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LEAVING NAFTA: THE INSURMOUNTABLE LEGAL AND ECONOMIC CHALLENGES FACING THE TRUMP ADMINISTRATION

❖ NOTE ❖

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I. INTRODUCTION

Labeled as a treaty that steals jobs from American workers, President Donald Trump has made his disdain for the North America Free Trade Agreement known long before his inauguration. “Since the deal came into force . . . thousands of factories have closed, and millions of Americans have found themselves stranded.”¹ He labels NAFTA as “one of the worst deals ever made by any country having to do with economic development,”² The question is whether the current President has the authority to arbitrarily withdraw from the agreement.

¹ Robert D. Blackwill, *Unpacking Trump’s ‘Alternative Facts’ on NAFTA*, FOREIGN POLICY (Sep. 15, 2017, 3:00 PM), <http://foreignpolicy.com/2017/09/15/unpacking-trumps-alternative-facts-on-nafta/>.

² *Id.*

Part II of this Note will give a brief history of NAFTA and the uncertain future it is facing under the Trump Administration. Part III of this Note will analyze the legal and economic issues that President Trump should face and overcome, before existing the treaty. Part IV recommends that the President Trump should participate in renegotiation of the provisions of NAFTA to reach a superior deal that will help revitalize the already ailed U.S. economy.

II. BACKGROUND

NAFTA, currently the world's biggest free-trade bloc, came into effect on January 1, 1994.³ The purpose of this multilateral agreement was to help and incentivize companies in the three countries of the North American Continent to do business across borders. To achieve this goal, NAFTA removed tariffs on imports on virtually all goods traded among the United States ("U.S."), Canada, and Mexico.⁴

However, opponents of NAFTA, including President Trump, have argued that the agreement permits the other parties to benefit at the expense of the U.S. According to its opponents, NAFTA hurts the American economy because Americans import more goods and services from Mexico and Canada than the other way around, creating a considerable trade deficit and imbalance.⁵ Additionally, the opponents state that NAFTA is to blame for job losses in the U.S. as, allegedly, many manufacturing companies in the U.S. have chosen to move factories to Mexico where labor is cheaper.⁶

President Trump has made unabashed public threats aimed towards Canada and Mexico stating that, unless there are significant changes made to the

³ Andréa Ford, *A Brief History of NAFTA*, TIME (Dec. 30, 2017), <http://content.time.com/time/nation/article/0,8599,1868997,00.html>.

⁴ *Id.*

⁵ John Brinkley, *Trump's NAFTA Focus Is In The Wrong Place: Trade Deficits Are Irrelevant*, FORBES (Oct. 10, 2017, 12:38 PM), <https://www.forbes.com/sites/johnbrinkley/2017/10/10/trade-deficits-are-irrelevant/#365a8df67d8c>.

⁶ *Id.*

terms of NAFTA, the U.S. will leave the treaty.⁷ The President has made it clear that he considers terminating NAFTA the “best deal” to update the 24-year-old treaty.⁸ Upon President Trump’s insistence, the first round of renegotiations began in August 2017,⁹ and have yet to reach a resolution as of the time this Note is written, and with little probability of doing so soon.

III. ANALYSIS

A. NAFTA Article 2205: Withdrawal

One point President Trump has made abundantly clear is that he could arbitrarily withdraw the U.S. from NAFTA whenever he wishes. But is this true? The current situation is alarmingly analogous to Great Britain’s decision, as well as the preceding discussion, to leave the European Union in 2016. Indeed, then Republican nominee Trump praised the narrow poll result to exit the European Union, tweeting that “[they] took their country back, just like we will take America back.”¹⁰

However, there is great dissimilarity in the language of the Treaty on European Union (“EU Treaty”) and NAFTA. While the EU Treaty provides a detailed procedure triggered by a member state’s notice of withdrawal, NAFTA’s language on withdrawal remains ambiguous and lacks the same degree of finality.

Upon exiting the agreement, the Treaty on European Union offers systematic procedure in details as follows:

⁷ Edward Helmore, *Trump warns it's 'possible' the US will drop out of NAFTA*, THE GUARDIAN (Oct. 12, 2017, 12:08 PM), <https://www.theguardian.com/world/2017/oct/12/trump-warns-its-possible-the-us-will-drop-out-of-nafta>.

⁸ Jeff Mason, *Exclusive: Trump Says Terminating NAFTA Would Yield The ‘Best Deal’ In Renegotiations*, REUTERS (Jan. 17, 2018), <https://www.reuters.com/article/us-usa-trump-nafta-exclusive/exclusive-trump-says-terminating-nafta-would-yield-the-best-deal-in-renegotiations-idUSKBN1F703Y>.

⁹ *The North American Free-Trade Agreement Renegotiation Begins*, THE ECONOMIST (Aug. 17, 2017), <https://www.economist.com/news/finance-and-economics/21726711>.

¹⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 24, 2016, 2:21 AM), <https://twitter.com/realDonaldTrump/status/746272130992644096>.

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.¹¹

In other words, once a country formally informs the European Council of its decision to withdraw, a two-year clock begins to count down. Once the time is up, the country is free to leave the treaty. Expectedly, Britain and the European Union will continue to engage in discussions and negotiation, but once the two-year deadline arrives, Britain will officially and legally cease to be a part of the European Union, with no remaining attachment or legal question.

In contrast, the corresponding part of NAFTA does not offer the same level of finality. Instead, NAFTA Article 2205 simply states that: “A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.”¹²

Here, the “Party” is the U.S. government. At first glance, this provision seems to allow the exiting party to go through the six-month withdrawal period without any specific requirements. However, the language of NAFTA states that a party “may withdraw” after the six months have passed. This is different from the

¹¹ Treaty Establishing a Constitution for Europe, Dec. 14, 2004, 2004 O.J. (C 310) 46.

¹² North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L. 605, 703 (1993).

EU Treaty's language that "[t]he Treaties shall cease to apply." Rather, "[u]nder the plain language of NAFTA Article 2205, providing a written notice of withdrawal is simply a condition that a Party must fulfil before it proceeds to withdraw from NAFTA."¹³ Complicating matters further, NAFTA does not provide what such proceeding should be. Thus, even if President Trump decides to pull out of the further renegotiations with Canada and Mexico, leaving the treaty would not be as simple and swift as he has made it sound.

B. Foreign Affairs Powers under the United States Constitution

Still, President Trump's supporters argue that the president can arbitrarily cause the U.S. to terminate NAFTA despite the ambiguous language of NAFTA article 2205. They argue that the president can exercise executive actions under the U.S. Constitution to deal with national emergencies and balance of payments.¹⁴ This argument is baseless as NAFTA has not created a national emergency where a presidential action to "prohibit transactions prohibit transactions involving property in which a foreign country" is allowed.¹⁵

The second argument made by President Trump's supporters is that, under Section 125 of the Trade Act of 1974, the president holds the authority to unilaterally withdraw from any trade agreement, including NAFTA.¹⁶ However, this is not the case, as Congress enacted NAFTA by passing a federal law: the NAFTA Implementation Act.¹⁷ This legislation effectuated NAFTA provisions by

¹³ Jon R. Johnson, *The Art of Breaking the Deal: What President Trump Can and Can't Do About NAFTA*, Commentary No. 464 On Trade & Intl' Policy, C.D. HOWE INST. (January 2017), https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary_464.pdf.

¹⁴ Jason Luong, *Forcing Constraint: The Case for Amending the International Emergency Economic Powers Act*, 78 TEX. L. REV. 1181 (2000) (explaining that the National Emergency Act and the International Emergency Economic Powers Act can work together because a declaration of a national emergency under the former triggers the broad regulatory powers enumerated in the latter. When triggered, under the IEEPA, the president has the power to fully regulate trade with other nations.).

¹⁵ 50 U.S.C. § 1706 (2012).

¹⁶ 19 U.S.C. § 2251 (2012).

¹⁷ *Bestfoods v. United States*, 165 F.3d 1371, 1374 (Fed. Cir. 1999).

implementing removal of tariffs and other pro-trade measures. In other words, as NAFTA was sanctioned and adopted by Congress, Congress thus has the power to approve or reverse a president's decision to withdraw from the agreement under the Commerce Clause.

To further this understanding, it is essential to delve into the constitutional language which provides foreign affairs powers to the executive branch and Congress respectively. Article II Section 1 of the U.S. Constitution offers that “[t]he executive Power shall be vested in a President of the United States of America.”¹⁸ At the time of drafting, “executive Power” was interpreted to include foreign affairs powers.¹⁹ It was therefore not seen as necessary to expressly include foreign affair powers or enumerate specific executive powers.²⁰ Furthermore, the Treaty Clause provides that the President has the power to make treaties “by and with the Advice and Consent of the State . . . provided two thirds of the Senators present concur.”²¹

Contrastingly, the Constitution provides Congress with explicitly identified powers. The Commercial Clause gives the Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”²² Under Clause 18 of the same article, Congress has powers that are “necessary and proper” for “carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”²³ The Necessary and Proper Clause thus authorizes Congress to use any reasonable means to effectuate the exercise of the enumerated powers, including regulation of commerce with foreign nations.

¹⁸ U.S. CONST. art. II, § 1.

¹⁹ Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 549 (2004).

²⁰ *Id.*

²¹ U.S. CONST. art. II, § 2, cl. 2.

²² *Id.* art. I, § 8.

²³ *Id.* art. I, § 18.

In approving NAFTA, Congress explicitly granted the terms upon which the commerce of the United States with each of Canada and Mexico is regulated. It is thus Congress that has the power to regulate NAFTA under the Commerce Clause. A decision to withdraw from NAFTA significantly changes the regulation of commerce between these countries. Therefore, without Congress's approval, President Trump's choice to withdraw from the pact will remain merely a "suggestion," and not the effective final decision.

Thus, under the powers given by the Commerce Clause, Congress is and should be involved in decisions regarding foreign affairs matters. In conclusion, the notion that the president holds and can exercise an arbitrary authority to decide whether the treaty is inoperative and should be terminated, without challenge by the Congress, is simply and fundamentally wrong.

IV. RECOMMENDATION

From the above discussion, President Trump will unquestionably face legal obstacles if he withdraws the U.S. from NAFTA. However, these legal challenges are not the only reason for the current renegotiations over NAFTA terms with Canada and Mexico. The U.S. would lose more than it would gain by withdrawing. One of the potential devastating effects of leaving the treaty is a tumultuous downturn in the stock market. The impact would be felt in almost every industry such as agriculture, car manufacturing, and energy. For example, the U.S. auto industry has relied heavily on cheap and quality auto parts manufactured and delivered from Mexico.²⁴ Also, in regards to agriculture, about three-quarters of high fructose corn syrup made in the U.S. is sold to Mexico.²⁵

²⁴ Alexia Fernandez Campbell, *The U.S., Canada, and Mexico are Renegotiating NAFTA—Here's What Each Country Wants*, VOX (Sep. 5, 2017, 11:13 AM), <https://www.vox.com/policy-and-politics/2017/9/5/16156924/>.

²⁵ *Id.*

Pulling out of NAFTA may have some deterring effect on companies to outsource as the Trump Administration argued.²⁶ Yet, it would not instantly revitalize the economy either. The administration seems to be greatly dissatisfied with the great imbalance in trade with Mexico, with which the U.S. had a \$60 billion trade deficit in one fiscal year.²⁷ However, it should be noted that most rural counties in the US, in which voters overwhelmingly chose President Trump,²⁸ rely on selling agricultural products to Mexico.²⁹ These supporters would not be pleased once duty-free access to the Mexican market under the treaty is no longer available. Indeed, current renegotiations and the possibility of withdrawing from NAFTA are causing serious concern among American manufacturers as to whether changes would negatively impact their business. They are especially worried about potential disruption in global supply chain and increased costs in manufacturing that would follow after the termination of NAFTA.³⁰ Therefore, terminating NAFTA and restoring tariffs to all trade transactions would simply hurt the already beleaguered American economy.

The best course of action for the Administration is to lead the negotiation and garner as much favorable terms to the United States as possible. The United States still has the leverage because Canada and Mexico understand that their economies would be hit harder should the treaty end because of their greater

²⁶ Daniel Dale, *NAFTA has 'Fundamentally Failed Americans, Says Trump's Top Trade Official*, METRO NEWS (Aug. 16, 2017), <http://www.metronews.ca/news/canada/2017/08/16/nafta-fundamentally-failed-americans-trump-trade-official.html>.

²⁷ Jeffry Bartash, *Trump Calls U.S.-Mexico Trade One-Sided—And Here's The Reality*, MARKET WATCH (Jan. 27, 2017), <https://www.marketwatch.com/story/trump-calls-us-mexico-trade-one-sided-heres-the-reality-2017-01-26>.

²⁸ Danielle Kurtzleben, *Rural Voters Played a Big Part in Helping Trump Defeat Clinton*, NPR (Nov. 14, 2016), <https://www.npr.org/2016/11/14/501737150/>.

²⁹ Ted Genoways, *Farmers Voted Heavily for Trump. But His Trade Policies Are Terrible For Them*, WASH. POST (Oct. 24, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/10/24/farmers-voted-heavily-for-trump-but-his-trade-policies-are-terrible-for-them/?utm_term=.2d06ca0fac3f.

³⁰ Joseph Parilla, *How US States Rely On The NAFTA Supply Chain*, BROOKINGS.EDU (Mar. 30, 2017), <https://www.brookings.edu/blog/the-avenue/2017/03/30/how-u-s-states-rely-on-the-nafta-supply-chain>.

dependency on the trade with the U.S. market.³¹ Reflecting worries felt in both Canadian and Mexican markets, in early January of 2018, when it was reported that President Trump was looking to end the negotiation, Canadian and Mexican Currencies plummeted almost immediately.³² The Trump Administration must stop relying on the brash rhetoric and empty-handed, hostile threats, and start an honest and sincere discussion to reach a superior deal, more favorable to the United States than the current provisions allow.

The Administration is facing immense pressure to win over NAFTA both to prove its capability in handling economic policy, and establish that their slogan of “American First” is nothing but empty words and braggadocio. Diane Swonk, chief economist at Grand Thornton noted that the three countries are “dangerously close to allowing an ill-informed group to lose all that NAFTA has delivered in terms of competitiveness of North American companies.”³³ President Trump will need to make careful calculation and estimation on what could be achieved or lost from the outcome of the negotiations. Much more importantly, Trump administration should start addressing the truth about the U.S. market’s inability to rebound, rather than blaming NAFTA for job losses and bad economy.

V. CONCLUSION

Even if President Trump eventually moves for withdrawal, he must deal with not only legal challenges but also enormous domestic economic consequences. President Trump should make use of various political and economic tactics to continue to have leverage in bargaining and achieving real

³¹ Jacob M. Schlesinger, Commerce Secretary Ross: U.S. Has Leverage to Pressure Mexico, Canada in NAFTA Talks, WALL ST. J. (Nov. 14, 2017, 3:33 PM), <https://www.wsj.com/articles/commerce-secretary-ross-u-s-has-leverage-to-pressure-mexico-canada-in-nafta-talks-1510691610>.

³² David Ljunggren, *Exclusive: Canada Increasingly Convinced Trump Will Pull Out Of NAFTA*, REUTERS (Jan. 10, 2018, 1:16 PM), <https://www.reuters.com/article/us-trade-nafta-canada-exclusive/exclusive-canada-increasingly-convinced-trump-will-pull-out-of-nafta-idUSKBN1EZ2K4>.

³³ Anu Bararia, *NAFTA Talks Seen Ending Happily, Despite Growls From Trump*, REUTERS (Jan. 19, 2018, 7:25 AM), <https://www.reuters.com/article/us-trade-nafta-poll/nafta-talks-seen-ending-happily-despite-growls-from-trump-idUSKBN1F81H3>.

results. The outcome could easily reshape the economy of the United States, which has grown increasingly dependent on trade with Canada and Mexico. Already burdened with innumerable legal battles to defend itself in just one year of presidency, the Trump Administration would not want to risk facing another disaster, which as may well have both legal and economic repercussions. Yet, if there is anything President Trump has proved of himself, it is that he is unpredictable. How the fate of NAFTA is decided will surely be an interesting journey to follow, as discussions continue in 2018.