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BEFORE THE UNITED STATES TRADE REPRESENTATIVE
Docket Number USTR-2017-0006

COMMENTS CONCERNING THE PROPOSED RENEGOTIATION OF THE NORTH AMERICAN FREE TRADE AGREEMENT

PUBLIC CITIZEN
JUNE 12, 2017

Public Citizen welcomes the opportunity to comment on the Office of the U.S. Trade Representative's (USTR) proposal to enter into renegotiations of the North American Free Trade Agreement (NAFTA). Public Citizen is a nonprofit consumer organization with more than 400,000 members. A mission of Public Citizen is to ensure that in this era of globalization, a majority can enjoy economic security; a clean environment; safe food, medicines and products; access to quality affordable services; and the exercise of democratic decision-making about the matters that affect their lives. We have conducted extensive analysis of U.S. trade and investment agreements and their outcomes, starting in 1991 during the initial NAFTA negotiations.

President Donald Trump has labeled NAFTA "the worst trade deal in the history of the country." He promised to renegotiate it to bring down our large, persistent NAFTA deficit and to create manufacturing jobs here. He pledged to withdraw from it if he could not "get a much better deal for our workers."

NAFTA set a new – and now proven failed – trade agreement model. It was a radical break from past agreements that focused on traditional trade matters, such as tariff and quota elimination. NAFTA is rigged with investor protections and other incentives to offshore jobs as well as special interest provisions that have resulted in damage to most Americans' interests as workers and consumers. To stop this damage and to create a new model for U.S. trade agreements, NAFTA must be replaced – not tweaked.

Yet, some in the administration, including repeatedly the official who President Trump has said will lead trade policy, Commerce Secretary Wilbur Ross, suggest the "starting point" for renegotiations is the terms of the Trans-Pacific Partnership (TPP). Not only was the TPP based on expanding the damaging model established with NAFTA, but President Trump declared the TPP a disaster and formally withdrew from the deal, which could not obtain majority support in Congress. Failing to remove NAFTA's damaging provisions and adding TPP terms will make NAFTA worse for working people.

Monthly government data will show whether a revised NAFTA delivers on the deficit reduction and job creation President Trump promised. Moving those numbers will require eliminating NAFTA's investor protections that promote job and investment offshoring, reversing its ban on Buy American procurement and adding terms that raise Mexican wage levels and environmental standards, among other changes.

Absent a major redo that can stop NAFTA's ongoing damage, it is better to have no NAFTA than an agreement that maintains NAFTA's current investment, procurement, and other terms that directly harm working people. That is the case because NAFTA is causing significant *ongoing* damage for working people, healthy communities and a clean environment here and in Mexico and Canada.

The Outcomes of a Failed Trade Agreement Model

There are more than two decades of data documenting NAFTA's outcomes: mass offshoring of jobs, erosion of middle class wages, displaced family farmers, forced migration, increased medicine costs, floods of unsafe food imports, polluted air and water, and hundreds of millions in taxpayer funds paid to corporations in investor attacks on domestic laws. Our comments detail the damage wrought by NAFTA's investor tribunals, which have ordered almost $400 million in taxpayer compensation to be paid to corporations attacking land use, energy, water, timber and other policies.

But a review of just NAFTA's direct economic outcomes demonstrates why the agreement must be thoroughly redone or terminated. Defenders of NAFTA focus on the expansion of the volume of total trade flows between the United States, Mexico and Canada as if this were an indication of the agreement's success. But the real test is how NAFTA has affected the lives and livelihoods of people in North America. By that measure, it has been an abysmal failure.

There are more than 900,000 specific U.S. jobs certified by the U.S. Labor Department as lost to NAFTA offshoring and import floods under just the narrow Trade Adjustment Assistance (TAA) program, which is a significant undercount of NAFTA job loss given that the program explicitly excluded many categories of workers during the first decade of NAFTA's damage, and reporting is not mandatory, so only those who know about the program and do the work to apply are even considered. The TAA data show that many of these jobs were in high-wage advanced manufacturing – aerospace, information technology, automotive, medical equipment and the like. And the damage has hit nationwide. For instance the congressional district with the highest number of TAA trade job loss certifications is in Texas.

But NAFTA's economic damage to American families extends beyond those who directly lost jobs to NAFTA. Trade affects the *composition* of jobs available in an economy. The aggregate *number* of jobs is more affected by fiscal and monetary policy, the impact of recessions and other macroeconomic realities. The United States lost millions of manufacturing jobs during the NAFTA era, but overall unemployment has been largely stable (excluding the fallout of the Great Recession) as new low-paying service sector jobs have been created. Proponents of NAFTA raise the *quantity* of total jobs in the U.S. economy to claim that NAFTA has not hurt U.S. workers. But what they do not mention is that the *quality* of jobs available, and the wages most U.S. workers can earn, have been degraded.

According to the U.S. Bureau of Labor Statistics, two out of every five displaced manufacturing workers who were rehired in 2016 experienced a wage reduction. One out of every four displaced manufacturing workers took a pay cut of greater than 20 percent.[1] For the average manufacturing worker earning more than $38,000 per year, this meant an annual loss of at least $7,700.[2] Such displacement not only spells wage reductions for former manufacturing workers, but also for existing service sector workers. As increasing numbers of workers displaced from manufacturing jobs have joined the glut of workers competing for non-offshorable, low-skill jobs in sectors such as hospitality and food service, real wages have also fallen in these sectors under NAFTA.[3]

The shift in employment from high-paying manufacturing jobs to low-paying service jobs has contributed to overall wage stagnation. The *average* U.S. wage has grown less than one percent annually in real terms since NAFTA was enacted even as worker productivity has risen at more than two times that pace.[4]

These wage losses now outweigh the benefits of cheaper consumer prices from imported goods. Many proponents of NAFTA-style trade pacts acknowledge that they will cause the loss of some U.S. jobs, but argue that U.S. workers still win overall by being able to purchase cheaper goods imported from abroad.

The Center for Economic and Policy Research has discovered that when comparing the lower prices of cheaper goods to the income lost from low-wage competition under current trade policy, the trade-related losses in wages outweigh the gains in cheaper goods for the vast majority of U.S. workers. U.S. workers without college degrees (58 percent of the workforce) have likely lost an amount equal to 12.2 percent of their wages under NAFTA-style trade, even after accounting for the benefits of cheaper goods. That means a net loss of more than $3,300 per year for a worker earning the median annual wage of $27,500.[5]

There is a broad academic consensus that trade flows have contributed to rising U.S. income inequality. The only debate is *the extent* of trade's role in creating a situation in which the richest 10 percent of Americans are now taking more than half of the economic pie, while the top 1 percent is taking more than one fifth. Since NAFTA's implementation, the share of national income collected by the richest 10 percent has risen by 24 percent, while the top 1 percent's share has shot up by 58 percent.[6]

And, contrary to conventional wisdom, NAFTA has not been a boon to American farmers and ranchers. In reality, the U.S. agricultural trade balance with NAFTA partners has fallen from a $2.5 billion surplus in the year before NAFTA to a $6.4 billion deficit in 2016 – the largest NAFTA agricultural trade deficit to date. USDA data show imports of food into the United States from Mexico and Canada have risen more steadily and to a greater degree than U.S. food exports to those nations in recent years. The volume of U.S. food imports from NAFTA partners rebounded quickly after the 2009 drop in global trade following the financial crisis. But U.S. food exports to NAFTA nations have increased only slightly relative to their level in 2008.

Today, the U.S. is importing 25 percent more food from Canada and Mexico than it was prior to the financial crisis. The United States' rising agricultural trade deficit with NAFTA countries has contributed to a decline in smaller-scale U.S. family farms. Since NAFTA has taken effect, one out of every 10 small U.S. farms has disappeared. By 2016, nearly 203,000 small U.S. farms had been lost. Meanwhile, despite an overall 203 percent rise in food imports from Canada and Mexico under NAFTA, the average nominal price of food in the United States has jumped 73 percent since the deal went into effect.[7] And, significant food safety problems have occurred with Mexican and Canadian imports. Yet, thanks to a successful trade agreement attack by Canada and Mexico on the popular U.S. Country of Origin Labeling (COOL) policy, American consumers no longer benefit from the labels that once informed them where their meat was raised and slaughtered. This is especially intolerable given that a large share of the U.S. NAFTA agriculture trade deficit is in beef and live cattle.

The losses suffered to people in the United States have not resulted in gains for Mexican workers. While President Trump is correct that NAFTA has been a disaster for U.S. workers, he targets the wrong villain in the story. It is not Mexican workers, but the "financial elite" he targeted in his Pennsylvania trade speech a year ago who have gained while working people here and in Mexico have lost. President Trump said: "Globalization has made the financial elite who donate to politicians very wealthy. But it has left millions of our workers with nothing but poverty and heartache."[8] This describes the outcomes of NAFTA for most Mexican working people.

Real average annual wages in Mexico have fallen below pre-NAFTA levels, contrary to the promises by NAFTA supporters that the pact would raise Mexicans' living standards. The reality is that real wages in Mexico have dropped 9 percent since NAFTA. This means that the average Mexican worker is making 14,000 pesos, or $1,500, less per year today than the year before NAFTA. Mexican manufacturing wages are now lower than in coastal China. Unless a NAFTA renegotiation includes provisions that raise Mexican wages, not only will Mexican workers continue to face poverty, but U.S. firms will continue to relocate to Mexico to exploit such conditions.

Prior to NAFTA, 36 percent of Mexico's rural population earned less than the minimum income needed for food, a share that grew by nearly 50 percent in NAFTA's first three years. After two decades-plus, the percentage of the population unable to afford food has barely budged. Today, over half of the Mexican population, and over 60 percent of the rural population, still fall below the poverty line, contrary to the promises made by NAFTA's proponents. On the 10-year anniversary of NAFTA, the *Washington Post* reported: "19 million more Mexicans are living in poverty than 20 years ago, according to the Mexican government and international organizations." According to a study by the Center for Economic and Policy Research, those who are unable to afford housing, clothing, transportation, healthcare, education and food declined from 52.4 to 52.3 percent, a marginal effect after 20 years of NAFTA.

Before NAFTA, Mexico only imported corn and other basic food commodities if local production did not meet domestic needs. NAFTA eliminated Mexican tariffs on corn and other commodities. NAFTA terms also required revocation of programs supporting small farmers. But NAFTA did not discipline U.S. subsidies on agriculture. The result was disastrous for millions of people in the Mexican countryside whose livelihoods relied on agriculture. Amidst a NAFTA-spurred influx of cheap U.S. corn, the price paid to Mexican farmers for the corn that they grew fell by 66 percent, forcing many to abandon farming. From 1991 to 2007, about 2 million Mexicans engaged in farming and related work lost their livelihoods. Mexico's participation in NAFTA was conditioned on changing its revolutionary-era Constitution's land reforms, undoing provisions that guaranteed small plots ("*ejidos*") to millions of Mexicans living in rural villages. As corn prices plummeted, indebted farmers lost their land, which newly could be acquired by foreign firms that consolidated prime acres into large plantations.

According to a *New Republic* exposé: "as cheap American foodstuffs flooded Mexico's markets and as U.S. agribusiness moved in, 1.1 million small farmers – and 1.4 million other Mexicans dependent upon the farm sector – were driven out of work between 1993 and 2005. Wages dropped so precipitously that today the income of a farm laborer is one-third that of what it was before NAFTA." The exposé noted that, as jobs and wages fell, many rural Mexicans joined the ranks of the 12 million undocumented immigrants competing for low-wage jobs in the United States.

Though the price paid to Mexican farmers plummeted after NAFTA, the newly deregulated retail price of tortillas – Mexico's staple food – shot up 279 percent in the pact's first 10 years. This contradicts free trade theory, which predicts that gains from liberalization come on the import side as all consumers enjoy lower prices, while injury only occurs to those in sectors directly displaced by imports. But, NAFTA included service sector and investment rules that facilitated consolidation of grain trading, milling, baking and retail. So in short order the relatively few remaining large firms dominating these activities were able to raise the prices paid by Mexican consumers and reap extra profits as corn costs simultaneously declined.

NAFTA's economic failure is also revealed by a more thorough review of the trade flow data. The U.S. goods trade deficit with Canada of $30.4 billion and the $2.6 billion surplus with Mexico in 1993 (the year before NAFTA took effect) turned into a combined NAFTA goods trade deficit of $173 billion by 2016. This represents a 521 percent increase. These are inflation-adjusted numbers, meaning the difference is not due to inflation, but an increase in the deficit in real terms.

The U.S. goods trade deficit with NAFTA partners Mexico and Canada has worsened considerably more than the U.S. goods trade deficit with countries with which we have not signed NAFTA-style deals. Since NAFTA, the annual growth of the U.S. goods trade deficit has been 47 percent higher with Mexico and Canada than with countries that are not party to a NAFTA-style trade pact.[3] Defenders of NAFTA argue that the NAFTA deficit is really only due to fossil fuel (oil, coal and gas) imports. That is simply false:

Even if one removes all of the fossil fuel categories from the NAFTA trade balance, the remaining 2016 NAFTA goods trade deficit was $145.1 billion. Moreover, the share of the U.S. NAFTA goods trade deficit that is fossil fuels has declined under NAFTA (from 82 percent in 1993 to 16 percent in 2016) as we have faced a surge of imported manufactured and agricultural goods.[4]

And, U.S. manufacturing and services exports in particular grew slower after NAFTA took effect. Since NAFTA's enactment, annual growth in U.S. manufacturing exports to Canada and Mexico has fallen 69.5 percent below the annual rate seen in the years before NAFTA.[5] Even growth in services exports, which were supposed to do especially well under NAFTA given a presumed U.S. comparative advantage in services, dropped precipitously after NAFTA's implementation. Annual growth of U.S. services exports to Mexico and Canada since NAFTA has fallen to less than half the pre-NAFTA rate.[6]

If one includes the relatively small U.S. service sector trade surpluses with Mexico and Canada, the combined U.S. goods and services U.S. trade deficit with Mexico and Canada rose (in inflation-adjusted terms) from $9.9 billion before the NAFTA in 1993 to $134.3 billion in 2015 (the latest year of available services data). Minus fossil fuels, our NAFTA goods *and services* deficit in 2015 was $90 billion, which represents a large U.S. deficit in manufactured and agriculture goods.

NAFTA Will Only Become Better for Working Americans if the Negotiating Process Is Made Transparent and the 500 U.S. Trade Advisors Representing Corporate Interests Are Retired

Given this dismal record, the goal of renegotiations must be to stop NAFTA's ongoing damage *by eliminating the provisions that are causing the documented harm* and ensuring a NAFTA replacement deal can benefit working people *by adding new terms that can deliver on widely supported, commonsense goals*. This includes creating good jobs, including for the 58 percent of Americans who do not have college degrees; raising wages in all three countries; improving working conditions, health and the environment in all three countries; ensuring farmers and ranchers receive fair compensation for the food they grow; ensuring food and other products traded under NAFTA are safe and are labelled to allow consumers to make informed choices in the marketplace; ensuring that services being performed or consumed here meet the U.S. consumer and environmental protections on which we rely; keeping medicines prices affordable by promoting competition; ensuring no new obstacles are created for consumer access to information and the protection of data privacy; and preserving for *We the People* the right to make decisions through domestic, democratic processes on the array of non-trade policies that past "trade" pacts have locked into place one-size-fits-all with changes requiring consensus among pacts' signatory countries.

But, if the 500 official U.S. trade advisers representing corporate interests who have had a privileged role in developing our past trade deals,[9] including NAFTA, remain in place, then NAFTA renegotiations could result in a deal that not only would be more damaging to working people, but – like the TPP – would become impossible to enact. While the corporate trade advisers who got us into the TPP were consulted this spring on NAFTA renegotiations, the few labor advisers included in the official trade advisory system were shut out of that March meeting.

Yet one of the fundamental reasons why NAFTA and the TPP were such terrible deals is because they were negotiated under the influence of hundreds of corporate advisors while the public and Congress were locked out. Terms needed for the deal to benefit most Americans were traded away in favor of special protections for the special interests that had access. The resulting deal did not prioritize creating good jobs, raising wages or safeguarding our democratically-achieved policies. A successful NAFTA renegotiation must replace the corporate advisory system with an on-the-record public process, including public hearings, to formulate U.S. positions and obtain comment on draft and final U.S. text proposals. U.S.-proposed NAFTA texts and draft consolidated texts after each negotiating session must be made public. Strict conflict of interest rules must be enforced.

For the Trump administration, making the negotiations transparent is especially important. First, many senior officials in the Trump administration are ardent NAFTA and TPP supporters, including many Cabinet officials. As well, the chair of the National Economic Council, Gary Cohn (a former top Goldman Sachs official) and his deputy and top trade official, Everett Eissenstat, are strong NAFTA and TPP supporters. As Eissenstat's biography notes, during the time he served as Deputy USTR for the Western Hemisphere, he "served as the lead negotiator for U.S. trade agreements in the region, including the U.S.-North America Trade Agreement, the U.S.-Central American-Dominican Republic Trade Agreement, and U.S. trade agreements with Chile, Peru, Colombia and Panama. He also helped lead policy development on the Trans-Pacific Economic Partnership..."

Many of the corporations and their allies in government who have rigged past deals view NAFTA renegotiation as a means to revive aspects of the TPP. This includes limits on generic competition that bring down medicine prices for consumers, expanding NAFTA's investor offshoring protections to the scope included in TPP, and adding ecommerce provisions that consolidate the power of monopolistic online firms and threaten consumer data privacy. These interests would support the TPP labor and environmental terms for the very reasons that most Democrats in Congress and unions, environmental exports and scholars opposed them: They are ineffective.

Worryingly, their agenda is reflected in recent comments by Commerce Secretary Ross. In a June 1, 2017 speech to the Bipartisan Policy Center, Ross said the administration's approach to NAFTA renegotiations would be to "do no harm" to NAFTA and "modernize" the deal. The formal notice on NAFTA renegotiation sent to Congress on May 18 also frames the negotiations as a "modernization." This perspective could be translated to mean not changing the NAFTA provisions the corporate lobby likes, such as the investor offshoring protections and ban on Buy American procurement, and adding the TPP terms not already in NAFTA. In addition to making NAFTA worse for working Americans, this approach carries enormous political liabilities, as noted in the conclusion of these comments.

Finally, transparency in the negotiating process is essential because President Trump has not divested his business holdings or released his tax returns as past presidents have done, so there are unique conflict of interest concerns. The Trump business empire has Canadian and Mexican investments, and some of the Trump clothing line is made in Mexico. Second, only by issuing detailed goals and making draft texts available will the American public know in whose interest the negotiations are being conducted.

Simply put, for a prospective NAFTA replacement to succeed in terms of policy or politics, it cannot merely mirror past U.S. agreements. The only way NAFTA will be "much better" for working people is if these criteria are met:

1. **Eliminate NAFTA foreign investor protections that incentivize the offshoring of jobs and empower corporations to attack democratic policies in unaccountable foreign tribunals.**

Given that a goal of renegotiation is to counter NAFTA's ongoing offshoring of U.S. jobs, one essential change is to eliminate the provisions that incentivize offshoring of investment and jobs. NAFTA was the first U.S. trade agreement to include special privileges for investors and the Investor-State Dispute Settlement (ISDS) regime that make it less risky and less costly for U.S. firms to relocate jobs offshore. These investor protections also simultaneously threaten democratic policymaking at home and abroad.

That NAFTA's investor protections make it less risky and cheaper for U.S. firms to move offshore is not controversial. Even the pro-NAFTA Cato Institute says ISDS subsidizes offshoring by lowering the risk premium of relocating. "ISDS provisions are intended to encourage companies to invest overseas," notes a senior fellow in trade policy studies at the Cato Institute .[10] When firms considering offshoring production calculate the costs and benefits of doing so, ISDS means that costs are eliminated, including purchasing risk insurance and concessions that might be required to get a government to sign off on an investment agreement that includes arbitration for certain disputes. And, the risks of relocating to low-wage venues with weak rule of law are eliminated, and indeed, relocating earns investors special rights and privileges not available to domestic firms. Dan Ikenson, the director of Cato's Center for Trade Policy Studies and a fierce proponent of NAFTA in specific and free trade in general, wrote extensively about the problems with ISDS during the TPP debate:

> ... ISDS encourages "discretionary" outsourcing. In the global competition to attract investment from the world's best companies, the United States has some enormous advantages. For many decades, the United States has been the world's premier destination for foreign direct investment. But in recent years, the United States has been slipping in a number of important investment-location decision criteria and, accordingly, its share of global foreign direct investment has declined from 39 percent in 1999 to 17 percent in 2011.
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> While ISDS may benefit U.S. companies looking to invest abroad, it neutralizes what was once a big U.S. advantage in the competition to attract investment. Respect for property rights and the rule of law have been relative U.S. strengths, but ISDS mitigates those U.S. advantages. Access to ISDS could be the decisive factor in a company's decision to invest in a research center in Brazil, instead of the United States. Why should U.S. policy reflect greater concern for the operations of U.S. companies abroad than for the operations of U.S. and foreign companies in the United States? Why should ISDS effectively subsidize outsourcing, and not insourcing?
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> To be sure, success abroad and success at home are closely correlated. Companies must be able to invest abroad to compete there, and the success of those foreign affiliates tends to be reflected in the performance of the parent companies at home. But there is a crucial distinction between "discretionary" and "nondiscretionary" outsourcing.
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> "Discretionary" outsourcing is investment that goes abroad, but doesn't really have to. It is investment in activities that could be performed competitively in the United States, but is chased away by policies that make U.S. investment relatively more expensive. Nondiscretionary" outsourcing is investment in activities that requires a foreign presence.
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> While we should not denigrate, punish, or tax foreign outsourcing, neither should we subsidize it, and ISDS subsidizes discretionary outsourcing.[11]

Under NAFTA's investment chapter, not only do U.S. taxpayers lose jobs, but our laws, court rulings, government decisions and our Treasury are exposed to reciprocal ISDS attacks by foreign firms operating here. NAFTA's Chapter 11 ISDS provisions grant foreign investors and corporations the right to challenge the U.S. government before tribunals of three private-sector lawyers operating outside our domestic legal system. The tribunals can award unlimited compensation to be paid by U.S. taxpayers, including for their "expected future profits." Foreign firms only need to convince the lawyers that a federal or state law, court ruling, or other government action undermines vaguely-defined foreign investor rights granted to them in an agreement. The merits of these rulings, which are fully enforceable against the U.S. government in U.S. courts, are not subject to appeal.

As Chief Justice John Roberts noted in his 2014 dissent in *BG Group PLC v. Republic of Argentina*, ISDS arbitration panels hold the alarming power to review a nation's laws and "effectively annul the authoritative acts of its legislature, executive, and judiciary." These extrajudicial tribunals, he noted, "can meet literally anywhere in the world" and "sit in judgment" on a nation's "sovereign acts."

As Cato's Ikenson noted, this regime provides greater rights to foreign firms operating here than are provided to domestic firms and investors under our domestic legal system:

> ... ISDS exceeds "national treatment" obligations, extending special privileges to foreign corporations. An important pillar of trade agreements is the concept of "national treatment," which says that imports and foreign companies will be afforded treatment no different from that afforded domestic products and companies. The principle is a commitment to nondiscrimination. But ISDS turns national treatment on its head, giving privileges to foreign companies that are not available to domestic companies. If a U.S. natural gas company believes that the value of its assets has suffered on account of a new subsidy for solar panel producers, judicial recourse is available in the U.S. court system only. But for foreign companies, ISDS provides an additional adjudicatory option.
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> This inequality of treatment seems to run afoul of the investment provisions in the Baucus-Hatch-Camp legislation (to extend fast-track trade promotion authority to the president), which state that the principal U.S. negotiating objectives regarding foreign investment are to: "[R]educe or eliminate artificial or trade distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States…
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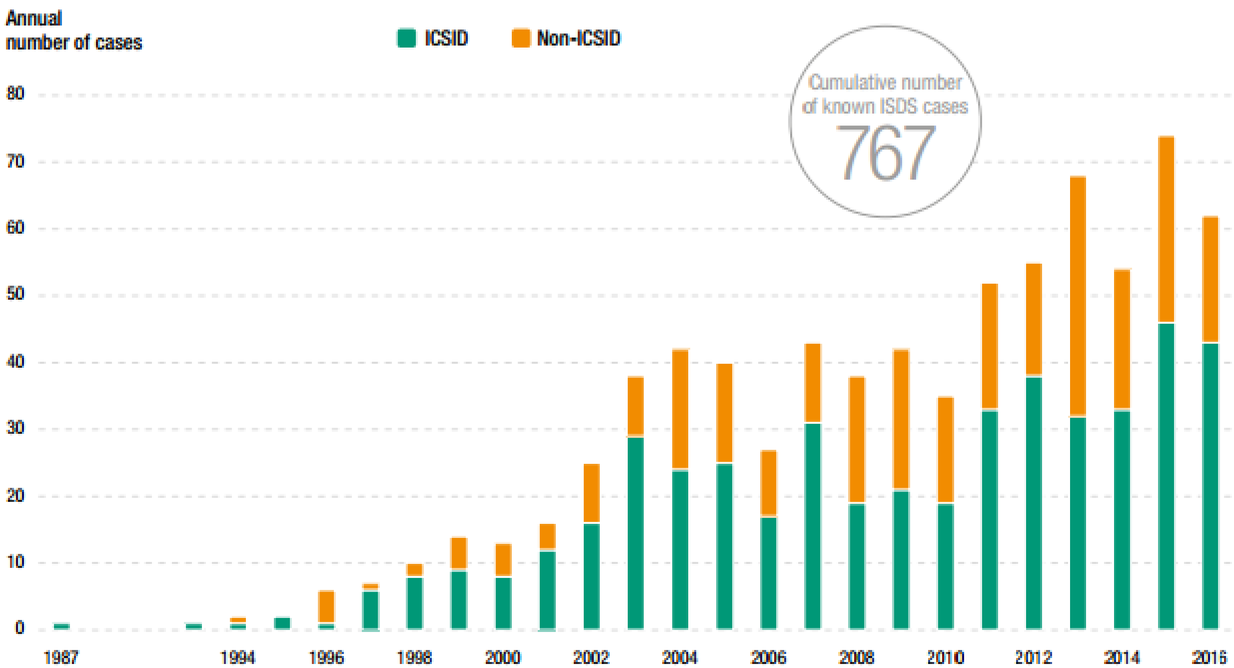
> Foreign investors having recourse to the U.S. legal system and then, if that produces unsatisfactory results, to third-party ISDS procedures arguably constitutes greater substantive rights for them than for domestic investors, whose options are confined to the U.S. legal system.[10]

More than $390 million in compensation has been paid to corporations after NAFTA ISDS attacks on land use, energy, water, timber and toxics policies.[12] Of the 11 claims (for more than $36 billion) currently pending under NAFTA, nearly all relate to environmental, energy, financial, public health, land use and transportation policies – not traditional trade issues.

Today, only about 10 percent of foreign direct investment in the United States is subject to ISDS. However, even so the United States is the eighth-largest target, having faced 14 claims over the years. NAFTA ISDS tribunals have ruled against the United States on important elements of ISDS cases brought under NAFTA against the United States.[13] But, thanks in part to technical errors by lawyers representing corporations in several cases, the United States has thus far dodged the bullet and avoided paying compensation. All 14 ISDS cases against U.S. policies have been brought by Canadian firms under NAFTA. A Columbia University Law School study shows that we have only narrowly escaped liability in some of these cases. For example, in the Loewen case, a NAFTA tribunal concluded that a Mississippi state Supreme Court decision violated NAFTA investor protections when it ruled that a Canadian funeral home conglomerate must follow normal civil procedure rules and post bond to appeal a contract dispute it had lost with a U.S. firm. Luckily for U.S. taxpayers, before compensation was ordered, the Canadian firm's lawyers reincorporated the firm as a U.S. corporation under bankruptcy protection. This eliminated Loewen's status (and privileges) as a foreign investor. However, the NAFTA tribunal in the Loewen case explicitly declared that any U.S. court ruling is subject to review in this foreign tribunal system.[14]

The number of ISDS cases being filed every year is rising and the scope of policies being attacked is expanding significantly. In recent years, other nations with robust legal systems have had to pay, including Germany and Canada. While this shadow legal system for multinational corporations has been around since the 1950s, just 50 known cases were launched in the regime's first three decades combined. In contrast, corporations have launched at least 50 claims in each of the last six years.

Figure III.12. | Trends in known treaty-based ISDS cases, 1987–2016



Source: ©UNCTAD, ISDS Navigator.
Note: Information has been compiled on the basis of public sources, including specialized reporting services. UNCTAD's statistics do not cover investor–State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continuously adjusted as a result of verification and may not match case numbers reported in previous years.

ISDS is now so controversial that some governments have begun terminating their treaties that include ISDS. Yet, the early draft of the Trump administration NAFTA notice to Congress that leaked in March 2017 suggested that the administration was considering expanding this regime rather than eliminating it.

If ISDS remains in NAFTA or U.S. ISDS liability is expanded via new pacts, it is likely only a matter of time before we lose a case. Already, the U.S. government has spent tens of millions in legal costs to defend against NAFTA investor-state cases. This is because tribunals can order governments to pay costs even when governments win. Merely having more ISDS cases filed against the United States means the federal government and states will have to allocate legal resources to defending challenges. When U.S. state laws are challenged under the investor-state system, state governments have no standing and must rely on the federal government to defend their laws. If states are invited by federal officials to participate, they must pay their own legal expenses.

As corporations and law firms become emboldened and more creative, it is likely only a matter of time before U.S. taxpayers are on the hook, given that as long as NAFTA is in effect, more than 8,500 corporate subsidiaries from Canada and Mexico are empowered to use ISDS to challenge our policies.

No U.S. trade deal should subsidize offshoring or threaten our sovereignty: ISDS must be eliminated from NAFTA.

2. **Imported food and goods and services provided by Mexican and Canadian firms operating here or delivering cross-border must meet U.S. consumer and environmental standards.**

Many NAFTA chapters set rules unrelated to trade to which all U.S. federal, state and local laws must conform. Under these terms, NAFTA tribunals can authorize trade sanctions against the United States or order cash compensation from the U.S. Treasury for laws democratically passed by Congress, state legislatures and city councils that have been approved by U.S. courts, even if such policies apply equally to U.S. and foreign goods, firms and services. Effectively, NAFTA negotiators created an expansive body of law outside of normal democratic procedures.

As a result, NAFTA requires us to import meat that does not conform to U.S. safety or inspection standards. Food imports into the United States from Canada and Mexico have increased 203 percent under NAFTA, and significant food safety problems have occurred with Mexican and Canadian imports. Yet, thanks to a successful trade agreement attack by Canada and Mexico on the popular COOL meat labeling policy, American consumers can no longer ascertain where their meat is raised and slaughtered.

Industry proponents of the TPP have called for adding additional limits included in the TPP on our food safety rules, as well as limits on the labeling regimes needed for consumers to make informed choices in the marketplace.

NAFTA also requires us to permit unlimited access to U.S. roads for trucks from Canada and Mexico. Some of these trucks may not meet U.S. safety, insurance or environmental standards, and they are operated by drivers who do not hold U.S. Commercial Drivers Licenses and thus are not subject to the various training and health requirements. The Mexican drivers also are paid a fraction of what U.S. drivers are paid to carry cargo on U.S. roads, which creates downward pressure on U.S. wage levels. This NAFTA provision has been opposed by U.S. consumer groups, the Teamsters Union and the independent owner-operator trucking association, as well as some border state law enforcement agencies. However, Mexico won a NAFTA challenge against the United States and threatened to impose sanctions on more than $2.4 billion in U.S. trade unless the NAFTA-provided access was allowed. Thus, the Obama administration implemented the NAFTA trucking provisions.

NAFTA subjects numerous other service sector policies – U.S. financial, energy and other safeguards – to challenge before NAFTA tribunals that can authorize trade sanctions or orders for cash compensation if our domestic policies do not comply with NAFTA rules unrelated to trade in such services. These NAFTA rules not only threaten the health and wellbeing of consumers here, but also undermine U.S. jobs by making it easier for companies to move jobs and operations to low-standard facilities abroad.

These NAFTA terms must be replaced with a simple rule: Imported products must meet the same standards as domestic products, and all service providers who operate within the United States – whether those providers are domestic or foreign, or that deliver services for consumption here – must equally comply with U.S. environmental, land use, safety, privacy, transparency, professional qualification and licensing, and consumer access laws and regulations to ensure high-quality products and services, as well as high-quality jobs.

And, a new "carve out" protecting non-discriminatory domestic regulatory policies must be added to NAFTA's Exceptions Chapter that covers all of the agreements terms so as to deter attacks and provide an early defense against challenges to our health, safety, environmental, energy, land use and other non-trade policies. As well, a renegotiated NAFTA must not require privatization of public services or otherwise limit the ability of federal, state or local governments to establish whatever service delivery mechanisms can best ensure quality, affordable service.

To repair the damage of past trade-pact attacks, a NAFTA renegotiation must restore the U.S. country-of-origin meat labels and include a "peace clause" to end Mexico's continual trade pact attacks and terminate the ongoing case against the U.S. dolphin-safe tuna labeling program. This labeling program is all that remains after a series of trade pact attacks on the U.S. ban of tuna caught using methods that kill dolphins. With the U.S. ban on dolphin-deadly tuna lifted to avoid trade sanctions, now U.S. consumers rely on a voluntary labeling program that many companies use. Mexico is now threating to impose trade sanctions if the United States does not eliminate this non-discriminatory labeling regime, which applies equally to U.S. and Mexican fishers. Consumers rely on the information provided by the labels to purchase dolphin-safe tuna if they so desire.

And, certainly the TPP's limits on financial, e-commerce and other service sector consumer safeguards shouldn't be added to NAFTA. For instance, the TPP included language limiting financial regulation that forbid whole categories of regulation even if such rules are equally applied to domestic and foreign firms. That is to say that the TPP legislated U.S. domestic policy rather than Congress. The TPP also meddled in standards for U.S. professional licensing and imposed e-commerce policies. Such rules cannot be changed once agreed in a trade deal unless all signatory countries agree. The result is a form of international preemption with one-size-fits all international standards locked in, usurping the role of Congress and state legislatures.

3. Eliminate NAFTA's limits on procurement policy that forbid Buy American and other Buy Local policies, offshoring U.S. tax dollars.

NAFTA undermines the "Buy American" preferences that have been in place since the Franklin D. Roosevelt administration to ensure that American-made goods are purchased when the government spends our tax dollars on infrastructure projects or purchases vehicles, computers and other products. NAFTA also forbids the U.S. government from requiring that firms operating government call centers or providing other government services employ U.S. workers. These rules offshore our tax dollars rather than investing them to create jobs and innovation at home.

NAFTA's rules that require us to waive Buy American, Buy Local and other procurement preferences that spur innovation and create good jobs at home, and that subject government procurement policies relating to technical specifications and bidder qualifications to challenge in NAFTA tribunals, must be eliminated. The American public agrees: Requiring that tax dollars spent on government procurement support U.S. jobs and firms is broadly popular. A recent Rasmussen poll found that 83 percent of Americans believe it is important to Buy American.[15]

The current trade agreement procurement rules are not only bad policy by eliminating an important tool to spur domestic innovation and employment. They also result in net losses even when considering prospective procurement opportunities provided in other countries under these trade pact terms. As revealed in a March 2017 Government Accountability Office report, "United States Reported Opening More Opportunities to Foreign Firms Than Other Countries, but Better Data Are Needed," the United States reported opening *twice as much* procurement to foreign firms as the next five largest World Trade Organization (WTO) Agreement on Government Procurement (GPA) signatories *combined* (European Union, Japan, South Korea, Norway and Canada). That is to say that our NAFTA procurement tradeoff with Canada, a larger procurement market than Mexico, is a losing deal for us even if all of Europe, Japan, Korea and Norway are added to the prospective opportunities for U.S firms.

For many years, domestic manufacturers and many members of Congress have noted that given the much greater value of U.S. government procurement relative to almost every other trading partner, providing some U.S. firms with opportunities to bid on a smaller amount of government contracting in other countries did not seem like a sound trade-off for providing preferential access for foreign goods and firms to our larger pool of government contracts. Certainly this is the case with NAFTA given the size of Canada and Mexico's prospective procurement markets.

Certainly given that the administration that has declared that "Buy American, Hire American" is its policy, it would prioritize eliminating the NAFTA provisions that forbid both practices in government procurement. Removing these terms from NAFTA is an important start, but currently 59 nations obtain Buy American waivers.

"Buy American" Now Means Buy U.S. and from These 59 Countries

Armenia, **Aruba**, *Australia*, **Austria**, *Bahrain*, **Belgium**, **Bulgaria**, ***Canada***, *Chile*, *Colombia*, *Costa Rica*, **Croatia**, **Cyprus**, **Czech Republic**, **Denmark**, *Dominican Republic*, *El Salvador*, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, *Guatemala*, *Honduras*, **Hong Kong**, **Hungary**, **Iceland, Ireland**, ***Israel***, **Italy**, **Japan**, **Latvia**, **Liechtenstein**, **Lithuania, Luxemburg**, *Mexico*, **Moldova**, **Malta**, **Montenegro**, *Morocco*, **Netherlands**, **New Zealand**, *Nicaragua*, **Norway**, *Oman*, *Panama*, *Peru*, **Poland**, **Portugal**, **Romania**, ***Singapore***, **Slovak Republic**, **Slovenia**, ***South Korea***, **Spain**, **Sweden**, **Switzerland**, **Taiwan**, **Ukraine**, **UK**

Bold = WTO GPA; Italics = FTA

Every country should be free to determine how to spend its own tax dollars. Instead, NAFTA's Chapter 10 includes rules that require companies operating in Canada and Mexico, whether they are Chinese, Korean or Japanese firms or Mexican and Canadian, to be treated like U.S. firms with respect to bidding on U.S. government contracts. As well, foreign goods that meet rules of origin to count as produced in Mexico and Canada must be treated as if they were made in America with respect to many types of U.S. government contracts over a certain dollar-value threshold.

The rules also limit conditions for procurement contracts, like requiring workers on infrastructure and construction contracts be paid 'prevailing wages' or requiring recycled content in goods or renewable energy. If the U.S. government – or a state – does not conform its policies to these constraints, then the other countries that are part of the agreement can challenge our policies in foreign tribunals that can impose trade sanctions against the United States until the laws are eliminated or changed.

4. Eliminate NAFTA rules that raise medicine prices.

Among NAFTA's most outrageous special interest terms are those that shield pharmaceutical firms from the market competition that brings down medicine prices for consumers. Those firms hope to use NAFTA renegotiation to gain even further protections. But stronger monopoly power would simply enable these firms to extract more profits from existing medicines by setting ever higher prices, perpetuating a system that is now failing to deliver the innovation needed to address today's health needs while leaving millions of patients without required treatments.

No new monopoly rights should be added to NAFTA, and NAFTA's existing intellectual property protections that would go beyond the existing World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) should be eliminated.

NAFTA was the first multilateral trade agreement to include specific obligations to protect intellectual property. The WTO TRIPs agreement was adopted subsequent to NAFTA. However, NAFTA contains provisions that go beyond TRIPs, thus, for a time, it remained an important source of obligations for the parties. All three NAFTA countries have incorporated TRIPs as well as the NAFTA provisions into their laws. Over the years, they all have adopted rules demanded by the pharmaceutical industry and opposed by consumer groups that go beyond TRIPs and NAFTA. Since all three countries have TRIPs-plus and NAFTA-plus intellectual property (IP) regimes, with well-developed and mature components, any changes to NAFTA should exclude any provisions related to patents, copyright, trademarks, data protection, trade secrets or other forms of intellectual property.

If intellectual property is not excluded from the NAFTA talks, the IP chapter should be kept as slim as possible and should not lead to rewriting already existing TRIPS-plus and NAFTA-plus standards. Specifically, NAFTA renegotiations should avoid additional terms on patentability standards and patent disclosure, biologics exclusivity and patent term extensions. In addition, copyright terms, copyright limitations and exceptions, Internet Service Provider liability and safeguard rules, trade secrets and related enforcement measures, and border measures should not be locked in via a trade agreement.

The United States, Canada and Mexico have incompatible policies in all realms of these issues. There is a significant chance that negotiations on these issues will create conflicts that will become a major obstacle to negotiations. And, given that these are areas in which policy flexibilities are needed to adapt to constant technological advances and the disproportionate influence of the large pharmaceutical firms and content industry in the policymaking process, locking in rules on these subjects would harm consumer interests in affordable medicine and healthcare and Internet freedom. In sum, the intellectual property chapter of NAFTA should not serve as a forum for powerful lobbies to continue pushing for maximalist IP standards that fail to account for the interests of Americans, Mexicans and Canadians.

5. Add strong, enforceable labor and environmental standards, not the TPP's weak rules.

U.S. trade agreements since the George W. Bush administration have included labor and environmental standards in their core texts. The ostensible goal of these terms was to raise standards in trade partner countries. But these terms, replicated in the TPP, have proved ineffective.

Unless a renegotiated NAFTA includes terms that can raise Mexican wages above the current average of $2.50 per hour, not only will Mexican workers be unable to support their families, but Mexican consumers will be unable to afford U.S. exports. And the absence of effective labor and environmental standards creates race-to-the-bottom incentives for U.S. firms to offshore production and slams U.S. firms and workers with a flood of imports subsidized by environmental and social dumping.

A NAFTA renegotiation must level the playing field by conditioning NAFTA trade benefits on countries adopting, maintaining and implementing in their domestic laws the policies needed to fulfill the international labor rights and environmental obligations to which they have committed. Public Citizen wishes to associate itself with the comments of the AFL-CIO with respect to the specific mechanisms needed to ensure that wages increase and the labor rights provided in the International Labor Organization's Core Conventions and other related treaties become a condition of trade under a revised NAFTA. Such labor obligations – as well as environmental terms based on a requirement of the adoption, implementation and maintenance in domestic law of the obligations of the multilateral environmental treaties nations have signed – must be subject to the same enforcement and sanctions as all other terms. Market access benefits under a renegotiated NAFTA must be conditioned on confirmation that labor and environmental commitments are enforced – meaning sustained evidence that conditions on the ground have improved and withdrawal of trade benefits for backsliding.

6. Do not lock in e-commerce rules.

When NAFTA was concluded in 1994, the internet was in its infancy. Since then, the Internet has changed the way we think, communicate and live. With the internet of things and billions of devices scattered around the globe, data has become a massively important commodity.

The data economy is giving rise to many tough questions. The rise of artificial intelligence and big analytics, monopolization of services and strong network effects present a potent cocktail of challenges to privacy, competition, consumer protection and taxation. There are growing calls for antitrust regulators to scrutinize the internet giants for their control of data.

There are many unknowns regarding the technological advances ahead, and therefore the digital economy. For years, the internet giants took advantage of the much less prescriptive, voluntary regime of the United States for customer data. This does not mean the *status quo* will remain in the future.

More than 90 percent of Americans are concerned about how companies collect and use their online data. There is a great need for stronger legal safeguards to give consumers confidence in what is done to their personal information by the internet giants.

NAFTA should not enable cross-border data transfers and data-processing across all services sectors without adequate safeguards. Data protection and privacy are not non-tariffs barriers to trade. They are fundamental rights and strong safeguards that must be put in place to protect American consumers. NAFTA rules on digital trade should not shrink the policy space of the U.S. regulators and U.S. Congress.

Given the constant technological developments and the moving boundaries of consumer threats, it is simply inappropriate to lock in e-commerce and related data policies in a trade agreement. Rather, such policies must be made in democratic policymaking processes that provide opportunities to revisit and revise policies.

7. Promote balanced agricultural trade to strengthen rural communities.

NAFTA has left U.S. farmers were they were in 1985 – with record debt-to-income ratios – and devastated rural communities nationwide. But now thanks to NAFTA and similar pacts, there are far fewer U.S. farmers. At the same time, NAFTA forced millions of Mexican farmers off their land, fueling a 60 percent increase in migration from Mexico to the United States in NAFTA's first decade. Many are now working in the United States, often as undocumented farmworkers living in precarious conditions.

The NAFTA agribusiness model has concentrated wealth in a handful of companies, depleted natural resources and left taxpayers to pick up the tab for agribusinesses' failure to pay farmers prices above cost-of-production prices.

NAFTA's outcomes for cattle ranchers is emblematic of the problem of NAFTA rules that benefit a few large meat packers rather than small- and medium-sized independent ranchers or consumers. The number of beef cattle operations in the United States has fallen from 1,074,349 to 913,246, a decrease of almost 15 percent. The number of the largest-size ranches – those with 5,000 or more head – jumped 60 percent, from 704 ranches to 1,124. Just four beef packers now control 85 percent of the beef market, up from an already alarming 69 percent before NAFTA. These multinational corporations have used NAFTA's rules to consolidate their market share and control to maximize their profits – maintaining high consumer prices while pressuring down prices paid for small and medium-sized U.S. ranchers or simply sourcing cattle from Mexico.

As NAFTA imports in cattle and beef grew, the U.S. agricultural trade balance with Canada and Mexico flipped from a $2.5 billion surplus in the year before NAFTA to a $6.4 billion deficit in 2016. Many people are surprised to learn the United States has a NAFTA agricultural trade deficit, given broad press coverage of increased U.S. corn exports to Mexico displacing millions of Mexican farmers. But even as the United States now exports 47 times more corn to Mexico than pre-NAFTA, growing food imports from NAFTA countries outweighed that increase. (Even if NAFTA was eliminated, almost all U.S. corn exports to Mexico would remain duty-free. In 2008, Mexico eliminated its corn tariffs for all countries via the World Trade Organization. It later raised tariffs to 20 percent on white corn, but almost all U.S. exports are of yellow corn. Similarly, most U.S. soy exports would be duty-free to Mexico without NAFTA.)

NAFTA's agriculture terms must be renegotiated to achieve balanced trade that supports fair and sustainable rural economies and food supplies. All nations must have the right to democratically establish domestic farm policies that ensure that farmers are paid fairly for their crops and livestock, and other farm and food policies that protect farmers and consumers such as inventory management, strategic food reserves and import surge protections, and other mechanisms to protect the right of each country to prevent dumping of agricultural commodities at below the cost of production.

8. Stop trade cheating.

All U.S. trade deals must have enforceable disciplines against currency manipulation, strong rules of origin and strong measures to stop transshipment.

When trade partners are free to lower the value of their currencies to gain trade advantages, the United States is flooded with imports made artificially cheap while U.S. exports are unfairly priced out of their markets. Currency manipulation has fueled our persistent trade deficit and destroyed millions of American jobs. The United States should work with Mexico and Canada to establish common mechanisms so that together we can confront currency manipulation by China or other large exporters. And all U.S. trade pacts must include enforceable disciplines against currency manipulation in their core texts, and U.S. domestic legislation must be enacted that triggers automatic action against currency manipulators, rather than simply triggering reports or dialogue.

In order for the benefits of our trade agreements to flow to the workers in the countries that sign the pacts and play by the rules, we must have clear "rules of origin" that can't be easily gamed. Under current NAFTA rules, a large share of a car's parts could come from China, but a car assembled in a NAFTA country still could enter the United States with the duty-free privileges. NAFTA renegotiations should raise the rules of origin so that producers that meet new NAFTA wage, labor and environmental standards gain market access. However, if NAFTA does not improve wage, labor and environmental standards significantly, raising the rules of origin would well result in even more U.S. job loss as firms source in Mexico at low wages inputs they would have obtained from non-party countries.

Conclusion

As is always the case, policy decisions are intertwined with political considerations. President Trump made criticism of America's trade agreements a central focus of his campaign. Indeed, President Trump won key midwestern states and thus the presidency by speaking to voters' fury about the hijacking of trade agreements by special interests to promote their agendas to the detriment of most working Americans.

In his Pennsylvania trade speech a year ago, President Trump said: "Our politicians have aggressively pursued a policy of globalization – moving our jobs, our wealth and our factories to Mexico and overseas. Globalization has made the financial elite who donate to politicians very wealthy. But it has left millions of our workers with nothing but poverty and heartache ... The people who rigged the system for their benefit will do anything – and say anything – to keep things exactly as they are."

And indeed, those who have rigged our trade agreements are working at full tilt to make sure none of NAFTA's damaging terms are eliminated and that elements of the TPP are added to NAFTA in the pending renegotiations.

Millions of people across the United States have long pushed for a NAFTA renegotiation that would halt the deal's damage. Now the American public is expecting the Trump administration to create a new American trade policy. And given that the NAFTA renegotiations are the first key step in that process, and, as administration officials have stated, will set the standard for future agreements, these talks will be subject to close scrutiny.

If NAFTA renegotiations continue the past trade model, for instance by adding elements of the TPP to NAFTA, or if the only changes made in these negotiations are modest tweaks on the margins of the existing NAFTA text, the political implications could be as dire as the policy implications.

Public Citizen will closely monitor the negotiations and outcomes. We will ensure the public is apprised of how new NAFTA terms will affect peoples' jobs, health and safety and the environment. We will fight fiercely for the changes to NAFTA for which we have long advocated and against any deal that replicates the past failed model.

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