

NAFTA – THE SKY IS NOT FALLING – THOSE ARE JUST THUNDER CLOUDS

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Since the election of President Trump in the United States, there has been much alarm expressed in the press about potentially disastrous implications of the new US administration policies on trade and investment flows. This bulletin aims to explain certain limitations on the new US administration and what might be expected going forward in the context of renegotiation of the *North American Free Trade Agreement* (“NAFTA”).

While there have been many suggestions that President Trump’s actions are difficult to predict, Mexican billionaire Carlos Slim has noted that Donald Trump is a negotiator rather than a “terminator”. An experienced negotiator does not begin offering concessions in advance of negotiations.

President Trump calls for the imposition of a broad Buy American requirement and the US Congress is also exploring potential “border taxes”. Both are arguably contrary to international trading rules of the World Trade Organization (“WTO”) as well as under *NAFTA*. The US can withdraw from *NAFTA*, but is unlikely to exit from the WTO.

The imposition of an obligation in government procurement to “Buy American” is contrary to the principle of national treatment, where imported goods are to receive the same treatment as domestically produced goods. Currently many small procurements and non-federal-government procurements are exempt from the *NAFTA* and WTO procurement rules, but an attempt by the US administration to impose Buy America requirements for the types of procurements covered by the WTO would provide affected countries such as Canada with the right to challenge such measures under the WTO dispute resolution process.

The arbitrary imposition of “border taxes” would also be constrained under international trading rules. The GATT 1994 expressly precludes using taxation measures to disadvantage imports or to favour exports.

The US certainly can end tariff concessions that it has provided under free trade agreements such as *NAFTA* (with appropriate notice), although it cannot charge different import duties for different WTO Member countries, because the most favoured nation (“MFN”) principle requires that all Member countries be treated the same (subject to exceptions for free trade arrangements and for developing or least developed countries). The US also has the power to increase tariffs to all countries to its “bound” levels, but most of these are relatively

low compared to tariff rates in many other countries around the world.

The imposition of such measures would likely lead to retaliation by other countries in various forms. In the worst case scenario, the international trading order could be substantially impaired, leading to a significant global economic downturn. This would likely damage the US economy as much as others. Even if there was some net benefit to the US on trade in goods, it may have more to lose on trade in services where protections are less developed and where it has a trade surplus with most countries. Accordingly, we believe that aggressive arbitrary action by the US against a broad range of imported goods is not a likely scenario.

On the other hand, the announcement of the possibility of these policies has already paid dividends to the US administration by encouraging certain large companies to announce additional investments in the US, without the need to take any action that is not in accordance with America's international trading obligations. Promoting a "Buy American" policy, or investments in the US, does not contravene *NAFTA* or the WTO if there are no legal obligations on companies to do so.

There are procedures and remedies to obtain redress for breaches of the WTO agreements. These multilateral rights and obligations would not be superceded by negotiation of a revised free trade agreement for North America. Instead, we expect that such a renegotiation would focus on existing *NAFTA* provisions that one or more of the participating countries views as problematic, as well as trade barriers or irritants and new issues that were not addressed by *NAFTA*. The world has changed substantially since *NAFTA* came into force in 1994. The internet and its impact on commerce were essentially non-existent at that time. Internet commerce has become a major retail channel, yet each country each has different rules relating to limits on the value of goods crossing the border.

For those industries that have an interest in regional trade, time would be much better spent identifying specific concerns under *NAFTA* relating to particular types of goods and services that affect a given industry, and getting these points of view before decision-makers at an early stage of negotiations.

While the renegotiation process will involve several steps over a period of many months, the US could begin the process relatively quickly once it appoints designated officials and obtains negotiating authority from Congress. Accordingly, companies and industries with specific concerns should be preparing their positions now and considering pre-negotiation dialogue with relevant allies and governments.

There are many opportunities to further liberalize the trade and goods and services within *NAFTA*. While *NAFTA* was at the vanguard of trade liberalization in the early 1990s, much of the agreement is concerned with limitations, exceptions and conditions. Some of those are likely to be candidates for removal. For example, agriculture is an area with many restrictions on trade. The US will likely be looking for Canada to liberalize trade in supply-managed industries including concessions similar to those Canada made in the

Comprehensive Economic Trade Agreement (“CETA”) with Europe and in the negotiations for the Trans-Pacific Partnership (“TPP”). At the same time, Canada and Mexico may want increased opportunities in other agricultural sectors, and the US will likely object to the liberalization of some of those.

US administrations have for decades been pushing the envelope of liberalization in trade of goods and services because the US has a significant interest in an organized international trading order. The importance of these rules to American industry should not be underestimated. Accordingly, we would suggest that less time be spent panicking about things the United States would be foolish to do, and more time spent preparing for what will almost certainly be a tough negotiation on specific changes to provisions in *NAFTA* that may involve significant sectoral threats or opportunities.

by Geoffrey Kubrick and Neil Campbell

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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