



## Analysis of the NAFTA 2.0 Text Relative to the Essential Changes We Have Demanded to Stop NAFTA's Ongoing Damage

Text of a revised North American Free Trade Agreement (NAFTA) was published on September 30, 2018 following a year of renegotiation talks. This overview analysis measures the NAFTA 2.0 text against changes Public Citizen has long demanded that are necessary to stop NAFTA's ongoing damage. Almost one million American jobs have been government-certified as lost to NAFTA, with more outsourced to Mexico every week. New NAFTA Investor-State Dispute Settlement (ISDS) attacks on environmental and health policies are regularly filed after \$392 million has been seized from taxpayers by corporations using NAFTA's ISDS regime. The NAFTA 2.0 text includes some improvements we have long demanded, as well as the addition of damaging terms we have long opposed in other pacts. It also reveals that more work is needed, especially with respect to ensuring the swift and certain enforcement of labor standards and environmental standards.

***DEMAND: Cut NAFTA's corporate-power-boosting Investor-State Dispute Settlement regime that grants corporations rights to attack our laws and demand unlimited taxpayer compensation.***

✓ The **old NAFTA ISDS text, Chapter 11-B, is eliminated in NAFTA 2.0.** ISDS between the United States and Canada is terminated, but investors would have three years after the new agreement goes into effect to bring claims related to investments already in place on that date. Going forward, U.S. and Canadian investors in the other country would only have recourse to domestic courts or administrative bodies to settle investment disputes with the other government. Terminating U.S.-Canada ISDS will significantly limit future ISDS attacks. To date all but one of the NAFTA ISDS payouts implicating environmental and health issues have involved U.S. firms challenging Canadian policies. And all but three of the 61 NAFTA ISDS attacks on U.S. and Canadian policies have been brought by investors from the other country. This change will eliminate 92 percent of U.S. ISDS liability under NAFTA and most U.S. ISDS exposure overall. While this change will prevent many ISDS attacks over the long term, the three-year phase-out period for claims on investments existing when NAFTA 2.0 goes into effect poses serious risks of more corporate attacks on environmental and health policies before the old NAFTA ISDS rules are entirely terminated.

✓ With respect to Mexico, ISDS is replaced by a new approach that reflects some longstanding progressive demands. Annex 14-D, "Mexico-United States Investment Disputes," **eliminates the extreme investor rights** relied on for almost all ISDS payouts: Minimum Standard of Treatment and the related Fair and Equitable Treatment standard, Indirect Expropriation, Performance Requirements, Transfers and pre-establishment "rights to invest." The new process requires investors to exhaust domestic remedies. Only after doing so may a review be filed and only for Direct Expropriation and post-establishment discrimination (National Treatment or Most Favored Nation). Direct Expropriation is defined as when "an investment is nationalized or otherwise directly expropriated through

formal transfer of title or outright seizure.” The annex explicitly states that the expansive substantive rights found in other trade or investment pacts may not be brought back into NAFTA via Most Favored Nation (MFN) claims, and that the MFN treatment required is limited to actual policies and practices of a country with respect to other foreign investors and “excludes the provisions in other international trade or investment agreements...” The approach in this annex represents a significant scale back of investor power relative to governments, but the new system only starts three years after NAFTA 2.0 goes into effect.



The annex also includes **remedies to several major procedural problems with the old ISDS** regime. ISDS allows foreign investors to skirt domestic courts. The new process requires an investor to initiate domestic remedies in a country’s courts and administrative bodies and see them through until a final decision or 30 months (2.5 years) pass with no decision. The people adjudicating claims in this system cannot simultaneously represent corporations suing governments and must meet enumerated ethical rules forbidding direct or indirect conflicts of interest. The NAFTA 2.0 text clarifies that investors may be compensated only for losses that they can prove on the “basis of satisfactory evidence and that is not inherently speculative,” to counter past outlandish awards of enormous sums that investors claim would be their expected future profits but for a challenged policy or act. Also, the annex explicitly states that a tribunal can only order compensation for an investor and may not order countries “to take or not take other actions, including the amendment, repeal, adoption, or implementation of a law or regulation.” This would prevent decisions like that in the Chevron v. Ecuador ISDS case, in which a tribunal ordered Ecuador’s president to violate the nation’s constitutional separation of powers by halting implementation of a ruling by the country’s highest court. The annex also states that procedures, including ISDS itself, or elements of other agreements’ ISDS procedures, may not be brought back in to NAFTA via Most Favored Nation claims.



What is otherwise real improvement on reining in the threats posed by ISDS has a **significant loophole that must be closed**. A very problematic secondary “Mexico-U.S. Investment Disputes Related to Covered Government Contracts” (Annex 14-E) preserves the full substantive ISDS rights for nine U.S. firms that obtained 13 contracts during the outgoing government’s partial privatization of Mexico’s oil and gas sector as long as Mexico provides such rights in pacts with other countries. Procedural reforms limiting awards and banning tribunalists from rotating between suing governments and deciding cases apply. To qualify for this exception, an investor must have a covered contract with the federal government in a listed sector. The listing of the oil and gas sector captures contracts with Mexico’s Hydrocarbon Authority, but the United States is excluded because it does not issue federal oil and gas contracts. In practice, the annex’s listing of other sectors beyond oil and gas is largely irrelevant given that neither the U.S. nor Mexican federal government uses contracts in the those sectors. Permits, licenses, and similar government-issued instruments are explicitly excluded from a narrow definition of “covered contracts.” Thus, neither government’s licenses and authorizations in telecommunication, another listed sector, nor U.S. federal permits for oil exploration are covered. Contracts in other listed sectors, for electricity generation for sale to the public on behalf of a government, the supply of transportation services for sale to the public on behalf of a government, and for the ownership and management of roads, bridges, railroads and canals, are with sub-federal governments in both countries and thus excluded. However, beyond the problem of preserving the expansive substantive NAFTA ISDS rights for the nine covered oil firms,

their subsidiaries operating in the sector in Mexico can also qualify for this exception. At a minimum, this annex should be altered to ensure that only uncompensated cancellations of Mexican oil and gas contracts, not environmental and health policies, are subject to review.

***DEMAND: Eliminate NAFTA terms that promote the outsourcing of American jobs and create downward pressure on wages.***

- *Eliminate Investor-State Dispute Settlement and the foreign investor protections it enforces that make it less risky and cheaper to outsource jobs.*



The elimination of ISDS between the U.S. and Canada and the replacement of NAFTA's ISDS regime with the two U.S.-Mexico annexes on investment **would eventually remove the original NAFTA Investment Chapter incentives to outsource U.S. jobs, but the current text allows the outsourcing incentives to remain in place for three years after NAFTA 2.0 goes into effect.** The main U.S.-Mexico investment annex eliminates the protections that have functioned as no-cost risk insurance to firms considering outsourcing, making it cheaper and less risky to relocate production. This includes elimination of rights to compensation for violations of Minimum Standard of Treatment, Indirect Expropriation, Performance Requirements and Transfers as well as the pre-establishment "right to invest" that provided protections for prospective new investors that minimized entry costs. The secondary "Mexico-U.S. Investment Disputes Related to Covered Government Contracts" annex is problematic for preserving broad substantive ISDS rights for oil firms, but given it is limited to investors with contracts with a federal government to perform services *in Mexico*, it does not provide those protections in a context that could make it cheaper or less risky to *outsource* manufacturing production from the United States to Mexico.

- *Eliminate NAFTA procurement rules limiting Buy American, labor and environmental preferences so the government buys U.S.-made, pro-worker and pro-environment goods – reinvesting our tax dollars to create jobs here rather than outsourcing them to buy cars, construction materials, office supplies and other goods made elsewhere.*



With respect to Mexico, the NAFTA 2.0 text maintains the old NAFTA rules that require the **waiver of Buy American procurement preferences.** This is a stark **contradiction with Donald Trump's "Buy American, Hire American" policy.** The only change with respect to which U.S. government agencies must comply with these rules is the removal of certain purchases of the Transportation Security Administration. (The once-independent Office of Thrift Supervision was previously listed on its own, but is now part of the Department of Treasury.) Language in U.S. trade agreements since 2007 that was designed to clarify that countries can use technical specifications for goods and services they seek to purchase relating to environmental protection was incorporated, but similar language pertaining to labor standards was weakened. The provision in the new agreement only allows countries to "promote" rather than "require" compliance with labor-related technical specifications. There is no Canada procurement schedule in the text that is posted. This likely represents the reality that U.S.-Canada procurement terms established in the World Trade Organization's (WTO) Agreement on Government Procurement provide Canada greater access to U.S. procurement contracts than Canada's NAFTA terms. Because Canada has a waiver of Buy American rules under the WTO, fixing the waiver of U.S. domestic procurement preferences with respect to Canada requires changes to WTO terms, while changes to NAFTA

procurement terms would remedy the problem with Mexico.

- *Raise wages by adding strong labor and environmental standards with swift and certain enforcement to raise poverty wages and strengthen lax environmental rules in Mexico.*



**This is a work in progress.** For detailed analysis, please review the official [Labor Advisory Committee \(LAC\) report](#). With respect to the labor provisions, the LAC overview states that “there are **modest but meaningful improvements** in the rules in comparison to the Trans-Pacific Partnership (TPP).” However, given the abysmal TPP labor standards, that is hardly a measure of the standards’ prospects for actually improving labor rights, wages or working conditions. With respect to the NAFTA 2.0 text, the LAC report notes: “The obligations include some improvements, including new provisions regarding violence, migrant workers, wage-related benefit payments and the right to strike. The text, however, retains the basic flaws of the ‘May 10’ agreement, limiting itself to the 1998 Declaration of Fundamental Principles and Rights at Work, as opposed to the clearer ILO [International Labour Organization] Conventions. While 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), clarification of these standards is welcome. Language strengthening rules regarding goods made with forced labor and compulsory labor, including forced or compulsory child labor, is welcome but should be made stronger by including goods from NAFTA countries and those made in whole or in part by the worst forms of child labor as well as by eliminating the phrase ‘through measures it considers appropriate.’ Critically, the chapter includes an annex we support with specific provisions detailing how Mexico must reform its labor law. Important weaknesses remain, including a footnote that makes it difficult to uphold international labor standards (footnote 2) and the absence of rules prohibiting abusive labor recruitment practices or requiring the payment of living wages. Most importantly, there are no labor-specific monitoring or enforcement provisions... Therefore, we will continue to work for improvements to the labor provisions.” See below for details on environmental standards. However, what is clear is that swift and certain enforcement of both the labor and environmental standards remains lacking and must still be addressed, or U.S. corporations will continue to outsource jobs to Mexico to pay workers a pittance, dump toxins and import products back for sale here.

- *These terms must raise wages and end existing “protection contracts” that lack majority support of workers they cover. A revised NAFTA must address shortcomings exposed by the recent Guatemala-CAFTA labor rights case by eliminating the use of the terms “sustained or recurring course of action or inaction” and “manner affecting trade” as barriers to enforcement of labor and environmental standards.*



**This is a work in progress.** The NAFTA 2.0 text includes what the LAC report characterizes as “new rules to eradicate wage-suppressing protection contracts in Mexico” in a new Labor Annex. Fake “protection contracts” are endemic in Mexico. Workers arrive at a new high-tech, multi-million-dollar plant to find that a fake union for which they never voted has already signed a contract with the company that the workers never approved that locks in low wages. Workers who go on strike are arrested for violating “their contract.” According to the LAC report: “This Annex, in contrast to prior trade agreements and the bulk of the [new NAFTA text’s] labor chapter, includes detailed, specific rules with which

Mexico's labor laws must comply. Of the changes to the labor text vis a vis prior labor agreements, this **Annex has the potential to be the most meaningful, but only if it is enforced.**" The LAC report also notes, that the new Labor Chapter text includes language intended to fix the problems exposed by the Guatemala CAFTA labor rights case that it consider progress. But, those clarifying terms still leave doubt as to whether all workers in an economy are covered by the agreement's labor rights provisions, and also whether single egregious acts that fail to form a "sustained or recurring" course of action remain uncovered, even potentially a one-time mass murder of union activists.

- *New tools must be added to ensure that independent monitoring and enforcement will occur, and preferential market access must be conditioned on sustained evidence of on-the-ground improvements, with social and environmental dumping tariffs imposed for backsliding.*



**This is a work in progress.** There are no labor-specific monitoring or enforcement provisions (such as an independent secretariat or labor-standards-compliance certification requirements) that would ensure that the new rules will be swiftly or certainly enforced. The LAC report notes: "As a result, the LAC has serious doubts that the improved rules will make a meaningful difference to North American working families without additional provisions, assured funding, and implementing language. Unenforced rules are not worth the paper they are written on." The report also notes that while the labor standards are subject to state-to-state enforcement, like other provisions in the agreement, there has been a consistent history through Democratic and Republican administrations alike of government officials being unwilling to challenge even the most egregious violations. Thus, relying on government enforcement of the agreement's labor standards provides no certainty that the terms included in the text will have any practical effect. The LAC report notes: "We will continue to engage with the Administration and Congress on implementing, monitoring, and enforcement measures to buttress the provisions in the agreement and to secure sufficient mandatory funding to provide technical assistance, where needed, and capacity building to help new unions form and budding unions to stand up." Finally, while tariffs could be implemented in the course of a state-state dispute if violations of labor standards are found, there are no new provisions establishing countervailing duties based on social dumping.

- *Congress must not vote on a new NAFTA until each party adopts, maintains, implements and enforces domestic laws that provide the labor rights and protections in the International Labor Organization's Core Conventions (including but not limited to the recent constitutional changes in Mexico).*



**This is a work in progress.** The LAC report notes that unions welcome language in the NAFTA 2.0 text's Labor Annex that sets an expectation that Mexican labor law reform will be passed before the deal is signed and implemented prior to the agreement's entry into force. Among the changes that would be required in Mexico are the establishment of impartial labor courts and an independent agency to administer conciliation and the registration of collective bargaining agreements. To guarantee that expectation, the LAC report recommends that the pact's implementing legislation should include a provision explicitly preventing entry into force of NAFTA 2.0 if Mexico has not enacted and implemented its labor law reforms.

- *Create American jobs and reinforce improved labor and environmental standards by strengthening "rules of origin" and stopping "transshipment." Strengthened rules of origin and*

*new safeguards that reduce opportunities for leakage must be added to incentivize production in North America in general and the United States in particular. Strengthening rules of origin must go hand-in-hand with significantly improving labor rights, wages, environmental standards and enforcement to effectively address American job loss and wage stagnation.*



The NAFTA 2.0 text includes **stronger rules of origin (ROO)** in the automotive sector, which covers a significant portion of trade between NAFTA countries. The total share of value that must be made in North America to get NAFTA benefits is raised to 75 percent from the current 62.5 percent for automobiles and parts, with some exceptions such as heavy-duty trucks, for which the requirement is 70 percent. These new requirements are phased in over five years. The previous auto 62.5 percent ROO allowed NAFTA benefits for goods with significant value produced in China and other non-North America countries. Also included is a first-time innovation that would require workers making \$16 per hour or more to produce 40 percent of the value of autos and 45 percent of the value of light trucks in order for the finished product to qualify for NAFTA's duty-free treatment. This Labor Value Content (LVC) requirement spotlights an important concept of linking trade market access to wage levels and sets an important precedent for future pacts. But to date it has been difficult to calculate the LVC's practical effects on where auto assembly and auto parts jobs will be located and on wage levels in the United States, Mexico or Canada. Only the auto firms know precisely where every element of their product is manufactured, and thus the extent of the changes that would be needed to meet the required percentage of production by workers paid \$16 or more. While the auto sector rules have gotten the most attention, the NAFTA 2.0 text has higher rules of origin throughout. As the LAC report notes, in sectors other than automobiles and parts, "the negotiated text improves upon the original NAFTA in a number of ways that should increase production and employment in North America. Examples of improvements are elimination of methodologies for calculating the value of inputs in a product that minimize counting the foreign content, improved rules on the origin of steel and aluminum used to make products, and a shift in focus in the determination of the "origin" of a good to the value of inputs rather than whether final changes to or assembly of a good occurs.

- *Ensure a fair playing field for American job creation by adding strong, enforceable disciplines against currency manipulation and misalignment. New binding disciplines against currency manipulation and misalignment must be added to NAFTA's core text along with a commitment to cooperate tri-nationally to confront harmful currency manipulation and misalignment by trading partners around the world. Add stronger rules to stop transshipment cheating.*



**This is a mixed outcome.** Inclusion of terms in NAFTA 2.0 on the **misalignment of currency values** to gain trade benefits sets an important precedent for future agreements. However, in a new chapter, "Macroeconomic Policies and Exchange Rate Matters," only the reporting requirements are binding and subject to dispute settlement. Terms that refer to refraining from competitive devaluations and other bad practices are framed in non-binding "should" terms and are not subject to dispute settlement. In contrast, countries actually are obligated ("shall" terms) to publicly disclose foreign exchange reserves data and currency market interventions. But there is no mechanism for disciplining actions countries may take to manage the value of their currencies. The LAC report recommends terms in implementing legislation "to ensure provisions are linked to action under existing U.S. trade laws" and to make currency manipulation and misalignment a subsidy subject to countervailing duties.

***DEMAND: Cut NAFTA terms that undermine environmental and conservation policies and add strong environmental standards that are subject to swift and certain enforcement.***



The **ISDS fix eliminates major threats to environmental policies**. ISDS has been a top target of environmentalists' trade reform demands, given decades of outrageous NAFTA ISDS attacks on conservation and environmental policies. All but one of the NAFTA ISDS payouts related to environmental issues involved U.S. firms attacking Canadian toxics bans and timber, energy, mining and other policies. The NAFTA 2.0 text's termination of ISDS between the United States and Canada would prevent numerous future cases, albeit with continuing exposure during the three-year phase-in. The main U.S.-Mexico investment annex (14-D) ends the investor rights (including Minimum Standard of Treatment (MST)/Fair and Equitable Treatment, Indirect Expropriation, pre-establishment National Treatment and Performance Requirements) used by ISDS tribunals to rule in favor of corporations on all NAFTA ISDS attacks against environmental policies to date. For instance, the tribunal in the infamous Bilcon mining case based its ruling on pre-establishment National Treatment and MST. The Metalclad ruling was premised on Indirect Expropriation and MST violations, while ExxonMobil was a Performance Requirements case. Lone Pine Resources, the fracking case, is an Indirect Expropriation and MST claim.



However, as noted above, a **supplemental U.S.-Mexico investment annex (14-E) is very problematic**. It provides a carve-in for firms that have contracts with a federal government in specified economic sectors, including oil and gas, to access the full set of substantive investor protections in past pacts, if the host country continues to provide these rights under other pacts. Most sectors listed in the annex are meaningless in practice because neither the U.S. nor Mexican federal governments use contracts in those sectors. And, the U.S. federal government does not use contracts in oil and gas. The text makes clear that obtaining permits, licenses, authorizations and the like from a government does not qualify an investor for this carve-in. However, during the outgoing Mexican government's partial privatization of the oil and gas sector, nine U.S. oil and gas firms obtained 13 contracts that are covered. Those firms would be carved in. Given that the incoming Mexican president has declared he will stop further privatization, the prospect of new contracts is limited for now. But if that annex remains, a future Mexican president could issue new contracts. None of the past NAFTA ISDS cases would have qualified for the carve-in. But three of the nine firms have used ISDS before, two them against Canada in NAFTA.



**Provisions forcing countries to export natural resources have been eliminated.** NAFTA's natural resources "**proportional**" **sharing rules** that required exports of oil, gas, timber and even water based on previous years' export levels are removed in the new text. These terms, found in the original NAFTA's Energy Chapter and in its Trade in Goods Chapter, meant that if a country began to export lake water, for example, then that resource would be considered "commodified," and continuing exports would be required based on previous years' volume – even if that country sought to end such activity or otherwise conserve that resource. The terms also undermined efforts to eliminate environmentally damaging production processes, in that a country would still be obliged to export set levels of a resource produced using such processes.



Like all U.S. trade agreements since the George W. Bush administration, the NAFTA 2.0 text includes **environmental standards** in the core text rather than in an unenforceable side agreement, an improvement over the original NAFTA. However, the new Environment Chapter **fails to require each party to adopt, maintain, implement and enforce domestic laws that provide policies that fulfill a list of seven core multilateral environmental agreements** that were subject to this obligation in past U.S. trade pacts. The new Environment Chapter replicates the TPP's Environment Chapter in only making one multilateral environmental agreement (MEA), the endangered species treaty known as CITES, subject to this obligation. The NAFTA 2.0 text also removes the only environmental provision included in the original NAFTA, Article 104. That provision specified that to the extent of inconsistency between the NAFTA text and five listed international environmental agreements, all of which also were included in the MEA obligation noted above in past agreements since 2007, the international environmental agreements prevailed. The new text provides no savings clause to give priority to any environmental agreement in the case of conflicting obligations. One small improvement relative to the TPP is clarification of obligations for countries to enforce their environmental laws that reflects language added to the Labor Chapter with respect to the interpretation of the terms "sustained or recurring course of action or inaction" and "manner affecting trade." Shamefully, like the TPP, the NAFTA 2.0 text **fails to mention the words "climate change,"** much less address climate issues, which is a glaring omission at a time of climate crisis.



Given that the original NAFTA text and its environmental side agreement ignored **conservation issues** altogether, their inclusion in the NAFTA 2.0 Environment Chapter may seem like progress. But, while the wording of these terms differs in some places relative to the ineffective TPP conservation provisions, the effect is largely the same: Beyond fisheries conservation, there are few real obligations. Most of the prose focuses on "recognition" of problems and goals, but with few requirements to do anything to achieve improvements.

***DEMAND: Protect our health and the environment by requiring all imported goods and services meet U.S. standards.***

- *All products imported into the U.S., all cross-border services and all service providers operating in the United States, including trucks, must comply with U.S. health, safety, environmental, land use and zoning, licensing, professional qualification, privacy, transparency and consumer access policies.*



Our initial review of the Services, Financial Services and Technical Barriers to Trade Chapters and a new chapter called Sectoral Annexes in the NAFTA 2.0 text reveals the same sorts of provisions that we have long criticized as **undermining domestic consumer safeguards**. A chapter entitled "Good Regulatory Practices" appears to be largely unrelated to trade, but rather focuses on obliging each country to adopt practices that seem aimed at limiting the creation and maintenance of consumer and environmental safeguards. The Financial Services Chapter reverses the U.S. position with respect to the final text of the TPP that provided an exception for financial data to the general prohibition on requiring data to be stored locally. This exception was pushed by the U.S. Treasury Department based on the agency's concerns about being able to access information during financial crises. The exception was supported by consumer groups, who also are concerned about the security of sensitive and confidential data stored offshore and the ability to obtain redress in the case of

a data security breach occurring in another country. The Services Chapter also includes damaging new disciplines on countries' domestic service sector regulation that reverse a longstanding U.S. position in WTO negotiations against additional constraints.



The NAFTA 2.0 text provides **a resolution to a longstanding problem related to NAFTA rules requiring that trucks from all three countries be provided access to all North American roadways regardless of safety and environmental concerns.** The Clinton administration decided not to allow access beyond a limited border zone for Mexico-domiciled long haul trucks after a series of Department of Transportation Inspector General reports found widespread violations of U.S. standards for both trucks and drivers. Mexico challenged this policy before a NAFTA dispute settlement tribunal and won. The Bush administration provided access, which Congress then reversed. After a NAFTA tribunal authorized Mexico to impose \$2.4 billion in trade sanctions against U.S. imports for failure to comply with the NAFTA terms, the Obama administration approved access despite the failure of a pilot program that was established to test whether the vehicles complied with U.S. safety and environmental rules. The NAFTA 2.0 text includes new U.S. exceptions to the old NAFTA trucking obligations that allow the U.S. government to limit grants of the authorizations required to provide cross-border long-haul trucking services.



There is **no new safeguard for environmental, health and other public interest policies.** The NAFTA 2.0 text only includes the exceptions language found in the original NAFTA that is based on the same construct used in Article XX of the General Agreement on Tariffs and Trade (GATT). Relative to the original NAFTA text, the new exception language does add terms derived from Article XIV of the WTO's General Agreement on Trade in Services (GATS), which was concluded after NAFTA. Only two of the 47 instances when a country tried to use the GATT or GATS exceptions ostensibly designed to protect environmental and health policies have been successful. Thus, replicating these terms will not provide effective safeguards for domestic policies, which is why we demanded a new effective exception.

***DEMAND: Make medicine more affordable by eliminating NAFTA rules that increase costs.***

➤ *Add no new terms that go beyond the existing World Trade Organization patent rules.*



The NAFTA 2.0 text includes intellectual property and other provisions that extend beyond WTO terms and beyond the original NAFTA terms to lock in bad U.S. policies that **keep prescription drug prices high** and export those policies to Mexico and Canada.



The NAFTA 2.0 text would require at least **10 years of government-granted marketing exclusivity – that is, longer monopoly protections – for cutting-edge biologic medicines,** such as many new cancer treatments. The 10-year exclusivity period would lock the United States into its current bad system that keeps cancer medicine prices sky-high and export it to Mexico, which does not provide any additional exclusivity period for biologic medicines, and to Canada, which now has an eight-year period. A five-year biologics exclusivity term that was included in the TPP was considered so controversial that the remaining countries – including Mexico and Canada – suspended the provision after the United States withdrew from the TPP. Patients' lives will be placed newly at risk by this provision, as it would delay access to more affordable cancer and other biosimilar treatments becoming available.



There are an array of giveaways to brand name drug firms in the NAFTA 2.0 text, which would **grant pharmaceutical firms new monopoly rights** that extend beyond NAFTA or the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). These terms also violate the so-called "May 10" standard set in 2007 that set a floor for the access to medicines standards, which many U.S. Free Trade Agreements (FTAs) followed until the TPP. The revised rules are worse than the original NAFTA in that they require the following, among other harmful measures. Countries must establish special marketing exclusivity periods and, separately, patent "evergreening" policies, each intended to provide additional monopoly protections to new uses, forms and combinations of older medicines. ("Evergreening" means making monopoly rights last longer with lax patentability standards that help keep older medicines under monopoly control and thus let corporations charge higher prices.) And countries must offer multi-year extensions on patent terms when reviews at the regulatory or patent office take longer than terms deemed "unreasonable," while the public gets no reduction in patent terms when these processes move quickly.

- *Add no new terms that limit countries' abilities to negotiate lower prices for government health programs like Medicare or Medicaid.*



The original NAFTA text did not include terms on this issue. But the U.S.-Korea FTA included outrageous requirements that government health care programs pay "market-derived" prices to pharmaceutical firms, rather than being able to negotiate for a discount for their bulk purchases. The pharmaceutical industry pushed for these terms, which increase the costs to taxpayers of government health programs, to be included in the NAFTA 2.0. The text has a new annex on "Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices" with terms that reflect the current U.S. practice of giving drugmakers opportunities to intervene in and challenge some government healthcare programs' reimbursement decisions. But, unlike similar terms in the TPP, in NAFTA 2.0 they are entirely unenforceable. They are not subject to state-state dispute settlement, nor were they in the TPP. But, with the elastic "Minimum Standard of Treatment" investor right and ISDS phased out in NAFTA 2.0, pharmaceutical firms will have no means to enforce terms that otherwise could have been used to claim a "reasonable expectation" of treatment provided to them by a government. In NAFTA 2.0, these terms are entirely unenforceable.

***DEMAND: Protect consumers and ensure a level playing field for U.S. businesses, farmers and workers by ending NAFTA rules that threaten food safety and labeling.***



The NAFTA 2.0 text includes more expansive and detailed restraints on signatory countries' domestic **food safety and inspection policies** than the original NAFTA. While strong opposition by members of the U.S. Congress resulted in the demise of a no-junk-food-labelling proposal that would have forbidden countries from requiring consumer warnings on the packaging of sugary drinks and fatty snack foods, the new text otherwise represents the demands and goals of the food processing industry and agribusiness. It includes many policies undermining consumer health and safety that these interests have pushed into U.S. law and practice and seek to expand. In numerous ways that reflect the troubling model established in decades of trade pacts, the NAFTA 2.0 text prioritizes trade facilitation over food safety. It limits how domestic food safety standards may be designed, requiring undue

reliance on “scientific evidence” of risk, despite this data often being based on industry research – with the goal of “assessing” and “managing” health risks, not eliminating them.

- *Imported food must be required to meet U.S. safety standards, not the safety and inspection standards of Mexico and Canada.*



The NAFTA 2.0 text retains the old NAFTA “equivalence” standard that currently requires the United States to **import meat and poultry from Mexico and Canada that does not meet U.S. safety or inspection standards**. The NAFTA countries have also committed to the same equivalence regime, which prioritizes trade facilitation over food safety, in the WTO’s food standards agreement. Like the new NAFTA text, the WTO agreement specifically notes that an importing country must conduct an “equivalence” assessment if requested by an exporting country “even if these measures differ from their own.” The NAFTA 2.0 text, like the TPP’s food standards text, calls on countries to consider deeming another countries’ entire food safety system to be equivalent, rather than determining equivalence for specific products. While the text also contemplates that countries may reject such requests with respect to products or whole systems, with procedures to notify the other country that its request was denied, it also includes more specific procedures for how to conduct equivalence assessments without “undue delay.” Under the equivalence regime, a country is required to admit products from any processing facility deemed by the other country to meet that country’s requirements, even if core elements of its own food safety regime are not met. Before NAFTA the United States only accepted imports from one Mexican plant specifically certified by U.S. inspectors to meet U.S. standards. Now we accept all meat and poultry from any Mexican or Canadian processing plant.

- *Enhanced border inspection must be added.*



Instead of improving food safety border inspection, the NAFTA 2.0 text replicates the old NAFTA language that **prioritizes trade facilitation over food safety** and adds additional limits on inspection. For instance, both the original and NAFTA 2.0 texts, as well as the WTO’s food standards, include rules on import checks that oblige countries to limit requirements regarding individual specimens or samples of an import to those that are “reasonable and necessary.” What is “reasonable and necessary” is an inherently subjective matter and the inclusion of this standard in trade pacts means that judgements made by a country’s food safety officials in interpreting their countries’ import safety policies are open to challenge in trade dispute resolution procedures, where tribunals of trade lawyers can second-guess domestic food safety policies related to border inspection. The NAFTA 2.0 text, like the TPP, spells out in much more detail than the original NAFTA constraints on border import checks. For instance, both pacts specify that, “An importing Party shall ensure that its final decision in response to a finding of non-conformity with the importing Party’s sanitary or phytosanitary measure is limited to what is reasonable and necessary in response to the non-conformity.” The provision is designed to limit the actions a country may consider, for instance, simply banning imports of a product after finding problems with the samples it tested. And by using the vague “reasonable and necessary” standard, it creates incentives for countries’ food safety officials to err on the side of promoting trade, not food safety, so as not to be second-guessed by a trade tribunal. In addition, the text has detailed rules not included in the original NAFTA about how countries may audit other countries’ implementation of and compliance with their food safety policies. These terms prioritize

review of documents and do not mandate that countries being audited provide access to food processing facilities or locations where food is being produced.

- *Food labeling regimes – including mandatory country-of-origin labels for meat and dolphin-safe labels for tuna – must be explicitly affirmed and protected so consumers can make informed choices.*



These problems were not addressed, much less resolved, in the new NAFTA agreement. Mexico and Canada successfully challenged U.S. **Country of Origin Labeling (COOL)** policies at the WTO. In late 2015, under threat of the imposition of \$1 billion in WTO-approved sanctions against U.S. exports, Congress gutted the policy that provided consumer information about where their meat and poultry was produced. And Mexico successfully challenged the U.S. ban on tuna caught using nets that encircle and kill dolphins, leading to the elimination of an embargo on such tuna. Mexico then successfully challenged a voluntary labeling program that allowed consumers to choose **dolphin-safe tuna**. A final WTO ruling on that case is pending. The NAFTA 2.0 text includes problematic provisions not found in the original NAFTA text that could limit other product labeling regimes. It requires countries to ensure that their “technical regulations concerning labels ... do not create unnecessary obstacles to trade.” This subjective standard, found in the NAFTA 2.0 Technical Barriers to Trade Chapter must be read in combination with terms in the food standards chapter, which prohibit certification requirements concerning “the quality of a product or information relating to consumer preferences.” Together, these terms could newly expose to challenge labeling policies deemed not to pertain to food safety per se, for instance relating to Genetically Modified Organisms (GMO) or organic standards, especially if access to a market requires government certification of the product’s compliance with the standard. The GMO issue is of special note, given that the NAFTA 2.0 Agriculture Chapter includes terms on agricultural biotechnology also found in the TPP. While these terms do not require countries to approve GMO products, they are designed “to reduce the likelihood of disruptions to trade in products of agricultural biotechnology,” to speed up countries’ review of applications to approve GMO seeds and foods, and to use measured responses to incidents of low level GMO contamination in non-GMO products. With requirements for risk assessment and scientific evidence of risk in the food chapter and similar terms in the Technical Barriers to Trade chapter, NAFTA 2.0, like the TPP, is designed to promote agricultural biotech and limit policies that help consumers avoid exposure to such products.

***DEMAND: Insert democratic accountability and oversight by adding a sunset clause.***

- *By requiring NAFTA to be affirmatively reauthorized every five years, if outcomes don’t improve, more changes can be made or the pact ended. Losses won’t continue indefinitely, as with the original NAFTA.*



The NAFTA 2.0 text **does not include a meaningful sunset provision**. Rather than requiring an affirmative vote to continue the pact after its first five years in effect, which was the U.S. proposal, the text includes language stating that the new pact’s term will be 16 years. The parties are to meet for a review after the first six years, at which point if they all agree, the pact is granted another 16-year timeframe and so on. If during any such six-year review, one party does not agree to the next 16-year extension, the joint reviews are to be conducted annually. At any point in that process, the parties can agree to another 16-year

reset. Requiring a mandatory review process is better than the status quo NAFTA, which requires no reviews. This will shine some attention on the new deal's outcomes if it goes into effect. But the "Review and Term Extension" provision does not deliver on either of the prospective benefits of an actual sunset clause. First, even if it were not extended, the 16-year term is too long to add uncertainty to investors' outsourcing decisions. Second, the real test of NAFTA renegotiations – whether the deal is "fixed" – must be assessed on the basis of whether changes, if enacted, alleviate NAFTA's ongoing damage. Establishing a limited time period to measure the results was critical. But most important was the possibility for any country that found the outcomes unacceptable to terminate the pact by simply refusing to approve another five-year extension of it. Instead of requiring all three countries to take affirmative action to *continue* the pact, now countries must take action to terminate it. And already in the original NAFTA any country has the right to withdraw upon six-month notice.

### ***Additional Problematic Terms:***

The NAFTA 2.0 intellectual property text includes a plethora of copyright rules that require careful analysis to determine their **implications for freedom of expression and access to information on the internet** in the three countries. Many elements of these copyright rules were derived from controversial provisions in the TPP that digital rights activists vigorously opposed. What is immediately obvious is that by requiring a copyright term of "life of the author plus 70 years" the new copyright text would dramatically lengthen Canada's copyright term by 20 years. The WTO TRIPS agreement requires protection for 50 years after the death of the author. Including such terms in NAFTA also would lock the United States in to our unnecessarily long copyright term. The result would be needlessly keeping classic literary and artistic works of cultural importance under the monopoly control of Hollywood and the recording and publishing giants.

New "**digital trade**" rules could undermine governments' efforts to protect their citizens' privacy, personal data and security. For example, one NAFTA 2.0 rule would require governments to allow the transfer of consumers' data – including financial or medical data subject to privacy protections in the countries' laws – outside their borders. Policies to protect privacy by restricting where or how data may move or be stored would be subject to challenge as "illegal trade barriers" under the text. In such challenges, the defending country must bear the burden of proving that no less-trade-restrictive means of accomplishing the desired policy goal are possible. Very few public interest regulations have survived this "prove a negative" exercise when challenged under trade pact terms. The NAFTA 2.0 text also includes a provision prohibiting governments from requiring software companies to disclose their source code or algorithms. This could increase the monopoly power of software giants like Microsoft and thwart efforts to investigate and regulate anti-competitive and discriminatory behavior. Finally, weak and unenforceable standards included in the text fail to safeguard net neutrality, the absence of which poses a threat to an open internet.