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A New Deal for the North American Economy in the Twenty-first Century

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Addressing limitations in the ways nations tackle shared economic challenges, the Global Economy Program at CIGI strives to inform and guide policy debates through world-leading research and sustained stakeholder engagement.

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Acronyms and Abbreviations

AoA	Agreement on Agriculture
APEC	Asia-Pacific Economic Cooperation
ARRA	American Recovery and Reinvestment Act
BSE	bovine spongiform encephalopathy
CETA	Comprehensive Economic and Trade Agreement
CIDA	Canadian International Development Agency
CUSFTA	Canada-United States Free Trade Agreement
DFAIT	Department of Foreign Affairs and International Trade
FTAs	free trade agreements
GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Government Procurement
GVCs	global value chains
ICSID	International Centre for Settlement of Investment Disputes
IIAs	international investment agreements
ISDS	investor-state dispute settlement
MFN	most-favoured nation
MRAs	mutual recognition agreements
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
NAO	national administrative office
OIE	World Organisation for Animal Health
SPP	Security and Prosperity Partnership
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade Agreement
TN	Trade National
TPP	Trans-Pacific Partnership Agreement
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
WLN	Women Leaders' Network
WTO	World Trade Organization

Executive Summary

Whether Canada, Mexico and the United States will succeed in renegotiating the North American Free Trade Agreement (NAFTA) remains to be seen. What is sure, however, is that NAFTA is now more than 20 years old and, as a result, it would benefit from being modernized to reflect North America's twenty-first-century economic reality of "making things together." Relying in several instances on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, and the now-suspended Trans-Pacific Partnership (TPP) Agreement, this paper proposes changes and additions that should be part of an updated NAFTA. The focus is on the NAFTA elements that have been subject to criticism since the agreement's entry into force. It offers a fairly detailed road map to the agreement's modernization. This paper does not, however, provide a chapter-by-chapter, article-by-article review of NAFTA. Regardless of the rhetoric coming from the Trump administration, it is the authors' view that Canada's position should be to approach any NAFTA renegotiation from a "best case" perspective in view of making trade and investment in North America easier for business. Only in this way is Canada likely to get the best deal possible for its own economy, as well as for the American and Mexican economies.

Introduction

During the months leading up to the 2016 election in the United States, presidential candidate (now US President) Donald Trump repeatedly attacked the TPP[1] and NAFTA. He vowed to abandon the former and renegotiate the latter. These positions were confirmed once Trump was elected. On January 24, 2017, only four days after his inauguration, President Trump signed an executive order indicating that the United States was formally pulling out of the

1 The TPP's member countries are: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. The agreement was signed by all 12 members on February 4, 2016, in Auckland, New Zealand, but has yet to be ratified. In order for the TPP to come into force, both Japan and the United States must ratify it. The agreement's text can be found at: http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng.

TPP. When he met with Canadian Prime Minister Justin Trudeau on February 13, 2017, President Trump indicated that he would "tweak" NAFTA with respect to Canada but that more significant changes would have to be made with Mexico, which he cited as the source of the problems.

Without the TPP, the deepening of North America's economic integration squarely rests on renegotiating NAFTA in order to modernize it. This is because the TPP has generally been considered to be the vehicle through which NAFTA would be augmented and updated, since Canada, Mexico and the United States were TPP members (Leblond 2016a, 79-80). Although NAFTA was considered, at the time it was concluded, to be at the leading edge of free trade agreements (FTAs), it is now more than 20 years old. The North American and world economies have changed significantly since then. For instance, the Internet as we know it today — with the ability to buy and sell goods and services online in an instant — was still just a dream back in the early 1990s. China and other emerging economies were only beginning their economic ascent and integration into the world economy. The concept of global value chains (GVCs) was, for many of us, still unknown. Hence, NAFTA could benefit from an upgrade to be better suited for the North American economy in the twenty-first century.

CETA[2] (between Canada and the European Union) and the TPP (even if currently in limbo) offer good templates and ideas to upgrade NAFTA. In this paper, the focus is on the NAFTA elements that have been subject to criticism since the agreement's entry into force. It also offers a fairly detailed road map to the agreement's modernization. The paper does not, however, provide a chapter-by-chapter, article-by-article review of NAFTA.

It should also be clear that this paper is not meant to offer Canada a negotiation strategy for NAFTA's revision in order to satisfy the Trump administration's demands, whatever they may be. Canada's position should be to approach any NAFTA renegotiation from a "best case" perspective in view of making trade and investment in North America easier for business. If Trump's goal is ultimately to modify NAFTA in a way that limits trade between Canada and the United States, then there should be no negotiation; Canada would be better to refuse to negotiate and keep the current agreement as is.[3] If, however, the Trump administration is willing to renegotiate NAFTA in good faith, then this paper represents the best starting point for such negotiations.[4] Nevertheless, whenever possible — that is, where the Trump administration's positions or preferences have been made clear (and consistent) — the paper pinpoints modernization elements that could prove problematic for the United States.

Modernizing NAFTA: Existing Elements

The first part of this analysis examines existing elements of NAFTA that have been criticized over the years and that, as a result, would benefit from being modernized by borrowing from CETA or the TPP. The second part of the analysis considers new elements that should be included in a modernized NAFTA, such as electronic commerce.

Chapter 4: Rules of Origin

Rules of origin are used to determine which goods can circulate tariff-free within a free trade area, compared to the most-favoured nation (MFN) tariff rates set in the World Trade Organization (WTO). In NAFTA's case, goods must in general have 50 or 60 percent (depending on the method of

2 The agreement's text can be found at: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

3 In such a case, Trump has threatened to pull the United States out of NAFTA. Whether he can do so on his own (by executive order), or he requires congressional approval, is a matter of debate (Clinton et al. 2016; Ku and Yoo 2016; Trachtman 2016). Obviously, in the latter case, the threat of terminating America's participation in NAFTA is much less credible than in the former case.

4 Following the meeting between Prime Minister Trudeau and President Trump, there is a strong possibility that the United States will negotiate with Canada and Mexico on a bilateral basis, as opposed to a trilateral one. What such separate, bilateral negotiations would mean for NAFTA is unclear. One scenario is for NAFTA to disappear and be replaced by two bilateral FTAs (Canada-US and Mexico-US), which is what the Trump administration has been hinting at. In such a case, Canada and Mexico would have to negotiate a new FTA between them. Another scenario calls for NAFTA to remain but incorporate differences between Canada and Mexico in their relations with the United States. In such a scenario, NAFTA would probably end up having even more bilateral elements than before, since parts of the agreement were originally negotiated bilaterally (e.g., agriculture). In either case, this paper provides the basis for Canada's stance in its negotiation with the United States.

calculation)[5] of their value originate from within North America in order to cross the border free of members' external tariffs,[6] tariffs that goods originating from outside the NAFTA region have to pay. This is because NAFTA member states retain their own external tariffs.[7] The reason for rules of origin is to prevent a business outside a free trade area from exporting its good to the country with the lowest external tariff in order to then re-export (or transship) it duty-free to another country within the free trade zone, a process known as trade deflection. These rules also serve to ensure that the products that benefit from the preferential tariff (most often zero) have a minimum level of content coming from within the free trade area. In other words, they act as regional content requirements.

The problem with rules of origin in general is that it is costly for firms and government to comply with them and administer such a process. For instance, Brian Staples and Laura Dawson (2014, 6) indicate that the paperwork can represent more than 100 pages for a single product. Government officials have to review and sometimes audit this paperwork. It all adds up to a very costly process. This is why in some cases businesses decide that it is cheaper and less cumbersome to pay the MFN tariff than to comply with rules-of-origin regulations, thereby rendering pointless an FTA's preferential market access for its members. In NAFTA's case, Robert Kunimoto and Gary Sawchuk (2006, 280) noted that "small shipments and exporters with limited knowledge of NAFTA and small-sized firms are likely to pay MFN duties rather than incur the additional expense of meeting NAFTA requirements." Kunimoto and Sawchuk also found that NAFTA rules of origin were used in 50 percent of Canada-US bilateral trade (ibid., 306).

The proliferation of bilateral and regional FTAs around the world in the last 30 years has only increased the costs associated with rules of origin. It has become increasingly difficult for businesses to administer effectively and efficiently the differing rules of origin that their products are subject to if they wish to take advantage of preferential tariffs offered by FTAs (Abreu 2013; Augier, Gasiorek and Lai-Tong 2005; Staples and Dawson 2014). Ultimately, differing and overlapping rules of origin act as obstacles to an efficient world trading system. Patricia Augier, Michael Gasiorek and Charles Lai-Tong (2005, 576) identify two channels through which rules of origin act as trade barriers: "they impose administrative costs on exporters" and "they may induce firms to switch suppliers in order to meet the rules of origin." In the first channel, the transaction costs imposed by rules of origin act to limit trade opportunities. In the second case, rules of origin divert trade from its most efficient route, thereby representing a form of protectionism against goods originating from outside the free trade zone.

In NAFTA's context, several solutions have been proposed in order to reduce the costly burden imposed by the agreement's rules of origin. The economically (although not politically) simplest solution would be for the three NAFTA member states to move to a customs union with common (i.e., harmonized) external tariffs for North America (Georges 2008; Hufbauer and Schott 2005, 474). This solution would eliminate the need for rules of origin within NAFTA.

A less radical solution would be to reduce the regional (i.e., NAFTA) value content threshold from their current levels (Kunimoto and Sawchuk 2006, 307). This would allow North American firms to source their inputs from a wider array of suppliers. A good example of this approach are the TPP's rules of origin for the automotive sector, which provide for lower value thresholds than do NAFTA's rules (Moroz 2016, 13): 45 percent for motor vehicles and most engines and parts, rather than 62.5 percent (under the net cost method). For small engines and other auto parts, the TPP thresholds are even lower. Given Trump's oft-repeated desire to bring back jobs on American soil, it appears unlikely for the time being that the United States would accept lowered content thresholds. On the contrary, American negotiators might even seek to increase existing thresholds. For instance, smaller automotive parts manufacturers in North America have opposed the lower TPP value thresholds on the grounds that it would increase competition from Asian manufacturers (Moroz 2016).

An easily implemented and maybe more politically acceptable solution could be to waive the application of NAFTA's rules of origin if the difference between MFN tariffs applied by

5 For passenger cars and light trucks, including their engines and transmissions, the threshold is 62.5 percent (under the net cost method).

6 For an explanation of NAFTA's rules of origin, see Kunimoto and Sawchuk (2006, 276–79).

7 In a customs union, members share common external tariffs. In such a case, rules of origin are unnecessary.

NAFTA countries for a particular product is less than, for example, five percent (Abreu 2013).[8]

Finally, a revised NAFTA should adopt the principle of cross-cumulation. Staples and Dawson (2014, 13) define cumulation as "the principle that materials considered to be originating in one country within a free trade trade bloc should be considered to be originating by other countries in the same bloc." Cross-cumulation (or extended cumulation) applies in the case of overlapping FTAs. Staples and Dawson (2014, 13) give the example of Colombian shirts made with Peruvian cotton yarn. Without cross-cumulation, such shirts could not enter Canada duty-free under the Canada-Colombia Free Trade Agreement because the yarn does not originate from Colombia (i.e., there is not enough Colombian content). However, the same yarn could be exported duty-free to Canada under the Canada-Peru Free Trade Agreement. With cross-cumulation provisions in Canada's FTAs with Colombia and Peru, shirts made in Colombia with Peruvian yarn could be exported duty-free to Canada. Given that Canada and the United States have many overlapping free trade arrangements, a cross-cumulation provision within NAFTA would help reduce the trade diversion effects of rules of origin. Staples and Dawson (ibid.) note that Canada is "an international leader in promoting cumulation among common trading partners," but not the United States. The European Union is also favourable to cross-cumulation, which is why CETA contains provisions to that effect. Whether the Trump administration would support cross-cumulation remains to be seen, even if such an approach helps address today's cross-border trade realities in a world of overlapping bilateral or regional trade agreements.

Chapter 7: Agriculture and Sanitary and Phytosanitary Measures

Between World War II and the advent of the WTO, agriculture was virtually exempt from the market-opening philosophy of the General Agreement on Tariffs and Trade (GATT) (Skogstad 2008, 28). However, since the signing of NAFTA in 1993 and the inception of the WTO in 1994, agriculture has come to be governed by several agreements: NAFTA's agreements on agriculture; the WTO Agreement on Agriculture (AoA); the Sanitary and Phytosanitary Measures (SPS) Agreement; the Technical Barriers to Trade (TBT) Agreement; and the Trade-Related Aspects of Intellectual Property Rights (TRIPS). For its part, NAFTA eliminated tariff and non-tariff barriers on agricultural products save for the dairy, poultry, egg, and sugar sectors.[9] It also included chapters on SPS and TBTs (Skogstad 2008, 63). In addition, as Grace Skogstad (ibid., 28) notes, the trade architecture governing agriculture also includes the NAFTA and WTO dispute-settlement mechanisms, and the international organizations "authorized by the WTO to recommend health and safety standards with respect to food, plants, and animals." Yet even with the above agreements, Canada's statist, supply-management instruments for the agricultural sector remain largely intact. As Skogstad (ibid., 63) explains,

> The United States was unwilling to discuss any major dismantling of non-tariff barriers in agriculture in the FTA/NAFTA, since its primary liberalizing target was the European Community. Sensitive issues such as export subsidies (for the US particularly) and supply management (for both countries) were reserved for the Uruguay Round GATT negotiations. The result was a limited agreement on agriculture that, aside from tariff reduction, did not require any immediate changes to each country's most important agricultural programs.

In the event, Europe's reticence to open its agricultural sector fully to market forces meant that NAFTA and the WTO did not do so either. Therefore, agri-food markets are not fully open. Indeed, despite Timothy Josling's argument that the AoAs signal a loss of faith in the statist model of agricultural governance (Josling 2008, cited in Skogstad 2008, 29), the goal of NAFTA and the WTO always was to create a rules-based agri-food trading system, not merely one that is liberal.

Even so, of the six agreements above, NAFTA's AoA is the oldest, suggesting it is likely to be somewhat outdated. For example, as Maxwell Cameron and Brian Tomlin (2002, 38) note, given that the agricultural agreements in NAFTA

8 Gary Clyde Hufbauer and Jeffrey Schott (2005, 745) propose a similar approach: "rules of origin no longer apply after all three NAFTA members get to a stage where 90 percent of their MFN eight-digit Harmonized Tariff System (HTS) rates in any two-digit HTS group fall within plus or minus one percentage point of the average for the three countries."

9 In Canada, the supply of dairy, poultry and egg products is managed jointly by the industry and the government, behind high tariff walls.

were bilateral (between Canada and Mexico and between the United States and Mexico), it would be very surprising if this did not in itself present possibilities for harmonization across the three NAFTA parties, especially given the two decades of multilateral governance instruments that have come to affect agriculture since 1993 (for example, SPS, TBT, TRIPS). Equally, NAFTA envisioned that agricultural tariffs between Mexico and Canada, and between Mexico and the United States, would be eliminated over 10 to 15 years, and that certain products were to be open to temporary "snapback" tariffs[10] of 10 years or less, while quantitative restrictions were to be tariffied (ibid.). These areas can be revisited to assess whether all tariffs have in fact been eliminated, whether tarification has taken place as intended, and whether new (or renewed) "snapback" tariffs are called for.

Finally, as Stephen Clarkson (2008) argues, NAFTA has created significant complexities —and, in some cases, problems — of governance. This is particularly so with respect to the balance between transnational processing interests and domestic producers. As Clarkson (ibid., 207) states, "NAFTA's constraints on national governments allowed TNCs [transnational corporations] active on the domestic political scene to offset the traditional influence of farmers' lobbies. The overall result has been to weaken government support for domestic producers to the benefit of transnational agri-processors."

The conclusion of Skogstad's extensive study on the internationalization of Canadian agriculture differs slightly. She states that "internationalization in the form of regional market integration appeared to be narrowing the scope for domestic policy choice, including marketing institutions, when these differed from important trading partners, while internationalization in the form of international regulatory governance appeared to be maintaining it" (Skogstad 2008, 259). However, she also notes that "the international arena has become a crucial site for political mobilization and contestation around agriculture and food issues" and "the international trade regime must heed such voices if it is to be legitimate and effective" (ibid.). A NAFTA renegotiation would be an opportunity to address whether the above shifts in balance need to be offset by renewed support for domestic producers (as the Trump administration seems to suggest, and not only in agriculture), or whether the post-NAFTA balance has in fact served the interests of the NAFTA parties better than the balance that preceded NAFTA.

Clarkson (2008, 212-13) also makes the important argument that the bovine spongiform encephalopathy (BSE, or "mad cow") crisis of 2003–2005 revealed three characteristics of integrated agricultural sectors after NAFTA. The first was that "geographically concentrated US producers continue to exploit their protectionist mechanisms to prolong trade disruptions that favour their interests." The second was that "the abundant avenues for litigation provided by the US judicial system can be manipulated to the temporary advantage of trade-vulnerable producers." The third was that the mad cow episode showed NAFTA to be irrelevant to the North American beef industry's governance. The United States alternated between unilateral and imperial positions, while Canada was peripheralized and sought remedies through the World Organisation for Animal Health (OIE) in Paris and the WTO in Geneva (ibid., 213). This suggests that agricultural governance under NAFTA could be opened for revision with a view to greater robustness of governance structures, increased recognition of the continued existence of protectionist mechanisms in US agricultural states that harm Canadian interests, and greater protection of Canadian agricultural interests from the manipulation of litigation under the US judicial system.

In addition, the effects of NAFTA permeate every aspect of the supply chains in North American agricultural and agri-food production, and in many cases are an essential precondition for the existence of that production. It follows that Canada's agricultural and agri-food production sectors are among the most vulnerable, should a revision of NAFTA lead to a thickening of the Canada-US border. The size of the trade flows, and their increase since the advent of NAFTA, give an idea of the potential consequences of NAFTA revision. Between 1990 and 2011, American agricultural exports to Canada rose from US$4.2 billion to US$19 billion, and Canadian agricultural exports to the United States have risen 92 percent since 1994 (Murray 2016).

10 "'Snap-back' is a mechanism that allows the United States or Canada to apply a temporary duty on certain fresh fruits and vegetables originating in the other country and imported into its territory when import prices fall below a certain percentage of the average monthly import price, and planted acreage of the agricultural product is within certain limits" (Kelly 1998, 35).

Similarly, Canadian imports of Mexican fruits and vegetables have grown at about nine percent per annum since 1994, and Canadian imports of Mexican beer have grown at about 11 percent per annum during the same period (ibid.). Perhaps most remarkably, Canadian beef exports to Mexico have grown at about 40 percent per annum since NAFTA came into effect, including from CDN$4 million annually in 1997 to CDN$200 million annually at present. Finally, according to Agriculture and Agri-Food Canada, and the US Census Bureau, the eight Great Lake states in total imported US$8.9 billion in agricultural products from Canada in 2015, and exported US$8.4 billion, creating 2,461,500 jobs in the eight states (Cheney et al. 2017, 17). Clearly, there is a great deal to be lost in the agricultural and agri-food sectors if NAFTA revision thickens either the Canada-US border or the US-Mexico border.

Since NAFTA's entry into force, North American supply chains are complex and therefore somewhat fragile. Those in the agriculture and agri-food sectors would certainly be prone to disruption by protectionist NAFTA revisions. For example, the pork supply chain operates in the following manner, as Erin Cheney et al. (ibid., 20) describe: "feeder pigs are raised on Canadian farms; they are finished on American farms on lower-cost soybean and corn meal; they are slaughtered, processed and packaged in American facilities; and sold in Canada, the United States, and Mexico." They continue at a more granular level:

> [Maple Leaf Foods] exports all live sows and boars (breeding animals) into the US for further processing. These sows and boars are received at a number of processing facilities in the northern US including Minnesota. The shortage of federal slaughter facilities in Canada means this trade of live sows and boars returns value to Canadian hog farmers who might otherwise just send hogs to rendering, and at the same time creates a lower-cost ingredient for the US brand Johnsonville Sausage....These products are made in the US with low-cost sow meat, some of it coming from Canadian sows. Trade restrictions would impact the flow of goods in both directions and impose considerable price increases for both the processor (Johnsonville Sausage) and the end-consumer. In 2015, Canada imported CAD 263m worth of pork sausages from the United States. (Ibid., 21)

It should be added that Maple Leaf Foods and other similar companies maintain operations on both sides of the Canada-US border (ibid., 22). Also, most agricultural commodities move freely across the Canada-US border. Again, agricultural and agri-food supply chains under NAFTA are fragile in part because they are used to operating largely without customs-related hindrance or delay. Any increase in protectionist policies would necessarily cause disruption, raise production costs and increase end-consumer prices.

Two final points must be made in relation to agricultural and agri-food supply chains under NAFTA. First, in 2015, Peter Dixon and Maureen Rimmer conducted an important study on the effects of the extreme case of a complete cessation of trade between Canada and the United States. They found that of 87 agriculture and agri-food commodities studied, fully 64 would contract, again showing their vulnerability to protectionist revisions to NAFTA (Dixon and Rimmer 2014, 1, cited in Cheney et al. 2017, 20).

The second point is that integrated North American supply chains in agricultural and agri-food products (as in other sectors) mean that the Canadian government's position at the time of the NAFTA negotiations — that a return to the Canada-United States Free Trade Agreement (CUSFTA) is a perfectly acceptable BATNA ("best alternative to negotiated agreement") — is no longer a viable option. Canada can no longer simply return to the status quo ante. Rather, interruptions of trade between Mexico and the United States in the agricultural and agri-food sector will negatively affect the Canadian economy, even if such interruptions are the result of Mexican retaliation to US immigration policies, for example. For this reason, it is in Canada's interest to try to maintain or extend the NAFTA regime, not only between Canada and the United States, but between Mexico and the United States as well.

Chapter 10: Government Procurement

NAFTA's Chapter 10 on government procurement is limited to federal government agencies and enterprises in the three member states. State and provincial government agencies and enterprises were excluded; however, it was planned that the three countries would begin negotiating their inclusion no later than December 31, 1998 (see article 1024). Nothing came of these negotiations.

The purpose of NAFTA's Chapter 10 is to prevent (federal) government agencies and enterprises from discriminating against firms bidding on procurement contracts from the other NAFTA member states. These national treatment and non-discrimination provisions apply only to contracts that are above certain thresholds.[11] This means, for instance, that above the thresholds, US federal government entities cannot apply "Buy American" provisions to Canadian (and Mexican) firms bidding on procurement tenders.

NAFTA's Chapter 10 did not, however, prevent US state and local government entities from applying the Buy American provision found in the American Recovery and Reinvestment Act of 2009 (ARRA) to Canadian products (Faiola and Montgomery 2009).[12] According to Carl Ek et al. (2006, 22), "regulations implementing the ARRA excluded Canadian firms from bidding on ARRA-financed contracts that are tendered by the U.S. states," because Canadian provinces had not signed on to the WTO's plurilateral Agreement on Government Procurement (GPA), unlike 37 US states.

Although the Canadian government might have been able to win a state-to-state arbitration proceeding against the US government in this case, using NAFTA's Chapter 20 rules (Hufbauer and Schott 2009, 7), it decided that such proceedings would take too long, and by the time of resolution the ARRA funds would have been disbursed and Canadian firms would have gained nothing. Instead, it negotiated a formal agreement with the US federal government whereby Canadian provinces and territories (except for Nunavut) agreed to allow US firms to bid on provincial or municipal procurement contracts. Under this agreement,[13] signed on February 12, 2010, provincial and territorial governments agreed to be included in the list of Canadian government entities that are subject to the GPA.[14] In exchange, the US government provided "reciprocal access for Canadian companies to 37 states already covered by the GPA and a limited number of Recovery Act programs" (Office of the United States Trade Representative 2010).

In revising NAFTA, it would make sense, at a minimum, to incorporate this agreement in Chapter 10 in order to include Canadian provinces and territories within the chapter's scope. However, it would be even better for NAFTA's government procurement chapter to reflect Canadian and US commitments under the revised GPA, which goes beyond the above-mentioned agreement in terms of thresholds and obligations and is reflected in the TPP's Chapter 15 on public procurement.

Chapter 11: Investment Protection

One of NAFTA's innovations was the inclusion, in Chapter 11 on investment, of a mechanism for settling disputes between investors and government (Hufbauer and Schott 2005, 201). Until then, investor-state dispute settlement (ISDS) mechanisms were found in bilateral investment treaties negotiated between developed and developing countries, in order to protect investing firms from developing countries' uncertain application of the rule of law (Soloway 2003, 3). As such, developed countries did not need to negotiate bilateral investment agreements with each other. This explains why there was no ISDS mechanism in the CUSFTA.

In NAFTA's case, Canada and the United States were concerned with the degree of legal protection that their investors would have in Mexico: "Mexico had long been a champion of the Calvo doctrine, which called for strict regulation of foreign investment and required disputes to be adjudicated only in local courts" (Hufbauer and Schott 2005, 201). By accepting the rights and obligations conferred

11 According to article 1001.1(c), the original thresholds are: for federal government entities, US$50,000 for contracts for goods, services or any combination thereof, and US$6.5 million for contracts for construction services; for government enterprises, US$250,000 for contracts for goods, services or any combination thereof, and US$8.0 million for contracts for construction services. The value of these thresholds has increased over time with US inflation rates.

12 ARRA's Buy American provision "states that no funds shall be appropriated for building projects or public works projects unless all the iron, steel, and manufactured goods are made in the United States" (Ek et al. 2006, 21).

13 The text of the agreement can be found at: www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/other-autre/us-eu.aspx?lang=eng.

14 A revised GPA, which sought to extend access to its members' government procurement markets, entered into force in April 2014 (www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm). It reflects the inclusion of Canadian provinces and territories in the list of government entities listed by Canada.

by NAFTA's Chapter 11,[15] Mexico wanted to send a strong signal to investors that it was now committed to a new and open international investment regime (ibid., 202). The hope was that this regime would help attract foreign direct investment from Canada, the United States and beyond.

Chapter 11's section B allows a private investor the opportunity to obtain monetary compensation from a member state through an ad hoc arbitration tribunal[16] if the investor thinks the state has breached one of its substantive obligations under that chapter. As mentioned above, Chapter 11's ISDS mechanism was inserted into the NAFTA text in order to protect Canadian and American firms investing in Mexico. In reality, however, the majority of such disputes have been targeted at Canadian and American governments (Herman 2010, 3). Furthermore, NAFTA's Chapter 11 provisions on expropriation and minimum standard treatment have been used to challenge governments' regulatory measures, which was not the negotiators' original intention, although this is part of a wider trend globally (Herman 2010). For example, in the Ethyl case, Ethyl Corporation launched a dispute against the Canadian federal government because it had imposed a ban on the international trade of the fuel additive MMT (methylcyclopentadienyl manganese tricarbonyl). The government settled the case for CDN$19 million and revoked the ban. According to Soloway (2003, 5), "the case became a lightning rod for widespread opposition to Chapter 11, sowing the seeds for controversy in later cases."

Criticism of NAFTA's Chapter 11 and ISDS mechanisms more broadly has focused on the fact that private investors could now challenge governments' ability to regulate public matters related to such issues as health, welfare and the environment (ibid.). Ad hoc arbitration tribunals were interpreting Chapter 11's provisions too broadly, possibly because of some inherent bias, on the arbitrators' part, in favour of private investors.[17] The state's sovereignty to decide its own public policies for the benefit of its population was considered at risk.[18] The fear was that such broad ISDS interpretations would lead to "regulatory chill," whereby NAFTA member state governments would limit their environmental, health and safety regulations for fear of a NAFTA challenge (ibid.). Another related criticism of NAFTA's Chapter 11 is that its ISDS mechanism does not allow for the public's participation in the arbitration process, which is especially worrisome given that such disputes can involve public policy matters that are in the public's interest. At a minimum, the process should be transparent to the public. In addition, it should "provide for adequate participation in the arbitral process, for example, through the submission of briefs or other relevant information to the panel as a 'friend of the court' (*amicus curiae*)" (ibid., 6).[19]

In July 2001, the NAFTA parties tried to remedy some of these concerns by issuing notes of interpretation that would clarify and provide guidance for the interpretation of Chapter 11's

15 Julie Soloway (2003, 3) describes NAFTA member states' Chapter 11 obligations as follows: "(i) national treatment (the obligation to treat investments or investors from a NAFTA country no less favourably than domestic investments or investors in like circumstances) (Article 1102); (ii) most-favoured nation treatment (the obligation to treat investments or investors no less favourably than investments or investors from any other country) (Article 1103); (iii) minimum standard of treatment (the obligation to treat investments or investors in accordance with international law, including fair and equitable treatment) (Article 1105); (iv) compensation for expropriation (the obligation not to expropriate, either directly or indirectly, or to take a measure tantamount to expropriation of an investment, without compensation) (Article 1110); and (v) performance requirements (subject to certain exceptions, the obligation not to impose performance requirements, such as a given percentage of domestic content, in connection with any investment) (Article 1106)."

16 Ad hoc tribunals can be set up according to the arbitration rules of the International Centre for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL).

17 The claim is that many ISDS arbitrators are corporate lawyers who work for law firms that cater to the business community's legal needs.

18 Stepan Wood and Stephen Clarkson (2009) deemed NAFTA's Chapter 11 to be a "supraconstitution" that was superseding national constitutions.

19 For some, it is not enough to remedy the ISDS problems identified here: foreign private investors should have no special rights conferred to them through NAFTA's Chapter 11, and their recourse should be limited to the national judicial system. However, it is not at all clear that national courts offer the same degree of protection to foreign investors as Chapter 11 does. For instance, Armand de Mestral and Robin Morgan (2016) demonstrate that very few of the claims brought against Canada under Chapter 11 could have been made through the Canadian legal system. Alan S. Alexandroff (2006, 196) argues that, although justified, the critiques levelled at NAFTA's Chapter 11 have been exaggerated in terms of their extent: "Fears of the sort expressed over Chapter 11 NAFTA should not be dismissed out of hand. Still, the critique on investor protection does appear to be highly speculative and work exaggerated in the face of the actual course of investment protection cases. Many of the concerns expressed by civil society groups, or their counsel, as well as legal experts, have failed to materialize. The process and substantive protections have been treated generally with a restrained touch by tribunals. Most claimants' successful actions have been grounded on identifiable capricious and arbitrary behaviour by government officials."

provisions by ad hoc arbitration tribunals.[20] With respect to transparency, the notes stipulate that "nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration [and] nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal." In October 2003, the NAFTA Free Trade Commission, composed of trade ministers, announced additional transparency measures for Chapter 11 arbitration (Office of the United States Trade Representative 2003).[21] One such measure was *amicus curiae* briefs: "an affirmation of the authority of investor-state tribunals to accept written submissions (amicus curiae briefs) by non-disputing parties, coupled with recommended procedures for tribunals on the handling of such submissions." According to Armand de Mestral and Lukas Vanhonnaeker (2016, 4), ICSID arbitration rules were modified in 2006 to "allow and even encourage the publication of more information about investor-state disputes." UNCITRAL arbitration rules were similarly modified in April 2014.

At a minimum, any renegotiation in view of modernizing NAFTA should incorporate the above interpretations from the NAFTA Free Trade Commission into the text of a revised agreement. This would lock in greater transparency and public participation in Chapter 11's ISDS process, and would officially address some of the criticisms that have been targeted at NAFTA's Chapter 11.

In order to truly modernize NAFTA's Chapter 11, however, it would be best to turn to CETA, which goes much further than any investor protection agreement — whether in an FTA or in a bilateral investment treaty — in addressing the concerns raised about ISDS in general and NAFTA's Chapter 11 in particular.[22] According to de Mestral and Vanhonnaeker (2016, 5), CETA "explicitly incorporates the UNCITRAL Transparency Rules in its article 8.36(1)." Similarly, they indicate that CETA's Chapter 29 provides for the possibility of *amicus curiae* briefs in the case of an arbitration tribunal (ibid.).[23] In fact, CETA's Chapter 8 on investment seems to recognize *amicus curiae* briefs through article 8.38(2): "The Tribunal shall accept or, after consultation with the disputing parties, may invite, oral or written submissions from the non-disputing Party regarding the interpretation of this Agreement. The non-disputing Party may attend a hearing held under this Section." Article 8.38(4) further stipulates that "[t]he Tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on a submission by the non-disputing Party to this Agreement." Finally, in line with the NAFTA Free Trade Commission's Notes of Interpretation on Chapter 11 transparency, CETA's Chapter 8 allows for information sharing: "A disputing party may disclose to other persons in connection with the proceedings, including witnesses and experts, such unredacted documents as it considers necessary in the course of proceedings under this Section. However, the disputing party shall ensure that those persons protect the confidential or protected information contained in those documents."[24] It goes even further in making it mandatory for a "respondent" in a dispute to share information with third parties:

> The respondent shall, within 30 days after receipt or promptly after any dispute concerning confidential or protected information has been resolved, deliver to the non-disputing Party: (a) a request for consultations, a notice requesting a determination of the respondent, a notice of determination of the respondent, a claim submitted pursuant to Article 8.23, a request for consolidation, and any other documents that are appended to such documents; (b) on request: pleadings, memorials, briefs, requests and other submissions made to the Tribunal by a disputing party; written submissions made to the Tribunal pursuant to Article 4 of the UNCITRAL Transparency Rules; minutes or transcripts of hearings of the Tribunal, if available; and orders, awards and decisions of the Tribunal; and (c) on

20 NAFTA Free Trade Commission, North American Free Trade Agreement – Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng.

21 The Government of Canada's website provides details on third-party interventions in NAFTA Chapter 11 disputes: www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta-transparency-alena-transparence.aspx?lang=eng.

22 The TPP's investment provisions under Chapter 9 follow traditional Canadian and American practices, and its ISDS architecture follows that of NAFTA's Chapter 11 but includes the NAFTA Free Trade Commission's interpretations (Alschner and Skougarevskiy 2015).

23 See CETA annex 29-A, paragraphs 43–46.

24 CETA article 8.37(1).

> request and at the cost of the non-disputing Party, all or part of the evidence that has been tendered to the Tribunal, unless the requested evidence is publicly available.[25]

CETA also innovates when it comes to the arbitration tribunal. Instead of ad hoc tribunals set up each time there is a dispute, CETA will have a permanent investment tribunal to settle investor-state disputes (see article 8.27). This tribunal will consist of 15 members appointed by the CETA Joint Committee:[26] five members will be EU nationals, five members will be Canadian nationals and five will come from third countries. The tribunal will have its own code of conduct and working procedures. According to de Mestral and Vanhonnaeker (2016, 6), "tribunal members are required to be fully independent and may not serve as counsel in other [investor-state arbitrations]."[27] In return for their commitment, they will receive a monthly retainer fee (see article 8.27(12)). As in a traditional arbitration tribunal, there will be three tribunal members; however, the president of the tribunal will appoint them, not the parties to the dispute, as is the case in traditional ad hoc arbitration cases. As a result, "this new procedure thus responds to the frequently heard criticism that arbitrators cannot be perceived as fully independent of private interests and that they are not certain to be conscious of the public interests involved in investor-state claims" (de Mestral and Vanhonnaeker 2016, 6).[28]

Another important ISDS innovation contained in CETA is the creation of an appelate tribunal to consider appeals to the decisions by CETA's arbitration tribunal (see article 8.28). According to de Mestral and Vanhonnaeker (ibid., 9), "The principle of an appeal, which is grafted on to the existing arbitral procedures, is thus clearly framed by the text, but the procedures and composition of the appeal mechanism have yet to be fully determined. This important feature of CETA's investment chapter responds to many criticisms that have been formulated concerning the absence of an appeal process in traditional procedures."

Finally, CETA's Chapter 8 offers more precise language as well as a screening mechanism for ISDS claims, in view of addressing critics' concerns that traditional ISDS mechanisms, including NAFTA's Chapter 11, can be used to challenge governments' sovereignty in regulating public matters related to such issues as health, safety and the environment. With respect to more precise language, de Mestral and Vanhonnaeker (ibid., 14) identify several features within CETA that address the critiqued vagueness of the language found in NAFTA's Chapter 11 in particular and in ISDS mechanisms more generally.

> CETA also adopts a more precise and restrictive mode of drafting the traditional standards of treatment and in several instances goes even further than the model BITs [bilateral investment treaties]. Regarding the traditional non-discrimination standards (MFN and national treatment), CETA innovates through its MFN provision by providing two limitations to the standard. CETA first excludes the application of the MFN provision to "the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements." In addition, the MFN provision of CETA's investment chapter is also limited by explicitly prohibiting the borrowing of substantive obligations from other IIAs [international investment agreements], thus ensuring that the traditional standards of protection in CETA will be applied with their specific limitations.

De Mestral and Vanhonnaeker also mention that CETA "innovates" by clarifying the meaning of Chapter 8's notion of expropriation by including annex 8-A in the agreement. For instance, annex 8-A states that an expropriation may be direct or indirect. It also specifies the factors to consider when determining "whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation" (annex 8-A(2)). Finally, annex 8-A offers the following provision: "For greater certainty, except in the rare circumstance when the impact of a measure

25 CETA article 8.38(1).

26 The CETA Joint Committee "shall be co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees" (article 26.1(1)).

27 This follows from article 8.27(11): "The Members of the Tribunal shall ensure that they are available and able to perform the functions set out under this Section."

28 For a detailed analysis of the investment tribunal system found in CETA, see Céline Lévesque (2016).

or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations." This last provision aims to offer additional assurance that the tribunal will interpret the notion of expropriation in a restrictive manner. A final innovation that de Mestral and Vanhonnaeker (ibid., 15) attribute to CETA in terms of more precise language for investor protection concerns the standard of fair and equitable treatment (FET): "The new approach to the FET standard is especially characterized by the shift, for the first time in IIA practice, from an open-textured standard traditionally used in US investment agreements to a closed-list standard, generally favoured by the European Union. The parties effectively opted for legal certainty and predictability at the expense of the interpretative power of arbitral tribunals."

In terms of CETA's provisions allowing for the rejection of claims *a priori*, article 8.18(3) states that "for greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process." De Mestral and Vanhonnaeker (ibid., 10) also point out that article 8.1 stipulates that a covered investment must be "made in accordance with the applicable law at the time the investment is made." For them, "these provisions thus provide tools to arbitral tribunals willing to dismiss cases in which investments have been undertaken in an unlawful manner" (ibid.). In addition, CETA articles 8.32 and 8.33 give the investment tribunal the authority, upon an objection by a respondent (i.e., the Canadian federal government or the European Commission), to reject claims that are "manifestly without legal merit" and claims that are "unfounded as a matter of law."

To sum up, NAFTA's Chapter 11, although considered to be novel and to represent best practices at the time, did not operate quite as intended by the negotiators. Over time, it attracted a fair amount of criticism, especially in terms of private investors' ability to challenge governments' policies meant to protect public welfare on matters such as health, safety and the environment. In such a context, the transparency of the ISDS process was another key point of contention. A modernized version of NAFTA should surely address these criticisms. In doing so, CETA provides the best source of inspiration for a revised NAFTA Chapter 11.

Whether the Trump administration would accept an update of NAFTA's investment chapter in line with CETA's provisions is unclear. On the one hand, Peter Navarro, now head of the Trump administration's National Trade Council, has indicated that he was not comfortable with ISDS because it interferes with US sovereignty (Hamby 2016). On the other hand, US firms have, for the most part, been on the winning end of investor-state arbitration decisions against Canadian governments. In any case, CETA's ISDS provisions clearly address concerns about potential abusive challenges by firms to government policies and regulations. By giving more control to the Canadian and American governments over ISDS, a modernized NAFTA along CETA lines could nevertheless appeal to a US president who likes to be in control.

Chapter 17: Intellectual Property

One is hard pressed to find something wrong with NAFTA's Chapter 17 on intellectual property. It is generally considered to be a precursor to the WTO's TRIPS, even though the former went beyond the latter on some provisions. However, like the case with electronic commerce below, NAFTA's Chapter 17 was drafted at a time when digital trade was not really on people's radar. But as Thierry Verdier (2013, 18) writes, "ideas, information, and knowledge are increasingly tradable assets, taking many forms in their creation, dissemination, and movement across borders." As Verdier further states, "producers of knowledge have the right to prevent others from using their inventions, designs, and creations and can negotiate payments in return for their use by others" (ibid., 19). It is for this reason that NAFTA's intellectual property rules would also benefit from being modernized.

It makes sense to look to the TPP's Chapter 18 as the source for modernizing NAFTA's rules with respect to intellectual property, especially since they have been heralded as "the new gold standard for intellectual property protection in trade agreements" (Braga 2016). In Canada, however, the TPP rules have been criticized for the potential harm that they would cause in terms of stifling innovation (see, for example, Balsillie 2016). Olena Ivus (2016) provides some evidence to support such an argument; however, Ivus argues that the issue is not so much the TPP's intellectual property rules but the nature of Canada's economic structure: given that the Canadian economy's comparative advantage is in low-innovation, resource-intensive sectors, the TPP's stronger intellectual property protections will have fewer benefits for Canada overall. But this does not mean that innovative companies and individuals could not take advantage of these provisions, especially since the provisions do not seem to be too different from Canada's existing intellectual property laws (Herman 2015; Owens 2015; Sookman 2016).

For the Trump administration, whose people have argued in favour of stronger enforcement of intellectual property rights (Roberts 2017), especially with respect to China, transposing the TPP's intellectual property protection provisions into a revised NAFTA might not pose a problem.[29] Moreover, since American firms were likely to be the primary beneficiaries of these rules, it may not be very difficult to convince the US administration to update NAFTA's provisions accordingly.

Labour Side Agreement

As with environmental concerns, the relationship between NAFTA and labour was particularly fraught at the time of the agreement's negotiation. However, much more than with the environment, the result of negotiations was at the time considered a significant disappointment for labour, and has remained a disappointment since 1993. For this reason, labour concerns represent one of the most potentially fruitful areas for renegotiation should NAFTA be reopened. As the United Electrical Workers' Bob Kingsley stated in 2001: "In the consciousness of America's workers and to some extent the consciousness of America's labor movement the translation of globalization into [the] most understandable terms is NAFTA" (quoted in Kay 2011, 63).

During the early 1990s, when NAFTA was being negotiated, Canadian and American labour leaders shared similar concerns. They believed that NAFTA would result in "downward harmonization" of working conditions and wages, significant job losses, and the creation of an institution in NAFTA that would set policy without sufficiently democratic accountability, further empowering economic elites and multinational corporations (Kay 2011, 63-64). For these reasons, organized labour in Canada and the United States strongly and loudly opposed the very idea that NAFTA could come to pass, and did not engage with the negotiations in a constructive manner to the extent that environmental lobbies did. The direct practical result was relatively weaker protections for labour than for the environment in the two NAFTA side agreements (Cameron and Tomlin 2002, 206).

In contrast to Canadian labour, successive Canadian governments under Brian Mulroney, Kim Campbell and Jean Chrétien were less concerned or motivated by NAFTA as a whole, and still less by the side agreements (ibid.). Many factors contributed to this, but two were most essential: first, throughout the NAFTA negotiations, the Canadian government was content to return to the CUSFTA if a desirable agreement could not be reached; and second, the need for provincial ratification of the side agreements meant that their effect could be limited, implementation complicated, and appeal and importance correspondingly reduced. Indeed, if there is to be a cause identified for the advent of the NAFTA side agreements, it is most likely to be the strong support they received from congressional Democrats during the first two years of the Clinton administration (ibid.). In short, then, although for different reasons, neither Canadian organized labour nor the Canadian government achieved protections for labour standards in the context of NAFTA that were as expansive or effective as they could have been. A modernized NAFTA thus creates an opportunity to remedy the original side agreement's mediocre results.

In the event, as Nicholas Keresztesi (2003, 210) states, the North American Agreement on Labor Cooperation (NAALC) "is significant both for what it is, and for what it is not." He continues: "on the one hand, the NAALC is the first unfiltered treaty with an enforcement mechanism which links labour rights and standards with an international trade agreement. On the other hand, it is not an effective tool to redress labour rights violations or to sanction labour rights violators." The latter is because the NAALC does not amend the NAFTA text, does not mandate common minimum standards, does not require upward harmonization, excludes a large body of labour laws from the scope of dispute settlement, and allows significant latitude in determining violations by requiring that "a persistent pattern of failure" to enforce labour laws be shown. These are

29 Canada's enforcement of intellectual property rights has also been criticized (Panetta 2017).

primary among the reasons why Kevin Kennedy (2011, para 107) calls the NAALC a "standstill agreement," intended to dissuade degradation of labour standards but not to improve them.

Conversely, the NAALC established specific principles and obligations to which the NAFTA parties agreed to adhere (in Canada's case, in areas of federal jurisdiction only). The principles are the following: freedom of association and the right to organize; the right to bargain collectively; the right to strike; prohibition of forced labour; labour protections for children and young persons; minimum employment standards; elimination of employment discrimination; equal pay for women and men; prevention of occupational injuries and illnesses; compensation in cases of occupational injuries and illnesses; and protection of migrant workers.[30]

The six obligations upon the three NAFTA parties are the following: to ensure that "labour laws and regulations provide for high labour standards"; to "promote compliance and effectively enforce" labour law "through appropriate government action"; to ensure that individuals "have appropriate access to administrative, quasi-judicial, judicial or labour tribunals" for the enforcement of labour law; to ensure that all relevant "administrative, quasi-judicial, judicial and labour tribunal proceedings" for the enforcement of labour law are "fair, equitable and transparent"; to ensure that "laws, regulations, procedures and administrative rulings" are "promptly published or otherwise made available"; and to "promote public awareness" of labour law.[31]

Finally, the NAALC establishes an effective institutional structure in the form of the Commission for Labor Cooperation. The commission is comprised of a council, a secretariat and, within each NAFTA party, a national administrative office (NAO).[32] The council is the governing body of the commission, and the secretariat is mandated to provide administrative and research assistance to the council. The NAOs are established at the federal government level in each NAFTA party. They are mandated to serve as a point of contact between the commission and the government departments and agencies of the respective NAFTA parties. They are also mandated to provide publicly available information requested by the secretariat or other NAOs, and to publish lists periodically of public communications on "labour law matters arising in the territory" of the respective NAFTA parties.[33]

Given the above account, there are four evident avenues for NAFTA reform from the perspective of Canadian organized labour. The first, although probably not the most straightforward, would be to have Canada's provinces ratify the NAALC. In a sense, assuming success, this would be the surest avenue because it would expand the NAALC to jurisdictions where it does not currently apply, and because it could be accomplished without reference to the United States or Mexico. However, this avenue would also encounter all the usual and significant difficulties of interprovincial and federal-provincial negotiations, the ultimate success of which must be quite uncertain.

The second avenue is to strengthen the institutional components of the commission. This could mean allowing the council and/or the secretariat to undertake and publish research proactively concerning NAFTA parties' fulfillment of their NAALC obligations, or even just to inform party governments privately, but regularly, of the compliance of their labour laws with the NAALC. It could also mean allowing the council and/or the secretariat to suggest ways in which NAALC obligations could be more effectively met by NAFTA party labour laws.

The third avenue would be to clarify specific NAALC provisions. In particular, this could mean defining in a more restrictive manner what is meant by "a persistent pattern of failure" to enforce labour laws, to widen the body of labour laws subject to dispute settlement, or to require "upward" rather than "downward" harmonization of labour laws across NAFTA parties.

The advantage of the first three avenues is that they do not require amendment of the substantive text in NAFTA or the NAALC bearing upon labour standards. The fourth avenue, of course, would be to amend the text of NAFTA or the NAALC in order to advance more fully, explicitly and effectually the application of the principles and

30 *North American Agreement on Labor Cooperation,* "Annex 1: Labor Principles," September 13, 1993. www.dol.gov/ilab/reports/pdf/naalc.htm.

31 *Ibid*., "Part Two: Obligations."

32 The NAALC established NAOs in each NAFTA country in order to implement the agreement and to act as contact points between the national governments.

33 *North American Agreement on Labor Cooperation*, "Part Three: Commission for Labor Cooperation," September 13, 1993. www.dol.gov/ilab/reports/pdf/naalc.htm.

obligations defined in the NAALC. This would certainly change the text of NAFTA and/or the NAALC, and would require ratification anew of the agreement(s) by the parties. It is also entirely uncertain whether the nascent Trump administration would support any such changes. Campaign rhetoric and the early weeks of the administration's tenure can be taken to augur both for and against such changes as are considered here.

Under any Canadian or American government of the past two decades, prior to that of President Trump, the prospect of renegotiating NAFTA would have led to the improvement of labour mobility being raised as an obvious area where gains could be made. Indeed, it remains the Canadian government's position to pursue a thinner border between Canada and the United States, and improved labour mobility is an important part of that goal.

Of course, it is not that NAFTA is without important provisions concerning labour mobility; for its time, it marked a significant innovation in the area, and for trade in services generally. However, it has since been eclipsed by CETA as a model for increasing labour mobility and liberalizing trade in services, while retaining important protections.

NAFTA's most significant innovation was the introduction of a special Trade National (TN) visa category. This allowed qualified citizens of NAFTA countries temporary entry to another NAFTA country in order to engage in professional work. A very wide range of occupations qualifies under the TN visa regime, ranging from architect and mathematician to teacher, professor, nurse, dentist, horticulturalist, pharmacist, librarian and insurance claims adjustor.[34] In all cases, individuals must hold a relevant degree, certificate and/or relevant experience. 'Temporary" is defined as any period not intended to be permanent, although renewal of TN visa status is required every 12 months (Government of Canada 2017a). The key liberalizing innovation was to define TN visa holders as non-immigrants, and thereby to create a special pre-approval process for their entry into a NAFTA country.

Data for the years following NAFTA show clearly that it established a new paradigm in the migration of professionals from Canada to the United States. For example, the total number of TN visas issued under the CUSFTA from 1989 through 1994, for Canadian professionals working in the United States, was 50,347 (Hufbauer and Schott 2005, 97). By contrast, the total number of TN visas issued by the United States to Canadians during 1994–1996, and 1998–2000, was 289,391 (data is unavailable for 1997) (ibid.). In 2001 alone, 95,479 TN visas were granted by the United States to Canadian professionals (ibid.). Although the number of visas declined after the September 11, 2001, attacks and the bursting of the dot-com bubble, it remained between 50,000 and 70,000 per year between 2003 and 2015 (ibid.; Panizzon, Zürcher and Fornalé 2016, 3.4). The TN visa program has clearly been a success on its own terms. As Marion Panizzon, Gottfried Zürcher and Elisa Fornalé (2016, 3.4.) write, "the NAFTA experience shows that a liberal free-mobility provision can be included in an FTA with safeguards, namely limiting entries to those with at least college degrees in specified fields."

Yet the TN visa program has also been subject to important criticism, some of which stems from its very success. Four criticisms stand out. First, it has been argued that the TN visa program was an unintended but significant contribution to a "brain-drain" from Canada to the United States (Hufbauer and Schott 2005, 97). Second, NAFTA does not provide sufficient recognition of professional qualifications among Canada, the United States and Mexico. Third, the exclusive list of professions that qualify for TN visas under NAFTA has not been updated sufficiently to account for technological changes — particularly in information and mobile technologies — since 1994. This period includes, of course, the advent of the Internet and the smartphone, and the myriad professions to which they have given rise. Fourth, the TN visa program does not require a minimum wage for the positions to which the visa gives access.

In some respects, then, the TN visa program under NAFTA, however successful by its own criteria, represents an older model of labour mobility that needs to be updated. The February 2017 joint statement by Prime Minister Trudeau and President Trump reflects this need when they state that they will "pursue shared regulatory outcomes that are business-friendly, reduce costs, and increase economic efficiency," and that they "will work together regarding labour mobility in various economic sector" (Government of Canada 2017b).

CETA offers a model for updating labour mobility regulations in NAFTA. For example, Chapter 23.2(a)

34 The complete list of professional occupations eligible for TN visas under NAFTA may be found at: http://canadiansinusa.com/Working-in-the-US/tn-visa.html.

requires the CETA parties to establish "acceptable minimum employment standards for wage earners, including those not covered by a collective agreement." Second, the entirety of Chapter 11 of CETA establishes a regime by which mutual recognition agreements (MRAs) may be reached between the CETA parties and Canada for recognizing each other's professional qualifications. In particular, Chapter 11.3 requires that "Recognition under an MRA cannot be conditioned upon… (b) a service supplier's education, experience or training having been acquired in the Party's own jurisdiction." Third, instead of defining all the professions to which MRAs and other provisions concerning labour mobility might apply, CETA includes various lists of exceptions to which the provisions of the agreement, in varying degrees, do not apply. This approach allows CETA to remain relevant to labour mobility and trade in services even as economies change. Similarly, CETA Chapter 10 provides the conditions for governance of temporary and short-term business visitors, including for terms as short as three months. This allows for much greater flexibility in providing temporary entry under CETA than under NAFTA.[35]

The allowance for short-term entry will help to mitigate "brain-drain" from Canada. The same is true of CETA's requirement that reservations and exceptions be included specifically and positively in the text of CETA, since it allows for targeted, rather than general, protectionist measures, and since it implies a method for updating the agreement as economies change.

Each of these points provides a model for updating NAFTA as it concerns labour mobility, thereby helping to "thin" the border between Canada and the United States in this respect, but without sacrificing labour standards. It cannot be known whether such an approach could appeal at all to the Trump administration. On the one hand, the approach accords with a general preference for smaller government and less regulation. On the other hand, the Trump campaign garnered significant support by adopting protectionist positions concerning NAFTA, labour, and trade governance generally, and it might jeopardize that support by liberalizing trade in services, even if only with Canada and concerning professional occupations.

Modernizing NAFTA: New Elements

This second section of the analysis examines new elements that should be added to NAFTA because they reflect current realities that did not exist when NAFTA was first drafted.

Electronic Commerce

When NAFTA entered into force on January 1, 1994, the Internet was just beginning to emerge in people's daily lives. This means that NAFTA negotiators did not factor electronic commerce into their discussions. In today's world economy, however, digital trade is an important driver. According to a recent McKinsey Global Institute report, around 50 percent of the world's traded services are in digital form, while e-commerce accounts for close to 12 percent of all goods traded across borders (Manyika et al. 2016, 23). As a result, a revised and modernized NAFTA must consider dealing with barriers to cross-border digital trade.

Barriers to digital trade usually take the form of government policies that require foreign enterprises to "localize economic activity in order to compete in a country's markets" (Ezell, Atkinson and Wein 2013, 4). Such localized barriers to trade aim to prevent or limit the flow of data and information across national borders. Robert Atkinson (2016, 12) indicates that barriers to the cross-border flow of data can add 30 to 60 percent to cloud computing costs if firms must use local vendors, as opposed to global suppliers, of such services.

Atkinson (ibid., 8) identifies three "justifications" that are usually put forward in defence of such restrictions: "privacy and security concerns, national security and law enforcement concerns, and aspirations for domestic economic growth." In the case of privacy and security concerns, the concern is that data is less secure if transferred abroad. However, Atkinson (ibid.) argues that it is not geographical location of the data that matters but the laws applicable to the data in terms of privacy and cybersecurity protection: "As long as the company involved has legal nexus in a nation, it is subject to the privacy and cybersecurity laws and regulations of that nation — moving

35 The complete text of CETA may be found at: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

data overseas, or storing it elsewhere, does not give the company a free pass to ignore a nation's laws. It is either in compliance with the privacy laws and regulations of that nation, or it is not."

The second justification that governments offer in favour of keeping data at home is that they have an easier time accessing it, if need be. Again, Atkinson (ibid., 9) argues that such restrictions of the flow of data are not necessary:

> There is no question that localization policies such as these give government security services easier access to data. However, those nations do not need to mandate localization for their governments to have legal access to data. They are still able to compel companies doing business in their markets to turn over data, even if it is stored outside their nation. In truth, even this is not enough for some governments; they want the power to collect data without the knowledge of the company involved, and that is easier if the data are stored locally. For democratic nations that abide by the rule of law, there is no need for mandating data be stored domestically as long as there is a well-functioning and robust system of mutual legal assistance treaties (MLATs) in place, as described subsequently.

The final reason why governments want to limit the cross-border flow of data is a mercantilist one: if a country prevents data from leaving its border, then it will force businesses to locate their operations in that country, thereby creating jobs and economic activity. For example, a requirement that the servers where a company stores the data collected from the country's residents be physically located within the borders of that country means that the company will be forced to spend money to house the computing equipment as well as to hire people to operate and maintain it. Such requirements are often "a smokescreen for naked data protectionism" in order to protect domestic firms against their foreign competitors (ibid.).

Both CETA and the TPP include chapters on electronic commerce that limit the imposition of the above-mentioned barriers to cross-border digital trade.[36] In this case, the model to follow for NAFTA is the TPP rather than CETA. The TPP's chapter on e-ecommerce goes much further in terms of protecting cross-border data flows, while ensuring the need for data privacy and security.[37] First, it prohibits the imposition of tariffs on electronic transmissions, including content such as software, music, videos, games and books. It does not, however, prevent the parties from imposing "internal taxes, fees or other charges on content transmitted electronically, provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement" (article 14.3(2)). This means that TPP members are allowed to impose a national or provincial value-added tax on such electronic transactions as long as it is applied equally to domestic as well as foreign providers, in line with article 14.4 on non-discriminatory treatment.[38]

Second, the TPP's Chapter 14 guarantees that foreign businesses cannot be compelled to build specific computing facilities in the territory of a member state in order to be able to conduct business in that country.[39] However, there is an escape (i.e., safeguard) clause in this case. Derogations are allowed in order to "achieve a legitimate public policy objective," as long as it can be clearly demonstrated that such derogation is not a means to benefit domestic competitors.[40] Whether it is or not will be a matter for investment tribunals to decide.[41] Third, the free flow of digital data across member states' borders is similarly

36 Chapter 16 for CETA and Chapter 14 for the TPP.

37 It does, however, exclude financial data and broadcasting.

38 TPP article 14.4(1) states: "No Party shall accord less favourable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products."

39 TPP article 14.13(2) states: "No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory."

40 TPP article 14.13(3) states: "Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure: (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and (b) does not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective."

41 It is worth noting that British Columbia and Nova Scotia have privacy legislation that require public bodies such as schools, hospitals and public agencies to access and store personal data only in Canada, with some limited exceptions. Private investors could potentially challenge these laws through an ISDS process, should the equivalent of the TPP's Chapter 14 be incorporated into a revised NAFTA.

protected under Chapter 14,[42] with the same safeguard provision that applies to the location of computing facilities.[43] Finally, the TPP's Chapter 14 "ensure[s] that countries have laws and regulations that protect consumers from fraudulent and deceptive activities and protect personal information online, and sets up a mechanism for countries to cooperate on a range of e-commerce related issues" (ibid., 14). It also ensures that member states adopt or maintain measures against unsolicited commercial e-mails (i.e., spam).

In sum, the TPP's Chapter 14 would be a major addition to a modernized NAFTA. As Atkinson (ibid.) states: "these provisions are indeed groundbreaking, as before there were no rules in place that protected and enabled cross-border data flows." Moreover, the chapter tries hard to achieve a balance between free digital trade and public policy concerns for privacy and security. How this delicate balancing act would work in practice is not clear. It would depend on how governments "interpret, enact, and enforce these rules, especially the exceptions to each of these provisions" (ibid.). It would also depend on how investor-state and state-to-state dispute-resolution mechanisms would determine whether any barrier to cross-border data flows is not justified or too restrictive, given the chapter's stated objective. At least there would be rules and, hopefully, adequate processes for resolving disputes that could arise.

Regulatory Cooperation

If there is one area where most analysts agree that NAFTA could benefit from an upgrade, it is regulatory cooperation. Differences in product regulation, licensing requirements, certification and conformity assessment represent significant barriers to international trade, not only in North America but all over the world. According to Bernard Hoekman (2015, 3), regulatory convergence could increase global income by up to 5 percent. What Michael Hart (2006) calls the "tyranny of small differences" can be costly for businesses operating across borders. Hugo Perezcano (2015, 12-13) captures the consensus with respect to NAFTA and regulatory cooperation: "A significant step toward North American integration would be to foster regulatory cooperation and education initiatives, with a view to achieving regulatory uniformity in sectors such as animal and plant health, food safety, transportation safety and emissions, to name a few."

The need for greater regulatory cooperation in North America was recognized early on. In 2005, under the guise of the Security and Prosperity Partnership (SPP), the Canadian, Mexican and US governments agreed to develop a trilateral regulatory cooperation framework (Hart 2006). However, the SPP faded a few years later, owing to a lack of political support at the highest level. Bilateral agreements (Canada-US and Mexico-US) quickly replaced the trilateral approach. In 2011, Canada and the United States created the Canada-US Regulatory Cooperation Council "to better align the two countries' regulatory approaches, where possible."[44] For their part, Mexico and the United States set up the US-Mexico High Level Regulatory Cooperation Council. Both bodies are still in existence today and seem to have been moderately effective.

In a modernized version, NAFTA would include a chapter on regulatory cooperation, as CETA does.[45] Such a chapter would integrate the Canada-US Regulatory Cooperation Council, and the US-Mexico High Level Regulatory Cooperation Council, as the bodies dedicated to implementing such a chapter.[46] In CETA's case, the regulatory cooperation objectives are fourfold (see article 21.3): "contribute to the protection of human life, health or safety, animal or plant life and the environment"; "build trust, deepen mutual understanding of regulatory departments to identify, assess and manage risks"; "facilitate bilateral trade and investment"; and "contribute to the improvement of competitiveness and efficiency of industry." There should, however, be one key difference between this new NAFTA chapter and CETA's: in the former, regulatory cooperation should be made compulsory, not voluntary as in CETA (see article 21.2(6)).

Although harmonization or mutual recognition of regulatory standards are usually the two options considered when it comes to regulatory

42 TPP article 14.11(2) states: "Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person."

43 See TPP article 14.11(3), which has the same wording as article 14.13(3).

44 Canada-US Regulatory Cooperation Council: www.hc-sc.gc.ca/ahc-asc/legislation/acts-reg-lois/rcc-ccmr/index-eng.php.

45 See CETA Chapter 21.

46 In CETA's case, there is one body known as the Regulatory Cooperation Forum.

cooperation (the latter being much easier than the former), Hoekman (2015) calls for a third option: regulatory equivalence (also known as enhanced mutual recognition). He defines it as follows: "agreement that the regulatory objectives of the parties involved are equivalent and acceptance that implementation and enforcement mechanisms in the parties' jurisdictions are effective" (ibid., 6). This agreement is obtained through a process of mutual assessment of the regulatory regimes of each party. Some form of adjustment on either part may prove necessary in some cases: that is, "regulatory equivalence might be conditional on some elements of harmonization" (ibid.).

According to Hoekman, CETA's Chapter 21 on regulatory cooperation and Chapter 6 on sanitary and phytosanitary measures contain regulatory equivalence language. Another important element to make regulatory equivalence effective is regular engagement with stakeholders, especially, but not exclusively, business firms. This is something that CETA's Chapter 21 calls for in article 21.8, whereas both North American Regulatory Cooperation Councils already consult actively with relevant stakeholders.

In sum, the three NAFTA countries already have the fora for conducting regulatory cooperation. What they need in a revised NAFTA is an architecture that formalizes such cooperation and makes it compulsory, even if the parties are neither obliged to agree with one another nor to grant each other regulatory equivalence. CETA's Chapter 21 on regulatory cooperation offers precisely such a template for this architecture. Such cooperation is also called for in other parts of CETA: Chapter 4 on technical barriers to trade, Chapter 5 on sanitary and phytosanitary measures, Chapter 6 on customs and trade facilitation (see Leblond 2016b).

The good news in this case is that when President Trump and Prime Minister Trudeau met in Washington on February 13, 2017, their joint statement specified that "we will continue our dialogue on regulatory issues and pursue shared regulatory outcomes that are business-friendly, reduce costs, and increase economic efficiency without compromising health, safety, and environmental standards" (Government of Canada 2017b).

Gender and Human Rights

In an environment where most institutions of global (economic) governance incorporate gender perspectives, while for the most part trade governance, whether national, regional, or international, has been resistant to gender considerations, the European Union is looking to make its trade policy gender-sensitive (Viilup 2015; Fontana 2016). At the same time, the European Union also took a leadership position on making the WTO increasingly gender-sensitive (Inter-Parliamentary Union and the European Parliament 2016a; 2016b). This is remarkable because, to date, the Asia-Pacific Economic Cooperation (APEC) is the only trade governance body that has gender considerations incorporated throughout its policies in the form of gender mainstreaming, and until recently, both the Directorate General for Trade of the European Commission and the WTO were almost completely closed to the idea. However, the most important aspect of these recent developments (for the purposes of this paper) is that they are looking to Canada for guidance.

Canada was at the forefront of research and policy concerning gender and trade during the 1990s and early 2000s. Dana Peebles (2005, 65) writes: "Canada is a world leader with regard to gender mainstreaming processes. Foreign Affairs and International Trade could help Canada actively consolidate Canada's position as a world leader and innovator in this area by promoting the adoption of a gender integration policy at the WTO."

Prior to the above call, APEC committed to gender mainstreaming in 1996, after the Women Leaders' Network (WLN) began to lobby APEC to include gender issues in its economic forum (Malhotra 2003, 97). It was promoted in 1997 by Canada, the APEC chair at the time (Gabriel and Macdonald 2005, 82).[47] The support of the Canadian International Development Agency (CIDA) for the WLN led to APEC's *Framework for the Integration of Women in APEC*, which determined that all proposals related to general or sectoral policies and programs were to be analyzed from a gender-equality perspective to ensure positive, equitable impacts (APEC 1999; Gibb 2001, 7). APEC thus became the only multilateral economic organization to incorporate

47 The APEC chair was held by Canada at the time (1997), and was shared by Lloyd Axworthy, then minister of foreign affairs, and Sergio Marchi, then minister of international trade.

"gender mainstreaming" throughout its policy initiatives, and did so under Canadian leadership.

Later, Adair Heuchan's time as counsellor to the WTO for the government of Canada in Geneva was instrumental in the creation of the 2003 WTO-non-governmental-organization symposium, "Women as Economic Actors in Sustainable Development," and a session sponsored by CIDA and the Department of Foreign Affairs and International Trade (DFAIT) (now Global Affairs Canada), "Gender Equality, Trade and Development," held in conjunction with the Cancun WTO Ministerial Conference (Organization of Women in International Trade 2004). These were the first sessions on gender at the WTO. In addition, also in 2003, Industry Canada officials briefed the Canadian trade minister concerning gender issues before entering negotiation (Peebles 2005), suggesting that the gender and trade connection was to be taken seriously.

However, this proved to be a relatively brief period of success and engagement. Shortly after the above successes, due to Canadian domestic restructuring, the gender and trade connection almost disappeared from the horizon in Canada. One of the last readily identifiable initiatives in this regard was the conference "Socio-Economic Impacts of International Economic Policy," which was part of the Russia, Trade and Development Project (2004–2007) organized by the Centre for Trade Policy and Law (Ottawa) to facilitate Russia's WTO accession and increased integration into the global economy. The project was partially funded by CIDA, which had a requirement to include concerns of gender in research and policy.[48]

Thus, while there was a hiatus in gender and trade research for about the past decade in Canada, the European Union is currently looking to Canada for guidance, at a time when there is a strong enthusiasm on the part of the current Canadian government concerning gender and women. This is fundamental for Prime Minister Justin Trudeau, who strongly identifies as a feminist, as he openly, frequently and clearly states. His views and the current Liberal government's views, which are in stark contrast to the previous government's views in this regard, allowed for the topic of gender and trade to resurface. Since the Canadian government also renewed its commitment with regard to women and gender at the international level, it also served to encourage other governments to pick up the agenda, including gender and trade, which from the late 1980s and onward was associated with Canadian leadership and origin.[49]

The problem, of course, is that Canadian research and initiative have advanced very little over the past decade or so in this area, mostly due to cutbacks. And, although Canadian government departments are now required to "gender mainstream" their policies, Global Affairs Canada, which is currently responsible for international trade and has had CIDA merged into it, does not yet fully participate. Its stated aim is to do so, while there is a strong message that it will likely take a longer period of time to figure out how to "go about things." One of Global Affairs' representatives stated that, in her opinion, to arrive at something truly tangible could take a decade or more (Women, Peace and Security 2016). Thus, when the European Union was looking for pointers from Canada in 2015, they realized they would have to rely on research and initiatives from Canada that were about a decade old. This did not help their cause to "gender" the Directorate-General for Trade of the European Commission and EU trade policy. Thus, a key EU study concluded that, in general, the research on gender and trade is in its infancy and more work is needed before it can be addressed on a wider policy basis (Viilup 2015).

It is interesting to note, however, that the European Union is currently dealing with gender equality with relation to trade "through human rights and labour market provisions," as "EU trade agreements include human rights clauses" (Viilup 2015, 13). This

48 It might be worth noting that the relationship between Canada and Russia has considerably changed since, due to Russia's annexation of Crimea on March 18, 2014, and continued intervention in Ukraine. Indeed, Canadian Minister of Foreign Affairs Chrystia Freeland (formerly the minister of international trade) is banned by the Russian government from entering Russia. Freeland is proud of her Ukrainian heritage and responded to the ban with pride.

49 It is important to note, however, that some of the early Canadian organizing with relation to gender and trade took a position against trade liberalization, which arguably resulted in a rocky relationship with the Canadian government and its objectives. The primary focus of this early organizing was impacts upon women in terms of employment income and welfare effects. Given the structure of the Canadian economy at the time, studies showed that a relatively large number of women would be negatively affected by trade liberalization, with the United States in particular. Some of these issues are explored in Judit Fabian (2015; 2016). Some earlier Canadian literature and scholarship on gender and trade vis-à-vis FTAs in the North American context include: Blouin (2002, 33); Blouin, Gibb, McAdams and Weston (2004); Gabriel and Macdonald (1996; 2005); Gibb (2001, 66; 2002, 2–21; 2003, 1–14; 2004, 2–58); Hassanali (2000); Hershkovitz (2003); Macdonald (1999, 53–71; 2002, 151–72; 2003, 2004); Peebles (2005); Sjolander (2003, 1–11); and Sjolander, Smith and Stienstra (2000; 2003, 246).

might be a problematic approach because it likely conflicts with WTO provisions and the currently dominant interpretation of the place of WTO law within international law (Fabian, forthcoming 2017).

All that said, perhaps the right question to ask now is not how exactly a gender-sensitive or gender-friendly trade agreement would look, but to ask whether the renegotiation of NAFTA would be possible without a gender equality component. Given that NAFTA has encountered major opposition from women's groups (see, for example, Debra Liebowitz 2000); given women's protests in Europe against new FTAs (in particular the TTIP; see Brigitte Young [2014]); given the recent "global women's march" on January 21, 2017; given a strongly self-identifying feminist Canadian prime minister; and given the fact that Canada's new minister of Foreign Affairs[50] is committed to what she calls "feminist foreign policy," the answer to the question is likely "no." Indeed, the joint statement issued by Prime Minister Justin Trudeau and President Donald Trump after their first meeting on February 13, 2017, states that "it is a priority of both countries to ensure equal opportunities for women in the workforce. We are committed to removing barriers to women's participation in the business community and supporting women as they advance through it. As part of this effort, we are creating a Canada-United States Council for Advancement of Women Entrepreneurs and Business Leaders" (Government of Canada 2017b).

In addition, although its gender component is very small, the recently signed CETA (October 2016) is pioneering: it is the first trade agreement between "developed" countries to name gender discrimination as a violation of its terms. Specifically, CETA article 8.10 states that "Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7." Pursuant to this, paragraph 2 states that "a Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:...(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief."

This is the only mention of gender in the text of CETA, and, without question, protections against gender discrimination could be framed in ways more expansive and nuanced. Nevertheless, this single mention of gender remains a powerful statement not only because it is a milestone, but because it explicitly requires consideration of gender discrimination as grounds to establish failure to provide fair and equitable treatment, if such a complaint is brought before an appropriate body. Moreover, it follows from the text of article 8 that proof of gender discrimination is sufficient to show that treatment of the complainant has not been fair and equitable. This single mention of gender therefore has real and powerful practical application in the adjudication of trade disputes concerning investment under CETA.

Thus, although it is as yet unclear what a renewed NAFTA would look like with gender equality provisions, under the current political climate in the three NAFTA countries, globally, and with relation to FTAs, it is unlikely that a workable, modern and sustainable NAFTA agreement could be negotiated without such provisions. The new Canada-United States Council for Advancement of Women Entrepreneurs and Business Leaders, perhaps copying and perhaps expanding upon the CETA innovation, might be able to lead the way.

Softwood Lumber

No discussion of modernizing NAFTA would be complete without mentioning softwood lumber, which has been a long-standing source of tension between Canada and the United States (Hart and Dymond 2005). If it were included within a revised NAFTA, softwood lumber would be a new element, since it has stood outside the NAFTA framework until now. The problem here is that it is not at all clear, even if it were politically possible, how NAFTA can be modified to resolve the lingering softwood lumber disputes between Canada and the United States.

To begin with, it is important to affirm that, in principle, there is free trade in softwood lumber products between Canada and the United States as a result of NAFTA and its predecessor, the CUSFTA. In other words, NAFTA's zero tariffs apply to softwood lumber products. So that is not where the problem lies.

50 Chrystia Freeland has reportedly retained the NAFTA portfolio, while all other trade portfolios are now the responsibility of the new Canadian minister of international trade, François-Philippe Champagne.

The repeated disputes that Canada and the United States have on this issue are a result of the American government applying countervailing and anti-dumping duties on Canadian softwood lumber products entering the United States. The claim is that a significant number of Canadian softwood lumber products are too cheap relative to US prices. This is seen as the result, in large part, of the Canadian provinces (which, with the exception of the Atlantic provinces, own the forests) charging lower stumpage fees to lumber firms than the fees that prevail in the United States, where forests are privately owned. The claim is that provinces indirectly subsidize softwood lumber products by charging below-market-rate stumpage fees. Following US imposition of countervailing and anti-dumping duties on Canadian softwood lumber, the Canadian government has resorted to launching dispute-settlement mechanisms under both NAFTA (Chapter 19) and the WTO, in order to show that there is either no indirect subsidy from provincial governments or, if the latter fails, that the amounts of retaliatory duties imposed by the US government are too high and not in line with reality.

Regardless of the dispute-settlement outcomes, the US government has generally failed to abide by NAFTA or WTO panel decisions in order to force a bilateral agreement with Canada. The latest agreement signed between the two countries dates back to September 12, 2006.[51] It took five years to get there, following the expiry of the 1996 agreement in 2001. The 2006 agreement expired on October 12, 2015, which then allowed Canadian lumber products unfettered access to the US market.

Because the agreement contained a one-year litigation standstill clause, the US government could not impose countervailing or anti-dumping duties on Canadian softwood lumber until after October 12, 2016. The process began at the end of November 2016, when the US Lumber Coalition filed a petition with the US Department of Commerce "to investigate Canadian softwood lumber shipments with an eye to potentially levying new duties" (McGregor 2016). In early January 2017, the US International Trade Commission announced "it made an initial determination of harm from Canadian lumber that is 'allegedly subsidized and sold in the United States at less than fair value'" (The Canadian Press 2017).

If the past is a good predictor of the future, then it will likely take years before a new bilateral Softwood Lumber Agreement is reached. The US government is usually happy to arm-twist Canadian governments and firms into an agreement in its favour, after the Canadians have put up a good fight. But such agreements are never permanent, which is why it is highly unlikely that a permanent solution to softwood lumber disputes would be incorporated into a revised NAFTA. In addition, even a softwood lumber chapter within NAFTA could foresee periodic revisions to export duties and quotas. As such, the best that one could expect from such a chapter would be the codification of the status quo. As Hart and Dymond (2005, 20) wrote in the context of the last softwood lumber dispute: "no procedure can yield a definitive solution when domestic interests are entrenched and enjoy substantial political support." More than a decade later, nothing has changed.

From a Canadian perspective, the only permanent solution is for softwood lumber to somehow be exempt from the application of anti-dumping and countervailing duties under a revised NAFTA. In such a case, there would be true free trade in softwood lumber across North America. However, this would be mere wishful thinking, as Americans will never give up their ability to impose such duties on any foreign product in any trade agreement, as it would in all likelihood lead to abuses by trading partners of the United States. For example, in the softwood lumber case, it would open the way for Canadian provinces to lower their stumpage fees so that Canadian lumber producers could undercut their US competitors. Anti-dumping and countervailing duties exist precisely to deal with such anti-competitive behaviour.

51 The agreement proposed two options to the provinces concerned, which excluded the Atlantic provinces: export charges ranging from five to 15 percent; and lower export charges, but with limits on softwood lumber volumes exported. These two options would apply whenever the price of softwood lumber in the United States was at or below US$355 per thousand board feet (Moreau 2016, 1).

Conclusion

Whether Canada, Mexico and the United States will succeed in renegotiating NAFTA remains to be seen. For the time being, it is hard to reconcile the Trump administration's vision of a wall and 35 percent tariffs on the southern border with "tweaks" to its northern trade relationship. What is sure, however, is that NAFTA is now more than 20 years old and, as a result, it would benefit from being modernized to reflect North America's twenty-first-century economic reality of "making things together."

Relying in several instances on CETA and the TPP, this paper proposes changes and additions that should be part of an updated NAFTA. Regardless of the rhetoric coming from the new US administration, Canada would do well to enter any NAFTA renegotiation with what could be considered a best-case agreement as its starting position. Only this way is it likely to get the best deal possible.

The irony in all this is that the United States would also benefit from the proposals offered by this paper to modernize NAFTA. Therefore, it may be in everyone's interest (that of Americans, Canadians and Mexicans) to wait out the Trump storm and postpone any NAFTA renegotiation until there is a new, more moderate or centrist leadership in the White House that would be willing to modernize NAFTA in a way that reflects North America's twenty-first-century economic reality.

Works Cited

Abreu, Maria Donner. 2013. "Preferential Rules of Origin in Regional Trade Agreements." Staff Working Paper ERSD-2013-05. Geneva: World Trade Organization, Economic Research and Statistics Division.

Alexandroff, Alan S. 2006. "Conclusion — Investor Protection in the NAFTA and Beyond: Private Interest and Public Purpose." In *Investor Protection in the NAFTA and Beyond: Private Interest and Public Purpose*, edited by Alan S. Alexandroff, 185–215. Policy Study 44, The Border Papers. Toronto: C. D. Howe Institute.

Alschner, Wolfgang and Dmitriy Skougarevskiy. 2015. "The new gold standard? Empirically situating the TPP in the investment treaty universe." Working Paper N IHEIDCTEI2015-08. Geneva: Graduate Institute of International and Development Studies, Centre for Trade and Economic Integration. graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working_papers/CTEI%202015-8%20Alschner_Skougarevskiy_2015_20Nov_TPP.pdf.

APEC. 1999. *Framework for Integration of Women in APEC.* www.apec.org/~/media/Files/Groups/GFPN/02_aggi_framewk.pdf.

Atkinson, Robert D. 2016. "Testimony of Robert D. Atkinson, Ph.D. Founder and President Information Technology and Innovation Foundation, Before the Committee on Ways and Means Trade Subcommittee Hearing on 'Expanding U.S. Digital Trade and Eliminating Barriers to Digital Exports.'" July 13. Information Technology and Innovation Foundation. www2.itif.org/2016-expanding-us-digital-trade.pdf?_ga=1.98881630.1772078813.1485494530.

Augier, Patricia, Michael Gasiorek, Charles Lai-Tong. 2005. "The impact of rules of origin on trade flows." *Economic Policy* July: 567–624.

Balsillie, Jim. 2016. "For Canadian innovators, will TPP mean protection — or colonialism?" *The Globe and Mail*, January 30. www.theglobeandmail.com/report-on-business/rob-commentary/for-canadian-innovators-will-tpp-mean-protection-or-colonialism/article28462854/.

Blouin, Chantal. 2002. "Gender and International Trade: An Annotated Bibliography Prepared for Status of Women Canada." Ottawa: The North-South Institute.

Blouin, Chantal, Heather Gibb, Maire McAdams and Ann Weston. 2004. "Engendering Canadian Trade Policy: A Case Study of Labour Mobility in Trade Agreements." Ottawa: Status of Women Canada.

Braga, Carlos A. Primo. 2016. "TPP: The New Gold Standard for Intellectual Property Protection in Trade Agreements?" *The Huffington Post*, March 24. www.huffingtonpost.com/eastwest-center/tpp-the-new-gold-standard_b_9544428.html.

Cameron, Maxwell A. and Brian W. Tomlin. 2002. *The Making of NAFTA: How the Deal Was Done*. Ithaca: Cornell University Press.

Cheney, Erin, Leslie Coates, Mike Moffatt, Vincent Thivierge and David Zhang. 2017. "We Make Things Together: Potential Impact of Changes to NAFTA on the Great Lakes Region." February. Lawrence National Centre for Policy and Management, Ivey Business School. London, ON: Western University.

Clarkson, Stephen. 2008. *Does North America Exist? Governing the Continent after NAFTA and 9/11*. Toronto: University of Toronto Press.

Clinton, William, Scott Lincicome, Brian Picone, Richard Eglin and William Barrett. 2016. "Implications of the 2016 US Presidential Election for Trade Policy." December. Washington: White & Case. www.whitecase.com/publications/alert/implications-2016-us-presidential-election-trade-policy.

de Mestral, Armand and Robin Morgan. 2016. *Does Canadian Law Provide Remedies Equivalent to NAFTA Chapter 11 Arbitration?* Investor-State Arbitration Series Paper No. 4, May. Waterloo: CIGI.

de Mestral, Armand and Lukas Vanhonnaeker. 2016. *The Impact of the NAFTA Experience on Canadian Policy Concerning Investor-State Arbitration*. Investor-State Arbitration Series Paper No. 13, November. Waterloo: CIGI.

Dixon, Peter B. and Maureen T. Rimmer. 2014. *The Dependence of U.S. Employment on Canada, 2013*. Centre of Policy Studies, Victoria University. December 3. www.copsmodels.com/pdf/canada_trade_2013.pdf.

Ek, Carl, Ian F. Fergusson, Blas Nunez-Neto, Stephen F. Clarke, Amy Abel, Geoffrey S. Becker, Eugene H. Buck, M. Lynne Corn, Bernard A. Gelb, Ross W. Gorte, Charles E. Hanrahan, James E. McCarthy and Randy Schnepf. 2006. "Canada-U.S. Relations." Congressional Research Service Report 96-397, January 2. fas.org/sgp/crs/row/96-397.pdf.

Ezell, Stephen J., Robert D. Atkinson and Michelle A. Wein. 2013. "Localization Barriers to Trade: Threat to the Global Innovation Economy." September. The Information Technology and Innovation Foundation. www2.itif.org/2013-localization-barriers-to-trade.pdf.

Fabian, Judit. 2015. "Towards a Theory of Democratic Global Economic Governance: Hybridization of Soft and Hard Law in the Case of Gender within the World Trade Organization." Ph.D. dissertation, Carleton University.

———. 2016. "Global Economic Governance and Gender/Women: Why the World Trade Organization Is Such a Difficult Case for the Representation of Women and their Interests." Paper presented at the 24th World Congress of the International Political Science Association (IPSA): Politics In a World of Inequality, Poznan, Poland, July 25.

———. Forthcoming 2017. "The *Lex Specialis* Obstacle to Representing Women and Their Interests within the World Trade Organization." Paper to be presented at Gender, Institutions and Change: Feminist Institutionalism after 10 years, Manchester, United Kingdom, April 4.

Faiola, Anthony and Lori Montgomery. 2009. "Trade Wars Brewing in Economic Malaise." *The Washington Post*, May 15. www.washingtonpost.com/wp-dyn/content/article/2009/05/14/AR2009051404241.html.

Fontana, Marzia. 2016. "Gender Equality in Trade Agreements." Brussels: European Parliament, Directorate-General for Internal Policies, Policy Department for Citizens' Rights and Constitutional Affairs.

Gabriel, Christina and Laura Macdonald. 1996. "Women's Responses to NAFTA in Canada and Mexico: Prospects for a Feminist Internationality." In *Changing Spaces: Gender and State Responses to Restructuring in Canada*, edited by Isabella Bakker, 165–86. Toronto: University of Toronto Press.

———. 2005. "Managing Trade Engagements? Mapping the Contours of State Feminism and Women's Political Activism." *Canadian Foreign Policy* 12 (1): 71–88.

Georges, Patrick. 2008. "Toward a North American Customs Union: Rules of origin liberalization matters more than a common external tariff for Canada." *North American Journal of Economics and Finance* 19: 304–18.

Gibb, Heather. 2001. *Gender Mainstreaming: Good Practices from the Asia Pacific Region*. North-South Institute and Asia-Pacific Economic Cooperation Secretariat. Ottawa: Renouf Publishing.

———. 2002. "Review of Gender Integration in APEC." Ottawa: The North-South Institute.

———. 2003. "Speaking Notes: Prime Minister's Task Force on Women Entrepreneurs." June 9. Ottawa: The North-South Institute.

———. 2004. "Supporting Marginalized Women Exporters: An Overview of Issues and Strategies." Ottawa: The North-South Institute.

Government of Canada. 2017a. "International Mobility Program: North American Free Trade Agreement. 'What is 'temporary' entry?'" www.cic.gc.ca/english/resources/tools/temp/work/international/nafta.asp.

———. 2017b. "Joint Statement from President Donald J. Trump and Prime Minister Justin Trudeau." February 13. pm.gc.ca/eng/news/2017/02/13/joint-statement-president-donald-j-trump-and-prime-minister-justin-trudeau.

Hamby, Chris. 2016. "Elizabeth Warren Squares Off Against Global Super Court." *BuzzFeed*, September 9. www.buzzfeed.com/chrishamby/heres-the-guy-who-trump-said-just-offered-him-a-2-billion-de?utm_term=.pooA8nVROg#.fpOG80A4Q2.

Hart, Michael. 2006. "Steer or Drift? Taking Charge of Canada-US Regulatory Convergence." Commentary No. 229, March. Toronto: C. D. Howe Institute.

Hart, Michael and Bill Dymond. 2005. "The cul-de-sac of softwood lumber." *Policy Options*, November 1: 19–27.

Hassanali, Soraya. 2000. "International Trade: Putting Gender into the Process Initiatives and Lessons Learned: A discussion paper prepared for Status of Women Canada." Ottawa: Status of Women Canada.

Herman, Lawrence L. 2010. "Trend Spotting: NAFTA Disputes After Fifteen Years." Backgrounder No. 133, July. Toronto: C. D. Howe Institute. www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/backgrounder_133.pdf.

———. 2015. "Trans-Pacific Trade and the Intellectual Property Challenge." November 28. Herman & Associates. hermancorp.net/2015/11/28/trans-pacific-trade-and-the-intellectual-property-challenge/.

Hershkovitz, Linda. 2003. "Gender Equality and Trade-Related Capacity Building: A Resource Tool for Practitioners." Ottawa: Canadian International Development Agency.

Hoekman, Bernard. 2016. "International Regulatory Cooperation in a Supply Chain World." In *Redesigning Canadian Trade Policies for New Global Realities*, edited by Stephen Tapp, Ari Van Assche and Robert Wolfe. Montreal: Institute for Research on Public Policy. irpp.org/research-studies/aots6-hoekman/.

Hufbauer, Gary Clyde and Jeffrey J. Schott. 2005. *NAFTA Revisited: Achievements and Challenges*. Washington: Peterson Institute for International Economics.

———. 2009. "Buy American: Bad for Jobs, Worse for Reputation." Policy Brief No. PB09-2, February. Washington: Peterson Institute for International Economics.

Inter-Parliamentary Union and the European Parliament. 2016a. *What Future for the WTO?* Annual Session of the Parliamentary Conference on the WTO, WTO Headquarters, Geneva, June 13-14. www.ipu.org/splz-e/trade16.htm.

———. 2016b. *Outcome Document*. Annual Session of the Parliamentary Conference on the WTO, WTO Headquarters, Geneva, June 13-14. www.ipu.org/splz-e/trade16/outcome.pdf.

Ivus, Olena. 2016. *The TPP and the New Intellectual Property Regime: Implications for Canada*. CIGI Papers No. 108, September. Waterloo: CIGI.

Josling, Timothy. 2008. "Competing Paradigms in the OECD and Their Impact on the WTO Agricultural Talks." In *Agricultural Policy for the 21st Century,* edited by Luther Tweeten and Stanley R. Thompson, 245–64. Ames, IA: Iowa State Press.

Kay, Tamara. 2011. *NAFTA and the Politics of Labor Transnationalism.* Cambridge, UK: Cambridge University Press.

Kelly, Raymond. 1998. "NAFTA: A Guide to Customs Procedures." August. U.S. Customs and Border Protection. www.cbp.gov/sites/default/files/documents/NAFTA%20A%20Guide.RTF.

Kennedy, Kevin C. 2011. *North American Free Trade Agreement (NAFTA)*. Alphen aan den Rijn: Kluwer Law International.

Keresztesi, Nicholas. 2003. "Linking Labour Rights and International Trade." In *The Auto Pact: Investment, Labour and the WTO*, edited by Maureen Irish. The Hague: Kluwer Law International.

Ku, Julian and John Yoo. 2016. "Trump might be stuck with NAFTA." *Los Angeles Times*, November 29. www.latimes.com/opinion/op-ed/la-oe-yoo-ku-trump-nafta-20161129-story.html.

Kunimoto, Robert and Gary Sawchuk. 2006. "NAFTA Rules of Origin." In *NAFTA@10*, edited by John M. Curtis and Aaron Sydor, 275–312. Ottawa: Minister of Public Works and Government Services Canada.

Leblond, Patrick. 2016a. "Le Canada et l'Asie." In *Christophe Colomb découvre enfin l'Asie: Intégration économique, chaînes de valeur et recomposition transpacifique*, edited by Mathieu Arès and Éric Boulanger. Montreal: Athéna Éditions.

———. 2016b. *Making the Most of CETA: A Complete and Effective Implementation Is Key to Realizing the Agreement's Full Potential*. CIGI Papers No. 114, October. Waterloo: CIGI.

Lévesque, Céline. 2016. *The European Commission Proposal for an Investment Court System: Out with the Old, In with the New?* Investor-State Arbitration Series Paper No. 10, September. Waterloo: CIGI.

Liebowitz, Debra J. 2000. "Gender and Identity in an Era of Globalization: Transnational Political Organizing in North America." Ph.D. dissertation, Rutgers University.

Macdonald, Laura. 1999. "Trade with a Female Face: Women and the New International Trade Agenda." In *Global Trade and Global Social Issues*, edited by Annie Taylor and Caroline Thomas. New York: Routledge.

———. 2002. "Globalization and Social Movements: Comparing Women's Movements' Responses to NAFTA in Mexico, the USA and Canada." *International Feminist Journal of Politics* 4 (2): 151–72.

———. 2003. "Gender and Canadian Trade Policy: Women's Strategies for Access and Transformation." In *Feminist Perspectives on Canadian Foreign Policy*, edited by Claire Turenne Sjolander, Heather Smith and Deborah Stienstra. Toronto: Oxford University Press.

———. 2004. "Gendering Transnational Social Movement Analysis: Women's Groups Contest Free Trade in the Americas." In *Coalitions Across Borders: Transnational Protest and the Neo-Liberal Order*, edited by Joe Bandy and Jackie Smith, 21–41. Lanham: Rowman and Littlefield.

Malhotra, Kamal. 2003. *Making Global Trade Work for People*. United Nations Development Programme. Abingdon, UK, and New York: Earthscan (Taylor & Francis).

Manyika, James, Susan Lund, Jacques Bughin, Jonathan Woetzel, Kalin Stamenov and Drhuv Dhingra. 2016. "Digital globalization: The new era of global flows." McKinsey Global Institute Report, February. McKinsey & Company. www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows.

McGregor, Janyce. 2016. "U.S. Lumber Coalition files petition, restarting Canada-U.S. softwood lumber hostilities." *CBC News*, November 25. www.cbc.ca/news/politics/softwood-lumber-commerce-investigation-launched-1.3904753.

Moreau, Alexandre. 2016. "The economic costs of protectionism: the case of softwood lumber." Viewpoint, September. Montreal: Montreal Economic Institute.

Moroz, Andrew (Sandy). 2016. "Navigating the Maze: Canada, Rules of Origin and the Trans-Pacific Partnership." In *Redesigning Canadian Trade Policies for New Global Realities*, edited by Stephen Tapp, Ari Van Assche and Robert Wolfe. Montreal: Institute for Research on Public Policy. irpp.org/research-studies/aots6-moroz/.

Murray, Martin. 2016. "NAFTA and Agriculture: Agricultural imports and exports are a significant part of NAFTA." *The Balance*, June 7. www.thebalance.com/nafta-and-agriculture-2221153.

Office of the United States Trade Representative. 2003. "NAFTA Commission Announces New Transparency Measures." October. ustr.gov/about-us/policy-offices/press-office/press-releases/archives/2003/october/nafta-commission-announces-new-transparen.

———. 2010. "U.S., Canada Sign Agreement on Government Procurement." Office of the United States Trade Representative press release, February 12. ustr.gov/about-us/policy-offices/press-office/press-releases/2010/february/us-canada-sign-agreement-government-procurement.

Organization of Women in International Trade. 2004. "OWIT award citation." News Archives, November. www.owit-toronto.ca/news/news_archive04.html.

Owens, Richard C. 2015. "Debunking Alarmism Over the TPP and IP: Why the Trans-Pacific Partnership Is a Good Deal for Canadian Innovators." Commentary, December. Ottawa: Macdonald-Laurier Institute.

Panetta, Alexander. 2017. "What will Trump want from Canada on NAFTA? A U.S. document may offer clues." *CBC News*, February 3. www.cbc.ca/news/business/nafta-what-will-us-demand-1.3965165.

Panizzon, Marion, Gottfried Zürcher and Elisa Fornalé, eds. 2016. *The Palgrave Handbook of International Labour Migration: Law and Policy Perspectives*. London: Palgrave MacMillan.

Peebles, Dana. 2005. "Increasing gender inputs into Canadian international trade policy positions at the WTO." Ottawa: Status of Women Canada.

Perezcano, Hugo. 2015. *Peeling NAFTA Layers: Twenty Years Later*. CIGI Papers No. 68, May. Waterloo: CIGI.

Roberts, Jeff John. 2017. "What Trump Means for the U.S. Patent System." *Forbes*, January 24. fortune.com/2017/01/24/trump-patents/.

Sjolander, Claire Turenne. 2003. "Of Playing Fields, Competitiveness and the Will to Win: Representations of Gender and Globalization." In *Feminist Perspectives on Canadian Foreign Policy*, edited by Claire Turenne Sjolander, Heather Smith and Deborah Stienstra. Toronto: Oxford University Press.

Sjolander, Claire Turenne, Heather Smith and Deborah Stienstra. 2000. "Gendered Discourses, Gendered Practices: Feminists (Re)write Canadian Foreign Policy: A Roundtable Report." Ottawa: Canadian Centre for Foreign Policy Development.

Sjolander, Claire Turenne, Heather Smith and Deborah Stienstra, eds. 2003. *Feminist Perspectives on Canadian Foreign Policy*. Toronto: Oxford University Press.

Skogstad, Grace. 2008. *Internationalization and Canadian Agriculture: Policy and Governing Paradigms*. Toronto: University of Toronto Press.

Soloway, Julie. 2003. "NAFTA's Chapter 11: Investor Protection, Integration and the Public Interest." *Choices* 9 (2): 2–47. Montreal: Institute for Research on Public Policy.

Sookman, Barry. 2016. "Why Canada has nothing to fear over TPP and intellectual property." *Financial Post*, January 6. business.financialpost.com/fp-comment/why-canada-has-nothing-to-fear-over-tpp-and-intellectual-property.

Staples, Brian and Laura Dawson. 2014. "Made in the world: Defragmenting rules of origin for more efficient global trade." June. Ottawa: Canadian Council of Chief Executives. www.ceocouncil.ca/wp-content/uploads/2014/06/Made-in-the-world-Dawson-and-Staples-June-2014.pdf.

The Canadian Press. 2017. "U.S. International Trade Commission says Canadian softwood lumber caused harm." *CBC News*, January 6. www.cbc.ca/news/business/canada-us-softwood-1.3925105.

Trachtman, Joel. 2016. "US Presidential Power to Terminate Trade Agreements." *International Economic Law and Policy* Blog. December 15. worldtradelaw.typepad.com/ielpblog/2016/12/us-presidential-power-to-terminate-trade-agreements.html.

Verdier, Thierry. 2013. "Smart Trade: The cross-border flow of intellectual property comes under 21st century economic scrutiny." *Finance & Development* 50 (4): 18–21.

Viilup, Elina. 2015. "The EU's Trade Policy: from gender-blind to gender-sensitive?" DGEXPO/B/PolDep/Note/2015_194, July. Brussels: Policy Department, Directorate-General for External Policies, European Parliament. www.europarl.europa.eu/RegData/etudes/IDAN/2015/549058/EXPO_IDA(2015)549058_EN.pdf.

Wood, Stepan and Stephen Clarkson. 2009. "NAFTA Chapter 11 as Supraconstitution." Comparative Research in Law & Political Economy, Research Paper No. 43. Toronto: Osgoode Hall Law School of York University. digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1152&context=clpe.

Women, Peace and Security Network. 2016. Presentation by representatives of Global Affairs Canada, The Future of Canada's NAP on Women, Peace and Security workshop, University of Ottawa, April 20.

Young, Brigitte. 2014. Heinrich-Böll Foundation, TTIP: The Invisible Gender Problem. www.boell.de/de/2014/08/05/ttip-die-unsichtbare-genderproblematik.

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