
The United States-Mexico-Canada Agreement: How NAFTA 2.0 Represents a New Era in North American Trade

David Evans

Follow this and additional works at: <https://via.library.depaul.edu/law-review>



Part of the [Law Commons](#)

Recommended Citation

David Evans, *The United States-Mexico-Canada Agreement: How NAFTA 2.0 Represents a New Era in North American Trade*, 71 DePaul L. Rev. 831 (2022)

Available at: <https://via.library.depaul.edu/law-review/vol71/iss3/5>

This Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

THE UNITED STATES-MEXICO-CANADA AGREEMENT: HOW NAFTA 2.0 REPRESENTS A NEW ERA IN NORTH AMERICAN TRADE

I. INTRODUCTION

In May 2017, President Trump fulfilled a key campaign promise¹ when he began renegotiating the North American Free Trade Agreement (NAFTA).² Enacted in 1994, NAFTA created one of the largest free trade zones in the world by liberalizing trade between the United States, Canada, and Mexico.³ NAFTA inextricably integrated three vastly different economies into a single trade bloc, resulting in many unintended economic consequences. In an attempt to remedy some of these consequences, the Trump administration embarked on a year-long effort to re-negotiate the agreement, culminating in the signing of the United States-Mexico-Canada Agreement (USMCA or Agreement) on November 30, 2018.⁴ Although the USMCA has been dubbed “NAFTA 2.0” since it contains many key provisions from NAFTA, the re-negotiated text introduces important substantive changes to trade policy aimed at creating a fairer economic landscape and preparing the trade bloc for the economic realities of the twenty-first century.⁵

For many workers, industry leaders, and politicians, the USMCA is a necessary modernization of a deeply flawed deal that created devastating unintended economic consequences and unbalanced reciprocal trade in North America. But whether the USMCA will achieve its desired result remains uncertain. Will the USMCA, like NAFTA, result in unintended consequences that will not come to light until decades after its implementation?

1. Sheelah Kolhatkar, *Trump’s Rebrand of NAFTA*, NEW YORKER (Oct. 3, 2018), <https://www.newyorker.com/news/news-desk/trumps-rebrand-of-nafta> (“Throughout the campaign, I promised to renegotiate NAFTA, and today we have kept that promise.”).

2. Tori K. Whiting & Gabriella Beaumont-Smith, *AN ANALYSIS OF THE UNITED STATES-MEXICO-CANADA AGREEMENT*, HERITAGE FOUND. 1 (2019), <https://www.heritage.org/trade/report/analysis-the-united-states-mexico-canada-agreement>.

3. *Id.*

4. *Id.*

5. Dimitrios Bakas et al., *NAFTA 2.0 Is a Welcome Deal for the US, Canada and Mexico in a Time of Trade Uncertainty*, LSE (Nov. 13, 2019), <https://blogs.lse.ac.uk/usappblog/2019/11/13/nafta-2-0-is-a-welcome-deal-for-the-us-canada-and-mexico-in-a-time-of-trade-uncertainty/>.

The answer is unclear, but what is certain is that the USMCA will present a host of new legal challenges for companies seeking to avail themselves to the benefits of the Agreement.⁶ The USMCA affects all producers, exporters, and importers of goods in North America.⁷ Corporations and corporate counsel will need to become familiar with its terms and obligations in order to effectively advise their clients since failure to comply can have devastating financial ramifications.⁸

Thus, this Comment is intended to provide the legal community with a starting point for understanding these new provisions by analyzing several of the USMCA's key changes in the context of their practical applications and the shortcomings of NAFTA they purport to solve. Part II will provide a background on NAFTA, its re-negotiation, and the key changes embodied in the USMCA. Part III will analyze several of the USMCA's most drastic changes, particularly its labor and environmental provisions, with a focus on what the Biden administration will need to do to effectively implement their intended changes. Finally, Part IV will look forward to the potential unforeseen impacts of the USMCA and its influence on future trade policy.

II. BACKGROUND

A. NAFTA

"[NAFTA] means jobs. American Jobs, and good paying American jobs. If I didn't believe that, I wouldn't support the agreement."

—President Bill Clinton, 1993⁹

NAFTA was signed into law by President Bill Clinton and came into effect on January 1, 1994.¹⁰ The purpose of NAFTA was to boost trade between the United States, Canada, and Mexico while modernizing Mexico's economy.¹¹ NAFTA was enacted in a political climate

6. Richard Mojica et al., *Five Takeaways for Corporate Counsel on the USMCA*, LAW.COM (June 24, 2020), <https://www.law.com/corpcounsel/2020/06/24/five-takeaways-for-corporate-counsel-on-the-usmca/?slreturn=20201022191529>.

7. *Id.*

8. *Id.*

9. Janna Herron, *Was NAFTA Really So Bad for the Economy?*, FISCAL TIMES (Sept. 28, 2016), <https://www.thefiscaltimes.com/2016/09/28/Was-NAFTA-Really-So-Bad-Economy>.

10. HISTORY.COM, *This Day in History: December 08 1993 NAFTA Signed Into Law* (Mar. 4, 2010), <https://www.history.com/this-day-in-history/nafta-signed-into-law>.

11. David Floyd, *NAFTA's Winners and Losers*, INVESTOPEDIA (Jan. 11, 2022), <https://www.investopedia.com/articles/economics/08/north-american-free-trade-agreement.asp>; Andrew Chatzky et al., *NAFTA and the USMCA: Weighing the Impact of North American Trade*, COUNCIL ON FOREIGN RELATIONS (July 1, 2020), <https://www.cfr.org/backgrounder/naftas-economic-impact> (Mexican President Carlos Salinas de Gortari saw NAFTA as an opportunity to modernize the Mexican economy.).

dominated by a neoliberal¹² economic ideology advocating for the elimination of trade barriers to simplify the flow of commodities and capital financing around the world and foster global competition.¹³

Thus, NAFTA was initially hailed as a massive victory by proponents of free trade as the agreement created a trilateral trade bloc that eliminated tariffs between the three largest North American markets.¹⁴ However, President Clinton's remarks would eventually come back to haunt him, as free trade between the three countries opened a Pandora's box of unforeseen economic issues.

The first of these unintended consequences came about in the manufacturing sector. As massive American multinational corporations gained access to Mexican markets and labor, they began to invest heavily in moving their manufacturing operations to Mexico.¹⁵ In NAFTA's first ten years, U.S. foreign direct investment (FDI) in Mexico rose from \$15 billion to more than \$107.8 billion.¹⁶ Companies began to concentrate manufacturing operations along Mexico's northern border with the United States in areas known as "maquiladoras."¹⁷ Maquiladoras are specialized industrial zones in Mexico that import raw materials from the United States, convert them into goods, and then export those finished products back to the United States for sale and consumption.¹⁸ These specialized trade zones offer geographically convenient locations for manufacturers to take advantage of free trade, lower wages, and relaxed labor regulations to cut manufacturing costs.¹⁹ The resulting shift in production to Mexico caused an estimated loss of over 900,000 U.S. jobs, the closing of around 80,000 U.S.

12. Will Kenton, *Neoliberalism*, INVESTOPEDIA (Oct. 26, 2020), <https://www.investopedia.com/terms/n/neoliberalism.asp>. Neoliberalism refers to market-oriented reform policies such as the elimination of price controls, deregulation of capital markets, lowering of trade barriers, and reducing state-influence in the economy. *Id.*

13. Pablo Ruiz Nápoles, *Neoliberal Reforms and NAFTA in Mexico*, 14 *ECONOMIA UNAM* 75, 75 (2017), <https://www.sciencedirect.com/science/article/pii/S1665952X17300191> (NAFTA was a neoliberal reform of "prime political importance.").

14. Chatzky et al., *supra* note 11. ("NAFTA eliminated most tariffs on products traded between [the United States, Mexico, and Canada], with a major focus on liberalizing trade . . .").

15. See Herron, *supra* note 9.

16. Mauro Guillén, *NAFTA's Impact on the U.S. Economy: What Are the Facts?*, KNOWLEDGE WHARTON (Sept. 6, 2016), <https://knowledge.wharton.upenn.edu/article/naftas-impact-u-s-economy-facts/>.

17. William C. Gruben, *Did NAFTA Really Cause Mexico's High Maquiladora Growth?* (Ctr. for Latin Am. Econs., Working Paper No. CLAE 0301, 2001), <https://www.dallasfed.org/~media/documents/research/papers/2001/wp0106.pdf>.

18. *Id.*

19. JESUS CAÑAS & ROBERT W. GILMER, *THE MAQUILADORAS CHANGING GEOGRAPHY*, FED. RESERVE BANK DALL. 12-14 (2009), <https://www.dallasfed.org/~media/documents/research/swe/2009/swe0902c.pdf>.

factories, and imbalanced trade between the United States and Mexico.²⁰

On the other hand, NAFTA bolstered U.S. agricultural trade. NAFTA required Mexico to eliminate tariffs and non-tariff barriers on agricultural products in order to accommodate U.S. agri-business.²¹ As a result, U.S. agriculture, which is one of the most heavily subsidized and mechanized industries in the world, was able to dominate the Mexican corn market by exporting surplus product into Mexican markets at nineteen percent below the cost of production between 1997 and 2005.²² The consequences to the Mexican agricultural industry were devastating, as it was unable to compete with American production and pricing.²³ “Ejido”²⁴ farmers, who were already some of the poorest and most underrepresented people in Mexican society, saw their monthly wages decrease from 1,959 pesos to just 228 pesos in a little over ten years.²⁵ It is estimated that over 1.3 million ejido

20. PUBLIC CITIZEN, *NAFTA's Legacy: Lost Jobs, Lower Wages, Increased Inequality* (Feb. 2018), https://www.citizen.org/wpcontent/uploads/nafta_factsheet_deficit_jobs_wages_feb_2018_final.pdf. In 1993 (the year before NAFTA took effect), the United States had a goods and services surplus of \$7.5 billion with Mexico. *Id.* In 2017, the United States had a \$119.4 billion good and services *deficit* with Mexico, consisting of a \$126.4 billion goods deficit and a \$7 billion services surplus. *Id.* The effect of this shift in production was enormous. The U.S. Labor Department certified that more than 950,000 U.S. jobs were lost because of NAFTA outsourcing. *Id.* This figure does not consider many categories of workers that lost their jobs during NAFTA's first ten years. *Id.* In NAFTA's first ten years, the Economic Policy Institute (EPI) estimates that the United States's trade deficit with Mexico and Canada eliminated one million net jobs, one-third of which were due to NAFTA. *Id.* This is supported by data from the U.S. Bureau of Labor Statistics, which shows that between 1993 and 2017, nearly 4.5 million U.S. manufacturing jobs were lost and that one out of every four of those losses could be attributed to NAFTA. *Id.* Similarly, a report by the Liberal Economic Policy Institute found that from 1993 to 2013, 851,700 U.S. jobs were displaced because of the United States's rising post-NAFTA trade deficit with Mexico and Canada. *Id.* In terms of factory losses, the EPI found that 80,000 manufacturing establishments in the United States were closed from 1994 through 2014. *Id.* This determination is based on data from the Census Bureau, Business Dynamics Statistics, which found that there were 357,330 manufacturing establishments in the United States in 1994, and just 274,765 in 2014. *Id.*

21. See Rick Relinger, *NAFTA and U.S. Corn Subsidies: Explaining the Displacement of Mexico's Corn Farmers*, PROSPECT (Apr. 19, 2010), <https://prospect-journal.org/2010/04/19/nafta-and-u-s-corn-subsidies-explaining-the-displacement-of-mexicos-corn-farmers/>.

22. Timothy A. Wise, *Agricultural Dumping Under NAFTA: Estimating the Costs of U.S. Agricultural Policies to Mexican Producers* 13, 17 (Glob. Dev. & Env't Inst., Working Paper No. 09-08, Dec. 2009), <https://ageconsearch.umn.edu/record/179078/>.

23. Megan Janetsky, *Mexicans Work To Reclaim Corn As Their Own*, CRONKITE NEWS (Oct. 12, 2017), <https://cronkitenews.azpbs.org/buffett/mexico/corn/>.

24. MEXLAW, *The Ejido, A Mexican Concept Misunderstood by Foreigners* (Aug. 18, 2017), <https://mexlaw.com/ejido-mexican-concept-misunderstood-foreigners/> (“An Ejido is an area of communal land mainly used for agriculture, on which community members farm designated plots and collectively maintain communal holdings.”).

25. MARCELINE WHITE ET AL., WOMEN'S EDGE COALITION, *NAFTA AND THE FTAA: A GENDER ANALYSIS OF EMPLOYMENT AND POVERTY IMPACTS IN AGRICULTURE* iii, 5–6 (2003),

farmers became unemployed as a result.²⁶ This massive increase in unemployment is cited as one the major factors for the increase in migration and illegal immigrants entering the United States in the 2000s, as impoverished farmers had little choice but to seek work in the newly created “maquiladoras” or seasonal work on U.S. farms.²⁷

B. Calls for Reform

“The single worst trade deal ever approved in this country.”

–Donald Trump²⁸

With the election of President Donald Trump, the neoliberal economic policies of the 1990s and 2000s began to give way to an “America First” trade ideology that promised to limit globalization and revitalize protectionist tariffs in order to shield domestic industry from foreign competition.²⁹ As president, Donald Trump began to pursue an aggressive renegotiation of trade deals in order to level the playing field for domestic manufacturing.³⁰ This included a commitment to “tear up NAFTA” in order to re-negotiate and replace it with a deal that sought to balance the United States’s trade deficit.³¹ The result was a year-long renegotiation process that culminated in the ratification of the United States-Mexico-Canada Agreement on July 1, 2020.³²

https://www.iatp.org/sites/default/files/NAFTA_and_the_FTAA_A_Gender_Analysis_of_Employment.pdf.

26. *See id.*

27. *Id.*

28. Herron, *supra* note 9.

29. Julia Howald et al., Farewell to “America First”? Trade Policy Under Joe Biden, BDI (June 6, 2021), <https://english.bdi.eu/article/news/america-first-u-s-trade-policy-under-president-donald-trump/>.

30. Jen Kirby, *Trump Has Threatened To Withdraw from NAFTA. What’s Next?*, VOX (Dec. 4, 2018), <https://www.vox.com/2018/12/4/18123809/usmca-trump-nafta-withdrawal-congress>.

31. *See id.*

32. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *United States-Mexico-Canada Agreement* (last visited Apr. 22, 2022), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>.

C. USMCA

“[A] victory for American workers.”

—Nancy Pelosi³³

The USMCA is not really a new trade agreement since it retains many of NAFTA’s key provisions.³⁴ Instead, it modifies NAFTA by revising, adding, and eliminating several provisions. The Agreement has received wide bi-partisan support, being characterized as “better than NAFTA” and “a victory for American workers” by Nancy Pelosi.³⁵ The USMCA preserves the United States’s competitive advantage in many areas, such as the digital economy, patents, and financial services, while simultaneously leveling the playing field for companies manufacturing products in the United States.³⁶ The initial version of the deal was estimated to create more than 176,000 U.S. jobs and increase GDP by up to 0.35% during its first six years.³⁷

The text of the USMCA contains thirty-four chapters, four separate annexes, and thirteen side-letters.³⁸ The USMCA mirrors several key provisions of NAFTA such as those relating to state-to-state dispute resolution and U.S. aluminum and steel tariffs on Canada and Mexico (along with retaliatory Canadian tariffs).³⁹ Notably, the USMCA has

33. Stephen Loiaconi, *Dems Claim ‘Victory for America’s Workers’ as They Announce Support For Trump’s USMCA*, ABC 6 (Dec. 10, 2019), <https://abc6onyourside.com/news/nation-world/dems-claim-victory-for-americas-workers-as-they-announce-support-for-trumps-usmca>.

34. M. ANGELES VILLARREAL, CONG. RESEARCH SERV., *THE UNITED STATES-MEXICO-CANADA AGREEMENT* Summary Page (2021), <https://sgp.fas.org/crs/row/R44981.pdf> (“USMCA . . . retains most of NAFTA’s market opening measures and others measures, while making notable changes to motor vehicle rules of origin, dispute settlement provisions, government procurement, investment, and intellectual property protection. It also modernizes provisions on services, labor, and the environment.”).

35. Loiaconi, *supra* note 33.

36. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *United-States-Mexico-Canada Trade Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement*, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing> (last visited Apr. 22, 2022) [hereinafter *Modernizing NAFTA*]; OFFICE OF THE U.S. TRADE REPRESENTATIVE, *United States-Mexico-Canada Trade Fact Sheet: Rebalancing Trade to Support Manufacturing*, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/rebalancing> (last visited Apr. 22, 2022) [hereinafter *Rebalancing Trade*].

37. Robert E. Scott, *Meet the New NAFTA – Same as the Old NAFTA*, THE HILL (Apr. 29, 2019), <https://thehill.com/opinion/finance/441057-meet-the-new-nafta-same-as-the-old-nafta>.

38. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *Agreement Between the United States of American, the United Mexican States, and Canada 7/1/20 Text*, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> (last visited Apr. 22, 2022).

39. *Id.*

eliminated investor-state dispute settlements between the United States and Mexico.⁴⁰

Where the new agreement substantially differs from NAFTA is in rules for manufacturing. The USMCA's labor provisions require collective bargaining and secret union voting in order to reduce the influence of powerful Mexican business owners and improve labor conditions in Mexican manufacturing plants.⁴¹ The USMCA contains key enforcement procedures that allow U.S. labor inspectors to visit Mexican facilities to ensure compliance, gives the U.S. government power to deny preferential tariffs for goods purchased by Mexican companies that do not meet agreed upon labor standards, and provides for an interagency committee that will monitor Mexico's labor reform implementations and compliance with labor obligations.⁴² It even provides for a "Rapid Response Panel" to review whether specific facilities are violating workers' rights and to levy duties against rule breakers.⁴³ Further, the USMCA contains anti-discrimination provisions that seek to eliminate workplace discrimination based on sexual orientation and gender identity.⁴⁴

The USMCA was even supported by the American Automotive Policy Council, an organization representing the Big Three automotive manufacturers in the United States.⁴⁵ The new agreement modified several key provisions of NAFTA relating to automobile manufacturing. First, the rules of origin for automobiles were modified so that seventy-five percent of every automobile must be made in North America in order to qualify for duty-free treatment.⁴⁶ Further,

40. *Id.* NAFTA's Chapter 11 provided for an investor-state dispute mechanism. *Id.*

41. U.S.M.C.A. art. 23.3(1)(a), Nov. 30, 2018 ("Each Party shall adopt and maintain . . . freedom of association and the effective recognition of the right to collective bargaining"); *see also id.* at annex 23-A, Worker Representation in Collective Bargaining in Mexico (sets out Mexico's obligations with regard to worker representation and collective bargaining and explains that "Mexico shall . . . [p]rovide in its labor laws . . . for an effective system to verify that elections of union leaders are carried out through a personal, free, and secret vote of union members").

42. *Id.*

43. KING & SPALDING, *Companies Face Risk from the USMCA's New Rapid Response Mechanism To Enforce Labor Rights* (July 15, 2020), <https://www.kslaw.com/news-and-insights/companies-face-risk-from-the-usmcas-new-rapid-response-mechanism-to-enforce-labor-rights>.

44. Alex Reed, *NAFTA 2.0 and LGBTQ Employment Discrimination*, 57 AM. BUS. L.J. 5, 11 (2020).

45. Press Release, American Automotive Policy Council, AAPC Statement of Signing of USMCA (Nov. 30, 2018), <http://www.americanautocouncil.org/content/aapc-statement-signing-usmca>.

46. WILLIAM ALAN REINSCH, ET AL., THE IMPACT OF RULES OF ORIGIN ON SUPPLY CHAINS, CSIS 19 (2019), <https://www.csis.org/analysis/impact-rules-origin-supply-chains-usmcas-auto-rules-case-study>. The USMCA requires a seventy-five percent Regional Value Content (RVC) for light vehicles and light trucks and a seventy percent RVC threshold for heavy trucks. *Id.* Core parts, including "engines, chassis, gearboxes (transmissions), shocks, steering boxes, and ad-

forty to forty-five percent of automobile parts manufactured for vehicles receiving duty-free treatment must originate in factories that pay workers at least \$16 an hour.⁴⁷ Collectively, these provisions were aimed at raising wages and the cost of manufacturing in Mexico, while allowing the industry to remain globally competitive by ensuring that vehicle and auto parts are allowed to move freely.⁴⁸ As a result of the USMCA, General Motors shifted production plans for a new Chevrolet electric vehicle back to the United States and is now building a new manufacturing plant in Ohio.⁴⁹

In the agricultural sector, the USMCA retains many of NAFTA's original advantages for U.S. agribusiness. NAFTA originally eliminated almost all tariffs on agricultural products.⁵⁰ The USMCA retains this free rate of duty, however, it will further open Canadian markets to U.S. dairy producers by requiring Canada to set new quotas which are expected to grant U.S. dairy farmers access to up to 3.6 percent of Canada's dairy market.⁵¹

Moreover, the USMCA enforces additional protections for intellectual property rights. The Agreement supports ten years of data protection for biological drugs and promulgates standards protecting against the infringement of digital works.⁵² These provisions bar Ca-

vanced batteries for electric cars" must meet a seventy-five percent RVC threshold. *Id.* Core parts are typically manufactured by higher-skilled workers. *Id.*

47. The USMCA's contains a new labor value content requirement:

The USMCA introduces a phased-in labor value content (LVC) requirement, that requires 40-45 percent of the content of an automobile be made by workers earning at least \$16 per hour. The 40-45 percent range is dependent on the type of vehicle; passenger vehicles require 40 percent, whereas pickup trucks require 45 percent.

Id. at 21.

48. WQAD, *5 Key Difference Between NAFTA and Trump's USMCA Deal* (Dec. 10, 2019), <https://www.wqad.com/article/news/5-key-differences-between-nafta-and-trumps-usmca-deal/526-2d592d7f-11b7-4127-8b00-1ed633b9cc6e>.

49. Dan Flores & Jim Cain, *GM Announces News Manufacturing Jobs Coming to Ohio*, GEN. MOTORS (Aug. 5, 2019), <https://media.gm.com/media/us/en/gm/home.detail.html/content/Pages/news/us/en/2019/may/0508-ohio.html>.

50. Sebastian Pouliot, *The Importance of NAFTA for the Agricultural Sector*, IOWA ST. AGRIC. POL'Y REV., https://www.card.iastate.edu/ag_policy_review/article/?a=73 (last visited Apr. 24, 2022).

51. Katie Lobosco, *Canada Opened its Dairy Market. But by How Much?*, CNN (Oct. 2, 2018), <https://www.cnn.com/2018/10/02/politics/usmca-canada-dairy/index.html>; see also OFFICE OF THE U.S. TRADE REPRESENTATIVE, *United States-Mexico-Canada Trade Fact Sheet Agriculture: Market Access and Dairy Outcomes of the USMC Agreement*, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/market-access-and-dairy-outcomes> (last visited Apr. 19, 2022).

52. U.S.M.C.A. art. 19; see also Nicole Corey, *USMCA Trade Agreement Includes Minimum 10-Year Data Exclusivity for Biologics*, GOODWIN (Oct. 5, 2018), <https://www.bigmoleculewatch.com/2018/10/05/usmca-trade-agreement-includes-minimum-10-year-data-exclusivity-for-biologics/>; *Modernizing NAFTA*, *supra* note 36.

nada and Mexico from forcing U.S. companies to store their data on their own servers.⁵³ They also immunize U.S. companies from lawsuits in Canada or Mexico for content appearing on their internet platforms.⁵⁴

Additionally, the USMCA adds special provisions dealing with “non-market” countries.⁵⁵ USMCA members are required to notify each other if they intend to negotiate with non-market countries.⁵⁶ These provisions allow for the Agreement to be unilaterally terminated if any country enters into a free trade agreement with a non-market country.⁵⁷ This limitation, of course, is seen as a direct attack on China, which has been increasingly active in the past decade in international trade affairs and is seen as a competitor to U.S. economic interests.⁵⁸

Finally, the USMCA allocates USD \$300 million to address environmental problems and makes regulations easier to enforce by eliminating NAFTA’s requirement that a plaintiff must prove a violation “affect[s] trade” before they are allowed to pursue relief.⁵⁹ Despite these measures, many have criticized the USMCA for not going far enough to protect the environment and for not directly dealing with issues of climate change.⁶⁰ Notably, the Sierra Club⁶¹ refused to support the USMCA, claiming that its so-called “environmental protections” fail to remedy NAFTA’s threats to “wildlife, clean air and

53. Art. 19.12 (“No Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory.”); *see also id.* at art. 19.1 (defining computing facility as “a computer server or storage device for processing or storing information for commercial use”).

54. *See id.* at Art 19.

55. Simon Lester et al., *The Canada-China FTA in Peril Part 1: The USSMCA “Non-Market Country” Provision*, GEO. J. INT’L AFFS. (Feb. 28, 2019), <https://www.georgetownjournalofinternationalaffairs.org/online-edition/2019/2/28/the-canada-china-fta-in-peril-part-1-the-usmca-non-market-country-provision>.

56. *Id.*

57. *Id.*

58. *Id.*

59. Press Release, Diane Feinstein, Statement on USMCA Trade Agreement (Jan. 15, 2020), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=A117BA0D-470A-45AC-9688-3794EF627557>; CONG. RES. SERV., USMCA: AMENDMENT AND KEY CHANGES (Jan. 30, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11391> (“The revised text [of the USMCA] asserts the presumption that an environmental dispute affects trade and investment unless a respondent party can prove otherwise.”).

60. *Id.*

61. SIERRA CLUB, *Mission Statement*, <https://www.sierraclub.org/about-sierra-club> (last visited Apr. 24, 2022). The Sierra Club is a grassroots environmental organization in the United States dedicated to protecting the environment, promoting the responsible use of resources and ecosystems, and educating humanity on protecting and restoring the natural environment. *Id.*

water, or the health of . . . communities.”⁶² Despite the USMCA’s bipartisan support, environmental regulation has been a particularly contentious issue with the Agreement and was noted as the primary reason for its lack of support among progressives.⁶³

D. Looking Forward

Officials have touted the new USMCA as a major victory for proponents of fair trade. Former United States Trade Representative (USTR) Robert Lightizer claimed the new Agreement’s stronger rules for automobiles, greater access for farmers, and unprecedented labor standards are meant to honor notions of fairness by leveling the playing field for American workers and bringing billions of dollars’ worth of manufacturing back to the United States.⁶⁴ The USTR Secretary’s office claims the USMCA’s provisions regarding digital trade will protect the United States’s competitive advantage in intellectual property and financial services and will provide for much needed discipline of state-owned enterprises and currency manipulators by limiting relationships with non-market countries.⁶⁵ These measures were advocated as necessary to spur what many see as unfair trade practices by China.⁶⁶ The USMCA’s termination provision, which sets a definite period of sixteen years and mandatory review every six years, is purported to ensure that the USMCA, unlike NAFTA, will not become unbalanced or out of date.⁶⁷

62. SIERRA CLUB, *Trump’s NAFTA Deal Threatens Our Air, Water, and Climate*, <https://www.sierraclub.org/sites/www.sierraclub.org/files/NAFTA-environment-statement.pdf> (last visited May 1, 2022).

63. William Alan Reinsch & Madeleine Waddoups, *The Road to Ratification: Democrats’ Resistance to the USMCA*, CTR. FOR STRATEGIC & INT’L STUDIES (May 16, 2019), <https://www.csis.org/analysis/road-ratification-democrats-resistance-usmca>.

64. Robert Lightizer, *USMCA, Replacing NAFTA Today, Is the Model for All Future Trade Agreements*, TRIB LIVE (July 1, 2020), <https://triblive.com/opinion/robert-lightizer-usmca-replacing-nafta-today-is-the-model-for-all-future-trade-agreements/>.

65. See *Modernizing NAFTA*, *supra* note 36.

66. James Bacchus et al., *Disciplining China’s Trade Practices at the WTO: How WTO Complaints Can Help Make China More Market-Oriented*, CATO INST. (Nov. 15, 2018), <https://www.cato.org/policy-analysis/disciplining-chinas-trade-practices-wto-how-wto-complaints-can-help-make-china-more#introduction>. China’s trade practices have come under increasing scrutiny in recent years. China discriminates against foreign products and companies by forcing foreign companies to relinquish their intellectual property to gain market access. *Id.* China also imposes artificially high tariffs and domestic content requirements on imports. *Id.*

67. *Id.*; U.S.M.C.A. art. 34.7.

III. ANALYSIS

A. *New Administration*

The Trump administration took much credit for fostering a national economy that prospered due to deregulation, lower taxes, energy independence, and trade deals that put American workers first.⁶⁸ The USMCA was meant to embody this commitment by leveling the playing field for domestic manufacturing and improving the plight of American middle-class workers.⁶⁹ However, with the election of President Joe Biden, many began to question the new administration's commitment to pursuing the implementation and enforcement of the USMCA's agenda.⁷⁰ President Biden, a supporter of both the Trans-Pacific Partnership (TPP) and NAFTA, is undoubtedly a champion of free trade and foreign direct investment.⁷¹ His trade policy may be viewed as a return to the neoliberal policies of the Clinton and Obama administrations that further opened the United States to the fruits and consequences of globalization. Although President Biden is seen by many as economically moderate, critics have questioned the influence of the left-wing progressive faction of the Democratic party on his policymaking and the practical effects that compromise with a more progressive agenda will have on a trade policy promulgated under a conservative administration.⁷²

However, any fears that the Biden administration would throw-out or re-write key provisions of the USMCA seem to have calmed. In fact, President Biden has nominated individuals who were instrumental to the USMCA's enactment to the United States Trade Representative's office.⁷³ Katherine Tai, the chief trade lawyer for the USMCA's labor provisions, is the new United States Trade Representative, replacing Robert Lighthizer.⁷⁴ Additionally, Nora Todd, a top senate aid in the negotiation of the USMCA, was selected for the role

68. See Michael Taube, *Cancellation of the Keystone XL Pipeline Starts Biden and Canada on the Wrong Foot*, WASH. POST (Jan. 21, 2021), <https://www.washingtonpost.com/opinions/2021/01/21/keystone-pipeline-biden-canada-trudeau-wrong-foot/>.

69. *Rebalancing Trade*, *supra* note 36.

70. See, e.g., Tyne Morgan, *Biden's Trade Team is Stacked with USMCA Linchpins*, AG WEB (Jan. 22, 2021), <https://www.agweb.com/news/policy/politics/bidens-trade-team-stacked-usmca-linchpins>.

71. Yen Nee Lee, *Biden Would Want the U.S. to Rejoin Trans-Pacific Partnership, Leading China Watcher Says*, CNBC (Nov. 3, 2020), <https://www.cnbc.com/2020/11/04/biden-would-want-the-us-to-rejoin-tpa-says-harvard-scholar.html>.

72. Ana Swanson, *Biden Appointments Signal a Trade Approach that Hews to the Left*, N.Y. TIMES (Feb. 8, 2021), <https://www.nytimes.com/2021/02/08/business/economy/biden-trade.html>.

73. Morgan, *supra* note 70.

74. *Id.*

of chief of staff.⁷⁵ These appointments signal that the Biden administration will put forth a full effort to protect and implement the essence of the new agreement.⁷⁶ Thus, in order to effectively manage their operations and supply chains, North American corporations will not only need to understand the key provisions of the USMCA, but also predict the approach the Biden administration will take in their implementation. The following sections are meant to outline some of those key provisions and how implementation has and will likely play out in the next four years.

As President Trump called for the narrowing of the trade deficit with Mexico, the auto industry became a major area of focus given that it accounts for the greatest imbalance in reciprocal trade between the United States and Mexico.⁷⁷ In order to combat this imbalance and bring automotive manufacturing jobs back to the United States, the USMCA introduces new manufacturing rules of origin.⁷⁸ Chapter 4 of the USMCA requires seventy-five percent of manufactured parts for vehicles to originate in North America in order to qualify for duty-free treatment within the trilateral trade bloc, up from a 62.2 percent threshold under NAFTA.⁷⁹ Additionally, it imposes a requirement that seventy percent of steel and aluminum used in vehicle production be sourced from North America, a move that has drawn praise from the Canadian Steel Producers Association.⁸⁰ Further, the Motor & Equipment Manufacturers Association (MEMA) recently lobbied Congress to reinstate legislation giving North American vehicle part suppliers the right to a refund of merchandise processing fees under

75. *Id.*

76. See HAGSTROM REP., *Tai Pledges to Enforce USMCA, Be Tough with China* (Feb. 26, 2021), <https://www.thefencepost.com/news/tai-pledges-to-enforce-usmca-be-tough-with-china/> (“Katherine Tai . . . promised . . . that she would push Canada and Mexico to comply with the U.S.-Mexico-Canada Agreement on trade and urge Canada to meet its obligations under the phase one trade agreement.”).

77. Jose Grajeda, *The United States’ Trade Deficit with Mexico*, TECMA (2017), <https://www.tecma.com/trade-deficit-with-mexico/>.

78. *Id.*

79. U.S. TRADE REPRESENTATIVE, *The United States-Mexico-Canada Agreement Fact Sheet Automobiles and Automotive Parts*, https://ustr.gov/sites/default/files/files/Press/fs/USMCA/USMCA-Autos_and_Auto_Parts.pdf (last visited Apr. 8, 2022) (The USMCA “[e]levates Regional Value Content (RVC) requirements . . . establishes an RVC of 75 percent (vs. 62.5 percent in NAFTA), with similarly high content thresholds for core, principal, and complimentary parts.”).

80. *Id.*; Press Release, Canadian Steel Producers Association, Statement on the Canada-United States-Mexico Agreement (July 1, 2020), <https://www.globenewswire.com/news-release/2020/07/01/2056071/0/en/Statement-by-the-Canadian-Steel-Producers-Association-on-the-Canada-United-States-Mexico-Agreement.html>.

the USMCA.⁸¹ Lastly, the Agreement calls for increased trade remedies such as anti-dumping and the use of Section 201,⁸² 232,⁸³ and 301⁸⁴ tariffs.⁸⁵ These changes are meant to benefit the bottom line of U.S. manufacturers, lowering the costs of domestic manufacturing and making them less dependent on outsourcing.

From a practical standpoint, the changes will be difficult to implement for U.S. manufacturers. Rules of origin are regulatory barriers and require businesses to spend vast amounts of money and time to update their production processes and supply chains. In fact, the Mexican government recently granted approval for North American car manufacturers to delay implementation of the reforms in order to allow for more time to develop effective implementation strategies.⁸⁶ To deal with these implementation problems, the USMCA allows automakers to request permission to implement “alternative staging regimes” that extend the deadline for compliance up to five years.⁸⁷ In this regard, trade lawyers will be vital in interpreting the USMCA’s various rules and in developing effective compliance plans.⁸⁸

However, the effects that these new rules of origin will have on U.S. job growth are far from certain. Although the increased regional value

81. WORLD TRADE ONLINE, *MEMA Lauds USMCA Merchandise Processing Fee Correction*, (Dec. 22, 2020), <https://insidetrade.com/trade/mema-lauds-usmca-merchandise-processing-fee-correction>.

82. CONG. RES. SERV., *Trump Administration Tariff Actions, Frequently Asked Questions* (Dec. 15, 2020), <https://fas.org/sgp/crs/row/R45529.pdf> (“Section 201 of the Trade Act of 1974 — Allows the President to impose temporary duties and other trade measures if the U.S. International Trade Commission (ITC) determines a surge in imports is a *substantial cause or threat of serious injury* to a U.S. industry.”).

83. *Id.* (“Section 232 of the Trade Expansion Act of 1962 – Allows the President to adjust imports if the Department of Commerce finds certain products are imported in such quantities or under such circumstances as to *threaten to impair U.S. national security*.”).

84. *Id.* (“Section 301 of the Trade Act of 1974 – Allows the United States Trade Representative (USTR) to suspend trade agreement concessions or impose import restrictions if it determines a U.S. trading partner is *violating trade agreement commitments or engaging in discriminatory or unreasonable practices that burden or restrict U.S. commerce*.”).

85. David R. Hamill et al., *Hot-Button Trade Issue in 2021*, LEXOLOGY (Jan. 22, 2021), <https://www.lexology.com/library/detail.aspx?g=159abd76-05a3-4b80-be7d-ece43431b9a0>.

86. REUTERS, *Mexico Backs Request by Auto Firms for More Time to Meet USMCA Rules* (Jan. 22, 2021), <https://www.reuters.com/article/us-mexico-trade-autos-idUSKBN29R2O7>.

87. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *Procedures for the Submission of Petitions by North American Producers of Passenger Vehicles or Light Trucks To Use the Alternative Staging Regime for the USMCA Rules of Origin for Automotive Goods* (Apr. 21, 2020), <https://www.federalregister.gov/documents/2020/04/21/2020-08405/procedures-for-the-submission-of-petitions-by-north-american-producers-of-passenger-vehicles-or>.

88. THOMPSON HINE, *Leading USMCA & Canada-U.S. Lawyer Daniel Ujczko Joins Thompson Hine’s International Trade Practice in Columbus* (Jan. 25, 2021), <https://www.thompsonhine.com/news/leading-usmca-canada-us-lawyer-daniel-ujczko-joins-thompson-hines-international-trade-practice-in-columbus>.

content⁸⁹ threshold will make it more difficult for semifinished products from Asia to qualify for duty-free treatment by moving through Mexico into the United States, it is unlikely that the rules will cause U.S. manufacturers to change where their vehicles are made.⁹⁰ Since the adoption of NAFTA, U.S. manufacturers have invested billions in fine-tuning their production processes for maximum profitability.⁹¹ Although manufacturers will certainly want to qualify for the duty-free treatment, the new content requirements under the USMCA do not dictate that a certain percentage of parts originate in the United States, only that they come from a USMCA country.⁹² Thus, most auto-assembly plants that operated under NAFTA are already close to the seventy-five percent target contemplated under the USMCA and it is unlikely that the new quotas will result in a major shift in where companies manufacture automotive products since the cost of uprooting manufacturing operations will simply be too great.⁹³

However, where the USMCA will present the biggest change to the bottom line of North American companies and the greatest opportunity to bring manufacturing jobs back to the United States will come from labor reform. NAFTA allowed many large U.S. manufacturers to take advantage of cheap Mexican labor in nearby “maquiladoras” in

89. See generally U.S. CUSTOMS & BORDER PROTECTION, *USMCA Fact Sheet: Regional Value Content*, https://www.cbp.gov/sites/default/files/assets/documents/2020-Jun/%2315_Regional%20Value%20Content_USMCA%20Informational%20Fact%20Sheet.pdf (last visited Apr. 24, 2022) (referencing U.S.M.C.A. art. 4.5). For the majority of goods, the USMCA provides two RVC methods: (1) the transaction value method and (2) the net cost method. *Id.* Under the transactional value method, $RVC = (TV \text{ (transaction value of the good, adjusted to exclude any costs incurred in the international shipment of the goods)} - VNM \text{ (the value of the non-originating materials including materials of undetermined origin used by the producer in the production of the goods.)} / TV \times 100)$. *Id.* Under the Net Cost Method, $RVC = (NC \text{ (cost of the good)} - VNM \text{ (value of the non-originating materials of undetermined origin used by the producer in the production of the good.)} / NC \times 100)$. *Id.* Under the USMCA there is no change in the calculation method, however, the importer may now also calculate RVC, not only the producer or exporter, as under NAFTA. *Id.* The RVC threshold for non-textile goods (not including auto and auto parts) is equal or less than sixty percent if the transaction value method is used and is equal or less than fifty percent if the net cost method is used, with an exception under Chapter 61-63. *Id.* However, the USMCA specifies that the automotive sector must use net cost method for passenger vehicles, light trucks, and heavy trucks. *Id.* Additionally, under the USMCA, where non-originating material is used in the production of a good, both (1) the value of processing of non-originating materials undertaken in the territory of one of more of the Parties; and (2) the value of any originating material used in the production of the non-originating material undertaken in the territory of one or more of the Parties, may be counted as originating content for the purposes of calculating RVC (under either method). *Id.*

90. DICKINSON WRIGHT, *Dan Ujczó Quoted by Society of Corporate Compliance and Ethics* (Aug. 2020), <https://www.dickinson-wright.com/news-alerts/ujczo-scce>.

91. Nicole Aschoff, *The New NAFTA Is a Raw Deal for Workers*, JACOBIN (Dec. 14, 2019), <https://jacobinmag.com/2019/12/nafta-deal-usmca-united-states-mexico-canada-agreement>

92. *Id.*

93. *Id.*

order to reduce costs.⁹⁴ Under Chapter 23 of the USMCA, these manufacturers will have to deal with a complex new labor scheme aimed at overhauling Mexico's labor laws and bringing labor costs on par with U.S. manufacturing.⁹⁵ The reforms mandate a minimum standard for working conditions and require that parts originate in factories paying production workers at least \$16 per hour.⁹⁶ These provisions are highly significant, given that the average Mexican auto worker's wage is around \$3 an hour.⁹⁷ Additionally, Mexican labor reform under the USMCA is meant to encourage unionization similar to the current U.S. system, and its terms are expressly laid out as "critical" to the Agreement.⁹⁸ The seven major manufacturing sectors the Agreement has targeted for compliance are auto assembly, auto parts, aerospace, industrial bakeries, electronics, mining, and steel and aluminum.⁹⁹

The labor reforms will eliminate Mexican employers' reliance on so-called "protection contracts," which are contracts between employers and employer-sponsored unions that have been used to provide favorable terms to powerful employers at the expense of Mexican workers' rights.¹⁰⁰ Protection contracts are essentially "fake collective bargaining agreements made by unions that are completely company controlled, without the input of workers."¹⁰¹ They lock in low wages and poor working conditions and are estimated to make up as much as seventy-five percent of collective bargaining agreements in Mexico.¹⁰²

94. WHITE ET AL., *supra* note 25.

95. U.S.M.C.A. art. 23.

96. Ana Swanson & Jim Tankersley, *Trump Just Signed the U.S.M.C.A. Here's What's in the New NAFTA*, N.Y. TIMES (Jan. 29, 2020), <https://www.nytimes.com/2020/01/29/business/economy/usmca-deal.html>.

97. Daniel Dale, *NAFTA Talks Focus on Low Wages for Mexican Autoworkers*, THE STAR (May 11, 2018), <https://www.thestar.com/news/world/2018/05/11/nafta-talks-focus-on-low-wages-for-mexican-autoworkers.html>.

98. NAT'L L. REV., *Pressures on U.S. Manufacturers with Mexico Operations, Supply Chains to Comply with New Labor Laws* (Jan. 20, 2021), <https://www.natlawreview.com/article/pressures-us-manufacturers-mexico-operations-supply-chains-to-comply-new-labor-laws> (Mexico's labor law reforms "overhauled the country's labor laws to encourage meaningful unionization similar to what the United States has maintained for nearly 80 years. . . . [T]he reforms are an expressed (and critical) term in the USMCA.").

99. John L. Sander & James P. Verdi, *Pressures on U.S. Manufacturers with Mexico Operations, Supply Chains to Comply with New Labor Laws*, JACKSON LEWIS (Jan. 20, 2021), <https://www.jacksonlewis.com/publication/pressures-us-manufacturers-mexico-operations-supply-chains-comply-new-labor-laws>.

100. *Id.*

101. Ana Swanson, *Panel Finds "Serious Concerns" With Mexican Labor Reforms*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/business/economy/usmca-mexico-labor-reforms.html>.

102. *Id.*

Mexican workers who have challenged the system of protection contracts have faced “harassment, arrest and violence.”¹⁰³ For example, Mexican labor activist Susana Prieto Terrazas was arrested for trying to organize workers in the state of Tamaulipas as recently as June 2020, right before the USMCA took effect.¹⁰⁴

Importantly, what makes these labor reforms truly revolutionary is that they are not empty promises, but instead are backed by complex enforcement mechanisms to ensure compliance. Although Mexico’s federal labor law sets forth a four-year schedule to implement the reforms, the United States is seeking a much faster enforcement schedule, for which the USMCA provides unprecedented mechanisms to meet.¹⁰⁵ The Agreement includes a mandatory dispute resolution procedure to address nationwide compliance, a facility-specific rapid response arbitration mechanism that authorizes the United States to take action against Mexican manufacturing facilities for denying workers the right to free association or collective bargaining, and federal regulations granting any individual the right to file a complaint to an Interagency Labor Committee co-chaired by the USTR and Secretary of Labor to initiate an investigation.¹⁰⁶ If the Interagency Labor Committee determines a violation, the USTR can file a complaint under the USMCA, and the United States can temporarily suspend a Mexican facility’s favorable tariff rates authorized under the USMCA.¹⁰⁷ In fact, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) has already announced its intention to file a complaint with the Labor Committee.¹⁰⁸

Additionally, the U.S. Congress has established a bipartisan Independent Mexico Labor Expert Board (IMLE Board) to monitor and evaluate the implementation of the reforms.¹⁰⁹ The IMLE Board has already issued its first mandatory report (Report) on the progress of Mexico’s labor law reform, which criticized Mexico for missing critical deadlines and underestimating the costs of implementation.¹¹⁰ The USMCA requires federal and local consolidation centers and labor courts to enforce reforms, which the Report states have been significantly delayed.¹¹¹ The Report issued a stark warning, stating that

103. *Id.*

104. *Id.*

105. Sander & Verdi, *supra* note 99.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

“[u]nless significant additional resources are devoted to supporting workers to exercise these rights, the historic opportunity presented by the Mexican labor reform is unlikely to achieve its goals.”¹¹² Unfortunately, most union workers are still unable to “democratically elect their leaders” and “the old system of protection contracts remains [largely] intact.”¹¹³ Workers challenging these conditions continue to be fired, jailed, or even killed.¹¹⁴

The fact of the matter is that Mexico will need to allocate a significant amount of additional funds for more federal labor inspectors and administrative personnel if its reform program is to be successful. Additionally, greater cooperation between unions in the United States and Mexico, and even increased federal funding from the United States, may be necessary if these goals are to be realistically attained. The Biden administration has promised to uphold its commitment to the enforcement of workers’ rights.¹¹⁵ However, sometimes it is necessary to put your money where your mouth is. Although some have criticized the enforcement role of the United States as an invasion of Mexican sovereignty, increased U.S. involvement and funding will almost certainly be needed to implement these truly revolutionary reforms. Just as the United States struggled through its own period of organizing labor in the beginning of the twentieth century, without U.S. involvement, these changes would likely continue to come to fruition only through strife and conflict. Any sacrifice to Mexican sovereignty is well worth the gains to Mexican workers’ rights and their quality of living.

In any case, U.S. manufacturers will have to review their operation networks and supply chains to comply with the new labor laws. Any U.S. investigation into labor violations could have immediate impacts on their supply chains and jeopardize the cross-border transfer of their goods. Although this will inevitably lead to greater costs for these corporations, the effect of implementing labor reforms will improve the state of not only Mexican workers, but U.S. workers who should benefit from a boost in domestic jobs and manufacturing.

Many have expressed concern that when faced with these increased costs, companies will simply shift the costs to consumers, making auto-

112. *Id.*

113. Swanson, *supra* note 101.

114. *Id.*

115. JOEBIDEN.COM, *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, <https://joebiden.com/empowerworkers/> (last visited Apr. 19, 2022).

mobiles more expensive.¹¹⁶ Alternatively, manufacturers may elect to pay the 2.5 percent standard tariff rather than accommodate higher wages in Mexico in order to qualify for the preferred tariff rate.¹¹⁷ Thus, it may be necessary to raise the standard tariff to a level that eliminates the benefit of disregarding labor requirements and incentivizes manufacturers to advance labor reforms. These labor reforms are truly unprecedented in scope and must be aggressively pursued under the leadership of the new Biden administration. If the labor reforms fail, it will not only condemn Mexican workers to further oppression, but will also result in U.S. manufacturers maintaining largely outsourced production operations.

B. Energy & Environmental Protections

Chapter 24 of the USMCA contains “broad, boilerplate language on the protection of air and water quality,” mandating that the signatory countries “agree to promote corporate social responsibility, as well as utilize voluntary mechanisms” to protect the environment and address the spread of invasive species.¹¹⁸ Although dedicating a full chapter to environmental issues is an upgrade from the mere side letter status afforded to environmental commitments under NAFTA, the commitments are seen by most as having no meaningful legal effect.¹¹⁹

However, although many have criticized the USMCA’s lack of environmental protections, the Agreement may actually be the key mediator for transitioning the continent to renewable energy. For example, the USMCA has wide implications on the Mexican energy industry and U.S. efforts to aid in the country’s transition to renewable energy sources. Chapter 8 of the USMCA spells out Mexico’s ownership of oil and gas, recognizing that Mexico has “sovereign right[s] to reform its constitution and its domestic legislation . . . without prejudice to their rights and remedies” under the Agreement.¹²⁰ However, the USMCA obligates Mexico to respect private sector energy investments, limiting newly elected President Manuel Lopez Obrador’s ability to honor his commitment to bolster state-owned energy fossil fuel firms like *Petróleos Mexicanos* (PEMEX) and The Comisión Federal

116. Ashlie Lopez, *How USMCA Will Affect Auto Industry*, WARDSAUTO (June 25, 2020), <https://www.wardsauto.com/industry-voices/how-usmca-will-affect-auto-industry> (“Higher material and labor costs will ultimately increase retail prices . . .”).

117. Aschcoff, *supra* note 91.

118. U.S.M.C.A. ch. 24; WHITING & BEAUMONT-SMITH, *supra* note 2, at 6.

119. See WHITING & BEAUMONT-SMITH, *supra* note 2.

120. U.S.M.C.A. ch. 8.; Dave Graham, *UPDATE 2- Mexico Defends State-Led Energy Policy as Investors Look to Biden*, REUTERS (Jan. 21, 2021), <https://www.reuters.com/article/usa-biden-mexico-idCNL1N2JW1LY>.

de Electricidad (CFE) at the expense of private renewable energy providers.¹²¹ President Obrador is currently attempting to overturn a constitutional reform that opened up the Mexican energy market to foreign investors.¹²² He has “threatened to overturn a 2013-14 constitutional overhaul” by the previous government that allowed for the opening of the energy sector to private capital.¹²³ Many renewable energy providers have taken the Mexican government to court over efforts to sideline these investments in favor of traditional state-owned fossil fuel.¹²⁴ More than twenty companies have filed injunctions against Mexico, arguing that the law may violate Mexico’s commitments under the USMCA.¹²⁵

Further, observers have also complained that these efforts are undermining the goals of the USMCA.¹²⁶ “There can’t, for practical purposes, be a change in the [Mexican] constitution that would reverse . . . the opening [of Mexico’s energy market] without violating the USMCA.”¹²⁷ Thus, many industry groups active in renewable energy investment are pressuring the Biden administration to aggressively defend corporate interests under the Agreement, especially since the Trump administration did little to pressure compliance.¹²⁸

The USMCA may be effective in deterring Mexico from blocking foreign renewable energy investment. If Mexico does choose to breach the USMCA, “it could face heavy penalties, such as costly arbitration settlements or [trade] restrictions” with USMCA members.¹²⁹ This would be a costly gamble for President Obrador, as the United States alone accounts for about eighty percent of Mexican exports.¹³⁰ This may be the reason that President Obrador has scaled back much of his rhetoric about the energy sector. After initially casting energy reformers as corrupt politicians influenced by private com-

121. Graham, *supra* note 120.

122. Dave Graham, *Analysis: Mexican President’s Energy Reform Threat Faces U.S. Reality Check*, REUTERS (Jan. 19, 2021), <https://www.reuters.com/article/us-mexico-usa-energy/analysis-mexican-presidents-energy-reform-threat-faces-u-s-reality-check-idUSKBN29O2BK>

123. *Id.*

124. Graham, *supra* note 120.

125. John F. Walsh et al., *United States: Three Tips For Investors in Mexico’s Energy Sector Regarding Potential USMCA Claims*, WILMERHALE (Mar. 22, 2021), <https://www.mondaq.com/unitedstates/oil-gas-electricity/1049450/three-tips-for-investors-in-mexico39s-energy-sector-regarding-potential-usmca-claims->

126. *Id.*

127. Graham, *supra* note 122.

128. Graham, *supra* note 120.

129. *Id.*

130. CANDRIAM, *Mexico: Economy Highly Dependent on the United States* (July 2, 2019), <https://www.candriam.com/en/professional/market-insights/topics/macro/mexico-economy-highly-dependent-on-the-united-states/>.

panies, he has recently embraced the USMCA as vital to reviving Mexico's post-coronavirus economy and even walked back on talks of eliminating Mexico's telecom regulator after the country's economic minister advised him that doing so would violate the USMCA.¹³¹ Obrador is now committed to not doing "'anything that breaches the law.'"¹³²

Regardless, President Obrador has reiterated his commitment to defend Mexico's strategic economic interests.¹³³ Other officials have also indicated the energy reforms "would not be canceled," but would be pursued through channels of international negotiation.¹³⁴

Understandably, U.S. investors are wary of the status of their billions of dollars' worth of energy investment in the country. As the Biden administration is expected to adopt a more rules-based approach to government than the Trump administration, and is seen as a champion to renewable power, the USMCA is set to become a powerful tool to hold Mexico to its commitment to opening its energy sector to foreign investment and ultimately transition the country to renewable energy sources. Whether he will go through with the reforms, President Obrador's policies are delaying, frustrating, and discouraging private investment in Mexico's energy sector. The commitment the Biden administration demonstrates to enforcing the USMCA will inevitably play a major role in increasing investor confidence in Mexico's private energy market. If the Biden administration is to avoid regulatory paralysis, it will have to come out in full force regarding its commitment to holding Mexico to its agreed upon obligations to ensure continued renewable investment in the region.

IV. IMPACT

As NAFTA had many unintended consequences, so too will the USMCA. Although many of these consequences will take years to come to light, some are now becoming apparent. However, perhaps these consequences do not have to be so dim.

For example, the USMCA's labor provisions may lead to further unintended benefits for Mexican migrant workers. These labor provisions include health protections for migrants regardless of immigra-

131. Graham, *supra* note 122.

132. *Id.*

133. Graham, *supra* note 120.

134. Graham, *supra* note 122.

tion status.¹³⁵ Article 23.3, point 2 states that “[e]ach party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of . . . occupational safety and health,” and Article 23.8 notes that all parties “must ensure migrant workers are protected under labor laws” whether they are citizens or not.¹³⁶ Mexico has indicated that it will invoke these labor provisions to ensure that illegal migrants in the United States receive coronavirus vaccines and announced that they will consider any exclusion of migrant workers as a violation of the Agreement.¹³⁷ Although they are relatively vague provisions and are unlikely to obligate the United States to vaccinate migrant workers, the Mexican government could use its power to deny Mexican nationals the right to migrate to the United States for work as leverage to enforce its demands. NAFTA made many U.S. industries dependent on Mexican labor, giving Mexico a powerful tool in its trade arsenal.¹³⁸ The Biden administration will almost certainly be more receptive to this idea than the previous administration, and if it is to maintain its commitment to increasing the standard of living of workers, then it ought to consider it.

Additionally, where the Biden administration may represent the greatest change to U.S. trade policy is with the environment. Perhaps the greatest environmental challenge to the Biden administration will be climate change, which has never been a major feature of any U.S. trade agreement.¹³⁹ However, that may be set to change, as President Biden has called for the conditioning of future trade agreements on the ability of trade partners to meet climate targets under the Paris Climate Agreement, which President Biden recently rejoined as one of the first acts of his presidency.¹⁴⁰

Additionally, President Biden immediately revoked the permit needed to build the \$9 billion Keystone XL oil pipeline running from Canada to Texas.¹⁴¹ Canadian Prime Minister Justin Trudeau, who

135. Matt Rivers, *Can Mexico Force the US to Vaccinate Migrant Workers Against Covid-19?*, CNN (Jan. 15, 2021), <https://www.cnn.com/2021/01/15/americas/mexico-us-workers-vaccination-usmca/index.html>.

136. U.S.M.C.A. arts. 23.3.2, 23.8.

137. *Id.*

138. CONGRESS. RES. SERV., U.S.-MEXICO RELATIONS: TRENDS, ISSUES, AND IMPLICATIONS 6 (June 25, 2020), <https://crsreports.congress.gov/product/pdf/RL/RL32934> (“U.S. manufacturing industries, including automotive, electronics, appliances, and machinery, all rely on the assistance of Mexican manufacturers.”).

139. Alexandra Ellerbeck, *The Energy 202: Advocates Want Biden to Use Trade Deals to Combat Climate Change*, WASH. POST (Jan. 20, 2021), <https://www.washingtonpost.com/politics/2021/01/20/energy-202-advocates-want-biden-use-trade-deals-combat-climate-change/>.

140. *Id.*

141. Taube, *supra* note 68.

“welcome[d] the president’s commitment to fight climate change,” was “disappointed” in President Biden’s decision to revoke the permit.¹⁴² This most recent revocation is the third time a U.S. president has blocked the pipeline, which requires a presidential permit to cross the U.S.-Canadian border.¹⁴³

Although the USMCA may provide some remedies to aggrieved industries that have been affected by Biden’s recent executive orders, it is unlikely that those companies will be able to secure any significant legal remedy under the Agreement. For example, there are murmurs that the owners of the Keystone XL pipeline may seek a remedy against the United States through the USMCA.¹⁴⁴ TC Energy and the Government of Alberta, which both have ownership stakes in the pipeline, may file a lawsuit over breach of contract and lost revenue from the pipeline.¹⁴⁵ Alberta Premier, Jason Kenny, recently stated that his government “would file lawsuits seeking damages from the United States for canceling the pipeline.”¹⁴⁶

The Alberta government has the option of filing a Chapter 11 case against the United States.¹⁴⁷ “A Chapter 11 complaint allows companies to challenge decisions by states and the provision to do so has been grandfathered” into the USMCA, from the old NAFTA agreement.¹⁴⁸ The government has until 2023 to file a complaint.¹⁴⁹ TC Energy or the Government of Alberta will need to make the case that the revocation was arbitrary and a denial of due process, which many see as exceedingly challenging.¹⁵⁰ In fact, TC Energy tried a Chapter 11 challenge in 2016 when the pipeline was canceled by the Obama administration, but the suit was ultimately dropped when President Trump granted the permit.¹⁵¹ Although the pipeline owners may decide to re-file these suits, the odds are against them as the United States has never lost a Chapter 11 case and paid damages.¹⁵² Additionally, the language contained in the presidential permit specifically states that “Keystone’s ‘permit may be terminated, revoked, or

142. *Id.*

143. Geoffrey Morgan, *TC Energy and Alberta Face Long Odds if They Sue U.S. Government Over Cancelled Keystone XL*, FIN. POST (Jan. 20, 2021), <https://financialpost.com/commodities/tc-energy-and-alberta-face-long-odds-if-they-sue-u-s-government-over-cancelled-keystone-xl>.

144. *Id.*

145. Taube, *supra* note 68.

146. Morgan, *supra* note 143.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

amended at any time at the sole discretion of the President.’”¹⁵³ Thus, although the USMCA may be criticized as providing a means to challenge needed environmental actions, the fact of the matter is that it offers little hope under its Chapter 11 provisions of providing any real remedy.

V. CONCLUSION

Although NAFTA was initially hailed as a massive victory for proponents of free trade and globalization, the agreement had devastating unintended economic consequences throughout North America and ignored many of the realities of climate change and environmental regulation. The USMCA aims to modernize NAFTA, creating a modern trade framework reflective of twenty-first century economic realities. Early signs are pointing to the Agreement being a success. The acquisition of Kansas City Southern Railroad by Canadian Pacific Railway Ltd. (CP) for USD \$29 billion is a sign that private enterprise expects trade between the three nations to increase from the deal.¹⁵⁴ Additionally, the Independent International Trade Commission predicted the USMCA would create 176,000 new jobs, increase U.S. exports in the trade bloc by \$33 billion, and add over \$68.2 billion to the U.S. economy – all while modernizing Mexican labor practices.¹⁵⁵ However, the reality is that these goals will not be obtained unless the Biden administration seriously commits itself to enforcing the Agreement and providing the necessary funding for implementing its reforms.¹⁵⁶

In the hands of a new administration, the USMCA is a powerful tool that can be used to transition North America to renewable energies instrumental in the fight against climate change. Its labor reforms offer hope of not only improving conditions for Mexican workers, but also that of the American middle class. Unlike NAFTA, the USMCA is malleable to change. Article 34.7 details a review and termination process requiring review every six years to ensure it never becomes outdated.¹⁵⁷ It is an extraordinary tool if used to its full extent and

153. *Id.*

154. RAILWAY AGE, *Canadian Pacific, Kansas City Southern Will Merge into “The First USMCA Railroad,” CPKC (UPDATED)* (Mar. 21, 2021), <https://www.railwayage.com/freight/class-i/canadian-pacific-kansas-city-southern-will-merge-into-the-first-usmca-railroad-cpkc/> (The deal will create the first “USMCA railroad,” linking the United States, Canada, and Mexico.).

155. Steve Bulger, *US-Mexico-Canada Trade Agreement Crucial to Small Business in NY*, SYRACUSE.COM (Oct. 28, 2019), <https://www.syracuse.com/opinion/2019/10/us-mexico-canada-trade-agreement-crucial-to-small-business-in-ny-commentary.html>.

156. *Id.*

157. WHITING & BEAUMONT-SMITH, *supra* note 2.

represents an opportunity to usher in a new era of North American cooperation for the benefit of the citizenry of the entire trade bloc. It can truly be a “gold standard for trade agreements,” and become the building block for U.S. trade policy for years to come.¹⁵⁸

David Evans

158. Morgan, *supra* note 143.