

“MODERNIZING NAFTA: THE USMCA AND ITS KEY PROVISIONS”

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In October 2018, the United States, Mexico, and Canada renegotiated the North American Free Trade Agreement (NAFTA) to what we now know as the United States-Mexico-Canada Trade Agreement (USMCA). This article addresses the key differences between NAFTA and the USMCA.

I. INTRODUCTION

For a little over a year, there have been contentious negotiations among the United States (U.S.), Mexico, and Canada to modernize the North American Free Trade Agreement (NAFTA). Formal negotiations began on August 16, 2017, and by November of that year, the parties had gone through five rounds of negotiations.¹ At the time, it seemed the three member countries would never reach an agreement with each one pushing for the others to accede to its demands.

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¹ Press Release, Office of the U.S. Trade Rep., USTR Releases Updated NAFTA Negotiating Objectives (Nov. 17, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/november/ustr-releases-updated-nafta>.

On October 1, 2018, President Donald Trump announced that the parties had successfully renegotiated NAFTA to create what we now know as the United States-Mexico-Canada Agreement (USMCA).² This article addresses the key differences between NAFTA and the USMCA.

II. THE HISTORY OF NAFTA

On January 1, 1994, NAFTA went into effect with the primary goal of eliminating trade barriers between the U.S., Mexico, and Canada.³ Proponents of NAFTA believed that allowing greater access to member countries' exports would stimulate economic growth.⁴ Specifically, proponents viewed the agreement as an opportunity for "creating jobs, increasing productivity, reducing income disparity, strengthening trilateral relations, and enhancing North American cooperation."⁵ Critics, on the other hand, believed the agreement would do more harm than good, arguing that it would "cause[] job losses in the [U.S.] as companies moved production to Mexico to lower costs, put downward pressure on U.S. wages, increase[] income disparity, [lead] to environmental degradation, and . . . infringe[] on U.S. sovereignty."⁶

As expected with any agreement, NAFTA had its pros and cons. On the positive side, NAFTA made it easier for the U.S. to purchase Mexican and Canadian goods,⁷ helped the U.S. auto manufacturing industry become more globally competitive with the development of supply chains, and directly supported roughly 4.9 million U.S. jobs.⁸ On the negative side, NAFTA caused 682,900 U.S. job losses,⁹ and with manufacturers relocating to Mexico for cheaper labor, depressed U.S. wages in some states and industries.¹⁰ A June 2016 U.S. International Trade Commission report summarized NAFTA's impact as causing

² Donald Trump, U.S. President, Remarks on the United States-Mexico-Canada Agreement (Oct. 1, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-united-states-mexico-canada-agreement/>.

³ North American Free Trade Agreement, art. 102, Dec. 8, 1993, 32 I.L.M. 289 (hereinafter NAFTA Text).

⁴ David M. McPherson, *Is the North American Free Trade Agreement Entitled to an Economically Rational Countervailing Duty Scheme?*, 73 B.U. L. REV. 47, 48–49 (1993).

⁵ M. Angeles Villareal & Ian F. Fergusson, Cong. Research Serv., *North American Free Trade Agreement (NAFTA)* (Jan. 15, 2015), <https://fas.org/sgp/crs/row/IF10047.pdf>.

⁶ *Id.*

⁷ See McPherson, *supra* note 4.

⁸ See Laura M. Baughman & Joseph F. Francois, *Opening Markets, Creating Jobs: Estimated U.S. Employment Effects of Trade with FTA Partners*, U.S. Chamber of Commerce, (2010), https://www.uschamber.com/sites/default/files/legacy/reports/100514_ftajobs_full_0.pdf (NAFTA accounted for 92% of 5.4 million U.S. jobs created by free trade agreements).

⁹ Robert E. Scott, *Heading South: U.S.-Mexico Trade and Job Displacement After NAFTA*, Economic Policy Inst. (May 3, 2011), https://www.epi.org/publication/heading_south_u-s-mexico_trade_and_job_displacement_after_nafta1/.

¹⁰ Congressional Research Service, *The North American Free Trade Agreement (NAFTA)* (May 24, 2017), <https://crsreports.congress.gov/product/pdf/R/R42965>.

“a substantial increase in trade volumes for all three countries; a small increase in U.S. welfare; and little to no change in U.S. aggregate employment”¹¹

Because of NAFTA’s modest impact in the U.S., it was repeatedly at the center of many political debates. In 2008, responding to the Democratic party’s widespread trade skepticism, then-presidential candidate Barack Obama promised to renegotiate the agreement, a pledge he later abandoned.¹² In the 2016 presidential campaign, both Bernie Sanders and then-presidential candidate Donald Trump criticized NAFTA for causing a significant number of U.S. job losses.¹³ Not surprisingly, when President Trump took office, he denounced NAFTA as the “worst trade deal in history” and vowed to renegotiate it.¹⁴

III. The USMCA Is Born

On August 16, 2017, U.S. Trade Representative, Robert Lighthizer, began formal renegotiations of NAFTA.¹⁵ During negotiations, the U.S. emphasized, among other things, that it wanted to “increase the threshold for automobiles that needed to be manufactured in North America in order to qualify for zero tariffs from 62.5 percent to 85 percent”¹⁶ The U.S. also demanded a sunset clause which would require that the agreement expire every five years unless all three countries agreed to renew [it].¹⁷ To pressure Mexico and Canada into agreeing with the U.S., President Trump imposed on them 25% steel tariffs and 10% aluminum tariffs.¹⁸ Both countries responded by imposing their own tariffs and emphasizing the need to reach an agreement.¹⁹ On October 1, 2018, President Trump announced that the parties had successfully renegotiated NAFTA to what we now know as the USMCA.²⁰

¹¹ U.S. Int’l Trade Comm’n, *Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, 2016 Report* (June 2016), <http://www.usitc.gov/publications/332/pub4614.pdf#page=131&nameddest=1>.

¹² Andrew Chatsky, James McBride & Mohammed Aly Sergie, *NAFTA and the USMCA: Weighing the Impact of North American Trade* (last updated Feb. 24, 2020), <https://www.cfr.org/backgrounder/nafta-and-usmca-weighing-impact-north-american-trade>.

¹³ *Id.*

¹⁴ Donald Trump, Jobs Plan Speech (June 28, 2016), <https://www.politico.com/story/2016/06/full-transcript-trump-job-plan-speech-224891> (last visited Mar. 28, 2020).

¹⁵ See USTR Releases Updated NAFTA Negotiating Objectives, *supra* note 1.

¹⁶ Kristen DeWilde et al., *NAFTA Is Renegotiated and Signed by the United States*, 113 AM. J. INT’L L. 150, 150 (2019).

¹⁷ *Id.* at 150–51.

¹⁸ *Id.* at 151.

¹⁹ *Id.*

²⁰ See Trump, *supra* note 2.

IV. NAFTA v. USMCA

Although President Trump coined NAFTA as “the worst trade deal maybe ever signed, anywhere,”²¹ the USMCA is substantially similar to NAFTA, making only five major changes to (1) the sunset/review process, (2) the automotive industry, (3) investor-state dispute settlement practices, (4) digital trade intellectual property rights (IPR) and digital trade, and (5) labor laws.

A. Sunset/Review Clause

Unlike NAFTA, which lacked a sunset/review process or expiration date, the USMCA provides that the agreement will end in sixteen years unless the parties agree to renew it for another sixteen-year term.²² On its sixth anniversary, the parties will meet to conduct a “joint review” of the USMCA’s operations, make recommendations, and decide any appropriate actions.²³ Notably, if a party no longer wishes to be a part of the agreement, it may withdraw with six months written notice and written justification.²⁴

B. Automotive Industry

The USMCA’s most substantial change relates to the country of origin rules for the automotive industry. The rules “help [to] ensure that only producers using sufficient and significant North American parts and materials receive preferential tariff benefits.”²⁵ Specifically, the agreement raises the required percentage of a vehicle’s components manufactured in the U.S., Mexico, or Canada from 62.5% to 75% to qualify for zero tariffs,²⁶ and requires that 40 to 45% of auto content be made by workers making at least \$16 per hour.²⁷

The American Institute for Economic Research (AIER) found the substantial change to the country of origin rules to be the most alarming.²⁸ The AIER explained that the requirement that at least 75% of automobile contents must originate

²¹ Global News, *Presidential debate: Trump calls NAFTA ‘the worst trade deal maybe ever signed, anywhere’*, YOUTUBE, Sep. 26, 2016, <https://www.youtube.com/watch?v=kl2QShtOwbU>.

²² Office of the U.S. Trade Rep., *United States-Mexico-Canada Agreement Text*, art. 34.7, Nov. 30, 2018, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> (hereinafter USMCA Text).

²³ *Id.*

²⁴ *Id.* at art. 34.6.

²⁵ Office of the U.S. Trade Rep., *United States-Mexico-Canada Trade Fact Sheet Rebalancing Trade to Support Manufacturing*, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/rebalancing> (last visited Apr. 29, 2020).

²⁶ Jonathan Babcock et. al., *The Year in Review: International Trade*, 53 A.B.A. SEC. INT’L L. 99, 102 (2019).

²⁷ See Office of the U.S. Trade Rep., *supra* note 22.

²⁸ Veronique de Rugy, *The US-Mexico-Canada Trade Deal Is Not as Good as Nafta*, AMERICAN INSTITUTE FOR ECONOMIC JUSTICE (Dec. 9, 2019), <https://www.aier.org/article/the-us-mexico-canada-trade-deal-is-not-as-good-as-nafta>.

in the three member countries would increase the price that Americans pay for automobiles, which would negatively impact the overall economy.²⁹

C. Investor-State Dispute Settlement

Investor-state dispute settlement (ISDS) is a mechanism “designed to protect cross-border investors and facilitate the settlement of investment disputes.”³⁰ Pursuant to NAFTA’s terms, investors from one member country could seek monetary damages for discriminatory treatment against another member country through neutral arbitration.³¹ Many Canadian experts raised concerns with ISDS, cautioning against its rising costs, both financial and to the fabric of Canadian democracy.³² Reportedly, Canada had paid over \$219 million in damages and settlements under the ISDS system.³³ It, thus, came as no surprise when Canada requested to opt out of ISDS during USMCA negotiations.³⁴ The U.S. and Mexico agreed and “maintain[ed] ISDS [between them] for claimants regarding government contracts in the oil, natural gas, power generation, infrastructure, and telecommunications sectors,” provided the claimants exhaust natural remedies first.³⁵

D. Digital Trade and IPR

It is unlikely that the NAFTA drafters accounted for the new technology and global markets of the 21st century back in 1994. Thus, to keep up with the digital economy, the USMCA eliminates all tariffs, fees, and other charges in connection with digital, electronic trade between the parties, including music, e-books, and podcasts.³⁶ The agreement also increases IPR protections by extending the terms of copyright from 50 years to 70 years beyond the author’s life.³⁷

E. Labor Laws

Lastly, the USMCA strengthens labor laws by requiring the parties to adopt and maintain labor laws in alignment with the International Labor Organization’s Declaration on Rights at Work.³⁸ These rights include the freedom of association,

²⁹ *Id.*

³⁰ U.S. Dep’t of State, *NAFTA Investor-State Arbitrations*, <https://www.state.gov/nafta-investor-state-arbitrations/> (last visited Apr. 29, 2020).

³¹ *Id.*

³² Scott Sinclair, *Canada’s Track Record Under NAFTA Chapter 11*, CANADIAN CENTRE FOR POLICY ALTERNATIVES, at 2, (2018), <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2018/01/NAFTA%20Dispute%20Table%20Report%202018.pdf>.

³³ *Id.* at 1.

³⁴ DeWilde et al., *supra* note 16, at 155.

³⁵ Villarreal & Fergusson, *supra* note 5.

³⁶ USMCA Text, *supra* note 22, at art. 19.3.

³⁷ Daniel Roberts & Kevin Williams, *The New NAFTA and its Business Implications*, 37 No. 5 ACC Docket 56, 60 (2019).

³⁸ USMCA Text, *supra* note 22, at art. 23.2.

the right to collective bargaining, the elimination of all forms of forced labor, the abolition of child labor, and the elimination of discrimination in the workplace.³⁹

V. Conclusion

As evidenced by the USMCA's substantial similarity to NAFTA, "modernizing" NAFTA required a few tweaks rather than a fundamental overhaul. The U.S., Mexico, and Canada must constantly evaluate the USMCA's pros and cons over time, especially given the rapid rate of technological and digital advancements. If the USMCA holds up, it remains as is. If not, the parties "simply" renegotiate.

³⁹ *Id.* at art. 23.3.