

Center for American Progress



Trump's Trade Deal and the Road Not Taken

How to Evaluate the Renegotiated NAFTA

By Marc Jarsulic, Andy Green, and Daniella Zessoules February 2019



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Introduction and summary

American workers' real wages have been stagnant for decades. While a wide range of domestic forces have led to that outcome—from a decline in union coverage to the slow and uneven recovery from the Great Recession¹—trade has also played an important role in generating economic stress. Capital is increasingly mobile across country borders, yet workers are not. Business, in effect, can level an ultimatum to workers: Accept what we offer, or we will outsource or move to another country where wages are lower. Millions of working families have personally experienced this threat in recent decades, and the resulting economic stress on many American workers—especially in the Midwest—has been significant.

The North American Free Trade Agreement (NAFTA), negotiated under President George H.W. Bush in 1992, has long been a flashpoint in the debate around whether trade rules are helping or harming workers and the economy. Over the years, progressives and their allies, including labor unions, environmental groups, and consumer groups have been consistent critics of NAFTA and its successor deals.

Wrapping itself in trade war rhetoric, the Trump administration has prioritized a rewrite of NAFTA, renegotiating terms and signing a rebranded U.S.-Mexico-Canada Agreement (USMCA) on November 30, 2018. The agreement will likely be considered in the new Congress.²

There is every reason to closely examine the result. The Trump administration is known for talking a populist game while serving the interests of the wealthy and powerful. The administration's attempted destruction of the Affordable Care Act (ACA), for example, would have ended health care coverage for millions of people. Its large tax cuts for corporations and high-income households are already being used to justify reductions in social investment.³ The administration consistently undermines common-sense protections for clean air, clean water, and public health in order to benefit fossil fuel interests. And it is engaged in a persistent assault on labor rights, financial reforms, antitrust protections, and other regulations that protect workers, farmers, and consumers.

The key question, then, is does President Donald Trump's agreement make trade work for ordinary workers? The short answer, at least to date, is that it does not.

President Trump's USMCA largely fails to deliver the strong labor and environment standards and enforcement that workers need. The complete omission of climate change as a priority to be addressed in trade is a significant failure in the agreement. The USMCA includes expanded monopoly protections for pharmaceutical companies that would help keep U.S. drug prices high, and it also exports these policies to Mexico and Canada. Moreover, large swaths of text—covering areas such as anti-trust, regulatory coherence, and more—contain a strong deregulatory thrust that can chill needed changes in domestic policy. While the USMCA significantly limits NAFTA's investor-state dispute settlement (ISDS) mechanism—which gives foreign corporations the special right to challenge government actions in private forums instead of domestic courts—for most sectors, it nonetheless retains it for the oil and gas firms with governmental contracts in Mexico.

The shortcomings in the USMCA are highly significant. Globalization has enabled a freer flow of ideas, people, and products than ever before, which has brought benefits to Americans and people around the world. But it has also brought significant economic pain to large segments of working populations both in America and abroad. The social and political backlash to this pain is contributing to the rise of authoritarian trends around the world that trample on fundamental democratic freedoms and rights.⁴ Those who support an open orientation toward the world, both economically and socially, must take seriously the need to place the economic well-being of working households more squarely at the center of how globalization delivers its benefits and thus at the center of the rules around trade.

What follows is an attempt to describe what a meaningful alternative to NAFTA requires. This report first outlines the economic pressures on the American working class. It then discusses the accumulating empirical evidence of NAFTA's economic effects on U.S. workers. Finally, the report advances recommendations that could be used to rewrite NAFTA in a manner that supports an economically competitive, high-road environment in which all three signatory countries can have a thriving middle class, climate-sustainable growth, and cooperative relationships.

Economic context

American workers' real wages have been stagnant for decades. Despite continued productivity growth, the real average income of the bottom 50 percent of adults has been essentially stagnant since 1980. The bottom 90 percent of adults—the vast majority of the adult population—saw modest wage growth until 2000, but its income has been essentially stagnant since then.⁵

Many factors have constrained workers' ability to garner a meaningful share of the growing productivity of the U.S. economy:

- Worker bargaining power has been dramatically constrained by continuing attacks on unions and labor market protections.⁶
- Increases in corporate market power—in both product markets and labor markets—have constrained real wages and employment rates.⁷
- Continuing technical change has contributed to reduced employment in relatively high-wage manufacturing industries.⁸
- Fiscal and monetary policy have not been used in a consistent, coordinated manner to pursue meaningful full employment.

However, the rules currently structuring global competition also play an important role in generating economic stress. The fact that capital is increasingly mobile across country borders has given multinational corporations more bargaining power than domestic workers.

This is a credible threat—one that millions of working families have personally experienced in recent decades, as multinational corporations have increasingly oriented themselves to a world market. As a result, their ties to the United States, especially in whether they need to site operations here, are weaker than ever before.⁹ A substantial number of skilled and unskilled U.S. workers, exposed to the effects of increased labor market and import competition, have experienced measurable economic loss in the past two decades: They have been displaced from jobs and experienced negative impacts on their wages.¹⁰

President Trump exploits workers' long-developing economic difficulties in an opportunistic—and deeply troubling—fashion. According to President Trump, workers' wage and employment problems are primarily the result of foreigners, who, he claims, take advantage of American markets and American workers—and that it is those other people, whether through trade or immigration, who are to blame.¹¹ President Trump's solutions have ranged from slapping tariffs on allies to outright xenophobia, racism, and cruelty, including separating children from their parents.¹²

Of course, this blame game is little more than a distraction. The de facto domestic economic policy of the Trump administration has consisted of efforts to turn America into a low-wage, low-road economy. Whether by gutting overtime pay; undermining quality standards for workforce training; providing massive corporate tax giveaways; neglecting infrastructure investment while claiming to increase it; or engaging in wide-ranging environmental and financial deregulation, the administration's economic policy will intensify the economic pressure on workers, allow corporations to ignore the negative impacts they generate, and reduce corporations' contribution to the public investments that support them.¹³

Economic reality requires a coherent policy response directed toward building a high-wage, high-productivity economy that benefits working households. From a domestic standpoint, this includes:

- Adopting fiscal and monetary policies to maintain high employment rates¹⁴
- Supporting America's position on the frontier of technical advance and productivity growth¹⁵
- Raising labor, environmental, and consumer protection standards¹⁶
- Restraining the market power of corporations¹⁷
- Strengthening institutions such as unions that provide workers necessary bargaining power.¹⁸
- Investing in workers, infrastructure, housing, families, and communities¹⁹
- Addressing barriers to equal opportunity²⁰

Progressives have advanced in detail many of the necessary changes to domestic policy, and there is more to be learned from the experiences of other open market economies as well.²¹

Yet there is also a need to make the rules that govern the global economic system—in which corporations are able to organize production across borders to minimize costs, and domestic labor is put into competition with workers across the world—more symmetrical and supportive of working households and their participation in a thriving middle class. The following sections discuss the impacts and implications of NAFTA, the USMCA, and the ways in which the NAFTA rewrite could be restructured to help achieve these goals.

Economic impact of NAFTA

In 1992, former President George H.W. Bush signed NAFTA, which came into effect on January 1, 1994, under former President Bill Clinton. The agreement between the United States, Canada, and Mexico was a groundbreaking change in trade policy, which had previously been dominated by a series of multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT), the predecessor to the World Trade Organization (WTO). Begun after the devastation of World War II, GATT negotiations generally focused on lowering tariffs on a multilateral basis. By the 1980s, though, policymakers expanded their focus to changing domestic regulatory standards and policies that were characterized as nontariff barriers to trade. These new areas of focus were part of bilateral or regional free trade agreements, such as NAFTA, and the series of agreements supplementing the GATT that form the WTO suite of agreements, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).²²

NAFTA removed almost all tariffs on goods traded within Canada, the United States, and Mexico. It also introduced major new provisions including the liberalization of services trade, expanded intellectual property rights protection, limits on domestic preferences in government procurement, and mandatory arbitration for antidumping and countervailing duties, to name just a few. In a departure from the principle that only governments, not private entities, can enforce trade agreements, NAFTA includes investor-state dispute settlement (ISDS), which provides special rights for investors to bring arbitration cases against governments for alleged violations of certain NAFTA rules.

Labor and environmental provisions were not included in the original NAFTA negotiated by first President George H.W. Bush. President Clinton forced a renegotiation that resulted in side agreements, which created labor and environmental commissions to facilitate cooperation in the enforcement of labor and environmental standards, with monetary fines for noncompliance. Mexico and the United States also entered into a bilateral side agreement on border environmental cooperation and development.²³ The addition of these provisions made NAFTA the first free trade agreement to include labor and environmental provisions, albeit in modest fashion. However, the side agreements proved utterly ineffectual as enforcement mechanisms, as the mechanisms never resulted in meaningful sanctions.²⁴

Evidence suggests that the net benefits from NAFTA have been small

The accumulated empirical evidence on the economic outcomes of NAFTA suggests that while the agreement may have led to some overall efficiency gains, those have been minimal, and job dislocation and wage effects have been significant for some workers and industries.

Overall U.S. economic gains from NAFTA have been quite small. Researchers Peter B. Dixon and Maureen T. Rimmer, for example, estimate that of the 24.4 percent cumulative growth in U.S. gross domestic product (GDP) that occurred from 1992 to 1998, NAFTA accounted for only 0.2 percent.²⁵ Other empirical work, which takes into account sectoral linkages and the construction of cross-border supply chains, concludes that the effect of tariff reductions on U.S. economic welfare, including benefits to consumers from lower prices, was also negligible.²⁶

Furthermore, the competitive environment that NAFTA fostered produced significant negative effects for some U.S. workers. While studies of the aggregate effect of NAFTA on employment conclude that this impact has been small, there is evidence of job displacement.²⁷ For example, Robert E. Scott of the Economic Policy Institute estimated that, on net, approximately 800,000 workers were displaced from manufacturing jobs from 1993 to 2013 due to trade with Mexico. He arrived at this estimate by using input-output data to calculate the effects of trade deficits on employment levels.²⁸ Displaced workers are often forced to accept lower-wage jobs, which negatively affects their households and communities.²⁹

Recent research on the wage effects of NAFTA concludes that while “the effect of NAFTA on most workers and on the average worker is likely modest,” industries and localities that experienced a loss of protection because of associated tariff reduction were hit harder:

NAFTA-vulnerable locations that lost their protection quickly experienced significantly slower wage growth compared to locations that had no protection against Mexico in the first place, particularly for blue-collar workers. For the most heavily NAFTA-vulnerable locations, a high-school dropout would have up to 8 percentage points slower wage growth from 1990 to 2000 compared to the same worker in a location with no initial protection. There is, however, an even larger industry effect, with wage growth in the most protected industries that lose their protection quickly falling 17 percentage points relative to industries that were unprotected to begin with.³⁰

The authors conclude that college-educated workers did not experience similar effects and that effects on blue-collar workers were not confined to those employed directly in affected industries. Service-sector workers also experienced negative wage impacts in areas that saw measurable trade effects. In contrast, most work on the aggregate effect on real wages from NAFTA's tariff reductions concludes that there was a small positive effect on the U.S. economy.³¹

Some have argued that NAFTA's benefits for particular industries, such as the automobile industry, have been quite large,³² and that by extending supply chains to Mexico, firms have been able to lower costs; this, in turn, has made them more competitive. However, while a corporation's decision to site production in Mexico benefits that individual corporation, those gains have not been large enough to register at an aggregate level, as the economic studies cited above illustrate.

Furthermore, the assumption that production supply chains will remain integrated across North America is itself subject to question. Susan Helper, former chief economist of the U.S. Department of Commerce, notes that there is some evidence—though it is not yet conclusive—that once corporations site a part of their supply chain in a low-wage, low-standard environment and learn how to operate within it, the rest of the supply chain follows over time.³³

This is not to say that the United States can or should avoid the realities of globalization. The United States obtains genuine benefits from trade and international investment, including greater competition and choice in the United States and poverty reduction in developing countries.³⁴ But one must remain clear-eyed about the potential results and develop strategies both to mitigate and respond to globalization's predictable negative effects.

Recommendations to promote a high-road approach to North American trade

NAFTA's current structure makes it easier for corporations to operate across North America in ways that serve their interests, but it fails to account for and effectively mitigate the negative effects on workers' wages or the pressure that cross-border business mobility puts on public interest regulatory standards and other domestic social and economic norms.³⁵ A sensible rewrite of NAFTA should aim to correct this asymmetry and place economic competition on a more level playing field for all economic actors—particularly working households. But Trump's USMCA, by not putting working families at the center of its priorities, fails to hit the mark.

An overview of the USMCA—a representative sample of Trump's priorities in trade

What does the USMCA get right?

- Reduces and reforms investor-state dispute resolution for most sectors
- Mexican commitments to eliminate company-controlled unions and implement free and independent unions
- Removes the mandate to export certain natural resources

What does the USMCA get wrong?

- Problematic intellectual property protections, including locked-in exclusivity periods for biologic drugs and the potential for patent extensions or evergreening, that chill the United States' ability to bring down high prescription drug prices
- Special access principally for the U.S. oil and gas sectors to unreformed ISDS in Mexico
- Deregulatory impacts, including threats to stronger antitrust enforcement

What is missing from the USMCA?

- Stronger, detailed standards and meaningful enforcement for labor and the environment.
- Trade-related tools to address the threat of climate change.
- Greater ability for U.S. businesses and farmers to distinguish their products, whether for consumer right-to-know, climate-labeling, or other purposes.

This list is illustrative, and omission of particular provisions in this list or report should not be read as endorsements thereof.

For the USMCA to come into effect, congressional approval will be needed. The agreement is expected to come before Congress under the fast-track rules of trade promotion authority passed in 2015.³⁶ Despite recent enhancements to the process of congressional consultation, Congress' power to directly amend the agreement or the associated implementing legislation is limited, and if brought up, it can be passed by majority vote.³⁷ But with Democratic control of the House of Representatives in particular, Congress has new leverage to seek changes to the USMCA to correct its flaws.

Many progressives and progressive organizations, including the Center for American Progress, have offered a range of suggestions for how to create a progressive high-standards trade agreement that approaches globalization more equitably.³⁸ The following sections offer suggestions on how the USMCA could be improved. These suggestions, of course, are not meant to identify all that ought to be done, as the agreement covers a range of important matters. However, the following suggestions are intended to illustrate the direction of change that would help the North American economies deliver better outcomes for the people who work in them.

What should be included in a renegotiated NAFTA?

Raising wages, improving labor standards, and protecting the environment are principally the province of domestic economic policy, but trade policy plays a role in ensuring that international competition does not undercut domestic policymaking.³⁹ Therefore, one of the most important goals of a NAFTA rewrite should be to limit the ability of global competition to bring downward pressure on wages in the United States.

Unfortunately, President Trump's USMCA fails to include the labor and environmental standards and enforcement mechanisms needed to improve conditions in Mexico and put upward pressure on wages in the United States and Canada. Without that, the benefits of trade globalization will flow to the largest corporations and their shareholders—not to working households.

Raise labor standards in North America

The Trump administration has adopted domestic policies that undermine labor standards and worker bargaining power—including gutting overtime standards, undermining standards for workforce training, attacking unions representing federal workers, supporting “right to work” laws that gut collective bargaining, and failing to raise the minimum wage.⁴⁰ The USMCA, by failing to put forward strong and

enforceable labor standards, reinforces this hostility to workers' interests. The lack of swift and certain enforcement means that even the most significant pro-worker commitments put on paper, such as Mexico's commitment to replace its system of fake "protection" unions with new ones approved by workers within four years, may not translate into meaningful action.⁴¹ The problem with this failure is that business will still get the benefits of access to a low-standards labor for its supply chains.

As a starting point to countering unfair trade competition, the United States, Canada, and Mexico should have agreed to maintain in law and enforce in practice the essential labor rights provided in the eight International Labour Organization (ILO) core conventions.⁴² These conventions include the protection of the right to organize and bargain collectively, abolition of forced labor and child labor, and elimination of employment discrimination, among other principles.

The USMCA, however, simply continues to reference the ILO Declaration on Fundamental Principles and Rights at Work, which is far more vague.⁴³ Canada and Mexico have adopted all eight of the fundamental conventions domestically regardless of NAFTA and the U.S. should too. However, the United States maintains a significant number of their substantive protections already in law.⁴⁴ Placing the real, detailed labor protections of the ILO core conventions in a renewed NAFTA could counter companies' ability to site their operations in the noncompliant country and export to the other countries.⁴⁵

As the U.S. Department of State has recognized, the right to organize and bargain collectively is severely constrained in Mexico.⁴⁶ In practice, the bargaining rights of Mexican workers can be overridden by so-called protection contracts between an employer and an employer-dominated union. These contracts can be signed without the participation or knowledge of workers to whom they apply, and workers' attempts to challenge these contracts have been met with retaliation, including threats, dismissal, and violence.

Restrictions on bargaining rights help explain the fact that the real hourly compensation of Mexican production workers has been stagnant since 1994, even though manufacturing exports have grown.⁴⁷ The good news in the USMCA is that the Mexican government has committed to enacting legislation that would secure workers' right to union representation as well as expand labor protections for workers. The bad news is that the USMCA does essentially nothing to guarantee U.S.-Mexico trade will only occur if that commitment is kept.⁴⁸ (We discuss enforcement mechanisms for both labor and the environment below.)

Furthermore, because NAFTA has made it substantially easier for firms to operate across borders, workers should have the right to organize and bargain across those same borders. The United States, Mexico, and Canada, as part of their trade agreement, should allow the formation of cross-national unions that have the right to bargain with firms that operate in more than one NAFTA country.⁴⁹

The agreement should also have a mechanism for determining a country-specific minimum wage that would guarantee workers are paid at least a living wage.⁵⁰ The USMCA's attempt to put a wage floor in through certain rules of origin provisions acknowledges the issue but fails to adopt a standard that is broad enough or able to evolve. Absent a true minimum wage, it is possible that some trade would be based on exploitation.

While the USMCA includes some significant improvements—largely at the insistence of labor unions—such as new language to stop violence against workers and gender discrimination, labor standards under the USMCA are only enforceable if a breach occurs in a manner affecting trade or investment. Other parts of the agreement, such as those dealing with intellectual property, do not limit enforcement in this way.⁵¹

Raise environmental and sustainability standards in North America

The Trump administration has pursued a damaging environmental policy agenda, including through its withdrawal from the Paris agreement, expansion of offshore drilling, and has proposed significant defunding of vital climate and energy research programs.⁵² The USMCA is consistent with the administration's approach to environmental policy. While it pays lip service to the importance of environmental standards, it fails to incorporate the meaningful standards and tools necessary to ensure signatory compliance with domestic environmental laws and international agreements to which they are parties.⁵³ Notably, it steps backwards on requirements to comply with international environmental agreements, and omits the necessary standards needed to address the global threat of climate change.⁵⁴ As with the labor chapter, enforcement, discussed below, is also sorely lacking.

Given what scientists know about the immediate threats to the planet and their consequences for economies and societies, no trade agreement should fail to incorporate new, high-road approaches to environmental standards that recognize the costs of pollution and climate change.⁵⁵ Not only should countries be discouraged from lowering their environmental standards and enforcement to attract trade and investment, but trade agreements should also be structured to enable and indeed incentiv-

ize countries to raise their standards. It should also sanction those who allow firms to seek to outsource pollution to trading partner countries, which harms both their workers and American workers. The shift in car battery recycling from the U.S. to Mexico is an example of just this type of dual harm.⁵⁶

The agreement should also explicitly exempt from trade-related challenges those domestic policies that are intended to reduce or adapt to environmental harm, such as measures to reduce greenhouse gas emissions or regulate practices such as fracking or offshore drilling.⁵⁷ This would prevent challenges to domestic policies that otherwise would be considered violations of NAFTA rules. One positive provision in the USMCA is that it does remove a requirement that the United States and Canada continue to export natural resources, including fossil fuels, based on previous years' trade, even if a country sought to enact conservation policies. This rule in the original NAFTA impacted Canada's ability to reduce oil sand production to meet its international environmental commitments.⁵⁸ The rule also impacts the United States' ability in the future to dial back resource exports from any public lands that the Trump administration opens up.

The United States trades more energy with Canada and Mexico than with the rest of the world combined,⁵⁹ and a successful NAFTA renegotiation should seize opportunities to promote higher standards and incentives for clean energy and efficiency among all three North American countries, such as the appliance efficiency standards that the United States and Canada typically harmonize on a bilateral basis.⁶⁰ In addition, although none of the NAFTA countries currently has a formal economy-wide carbon price, a rewritten NAFTA should seek to foreclose the possibility of carbon leakage across borders in the event one of the countries adopts such a measure.⁶¹

It is also important to safeguard countries' other tools to take action to address the climate crisis. Whether it's securing climate-friendly labeling on products traded across borders in North America or boosting climate-friendly procurement, trade agreements should enhance a country's efforts to tackle climate change—not potentially limit them.⁶²

Lastly, it is no small matter that Trump's agreement contains a loophole to the reformed ISDS provisions that is principally a special giveaway to the oil and gas sectors, which have contracts with the government in Mexico.⁶³ That's representative of a deeply unfortunate failure to make the threat of climate change—as it impacts workers, communities, and the planet—central to a new vision for North American economic cooperation.

Enforce labor and environmental standards

Not only is it important to have stronger labor and environmental standards, but any renegotiated agreement should have effective enforcement mechanisms, ensuring that all countries meet these standards. While the USMCA proposes to enforce labor and environmental standards through the general dispute settlement procedures, that is likely to be inadequate.

State-to-state enforcement has a poor history of effectiveness.⁶⁴ In part, this is because of a loophole in the original NAFTA that enabled countries to avoid participating in a dispute settlement panel—a problem that remains in the USMCA. More broadly, labor and the environment often get pushed aside by governmental priorities in state-to-state relationships. Lastly, cases that require evaluating the compliance of an entire economy can be difficult to prove and force meaningful, timely change.

Given the complexity of the issues surrounding labor and environmental matters, as well as the limited resources of the individuals and organizations they affect, an independent authority is needed to enable investigations to be conducted when violations are reported. It ought to be independent, well-staffed, and with sufficient authority to investigate or monitor compliance when remedies are agreed on for violations.⁶⁵

The need for an effective approach to enforcement has been recognized by progressive policy makers for some time. One important idea that some have floated is an inspection, compliance, and exclusion system modeled on the U.S.-Peru Free Trade Agreement's timber annex.⁶⁶ The annex gave the United States the power to verify that Peruvian lumber had been produced legally, including provisions permitting on-site inspections in Peru. It also empowers customs officers to block illegal products at the border and to prohibit future shipments. Illegal logging of Peruvian timber remains a serious problem that the U.S. has only begun to address, but were the authorities and inspections strengthened and the enforcement made more automatic, this could be a potential pathway towards enforcing standards that are important to workers in the United States, Canada, and Mexico.⁶⁷

In addition, private parties ought to be able to supplement governmental actions and directly challenge violations of labor and environmental provisions of trade agreements. Strong private rights of action, which are present in U.S. trade remedy law (antidumping and countervailing duty cases), could be deployed to help ensure that labor and environmental protections and rights are authentic. One way to accomplish this is to insert labor and environmental standards into the way the U.S. Department of Commerce (or relevant trade ministry) calculates the normal value for a particular import.⁶⁸

However, it is important to remember that private actions, including trade remedy cases, cannot replace swift and certain state enforcement. Private cases can be expensive and difficult to bring because of barriers to needed information. They also are limited in their ability to produce systemic changes throughout an economy, such as securing union organizing rights. But they and similar mechanisms offer a useful way to pressure improved behavior in trading partners and could signal to the United States Trade Representative that broader action is needed.

What should be excluded or reformed?

The above sections discuss several areas where trade agreements need to do more to counter the negative economic pressures on workers and other public policy priorities in all three NAFTA countries. This section considers items that are already part of NAFTA or included in the USMCA that should be removed or significantly modified to achieve a high-road approach to trade—rebalancing the rules to prevent inappropriate protection of corporate power at the expense of workers, consumers, or the environment. Given the scope and detail of the agreement, the list of items is by necessity illustrative rather than exhaustive.

Many of these provisions arose out of a shift in trade policy that occurred under Presidents Ronald Reagan and George H.W. Bush, from focusing on lower tariffs to tackling domestic regulations that were perceived as barriers to market access, even if they were not explicitly discriminatory.⁶⁹ NAFTA was the first trade agreement that took this new, aggressive approach to perceived nontariff barriers. But this approach reached much deeper into domestic policy, including matters far beyond the cross-border movement of goods or services, in ways that constrain governmental action in the public interest. Economist Dani Rodrik has labeled this “hyperglobalization.”⁷⁰ Any effort to rebalance trade priorities and focus more on the economic outcomes of working households must grapple with the need to reduce this level of hyperglobalization and ensure greater policy space for domestic democratic decision-makers.

Exclude the ability to use investor-state dispute settlement

One of the more far-reaching and troubling innovations in the NAFTA model of hyperglobalization was its investor-state dispute settlement (ISDS) system, which gives corporations the right to challenge government actions affecting their investments in private arbitration. ISDS has since become a standard feature in U.S. trade agreements.

ISDS ostensibly aims to address the concerns of investors from developed countries that their investments in developing economies are insufficiently protected from expropriation or otherwise subject to discrimination under national legal systems. There are private means to mitigate some of these risks, such as securing political risk insurance.⁷¹ But ISDS provides a stronger set of protections for foreign investors, underwritten directly by national taxpayers. While some of the largest recipients of foreign direct investment in recent decades do not have ISDS agreements—namely China—it was believed that ISDS would make investment in less developed economies more attractive. But even as a development tool, ISDS has significant flaws. Not only does it expose developing countries that seek to change domestic policies, including domestic health, environmental, safety, or other public interest standards to challenge under vague minimum standards of treatment for foreign investors, but it also does not encourage those countries to compete to improve their legal systems.⁷² It also increases downward pressure on wages in high-standard economies.⁷³

The risks to U.S. public interest decision-making are real and growing in number.⁷⁴ Under NAFTA, for example, the energy company TransCanada challenged President Obama’s decision to reject the construction of the Keystone XL pipeline and demanded \$15 billion in compensation.⁷⁵ This case was suspended after President Trump reinstated the construction of the Keystone XL pipeline, but it demonstrates the potential for foreign investors to challenge U.S. domestic policy.⁷⁶

This is not to downplay the bias that foreign investors can face in many court systems or otherwise in ensuring legitimate returns based on the terms of their investments. But other solutions, such as private risk insurance, building judicial capacity in developing countries, and supporting the rule of law broadly, are available that are less harmful to domestic democratic decision-making.⁷⁷

Notably, one of the USMCA’s bright spots is that it restricts ISDS principally to expropriation and discrimination, with requirements to exhaust domestic remedies. It also eliminates the vague, expansive minimum standards of treatment that had fueled much of the ISDS litigation that chilled domestic public interest regulation. However, as mentioned above, the USMCA retains certain special rights principally for the oil and gas sectors that have contracts in Mexico with the government.⁷⁸

Limit the inclusion of standards that overly benefit business and constrain democratic action

ISDS is not the only item that should be excluded—or significantly limited compared with recent practice—from a renegotiated NAFTA. Unfair foreign practices undoubtedly make it more difficult for American businesses to operate abroad. Yet utilizing trade-agreement-based restraints on governments can in some circumstances negatively affect public interest-oriented policymaking both in America and abroad.

Take, for example, rules governing intellectual property protections. American businesses do face theft of intellectual property abroad. Still, care needs to be taken lest trade agreements limit the ability of governments, including the United States, to promote access to affordable medicines, affordable seeds for farmers, and more.⁷⁹ For example, the USMCA includes a special exclusivity period of 10 years for biologic drugs. This would grant large pharmaceutical companies market and regulatory protection from others, including generic drug companies, for a specific period of time—in this case, a decade—separate and apart from their rights under patents they may hold, allowing them to more readily increase name-brand drug prices.⁸⁰ This raises the exclusivity period for Mexico and Canada while simultaneously preventing the United States from reducing its exclusivity period. The USMCA's intellectual property chapter also has raised concerns regarding evergreening (or extending, without sufficient novelty) patents and other provisions that benefit patent holders.⁸¹ Grants of monopoly power to pharmaceutical and biotech manufacturers are prime drivers of the high cost of medicines in the United States, and a lock-in of the exclusivity period forecloses an obvious way to lower the price of biologics.⁸²

The USMCA also includes a new section on regulation generally.⁸³ This “good regulatory practices” chapter emerged from concerns that many countries’ regulatory processes are opaque and, in some cases, even result in regulations being adopted in secret and then applied to companies with little to no warning.⁸⁴ Rather than just focus on transparency and the rule of law, which could be more easily justified, the chapter could also lock in, and export, problematic aspects of U.S. law and practice. Namely, it subjects regulations to impact assessments, also known as cost-benefit or economic analyses, and retrospective reviews. The agreement also guarantees a range of special consultation opportunities, including the publication of cost-benefit analyses during the proposal stage.

When implemented in a reasonable manner—and with a recognition that measurement of social costs and benefits can be imprecise or impossible—economic analyses can sometimes provide useful information about the possible consequences of regulation.⁸⁵ Too frequently, however, those hostile to regulation use cost-benefit analysis, special consultation opportunities, and retrospectives as weapons, exaggerating measures of cost, dismissing measures of benefits, and using the tools to slow down or stymie public interest protections in the bureaucracy and the courts.⁸⁶ These impacts can be particularly burdensome on government agencies squeezed for funding, particularly those in developing countries or localities. Trade rules should not be used to frustrate domestic rules that serve in the public interest, in the U.S. or elsewhere.⁸⁷

Against the backdrop of a growing range of evidence that the U.S. faces a competition problem, the USMCA's antitrust obligations also present an increasingly concerning set of trade limitations.⁸⁸ The agreement's provisions aim to counter the efforts of some countries to use competition policy to achieve discriminatory industrial policy ends.⁸⁹ To that end, some of the efforts to boost transparency and procedural fairness can be positive steps.

Similarly, the USMCA endorses the requirement that governments maintain national competition laws to proscribe anticompetitive conduct and promote competition—itself a recognition of the importance of antitrust. Yet, the agreement only references “economic efficiency and consumer welfare” as the purposes of antitrust.⁹⁰ The consumer welfare standard is a court-adopted standard that is nowhere in the U.S. competition statutes and is the subject of current criticism and debate. Endorsing it in a trade agreement, even in a hortatory chapter, as the purpose of antitrust policy could potentially constrain the evolution of U.S. competition policy to address the clear accumulation of market power in many segments of the American economy.⁹¹

Conclusion

There is little question that NAFTA could be improved in ways that would benefit working families in the United States, Canada, and Mexico over the longer term, maintain an open orientation to business and the world, and strengthen relationships with essential allies. Pressure on workers' wages and erosion of the democratically chosen norms that govern market behavior in the U.S. economy help push the nation toward a low-road path. Along this path, those most vulnerable to the negative effects of corporate competitive strategy are left to fend for themselves, and the rules and institutions that make the economy a good place in which to work and thrive are less effective.

Because there is no reason to believe that a low-road economic environment is necessary to promote economic innovation and rapid productivity growth, there is no good reason to settle for it.⁹² A progressive rewrite of NAFTA should be part of a much bigger project—one that develops a comprehensive set of domestic economic policies to support wages, employment, and inclusive economic growth for workers both in the United States and abroad.

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