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Terence P. Stewart

Shahrzad Noorbaloochi

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THE USMCA & UNITED STATES-CANADA TRADE RELATIONS: THE PERSPECTIVE OF A U.S. TRADE PRACTITIONER

Terence P. Stewart[†] & Shahrzad Noorbaloochi^{††}

ABSTRACT: This article is taken from a presentation given by Terence P. Stewart at the Canada-United States Law Institute 42nd Annual Conference, April 12, 2018.¹

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I. INTRODUCTION

On September 30, 2018, the United States, Mexico, and Canada concluded negotiations on a new trade agreement to replace the North American Free Trade Agreement (“NAFTA”).² The new agreement, titled the United-States-Mexico-Canada Agreement (“USMCA” or “Agreement”), was announced after a thirteen-month-long negotiation period between the United States, Mexico, and Canada.

[†] Managing Partner, Law Offices of Stewart & Stewart, Washington, D.C..

^{††} Associate, Law Offices of Stewart & Stewart, Washington, D.C.. We thank Courtney G. Taylor, a graduate of American University Washington College of Law and the University of Ottawa Faculty of Law for her extensive assistance in the preparation of this article.

¹ This paper was prepared for a talk on April 12, 2018, when tariffs pursuant to Section 232 of the Trade Expansion Act of 1962 were in effect with respect to Canada and Mexico. Section III.B, *supra* pp. 11-13, should be read with this in mind. Since that time, Section 232 tariffs have been lifted.

² North American Free Trade Agreement, 32 I.L.M. 289 and 605, Ch. 11 (1993) [hereinafter “NAFTA”].

The Trump Administration identified revisions to NAFTA or withdrawal from the trilateral agreement as a top trade priority upon taking office. The President characterized NAFTA as one of the worst trade deals ever negotiated by the U.S., and many in organized labor and related NGOs had longstanding concerns about the effectiveness of NAFTA in improving standards of living for working class families and the loss of good paying jobs in America.³ Much of the U.S. business community has been highly supportive of NAFTA, though many were equally supportive of updating NAFTA to reflect issues of importance to the business community in 2017-2018. The President's focus is largely premised on the large trade deficits the U.S. runs with Mexico and Canada, though much of the deficit with Canada over time has been energy related. In 2017, the U.S. trade deficit with Mexico was \$70.95 billion, and the trade deficit with Canada was \$17.05 billion.⁴ Statistically, thousands of factories have closed in the U.S. since 1994 when NAFTA came into force, and large numbers of factories and jobs were transferred to Mexico, before larger movements to Asia.⁵ As stated by U.S. Trade Representative Robert Lighthizer, NAFTA had "failed many, many Americans and need[ed] major improvements."⁶

In setting out the goals of a new deal, Ambassador Lighthizer stated, "we need to ensure that the huge trade deficits do not continue and we have balance and reciprocity."⁷ To advance reciprocity, he noted the need to reconfigure the rules of origin for autos to "require higher NAFTA content and substantial U.S. content."⁸ With these U.S. aims in mind, the USTR engaged its neighbors to pursue an updated and potentially rebalanced arrangement. The Trump Administration envisioned a speedy process for the renegotiations.

While broad-based trade negotiations would normally take years to go through the wide variety of issues, the U.S., Canada, and Mexico had all been signatories to the Trans-Pacific Partnership ("TPP") Agreement which contained text on many topics of likely interest to an updated NAFTA. While the U.S. withdrew from the TPP after President Trump assumed office, many of the chapters of the USMCA draw heavily from the previously negotiated TPP text, using it as the baseline for what had been deemed acceptable for all three parties in that agreement. The updated USMCA reflects the updating of NAFTA through the addition of topics both contained in the TPP and new agreements. Whereas NAFTA consists of twenty-two chapters and the TPP consists of thirty chapters, the USMCA has a

³ Marcy Kaptur, *Nafta failed Americans workers. Here's how Trump can fix our trade woes*, THE GUARDIAN (Aug. 24, 2017), <https://www.theguardian.com/commentisfree/2017/aug/24/nafta-failed-american-workers-congresswoman-marcy-kaptur>.

⁴ OFFICE OF THE U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, Canada, Trade Balance, available at <https://ustr.gov/countries-regions/americas/canada>.

⁵ ROBERT E. SCOTT, ECONOMIC POLICY INSTITUTE, HEADING SOUTH: U.S.-MEXICO TRADE AND JOB DISPLACEMENT AFTER NAFTA (May 3, 2011), available at https://www.epi.org/publication/heading_south_u-s-mexico_trade_and_job_displacement_after_nafta1/.

⁶ David Lawder, *U.S. Trade Envoy Lighthizer Says NAFTA has "failed" Americans*, REUTERS (Aug. 16, 2017, 10:28 AM), <https://www.reuters.com/article/trade-nafta-usa-lighthizer-idUSW1N1D90LH>.

⁷ *Id.*

⁸ *Id.*

total of thirty-four chapters.⁹ Several chapters are almost verbatim from the negotiated TPP text, such as those on Digital Trade (USMCA Chapter 19), Small- and Medium-Sized Enterprises (USMCA Chapter 25), Competitiveness (USMCA Chapter 26), Anticorruption (USMCA Chapter 27), and Good Regulatory Practices (USMCA Chapter 28).¹⁰ The Agreement's only chapters without equivalents in the two prior texts were Chapter 12 Sectoral Annexes, largely devoted to defining standards and definitions of specific product groups within the individual USMCA countries, and Chapter 33 on Macroeconomic Policies and Exchange Rate Matters.¹¹ Chapter 33 will be discussed in a later section but it is worth noting that the USMCA is the first free trade agreement ("FTA") negotiated by the U.S. which includes provisions addressing currency manipulation and devaluation for competitive advantage, an issue of concern in recent years with certain countries, though not specifically with Canada or Mexico.

Because the U.S. was seeking in part a rebalancing to address the deficits it was running with Canada and Mexico, the talks were always going to be difficult. As is true of most negotiations, the prospect of failure was present up to the very end. While negotiations were trilateral for most of the period, the U.S. and Mexico worked through issues between themselves and announced an agreement in August 2018.¹² Whether Canada would be able to resolve outstanding issues with the U.S. in the timeframe permitted for a new trilateral deal made September 2018 an interesting month with a deal reached between the three countries late on September 30th.¹³ Each country has its own process for considering the terms of the Agreement and whether the Agreement will be implemented into domestic law. In the U.S., the process of adopting implementing legislation has become challenging, although whether that will be true with the USMCA is yet to be seen. There will be groups in each country who have continuing concerns about the content of the USMCA. Most observers expect that the new Agreement, if implemented by each country, will go into effect in late 2019 or early 2020.

As is true in any negotiation, no trading partner gets all that it is seeking in a final deal, and many proposals made may be made specifically to have something to "lose" in the negotiations or with the knowledge that the end game will look significantly different than the starting position. Thus, not surprisingly, none of the three parties achieved all that it staked out to achieve, but each achieved significant results. Certainly each government has declared satisfaction with the USMCA, and there are also obvious issues that each country has flagged as critical to the successful conclusion of negotiations that are reflected in the September 30, 2018 Agreement. While Canada and Mexico are hoping to achieve a resolution of

⁹ For a complete overview of where the three texts converge and diverge, see Stewart and Stewart, *The United States-Mexico-Canada Agreement (USMCA) of 2018, the North American Free Trade Agreement (NAFTA) Text, and the Trans-Pacific Partnership (TPP) Text Side-by-Side* (2018), available at <http://www.stewartlaw.com/PracticeAreas/USMCASidebySide>.

¹⁰ *Id.*

¹¹ *Id.*

¹² Jen Kirby, *The US, Canada, and Mexico Have a New NAFTA Deal. It's Called USMCA*, VOX (Oct. 1, 2018, 9:50 AM), <https://www.vox.com/2018/10/1/17921966/usmca-nafta-agreement-trump-canada>.

¹³ *Id.*

current Section 232 tariffs on steel and aluminum ahead of the signing of the Agreement on the sidelines of the G20 Summit in Buenos Aires on November 30, press reports indicate that both countries will sign the Agreement even if the 232 tariff issue has not been resolved by that point.

The aim of this article is to briefly outline some of the key changes to NAFTA contained in the USMCA, assess their relevance for the United States and Canada, and explore whether these successful negotiations will provide likely forward movement in resolving a number of other bilateral and multilateral trade issues.

II. SOME CHANGES FROM NAFTA CONTAINED IN THE USMCA

Some of the major improvements in the USMCA as compared to NAFTA are the inclusion of chapters to address advancements in technology and other issues of increased importance to economic development.¹⁴ For example, the USMCA's Chapter 19 is a new provision, not to be confused with Chapter 19 in NAFTA, to address the advent of digital trade.¹⁵ Under the new Chapter 19, parties are prohibited from imposing customs' duties, fees, or other charges on or in connection with the importation or exportation of digital products transmitted electronically between a person of one party and a person of another party.¹⁶ Chapter 19 also provides that parties cannot prohibit or restrict the cross-border transfer of information if such transfer is for business and prohibits parties from requiring that computing facilities be used or located in their territory as a condition for conducting business therein.¹⁷ These provisions are important for many businesses involved in e-commerce or digital trade.

The USMCA also includes full chapters on labor, small- and medium-sized enterprise ("SME") development, and currency manipulation.¹⁸ In the Labor Chapter (Chapter 23), the USMCA prohibits the importation of goods produced by forced labor, protects against labor discrimination on the basis of sex, sexual orientation, and gender identity, addresses violence against workers, and incorporates protections for migrant workers.¹⁹ These provisions are fully subject to the dispute settlement provisions of the USMCA.²⁰

Chapter 25 also constitutes a commitment to fostering the dynamism and competitiveness of SMEs.²¹ This chapter memorializes the parties' commitment to cooperating to increase trade and investment opportunities for such

¹⁴ Office of the U.S. Trade Rep., Exec. Office of the President, United-States-Mexico-Canada Agreement Text ch. 19 (2018), available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico> [hereinafter USMCA]; see also Terence P. Stewart, *The United States-Mexico-Canada Agreement (USMCA) - An Upgrade of the Trade Relationship Among North American Neighbors*, Trade Flow (Oct. 11, 2018); <http://www.stewartlaw.com/article/ViewArticle/1132>.

¹⁵ *Id.*

¹⁶ *Id.* art. 19.3.

¹⁷ *Id.* arts. 19.11, 19.12.

¹⁸ *Id.* chs. 23, 25, 33.

¹⁹ *Id.* art. 23.12.

²⁰ *Id.* art. 23.17(11).

²¹ *Id.* ch. 25.

enterprises.²² Accordingly, it asks that the parties establish an information-sharing mechanism, creates a “Committee on SME issues,” and mandates the convening of an annual SME Dialogue to facilitate the exchange of information among the parties.²³

A first for the United States is the Agreement’s inclusion of binding obligations among the parties as to currency manipulation and misalignment in Chapter 33.²⁴ The USMCA is the first U.S. free trade agreement to include such a chapter. In this provision, each party “confirms” that it is bound under the IMF’s Articles of Agreement to avoid manipulating exchange rates and the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage.²⁵ Each party should, pursuant to this chapter, “(a) achieve and maintain a market-determined exchange rate regime; (b) refrain from competitive devaluation, including through intervention in the foreign exchange market; and (c) strengthen underlying economic fundamentals, which reinforces the conditions for macroeconomic and exchange rate stability.”²⁶ This chapter also includes numerous transparency and reporting provisions,²⁷ establishes a “Macroeconomics Committee” to monitor implementation,²⁸ and provides for dispute settlement procedures where a party has “failed to carry out an obligation.”²⁹ The importance of this chapter is much more likely to be as a prototype for future U.S. FTAs rather than reflecting specific concerns from Canada or Mexico.

Other issues addressed in the USMCA of importance to the U.S. were changes to the rules of origin for certain products, the opportunity to review the Agreement periodically with termination options, changes to investor-state dispute settlement, market access in dairy, and intellectual property issues on both biologics and copyright. Consider rules of origin. Because the U.S. Administration is concerned about the large trade deficits with Mexico and Canada, it pushed for changes to eligibility for duty-free treatment on motor vehicles since the entirety of the trade deficit with Mexico, and at least some of the deficit with Canada, flows from trade in autos and auto parts. Thus, the rules of origin provisions of Chapter 4 and its annexes³⁰ raise the percentage of a motor vehicle’s content that must be built within North America from 62.5% to 75% (phased in over a period of years) in addition to other requirements to qualify for duty-free status.³¹ In addition, 70% of steel and aluminum used in the vehicles will also have to come from the three

²² *Id.* art. 25.2.

²³ *Id.* art. 25.4.

²⁴ *Id.* ch. 33.

²⁵ *Id.* art. 33.4(1).

²⁶ *Id.* art. 33.4(2).

²⁷ *Id.* art. 33.5.

²⁸ *Id.* art. 33.6.

²⁹ *Id.* art. 33.8.

³⁰ *Id.* ch. 4.

³¹ *Id.* Annex 4-B, art. 4-B.3(1).

nations.³² Finally, at least 30% of a vehicle's content must be built in facilities where workers earn at least \$16 per hour, increasing to 40-45% in 2023.³³

The U.S. Administration is obviously hopeful that these changed requirements for duty-free treatment will result in increased North American value added and, from Washington's perspective, increased U.S. content. Mexico's incoming government, though Jesús Seade (who shadowed the current Mexican trade negotiators during the final phases of the USMCA negotiations and is Mexico's undersecretary of foreign relations for North America) has indicated that they believe the new rules of origin will actually benefit Mexico as additional production will (in his view) be done mainly in Mexico. Some in industry have opined that the new rules and their complexity may result in either no change as companies simply incur the ordinary customs duties or will result in reduced demand and a resulting reduced investment. Nonetheless, obtaining a change in the rules of origin for autos was an important objective for the Trump Administration that it has achieved.

The United States also achieved somewhat greater market access in Canada for the U.S. dairy industry. Despite their supply-management system, Canada has increased its access for American dairy products by raising quotas on several products.³⁴ Additionally, Canada will eliminate its Class 7 pricing systems, which will eliminate a significant irritant to American dairy producers of milk protein and formula.³⁵ Both provisions, while rolled out progressively through annual increases in quotas and decreases in tariff rates, will allow Midwestern dairy producers in the United States to have greater American access to the Canadian market. There were other gains in agriculture for the U.S. including for wheat, eggs, poultry and turkeys. Canada also obtained increased access in the U.S. for dairy, peanuts, and sugar.

The United States also secured higher tariff-free access for goods under the *de minimis* provisions in Chapter 7.³⁶ The Customs Administration and Trade Facilitation Chapter allows American shipments to Canada under \$150 CAD to be exempt from customs' duties.³⁷ In addition, shipments under \$40 CAD are exempt from Canadian taxes.³⁸ This represents a significant jump from the current thresholds of \$20 CAD.³⁹ The higher *de minimis* thresholds will ensure that small- and medium-sized enterprises will face lower costs in reaching Canadian consumers, will expand market access for growing firms, and facilitate e-commerce direct to consumer sales.⁴⁰

³² *Id.* Annex 4-B, art. 4-B.6(1).

³³ *Id.* Annex 4-B, art. 4-B.7(1).

³⁴ *Id.* Annex 2-B Appendix C.

³⁵ *Id.* Annex 3-B Section C.

³⁶ *Id.* ch. 7.

³⁷ *Id.* art 7.8(1)(f)(iii).

³⁸ *Id.*

³⁹ *Postal Imports Remission Order*, SI/85-181 art. 4 (Oct. 16, 1985); *Courier Imports Remission Order*, SI/85-182 art. 4 (Oct. 16, 1985).

⁴⁰ See Zak Stambor, *NAFTA is now USMCA: Here's what the deal means for e-retailers*, DIGITAL COMM. 360 (Oct. 1, 2018), <https://www.digitalcommerce360.com/2018/10/01/nafta-is-now-usmca-heres-what-the-deal-means-for-e-retailers/>.

The United States similarly was able to obtain a longer term of intellectual property protection in Chapter 20.⁴¹ Under Chapter 20, the period of copyright protection applicable to work, performance, or phonogram was increased to seventy years after the author's death, from Canada's current provision of fifty years of protection.⁴² Chapter 20 likewise increased the period of data protection for biologic drugs from Canada's current term of eight years to ten years.⁴³ This was an improvement over the TPP term which required eight years or more. The TPP outcome on biologics had drawn opposition from industry and from Congressional supporters.⁴⁴ Specifically, in September 2017, Senator Orin Hatch expressed that the duration of data exclusivity for biologics should be at least twelve years (the current U.S. period of protection) and suggested that a term less than that would likely not meet the approval of Congress.⁴⁵ The USMCA results are generally supported by producers but have raised concerns from unions and health care groups because of the potential to increase the costs of medicines.⁴⁶

The United States was additionally able to successfully remove the investor-state dispute resolution mechanism (also referred to as ISDS) for any investments with Canada after a transition period for preexisting investments. This protection, previously granted under NAFTA Chapter 11, allowed investors in all three NAFTA countries to take their disputes to neutral arbitration in the event of any violation of the investment protections in the agreement.⁴⁷ Critics of ISDS, including those in the Administration, stated that it violated national sovereignty, especially hindering legislative efforts on labor and the environment.⁴⁸ Some Canadian experts have also raised concerns with ISDS, "caution[ing] against [its] rising costs . . . , both financial and to the fabric of [Canadian] democracies."⁴⁹ According to such reports, Canada has paid more than \$219 million in damages and settlements and \$95 million in unrecoverable legal costs under the ISDS system.⁵⁰

Moving forward, this system is completely removed with respect to Canada, with only a phasing-out provision to allow for another three years of disputes under

⁴¹ USMCA, *supra* note 14 ch. 20.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Brett Forman, *Stakeholders: TPP-like IP Chapter in NAFTA Wouldn't Win Congressional Support*, INSIDE U.S. TRADE (May 8, 2018, 9:12 AM), <https://insidetrade.com/daily-news/stakeholders-tpp-ip-chapter-nafta-wouldnt-win-congressional-support>.

⁴⁵ *Id.*

⁴⁶ *Patient groups: Pharmaceutical provisions in USMCA inconsistent with U.S. law*, INSIDE U.S. TRADE (Nov. 5, 2018), <https://insidetrade.com/trade/patient-groups-pharmaceutical-provisions-usmca-inconsistent-us-law?s=em>.

⁴⁷ NAFTA, *supra* note 2 ch. 11.

⁴⁸ See U.S. Trade Policy Agenda, Hearing Before H. Comm. on Ways and Means, 115th Cong. 27-28 (2017) (statement of Amb. Robert Lighthizer, U.S. Trade Rep.) ("I am troubled by the sovereignty issue. I am troubled by the fact that anyone, anyone can overrule the United States Congress and the President of the United States when it has passed a law. That is troubling to me.").

⁴⁹ Scott Sinclair, Canadian Centre for Policy Alternatives, *Canada's Track Record Under NAFTA Chapter 11: North American Investor-State Disputes to January 2018* at 1 (Jan. 2018).

⁵⁰ *Id.*

the NAFTA clause.⁵¹ Investors will now be able to seek redress in either the U.S. or Canadian courts with certain modifications to their substantive legal rights.

ISDS has been a matter of concern to workers and NGOs for many years and an issue supporting opposition by those groups to earlier trade agreements. For businesses, there is obvious concern about the perceived reduction in protections for investments, although those fears may be less for our neighbors than may exist with other countries if the USMCA approach is the “new” model. From the Administration’s perspective, the modification in investor-state dispute and the chapters on labor and environment were major efforts to broaden the base of support for the new agreement. Time will tell whether the changes are sufficient to develop a significantly more bipartisan adoption of any implementing legislation.

Finally, the United States pushed for a provision contained in Chapter 32 (32.10) that reflects the concern of the United States that the economic system of countries like China, with heavily state-directed economies, creates massive distortions both within their economies and in global trade flows.⁵² Specifically, the provision in Article 32.10 requires any USMCA country that might engage in trade negotiations with a country treated as a non-market economy (“NME”) under trade remedy laws to notify the other countries of such negotiations, keep them informed, provide them the opportunity to review any agreement, and determine whether the USMCA will remain in place with respect to that country.⁵³ While both Canada and Mexico have indicated the clause will not prevent them from negotiating with China, the provision is a signal of the United States’ ongoing concern with non-market economies and the distortions it creates for the U.S. and businesses.

Moreover, while many articles view the provision as a “poison” pill that is an effort to move countries into a U.S. or China camp, there is a more straight forward interpretation of the provision as one reflecting the Administration’s concern that current WTO rules do not effectively deal with the distortions created by China’s state-directed economy. Hence, the opportunity to be informed of such a potential FTA and to understand the terms of that agreement, permits other parties to the USMCA to decide if the agreement with the country doing the FTA will distort the economic outcome in light of the new arrangement with a non-market economy country. The notice requirement and the continuation of a bilateral agreement among the remaining members are consistent with the general withdrawal provisions contained in Article 34.6.

There were obviously many negotiation issues of importance to Canada as well. Such issues include maintaining a cultural exemption, protecting indigenous rights, minimizing market access in dairy, and maintaining Chapter 19 dispute settlement for antidumping and countervailing duty cases, to name just four. As noted above, while the U.S. achieved some limited improved market access in dairy, the Canadian system is maintained and the market access is quite limited considering the FTA. Similarly, Canada has maintained its cultural exemption,

⁵¹ USMCA, *supra* note 14 ch. 14, Annex 14-C.

⁵² USMCA, *supra* note 14 art. 32.10.

⁵³ *Id.*

which Canadian Prime Minister Justin Trudeau stated was “fundamental to Canadians.”⁵⁴ Additionally, Article 32.5, included at the behest of Canada, retains protections for indigenous peoples, providing that nothing in the USMCA “shall preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its obligations to indigenous peoples” so long as such measures are not “arbitrary or unjustified discrimination against persons of the other Parties . . . or . . . disguised restriction on trade in goods, services, and investment.”⁵⁵

Furthermore, NAFTA’s Chapter 19 has been maintained, now as part of Chapter 10 of the USMCA.⁵⁶ Specifically, the old Chapter 19 has been continued without change and provides for a binational panel to review antidumping and countervailing duty determinations in lieu of judicial review in the country conducting the investigations or reviews.⁵⁷ Despite the fact that Chapter 19 panels have proven to be no quicker in general than judicial reviews in U.S. courts, Canada was adamant about maintaining this approach to review of agency determinations. Canadian commentators have also recognized other limitations of Chapter 19, noting that its “binational review panels did not achieve Canada’s sought-after exemption from the application of domestic trade remedy laws,” or resolution “of major trade disputes such as softwood lumber.”⁵⁸ Nevertheless, while the U.S. Administration had sought elimination of the binational panel approach as an important objective for the U.S. in a revised agreement, Chapter 10 of the USMCA contains identical language to the NAFTA Chapter 19.

Another important issue for Canada was that of an exemption from potential future U.S. Section 232 measures on its auto sector.⁵⁹ In a side letter to the USMCA, the United States agreed to provide an exemption of at least sixty days of any additional tariffs to Canada in the event of future Section 232 measures.⁶⁰ Additionally, under the side letter, Canada is guaranteed an exemption from Section 232 tariffs for exports to the United States of 2.6 million Canadian automobiles, all light trucks, and \$32.4 billion worth of Canadian auto parts.⁶¹ Canada asserts that the side letter does not diminish Canada’s right to challenge Section 232 measures at the WTO and to undertake retaliatory measures of

⁵⁴ Mahem Abedi, *Trudeau Says no NAFTA Without Cultural Exemption – Is It Really that Important?* GLOBAL NEWS (Sept. 5, 2018, 3:57 PM), available at <https://globalnews.ca/news/4428229/nafta-cultural-exemption-canada/>.

⁵⁵ USMCA, *supra* note 14 art. 32.5.

⁵⁶ *Id.* ch. 10; see also Heather Long, *USMCA: Who are the winners and losers of the ‘new NAFTA’?*, WASH. POST (Oct. 1, 2018), https://www.washingtonpost.com/business/2018/10/01/winners-losers-usmca-trade-deal/?utm_term=.b53d0e046a7e.

⁵⁷ USMCA, *supra* note 14 ch. 10 § D.

⁵⁸ Scott Sinclair, Canadian Centre for Policy Alternatives, *Saving NAFTA Chapter 19: Was it Worth it?* at 19 (Oct. 2018).

⁵⁹ OFFICE OF THE U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, USMCA Side Letters, available at <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/US%20Mexico%20232%20Side%20Letter.pdf>.

⁶⁰ *Id.* at 2.

⁶¹ *Id.*

equivalent commercial effect, where warranted.⁶² In a separate side letter with Mexico, the United States provided similar guarantees, exempting from any potential future Section 232 tariffs 2.6 million passenger vehicles, all light trucks, and \$108 billion worth of Mexican auto parts.⁶³

Additionally, the U.S. Administration originally outlined plans for a provision requiring automatic termination of the Agreement after five years⁶⁴ as a way to ensure periodic reexamination of the Agreement and to assess whether it was achieving reciprocal benefits. Canada and Mexico were not supportive of such an approach. In the end, the countries agreed to a sixteen-year period before expiration, extendable through reviews every six years.⁶⁵ Thus, Canada, Mexico, and the U.S. can address changes perceived to be needed periodically, and failure to agree gives countries a decade to resolve their differences before the Agreement terminates.

Finally, the USMCA provides for further cooperation between the parties on various other issues of significance in the trade arena. The USMCA allows for cooperation between the United States and Canada on many issues facing North America and the world. The chief opportunity for cooperation is the ability of specific industry sectors to work on mutual solutions for the benefit of member countries. This is encouraged through direct provisions of the Agreement. For example, Chapter 28 on Good Regulatory Practices encourages open dialogue on rule-making and regulatory compatibility and cooperation.⁶⁶ It also encourages the development of research co-ops, private industry group cooperation, and collaboration within international fora.⁶⁷ Similarly, Chapter 30 allows ministers of the governments to collaborate and consider “all matters relating to the implementation or operation of this Agreement,”⁶⁸ establish standing committees and working groups,⁶⁹ and “seek the advice of non-governmental persons or groups.”⁷⁰

III. WHAT DOES THE COMPLETION OF THE USMCA SUGGEST FOR OTHER TRADE ISSUES?

A. Reform of Canada’s dairy management system

With the increase in access to the Canadian dairy market afforded in the USMCA and other recent trade agreements such as the Comprehensive and

⁶² Government of Canada, U.S. Section 232 side letters summary (Oct. 25, 2018), available at <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/usmca-aeumc/article-232.aspx?lang=eng>.

⁶³ *Id.* at 1.

⁶⁴ Alan Beattie & James Politi, *How is Donald Trump’s USMCA trade deal different from NAFTA?*, FINANCIAL TIMES (Oct. 1, 2018), <https://www.ft.com/content/92e9ce0a-c55f-11e8-bc21-54264d1c4647>.

⁶⁵ *Id.*

⁶⁶ *Id.* art. 28.

⁶⁷ *Id.* art. 28.17.

⁶⁸ *Id.* art. 30.2(1)(a).

⁶⁹ *Id.* (2)(a).

⁷⁰ *Id.* (2)(g).

Progressive Agreement for Trans-Pacific Partnership (“CPTPP”) and EU-Canada Comprehensive Economic and Trade Agreement (“CETA”), Canada’s dairy producers are expecting to lose up to 10% market share.⁷¹ Critics of Canada’s system have stated that now is the time to restructure or completely abandon the system.⁷² Given the dismantling of price supports in the U.S. dairy industry in 2014,⁷³ the area may be ripe for cooperation between the two governments and relevant industry groups, although that would require a large leap of faith and is inconsistent with the media reports of the Canadian dairy industry response to the very limited opening of the Canadian market.

B. Global Excess Capacity in Steel and Aluminum

The world is presently suffering from a seismic overcapacity of steel production and issues of unsustainable pricing, largely as a result of Chinese subsidies, state planning, and the role of state-owned and -invested enterprises in these and other sectors.⁷⁴ While the G20 and Organization for Economic Cooperation and Development (“OECD”) have been studying the problems and calling for solutions,⁷⁵ and while China has taken certain steps to reduce some of its excess capacity, the problem overhangs global markets and likely will for years to come.⁷⁶

⁷¹ Jeff Lagerquist, *Canada’s dairy farmers: ‘If you give an inch, Trump is going to take a mile’*, FINANCIAL POST, (Sept. 12, 2018), <https://business.financialpost.com/news/economy/canadas-dairy-farmers-say-theyve-given-enough-in-past-trade-deals>.

⁷² See Editorial, *Globe editorial: End supply management in Canada, but do it fairly*, THE GLOBE AND MAIL (Mar. 11, 2018), <https://www.theglobeandmail.com/opinion/editorials/article-globe-editorial-end-supply-management-in-canada-but-do-it-fairly/>; Jesse Snyder, ‘*Cheese ninjas’ to the rescue: Why Canada’s supply management system needs reform*, FINANCIAL POST (Dec. 20, 2017), <https://business.financialpost.com/commodities/agriculture/cheese-ninjas-to-the-rescue-why-canadas-supply-management-system-needs-reform>; Sylvain Charlebois, *The many failings of Canada’s supply-management system are government’s fault, not farmers’*, THE GLOBE AND MAIL (Apr. 13, 2017), <https://www.theglobeandmail.com/report-on-business/rob-commentary/the-many-failings-of-canadas-supply-management-system-are-governments-fault-not-farmers/article34793275/>.

⁷³ Kim Dillivan, *Dairy Policy Changes in the 2014 Farm Bill*, AGWEB (Apr. 1, 2014), https://www.agweb.com/article/dairy_policy_changes_in_the_2014_farm_bill_naa_university_news_release/ (discussing how the “Dairy Product Price Support Program (DPPSP), the Dairy Export Incentive Program (DEIP), and the Federal Milk Marketing Order Review Commission are repealed in the Agricultural Act of 2014”).

⁷⁴ See BUREAU OF INDUS. & SEC., OFFICE OF TECH. EVALUATION, U.S. DEP’T OF COMMERCE, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED 14-16 (2018) [hereinafter *Steel Section 232 Report*].

⁷⁵ See Ministerial Report, G20 Global Forum on Steel Excess Capacity, Ministerial Meeting (Sept. 20, 2018), available at https://www.g20.org/sites/default/files/gfsec_ministerial_report_2018.pdf; OECD, *Getting stronger, but tensions are rising*, OECD Interim Economic Outlook (Mar. 13, 2018), <https://www.oecd.org/eco/outlook/Getting-stronger-but-tensions-are-rising-press-handout-oecd-interim-economic-outlook-march-2018.pdf>. (“Governments should avoid escalation and rely on global solutions to resolve excess capacity in the global steel industry.”).

⁷⁶ World Steel Association, *World Steel in Figures 2018*, 9, 14-15, available at <https://www.worldsteel.org/en/dam/jcr:f9359dff-9546-4d6b-bed0-996201185b12/World>

Many countries in the world have taken individual actions to address problems flowing from the massive excess capacity. Most have used trade remedies (antidumping, countervailing duty, and/or safeguard actions). The United States earlier in 2018, and following lengthy investigations under Section 232 of the Trade Expansion Act of 1962,⁷⁷ found that imports of steel and aluminum were a threat to the national security of the United States.⁷⁸ The President then assessed duties on all imports (subject to country negotiations of other ways to address U.S. concerns) of 25% on steel and 10% on aluminum.⁷⁹ While a number of countries did enter into negotiations with the U.S. to find an alternative solution to the United States' planned tariffs, many countries, including Canada and Mexico, simply retaliated against the United States. Canada and Mexico have requested consultations at the WTO on the consistency of U.S. actions, and the U.S. separately has requested consultations on the consistency of the retaliatory measures of Canada and Mexico, and has asserted the right to take such actions in the cases filed by the two countries.⁸⁰

With the USMCA concluded, Canada and the U.S. (and Mexico and the U.S.) are in discussions on how the 232 issue can be resolved. Canada and Mexico have expressed the hope that a resolution could be achieved before the signing of the Agreement at the end of November 2018, but the actual outcome currently remains unknown. Canada and Mexico have been pushing for simple repeal of the duties on them. As the U.S. Administration's action is premised on the U.S. statute's broad scope of national security (including national economic security), the Administration has been willing to consider quotas with other countries. Indeed, the Commerce Department report on the investigations identifies that if one or more countries are excluded or otherwise not subject to tariffs, the protection of national security can be achieved by quotas or by raising the duties on the remaining imports from other countries.⁸¹ This commitment to negotiations has gone beyond mere rhetoric, as evidenced by the Administration's grant of exemptions to numerous countries, including Argentina, Australia, Brazil, and South Korea on steel, and Argentina and Australia on aluminum.⁸² Whether and

+Steel+in+Figures+2018.pdf (the NAFTA area accounts for 7% of all world output of steel, with the U.S. and Canada both ranking in the top 20 producing states).

⁷⁷ 19 U.S.C. § 1862.

⁷⁸ See Steel Section 232 Report, *supra* note 74; BUREAU OF INDUS. & SEC., OFFICE OF TECH. EVALUATION, U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF ALUMINUM ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED (2018) [hereinafter Aluminum Section 232 Report]; see generally Terence P. Stewart & Shahrzad Noorbalooshi, *Imports and National Security - An Update*, TRADE FLOW (Oct. 24, 2018), <http://www.stewartlaw.com/article/ViewArticle/1135>.

⁷⁹ See Proclamation No. 9704, 83 Fed. Reg. 11,619, 11,619-24 (Mar. 8, 2018) (Adjusting Imports of Aluminum Into the United States); Proclamation No. 9705, 83 Fed. Reg. 11,625, 11,625-30 (Mar. 8, 2018) (Adjusting Imports of Steel into the United States).

⁸⁰ See, e.g., Communication from the United States, *United States - Certain Measures on Steel and Aluminum Products*, WT/DS556/4 (July 20, 2018).

⁸¹ See generally Steel Section 232 Report, *supra* note 74; Aluminum Section 232 Report, *supra* note 78.

⁸² RACHEL F. FEFER ET AL., CONG. RESEARCH SERV., 7-5700, SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 8 (2018).

when there will be a resolution of the steel and aluminum issue with Canada and Mexico remains an open question. Press indicate that the November 30 signing of the USMCA will occur regardless of whether there has been a resolution on the 232 issue before then.

C. Softwood Lumber

The longstanding issue of fair trade in softwood lumber remains an issue of concern to both parties. Canada is a major exporter of softwood lumber to the United States. When trade cases are filed by industry in the United States seeking the imposition of countervailing and antidumping duties to offset the material injury the U.S. industry is experiencing, a protracted dispute is certain first at the agencies, then through dispute settlement processes (NAFTA and WTO), and then (often) through government-to-government negotiations for a possible agreement. In pushing for the preservation of a neutral forum in the USMCA comparable to NAFTA's Chapter 19, Canada was largely animated by concerns over these proceedings. The United States, on the other hand, remains concerned that the Canadian government (basically its provincial governments) continues to subsidize and/or dump lumber in the United States, to the detriment of the U.S. domestic industry. This dispute periodically resurfaces and goes back to 1982.⁸³ Numerous agreements between the parties have proven unsuccessful at permanently resolving it. The intractability of this dispute is, from the U.S. perspective, largely the result of provincial control over timber in Canada. The unique delegation of authority to the provinces alone to legislate over property under the Canadian Constitution makes federal promises regarding this industry largely ineffective without provincial government support.⁸⁴ For any lasting resolution, the Canadian government will need to find a way to enforce uniform guarantees to the United States. Nothing about the USMCA will facilitate a final resolution to this longstanding bilateral trade issue.

D. WTO Reform

The Trump Administration is the third U.S. Administration to raise concerns with the WTO dispute settlement system.⁸⁵ While the U.S., like most other countries, has generally been supportive of most decisions reached (whether for or against the U.S. as such), the U.S. has repeatedly identified situations where the panels or Appellate Body were exceeding their authority.⁸⁶ The substantive and procedural concerns of the United States were succinctly outlined in the

⁸³ See Helmut Mach, *The Softwood Lumber Dispute*, 27 Can.-U.S. L.J. 287 (2001).

⁸⁴ See CONSTITUTION ACT, 1867, 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C. 1985, app. II, no. 5, arts. 91-92 (Can.).

⁸⁵ See Terence P. Stewart, *The Future of the WTO - Will Reform Happen in a Timely Manner?*, TRADE FLOW (Nov. 8, 2018); <http://www.stewartlaw.com/article/ViewArticle/1138>.

⁸⁶ See Press Release, Statement of the United States by Ambassador Michael Punke at the 13th WTO Trade Policy Review of the United States of America at 5 (Dec. 19, 2016), <https://ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2016/december/Statement-US-13-WTO-TPR-USA>.

President's 2018 Trade Policy Agenda.⁸⁷ First, in the United States' perspective, WTO adjudicators have gone beyond the scope of their mandate in that they have "added to or diminished" the rights and obligation of WTO members, in contravention of express provisions in the Dispute Settlement Understanding ("DSU").⁸⁸ Second, the United States believes the adjudicative system has exceeded its authorities by assessing and ruling on various matters that have not been necessary to resolving the specific disputes before it.⁸⁹ In the United States' view, this approach goes beyond the envisioned role of the system as one of contract arbitration.⁹⁰ The U.S. has also been concerned about the issuance of advisory opinions contrary to the limited roles of the Appellate Body and panel, set out in the WTO's DSU. Similarly, the U.S. has expressed extensive concerns over the failure of the Appellate Body to limit its review to issues of law and its insistence on reviewing issues of fact despite its lack of authority to do so. Third, the United States has significant concerns regarding the Appellate Body's (1) failure to comply with the ninety-day decision deadline,⁹¹ and (2) the Appellate Body's practice of permitting individuals whose term as an Appellate Body member has expired to continue to work on appeals that they were assigned to prior to the termination of their service (Rule 15 of the Appellate Body's Working Procedures).⁹²

While a review of the DSU that has been ongoing for more than twenty-two years at the WTO continues, modifications to the system have not been adopted.⁹³ Instead, the Appellate Body's decision-making has become increasingly backlogged and strayed from helping the parties resolve disputes between them to creating rights and obligations not originally a part of the system. Moreover, the Appellate Body has insisted that their decisions must be followed despite the DSU not being a system intended to establish precedent.

Under the Trump Administration, the United States has used the requirement for consensus decision-making in the WTO to block new Appellate Body appointments or reappointments until the United States' concerns have been addressed. With the Appellate Body being down to three members, the WTO is thirteen months away from having fewer members than the minimum needed to hear an appeal. Other members of the WTO, including Canada, have been looking at WTO reform to both address U.S. concerns with the dispute settlement system and to update the WTO to cover issues of importance to global commerce in 2018, such as transparency and notification, among other issues.⁹⁴

⁸⁷ OFFICE OF THE U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S TRADE POLICY AGENDA (2018), *available at* <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf>.

⁸⁸ *Id.* at 23.

⁸⁹ *Id.* at 26.

⁹⁰ *Id.*

⁹¹ *Id.* at 24.

⁹² *Id.* at 25-26.

⁹³ *Id.* at 23.

⁹⁴ Communication from Canada, *Strengthening and Modernizing the WTO: Discussion Paper*, JOB/GC/201 (Sept. 24, 2018).

It is hoped that the completion of the USMCA will permit the U.S. and Canada to help reform the WTO, as many of the issues identified by Canada as of possible interest to likeminded countries are also of interest to the United States.⁹⁵ In December 2017, at the WTO Ministerial in Buenos Aires, Ambassador Lighthizer, despite recognizing serious challenges, expressed that “the WTO is obviously an important institution. It does an enormous amount of good, and provides a helpful negotiating forum for Contracting Parties.”⁹⁶ Outside of dispute settlement, the United States is pursuing reform in various ways. For example, in 2017, the U.S. submitted a new proposal on enhancing transparency and strengthening notification requirements in the WTO.⁹⁷ A similar proposal was recently submitted by Argentina, Costa Rica, the European Union, Japan, and the U.S. on November 1, 2018.⁹⁸ Similarly, the U.S., EU, and Japan issued a joint declaration in Buenos Aires on the need to address subsidies, state-owned enterprises, and state planning that distort global markets and create massive global excess capacity.⁹⁹ These subjects have been addressed both in Canada’s recent discussion paper and in a similar paper from the EU.¹⁰⁰

IV. CONCLUSION

It is obviously significant to all businesses in North America to have an updated free trade agreement providing updated rules, expanded market access and predictability going forward. The U.S. Administration has attempted to address issues of historic importance to labor and environmental groups in an effort to build a broader coalition of support for any needed implementation legislation. Whether the Administration will be successful in gaining Congressional approval will be an important topic in 2019. For this Administration, obtaining more reciprocal trade among our neighbors is the same objective they have with other trading partners. The periodic opportunity to review and update the Agreement is an important improvement that should permit the parties to keep the USMCA relevant to changing market realities.

⁹⁵ See ROBERT MCDUGALL, CENTRE FOR INT’L GOVERNANCE INNOVATION, CRISIS IN THE WTO: RESTORING THE WTO DISPUTE SETTLEMENT FUNCTION 2-3 (2018), available at <https://www.cigionline.org/publications/crisis-wto-restoring-dispute-settlement-function>.

⁹⁶ Amb. Robert Lighthizer, Office of the U.S. Trade Rep., Opening Plenary Statement to the WTO 11th Ministerial Conference (Dec. 11, 2017).

⁹⁷ Communication from the United States, *Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements*, JOB/GC/148 (Oct. 30, 2017).

⁹⁸ Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements, Communication from Argentina, Costa Rica, the European Union, Japan, and the United States, JOB/GC/204, JOB/CTG/14 (Nov. 1, 2018).

⁹⁹ See Press Release, Joint Statement by the United States, European Union and Japan at MC11 (Dec. 12, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states>.

¹⁰⁰ See Communication from Canada, JOB/GC/201 (Sept. 24, 2018). The paper is available at http://international.gc.ca/gac-amc/campaign-campagne/wto-omc/discussion_paper-document_travail.aspx?lang=eng. The EU Concept Paper is available at http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf.

Important trading partners like Canada, Mexico, and the U.S. have many opportunities to collaborate and find mutually beneficial solutions. Starting from a solid trilateral agreement makes it more likely that the North American neighbors will use the opportunities that present themselves. WTO reform should be one such area. Canada's actions in convening a group of "likeminded" countries in Ottawa in October 2018 is a good first step that will, over time, need to include the United States.

There are also issues where national priorities, constitutional concerns, or cultural differences prevent or make more difficult the finding of acceptable solutions. Softwood lumber is one of those issues (constitutional authority in the provinces restricts the ability of the Canadian government to find an enduring solution with the United States), and addressing perceived issues of national economic security is another (for example, the current Administration's use of section 232). The USMCA has eased concerns and provided greater certainty for Canada, Mexico, and producers with operations in those countries regarding the ongoing 232 auto investigation. Time will tell what the resolution on steel and aluminum 232 orders will be.