USMCA Basics: NAFTA 1.0 versus NAFTA 2.0

1994 NAFTA

NON-AGRICULTURAL TRADE: All tariffs and quotas are eliminated.

AGRICULTURAL TRADE: All U.S.-Mexico agricultural trade is duty free, as is most between the U.S. and Canada. A $2.5 billion U.S. agricultural trade surplus Canada and Mexico before NAFTA reversed to a $9 billion deficit in 2018. Nearly 250,000 small- to medium-scale farmers have been driven out of business since the original NAFTA went into effect.

LABOR AND ENVIRONMENTAL STANDARDS: Side agreements covering these issues were added by President Clinton to the NAFTA deal President Bush signed in 1992. But the terms were vague and violations of the standards could only result in limited- amount fines being imposed against a government after a lengthy and circuitous process. Not a single labor or environmental claim ever resulted in fines. (The side agreements were not connected legally to the text of the agreement, and violations of the standards cannot result in trade sanctions or violating products being stopped at the border.) Conditions in Mexico did not improve. The core mission of any NAFTA replacement pact must be establishment of clear and enforceable labor and environmental standards to halt the race to the bottom in wages and standards and related job outsourcing. The continuing absence of independent labor unions in Mexico since NAFTA has contributed to real wages in Mexico being lower now than before NAFTA. Mexican manufacturing wages are 40% lower than in China. The lure of $2-4 per hour wages for skilled employees located close to the United States has led many U.S. companies to build high-tech modern factories in Mexico and shutter U.S. production. In addition, firms operating in Mexico avoid environmental compliance with mass toxics dumping polluting air and water. More than 970,000 U.S. jobs have been certified as lost to NAFTA under the Department of Labor’s Trade Adjustment (TAA) Assistance program. This is an undercount: TAA only accounts for jobs lost to NAFTA by workers who knew about the program, applied and met its narrow criteria. During NAFTA’s 25 years in force, the U.S. goods trade deficit with Canada of $31 billion and the $2.7 billion surplus with Mexico in 1993 (the year before NAFTA) turned into a combined NAFTA goods trade deficit of $215 billion in 2018.

NAFTA 2.0 Signed 11/30/18 aka USMCA

NON-AGRICULTURAL TRADE: Tariff and quota-free terms unchanged. Some rules-of-origin are higher, so goods with high non-NAFTA value cannot slip through. For autos/trucks, 40-45% of value must be made by workers paid on average $16. But this rules includes some high-wage salaried workers so auto firms’ supply chains likely already comply.

AGRICULTURAL TRADE: Additional duty-free access to Canada for dairy, eggs, poultry, and wine. Canada gets U.S. access for dairy, peanuts and sugar and good containing them. The International Trade Commission projects total ag gains at $450 million with vanishingly small (1,700) ag job benefits after over the full period of USMCA implementation U.S. 2018 NAFTA ag exports were $44 billion with $1.6 billion in dairy to Canada.

LABOR AND ENVIRONMENTAL STANDARDS: USMCA includes such standards in its core text, but some standards include loopholes that must be fixed if the terms are to be enforceable. The Environment Chapter does not refer to climate. USMCA eliminates NAFTA’s only environmental rule, which gave priority to multilateral environmental treaties if they conflicted with NAFTA. The Labor Chapter has a strong Mexico Labor Annex requiring “protection” union contracts be replaced with those approved by workers within four year. But USCMA has no labor- or environment-specific monitoring or enforcement provisions. Non-complying goods cannot be stopped at the border, which is how intellectual property rules are enforced. The Labor Advisory Committee (LAC) of U.S. unions raised “serious doubts that the improved rules will make a meaningful difference to North American working families without additional provisions…Enforced rules are not worth the paper they are written on.” Among labor standard problems LAC noted: “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).” Some labor standards extend beyond the protections included in past pacts with new terms on violence, migrant workers, and the right to strike. But, USCMA retains a core flaw of past pacts: Labor standards are defined by a vague 1988 International Labor Organization “Declaration of Fundamental Principles and Rights at Work” not the actual ILO Conventions and a footnote excluding reference to the Conventions is included. In May, Mexico passed labor law reform, but hundreds of court challenges were filed. Mexican courts issued injunctions against implementation, which is necessary to enact the Labor Annex, including establishment of impartial labor courts and an independent agency to administer conciliation and register collective bargaining agreements.

Additionally, a recently proposed Mexican Labor Department budget is insufficient to provide the necessary funds to stand up these new institutions.
JOB OUTSOURCING INCENTIVES:
NAFTA includes special rights for investors that eliminate many costs and risks of relocating to low-wage countries. The pro-NAFTA Cato Institute labels these terms an outsourcing subsidy. It includes minimum standards of treatment in Mexico and rights to get government compensation for violations of these rights.

WAIVER OF BUY AMERICAN
GOVERNMENT PROCUREMENT RULES:
NAFTA’s government procurement rules forbid preferences for domestic goods, effectively banning application to Mexico and Canada of Buy American terms. Plus, labor and green procurement standards are exposed to challenge. This increases government purchases of foreign goods rather than reinvestment of U.S. tax dollars to create jobs at home and ensures U.S. firms could relocate to Mexico and still be ensured lucrative U.S. government purchasing contracts.

ENFORCEMENT: NAFTA established a process for countries to challenge others’ NAFTA violations before five-person tribunals selected from a roster established under the pact. However, in this system a country can effectively block establishment of an enforcement tribunal. The process relies on disputing parties agreeing to appoint panelists for cases. Three cases were completed under this system. But no NAFTA enforcement action has occurred since 2000 after the U.S. refused to agree to panelists for a Mexican challenge of U.S. sugar-trade policy.

PATENT RULES AND MEDICINE PRICES:
NAFTA’s intellectual property rules expanded protections for drug firms beyond WTO requirements. But recent pacts, like the TPP, went far beyond NAFTA. When the U.S. left TPP, the other nations suspended these rules.

INVESTOR PROTECTIONS THAT SUBJECT U.S. TO COMPENSATION CLAIMS BY FOREIGN FIRMS: NAFTA’s Investor-State Dispute Resolution (ISDS) system grants rights to foreign corporations to bypass domestic courts and “sue” governments before tribunals of three corporate lawyers. The lawyers can award corporations unlimited sums to be paid by taxpayers, including for the loss of expected future profits, on claims that a domestic environmental law, safety rule or court ruling violates their NAFTA rights. Tribunal decisions are not subject to outside appeal. More than $392 million has been paid to corporations in a series of NAFTA ISDS cases against energy, zoning, water and timber policy, toxics bans, and more.

U.S. MUST IMPORT FOOD NOT MEETING U.S. SAFETY STANDARDS; HEALTH AND LAWS EXPOSED TO CHALLENGE: With respect to food safety and inspection, product safety, service sector consumer protections and more, NAFTA sets a ceiling but no floor with strong consumer and environmental standards subject to challenge as illegal trade barriers.

JOB OUTSOURCING INCENTIVES: The investor outsourcing subsidy features are eliminated.

WAIVER OF BUY AMERICAN
GOVERNMENT PROCUREMENT RULES:
The Buy American waiver is retained in USMCA. The exception is that certain purchases of the Transportation Security Administration were excluded from the ban on applying preferences for American-made goods. Language in U.S. trade pacts since 2007 designed to clarify that countries can use technical specifications for goods and services relating to environmental protection was added, but language pertaining to labor standards was weakened.

ENFORCEMENT: USMCA Chapter 31 replicates NAFTA’s enforcement tribunal regime. Thus, the prospect of “panel blocking” means that none of the USMCA terms are subject to the sort of challenges, tribunal hearings and prospective orders to conform laws to NAFTA terms or face trade sanctions that operates at the World Trade Organization or in post-NAFTA U.S. Free Trade Agreements. USMCA does not include terms to bring labor or environment enforcement on par with IP enforcement.

PATENT RULES AND MEDICINE PRICES: USMCA adds to NAFTA new monopoly rights for pharmaceutical firms that go beyond any U.S. trade pact. This would lock in policies on patent extensions and limits on generic competition for biologics that make U.S. drug prices high.

INVESTOR PROTECTIONS THAT SUBJECT U.S. TO COMPENSATION CLAIMS BY FOREIGN FIRMS: A major USMCA improvement is elimination of ISDS between the United States and Canada. With Mexico, ISDS is replaced by a new approach that reflects some longstanding progressive demands. The extreme investor rights relied on for most ISDS payouts are removed. The new process requires investors to exhaust domestic remedies and fixes some other ISDS procedural problems. But a major loophole preserves full ISDS rights for nine U.S. oil and gas firms that obtained 13 contracts during the partial privatization of Mexico’s oil and gas sector as long as Mexico provides such rights in pacts with other countries.

U.S. MUST IMPORT FOOD NOT MEETING U.S. SAFETY STANDARDS; HEALTH AND LAWS EXPOSED TO CHALLENGE: The existing problematic NAFTA regulatory limits were retained and, in some instances, expanded. Additional regulatory limits, including related to e-commerce and Internet policy (including terms similar to CDA §230), were added.