

Report
on the
Impacts of the Renegotiated
North American Free Trade Agreement

By

The Labor Advisory Committee on Trade
Negotiations and Trade Policy

September 27, 2018

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The Honorable Robert Lighthizer
United States Trade Representative
600 17th Street NW
Washington, DC 20508

Dear Ambassador Lighthizer:

Pursuant to Section 135(b) of the Trade Priorities and Accountability Act of 2015, and Section 135(e) of the Trade Act of 1974, as amended, I am pleased to transmit the report reflecting the opinions of the Labor Advisory Committee (LAC) on the renegotiated North American Free Trade Agreement (NAFTA).

The LAC appreciates all the work that has gone into the negotiating process and the level of your engagement and of the Administration. For roughly 25 years, workers in the U.S., along with their counterparts in Mexico and Canada, have suffered under the terms of the original NAFTA. Outsourcing of jobs from the U.S. and Canada has decimated production and employment while workers in Mexico have not been able to properly share in the profits their hard work has generated for multinational companies. NAFTA's review and reform is long overdue.

While there are positive provisions in the renegotiated NAFTA, there are also provisions in the agreement which undermine the interests of workers and consumers. Among other things, we continue to stress the need to effectively curtail the outsourcing of manufacturing work to Mexico.

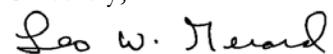
In the attached report, we have identified improvements in the draft agreement and also areas where improvement is needed. We have also identified areas where we simply do not have enough information to make a final judgment. Given that the text we have reviewed is neither final nor complete, and that there are other measures that will affect the analysis of future prospects for working people, we have taken the position that the agreement and supporting legislation and rules can still be improved.

In addition, as we have noted, it is critical that any final agreement be trilateral in nature. The integrated nature of the North American market, which has expanded and deepened since the entry-into-force of NAFTA, demands that all three countries be included to achieve our goals. Negotiations with Canada, along with follow-up negotiations to ensure the viability and integrity of the final agreement, must continue. Procedural concerns should not interfere with the need for an agreement that advances the interests of working people in all three countries.

The process is far from over and, under the terms of the fast track, as well as the Congressional schedule, any implementing legislation will not be voted on until sometime next year. We will continue to work with

the Administration in the hope that a final agreement, coupled with the suggested improvements included in our Report as well as modifications in laws and regulations, will make the changes in the NAFTA that are needed.

Sincerely,

A handwritten signature in cursive script that reads "Leo W. Gerard".

Leo W. Gerard

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Table of Contents

Members of the Labor Advisory Committee	iii
On Trade Negotiations and Trade Policy	iii
Table of Acronyms	vi
I. Executive Summary	1
II. A Note on the LAC Process.....	4
III. Statutorily Required Analysis.....	4
IV. Were the Trade Negotiating Objectives Set Forth in Fast Track 2015 Achieved and in the Best Interests of America’s Working Families?.....	5
V. Were the Labor Advisory Committee’s Objectives Met?.....	6
1) Was the NAFTA renegotiation process transparent and democratic? No.	7
2) Does NAFTA 2018 include strong labor rules with swift and certain enforcement? Requires more work. .7	
3) Does NAFTA 2018 eliminate private justice for foreign investors (ISDS)? Partially.	7
4) Does NAFTA 2018 create jobs by adding enforceable currency rules? Minimal Progress.....	7
5) Does NAFTA 2018 strengthen rules of origin? In part.....	8
6) Does NAFTA 2018 protect responsible government purchasing and “Buy American” policies? Unknown.	8
7) Does NAFTA 2018 improve screening for foreign direct investment? No.	8
8) Does NAFTA 2018 improve trade enforcement as part of a robust manufacturing policy? Partially.....	8
9) Does NAFTA 2018 promote transportation safety? Yes.....	9
10) Does NAFTA 2018 eliminate Chapter 19 obstacles to trade enforcement? Yes.	9
11) Does NAFTA 2018 include rules to combat tax dodging? No.....	9
12) Does NAFTA 2018 remove rules that undermine protections for workers, consumers, and the environment? No.....	9
13) Does NAFTA 2018 include commitments to invest in infrastructure? No.	9
14) Does NAFTA 2018 protect consumers and ensure financial stability? No.	9
15) Does NAFTA 2018 protect intellectual property while ensuring the right to affordable medicines? No.	10
16) Does NAFTA 2018 prohibit global corporations from using NAFTA to capture public services for profit? No.....	10
17) Does NAFTA 2018 add strong environmental rules with swift and certain enforcement? Minimal progress.....	10
18) Will the USITC update its modeling of trade agreements? Unknown.....	10
VI. A Note on Canada	10
VII. Analysis of NAFTA 2018’s Likely Effects on Critical Industries & Sectors.....	11

Manufacturing—General.....	11
Aerospace Manufacturing	11
Autos and Auto Parts.....	12
Call Centers.....	13
Ground Transportation.....	14
Maritime Transportation.....	15
Meat and Food Production and Processing	15
Public Sector	17
Steel.....	18
VIII. Analysis of Critical Issues in NAFTA 2018.....	19
The LAC Recommends the Inclusion of Effective, Swift, and Certain Labor Monitoring and Enforcement Mechanisms to Ensure that Protection Contracts are Dismantled and All North American Workers Can Freely Organize and Negotiate for Better Wages and Benefits	19
Currency Manipulation Is Not Effectively Addressed.....	23
NAFTA 2018 Jeopardizes Access to Affordable Medicines.....	23
Intellectual Property.....	24
Medpharm Annex.....	25
The LAC Recommends Further Improvements to Trade Enforcement Mechanisms.....	25
NAFTA 2018 Fails to Live Up to All of the “May 10” Standards.....	26
The LAC Does Not Have Enough Information to Determine the Likely Impact of the Rules of Origin.....	27
Auto ROOs	28
The Investment Provisions Are Meaningfully Improved Over the Original NAFTA, But Still Give Foreign Investors Greater Legal Rights than Working Families and Domestic Firms.....	29
The Environment Chapter Is an Improvement over the Original NAFTA, But Fails to Meet the Minimum Standard of “May 10,” Leaving Incentives to Outsource	32
IX. Overview of Labor Conditions in Mexico and Canada	33
Mexico	33
Canada	36
APPENDIX: Making NAFTA Work for Working People	i

Table of Acronyms

<u>Acronym</u>	<u>Long Form</u>
CAB	Conciliation and Arbitration Board
CBA	Collective Bargaining Agreement
CFIUS	Committee on Foreign Investment in the United States
CGE	Computable General Equilibrium
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COOL	Country of Origin Labeling
DOD	U.S. Department of Defense
DOL	U.S. Department of Labor
DOS	U.S. Department of State
EPI	Economic Policy Institute
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	“Free” Trade Agreement
GAO	Government Accountability Office
ILAB	International Labor Affairs Bureau
ILO	International Labor Organization
IMF	International Monetary Fund
ITUC	International Trade Union Confederation
IP	Intellectual Property
ISDS	Investor-to-State Dispute Settlement
LVC	Labor Value Content
LAC	Labor Advisory Committee on Trade Negotiations and Trade Policy
MEA	Multilateral Environmental Agreement
MST	Minimum Standard of Treatment
NAFTA	North American Free Trade Agreement
PSR	Product-Specific Rule of Origin
ROO	Rule(s) of Origin
RVC	Regional Value Content
TPP	Trans-Pacific Partnership

UNCTAD	United Nations Conference on Trade and Development
USTR	United States Trade Representative
WTO	World Trade Organization

I. Executive Summary

On behalf of the millions of working people we represent, we reserve judgment on the renegotiated North American Free Trade Agreement (NAFTA) at this time.

The Labor Advisory Committee on Trade Policy and Trade Negotiations (LAC) has long recognized that workers live in a global economy. That global economy brings many benefits for working families, from fresh fruit available off-season to more jobs in export sectors. But it also brings harm, from lost jobs and lower wages to unsafe imports and reduced freedom to direct domestic economic policy.

It is crucial to recognize that working people's opposition to most trade deals since the North American Free Trade Agreement (NAFTA) is not about withdrawal from international commerce or opposition to "trade" per se. We oppose a set of rules made largely by and for global corporations that reward greed and irresponsibility at the expense of hardworking families across the globe.

Beginning with NAFTA, trade agreements have incorporated rules and restrictions designed to limit the way citizens can organize their economies. These sweeping trade rules have received only superficial debate under Fast Track. As a result, NAFTA and other similar trade deals have fueled the U.S. trade deficit, contributed to outsourcing and job loss, fostered income inequality, and suppressed wages while weakening the U.S. economy and our security.

NAFTA's rules have not benefitted working people. It is an inescapable fact that millions of workers across economic sectors regard NAFTA as a failure. They have been left behind and have not shared in the gains from globalization. Across the country, workers and communities have lost confidence in the way the United States manages globalization.

By design, the original NAFTA distorted power relationships in favor of global employers over workers, weakening worker bargaining power and encouraging de-industrialization of our economy. Thus, we welcome renegotiation. Unfortunately, we have been presented with an unfinished text to review. In some places, text is still in draft form, in other places, important terms remain bracketed (unresolved) and in some cases, including with respect to the government procurement schedules, there is no text to review.

The labor provisions in the NAFTA—both the chapter and the annex—necessitate legislative changes in Mexico. We cannot evaluate the agreement until we have knowledge of those legal changes and confidence they will be implemented and enforced. Furthermore, we will require that additional implementing, monitoring, and enforcement measures are in place on the U.S. side of the border. Moreover, critical to any evaluation of an agreement is whether Canada will be included in the final deal and under what terms.

Just as we would never sign a collective bargaining agreement (CBA) whose provisions and text were not final, we cannot at this time make a final judgment as to the benefit or harm this new deal may cause. However, in this report, we attempt to set out the good, the bad, and the unknown of the renegotiated NAFTA (hereinafter NAFTA 2018), based on what we know so far.

The Good: In comparison to the original NAFTA, this version includes labor and environmental provisions in the main text, with obligations that are, at least in theory, subject to dispute settlement (more on this below). With respect to the labor provisions in particular, there are modest but meaningful improvements in the rules in comparison to the Trans-Pacific Partnership (TPP). Although not an automatic sunset provision, NAFTA 2018 does include provisions that will at least require a periodic review of its rules. In addition, NAFTA 2018 meaningfully reduces (but does not eliminate) the unjustifiable and

indefensible investor-to-state dispute (ISDS) settlement mechanism, which privileges foreign investors over citizens in terms of access to justice while also promoting outsourcing. The rules of origin (ROO) will likely do more to prevent “free riders” who are not party to the agreement from benefiting and incentivize North American investments. The auto ROO also includes innovative concepts that link wages to commercial benefits for companies that comply with the standards. NAFTA 2018 also retains important Annex II reservations for maritime and air transportation sectors and includes a new reservation protecting cross border, long-haul trucking.

The Bad: NAFTA 2018 moves backwards from the original NAFTA in many areas important to working families, including with respect to “Good Regulatory Practices” (code for using this trade agreement to attack important consumer, health, safety, and environmental protections), Financial Services (providing new tools for Wall Street to attack efforts to rein in its continuing abuses), and affordable medicines (extending monopolies for brand name pharmaceuticals at the expense of affordability). The Digital Trade Chapter of NAFTA 2018 gives away our right to protect personal financial and health information by failing to ensure that data is stored and processed in the United States. NAFTA 2018 also fails to include provisions that would allow the United States to reinstate country-of-origin labeling (COOL) and further protect the public sector (in Annex II), as the LAC recommended.

The Unknown: We do not know whether “Buy American” rules will be strengthened. And we still do not know whether the United States’ main trading partner, Canada, will be included. Much of the text we have reviewed simply will not make sense if Canada is not included and may trigger significant renegotiations.

Critically, if the labor rules and enforcement system is left as it is in the text that we have reviewed, without other measures, the overall labor package could fall short of what is needed to create real change for working families. We have learned through 25 years of experience that it is simply too easy for trading partners and firms that outsource to violate labor obligations and for U.S. administrations, both Democratic and Republican, to do nothing. Some have asked us, “Isn’t it better to have labor rules that aren’t enforced than no rules at all?” Our unequivocal answer is, “No.” A worker who is fired for exercising the freedom to join a union is just as jobless, whether the firing was in violation of a trade obligation or not. His or her former co-workers are just as intimidated, and wages are just as suppressed.

We understand that the United States Trade Representative (USTR) may be working to include labor enforcement provisions in the implementing legislation for NAFTA 2018. While we appreciate these efforts, it is simply too soon to make a final evaluation about provisions in a bill that is not yet drafted, much less finalized. This is why, throughout this report, we will repeatedly reference the labor provisions, emphasizing the enforcement issue. We hope the provisions will improve, both within NAFTA 2018 and in related implementing legislation. We will continue to work with USTR and Congress to achieve these improvements. We will also continue to urge the addition of provisions that will effectively eliminate the continued outsourcing of manufactured goods, including aerospace and other goods, to Mexico.

Equitable economic development requires fundamental changes to trade policy. Trade deals should stimulate international commerce while simultaneously promoting a virtuous cycle of wage-driven growth and high standards of protection for working families and democracy. Trade rules should promote investment in the domestic economies of the participating countries rather than simply making it easier to outsource and offshore goods and services production.

Incremental improvements in NAFTA 2018 could reduce some of the harm caused by the original NAFTA and limit future outsourcing. However, incremental harm reduction is insufficient to reverse the monumental damage caused by the corporate-driven original NAFTA. NAFTA 2018 does not address the

basic fact that the United States' market-fundamentalist, pro-corporate approach to trade and globalization fails socially, politically, and economically.

Instead of useless debates about “free trade” versus protectionism or dangerous forays into nationalism and xenophobia, this trade reform moment should be about exploiting the cracks in the current approach to trade so that we can adopt new, inclusive solutions that recognize human dignity and create shared prosperity not just in the United States, but globally.

Our approach to globalization is based on three basic principles. First, the purpose of an economy is to raise living standards and improve well-being for its citizens. Second, every country has legitimate national interests, and it is the appropriate role of public policy to pursue those national interests in ways that do not impose burdens on the people of other countries. Third, a new trade policy should prioritize the public interest, rather than allowing powerful private interests to guide trade policy.

The deal before us falls short of this ambitious, transformative trade agenda. However, if the agreement can be improved, it could have value to our members and the populace of the United States, Mexico, and Canada. We hope that the shortcomings that we identify in this document can be reversed and that additional beneficial rules can be added. We view this report as a continuation of the conversation about how to reform NAFTA and other trade agreements.

II. A Note on the LAC Process

The Labor Advisory Committee on Trade Negotiations and Trade Policy (LAC) has advocated for dramatically enhanced transparency and democratic accountability with regard to trade policy and trade negotiations. It has been our view that the text of proposals and other documents should be made available to the public to ensure not only the broadest participation, but to enhance support for potential outcomes. The existing rules that impose severe limitations on the ability to share views and assessments undermine the public interest.

Nevertheless, the LAC appreciates the engagement of Ambassador Lighthizer and his staff. The discussions under his leadership have been a dramatic improvement over previous Administrations. The result of this engagement has been evident in many of the proposals and texts that have been advanced during the process. While we may differ on the outcomes, we do not question that our views and concerns were taken seriously.

At the same time, we continue to press for greater openness. The ability to engage other colleagues, other stakeholders, and Members of Congress on specific textual issues would strengthen the process and the negotiated outcomes. We will continue to press for reforms and democratization of the process.

III. Statutorily Required Analysis

The LAC has the statutory duty to respond to three questions concerning NAFTA 2018. This section will answer each question briefly. Further, in the following sections, the report will provide additional analysis, detail, and comments to support our conclusions.

Question 1: Is NAFTA 2018 in the economic interests of the United States?

We simply do not have enough information at this time to know whether NAFTA 2018 is in the economic interests of the United States. Certainly, if Canada is not included, it is doubtful the deal will be in the interests of the United States.

Question 2: Does NAFTA 2018 achieve the applicable overall and principal negotiating objectives?

NAFTA 2018 achieves some of the applicable negotiating objectives as set forth in the “Bipartisan Congressional Trade Priorities and Accountability Act of 2015” (“Fast Track 2015”), but fails to achieve others, particularly with respect to investment, labor, environment, anti-corruption, and dispute settlement. More importantly, as we explain in the next section, whether or not NAFTA 2018 achieved Fast Track 2015’s negotiating objectives is simply the wrong measuring stick. Some of the objectives are quite literally antithetical to working families and were a major reason for organized labor’s opposition to Fast Track’s passage. The correct question is whether NAFTA 2018 is in the best interest of working families.

Question 3: Does NAFTA 2018 provide equity and reciprocity for labor interests?

NAFTA 2018 provides some benefits for labor interests, including with respect to rollbacks in investor rights, higher labor standards than comparable provisions in other recent U.S. trade deals (including the Labor Annex), in strengthened rules of origin for some products, and in the inclusion of new rules requiring periodic reviews of NAFTA 2018’s impacts. But it is far from certain that these measures, none of which

are included in the fulsome manner we recommended during the negotiation process, will provide equity and reciprocity for labor interests. In particular, new measures on violence and migrant workers have the potential to leave violence, threats, and intimidation of workers unaddressed and migrant workers subject to abuse, lowering wages for all workers. In addition, the new monopoly provisions for pharmaceutical companies ensure that outrageously high prices on drugs, particularly biologics drugs, will continue. And new tools to attack public interest measures in the Digital Trade, Financial Services, and Good Regulatory Practices Chapter seems poised to undermine protections for working families that could exceed modest benefits gained through reduced outsourcing. In sum, as with Question 1 above, we simply do not have enough information to answer this question.

IV. Were the Trade Negotiating Objectives Set Forth in Fast Track 2015 Achieved and in the Best Interests of America's Working Families?

It is our belief that the objectives identified in P.L. 114-26, the “Bipartisan Congressional Trade Priorities and Accountability Act of 2015” (also known as “Fast Track 2015”) are fundamentally flawed and if an agreement were bound to simply achieving those goals, it could **not possibly** be in the best interests of working families. Indeed, the negotiating objectives of Fast Track 2015 were not only misguided in a number of areas but are outdated and fail to take account of decisions and activities that have taken place since the law was enacted. The LAC opposed Fast Track 2015 in part because of its unsatisfactory negotiating objectives, many of which failed to support our goal of strengthening the U.S. economy and advancing the interests of working people. Many of the negotiating objectives we have been asked to evaluate are so vague that meaningful analysis is nearly impossible. Other objectives are quite literally antithetical to the interests of America's working families.

While NAFTA 2018 appears to accomplish some of the objectives set out in the Fast Track 2015, there are notable failures where achievement of the goals, specifically in the areas of investment, environment, access to medicines, dispute settlement, and anti-corruption, **would have** the interests of working people. We will not repeat in this report an extended evaluation of the numerous defects of Fast Track 2015 legislation nor rehash the 2015 fast track debate, but we continue to believe Fast Track 2015 is fundamentally flawed in terms of both process and policy.

NAFTA 2018 fails to meet Fast Track 2015 objectives in ways relevant to working families as follows:

- NAFTA 2018 continues to include investor-to-state dispute settlement (ISDS), even though the reach of ISDS is more limited than in the original NAFTA. ISDS provides foreign investors with a private justice system in which to pursue cases they could not pursue in U.S. courts. Thus, the deal accords “greater substantive rights” to foreign investors as well as rights that are **not** “comparable to those that would be available under United States legal principles and practice,” in contravention of the foreign investment objectives of Section 102(b)(4) of P.L. 114-26. The ISDS provisions in NAFTA 2018 are improved over the original NAFTA and other subsequent agreements, but these provisions should have been eliminated altogether to best serve the interests of working families. Future agreements must not include ISDS coverage.
- NAFTA 2018 does not provide for the creation of an appellate body for investment disputes, as required by Section 102(b)(4)(G)(iv). If investment disputes are to be addressed through ISDS, it is in our national interests that rogue panels can be reined in by an appellate body.

- NAFTA 2018 does not promote access to medicines, as required by Section 102(b)(5)(C). Instead, the agreement includes a number of provisions that limit legitimate generic competition, which tends to raise prices, and gives pharmaceutical companies additional leverage to raise prices and gouge Medicare.
- NAFTA 2018 includes inadequate provisions to “strengthen the capacity of United States trading partners to promote respect for core labor standards” and “protect the environment,” as required by Section 102(b)(10)(C) & (D). Although the text contains provisions regarding labor and the environment that will be discussed more thoroughly in other sections of this report, the capacity building provisions in NAFTA 2018 itself must be strengthened. The LAC is hopeful that the implementing bill will include robust, long-term mandatory funding, require labor attachés to be placed in the U.S. embassy in Mexico to evaluate the implementation, monitoring, and enforcement of the agreement’s provisions, and contain additional provisions to accomplish the needed capacity building for Mexico.
- NAFTA 2018 includes inadequate provisions to address anti-corruption as required by Section 102(b)(14). These provisions could be strengthened by ensuring the entire chapter is subject to dispute settlement, removing the language restricting violations to those that are in a “manner affecting trade or investment between Parties,” and by insuring that the concept of “securing improper advantage” includes not just bribes offered to public officials, but those offered to businesses by employer-dominated unions and to employer-dominated unions by businesses.
- NAFTA 2018’s dispute settlement and enforcement provisions are neither “effective” nor “equitable,” as required by Section 102(b)(15)(A). While we appreciate the coverage of state-to-state dispute settlement to obligations in the Labor and Environment Chapters, the dispute settlement provisions appear to allow the Commission to refuse to meet, which would block the establishment of a dispute settlement panel altogether. This undermines the effectiveness of the dispute settlement provisions across all chapters. In addition, by failing to include additional provisions to ensure that the labor rules are adequately and promptly monitored, remedied, and sanctioned if not remedied, the dispute settlement provisions will be neither effective nor equitable as regards labor. A quarter century of experience has proved that labor rules must receive special attention to ensure swift and certain enforcement. Workers simply do not have the power and influence that global companies seeking to vindicate their trade rights have. Without additional measures, we expect the labor rules to be as ineffectively enforced as rules in earlier agreements, which will undermine the strengthened rules. We remain hopeful that these provisions can be improved in the agreement itself and that they will be buttressed by implementation, monitoring, and enforcement provisions in implementing legislation.

V. Were the Labor Advisory Committee’s Objectives Met?

In June 2017, the Labor Advisory Committee recommended a more open and democratic negotiating process and 17 additional specific objectives for renegotiating NAFTA. The texts available at this point show mixed results.¹ Below, we compare the text we have reviewed to our original benchmarks.

¹ In our original recommendations, included as an Appendix to this report, we included the transparency recommendation as a recommendation on process, and we included the next 17 recommendations on substance in the following order: recommendations to existing NAFTA chapters, in chapter order; recommendations for new chapters; and recommendations based primarily in domestic trade law rather than in the NAFTA text per se. In this section, we have re-ordered the 18 recommendations, placing those with greater priority nearer the top of the list.

1) Was the NAFTA renegotiation process transparent and democratic? No.

Although Ambassador Lighthizer and his staff have been polite, responsive, and willing to engage in constructive consultations—improving on the consultations of prior administrations, there has been no change in the “behind closed doors” negotiation process that we reject. This diminished the influence that ordinary working families and our allies in Congress could exert in shaping NAFTA 2018.

2) Does NAFTA 2018 include strong labor rules with swift and certain enforcement? Requires more work.

The obligations include some improvements, including new provisions regarding violence, migrant workers, wage-related benefit payments and the right to strike. The text, however, retains the basic flaws of the “May 10” agreement, limiting itself to the 1998 Declaration of Fundamental Principles and Rights at Work, as opposed to the clearer ILO Conventions. While the text retains limitations we reject that labor violations under the agreement must be in a “manner affecting trade or investment” (which likely excludes much of the public sector) and occur in a “sustained or recurring course of action or inaction” (which excludes egregious but one-time acts such as murder or torture), clarification of these standards is welcome. Language strengthening rules regarding goods made with forced labor and compulsory labor, including forced or compulsory child labor, is welcome but should be made stronger by including goods from NAFTA countries and those made in whole or in part by the worst forms of child labor as well as by eliminating the phrase “through measures it considers appropriate.” Critically, the chapter includes an annex we support with specific provisions detailing how Mexico must reform its labor law.

Important weaknesses remain, including a footnote that makes it difficult to uphold international labor standards (footnote 2) and the absence of rules prohibiting abusive labor recruitment practices or requiring the payment of living wages. Most importantly, there are no labor-specific monitoring or enforcement provisions (such as an independent secretariat or certification requirements) that would ensure that the rules will be swiftly or certainly enforced. As a result, the LAC has serious doubts that the improved rules will make a meaningful difference to North American working families without additional provisions, assured funding, and implementing language. Unenforced rules are not worth the paper they are written on. Therefore, we will continue to work for improvements to the labor provisions.

3) Does NAFTA 2018 eliminate private justice for foreign investors (ISDS)? Partially.

NAFTA 2018 would eliminate ISDS with Canada after three years (if they remain a party to the agreement). For bilateral investment between the U.S. and Mexico, all investors would be able to access a pared down ISDS after exhausting local remedies and only on the basis of national treatment, most favored nation treatment, and direct expropriation. These are all improvements over the status quo. Full ISDS was retained for investors that have federal government contracts in the fields of oil, gas, power generation, telecommunications, transportation, roads, rail, canals, bridges, and dams, with investors in these sectors being eligible for access to the full suite of ISDS claims, including for alleged violations of the vague and ill-defined “minimum standard of treatment.” These provisions continue to stratify access to justice, providing investors with special rights that are unavailable to working families. While restricted in NAFTA 2018, so long as any ISDS provisions are included in NAFTA, ISDS will continue to incentivize outsourcing, privilege foreign investors over local businesses, and ensure that gains of trade are not distributed equitably.

4) Does NAFTA 2018 create jobs by adding enforceable currency rules? Minimal Progress.

The currency provision is inadequate. Only the reporting requirements are enforceable—not any obligation to refrain from competitive devaluation. Importantly, the provision does not establish a united NAFTA front to combat currency manipulation and misalignment by non-NAFTA parties. In short, the LAC

believes the currency rules will be of minimal value and do not set a strong marker for China or other non-NAFTA partners with a history of currency manipulation and misalignment.

5) Does NAFTA 2018 strengthen rules of origin? In part.

NAFTA 2018 includes new rules of origin for autos that will require 75% North American content, close the “deeming” loophole, raise North American content requirements for auto parts, and institute new “labor value content” (LVC) rules for autos and light trucks. While these new rules are, facially, an improvement over the status quo, the LAC unfortunately has not been able to review the final legal text, nor have we been able to adequately verify that the new rules will incentivize new auto supply chain investment in the U.S. such that it will lead to new, high-wage jobs. Thus, we continue to have questions about the impact and operation of these rules over the short and long term. The failure to adjust the wage threshold in the LVC will weaken the impact of this innovative proposal over time. We are disappointed by the less stringent requirements and longer phase-in periods that are applied to heavy-duty trucks—60% upon entry into force of the agreement and a seven-year transition to 70%. We believe the most effective way to level the competition across North America is to ensure that Mexico’s workers can freely join unions and negotiate collectively with employers. Without labor-specific enforcement mechanisms, we have doubts that conditions for Mexico’s workers will change.

With respect to rules of origin for non-automotive critical manufactured products, the results are mixed. For example, the rules for steel do not include a “melted and poured” standard, which means that slabs imported from China or elsewhere will qualify as “originating” steel when transformed. For other steel products, NAFTA 2018 includes new originating rules for structures and other products that should have a positive effect on North American sourcing of these products. NAFTA 2018 contains no new provisions to address outsourcing for aerospace parts.

6) Does NAFTA 2018 protect responsible government purchasing and “Buy American” policies? Unknown.

The text available to the LAC includes the government purchasing rules, but not the specific schedules of commitments. Thus, it is impossible to determine whether NAFTA 2018 strengthens Buy American by reducing the scope of U.S. government purchases that must provide preferential access to foreign bidders. Disappointingly, the rules we reviewed appear to retreat from “May 10” standards because they only allow Parties to “promote” rather than “require” compliance with labor obligations in government contracts. Nor do the rules adopt our recommendation to clarify that project-labor agreements, “clean hands” rules, living wage requirements, and sustainability requirements are consistent with NAFTA 2018 and not subject to trade challenges.

7) Does NAFTA 2018 improve screening for foreign direct investment? No.

NAFTA 2018 contains no language to improve screening of foreign direct investment. While Congress acted in 2018 to enhance screening of foreign direct investment through amendments to the statute authorizing the Committee on Foreign Investment in the U.S. (CFIUS), this improvement to U.S. law is not acknowledged by the NAFTA text, even though the text retains the ISDS mechanism, which could potentially be used to challenge certain CFIUS decisions without an explicit carve out.

8) Does NAFTA 2018 improve trade enforcement as part of a robust manufacturing policy? Partially.

NAFTA 2018 includes *very few improvements* with respect to trade enforcement. Of note are a new provision that allows—but does not require—information sharing to address transshipped, pirated and counterfeit goods, the inclusion of the labor and environmental obligations in the main text and subject to

Chapter state-to-state dispute settlement, and a new authorization for U.S. inspectors to accompany Mexican customs inspectors as part of verification visits that should have a positive impact. The LAC does not believe these changes, without more, will meaningfully improve trade enforcement. However, many of our trade remedies and enforcement recommendations can be accomplished through domestic law, so the LAC will continue to work diligently to include needed enforcement measures in the implementing bill.

9) Does NAFTA 2018 promote transportation safety? Yes.

NAFTA 2018 continues to exclude the air and maritime transportation sectors from coverage and creates new limitations on cross-border long haul trucking, as recommended by the LAC. Unfortunately, it fails to correct asymmetrical access for cross-border rail, advantaging Mexico's lower cost rail sector over the U.S. sector.

10) Does NAFTA 2018 eliminate Chapter 19 obstacles to trade enforcement? Yes.

NAFTA 2018 eliminates private arbitration panels that duplicate the role of the U.S. Court of International Trade and can override trade remedy decisions of the U.S. International Trade Commission (USITC). Of course, we have concerns that talks with Canada have not concluded and that this outcome may change.

11) Does NAFTA 2018 include rules to combat tax dodging? No.

NAFTA 2018 includes no rules to prevent global companies from using tax havens, transfer pricing and other tax avoidance schemes that go hand in hand with outsourcing U.S. jobs. To the contrary, NAFTA 2018 includes rules, albeit circumscribed, that allow investors and Parties to challenge tax measures. In addition, the 2017 GOP tax bill provided substantial new tax incentives for outsourcing. Taken in total, the NAFTA 2018 and recent tax legislation will not combat tax dodging. The LAC encourages the administration to include efforts to combat tax dodging in the NAFTA 2018 implementing bill.

12) Does NAFTA 2018 remove rules that undermine protections for workers, consumers, and the environment? No.

This is one of NAFTA 2018's greatest shortcomings. Instead of rewriting NAFTA's ineffective "general exception" and eliminating rules from the original NAFTA that undermined important protections for working families, NAFTA 2018 in many places doubles down on the corporate-agenda, imposing rules that in many cases are worse than those in the failed, anti-worker TPP. In particular, the "Good Regulatory Practices" chapter, which did not even exist in the original NAFTA, degrades our ability to enact needed public interest measures. Importantly, NAFTA 2018 also fails to ensure the U.S. can reinstate country of origin labeling (COOL) for beef and pork.

13) Does NAFTA 2018 include commitments to invest in infrastructure? No.

Unfortunately, NAFTA 2018 failed to incorporate recommendations to create joint infrastructure investment targets, which would have facilitated trade and helped address the inequitable distribution of gains from trade.

14) Does NAFTA 2018 protect consumers and ensure financial stability? No.

Unfortunately, NAFTA 2018's financial services rules would impose greater restrictions on our ability to rein in Wall Street excesses and abuses than the original NAFTA. In addition, the investment rules fail to include the explicit language we recommended to ensure governments can slow capital flows to stabilize their economies and protect workers from unscrupulous employers.

15) Does NAFTA 2018 protect intellectual property while ensuring the right to affordable medicines? No.

While NAFTA 2018 strengthens some of the original NAFTA's copyright protections for creative sector workers who rely on strong copyright protections for their residuals income, its rules further incentivize internet service providers and online content platforms to shirk responsibility for copyright infringement and other unlawful acts by exporting controversial U.S. copyright safe harbor and platform immunity standards. Furthermore, with respect to medicines, the text is worse than the original NAFTA and worse than rules we opposed in the TPP. It mandates 10 years of market exclusivity for biologic drugs, which means the U.S. law could never go below 10 years. It also includes a "Medpharm Annex" that could allow other NAFTA Parties to interfere with efforts to control Medicare costs. NAFTA 2018 could therefore decrease access to affordable medicines for working families across North America.

16) Does NAFTA 2018 prohibit global corporations from using NAFTA to capture public services for profit? No.

NAFTA 2018 fails to expand the Annex II public services exception as recommended by the LAC. As a result, important public services including energy, postal, water and sewer, sanitation, immigration services, and public transportation services could be limited by NAFTA obligations. No trade deal should interfere with the right of a country's citizens to determine how best to provide public services to residents.

17) Does NAFTA 2018 add strong environmental rules with swift and certain enforcement? Minimal progress.

While NAFTA 2018 improves upon the status quo by moving environmental obligations into the main text and making them subject to dispute settlement, the text comes nowhere close to requirements of "May 10" or Fast Track 2015. These shortcomings will negatively affect U.S. efforts to protect the environment and will continue to incentivize outsourcing of U.S. jobs to Mexico. And, like the labor chapter, the environment chapter contains nothing that would make monitoring and enforcement timely or certain. Finally, it fails to include any rules that would ensure the United States could use border adjustment fees to address a trading partner who intentionally engaged in a carbon intensive strategy to lure investment from the U.S.

18) Will the USITC update its modeling of trade agreements? Unknown.

Whether or not the USITC abandons its slavish commitment to the outdated and limited computable general equilibrium (CGE) model remains to be seen. We hope so. The CGE fails to account for the structure of modern trade agreements, which are more rules-based than tariff-based, and its projections have failed to accurately forecast the significant job and wage losses associated with the original NAFTA, the South Korea-U.S. trade deal, and most importantly, the addition of China to the World Trade Organization. The limitations of the USITC's methodology, if not updated, will become especially evident in any NAFTA 2018 assessment: the CGE model only assesses the impact of tariff changes, yet tariffs are already at zero and will remain so, meaning that many critical changes in NAFTA 2018 will go unassessed by the USITC.

VI. A Note on Canada

The LAC wishes to note that our analysis in this report is largely based on an assumption that a final deal will include Canada. Canada is the United States' closest trading partner. Many of the unions represented on the LAC are international unions, just as U.S. families, businesses, and industrial production span the U.S.-Canadian border. For the record, we oppose leaving Canada out of NAFTA 2018 and urge the Administration in the strongest possible terms to ensure that any new deal includes Canada.

VII. Analysis of NAFTA 2018's Likely Effects on Critical Industries & Sectors

Manufacturing—General²

The effect of NAFTA 2018 on manufacturing is unknown at this time, due to the lack of specific text on a number of important issues, the lack of effective currency disciplines, the uncertainty about what steps Mexico will take to implement its Constitutional and NAFTA 2018 commitments to promote labor rights, and what implementing, monitoring and enforcement infrastructure and resources will be provided. Additional information is needed vis-à-vis rules of origin provisions before we can perform a more robust evaluation.

This is, perhaps, the most critical issue in the NAFTA debate as manufacturing employment has been devastated since the agreement's implementation roughly 25 years ago. The Economic Policy Institute's Robert Scott estimated that by 2013, trade deficits with Mexico had eliminated 851,700 good jobs, most (70%) in manufacturing.³ The job loss has increased significantly since then.

The hope, and promise, was that NAFTA 2018 would substantially reverse the outsourcing of jobs to Mexico, while promoting the ability of workers in that country to exercise expanded labor rights to increase their incomes and standard of living. The interaction of numerous provisions, which have not yet been fully defined, buttressed by additional provisions in implementing legislation, will determine the success, or failure, of NAFTA 2018 to advance the interests of working people in all three original signatory countries.

Aerospace Manufacturing

NAFTA 2018 does little, if anything, to stop the outsourcing of U.S. aerospace production jobs to Mexico. Mexico's average wage for a manufacturing worker is less than \$3.00 per hour, and its repression of workers' rights is a major contributing factor.⁴ Mexico's manufacturing industry has dramatically expanded since NAFTA, with a direct negative impact on U.S. workers. For example, since NAFTA, aerospace has become the third largest industry in Mexico, employing between 30,000 and 40,000 workers.

Aerospace manufacturers promote Mexico's low wages to draw business across the border. Analysts have commented that "Mexico's proximity to the U.S. and its lower labor cost structure have drawn approximately 300 foreign manufacturers to areas in five Mexican states."⁵ As one review of the aerospace industry noted, "[T]he downside of this is that the country may be used increasingly for its cheap labor by profit-hungry companies from more established markets."⁶ Mexico's aerospace industry is now a major exporter to the U.S. The direct U.S. job loss to Mexico would be even greater if one takes into account the lost job opportunities that would have been created if European aerospace companies and their suppliers had located production in the United States, rather than in Mexico.

² After a general subsection on manufacturing, this section of the report is organized by industry in alphabetical order.

³ Scott, Robert E., "The effects of NAFTA on US trade, jobs, and investment, 1993–2013," Review of Keynesian Economics, Vol. 2 No. 4, Winter 2014, pp. 429–441. Available at: www.elgaronline.com/view/journals/roke/2-4/roke.2014.04.02.xml.

⁴ Herrnstadt, Owen, "Renegotiating NAFTA is an Opportunity to Get Trade Policy Right", Economic Policy Institute, 2018. Available at: www.epi.org/blog/renegotiating-nafta-is-an-opportunity-to-get-trade-policy-right/citing_www.ft.com/content/bddc8121-a7a0-3788-a74c-cd2b49cd3230.

⁵ *Id.*; citing <https://offshoregroup.com/industries/aerospace-manufacturing-in-mexico/>.

⁶ *Id.*, citing <https://www.americasquarterly.org/content/aerospace-emerging-mexican-industry>.

The United States International Trade Commission reported:

U.S. and foreign aerospace component suppliers have been increasingly locating production facilities in Mexico. Lower manufacturing costs (largely due to a lower wage structure), proximity to original equipment manufacturers (OEMs) in the United States, duty-free access to other important aerospace markets ... all contribute to Mexico's greater appeal compared with other global manufacturing locations. Mexico's base of aerospace suppliers expanded rapidly from 109 firms to 249 during 2006–11. Employment also grew from 10,000 to 31,000 workers during this period, and by 2012, companies located in Mexico were supplying parts and structures to U.S. and foreign transport aircraft OEMs (table 1) and OEMs of general aviation aircraft (Bombardier Learjet, Cessna, and Hawker Beechcraft).⁷

In addition to the companies mentioned above, other U.S. companies with an industrial presence in Mexico include General Electric, Honeywell, Rockwell Collins and UTC.⁸ Suppliers to aerospace giants Boeing and Europe's Airbus have operations in Mexico. United Technologies has “showcased” its operations in Mexico.⁹ Unfortunately, while U.S. negotiators have focused on auto, steel, and NAFTA trucking, NAFTA 2018 includes no rules to address the outsourcing of U.S. aerospace work to Mexico.

Autos and Auto Parts

The importance of these sectors on the U.S. economy, jobs, and our standard of living is critical. The automotive and auto parts sector is the single most important manufacturing sector with cross-border trade in the North American market. Since NAFTA's entry into force in 1994, the trade deficit with Mexico has skyrocketed. In 1993, the U.S. had an automotive trade deficit with Mexico of \$3.5 billion. By 2016, that trade deficit had grown to \$45.1 billion—an increase of almost 1,300%. In auto parts, the situation is even worse, with the U.S. trade deficit with Mexico over the same period growing from \$1 billion to \$23.8 billion—an increase of more than 2,300%.

During this same period, as the trade deficit in these sectors blossomed, wages have declined. Adjusted for inflation, auto parts production workers' average hourly wages declined by 23 percent in the last decade. Employment among U.S. parts suppliers declined 36% between 2000 and 2014. While other factors certainly played a role in these trends—including technology changes and attacks on workers' rights—NAFTA was a major contributing factor.

The situation in terms of auto production facilities paints a graphic picture of the impact of NAFTA on the outsourcing of production and jobs in the sector to Mexico. Between 1994 and 2016, light vehicle final assembly facilities in the U.S. dropped by 10 and in Canada by 4. Over the same period, Mexico added 8 facilities. The U.S. share of NAFTA production over the period dropped from 77% to 67% while Mexico's share more than doubled from 8% to 19%.

The outsourcing of production in these sectors to Mexico has resulted from a number of factors. Most important has been the repressive labor policies in Mexico, most particularly “protection” unions and contracts—the Mexican equivalent of a company union. Workers are kept from organizing in a meaningful way, suppressing wages and working conditions to unacceptable levels. These and other labor issues are dealt with elsewhere in this report.

⁷ *Id.*; citing, https://www.usitc.gov/publications/332/coffin_mexico_aerospace4-25.pdf.

⁸ *Id.*; citing, https://www.usitc.gov/publications/332/coffin_mexico_aerospace4-25.pdf.

⁹ *Id.*; citing, <http://www.utc.com/News/UTAS/Pages/UTC-Aerospace-Systems-joins-Mexico-for-inaugural-Aerospace-Fair.aspx>.

The outdated and unacceptable rules of origin (ROOs) in the original NAFTA have contributed significantly to the outsourcing of jobs to Mexico and decimation of assembly and parts jobs in the U.S. The original NAFTA's rules are riddled with loopholes—not only in terms of their original design, but also in terms of the changing nature of autos and parts over the past 25 years. Many parts and technologies that are standard in today's vehicles did not exist when NAFTA was first drafted, and the rules have not adapted to changes in the sector.

Reforming and updating the rules is vital to rebalancing trade in this sector. Auto sector trade is out of balance. Strong policies are needed to reverse the trend and change the competitive landscape. Updated ROOs are an important component in this effort.

We are appreciative of the Administration's recognition of the need for change. Early on, the Administration made clear that it wanted to make substantial changes in the rules and provide incentives for increasing production and employment not only in the region, but in the U.S.

As in several other areas of the agreement, the rules are still a work in progress. While the basic structure has been identified, a number of important questions remain. Indeed, the text indicates that it is an "Agreement in Principle." A complete and considered evaluation can only occur when the final scope and provisions of an agreement are available. In addition, of course, is the question of whether Canada will be a party to the final agreement as it is an integrated partner in the North American automotive and auto parts sector. The agreement reached between Mexico and the U.S. (the text that is before us), would be impacted in significant ways depending on whether all three parties are signatories to the agreement. The auto ROO issue is examined more closely in the "Issues" section of this document (Section VIII).

Call Centers

Call center workers take orders for goods and services, provide product support, answer consumers' questions, perform market research, and more. These jobs are a major source of employment in the U.S., as nearly 4% of the U.S. workforce is employed in call centers. According to the Bureau of Labor Statistics, customer service representatives earn an average of \$17.14 per hour, making call centers a source of good jobs, often in communities where manufacturing jobs have been automated or sent overseas. While this wage is relatively modest compared to manufacturing wages, it is measurably better than the minimum wages usually available in retail and fast food sectors—sectors call center workers may end up in when their jobs are offshored. Call centers are often primary sources of stable jobs in regions that have been decimated by poor trade policy.

The offshoring of call centers to low-income countries including Mexico has jeopardized many of these jobs. One frequently cited 2004 study projected that 3.4 million service sector jobs would be offshored over the next decade, while another noted that 14 million service sector jobs would be vulnerable to offshoring.¹⁰ Mexico is a particularly attractive location for offshoring call center jobs, given the low-wage structure of the economy and the large number of available workers who are fluent in both English and Spanish. This dynamic has accelerated in recent years as the number of immigrants to the United States being deported to Mexico has increased.

According to news reports, the number of call centers in Mexico has grown dramatically over the last decade. For instance, the number of call centers in Tijuana has grown from a handful a decade ago to more than 50 today, employing over 10,000 workers. Thousands of people who have been deported work in call

¹⁰ Levine, Linda. *Offshoring (or Offshore Outsourcing) and Job Loss Among U.S. Workers*. Congressional Research Service, 17 December 2012. Available at <https://fas.org/sqp/crs/misc/RL32292.pdf>.

centers in Mexico, usually earning about \$100 per week.¹¹ Overall, there are now an estimated 689,000 business process outsourced jobs in Mexico, largely concentrated in call centers.¹²

Many call centers in Mexico serve the U.S. market. For instance, a TeleTech call center in Mexico City handles customer service and technical-assistance calls exclusively for U.S. clients such as Time Warner, Dish TV, and Best Buy.¹³ A company-owned AT&T call center outside Mexico City is currently hiring and is expected to ultimately employ 5,000 workers. Based on recent reports, workers at this center are being trained to do the same work as employees in the United States, including support for small businesses and bilingual customer service.¹⁴

Unfortunately, provisions included in this agreement could exacerbate this trend of sending call center jobs out of the United States instead of counteracting it. Specifically, the LAC is concerned that provisions included in the Digital Trade Chapter (Articles 19.11 and 19.12) could potentially subject the United States to trade disputes if it were to take measures to protect call center jobs or heighten standards for the protection of consumer data. Language precluding any restrictions on the cross-border transfer of “information, including personal information, by electronic means if this activity is for the conduct of the business of a covered person,” could be used to allege that policies to maintain high standards in call centers are, in fact, disguised restrictions on the transfer of information, even if they are not. Similarly, a wide range of provisions in the Services Chapter could be used to subject policies of that sort to trade disputes.

This failure to protect U.S. measures designed to increase U.S. call center employment or to raise consumer standards in the industry is particularly problematic because bipartisan legislation is currently pending in Congress (H.R. 1300/S. 515) that is designed to facilitate the on-shoring of call center jobs.

Furthermore, the provisions included in the Digital Trade Chapter that are supposed to protect the security of consumer information are simply inadequate. Article 19.8 says that parties “should take into account principles and guidelines of relevant international bodies,” without providing meaningful and enforceable direction beyond that. These protections fall far short of the protections embodied in U.S. domestic law, including the Health Insurance Portability and Accountability Act. As such, the provisions in the Digital Trade Chapter could, on net, further the race to the bottom in consumer protection standards and encourage companies to move call center jobs to parties that weakened their protections for consumer privacy.

Ground Transportation

On the whole, NAFTA 2018 should and likely will inure to the benefit of commercial transportation, including the many union members who work in cross-border services like freight rail, air cargo, and long-haul trucking. However, the LAC observes that strong and specific provisions in the implementing legislation will be critical to achieving the promise and improvements made at the negotiating table.

¹¹ Carroll, Rory. “Mexico call centers await ‘huge pool of talent’ if Trump keeps deportation pledge.” *The Guardian*, 17 February 2017. Available at <https://www.theguardian.com/world/2017/feb/17/mexico-call-centers-trump-deportations>.

¹² Kendall, Matt. “Infographic: How Competitive is the BPO Sector in Mexico?” *Nearshore Americas*, 10 September 2018. Available at <https://www.nearshoreamericas.com/infographic-bpo-sector-in-mexico/>.

¹³ Freed Wessler, Seth. “Call centers: Returning to Mexico but sounding ‘American’.” *Al Jazeera*, 16 March 2014. Available at <http://america.aljazeera.com/features/2014/3/mexico-s-call-centers.html>.

¹⁴ “AT&T 2018 Jobs Report: Telecom Giant Hollows Out Middle Class Workforce and Outsources to Global Contractors, Even as it Reaps Tax Windfall.” *Communications Workers of America*, 25 April 2018. Available at <https://www.cwa-union.org/sites/default/files/att-jobs-report-2018.pdf>.

- A. Highway safety and long-haul trucking: The LAC acknowledges the creative approach by the USTR to fix a problem with the original NAFTA that is a legacy issue for the Teamsters union and their stakeholder allies in the environmental and highway safety advocacy communities. To the extent that the United States reserves the right to adopt and maintain new restrictions on operating authority for Mexican-domiciled carriers, we will look forward to working with the Administration and Congressional committees of jurisdiction to craft those new restrictions in the implementing legislation for NAFTA's replacement.
- B. Freight Rail crew changes and the principle of exclusivity: The LAC notes that the Mexican government has maintained a non-conforming measure in Annex I to the cross-border services chapter that restricts freight rail crews to Mexican nationals. In consultation with the unions that represent freight rail workers—principally, the Brotherhood of Locomotive Engineers and Trainmen (BLET) and the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART)—the LAC recommends that the U.S. include a similar reservation to restrict freight rail crews on American rail beds to U.S. citizens.
- C. Cross border services and transportation infrastructure: Recalling our 2017 recommendations for renegotiating NAFTA in the interests of working people, we continue to recommend that all three NAFTA countries commit to “public infrastructure construction, repair, and maintenance” that includes “improved land border crossings and ICC border commercial zones.” When the time comes to take the renegotiated NAFTA to Congress, we hope to work with the administration to lobby for this important collateral investment in the implementing legislation.

Maritime Transportation

The LAC fully supports the maritime transportation reservation contained in Annex II of NAFTA 2018. It will, as it has in the original NAFTA and in all other United States' free trade agreements, preserve the U.S. government's ability to enforce its existing maritime laws and to enact future measures to promote the U.S.-flagged domestic and international fleets and the American seafarers who safely and securely man the vessels.

The reservation includes our domestic cabotage laws (Jones Act), manning requirements for U.S.-flagged vessels, government cargo preference and Federal Maritime Commission authority over foreign discrimination against U.S. carriers. These laws and promotional programs are necessary to stabilize and grow the U.S.-flag fleet which serves our international trade, U.S. domestic offshore and coastwise trade, and inland waterways. A strong U.S.-flag fleet, manned by American crews, is critical to supporting our nation's economic and defense needs.

The LAC also supports the position cited in Section IV of this report that further work needs to be done to strengthen and improve the agreement to meet many of the LAC objectives communicated to USTR before and during the negotiations. One of these objectives of importance to the maritime and other transportation sectors is for NAFTA 2018 to commit the parties to further investment in infrastructure to facilitate trade. We urge USTR to make these improvements before sending the agreement to Congress for approval.

Meat and Food Production and Processing

Prior to NAFTA, there was very little integration between the U.S. and Mexican food processing industries. However, after implementation of NAFTA, food exports from Mexico to the U.S. market increased dramatically, particularly in the baked goods, confectionery, cereal, and candy industries.

It was not that Mexican-based companies were exporting to the U.S. Instead, it was largely U.S. corporations that began building major manufacturing facilities in Mexico with the clear purpose of producing primarily for the U.S. market. NAFTA enabled multinational food corporations to exploit Mexico's suppressed-wages, non-functioning labor laws, and lax regulatory environment. In the baking industry in Mexico specifically, wages are reportedly as low as approximately \$1.25 per hour.

Many of these companies shifted their manufacturing footprint from the United States to Mexico, resulting in the closure of scores of factories across the United States and the loss of many thousands of good, middle-class jobs. Among the companies that have expanded their manufacturing presence in Mexico since NAFTA are Mondelez/Nabisco, the Hershey Company, General Mills, Kellogg's, Brach's Confections, Sunrise Confections, and Ferrero International.

Without robust and effective labor monitoring and a strong labor enforcement mechanism, NAFTA 2018 will not lead to legitimate organizing and collective bargaining rights for Mexican workers and, in turn, a higher wage standard in that country. As such, NAFTA 2018, like its predecessor, could continue to encourage the outsourcing of good, middle-class U.S. food manufacturing jobs to Mexico in the food processing sector unless these shortcomings are remedied.

NAFTA 2018 does nothing to protect citizen choices regarding food safety or food labeling (including country-of-origin meat labeling, dolphin-safe tuna labeling, and GMO labeling). Reinstating country-of-Origin-Labeling (COOL) for beef and pork would allow consumers to make an informed and free choice about where the food they feed their families comes from. Families are safer if they know their food comes from a trusted, top-quality American source with high safety standards. It would also provide a premium for U.S. cattle producers and a much-needed incentive for American ranchers to rebuild their herds. This in turn could help stem the loss of good paying jobs in the U.S. beef sector and bolster the rural economy. Since 1995, 50 American beef plants have been forced to close, leading to the loss of tens of thousands of good-paying, family sustaining beef packing jobs.¹⁵ As a result, NAFTA 2018 is potentially the worst of both worlds. It provides very little to ensure that U.S. workers in the meat industry will gain jobs or wages through significant export increases, nor does it raise the bar on food safety or consumer information in ways that will protect working families and our democracy.

Finally, we are concerned that the procurement language in NAFTA 2018 could require the government to provide bidders from Mexico "Buy American" preferences in contracts for meat and other food products. This could have a big impact on the protein marketplace in the U.S. Mexican slaughterhouses have lower labor standards and wages than domestic slaughterhouses (and whether this will change as a result of NAFTA 2018 is in doubt). This will result in protein processing moving to Mexico. In a small margin industry such as this one, the appeal for less regulation and lower labor costs is undeniable, with corresponding negative impacts on U.S. jobs and wages and increased risks in our food supply. However, since we have not been able to review the schedules of commitments for the Government Procurement Chapter, we await clarification regarding this concern.

We urge the Administration to continue to seek solutions to the COOL labeling dilemma and to minimize foreign access to Buy American preferences for food.

¹⁵ S. Kay.. "Are packing plants on the endangered species list?" Beef Magazine. Oct. 5, 2015. Available at: <http://www.beefmagazine.com/blog/are-packing-plants-endangered-species-list>

Public Sector

Public sector workers have been harmed by existing U.S. trade policy and are likely to be further harmed by NAFTA 2018. Existing unbalanced U.S. trade policy, designed by and for global corporations, has already cost public workers in terms of lower wages, fewer jobs, and reduced infrastructure investment. Unfortunately, there are no new or revised terms in the NAFTA 2018 that are poised to alter this trend.

The decision to provide some services through the public sector ensures efficient and equitable access to these services—for example, many remote and rural communities were connected to the nation’s power grid only because *public* utilities made it possible. Private service providers, in contrast, often fail to provide services to geographically isolated communities or to individuals who cannot afford to pay.

The privatization of public services has often demonstrably lowered quality, decreased wages and working conditions for service workers, and excluded the poorest and most geographically isolated customers, those too marginalized to deliver a profit for greedy corporations. In 2011, the Project on Government Oversight (POGO), which accepts no union contributions, compared the costs of federal employees and contractors in a seminal study entitled *Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*, the first to compare service contractor billing rates to the salaries and benefits of federal employees.¹⁶ POGO determined that on average, contractors charge the government almost twice as much as the annual compensation of comparable federal employees. Of the 35 types of jobs that POGO looked at in its report, it was cheaper to hire federal workers in all but two cases.

NAFTA 2018 May Have a Negative Impact on Public Sector Wages: Existing trade rules have reduced the wages of a full-time American worker without a four-year college degree by just under \$2,000 a year on average, in both traded and non-traded sectors.¹⁷ Non-college-educated workers comprise about two-thirds of America’s workforce, including large portions of its public sector workforce. Without the suite of reforms we recommended, NAFTA 2018 may continue to negatively affect public sector wages, benefits, and working conditions.

NAFTA 2018 May Continue to Reduce Revenues Available to Provide Public Services: Given what we know about NAFTA’s previous impacts on manufacturing, NAFTA 2018 may reduce the property tax revenues in manufacturing communities, especially if swift and certain enforcement mechanisms are not added to the labor chapter. More analysis on this will be provided when final text and other information is available. When communities lose factories, businesses that provide services to factories and their employees lose revenue and jobs, decreasing both sales and income tax revenues. Detroit, Michigan, Bridgeport, Connecticut, and Baltimore, Maryland have all experienced this cycle. Abandoned land and buildings and unemployed residents lead to reduced federal, state, and local tax revenues. Reduced revenues lead to disinvestment in quality public services such as education—which is the anchor of our democracy, infrastructure—which buttresses our national security, training programs—which help people find better jobs, fire and police personnel—whose job it is to keep us safe, and many other services. Though several new provisions aimed at supporting Mexican wages have been included in NAFTA 2018, to meaningfully limit outsourcing, more teeth on enforcement must be added to prevent ripple effects on our economy.

¹⁶ POGO’s *Bad Business* study can be found here: <http://pogoarchives.org/m/co/igf/bad-business-report-only-2011.pdf>.

¹⁷ Josh Bivens, “Adding Insult to Injury: How bad policy decisions have amplified globalization’s costs for American workers,” Economic Policy Institute, Jul. 11, 2017. Available at: <https://www.epi.org/publication/adding-insult-to-injury-how-bad-policy-decisions-have-amplified-globalizations-costs-for-american-workers/>.

NAFTA 2018 Fails to Adequately Protect Public Services from Trade Commitments: The U.S. has never clearly exempted public transportation, sanitation, water or wastewater, utility, postal or other services from its trade deals. If the U.S. or a state or local government decides at some future date to reverse a failed privatization experiment, the U.S. could face a state-to-state or an investor-to-state challenge (depending upon the sector)—potentially well after good-paying unionized jobs have been eliminated.

NAFTA 2018 Fails to Specifically Include the Public Sector Under Its Labor Standards: Since labor violations under the Labor Chapter must be in a “manner affecting trade or investment,” labor violations for significant parts of the public sector, like teachers and others, would not necessarily constitute a violation of the agreement. This important limitation could mean that rampant abuses in the public sector that decrease wages and working conditions for similarly skilled private sector workers would not be actionable under NAFTA 2018’s provisions.

Steel

Several provisions in the text should promote production and employment in the steel sector in North America. Questions continue, however, as to whether these positive steps will improve conditions in the United States or be shared among all three countries.

- The proposed text would make a number of positive changes to existing rules for steel intensive goods. For several products, there is a new requirement that a percentage of North American steel be utilized in a product. However, not included in the text was a request by the United Steelworkers (USW) that steel, to qualify as originating, be “melted and poured” in North America. The failure to include a melted and poured standard, without other provisions, puts in jeopardy some steel jobs in North America. For example, Chinese-produced carbon steel slabs could be imported into Mexico at dumped or subsidized prices and be turned into other products, but still comply with the NAFTA ROOs.
- In the U.S., existing antidumping and countervailing duty orders cover many unfairly-traded products. But these dumped and subsidized products make their way into Canadian and Mexican produced parts and qualify for NAFTA benefits; creating substantial competitive pressures on U.S. producers and undermining not only the effectiveness of the relief granted to industry and workers under our laws against unfair trade, but also promoting the outsourcing of certain steel-intensive production to our NAFTA partners. The text includes a new enforcement and cooperation provision. This would create a new NAFTA subcommittee on customs enforcement that would require Mexico to provide confidential information on potential duty evasion and other customs problems. In addition, the language would allow U.S. officials to accompany Mexican enforcement personnel on investigations concerning such matters in their territory.
- The new rules would require originating steel to be used in several applications that should promote the use of U.S. steel products, for example in the production of electrical transformers and cores (utilizing grain oriented electrical steel). Steel structures and certain other important products would also be covered by new originating requirements.
- The NAFTA 2018 text expands coverage for the first time to certain railway or tramway freight cars, requiring that they include originating North American steel to qualify for the benefits of the agreement. The North American freight railway sector has been under competitive pressures and these provisions should result in production and employment increases.

- It is important that the implementing bill make clear that the provisions relating to origination under NAFTA 2018 do not replace or conflict with requirements under U.S. law as to what products qualify under Buy America provisions. The lack of a melted and poured standard in NAFTA 2018 must not eliminate the requirement that the melted and poured standard be met for purposes of the Buy America statute.
- The change in the treatment of safeguard actions under the remedies chapter raises concerns. The decision to exempt Mexico and Canada from safeguard actions could, in certain industries and in certain instances, pose significant threats to U.S. production and employment.

Additional information is needed on other provisions that will be included in the final text which could bear significantly on the impact of the provisions relating to steel products.

VIII. Analysis of Critical Issues in NAFTA 2018

The LAC Recommends the Inclusion of Effective, Swift, and Certain Labor Monitoring and Enforcement Mechanisms to Ensure that Protection Contracts are Dismantled and All North American Workers Can Freely Organize and Negotiate for Better Wages and Benefits

We have worked closely with the USTR, supporters of working families in Congress, as well as our counterpart union representatives in Mexico and Canada and worker advocates in all three NAFTA countries to update the agreement. As we have already stated publicly, there have been improvements in the labor rules, including, most importantly, new rules to eradicate wage-suppressing protection contracts in Mexico. As we have also already stated publicly, these changes will be meaningful only if we can be certain that the labor standards in the agreement are clear, strong and enforced and that specific changes to current labor law in Mexico will be adopted, implemented, and enforced. Now that we have had an opportunity to review the full labor text, we can provide additional details regarding how the text compares to our recommendations for a robust labor chapter that would raise wages and working conditions and help ensure worker rights and freedoms across North America. We believe that potential changes to the agreement are still possible, including with the entry of Canada into the agreement.

Our experience—not only with NAFTA, but with other failed trade agreements—makes clear that the highest priority must be placed on the terms of the trade agreement itself and the obligations it imposes. Other obligations, commitments, and measures can support and enhance these provisions, but only obligations included in the text of the deal have the permanence of a trade agreement. It is this deal and its implementing bill—not promises, not executive orders, not statements of administrative action—that Congress will vote on.

We have made clear since the initiation of these negotiations to reform and update the NAFTA, that the core obligations in the labor chapter must be the foundation for a new arrangement. In part because NAFTA renegotiation coincided with recent Constitutional changes adopted by Mexico, we were optimistic that this process, if combined with properly implemented Mexican legislation, could address many of the most significant worker rights abuses in that country. Unfortunately, Mexico has yet to adopt a package of laws, much less regulations and implementing actions, that would give life to those Constitutional commitments. The result is that we must not only place greater weight on the labor chapter of the agreement, but also adopt clear requirements as to what Mexico's laws must do to fulfill its commitments.

While we cannot know whether Mexico will enact labor legislation that faithfully implements its Constitutional reforms, and whether it will promptly, thoroughly, and effectively implement those changes,

we welcome the language in the Labor Annex that sets an expectation that the law will be passed before the deal is signed and implemented prior to the Agreements' entry into force. We urge these "expectations" to become requirements. We have learned from prior trade agreements that the period of greatest leverage is before Congress votes. It is imperative that this leverage be used and not be squandered. That is why we recommend that the implementing legislation include a provision **preventing** entry into force of NAFTA 2018 if Mexico has not enacted and implemented its labor law reforms.

With respect to the labor chapter itself, we welcome modest improvements over past trade agreements. Yet the basic flaws of the May 10 template remain: the standard exclusively focuses on the 1998 ILO Declaration of Fundamental Principles and Rights at Work, an ambiguous principles document, as opposed to the more precise ILO Conventions. If instead NAFTA ensured all workers can exercise fundamental labor rights reflected in the ILO's eight fundamental labor conventions, including the bedrock right to join unions and negotiate with employers, the obligations would be clearer and therefore easier to enforce. Referring to these standards in the agreement itself would help define what actions Mexico will need to take to comply with the terms of the agreement. We will continue to push for these strong labor obligations to be embedded in the text.

Instead of referring to the ILO's core conventions, the Parties chose to include language (in footnote 2) that serves to obfuscate, rather than clarify, the rights and principles in the ILO Declaration. We have offered numerous ideas about this matter including simply eliminating the footnote, all of which have been rejected to date. Eliminating the footnote would not and could not bind the U.S. to ILO conventions it has not ratified, nor would it give the ILO jurisdiction over NAFTA. In the end, this matter is of grave importance because vague standards are difficult, if not impossible, to enforce, giving Parties the recourse to argue that their actions arguably met the vague standard required, and, in the alternative, that they did not have fair notice that their actions violated the standard.

The LAC appreciates clarifying language in Footnote 4 that the freedom of association includes the right to strike, which is a significant improvement in establishing the meaning of freedom of association in law and in practice, as well as Footnote 1, which, after years of effort, finally makes clear that the term "minimum wages" includes all required payments legally due on behalf of workers. Failure to pay into legally required health and retirement funds is just one of the many ways that bad actor employers exploit lax labor enforcement in our trading partner countries.

Language to fix the so-called "Guatemala issues" of "manner affecting trade and investment" and "sustained or recurring course of action or inaction" moves in the right direction but remains problematic. It is important to note that the underlying terms of "manner affecting trade and investment" and "sustained or recurring course of action or inaction," which appear in the current trade promotion authority law (Fast Track 2015), were undermined by a subsequent panel decision in the Guatemala case. Congress did not know in 2015, when Fast Track 2015 (P.L. 114-26) became law, that the Guatemala panel would use the phrases "manner affecting trade" and "sustained or recurring course of action or inaction" in such a way as to make the entire chapter virtually unenforceable.

While we appreciate the footnote clarifying the meaning of "manner affecting trade and investment," we are disappointed that it leaves doubt as to whether it covers all workers in the economy. It therefore risks leaving loopholes for wage suppression, particularly by public sector employers that refuse to accord fundamental labor rights to their employees. Mexico has denied workplace rights and freedoms to its teachers, which not only suppresses the wages, benefits, and conditions of those teachers, but also applies downward pressure on wages, benefits, and conditions of similarly skilled working people in Mexico's private sector, many of whom produce goods or provide services that compete with goods and services of U.S. workers.

Markets are not defined by individuals, but by the entirety. The failure of one significant set of workers to be able to enjoy their rights can undermine the proper functioning of a market, suppressing demand, both for the goods produced in that country and for the goods produced by other trading partners. Literally, we are all in this together.

We also have strong concerns that, even with the clarifying footnote, that the phrase “sustained or recurring course of action or inaction” continues to be language of limitation. The footnote seems to provide some guidance on when a Party’s actions or inactions have violated its obligations. Unfortunately, single egregious acts that fail to form a sustained or recurring course remain uncovered, even though such acts could be used to coerce thousands or tens of thousands of workers not to exercise their labor rights. We raise this concern because such single egregious events have occurred, including murder. For this reason, we remain especially concerned about the language in Footnotes 7 and 11, which emphasizes that “an isolated instance or case” is not covered.

We appreciate the strengthening of the language in Article X.6.1 vis a vis the language in the TPP, which only required parties to “discourage” rather than “prohibit” the importation of goods . . . made in whole or in part by forced or compulsory labor.” However, a Party is only required to adopt “measures it considers appropriate,” which makes the provision self-judging and therefore extremely difficult to enforce. Moreover, the provision reincorporates the limitation of the TPP that the parties need only address goods made with forced labor from “other sources” rather than from NAFTA Parties themselves. There is no reason not to prohibit the importation of such goods from NAFTA Parties, especially given that the U.S. government has documented forced labor in the North American supply chain.¹⁸ Additionally, we recommended that the provision be expanded to cover the worst forms of child labor, and this additional language to protect children was not included.

With respect to the new language on violence, Article X.7, the absence of which was a key failure of the Guatemala case, we are pleased that the text incorporated a clear link between failing to address threats and violence and failure to enforce labor laws. This appears to be a clear improvement over the status quo. However, the incorporation of the language of limitation into the new obligation on violence (“manner affecting trade or investment” and “sustained or recurring course of action or inaction”) leaves room for gross human rights abuses. A single mass murder of working people engaged in collective action would not appear to be covered by this proposal. Mexico could refuse to investigate 50 murders that happened in one fell swoop and argue that its refusal did not violate NAFTA because no related or identical tragedy occurred. In addition, “investigate and prosecute” would have been stronger than “address.”

Although we strongly agree that NAFTA’s labor rules should apply equally to all workers, regardless of national origin or immigration status, we have concerns that the language in Article X.8 is weak and could enshrine differential treatment for migrants as adequate under NAFTA. This could be remedied by inserting the phrase “equal protection” or “the same level of protection.” Clearly, so long as the government allows any worker to be abused with impunity, all workers are at risk of such abuse.

¹⁸ See, e.g., U.S. Department of State, *Trafficking in Persons Report: Mexico* (2017), <https://www.state.gov/j/tip/rls/tiprpt/countries/2017/271242.htm>. (“As reported over the past five years, Mexico is a source, transit, and destination country for men, women, and children subjected to sex trafficking and forced labor. Groups considered most vulnerable to human trafficking in Mexico include women, children, indigenous persons, persons with mental and physical disabilities, migrants, and LGBTI individuals. Mexican women and children, and to a lesser extent men and transgender individuals, are exploited in sex trafficking in Mexico and the United States. Mexican men, women, and children are exploited in forced labor in agriculture, domestic servitude, child care, manufacturing, mining, food processing, construction, tourism, forced begging, and street vending in Mexico and the United States.”)

We appreciate that the scope of cooperative activities outlined in the chapter place more emphasis on work-life balance, preventing worker abuses, and eradicating discrimination than has been the case in past agreements, though these commitments would be much more meaningful if they were structured as binding, enforceable obligations instead of aspirational areas for discussion.

Before turning to the critical issue of enforcement, we wish to comment on the Labor Annex (23-A). This Annex, in contrast to prior trade agreements and the bulk of the labor chapter, includes detailed, specific rules with which Mexico's labor laws must comply. Of the changes to the labor text vis a vis prior labor agreements, this Annex has the potential to be the most meaningful, but only if it is enforced (about which, more below). However, even the Annex has room for improvement. We suggest the following two changes:

- 1) In Annex 23-A.5(b), the words "majority support" should be replaced with "representation." Article 123.A.XVIII of Mexico's Constitution requires only that "when the celebration (negotiation) of a collective contract is attempted, the representation of the workers must be demonstrated." It could be inappropriate and counterproductive for NAFTA 2018 to set the bar higher than Mexico's own Constitution, particularly when Mexican workers have already faced so many obstacles in attempting to exercise their rights and freedoms.
- 2) Annex 23-A.6, in the second paragraph sets up the danger that protection contracts not approved by a majority of workers will be unilaterally terminated, even if there is not yet an independent union in the workplace. That means some workers could lose protections and even see wages fall (e.g., if their protection contract provides for wages and benefits above the bare legal minimum). This language should stipulate that if an agreement is terminated, its terms and conditions regarding wages, hours and working conditions cannot be derogated, at least for some reasonable period of time to allow the workers themselves to organize a new, independent union. Otherwise, this provision could be counterproductive, allowing businesses to penalize workers for voting down bogus protection contracts, thereby actually saving money for outsourcers.

These concerns should be addressed in the text as well as in the legislation Mexico is expected to adopt to fulfill its Constitutional and NAFTA 2018 commitments.

We are always hopeful that commitments to adopt and enforce workers' rights will provide meaningful benefits to workers. Experience has shown us, however, that hope must be backed up by effective measures. We do not see the filing of workers' rights cases as a sign of "success" as it signals fundamental problems in that country. Nor have we found the state-to-state dispute settlement process to provide swift, certain, or effective remedies to workers harmed by violations of labor provisions in trade agreements. While the dispute settlement chapter includes no "set-aside," it does include a provision allowing the Commission to block panel formation by failing to meet. Whether or not state-to-state dispute settlement panels can be blocked, they must be buttressed by additional monitoring and enforcement mechanisms and resources if we are to expect NAFTA 2018 to have better outcomes than prior labor chapters. Simply put, vulnerable workers do not have the political clout or resources of Big Pharma or Big Ag to mount the lobbying campaign necessary to gain the United States' enforcement attention.¹⁹

¹⁹ See, e.g., "Dispute with Swiss drugmaker has Colombian officials worried about U.S. peace funding," *Washington Post*, May 18, 2016, https://www.washingtonpost.com/business/economy/dispute-with-swiss-drugmaker-has-colombian-officials-worried-about-us-peace-funding/2016/05/18/6f1903ee-1c5e-11e6-8c7b-6931e66333e7_story.html?utm_term=.f7ca580fad18; and "Seeds of discord or seeds for development – which way for US policy with El Salvador?," the Politics of Poverty, Oxfam America, Jul. 3, 2014, <https://politicsofpoverty.oxfamamerica.org/2014/07/seeds-discord-seeds-development-way-us-policy-el-salvador/>.

As we have noted previously, despite progress, more work remains to be done. Mexico must follow through on its labor law reforms. In addition, we will continue to engage with the Administration and Congress on implementing, monitoring, and enforcement measures to buttress the provisions in the agreement and to secure sufficient mandatory funding to provide technical assistance, where needed, and capacity building to help new unions form and budding unions to stand up.

Since the fight for worker rights in trade agreements began more than a quarter century ago, there have been evolutionary, not revolutionary changes. Workers have lived under the yoke of a bad NAFTA for far too long. The devastating impacts of NAFTA can be addressed, but the journey is far from over.

Currency Manipulation Is Not Effectively Addressed

The LAC has highlighted the need for currency manipulation and misalignment commitments to be binding and subject to trade sanctions when necessary. Currency manipulation and misalignment have proved to have significant adverse consequences for U.S. producers and workers. Indeed, shortly after the entry into force of the original NAFTA, Mexico dramatically devalued its peso, significantly wiping out the purported benefits of the agreement.

The first-ever inclusion of language on currency manipulation and misalignment in the core text of a trade agreement is an important milestone but, unfortunately, the proposed text has limited impact. While it indicates that parties should avoid manipulating exchange rates, its only operative impact would be to require dispute resolution if a country is “failing to disclose publicly information described in Article XX.5 (Transparency and Reporting) in a sustained or recurring manner.” It has no specific disciplines or enforcement measures for addressing competitive devaluations. In addition, the text fails to include any provisions to coordinate actions among the three NAFTA parties to address currency manipulation and misalignment by non-NAFTA parties, such as China. Such a provision could provide significant leverage over third-party actions that injure, or threaten to injure, production and employment in the NAFTA region.

The language must be buttressed by provisions in the implementing bill to ensure that the provisions are linked to action under existing U.S. trade laws. In addition, the implementing bill should include a provision, similar to those that have separately passed the House and Senate in the past that would make currency manipulation and misalignment a countervailable subsidy. In this way, the limitations of the proposed text could be addressed, in part, through U.S. unilateral mechanisms. In addition, future trade agreements should use the proposed text not as a model to follow, but as a base for further revision to advance enforceable disciplines along with a coordination mechanism for third party manipulation and misalignment.

NAFTA 2018 Jeopardizes Access to Affordable Medicines

NAFTA 2018 is poised to drive up the price of medicines for working families and retirees. Rather than learning from the mistakes of prior trade rules that have increased the price of medicines in developing countries²⁰ and that made the TPP so deeply unpopular, NAFTA 2018 incorporates nearly wholesale the wish list of big pharmaceutical companies with respect to intellectual property rights and drug pricing provisions. Measured against the status quo, public health is likely to be harmed and prices on drugs and

²⁰ “All Costs, No Benefits: How TRIPS-plus intellectual property rules in the US-Jordan FTA affect access to medicines,” Oxfam Briefing Paper 102, Oxfam International, Mar. 21, 2007. Available at: <http://donttradeourlivesaway.files.wordpress.com/2011/01/all-costs-no-benefits.pdf>.

medical devices are likely to increase.²¹ Life-saving medicines could be increasingly out of the reach of those most in need.

Intellectual Property

The IP Chapter includes specific measures that undermine access to affordable medicines and undermine the “May 10” standards. These harmful measures also lock in current U.S. patent rules that many policymakers and stakeholders seek to reform to promote the interests of workers, retirees, and businesses trying to compete with monopolists. In the future, Congress will be less able to rebalance U.S. patent policies to give affordability and cost effectiveness a higher priority than guaranteeing patent holders, especially multibillion-dollar pharmaceutical companies, excessive rents. The situation is even direr for our Mexican partners who face even greater resource constraints than we do.

Articles 18.F.13 and 18.F.14²² require countries to establish periods of test or other data exclusivity for chemical and biologic drugs that could lead to delays in the introduction of generic competition, even beyond the original patent period. In particular, expansion of IP exclusivity for biologics to ten years goes far beyond the original NAFTA standard of five years that applies to other pharmaceutical products. This provision would primarily benefit those who seek to delay domestic market access to lower cost prescription alternatives and would prevent the U.S. from ever changing our domestic exclusivity period to less than 10 years. The LAC also opposes the expansion of the definition of biologic drug (in Article 18.F.14.2), which will expand the pharmaceutical products to which these delaying provisions will apply. It is also unfortunate that patent holders may be able to extend monopoly protections by delaying applications for marketing approval for generics, per Article 18.F.16. These provisions run counter to the Administration’s stated goal of lowering the high cost of prescription drugs for American consumers.

Article 18.F.1 requires countries to establish at least one of three paths that allow pharmaceutical companies to “evergreen” drugs or extend patents for an additional 20 years. This misguided policy will further push the cost of medicines in NAFTA countries in the wrong direction and undermine efforts to reform U.S. laws. Evergreening inhibits innovation by encouraging pharmaceutical companies to make small changes in existing technologies, and to roll them out slowly, rather than focus their research efforts on real breakthroughs. In contrast to NAFTA 2018, evergreening was not required in the U.S.-Peru FTA, which is viewed as a gold standard by proponents of the “May 10” framework, including many Members of the House and Senate.

Requirements for patent term adjustments in Articles 18.F.9 and 18.F.11 could significantly delay generic competition and restrict access to affordable medicines. During the negotiation of the TRIPS Agreement, patenting and regulatory delays were a justification for the adoption of a 20-year patent term—three years longer than the previous term in the United States.

Article 18.J.4.4 requires that NAFTA country courts be authorized to consider “any legitimate measure of value the right holder submits, which may include lost profits, the value of the infringed goods or services measured by the market price or the suggested retail price,” when deciding damages in a patent infringement case. It is not clear how these considerations may exceed the remedy of a “reasonable royalty” allowed for

²¹ For more information on the possible impact of these provisions on access to medicines, please visit Doctors Without Borders (<http://enewspf.com/2015/11/06/doctors-without-borders-statement-on-the-official-release-of-the-full-text-of-the-trans-pacific-partnership-trade-agreement/>) and UNITAID (<http://www.unitaid.eu/en/rss-unitaid/1339-the-trans-pacific-partnership-agreement-implications-for-access-to-medicines-and-public-health>).

²² In this section, we use the section numbers corresponding to the text we reviewed, regardless of the fact that the text numbers are subject to change.

patent infringement under the Biologic Price Competition and Innovation Act section of the Affordable Care Act.

Medpharm Annex

From the outset, the LAC urged the USTR to abandon the so-called “transparency” provisions for pharmaceuticals and medical devices that had been included in the U.S.-Korea FTA and the TPP. It is a disappointment that such an annex is included in NAFTA 2018. NAFTA 2018 includes provisions that give device and pharmaceutical companies greater leverage in listing and pricing decisions in government-supported programs, including Medicare. The Annex appears to force governments to reveal “methodologies” and “guidelines” they use to make pricing and listing decisions. This information can in turn be used by drug and device companies to undermine our leverage to negotiate reduced costs.

The Medpharm Annex also gives device and pharmaceutical companies the ability to appeal decisions they do not like. While the annex is not subject to state-to-state dispute settlement, if the Annex remains in the deal, it is imperative that global drug and device companies be prohibited from accessing ISDS to complain that any particular listing or pricing decision denied the company its "minimum standard of treatment" or constituted an "indirect expropriation." Such claims would be a direct assault not only on our democracy and sovereignty, but also on the public purse. They would interfere with attempts to be good public stewards of taxpayer funds.

Finally, the Medpharm Annex fails to reference cost effectiveness among its principles but does highlight the need to value the therapeutic significance of a product. This could create adverse pressure on public programs that seek to elevate the use of less expensive technologies that are as effective as more expensive therapies. Medicare regulators have tried multiple times over the last 20 years to develop cost effectiveness criteria for making national coverage determinations. These efforts have failed under strong opposition by manufacturers who have an interest in securing coverage of high cost drugs that are no more effective than (and in some cases even less effective than) more affordable alternatives. The failure to include cost effectiveness among the principles in this Annex will no doubt give the drug and device makers another tool for blocking reforms that could provide substantial savings for Medicare.

The LAC Recommends Further Improvements to Trade Enforcement Mechanisms

The Labor Advisory Committee has made clear that existing infrastructure, as well as orientation, of our nation’s trade enforcement system has been completely inadequate. From labor rights to commercial activities, previous administrations have essentially ceded responsibility for trade enforcement to the private sector. In certain areas, such as addressing currency manipulation, no administration has initiated action through the interpretation of existing laws and statutes, allowing trading partners to act with impunity. The result of years of enforcement neglect has been rising trade deficits, outsourced production, offshored jobs, lost opportunities, and rising income inequality.

The current Administration has initiated a number of actions to reverse this trend, as it concerns commercial and national security interests. Actions under Section 232, 301 and under Title VII of our trade laws have sought to promote our national and economic security interests. While activity is underway, results are still limited in terms of commercial and market access successes: global overcapacity in steel and aluminum continue to plague world markets. Intellectual property theft and abuse by China continues to run rampant. Dumping and subsidization of products destined for the U.S. market also continues. And, our global trade deficit in goods continues to rise, fueling further wage inequality, outsourced production, and diminished manufacturing employment. Much work remains.

With respect to labor, however, there has been no progress in enforcing worker rights provisions in the past 25 years. Indeed, while it is not the result of this Administration's activities, the decision in the Guatemala labor rights case, which imposed severe constraints on the ability to address violations of labor rights, was a serious setback to advancing the interests of workers covered by trade agreements. This limitation, has, in part, been addressed by new language in footnotes in the labor chapter of NAFTA 2018. However, negotiators argued that Fast Track 2015 placed limits on their ability to more fully address these counterproductive phrases that grossly undermined the Guatemala labor rights case. The current Administration has failed to live up to labor enforcement expectations by failing to take meaningful action on open labor cases against Bahrain, Colombia, the Dominican Republic, Honduras, Peru and declining to accept an AFL-CIO submission against Mexico made in January 2018.

Enforcement under NAFTA 2018 takes several forms:

1. State-to-state dispute settlement (Chapter 20), has been retained which will continue to allow certain disciplines to be addressed in this forum. As is noted elsewhere, however, the ability to block action at the Commission level and unduly delay decisions continues.
2. Chapter 19, which severely impeded the proper implementation and adjudication of U.S. laws against unfair trade, has been eliminated. This is a very positive step.
3. In the area of trade remedies, underlying U.S. laws have not been addressed, other than to allow for U.S. inspectors to join their Mexican counterparts on certain duty evasion inspections (Chapter X, Article X.5:7). This should help advance the proper coordination of laws against unfair trade between our two countries.
4. NAFTA 2018 also excludes Mexico from coverage under global safeguard provisions. While it is certainly hoped that there will be greater coordination of trade policies between our two countries, the inability to apply safeguard laws against Mexico, without being required to provide compensation, is an undue limitation and could jeopardize U.S. production and employment in the future.

These enforcement measures are only as good as the intent of each administration, and the resources applied to ensure their effectiveness. We look forward to working with the USTR and Congress to ensure that the failed approaches of the past are remedied in the future NAFTA context.

NAFTA 2018 Fails to Live Up to All of the "May 10" Standards

NAFTA 2018 does not live up to the "May 10" provisions, particularly in the areas of environment, procurement, and access to medicines. The "May 10" agreement represented progress, within the harmful corporate-driven trade rules established in all U.S. trade deals since NAFTA. Although members of the LAC have differing opinions on the value and quality of the "May 10" Agreement, we all agree that it was intended to set the floor for improving trade rules, not the ceiling. Unfortunately, some in Congress are apparently opportunistically using the "May 10" Agreement as an excuse to block progress on issues vital to improving the lives and livelihoods of their constituents.²³

NAFTA's Labor Chapter meets, and in some places exceeds, the standards of the "May 10" Agreement, though, as noted elsewhere, it fails to include the vast majority of the improvements that the LAC recommended in June 2017. Importantly, the administration has promised to require Mexico to enact labor law reform before it will sign the deal and to ensure that the new law has been implemented before the entry into force of the agreement. This would be an improvement over the process for the failed TPP and is

²³ While there are always those in Congress who will threaten to withhold their support for an agreement because it "goes too far" toward protecting working families or the environment, the reality is that no trade agreement that has received a vote under fast track procedures has ever been defeated.

imperative if “May 10” is to be upheld.²⁴ Disappointingly, however, the dispute settlement chapter, even on its own terms, may fail to ensure that labor obligations are subject to binding dispute settlement as it leaves open the possibility that a NAFTA Party may block the formation of a dispute settlement panel.

In a labor-related issue in the Government Procurement Chapter, the NAFTA 2018 text is weaker than “May 10.” Where the Peru FTA allowed procuring entities to “apply technical specifications . . . to **require** a supplier to comply” with laws covered by the Labor Chapter, NAFTA 2018 only ensures that a procuring entity may “**promote** compliance” with such laws (emphasis added).

NAFTA 2018 also fails to live up to the “May 10” Agreement standards on the environment in two critical ways. NAFTA 2018 does not require member nations to “adopt, maintain, and implement” policies to fulfill their commitments under all seven MEAs listed in the “May 10” Agreement. The only MEA held to this standard in the NAFTA 2018 is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), even though there is evidence that Mexico is in violation of at least one “May 10” MEA.²⁵

Most egregiously, NAFTA 2018 takes major steps back in comparison to “May 10” on the issue of access to affordable medicines. First, the “May 10” Agreement provides for five years of data exclusivity for biologic medicines,²⁶ yet NAFTA 2018 requires ten years.

Another area in which NAFTA 2018 falls short relates to patent term extensions. “May 10” exempted parties from having to provide patent extensions for pharmaceuticals. In contrast, NAFTA 2018 provides no such exemption.

NAFTA 2018 also falls short of “May 10” in terms of evergreening. Unlike the U.S.-Peru FTA, Article 18.F.1.2 of NAFTA 2018 enables pharmaceutical companies to “evergreen” patents (i.e., to extend their monopoly rights) by making modest changes in the way an older drug is administered or formulated or by demonstrating a new use for an older drug. Such provisions reward rent-seeking and withholding updated formulas, rather than rewarding innovation and rapidly getting new treatments to the market.

The LAC Does Not Have Enough Information to Determine the Likely Impact of the Rules of Origin

In the critical area of rules of origin (ROOs), other than for automobiles and parts (which will be discussed separately), the negotiated text improves upon the original NAFTA in a number of ways that should increase production and employment in North America. The ROOs define what percentage of a product—by value, weight, or process—must originate or occur in North America to be eligible for tariff benefits under NAFTA 2018. In other words, a product that does not meet the ROO would be subject to any applicable tariffs on its importation into a NAFTA partner country. ROOs under the existing NAFTA have been both deficient and outdated and have contributed to production and job loss in the U.S. A key objective of organized labor was to improve upon these rules and, while more could and should have been done, improvement has largely been achieved. It is yet to be determined, however, if these changes will

²⁴ See e.g., Levin, Sandy. “An Open Letter to Progressives: TPP Is Not Yet 'The Most Progressive Trade Agreement in History'.” May 11, 2015. <http://democrats.waysandmeans.house.gov/op-eds/open-letter-progressives-tpp-not-yet-most-progressive-trade-agreement-history>.

²⁵ For example, in 2015, NOAA has cited a Mexican-flagged fishing vessel as being in violation of the IATTC (http://www.nmfs.noaa.gov/ia/iuu/msra_page/2015noaareptcongress.pdf).

²⁶ See e.g., Levin, Sandy. “Is TPP the Most Progressive Trade Agreement in History? Not If You Need Access to Affordable Medicines.” May 28, 2015. <http://levin.house.gov/tpp-most-progressive-trade-agreement-history-not-if-you-need-access-affordable-medicines>

result in a significant increase in production and employment in the U.S. in the critical area of autos and auto parts.

The ROOs are addressed in two ways in the text—first through general rules and, second, through Product Specific Rules (PSRs), which cover many sectors of key importance to U.S. manufacturers and their workers. For the general rules, so far as we can tell, the text essentially abandons what is known “tariff shift” rules—which can require minimal changes in a product to move its designation from one tariff classification to another—in favor of either a wholly originating concept or a regional value concept (where the North American content would be required to meet a general 60 percent threshold under the transaction value method or a 50 percent threshold under the net cost method). This change in the ROOs should have a positive impact on production and employment in North America. Additional analysis will be required, once the final text of the agreement is certain, as to what specific impact these rules will have on production and employment in the United States.

Several areas have Product Specific Rules (PSRs). Of particular interest are those in the automotive sector and for steel-intensive goods (each discussed in more detail in the industry-specific section, VII).

Auto ROOs

NAFTA 2018 proposes a number of changes to the existing auto ROOs. It is important to note, however, that the auto ROO that we reviewed is entitled “Agreement in Principle.” Thus, it appears that the rules are still a work in progress and the final details are still in question. In addition, as has been noted in the press, a side letter has apparently been reached between the U.S. and Mexico with regard to potential action on autos under Section 232 of U.S. trade law. The specific commitments in that letter, in addition to any other side agreements that may have been reached, have not been made public.

The proposed ROO is an improvement over the original NAFTA’s standards. However, there are lingering questions that remain about its effectiveness and whether it will be helpful to workers and domestic auto manufacturing in the long-term.

Undoubtedly, a strong rule of origin is needed to prevent the outsourcing of U.S. auto jobs. The inclusion of the Labor Value Content (LVC) in the ROO is a positive and much welcomed improvement. This concept explicitly links commercial trade benefits to wages. Arguments have been made for this linkage for decades. As currently proposed, it primarily applies to auto assembly. The LVC is weakened because it is not indexed to inflation, and thus will not automatically increase over time. However, the overall intent of the LVC is positive.

It is unclear if the ROO proposal will bring jobs back to the U.S. It is difficult to predict with any degree of accuracy if it creates incentives to invest in North America as opposed to China, Vietnam and other export platforms that exploit workers. It is also unclear how the ROO will interact with other labor reforms suggested elsewhere in this document to ensure that workers in all three NAFTA countries can benefit. As noted in the analysis section on the Labor Chapter, the impact of NAFTA 2018, over the long-term, will depend not only on the Labor Chapter and Annex, but on enforcement and other measures that have not yet been defined.

In evaluating this proposal, we must look beyond short-term fixes and measure how it will create jobs for U.S. workers, increase domestic auto manufacturing in the long term, and create strong labor standards in Mexico. It is unclear if the proposal would have the beneficial impacts we seek. Additionally, it is unclear if the proposal would lead to increased production in the United States, reinvigorate the U.S. auto industry,

strengthen trade in North America as a whole or whether it might have unintended negative consequences, such as additional outsourcing to China.

Outstanding questions remain, and the LAC needs additional data to effectively evaluate the proposal including current and historical NAFTA content data, specifically Original Equipment Manufacturing and component data. Data and hard numbers are needed to gain a full understanding of the effect the auto ROO will have on the auto industry and affected components. Additionally, it would be beneficial to have projections, even rough estimates, on how the ROO would impact production location decisions.

While the Auto ROO proposal is a positive step in the right direction, there are still looming questions and insufficient data and hard numbers to fully evaluate the proposal. We also cannot evaluate the ROO in isolation. It will need to be reviewed in conjunction with a strong enforcement mechanism in the labor chapter, other ROOs, currency provisions, and other important rules. There are significant details yet to be ascertained on the full impact of the new ROO. These details may improve, or dramatically undermine, any positive impact that the ROO might have on U.S. production and employment.

The Investment Provisions Are Meaningfully Improved Over the Original NAFTA, But Still Give Foreign Investors Greater Legal Rights than Working Families and Domestic Firms

The investment provisions are a clear improvement over the original NAFTA and yet fall far short of eliminating ISDS entirely, as we have recommended. Nor do they eliminate the vague obligation to provide investors with “fair and equitable treatment” (FET) as part of the obligation to provide a “minimum standard of treatment” (MST). Private arbitrators have used the vague FET and MST obligations—which do not exist in U.S. domestic law—to create new legal obligations out of whole cloth.

By offering additional legal protections beyond those that exist under U.S. law or other countries’ national courts, ISDS, FET and MST make it more attractive to send production and investment outside the U.S. It simply makes no sense for NAFTA 2018 to include *any* provisions that could promote the outsourcing of jobs—particularly unionized, middle class jobs. Furthermore, ISDS, FET and MST actually disadvantage U.S. companies that only produce in the U.S. (e.g., micro and small to medium sized companies) because they have fewer rights than their foreign competitors. And when foreign investors get their own private justice system, it tells citizens that the quality of justice they receive in public courts is inadequate. In short, ISDS undermines confidence in both trade and democracy.

Simply put, ISDS is a separate justice system for which there is no legal or ethical justification. The global investors who benefit from the system have never provided evidence of systemic bias against them from the developing countries that they claim are the target of the provisions.²⁷ And rule of law requires that the law—including the system of justice—apply to everyone equally. That is why the LAC opposes inclusion of ISDS in any form in the NAFTA 2018 and in all other trade deals.

Assuming the investment provisions of NAFTA 2018 retain their current form and that Canada becomes a party to the final deal, ISDS will be phased out with Canada entirely after three years (Annex 11-C). Investors with complaints would have recourse to state-to-state dispute settlement, guided by the home state rather than by the investor directly. State-to-state systems, while imperfect, are a more appropriate way to resolve international disputes than giving private investors the status of states. This change cannot be viewed as anything but a win for the citizens of both the U.S. and Canada.

²⁷ The argument that ISDS is only about developing states is, incidentally, a demonstrably false claim, with the United States, Canada, Spain, and the Czech Republic among the developed states in the top 20 most-sued countries in the ISDS system. UNCTAD Investment Policy Hub, <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>.

With respect to Mexico, ISDS would be retained for all investments between the two countries, but investors would for the first time be required to show that they had exhausted domestic remedies and most importantly would be limited to bringing claims only on the basis of discrimination (violations of the national treatment or most-favored nation treatment standards) or direct expropriation without just compensation. This is also superior to the original NAFTA.

However, for investment between the United States and Mexico, investors who are parties to covered government contracts:

- with respect to oil and natural gas that a national authority controls, such as for exploration, extraction, refining, transportation, distribution, or sale;
- to supply power generation, telecommunications, or transportation services to the public on behalf of the Party; or
- with respect to the ownership or management of infrastructure, such as roads, railways, bridges, canals, or dams, that are not for the exclusive or predominant use and benefit of the government

can bring an ISDS claim *on any basis covered in the investment chapter* on behalf of their enterprises which are parties to the contracts or on behalf of their enterprises in the same covered sector (oil and natural gas, power generation, telecommunications, transportation, or infrastructure) as a sector in which the investor has a government contract. This means that, for the critical extractives industry, which is a primary user of the ISDS system, vague and overbroad claims of “indirect expropriation” and violations of FET and MST obligations continue to be a risk. In addition, providers of important public services such as power generation, telecommunications, and transportation and managers of bridges, roads, and rail retain broad rights to challenge public interest regulations, environmental protections, and good governance measures.

A single ad hoc ISDS panel’s novel interpretation of the fair and equitable treatment obligation can work to expand the rights that *all* investors can seek to protect. The panel decision in *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (“*Occidental*”)²⁸ provides an example. In *Occidental*, the claimant complained that when it admittedly violated a provision of an extractives contract of the type that will be covered by NAFTA 2018, the penalty that Ecuador applied was too harsh.²⁹ The panel expanded the application of the “proportionality principle” to the obligation to afford investors with fair and equitable treatment, a component of the minimum standard of treatment. The panel applied this principle despite the existence of a contractually-agreed measure, freely arrived at by the contracting parties, that specified the exact penalty that Ecuador had imposed upon Occidental.³⁰ The *Occidental* decision

²⁸ *Occidental Petroleum Corp. & Occidental Exploration & Prod. Co. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, ¶ 182 (Oct. 5, 2012), <https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf>. This decision was partially annulled on other grounds by *Occidental Petroleum Corp. & Occidental Exploration & Prod. Co. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, (Nov. 2, 2015), <https://www.italaw.com/sites/default/files/case-documents/italaw4448.pdf>.

²⁹ *Id.*

³⁰ See *Occidental Petroleum Corp.*, Award at ¶ 410–22. Despite Ecuador’s claim that the penalty it imposed upon Occidental “could not be a breach of the Treaty when it was a penalty freely agreed to” by Occidental, the panel held that “[t]he fact that a contractor agrees that [a particular penalty] may be a remedy in certain situations does not mean that the contractor has waived its right to have such a remedy imposed proportionately.” The cases cited by the panel as support for the application of the proportionality principle date back only to 2003, demonstrating the pace of expansion of the obligation to provide fair and equitable treatment. See also Anne Marie Martin, Proportionality: An Addition to the International Centre for the Settlement of Investment Disputes’ Fair and Equitable Treatment Standard, 37 B.C. Int’l & Comp. L. Rev. 58 (2014), <http://lawdigitalcommons.bc.edu/iclr/vol37/iss3/6> (writing that the panel “demonstrated its commitment to using proportionality as the newest principle in the evolving definition of fair and equitable treatment”).

expanded the already broad rights that investors may seek to assert under investor rights rules that incorporate the principle of fair and equitable treatment.³¹

In another egregious case, an ISDS panel demonstrated how they can get the law wrong by ignoring the intent of the parties to limit a panel's ability to interpret minimum standard of treatment too broadly. With no appellate mechanism, there is simply no recourse to correct such mistakes. In *Railroad Development Corporation v. Guatemala*, the claimant, the holder of a government contract to provide railway services (the exact type of foreign investor that would be able to access ISDS under NAFTA 2018) complained that the host state, Guatemala, illegally cancelled its contract, in violation of its MST rights.³² The panel agreed.³³ In doing so, the panel quoted from the agreement they were interpreting (the Central American Free Trade Agreement), to wit, that the customary international law principle of minimum standard of treatment “results from a general and consistent practice of States that they follow from a sense of legal obligation.”³⁴ The panel then proceeded to explain why it was not required to analyze state practice and instead adopted a standard that the quoted language had sought to avoid,³⁵ and used that standard to rule for the claimant.

Another oil sector case, *Mobil and Murphy Oil v. Canada*, demonstrates that the exhaustion of local remedies is not a cure-all.³⁶ Instead, it may provide foreign investors a second bite at the apple. In *Mobil and Murphy*, two oil companies challenged the update of guidelines on oil projects issued by the Canadian province of Newfoundland and Labrador.³⁷ The guidelines required the companies to support local economic development through expenditures on research, development, and training programs. The province argued that it merely updated the longstanding guidelines, but the claimants argued that the obligations were new.³⁸ The companies first tried to challenge the guidelines in the Canadian courts and lost,³⁹ but won in the ISDS “corporate court,” getting a second bite at the apple—a bite a domestic Canadian company could not get. The companies won \$17 million.⁴⁰

It is disingenuous for proponents of ISDS, including the extractives industry, to argue that ISDS is anything but a special interest giveaway. The U.S. economy does not “win” just because U.S. companies win ISDS cases. Furthermore, ISDS will continue to undermine rule of law in Mexico by creating special rules and special “courts” available only to a certain class—the foreign investor class. Taking the claims of powerful

³¹ Cf. Tai-Heng Cheng & Lucas Bento, *ICSID's Largest Award in History: An Overview of Occidental Petroleum Corporation v The Republic of Ecuador*, KLUWER ARBITRATION BLOG (Dec. 19, 2012), <http://kluwerarbitrationblog.com/blog/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/> (“[O]bservers should now realize that [the power of investment arbitration tribunals] is nothing short of the ability to radically alter the wealth of shareholders and workers of investor companies, as well as the well-being of citizens and residents of host states. Fundamental issues about ICSID [the International Center for the Settlement of Investment Disputes], such as its role in increasing foreign investment and its compatibility with democratic accountability, can no longer be reserved for polite academic discussions. After the Oxy award, these issues must also be confronted in rigorous policy debates.”).

³² *Railroad Development Corporation (RDC) v. Republic of Guatemala*, Jun. 29, 2012 (ICSID Case No. ARB/07/23). Available at: <https://www.italaw.com/sites/default/files/case-documents/ita1051.pdf>.

³³ *Id.* at 90.

³⁴ *Id.* at 80.

³⁵ *Id.* at 83.

³⁶ *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, May 22, 2012 (ICSID Case No. ARB(AF)/07/4) (Decision on Liability and on Principles of Quantum). Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1145.pdf>.

³⁷ *Id.* at 4.

³⁸ *Id.* at 16-21.

³⁹ *Id.* at 35.

⁴⁰ *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, Feb. 20, 2015 (ICSID Case No. ARB(AF)/07/4) (Award. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw4399_0.pdf).

actors out of the jurisdiction of domestic courts of Mexico may impede the development of Mexican rule of law by removing a main pressure point to improve the fairness and efficiency of courts. Furthermore, there is no way for either developing or developed countries to “graduate” from the ISDS mechanism once domestic courts “measure up.” There is simply no pro-worker argument for ISDS. Thus, though NAFTA 2018 pares ISDS back in a meaningful way, this improvement should not be mistaken for a complete solution.

The Environment Chapter Is an Improvement over the Original NAFTA, But Fails to Meet the Minimum Standard of “May 10,” Leaving Incentives to Outsource

The agreement’s Environment Chapter addresses more issues of environmental concern than many past agreements and makes modest, yet important improvements on the Environment Chapter of the Trans-Pacific Partnership. However, the LAC is disappointed that the agreement does not meet the standard of the so-called “May 10” agreement, address the economic and national security challenges presented by climate change, or include provisions that would ensure swift and certain enforcement of these provisions. Securing strong environmental standards across the region is important both for improved quality of life and for avoiding a race to the bottom in standards that could put downward pressure on American working conditions and encourage the continued offshoring of jobs.

The May 10 agreement and the Bipartisan Congressional Trade Priorities and Accountability Act (Fast Track 2015) direct USTR to pursue provisions in trade agreements that would require member nations to “adopt, maintain, and implement” policies to fulfill commitments under seven different multilateral environmental agreements (MEAs) to which they are party. However, the only MEA included in this form in NAFTA 2018 is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The Chapter also incorporates by reference the Montreal Protocol on Substances that Deplete the Ozone Layer and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, but does not include the affirmative obligation to “adopt, maintain, and implement” commitments under those agreements, while it omits the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the Convention on the Conservation of Antarctic Marine Living Resources, the International Convention for the Regulation of Whaling, and the Convention for the Establishment of an Inter-American Tropical Tuna Commission (IATTC) altogether. The omission of the IATTC is particularly notable in the context of NAFTA because the U.S. National Oceanic and Atmospheric Administration (NOAA) has found Mexico to be in violation of the IATTC.

In lieu of obligations to “adopt, maintain, and implement” the MEAs, the agreement includes provisions directly referencing a number of environmental policies, such as marine litter, air quality, and ship pollution. However, in this context, the agreement repeats the flaws of many past agreements by including unenforceable language such as “endeavor to improve cooperation” and “strive to act consistently with.” Because of this vague and unenforceable language, it is entirely possible that parties could do little or nothing to achieve these goals, yet they could still not be held accountable under NAFTA 2018.

Furthermore, the agreement does not include any provisions to mitigate climate change while protecting union jobs. In order for any strategy to mitigate global climate change to succeed, all countries must do their respective parts. Failure to secure participation in these efforts could facilitate the offshoring of good American jobs in energy intensive and trade exposed industries (including steel, aluminum, chemical manufacturing, paper mills, mining, utilities, transportation, and plastics manufacturing). A 21st century agreement should implement standards that ensure a level playing field and prevent countries from ensuring an unfair advantage by failing to act. More specifically, the LAC recommended that the agreement guarantee parties the right to impose border adjustment mechanisms. That recommendation was not included in the text we have reviewed.

Finally, the LAC is disappointed that our recommendation that the agreement include rules to ensure swift and certain enforcement of environmental standards has not been adopted. Instead, most enforcement terms of the Environment Chapter reflect the failed state-to-state enforcement policies of the past. The LAC does appreciate, though, the apparent inclusion in the Environment Chapter of language clarifying the meaning of “manner affecting trade or investment” and “sustained or recurring course of action or inaction.” This clarification is critical to maintaining any ability whatsoever to allow for the enforcement of environmental rules in light of the flawed decision regarding a labor rights case in Guatemala last year that interpreted that standard incredibly narrowly. That said, the Chapter would have been further improved had it struck these legacy provisions entirely.

The LAC appreciates ongoing discussions about methods to enhance enforcement practices and is hopeful that the Environment Chapter will be covered by any improvements achieved. A positive outcome of those negotiations is critical to rendering the provisions of the Environment Chapter meaningful, given that the enforcement process embedded in the agreement as such has a lengthy record of failure through its inclusion in other FTAs.

IX. Overview of Labor Conditions in Mexico and Canada

At the outset of this section, the LAC notes that the United States is out of compliance in a number of ways with fundamental labor rights. As Human Rights Watch put it, “freedom of association is a right under severe, often buckling pressure when workers in the United States try to exercise it.”⁴¹ Particularly egregious examples include restrictions and in some cases even prohibitions on the rights of freedom of association and collective bargaining for many public employees (at the federal, state, and local levels), child labor in the agricultural sector, many prison labor systems, and the lack of a federal regime sufficient to deter private sector employers from routinely interfering with the right to freedom of association. We will continue to work domestically at the state and federal levels to improve these shortcomings. As well, we support U.S. ratification of the remaining six ILO Core Conventions.

Mexico

For the past three decades, Mexico has pursued a low-wage, low-rights strategy to attract investment in industry. This strategy has led to rapid growth of manufacturing industries, but it has done little to improve the living standards of Mexican workers and their families. Mexican industry has world class productivity yet falling wages.⁴² Mexican manufacturing workers earn on average less than a fifth of manufacturing workers in the U.S., and that wage gap has remained steady for 30 years despite wage stagnation in the U.S.⁴³ Despite the massive increase in foreign investment since NAFTA, more than half of Mexicans live below the poverty line. Growth is simply not benefitting average Mexicans.

Low wages obviously hurt Mexican workers and their families. But they hurt American workers too. For example, Mexican workers do not make enough to buy U.S. exports, which keeps trade unbalanced. In addition, Mexico's low-wage strategy continues to encourage companies to move production and jobs from the U.S. to Mexico and undermines U.S. worker leverage when bargaining for higher wages.

⁴¹ UNFAIR ADVANTAGE: Workers' Freedom of Association in the United States under International Human Rights Standards, Human Rights Watch, 2000. Available at: <https://www.hrw.org/reports/2000/uslabor/>.

⁴² Harley Shaiken, *The NAFTA Paradox*, *Berkeley Review of Latin American Studies*, Spring 2014.

⁴³ The Conference Board, International Comparisons of Hourly Compensation Costs in Manufacturing, 2015, <https://www.conference-board.org/ilcprogram/index.cfm?id=38269>.

How does Mexico keep wages so low? The country's corporatist system of labor relations has remained basically unchanged during 70 years of one-party rule. Under this system, employers sign collective bargaining agreements with employer-dominated unions, generally without the workers' knowledge and sometimes before they have even been hired. These agreements are known in Mexico as "protection contracts," and they are a very effective way for companies to keep wages low and deny workplace rights. If workers in Mexico want to have their own worker organization, they face major challenges:

- First, they have to find out if they already have a union—but in Mexico, unlike the U.S., workers have no right to get a hard copy of their collective bargaining agreement.
- They then have to form or join an independent union. Usually when workers do this, they are immediately fired. Labor law reforms in 2012 limited back pay for unjust dismissal to one year, making it even more difficult to pursue such claims.
- The next hurdle is to file a bargaining demand (*emplazamiento*) with the company. The company does not have to tell workers if there is already a protection contract in place until the *emplazamiento* is filed.
- The workers must then file a demand against the company-dominated union for control of the collective bargaining agreement (*titularidad*). Then they have to wait for the Conciliation and Arbitration Board (CAB) to schedule an election (*recuento*) so the workers can choose the union they want to represent them. This can take years and usually the workers cannot hold out against the combined might of the employer, the employer-dominated union, and the government.

As a result of these obstacles, which have been extensively documented by the State Department, the ILO, and the global trade union movement, today only a small fraction of Mexico's private sector workforce is represented by democratic unions. One sign of just how bad things are in Mexico is that it ranks 5 on the International Trade Union Confederation's Global Rights Index, which ranks countries from 1 (best) to 5+ (worst).⁴⁴

Recent cases illustrate the continuing obstacles to freedom of association and collective bargaining:

- At the Goodyear tire plant in San Luis Potosí, the company signed a contract with the CTM, a protection union, before the plant was built. On April 24, 2018, workers walked out to protest low wages (less than \$2.00 per hour) and the refusal to allow an independent union. The company signed a non-reprisal agreement, but in July it fired 57 supporters of the independent union.⁴⁵
- At PKC in Ciudad Acuña, which produces wiring harnesses for export to the U.S., ten workers filed lawsuits for reinstatement after they were fired in 2012 for supporting an independent union, Los Mineros. Despite court orders, the company has refused to reinstate them. The workers also filed a bargaining demand in 2012 seeking an election to challenge the CTM, but the Federal Labor Board has refused to order the election.⁴⁶

⁴⁴ "Major win for Mexican workers as senate approves ILO organising and collective bargaining treaty," International Trade Union Confederation News, Sep. 21, 2018. Available at: <https://www.ituc-csi.org/major-win-for-mexican-workers-as>.

⁴⁵ IndustriALL, [Goodyear Mexico fires workers for setting up their own union](#), July 12, 2018; Associated Press, [Mexico-US trade deal unlikely to boost low Mexican wages](#), August 30, 2018

⁴⁶ Worker Rights Consortium, [Violations of International Labor Standards at Arneses y Accesorios de Mexico, S.A. DE C.V. \(PKC Group\)](#), June 18, 2013; IndustriALL, [Finnish company PKC ignores court ruling and fails to reinstate workers in Mexico](#), July 14, 2016

- In Guerrero, supporters of Los Mineros at a Canadian mining company, Torex Gold, filed a bargaining demand in September 2017 seeking an election to remove the CTM. When the Federal Labor Board refused to act, the workers and local communities organized protests and three union supporters were assassinated. There has been no arrest or prosecution.⁴⁷

In 2016, Mexico adopted Constitutional reforms that were meant to accomplish three things. First, they eliminate the CABs and transfer their legal functions to the judicial branch. Prior to referral to the courts, conciliation will be carried out by “specialized and impartial” federal and local level conciliation centers.⁴⁸ Second, the administrative functions of the CABs, such as union registration, will be performed by a new decentralized and autonomous federal entity whose president will be voted on by the Senate.⁴⁹ Third, elections to determine the outcomes of conflicts between unions, the election of union leaders, and bargaining demands must be “personal, free, universal and secret,” and a union must demonstrate that it represents workers at the workplace in order to make a bargaining demand.⁵⁰

The reform required the Mexican Congress to pass implementing legislation within one year of the Constitutional provisions taking effect. But after the reform took effect on February 24, 2017, the Congress failed to agree on implementing legislation, and as a result the reforms have not been put into practice. It is important to note that the draft legislative package would not have faithfully implemented the Constitutional reforms. Facing opposition from trade unions across North America, the draft package was not voted on.

A new Congress was elected on July 1, 2018 and convened on September 1. On September 20, 2018, the Senate unanimously ratified ILO Convention 98 on the Right to Organize and Collective Bargaining, which specifically prohibits anti-union discrimination and employer domination of labor organizations.

Annex 23-A to NAFTA 2018, as reviewed by the LAC, states that Mexico is expected to enact legislation to implement its Constitutional reform by January 1, 2019, and provides that the revised NAFTA’s entry into force may (but not necessarily will) be delayed until such legislation becomes effective. The Annex specifies that this legislation must establish impartial labor courts and an independent agency to administer conciliation and the registration of collective bargaining agreements. The legislation must also ensure that workers have access to their contracts (although it does to require that workers receive a physical copy); that all future collective bargaining agreements must be ratified by a secret ballot vote; that the backlog of existing contracts (which may number in the hundreds of thousands) is revised within four years to verify worker support; and that procedural delays to union representation challenges (*recuentos*) are eliminated.

These are important reforms but do not address all of the obstacles to labor justice in Mexico. For example, they do not apply to public sector workers (*Apartado B*). The division of workers into federal and state jurisdictions, long a source of delay and confusion, remains. Workers outside the formal economy will not benefit directly. The widespread use of outsourcing to evade legal obligations, the cap on back pay for unjust dismissal, and other problems remain. But it is fair to say that the proposed legislation, if effectively implemented and enforced, will create significant opportunities for workers in export sectors to form, join, and participate in democratic unions and democratic collective bargaining. The public statements of the

⁴⁷ Reuters, [Killings at Canadian-owned gold mine in Mexico jolt NAFTA talks](#), November 20, 2017; Globe & Mail, [Deadly mine strike highlights accusations NAFTA used to exploit Mexican workers](#), November 24, 2017; Canada Newswire, [Third Torex Gold striker murdered in Mexico](#), January 25, 2018.

⁴⁸ Constitution of Mexico, Article 123. A. XX.

⁴⁹ *Id.*

⁵⁰ See Constitution, Article 123. B. XXII Bis; Article 123. A. XVIII.

incoming López Obrador government and the action of the Senate in unanimously ratifying Convention 98 suggest that the new government intends to address these issues seriously.

Canada⁵¹

Freedom of Association and the Right to Collectively Bargain: Laws at the federal level and some at the provincial level provide for rights of workers to freely associate and bargain collectively. Federal labor law applies only to approximately 10 percent of workers; in workplaces and occupations that are not federally regulated, provincial, and territorial governments are responsible for labor laws.

In several provinces, this translates into a number of categories of workers being prohibited or limited from forming or joining a union or holding a union office. In Ontario, several categories of professionals (members of the architectural, dental, land surveying, legal or medical professions), are excluded from protection, as are domestic workers. In Ontario and New Brunswick (in operations with fewer than five workers), agricultural workers are excluded from general labor legislation, thus depriving them of the right to form independent unions for the purposes of collective bargaining.

Forced Labor and Child Labor: Canadian law prohibits all forms of forced or compulsory labor and the government enforces the law. Some reports indicated that child labor occurred, especially in the agricultural sector. In British Columbia, children as young as 12 years old can work legally in any industry; a letter from the parent is all that is required, and the province places no legislative or regulatory restrictions on the occupations, tasks, or time of day a child can work. There is some evidence of forced labor trafficking of workers from Eastern Europe, Asia, Latin America, and Africa who are subjected to forced labor in agricultural, construction, restaurants, hospitality, food processing plants, and as domestic workers.

Discrimination: Discrimination is prohibited with respect to employment or occupation on the basis of race, gender, etc.

Unfortunately, the original NAFTA, which has been in force for more than 24 years, has been ineffective at improving labor law and practice in any of the three countries to which it applies. Even though Canada is in compliance in many areas, its noncompliant laws, like those of Mexico and the United States, should be changed before Congress votes on NAFTA 2018. The LAC has listed some of Canada's most problematic laws below.

Federal: In March 2009, The Public Service Equitable Compensation Act (PSECA) was passed into law. Sections 36 and 41 of the PSECA make it a criminal offence for a union to encourage or assist any employee in filing or proceeding with a pay equity complaint. Unions are subject to summary conviction and fined up to \$50,000 if they assist their members in any way in advancing pay equity complaints.

Ontario: In 2011, the Government of Ontario passed legislation declaring the Toronto Transit Commission an essential service, prohibiting strikes by TTC employees. Toronto's public transit system fails to meet the ILO requirement for an essential service such that interruption constitutes "a clear and imminent threat to the life, personal safety or health of the whole or part of the population." It also conflicts with the principle that entire classes of personnel should not be deprived of the right to strike because the interruption of the job functions they perform does not in practice affect life, personal safety or health.

⁵¹ ITUC, "Survey of Violations of Trade Union Rights: Canada," 2015. Available at: <http://survey.ituc-csi.org/Canada.html>.

Quebec: The essential services law imposes severe and disproportionate sanctions in the event of an infringement of the provisions prohibiting recourse to strike action. These include unilateral suspension of the deduction of trade union dues by the employer or reduction of employees' salary by an amount equal to the salary they would have received for any period of the infringement (in addition to not being paid during that period).

Manitoba and Prince Edward Island: Pursuant to the Public School Act, Manitoba teachers are prohibited from striking. Prince Edward Island teachers are also formally denied the right to strike. This prohibition denies teachers their fundamental right to freedom of association and is inconsistent with ILO guidance.

Federal: In the public service of the Government of Canada, the Treasury Board of the Government of Canada refuse to negotiate pensions, classification, and staffing, which are declared out of scope of the Public Service Labour Relations Act.

APPENDIX: Making NAFTA Work for Working People

[The text that follows tracks the LAC's NAFTA Renegotiation Recommendations, submitted in June 2017.]

NAFTA Negotiations Recommendations Docket No. USTR-2017-0006

June 12, 2017

Ed Gresser
Chair
Trade Policy Staff Committee
United States Trade Representative
1724 F Street NW
Washington, DC 20508

Dear Chairman Gresser:

Please accept these written comments and request from the AFL-CIO to testify at the TPSC hearing to be held on June 27, 2017 on the topic of the “Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement with Canada and Mexico” (Docket No. USTR-2017-0006) as announced in the Federal Register on May 23, 2017.

Name and Contact Information of Witness:

Thea Lee, appearing on behalf of
AFL-CIO
815 16th Street NW
Washington, DC 20006
202-637-5344

Summary of Testimony:

The AFL-CIO recommends that the USTR incorporate a new approach to trade policy in NAFTA renegotiations, one that prioritizes benefits for working families, not simply benefits for multi-national or global enterprises. Equitable economic development, whether for the U.S., North America, or globally, requires fundamental changes to trade policy. It must promote international commerce while simultaneously promoting a virtuous cycle of wage-led growth and high standards of protection for working families and our very democracy. Its rules must promote investment in the domestic economies of the NAFTA countries rather than simply

making it easier to relocate goods and services production elsewhere. Renegotiation must begin with a democratized, inclusive process and proceed from there to stronger and more effective protections for workers, consumers, domestic farmers, ranchers and manufacturers, and the environment. It will require not just tweaks around the edges, but new provisions to address the unsustainable U.S. trade deficit and promote an equitable economy with human dignity. If instead, NAFTA is simply updated with provisions borrowed from the TPP, working families in the U.S., Mexico, and Canada will continue to pay a high price in the form of suppressed wages, a more difficult organizing environment, and an eroding democracy, no matter how much global corporations profit.

Thank you.

Sincerely,

A handwritten signature in black ink that reads "Celeste Drake". The signature is written in a cursive, flowing style with a large initial "C".

Celeste Drake
On behalf of the AFL-CIO

Making NAFTA Work for Working People

Contents

Introduction.....	1
NAFTA Renegotiation Process	4
In-Depth Discussion of Key Recommendations	6
1. Rules of Origin (Chapter 4) 6	
2. Regulatory “Harmonization” (Chapters 7, 9, 11, 12 and 14) 7	
3. Procurement (Chapter 10) 10	
4. Investment (Chapter 11) 11	
5. Financial Services and Stability (Chapters 11 and 14) 12	
6. Highway Safety (Chapter 12 and Annex I) 13	
7. Intellectual Property and Drug Pricing Transparency (Chapter 17) 14	
8. Trade Remedies (Chapter 19) 14	
9. Public Services (Annex II) 15	
10. New Provision: Strong Labor Rules with Swift and Certain Enforcement 15	
11. New Provision: Strong Environmental Rules with Swift and Certain Enforcement 18	
12. New Provision: Enforceable Currency Rules 18	
13. New Provision: Infrastructure Investment Commitment 19	
Figure 1: Corporate Tax Rates in OECD Countries Compared (2000 vs. 2016)	20
Figure 2: Decline in Labor Share of Income, 1970–2014.....	21
14. New Provision: Agreement to Combat Tax Avoidance 22	
15. New Provision and Change to Domestic Policy: Enhanced Screening for Foreign Domestic Investment (FDI) 24	
16. Change to Domestic Policy: Improve Trade Enforcement 24	
17. Change to Domestic Policy: Improve the ITC’s Economic Modeling 25	
Annex I: Background on the Failure of U.S. Trade Policy.....	27
Figure 3: Job Displacement Due to Existing Bad Trade Policies	27
Figure 4: Workers’ Share of National Income is Shrinking (United States).....	28
Figure 5: U.S. Trade Balance with FTA Partner Countries, 2016 (Deficits in Yellow)	29
Annex II: Proposal for NAFTA Labor Chapter (New Chapter 23)	31

Introduction

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) long has recognized that workers everywhere live in a global economic environment. The global economic environment brings many benefits for working families, from fresh fruit available off-season to more jobs in export sectors. But the global economic environment brings harm as well, from lost jobs and lower wages to unsafe imports and reduced freedom to make domestic economic policy choices.

It is crucial to recognize that working people's opposition to most trade deals since NAFTA⁵² is not now, and never was, about withdrawal from international commerce or opposition to "trade" per se. Instead, we oppose a set of rules made largely by and for global corporations that use the United States as a flag of convenience. Rather than exacting a price for this flag of convenience by strengthening the American social contract and increasing equitable growth for America's workers, U.S. trade agreements—starting with NAFTA—largely have substituted the interests of global corporations for the interests of America's people. And, because the rules of these agreements have amplified and exacerbated the effects of domestic neoliberal economic policies, working- and middle-class families have paid the price in terms of increasing inequality, depressed wages, reduced job opportunities, a substantial trade deficit and a weaker democracy.

The key trade debate is not about whether to increase trade, but about what rules should govern trade and how those rules should be enforced. Those who frame the debate as "trade versus isolation" do a disservice to America's workers. The "trade versus isolation" frame fails to address the questions of what rules govern trade and who benefits.

Why are the rules of trade so important? Because trade deals are not simply about reducing tariffs and quotas. Beginning with NAFTA, trade deals and trade policy have incorporated rules and restrictions designed to limit the way citizens can organize and govern the economies of the countries in which they live. These sweeping trade rules deserve robust public debate about which economic policy choices are being removed from national control and why. But they typically receive only superficial debate, with supporters extolling the virtues of trade in general rather than the specific impacts of the rules in question. U.S. trade policy remains secretive, with members of Congress and official trade advisers frequently privy only to descriptions of the proposed deals rather than the full legal texts under negotiation.

As a result, NAFTA and other similar trade deals have fueled the U.S. trade deficit while failing to raise wages or strengthen the U.S. economy. But this failure is not a "bug" of NAFTA. It is a feature built into NAFTA.

As President Trump recognized when he called NAFTA "a disaster,"⁵³ NAFTA's rules are simply not constructed to benefit working people. Instead, its rules benefit economic elites, making it easier for global companies to suppress wages, disrupt union organizing, and skirt clean air and water obligations by relocating or threatening to relocate production elsewhere. NAFTA's rules provide a variety of tools, such as investor-to-state dispute settlement (ISDS, a private justice system for foreign investors), that

⁵² For example, the AFL-CIO worked for the passage of the U.S.-Jordan trade agreement and more recently for the reauthorization of the Generalized System of Preferences and the African Growth and Opportunity Act.

⁵³ Presidential Debate, University of Nevada, Las Vegas, Oct. 16, 2016.

global corporations can use to ratchet down the levels of workplace safety, environmental protections and consumer safeguards.

On the other hand, as President Trump has recognized, “[w]orkers in both [Mexico and the United States] need a pay raise very desperately,”⁵⁴ but NAFTA provides no effective tools to raise wages.

In other words, NAFTA’s rules are skewed and in dire need of rebalance. One of the single most important things a renegotiated NAFTA could do for workers in all three countries is to raise wages and protect fundamental rights for workers in Mexico, thereby limiting the ability of corporations and Mexico’s ruling elite to use Mexican wages as an instrument of labor arbitrage. Mere tweaks or “updates” to NAFTA’s rules will not do this. Nor will they change its basic race-to-the-bottom structure.

Equitable economic development, whether for the United States, for North America, or globally, requires fundamental changes to trade policy. Trade deals must stimulate international commerce while simultaneously promoting a virtuous cycle of wage-driven growth and high standards of protection for working families and our very democracy. Its rules must promote investment in the domestic economies of the participating countries rather than simply making it easier to relocate goods and services production.

Instead of minor tweaks, NAFTA renegotiation must embrace what AFL-CIO President Richard Trumka has called a “Global New Deal”:

The path to global prosperity, to restoring economic balance, should begin with making sure that every person on this planet has benefit of what the New Deal brought to most Americans—electric power, clean water, schools and libraries, and in this new digital age, internet access. . . .

But we must remember as we plan this better global future that at the heart of Franklin Roosevelt’s New Deal was respect for the rights of workers. Without workers having a voice in the global economy, we get globalization for the few, we get special financial interests running rampant, we get a race to the bottom in wages and living standards.⁵⁵

For a quarter-century, NAFTA has exacerbated a race to the bottom for workers across North America. The document that follows is an attempt to lay out the substantial reforms needed for a new vision for trade. In place of policies that enrich the already economically and politically powerful at the expense of ordinary families, this document contains detailed, specific recommendations for a progressive NAFTA that puts working people first. The rules we propose aim to stop NAFTA’s vicious cycle and replace it with a virtuous one.

The recommendations include effective new tools to address abuses of internationally recognized labor rights—but they go much further. Labor provisions alone cannot undo a set of trade rules that lock in powerful advantages for global corporations over people and the planet. NAFTA reform must be a holistic process, resulting in comprehensive changes, not just business-friendly updates. That is why the recommendations suggest wholly new chapters to address problems associated with international trade, such as currency misalignment, tax avoidance and base erosion, and the public disinvestment that has resulted from tax avoidance and base erosion.

⁵⁴ Remarks in Mexico City, Mexico, by Donald Trump, Aug. 31, 2016.

⁵⁵ Richard Trumka, Address to the Global Progressive Forum, Oct. 7, 2010.

We hope these recommendations are the beginning, not the end, of the conversation about how to reform NAFTA and other trade agreements. We look forward to robust consultations with the United States Trade Representative and Congress to reform the rules of trade so that they work for working people. A better NAFTA is possible, and it should begin with a serious conversation about the recommendations set forth in this document.

NAFTA Renegotiation Process

Key Recommendations: NAFTA renegotiation must be focused on improving conditions for workers in all three countries. The negotiation must be transparent, democratic and participatory. The following reforms are critical:

- With the full participation of the public and Congress, develop negotiating objectives that are specific to NAFTA, rather than generic;
- Review and revise past practices that have resulted in the overclassification of trade policy documents, including textual proposals, working negotiating texts and offers tabled by other parties;
- Increase access to U.S. trade policy making, U.S. trade proposals and negotiating texts for Congress, congressional staff and members of the public, including by publishing draft textual proposals in the Federal Register with adequate time for public comment before tabling them;
- Expand and balance membership in the existing trade advisory committees, ensuring adequate participation in all committees by academics, small domestic firms and family farms, labor unions, public interest advocates, and state and local officials;
- Ensure that trade advisory committees have the opportunity to meaningfully advise and consult on proposals *before* securing interagency approval on texts, at which point it is often too late for revisions; and
- Cooperate with Congress to ensure the opportunity for periodic oversight hearings, by all committees whose jurisdictions include issues covered by NAFTA, on the negotiations at the outset, midstream, and once negotiations are complete in order to understand the legal implications of the NAFTA revisions.

Why This Is Important: Decisions about international economic policy have been made behind closed doors and, as a result, have primarily advanced the policy preferences of political and economic elites, not the broad interests of working families or the nation at large. U.S. trade policy decisions have been made this way for years, and American workers, small farmers, small businesses and domestic producers have paid the price. The U.S. trade deficit has grown with each succeeding trade agreement, manufacturing employment continues to shrink, and even highly-skilled workers often have a hard time making ends meet. The administration must bring trade policy decision making out into the open so that all affected people can participate in the marketplace of ideas and have a fair opportunity to bring their influence to bear.

NAFTA is about more than tariffs and quotas. It has rules designed to encourage foreign investment, undermine public interest regulations and provide monopoly protections for particular industries. NAFTA includes rules that constrain Congress's ability to support the economy, even though the public had no opportunity to help shape those rules. NAFTA also has real consequences for local and state policy making, especially with regard to regulating goods and services in the public interest; yet state and local officials had only trivial opportunities to influence its rules.

Because trade agreements affect labor rights, investment incentives, environmental protections, food safety, anti-trust policies and more, America's working people have been clear: **these decisions should not be made behind closed doors—away from the eyes of the people.** Such secrecy is inconsistent with democratic principles.

Trade agreements made on this expansive and secretive model, beginning with NAFTA, have harmed job growth, put downward pressure on wages and made workers rightly skeptical about who really benefits from these deals. Trade negotiators who tell the American public “trust me, this’ll be good for you, even though I can’t tell you what’s in it” only breed further distrust. NAFTA renegotiation presents an opportunity to undo this grave injustice. This administration can open the door to trade policy making and let all citizens participate, not just the wealthy and the powerful.

By transparent, democratic and participatory, we mean that trade negotiations must include broader and deeper consultations with the full range of congressional committees whose jurisdiction touches on the issues being negotiated. By transparent, democratic and participatory, we mean that all interested domestic parties (both citizens and organizations) must have opportunities to provide timely and meaningful input on developing trade agreements, and to provide advice regarding trade-offs and priorities, so that the final product does more than advance the agenda of a narrow elite. This includes the opportunity to review both initial proposals and working texts.

NAFTA renegotiation should be as open as other international policy-making processes. It is a misnomer to characterize these talks as “negotiations.” Trade deals are not analogous to two private parties haggling over the price of an acre of land. Trade policy making has more in common with the legislative process than with private negotiations, and its impact is even more far reaching. Because trade deals never expire and do not require periodic reauthorization to remain in place, they are much more difficult to amend or repeal than domestic laws and regulations.

The public understands the broad scope of coverage and impact of NAFTA and has made clear it must be renegotiated in a fair manner. It will be impossible to repeat the secrecy under which it was negotiated originally. Many other international policy-making frameworks already incorporate the transparency, democracy and participation we recommend. At the United Nations Framework Convention on Climate Change and World Intellectual Property Organization meetings, the negotiating texts are released and members of the public can attend meetings as observers and provide relevant feedback and advice to the parties. Even the World Trade Organization, which labor often criticizes, makes many submissions, offers and reports by member states and committee chairs available.

Not only does excessive secrecy undermine the quality of the resulting deal and undermine support for trade, it is also expensive. As adduced at a hearing of the House Committee on Oversight and Government Reform, the federal government spent more than \$100 billion between 2006 and 2016 on security classification activities, and yet, it is estimated 50% to 90% of classified material never should have been kept from the public at all.⁵⁶

The United States has championed transparency efforts in other fora and helped found the Open Government Partnership.⁵⁷ It makes no sense to abandon those principles just because it is traditional to make trade rules in locked rooms, without citizen oversight and participation.

A quarter-century of NAFTA has demonstrated that trade deals negotiated behind closed doors will leave most Americans behind. As we say in the labor movement, “if you’re not at the table, you’re on the menu.”

⁵⁶ See testimony and transcripts from “Examining the Costs of Overclassification on Transparency and Security, 2016”: Hearing Before the House Committee on Oversight and Government Reform, 114th Congress, 2nd Session, 2016. Available at: <https://oversight.house.gov/hearing/examining-costs-overclassification-transparency-security/>.

⁵⁷ For more information, see www.opengovpartnership.org/about/about-ogp.

In-Depth Discussion of Key Recommendations

Recommendations are presented in the following order:

1. In numerical order by existing chapter number if the topics occur in the existing NAFTA text;
2. Proposals for new chapters, starting with existing “side agreements,” followed by wholly new ideas; and
3. Proposals for accompanying changes to domestic law.

1. Rules of Origin (Chapter 4)

Key Recommendations: In general, “rules of origin” should be set such that domestic producers and workers in the NAFTA signatory countries are the primary beneficiaries of market access commitments, not third-party countries that take on no trade obligations in the deal. This goal can be advanced through the following specific recommendations:

- a. Auto Regional Value Content (RVC) should rise above the current 62.5%, with a phase-in period to allow manufacturers to adjust supply chains.
- b. Auto Parts RVC also should increase from current levels; otherwise, the actual auto content will lag far behind its nominal value.
- c. Current producers could be granted additional time to comply with the new, higher auto and auto parts RVCs dependent on the degree to which their hourly compensation of employees exceeds the median wage in the industry in the country in which they operate, and to which the enterprise observes all applicable workers’ rights standards in NAFTA. Additional analysis on this topic, and a specific proposal, is being prepared that would ensure workers are the real beneficiaries of the NAFTA renegotiation.
- d. Abolish “deeming” and instead require auto parts to actually meet the nominal content requirement.
- e. For the class of green/energy-efficient parts identified by the International Association of Machinists, United Auto Workers and United Steelworkers in a joint Trans-Pacific Partnership safeguard proposal, require these parts to be made in the United States to count toward the RVC for vehicles sold into the United States. Although this would be a deviation from the typical NAFTA-region sourcing rules, the AFL-CIO understands that these high-value parts are not presently made in Mexico or Canada. This recommendation is aimed to promote the retention and growth of manufacturing in the particular class of parts here in the United States for utilization in vehicles sold here.
- f. Eliminate tariff preference level exceptions (TPLs), which undermine the yarn-forward rule.
- g. Close other rule-of-origin loopholes that minimize the domestic content through roll-up and other provisions.
- h. Rules of origin relating to the production of steel must require that, to be considered for tariff preferences, the steel must be melted and poured in the NAFTA region. A similar standard should be adopted for other materials (e.g., aluminum), to ensure the entire process relating to the production of the materials occurs in the NAFTA region.

Why This Is Important: A strong rule of origin (ROO) promotes production in the NAFTA countries, rather than rewarding outsourcing to third-party countries. In addition, a strong rule of origin supports production and jobs. If the NAFTA renegotiations also include stronger rules to raise wages and environmental protections in Mexico, thus leveling the playing field, strong ROOs could promote more jobs in the United States, as well as in Mexico.

This concern is not theoretical. Auto manufacturers and suppliers in the United States directly and indirectly contribute to jobs for 5.6 million U.S. families.⁵⁸ The United States had a trade surplus with Mexico in 1993, the year before NAFTA was implemented. Supporters of the trade agreement promised new jobs and an improved trade balance. Instead, U.S. trade deficits with Mexico displaced more than 850,000 U.S. jobs by 2013. Most of the jobs displaced were in manufacturing.⁵⁹ Strong rules of origin will provide an incentive to produce in North America as opposed to China, Vietnam and other export platforms that exploit workers, and the incorporation of labor and other reforms suggested elsewhere in this document will ensure workers in all three NAFTA countries can benefit.

The International Association of Machinists, United Auto Workers and United Steelworkers, supported by others in labor, tabled a proposal during the Trans-Pacific Partnership negotiations to ensure that domestic parts promoting energy efficiency and emissions reduction would have preferential status. That same class of parts should be given such status in the NAFTA renegotiation.

2. Regulatory “Harmonization” (Chapters 7, 9, 11, 12 and 14)

Key Recommendations: NAFTA must not expand any commitments in Chapters 7, 9, 11, 12 or 14 that have the effect of limiting, undermining or inhibiting public interest standards or regulations. The renegotiated NAFTA must contain no negative lists, no ratchet clauses and no “Regulatory Impact Analysis” requirements. Negative list commitments in NAFTA must be rewritten into positive list commitments to ensure that North American democracies retain to right to advance commonsense rules relevant to newly developed services, free from the threat of trade challenges.

In addition, Article 2101, which currently provides a wholly ineffective general exception, must be rewritten to read:

Nothing in this agreement shall be construed to prevent the adoption or enforcement by any Party of non-discriminatory measures designed to achieve public interest objectives such as environmental protection; the conservation of climate, resources and biodiversity; human, animal and plant health; consumer protections; financial stability; international human rights compliance; social security, worker protections and labor laws; or worker health and safety unless the primary purpose of the measure is to discriminate with respect to market access. Parties seeking to challenge measures described in this paragraph have the obligation of demonstrating that the primary purpose of the measure is to discriminate with respect to market access.

Finally, U.S. negotiators must include a new provision that makes clear that, as between the NAFTA Parties, country-of-origin labeling (known as COOL) for meat products is consistent with NAFTA rules and cannot be subject to trade challenges under NAFTA or the World Trade Organization (WTO).

Why This Is Important: While the AFL-CIO agrees that, under the right circumstances, regulatory cooperation can increase trade and efficiency in ways that benefit workers and consumers, we also caution against blunt efforts to use NAFTA renegotiation as a back-door route to attack important worker, consumer, environmental, health and food safety protections. Deregulation via international

⁵⁸ Auto Alliance “Cars Move America: State of the Auto Industry.” 2016. Available at: https://autoalliance.org/wp-content/uploads/2017/01/2016_Cars_Move_America_Report.pdf.

⁵⁹ Economic Policy Institute, “Manufacturing Job Loss: Trade, not Productivity, is the Culprit” Aug. 11, 2015. Available at: www.epi.org/publication/manufacturing-job-loss-trade-not-productivity-is-the-culprit/.

negotiations is inherently undemocratic, reducing trust in the democratic system and undermining standards that citizens struggled to enact.

Business interests long have tried to politicize and demonize the concept of regulation, labeling all regulations “wasteful red tape.” As a result, NAFTA and its progeny have incorporated rules that provide corporate lobbyists with leverage to dismantle popular, commonsense protections. For example, various trade commitments have been used as justification to attack a host of U.S. measures, including consumer labels (regarding country of origin⁶⁰ and dolphin-safe tuna⁶¹, for example), “Buy America(n)”⁶² coverage, and even efforts to stabilize the economy after the Great Crisis.⁶³ Trade deals should raise standards of living, not leave families more vulnerable. Thus, NAFTA renegotiation must not be used as a tool to undercut protective measures in any way—whether with regard to financial stability, food safety, highway safety or any other realm. It is imperative that NAFTA Parties retain the ability to enact, enforce, and strengthen protective measures, free from the chilling effect of trade challenges.

NAFTA renegotiations must not make it easier to avoid or block regulations meant to secure the health and safety of the public, including on-the-job health and safety regulations; licensing and certification requirements that protect consumers from bogus products or practitioners; bonding or deposit requirements to ensure the ability to pay customers’ claims; building codes; rules to deter risky financial services schemes; transportation safety standards in interstate commerce; or any other public interest measure. Working families should not have to give up the regulatory gains made in the 20th century nor the right to future protections in the name of “free trade.” Therefore, NAFTA must not require any Party to engage in “Regulatory Impact Analysis” to justify particular public interest measures. Nor should it include any “negative lists” that prohibit regulations on new products and services that have yet to be invented.

Recent trade negotiations have included proposals that would undermine the United States’ ability to protect American consumers’ private information. Such rules on “data localization” would make it easier for companies to offshore call center jobs, even when overseas call centers lack crucial privacy and data security protections. These rules should not be incorporated into NAFTA; instead, NAFTA renegotiations should be used to strengthen data security and privacy protections across North America.

COOL, an important consumer information law, provides an object lesson in the dangers of deregulatory policies in NAFTA and other trade deals. In 2015, the U.S. Congress voted to repeal country-of-origin labeling for beef and pork, as a result of a WTO decision that U.S. laws requiring such labeling constitute a “technical barrier to trade.” The COOL law did not prevent foreign meat from entering the United States. It merely required information for consumers about where the meat was born, raised and

⁶⁰ Huehnergath, Nancy Fink, “Quashing Consumers’ Right-To-Know, Congress Repeals Country-Of-Origin-Labeling For Beef and Pork,” *Forbes*, Food and Agriculture Section, Dec. 21, 2015. Available at: www.forbes.com/sites/nancyhuehnergath/2015/12/21/quashing-consumers-right-to-know-congress-repeals-country-of-origin-labeling-for-beef-and-pork/#1de5a6d136e5.

⁶¹ Dayen, David, “WTO Ruling on Dolphin-Safe Tuna Labeling Illustrates Supremacy of Trade Agreements,” *The Intercept*, Nov. 24, 2015. Available at: <https://theintercept.com/2015/11/24/wto-ruling-on-dolphin-safe-tuna-labeling-illustrates-supremacy-of-trade-agreements/>.

⁶² “Senate eases ‘Buy American’ clause in stimulus,” *CNN Politics*, Feb. 5, 2009. Available at: www.cnn.com/2009/POLITICS/02/05/senate.buy.american/index.html.

⁶³ Robertson, Grant, and Kiladze, Tim, “Canadian banks warn proposed Volcker rule could violate NAFTA,” in *The Globe and Mail*, Business Section, Jan. 19, 2012. Available at: www.theglobeandmail.com/report-on-business/international-business/us-business/canadian-banks-warn-proposed-volcker-rule-could-violate-nafta/article1359765/.

slaughtered. The WTO decision that such information is a barrier to trade is contrary to fact: U.S. imports of Canadian beef actually increased 53% under COOL.⁶⁴ The WTO's COOL ruling provoked the United States to repeal COOL to avoid trade sanctions. The consumer's right to know became a producer's right to conceal. This is exactly the kind of encroachment into purely domestic consumer policy that is inappropriate in a trade agreement. It is important to recognize that not only is a specific COOL fix important in NAFTA, but adoption of the recommendations in this chapter will prevent repeat of the COOL debacle.

Rules that undermine high standards, like COOL, harm working families as well as domestic firms. Weak standards penalize U.S.-based producers that operate in a safe and responsible manner by forcing them to compete with businesses that cut corners. NAFTA should reward rather than suppress responsible business practices.

To the extent that harmonization is useful to enhance trade, NAFTA should call for the adoption of the strongest protections, not the weakest (this principle is known as "upward harmonization"). The United States has been a world leader in developing and implementing laws and regulations to improve workplace safety, regulate toxic chemicals, and protect consumers and the environment. NAFTA should build on this legacy, not tear it down. NAFTA should establish a cooperative framework that allows the United States, Canada and Mexico to share and build upon their respective regulatory experiences to enhance protections.

⁶⁴ Press Release: "WTO Orders U.S. to Gut U.S. Consumer Country-of-Origin Meat Labeling Policy, Further Complicating Obama Fast Track Push by Spotlighting How Trade Pacts Can Undermine U.S. Consumer, Environmental Policies," Public Citizen, May 18, 2015. Available at: www.citizen.org/sites/default/files/press-release-wto-cool-ruling-may-2015.pdf.

3. Procurement (Chapter 10)

Key Recommendation: Eliminate all procurement commitments that undermine domestic or local preferences.

Why This Is Important: Trade commitments that require the federal government to treat foreign bidders as if they were U.S. bidders undermine one of the most important job creation tools the United States has: fiscal policy. The AFL-CIO recommends abolishing such arbitrary commitments. Each NAFTA Party should be free to use stimulus funds to create jobs within its borders, and should not be prevented from using limited funds on domestic stimulus based on some arbitrary NAFTA commitment that fails to create reciprocal benefits.

Currently, NAFTA gives bidders from all NAFTA countries expansive access to U.S. goods, services and construction contracts. These provisions can undermine not only domestic preferences, but also responsible bidding criteria (such as requirements that a bidder provide benefits for same-sex spouses or have no outstanding environmental cleanup obligations, or a system that awards bonus points for bidders with better safety records or that source from local farms). Arbitrary procurement commitments curtail efforts to ensure bidders—from any NAFTA Party—are not unfairly undercut by unscrupulous competitors, which is a further reason to eliminate procurement commitments.

The United States' trade obligations open far more U.S. procurement (by dollar amount and by percentage) to foreign bidders than any other large economy.⁶⁵ As detailed in a February 2017 Government Accountability Office (GAO) report, there is no evidence that the United States' procurement commitments, at the WTO or in regional trade deals like NAFTA, create more jobs for U.S. workers than they cede to workers elsewhere.⁶⁶ To the extent that procurement commitments like NAFTA's Chapter 10 drive down wages in a race to be the lowest bidder,⁶⁷ they already have harmed untold numbers of U.S. workers.

Although there is room for additional study of the impacts of existing procurement deals (e.g., an analysis of the job and wage effects of the reciprocal agreement between the United States and Canada that was adopted for the expenditure of American Recovery and Reinvestment Act funds and an analysis of U.S. procurement contracts won by multinational versus domestic-only firms), to date, there is simply no evidence to support maintaining Chapter 10 commitments that require the U.S. government to treat foreign bidders with the same preferences as U.S.-based bidders.

Instead, the NAFTA Parties should work to develop transparent, multilingual bidding systems and responsible employer standards that will benefit enterprises and workers located within North America, while leaving our democracies the freedom to choose when domestic preferences are necessary and appropriate, and when other considerations should prevail.

⁶⁵ U.S. Government Accountability Office, "Government Procurement: United States Reported Opening More Opportunities to Foreign Firms than Other Countries, but Better Data Are Needed," February 2017, Fig. 2, p. 12. Available at: www.gao.gov/products/GAO-17-168.

⁶⁶ *Id.* In 2014 the Obama administration agreed to amend the World Trade Organization Government Procurement Agreement to delete the requirement that parties provide statistics on the country of origin of products and services purchased by covered government entities, ensuring that future studies will be stymied in efforts to document the effectiveness (or lack thereof) of procurement commitments as "job creation" tools.

⁶⁷ See, e.g., Richard B. Du Boff, "Globalization and Wages: The Down Escalator," in *Dollars & Sense*. Available at: www.dollarsandsense.org/archives/1997/0997duboff.html.

A critical provision in Chapter 10 that should be maintained is its prohibition on offsets. Offsets require firms to transfer technology, production and jobs in return for government procurement. Collectively, these policies provide incentives to move jobs and whole enterprises, including call centers and factories, to other countries. The use of offsets has accelerated the relocation of aerospace, defense and other industries important to national and economic security to China and other nations with whom we have no effective rules against offsets. Thus, the offset provision in NAFTA should be maintained, and the USTR must enforce it in a swift and certain manner.

4. Investment (Chapter 11)

Key Recommendations: Omit Part B of Chapter 11, the Investor-to-State Dispute Settlement (ISDS) Mechanism. Also omit Article 1105, the Minimum Standard of Treatment.

Why This Is Important: Simply put, ISDS is a separate justice system for foreign investors for which there is no legal or moral justification. It discriminates against U.S.-located firms by providing extraordinary procedural and substantive rights to foreign-based firms. According to the Cato Institute, “It is effectively a subsidy that mitigates risk for U.S. multinational corporations and enables foreign MNCs [multinational corporations] to circumvent U.S. courts when lodging complaints about U.S. policies.”⁶⁸ Eliminating ISDS will protect democracy, Article III of the Constitution and America’s rich jurisprudence while eliminating a handout to companies that choose to produce abroad.

Rule of law requires that the law—including the system of justice—apply to everyone equally. ISDS violates this bedrock principle of democracy. Moreover, by offering additional legal protections beyond those that exist under U.S. law or other countries’ national courts, ISDS makes it more attractive to send production and investment overseas. NAFTA must not include provisions that promote the further offshoring of jobs—particularly good, middle-class jobs. Furthermore, ISDS disadvantages U.S. companies that only produce in the United States (e.g., micro- and small- to medium-sized companies) because they have fewer rights than their foreign competitors.

As one of the lawyers who brought a case against the United States on behalf of a Canadian company explained, “[The ISDS provision in] NAFTA does clearly create some rights for foreign investors that local citizens and companies don’t have. But that’s the whole purpose of it.”⁶⁹

ISDS undermines the rule of law by creating special rules and special “courts” available only to a certain class—the foreign investor class. Taking claims of powerful actors out of the jurisdiction of domestic courts impedes the development of domestic rule of law by removing the foreign business community as an advocate for fair and efficient courts. Finally, because there is no way for countries to “graduate” from the ISDS mechanism once domestic courts “measure up,” including ISDS in deals such as NAFTA means subjecting the United States to these unaccountable tribunals in perpetuity.

⁶⁸ Ikenson, Daniel J., “A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement,” Cato Institute’s Free Trade Bulletin No. 57, March 4, 2014. *Available at:* www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state.

⁶⁹ Greider, William, “The Right and US Trade Law: Invalidating the 20th Century: How the right is using trade law to overturn American democracy,” The Nation, Nov. 17, 2001. *Available at:* www.thenation.com/article/right-and-us-trade-law-invalidating-20th-century#.

Finally, the vague and overbroad minimum standard of treatment (MST) obligation should be eliminated. The MST obligation goes far beyond the property rights available under domestic property law and is ripe for abuse.⁷⁰

5. Financial Services and Stability (Chapters 11 and 14)

Key Recommendations:

- a. NAFTA must not expand any commitments in Chapter 14, nor insert any new provisions that have the effect of limiting, undermining or inhibiting financial services regulations.
- b. Add the following language to Article 1109.4 to ensure that under specified conditions, Parties may prevent the transfer of capital through the equitable, nondiscriminatory and good faith application of laws relating to:
 - (f) Unpaid obligations to employees, including wages and pensions; and
 - (g) Safeguarding the safety and soundness of the financial system.

Why This Is Important: The WTO's General Agreement on Trade in Services (GATS) and NAFTA's existing text already provide sufficient market opening for financial services providers. Further liberalization in financial services trade not only is unnecessary, it is likely to be harmful to working families given the role that financial services globalization played in creating and exacerbating the Great Crisis.

As Philip R. Lane explains in his paper, "Financial Globalization and the Crisis," financial globalization enabled the scaling-up of the U.S. "securitization boom" that triggered the crisis and was a key factor in the rise of large credit growth differences and current account imbalances that propelled the crisis across countries.⁷¹ NAFTA Parties must incorporate the lessons learned from the aggressive financial deregulation of the 1990s and resist the entreaties of Wall Street and Canadian banks to use NAFTA renegotiation to ease financial services regulation.

In the aftermath of the Great Crisis, the U.S. government must reassess the relationship between finance and growth in the real economy.⁷² U.S. trade policy must recognize that a too-large financial sector can slow economic growth and increase economic inequality.⁷³ Given that the rapid growth of the U.S. financial sector *already* has harmed the real economy, and that working families still are suffering from lost wealth and income, NAFTA renegotiation should not be used as a tool to fuel deregulation and financial instability.

Instead, the three NAFTA parties should take this opportunity to work together to design and promote the development of new laws, regulations, policies, practices and directives that promote financial stability and protect consumers from the ravages of financial crisis.

⁷⁰ Even the staunchly free trade Cato Institute's Simon Lester calls the minimum standard of treatment a "poorly written" provision. Lester, Simon, "Responding to the White House Response on ISDS," Cato at Liberty Blog, Feb. 27, 2015. Available at: www.cato.org/blog/responding-white-house-defense-investor-state-dispute-settlement.

⁷¹ Lane, Philip R., "Financial Globalisation and the Crisis," Prepared for the 11th BIS Annual Conference on The Future of Financial Globalisation, Lucerne, June 21–22, 2012.

⁷² See Buttonwood, "Warning: too much finance is bad for the economy," The Economist, Feb. 18, 2015. Available at: www.economist.com/blogs/buttonwood/2015/02/finance-sector-and-growth.

⁷³ OECD, "How to restore a healthy financial sector that supports long-lasting, inclusive growth?", OECD Economics Department Policy Notes, No. 27, June 2015. Available at: www.oecd.org/eco/How-to-restore-a-healthy-financial-sector-that-supports-long-lasting-inclusive-growth.pdf.

We urge the administration to carefully consider the economic interests of the 111 million American households (93% of the population), whose wealth plummeted between 2009–2011 as a result of the financial crisis.⁷⁴ Middle-class Americans bore the brunt of the financial crisis, through declining home values as well as unemployment and stagnant wages. Working Americans can afford neither another financial crisis nor another round of financial deregulation.

Given the size of the American and Canadian financial sectors, the banking sector will exert great pressure to use NAFTA renegotiation to narrow the available space for prudential policy development. Negotiators must resist this pressure.

Instead, negotiators should work together with academics, consumer advocates, national, state and provincial regulators, and other financial services policy experts to protect working families. Each NAFTA country must have adequate policy space, flexibility and authority to effectively regulate mergers and acquisitions; enforce antitrust law; administer criminal and civil penalties; and prevent systemic financial failures. NAFTA must leave room for stronger financial regulations, instead of creating leverage for financial institutions to cut back on existing regulations.

On a related note, there has been an important shift in global thinking with respect to the value of capital controls. In 2012, even the IMF endorsed the use of capital controls in certain circumstances.⁷⁵ Accordingly, the NAFTA parties should amend the language that inhibits the use of capital controls in Article 1109. Article 1109 originally was included in NAFTA to ensure that those who invest abroad could freely transfer their profits elsewhere. However, the current provision (which lists exceptions to the general prohibition on capital controls) is too narrow. The current provision lacks explicit language to ensure governments can slow capital flows to stabilize their economies and act to protect workers from unscrupulous employers. The recommended additions would make clear that efforts to protect workers and economic stability are allowable and not subject to NAFTA challenges.

6. Highway Safety (Chapter 12 and Annex I)

Key Recommendation: Revise Chapter 12 (Services), including Annex 1212, and Annex I as they relate to cross-border transportation, including long-haul trucking and busing. These provisions have been applied in ways that undermine labor, environmental and safety standards and must be amended.

Why This Is Important: NAFTA has been interpreted to require the United States to permit unlimited access to U.S. roads for trucks from Canada and Mexico, even in cases where vehicles do not meet U.S. safety and environmental standards and drivers do not hold U.S. commercial driver's licenses.

NAFTA should be upgraded to ensure that Parties may enforce domestic highway safety, labor protections and environmental standards. The original intent of the NAFTA negotiators was to delay cross-border traffic beyond the border zone until the safe operation of foreign carriers could be tested and verified. Although cross-border trucking since has been approved and expanded, the inspector general of the Department of Transportation reported that too few participants completed the pilot

⁷⁴ "What Recovery? US Rich Get Richer, Middleclass Treading Water," RT.com, April 24, 2013. Available at: <http://rt.com/usa/us-financial-crisis-wealth-occupy-wall-street-307/>.

⁷⁵ "The Liberalization and Management of Capital Flows: An Institutional View," International Monetary Fund, Nov. 14, 2012. Available at: www.imf.org/external/np/pp/eng/2012/111412.pdf.

program to make a reliable safety projection.⁷⁶ When Congress has supported a NAFTA interpretation that prioritizes highway safety over unrestricted access, the Mexican government has responded with manifestly excessive sanctions under Chapter 20. Amending Chapter 12, Annex 1212 and Annex 1 will eliminate the threat of further trade sanctions that have impeded congressional intent to protect highway safety and clean air.

7. Intellectual Property and Drug Pricing Transparency (Chapter 17)

Key Recommendations:

- *For copyright:* NAFTA should retain strong provisions to protect creative and innovative workers (including actors, writers, musicians and others) whose income, standard of living, and health and retirement benefits rely upon residuals, royalties and other payments tied to international copyright protection.
- *For patents and related protections:* NAFTA must balance innovation with affordability of health care. The administration must work to ensure NAFTA's patent provisions do not become a corporate welfare program for brand-name pharmaceutical and medical device companies. Nor should NAFTA undermine democratic choices about how to ensure prescription drugs and medical devices provided through public programs are affordable for taxpayers and beneficiaries. Reproducing TPP provisions on patents, exclusivity and so-called "transparency and procedural fairness" into a renegotiated NAFTA would be a step backward for the health of working families in the United States, Canada and Mexico, and is unacceptable.

Why This Is Important:

- *For copyright and related rights:* Illegal streaming, illegal downloads, unauthorized fixation and distribution of live musical and audio-visual performances, counterfeit products and similar acts of intellectual property theft have devastating consequences on creative arts workers across the nation. NAFTA should help curb such theft, which robs America's creative artists and innovators of incomes, and health and retirement benefits.
- *For patents and related protections:* The TPP exceeded the so-called "May 10" agreement, undermining drug and device affordability for working families. NAFTA would harm working families and lead to higher drug and device prices if it included new or harsher provisions on patent linkage, excessive data/market exclusivity periods, evergreening, bans on pre-grant opposition to patents, or a so-called "transparency annex" that gives drug makers leverage over drug listing and pricing decisions made by government health programs. While industrial espionage and other forms of patent theft can undermine American workers and their employers, the need for cooperation to protect legitimate interests should not undermine the social provision of health care or other efforts to ensure the affordability of medically necessary drugs and devices.

8. Trade Remedies (Chapter 19)

Key Recommendation: Omit Chapter 19. Replace it with a mechanism for government cooperation to ensure effective enforcement against unfairly traded products from non-NAFTA countries.

⁷⁶ Department of Transportation Office of the Inspector General, "FMCSA Adequately Monitored Its NAFTA Cross-Border Trucking Pilot Program But Lacked A Representative Sample To Project Overall Safety Performance," Audit Report ST-2015-014, Dec. 10, 2014. Available at: www.oig.dot.gov/sites/default/files/NAFTA%20Pilot%20Final%20Report_508.pdf.

Why This Is Important: NAFTA allows for a final review of a domestic antidumping or countervailing duty case by a binational panel instead of by a competent domestic court. This rule, omitted from subsequent trade deals, can hamper trade enforcement, hurting U.S. firms and their employees. The USTR seems to have learned that Chapter 19 was a mistake, as a similar provision was not included in later trade agreements. To ensure the strength and primacy of U.S. domestic trade laws to protect America's working people, NAFTA should be updated to replace this chapter with something more productive.

Cooperation on enforcement against unfairly traded products from non-NAFTA countries could reduce circumvention and evasion of trade remedies imposed by a NAFTA signatory country. The United States, for example, has suffered from numerous instances where products that are subject to relief measures in the United States under antidumping and countervailing duty laws then are imported through Mexico to evade duties or other measures. To the extent appropriate, the NAFTA signatory countries should cooperate to ensure that remedies imposed by one NAFTA Party are not undermined by a failure to effectively enforce trade remedy laws in other parties.

9. Public Services (Annex II)

Key Recommendation: Expand the public services exception in Annex II so that public services are fully carved out, or protected, from the agreement. The current NAFTA text leaves out a number of important public services, including energy, postal, water and sewer, sanitation, immigration and public transportation services from its Annex II reservation. This shortcoming must be rectified to protect the full spectrum of democratic decision making regarding the provision of public services.

Why This Is Important: While NAFTA exempts some existing laws and regulations from some of the rules of the services and investment chapters of the agreement, many existing and future laws or policies can be challenged because the current carve-out is too limited. NAFTA renegotiation is an opportunity to correct this important shortcoming.

The interest in profit must not be allowed to trump economic justice and human dignity. Under existing NAFTA rules, an investor or Party may challenge domestic policies related to public services as trade or investment barriers. For instance, government rules may be necessary to guarantee equitable access to services. But if these rules are undermined by NAFTA challenges, some U.S. residents could find themselves with inadequate access to services or substandard services. NAFTA's existing investment rules also can penalize governments that reverse privatizations, even when those privatizations have lowered service quality or have led to less public accountability and access. NAFTA must not interfere with the right of a country's citizens to determine how best to provide services to residents.

10. New Provision: Strong Labor Rules with Swift and Certain Enforcement

Key Recommendations:

- a. To improve compliance and enforceability, include in the agreement explicit references to the eight core ILO Labor Conventions and others where appropriate;
- b. To protect workers, raise wages and level the playing field among NAFTA countries, require that Parties not waive or derogate from any of their labor laws—regardless of the sector in which the breach occurred;

- c. To level the playing field among NAFTA countries, define “acceptable conditions of work” to include such concepts as payment of all wages and benefits legally owed and compensation in cases of occupational injuries and illnesses;
- d. To increase compliance, include commitments aimed at ensuring effective labor inspections;
- e. To level the playing field among NAFTA countries, do not include any requirement that violations must be in a “manner affecting trade or investment between the parties,” or that violations must be “sustained or recurring,” both of which add unnecessary barriers to enforcement;
- f. To prevent worker exploitation, agree that workers should be paid a floor wage that provides a decent standard of living, and include provisions to prevent social dumping of goods made by workers paid less than floor wages or inadequate enforcement of workers’ rights;
- g. To prevent forced labor and the worst forms of child labor, prohibit trade in goods made with forced labor and the worst forms of child labor;
- h. To prevent a spiral to the bottom in wages and working conditions, ensure migrant workers receive the same rights and remedies as a country’s nationals;
- i. To prevent human trafficking and forced labor, establish enforceable rules for international labor recruiters and employers of foreign labor;
- j. To ensure timely enforcement and reduce unwarranted delays, establish clear, universal timelines for consideration of and action upon labor complaints;
- k. To help raise standards across the region, create an *independent* labor secretariat (not controlled by the Parties) to research emerging issues, report on best practices, provide technical assistance when necessary, investigate alleged violations, recommend remediation and, in the absence of remediation, bring cases to dispute settlement;
- l. To make enforcement more effective and to reduce the ability to delay or ignore labor complaints, require the Secretariat to pursue meritorious complaints until the defects have been remedied;
- m. To ensure comprehensive analysis of the effects of NAFTA on working people, establish a Wages and Standards Working Group to oversee the Secretariat, recommend remedial responses and policies to aid workers, families and communities negatively impacted by NAFTA, and provide recommendations for improving NAFTA and national laws in ways that benefit working families;
- n. To ensure that enforcement occurs, include enhanced enforcement tools, such as social dumping tariffs, additional duties for persistent labor violations, and private rights of action where the Secretariat or Parties refuse to enforce obligations;
- o. To level the playing field, allow unions to engage in transnational collective bargaining with employers that operate in two or more NAFTA countries; and
- p. To maximize the potential for wages in Mexico to rise, continue to pursue constitutional and legal reforms already begun in Mexico as of 2016.

Please see Annex II for a complete labor chapter outline incorporating these recommendations.

Why This Is Important: Trade agreements that do not create a level playing field in labor obligations force communities and companies into a race to the bottom. NAFTA, in particular, has been poorly enforced. Its lack of any meaningful sanctions has left Parties free to violate labor obligations with impunity. This has had detrimental effects on working families and retarded consumer demand across the NAFTA countries.

When workers lack the right to speak up about workplace conditions and bargain collectively to improve their lives and livelihoods, it keeps wages, benefits and job safety lower than they would otherwise be. This race to the bottom is real,⁷⁷ and has led to a global weakness in demand that hampers GDP growth and exacerbates inequality. Even the IMF has recognized a link between the decline in unionization and the dramatic increase in inequality worldwide.⁷⁸ If the new NAFTA fails to establish a level playing field for workers, it will continue to drive wages down and breed doubt that trade and globalization can be fair.

Mexico, like other popular offshoring destinations, promises low wages, no unions (or company-dominated unions) and substandard workplaces. Unfortunately, Mexican workers can face grave consequences for attempting to exercise their basic human rights. This is because, with few exceptions, Mexican labor unions are undemocratic and aligned more with employers or local political elites than with workers. These employer-dominated unions often sign contracts without any participation or input from workers for the sole purpose of interfering with the right to form effective, worker-directed unions. The cumulative effect of these bogus unions is to lower wages and working conditions in Mexico.⁷⁹ Improving wages will reduce the ability of employers to use NAFTA as a tool of arbitrage that pushes wages down across North America. Higher wages in Mexico not only are good for Mexico's working families, they are a required outcome of beneficial trade policy.

In addition to the specific labor provisions recommended here, the administration must, for every new trade agreement, ensure that negotiating partners are complying with labor rights obligations in practice before concluding negotiations and sending the agreement to Congress for approval. Failure to require labor compliance beforehand provides a free pass for continued labor abuses. The administration also must address domestic enforcement practices and pursue complementary measures to reduce the flood of imports from NAFTA and non-NAFTA countries that have been made under exploitive, social dumping conditions.

“Social dumping” is similar to other forms of dumping that unfairly use below-cost pricing to undercut competitors. Companies that engage in social dumping by paying workers subpar wages, allowing unsafe working conditions or escaping compliance with environmental and climate regulations effectively pull down standards for all other workers globally, including workers in the United States. We propose that NAFTA make clear that tariffs can be imposed for goods and services made under such race to the bottom conditions.

Without high labor and human rights standards and strong enforcement tools that cannot be weakened through delay, inaction or the acceptance of “progress” as a substitute for compliance, the labor rules in NAFTA will continue to provide cover for policies that impoverish workers. If these provisions are not amended as we recommend, NAFTA will continue to provide incentives for lowering standards and relocating jobs to locations where workers are most easily abused.

⁷⁷ See the explanation in Annex I for additional detail.

⁷⁸ Jaumotte, Florence, and Buitron, Carolina Osorio, “Power from the People,” Finance & Development, Vol. 52, No. 1, International Monetary Fund, March 2015. Available at: www.imf.org/external/pubs/ft/fandd/2015/03/jaumotte.htm.

⁷⁹ See Annex I to learn more about wage suppression.

11. New Provision: Strong Environmental Rules with Swift and Certain Enforcement

Key Recommendations: In addition to the robust enforcement mechanisms needed for both labor and environmental standards mentioned above, NAFTA must be reformed to include strong environmental standards. NAFTA must require adoption of and compliance with key multilateral environmental agreements, including: the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the Convention on the Conservation of Antarctic Marine Living Resources, the International Convention for the Regulation of Whaling (ICRW), and the Convention for the Establishment of an Inter-American Tropical Tuna Commission (IATTC).

The renegotiated NAFTA also must raise standards for combatting the illegal trade of timber and wildlife, as well as for responsible fisheries management. It also must ensure that treaties protecting indigenous rights are observed.

Finally, the agreement must recognize the economic and national security challenges presented by climate change. American efforts to address the problem must be protected so that countries cannot gain an unfair advantage by failing to act. Parties shall have the right to impose border adjustment mechanisms consistent with the climate change commitments. NAFTA should promote cooperation to address North American environmental challenges so that each Party does its part.

Why This Is Important: Just as many companies move production in search of the lowest wages and weakest labor standards, many do so to find the weakest standards for clean air and water. This kind of environmental arbitrage poisons communities and kills U.S. jobs.

Strong environmental rules with robust and effective enforcement can end this race to the bottom and ensure that American producers who comply with international standards are not undercut by lax enforcement elsewhere. Further, by ensuring that all parties meet basic environmental standards, these improvements would protect American industries that depend on a healthy environment.

12. New Provision: Enforceable Currency Rules

Key Recommendations: NAFTA must include enforceable currency disciplines subject to trade sanctions in the text of the agreement.⁸⁰ NAFTA parties also should commit to coordinating enforcement efforts with respect to the currency manipulation by non-NAFTA countries. The goal of both provisions would be to reduce the unsustainable U.S. trade deficit by addressing issues of trade and exchange rates.

Why This Is Important: Economists and elected officials across the political spectrum have urged the United States to insist on enforceable measures to curb currency manipulation and misalignment. Indeed, shortly after NAFTA entered into force, Mexico engaged in a predictable devaluation that virtually eliminated the potential benefit from tariff cuts envisioned by the agreement.

⁸⁰ There are many ways to establish such enforceable provisions against currency manipulation and misalignment. During the TPP negotiations, for example, two useful proposals included a test promoted by the American Automotive Policy Council and the incorporation of the International Monetary Fund's seven factor guidelines.

American workers have paid a heavy price, as millions of American jobs already have been lost due to currency misalignment in recent decades. The Economic Policy Institute (EPI) concludes that reducing the U.S. trade deficit through currency realignment would create 2.3 million to 5.8 million jobs over the next three years.⁸¹ According to Matt Blunt, president of the American Automotive Policy Council, a weak yen adds \$5,700 per car in profits for Japanese imports. Toyota's record quarterly profits in 2015 can be directly attributed to the weak yen, according to The Wall Street Journal.⁸² The Peterson Institute for International Economics, a strong, unquestioning supporter of trade agreements, agrees that the United States can strengthen its economy and increase jobs by addressing currency misalignments and global trade imbalances.⁸³

13. New Provision: Infrastructure Investment Commitment

Key Recommendations:

- a. NAFTA must include a new chapter in which each Party commits itself to investing a minimum of 3% of GDP annually on public infrastructure construction, repair and maintenance. The commitment must ensure that preferences for domestic procurement are allowable. Parties shall determine their respective infrastructure priorities with public input, and all public construction, repair and maintenance investments (transit, aviation, bridges, roads, ports, water, sewer, electricity, communications, schools, parks, other public facilities, etc.) shall count toward the minimum. The idea behind this provision is simple: set a reasonable target⁸⁴ for public infrastructure spending and require Parties to report their actual spending annually. The public reporting aspect will assist local, state and federal policy makers in evaluating their respective investments and helping their economies to grow.
- b. Separately, and in addition, the NAFTA implementing bill must contain one-time mandatory funding for specific trade-related projects in the United States, to enhance the benefits working families can reap from North American trade, including but not limited to:
 - New and improved land border crossings and ICC border commercial zones with Mexico and Canada;
 - Ports, airports, roadways and waterways;
 - New and improved rail corridors, including high-speed rail; and
 - Broadband infrastructure, including in rural communities.

Why This Is Important: Investing in infrastructure drives long-term, broadly shared growth, which would benefit both the United States and its NAFTA partners. However, NAFTA sets up a set of incentives that lead to underinvestment. NAFTA stimulates a form of competition that tries to increase returns to capital at the explicit expense of wages and tax revenues, making it difficult to engage in

⁸¹ Scott, Robert E., "Stop Currency Manipulation and Create Millions of Jobs, With Gains across States and Congressional Districts," EPI Briefing Paper #372, Economic Policy Institute, Feb. 26, 2014. Available at: www.epi.org/publication/stop-currency-manipulation-and-create-millions-of-jobs/.

⁸² Kunaota, Yoko, "Toyota Posts Record Profits Fueled by Weak Yen," The Wall Street Journal, Aug. 4, 2015.

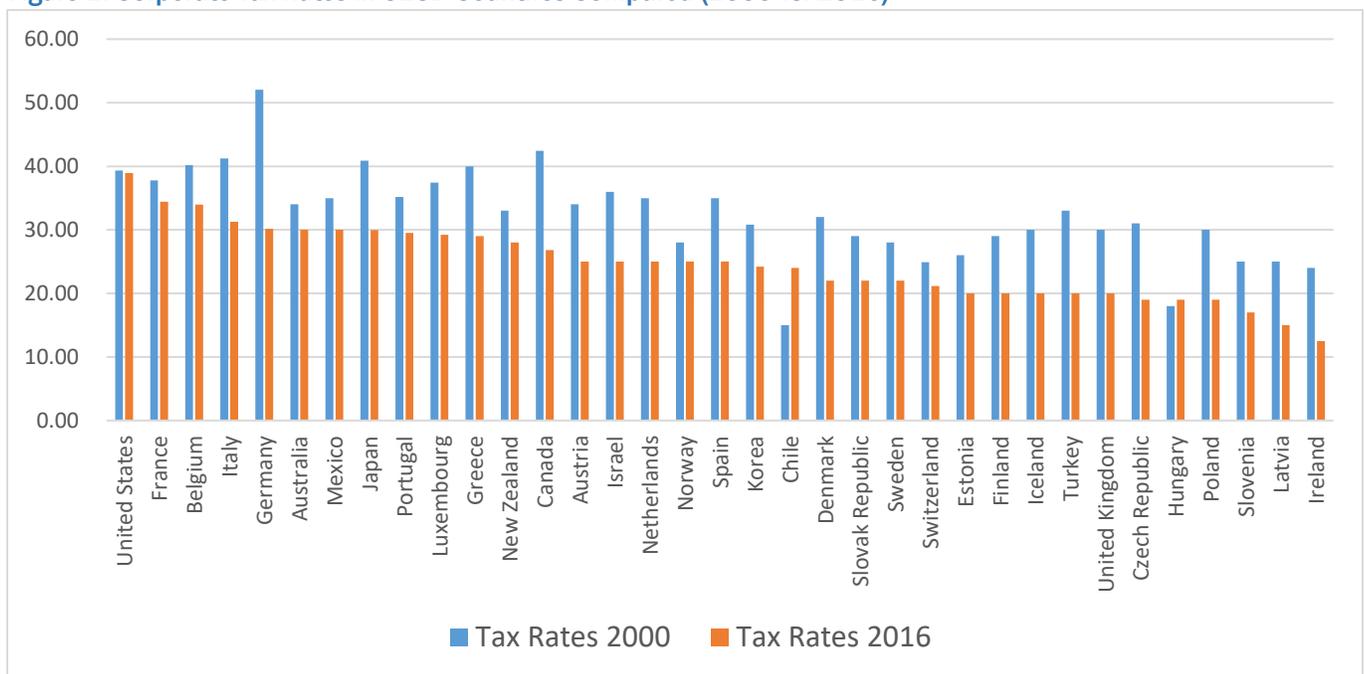
⁸³ Bergsten, C. Fred, and Gagnon, Joseph E., "The New US Currency Policy," Peterson Institute for International Economics Realtime Economic Issues Watch, April 29, 2016. Available at: <https://piie.com/blogs/realtime-economic-issues-watch/new-us-currency-policy>.

⁸⁴ According to the Congressional Budget Office, public spending on transportation and water infrastructure alone "over the past three decades has hovered at about 2.4 percent," "Public Spending on Transportation and Water Infrastructure, 1956 to 2014," CBO, March 2015. Available at: www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/49910-Infrastructure.pdf.

commonsense infrastructure investment. NAFTA’s neoliberal model has fostered income inequality both within and between Parties. A reformed NAFTA can counteract these inequality and disinvestment-producing effects, and critical to that reform is the inclusion of infrastructure investment commitments in the text of NAFTA itself, as well as in its implementing bill.

Public and private disinvestment in U.S. infrastructure is a result of many factors, including competition to increase returns to capital investments by decreasing nominal labor unit costs (i.e., wages) and reducing direct taxes. Virtually all Organization for Economic Co-operation and Development countries, including all three NAFTA countries, have pursued this strategy (see Figure 1), creating a negative cycle of disinvestment. As Jeronim Capaldo explains in a 2016 paper, the neoliberal trade model favors this form of competition, accelerating a race to the bottom as investors seek “ever more elusive trade gains” in a world of already low tariffs.⁸⁵ This low-road strategy is particularly counterproductive because infrastructure investment is a mechanism to drive broadly shared growth.

Figure 1: Corporate Tax Rates in OECD Countries Compared (2000 vs. 2016)



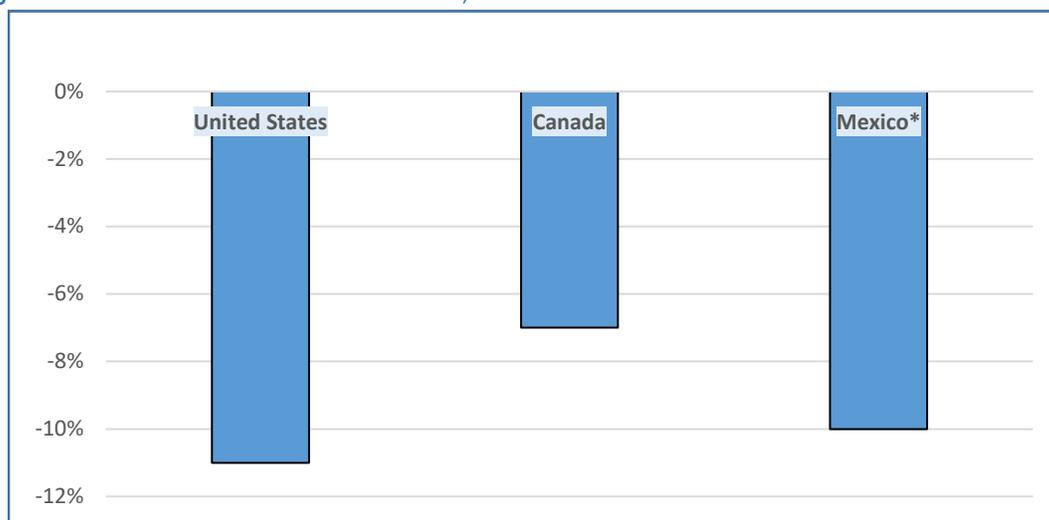
Source: AFL-CIO-created chart using data from OECD.Stat. Available at: <http://stats.oecd.org//Index.aspx?QueryId=58204> (Data extracted on March 30, 2017).

This competitive drive to increase the share of national income accruing to capital at the expense of labor (see Figure 2) reduces America’s tax base even as its tax-rate reducing impacts have hobbled public investments in America’s future. The American Society of Civil Engineers give U.S. infrastructure a D+ and calls for an investment of nearly \$5 trillion over the next 10 years.⁸⁶

⁸⁵ Capaldo, Jeronim et al., “Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement,” Global Development and Environment Institute Working Paper No. 16-01, January 2016, at pp. 12–13. Available at: www.ase.tufts.edu/gdae/Pubs/wp/16-01Capaldo-IzurietaTPP.pdf.

⁸⁶ “2017 Infrastructure Report Card,” American Society of Civil Engineers, March 2017. Available at: www.infrastructurereportcard.org/wp-content/uploads/2016/10/2017-Infrastructure-Report-Card.pdf.

Figure 2: Decline in Labor Share of Income, 1970–2014



* Data for Mexico covers 1995–2012. Source: AFL-CIO-created chart using data from “The Labour Share in G20 Economies,” International Labour Organization and Organisation for Economic Co-operation and Development, Feb. 25–26, 2015. Available at: www.oecd.org/g20/topics/employment-and-social-policy/The-Labour-Share-in-G20-Economies.pdf.

Despite using a methodology that has repeatedly proved over-optimistic, the U.S. International Trade Commission projected the now-defunct Trans-Pacific Partnership would result in a mere .15% growth in GDP after 15 years.⁸⁷ By contrast, the International Monetary Fund projects that that an infrastructure investment of 1% of GDP will result in an increase in GDP of almost 3% a mere four years after the investment.⁸⁸ This outcome is **six times the over-optimistic projected outcome of the TPP and would occur more than four times as quickly.**

The United States could achieve far greater growth, far faster, by investing in its own economy than by concluding another NAFTA without infrastructure investment—but the race to the bottom model of NAFTA makes that difficult.

Investing in infrastructure is important for reasons beyond creating jobs and boosting the economy in the short term. Investments spur sustainable economic growth, enhance long-term economic competitiveness and improve the quality of life for residents.⁸⁹ In addition, the benefits of public infrastructure investment will be shared more broadly across households at all income levels: the benefits of state-of-the-art ports, airports, roads and rail; education, training and research centers; water

⁸⁷ “Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors,” U.S. International Trade Commission, May 18, 2016. Available at: https://usitc.gov/press_room/news_release/2016/er0518II597.htm.

⁸⁸ “Chapter 3: Is It Time for an Infrastructure Push? The Macroeconomic Effects of Public Investment,” in World Economic Outlook, International Monetary Fund, October 2014. Available at: www.imf.org/external/pubs/ft/weo/2014/02/pdf/c3.pdf. See especially p. 82 (“During periods of low growth [as the U.S. is in now] a public investment spending shock increases the level of output by about 1½ percent in the same year and by 3 percent in the medium term . . .”); and p. 83 (“[A] debt-financed public investment shock of 1 percentage point of GDP increases the level of output by about 0.9 percent in the same year and by 2.9 percent four years after the shock . . .”).

⁸⁹ See Bivens, Josh, “The Short- and Long-Term Impact of Infrastructure Investments on Employment and Economic Activity in the U.S. Economy,” EPI Briefing Paper No. 374, Economic Policy Institute, July 1, 2014. Available at: www.epi.org/publication/impact-of-infrastructure-investments/; and Testimony of Richard L. Trumka, President, AFL-CIO, before the Committee on Transportation and Infrastructure, U.S. House of Representatives, Feb. 1, 2017. Available at: <http://transportation.house.gov/uploadedfiles/2017-02-01-trumka.pdf>.

and wastewater treatment and storage; and upgraded national utilities, including broadband, cannot be “captured” by any one group in the economy, but benefit us all, with huge spillover effects for the economy as a whole.⁹⁰

Critically, ensuring that infrastructure investments occur not just in the United States, but on a regionwide basis will ensure the benefits of economic growth are more widely shared than they have been under the current NAFTA. Under NAFTA, while corporate profits and incomes for economic elites have continued to soar, returns to wage earners have stagnated.⁹¹ Workers have reduced leverage to bargain for better wages and working conditions,⁹² and the wage gap between workers in the United States and Mexico has grown, even for workers performing similar jobs with similar skill sets and levels of education.⁹³ Substantial investments in infrastructure could mitigate wage distribution issues within countries as well as between them. Infrastructure occupations offer higher wages compared with jobs that require similar skills sets and educational requirements and frequently pay more than the national median wage.⁹⁴ By increasing the demand for these jobs and tightening the labor market through enhanced public investment, the new NAFTA could help repair the income inequality that the treaty originally helped accelerate.

Including infrastructure investment as a core commitment of NAFTA will help build popular support for it and help break the cycle of disinvestment in North American infrastructure.

14. New Provision: Agreement to Combat Tax Avoidance

Key Recommendations: Parties must agree to cooperate to combat tax havens and tax avoidance. Specifically, the renegotiated NAFTA must include at least the following obligations:

- a. *Country-by-Country Reporting:* Each Party shall require all multinational enterprises (MNEs) with prior year revenues of \$850,000,000 or more to report annually and for each tax jurisdiction in which they do business the information set out in the OECD/G20 Base Erosion and Profit Shifting Action 13 Guidance.⁹⁵ Require that such reporting be made public, e.g., through the Department of the Treasury.
- b. *No Secret Tax Deals:* To ensure equal footing for all enterprises, each Party shall prohibit secret tax deals and shall instead create a public database to report tax abatements, tax holidays and the like.
- c. *Improve Enforcement Against Transfer Mispricing Schemes:* The Parties shall make available to customs officers of each Party a database of typical prices for HTS items. Customs officers shall use the database to refer for further investigation those shipments whose invoice prices are grossly misaligned with comparative prices as recorded in the database.

⁹⁰ *Id.*

⁹¹ “NAFTA at 20,” AFL-CIO Report, March 2014. Available at: <https://aflcio.org/reports/nafta-20>.

⁹² *Id.* at pp. 4–5.

⁹³ See “The US-Mexico Wage Gap Has Grown, Not Shrunk, under NAFTA. Awkward.,” Center for Global Development Views from the Center, March 17, 2015. Available at: www.cgdev.org/blog/us-mexico-wage-gap-has-grown-not-shrunk-under-nafta-awkward?utm_source=150317.

⁹⁴ See Kane, Joseph, and Puentes, Robert, “Beyond Shovel Ready: The Extent and Impact of U.S. Infrastructure Jobs,” The Brookings Institution, May 2014. Available at: www.brookings.edu/wp-content/uploads/2014/05/Beyond-Shovel-Ready.pdf.

⁹⁵ See “Guidance on the Implementation of Country-by-Country Reporting: BEPS Action 13,” Organisation for Economic Co-operation and Development (OECD), last updated April 6, 2017. Available at: www.oecd.org/tax/beps/guidance-on-the-implementation-of-country-by-country-reporting-beps-action-13.htm.

Why This Is Important: The rise of the neoliberal model of globalization has had a negative long-term impact on tax rates and public investment. In addition, through a variety of legal and illegal tax avoidance schemes, tax revenues have fallen for jurisdictions around the world, regardless of rates. The OECD and G-20 both have recognized and developed recommendations to address this troubling trend, which undermines the social contract and inhibits robust public investment in infrastructure and human capital. Recommendations have been organized into the “OECD/G20 Base Erosion and Profit Shifting (BEPS) Package.” Without efforts to address base erosion and tax avoidance, it is unlikely that Parties will be able to sustain their infrastructure commitments outlined in Section 13 (above) or to continue to cultivate public support for international trade.

As the OECD explains, BEPS are:

“tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity. Although some of the schemes used are illegal, most are not. [BEPS] undermines the fairness and integrity of tax systems because businesses that operate across borders can use BEPS to gain a competitive advantage over enterprises that operate at a domestic level. Moreover, when taxpayers see multinational corporations legally avoiding income tax, it undermines voluntary compliance by all taxpayers.”⁹⁶

To build an inclusive North American economy that promotes shared prosperity, the NAFTA parties must work together to combat base erosion and profit shifting. No country can do it alone. Trade rules currently facilitate tax base erosion and profit shifting. Using NAFTA to combat these trends will turn a negative effect into a positive one, simultaneously helping to create a level playing field, increase revenues without raising taxes, and help build support for trade as an equity building policy instead of a rigged game to benefit global corporations.

Regarding Recommendation No. 1, the United States already has embraced country-by-country reporting for United States persons that are the ultimate parent entity of a multinational enterprise group with annual revenues for the preceding accounting period of \$850,000,000 or more.⁹⁷ The next step is to make such reporting public to increase accountability and oversight.

News reports of tax avoidance schemes by Apple⁹⁸ and Amazon⁹⁹ have contributed to enhanced oversight of such schemes and efforts to close loopholes in the United States, Europe and elsewhere. Incorporating such publication by rule, rather than leaving it to enterprising journalists, not only will flip the tendency of trade deals to ease tax avoidance, it will enhance public trust, good governance and oversight of the financial sector. As Justice Louis Brandeis wrote: “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”

Regarding Recommendation No. 2, tax abatements, tax holidays and other tax deals are becoming ever more common as cities, states, provinces and countries compete for jobs and investment. However,

⁹⁶ “About BEPS and the inclusive framework,” OECD website. Available at: www.oecd.org/tax/beps-about.htm.

⁹⁷ “Country-by-County Reporting,” Internal Revenue Bulletin: 2016-29, July 18, 2016, T.D. 9773. Available at: www.irs.gov/irb/2016-29_IRB/ar05.html.

⁹⁸ See, e.g., Wong, Andrea, “Americans Are Paying Apple Millions to Shelter Overseas Profits,” Bloomberg Technology, Dec. 7, 2016. Available at: www.bloomberg.com/graphics/2016-apple-profits.

⁹⁹ See, e.g., Marks, Simon, “How Amazon Saved Billions in Taxes,” Newsweek.com, Sept. 2, 2016. Available at: www.newsweek.com/behind-amazons-tax-strategy-494325.

research indicates that such strategies can be wasteful, particularly when workers underpaid by firms that benefit from secret tax deals must turn to publicly funded support services.¹⁰⁰ Ensuring that such deals are transparent will enhance scrutiny and public debate regarding the ultimate costs and benefits of such deals while leveling the playing field for businesses too small to pressure governments into providing such tax schemes. As tax deals continue to be made, making them public will ensure democratic oversight and a better value proposition for the public.

Finally, regarding Recommendation No. 3, as noted by the OECD and G20, transfer pricing schemes are another important source of base erosion and profit shifting. Three of the BEPS Package proposals focus on better aligning transfer pricing outcomes with value creation. Recommendation No. 3 would provide a stronger tool to help customs officials identify and sanction the most basic of transfer pricing schemes: deliberate mispricing to avoid duties. The proposal will enhance duty collection without raising rates, thereby promoting rule of law and public confidence that all businesses, not just domestic ones, are paying their fair share.

15. New Provision and Change to Domestic Policy: Enhanced Screening for Foreign Domestic Investment (FDI)

Key Recommendations: NAFTA should be amended to ensure the Committee on Foreign Investment in the United States (CFIUS) can consider economic security and review greenfield transactions, in addition to national security issues. In addition, the United States must update and improve CFIUS to emulate the screening mechanisms that Australia and Canada use (e.g., add a “net economic benefit test”) to ensure that foreign direct investment (FDI) does not undermine the U.S. economy or U.S. workers.

Why This Is Important: The existing interpretation of CFIUS prevents the United States from scrutinizing deals such as the original proposal for a China Development Bank loan to Lennar Corp., which would have required the homebuilder to use a Chinese state-owned construction company. To create jobs, raise wages and strengthen the U.S. economy, the United States must be able to screen investments based on risk to America’s economic security as well as national security. Once the United States has updated its domestic policy, trade policy must align with it, which requires an update to NAFTA and other existing agreements. Otherwise, the United States could face costly and wasteful trade challenges designed to pressure it to allow investments that will harm America’s working families.

16. Change to Domestic Policy: Improve Trade Enforcement

Key Recommendations: Trade enforcement should promote the export of goods and services, rather than the export of jobs. Rules crafted to create a fair and level playing field will help support employment and rising wages in all three NAFTA countries; this will be a significant improvement over the current rules, which reward low-road practices, harming businesses, farms and working families across the region.

¹⁰⁰ For example, in “Money for Something: Job Creation and Job Quality Standards in State Economic Development Subsidy Programs,” (December 2011) by Mattera, Philip et al., the authors found that programs “without any wage requirement—which together cost more than \$8 billion a year—can potentially result in jobs that pay so little that workers must rely on social safety net programs such as food stamps, Medicaid, State Children’s Health Insurance and the Earned Income Tax Credit. These hidden taxpayer costs may also occur from wage requirements that are sometimes set *below market levels...*” (emphasis added).

In particular, a renegotiated NAFTA must be accompanied by an effective new trade enforcement strategy to protect against trade cheating, including:

- Domestic tools to prevent and address currency manipulation and misalignment by NAFTA and non-NAFTA countries alike;
- A strategy to address overcapacity, particularly China's overcapacity in aluminum and steel, which is harming all three North American countries;
- Strong, timely and effective enforcement of existing rules against forced technology transfer, performance requirements and forced localized production (known as offsets);
- Changes in U.S. law to assist smaller businesses with promptly identifying and addressing violations of trade laws and to provide timely self-initiation, where appropriate, by the U.S. government; and
- Timely, robust and effective enforcement of labor and environmental rules.

Why This Is Important: Trade rules are only as good as their enforcement. Upgrading NAFTA's provisions without a simultaneous upgrade in the U.S. enforcement strategy will send the wrong message to trading partners: that obligations are not worth the paper they are written on. As working people have learned over the years, obligations without swift and certain enforcement strategies—including the full range of consultations through the imposition of sanctions when necessary—simply do not work.

17. Change to Domestic Policy: Improve the ITC's Economic Modeling

The United States International Trade Commission is responsible for projecting the economic outcomes of proposed U.S. trade and investment negotiations. The ITC uses a model called the computable general equilibrium. The CGE has a number of limitations. It focuses almost exclusively on tariff reduction. The ITC report typically supplements its CGE results with an explanation that benefits likely are underestimated for the trade deal in question because CGE does not account adequately for the efficiencies gained through reduced regulation or enhanced intellectual property protection. The CGE model does not adequately address such issues as mercantilist trade policies, currency manipulation, long-term wage stagnation or inefficiencies that result from trade deal-caused deregulation, privatization, market concentration or deunionization.

Not only have the ITC's past projections been *overly* rather than *underly* optimistic,¹⁰¹ the CGE method is particularly ill suited to NAFTA renegotiations, as tariffs for nearly all traded goods already are at zero. The AFL-CIO recommends that the ITC expand its methodology to include economic analyses that can compensate for some of the limitations of the CGE, including:

- Currency misalignment;
- Mercantilist trade behavior;
- Social welfare losses due to weakened regulations;
- Income inequality;
- Wage suppression;
- Enhanced corporate influence, which can drive government revenues down and undermine the ability of governments to invest in infrastructure and market-correcting mechanisms; and

¹⁰¹ See, e.g., Drake, Celeste, on behalf of the AFL-CIO, Oral Testimony on "Investigation No. TPA-105-001, Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors," Before the U.S. International Trade Commission, Jan. 13, 2016. Available at: www.usitc.gov/press_room/documents/testimony/105_001_005.pdf.

- Variable impacts of strong versus weak enforcement approaches.

There are numerous ways the ITC can attempt to better account for these effects, including adjusting its current model as well as supplementing CGE with alternative models, including the United Nations Global Policy Model.¹⁰² The ITC also may wish to consult with economists who have criticized the predictive effects of the CGE model, such as Jim Stanford (author of *Economics for Everyone*) and Robert E. Scott of the Economic Policy Institute.

¹⁰² The UN Global Policy Model was used in Jeronim Capaldo et al., “Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement,” Global Development and Environment Institute Working Paper No. 16–01, January 2016. Available at: www.ase.tufts.edu/gdae/Pubs/wp/16-01Capaldo-IzurietaTPP.pdf

Annex I: Background on the Failure of U.S. Trade Policy

Repeatedly, over many decades, America’s workers have protested flawed trade policies, including those enshrined in the North American Free Trade Agreement (NAFTA), the World Trade Organization (WTO) and Permanent Normal Trade Relations (PNTR) for China. Yet the United States seems to be duplicating the same old mistakes about trade policy despite the fact that the bulk of the economic evidence weighs in favor of reforming of trade rules.

Figure 3: Job Displacement Due to Existing Bad Trade Policies

Policy	Projected U.S. Jobs Lost	Source	Relevant Dates
NAFTA	851,700	Robert E. Scott ¹⁰³	1993–2013
PNTR with China, with no action on currency manipulation	3,400,000	Economic Policy Institute ¹⁰⁴	2001–2015
Korea FTA	95,000	Economic Policy Institute ¹⁰⁵	2011–2015
Trade deficit with Japan with no action on currency manipulation	896,600	Economic Policy Institute ¹⁰⁶	2013

Under past trade agreements and policies, U.S. communities lost hundreds of thousands of jobs as companies shed their U.S. workforces to shift jobs and production to places where workers’ fundamental human rights are routinely violated (despite promises made in FTA labor chapters) and wages consequently are suppressed unfairly. While there have been improvements in trade-linked labor and environmental provisions over the past 20 years, these provisions have not been effectively enforced and have come nowhere near to creating a level playing field.

Furthermore, to make any new trade and economic deal successful, the administration and Congress must enact and implement, in conjunction with the deal itself, a broad set of domestic industrial and economic policies to rebuild, repair and modernize U.S. infrastructure; support research, development and advanced manufacturing; and prepare the workforce for the jobs of the future. Absent these investments, globalization and trade deals will continue to leave workers behind.

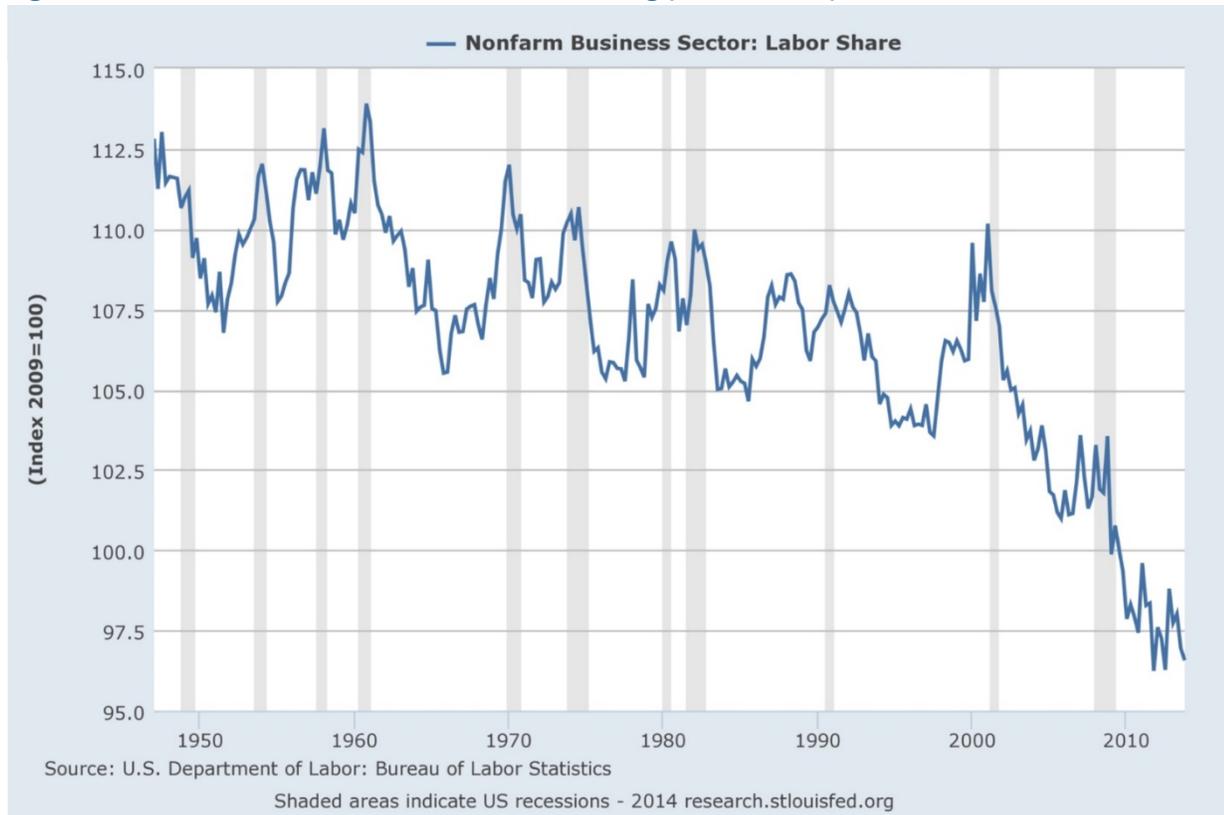
¹⁰³ Scott, Robert E., “The effects of NAFTA on US trade, jobs, and investment, 1993–2013,” *Review of Keynesian Economics*, Vol. 2 No. 4, Winter 2014, pp. 429–441. Available at: www.elgaronline.com/view/journals/roke/2-4/roke.2014.04.02.xml.

¹⁰⁴ Scott, Robert E., “Growth in U.S.–China trade deficit between 2001 and 2015 cost 3.4 million jobs: Here’s how to rebalance trade and rebuild American manufacturing,” *Economic Policy Institute Report*, Jan. 31, 2017. Available at: www.epi.org/files/pdf/114752.pdf.

¹⁰⁵ Scott, Robert E., “U.S.-Korea trade deal resulted in growing trade deficits and more than 95,000 lost U.S. jobs,” *Economic Policy Institute’ Working Economics Blog*, May 5, 2016. Available at: www.epi.org/blog/u-s-korea-trade-deal-resulted-in-growing-trade-deficits-and-more-than-95000-lost-u-s-jobs/.

¹⁰⁶ Scott, Robert E., “Currency Manipulation and the 896,600 U.S. Jobs Lost Due to the U.S.-Japan Trade Deficit,” *Economic Policy Institute Briefing Paper No. 387*, Feb. 4, 2015. Available at: www.epi.org/files/2014/JapanCurrencyManipulation.pdf.

Figure 4: Workers' Share of National Income is Shrinking (United States)



Source: Created with the FRED Economic Data Tool of the St. Louis Federal Reserve Bank. Available at: <https://fred.stlouisfed.org/>.

Bad trade deals, beginning with NAFTA, have contributed significantly to wage stagnation in a number of ways. First, and most obviously, these deals have expanded the U.S. trade deficit (see Figure 5). While some imports represent important intermediate parts, they also represent lost opportunities for jobs and production in the U.S. The current \$500 billion dollar U.S. trade deficit¹⁰⁷ hampers both economic growth and job creation.¹⁰⁸

¹⁰⁷ According to the U.S. Census Bureau, the current U.S. trade deficit with the world in 2016, on a balance of payments basis, is \$500,560,000,000, a slight uptick from 2015. The deficit in goods is a whopping \$749,926,000,000. See <https://www.census.gov/foreign-trade/statistics/historical/gands.pdf>.

¹⁰⁸ Although China represents more than half the current U.S. trade deficit, it is important to recognize that all trade policy decisions, from NAFTA renegotiation to enforcement priorities, have a role to play.

Figure 5: U.S. Trade Balance with FTA Partner Countries, 2016 (Deficits in Yellow)

Country	2016
	<i>In \$1,000</i>
Australia	12,690,147
Bahrain	133,764
Canada	-12,106,120
Chile	4,141,477
Colombia	-696,322
Costa Rica	1,564,753
Dominican Rep	3,101,760
El Salvador	465,628
Guatemala	1,951,406
Honduras	227,297
Israel	-9,009,351
Jordan	-62,372
Korea	-27,666,003
Mexico	-63,191,939
Morocco	844,199
Nicaragua	-1,828,962
Oman	675,176
Panama	5,736,338
Peru	1,780,200
Singapore	9,067,884
Total	-72,181,042

Source: Created with the U.S. International Trade Commission's Dataweb tool. Available at: Dataweb.usitc.gov (Accessed May 8, 2017).

Further, by providing incentives that make offshoring decisions more attractive (including ISDS, guaranteed market access, excessive intellectual property protections and a low-standards regulatory framework), these deals provide added leverage for employers to actively hold down wages and standards by “predicting” workplace closures and offshoring of jobs if workers form a union or refuse to give back hard-won wages and protections during negotiations.¹⁰⁹

When trade deals cause “job churn,” as all economists recognize that they do, affected workers do not immediately find jobs with the same or better wages as traditional economic models assume. Instead, many former manufacturing workers find new jobs in lesser-paid service and retail sectors. As Jeff Faux noted, “[t]he vast majority of workers who lost jobs from NAFTA suffered a permanent loss of income.”¹¹⁰ This trend affects not just the workers in higher-paid countries such as the United States, but

¹⁰⁹ Bronfenbrenner, Kate, “We’ll Close! Kate Bronfenbrenner’s article on threats of plant closings after NAFTA,” *Multinational Monitor*, 18(3), 8–14, 1997. Available at:

<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1018&context=cbpsubs>.

¹¹⁰ See “NAFTA’s Impact on U.S. Workers,” EPI Working Economics Blog, Dec. 9, 2013. Available at:

www.epi.org/blog/naftas-impact-workers/.

also workers in lower-paid countries. For example, since NAFTA, wages in Mexico have lost purchasing power, and the U.S.-Mexico wage gap actually has increased.¹¹¹

It is important to recognize that trade deals can cause so much churn and economic upheaval that they contribute to migration flows and, in the worst scenarios, produce economic refugees. When NAFTA and other inadequate trade policies fail to address worker exploitation in trading partner countries, they can add to wage stagnation in the United States. They allow bad-actor employers to drive down the wages and working conditions of all workers by exploiting and abusing undocumented migrants. This drives wages down, just as water will equalize between connected full and empty pools. Even highly skilled, less-trade-exposed workers can be affected.

Finally, by putting trading bloc countries into competition for investment without ensuring—before a trade deal is signed—that those countries not only have high standards on paper but an effective enforcement regime, and that brakes are in place to avoid a “race to the bottom” in taxes and regulations, these trade deals act as an anchor, dragging down taxes, wages and standards toward their lowest level within the trading bloc. Because of the competitive incentives imposed by NAFTA and similar trade policies, income distributions become more unequal as capital captures an ever-larger share and workers an ever-smaller share.¹¹²

Added together, these trends suppress wages and reduce demand for goods and services, both of which are important to economic growth. Those who advocate trade policies that drive wages ever lower in the relentless pursuit of quarterly profits and “competitiveness” ignore the fact that workers also are consumers. Consumers drive the demand necessary to support the global economy. This one-sided vision of competitiveness leaves jobs and development opportunities on the table and limits the potential for U.S. exports.

¹¹¹ See “The US-Mexico Wage Gap Has Grown, Not Shrunk, under NAFTA. Awkward.,” Center for Global Development Views from the Center, March 17, 2015. Available at: www.cgdev.org/blog/us-mexico-wage-gap-has-grown-not-shrunk-under-nafta-awkward?utm_source=150317; Weisbrot, Mark, et al., “Did NAFTA Help Mexico? An Assessment After 20 Years,” Center for Economic and Policy Research, February 2014. Available at: <http://cepr.net/documents/nafta-20-years-2014-02.pdf>.

¹¹² See Jeronim Capaldo et al., “Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement,” Global Development and Environment Institute Working Paper No. 16–01, January 2016, at pp. 12–13. Available at: www.ase.tufts.edu/gdae/Pubs/wp/16-01Capaldo-IzurietaTPP.pdf.

Annex II: Proposal for NAFTA Labor Chapter (New Chapter 23)

A. Scope and Definitions

- 1. Basic Labor Rights to Ensure Level Playing Field:** Parties are obliged to ensure, in law and in practice, all workers in their territory, regardless of the workers' citizenship, immigration status or national origin, the rights and freedoms guaranteed in the eight ILO Core Conventions (C87, C98, C29, C105, C138, C182, C100 and C111). In cases in which there is a dispute regarding the level of protection required, the Secretariat and any dispute settlement panels shall refer to ILO conventions, reports, and recommendations for guidance.
- 2. Acceptable Conditions of Work to Ensure Level Playing Field:** Parties are obliged to ensure acceptable conditions of work, in law and in practice, covering all workers in their territory, regardless of the workers' citizenship, immigration status or national origin. The term "acceptable conditions of work" includes all measures pertaining to wages and benefits owed whether by law or by contract, including payments made on behalf of workers to public and private retirement and health arrangements; hours of work; worker representation; termination of employment; gender-based violence; and occupational health and safety, including the right to compensation for workplace injuries and illnesses.
- 3. Floor Wages to Ensure Level Playing Field:** Parties agree that all workers—regardless of sector—have the right to receive wages sufficient for them to afford, in the region of the signatory country where the worker resides, a decent standard of living for the worker and her or his family. Elements of a decent standard of living include food, water, housing, education, health care, transportation, clothing and other essential needs, including the ability to save for retirement and emergencies. Parties agree that it is a violation of NAFTA to export products whose production in one of the signatory countries, at any point in the supply chain, involved the payment, to any worker involved in the production process, of remuneration for a standard workweek that was insufficient to meet this standard. Enforcement of this provision shall be subject to the procedures outlined in Sections C and D.
- 4. All Workers Covered:** Given the impact of systemic abuse of worker rights on the ability of all workers in an economy to make fair wages, the work of all workers in the economy shall be deemed trade-related and therefore subject to the obligations of this chapter. Lesser coverage would create loopholes that would drive down wages and working conditions in other sectors and in trading partner countries.
- 5. No Derogation:** Parties agree not to reduce labor standards, provide formal or informal exceptions to any employer, whether or not to induce a particular investment, or fail to enforce such standards as to any obligation covered by this chapter. Any tolerance of lesser application or enforcement will create loopholes that will drive down wages and working conditions for all workers.
- 6. Threats and Violence Against Workers are Unacceptable:** A threat, act of intimidation or an act of violence against a worker or workers exercising, or attempting to exercise, any of the rights and freedoms protected by this agreement shall be considered a violation of the underlying right or freedom being exercised or attempting to be exercised. Failure to investigate any such

threat, act of intimidation or act of violence or failure to prosecute identified perpetrators of any such threat or act shall be considered a failure to enforce the underlying right or freedom and therefore a violation of this chapter.

- 7. No Forced or Child Labor:** All trade in goods made, in whole or in part, by forced labor or the worst forms of child labor (as outlined in ILO Convention 182) is banned outright, regardless of the source of such goods. Parties also agree that no Party shall procure goods, regardless of the source of such goods, made with forced labor or the worst forms of child labor. Customs procedures shall be improved to better trace goods' production lines to better identify products made with forced labor and the worst forms of child labor. Such goods shall be seized at the border.
- 8. Access to Justice:** Parties shall ensure that all persons have appropriate and timely access to tribunals for the enforcement of the Party's own labor laws. Parties shall ensure that cases are resolved without undue delay.
- 9. Adequate Inspections:** Parties shall ensure that their domestic laws and regulations provide for adequate and timely access to labor inspectors from any level of government, that denial of lawful access carries meaningful punishment, and that efficient processes are in place to allow unions to seek timely inspections to follow up on alleged violations of this Chapter. In cases in which there is a dispute regarding the level of protection required, the Secretariat and any dispute settlement panels shall refer to ILO Labor Inspection Conventions for guidance.
- 10. Non-Derogation by Misclassification:** Parties shall ensure that no person wishing to be protected by this section shall be excluded from such protections by virtue of being classified as a temporary worker, fixed-contract worker, subcontracted worker, "independent contractor" or the like. Persons in positions of management as defined in national law, and consistent with ILO guidance, may be excluded from such rights. Parties shall establish legal mechanisms, such as joint and several liability for labor and employment law violations, to help effectuate this obligation.
- 11. Non-Derogation by Employer-Dominated Unions or Unions Controlled by the Parties:** To guard against employer-dominated unions or unions controlled by the Parties, unions must be responsible to their members. All Parties must have laws in place requiring that unions provide members with timely access to union bylaws and collective bargaining agreements.
- 12. Place of Posting:** Parties shall ensure workers are entitled to all rights and benefits of their primary work location (including but not limited to minimum wages and other applicable wage, hour and benefit requirements), regardless of their citizenship, immigration status or national origin, and that adequate effort be made to ensure that workers are provided with access to information in their primary language and in printed format, if requested.

B. Recruiting Foreign Labor

1. All migrant workers (regardless of immigration status) are to be afforded the same rights and remedies available to nationals.

2. Prior to hiring, each employer and foreign labor contractor/recruiter who engages in foreign labor contracting shall ascertain and disclose to each recruited worker in writing, and in a language the worker understands, definite information on:
 - a. His/her rights under law (including the right not to be charged fees per subsection 3. below) and means of redress for violations;
 - b. Terms of employment, including worksite, compensation, job description, period of employment and employee benefits (e.g., housing, transportation);
 - c. Terms of any work visa, including duration, family provisions, renewal procedures and overseeing government agencies;
 - d. Existence of any union in the relevant sector (and contact details if applicable);
 - e. The nature of any training related to the condition of employment; and
 - f. Other relevant information.
3. Parties shall ensure foreign labor contractors/recruiters are prohibited from charging fees to workers. Employers shall pay the transportation and subsistence costs during the period of travel and recruitment, and any fees charged by the contractor/recruiter. Workers who report being charged fees at any point in the recruitment and employment process shall have recourse to prompt recoupment of fees from employers, while maintaining their visa eligibility.
4. Parties shall ensure that under no circumstance may an employer or labor contractor/recruiter take possession of a worker's passport, visa or other travel documents.
5. Parties shall establish and maintain a functioning public registry system, available in real time, of job offers in relation to employers offering jobs and their relationships to all labor contractors/recruiters who are recruiting workers, so as to prevent fraud and other violations and afford workers a channel to search for available jobs and verify the legitimacy of job offers and terms of employment.
6. Lowering standards or failing to enforce any laws, regulations, or policies covered by this Section shall be a violation of this agreement.
7. Limiting access to legal services, due process or justice systems on the basis of immigration status shall be a violation of this agreement.
8. Retaliation against workers who exercise their rights under this Section shall be a violation of this agreement.
9. Parties are responsible for ensuring their laws reflect these standards for labor contractors/recruiters and that laws include penalties sufficient to deter violations. In addition, Parties must establish or maintain a process to bar employers and contractors/recruiters from accessing work visas if they violate the terms of this Section, including, but not limited to, the use of visas to drive down wages and working conditions.
10. Chapter 16 Reform: The TN and TD visas shall be phased out. Those currently working abroad on a TN visa shall be given an option to establish permanent residence or return to their country of origin after a period of not less than three years. The decision to remain or return should be made by each individual TN worker, and not his or her employer. This agreement shall not create any new visa categories or guarantee levels of access to any country's labor market for any

specific type of migrant worker. Each nation's relevant ministries must determine annual visa allotments based upon actual labor market conditions.

C. Establishment of an Independent Labor Secretariat

1. There shall be established a NAFTA Labor Secretariat to address transnational labor issues, to monitor and enforce this chapter, and to provide research on:
 - a. Best practices for any area covered by this agreement that affects the lives and livelihoods of working people.
 - b. The contribution of NAFTA toward the creation of stable, secure, family-supporting jobs.
 - c. Wage, job, union, community and public well-being effects of NAFTA. The Secretariat shall report at least biennially, or more frequently if requested by the Working Group, on such issues as positive and negative impacts of NAFTA on labor markets, including the transfer of production between nations and the effects on displaced workers; wage effects of NAFTA, particularly in sectors and industries impacted by significant transfers of production; and community effects of NAFTA, including impacts on local tax revenues, municipal services, and community enrichment or impoverishment. The Secretariat shall indicate when negative effects are sufficient to warrant policy intervention by the Parties and shall recommend solutions.
 - d. The Secretariat will be responsible for providing regular, independent and public reports on compliance with this chapter of NAFTA.
 - e. In addition to reports referenced in subsection (d), the Secretariat shall research and report on noncompliance alleged by any interested party in submissions made to the Secretariat. The Secretariat shall create an effective mechanism to receive such submissions, which shall be language appropriate. The Secretariat shall establish technical assistance protocols to ensure members of the public of whatever means and background are able to present submissions.
 - f. Reports in response to submissions made under subsection (e) shall be completed within 180 days. The Secretariat may grant itself extensions on reports if necessary. Each extension may consist of a maximum of 30 days and must be published, together with the reasons therefor.
 - g. The Secretariat shall immediately refer submissions alleging violations of Section A.3 to the Expert Wages Panel described in Section D.9.
2. When, pursuant to subsections (1) (c), (d) or (e) above, the Secretariat finds good cause to believe that a Party, employer or recruiter is not in compliance with the chapter, it shall create recommendations for improvement and shall provide technical assistance, where necessary or appropriate, to effectuate the recommendations and bring the Party, employer or recruiter into compliance. Such recommendations and technical assistance will be publicly available, and stakeholders must have a reasonable opportunity for consultation and advice in their development.
3. When, pursuant to subsection 1(g) above, the Secretariat receives report from the Expert Wages Panel affirming the payment of less than decent wages at any point in the supply chain for a good exported from a NAFTA Party, the Secretariat shall work with the relevant government official(s) and the employer(s) in question to raise wages to meet the standard set out in A.3. If such standard is not achieved within one year of the initial finding, the Parties shall cause to be affixed to affected goods (exports from the NAFTA Party where final assembly is performed,

which are made in whole or in part in violation of Section A.3) a label specifying, as applicable, in English, Spanish and French:

- a. “This good was made in [NAFTA Party] in a facility in which workers receive less than a decent wage.” or
- b. “This good was made with components made in [NAFTA Party] in a facility in which workers receive less than a decent wage.”

Employers who come into compliance with Section A.3 may petition for a re-evaluation of the wages paid in such facility. If the Expert Wages Panel finds that wages are being paid in compliance with Section A.3, the Secretariat shall notify the Parties that the labels no longer are required. Should the facility(ies) in question remain out of compliance at the end of the second year after the initial finding, the Secretariat shall recommend to the NAFTA Parties importing such goods that they levy a duty equal to the difference between the wages received by the affected workers in the relevant facility(ies) and the wages they would receive if the facility(ies) complied with the Floor Wage obligation in Section A.3, plus a 20% penalty. The collecting Parties shall cause the funds so collected to be distributed to the affected workers who are receiving less than the wages specified in Section A.3. The duties shall continue as described in this section until such time as the Expert Wages Panel confirms pursuant to the procedures specified in Section D.9(b) that decent wages are being paid in the facility(ies) in question.

4. In order to perform its work monitoring, investigating and providing technical assistance for any item described in subsection (1), Secretariat staff shall be free to visit and monitor workplaces within the Parties, to interview workers free from employer or government monitoring and interference, and to visit, observe and assist relevant government offices tasked with securing the rights and freedoms protected under this chapter in a timely manner. Secretariat personnel shall be empowered to recommend to employers and labor officials on-the-spot changes to workplace conditions to bring employers into compliance with the provisions of this chapter, and to otherwise help effectuate the rights of workers and responsibilities of Parties under this chapter.
5. When the Secretariat determines that meaningful progress toward effective implementation of its recommendations has ceased, and if the Party remains out of compliance with this chapter, the Secretariat shall begin dispute settlement procedures subject to Chapter 20 of this agreement. For greater transparency, the Secretariat shall report publicly at least annually on the progress of each open case, including the reasons that case does not yet qualify for closure and, if applicable, the reason why it has not yet been referred for dispute settlement.
6. Cases referred for dispute settlement shall proceed under the terms of that chapter, with no differences, including with respect to penalties, except that the arbitrators shall have expertise in international labor law, or human rights law, or both. The arbitrators shall base their decisions on ILO guidance, including Conventions, reports and recommendations, and may seek technical assistance or request expert reports from the ILO Committee of Experts at any time. The work of a dispute settlement panel may be delayed for a reasonable period, not to exceed 75 days, while it seeks such expertise from the ILO. Should the ILO decline to provide such advice, dispute settlement processes shall resume immediately.
7. As with any other matter that proceeds to dispute settlement pursuant to the Dispute Settlement Chapter, a panel may authorize sanctions in the form of suspension of benefits. In such a case, the panel is directed to authorize such benefits to be suspended as to the specific workplaces

identified as problematic in the case; and if that is not practicable, then by specific employers where lack of compliance is documented; and if that is not practicable, then in specific industries in which the lack of compliance subject to the dispute is concentrated; and if that is not practicable, then in specific sectors in which the lack of compliance subject to the dispute is concentrated. The workplaces, industries and sectors thereby will be motivated to come into compliance. The amount of the suspension authorized shall be dissuasive enough to encourage resolution at the initial stages of the dispute and shall bear a relationship to the number of workers affected, the severity of the noncompliance, the length of the noncompliance, and the potential for such noncompliance to induce a race to the bottom by motivating other employers to reduce wages, benefits, safety conditions or other workplace standards. Further, dispute settlement panels are authorized to escalate the level and the breadth of the suspension, or both, if, year on year, the Party has not come into compliance.

8. So long as the Secretariat continues to find good cause to believe that a Party remains out of compliance with the terms of this Chapter, it shall proceed through the steps described in this Section C to achieve compliance.
9. Should the Secretariat bring a case that results in a dispute settlement panel authorizing a suspension of benefits against one Party, the other two Parties shall suspend benefits as described Section C.7.
10. If a Party chooses not to suspend benefits as authorized in Section C.9 or to impose duties as authorized in Section C.3, above, that Party shall publish in writing the reasons therefor. Where Parties decline to suspend benefits or impose duties, the Secretariat may define other remedies. Further, when any Party declines to suspend benefits, interested parties, including workers and unions, may pursue remedies in the domestic courts of any Party, each of which shall have jurisdiction to decide the case and order damages at law.
11. Experts in labor and human rights law, including former officers and staff of the International Labor Organization, shall staff the Secretariat. In no case shall more than 40% of the staff consist of any of the following groups: U.S. nationals, Mexican nationals or Canadian nationals. Staff shall be considered employees of the Secretariat, and shall not be considered employees or officials of any Party. Staff may not simultaneously be an employee, or an elected or appointed officeholder of any Party government, or political subdivision thereof, during the term of Secretariat employment.
12. The Secretariat shall establish and maintain an office of the public advocate to assist interested parties with submissions, promote robust stakeholder participation, ensure affected workers may participate in dispute settlement proceedings, and the like. It shall be the mandate of the public advocate to ensure income and language do not pose barriers to workers and unions seeking to ensure NAFTA Parties comply with obligations.
13. No Party shall have veto power over Secretariat activities, nor shall a Party control, prevent or delay Secretariat activities or the publication of Secretariat reports or recommendations.
14. The Secretariat shall be funded by the Parties on a pro-rata basis, with each Party contributing to the budget consistent with the size of its GDP compared with the size of the GDP of the entire NAFTA.

15. The Secretariat shall have at least one office in each Party, which must be accessible to the public. Staff may rotate between the offices in a manner to be determined by the executive director.
16. The executive director of the Secretariat shall be approved by a majority vote of the Working Group, and must receive affirmative votes from members from each NAFTA Party as well as from each sector (labor, employers, civil society, academics and government).
17. The executive director shall serve an initial term of three years. To promote balance, no executive director may serve more than five consecutive years, and no series of executive directors who are nationals of the same Party may serve consecutive terms totaling more than five years.
18. Interested parties, including workers and unions, are authorized to use the domestic courts of any Party to compel action from the Secretariat if either of the following occur:
 - a. 18 months after an initial submission pursuant to Section 1(e) above, the Secretariat still has not published an initial report; or
 - b. 30 months after the publication of a report pursuant to 1(f) above, the conditions complained of have not materially improved and the Secretariat has not initiated Dispute Settlement.
19. Interested parties, including workers and unions, are authorized to use the domestic courts of any Party to seek damages at law or to compel action from the Secretariat or the Parties if either of the following occur:
 - a. 13 months after an initial finding by the Expert Wages Panel that less than decent wages are being paid in a relevant facility(ies), the situation has not been remedied and notification labels are not being affixed to covered exports pursuant to Section C.3 above; or
 - b. 25 months after an initial finding by the Expert Wages Panel that a product or products are being exported in violation of Section A.3, the Expert Wages Panel has not found the relevant facility(ies) in compliance and either or both importing Parties are not levying duties as authorized in Section C.3.

D. Creation of the NAFTA Wages and Standards Working Group

1. The Parties shall establish a Wages and Standards Working Group that may consider issues upon its own accord or in response to reports produced by the Secretariat. The Working Group shall include representatives of trade unions, employers' organizations, civil society groups, academia, and government from each Party. The Working Group shall be chaired by an independent eminent person with labor expertise, without voting power, for an initial term of three years. The chairperson shall not hold any elected or appointed office in the government of any Party.
2. The Working Group shall meet at least once a year. Decisions of the working group must include a majority of each sector represented. When the Working Group fails to reach consensus, its published recommendations must include the diversity of opinions of Working Group members. The Working Group shall develop its own rules of procedure, taking into account existing practice of social dialogue.

3. The Working Group shall study, review and consider the impact of the NAFTA on wages, benefits, labor rights, working conditions, inequality, disparities and the creation of stable, secure, family-wage work in order to prevent a race to the bottom, and instead create a cycle of continuous improvement.
4. The Working Group shall be tasked with investigating and reporting on policies that support or promote a degradation in equity, standards of living or quality of life matters, including tax policies and infrastructure investment, in any Party or locale within NAFTA.
5. The Working Group shall consider in its deliberations and recommendations the annual public infrastructure spending reports produced by the Parties (as recommended in Chapter 13 of this document).
6. If the Working Group determines there is evidence that as a result of, or potentially as a result of, NAFTA:
 - a. Wages, benefits, labor rights, working conditions, social protections, or the creation of stable, secure, family-wage work are stagnating or falling anywhere in the NAFTA countries;
 - b. Gender, racial, ethnic or other socioeconomic disparities are growing;
 - c. Income or wealth inequality is increasing;
 - d. Disadvantaged populations are not sharing in economic growth; or
 - e. Parties (or political subdivisions thereof) are engaging in harmful race-to-the-bottom policies,

the Working Group shall have the authority to do any or all of the following:

- f. Recommend changes to NAFTA labor provisions or to national laws, or both;
- g. Recommend actions to the Secretariat;
- h. Recommend that the NAFTA Free Trade Commission meet; and
- i. Develop recommendations for renegotiation of NAFTA.

Any such recommendations shall be public.

7. The Working Group may request information or reports from the Secretariat at any time. The Secretariat shall respond promptly to information and report requests.
8. The Working Group shall monitor the work of the Secretariat. On the basis of sufficient evidence, the Working Group shall have the power to launch an official complaint to the Executive Director of the Secretariat for the Secretariat's shortcomings and failures to deliver on its mandate. Upon receipt of such a complaint, the Secretariat must reply within 30 days in writing, with measures to be taken to correct the shortcoming or to explain the reasons for rejecting the complaint.
9. The Working Group shall be advised by an Expert Wages Panel. The panel shall be composed of seven people who possess appropriate academic credentials and a record of research and publication demonstrating substantial expertise in relevant fields, including, but not limited to, wage and welfare economics, labor markets, wages and benefits, public health and calculations of costs of living, and who have not been employed by or received significant compensation from a for-profit corporation or labor union at any time in the past five years.

- a. The Panel shall publish biennially, or more regularly if directed by the Working Group, advice for amending national wage laws and rates in order to improve standards of living in the NAFTA region. The Working Group shall consider and include this advice in any recommendations made pursuant to Section 4. (above).
- b. The Panel shall be tasked with analyzing submissions referred from the Secretariat that allege that goods have been traded between NAFTA parties that fail to meet the commitment in Section A.3. For each referral received, the Panel shall perform a cost-of-living analysis and pay practices investigation specific to the exported goods in question and issue a report to the Secretariat within 90 days. The report shall state the panel's conclusion, in the affirmative or negative, as to whether pay practices by relevant employers yielded remuneration, at the time of the alleged violations, insufficient to meet the standard referenced in Section A.3., and also providing the data and analysis supporting the panel's conclusion and indicating the extent, as well as the fact, of any violation. The panel's reports must be endorsed by at least five of its seven members.

E. Collective Bargaining

The existence of international labor standards does little to enhance cross-border labor relations, as these standards are framed for employment relations within one jurisdiction. Thus, we need a framework that could give employers and workers the ability to address labor relations matters across borders. The NAFTA must specifically allow workers in unions employed by a common employer in two or more NAFTA countries to jointly organize unions and negotiate binding collective agreements. As part of the NAFTA, employers with more than 500 total employees, with at least 50 employees in two or more NAFTA Parties, shall recognize and bargain with, if established, a supranational labor organization. Such organizations must have the opportunity to negotiate a binding enterprisewide agreement, which individual workplace agreements could build upon, with greater specificity at the workplace level. Supranational labor organizations also will have the authority to engage in other concerted activities for the purpose of collective bargaining. In no case may such agreements authorize wages below the floor wage level for the region in which a workplace is located. Enforcement of such agreements would be subject to the national and subnational laws of the applicable jurisdiction. Failure to provide for this supranational bargaining shall be a violation of this chapter. Further, investors of a Party seeking to assert rights under the investment provisions of NAFTA may be denied such rights unless and until recalcitrant Parties come into compliance with the supranational collective bargaining provision E.