















effective, worker-directed unions. The cumulative effect of these bogus unions is to lower wages and working conditions in Mexico.<sup>11</sup> 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 fact, raising wages in Mexico should be one of the most important goals of NAFTA renegotiation.

**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

<sup>11</sup> See NAFTA at 20, *supra* note 3.



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 workers to form transnational union organizations to negotiate 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.

### **3. *Eliminate Investor-to-State Dispute Settlement and Minimum Standard of Treatment***

Simply put, investor-to-state dispute settlement (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.”<sup>12</sup> 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.”<sup>13</sup>

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.<sup>14</sup>

<sup>12</sup> 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](http://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state).

<sup>13</sup> 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#](http://www.thenation.com/article/right-and-us-trade-law-invalidating-20th-century#).

<sup>14</sup> 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](http://www.cato.org/blog/responding-white-house-defense-investor-state-dispute-settlement).

#### **4. Create Jobs by Adding Enforceable Currency Rules**

NAFTA must include enforceable currency disciplines subject to trade sanctions in the text of the agreement.<sup>15</sup> 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. Currency realignment would create 2.3 million to 5.8 million jobs over the next three years.<sup>16</sup>

#### **5. Strengthen Rules of Origin**

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, UAW 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 Labor Advisory Committee on Trade Negotiations and Trade Policy (LAC) 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.

<sup>15</sup> 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.

<sup>16</sup> 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/](http://www.epi.org/publication/stop-currency-manipulation-and-create-millions-of-jobs/)

- 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.

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. 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.

#### **6. *Protect Responsible Government Purchasing and Buy American Policies***

NAFTA should support domestic job creation efforts by eliminating procurement commitments and promoting responsible bidding standards.<sup>17</sup> 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 have no outstanding environmental cleanup obligations or the implementation of 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.<sup>18</sup> 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.<sup>19</sup> To the extent that procurement commitments like NAFTA's Chapter 10 drive down wages in a race to be the lowest bidder,<sup>20</sup> they already have harmed untold numbers of U.S. workers.

<sup>17</sup> 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.

<sup>18</sup> 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](http://www.gao.gov/products/GAO-17-168).

<sup>19</sup> *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.

<sup>20</sup> 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](http://www.dollarsandsense.org/archives/1997/0997duboff.html).

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. A critical provision in Chapter 10 that should be maintained is its prohibition on offsets.

**7. *Eliminate Chapter 19 Obstacles to Effective Trade Enforcement***

Chapter 19 should be eliminated and replaced with a mechanism for government cooperation to ensure effective enforcement against unfairly traded products from non-NAFTA countries

**8. *Combat Tax Dodging***

NAFTA and subsequent NAFTA-style trade and globalization rules have 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 tax 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. Without efforts to address base erosion and tax avoidance, it is unlikely that the U.S. will be able to address its infrastructure needs or cultivate public support for international trade. The new NAFTA should incorporate at least the following commitments to combat tax dodging:

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.<sup>21</sup> 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 imported items, using the harmonized tariff schedule. 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.

**9. *Remove Rules That Undermine Protections for Workers, Consumers and the Environment***

NAFTA must not limit, undermine or inhibit public interest standards or regulations. NAFTA must ensure that North America's democracies retain the freedom to develop, advance and implement commonsense protections, including country-of-origin labeling, free from the threat of trade challenges. For this reason, 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

<sup>21</sup> 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](http://www.oecd.org/tax/beps/guidance-on-the-implementation-of-country-by-country-reporting-beps-action-13.htm).

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.

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 negotiations is inherently undemocratic, reducing trust in both trade and the democratic system because it undermines standards that citizens struggled to enact (such as “COOL” labeling).

#### ***10. Add Commitments to Invest in Infrastructure***

Investing in infrastructure drives long-term, broadly shared growth, but is hard to do when global companies are driving a race to the bottom. Adding an infrastructure commitment will help balance the incentives of prior trade deals that have depressed public investment.

Specifically, 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 target<sup>22</sup> 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.

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.

<sup>22</sup> 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](http://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/49910-Infrastructure.pdf).

### **11. Protect Consumers and Ensure Financial Stability**

NAFTA should protect the ability to engage in fair and nondiscriminatory application of capital controls and other measures to ensure the stability of the financial system. 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.<sup>23</sup> 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.

To achieve these ends, 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. Moreover, Article 1109.4 must be amended 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 unpaid obligations to employees and safeguarding the safety and soundness of the financial system.

### **12. Promote Transportation Safety**

The new NAFTA must ensure that all Parties may enforce domestic highway safety, labor protections and environmental standards on foreign trucks, rail and buses. In addition, NAFTA should continue its existing policy of broadly excluding water and air transportation services from coverage. This includes maintaining existing Annex I and Annex II reservations covering the Jones Act, laws respecting ownership and control of airlines, and the like.

### **13. Protect Intellectual Property While Ensuring the Right to Affordable Medicines**

*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.

<sup>23</sup> 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.

**14. *Prohibit Global Corporations from Using NAFTA to Capture Public Services for Profit***

NAFTA renegotiation must 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.

**15. *Add Strong Environmental Rules with Swift and Certain Enforcement***

NAFTA must be reformed to include strong environmental standards that will be enforced. NAFTA must require adoption of and compliance with key multilateral environmental agreements; prohibit illegal trade of timber and wildlife; promote responsible fisheries; and ensure countries cannot gain an unfair trade advantage by allowing highly polluting practices. This should be done in a manner akin to the recommendations for labor obligations.

**16. *Improve Screening for Foreign Domestic Investment***

Congress and the administration should work together to enhance the powers of the Committee on Foreign Investment in the United States to be sure the U.S. can review greenfield investments and use a “net economic benefit test” to measure more impacts on our working people as a whole. In addition, NAFTA should be updated to accommodate this domestic policy change.

**17. *Improve Trade Enforcement as Part of a Robust Manufacturing Policy***

Trade rules are only as good as their enforcement. Enforcement tools must be expanded and used promptly. Rules crafted to create a fair and level playing field and promote good jobs in growing industries will support employment and wage growth in all three NAFTA countries. This will be a significant improvement over the current rules and practices, which reward low-road practices, harming businesses, farms and working families across the region.

**18. *Improve the ITC’s Economic Modeling***

The United States International Trade Commission (ITC) 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 (CGE). 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,<sup>24</sup> the CGE method is particularly ill suited to NAFTA renegotiations, as tariffs for nearly all traded goods

<sup>24</sup> 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](http://www.usitc.gov/press_room/documents/testimony/105_001_005.pdf).

already are at zero. The LAC 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
- Variable impacts of strong versus weak enforcement approaches.