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LEGAL ASPECTS OF WITHDRAWAL FROM NAFTA & A SHORT HISTORY OF US-CANADA TREATY RELATIONS

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Introduction

This paper deals with treaty withdrawal in the NAFTA re-negotiations context, taking into account the uncertain state of affairs at the time this is being written. It looks at the interrelationship among some of the major factors involved in the re-negotiations, including the use of unilateral tariff surcharges by President Trump and the role of the US Congress in the process of treaty withdrawal.

President Trump's repeated threats to end US participation has left NAFTA itself hanging in the balance. While negotiations resumed the week of September 3, Mr. Trump has continued his threat to withdraw the US from NAFTA unless Canada dropped its opposition to many US demands.[1]

[1] Mr. Trump's threats against Canada have been repeated over many months and widely reported in the media. Among some samplings: "Trump warns Congress not to 'interfere' with NAFTA negotiations", *World Trade Online*, 1 September 2018; "Trumps fight with Canada over NAFTA faces growing opposition at home", *Bloomberg News*, 4 September 2018; "The United States has been taken advantage of for many decades on trade. Those days are over," Mr. Trump said in a statement. "Earlier today, this message was conveyed to Prime Minister Justin Trudeau of Canada: The United State will agree to a fair deal, or there will be no deal at all.": *Globe and Mail*, 1 June 2018.

The re-negotiations suffered a major set-back earlier in the process, as did the bilateral relationship generally, with the application of tariff surcharges on Canadian steel and aluminum imports under the guise of US national security in May 2018, followed by insulting comments directed to Prime Minster Trudeau after the G-7 summit in Quebec.

Mr. Trump has threatened additional surcharges on Canadian-made vehicles and parts. While dressed up as possible national security measures, the threat is designed to pressure Canada into agreeing to NAFTA terms dictated by the Trump administration.

The August 2018 "preliminary agreement in principle" between the US and Mexico[2], concluded in Canada's absence, worsened the negotiating atmosphere and further soured the US-Canada relationship. In notifying Congress of the Mexican agreement, President Trump repeated his threat to go with Mexico alone if Canada didn't accept NAFTA terms dictated by the United States.[3]

As noted above, this paper will brief address the public international law aspects of treaty termination and withdrawal in the age of Trump with particular application to NAFTA. This inevitably brings into play the legal principles in the 1969 *Vienna Convention on the Law of Treaties*[4] and the fundamental principle of *pacta sunt servanda*.

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[2] "Modernizing NAFTA to be a 21st Century Trade Agreement", USTR Press Release, 27 August 2018.

[3] On Twitter, Trump alluded to Canada's decision to stay out – for now – of a trade deal the U.S. and Mexico struck earlier in the week, saying 'There is no political necessity to keep Canada in the new NAFTA deal. If we don't make a fair deal for the U.S. after decades of abuse, Canada will be out.': *World Trade Online*, 1 September 2018, *supra.*

[4] [1980]UN Treaty Series, No. 18232.

While NAFTA is classified as a Congressional-Executive Agreement, as distinct from a treaty, under the US system, there is no doubt that it is a treaty under international law and binding as such as between Canada, the US and Mexico.[5]

A Short History of Canada-US Trade Relations

The US has only terminated a single trade agreement in its entire history. And that was a trade agreement with Canada.

The *1854 Reciprocity Treaty* was the first free trade agreement ever concluded by the United States. Canada was still a British colony then, so the treaty was negotiated and signed in Canada's name by the British government.[6] It provided for access of American and Canadian fishermen to each other's coastal waters and created duty-free trade in fish, grain, poultry, eggs, lumber and a range of other non-manufactured commodities.[7]

While the Reciprocity Treaty wasn't anything like NAFTA or other free trade agreements we know today, it was a remarkable achievement for its time. In those days, customs duties were much more important than they are today, so duty-free trade really meant something, even if it was confined to basic commodities. The preamble used the following wording about both Parties being,

[5] The term "Treaty" under Article 2 of the Vienna Convention means an international agreement concluded between States in written form and governed by international law. Once if force between or among Parties, it is binding and must be performed by them in good faith (Article 26).

[6] Text of the Treaty can be found on the web-site of Library and Archives Canada at http://www.collectionscanada.gc.ca/confederation/023001-7101-e.html.

[7] Haynes, F.E., *The Reciprocity Treat with Canada of 1854*, Publications of the American Economic Association, Vol. 7, No. 6 (Nov. 1892), pp 7-70. Also see: Officer, Lawrence H., and Lawrence B. Smith, "The Canadian-American Reciprocity Treaty of 1855 to 1866," *Journal of Economic History*, Vol. 28, No. 4 (Dec., 1968), pp. 598–623.

> " . . . desirous to regulate the commerce and navigation between their respective territories and people, and more especially between Her Majesty's possessions in North America and the United States, in such manner as to render the same reciprocally beneficial and satisfactory . . "

Unfortunately, the treaty's days were numbered because of deteriorating relations between the US and Britain, mainly over the so-called "Alabama incident". The negative political climate after the Civil War led to the US abrogating the treaty in 1866.[8]

The seminal point about this is that President Johnson, who had assumed office when Lincoln was assassinated, required the approval of Congress to do so. While that was a treaty as opposed to a Congressional-Executive Agreement, here are some lessons here that are relevant in 2018.[9]

Now fast-forward a few decades to another interesting episode in the early years of the 20th century. The bitterness of the post-Civil War period had long dissipated and there was much improved goodwill between the two countries, allowing Canada under the Laurier

[8] The Alabama was a Confederate gunboat. It had been built by a British shipyard, delivered to the Confederacy (over protests by Washington) and then raided Union coastal shipping during the early years of the American Civil War. The fact that Britain allowed the Alabama (and other British-built gunboats) to be delivered to the South in spite of that country's legal neutrality didn't sit well in Washington when the war ended. As well, there was a perception that Britain had lent other forms of tacit support to the Confederacy because of its need for cotton from southern plantations to supply British textile mills. *The Alabama Claims, 1862-1972*, Office of the Historian, US Department of State: https://history.state.gov/milestones/1861-1865/alabama.

[9] To settle things down, the US and Britain subsequently concluded the 1871 *Treaty of Washington*, providing for an international tribunal to settle the Alabama claims, which eventually awarded Washington $15.5 million in compensation. The treaty also resolved pestering disputes over the Atlantic fisheries and drew the Canada-US maritime boundary line off the west coast in the Strait of Juan de Fuca. *Ibid*. The Treaty entered into force in 1873. *The Canadian Encyclopedia*: https://www.thecanadianencyclopedia.ca/en/article/treaty-of-washington.

government and the US under the Taft administration to conclude a second *Reciprocity Treaty* in 1911.[10]

In sending that treaty to Congress for approval in January of that year, President Taft expressed fine sentiments about the importance of good relations between the US and Canada:

> "The guiding motive in seeking adjustment of trade relations between two countries so situated geographically should be to give play to productive forces as far as practicable, regardless of political boundaries. . . . an exact balance of financial gain is neither imperative nor attainable. No yardstick can measure the benefits to the two peoples of this freer commercial intercourse and no trade agreement should be judged wholly by custom house statistics."

In the end, Congress approved the 1911 treaty but, as fate would have it, the Canadians rejected it. Laurier and the Liberals lost the bitterly fought 1911 election, the Reciprocity Treaty being one of the main issues in the campaign. Western Canada was in favour of it, eastern Canada largely opposed because of fear that imports of American-made manufactured goods would decimate Canada's own industrial manufacturing sector.

Borden and the Conservatives campaigned vehemently against reciprocity and won, the Toronto business community carrying an anti-free trade banner with the rallying cry, "No Truck or Trade with the Yankees."[11]

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[10] Paton, H.S., "Reciprocity with Canada. The Canadian Viewpoint", (1921) Vol. 35, *The Quarterly Journal of Economics*, pp. 574-595.

[11] Dutil, Patrice and MacKenzie, David, 1911: *The Decisive Election that Shaped a Country* (2011).

And here matters stood for several decades. While there was an intermittent effort by the McKenzie King government to conclude a trade deal with Washington in the late 1930s, nothing came of it. In 1965, there was forward movement with the conclusion of the ground-breaking Auto Pact, ushering in a period of virtually uninterrupted economic prosperity for both countries in that particular sector.[12]

However no all-encompassing trade talks occurred until President Reagan and Prime Minister Mulroney launched an historic set of bilateral free trade negotiations in the mid-1980s. In an admirable statement of vision, Ronald Reagan said this in presenting the final outcome – the 1988 Free Trade Agreement – to the Congress in January 1988:

> "The U.S.-Canadian free trade agreement is the culmination of 18 months of strenuous negotiations between our governments. . . Frankly, I think we've come up with a winner, a winner for people on both sides of the border. Canada and the United States are already each other's largest trading partners. . . . The economic health and national security of our countries are linked. This well-honed treaty will build on these ties that already exist and open up tremendous new potential."

In the years following, the FTA was expanded into the NAFTA as a three-way trade agreement.

Trade Expansion Act and Presidential Powers

Regardless of Canada's claim that the issues are not linked, Mr. Trump's action on steel and aluminum as well as the threat of surcharges on automotive imports has cast a pall over the NAFTA re-negotiations. The surcharges were applied by executive order in March

[12] *Automotive Products Trade Agreement*, 1965. The Agreement was signed by Prime Minister Lester Pearson and President Lyndon Johnson in January 1965 and entered into force later that year. The Auto Pact was abolished in 2001 after a WTO ruling declared it illegal, though by that time the NAFTA had superseded it.

2018 under a long-forgotten statute, the *1962 Trade Expansion Act*[13], which gave the President the authority to apply import surcharges by Executive Order under the guise of protecting national security.

Before applying such measures, section 232 of the Act requires a Commerce Department report concluding that a national security threat exists. It came as no surprise that Commerce Secretary Ross delivered what the President needed last February.

The irony is that *Trade Expansion Act* was a tariff reduction measure. Its objective and purpose was to give the President authority to cut tariffs to meet US trade obligations, including in the tariff-reducing rounds of the GATT that were about to be launched. Here's what President Kennedy said when signing the Bill into law, on 11 October 1962, emphasizing the tariff reduction objectives if the statute:

> "This act recognizes, fully and completely, that we cannot protect our economy by stagnating behind tariff walls, but that the best protection possible is a mutual lowering of tariff barriers among friendly nations so that all may benefit from a free flow of goods. Increased economic activity resulting from increased trade will provide more job opportunities for our workers. Our industry, our agriculture, our mining will benefit from increased export opportunities as other nations agree to lower their tariffs. Increased exports and imports will benefit our ports, steamship lines, and airlines as they handle an increased amount of trade. Lowering of our tariffs will provide an increased flow of goods for our American consumers. Our industries will be stimulated by increased export opportunities and by freer competition with the industries of other nations for an even greater effort to develop an efficient, economic, and productive system. The results can bring a dynamic new era of growth."

[13] Pub. L. 87-794; 19 U.S.C. ch. 7.

He went on to say,

> "A vital expanding economy in the free world is a strong counter to the threat of the world Communist movement. This act is, therefore, an important new weapon to advance the cause of freedom."

Because the Cold War was raging with the Soviet Bloc confronting the US in a number of theatres around the world, including the Cuban Missile Crisis, Congress included a subsidiary provision that delegated powers to the President under section 232 to apply tariff surcharges in extraordinary circumstances where there were imminent national security threats to the United States because of Soviet aggression.

Section 232 has mostly languished in the backrooms of US trade law ever since, having only been applied twice since its enactment - once in 1979 and again in 1982. It was dusted off by USTR Lighthizer and used by Mr. Trump in a totally different context, not against adversaries but against allies such as Canada, well beyond what was intended in those days when Kennedy and Khrushchev were on the global scene.

Mr. Trump has a domestic US law that appears to accord the president unusually broad powers to increase duties through presidential decree. He is using that power for all its worth.

National Security Surcharges - GATT Obligations

Because these measures so directly affect the future of the NAFTA and the treaty withdrawal issue, international law dimensions inevitably come into play, the focal point being Article XXI of the GATT, part of the WTO Agreement and equally part of the NAFTA.

GATT Article XXI (entitled "Security Exceptions") sets out exceptions to a member State's binding treaty obligations, including strictly bound tariff rates and the prohibition against unilateral tariff hikes. The Article says,

> Nothing in this Agreement shall be construed . . .
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . .
> (iii) *taken in time of war or other emergency in international relations* . .

Over the decades, Article XXI, paragraph (b) was rarely discussed, whether in the GATT era or in WTO councils. While some inconclusive discussions took place during the Falklands war in 1982, during the US-Nicaragua confrontation in 1985 and during the war in Yugoslavia in 1991[14], there are no conclusions on the scope of this wording and therefore not much guidance as to how far members can go in invoking these security exceptions.

On its face, Article XXI(b) contains both subjective elements ("which it considers necessary . . .") and objective elements ("or other emergency in international relations"). While the subjective component gives leeway to a WTO member to apply unilateral measures for what it deems to be in its own national security interests, the objective part means that any such unilateral action has to be based on fact, meaning a situation of war or other emergency in international relations objectively proven."[15]

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[14] *Guide to GATT Law and Practice* (1994), pp. 556-559.

[15] Given the danger that wholesale invocation of these national security exceptions could lead to a disintegration of GATT/WTO obligations, it has been correctly observed that "a narrow interpretation of Article XXI is necessary in order to avoid abuse of the Article and maintain the integrity of the GATT": Trebilcock, M. and Fishbein, M. "International trade: barriers to trade" in Guzman, A.T. and Sykes, A.O. (eds), *Research Handbook in International Economic Law* (2007), p. 50.

In other words, as a matter of international law, whether an emergency in international relations exists is evidence-driven and not up to a unilateral and self-determined claim by that government alone. This requirement for a fact-based international emergency underlying use of Article XXI(b), as opposed to a self-serving declaration that some kind of emergency exists, is fundamental.

Kenneth Vandevelde, a well-respected scholar of international law, provides documentary proof that this was the view of the US delegation to the conference drafting provisions of the GATT in 1946. Delegations had been preparing the various articles of inclusion in what was being called the International Trade Organization (ITO), the precursor of the GATT.[16] The ITO draft contained an exception for "essential security interests".

Professor Vandevelde found that during the GATT Preparatory Committee meetings in Geneva, the armed services members of the US delegation sought wording to make it clear that the applicability of the exception would be determined solely by the Party invoking it. However, they failed because the majority on the US delegation feared that such unilateral application would be abused and undermine the treaty. Professor Vandevelde says,

> "The U.S. delegation decided that application if the essential security interests exception in a treaty must not be left to the sole discretion of a treaty party. Thus, although each party had sole discretion under the ITO Charter to determine whether an action was 'necessary', that discretion did not extend to determining whether an action met the other conditions of the exception, such as the condition that the action be taken in time of war or other emergency in international relations."[17]

[16] Vandevelde, K., *The First Bilateral Investment Treaties* (2017, Oxford University Press), emphasis added.

[17] *Ibid*., p. 510. This conclusion was based on the author's examination of 1947 State Department documentary records. Other US bilateral treaty records at the time confirmed the predominant US view that self-judging wording allowing exemptions for national security was not acceptable in treaty language. *Ibid*., p. 511.

(emphasis added)

The position of the US delegation supports the view that while a GATT (or WTO) member may have discretion under Article XXI to determine what actions it considers necessary as a national security matter, there must be demonstrable objective evidence that an emergency in international relations exists. It has to be factually proven.[18]

An example of the kind of international emergency used to invoke Article XXI:2(b) was the suspension by the EU, Canada and other countries of imports from Argentina following that country's invasion of the Falkland Islands in 1982.[19] That situation involved a true state of emergency involving military action by one State against the territory of another.

There has been some suggestion that the Trump administration might invoke Article XXI (b)(ii) as justification for its section 232 surcharge, which allows security measures,

> "relating to traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment."

The Commerce Department's section 232 report on steel and aluminum is full of arguments about the security interests of the United States. It contains not the slightest suggestion, however that there is anything amounting to an "emergency in international relations". Nor does it refer to measures essential to deal with arms trafficking, etc., or to prevent steel and aluminum from Canada or other allies being used to supply military establishments to the prejudice of the United States.

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[18] Indeed, it could be argued that if any such emergency does exist, it's the result of Mr. Trump's unilateral and unwarranted use of Article XXI.

[19] *Analytical Index of the GATT,* p. 603.

Nothing coming out of the Commerce Department or While House even mentions US GATT or WTO obligations. It's as if these binding treaty obligations didn't even exist.

If the section 232 tariffs are contrary to US treaty obligations under GATT Article XXI, WTO members whose trade interests are "nullified or impaired" have the right to take countermeasures under GATT Article XXIII. Those retaliatory measures ultimately involve surcharges or quotas on US imports following approval of a WTO panel authorizing such action.

Because of this procedural requirement and its lengthy time line, countries affected by the Trump tariffs, such a Canada, China and the EU, have taken a different course, arguing that the US tariffs are actually safeguard measures under the WTO *Safeguards Agreement*, notwithstanding the Trump administration claiming cover under the Article XXI national security exemption.

Article 8 of the *Safeguards Agreement* gives affected members the right to suspend "the application of substantially equivalent concessions or other obligations" to the members taking safeguard action.

While events will take their course in these safeguards-related arguments and the right to retaliate, the submissions here is that, in absence of a situation of war or a fact-based "emergency" in international relations, these US national security measures are beyond the permissible scope of Article XXI.

NAFTA Withdrawal and Treaty Termination

NAFTA Article 2205 provides that any Party may withdraw by giving the other Parties 6-months formal notice of intent to do so. NAFTA doesn't say anything about what happens

after that.[20] The inference is that after the period ends, a Party is free to formally withdraw by way of a formal notice to the other two Parties.

There no requirement in NAFTA for a party to follow through and formally withdraw after the notice period expires, however. A Party can provide the Article 2205 notification but not take any further steps to formally withdraw from the agreement, leaving the matter up in the air.

When examined in the circumstances of Mr. Trump's threat to conclude a separate bilateral trade agreement with Mexico, the overhanging question is whether there is any authority for the President to actually withdraw from NAFTA without Congressional approval. The related question is whether, before formal NAFTA withdrawal, the President could negotiate and conclude a new bilateral trade agreement with Mexico.

US legal experts, together with leading members of Congress, have pointed out that the President's negotiating mandate under *Trade Promotion Authority* (TPA)[21] is decidedly limited. This is confirmed by the USTR itself, which says,

> "TPA does not provide new power to the Executive Branch. TPA is a legislative procedure, written by Congress, through which Congress defines U.S. negotiating objectives and spells out a detailed oversight and consultation process for during trade negotiations. Under TPA, Congress retains the authority to review and decide whether any proposed U.S. trade agreement will be implemented."

[20] The 1969 *Vienna Convention on the Law of Treaties*, to which the US is a Party, provides in common-sense wording in Article 55 that withdrawal of a Party from a treaty takes place in accordance with the terms of that treaty.

[21] Trade-promotion authority was renewed over the years and last granted under the *Bipartisan Congressional Trade Priorities and Accountability Act of 2015* (TPA 2015), P.L. 114-26.

As stated on the USTR web-site, TPA 2015 also "establishes Congressional requirements for the Administration to notify and consult with Congress, with the private sector and other stakeholders and with the public during the negotiations of trade agreements."

In accordance with its statutory obligation in TPA, the USTR's submission to Congress of the administration's NAFTA negotiating objectives on July 2017 referred only to modernizing the NAFTA and said nothing about a negotiating bilateral agreement with Mexico or Canada.[22]

The conclusion is that the President's Congressional authority, confirmed in the administration's Statement of Objectives under TPA 2015, allows for the negotiation of a modernized NAFTA as a three-way treaty but not the conclusion a new bilateral agreement with Mexico. This factor has resulted in concerted pushback over any bilateral Mexico-US agreement from the Congress and the American business community.[23]

Should Mr. Trump decide to proceed bilaterally with Mexico in spite of these legal and political hurdles, Congress could refuse to approve any such agreement under TPA or to approve repeal of the 1993 *NAFTA Implementation Act* and make changes to a host of other US statutes before withdrawal could be effective under US domestic law.[24]

Notwithstanding these seemingly insurmountable problems, should the US and Mexico proceed down the bilateral route, there would in any case have to be a fully-revised,

[22] "Summary of Objectives for the NAFTA Renegotiation", USTR, 17 July 2017.

[23] "The problem for Trump is that U.S. business and farm groups as well as a broad bipartisan swath of legislators say they will oppose any deal that doesn't include Canada.", *Bloomberg News, supra,* 4 September 2018.

[24] There are indications of serious Congressional opposition to a Mexico-US trade agreement that excluded Canada, as contrary to TPA 2015. This has become evident as of early September 2018: "Lawmakers say NAFTA deal without Canada will not pass in Congress", *World Trade Online*. 7 September 2018.

completed treaty text ready for Messrs. Trump and Pena Nieto to sign 60 days before the December 1, 2018 deadline. The December 1st date seems to be designed to meet Mexican political exigencies to allow the agreement to be signed by the outgoing president before he leaves office.[25]

A complicating factor is that President Trump's notification to Congress of his intent to sign some type of trade deal with Mexico (and possibly with Canada if some seriously difficult issues can be resolved) has started the clock on a series of procedural requirements laid out in the 2015 Trade Promotion Authority law.

The House and Senate advisory groups on negotiations must submit reports to the president, Congress and USTR 30 days after USTR submits its notification of an intent to sign a deal -- which in this case is Oct. 1. A senior administration official recently said the administration had reached out to the advisory groups about the reports even though the groups have not seen the text of a trade agreement.[26]

More critically, TPA 2015 requires that the full NAFTA text be published 30 days after the 90-day notification and tabled in Congress within 60 days after notification together with a draft statement of administrative action proposed to implement the agreement.[27] This means

[25] Depending on what the final version provided, there is no necessary legal requirement for a final agreement to be signed on Canada's behalf at the same time. For example, NAFTA article 2206 provided for signature of the 1994 agreement in the three capitals in triplicate but didn't expressly state that the signatures were all to be done simultaneously. The fact that they were done on the same date was a political rather than a legal requirement.

[26] "Freeland to return to Washington as TPA clock starts ticking", *World Trade Online*, 4 September 2018.

[27] *The Role of the US Congress in Trade Agreements*, European Parliamentary Research Service (March 2016), p. 12.

the final NAFTA document (as opposed to a "preliminary agreement in principle") must be ready by September 30, 2018 and submitted to Congress by October 31, 2018.[28]

Even if matters proceeded along these timelines, which seems unlikely, after the president signs the revised NAFTA, Congress has 90 sitting days to give its approval to US ratification as well as to the implementing Bill that the President is required to table at the same time.

As stated by the Congressional Research Office,

> "TPA's requirement that the President fulfill consultation and reporting obligations helps preserve the congressional role on trade agreements by giving Congress the opportunity to influence the agreement before it is finalized. Should Congress determine that the President has failed to meet these and other requirements, it may decide that the implementing bill is not eligible to be considered under TPA rules. It would implement this decision by adopting a joint "procedural disapproval" resolution in both houses of Congress."[29]

The likelihood is that the current Congress, which will be in its lame-duck period after November 6, 2018, would refuse to deal with the matter, leaving it to the new Congress to decide after it takes office in 2019.

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[28] If the President signs the agreement on 11/30/2018, then the USTR has until 1/29/2019 to release a report describing the required changes to US law. The International Trade Commission has until 3/15/2019 to release an assessment of the trade agreement; however, the assessment may be released sooner. Aikin Gump (Washington, DC), *Trade Promotion Authority 2015 Timeline*: https://solutions.akingump.com/tpatimeline.

[29] *NAFTA Renegotiation and Modernization*, Congressional Research Service (7-5700), 12 October 2017, p. 31.

There are also issues of international law that come into play. For the US to conclude a new bilateral trade agreement with Mexico (or Canada), the administration would have to terminate US adherence to the NAFTA.[30] While some commentators have suggested that the US could enter into a successor trade agreement with Mexico without actual withdrawal[31], it seems legally problematic and implausible that the Trump administration would wish to remain bound to Canada under the existing agreement.

A further issue, not much discussed, is the effect of US withdrawal from the NAFTA on the suspended but not abrogated 1988 *Canada-US Free Trade Agreement*.[32] While no clear statement has been made by the US government on the future of the FTA, it would seem likely that the Trump administration would seek to terminate the FTA simultaneously with action to end US adherence to the NAFTA.

Concluding Observations

Canada has been blindsided, forced into a difficult position by the US and Mexico reaching a broad-based NAFTA "agreement in principle" in Canada's absence. It's fair to say that nothing of this sort was contemplated when the US and Mexico met separately, ostensibly to work out auto rules of origin only.

Whether Canada will agree to join NAFTA 2.0 under these terms will depend on resolving a range of highly divisive issues that still separate the US and Canada at the time of writing.

[30] NAFTA Article 2205 provides that if one of the Parties withdraws from the agreement, it remains in force for the other two Parties. In the event of a US-Mexico agreement in Canada's absence, the reasonable assumption is that Mexico would withdraw from the existing NAFTA as well.

[31] That is, by providing that the new bilateral agreement succeeded US-Mexico treaty obligations under the NAFTA without actually terminating the agreement.

[32] The NAFTA provides that parts of the FTA continue to apply in certain areas of Canada-US. An example is the so-called cultural exemption. NAFTA Annex 2106 continues the FTA provisions in force this area as between the US and Canada.

Even if the two sides can resolve these differences, a fully-finished NAFTA 2.0 in something resembling treaty format by the September 30th TPA deadline seems impossible to achieve on technical grounds. That being said, reports as of early September indicate progress in the Canada-US negotiations.

Should Canada and the US not reach accommodation to allow some form of the text of a revised NAFTA 2.0 to be released on September 30th, a number of difficult questions arise. The first is whether Mr. Trump's threat to withdraw from the NAFTA and conclude a separate bilateral agreement Mexico will come to fruition. That raises serious legal and constitutional issues, including the role of the Congress in approving and implementing trade agreements.

The second question is whether a delay past the September 30th deadline matters if there's genuine progress but negotiations take longer than expected. The casualty will be the December 1st signing date, but that may not be an insurmountable problem, even under TPA procedural requirements. Signing could be postponed. Even if Peña Nieto is out of office, the agreement can be signed after that date by the Lopez Obrador government.

While it is risky to predict events, there seems to be reduced likelihood of NAFTA withdrawal and the conclusion of a separate US-Mexico trade agreement. There has been major push-back in the Congress to any deal that excluded Canada, including within the Republican Party. The American business community has also voiced strong disagreement.

Notwithstanding these factors, should Mr. Trump attempt to proceed with a bilateral agreement with Mexico and withdraw from NAFTA, the matter will ultimately fall to be resolved in Congress and through litigation in the US courts. Until that is done, NAFTA withdrawal issues will continue to unsettle markets and contribute to business unease.

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