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BEFORE THE HOUSE TERRORISM, NONPROLIFERATION AND TRADE SUBCOMMITTEE

OUTLOOK FOR THE TRANS-PACIFIC PARTNERSHIP TRADE & GLOBALIZATION AGREEMENT

CELESTE DRAKE
THE AMERICAN FEDERATION OF LABOR &
CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO)

AUGUST 1, 2013

The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), on behalf of its 57 affiliate unions, appreciates this opportunity to comment on the outlook for the Trans-Pacific Partnership Trade and Globalization Agreement (known as the TPP). The AFL-CIO has long recognized that workers everywhere live in a global economic environment. Trade and globalization are not a temporary trend; they are an economic reality. The key questions for workers, therefore, involve the rules that govern trade and globalization, who makes them, and who benefits from them. If working families' preferences play little or no role in shaping trade and globalization agreements, then it should surprise no one that such agreements harm instead of benefitting workers and their families.

Given its position as the first new trade and globalization agreement the Obama Administration has negotiated from scratch, the TPP is a particularly important agreement. Of course, much of the trade among the current TPP participants (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam) and the U.S. is already covered by trade and globalization agreements. But the TPP, unlike past trade agreements, is being specifically designed as an open-ended agreement and potential new entrants, including China and Thailand, are already being discussed. In that sense, it is especially important to re-examine our trade policy—as the rules set down in the TPP will govern a large portion of international trade in years to come.

As the Administration attempts to conclude the TPP by October of this year, the AFL-CIO strongly encourages Congress to increase its participation, consultation, and oversight roles with respect to this agreement. Though there is time for the agreement to solidify into one that pursues a people-centered agenda, what has been publicly discussed and reported does not warrant optimism.

The AFL-CIO has attempted to work with the Administration to implement specific changes to the prior U.S. trade and globalization model in such critical areas as labor, state-owned enterprises, rules of origin, government procurement, currency, investment (including a more comprehensive screen for inward bound foreign direct investment, or FDI), reciprocal market access, cross-border trade in services (including financial services), the environment, food safety and other public interest regulation, and intellectual property protections (including access to medicines).

To its credit, the United States Trade Representative (USTR) has been open and accessible. However, based on publicly available information, few, if any, of the detailed proposals we submitted have been translated into transformative changes in the still secret text. While negotiations continue, it appears most of the rules being considered in the TPP too closely follow the current trade model. If the TPP does indeed follow a similar path to that carved by NAFTA, the WTO, and the U.S.-Korea Trade and Globalization Agreement, it would be a tragic missed opportunity to strengthen our economy, reduce income inequality, and promote sustainable growth. The United States cannot afford another trade agreement that hollows out our manufacturing base and adds to our substantial trade deficit.

Unfortunately, it appears global firms that use the United States as a flag of convenience are once again substituting their interests for the national interest in TPP negotiations. Such firms seek to increase profits by pitting countries against one another in the quest to attract foreign investment by reducing labor, environmental, and other social costs. This is fundamentally at odds with the economic interests of the United States and its citizens, and in many cases also at odds with the interests of our trading partners, who seek rising living standards in their own countries.

The disproportionate voice of global corporations in the formation of U.S. trade and globalization policy has advanced deregulation, privatization, tax and other preferences for businesses, weakened worker bargaining power, and led to a dwindling social safety net. The results are clear: massive trade deficits, lost jobs, rising inequality, falling wages, and weakened democratic governance.¹

Neither the USTR nor other federal agencies have *performed and published comprehensive economic evaluations* of the likely impacts of the TPP. As with prior trade agreements, this seems poised to happen only after the text is set in stone—too late to make changes to improve outcomes for workers. If America’s workers only learn of the TPP’s probable harm to particular industries and their employees or likelihood to increase our trade deficit after negotiations are complete, they miss opportunities to act to secure better outcomes. In addition, this failure to *perform and disseminate a comprehensive (and unbiased) economic analysis before negotiations conclude* leaves USTR (and the working families whose interests it is supposed to represent) at a disadvantage in negotiations. It is unclear how any trade agreement negotiated under this closed system can ever really maximize job creation or prevent permanent harm to workers.

Unfortunately, USTR’s approach, largely based on the neoclassical theory of comparative advantage, specialization, and mutual gains from trade, relies on a set of assumptions that do not accurately describe today’s global trading system (if indeed they ever did). In the 1990s, Ralph Gomory and William Baumol demonstrated how adversarial relationships, economies of scale,

¹ For more information, see Robert E. Scott, “The China Trade Toll: Widespread Wage Suppression, 2 Million Jobs Lost in the U.S.,” EPI Working Paper, July 30, 2008 (wage suppression); Robert E. Scott, “The China Toll: Growing U.S. Trade Deficit with China Cost More than 2.7 Million Jobs between 2001 and 2011, with Job Losses in Every State,” EPI Briefing Paper #345, Aug. 23, 2012 (deficit and job loss); Mariama Williams, “Challenges Posed by BITs to Developing Countries,” in South Views No. 49, Dec. 11, 2012, and “Dangerous Weapons: How International Investment Rules Undermine Social and Environmental Justice,” Network for Justice in Global Investment, Aug. 20, 2012 (weakened democratic governance).

technological innovation, foreign direct investment, and indeed, even government policy undermine the predicted Ricardian outcome of mutual gains from trade.² Under today's globalized system, there are winners and losers, instead of winners and winners. It is the workers in the U.S. and in many of our trading partners who have been the losers—especially in the most recent decade, while global capital has taken an ever increasing share of the world's wealth.

America's workers have seen nearly 700,000 jobs displaced by growing trade deficits with our NAFTA partners and 2.7 million jobs (2.1 million in manufacturing alone) displaced due to trade with China since its accession to the WTO.³ High and rising trade deficits sap our nation's economic strength, are a significant drag on economic growth and job creation, and have turned the U.S. into the world's largest debtor nation. The most recent example of this trend is the U.S.-Korea Trade and Globalization Agreement: in just its first year in force, the bilateral U.S. trade deficit with South Korea increased by \$5.8 billion, or nearly 40%, costing U.S. workers about 40,000 jobs at a time when we sorely need them.⁴

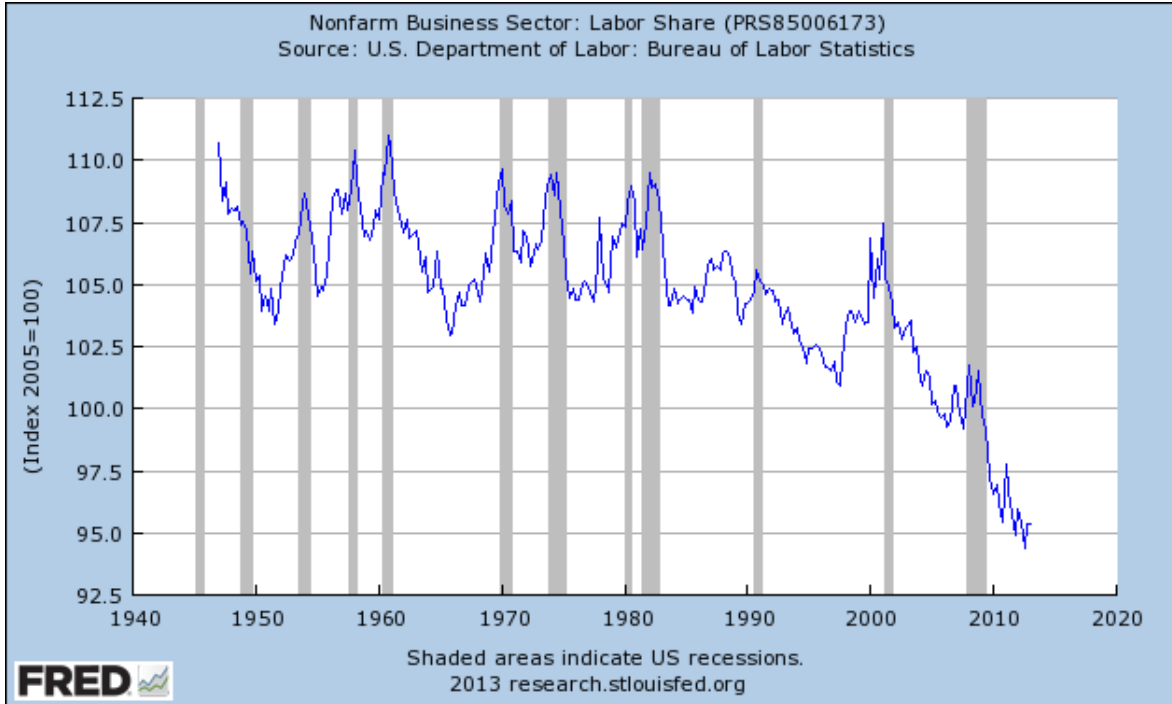
Meanwhile, workers in the territories of trade agreement partners Colombia, Guatemala, Honduras, Mexico, Bahrain, and Jordan, among others, have experienced varying levels of labor repression, including in some cases the detention, persecution, and murder of union and human rights activists. This repression has kept workers from sharing fairly in any gains from trade—and has seen global corporations keeping larger and larger shares of the gains from our trade agreements.

² See, e.g., Ralph E. Gomory and William J. Baumol, *Global Trade and Conflicting National Interests*, Massachusetts Institute of Technology, 2000.

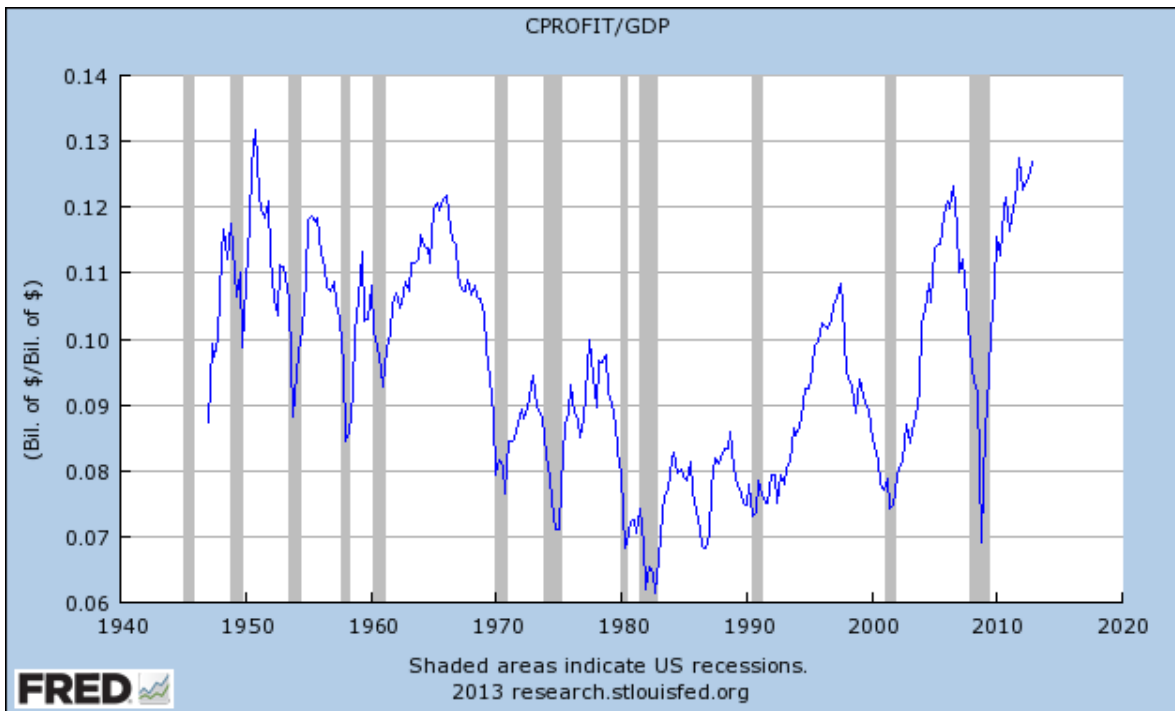
³ See Scott, *supra* note 1.

⁴ Robert E. Scott, "NO JOBS FROM TRADE PACTS: The Trans-Pacific Partnership Could Be Much Worse than the Over-Hyped Korea Deal," EPI Issue Brief #369, Economic Policy Institute, Jul. 18, 2013, available at: <http://www.epi.org/publication/trade-pacts-korus-trans-pacific-partnership/>.

U.S. workers' share of national income is at its lowest level since the 1940s and is plunging:



On the other hand, the share of corporate profits has reached its highest level since 1952:



Source: FRED Graphs/St. Louis Federal Reserve Bank, available at <https://research.stlouisfed.org/fred2/>.

To serve as a net benefit for any but the 1%, the TPP must change course—more of the same will only promote the status quo, which is unacceptable.⁵ The AFL-CIO has commented numerous times on the shortcomings of past trade agreements and the need for specific, achievable changes that would help U.S. workers and producers who are competing in a global marketplace. I will not reiterate all of our specific concerns here, but suffice it to say that past agreements have failed to address our concerns regarding jobs, investment, services (including public and financial services), government procurement, currency, intellectual property protection, worker rights, environmental safeguards, food and product safety, rules of origin, and other issues important to working families.⁶

Without addressing the still-secret text of the TPP, I will discuss a few of our concerns and recommendations with regard to some of the most pressing topics of the agreement.

LABOR

It is imperative that the USTR address economic justice and the societal infrastructure that can promote it, not as an adjunct goal, but as a central part of its trade and economic development efforts. Freedom of association and the existence of free civil society organizations, including trade unions, are essential to a democracy. These institutions provide a venue for ordinary citizens to raise their voices collectively, claim their rights, advocate for policies that serve their constituents and the broader public interest, and hold government accountable. As large membership-based institutions advocating for social and economic justice

⁵ See, e.g., Jacob S. Hacker and Nate Loewentheil, “Prosperity Economics: Building an Economy for All,” 2012, available at: <http://www.prosperityforamerica.org/wp-content/uploads/2012/09/prosperity-for-all.pdf>.

⁶ For a more comprehensive discussion of the AFL-CIO’s specific suggestions for the TPP, please refer to the AFL-CIO’s Testimony Regarding the Proposed United States-Trans-Pacific Partnership Trade Agreement, submitted to the USTR, January 25, 2010.

for workers and citizens, independent trade unions are among the most important of these institutions.⁷

To achieve these goals, the AFL-CIO recommends that the TPP build upon the changes achieved in the U.S.-Peru Trade and Globalization Agreement in 2007 (also known as the “May 10” provisions). In other words, the labor provisions in the TPP must be stronger than those achieved in any prior agreement. The USTR should fulfill the promise that the “May 10” provisions will serve as a floor, not a ceiling, on labor rights. These provisions represented an important step forward for labor rights, but did not contain all of the essential elements of an effective labor chapter.

The AFL-CIO, in conjunction with our counterparts from the majority of TPP countries, developed and submitted to the USTR and its counterparts a “New Model Labor and Dispute Resolution Chapter for the Asia Pacific Region,” which spells out in detail the recommended text for the labor chapter. Beyond reference to the ILO core conventions and the elimination of Footnote 2 from the Peru text⁸ to clarify that ILO jurisprudence will help give meaning to each party’s labor rights obligations, the AFL-CIO has several additional recommendations.

The labor provisions should also apply in the broadest context possible: limiting consultation and redress solely to violations in which there is a “persistent pattern of failure” in a “trade-related sector,” as is the case in NAFTA, excludes too many workers from coverage. Not only do these limitations make it exceedingly difficult to effectively pressure recalcitrant governments to do the right thing and protect their own workers—they allow governments to manipulate and depress their entire labor market through failure to enforce labor laws or defend

⁷ The interaction with the Investment Chapter here is clear: foreign investors must not be able to use the ISDS process to challenge improvements in labor laws or increased social protections.

⁸ U.S.-Peru Trade and Globalization Agreement, Art. 17.2, available at: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file73_9496.pdf.

labor rights in sectors deemed not trade-related (e.g. the public sector). Such purposeful manipulation of the entire labor market could have massive trade-distorting effects and yet be out of reach under the current rules.

In addition, the TPP should include enforceable standards for acceptable conditions of work, the right to strike, and the treatment of migrant workers. Given the labor mobility among the TPP countries, and the protections for migrant labor in the NAFTA side agreement known as NAALC (despite the weakness of the NAALC), omission of protections for migrant labor in the TPP would be a mistake with the potential to exacerbate the tendency of bad-actor employers to abuse, threaten, and take advantage of migrant workers to the detriment of native and migrant workers alike.

The labor chapter's enforcement mechanism must be timely, accessible, and reliable. The TPP's labor provisions must ensure that meritorious petitions proceed in a timely manner to the next step of the process until they are resolved (including through dispute settlement if necessary). Workers' livelihoods depend on swift justice. Should countries fail to resolve their differences during the consultation stage and proceed to the dispute settlement stage, the process must be at least as strong and swift as that available to business interests, and penalties should, where possible, be directly related to the sectors in which violations occur (in order to leverage political power of employers who fear loss of trade benefits) and high enough to encourage parties to engage seriously at the initial stages. Token fines unrelated to the economic sectors where the violations occur will do little to encourage private sector compliance or deter future violations.

Given that failure to uphold internationally recognized worker rights acts as a hidden subsidy for imported goods and services, the AFL-CIO is disappointed that more U.S.-based producers have not joined the call for stronger labor standards in trade agreements.⁹

STATE-OWNED ENTERPRISES

The potential disciplines that will cover State-Owned, State-Controlled, and State-Influenced Enterprises (collectively, SOEs) represent, perhaps, the most important area for new disciplines in the TPP which could (if done right) have a beneficial impact on U.S. jobs. Unlike in the U.S., SOEs are common in Vietnam, Malaysia, and Singapore. Moreover, given the interest expressed by both U.S. and Chinese officials in China's participation in the TPP, SOEs are of increasing concern for U.S. workers. The AFL-CIO does not oppose SOEs and does not seek to privatize them. However, given America's lack of a comprehensive manufacturing strategy or adequate governmental support for manufacturing, without strict disciplines on anti-competitive behavior by SOEs, U.S. workers and producers remain at risk from those entities. The U.S. cannot afford to get disciplines in this area wrong.¹⁰

An SOE can be a threat to the U.S. economy when it "competes" in the commercial arena with a subsidies unavailable to U.S. producers. These subsidies can range from raw materials or other inputs at below-market rates to access to preferential debt and equity financing, including soft "loans" from state-owned banks that do not need to be repaid.

Many SOEs consistently operate in a manner that gains them market share—rather than profits—and they do so with the advantage of these government subsidies. A private enterprise

⁹ We applaud producer organizations that have already done so. *See, e.g.*, "21st Century Trade Agreement Principles," Coalition for a Prosperous America, available at: http://action.prosperousamerica.org/p/salsa/web/common/public/content?content_item_KEY=10077.

¹⁰ This is true as regards our so-called "defensive interests" as well: the disciplines on SOEs must not put at risk U.S. entities that could be considered SOEs, whether at the local, state, or federal level, no matter which public service they engage in, from power generation (e.g., the Tennessee Valley Authority), to public transportation (e.g., Amtrak), to education (e.g., the University of California).

would not long remain in business if it failed to respond to the market, but, because they are propped up by state resources, SOEs not only can, but do. Even when they lose money by selling goods at below-market prices, they have forced U.S. competitors out of business, gaining market share that can be exploited later when the competition has been thinned.

I will concentrate my remarks on SOE activities here in the U.S. From the workers' perspective, the location of an employer's corporate headquarters is increasingly unimportant. There are good and bad employers no matter where they are headquartered. The critical question for workers is the behavior of the employer.

If the U.S. imports a subsidized product from an SOE that injures a company and its workers, we have existing trade remedies (such as countervailing duties) to address the impact. But if that SOE instead becomes a foreign investor in the U.S. and produces a product at a cost far below that of an existing U.S. firm because of the subsidized inputs, there is no existing remedy in U.S. law to address that harmful activity. In addition, in certain circumstances, an SOE producing in the U.S. might have standing under our trade laws to challenge an action by a domestic producer against unfairly traded products from overseas. The TPP must seek to address these shortcomings.

Several Chinese entities have already entered into or announced transactions that could pose problems for U.S. producers and their employees. Tianjin Pipe, a Chinese SOE, has broken ground on a \$1 billion seamless pipe facility in Texas—its products will be used to transport oil and gas, a thriving business given the shale oil boom. However, as an SOE, it is likely that Tianjin has received from the Chinese national or sub-national governments a variety of benefits unavailable to its U.S.-based private sector competitors, including low-cost or no-cost capital, favorable regulatory and tax treatment, and inputs at below-market rates.

If Tianjin were exporting to the U.S., such preferential treatment—if proved—could be addressed through anti-dumping and countervailing duty laws, but such laws do not apply to goods made in the U.S. by foreign investors, which leaves injured U.S. competitors at a disadvantage. Moreover, if any SOE’s goal in investing in the U.S. is to drive U.S. competitors out of business through predatory behavior, the long-term effects on the U.S. economy and its workers could be devastating. The result will be fewer jobs and lower wages as firms are driven out of business and higher prices as competition is reduced. In addition to commitments within the TPP itself, the AFL-CIO has also recommended an update to domestic laws to ensure that an effective remedy is readily available to the private sector to fight for its interests when SOE behavior on U.S. soil injures U.S. businesses and their employees. We have also recommended increased transparency and the creation of a rebuttable presumption that an SOE is acting on its home country’s behalf, not the interests of our workers, if it seeks to block action to protect an injured party in the U.S. This particular chapter faces strong resistance by TPP partner countries—and whether it will result in strict disciplines that benefit non-subsidized U.S. producers and workers remains in doubt.

Finally, the AFL-CIO recommends that Congress consider whether the existing screening mechanism for FDI is adequate to the task. The existing mechanism through which foreign investments are screened is the interagency Committee on Foreign Investment in the United States (CFIUS). Though CFIUS rarely makes the news, the few times that it does make it appear that CFIUS is constantly busy blocking foreign investment into the U.S. Nothing could be further from the truth. On the contrary, CFIUS’s charge is quite limited: it reviews mergers and acquisitions (as opposed to “brand new” investments, known as “greenfield” investments), and it assesses threats to national security (as opposed to economic security).

In its 2012 Report to Congress, the U.S.-China Economic and Security Review

Commission (the Commission) recommended, among other things, that:

Congress examine foreign direct investment from China to the United States and assess whether there is a need to amend the underlying statute (50 U.S.C. app 2170) for the Committee on Foreign Investment in the United States (CFIUS) to (1) require a mandatory review of all controlling transactions by Chinese state-owned and state-controlled companies investing in the United States; (2) add a new economic benefit test to the existing national security test that CFIUS administers; and (3) prohibit investment in a U.S. industry by a foreign company whose government prohibits foreign investment in that same industry. (p. 23)

The AFL-CIO strongly supports these and other recommendations in the Commission's report.¹¹ While we welcome foreign investment, we do not believe the current mandate of CFIUS adequately secures the economic interests of U.S. workers or the firms that employ them. Inclusion of these and related recommendations within the scope of the study could provide Congress with relevant and timely advice as more SOEs invest in the U.S.

RULES OF ORIGIN

The TPP must include strong rules of origin that will target benefits to the parties to the agreement (particularly, of course, the United States)—rather than weak rules of origin that will allow non-parties, who have made no reciprocal obligations to the U.S., to reap the rewards. Our primary goal must be to expand employment opportunities here in America.

It is critical that the rules of origin are carefully crafted to promote production within the participating parties, which have each made commitments to each other. Low standards for “regional value content” will allow non-parties (such as China) to reap great benefits from the

¹¹ It is important to note that the AFL-CIO is concerned with the question of how particular investments will help create or hinder sustained economic growth—not with the country from which they originate. The AFL-CIO urges Congress to consider the Commission's recommendations to expand CFIUS with respect to foreign investors *of any national origin*. An expanded review CFIUS review that considers America's economic security would be most helpful if it focused on job and economic impacts—not simply on the geographic source of the investment.

TPP.¹² Potential tariff benefits combined with strong rules of origin can tip the scale on a decision to build a new plant or keep a plant open in the U.S. or in a TPP country. On the other hand, a weak rule of origin gives producers a free pass to locate in a non-TPP country, knowing that only a token percentage of the value of the product, or a token transformation of a product from one tariff line to another, will be required to occur within a TPP country in order to reap the tariff benefits of the deal without having to subscribe to the other disciplines and provisions of an agreement. Because America's workers bear the brunt of decisions to produce elsewhere, we cannot emphasize strongly enough the importance of strong rules of origin that promote production within the TPP.

Moreover, in a trade agreement which is designed to grow in membership, and has no maximum number of contracting countries, the proposed rules of origin must be designed to accommodate these potential changes. The rules of origin must take into account the promotion of domestic job growth in the U.S., not just for today or tomorrow, but for the next decade and into the future. Rules of origin that respond more to the corporate needs of today (looking forward only to next quarter's stock prices) than to the long-term needs of America's domestic economy and the workers who make it run will not achieve the domestic economic growth we need.

A decision based on a simple calculation of where a product is currently produced does nothing to provide the right incentives to locate production within the TPP in the future. Our goal must be to maintain and then reclaim supply chains that have outsourced and offshored U.S. production and jobs. Simply cementing in place the status quo is not good enough. Given that the TPP model is designed to include an ever-growing list of countries, these rules of origin

¹² An example of such a low RVC is the 35% standard for automobiles contained in the U.S.-Korea Trade and Globalization Agreement.

should be designed to increase as the number of parties increases. Like NAFTA's rule of origin on automobiles, some should be designed to become more stringent over time, promoting growth of production within the agreement, rather than incentivizing choices to maximize production elsewhere.

Without such a forward-thinking structure, the current trend of factory closures and depressed job growth is likely to continue. America's workers continue to wait to see if these recommendations will be included in the TPP.

INVESTMENT RULES

Too often U.S. trade policy assumes all foreign investment is good, and promotes it for its own sake rather than on the basis of its effects on employment, wages, and standards of living either here or abroad. Past U.S. trade and globalization agreements, such as the U.S.-Korea Trade and Globalization Agreement, have protected broader concepts of property than would apply under U.S. takings law, have given wider latitude for determining whether an "indirect expropriation" has occurred, and have included the obligation to provide "fair and equitable treatment" as part of a "minimum standard of treatment" that foreign investors can claim a right to receive—but which domestic investors have no claim to. This minimum standard of treatment—an obligation whose scope is determined by reference to "customary international law"—provides no fixed obligation.¹³ Together, these provisions grant foreign investors with enhanced opportunities to seek compensation from the public purse for a variety of real or perceived injuries.^{14, 15}

¹³ Customary international law, like common law, can develop over time. However, due to use of arbitrators (who may cycle between acting as advocates and acting as neutrals) rather than judges and the lack of binding precedent in investment cases, bad arbitral decisions (e.g., decisions which expand the concept of customary international by taking inappropriate factors into account) can improperly expand the obligation a nation may owe as part of the minimum standard of treatment.

¹⁴ For example, investors have claimed that a state ban on a toxic gasoline additive constituted an indirect expropriation. Methanex Corp. v. U.S. <<http://www.state.gov/s/l/c5818.htm>>.

The investor-to-state dispute settlement mechanism (“ISDS”) is particularly troublesome and should not be included in the TPP.¹⁶ ISDS allows foreign investors to bypass domestic courts and challenge a government directly before an international arbitration panel.¹⁷ The right to bypass the judicial system is a right domestic investors do not have. The system allows foreign investors to bypass U.S. Article III courts and have their claims heard in an undemocratic, unaccountable forum.

Not only is the forum different, but so is the standard of review. Using the U.S. as an example, ordinary considerations, including the possibility of sovereign immunity and the “rational basis” standard, need not apply—nor is a panel required to consider whether the good of the public should outweigh the private right to make a profit. Instead, the panel considers whether the defendant nation violated its obligations to the foreign investor under the trade agreement in question—obligations that are decidedly one way, given that the investor makes no reciprocal promises to the defending nation or its people.

Since the principle of *stare decisis* does not govern investment panels, a foreign investor is always free to pursue a failed but potentially lucrative challenge, and a subsequent panel is free to rule favorably.¹⁸ Moreover, past U.S. investment provisions have excluded minimal constraints, such as exhaustion of domestic remedies, a standing appellate mechanism, or a diplomatic screen, each of which could act to limit abuse of this private right of action.

¹⁵ Even the very labor standards the U.S. fights for in its current trade model are not definitively exempt from an investor challenge should a foreign investor decide that a particular provision for the benefit of workers denies him or her fair and equitable treatment or goes too far in interfering with an assumption of risk or expectation of profit. Congress should protect labor and workplace laws from investor challenges in the TPP and all future agreements.

¹⁶ USTR has already committed to including ISDS in the TPP. <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>.

¹⁷ U.S.-Peru Trade and Globalization Agreement, Chapter 10 (available at: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file78_9547.pdf).

¹⁸ Of course, the lack of *stare decisis* may cut in the opposite direction as well because it can result in a decision favoring government action even where a prior panel found for a private party. In the long run, however, the lack of binding precedent is likely to generate more challenges, greater costs to the public, less certainly for policymakers, and a stronger chilling effect against measures similar to those which attracted prior challenges.

Perhaps the most telling fact about the benefits of ISDS is that they *only* apply to investors. This special privilege to sue a national government in an international arbitration forum is denied to labor and human rights groups pursuing enforcement of the labor chapter, as well as to environmental advocacy groups seeking redress for a violation of environmental obligations. No credible legal or philosophical argument has ever been offered to explain this differential treatment of property rights and labor rights.

These investment provisions may provide U.S. producers an incentive to invest offshore (compounding the incentive provided by U.S. tax treatment of foreign income). Of course, lower wages, safety standards, and environmental regulations can provide incentives of their own, but businesses are surely also aware of the power of the mere threat of an ISDS arbitration to stop new policies from being implemented. Such threats may be particularly effective in developing nations whose legal resources can be dwarfed by those of a large global corporation.¹⁹ Unfortunately for developing countries, the evidence is mixed on whether there is even a correlation—much less a causal relation—between ISDS and attracting foreign direct investment and whether such foreign investment has had the desired development effects.²⁰

¹⁹ For more information on the increasing use of the ISDS mechanism, see the May 2013 UNCTAD IIA Issues Note, “Recent Developments in Investor-State Dispute Settlement (ISDS),” which reported that a new record for the number of ISDS cases filed was set in 2012, with at least 58 new cases—this is the highest number of known treaty-based disputes ever filed in one year (not all filings are public, so the real number is likely far higher). More information available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf.

²⁰ See, e.g., Foreign Investment and Sustainable Development: Lessons from the Americas (Kevin P. Gallagher, Roberto Porzecanski, Andrés López, and Lyuba Zarsky, eds., 2008) and Axel Berger et al., “Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box,” Staff Working Paper ERSD-2010-13, World Trade Organization, Economic Research and Statistics Division, Sep. 2010, available at: http://www.wto.org/english/res_e/reser_e/ersd201013_e.pdf.

GOVERNMENT PROCUREMENT/BUY AMERICAN/DOMESTIC ECONOMIC POLICY

The TPP must not surrender or limit the application of domestic economic development, national security, environmental protection, or social justice policies, including policies related to Buy America/Buy American.

The AFL-CIO has long maintained that trade agreements should not constrain federal and sub-federal procurement rules that serve important public policy aims such as local economic development and job creation, environmental protection and social justice—including respect for human and workers’ rights. Maintaining this policy space is not an academic issue. In 2008, procurement policy became part of the debate over the American Recovery and Reinvestment Act, the largest domestic economic stimulus program since the Great Depression. Even after the U.S. reiterated its intention to fully adhere to its procurement obligations under the WTO Agreement on Government Procurement and various additional trade and globalization agreements, foreign firms were not satisfied that they had sufficient access to U.S. federally-funded projects. USTR must be more responsive to America’s working families than it is to the complaints of enterprises that do not operate in the U.S.

After the current record-slow recovery ends, Congress and the Administration should carefully consider the diminished impact of fiscal stimulus caused by procurement commitments (which decrease the ability of lawmakers to direct funds toward domestic job creation) and carve out from its TPP commitments all procurement projects funded by stimulus funds appropriated in response to a verified recession.

While access to foreign procurement does create opportunities for U.S. firms, some of which *may* support jobs in the United States, the question remains open whether the jobs potentially lost to opening U.S. procurement to foreign bidders are greater than the jobs

potentially gained by U.S. firms' access to foreign procurement markets. Also important are the kinds of jobs at stake. The AFL-CIO has repeatedly asked the USTR to provide figures for jobs created and lost due to prior procurement commitments, but has yet to receive a response.

Additionally, the AFL-CIO still has concerns left unaddressed by the May 10, 2007 compromise. For many years, the AFL-CIO has raised concerns about technical specifications in procurement chapters. The procurement chapter of the U.S.-Peru Trade and Globalization Agreement took a good step forward by providing that a procuring entity is not precluded from preparing, adopting, or applying technical specifications:

- (b) to require a supplier to comply with generally applicable laws regarding
 - (i) fundamental principles and rights at work; and
 - (ii) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health

However, to promote good jobs, the TPP should expand the language above to include living wage laws and, for the sake of clarity, prevailing wage laws. It must also leave room for the bidding process for non-discriminatory but potentially innovative policies such as providing a better score for employers with better on-the-job safety records or excluding bidders that do not have "clean hands" (e.g., firms that have failed to pay taxes, have outstanding unfair labor practice charges, OSHA violations, or outstanding violations of other national, state, or local laws).

Finally, but importantly, the AFL-CIO expects that no sub-federal entities will be bound to the procurement provisions of the TPP without their express consent and that none of the exemptions or exceptions taken from obligations undertaken in the WTO GPA will be deleted or altered in any manner (e.g., highway and transit projects). We ask for Congress's support in ensuring that each country's ability to stimulate its own economy is not ceded to global corporations as part of the TPP.

APPROPRIATE TRADING PARTNERS

The AFL-CIO believes that Congress should carefully consider the choice of partners for any trade and globalization agreement. In choosing partners, Congress should analyze not only the likely commercial effects of reduced tariffs, increased investor rights, and the like, but also consider the human and labor rights conditions prevailing in the territory of the proposed partner. Congress should not cede these choices to USTR.

With regard to human rights (including labor rights), due to existing commitments, the U.S. has already lost the use, in certain circumstances, of important economic tools to address these goals. The AFL-CIO does not support further limits on our ability to exert carefully crafted economic, rather than military pressure, to address nations that engage in egregious human rights violations. That is why we believe that the TPP must not allow “any willing partner” to join.

Instead, the U.S. government should negotiate a democracy clause in the TPP. Linking market access and democracy is not without precedent in regional economic agreements. For example, the members of the Southern Cone Common Market (MERCOSUR), which includes Brazil, Argentina, Uruguay, and Paraguay, signed onto the Ushuaia Protocol on Democratic Commitment in the Southern Common Market in 1998.²¹ In the event of a “breakdown of democracy” in any of the member states, Article 5 of the Protocol allows that the other state parties may apply measures that range from suspension of the right of the offending nation to participate in various bodies to the suspension of the party’s rights and obligations under the Treaty of Asuncion (the MERCOSUR foundational agreement). We have also seen that economic engagement in the form of a trade agreement does not necessarily yield democratic

²¹ Text of the Protocol is available online at http://untreaty.un.org/unts/144078_158780/20/3/9923.pdf. Associate Mercosur members Chile and Bolivia also signed onto the Protocol in 1998.

reform and respect for human rights. The Dominican Republic-Central American Free Trade Agreement (DR-CAFTA) provides a tragic example, with violent repression of union and other human rights advocates increasing since implementation. The U.S. government has already accepted submissions under the labor chapter regarding violations in Guatemala, Honduras, and the Dominican Republic.

With respect to Vietnam, though we welcome cooperative efforts to further empower Vietnamese workers—who are already engaging in wildcat strikes to better their wages and working conditions when existing mechanisms fail them—the AFL-CIO is still unclear how Vietnam will meet anything close to minimum acceptable labor standards upon implementation of the agreement should the agreement conclude this year. We fear that Vietnam will go the route of Colombia, with the imposition of a Labor Action Plan that lacks measurable benchmarks for progress and fails to require sustained action or thorough implementation. Such a cursory approach would benefit neither the workers of the U.S. or those of Vietnam—and would likely encourage the transfer of U.S. jobs to Vietnam, where unscrupulous employers would take advantage of inadequate laws to abuse workers' rights.

With respect to Japan, our concerns are commercial in nature. In 2012, the U.S. had a \$76.3 billion deficit in trade in goods with Japan,²² nearly 70% of it in the auto sector. The AFL-CIO deeply appreciates the efforts that USTR has made thus far to secure important commitments from Japan that will benefit America's workers, communities, and businesses, but our experience gives us little faith that these commitments will be completely implemented or effectively enforced. Therefore, the AFL-CIO is concerned that including Japan in the TPP

²² United States Census Bureau, Trade in Goods with Japan, available at: <http://www.census.gov/foreign-trade/balance/c5880.html>.

would adversely impact America's workers and U.S. domestic production, particularly in the auto sector.

Moreover, a number of critical issues were excluded from the deal announced in April, including concrete commitments on currency, auto parts, and labor rights. Japanese automakers manufacturing in the United States have persistently denied their workers a fair and democratic opportunity to decide on union representation. We believe securing additional commitments in these areas is essential.

USTR has failed so far to answer important questions about reciprocal market access, rules of origin for autos and auto parts, currency provisions, tariff reduction schedules for autos and auto parts, snap-back tariffs, and the like.

To combat likely harms to U.S. workers from a status quo approach to Japan's entry into the TPP, any future reduction in U.S. tariffs on Japanese imports must be tied to an actual, verifiable opening of the Japanese auto market and a substantial reduction in our bilateral auto trade deficit with Japan. In recognition of the dramatic risk involved in a premature phase-out of U.S. tariffs, USTR has already worked to secure an agreement that auto tariffs will be phased out in accordance with the longest staging period of any other product in the TPP. However, as previously noted, auto parts were not included in the initial agreement with Japan and the length of the phase out period has not yet been made public. Any tariff phase-out must be coupled with significant reforms and established penetration levels into the Japanese marketplace before any such phase out schedule begins. The inclusion of Japan in the TPP puts the recently renewed U.S. auto industry (an export leader) and its workers at grave risk.²³

²³ For a comprehensive list of provisions essential to creating the foundation for fair and open trade between the U.S. and Japan in automotive goods, please see the UAW statement on Japan's inclusion in the Trans-Pacific Partnership (TPP), Apr. 12, 2013, available at: <http://uaw.org/articles/uaw-statement-japan%E2%80%99s-inclusion-trans-pacific-partnership-tpp>.

INTELLECTUAL PROPERTY RIGHTS & ACCESS TO MEDICINES

Intellectual property (IP) protections—designed to promote innovation and serve the public interest—are critical to creating and maintaining domestic jobs, as well as to increasing exports. The U.S. economy produces many products for which IP is critical, from movies, television shows, sound recordings, and documentary productions to fiber optics, specialty steel, medicines, and countless other products.

In particular, the creative arts economy is a significant contributor to economic growth, the gross domestic product of our nation, and our rich cultural heritage. When we promote and protect the unique and original artistic and cultural contributions of America's artists and entertainers, we help these artists and entertainers to prosper. The IP provisions of past U.S. trade and globalization agreements have not effectively deterred rampant counterfeiting or online sites that profit from digital IP theft, a failure that resulted in lost jobs and reduced incomes for many workers. The AFL-CIO supports efforts by Congress and the Administration to address IP theft that jeopardizes worker incomes.

To effectively promote U.S. jobs and standards of living, however, strong and effective IP protections must also secure *legitimate generic competition*—particularly in the area of medicines. Rules that prevent fair competition from generic producers not only fail to create as many jobs as they might, they also jeopardize public health both here and abroad, by ensuring that life-saving medicines are priced out of reach of many working people—in the U.S. and elsewhere.

Past U.S. trade and globalization agreements have provided excessive protections for the producers of brand-name pharmaceuticals. Indeed, these agreements far exceeded the international standards for patent protection established in the WTO Agreement on Trade-

Related Aspects of Intellectual Property Rights (TRIPS). The AFL-CIO opposes TRIPS “plus” provisions because they jeopardize access to affordable medicines, particularly in developing countries.

The May 10, 2007 compromise took a significant step forward in cutting back the most onerous requirements for the IP protection of pharmaceuticals in U.S. trade and globalization agreements. However, harmful language on data exclusivity remains in the Peru Trade and Globalization Agreement.²⁴

Data exclusivity precludes use of clinical trial data of an originator company by a drug regulatory authority, even to establish marketing approval, normally for a defined period (five years in past U.S. trade and globalization agreements). As a result, a generic producer cannot secure pre-approval for a generic version of a patented medicine until after the data exclusivity period has expired (unless that producer runs its own tests—a costly and ethically dubious proposition). This limitation can delay legitimate generic drugs from reaching consumers in a timely fashion.

Data exclusivity can thus impose unnecessary costs—in financial and human health terms—on public health systems, which could be forced to purchase brand-name pharmaceuticals at elevated prices when cheaper generic medicines would otherwise be available but for the trade agreement. For example, a 2007 study by Oxfam found that the IP provisions of the U.S.-Jordan Trade and Globalization Agreement, especially the data exclusivity provisions, prevented generic competition for 79 percent of medicines launched by 21 multinational pharmaceutical companies in the first five years the agreement was in effect. Further, the study found that medicine prices in Jordan rose 20 percent, costing the government between \$6.3 and

²⁴ The data exclusivity provisions are found in Article 16.10, sub-sections 2 (b) and (c) of the Peru Trade and Globalization Agreement.

\$22 million in additional expenditures for medicines with no generic competitor as a result of enforcement of data exclusivity.²⁵

Despite progress in the U.S.-Peru Trade and Globalization Agreement to roll back TRIPS-plus requirements, U.S. trade policy has since taken a turn for the worse with regard to access to affordable medicines.

For example, the AFL-CIO opposes efforts (such as those included in the U.S.-Korea Trade and Globalization Agreement) to increase the power and influence of private sector drugmakers over the pricing decisions of public health systems and pharmaceutical benefit plans. The TPP must not include such provisions. Instead, it must not only protect current government-supported health care programs in the U.S. (including but not limited to Medicaid, Medicare, the Veterans Health Administration, and Community Health Centers) and abroad, but also ensure that countries retain the policy space to expand and improve such programs.

Further, the U.S.-Korea Trade and Globalization Agreement requires patent term extensions for new methods of use and manufacture of a pharmaceutical product.²⁶ It also effectively eliminates “pre-grant opposition,”²⁷ which allows the validity of a pharmaceutical patent to be challenged *before* a patent is granted, a process which makes it cheaper and quicker to dispose of bad patent applications than *after* a patent has been granted to an undeserving application. These provisions should not be repeated in the TPP because they further delay

²⁵ “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>.

²⁶ U.S.-Korea Trade and Globalization Agreement, Art. 18.8.6 (b), available at: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file273_12717.pdf.

²⁷ *Id.*, Art. 18.8.4.

legitimate generic competition that plays a role in increasing access to medicines for working families.²⁸

The AFL-CIO strongly supports governmental efforts to control costs of medicines so as to be able to provide affordable medicines to the public.

CONCLUSION

USTR and its partners must embark on economic development policies that explicitly address the creation of good jobs, the development of a thriving middle class, and respect for domestic policy space. Such an approach would require abandonment of the status quo. It would also require the cooperation of global corporations, many of which are used to using their leverage to play off one nation against the other in a race to the bottom in wages, benefits, social protection strategies, conservation, and public health and safety measures. The AFL-CIO cannot emphasize strongly enough that, for a trade agreement to benefit workers here and abroad, it must prioritize fundamental labor rights, the creation of high wage, high benefit jobs, and balanced and sustainable trade flows. When workers can exercise their fundamental rights, as well as have a secure and hopeful future and sufficient incomes, their demand will help businesses and the global economy grow in a sustainable way.

²⁸ For additional information, see Ruth Lopert and Deborah Gleeson, “The High Price of “Free” Trade: U.S. Trade Agreements and Access to Medicines,” *The Journal of Law, Medicine & Ethics*, Vol. 41, Iss. 1, Apr. 12, 2013, available at: <http://onlineibrary.wiley.com/doi/10.1111/jlme.12014/pdf>.