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The Risks and Rewards of Renegotiating the North American Trade Relationship

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We now live in a North American economy built around the reality of free trade. In particular, U.S., Canadian and Mexican manufacturing are deeply enmeshed with one another. Many industrial plants were built precisely to take advantage of our economic integration, buying from or selling to other industrial plants across the borders. As a result, breaking up or degrading NAFTA would have the same disruptive effects that came from NAFTA's creation: Plants would close, jobs would disappear, and communities would lose their livelihoods. And, yes, many businesses, small, large and in some cases huge, would lose many billions of dollars.[1]

I. INTRODUCTION

The North American Free Trade Agreement ("NAFTA"),[2] despite much criticism, had led to significant advantages for all Parties: total goods and services trade approaches $1.3 trillion annually. NAFTA

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1. Paul Krugman, Opinion, *Trump, Trade and Tantrums*, N.Y. TIMES (Oct. 19, 2017), https://www.nytimes.com/2017/10/19/opinion/trump-trade-and-tantrums.html; *See also* Steven Mufson, Joshua Partlow, & Alan Freeman, *Trump Twitter Bombs and a Negotiating Standoff: How NAFTA Talks Could Fail*, WASH. POST (Oct. 6, 2017), https://www.washingtonpost.com/business/economy/trump-twitter-bombs-and-a-negotiating-standoff-how-nafta-talks-could-fail/2017/10/06/96b25f68-a91b-11e7-850e-2bdd1236be5d_story.html (quoting C. Fred Bergsten, senior fellow at the Peterson Institute, "[F]ailure is an option . . . It depends on whether the Trump people follow through on their rhetoric.").

2. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 19 U.S.C. 21, 32 I.LM. 289 (1993) (entered into force Jan. 1, 1994). A free trade agreement under GATT art. XXIV is a regional agreement in which the Parties agree inter alia to eliminate tariffs and non-tariff barriers within the region for all goods that originate within the region.

has produced one of the most efficient automotive production sectors in the world; stimulated U.S. exports of agricultural products, with Canada ($21.8 billion) and Mexico ($18.3 billion) representing the United States' first and third most important export destinations; and permitted the creation of supply chains that allow North America to compete with European and Asian manufacturers that have ready access to lower labor cost for labor intensive manufacturing operations.[3]

But as discussed in Part II, below, NAFTA has become a scapegoat for other problems with U.S. manufacturing employment, aided by the Trump Administration's myopic focus on the U.S. trade deficit with Mexico ($60 billion on total trade of $531 billion) and unhappiness with Mexico as a locus for lower labor cost manufacturing by U.S. enterprises. Most of the largest U.S. trade deficits are with nations where the United States has no FTA (China, Germany and Japan)[4] so blaming deficits on regional trade agreements seems illogical. In any event, most economists agree that trade deficits are the result of fiscal policies, including actions such as tax reductions without corresponding reductions in government spending that encourage deficit financing, as well as low savings rates and high consumption, rather than trade agreements *per se*.[5]

Neither reducing the trade deficit nor discouraging U.S. manufacturing investment in Mexico (except peripherally with enforceable environmental and labor standards and possibly the elimination of investor-state dispute settlement), nor forcing Mexico to pay for a border wall is achievable through the demanded renegotiation of NAFTA. The first two are the antithesis of free trade agreements, and the latter if agreed to by Mexico would likely topple any Mexican government. Still, an agreement signed twenty-five years ago could benefit from updating in such areas, *inter alia*, as

3. *See generally* Francisco Veloso & Rajiv Kumar, *The Automotive Supply Chain: Global Trends and Asian Perspectives*, ASIAN DEVELOPMENT BANK (Jan. 2002), https://www.adb.org/sites/default/files/publication/28439/wp003.pdf. (Japanese and Korean auto manufacturers have relationships with suppliers in China and to a lesser extent Vietnam and Indonesia. [The EU members have lower wage cost jurisdictions in Eastern Europe.]).

4. Kimberly Amadeo, *U.S. Trade Deficit by Country: Current Statistics and Issues*, THE BALANCE (Feb. 21, 2017), https://www.thebalance.com/trade-deficit-by-county-3306264 (showing the largest five trade deficits to be with China, Japan, Germany and Mexico, in that order).

5. *See generally* Eduardo Porter, *Why the Trade Deficit Matters and What Trump Can do About It*, N.Y. TIMES (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/business/economy/trade-deficits-nafta.html (discussing the challenges in reducing the trade deficit and the counterproductive effects of withdrawing from trade agreements).

establishing rules on ecommerce and prohibiting barriers to the free flow of data, investor-state dispute settlement (with enhanced host country regulatory flexibility); more effective enforcement of labor rights and environmental protection; rigorous competition law disciplines; support for SMEs; and improved government procurement.

It is this dichotomy that is the focus of the present article. Will the Trump Administration be prepared to agree with Canada and Mexico on a modernized NAFTA that preserves its trade and investment liberalization features (perhaps incorporating a few of the less radical new U.S. proposals) and establishes new protections for data, or will it insist (unsuccessfully) on an agreement that is highly protectionist in terms of trade and investment within North America and rolls back most of the major benefits afforded earlier to the other Parties and their stakeholders? As of mid-March 2018, U.S. officials have made a series of controversial proposals[6] that have been rejected by Canada and/or Mexico, most recently in the seventh round of negotiations in Mexico City that ended March 5, 2018, without agreement on major issues.[7] In my view, if the United States maintains its obsession with the trade deficit and its unwillingness to compromise on major demands it is likely that the negotiations will fail through termination of NAFTA by the United States, or drag on indefinitely. Such termination would result in serious negative consequences for each of the North American economies and a significant loss of North American manufacturing competitiveness worldwide, although a substantial volume of intra-North America trade would undoubtedly continue. It will also squander a significant opportunity (after the United States' withdrawal from a pact—the Trans-Pacific Partnership—that established such protection for data) to prohibit barriers to data flows that threaten some $400 billion of annual U.S. data exports worldwide, particularly by such companies as IBM, Citibank, Federal Express and Visa.[8]

6. *See* Josh Wingrove & Eric Martin, *NAFTA Talks Left Reeling After Aggressive U.S. Proposals Land*, BLOOMBERG (Oct. 16, 2017, 4:00 AM), https://www.bloomberg.com/news/articles/2017-10-16/nafta-talks-left-reeling-after-aggressive-u-s-proposals-land (listing changes in auto rules of origin, a sunset clause, restricted government procurement and effective emasculation of the three NAFTA dispute settlement mechanisms).

7. *See* Rossella Brevetti, *NAFTA Talks Move on Modernization Issues, Not U.S. Demands*, INT'L TRADE DAILY (BNA) (Mar. 12, 2018), (summarizing the state of the negotiations).

8. David J. Lynch, *The U.S. Dominates the World of Big Data. But Trump's NAFTA Demands Could Put That at Risk,* WASH. POST (Nov. 28, 2017), https://www.washingtonpost.com/business/economy/trumps-trade-deficit-obsession-could-hurt-leading-american-industries/2017/11/27/b2b8122c-cbb5-11e7-8321-

Part II of this article briefly reviews the NAFTA experience over the past twenty-four years, with emphasis on trade creation and the competitiveness of the United States with principal rivals, the European Union nations and China, both of which have broad access to low cost labor and have become effective in the supply management that makes production more efficient in a global economy. Part III discusses the structure, and challenges of the renegotiations as of spring 2018. Part IV reviews the alternatives to NAFTA for Canada and Mexico if and when the United States is successful in terminating NAFTA. It also gives particular attention to the North American auto industry and agricultural trade in a post-NAFTA North America. Part V addresses (briefly) the legal complexities of a U.S. withdrawal from NAFTA. Part VI provides a short overview of the available—and largely unattractive—alternatives to the renegotiation.

Because the negotiations remain underway and are likely to continue at least through April 2018,[9] this article reflects a significant level of uncertainty and speculation. Tensions among the President and his advisors, and between the Administration and Congress, and with diverse stakeholders, have not been resolved. Despite assertions by top U.S. officials that a radically redesigned NAFTA could win the support of both U.S. labor and industrial stakeholders, few observers believe this is the case.[10] U.S. Trade Representative Robert Lighthizer bitterly criticized Canada and Mexico in October for declining to respond to U.S. calls to reduce the U.S. trade deficit through a NAFTA renegotiation,[11] and renewed the criticism after each session. Thus, in March 2018, the U.S. position had not changed; Ambassador Lighthizer continued to advocate both modernization (which is achievable) and a "rebalancing of NAFTA" to encourage "fair" treatment for the U.S. manufacturing sector and workers (which as

481fd63f174d_story.html?utm_term=.3fd4dc74eca3.

9. *See* Ana Swanson, *Signs of Progress in NAFTA Talks but Countries Remain Deeply Divided*, N.Y. TIMES (Jan. 29, 2018), https://www.nytimes.com/2018/01/29/us/politics/nafta-talks-conclude-in-montreal-with-signs-of-progress-and-risk.html (noting that despite lack of much progress negotiations were scheduled for Mexico City in late February and Washington, D.C. in April 2018).

10. *See Lighthizer: 'Historic' NAFTA 2.0 Could Win Labor and Business Support, Lead to 'Paradigm Change' in Congress*, INSIDE U.S. TRADE (Oct. 18, 2017), https://insidetrade.com/daily-news/lighthizer-%E2%80%98historic%E2%80%99-nafta-20-could-win-labor-and-business-support-lead-%E2%80%98paradigm-change (quoting both Lighthizer and various skeptical congressional sources).

11. Andrew Mayeda, *Mexico, Canada Refused to Improve NAFTA Text, USTR Says*, 34 INT'L TRADE REP. (BNA) 1383 (Oct. 19, 2017), http://news.bna.com/itln/ITLNWB/split_display.adp?fedfid=122777912&vname=itrnotallissues&wsn=482407500&searchid=31420656&doctypeid=1&type=date&mode=doc&split=0&scm=ITLNWB&pg=1.

defined by Ambassador Lighthizer is not likely to be attained).[12]

Unfortunately, for Mexico and Canada, the "rebalancing" that the United States seeks may be worse than having no NAFTA at all.

Given the level of disagreement among the three Parties as to the content of a revised NAFTA, it seems clear that if the negotiations are successfully completed at all, it probably will not be until after a new Mexican president is elected (July 1) and takes office (December 1, 2018), and the U.S. convenes a new Congress in January 2019 (assuming the President does not attempt to terminate NAFTA before then).

II. NAFTA OVERVIEW

NAFTA, despite much criticism, has led to significant advantages for all Parties

Total goods and services trade approaches $1.3 trillion annually.[13] It has been a major factor responsible for the creation and maintenance of an efficient, globally competitive automotive industry.[14] Here, as in other industrial sectors, North American supply chains allow the United States to compete with European and Asian manufacturers that have access to lower labor cost production for labor intensive manufacturing and assembly operations. Extensive exports in agricultural products, with Canada ($23 billion) and Mexico ($18 billion) representing the United States' first and third most important export destinations, is largely a result of NAFTA's reducing barriers for U.S. agricultural exports to Mexico and Canada.[15] While estimates vary, it is clear that many millions of Canadian and Mexican as well as U.S. jobs are dependent on North American trade, including those

12. *See Statement of USTR Robert Lighthizer at the Closing of the Seventh Round of NAFTA Renegotiations*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Mar. 5, 2018), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/february/statement-ustr-robert-lighthizer.

13. *The Facts on NAFTA: Assessing Two Decades of Gains in Trade, Growth, and Jobs*, U.S. CHAMBER OF COM. (Mar. 8, 2017, 11:15 AM), https://www.uschamber.com/report/the-facts-nafta-assessing-two-decades-gains-trade-growth-and-jobs [hereinafter *Chamber: NAFTA Facts*].

14. Melina Kolb & Cathleen Cimino-Isaacs, *A Guide to Renegotiating NAFTA*, PETERSON INST. FOR INT'L ECON. (June 19, 2017; 6:00 AM), https://piie.com/blogs/trade-investment-policy-watch/guide-renegotiating-nafta.

15. *See U.S.-Mexico Trade Facts*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/americas/mexico; *see also U.S.-Canada Trade Facts*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/americas/canada.

attributable not only to manufacturing but to services and transportation as well.

The Administration's focus on manufacturing jobs and the trade deficit with Mexico fails to consider the fact that as much as 88 percent of all U.S. job losses since 2000 are due to technology and automation rather than to offshoring to Mexico or China,[16] and that such losses are likely to increase in coming years regardless of whether NAFTA remains in force. In fact, it is reasonable to speculate that if more manufacturing were forced back into the United States from Mexico due to Trump Administration policies the affected manufacturers would do everything feasible to minimize the hiring of relatively costly U.S. workers, either through more extensive use of robots or seeking lower cost production in Asia or Eastern Europe.

It is also telling that both major political parties have failed over the past three decades to help the losers from globalization in terms of retraining and adjustment assistance, to deal through labor or tax laws with growing wage disparities between blue collar workers and professionals, or to take other steps that would help displaced manufacturing workers remain part of the middle class. Manufacturing job losses resulting from NAFTA have been widely estimated; for example the Economic Policy Institute estimates that 700,000 jobs were lost through U.S. production moved to Mexico (1994-2013). This sounds like a large number, unless one recalls that in good times the United States creates about 250,000 net new manufacturing jobs every month (313,000 in February 2018 alone)![17]

Nor are other causes of slow U.S. economic growth and poor income distribution to be ignored. Outmoded U.S. tax laws with high corporate tax rates (until modified in late 2017) have encouraged U.S. enterprises to do business in lower tax jurisdictions; whether the reduction of the marginal corporate tax rate from 35 percent to 21 percent, and other changes favorable to enterprises, will significantly affect U.S. manufacturing jobs remains to be seen.[18] It also remains questionable whether tax reductions that increase the deficit by an estimated $1.5 trillion, and discourage both government and private savings and stimulate more borrowing, will have any result other than

16. Barb Darrow, *The Bright Side of Job-Killing Automation*, FORTUNE (Apr. 5, 2017), http://fortune.com/2017/04/05/jobs-automation-artificial-intelligence-robotics/.

17. Ian Kullgren, *Job Growth Surged in February in Wage Growth Slackened*, POLITICO (Mar. 9, 2018), https://www.politico.com/story/2018/03/09/monthly-jobs-numbers-february-2018-448785.

18. *New Tax Law (H.R. 1) – Initial Observations*, KPMG (Dec. 22, 2017), https://home.kpmg.com/content/dam/kpmg/us/pdf/2017/12/tnf-new-tax-law-dec22-2017.pdf.

driving up the dollar and costs of U.S. exports, thus further increasing the trade deficit.[19] Research and Development ("R&D") spending by government (but not by private enterprise) has slowed in recent years to a record low, with overall R&D spending amounting to 2.78 percent, of GDP, down from 2.81 percent in 2009 and well below the 3.0 percent target proposed by President Obama in 2009.[20] U.S. transportation (road, railroad and port) infrastructure spending as a percentage of U.S. GDP has deteriorated steadily since 1965, from over 0.5 percent to about 0.032 percent,[21] with little hope of rapid reversal given that infrastructure improvement has not been pursued to date by the Trump Administration.[22]

If the abandonment of the Transpacific Partnership agreement ("TPP") by the United States[23] and broader U.S. economic disengagement from Asia is joined by U.S. termination of NAFTA, it seems inevitable that U.S. manufacturing jobs will be further reduced rather than augmented because of exports lost to nations with preferential trading arrangements, even assuming the U.S. trade policies do not trigger a trade war with our major trading partners such as the EU and China. The focus on manufacturing and the goods trade deficit jeopardizes not only agreement on data services as noted earlier, but the $88 billion in U.S. services exports to Canada and Mexico.[24]

19. *See* Paul Krugman, Opinion, *Everybody Hates the Trump Tax Plan*, N.Y. TIMES (Nov. 16, 2017), https://www.nytimes.com/2017/11/16/opinion/trump-tax-plan-hate.html?rref=collection%2Fsectioncollection%2Fopinion&action=click&contentCollection=opinion&region=rank&module=package&version=highlights&contentPlacement=6&pgtype=sectionfront&_r=0 (noting that the borrowed funds would come from abroad, driving up the value of the dollar, increasing the trade deficit by an estimated $6 trillion over ten years).

20. *See* Mike Henry, *US R&D Spending at All-Time High, Federal Share Reaches Record Low*, AMERICAN INST. OF PHYSICS (Nov. 8, 2017), https://www.aip.org/fyi/2016/us-rd-spending-all-time-high-federal-share-reaches-record-low (citing current trends as reported by the National Science Foundation).

21. Jeff Davis, *The 70-Year Trend in Federal Infrastructure Spending*, ENO TRANSPORTATION WEEKLY (May 12, 2016), https://www.enotrans.org/article/70-year-trend-federal-infrastructure-spending/.

22. *See* Lauren Gardner, *Trump Talks Infrastructure, But $1 Trillion Plan is as Elusive as Ever*, POLITICO (Aug. 15, 2017, 5:59 PM), http://www.politico.com/story/2017/08/15/trump-transportation-roads-infrastructure-241666 (discussing Trump's "languishing proposal for a $1 trillion initiative to rebuild the nations, roads, tunnels and bridges).

23. *Trans-Pacific Partnership Agreement*, signed Feb. 4, 2016 (not in force), *available at* http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx. [Hereinafter, TPP] (the United States, an original signatory, formally withdrew on January 23, 2017); *see Presidential Memorandum Regarding Withdrawal of the United States from Trans-Pacific Partnership Negotiations and Agreement* (Jan. 23, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific.

24. *Services Industry Group: NAFTA Withdrawal Could Lead to Loss of 587,000 U.S.*

Similarly, new restrictions on the government procurement market (which governs goods and services sales to foreign government agencies), could end the current situation where an estimated four out of five of all Mexican government employees are insured by a U.S. services supplier, with other U.S. firms providing the Mexican Government with pensions and auto insurance.[25] Whether major stakeholders, such as the U.S. Chamber of Commerce, which have joined the process very late in the game,[26] and strong (if belated) support from pro-NAFTA Senators[27] can have significant influence on the U.S. Administration's negotiating stance remains to be seen.

III. NAFTA RENEGOTIATION

To reiterate, general objectives earlier suggested by the Administration cannot be achieved through NAFTA renegotiation. These include discouraging U.S. businesses from moving labor-intensive manufacturing production to Mexico; reducing the trade deficit with Mexico (other than by drastically reducing trade); and forcing Mexico to pay for the cost of the Border Wall directly or indirectly.[28]

It is also doubtful whether the U.S. negotiating proposals made in October and renewed without significant change in subsequent negotiating sessions, largely rejected by Canada and Mexico, would significantly increase U.S. manufacturing employment, due in significant part to disrupted supply chains and higher cost parts and components. This non-exhaustive list of U.S. demands includes:

- United States rather than North American content rules for

Jobs, INSIDE U.S. TRADE (Nov. 17, 2017), https://insidetrade.com/trade/services-industry-group-nafta-withdrawal-could-lead-loss-587000-us-jobs.

25. *Id.*

26. *See* John G. Murphy, *Which States Would be hit Hardest by Withdrawing from NAFTA*, U.S. CHAMBER OF COM. (Nov. 17, 2017), https://www.uschamber.com/above-the-fold/which-states-would-be-hit-hardest-withdrawing-nafta#TrumpStates (listing the ten states, all Trump supporters, which would suffer the greatest export and job losses).

27. *See Letter to President Trump*, INSIDE U.S. TRADE (Jan. 30, 2018), *available at* https://insidetrade.com/sites/insidetrade.com/files/documents/2018/jan/wto2018_0045.pdf (last visited Feb. 4, 2018) (from more than 30 Senators reaffirming the benefits of NAFTA).

28. USTR's latest guidance affirms the primacy of lowering the trade deficit and emphasizes rules of origin that would require a significant part of auto manufacturing content to be of U.S. origin (explained in more detail below). In this document at least, there is no mention of Mexico paying for the wall. *See Summary of Objectives for the NAFTA Renegotiation*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Nov. 2017), https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf ("Objectives II").

manufacturing of automobiles and perhaps other products, with 82.5 North American content (up from 62.5 percent), including 50 percent U.S. content (including steel and aluminum);[29]

● Limitation of the U.S. government procurement market to the same dollar value as U.S. procurement in the other two Parties, an impractical restriction given that the U.S. economy is 18-20 times the size of the Mexican and of the Canadian economy;

● A partial roll-back of US textile and clothing market access through greater restrictions on the use of non-North American fabrics and yarns;

● Increases in so-called "unfair" trade remedy protection for U.S. growers against imports of labor intensive winter fruits and vegetables such as tomatoes and berries from Mexico (apparently designed to counteract Mexican comparative advantages in labor costs, lower humidity and a more favorable winter climate);[30]

● Elimination of Chapter 19 (AD/CVD binational panel) review of unfair trade practice actions taken by the United States;[31]

● Conversion of state-to-state dispute settlement (Chapter 20) into a less legal and more diplomatic means for resolving disputes over the interpretation and application of NAFTA provisions, by allowing the United States to ignore panel decisions that in the view of the United States are "clearly erroneous";[32]

● A provision that would allow a Party (e.g., the United States) to opt out of ISDS protection for inward investment, without necessarily providing reciprocal protection for Mexico and Canadian

29. David Lawder, *U.S. Seeks to Include Steel, Aluminum in NAFTA Autos Rules-Sources*, CNBC (Oct. 13, 2017, 12:12 PM), https://www.cnbc.com/2017/10/13/reuters-america-exclusive-u-s-seeks-to-include-steel-aluminum-in-nafta-autos-rules-sources.html (noting also the proposal for a 50 percent U.S. specific content and an increase in the total North American content to 85 percent).

30. *See* Caitlin Dewey, *How a Group of Florida Growers Could Help Derail NAFTA*, WASH. POST (Oct. 16, 2017), https://www.washingtonpost.com/business/economy/how-a-group-of-florida-tomato-growers-could-help-derail-nafta/2017/10/16/e1ec5438-b27c-11e7-a908-a3470754bbb9_story.html?utm_term=.92fc11aa67c7 (noting efforts of Florida tomato growers to increase their protection against Mexican competition).

31. Josh Wingrove & Eric Martin, *U.S. Proposes Gutting NAFTA Legal-Dispute Tribunals*, BLOOMBERG MARKETS (Oct. 14, 2017, 6:41 PM), https://www.bloomberg.com/news/articles/2017-10-14/u-s-is-said-to-propose-gutting-nafta-legal-dispute-tribunals. (The mechanism is applicable as well to Canadian and Mexican administrative actions.)

32. *Id.*

governments;[33]

● Removing the highly contentious provisions in NAFTA which permit Mexican and United States cross-border carriage of goods by motor freight on a reciprocal basis;[34] and

● A "sunset" provision under which a revised NAFTA could be reviewed and terminated by the United States after five years based on yet undefined criteria, throwing the entire process into further uncertainty.

If the United States negotiators insist on these changes without modification it is highly unlikely in my view that NAFTA will remain in force for the future. Many if not most of these proposals are also questioned (although not unanimously) by some U.S. stakeholders and some in Congress,[35] including those in the garment industry that depend on cross-border supply chains.[36] However, should the United States decide to show some flexibility, there appears to be some room for compromise, although Mexico and Canada may present a list of demands as well. The proposed new U.S. content requirement for auto rules of origin (ROO) is probably non-negotiable; Canada countered with a suggestion of increasing the North American (not American) regional content amount to 85.% but only through including research and development, an offer quickly rejected by Ambassador Lighthizer on the grounds that it would not increase the North American content significantly above the 62.5%.

Other major roadblocks include proposed changes in textile ROOs and increased trade remedy protection for winter fruits and vegetables, along with the virtual elimination of all dispute settlement mechanisms.

That being said, it is possible to envision compromises in government procurement (some limits to Canadian and Mexican

33. *See generally id.*

34. *USTR Considering a Carveout for Cross-Border Trucking Services in NAFTA*, WORLD TRADE ONLINE (Oct. 6, 2017), https://insidetrade.com/daily-news/ustr-considering-carveout-cross-border-trucking-services-nafta; *see also* In the Matter of Cross-Border Trucking Services, (U.S. v. Mex.), No. USA-MEX-98-2008-01, at 6 (NAFTA Secretariat).

35. *See generally* Vicki Needham, *U.S. Chamber of Commerce Official Calls U.S. NAFTA Proposals 'Highly Dangerous'*, THE HILL (Oct. 10, 2017, 6:01 PM), http://thehill.com/policy/finance/354331-us-chamber-of-commerce-calls-trumps-nafta-proposals-highly-dangerous.

36. Alexandra Stratton, *As NAFTA Tension Mounts, Retailers Warn of Economic Catastrophe*, BLOOMBERG (Oct. 17, 2017, 1:44 PM), https://www.bloomberg.com/news/articles/2017-10-17/as-nafta-tension-mounts-retailers-warn-of-economic-catastrophe.

access to U.S. procurement, but at a reasonable level rather than based on reciprocity) and a "sunset" clause that would be effective only if at least two Parties supported termination or that required review without automatic termination as Mexico is proposing[37] Still, as a Mexican proposal in November indicates, restricting government procurement in the United States by Mexican and Canadian firms is counterproductive. Mexico, probably not seriously, has proposed that government procurement be reciprocal in a revised NAFTA based on *effective* access. Thus, U.S. procurement sales in Mexico would be limited to Mexico's procurement sales in the United States (which are negligible).[38] (Government procurement between the United States and Canada would be relatively unaffected by the termination of NAFTA's Government Procurement Chapter 10, since both countries are parties to the WTO's more comprehensive Government Procurement Agreement, which was revised and expanded in 2015.[39])

Elimination of Chapter 19 review of national unfair trade practice administrative determinations is a non-starter for Canada because the earlier and nearly identical Chapter 19 in the United States-Canada Free Trade Agreement ("CFTA")[40], was a quid pro quo for Canada's acceptance of the CFTA. It was a principal ground offered by then Prime Minister Brian Mulroney for support in the 1987 election that was effectively a plebiscite on the CFTA. The lack of Canadian trust in U.S. federal trade courts was a significant concern in Canada, and Prime Minister Mulroney assured Canadians that the trade agreement would not have been accepted without the mechanism.[41] Moreover, shortly after the U.S. imposition of antidumping and countervailing duties ("CVD") on U.S. exports of softwood lumber in the latest round of a 30-year-old trade dispute, the Canadian government filed a

37. *Reports: Mexico to Propose Five-Year Review of NAFTA to Counter U.S. Sunset Clause*, INSIDE U.S. TRADE (Nov. 16, 2017), https://insidetrade.com/inside-us-trade/reports-mexico-propose-five-year-review-nafta-counter-us-sunset-clause.

38. *Sources: Mexico Tables Government Procurement Proposal Based on Reciprocal Effective Access*, INSIDE U.S. TRADE (Nov. 21, 2017), https://insidetrade.com/daily-news/sources-mexico-tables-government-procurement-proposal-based-reciprocal-effective-access.

39. *Agreement on Government Procurement (GPA): Parties Observers and Accessions*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (showing that Canada and the United States became parties to the GPA as of January 1, 1995).

40. U.S.-Can. Free Trade Agreement (FTA), Can.-U.S., Jan. 2, 1988, 27 I.L.M. 281 (entered into force Jan. 1, 1989).

41. *See The Significance of NAFTA's Chapter 19*, GHY (July 27, 2017), http://www.ghy.com/trade-compliance/the-significance-of-naftas-chapter-19/ (explaining the historical and political significance of the provision for Canada).

Chapter 19 challenge to the CVD ruling.[42] Still, a modified version of Chapter 19, with a more effective appellate process, is not beyond the realm of possibility, and a few commentators suggest that if Canada were to receive sufficient economic benefits in return, such as maintaining full access to the U.S. government procurement market, Canada might accept termination of Chapter 19.[43]

Effective elimination or emasculation of the Chapter 20 state-to-state dispute settlement mechanism may be negotiable for Canada and Mexico, simply because Chapter 20 has been so ineffective, with the most recent panel decision issued in February 2001.[44] Since Chapter 20 has worked poorly (particularly in the sense of avoiding delays in the appointment of the five panelists) the NAFTA Parties have learned to make do with the WTO's Dispute Settlement Body, with more or less satisfactory results.. With cross-border trucking, in my view (as one of five panelists in the 2001 decision) neither the U.S. nor the Mexican governments if pressed would expend substantial political capital on maintaining reciprocal access for U.S. and Mexican truckers. It has resulted in bitter disputes between the U.S. Executive Branch and organized labor's supporters in Congress (which are continuing), multiple court actions, and in 2009-10 Mexican punitive tariffs worth an estimated $2.4 billion on U.S. exports to Mexico.[45] That being said, some industry groups have lobbied the Administration to preserve the trucking provisions.[46]

Making the ISDS provisions of NAFTA subject to an opt-out provision, or eliminating them entirely, would anger many members of the U.S. business community who have long insisted on the inclusion of ISDS provisions in U.S. trade agreements, treating ISDS as a "red line."[47] In January, Canada and Mexico appeared to support

42. *Canada Files NAFTA Challenge Against U.S. in Softwood Lumber Dispute*, INSIDE U.S. TRADE (Nov. 16, 2017), https://insidetrade.com/inside-us-trade/canada-files-nafta-challenge-against-us-softwood-lumber-dispute (noting the filing even though the case is not yet final with regard to the injury determination).

43. *See id.* (quoting Robert Wolfe, professor emeritus at Queens University, Kingston).

44. *Cross-Border Trucking Services*, *supra* note 34.

45. William B. Cassidy, *Mexican Trucking Past U.S. Border in Crosshairs*, JOC.COM (Feb. 13, 2017, 4:33 PM), https://www.joc.com/trucking-logistics/truckload-freight/politics-economics-collide-us-mexico-truck-crossings_20170213.html (discussing the history of the dispute).

46. *100+ Industry Groups Urge Lighthizer to Preserve NAFTA's Trucking Provisions*, INSIDE U.S. TRADE (Nov. 17, 2017), https://insidetrade.com/inside-us-trade/100-industry-groups-urge-lighthizer-preserve-naftas-trucking-provisions.

47. *See* Shawn Donnan & Jude Webber, *Bitter Differences Over NAFTA Break Into the Open*, FINANCIAL TIMES, (Oct. 17, 2017) *available at* https://www.ft.com/content/058aa538-b387-11e7-a398-73d59db9e399 (last visited Oct. 22, 2017) (noting inter alia that the business

retaining ISDS under Chapter 11 even if the United States were to decide to opt out. USTR Robert Lighthizer, who is spearheading the drive to eliminate Chapter because he views it as an unfair subsidy for business, is well aware that Chapter 11 (investment) has long been a flash point for anti-NAFTA union groups and activists, whose support could be critical in obtaining Congressional approval for a revised NAFTA.[48] By late February, it appeared that both Canada and Mexico were prepared to join the United States in eliminating ISDS.[49]

Others have and will continue to speculate on what level of compromise, if any, might be possible if the negotiations continue into April and beyond. For example, would the United States ever accept Canada's proposed gender and indigenous rights chapter, language that might well appeal to some Democrats in Congress if the revised agreement were also to include elimination of ISDS and stronger labor and environmental chapters?[50]

Although the focus here and elsewhere has been on U.S. demands, it is obvious that the other two Parties have key objectives as well, even if their first is "do no harm" while giving the Trump Administration a "win."[51] Mexican authorities have expressed an interest in modernization of NAFTA, including incorporating energy, enhanced financial services and an updated agreement. They also may seek to reinstate a long-stalled guest worker program in the United States and incentives to encourage small and medium-sized businesses to trade internationally. However, Mexican negotiators have indicated that they will resist any U.S. proposals to impose tariffs on regional trade and eliminate the Chapter 19 dispute settlement mechanism for unfair trade disputes.[52] While the avoidance of damage is foremost for Canada as well (including the retention of Chapter 19), modernizing innovations have been suggested, including a chapter on gender rights and indigenous rights as noted above, addressing climate change in the environmental chapter, provisions on "regulatory alignment" and

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community has long pressured the government to include ISDS in trade agreements).

48. *See id.* (reporting on such views).

49. *Sources: Canada to Promise Eliminating ISDS at Meeting this Week; USTR to Agree*, WORLD TRADE ONLINE (Feb. 21, 2018).

50. Simon Lester, *Lighthizer's Trade Optimism*, INT'L ECON. L. & POL'Y BLOG (Oct. 20, 2017, 7:18 AM), http://worldtradelaw.typepad.com/ielpblog/2017/10/lighthizers-trade-optimism.html (discussing various possible compromises).

51. Kate Linthicum, *Mexico Enters New NAFTA Negotiations with Delicate Task: Give President Trump a 'Win' but Do No Harm*, L.A. TIMES (Aug. 14, 2017, 3:00 AM), http://www.latimes.com/world/mexico-americas/la-fg-mexico-nafta-20170814-story.html (discussing how Mexico wishes to avoid a renegotiated NAFTA at their expense).

52. *Id.*

extending government procurement to state and provincial governments, expanding the categories for temporary entry of business persons to other professions.[53]

Even those who oppose many of the Administration's new proposals agree that NAFTA, twenty-five years after its signature (December 1992), could benefit significantly from modernization, starting with many of the chapters that the United States, Canada and Mexico agreed upon as part of the Trans-Pacific Partnership negotiations.[54] Among the areas which in my view could be included are the following:

● Improved investor state dispute settlement (with greater host country regulatory flexibility, as reflected in Chapter 9 of TPP;

● Better labor protections, particularly in Mexico, as reflected in Chapter 19 of TPP;

● Improved environmental protections, as reflected in Chapter 20 of TPP;

● Improved competition law disciplines, as reflected in Chapter 16 of TPP;

● Increased support for small and medium-sized enterprises, as reflected in Chapter 24 of TPP;

● Better regulation of state owned enterprises (e.g., Pemex and CFE), as reflected in Chapter 17 of TPP;

● Inclusion of E-commerce and data protection/digital economy, as reflected in Chapter 14 of TPP;

● Improved government procurement, as reflected in Chapter 15 of TPP, including coverage of procurement by state and provincial government;

● Inclusion of "TRIPs-Plus" expanded protection for intellectual property, as provided in Chapter 18 of TPP;[55]

● Incorporation of new Mexican energy laws that permit foreign

53. Cyndee Todgham Cherniak, *Canada Releases List of NAFTA Modernization "Core Objectives"*, CANADA-U.S. BLOG (Aug. 15, 2017), http://www.canada-usblog.com/2017/08/15/canada-releases-list-of-nafta-modernization-core-objectives/.

54. *TPP Final Table of Contents*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

55. *Id.* (for text and explanation of each of these TPP chapters).

(and domestic) private investment in the sector[56] in NAFTA Chapter 6; and

● Better U.S. access to the highly restricted Canadian dairy and egg market.[57]

Some progress has been made on these modernization issues as March 2018. Chapters addressing regulatory cooperation, digital trade and food safety are among the handful that has been completed.[58]

Still, the legal, political and practical obstacles to such changes, along with the Administration's controversial demands as discussed earlier, suggest a strong possibility that the renegotiation will fail. The considerations include the following:

● The President and many Trump Administration officials, including Commerce Secretary Wilbur Ross, economic adviser Peter Navarro and USTR Robert Lighthizer, strongly favor bilateral over multiple party trade agreements;[59] more generally, these anti-trade, "America-First" officials remain engaged in an internal debate with more moderate advisers such as Treasury Secretary Steven Mnuchin, former National Economic Council head Gary Cohn, Chief of Staff John Kelly and national security adviser General McMaster, who are either pro-trade or fear the adverse political consequences of U.S. anti-globalization economic policy;[60]

● Earlier Administration statements have been aggressively critical of Mexico and have already damaged the negotiating atmosphere; Mexican authorities may well walk away if Trump negotiators are considered unreasonable or disrespectful again as the

56. Naki Mendoza, *Mexico's Energy Reforms: Bearing Fruit at Last*, FINANCIAL TIMES (Aug. 16, 2017), https://www.ft.com/content/2d540f64-793a-11e7-a3e8-60495fe6ca71 (discussing the impact of permitting foreign investment in the Mexican energy sector in 2013).

57. Rosella Brevetti, *NAFTA Talks Could Face Stormy Negotiations in Round Four*, 34 INT'L TRADE REP. (BNA) (Oct. 12, 2017) (listing dairy as one of the most contentious issues between the United States and Canada in the Oct. 11–15 negotiating round).

58. Brevetti, *NAFTA Talks Move on Modernization Issues*, *supra* note 7.

59. *Bilateral or Multilateral: Which Trade Partnerships Work Best?*, KNOWLEDGE @ WHARTON (Apr. 27, 2017), http://knowledge.wharton.upenn.edu/article/bilateral-multilateral-trade-partnerships-work-best/ (discussing the potential benefits and disadvantages of bilateral trade agreements, with reference to the views of Navarro and the president); *see also* Vicki Needham, *Ross Prefers Inking Bilateral Trade Agreements*, THE HILL (Jan. 18, 2017, 1:03 PM), http://thehill.com/policy/finance/314846-ross-prefers-inking-bilateral-trade-agreements (quoting Ross' preference at his confirmation hearings).

60. Ana Swanson, *Trump's America First Trade Agenda Roiled by Internal Divisions*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/politics/trumps-america-first-trade-agenda-roiled-by-internal-divisions.html?_r=0.

negotiations progress;[61]

● Key issues will be under discussion in the run-up to and probably well beyond the July 1, 2018 Mexican presidential election, and unresolved under the current Pena Nieto Administration even if the negotiations can be concluded before July;

● Given the highly controversial nature of NAFTA, the November 2018 U.S. Congressional elections may make NAFTA a lightning rod for many candidates of both major political parties, with support in Congress far less common than criticism;

● The President and Administration officials who should know better ignore trade in services, where the United States maintains a significant trade surplus with both Mexico and Canada;[62] and

● The imposition by the Trump Administration in March 2018 on alleged "national security" grounds of 25 percent tariffs on imported steel and 10% on imported aluminum may affect the negotiations even though initially Canada and Mexico were excluded,[63] and both have rejected any linkages between exceptions to these trade restraints and concessions in the NAFTA talks.[64]

Thus, in my view, the Administration may ultimately be faced with the difficult choice among: 1) compromising on its most protectionist (and unreasonable) demands and accepting a useful revision that fails to meet key Administration objectives, 2) terminating NAFTA entirely (See Part VI); or 3) permitting the negotiations to continue at some level until after the Mexican presidential and U.S. Congressional elections, that is, until January 2019 or beyond. Because of continuing risk of termination by the United States, in the next section I review some of the alternatives to NAFTA for Canada and for Mexico, and focus on the impact of NAFTA termination on the U.S. auto/auto parts and agricultural

61. *See* Jon Lee Anderson, *How Mexico Deals with Trump*, NEW YORKER (Oct. 9, 2017), https://www.newyorker.com/magazine/2017/10/09/mexico-in-the-age-of-trump (discussing *inter alia* the challenges for Mexico in finding common ground on NAFTA with the Trump Administration).

62. $7.6 billion and $24.6 billion (2016), respectively. *See US-Mexico Trade Facts* and *US-Canada Trade Facts*, USTR *supra* note 15.

63. Andrew Mayeda & Jennifer Epstein, *Trump Signs Tariff Order on Metals with Wiggle Room for Allies*, BLOOMBERG (Mar. 8, 2018), https://www.bloomberg.com/news/articles/2018-03-08/trump-to-sign-steel-tariff-order-with-wiggle-room-for-allies.

64. *Canada, Mexico Reject Linkage of Steel and Aluminum Tariffs to NAFTA Talks*, WORLD TRADE ONLINE (Mar. 12, 2019), https://insidetrade.com/daily-news/canada-mexico-reject-linkage-steel-and-aluminum-tariffs-nafta-talks.

sectors, the two most significantly impacted by NAFTA termination.

IV. ALTERNATIVES TO NAFTA IN A POST-NAFTA NORTH AMERICA

A. Alternatives for Canada

Despite the rhetoric, the U.S. trade deficit with Canada is relatively small, about $12.5 billion worth on $627.8 billion worth of trade in 2016,[65], including a huge deficit in petroleum products given that Canada is the United States' top source of crude oil imports.[66] While the Administration said early in 2017 that the US-Canada relationship only requires "tweaking,"[67] more recently it has attacked Canada on dairy and softwood lumber,[68] and tentatively imposed huge penalty duties (now terminated) on imports of commercial aircraft manufactured by Bombardier principally in Quebec.[69] Still, the situation is different from that with Mexico if the United States withdraws from NAFTA. Under the 1993 NAFTA Implementation Act the 1998 Free Trade Agreement between the United States and Canada (CFTA)[70] is "superseded" by that Act, but automatically enters into force again if NAFTA is terminated.[71] (Of course, the Trump administration could also attempt to terminate CFTA as well.)

65. USTR, *U.S.-Canada Trade Facts*, *available at* https://ustr.gov/countries-regions/americas/canada (last visited Mar. 1, 2018).

66. Robert Rapier, *Where America Gets its Oil: The Top 10 Foreign Suppliers of Crude to the U.S.*, FORBES (Apr. 11, 2016, 11:09 AM), https://www.forbes.com/sites/rrapier/2016/04/11/where-america-gets-its-oil-the-top-10-suppliers-of-u-s-oil-imports/#5067edaa264c. Canada exported 3.2 million barrels per day; Saudi Arabia was a distant second at 1.1 million bpd, while Mexico was fourth with 690,000 bpd.

67. Andrea Hopkins, *Trump Expects Only 'Tweaking' of Trade Relationship with Canada*, REUTERS (Feb. 13, 2017, 6:09 AM), https://www.reuters.com/article/us-usa-trump-canada/trump-expects-only-tweaking-of-trade-relationship-with-canada-idUSKBN15S14S.

68. Anna Isaac, *At Loggerheads: How a Canada-US Trade War Could Give Us All Splinters*, YAHOO! FINANCE (Oct. 12, 2017), https://uk.finance.yahoo.com/news/loggerheads-canada-us-trade-war-143543864.html (discussing the disputes over aircraft, dairy, and softwood lumber).

69. *See* Frederic Tomesco and Andrew Mayeda, *Bombardier Gets Surprise Win as U.S. Rejects Boeing Trade Case*, 35 INT'L TRADE REP. (BNA) (Feb. 1, 2018) (noting that the imposition of almost 300 percent antidumping and countervailing duties on commercial aircraft made in Canada was negated by the USITC's negative injury finding).

70. The Canada-U.S. Free Trade Agreement, *supra* note 40.

71. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 501 (c)(3), 107 Stat. 2057 (1993) (codified as 19 U.S.C. §§ 3311–3317 (2011)) (providing in pertinent part that "[o]n the date the United States and Canada agree to suspend the operation of the [CFTA] by reason of the entry into force between them of the North American Free Trade Agreement, the following provisions of this Act are suspended and shall remain suspended until such time as the suspension of the [CFTA] may be terminated[].").

The CFTA carries most of the same duty-free trade benefits, and could be modernized over a period of several years if the Parties and Congress were to agree, but lacks ISDS and agricultural and service market access comparable to NAFTA, among other differences. In the interim, CFTA could allow Canada to escape some of the dangers of a failure of NAFTA renegotiation with Mexico. Virtually all duties on manufactured goods became duty-free and quota-free under CFTA and NAFTA no later than 1998.[72] Also, if the United States were to terminate its participation in NAFTA, Canada (with Mexico's concurrence) could decide to keep NAFTA in force for those two countries. This could be a positive factor for various reasons, including but not limited to maintaining Mexico as an important source for auto parts to be used in Canadian auto production, including for automotive exports to the European Union under CETA,[73] and allowing Canada to replace the United States as a source of insurance and related financial services now provided by the United States under NAFTA's government procurement chapter.

Still, Canadian industries (including but not limited to autos) are highly dependent on imported parts and components from the United States as well as those from Mexico. Thus, Canadian auto producers would be adversely affected unless the Canadian Government were to reduce its tariffs on key parts imports to zero, or take other steps to assure a continuing supply of duty-free parts and components. The prospect of duty-free auto and auto parts trade with Canada's other "Comprehensive and Progressive Agreement for Trans-Pacific Partnership," the revised TPP[74], could also have a significant impact on post-NAFTA Canadian auto and auto parts production and trade, and assure duty-free automotive trade with Mexico even if NAFTA were to disappear as between Canada and Mexico.

Politically, Canadian relations with Mexico as well as with the rest of Latin America could suffer if Canada does not stand with

72. *Elimination of Tariffs Under the Canada-United States Free Trade Agreement*, GLOBAL AFFAIRS CANADA, http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/tariff-accel.aspx?lang=eng (last modified Mar. 17, 2017) (stating "Tariffs on qualifying goods traded between Canada and the United States became duty free on January 1, 1998, in accordance with the Canada-United States Free Trade Agreement (CUSFTA) which was carried forward under NAFTA for goods traded between Canada and the United States").

73. Comprehensive Economic and Trade Agreement [Canada, EU], Oct. 30, 2016 (entered into force Sep. 21, 2017), http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

74. New Zealand Foreign Affairs and Trade, CPTPP, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/ (signed Mar. 8, 2018).

Mexico to provide a unified front during the negotiations and any suspension of them, since if that occurs it will appear to many that Canada has abandoned Mexico and consequently made it more difficult for Mexico to reach an acceptable revised agreement. Although Canadian trade relations with Latin America pale by comparison with the United States, Canada has concluded free trade agreements with more than twenty countries in Latin America and the Caribbean, including Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala and Nicaragua, Panama and Peru.[75]

The Canadian economy will be less adversely affected by the termination of NAFTA and by other U.S. anti-trade policies if the threat encourages Canada to go beyond the CPTPP, CETA and the Canada-Korea FTA toward bilateral FTAs with other nations, such as the MERCOSUR group (Argentina, Brazil, Paraguay and Uruguay) and China. Such steps might at least begin to reduce the heavy dependency of the Canadian and Mexican economies on exports to the United States (about 78 percent of total Canadian exports and 81 percent of Mexican exports)[76] by encouraging the developing of new markets. However, this is a medium to long term process which is not likely to have a significant impact for five years or more.

In services, Canada is already benefitting from liberal immigration policies for high-tech professionals (including recent college graduates), which may further encourage U.S. high-tech firms (e.g., Apple, Amazon, Microsoft) to expand their operations in Vancouver and Toronto,[77] and depending on U.S. immigration policies are likely to continue benefitting from high-tech professional immigration in the foreseeable future.

B. Alternatives for Mexico

What happens to Mexican exports to the United States if NAFTA is terminated as between the United States and Mexico? The following

75. *Trade and Investment Agreements*, GLOBAL AFFAIRS CANADA, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng (last modified Nov. 11, 2017).

76. Daniel Workman, *Canada's Top Trading Partners*, WORLD'S TOP EXPORTS (Feb. 14, 2018), http://www.worldstopexports.com/canadas-top-import-partners/; Daniel Workman, *Mexico's Top Trading Partners*, WORLD'S TOP EXPORTS (Jan. 26, 2018), http://www.worldstopexports.com/mexicos-top-import-partners/.

77. Joel Rose, *Canada's Tech Firms Capitalize on Immigration Anxiety in the Age of Trump*, NPR (June 9, 2017, 11:46 AM), http://www.npr.org/2017/06/09/532220824/canadas-tech-firms-capitalize-on-immigration-anxiety-in-the-age-of-trump (noting *inter alia* that international tech workers, including those from the United States, can get a work permit in only two weeks).

are key factors but quantifying the effects is difficult:

● Assuming no draconian, WTO-illegal new trade barriers, Most Favored Nations ("MFN) tariffs between Mexico and US could be reinstated and other WTO rules, such as the Trade-Related Intellectual Property Agreement (TRIPS)[78] would continue to apply;

● The weighted average of Mexican applied import tariffs is about 7.1%, while the weighted average for Canada is 4.2%, and 3.7% for Mexican exports to the United States (keeping in mind that Mexico's bound tariffs average 36.1%).[79] Effects of reverting to WTO tariffs vary by sector (with textile, clothing and footwear tariffs, and agricultural tariffs being well above the MFN average, but only an estimated 15 percent of Mexican exports to the United States subject to tariffs above five percent[80]). In other sectors some increase in consumer prices and reduction in cross-border trade is likely when tariffs are passed on to consumers, but other factors such as a peso devaluation and the elimination of the costs of complying with rules of origin would likely offset the increased tariffs to some degree;

● United States, third country, and probably Mexican domestic-source investment would be discouraged, at least for a time, resulting in slower growth in Mexico,[81] although the impact on the deficit as well as on trade volumes is uncertain. Despite the disruption of supply changes and possible relocation of some U.S. enterprises away from North America, relatively low U.S. MFN tariffs and the other advantages of producing goods for the U.S. market in Mexico would remain (and would likely assure a significant, if somewhat reduced, volume of manufactured exports to the United States post-NAFTA).[82] Relevant factors working in Mexico's favor include the importance of

78. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 81, *available at* https://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

79. *World Tariff Profiles 2013*, WTO, INT'L TRADE CTR., UN CONF. ON TRADE & DEV. 54, 115, https://www.wto.org/english/res_e/booksp_e/tariff_profiles13_e.pdf (last visited Oct. 5, 2017); *see also* Mary Amiti and Caroline Freund, *U.S. Exporters Could Face High Tariffs without NAFTA*, LIBERTY ST. ECON. (Apr. 17, 2017), http://libertystreeteconomics.newyorkfed.org/2017/04/us-exporters-could-face-high-tariffs-without-nafta.html.

80. Amiti & Freund, *supra* note 79.

81. *Fitch: 'Significant Uncertainty' for Mexico's Economy if U.S. Leaves NAFTA*, INSIDE U.S. TRADE (Oct. 30, 2017), https://insidetrade.com/trade/fitch-significant-uncertainty-mexicos-economy-if-us-leaves-nafta (quoting a report by Fitch Ratings).

82. Ana Swanson and Kevin Granville, *What Would Happen if the U.S. Withdrew from NAFTA*, N.Y. TIMES (Oct. 12, 2017), https://www.nytimes.com/2017/10/12/business/economy/what-would-happen-if-the-us-withdrew-from-nafta.html (discussing the impact of terminating NAFTA on various industrial sectors).

long-established interconnected supply chains, geographical proximity to the United States compared to Asia, lower cost labor, and heavy prior investment in well-established facilities with skilled labor that could only be abandoned with great financial cost to their owners. In many cases, the costs of developing alternative manufacturing sites and supply chains could be foregone in place of simply raising prices as feasible to consumers;[83]

● Many other protections for American industry, such as those related to investment, rules of origin, labor and environment, common customs procedures and some services market access, would disappear should NAFTA be terminated, since WTO rules do not extend, *inter-alia*, to investment, labor or environmental protection, and are limited in scope for services.

Moreover, a focus on trade alone ignores other important aspects of the U.S.-Mexico relationship and cooperation, including security and terrorism; reducing illegal immigration by keeping the Mexican economy stronger than would otherwise be the case; interdicting and returning migrants from Mexico, Central America and further south; and seizing of illicit drugs and extradition of drug lords.[84] The Administration's bitter rhetoric may encourage anti-U.S. sentiment that results in support during the presidential campaign of the populist Andrés Manuel López Obrador.[85]

Only a minority of Americans are aware of the complex history of United States-Mexican history. Those know that from the 1840s, with the Mexican-American War, after additional threats of invasions by the United States and the transfer of more than half of Mexican territory to the United States by 1852, relations were either arms-length or hostile for most of the past 180 years.[86] In point of fact, the two countries have enjoyed a strong, cooperative relationship for only about the past 30 years,[87] beginning in the mid- 1980s when Mexico began opening its economy and joined the GATT.[88]

83. *Fitch*, *supra* note 81.

84. *U.S. Relations with Mexico*, U.S. DEP'T OF ST. (Jan. 25, 2017), https://www.state.gov/r/pa/ei/bgn/35749.htm (discussing broad ranges of cooperative activities, including those relating to drugs and border security and interdiction of illicit funds and arms).

85. Anderson, *supra* note 61 (discussing the prospects of López Obrador's election).

86. *Id.* (noting the relevance in Mexico of this and other historical incidents to the current negotiations).

87. *Id.* (discussing the historical baggage between the United States and Mexico).

88. *Mexico and the WTO*, WTO (Dec. 1, 2017), https://www.wto.org/english/thewto_e/countries_e/mexico_e.htm (noting that Mexico joined

If anyone gains from the destruction of NAFTA, it is likely to be Mexico's other trading partners and investors, including Argentina, Brazil, Canada (which would likely remain a NAFTA partner), China, Japan and the EU, as Mexico makes serious efforts to diversify its exports.[89] Among the recent developments is a fast-track effort by Mexico and the European Union to modernize their 2000 Free Trade Agreement,[90] and efforts by the Mexican president to stimulate trade with and investment from China.[91]

Many of the factors discussed in the next section focusing on the automotive industry would affect other manufacturing sectors as well.

C. Auto and Auto Parts Industry

The auto and auto parts industry are a key aspect of North American economic relations. North American auto production is the third largest in the world, after China and the European Union, with one source estimating approximately 24.5 million, 18.2 million and 17.9 million, respectively, in 2015.[92] Within North America, the United States produced about 12.1 million units, Mexico, 3.6 million units and Canada, 2.3 million units.[93] Trade in this sector currently accounts for at least 20 percent of total NAFTA trade,[94] in part because some automotive components cross the Canadian and/or Mexican borders as many as eight times before they are incorporated into a finished automobile in a final assembly plant in one of the three NAFTA countries.[95]

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the GATT on Aug. 24, 1986).

89. Nicholás Misculin, *Mexico, Looking South, Sees Trade Deal with Argentina Around Year's End*, REUTERS (Apr. 18, 2017, 4:58 PM), https://www.reuters.com/article/us-argentina-mexico/mexico-looking-south-sees-trade-deal-with-argentina-around-years-end-idUSKBN17K2HC.

90. *Countries and Regions: Mexico*, EUR. COMM'N, http://ec.europa.eu/trade/policy/countries-and-regions/countries/mexico/ (last visited Oct. 8, 2017) (discussing the negotiations).

91. *Mexico President to Visit China to Boost Trade Amid NAFTA Talks*, REUTERS (Aug. 26, 2017, 3:26 PM), https://www.reuters.com/article/us-trade-nafta-mexico-china/mexico-president-to-visit-china-to-boost-trade-amid-nafta-talks-idUSKCN1B820S (discussing Mexico's efforts to increase trade with Latin America and Asia).

92. *2016 Production Statistics*, OICA, http://www.oica.net/category/production-statistics/ (last visited Oct. 4, 2017).

93. *Id.*

94. *US-Mexico Trade Facts* and *US-Canada Trade Facts*, *supra* note 15 (showing automotive trade of approximately $200 billion (exports and imports) under NAFTA).

95. *See* Dziczek, et al., *NAFTA Briefing: Trade benefits to the automotive industry and potential consequences of withdrawal from the agreement*, CENTER FOR AUTOMOTIVE RESEARCH 7 (Jan. 2017), http://www.cargroup.org/wp-content/uploads/2017/01/nafta_briefing_january_2017_public_version-final.pdf.

A complex mix of factors exists which may make the net impact on the volume of auto production in post-NAFTA North America less severe than might otherwise be the case, even though the impact on U.S. auto and auto parts production, and on U.S. competitiveness in the auto industry world-wide, is likely to be adverse. Should NAFTA duty-free, quota-free entry of autos and auto parts into the United States be terminated, the applicable U.S. MFN duties are 2.5 percent on autos, around 3.1 percent on most auto parts, but 25 percent on light trucks.[96] In the other direction, Canadian tariffs are about 6 percent while Mexican applied tariffs are typically around 5-6% although some vehicles are subject to much higher tariff rates.[97]

The overall impact on the North American auto industry and particularly on the U.S. auto and auto parts industry depends on many factors which may not affect all models and all current supply chains in the same manner:

● Elimination of NAFTA 62.5% regional value content rule of origin means more and less expensive auto parts could be imported into Mexico from Asia (or into Canada) for use in Mexican and Canadian auto production for export to the United States, or for United States domestic production, particularly from current suppliers for such expensive components as engines (Japan, China and South Korea);[98]

● Such changes would likely cause a decrease in employment and output for auto parts producers in all NAFTA Parties, but particularly for the United States (estimated at up to 50,000 job losses out of a total of about 870,000 current jobs, including parts and finished vehicles),[99] given that the United States is usually the high cost producer (particularly with the current U.S. dollar—Canadian dollar exchange

96. BILL CANIS, ET AL., CONG. RESEARCH SERV., R44907, NAFTA AND MOTOR VEHICLE TRADE (2017).

97. *See Mexico Trade at a Glance: Most Recent Values*, WORLD INTEGRATED TRADE SOLUTION, https://wits.worldbank.org/CountrySnapshot/en/MEX (last visited Oct. 2017) (showing Mexico's applied simple average tariff of 6.1 percent); Andrei Sulzenko, *The U.S. Has a Weak NAFTA Hand on Autos—Canada and Mexico Should Stay Cool*, THE GLOBE & MAIL (Aug. 17, 2017), https://beta.theglobeandmail.com/report-on-business/rob-commentary/the-us-has-a-weak-nafta-hand-on-autos-canada-and-mexico-should-stay-cool/article36011401/?ref=http://www.theglobeandmail.com& (reporting a 6 percent tariff for Canada on autos and parts).

98. CANIS ET AL., *supra* note 96, at 8.

99. David Lawder, *Ending NAFTA Could Cost U.S. up to 50,000 Auto Parts Jobs: Study*, REUTERS (Oct. 12, 2007, 9:34 AM), https://www.reuters.com/article/us-trade-nafta-autos/ending-nafta-could-cost-u-s-up-to-50000-auto-parts-jobs-study-idUSKBN1CH1Z4.

rates);[100]

● Post-NAFTA, under WTO rules, Mexican MFN import duties on parts and components imported from Asia or US can be rebated under WTO rules when the finished vehicles are exported to the United States and Canada (or anywhere else),[101] and auto parts could be imported duty free from Mexico's many FTA partners, including Japan and the European Union;[102]

● Elimination of ROO for U.S. automakers would likely save them 2-3% in the administrative costs of complying with ROO, including but not limited obtaining certificates of NAFTA origin from the Mexican manufacturers and the complex calculations for auto industry ROO, which require tracing of the origin of parts used in the production of subassemblies such as engines and transmissions,[103] although adjusting to a new trade relationship within North America will carry some administrative costs at least for a few years;

● Further devaluation of the peso, which has historically taken place consistently from 1995 through 2016,[104] even by just a few percentage points, could reduce much of the impact of higher (MFN) duties on imports of autos and some auto parts from Mexico by making Mexican exports relatively less expensive in U.S. dollar terms;

● North American supply chains and "just in time" manufacturing would be somewhat disrupted at least for several years, and the overall additional cost of less efficient supply chains in terms of global competitiveness cannot be discounted, although some such costs would be temporary;

● Some automobile models currently assembled in Mexico or in the United States might be produced in China, Korea or elsewhere in

100. As of March 13, 2018, a Canadian dollar was worth 0.77 U.S. dollars, effectively a 20-plus percent discount for costs incurred in Canada. *See* https://www.google.com/search?q=canadian+dollar+us+dollar+exchange+rate&rlz=1C1PRFI_enUS788US788&oq=canadian+dollar-us+dollar+exchange+rate&aqs=chrome.1.69i57j0l5.10101j0j8&sourceid=chrome&ie=UTF-8.

101. Agreement on Subsidies and Countervailing Duties, Annex I(i) (Apr. 15, 1994) (if the remission of duties are not more than the imported duties paid on imported inputs).

102. CANIS ET AL., *supra* note 96, at 8.

103. *See* NAFTA *supra* note 2, Article 403: Automotive Goods (specifying the tracing rules or origin).

104. The value of the peso has fallen from a high of below 4:1 in 1995 to a low of nearly 22:1 in 2016. *See US Dollar Peso Exchange Rate (USD MXN) – Historical Chart*, MACROTRENDS, http://www.macrotrends.net/2559/us-dollar-mexican-peso-exchange-rate-historical-chart (last visited May 11, 2018).

Asia instead, given that the MFN tariff is only 2.5%, but cheaper Chinese labor, along with Chinese parts and components may not outweigh the other advantages of producing particularly small cars in Mexico given the installed factory capacity, highly skilled Mexican workers, low transportation costs and other factors such as favorable exchange rates as noted above;

● Small truck production (GM and Fiat-Chrysler currently produce about one third of their light trucks in Mexico) because of the prohibitive 25 percent U.S. MFN tariff noted earlier would largely be halted in Mexico—as already announced[105]— except for local consumption and perhaps for limited exports to third-countries; and

● In some instances, longstanding U.S. customs rules upon importation that tax goods assembled in foreign countries only on the non-U.S. content would be applicable to goods assembled in Mexico, assuming they could currently or with some modification of the industrial processes meet the requirements of the statute.[106]

Another possibly significant factor unrelated to NAFTA is the decision by the Trump Administration March 1 to impose so-called "national security" protective tariffs on imported steel (25 percent) and aluminum (15 percent).[107] Given that the average auto contains 2,400 pounds of steel and over 300 pounds of aluminum,[108] a substantial increase in steel and aluminum prices in the United States could make some models less expensive to produce in Mexico or Canada, even with the 2.5% import duty.These factors, plus at least some disruption of the supply chains that have been established since 1994 for NAFTA

105. Julia Horowitz, *Fiat Chrysler Will Move Ram Production to Michigan from Mexico*, CNN MONEY (Jan. 11, 2018), http://money.cnn.com/2018/01/11/news/companies/fiat-chrysler-tax-reform-bonus-jobs/index.html (reporting on a $1 billion investment in a Michigan plant, but indicating that a Saltillo Mexico plant will not be closed).

106. HTSUS item 9802.00.80 reads: "Articles, except goods of heading 9802.00.90 and goods imported under provisions of subchapter XIX of this chapter and goods imported under provisions of subchapter XX, assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting…" *See* Harmonized Tariff Schedule of the United States, USITC Pub. 4750 (2018).

107. *See Trump to Impose 25 Percent Tariff on Steel, 10 Percent on Aluminum*, WORLD TRADE ONLINE (Mar. 1, 2018), https://insidetrade.com/daily-news/trump-impose-25-percent-tariff-steel-10-percent-aluminum.

108. Julian Murdoch, *Cars and Metal, Metal and Cars*, ETF.COM (Nov. 17, 2008), http://www.etf.com/sections/features-and-news/1289-cars-and-metal-metal-and-cars?nopaging=1.

and Mexico and since 1965 for the United States and Canada through the Auto Parts Agreement,[109] make predicting new sourcing patters for both parts and complete vehicles difficult. The only certainty is that there will be at least some dislocations.

Given these uncertainties the overall impact on U.S. auto and parts production is difficult to assess, particularly after the industry in all three countries has time to adjust fully to the changes. It does not seem likely that auto producers in the United States will invest in new assembly capacity in the United States, at least in the foreseeable future, particularly at a time of declining vehicle consumption and increasing steel and aluminum costs. As one expert noted, "costs to automakers of expanding in the U.S. would be significant," and producers in Mexico would continue to enjoy many of the same comparative advantages of Mexican production post-NAFTA, as well as the ability to export autos tariff-free to markets outside North America where Mexico has FTAs).[110] As noted earlier auto parts production in North America, particularly in the high-labor-cost Canada and the United States, will probably decline, since sourcing the same parts in the Canada and the United States (rather than Mexico) would likely result in an increase in parts costs and thus vehicle prices. (It is possible that some such increased costs could be reduced through investment in greater automation.)

In the unlikely event that NAFTA is revised to increase the North American content requirement from 62.5 percent to over 80 percent, and/or impose a 50 percent U.S. content as the United States has imposed, the impact would be essentially the same on the auto industry as terminating NAFTA. Most of the same considerations listed above would apply, and many or most North American auto producers would simply forego NAFTA preferential tariff treatment and operate under MFN tariffs in intra-North American trade for vehicles destined to be sold in the United States,[111] or import fewer finished vehicles from the United States post-NAFTA and more from Japan duty-free under the CPTPP.

A possible harbinger of future developments is reflected in the decision of the Ford Motor Company to eschew building in Mexico a

109. Agreement Concerning Automotive Products Between the Government of the United States of America and the Government of Canada, Jan. 27, 1965, GATT Doc. L/2339.

110. *Fitch*, *supra* note 81.

111. *See Study: Stricter NAFTA Auto Rule of Origin Could Cost 24,000 Jobs,* INSIDE U.S. TRADE (Oct. 12, 2017), https://insidetrade.com/daily-news/study-stricter-nafta-auto-rule-origin-could-cost-24000-jobs (suggesting that these ROO changes would amount to "basically a withdrawal" from NAFTA).

new factory for production of the small Ford Focus after criticism from President Trump. However, the Focus will not be produced in either Mexico or United States, but in China![112] Even today, greater auto production of vehicles for the U.S. market is beginning to occur in China, as for example with recent Buick Envision SUV imports.[113] The decision to produce the Focus in China will essentially assure that the approximately 46 percent of parts for the Focus when made in the United States will be sourced largely from China and other Asian suppliers in the future. Estimates vary widely but approximately 30-40 percent by value of the parts for Mexican autos assembled for export to the U.S. market originates in the United States, while only 4 percent of vehicles imported into the United States from China represent U.S. content.)[114] Thus, the Ford decision alone is likely to result in a reduction of auto parts production in North America.

D. United States-Mexico Agricultural Trade Post-NAFTA

Canada and Mexico are respectively the largest and third largest export markets for the United States. U.S. agricultural exports to Canada were worth $23 billion on 2016, including prepared food, fresh vegetables, fresh fruit, snack foods, and non-alcoholic beverages, with imports of $22 billion.[115] A comprehensive analysis of the effects of NAFTA termination on regional agricultural trade is beyond the scope of this section, but is available through the Congressional Research Service.[116]

U.S. agricultural exports to Mexico are worth about $18 billion annually in such product areas as wheat, hops and other grains, corn, soy, beef, chicken parts and pork, while imports total $23 billion worth in 2016, including mostly fresh vegetables and fruit but also wine and beer, processed foods and processed fruits and vegetables.[117] Most such U.S. export goods are fungible, with Brazil, Argentina, Canada and Australia all eager to export more to Mexico, and the Mexican Government, with the support of several senators, making initial inquiries exploring the shifting of some grain and corn purchases from U.S. exporters to Brazil and Argentina, even though transport costs

112. Bill Vlasic, *Ford Chooses China, Not Mexico, to Build its New Focus*, N.Y. TIMES (June 20, 2017), https://www.nytimes.com/2017/06/20/business/ford-focus-china-production.html?_r=0.

113. *Id.*

114. Dziczek et al., *supra* note 95, at 2.

115. *U.S-Canada Trade Facts*, *supra* note 15.

116. *See* RENEE JOHNSON, CONG. RESEARCH SERV., R45018, POTENTIAL EFFECTS OF A U.S. NAFTA WITHDRAWAL: AGRICULTURAL MARKETS (2017).

117. *U.S-Mexico Trade Facts*, *supra* note 15.

would be higher because of the greater distances from those export markets to Mexico. In the short term, Mexican consumers could be harmed through higher food prices, partly as a result of peso devaluation but also through increases in animal feed costs, injury that the government is likely to try to avoid until new agricultural supply chains can be established over several years.

Under NAFTA, with zero tariffs on most agricultural products exported to Mexico,

> U.S. exports of farm products to Mexico have a huge tariff advantage. Under WTO rules, which apply currently to Argentina and Brazil among other competing source countries, but would apply to U.S. exports post-NAFTA, wheat is subject to a 15 percent tariff, beef, 25 percent, and chicken, 75 percent.[118]

Mexico exports labor-intensive farm produce to the United States, e.g., tomatoes, avocados, peppers, grapes, cucumbers, melons, berries, onions, other fruits/vegetables avocados, cantaloupes and tomatoes, accounting for 44 percent of total U.S. imports.[119] Most such fruits and vegetables currently enter duty-free; MFN tariffs are high in some product lines, e.g., 12.8%-29.8% for cantaloupes depending on the season, but much less for tomatoes (2.8-3.9 cents/kg) and in between for avocados (11.2 cents/kg).[120] Such tariffs would presumably be passed on to consumers and thus impact supermarket prices soon, or consumers would simply have fewer choices particularly in the off-season, but may be offset in part by a declining Peso against the dollar. Sufficient alternative sources probably do not exist in the United States, particularly in the winter, due to a (worsening) shortage of legal farm workers and water shortages in Arizona and California among other factors. With tomatoes, as noted earlier, the industry is seeking and the U.S. government demanding from Mexico, more extensive so-called unfair trade action protection for the Florida growers, who complain about the longer growing season, lack of humidity and lower cost labor in Mexico as an "unfair" advantage![121]

Existing U.S. concerns over access to the Canadian agricultural market under NAFTA include the supply management system that Canada uses to regulate dairy, turkey, chicken and egg industries, as

118. Swanson & Granville, *supra* note 82.

119. RENEE JOHNSON, CONG. RESEARCH SERV., RL34468, THE U.S. TRADE SITUATION FOR FRUIT AND VEGETABLE PRODUCTS (2016).

120. *See* Harmonized Tariff Schedule of the United States, USITC Pub. 4750 (2018) (citing 0702 tomatoes); 0804.40 (avocados); 0807.19 (cantaloupes).

121. Dewey, *supra* note 30.

listed in the U.S. demands reiterated in November;[122] geographical indications in CETA that could potentially limit imports of certain U.S. wine and cheese; and on U.S. grain imports.[123] If both NAFTA and CFTA were to disappear, U.S. exports to Canada would undoubtedly become more expensive and less competitive, particularly with the advent of CETA in September 2017. Historically, the bulk of Canada's imports of agricultural products from the United States have been prepared foods and specialty products, including wine, chocolate and beverages. However, as of 2010 the import volume was relatively small, approximately CDN$27.2 billion worth from all sources.[124] Should NAFTA disappear, it is possible that some of the current U.S. exports could be eventually be displaced by EU exports under CETA, particularly if the Canadian dollar continues to depreciate against the U.S. dollar, making Canadian imports from the United States relatively more expensive.

V. COMPLEXITIES OF U.S. WITHDRAWAL FROM NAFTA

NAFTA provides that "A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the other Parties."[125] There is little doubt that as a matter of international law such notice would be considered effective for the United States once all requirements under U.S. law are met.[126] However, as with most international agreements, NAFTA does not address the domestic legal and constitutional procedures that may be required for the United States to withdraw from NAFTA as a matter of domestic law.

This is complex and uncertain legal area, since the Constitution and most relevant legislation do not address withdrawal. In a few instances, a president has terminated an Article I-II treaty without seeking Congressional or Senate approval. For example, in 1979, President Jimmy Carter terminated the U.S. defense treaty with

122. *Summary of Objectives for the NAFTA Renegotiation*, *supra* note 28, at 3.

123. *Canada—Import Tariffs*, EXPORT.GOV (Aug. 14, 2017), https://www.export.gov/article?id=Canada-Import-Tariffs.

124. *Agricultural and Trade Policy Background Note: Canada*, FOOD AND AGRICULTURE ORG. 3 (Table 4), http://www.fao.org/fileadmin/templates/est/meetings/wto_comm/Trade_policy_brief_Canada_final.pdf.

125. NAFTA, *supra* note 2, art. 2205.

126. Vienna Convention on the Law of Treaties, art. 70, May 23, 1969, 1155 U.N.T.S. 331.

Taiwan as a precondition to establishing formal diplomatic relations with the People's Republic of China. At the time the Senate approved a "sense of the Senate" resolution contending that prior consultation was required, but no final vote occurred.[127] The litigation that followed was inconclusive, with the Supreme Court (absent a majority on a common ground) vacating a court of appeals opinion holding that presidential authority alone was sufficient and ordering that the lawsuit be dismissed.[128] No similar precedent exists for withdrawal by the President from an FTA approved under Trade Promotion Authority/Fast-track provisions.[129]

Presidents have typically relied extensively on their Article II powers in foreign relations, as broadly supported by *United States v. Curtiss Wright*,[130] decided at a time (1936) when presidential powers were probably at their all-time zenith. As recently as 2017, a Congressional Research Service analysis reaches the somewhat ambiguous conclusion that:

> [T]he weight of judicial and scholarly opinion suggests that the President possesses the exclusive constitutional authority to communicate with foreign powers, and such authority might provide the President with a constitutional basis for withdrawing from at least some types of international agreements. The agreement's subject matter, however, might be relevant to a legal analysis . . . Even in the event that the President could properly withdraw from an FTA unilaterally, the President cannot make laws, and thus repeal of federal statutory provisions implementing U.S. FTA obligations requires congressional action. Congress has enacted provisions that appear to delegate to the President authority to repeal some provisions of federal statutory law implementing FTA obligations upon termination of, or U.S. withdrawal from, the agreement. However, the President might not be able to exercise this authority if a court struck down such provisions as unconstitutional or Congress amended or repealed

127. *See CRS Annotated Constitution: Interpretation and Termination of Treaties as International Compacts*, CORNELL U. LEGAL INFO. INSTITUTE, https://www.law.cornell.edu/anncon/html/art2frag19_user.html (last visited Oct. 8, 2017) (discussing the Taiwan treaty termination process).

128. Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979) (en banc), *vacated*, 444 U.S. 996 (1979). As the Cornell note observed, "Four Justices found the case nonjusticiable because of the political question doctrine, id., 1002, but one other Justice in the majority and one in dissent rejected this analysis. Id., 998 (Justice Powell), 1006 (Justice Brennan). The remaining three Justices were silent on the doctrine."

129. BRANDON J. MURRILL, CONG. RESEARCH SERV., R44630, U.S. WITHDRAWAL FROM FREE TRADE AGREEMENTS: FREQUENTLY ASKED LEGAL QUESTIONS (2017).

130. 299 U.S. 204 (1936).

them.[131]

Much of the complexity arises from the Constitutional separation of powers, particularly in cases involving trade and commerce. The executive powers of the President under Article II have been interpreted as providing the President with a "vast share of responsibility" for the conduct of foreign relations[132], including the treaty power and acting as commander in chief. Simultaneously, Article I, section 8 provides Congress with the authority to "lay and collect taxes, duties, imposts, and excises," (2) "regulate commerce with foreign nations, among the several states and with the Indian Tribes," and (3) "make all laws which shall be necessary and proper" to carry out these specific powers. It is difficult to argue that the termination of a free trade agreement does not fall within both 1) and 2) above.

The NAFTA Implementation Act of 1993, in contrast to several later FTA implementing laws, does not incorporate "clear language on repeal of provisions implementing the agreement. However, it does contain language that could potentially be construed as repealing some provisions . . . at the time the United States determines not to apply the agreement with respect to a NAFTA partner country as a result of U.S. withdrawal from the agreement."[133] The lack of explicit language notwithstanding, any effort by the Trump Administration to withdraw from NAFTA and increase tariffs to MFN (or higher) levels would likely generate a firestorm among some members of the Congress and Senate as well as thousands of affected stakeholders, and almost certainly spawn multiple lawsuits (although whether they would reach the merits and if so result in a meaningful remedy for the plaintiffs is uncertain).

In addition to other factors that might affect a presidential decision to withdraw unilaterally from NAFTA, it is notable that the renegotiation of NAFTA has been proceeding in compliance by the Trump Administration with the 2015 Trade Promotion Authority

131. MURRILL, *supra* note 129, at ii.

132. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003).

133. MURRILL, *supra* note 129, at 13, noting further "NAFTA Implementation Act §109(b) (codified at 19 U.S.C. Chapter 21) ("During any period in which a country ceases to be a NAFTA country, sections 101 through 106 shall cease to have effect with respect to such country."); id. §415 ("Except as provided in subsection (b), on the date on which a country ceases to be a NAFTA country, the provisions of this title (other than this section) and the amendments made by this title, [which pertain to dispute settlement in antidumping and countervailing duty cases,] shall cease to have effect with respect to that country.").

legislation.[134] Thus, to comply with one of the significant statutory requirements, The U.S. Trade Representative provided Congress with a "Summary of Objectives for the NAFTA Renegotiation" in July 2017 as required by TPA,[135] and an updated summary in November.[136] There is no indication that the Administration, at least at the present time, contemplates any deviation from the TPA rules. Moreover, while the current three-year TPA expires July 1, 2018, it is subject to an automatic three-year extension if requested by the President by April 1, assuming that neither House of Congress vetoes the extension by majority vote. It would be foolhardy for the Administration to terminate NAFTA at a time when the Administration would need an extension of TPA to negotiate any future trade agreements.

All this suggests, at minimum, that the Administration might well consider seriously the adverse consequences of acting against the will of many of his own party in Congress (to the extent that such "will" can be determined) in a bedrock area (the Commerce Clause) before seeking to terminate NAFTA unilaterally in the event the negotiations become extended, or appear to be failing. Among other factors, Texas Senator John Cornyn has reminded the Administration of Congress' role in approving a new NAFTA, and urged that the Administration to keep out "some of these more controversial provisions."[137]

Should the President decide nevertheless to move forward with termination, either because of frustration with the pace of the negotiations or as a negotiating ploy (which could trigger a walkout by Mexico and Canada from the negotiations[138]), from an economic and political point of view the results could be adverse. Assuming that litigation resolving the question of the President's authority (and the many questions of what tariffs and other NAFTA provisions if any

134. Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, 129 Stat. 343 (2015).

135. *Summary of Objectives for the NAFTA Renegotiation*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (July 17, 2017), https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf (citing Section 105(a)(1)(D) of the Act) ("Objectives I")).

136. *Id.*

137. *See Cornyn Warns Administration Not to Take Congress for Granted on NAFTA,* INSIDE U.S. TRADE (Nov. 21, 2017), https://insidetrade.com/inside-us-trade/cornyn-warns-administration-not-take-congress-granted-nafta (reflecting warnings communicated to USTR Robert Lighthizer).

138. *See* Patrick J. McConnell, *Mexico Signals Tougher Stance on NAFTA, May Pull Out of Talks if Trump Moves to Scrap Deal*, L.A. TIMES (Aug. 31, 2017, 11:30 AM), http://www.latimes.com/world/mexico-americas/la-fg-mexico-nafta-20170831-story.html (quoting Mexican Foreign Secretary Luis Videgaray as stating that Mexico would not remain in the negotiations if Trump begins the withdrawal process).

would continue to apply and for how long) would take a year or more to resolve, the level of confusion among stakeholders would be extreme, including but not limited to concerns about the level of tariffs the United States might seek to impose (WTO legal or otherwise) on imports from Canada and Mexico, and uncertainties as to how and when Canada and Mexico would retaliate. Still, under the provisions of other legislation existing (zero) tariff rates would apparently be continued for a year unless the President decided to promulgate pre-NAFTA GATT/WTO rates prior to that time.[139]

VI. THE (GENERALLY UNATTRACTIVE) OPTIONS

It is difficult at this juncture (April 2018) to envision any broadly satisfactory outcome to the NAFTA renegotiations if the United States continues to insist on a list of demands many of which are effectively non-negotiable for Canada and/or Mexico, as discussed earlier. While Mexico and Canada may be willing to make some concessions to save NAFTA, it is obvious that a renegotiated NAFTA must be economically and politically acceptable to all sides, an enormous challenge if the United States continues to demand above all that a radically altered NAFTA must reduce the U.S. trade deficit.[140] Under that circumstance, the negotiations are bound to fail eventually, whether before or after the Mexican and U.S. elections in 2018.

All NAFTA Parties have already recognized that the initial deadlines for completing the negotiations (December 31, 2017 and March 31, 2018) were unrealistic for a negotiation of this complexity. The most likely option, given that none of the Parties at present appears to be enthusiastic about referring to its Congress or voters an agreement that would be attacked at home, suggests that even President Trump would be willing to continue the negotiations into the fall (or beyond), explaining to his supporters that he is still fighting for a better NAFTA.[141] That at least would give the negotiators a reasonable time to attempt compromise on the most difficult issues in

139. M. ANGELES VILLARREAL & IAN F. FERGUSON, CONG. RESEARCH SERV., R42965, THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) (2017) (citing Sec. 125 of the Trade Act of 1974, P.L. 93-618, 19 U.S.C. 2135 (2016)).

140. *See* John Paul Rathbone & Shawn Donnan, *Mexico Insists Reform of NAFTA Trade Deal Must Suit All Sides*, FINANCIAL TIMES (Oct. 17, 2017), https://www.ft.com/content/52170860-b409-11e7-a398-73d59db9e399 (discussing the views of Mexican Foreign Minister Luis Videgaray).

141. *See* Shawn Donnan, *Political Concerns Push Back NAFTA Talks Deadline*, FINANCIAL TIMES (Jan. 28, 2018), *available at* https://piie.com/blogs/trade-investment-policy-watch/extending-trade-promotion-authority (last visited Feb. 5, 2018) (discussing the reasons the negotiations are likely to stretch into the fall or beyond).

a less toxic political climate in both the United States and Mexico. The need for more time was evident in early May 2018, when despite several weeks of intense, high level negotiations, no agreement even in principle was reached by the latest target date of May 1, suggesting that the U.S. Administration's hope of obtaining approval of a new NAFTA by the end of the current Congress a highly unrealistic one.[142]

Significant changes on many issues of importance to the United States, such as better market access to the Canadian dairy market, major modification of NAFTA Chapter 19, elimination or major modification of ISDS and state-to-state dispute settlement as well as obligations regarding cross-border trucking, plus an increase in the North American (but not the U.S.) content for autos trade in the region are probably achievable. So are most of the TPP upgrades (data protection rules, labor, environment, ecommerce, SOEs and the like. Many of this latter group have already been accepted by the three Parties in TPP as noted earlier and are thus relatively uncontroversial.

Finally, even if the Trump Administration, Canada and Mexico were to agree on a revised text, there is no assurance that it would be accepted by a majority of the House and of the Senate, as Senator Cornyn and others have suggested. Many in both houses, mostly Democrats with strong labor union constituencies, have opposed NAFTA since before it was approved by Congress in 1993 and will continue do so in the future. Recently, Public Citizen, which has long opposed the TPP's extended protection for intellectual property (and has opposed NAFTA for twenty-five years), rejoiced when the TPP-11 eliminated many of those U.S. sponsored changes.[143] But a renegotiated NAFTA, with more limited expansion of IP beyond WTO rules, the curtailing of ISDS, and better labor and environmental protection, might win over at least a few of the Members of Congress and the Senate who have opposed NAFTA to date.

Conversely, many business interests will be unhappy if the investor protection provisions are eliminated, or stronger rules of origin increase the costs of auto manufacturing in North America. Also, advocates of strong labor rights and environment protection may be reluctant to support labor and environment provisions negotiated by

142 *See* Josh Wingrove & Eric Martin, *NAFTA Nations Won't Wrap Up Talks before U.S. Trip to China (1)*, Int'l Trade Daily (BNA), Apr. 30, 2018 (outlining the time constraints that are complicating the negotiations).

143. Anshu Siripurapu, *Analysts: TPP-11 Deal Could Impact NAFTA Negotiations*, INSIDE U.S. TRADE (Nov. 16, 2017), https://insidetrade.com/daily-news/analysts-tpp-11-deal-could-impact-nafta-negotiations (quoting former USTR official Wendy Cutler and a Brookings Institution report).

an Administration that lacks credibility in these areas and has both repudiated the Paris Accord on Climate Change and made a practice of seeking to roll back Obama era environmental protections.[144] Overall, a radical revision of NAFTA, according to congressional sources, will not as the USTR suggests result in both business and labor support. Rather, it is just as likely to lead to many members of both American political parties opposing the arrangements.[145] These often-conflicting forces make accurate prediction of Congressional reaction very difficult.

Moreover, this suggests that Members of the Congress and Senate in the United States, officials of state and local governments, consumer groups and private business stakeholders in all three NAFTA countries should be energetic and creative, despite the considerable costs, in devising contingency plans for continuing to operate (or ceasing to do business) in a post-NAFTA North America. Given the complexities for the United States both in formally withdrawing from NAFTA (six months' notice) *and* in eliminating the NAFTA zero tariffs that are embedded in the NAFTA Implementation Act of 1993 (probably a year or more), a one to two-year period likely exists for contingency planning. Such plans may well require implementation in all or part because most businesses, workers, consumers and state and local governments in the three countries will be affected, some profoundly, by the demise or emasculation of NAFTA. Common sense suggests that it is in the interest of all those directly concerned to mitigate the ill effects to the extent possible, even though as usual workers may have little influence on the ultimate outcomes.

144. *See, e.g.,* Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *52 Environmental Rules on the Way Out Under Trump,* N.Y. TIMES (Oct. 6, 2017), https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html; Justin Worland, *Trump Announces Withdrawal from Paris Agreement*, TIME (June 1, 2017, 3:38 PM), http://time.com/4801134/paris-agreement-withdrawal-donald-trump-rose-garden/.

145. *Lighthizer:'Historic' NAFTA 2.0 Could Win Labor and Business Support, Lead to 'Paradigm Change' in Congress,* INSIDE U.S. TRADE (Oct. 18, 2017), https://insidetrade.com/daily-news/lighthizer-%E2%80%98historic%E2%80%99-nafta-20-could-win-labor-and-business-support-lead-%E2%80%98paradigm-change.