THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

NAFTA Renegotiation and Modernization

CANADIAN BAR ASSOCIATION
INTERNATIONAL LAW, IMMIGRATION LAW, COMPETITION LAW, LABOUR AND EMPLOYMENT LAW AND REAL PROPERTY LAW SECTIONS, ANTI-CORRUPTION TEAM AND CANADIAN CORPORATE COUNSEL ASSOCIATION

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500–865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél. 613 237-2925 • **tf/sans frais** 1-800 267-8860 • **fax/téléc**. 613 237-0185 • cba.org • info@cba.org

PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the International Law, Immigration Law, Competition Law, Labour and Employment Law and Real Property Law Sections, the Anti-Corruption Team and the Canadian Corporate Counsel Association (CBA Sections), with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Sections.

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I. INTRODUCTION

The CBA International Law, Immigration Law, Competition Law, Labour and Employment Law and Real Property Law Sections, Canadian Corporate Counsel Association and the Anti-Corruption Team (collectively, the CBA Sections) welcome the opportunity to provide our views on the scope of the renegotiation and modernization of the existing North American Free Trade Agreement (NAFTA) with the United States and Mexico.

The CBA is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. We promote the rule of law, access to justice, effective law reform and provide expertise on how the law touches the lives of Canadians every day.

A. Current State of NAFTA

NAFTA has contributed to the success of trade between Canada, the U.S. and Mexico. NAFTA now links approximately 459 million people producing over $19 trillion worth of goods and services.

Trade between Canada and the U.S. increased by 200% between 1993 and 2013,[1] with a high of $597.3 billion in 2011.[2] The U. S. is Canada's number one trading partner, with approximately 75% of exports bound for the U.S. Similarly, 35 U.S. States have Canada as their number one trading partner.

Although trade with Mexico is on a smaller scale, there are significant advantages in maintaining a trilateral accord. For example, supply chains throughout North America are more integrated and many Canadian industries now depend on systems and relationships created by NAFTA.

B. Lessons Learned

Since NAFTA came into effect over 20 years ago, Canada has successfully negotiated many other trade agreements. Notably, the Trans-Pacific Partnership (TPP) and the Comprehensive Economic

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1 M. Angeles Villareal and Ian F. Fergusson, "NAFTA at 20: Overview and Trade Effects" U.S. Congressional Research Service (DC: 2014, CRS), available online (http://ow.ly/fU7N30dGGD4) at p. 10.

2 *Ibid,* at p. 13.

and Trade Agreement (CETA) with the European Union are next-generation agreements that reflect more current priorities and best practices. Canada's participation in these agreements will need to be appreciated by the other NAFTA parties.

As a general principle, Canada should take this opportunity to align a revised NAFTA with these new developments. Our recommendations often point to provisions of TPP and CETA – we emphasize that these can be advanced on the basis of their own merit and do not depend on a wholesale endorsement of TPP and CETA.

II. EXISTING AREAS THAT COULD BE CLARIFIED OR UPDATED

A. Chapter Three – National Treatment and Market Access for Goods

NAFTA does not provide sufficient opportunity for consultation on matters in Chapter Three and communications could be improved. This Chapter could also be modernized by referencing more recent technological developments.

RECOMMENDATIONS

1. **Add an ad hoc discussion element to Chapter Three (such as TPP Article 2.9.)**
2. **Include specific reference to technology products, requiring Parties to participate in the *WTO Ministerial Declaration on Trade in Information Technology Products* (Information Technology Agreement), 13 December 1996, and adopt the Schedule of Tariff Concessions set out in the Decision of 26 March 1980, L/4962, in accordance with paragraph 2 of the Information Technology Agreement (see TPP Article 2.17).**

B. Chapter Four – Rules of Origin

Product specific rules of origin should be reviewed to ensure that the specific rules achieve the dual objectives of ensuring appropriate levels of NAFTA country regional content and maximizing Canadian business development opportunities in Canada (for manufacturers and importers) and in the U.S. and Mexico (for Canadian manufacturers and service providers). See Annex A for detailed examples.

RECOMMENDATIONS

3. **Clarify the formula for wholly North American goods (perhaps by adopting TPP Article 3.3).**

4. **Incorporate provisions that account for recycling and remanufacturing in the three Parties (see TPP Article 3.4).**

5. **Incorporate the formula from TPP Article 3.5 to NAFTA Article 402. This change would close gaps in the NAFTA framework and give greater clarity to investors and other stakeholders.**

C. Chapter Nine – Standards

While this provision works relatively well, it could be useful to add a requirement for supporting data.

RECOMMENDATION

6. **Include a requirement that Parties wishing to introduce a new technical regulation must give the data upon which that regulation is based (see CETA Article 4.4(1)).**

D. Chapter Ten – Government Procurement

Canada should take this opportunity to refresh the Government Procurement chapter to reflect technical and procedural changes in recent agreements, such as TPP, CETA and the Revised WTO-AGP. Measures should be taken to reduce the administrative burden and cost of establishing procurement policies that must simultaneously comply with a myriad of trade agreements.

In addition, consideration should be given to integrating each Party's infrastructure strategies, particularly for transportation. Canada has significant public-private partnerships (P3) expertise to harmonize infrastructure development and job creation. NAFTA could benefit from greater alignment with CETA and TPP.

CETA provides for special accommodation for set-asides for Aboriginal peoples and carve-outs for certain agricultural programs (Article 19-7(2)). NAFTA could benefit from this type of provision.

RECOMMENDATIONS

7. **Adjust thresholds upwards to align with the thresholds under the TPP.**

8. **Update procedural requirements. For example, notice provisions in NAFTA reflect timelines that made sense for paper bids. Electronic bid submission has**

made procurement processes quicker and timelines have been adjusted accordingly.

9. **Use CPC codes (used in Revised WTO-AGP, CETA and TPP) instead of cumbersome and imprecise CCS codes.**

10. **To address "Buy America" restrictions, we suggest expanding the coverage of NAFTA to subnational governments (see CETA Chapter 19 Annexes, and TPP Chapter 15-A Annexes). However, we do not recommend pursuing this expansion in the absence of a significant gain in return.**

11. **Exclusions and carve-outs in TPP should be reflected in a revised NAFTA where appropriate. Provide special accommodation for set-asides for Aboriginal peoples (see CETA 19-7(2))**

E. Chapter Eleven – Investment

1. Article 1123: Number of Arbitrators and Method of Appointment

Under NAFTA Article 1123, each disputing party has the right to appoint an arbitrator and to agree on the appointment of the presiding arbitrator. The ability for parties to appoint an arbitrator of their choice is a common feature in most current investment treaties, having become a defining feature of arbitration more generally.

This practice is preferred over the recent shift by CETA to establish a quasi-permanent tribunal, with arbitrators randomly assigned to hear any investment dispute that arises. We prefer the current NAFTA mechanism because, *inter alia*,:

(a) It allows the parties to select arbitrators with the disciplinary and legal expertise and experience to most effectively and efficiently hear their case;

(b) It allows the parties to select arbitrators free of any real and perceived conflicts of interests, and based on their most current record of experience (as opposed to a pre-selection of Tribunal members whose experience will inevitably change over their term); and

(c) Having parties alone decide in advance the make-up of the arbitral Tribunal runs against the core value of having an independent and impartial tribunal in the first place, something unlikely to occur in the context of State-to-State disputes. The fact that Investor-State Dispute Settlement (ISDS) involves a non-State disputing party in no way diminishes the importance of the principle of independence and impartiality that the States assign to themselves in all inter-State disputes.

RECOMMENDATION

12. Maintain current language of Article 1123

We are satisfied with the current NAFTA selection process for arbitrators, which has many benefits over the roster system in CETA (Article 8.28). Further, we do not recommend the introduction of an appellate tribunal at this time.

2. Investor-State Dispute Settlement

Both TPP and CETA provide for mandatory consultation and negotiation prior to arbitration (TPP Article 9.18, CETA Article 8.19). CETA also gives the option for pre-arbitration mediation (Article 8.20).

Currently, NAFTA encourages parties to engage in consultation before turning to dispute settlement measures (Article 1118), but does not mandate consultation or mediation. NAFTA does however, mandate allowing six months to elapse before bringing a claim (Article 1120).

Article 1120 has worked well to ensure that cooler heads prevail in any dispute settlement process. It gives parties the opportunity and flexibility to decide the need for, and the intensity of, any consultation.

We suggest amending this provision to permit that, if both parties agree, they do not have to wait and can bring a claim before the required six month period has elapsed. This would be useful when it is obvious to both parties that arbitration is the only avenue to resolve the dispute, and where a six month delay will serve no purpose.

RECOMMENDATION

13. Amend Article 1120 to allow disputing parties to bring a claim before the six month period has elapsed (if both parties agree).

TPP clarifies when damages are permissible, i.e. only when a breach is proved, and that breach is the proximate cause of the damages sought (TPP 9.29(4)).

On this point, we encourage Canada to reaffirm the principles in the Commentary of the International Law Commission (ILC) on the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*. To the extent that damages to address an injury will be revisited, we should not lose track of the concept of restitution in Articles 34, 35 and 36 of the Draft Articles.

These Articles prioritize restitution as a primary remedy, and including interim measures as a form of reparation. We emphasize the value of the extensive work done by the ILC to articulate these principles.[3] To the extent that these ILC principles are espoused, greater elucidation on the causal link between breach and damages is likely unnecessary.

CETA provides a mechanism for the quick disposal of claims that are manifestly without legal merit (Article 8.32). Introducing this measure into NAFTA could improve the arbitration process by reducing waste of arbitral resources. However, the measure could be used as a tactic to discourage small and medium-sized enterprises (SMEs) from accessing dispute settlement. To avoid this result, we recommend incorporating costs consequences where a respondent's motion that a claim is manifestly without legal merit fails. To be effective, the costs awarded should be high.

Another avenue to reduce the strain of unmeritorious claims on arbitral resources is a requirement for security for costs. Again, SMEs could be unduly affected by such a requirement, and should be exempted from any mandatory security for costs provision.

This goal will also be aided by reaffirming the role of interim measures (per the ILC Draft Articles, discussed above) designed to enjoin further or additional breaches of NAFTA - mitigating aggravation of the dispute and encouraging the parties to engage in dispute settlement.

3. Performance Requirements

We recommend that NAFTA incorporate the following sections from the Performance Requirements chapter of TPP to reflect more current best practices:

RECOMMENDATIONS

14. Include TPP Article 9.10(1)(h), which prevents a Party from forcing an investor to use or not use a particular technology in connection with the investment, but with the exception in Article 9.10(4) that a Party may require an investor to employ or train workers in the Party's territory, so long as that training does not require transfer of proprietary technology or other knowledge.

[3] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2008, available online (http://ow.ly/9LHX30dGH8T). Particularly assistive is the commentary provided by the ILC at Article 35(1) at p. 96.

15. Include provisions that would help provide clarity and certainty, i.e. that a Party will not be restricted from pursuing legitimate public welfare objectives (see TPP Article 9.10 (3)(h) and Article 9.16).

One caveat to the above: to the extent that a State utilizes a "public welfare" justification of any kind, that State ought not to be permitted to withhold evidence going to the existence of the public welfare objective (including "State Secrets" or "Raison d'État"). Further, an investor should not be compelled to search that State's archives, or otherwise have its information-gathering efforts limited by access to information laws that deny, delay, or otherwise prevent investors from accessing information necessary to the dispute.

F. Chapter Twelve – Cross-Border Trade in Services

1. Scope and Coverage

The limits on the scope and coverage of cross-border trade in services set out in Article 1201.3(a)[4] may be inconsistent with Chapter Sixteen- Temporary Entry of Business Persons. Chapter Sixteen imposes obligations on a Party for a national of another Party seeking access to its employment market. We suggest this potential inconsistency be reconciled.

In addition, we encourage Canada to expand the scope and coverage of cross-border trade in services to maximize the benefits of NAFTA.

RECOMMENDATION

16. Consider CETA Article 9.2(1)(c) as a model for scope and coverage to broaden NAFTA's application to the supply of a service to the public generally. Also consider TPP Article 10.2(1)(c), which includes telecommunications, to modernize this Chapter.

2. Increased Harmonization

Chapter Twelve also deals with national treatment, most-favored-nation treatment and licensing and certification. However, it appears that much needs to be done to harmonize certification standards for professional services and licensing.

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[4] NAFTA Article 1201.3(a) "Nothing in this Chapter shall be construed to impose any obligation on a Party with respect to a national of another Party seeking access to its employment market, or employed on a permanent basis in its territory or to confer any right on that national with respect to access or employment."

G. Chapter Fifteen – Competition Policy, Monopolies and State Enterprises

Chapter Fifteen addresses competition policy, monopolies and state enterprises.

Recognizing the close cooperation between Canada, the U.S. and Mexico, we recommend adding that cooperation on competition law matters should be conducted in accordance with the major agreements between the Parties, including the *Agreement between the Government of Canada and the Government of the United States of America Regarding the Application of Competition and Deceptive Marketing Practices Laws and the Agreement between the Government of Canada and the Government of the United Mexican States regarding the application of their competition laws.*

We recommend considering provisions designed to ensure that competition laws and their enforcement are consistent with the principles of transparency, non-discrimination and procedural fairness, and provisions to the effect that exemptions and exclusions from the application of competition laws should be transparent.

Also, similar to TPP Article 16.6, we recommend considering consumer protection provisions encouraging each Party to maintain and enforce domestic measures to proscribe fraudulent and deceptive commercial activities, and promoting cooperation between Parties on matters of mutual interest related to consumer protection.

RECOMMENDATION

17. A revised NAFTA should contain a separate and stronger Competition Policy chapter. This new chapter should specify that competition law applies to monopolies and state enterprises, subject to recognized exemptions under the laws of each Party (see CETA Article 17.3).

H. Chapter Sixteen - Temporary Entry for Business Persons

We encourage the Parties to revisit the general principles in Article 1601, including the "desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry." While there has been a great deal of facilitation under NAFTA, facilitating temporary entry and establishing transparent criteria and procedures could be improved.

To remain competitive, Canada needs the ability to recruit skilled people in Canada and internationally. Speed and flexibility characterize today's connected, innovative and technology-based industries. Facilitating the mobility of human talent in the NAFTA region would increase efficiencies and economic growth.

The evolution of unilateral interpretations of the criteria for temporary entry has resulted in some drift and inconsistency resulting in uncertainty for certain business persons seeking temporary entry.

For example, the interpretation of "specialized knowledge" for Intra Company Transferees (ICTs) to gain temporary entry to Canada requires the business person to demonstrate on a balance of probabilities, *"knowledge at an advanced level of expertise" and "proprietary knowledge of the company's product, service, research, equipment, techniques or management."* The development of this two-pronged test in Canada appears to be a reaction to routine claims and potential misuse of the "specialized knowledge" category of ICT. The result is an overly strict and non-facilitative interpretation as well as inconsistency in its application by Immigration, Refugees and Citizenship Canada (IRCC) and the Canada Border Services Agency (CBSA). Similarly, we see inconsistencies and overly strict interpretation of "specialized knowledge" requirements by U.S. border officials.

Another example would be the difference in interpretation among U.S. and Canadian officials on whether a business person needs to be on payroll in the destination country and whether the employer needs to report and pay income tax on that payroll when the employment may be temporary and intermittent.

RECOMMENDATIONS

18. **Develop and adopt common criteria, definitions and interpretations for Temporary Entry for Business Persons and engage in regular, meaningful consultations to maintain relevance, consistency and procedural fairness.**
19. **Modernize the current list of professions by updating the positive list or creating a new negative list of professions similar to other free trade agreements (see Canada-Peru and Canada-Columbia trade agreements).**
20. **Generally align NAFTA with TTP Chapter 12 and CETA Chapters 10 and 11.**

If using a positive list, the current list of professions in Appendix 1603.D.1 should be updated with a more comprehensive and progressive list of professions. A commitment to review and update it at least every five years should also be made.

Examples of occupations that should be considered for inclusion are:

- Information and Technology occupations (NOC 217) (Annex B: Information Technology Occupations)
- Financial Analysts (NOC 1112)
- Marketing/Communications/Public Relations occupations (NOC 1123)
- Human Resources Professionals (NOC 112)

Additional consideration should be given to clarifying occupations such as:

- Management Consultant (NOC 1122)
- Scientific Technician / Technologist
- Technical Publications Writer (NOC 5121)

Also, if a negative list of professions cannot be contemplated, we recommend including experience as a qualifying factor for some professions.[5]

RECOMMENDATION

21. Parties engage in some capacity-building with respect to the timely evaluation of foreign credentials to facilitate temporary admission of foreign-educated professionals.

A modernized agreement should ensure information about the activities of the Temporary Entry Working Group (TEWG) is accessible to interested parties. After each annual meeting, the TEWG should publish an explanatory document on its activities and whether it has developed any measures to further facilitate entry of business persons.

NAFTA could be improved by modernizing the types of business activities authorized for business visitors. Currently, Appendix 1603.A.1 to NAFTA includes business visitors for research and design, growth, manufacture and production, marketing, sales, distribution, after sales service and general service. Categories such as after sales service are practical and beneficial to many, but

[5] For example, in information technology many individuals who qualify as a "Computer Systems Analyst" do not have Bachelor degrees or Associate degrees – the educational requirement does not accurately reflect the hiring practices of IT companies in general, especially in the U.S. Another example is a "field service engineer" who is more or less engaged in engineering activities with 30 years of service, but does not qualify under one of the professions without a degree or Professional Engineer designation.

others such as general service or growth, manufacture and production require elaboration for practicality in modern and future business models.

III. NEW AREAS THAT SHOULD FORM PART OF A MODERNIZED AGREEMENT

A. E-Commerce and Trade Facilitation

If the North American trade framework is to be modernized then governments should ensure new forms of trade can flourish with minimum regulatory obstacles.

The e-commerce market has developed constantly in the past decade. Retail sales from worldwide e-commerce are expected to grow from 1.92 trillion U.S. dollars in 2016 to 4.06 trillion in 2020. As of 2015, the largest e-commerce markets in the world were Asia Pacific and North America. Although in North America the U.S. is by far the largest regional market for e-commerce, Canada is gaining ground. Here, retail e-commerce sales are expected to reach almost 29 billion Canadian dollars by 2021, up from 18.3 billion in 2016.

Technology should be a focal point of any renegotiation, both in terms of e-commerce and to reduce delays and duplication of work. Using technological advances to streamline the border-crossing process should be top of mind.

RECOMMENDATION

22. **Obtain greater data protections for Canadian personal information by committing to a Privacy Shield-type arrangement that guarantees the same level of protection for Canadians as they enjoy in Canada. This arrangement should guarantee a minimum level of protection of the personal information of Canadians and Mexicans, particularly in light of concerns of mass government surveillance.**

We anticipate the U.S. may resist data localization rules, but we recommend remaining firm in this goal. Privacy is a key concern for Canadians. Beyond the concern for individuals, Canada's position as a key trading partner with the EU could be threatened if Canada does not maintain a rigorous personal data protection regime.

B. Accommodations for Small and Medium-sized Enterprises (SMEs)

Accommodating SMEs in the dispute resolution process is a critical aspect of NAFTA. The current process is impractical for many, if not most, SMEs.

CETA includes two dispute settlement provisions that would alleviate the concerns of SMEs. CETA Article 8.23(5) allows small businesses to request one arbitrator instead of the usual three-member panel, to reduce the cost of dispute resolution. Similarly, Article 8.39(6) allows the CETA Joint Committee to consider adding supplemental rules in the context of disputes with individuals and SMEs, to reduce the cost of dispute resolution and the amount of compensation.

RECOMMENDATION

23. Amend dispute resolution provisions to accommodate SMEs (see CETA articles 8.23(5) and 8.39(6))

Adding discretion to waive filing fees, reducing the number of arbitrators, or otherwise alleviating the financial burden facing SMEs seeking dispute resolution will greatly improve access to justice for SMEs. As a corollary, these accommodations may improve the social license and overall buy-in for NAFTA from Canadian investors and other important stakeholders, as dispute settlement will no longer be seen as an avenue available only to large multinational corporations.

Additionally, should Canada proceed with mandatory posting of security for costs in the context of dispute resolution, we recommend that SMEs be exempt from these provisions.

C. Carbon Border Transfer Adjustment

Canada imports $7.2B in crude oil and bitumen from the U.S., while exporting $51.5billion. Trade in this area is key to both the Canadian and the U.S. economy.

Canada's proposed federal carbon pricing backstop, in its current form, exempts fuel exports. It applies to imports only at the stage of transferal to the end-user, or to fuel that an importer brings into the jurisdiction and does not transfer the fuel to a Registered Fuel Distributor.

However, the federal carbon pricing backstop may have implications for Canadian exports that use fuel in the production process. Canadian producers may be subject to levies either via the regular levy component of the backstop, or the out-put based pricing system, if the producer is unable to improve emissions efficiency to the standard set by government, (likely the equivalent of top-

quartile performance in the industry). Facilities may relocate to avoid penalties associated with this backstop or Canadian producers may lose competitiveness with U.S. products.

RECOMMENDATION

24. Canada should not limit its ability to impose a Carbon Border Transfer Adjustment (CBTA) in the future (should a loss in competitiveness occur due to Canada's federal carbon pricing scheme).

In light of the U.S. leaving the Paris Agreement, Canada may consider working with individual U.S. states on carbon pricing. To that end, Canada should refer to emergent California legislation SB-775, which includes ambitious emissions reduction targets and introduce a complex pricing system.[6]

D. Training and Skills Development

Trilateral efforts should help workers in all three nations adjust to the dynamic labour market. Training and skills development ensure a safety net so those who have lost their jobs due to market or technological changes can still benefit from advantages of NAFTA.

E. Recognition of Professional and Trade Credentials

A modernized agreement could promote the recognition of credentials of professionals. This could also extend to certified trades. In Canada, recognition of foreign credentials has been a weakness due to inconsistencies among provincial regulatory authorities. In addition, it appears that some protectionism persists among certain professional regulatory bodies.

RECOMMENDATION

25. Parties make firm commitments to develop and implement programs for the recognition of professional and trade credentials in the NAFTA zone.

F. Mobility of Skilled Trade workers

There is currently no provision in NAFTA facilitating the mobility of skilled trade workers.

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6 SB-775 California Global Warming Solutions Act of 2006: market-based compliance mechanisms, available online (http://ow.ly/B3nt30dIX3r).

RECOMMENDATION

26. Implement a visa program modelled on the NAFTA professionals category for skilled trades with appropriate input from union and accreditation organizations.

G. Trusted Employers

A modernized agreement could promote good employment practices and conduct by rewarding employers that comply with employment standards. These employers could be eligible for trusted employer status or privileges to further facilitate the cross-border mobility of their workers. Given that employment standards are subject to provincial and territorial regulation in Canada, employers could maintain provincial certificates to be eligible for such a trusted employer program.

Giving employers access to time-sensitive, consistent processing of business visitors and temporary workers would increase access to talent, promote business efficiency and reduce loss of economic opportunities.

In addition, we recommend facilitative measures similar to the Global Talent Stream including work permit exemptions for short-term cross-border work and expedited processing.

H. Transparency and Anti-corruption

Canadian businesses benefit from an environment where good governance and the rule of law are protected. While foreign companies will benefit from the Canadian environment and Canada's commitment to fight corruption, it will be important to ensure that Canadian businesses and investors benefit from the same treatment abroad. Since NAFTA's inception, there is now consensus to include anti-corruption best practices and transparency provisions in trade agreements.[7]

RECOMMENDATION

27. At a minimum, NAFTA should include provisions that reflect TPP Chapter 26.

This approach would be consistent with international agreements on transparency and anti-corruption to which Canada is a party such as the *OECD Anti-Bribery Convention and the United*

[7] See: Anti-Corruption and Transparency Provisions in Trade Agreements, Transparency International, February 13, 2017.

Nations Convention Against Corruption (UNCAC) and would send a clear message that Canada promotes fair play in international trade. The U.S. and Mexico are parties to the *OECD Anti-Bribery Convention and UNCAC.* See a comparison of these conventions in Annex C.

Canada and U.S. already have robust anti-corruption legislation while Mexico, which ranked 123rd amongst 176 countries surveyed in the 2016 *Transparency International 2016 Corruption Perceptions Index*, recently enacted comprehensive anti-corruption legislation under the new National Anti-Corruption System *(Sistema Nacional Anticorrupción or SNA)*.

While Mexico's initiatives are a positive development in the global fight against corruption, Mexico is likely to face enforcement challenges.

Both TPP and CETA have significantly expanded transparency provisions (see for example TPP Articles 8.17 and 9.24; CETA Articles 8.36 and 4.6). However, in the context of dispute settlements, we caution Canada against overbreadth. Arbitrators should be empowered to limit the amount of information and evidence they admit into evidence. Boundless intervention in dispute settlements can create chaos and significantly increase the costs on the parties. This could have serious negative effects on access to dispute settlement generally, and particularly on access to dispute settlement by SMEs and individuals.

I. Corporate Social Responsibility

Since NAFTA was entered into in 1994 much progress has been made in corporate social responsibility. Many countries, including Canada, have committed to the United Nations Sustainable Development Goals (SDGs) and many public companies have embraced their corporate social responsibility given regulatory and other requirements.

A revised NAFTA should ensure that suppliers in each country are all held to similar standards so that no supplier will have a competitive advantage over another. These should include fair labour laws and regulations, anti-corruption and bribery laws, minimum wages, working hours, overtime, days of rest, workers health and compensation.

IV. AREAS THAT HAVE BEEN THE MOST BENEFICIAL TO CANADIAN EXPORTERS

A. Chapter 3 – National Treatment and Market Access for Goods

This chapter has had a very positive impact for Canadian exporters.

RECOMMENDATION

28. Consider incorporating a bar on import and export restrictions except in accordance with Article XI of GATT 1994, as in TPP Article 2.10.

B. Chapter 16 – Temporary Entry for Business Persons

Generally, temporary entry for business visitors has facilitated the movement and business activities of millions of business visitors in a manner consistent with NAFTA. The process for traders and investors to be approved under NAFTA at U.S. consulates is functioning well.

The temporary entry of Intra Company Transferees (ICTs) is highly beneficial to all Parties. There is reasonable flexibility on intermittent physical presence on the five-year cap for specialized knowledge and the seven-year cap for executives and managers.

V. POTENTIAL PROPOSALS FROM THE U.S. OR MEXICO WHERE CANADA COULD BE PRESSED TO TAKE ON COMMITMENTS TO ADDRESS PERCEIVED TRADE IRRITANTS

A. Telecommunication, Culture and Environmental

We anticipate that telecommunication and cultural carve-outs and environmental provisions may emerge as trade irritants. We recommend that Canada remain firm on these issues.

B. Importance of Trilateral Agreement

If Canada foresees attempts to negotiate a bilateral agreement, it should reinforce the importance of a trilateral agreement. A trilateral agreement streamlines supply chains, integrates industries and provides a uniform approach to dispute settlement.

C. Increased Professionals

There could be some resistance by the U.S. to any expansion of "TN"[8] professionals entering the U.S. and Canada should be prepared to explain the historical imbalance between the number of Canadians entering the U.S. and Americans entering Canada. We understand that far more Canadians enter the U.S., which may be a mere function of the U.S. market size. It is important to state the benefits to the U.S. economy of having access to Canadian talent and services.

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8 The TN status (or TN visa) is a special non-immigrant classification that permits qualified Canadian and Mexican citizens to seek temporary entry into the U.S. to engage in business activities at a professional level.

D. Real Property

The U.S. and Mexico may raise concerns with the foreign buyer's tax (FBT) on property purchases in the Greater Golden Horseshoe Region and Greater Vancouver Regional District in light of Canada's obligations under NAFTA Article 1102.

VI. COMMENTS ON SIDE AGREEMENT OF LABOUR

Currently, NAFTA does not impose domestic labour standards obligations. The North American Agreement on Labour Cooperation (NAALC) was a side agreement to NAFTA to address labour issues.

NAALC does not establish minimum standards for the domestic law of any Party. Rather, it serves to evidence the commitment of each Party to promote certain core labour standards. It also sets out the expectations of each Party to enforce its domestic labour legislation in an equitable and transparent manner. Finally, it establishes means of cooperation and consultation between the Parties to address potential disagreements.

NAALC provides a limited dispute mechanism process.

A. Incorporation of Labour Standards Directly into NAFTA

Since NAFTA and NAALC took effect in 1994, Canada has entered into trade agreements that directly incorporate labour commitments into the main agreement. The most recent example is TPP Chapter 19.

The primary criticism of NAALC has been its limited dispute mechanism process and the weak sanctions available for repeated non-compliance. Incorporating labour standards directly into NAFTA would make labour standards non-compliance complaints subject to the same protection as any other trade issue.

The enforcement provisions should be broader. Presently, Part Five (Resolution of Disputes) under NAALC may be invoked only with a complaint of a Party's failure to enforce its occupational health, child labour or minimum wage standards. In contrast, TPP Article 19.15 allows any Party to seek enforcement of any matter arising under Chapter19 to 28 (Dispute Settlement), where attempts to resolve the matter through consultation have been unsuccessful.

RECOMMENDATIONS

29. Incorporate a chapter to address labour standards within the body of the trade agreement (and consequently repeal the existing NAALC).

30. Include a workable and effective labour standards protection framework. The model adopted should ensure that any dispute about a Party's commitments on basic labour standards and their enforcement would be treated in the same manner as any other complaint of non-compliance.

B. Strengthen Commitment to Core International Labour Organization Principles

Under NAALC Annex 1, each Party commits to promoting certain labour principles.

More recent trade agreements have sought to strengthen the commitment of each Party to enact legislation to protect core labour rights.[9]

RECOMMENDATION

31. Adopt a provision requiring each Party to adopt legislation to protect core labour standards (see TPP Article 19.3).

Requiring Parties to adopt legislation would go beyond the current provisions of NAALC. which requires only a commitment to promote certain labour standards. It would ensure that another Party could not use weaker labour standards to gain a competitive advantage over Canadians. The obligations in TPP Article 19.3 are already in employment and labour standards legislation across Canada (federal and provincial). As such, this recommendation would not impose additional obligations in Canada.

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[9] For example, TPP Article 19.3 provides:

1. Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO Declaration:
   a. freedom of association and the effective recognition of the right to collective bargaining;
   b. the elimination of all forms of forced or compulsory labour;
   c. the effective abolition of child labour and, for the purposes of this Agreement, a prohibition on the worst forms of child labour; and
   d. the elimination of discrimination in respect of employment and occupation.
2. Each Party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

VII. COMMENTS ON SIDE AGREEMENT ON ENVIRONMENTAL COOPERATION

The renegotiation of NAFTA is an opportunity to incorporate the Side Agreement on Environmental Cooperation into the main text of the agreement.

RECOMMENDATION

32. Refer to TPP Article 20 and CETA Article 24 as benchmarks for improved environmental trade provisions. If these efforts fail, we encourage Canada to work with Mexico to maintain and, if possible, improve the environmental provisions in NAFTA.

VIII. CONCLUSION

Since NAFTA was implemented in 1994, economic and business models have evolved significantly. Many industry sectors depend on integration, efficiency and knowledge transfer in a competitive global market. Advances in information technology and communications have enhanced global supply chains, international trade and market integration.

A key element of modernization is the cross-border mobility of human talent, capitalizing on technological advances and strengthening anti-corruption and transparency measures. As Canada prepares to engage in the renegotiation of NAFTA, a key focus should be on promoting efficiency, clarity and reliability.

We appreciate the government seeking input on NAFTA's renegotiation and modernization and would welcome an opportunity to discuss our comments. We also look forward to the opportunity for continued participation in this initiative.

IX. SUMMARY OF RECOMMENDATIONS

1. Add an ad hoc discussion element to Chapter Three (such as TPP Article 2.9.)

2. Include specific reference to technology products, requiring Parties to participate in the *WTO Ministerial Declaration on Trade in Information Technology Products* (Information Technology Agreement), 13 December 1996, and adopt the Schedule of Tariff Concessions set out in the Decision of

26 March 1980, L/4962, in accordance with paragraph 2 of the Information Technology Agreement (see TPP Article 2.17).

3. **Clarify the formula for wholly North American goods (perhaps by adopting TPP Article 3.3)**
4. **Incorporate provisions that account for recycling and remanufacturing in the three Parties (see TPP Article 3.4).**
5. **Incorporate the formula from TPP Article 3.5 to NAFTA Article 402. This change would close gaps in the NAFTA framework and give greater clarity to investors and other stakeholders.**
6. **Include a requirement that Parties wishing to introduce a new technical regulation must give the data upon which that regulation is based (see CETA Article 4.4(1)).**
7. **Adjust thresholds upwards to align with the thresholds under TPP.**
8. **Update procedural requirements. For example, notice provisions of NAFTA reflect timelines for paper bids. Electronic bid submission has made procurement processes quicker and timelines have been adjusted accordingly.**
9. **Use CPC codes (used in Revised WTO-AGP, CETA and TPP) instead of cumbersome and imprecise CCS codes.**
10. **To address "Buy America" restrictions, we suggest expanding the coverage of NAFTA to subnational governments (see CETA Chapter 19 Annexes, and TPP Chapter 15-A Annexes). However, we do not recommend pursuing this expansion in the absence of a significant gain in return.**
11. **Exclusions and carve-outs in TPP should be reflected in a revised NAFTA where appropriate. Provide special accommodation for set-asides for Aboriginal peoples (see CETA 19-7(2))**
12. **Maintain current language of Article 1123**
13. **Amend Article 1120 to allow disputing parties to bring a claim before the six month period has elapsed (if both parties agree).**

14. **Include TPP Article 9.10(1)(h), which prevents a Party from forcing an investor to use or not use a particular technology in connection with the investment, but with the exception in Article 9.10(4) that a Party may require an investor to employ or train workers in the Party's territory, so long as that training does not require transfer of proprietary technology or other knowledge.**

15. **Include provisions that would help provide clarity and certainty, i.e. that a Party will not be restricted from pursuing legitimate public welfare objectives (see TPP Article 9.10 (3)(h) and Article 9.16).**

16. **Consider CETA 9.2(1)(c) as a model for scope and coverage to broaden NAFTA's application to the supply of a service to the public generally. Also consider TPP Article 10.2(1)(c), which includes telecommunications, to modernize this Chapter.**

17. **A revised NAFTA should contain a separate and stronger Competition Policy chapter. This new chapter should specify that competition law applies to monopolies and state enterprises, subject to recognize exemptions under the laws of each Party (see CETA Article 17.3).**

18. **Develop and adopt common criteria, definitions and interpretations for Temporary Entry for Business Persons and engage in regular, meaningful consultations to maintain relevance, consistency and procedural fairness.**

19. **Modernize the current list of professions by updating the positive list or creating a new negative list of professions similar to other free trade agreements (see Canada-Peru and Canada-Columbia trade agreements).**

20. **Generally align NAFTA with TTP Chapter 12 and CETA Chapters 10 and 11.**

21. **Parties engage in some capacity-building with respect to the timely evaluation of foreign credentials to facilitate temporary admission of foreign-educated professionals.**

22. **Obtain greater data protections for Canadian personal information by committing to a Privacy Shield-type arrangement that guarantees the same level of protection for Canadians as they enjoy in Canada. This arrangement should guarantee a minimum level of protection of the personal**

information of Canadians and Mexicans, particularly in light of concerns of mass government surveillance.

23. **Amend dispute resolution provisions to accommodate SMEs (see CETA Articles 8.23(5) and 8.39(6))**

24. **Canada should not limit its ability to impose a Carbon Border Transfer Adjustment (CBTA) in the future (should a loss in competitiveness occur due to Canada's federal carbon pricing scheme).**

25. **Parties make firm commitments to develop and implement programs for the recognition of professional and trade credentials in the NAFTA zone.**

26. **Implement a visa program modelled on the NAFTA professionals category for skilled trades with appropriate input from union and accreditation organizations.**

27. **At a minimum, NAFTA should include provisions that reflect TPP Chapter 26.**

28. **Consider incorporating a bar on import and export restrictions except in accordance with Article XI of GATT 1994, as in TPP Article 2.10.**

29. **Incorporate a chapter to address labour standards within the body of the trade agreement (and consequently repeal the existing NAALC).**

30. **Include a workable and effective labour standards protection framework. The model adopted should ensure that any dispute about a Party's commitments on basic labour standards and their enforcement would be treated in the same manner as any other complaint of non-compliance.**

31. **Adopt a provision requiring each Party to adopt legislation to protect core labour standards (see TPP Article 19.3).**

32. **Refer to TPP Article 20 and CETA Article 24 as benchmarks for improved environmental trade provisions. Should these efforts fail, we encourage Canada to work with Mexico to maintain, and if possible, improve the environmental provisions in NAFTA.**

ANNEX A – Chapter Four: Rules of Origin, Product Specific Rule

General: Market access opportunities for Canadian businesses into the U.S. and Mexican markets should be considered generally. For example, goods which incorporate a duty free item from a non-NAFTA country should not become dutiable because of additional manufacturing and processing in a NAFTA country, even if the manufacturing and processing aren't sufficient to cause a tariff class shift. The effect of this under current NAFTA rules is to put manufacturing and processing in a NAFTA member country at a disadvantage compared to domestic manufacturers and processors using the same supply inputs. Are any Canadian manufactured goods or services currently considered to be non-originating under the rules of origin or otherwise non-qualifying for duty free treatment upon entry into one of the other NAFTA countries? Future products and services currently under development (e.g. high tech, etc.) also should be examined to ensure that they are able to access full NAFTA benefits.

Textiles: Rules relating to textiles should be examined to ensure that fiber forward, yarn forward and fabric forward rules do not impede or preclude the optimization of opportunities to cost effectively import for sale and distribution in Canada products such as life jackets and flotation or safety devices manufactured in the U.S. with non-originating fabric. For example, if 80% of the cost of a life jacket relates to the labour and other originating inputs, should the textile or fabric being imported from a non-NAFTA country disqualify the finished life jacket as NAFTA originating?

Food supplements: Rules on food supplements should be examined to ensure that we are maximizing Canadian production, sales and distribution opportunities of products that contain inputs such as powdered protein or fruit concentrates. If a tariff class shift is needed to qualify as NAFTA originating then, should the many protein-inclusive products such as protein bars or protein shakes be non-qualifying simply because they include protein powder but their transformation into one of these other products (a significant and growing segment opportunity) does not prompt a tariff code shift? The rules of origin also should be reviewed for ketchup.

Simplification: Wherever possible, simplifying the rules of origin should be considered. Complexity in regional value content rules (e.g. tracing) drives costs and significantly increases the likelihood of errors. It also increases the challenges for SMEs to enjoy the benefits of the trade agreement.

Definition of "originating": Consideration should be given to using the definition of originating as determined under NAFTA rules of origin, for purposes of anti-dumping or countervail investigations reviewed in the context of NAFTA. To use a different definition (e.g. one drawn from other contexts) is inconsistent with the objectives of NAFTA and the establishment of common trade rules in the NAFTA countries.

ANNEX B – Appendix 1603.D.1: Information Technology Occupations

Information technology (IT) is an industry identified by Innovation, Science and Economic Development Canada as an area for key growth. We recommend that IT occupations be included in the list of professions in Appendix 1603.D.1 to NAFTA.

For example, the majority of the "Category B Global Talent occupations" comprising the Global Skills Strategy, consists of the following IT occupations.

Global Talent Occupations List		
NOC	**Occupation**	**Minimum Education**
0213	Computer and information systems managers	Bachelor's degree usually required. Several years of experience required.
2147*	Computer engineers (except software engineers and designers)	Bachelor's degree required.
2171	Information systems analysts and consultants	Bachelor's degree usually required.
2172	Database analysts and data administrators	Bachelor's degree usually required.
2173*	Software engineers and designers	Bachelor's degree usually required.
2174	Computer programmers and interactive media developers	Bachelor's degree usually required.
2175	Web designers and developers	Bachelor's degree required.
2241	Electrical and electronics engineering technologists and technicians	1-3 year college program usually required.
2283	Information systems testing technicians	College program usually required.
5241*	Graphic designers and illustrators*	Bachelor's degree usually required.

*Already included in Appendix 1603.D.1

Similarly, the recently concluded *Liste des professions admissibles au traitement simplifié* in Quebec lists occupations that will receive simplified processing for a work authorization in Quebec. Many of the occupations listed in the Global Skills Strategy are listed here as well.

Quebec List of Occupations Eligible for Simplified Treatment		
NOC	**Occupation**	**Minimum Education**
2147*	Computer Engineers (Except Software Engineers and Designers)	Bachelor's degree required.
2173*	Software engineers and designers	Bachelor's degree usually required.
2174	Computer programmers and interactive media developers	Bachelor's degree usually required.
2175	Web designers and developers	Bachelor's degree required.
2281	Computer Network Technicians	College program usually required.
2283	Video Game Testers (only this name)	College program usually required.
5131	Producer, technical director, creative and artistic / technical director, creative and artistic, and project manager - visual effects and video games (only these names)	Bachelor's degree usually required.
5241*	Graphic designers and illustrators	Bachelor's degree usually required.

*Already included in Appendix 1603.D.1

ANNEX C – Comparison of TPP, OECD Convention and UNCAC

Topic	TPP	OECD	UNCAC
Transparency			
Publication	Publication of laws, regulations and procedures, after advance publication and consideration of comments (Article 26.2)	N/A	N/A
Administrative Proceedings	Procedural fairness rights in proceedings, including right to notice and right to present facts and arguments	N/A	N/A
Anti-Corruption			
Bribery offence (public officials)	"Shall" establish as criminal offences: bribing a [national] public official soliciting a bribe by national public officials bribing a foreign public official (Article 26.7(1))	"Shall" establish as criminal offence: • bribing a foreign public official	"Shall" establish as criminal offences: • bribing a [national] public officials (Article 15) • soliciting a bribe by national public officials (Article 15) • bribing a foreign public official (Article 16)
Bribery offence (private sector)	N/A	N/A	Article 21 (see also Article 12)
Embezzlement offence			Article 22
Money laundering	N/A	N/A	Article 23
Concealment	See books & records, Article 26.7(5)	See books & records, Article 8	Article 24
Obstruction offence	N/A	N/A	Article 25
Liability of legal persons (corporations)	Article 26.7(3)	Article 2, 3(2)	Article 12(3) and Article 26

Topic	TPP	OECD	UNCAC
Nationality jurisdiction (extra-territorial)	N/A	Article 4(2)	Article 42 (extradite or prosecute)
End tax deductibility for bribes	Article 26.7(4)	In later Recommendations.	Article 12(4)
Books and records	Article 26.7(5)	Article 8	Article 12(3)
Mutual legal assistance	N/A	Article 9	Article 46
Extradition	N/A	Article 10 • Make corruption offences extraditable • Extradite or prosecute own nationals	• Make corruption offences extraditable (Article 44-45) • Extradite or prosecute own nationals (Article 42)
Improve selection and training of public officials	Article 26.8(1)	N/A	Article 7
Codes of conduct for public officials, discipline procedures	Article 26.8(2)-(3)	N/A	Article 8(1)-(2), (6)
Declarations by senior public officials of outside activities and investments	Article 26.8(1)(d)	N/A	Article 8 (5)
Measures to prevent corruption among the judiciary	Article 26.8(4)	N/A	Article 11
Restrictions on post-employment activities of public officials	N/A	N/A	Article 12(2)(e)
Application and Enforcement of Anti-Corruption Laws	Article 26.9	N/A	Various provisions on enforcement (Articles 30-42, 47-50)
Asset recovery	N/A	N/A	Chapter V deals with asset recovery