

THE ART OF THE DEAL AND NORTH AMERICAN FREE TRADE: ADVANTAGE FOR THE UNITED STATES?

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ABSTRACT

The United States under the Trump administration is pursuing an aggressive trade policy which emphasizes using unilateralism as leverage to conclude bilateral trade “deals” that benefit industries and workers in the United States. This article first analyzes the United States-Mexico-Canada Trade Agreement (USMCA), which the U.S. administration has put forward as its most important accomplishment in the field of international trade. The USMCA seeks to advantage the United States’ economy in eight key areas: manufacturing, especially autos and trucks; services; agriculture; technology; pharmaceuticals; textiles; energy; and retail. The USMCA has many positive characteristics, which are mainly drawn from past multilateral trade negotiations, the North American Free Trade Agreement (NAFTA) and the Trans-Pacific Partnership (TPP) Agreement. However, the USMCA also introduces new complexities into rules of origin requirements and will require material changes in the supply chains of many products made in North America. The USMCA also fosters future business uncertainty since it will automatically terminate in 16 years.

The USMCA cannot take effect without Congressional approval and creates a dilemma for Congress. On the one hand, Congress can approve the USMCA, with its advantages and disadvantages. On the other hand, Congress can withhold approval with the hope that after the 2020 election, a new President will support U.S. adherence to the TPP, the Obama administration’s update of NAFTA that has become effective for eleven Asia-Pacific nations.

The second part of this article analyzes the root economic causes of U.S. trade deficits and puts forward suggestions for policy changes that will improve the U.S. trade balance with the rest of the world.

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I. INTRODUCTION

After more than two decades of relative quiet, international trade and investment law has once again taken center stage in importance in the annals of international law.¹ In a historic shift, the United States has taken steps to implement new trade and investment policies sparking anxiety and anger in capitals all over the world.² The administration of President Donald J. Trump has announced new trade policies based on an ideology of “economic nationalism.”³ The purpose of these new trade policies is to improve the terms of trade of the United States with respect to its economic partners.⁴ Although China is singled out because of its large trade surplus with the United States, no economic partner of the U.S. is exempt from criticism.⁵ NATO allies, Canada, and Mexico are caught up in this new movement as well.⁶ As a result, the important trade settlements of 1993-94, the North American Trade Agreement and the World Trade Organization (WTO) agreements achieved in the historic Uruguay Round in 1994, are under fire.⁷

¹ See, e.g., Zachary Karabell, *Trump's Creative Destruction of the International Order*, FOREIGN POL'Y (June 11, 2018, 9:37 PM), <http://foreignpolicy.com/2018/06/11/trumps-creative-destruction-of-the-international-order/>.

² See, e.g., David Ignatius, *The 'what ifs' of frayed ties with Europe*, WASH. POST, May 18, 2018, at A19.

³ For a discussion of the basic tenets of economic nationalism, see generally Daniel C.K. Chow, Ian M. Sheldon & William McGuire, *The Revival of Economic Nationalism and the Global Trading System*, 40 CARDOZO L. REV. 2133 (2019) (discussing economic nationalism).

⁴ See *id.*

⁵ See, e.g., Jeremy Diamond, *Trump Knocks US-Japanese Trade Relationship as Unfair*, CNN (Nov. 5, 2017, 10:00 PM), <https://www.cnn.com/2017/11/05/politics/trump-us-japanese-trade/index.html>; Mark Thompson & Charles Riley, *Trump Attacks Germany as 'very bad' on trade*, CNN MONEY (May 26, 2017, 10:12 AM), <http://money.cnn.com/2017/05/26/news/economy/trump-germany-bad-trade-cars/index.html>.

⁶ See *The Latest: Trump Renews Trade Criticism of Mexico, Canada*, AP NEWS (June 19, 2018), <https://www.apnews.com/85a33d2bda604003bb30f26c63a72204>.

⁷ Gregg Ip, *Weakened NAFTA, WTO Would Pave Way for Conflict*, WALL ST. J. (Oct. 18, 2017), <https://www.wsj.com/articles/weaker-trade-arbiters-pave-way-for-conflict-1508340483>.

The Trump administration's actions concerning international trade are unprecedented in the post-World War era.⁸ They are troubling because, for the first time in modern history, the United States is blatantly and unapologetically disregarding established rules of international trade and the multilateral trading system developed under U.S. leadership during the past seventy years.⁹ For example, the Trump administration is using tariffs as a cudgel to force other countries into trade concessions. The United States has levied world-wide tariffs on steel and aluminum, and, in addition, has imposed tariffs on \$250 billion worth of Chinese goods, and is threatening to tax all imports from China in 2019.¹⁰ As I have explained elsewhere,¹¹ these tariffs are blatant violations of U.S. obligations under the WTO Agreement on Tariffs and Trade, Article II. The goal of the Trump administration's trade policy seems to be using leverage to make bilateral "deals" to ensure equal trade flows between countries and to manage trade sector-by-sector notwithstanding objective legal rules.¹²

The most important accomplishment of the Trump administration in the field of international trade is the United States-Mexico-Canada Trade Agreement (USMCA), which was concluded on September 30, 2018. Although the USMCA is a three-party agreement, the United States negotiation of this agreement was bilateral in nature. The United States first reached a "preliminary agreement" in negotiations with

⁸ The conservative columnist George F. Will is among those who are extremely critical of the President's trade policies. See George F. Will, *The danger of dabbling in protectionism*, WASH. POST (May 10, 2019), https://www.washingtonpost.com/opinions/the-danger-of-dabbling-in-protectionism/2019/05/10/305a5d5a-7283-11e9-9f06-5fc2ee80027a_story.html.

⁹ Ambassador Rufus Yerxa, former USTR and Deputy Director of the WTO, has stated: "the Trump administration pretty much signaled it is throwing out the rule book on trade." David J. Lynch et al., *Trump imposes steel and aluminum tariffs on E.U., Canada, Mexico*, WASH. POST, May 31, 2018, at A1.

¹⁰ On December 1, 2018, at the G-20 Summit, the United States announced a 90-day "cease-fire" during which President Trump agreed to hold off plans to raise tariffs on January 1, 2019 on \$200 billion of Chinese goods for 90 days in return for a commitment by China to buy a "substantial amount" of U.S. products. Paul Wiseman et al., *US, China reach 90-day ceasefire in their trade dispute*, AP (Dec. 2, 2018), <https://www.apnews.com/589d268f276547b382ae85b3d6256a04>.

¹¹ See generally Thomas J. Schoenbaum and Daniel C.K. Chow, *The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony*, 30 STAN. L. & POL'Y REV. 115 (2019).

¹² See U.S. Trade Representative, *The President's 2017 Trade Policy Agenda 1-2* (2017), <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/Chapter%20I%20-%20The%20President%27s%20Trade%20Policy%20Agenda.pdf>.

Mexico in August 2018, then, using leverage gained from its agreement with Mexico, struck an agreement with Canada. In order to take effect, the USMCA must be approved by Congress; the Trump administration is moving to gain this approval. President Trump signed the USMCA on November 30, 2018 and announced that he will be “formally terminating the North American Free Trade Agreement.”¹³

At this writing the USMCA has not been formally submitted to Congress for approval. The USMCA Implementation bill and Statement of Administrative Action are still in preparation. However, the U.S. International Trade Commission (USITC) has published its assessment of the USMCA, and it is positive. According to the USITC Report,¹⁴ the USMCA will create 176,000 new American jobs and produce an increase in real GDP for the United States of \$68.2 billion.¹⁵ What is surprising about the USITC Report is the minimal impact of the USMCA. Moreover, in June 2019, President Trump threatened to impose 5 percent tariffs on all goods imported from Mexico, and that this tariff would be increased to 25 percent, if Mexico did not stop the immigration wave coming from Central America. Although this threat was suspended when Mexico and the US came to an agreement, President Trump reserved the right to renew it, stating, “tariffs are a great negotiating tool.”¹⁶

The USMCA presents a dilemma for the Congress. On the one hand, the Congress may choose to approve the USMCA, accepting the Trump administration’s version of NAFTA, which includes several troubling policy provisions, which are analyzed below. On the other hand, the Congress may reject the USMCA, gambling that a new President, who may take office in January 2021, will revive U.S. adherence to the TPP, the Obama administration’s update of NAFTA, which has become effective for eleven Asia-Pacific nations under the name, Comprehensive and Progressive Agreement for Trans-Pacific

¹³ Paul Wiseman et al., *US, China reach 90-day ceasefire in their trade dispute*, AP (Dec. 1, 2018), <https://www.apnews.com/589d268f276547b382ae85b3d6256a04>.

¹⁴ U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, Inv. No. TPA 105-003, USITC Pub. 4889 (Apr. 2019) (with Errata), <https://www.usitc.gov/publications/332/pub4889.pdf>.

¹⁵ *Id.* at 15-16.

¹⁶ Ben Foldy, *Tariffs Loom Over Car Makers, Despite Mexico Deal*, WALL ST. J. (June 13, 2019), <https://www.wsj.com/articles/tariffs-loom-over-car-makers-despite-mexico-deal-11560435900>.

Partnership (CPTPP or TPP-11).¹⁷ The latter course is extremely risky even if a new President who favors the TPP takes office in 2021, because President Trump has announced his intention to terminate NAFTA.¹⁸ Once NAFTA is terminated, the most-favored-nation tariffs negotiated at the WTO may snap into place to govern trade among the three North American countries.

Does President Trump have authority to terminate NAFTA? The short answer to this question is “yes,” but his authority will play out in one of two ways: (1) a “clean” termination; or (2) a “dirty” termination. For a clean termination of NAFTA, President Trump would formally invoke the NAFTA withdrawal provision, Article 2205, which states that withdrawal may be accomplished by “prior written notice” to the NAFTA parties. In such a case withdrawal takes effect six months after the date of written notice. However, since NAFTA is a Congressional Executive Agreement, not a “treaty” under U.S. law, a clean termination would require the Congress to repeal the NAFTA Implementation Act of 1993,¹⁹ which is the legal mechanism by which the U.S. is a party to NAFTA.

If Congress does not cooperate with the Trump administration and does not repeal the NAFTA Implementation Act, President Trump may attempt to terminate NAFTA by executive action alone. President Trump could do this by sending a notice in writing to both Canada and Mexico pursuant to Article 2205.²⁰ This action would trigger section 109 of the NAFTA Implementation Act, which states that upon

¹⁷ Trans-Pacific Partnership Agreement, Dec. 30, 2018, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [hereinafter TPP]. The new CPTPP is one of the largest free trade agreements in the world. The eleven member nations include 495 million people and have a total GDP of \$13.5 trillion. The parties to TPP are: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. See Comprehensive and Progressive Agreement for Trans-Pacific Partnership, GOV'T OF CAN. (Sept. 11, 2019), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng>. According to the Center for Strategic and International Studies, the United States, by its rejection of the TPP, and considering the formation of the CPTPP, moves from a GDP gain of \$131 billion to a GDP loss of \$2 billion. Matthew P. Goodman, *From TPP to CPTPP*, CTR. FOR STRATEGIC & INT'L STUD. (Mar. 8, 2018), <https://www.csis.org/analysis/tpp-cptpp>.

¹⁸ See *supra* note 13 and accompanying text.

¹⁹ 19 U.S.C. § 3311 (2018).

²⁰ The President has constitutional authority to terminate treaties. See *Goldwater v. Carter*, 444 U.S. 996 (1979) (termination of the Sino-American Mutual Defense Treaty of 1954 by executive action).

withdrawal of any party, sections 101-106 of the NAFTA Implementation Act cease to have effect for that party. The most important of such sections is section 101, which concerns the approval and entry into force of NAFTA. Section 101(b) provided authority to President Clinton to exchange notes with Canada and Mexico to bring NAFTA into force. President Trump may argue that when this provision ceases to have effect, NAFTA itself no longer has effect. This does not seem to be correct, as section 101 focusses on the original presidential authority to bring NAFTA into effect, not NAFTA termination. Thus, termination of NAFTA by executive action alone would be a “dirty” termination in the sense that much of the statutory underpinning of NAFTA, the NAFTA Implementation Act, would remain in effect even after executive termination. No doubt litigation would follow from which the outcome is problematic.

Nevertheless, President Trump may, by executive action countermand NAFTA preferential tariffs for goods imported from Canada and Mexico and decree that WTO tariffs apply to imports from those nations. The authority to do this may be found in section 201(b)(1)(D) of the NAFTA Implementation Act, which states that the President may proclaim modifications of NAFTA tariffs “as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Canada or Mexico as provided for by the Agreement.”²¹ If this authority is insufficient, President Trump can invoke section 125 of the Trade Act of 1974,²² which gives the President authority to raise tariffs on imports following the termination of any trade agreement.

II. THE UNITED STATES-MEXICO-CANADA TRADE AGREEMENT

Whereas virtually all previous free trade agreements were based upon economic theory holding that trade between nations is a *positive-sum* matter, all parties deriving benefits from the fact that freer trade gives consumers access to a greater variety and cheaper products, and producers gain access to an expanded market area,²³ the USMCA, consistent with the Trump administration’s view that international trade is a *zero-sum* matter, seeks to benefit key economic sectors in the United States, such as manufacturing, agriculture, technology,

²¹ 19 U.S.C. § 3331(b)(1)(D) (2018).

²² 19 U.S.C. § 2135(c) (2018).

²³ For economic theory on free trade agreements, see generally Paul Krugman, *The Move Toward Free Trade Zones*, 76 *ECON. REV.* 6 (1991).

pharmaceutical, and services companies, at the expense of economic interests in Mexico and Canada. Thus, the USMCA provides an important paradigm for the “America First” international economic policy espoused by the Trump administration.

The USMCA in part is based upon the following syllogism:

- Chronic trade-in-goods deficits are the principal cause of declines in manufacturing employment and certain other economic sectors experienced in the United States.
- Trade deficit problems and other international economic imbalances may be rectified by trade and investment agreements with other countries.
- Therefore, using economic and political leverage, the United States must conclude trade agreements with other countries that contain appropriate protectionist and protective provisions.

I believe that this syllogism does not hold, and, therefore, the USMCA is based in part upon false assumptions. Specifically, as I have extensively analyzed in an earlier publication,²⁴ the first two assumptions in this syllogism are false. International trade is not the chief culprit behind job losses in manufacturing, and trade deficits are not amenable to correction by provisions in international trade and investment agreements. In Part III of this article, I put forth my own suggestions for correcting trade imbalances based on macroeconomic theory and international law.

Nevertheless, I argue in this article in favor of Congressional approval of the USMCA. I do so only because the USMCA retains the core advantages of the North American Free Trade Agreement (NAFTA) as well as the Trans-Pacific Partnership Agreement (TPP), and because NAFTA needs updating.²⁵ The USMCA represents a positive updating of NAFTA that is, in some ways, superior to the TPP, which, ironically, President Trump disavowed upon coming into office. At the same time, the USMCA contains provisions that are

²⁴ See generally Thomas J. Schoenbaum & Daniel C.K. Chow, *The Perils of Economic Nationalism and a Proposed Pathway to Trade Harmony*, 30 STAN. L. & POL'Y REV. 115 (2019).

²⁵ President Donald J. Trump, Address at the G-20 Summit (Dec. 1, 2018) (stating that he intended to terminate NAFTA before the end of 2018).

problematic; the exposition below sorts these out. On the whole, however, I believe the USMCA merits positive consideration.

The USMCA draws on three sources for its provisions. First, the USMCA retains the core provisions of NAFTA, its predecessor trade agreement. Second, the great majority of the USMCA draws on the provisions of the TPP. Third, and most importantly, the USMCA contains provisions specifically designed to benefit American industries and workers. I discuss these in turn.

A. NAFTA 2.0

In many respects the USMCA functions as NAFTA 2.0 in that this agreement continues the core provisions of NAFTA. Like NAFTA the USMCA makes the territories of Mexico, Canada, and the United States a North American free trade area,²⁶ and each of the three countries agrees to extend national treatment with regard to goods,²⁷ including as a general rule, zero tariffs, to products of the other two countries.²⁸

In order to qualify for zero tariffs, however, the product in question must satisfy the applicable rules of origin, which determine whether the product may be legally considered as originating in North America. Products which do not satisfy the applicable rule of origin tests are subject to tariffs which are administered separately by each of the three North American countries.

Rules of origin is one of the major differences between NAFTA and the USMCA. Whereas NAFTA Rules of Origin are relatively simple for most products,²⁹ the USMCA Rules of Origin, Chapter 4, which consists of 16 pages followed by a 185-page Annex 4-B on Product Specific Rules of Origin,³⁰ is highly complex, stating tighter

²⁶ Agreement between the United States of America, the United Mexican States, and Canada art. 1.1, Nov. 30, 2018 [hereinafter USMCA], <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

²⁷ *Id.* art. 2.3.

²⁸ *Id.* art. 2.4.

²⁹ NAFTA chapter 4 specifies five general ways that goods can qualify as originating goods under the NAFTA rules of origin. See Harmonized Tariff Schedule of the United States gen. note 12, USITC Pub. 4991 (2019).

³⁰ USMCA, ch. 4.

rules of origin than under NAFTA for thousands of product categories. In addition, a separate Appendix to Annex 4-B (33 pages) states product-specific rules of origin for automotive goods (cars and trucks). The USMCA also has a separate Chapter 6,³¹ Textiles and Apparel, which specifies complex new Rules of Origin for textiles and apparel products. The USMCA also contains tighter rules and more extensive governmental powers on inspection, verification and enforcement of Rules of Origin.³² Certain problems related to rules of origin are considered below.

In addition to eliminating tariffs on trade in products for goods meeting the applicable rules of origin, the USMCA addresses non-tariff barriers to trade, such as technical barriers to trade, sanitary, and phytosanitary measures. Like NAFTA as well, the USMCA covers Government procurement,³³ as well as labor³⁴ and environmental matters.³⁵

Like NAFTA, the USMCA comprehensively covers not only trade in goods but also other important areas of economic activity.³⁶ USMCA chapters address such matters as investment,³⁷ cross-border trade in services,³⁸ temporary entry for businesspersons,³⁹ financial services,⁴⁰ telecommunications,⁴¹ and intellectual property.⁴²

The Investment Chapter 14 contains substantive provisions that vary greatly from NAFTA. The overarching purpose of these variations from NAFTA is to affirm the sovereign rights of the parties and to limit the rights of investors accordingly. For example, USMCA Articles 14-4 and 14-5 accord investors national treatment and most-favored-nation treatment rights, but reserve the right to distinguish investors or investments "on the basis of legitimate public welfare

³¹ *Id.* art. 6.1.

³² *Id.* art. 5.1.

³³ *Id.* art. 13.1.

³⁴ *Id.* art. 23.1.

³⁵ *Id.* art. 24.1.

³⁶ *Id.* at Preamble.

³⁷ *Id.* art. 14.1.

³⁸ *Id.* art. 15.1.

³⁹ *Id.* art. 16.1.

⁴⁰ *Id.* art. 17.1.

⁴¹ *Id.* art. 18.1.

⁴² *Id.* art. 20.1.

objectives.”⁴³ Similarly, the “minimum standard of treatment” that investors have a right to expect (USMCA Art. 14-6) is defined as the “customary international law minimum ... of treatment of aliens.”⁴⁴ Moreover, Article 14-6(4) provides that an action a party takes that “may be inconsistent with an investor’s expectations does not constitute a breach of this Article.”⁴⁵ Article 14-16 states that “[n]othing” in the Chapter shall be construed to prevent a party from adopting any environmental, health, safety, or other regulatory standard that “it considers appropriate.”⁴⁶ These substantive provisions are drafted to preclude investors from challenging or recovering damages in response to many types of actions by a party that may adversely affect investments.

The USMCA retains and adds to the institutional structure of NAFTA. Like NAFTA, the USMCA is administered by a Free Trade Commission⁴⁷ consisting of ministerial-level representatives of the three parties. The Commission is assisted by a Secretariat established by the parties.⁴⁸ The USMCA continues various NAFTA bodies, such as a Committee on Trade in Goods,⁴⁹ a Committee on Agricultural Trade,⁵⁰ a Committee on Textile and Apparel Trade Matters,⁵¹ a Committee on Technical Barriers to Trade,⁵² and a Committee on Sanitary and Phytosanitary Measures.⁵³ In order to implement the chapters on labor and environment, the USMCA establishes a Labor Council⁵⁴ and an Environment Committee.⁵⁵ The USMCA continues the work of the Commission for Environmental Cooperation (CEC) established under NAFTA as well.⁵⁶

⁴³ Niyati Ahuja, *USMCA: An Analysis of the Proposed ISDS Mechanism*, KLUWER ARBITRATION BLOG (Nov. 26 2019), <http://arbitrationblog.kluwerarbitration.com/2019/11/26/usmca-an-analysis-of-the-proposed-isds-mechanism/>.

⁴⁴ USMCA art. 14.6, ¶ 2, at 14-5.

⁴⁵ *Id.* art. 14.6, ¶ 4, at 14-5.

⁴⁶ *Id.* art. 14.16, at 14-15.

⁴⁷ *Id.* art. 30.1.

⁴⁸ *Id.* art. 30.3.

⁴⁹ *Id.* art. 2.17.

⁵⁰ *Id.* art. 3.7.

⁵¹ *Id.* art. 6.8.

⁵² *Id.* art. 11.9.

⁵³ *Id.* art. 9.17.

⁵⁴ *Id.* art. 23.14.

⁵⁵ *Id.* art. 24.26.

⁵⁶ *Id.* art. 24.25.

The USMCA retains the basic dispute settlement mechanisms established under NAFTA:

- NAFTA Chapter 20 on Dispute Settlement is continued pursuant to USMCA Chapter 31, as a three-step process involving (1) consultations; (2) referral to the Free Trade Commission; and (3) referral to a dispute resolution panel. Non-implementation of a panel decision by a responding party may lead to suspension of trade benefits by the complaining party.
- USMCA Chapter 10 on Trade Remedies retains the binational panel procedures of NAFTA Chapter 19 with respect to review of national decisions involving antidumping or countervailing duties. The binational panel procedure will apply, however, only to Canada and the United States; Mexico and the United States agreed to forego this procedure.
- USMCA Chapter 14 on Investment retains investor-state dispute settlement (ISDS) arbitration between the United States and Mexico,⁵⁷ but not between Canada and Mexican Investors, or U.S. investors, or between Canadian investors and Mexico, or the U.S.

Moreover, the scope of ISDS is substantially narrowed. Indirect expropriation and breach of fair and equitable treatment are no longer grounds for arbitration,⁵⁸ and, as a precondition to arbitration, local remedies must be exhausted.⁵⁹ However, a special benefit is granted to U.S. companies doing business with the government of Mexico. Annex 14-E of the USMCA on Mexico-United States Investment Disputes Related to Government Contracts permits claimants in “covered sectors” to obtain arbitration on a full panoply of grounds, including national treatment; most-favored nation treatment; minimum standard of treatment (encompassing fair and equitable treatment and full protection and security); non-discriminatory treatment in case of armed conflict or civil strife; and expropriation, including indirect (regulatory) expropriation. The covered sectors for purposes of Annex

⁵⁷ *Id.* art. 14-D-1.

⁵⁸ *Id.* art. 14-D-2.

⁵⁹ *Id.* art. 14-D-5.

14-E are: oil and gas investments, power generation services, telecommunications, transportation, and infrastructure.⁶⁰

A. *THE USMCA AND THE TPP*

The great majority of the text of the USMCA is identical or a paraphrase of the TPP, which President Trump repudiated, calling it “the worst deal maybe ever signed anywhere.” Despite this, many chapters of the USMCA track the chapters of the TPP, frequently using identical language. Borrowing from the TPP is evident in virtually every chapter of the USMCA, but is especially evident in the following chapters:

- Origin Procedures
- Customs and Trade Facilitation
- Sanitary and Phytosanitary Measures
- Trade Remedies
- Technical Barriers to Trade
- Government Procurement
- Investment
- Cross Border Trade in Services
- Financial Services
- Telecommunications
- Digital Trade
- Intellectual Property
- Competition Policy
- State-Owned Enterprises
- Labor
- Environment
- Small and Medium-Sized Businesses
- Competitiveness
- Anticorruption
- Good Regulatory Practices
- Publication and Administration

Of particular interest are the USCMA Chapters on Environment and Labor.

⁶⁰ *Id.* art. 14-E-3.

Chapter 24, Environment, is similar to both NAFTA⁶¹ and TPP. Each party agrees to enforce its own national environmental laws,⁶² but each party is accorded the right to “establish its own levels of domestic environmental protection and its own environmental priorities.”⁶³ Each party agrees to provide the public with information,⁶⁴ to ensure that “an interested person” may request the party’s competent authorities to investigate possible violations of national environmental laws,⁶⁵ and to “ensure that the competent authorities give those requests due consideration.”⁶⁶ The parties to the USMCA recognize the importance of multilateral environmental agreements and each agree to implement those to which it is a party.⁶⁷ Multilateral agreements specifically mentioned in the USMCA include the Montreal Protocol on Substances that Deplete the Ozone Layer (1987);⁶⁸ the Convention for the Prevention of Pollution from Ships (1973 and 1978);⁶⁹ the Agreement on Port State Measures to Prevent, Deter, and Eliminate IUU [Illegal, Unreported, and Unregulated] Fishing (2009);⁷⁰ and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973).⁷¹ The USMCA also singles out trade and biodiversity,⁷² marine litter,⁷³ invasive alien species,⁷⁴ air quality,⁷⁵ conservation of marine species,⁷⁶ sustainable forest management,⁷⁷ and sustainable fisheries management⁷⁸ as issues

⁶¹ NAFTA, of course, addressed environmental concerns in a side agreement, the North American Agreement on Environmental Cooperation (NAAEC) of 1994. North American Agreement on Environmental Cooperation art. 1, Jan. 1, 1994. Temp. Comm’n for Environmental Cooperation. This side agreement established a North American Commission on Environmental Cooperation in order to address regional environmental concerns, help prevent trade and environmental conflicts, and promote the enforcement of national environmental laws. *Id.*

⁶² USMCA art. 24.4, ¶ 2.

⁶³ *Id.* art. 24.3, ¶ 1, at 24-2.

⁶⁴ *Id.* art. 24.5, ¶ 1, at 24-3.

⁶⁵ *Id.* art. 24.6, ¶ 1, at 24-4.

⁶⁶ *Id.*

⁶⁷ *Id.* art. 24.8, ¶ 1-2, at 24-5.

⁶⁸ *Id.* art. 24.9, ¶ 1, at 24-6.

⁶⁹ *Id.* art. 24.10, ¶ 1, at 24-7.

⁷⁰ *Id.* art. 24.21, ¶ 1, at 24-17.

⁷¹ *Id.* art. 24.22, ¶ 2, at 24-18.

⁷² *Id.* art. 24.15, ¶ 1, at 24-10.

⁷³ *Id.* art. 24.12, ¶ 1, at 24-9.

⁷⁴ *Id.* art. 24.16, ¶ 1, at 24-11.

⁷⁵ *Id.* art. 24.11, ¶ 1, at 24-8.

⁷⁶ *Id.* art. 24.19, ¶ 1, at 24-14.

⁷⁷ *Id.* art. 24.23, ¶ 2(a), at 24-21.

⁷⁸ *Id.* art. 24.18, ¶ 1, at 24-13.

for special attention. The USMCA omits the TPP article mandating collective action on transition to a low-emissions economy.⁷⁹ An important point mandated by the USMCA, not in either NAFTA or the TPP, is a commitment by the parties to the “eventual elimination of all subsidies that contribute to overfishing.”⁸⁰ The USMCA mandates cooperation on conservation and trade⁸¹ and the importance of facilitating trade and investment in environmental goods and services.⁸²

Like the TPP, the USMCA establishes an Environment Committee and mandates the naming of national Contact Points in order to implement the environmental chapter.⁸³ Decisions and reports of the Environment Committee are to be adopted by consensus.⁸⁴ Regarding enforcement, “[a]ny person of a Party” may file a submission with the Secretariat of the Commission for Environmental Cooperation (CEC) “asserting that a Party is failing to effectively enforce its environmental laws.”⁸⁵ If this submission passes a 30-day screening process, the Secretariat forwards this submission to the relevant party, which must make a response within 60 days.⁸⁶ The Secretariat of the CEC, then, may decide to prepare a “factual record” of the matter for submission to the CEC, if instructed to do so by at least two members of the CEC.⁸⁷ This factual record is submitted to both the CEC and the Environment Committee, and a “requesting Party” may request “Environment Consultations” with any Contact Point of another party concerning the matter.⁸⁸ If such Senior Representative Consultations fail, the matter is referred for Ministerial Consultations among the concerned parties.⁸⁹ If the matter is still unresolved by these multiple levels of consultations, the “requesting Party” may request consultations and obtain the establishment of a dispute settlement Panel⁹⁰ pursuant to Chapter 31 of the USMCA. Dispute settlement may lead to a Panel Report that must be implemented by a party on pain of

⁷⁹ TPP, *supra* note 17, art. 20.15 ¶ 1.

⁸⁰ USMCA art. 24.20 ¶ 1, at 24-15.

⁸¹ *Id.* art. 24.22 ¶ 3, at 24-19.

⁸² *Id.* art. 24.24 ¶ 2, at 24-21.

⁸³ *Id.* art. 24.26 ¶ 1-2, at 24-22.

⁸⁴ *Id.* art. 24.26 ¶ 5, at 24-23.

⁸⁵ *Id.* art. 24.27 ¶ 1, at 24-24.

⁸⁶ *Id.* art. 24.27 ¶ 3-4, at 24-24-24-25.

⁸⁷ *Id.* art. 24.28 ¶ 1, at 24-25.

⁸⁸ *Id.* art. 24.29 ¶ 2, at 24-26.

⁸⁹ *Id.* art. 24.31.

⁹⁰ *Id.* art. 24.32.

suspension of benefits.⁹¹ Obviously this multi-level procedure is purposefully convoluted and designed to preclude any meaningful consideration of environmental concerns in opposition to government policies.

USMCA Chapter 23, Labor, like the TPP, requires each party to implement the International Labour Organization's Declaration on Rights at Work in its domestic laws.⁹² This Declaration requires observance of freedom of association of workers and recognition of the right of collective bargaining; the elimination of all forms of forced labor; the effective abolition of child labor; and the elimination of discrimination in employment and occupation.⁹³ The USMCA also contains a detailed statement of provisions Mexico agreed to adopt with regard to worker representation in collective bargaining.⁹⁴ Each party agrees to "effectively enforce" its labor laws.⁹⁵

The USMCA, like the TPP, creates a Labor Council composed of senior governmental representatives as a vehicle for consultations and to receive communications from "interested persons."⁹⁶ Each party also agrees to establish "Contact Points" to address labor matters relevant to the USMCA.⁹⁷ Each party, through its contact point, must provide for receipt and consideration of written submissions from "persons of a Party."⁹⁸ Government-to-government consultations on labor matters are provided first at the level of the contact points;⁹⁹ if this is unsuccessful, consultations move to the ministerial level.¹⁰⁰ If the matter is still unresolved, a party may request the establishment of a dispute resolution Panel pursuant to Chapter 31.¹⁰¹

We have over twenty-five years of experience under the NAFTA labor side agreement¹⁰² on dealing with trade and labor issues, but the

⁹¹ *Id.* art. 31.17, 31.18, and 31.19.

⁹² *Id.* art. 23.3.

⁹³ *Id.*

⁹⁴ *Id.* Annex 23-A.

⁹⁵ *Id.* art. 23.5.

⁹⁶ *Id.* art. 23.14.

⁹⁷ *Id.* art. 23.15.

⁹⁸ *Id.* art. 23.11.

⁹⁹ *Id.* art. 23.17, § 2.

¹⁰⁰ *Id.* art. 23.17, § 6.

¹⁰¹ *Id.* art. 23.17, § 8.

¹⁰² NORTH AMERICAN AGREEMENT ON LABOUR COOPERATION, Government of Canada, <https://www.canada.ca/en/employment-social->

record is not good. The idea behind including a labor chapter in a trade agreement is to ensure the enforcement of national labor laws in order to remove competitive advantages in trade based upon unfair exploitation of workers. Only one case addressing trade and labor rights has ever been formally considered, the *U.S. – Guatemala Labor Arbitration Ruling*¹⁰³ under CAFTA-DR, the Central American-Dominican Republic Free Trade Agreement between five Central American nations, the Dominican Republic and the United States.¹⁰⁴ This case, which related to enforcement of Guatemala’s labor laws, was filed in 2008 by the AFL-CIO and six Guatemalan trade unions.¹⁰⁵ After numerous delays, the arbitration panel constituted to hear the matter handed down a decision in 2017, concluding that, although Guatemala failed to effectively enforce certain labor laws, there was a failure of proof that such failures affected trade, except for one instance: but in that instance, the failure to enforce was not sustained or recurring; the panel concluded that there was no violation of CAFTA-DR Article 16.2.1(a).¹⁰⁶ The USMCA would not appear to change this result,¹⁰⁷ since Article 23.5 (Enforcement of Labor Laws) uses identical language to the CAFTA-DR agreement, requiring that a failure to enforce must be both systematic or recurring and affect trade or investment.¹⁰⁸

development/services/labour-relations/international/agreements/naalc.html (last visited on Oct. 10, 2019).

¹⁰³ *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(A) of the CAFTA-DR*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr> (last visited Oct. 10, 2019).

¹⁰⁴ The Dominican Republic - Central America - United States Free Trade Agreement (CAFTA - DR), Aug. 5, 2004, <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>. This free trade agreement was concluded in 2004. *Id.*

¹⁰⁵ See NORTH AMERICAN AGREEMENT ON LABOUR COOPERATION, *supra* note 102.

¹⁰⁶ *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(A) of the CAFTA-DR, Final Report of the Panel*, INT’L. TRADE ADMIN. (2017), 144-45, 169.

¹⁰⁷ *United States–Mexico Trade Fact Sheet, Modernizing NAFTA into a 21st Century Trade Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (2018), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/august/united-states-mexico-trade-fact-sheet-1>. The USMCA thus belies its billing by the USTR that national labor obligations will now be “fully enforceable.” *Id.*

¹⁰⁸ USCMA art. 23.5, nn.8-9 (the USMCA does, however, contain footnotes that, for “greater certainty” provide dictionary definitions of “sustained or recurring” and “affecting trade or investment”).

The TPP contains a side agreement forbidding parties to engage in currency manipulations or interventions in order to gain a trade advantage. The USMCA spells out the same pledge in Chapter 33, Macroeconomic Policies and Exchange Rate Matters.

C. AMERICAN “ADVANTAGE” PROVISIONS

The most important provisions of the USMCA are those that are designed to produce economic advantages for American industries and workers. This is where the USMCA represents a sharp break from previous trade agreements that respected the rules-based, objective, free-market legal rules of the multilateral trading system. The USMCA, in contrast, focusses on trade outcomes that will benefit the U.S. economy. The USMCA unapologetically seeks to tilt the trade “playing field” in favor of the United States. The provisions of the USMCA seek to advantage the United States in the following eight important economic areas:

- Manufacturing, especially passenger autos and light trucks
- Services
- Agriculture
- Technology
- Pharmaceuticals
- Textiles
- Energy
- Retail

I discuss each of these areas in turn.

1. *MANUFACTURING*

The USMCA seeks to benefit manufacturing industries based in the United States and to foster more manufacturing activity in the United States.

a. *AUTOMOTIVE GOODS*

The most important American “advantage” provisions of the USMCA involve the automotive industry, cars, light trucks, heavy trucks and the parts and components these entail. The automotive industry will face stringent new rules of origin whose compliance will

be necessary to qualify for zero tariff treatment. The new rules of origin provide:

- At least 70% of the steel and aluminum used to produce automotive products must originate in North America.¹⁰⁹
- At least 75% of the content of passenger automobiles and light trucks must originate in North America.¹¹⁰ This is an increase from the NAFTA rule requiring only 62.5%.
- A new labor value content rule will require that 40% to 45% (depending on the type of vehicle) of automotive production activities (components and assembly) be done by workers earning at least \$16 per hour.

First, these provisions are designed to shift production of autos and automotive parts to the United States. Second, it is evident that these rules will benefit the “big three” U.S. automakers, who are better positioned to comply than are European and Asian “transplant” factories in North America.

Third, to make doubly sure that automotive production will shift predominately to the United States, the USMCA, Article 32.2, preserves the right of the United States pursuant to section 232 of the Trade Expansion Act of 1962 (as amended),¹¹¹ to impose “national security” tariffs on Canadian and Mexican vehicles and automotive components imported into the United States if they exceed certain quota limits. The quota on passenger vehicles for each of the two countries is specified to be 2.6 million vehicles per year. The quota on auto parts is \$32.4 billion from Canada and \$108 billion from Mexico per calendar year.¹¹² These two quotas, while not now constraining, set a precedent for “managed trade” in autos and auto parts at some future time.

¹⁰⁹ *Id.* art. 4, 4-B-1-25 (this is the applicable general rule). *See id.* art. 4, 4-B-77 to 78 (exceptionally, certain categories of tariff shifts require 50% or 60% North American content).

¹¹⁰ *Id.* art. 4, 4-B-1-19 (this requirement would be phased in over three years).

¹¹¹ 19 U.S.C. § 1862 (2015).

¹¹² MX-US Side Letter on 232 from U.S. Trade Representative Robert E. Lighthizer to Mexican Secretary of Economy Ildefonso Guajardo Villarreal (Nov. 30, 2018), *in* USMCA; CA-US Side Letter on 232 from U.S. Trade Representative Robert E. Lighthizer to Canadian Minister of Foreign Affairs Chrystia Freeland (Nov. 30, 2018), *in* USMCA.

In addition, as of June 1, 2018, both Canada and Mexico became subject to existing U.S. section 232 tariffs on imports of steel (25%) and aluminum (10%). These tariffs were initially unaffected by the USMCA. The United States reportedly wanted to negotiate quotas on imports of Canadian and Mexican steel and aluminum as a condition of lifting these tariffs.¹¹³ But Canada and Mexico refused to accede to metal import quotas, and on May 28, 2019, the White House announced an agreement lifting the tariffs in exchange for promises by Canada and Mexico to monitor their steel and aluminum exports to prevent transshipments from other nations and to restrain any possible unfair subsidization or dumping of metals' exports to the United States.¹¹⁴

In retaliation for these tariffs, both Canada and Mexico filed complaints against the United States at the WTO, and retaliated by imposing tariffs on U.S. goods. Canada imposed tariffs on \$12.8 billion of U.S. agricultural products, and Mexico imposed tariffs on \$3 billion of U.S. farm products.¹¹⁵ When the agreement was announced on May 28, 2019, Canada and Mexico revoked these tariffs and dropped their cases at the WTO.¹¹⁶ But the May 28 agreement seems only to be an uneasy truce. The USMCA leaves open and does not resolve the important issue of possible future US national security tariffs.

b. *OTHER MANUFACTURED PRODUCTS*

The USMCA rules of origin chapter¹¹⁷ contains additional stricter requirements for North American content that apply to a wide variety

¹¹³ Alan Rappaport & Glenn Thrush, *U.S. Weighs Steel Quotas, Instead of Tariffs on Canada and Mexico*, N.Y. TIMES, Nov. 21, 2018, <https://www.nytimes.com/2018/11/21/us/politics/us-canada-mexico-steel-tariffs.html> (discussing how the United States has negotiated a steel quota of 2.68 million metric tons per year with South Korea and is negotiating such quotas with other countries as well).

¹¹⁴ Ratan Singh, *WTO Drops US Mexico Canada Metal Tariff Disputes*, STEEL NEWS (July 12, 2019), <http://steelguru.com/steel/wto-drops-us-mexico-canada-metal-tariff-disputes/543991>.

¹¹⁵ See Whitney Filloon, *These Are All the Foods Being Affected by Trump's Trade War*, EATER (last updated Sept. 24, 2018), <http://www.eater.com/2018/7/18/17527968/food-tariffs-trump-canada-china-mexico-eu>.

¹¹⁶ See Singh, *supra* note 114.

¹¹⁷ USMCA, art. 4, Annex 4-B.

of manufactured products and their components, including chemicals, plastics and rubber, articles of leather, handbags, footwear, articles of wood, paper products, glass, ceramics and various types of metals. The USMCA contains sectoral annexes¹¹⁸ that specifies enhanced regulatory compatibility for chemicals, cosmetics products, communications technology, energy performance standards, and medical devices.

2. SERVICES

Like the TPP, the USMCA places primary importance on services trade, considering the United States' competitive advantage with respect to services. Chapter 15 on Cross-Border Trade in Services, requires the parties to extend national treatment and most-favored nation treatment to service providers.¹¹⁹ Most limitations on service providers are forbidden,¹²⁰ and local presence cannot be made a precondition to cross-border supply of services.¹²¹ Regulations affecting the delivery of services must be administered in a reasonable, objective, and impartial manner.¹²² Annexes to Chapter 15 cover delivery services,¹²³ transportation services,¹²⁴ and professional services.¹²⁵

The USMCA Chapter 17 covers the important topic of Financial Services. Updated market access commitments include a wide range of financial services, including insurance, banking, portfolio management, investment advice, and electronic payment services.¹²⁶ Good regulatory practices in government licensing and other market access authorizations are guaranteed.¹²⁷ Cross-border transfer of data is fully guaranteed as well.¹²⁸ For the first time in any trade agreement, Chapter 17 prohibits local data storage requirements in circumstances where a financial regulator has access to data that it needs to fulfill its regulatory and supervisory mandate.¹²⁹

¹¹⁸ *Id.* Annexes 12-A to 12-E.

¹¹⁹ *Id.* art. 15.

¹²⁰ *Id.* art. 15.5.

¹²¹ *Id.* art. 15.6.

¹²² *Id.* art. 15.8.

¹²³ *Id.* Annex 15-A.

¹²⁴ *Id.* Annex 15-B.

¹²⁵ *Id.* Annex 15-C.

¹²⁶ *Id.* art. 17.1.

¹²⁷ *Id.* art. 17.13.

¹²⁸ *Id.* art. 17.19.

¹²⁹ *Id.* art. 17.20.

Telecommunication services are addressed in USMCA Chapter 18, which applies to (1) any measure relating to access to and use of public telecommunications networks or services; (2) any measure relating to obligations of suppliers of public telecommunications services; (3) any other measure relating to public telecommunications networks or services; and (4) any measure relating to the supply of value-added services. Detailed sections address each of these topics. Chapter 18 provides for the use of public telecommunications networks to move information in each party's territory and across their borders, as well as for access to information in databases in the territory of any party. Article 18.15 endorses a policy of technology neutrality and prohibits requirements that dictate technology choices.

Chapter 32 of the USMCA continues Canada's cultural industries exemption,¹³⁰ which was originally in NAFTA. This exemption applies to the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form; and radiocommunications in which transmissions are intended for direct reception by the general public, and all radio, television, and cable broadcasting undertakings and all satellite programing and broadcast network services.

3. AGRICULTURE

The USMCA addresses a wide range of agricultural issues, most with the aim of fostering market access for U.S. agricultural producers in Canada and Mexico. Under the USMCA all food and agricultural products having zero tariffs under NAFTA remain at zero tariffs. The USMCA addresses several problem areas under NAFTA. Chief among such problems is that all three nations administer tariff-rate quotas (TRQs) for certain agricultural products. Pursuant to a TRQ, an amount of product called the "quota" is allowed to enter duty free, but imports exceeding the quota are typically subject to a high, prohibitive tariff. The U.S. TRQs involve mainly peanuts, sugar, syrup and sugar containing products; Mexico's TRQs involve sugar and several other products, such as beef, rice, limes and onions. Canada's TRQs involve, most importantly, dairy, eggs, and poultry. The USMCA, Chapter 3 on Agriculture provides for a joint, three-party Committee on Agricultural Trade, and the three nations agree to forbid export

¹³⁰ *Id.* art. 32.6.

subsidies and to cooperate on domestic support and other agricultural trade issues. Export restrictions for the purpose of food security are permitted under the criteria contained in GATT Article XI:2(a).¹³¹ Chapter 3 contains two bilateral annexes. Annex 3-B, titled, "Agricultural Trade Between Mexico and the United States," preserves existing TRQs between the U.S. and Mexico; Annex 3-A, titled, "Agricultural Trade Between Canada and the United States," preserves existing TRQs between the US and Canada.

The three parties to the USMCA agreed to consult concerning and to reduce trade-distorting agricultural policies and standards, to improve transparency, and to ensure non-discriminatory agricultural product standards. Chapter 9 of the USMCA strengthens and requires science-based methods and increased transparency with respect to sanitary and phytosanitary measures imposed by the three parties.

a. *CANADA DAIRY, POULTRY AND EGGS*

Canada operates supply management schemes with respect to dairy, poultry and egg products. Under these schemes, farmers may sell products up to their individual quotas; they sell their products at prices fixed by farmer-run provincial marketing boards. This system involves tariff-quota limits on imported products under which imports enter duty free up to a designated quota, but once the quota is fulfilled, prohibitive tariffs apply. Under the USMCA, Canada agreed to expand the tariff-rate quotas to benefit U.S. exporters with respect to all three agricultural categories.¹³² U.S. access to the Canadian dairy market will expand to 3.59% of domestic Canadian production. This is marginally better than was the case under the TPP, which opened the Canadian market to about 3.25% of domestic Canadian production. Canada also agreed to eliminate milk price classes 6 and 7, opening the way for more imports of U.S. ultra-filtered milk products.¹³³

Canada also agreed to adopt measures to limit its export of certain milk products to the United States. Export caps apply to Canadian exports of skim milk powder, protein concentrates, and infant formula. Once these caps are exceeded, Canada must levy an export surcharge of C\$ 0.54 per kilogram.¹³⁴

¹³¹ *Id.* art. 3.5.

¹³² *Id.* Annex 3-A, art. 3.A.2.

¹³³ *Id.* art. 3.A.3.

¹³⁴ *Id.*

b. *CANADA WHEAT*

Canada agreed to grade imports of U.S. wheat in a manner no less favorable to the grading of Canadian wheat. No country of origin statement may be required upon quality grading or inspection.¹³⁵

c. *CHEESE NAMES AND GEOGRAPHICAL INDICATIONS*

Mexico agreed not to restrict imports of U.S. cheeses labeled with certain names; the parties agreed to discuss geographical indications and not to prevent U.S. producers from using common names for cheeses and other agricultural products.¹³⁶

d. *ALCOHOLIC BEVERAGES*

The three parties agreed to non-discriminatory and transparent treatment regarding the sale, distribution and labeling of wine and distilled spirits.¹³⁷

e. *PROPRIETARY FOOD FORMULAS*

In an Annex on Proprietary Food Formulas, the three parties agreed to protect the confidentiality of information provided in response to regulations and standards relating to prepackaged food and food additives.¹³⁸

f. *AGRICULTURAL BIOTECHNOLOGY*

The parties to the USMCA agreed on a common approach and common standards relating to agricultural biotechnology.¹³⁹

¹³⁵ *Id.* art. 3.A.4(2).

¹³⁶ MX-US Side Letter on Cheeses from U.S. Trade Representative Robert E. Lighthizer to Mexican Secretary of Economy Ildefonso Guajardo Villarreal (Nov. 30, 2018), *in* USMCA.

¹³⁷ *See* USMCA, Annex 3-C, art. 3.C.3.

¹³⁸ *Id.* Annex 3-D(3).

¹³⁹ *Id.* art. 3.14-16.

4. *TECHNOLOGY*

A very important objective of the USMCA is to advantage U.S. technology companies, including creators of new technology and technology entrepreneurs in order to maintain American leadership in technology. To this end, two USMCA chapters are of overriding importance: Chapter 19 on Digital Trade and Chapter 20 on Intellectual Property Rights.

The USMCA provisions on digital trade are similar to those in the TPP. Highlights include:

- Prohibiting duties and other discriminatory measures on digital products distributed electronically (e-books, software, videos, etc).
- Ensuring that data may be transferred across borders.
- Minimizing or prohibiting limits on where data may be stored and processed.
- Facilitating electronic authentication and digital signatures.
- Prescribing enforceable consumer protections for privacy and against unsolicited communications in the digital marketplace.
- Limiting governments' ability to require disclosure of proprietary computer source codes and algorithms, to better protect the competitiveness of digital suppliers.
- Promoting collaboration in dealing with cybersecurity and facilitating best practices to keep networks secure.
- Promoting open access to government-generated public data.
- Limiting the civil liability of internet platforms for third-party content and enhancing the economic viability of these engines of growth that depend on user interaction and content.

The USMCA Chapter 20 on Intellectual Property Rights is also virtually identical to the TPP. Many of these provisions require Canada and Mexico to change their laws to enforce U.S. standards for protection of intellectual property. Examples include:

- Strong standards against circumvention of technological protection measures protecting such works as digital music, movies and books.
- Strong protections for trade secrets.
- Enhanced provisions for protecting trademarks, including well-known marks.

- Procedural safeguards for geographical indications so that using common names is not prevented.
- Copyright safe harbors that provide predictability for legitimate companies.
- A minimum copyright term of life of the author plus 70 years.
- Strong patentability standards and patent office best practices.
- Patent protection standards geared especially to small- and medium-sized businesses.
- Strong enforcement provisions and penalties against violators.

5. *PHARMACEUTICALS*

The USMCA also champions the U.S. pharmaceutical industry. Chapter 20 provides special protection for biologic pharmaceutical products, including protection for a minimum term of ten years.¹⁴⁰ Chapter 20 also provides for procedures to reciprocally recognize safety and efficacy tests for pharmaceutical products, thereby enhancing the marketing of such products.¹⁴¹ Chapter 12, Annex 12-F of the USMCA provides for procedural cooperation among authorities of the three nations concerning the pharmaceutical marketing authorization process.

6. *TEXTILES AND APPAREL*

The USMCA Chapter 6 on Textiles and Apparel Goods contains provisions designed to incentivize greater U.S. production of textiles and clothing. Complex new rules of origin and origin procedures contained in USMCA Chapters 4 and 5 apply to textiles and apparel goods. These rules of origin are designed to promote greater use of “made-in-USA” fibers, yarns and fabrics. These rules limit inputs of non-North American inputs in textile and apparel trade; and require that sewing thread, pocketing fabric, narrow elastic bands, and coated fabric that is incorporated into finished apparel be made in North America in order for such textile and apparel products to qualify for free trade benefits.¹⁴²

¹⁴⁰ *Id.* art. 20

¹⁴¹ *Id.*

¹⁴² *Id.* art. 6.1(2) and (3).

The USMCA establishes a Committee on Textile and Apparel Matters¹⁴³ and contains upgraded inspection and enforcement standards.¹⁴⁴

7. ENERGY

Although Chapter 8 of USMCA recognizes Mexico's sovereign ownership of hydrocarbons in its subsoil, neither Mexico nor Canada place any restriction on international investment in energy resources, oil and natural gas, by U.S. companies. The USMCA leaves intact the ISDS remedy against Mexico for interference with U.S. investment.¹⁴⁵ In side letters attached to the USMCA, Canada and Mexico agree with the United States concerning disciplines related to energy regulatory measures and energy regulatory transparency.¹⁴⁶ Canada and the United States chose not to renew the Energy Proportionality Clause contained in NAFTA Article 605 forbidding the right of either nation to restrict access to each other's domestic oil and gas production in the event of shortage.

8. RETAIL

Chapter 7 of USMCA (Customs Administration and Trade Facilitation) greatly aids online and mail order retailers based in the United States. Delivery of express and online shipments will be faster under the USMCA, and the *de minimis* level for duty free and tax free delivery is raised as follows: for Mexico, USD117 for customs duties and USD50 for sales taxes; for Canada, CD150 for customs duties and CD40 for provincial sales taxes.¹⁴⁷

A. EVALUATING THE USMCA

The USMCA is billed as a new generation of trade agreement, a reflection of the Trump administration's nationalist "America First" economic and political philosophy. In reality, however, the USMCA

¹⁴³ *Id.* art. 6.8.

¹⁴⁴ *Id.* art. 6.6.

¹⁴⁵ *Id.* Annex 14-D, art. 14.

¹⁴⁶ See also CA-US Side Letter on Energy from U.S. Trade Representative Robert E. Lighthizer to Canadian Minister of Foreign Affairs Chrystia Freeland (Nov. 30, 2018), in USMCA.

¹⁴⁷ *Id.* art. 7.8.

is mainly an updated NAFTA. If the USMCA is approved by Congress, the North American free trade area which has linked the United States with Mexico and Canada economically for over two decades would continue in a somewhat different form. The USMCA has many positive points: this agreement preserves NAFTA while providing necessary updates and expanded market access. The USMCA would enact many of the reforms proposed in the now repudiated TPP. The USMCA will benefit American industries, especially agriculture and manufacturing. As the only candidate to replace and update NAFTA, the USMCA merits favorable consideration.

Nevertheless, the USMCA poses distinct uncertainties and dangers to American economic and political interests.

First, the USMCA, combined with section 232 tariffs on metals and negotiations to establish quotas on manufactured products, backed by the threat of additional section 232 tariffs,¹⁴⁸ makes clear the intention of the Trump administration to construct a protected North American manufacturing area that is relatively isolated from the rest of the world. This coordinated strategy aims to boost manufacturing industries in a part of the world dominated by the United States. The vision of the Trump administration is to establish a “renaissance” of American industrial activity in key economic areas, such as autos, steel, aluminum, chemicals, and other manufactured products. The combination of actions of the Trump administration - new rules of origin, labor value content rules, tariffs and quotas - accomplishes this by building a protective wall around much industrial production in North America, where the U.S. can easily establish dominance. This market protection and isolation is bound to lead to higher production costs for automotive products, steel and other manufactured products that will inevitably lead to price increases for consumers. The North American market as a whole will become a high-cost production area less able to compete with lower-cost regions which are now on the rise. For example, U.S. share of global light vehicle production is already declining,¹⁴⁹ isolation of the North American market as a high-cost

¹⁴⁸ Press Release, U.S. Dep’t of Commerce: U.S. Dep’t of Commerce Initiates Section 232 Investigation into Auto Imports (May 23, 2018), <https://www.commerce.gov/news/press-releases/2018/05/us-department-of-commerce-initiates-section-232-investigation-auto-imports>.

¹⁴⁹ See DELOITTE, *A New Era, Accelerating Toward 2020—An Automotive Industry Transformed*, 2-4 (2017).

region is bound to accelerate this trend. The U.S. will suffer economically compared to lower-cost regions of the world.

Second, the new and complex rules of origin contained in the USMCA will compel tens of thousands of companies to reevaluate and to alter their supply chains on a plant-by-plant and even a product-by-product basis. Every firm doing business on a global basis will be affected, and each will be affected in a different way. This process presents a huge challenge; many companies will have to decide whether to change contract suppliers and/or to make new investments in order to meet the new rules. Even under existing rules, small changes in design of a product can have huge effects. For example, a small company in Portland, Oregon, that makes and sells footwear has found that the addition of a sheath of fabric to the sole of a boot or shoe can circumvent an existing 37.5% tariff on imported rubber soles: a fabric sole pays a tariff of only 12.5%.¹⁵⁰ Such arcane distinctions abound in existing rules of origin, and the USMCA will make such rules even more stringent and complex. Reexamining and making necessary supply chain changes will be a massive undertaking.

Third, the sunset clause of the USMCA creates uncertainty as to the future of trade in North America as well as to the economic relationship between North America and the rest of the world. The USMCA provides for automatic termination of the entire agreement 16 years after the date of its entry into force.¹⁵¹ Moreover, a “joint review” of the agreement is mandated to begin no later than the sixth anniversary of its entry into force.¹⁵² The brevity of these time frames creates great uncertainty. Businesses will be reluctant to take decisions on supply contracts and investments in the face of such uncertainty.

Fourth, like many of the other trade and investment policies adopted by the Trump administration, the USMCA seems to be directed both explicitly and implicitly against China. Article 32.10 of the USMCA provides that “[e]ntry by any Party into a free trade agreement with a non-market country, shall allow the other Parties to terminate [the USMCA].” This is clearly directed toward Mexico and Canada, threatening the end of preferred access to the U.S. market if

¹⁵⁰ Jim Tankersly, *A Winter-Coat Heavyweight Gives Trump’s Trade War the Cold Shoulder*, N.Y. TIMES, <https://www.nytimes.com/2018/11/23/business/economy/columbia-sportswear-trump-trade-war.html>, Nov. 24, 2018, at A1.

¹⁵¹ USMCA, art. 34.7.

¹⁵² *Id.*

they choose a relationship with China. Combined with massive tariffs levied on Chinese products and the enactment of the Foreign Investment Risk Review Modernization Act of 2018, the USMCA represents what seems to be a piece of the strategy to decouple the American economy from China. Thus, the USMCA is aimed, in part, at impeding the rise of China, which is the second-largest economy in the world and is growing at a rate approximately three times the rate of growth of the United States. While there are many trade and investment issues and problems with respect to China that should be addressed,¹⁵³ this blatant strategy to impede Chinese economic and political influence is bound to fail. What may result is the division of the world into economic spheres of influence, which would be a dangerous development.

Fifth, the American “advantage” provisions of the USMCA are announced to be a key part of the effort by the Trump administration to use economic nationalism and neo-mercantilist trade agreements to rebalance trade between the United States and its trading partners. As I have written elsewhere,¹⁵⁴ this effort is misguided and will not work. In the next section of this article, I propose a better solution to U.S. trade imbalances.

III. A MACROECONOMIC SOLUTION TO TRADE IMBALANCES

The underlying cause of the U.S. trade deficit is the macroeconomic imbalance between the low U.S. savings rate and the U.S. need for domestic investment capital. Since U.S. savings fall far short, the U.S. economy is sustained by massive amounts of foreign investment capital.¹⁵⁵ The sources of this investment capital are the dollars earned when U.S. trading partners run trade surpluses with the United States.¹⁵⁶ Understanding these macroeconomic facts is key to understanding trade imbalances problems.

¹⁵³ See Schoenbaum & Chow, *supra* note 11.

¹⁵⁴ *Id.*

¹⁵⁵ See James McBride & Andrew Chatzky, *The U.S. Trade Deficit: How Much Does It Matter*, COUNCIL ON FOREIGN RELATIONS (Mar. 8, 2019), <https://www.cfr.org/background/US-trade-deficit-how-much-does-it-matter> (describing how shortfall in savings are financed by foreign lenders).

¹⁵⁶ See Kimberly Amadeo, *U.S. Debt to China, How Much It Is, Reasons Why, and What If China Sells?*, THE BALANCE (Aug. 01, 2019), <https://www.thebalance.com/u-s-debt-to-china-how-much-does-it-own-3306355>

Superficial analysis may lead to the conclusion that the U.S. trade deficit may be cured by erecting trade barriers to imports and getting partners to revalue their currencies against the U.S. dollar. This is a premise of the Trump administration's economic nationalism. Empirical evidence shows that this does not work. The Reagan administration employed this strategy with respect to Japan in the 1980s.¹⁵⁷ Not only did this strategy not work, it resulted in economic disaster for Japan.¹⁵⁸ In the 1980s the Reagan administration, to reduce the growing trade deficit with Japan, adopted trade restrictions in the form of "voluntary" quotas on autos, machine tools, and other Japanese exports.¹⁵⁹ In the 1985 Plaza Accord, Japan agreed to accept a large degree of appreciation of its currency, the yen, against the U.S. dollar.¹⁶⁰ These actions failed to make even a dent in the U.S. trade deficit with Japan.¹⁶¹ In 1985, the trade deficit was \$46 billion;¹⁶² and in 1989 the deficit was \$49 billion.¹⁶³ In Japan the doubling of the yen contributed to an asset bubble, which caused great economic problems in that country.¹⁶⁴ The trade deficit with the United States was temporarily lowered only in 1990-92, when Japan's bubble economy collapsed.¹⁶⁵ But the deficit with Japan rebounded in 1993 to over \$59 billion, and it remains high today. In 2017, it was \$69 billion.¹⁶⁶

(discussing how China uses dollars gained through exports to the U.S. to buy treasuries).

¹⁵⁷ Lee Branstetter, *Do Trade Restrictions Work? Lessons from Trade with Japan in the 1980's*, PUB. BROAD. SERV. (Nov. 20, 2017, 2:29 PM), <https://www.pbs.org/newshour/economy/making-sense/do-trade-restrictions-work-lessons-from-trade-with-japan-in-the-1980s>.

¹⁵⁸ *See id.*

¹⁵⁹ *Id.*

¹⁶⁰ Takatoshi Ito, *The Plaza Agreement and Japan: Reflection on the 30th Year Anniversary* 3-4 (Sep. 28, 2015) (unpublished manuscript), <https://www.bakerinstitute.org/media/files/files/0eb0ad16/WorkingPaper-Plaza-Ito-092815.pdf>.

¹⁶¹ Branstetter, *supra* note 157.

¹⁶² U.S. CENSUS BUREAU, TRADE IN GOODS WITH JAPAN (2019), <https://www.census.gov/foreign-trade/balance/c5880.html> (rounding to the nearest billion).

¹⁶³ *Id.*

¹⁶⁴ For analysis of the Plaza Accord, see Maurice Obstfeld, *Time of Troubles: The Yen and Japan's Economy* 4-6; 51-89 (National Bureau of Economic Research, Working Paper No. 14816, 2009), <https://www.nber.org/papers/w14816>.

¹⁶⁵ *See* U.S. CENSUS BUREAU, *supra* note 162.

¹⁶⁶ *Id.*

Trade import restrictions and currency changes will not sink the trade deficit because excessive foreign imports constitute only the symptoms not the root cause of the trade deficit. The root cause of the U.S. trade deficit is the current macroeconomic structure of the U.S. economy, which emphasizes consumption and government spending and disincentives saving. The four components of U.S. GDP are: (1) consumer spending; (2) investment; (3) net exports; and (4) government spending.¹⁶⁷ Of these the two most important are the first and last, consumer and government spending. Consumer spending is emphasized in the United States with consumer spending hovering around 70% of GDP.¹⁶⁸ The second major component, government spending, is excessive and virtually out of control. According to the Congressional Budget Office (CBO), the combination of the unfunded tax cut enacted by the Congress in 2017, and the \$1.3 trillion government spending bill enacted in 2018, mean that the U.S. budget deficit will rise to 804 billion in fiscal 2019, and will exceed \$1 trillion in fiscal 2020.¹⁶⁹

The structure of the American economy that emphasizes consumer spending means that the personal savings rate in the United States is quite low. In December 2017 the U.S. personal savings rate fell to 2.4% a twelve-year low.¹⁷⁰ The U.S. personal savings rate since 1960,

¹⁶⁷ BUREAU OF ECON. ANALYSIS, BEA18-31, GROSS DOMESTIC PRODUCT: FIRST QUARTER 2018 (THIRD ESTIMATE) CORPORATE PROFITS: FIRST QUARTER 2018 (REVISED ESTIMATE) 4 (2018), available at https://www.bea.gov/system/files/2018-07/gdp1q18_3rd_0.pdf.

¹⁶⁸ See Kimberly Amadeo, *The Components of GDP Explained*, THE BALANCE (July 10, 2019), <https://www.thebalance.com/components-of-gdp-explanation-formula-and-chart-3306015>.

¹⁶⁹ Jeff Stein, *Deficit to top \$1 trillion per year by 2020, CBO says*, WASH. POST (April 10, 2018, 4:35 PM), https://beta.washingtonpost.com/business/economy/deficit-to-top-1-trillion-per-year-by-2020-cbo-says/2018/04/09/93c331d4-3c0e-11e8-a7d1-e4efec6389f0_story.html; Damian Paletta & Erica Werner, *How Congress's and Trump's Latest Deficit Binge Paved the Way for the Next One*, WASH. POST (Apr. 16, 2018, 11:24 AM), https://beta.washingtonpost.com/business/economy/how-congress-and-trumps-latest-deficit-binge-paved-the-way-for-the-next-one/2018/04/15/2d198608-3f2f-11e8-8d53-eba0ed2371cc_story.html.

¹⁷⁰ Jeffry Bartash, *Why the Saving Rate Falling to a 12-Year Low Is Not a Death Knell for the U.S. Economy*, MARKETWATCH (Jan. 30, 2018, 1:53 PM), <https://www.marketwatch.com/story/why-the-savings-rate-falling-to-a-12-year-low-is-not-a-death-knell-for-the-us-economy-2018-01-29>.

has averaged only 8.2%,¹⁷¹ one of the lowest rates in the developed world.¹⁷² From a macroeconomic standpoint, the United States has a severe shortage of domestic savings with which to fund two very important items of its economy — *investment* and the *fiscal deficit*.

Where does the money come from every year to fund these two critical items? Answer: foreign capital. The United States needs and is dependent upon importing massive amounts of foreign capital every year to fund needed U.S. investment and the U.S. budget deficit because domestic savings alone cannot do the job.

And where do foreigners get the dollars to supply the capital needed by the U.S. economy? Answer: from their trade surpluses with the United States. George P. Schultz, former U.S. secretary of Labor, Treasury and State, and Martin Feldstein, professor of economics at Harvard and former Chairman of the U.S. Council of Economic Advisors, put it succinctly: “If a country consumes more than it produces, it must import more than it exports. That’s not a rip-off, that’s arithmetic . . . Federal deficit spending, a massive and continuing act of *dissaving*, is the culprit. Control that spending and you will control trade deficits.”¹⁷³ Schultz makes the further important point that the trade deficit cannot be “fixed” by taking measures that close the deficit with one or a few countries.¹⁷⁴ Unless fundamental macroeconomic reform is undertaken, reductions in deficits with a country like China will only result in deficit increases with other nations. The overall trade deficit will remain.¹⁷⁵

¹⁷¹ FED. RESERVE BANK OF ST. LOUIS, FRED: PERSONAL SAVING RATE *available at* <https://fred.stlouisfed.org/series/PSAVERT> (average of saving rate percentages for the range of Jan. 1, 1960 to May 1, 2018).

¹⁷² Maria Lamagna, *Why Americans Are Some of the World's Worst Savers*, MARKETWATCH (Apr. 14, 2016, 2:34 PM), <https://www.marketwatch.com/story/why-americans-are-some-of-the-worlds-worst-savers-2016-04-14>.

¹⁷³ George Shultz & Martin Feldstein, Opinion, *Everything You Need to Know About Trade Economics, in 70 Words*, WASH. POST (May 5, 2017), https://www.washingtonpost.com/opinions/everything-you-need-to-know-about-trade-economics-in-70-words/2017/05/05/a2b76a02-2f80-11e7-9dec-764dc781686f_story.html [emphasis added].

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*; see also Martin Feldstein, *Inconvenient Truths About the U.S. Trade Deficit*, NAT'L BUREAU OF ECON. RESEARCH (Apr. 25, 2017), <https://www.nber.org/feldstein/projectsyndicateapr252017.pdf>.

Analysis of the macroeconomic root causes of the trade deficit points the way toward macroeconomic reforms that will sink this deficit if we wish to make them. The solutions are quite simple, but politically complex. Three things should be done. First, as Schultz and Feldstein state, Congress must act to reduce the U.S. budget deficit. Second, economic incentives should be put in place to stimulate domestic savings. Third, tax measures should be put in place to stimulate American exports.

Tax reform can incentivize saving. At present, if we save money, we must pay a good portion of the money we earn from saving to the IRS in taxes. Americans are presently taxed on earnings from savings at ordinary income rates, so high-earners—who are most likely to save money—are taxed on their savings-earnings at the marginal rate of 37%.¹⁷⁶ Thus, if such a person earns a dollar from savings, he or she will get to keep only sixty-three cents of the money earned; thirty-seven cents will go to the U.S. government. By contrast, our high-earning individual is not taxed at all by the federal government on his or her spending. State sales taxes vary, but the average tax is 6.5%.¹⁷⁷ Thus, it is far more advantageous from a taxation standpoint to spend rather than to save money in the United States.

Reducing the trade deficit through tax reform would mean some combination of reducing the taxes on savings-earnings and increasing the taxes on consumption. For example, Congress could enact a tax bill reducing the individual income tax rates substantially and instituting some form of national consumption tax. In the European Union, for example, member nations collect national “value-added” taxes that range as high as 25%.¹⁷⁸ In fact, virtually every nation, over 140 countries, including all major trade partners of the United States,

¹⁷⁶ See Amir El-Sibaie, *2018 Tax Brackets*, TAX FOUND. (Jan. 2, 2018), <https://taxfoundation.org/2018-tax-brackets/> (listing the highest marginal tax rate on income to be 37%).

¹⁷⁷ Jared Walczak & Scott Drenkard, *State and Local Sales Tax Rates 2018*, FISCAL FACT NO. 572, TAX FOUND. 5 (Feb. 2018), <https://files.taxfoundation.org/20180313143458/Tax-Foundation-FF572.pdf> (number derived by averaging the state’s, excluding D.C., combined state and local sales tax rate).

¹⁷⁸ Randall Holcombe, *The Value Added Tax: Too Costly for the United States*, 5 (Mercatus Ctr., 2010), <https://www.mercatus.org/system/files/VAT.Special-Study.-Holcombe.pdf>.

levy a national tax on consumption, with some exemptions, such as for medicines and foodstuffs.¹⁷⁹

It is virtually certain that the foregoing tax reforms, accompanied by getting the federal budget under control, would immediately begin to reduce the U.S. trade deficit. Since this tax reform would incentivize saving by taxing spending, the U.S. savings rate would also rise, replacing, to some degree, the need for imported foreign capital. Such reform would also greatly incentivize U.S. companies to export, because, under international rules, a national consumption tax may be *collected at the border on imported products*¹⁸⁰ and is rebated on exports.¹⁸¹ Thus, a 10% consumption tax enacted by the United States Congress would tax all imports 10% in addition to the applicable tariff; and U.S. exporters would get a rebate of 10%, the amount of the

¹⁷⁹ Kyle Pomerleau, *How Many Countries in the World Have a Value-Added Tax?*, TAX FOUND. (Nov. 19, 2015), <https://taxfoundation.org/how-many-countries-world-have-value-added-tax/>.

¹⁸⁰ General Agreement on Tariffs and Trade, Oct. 30, 1947 Art. III:2 (1994). At present the United States is the only important trading nation in the world that does not benefit from substantial tax rebates on exported products. Since 1971, the U.S. Congress has tried to remedy this situation by enacting tax incentives for U.S. exporters. In this endeavor, the U.S. has been rebuffed at every turn because solutions have been found illegal under international law. *See* Panel Report, *United States Tax Legislation (DISC)*, GATT Doc. L/4422 (adopted Nov. 2 1976); Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations,”* WT Doc. WT/DS108/AB/R (adopted Mar. 20 2000); Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations,” Recourse to Article 21.5 of the DSU by the European Communities*, WTO Doc. WT/DS108/AB/RW (adopted Jan. 29 2002).

¹⁸¹ The WTO rules on subsidies allow rebates of taxes to exporters for direct but not indirect taxes. Consumption taxes are considered direct taxes. *See* World Trade Organization Agreement on Subsidies and Countervailing Measures, Annex I(e) (1994). Another variety of tax that would have an ameliorating impact on the U.S. trade deficit is a Carbon Tax on all domestic products made or produced by burning carbon fuels. This tax would vary depending on the volume of fossil fuel consumed in the making of each category of products. *See* James Baker III, et al., *The Conservative Case for Carbon Dividends* (2017), available at <http://www.clcouncil.org/media/TheConservativeCaseforCarbonDividends.pdf>. This tax, known as the “Baker Plan,” is proposed to be “tax neutral” in that the tax collected would be returned in full to the American people in some fashion, either directly or through cuts in other taxes. Since the rules of the GATT (Art. III:2(a)) permit a tax levied on domestic products to be also levied at the border on imported products, this tax would be an across-the-board tax on imports. Since this tax qualifies for border tax adjustment under the rules of the WTO Subsidies and Countervailing Measures Agreement, Annex I (h), (i) and footnote 61, U.S. exporters would receive a rebate of 100% of Carbon tax paid upon the export of any products of U.S. origin.

consumption tax they have to pay on domestic sales. Taxing imports (through a consumption tax not through tariffs) and exempting exports would operate to reduce the trade deficit as net U.S. exports would doubtless greatly increase. The U.S. trade deficit would fall dramatically through enactment of these simple but important measures. Regretfully, although these are simple measures, they lack political support due to the political culture in the United States. Politicians have a responsibility to educate the public as to the great advantages of these policies.

IV. CONCLUSION

The international trade and investment policies of the United States under President Donald J. Trump represent an historical turning point in the post-World War II era. The nationalist tone of “America First” policies threatens to isolate the United States and divide the world into economic spheres of influence. The USMCA, although it contains worrisome provisions, is better than the alternative of ending NAFTA and terminating the North American free trade area. The USMCA deserves favorable consideration as it preserves the core of NAFTA and incorporates updated provisions drawn from the TPP. Nevertheless, the USMCA contains many worrisome and problematic provisions. Certain of the American “advantage” provisions of the USMCA, although designed with the purpose of revitalizing the American economy, may backfire, isolating the United States. The USMCA also will fail as a tool to end U.S. trade deficits. Rebalancing trade may be accomplished only by attending to macroeconomic factors that plague the United States economy. A macroeconomic solution to U.S. trade imbalances is within our grasp if we have the political will to embrace it.