



**Could President-Elect Trump  
withdraw from NAFTA?\***

# Introduction

U.S. President-elect Donald Trump is preparing to completely overhaul U.S. trade policy. A memo drafted by the President-elect's transition team sets out a 200-day plan governed by five major trade objectives. The first objective is the renegotiation or withdrawal from the North American Free Trade Agreement ("NAFTA"). The President-elect plans to launch a study of the process and consequences of a potential NAFTA withdrawal on the first day of his taking office. He will consider making a formal NAFTA withdrawal by day 200.<sup>1</sup>

The Trump trade plan signals an important policy shift. The transition team's memo states that, "The Trump administration will reverse decades of conciliatory trade policy. New trade agreements will be negotiated that provide for the interests of U.S. workers and companies first." During his campaign the President-elect raised the prospect of slapping a 35 per cent tariff on goods from Mexico and of punishing U.S. companies who moved plants to Mexico. The U.S. government's withdrawal from NAFTA is being considered, in part, because Mexico will likely oppose a dramatic tariff increase. President-elect Trump mentioned scrapping the Chapter 11 NAFTA investor-state dispute resolution mechanism.<sup>2</sup> Further, his administration will likely be a strong promoter of the "Buy American" policy.<sup>3</sup>

Government leaders have been quick to respond in the wake of the U.S. election. One day after President-elect Trump's victory, Canadian Prime

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<sup>1</sup> Zeeshan Aleem, "Here's what will actually happen if Trump withdraws from NAFTA. It's not pretty." *Vox* (16 Nov, 2016) online: <http://www.vox.com/policy-and-politics/2016/11/16/13641944/trump-nafta-mexico-canada-recession-trade-warren-sanders-tpp>

<sup>2</sup> *Ibid*; Interview with Scott Pelly, host of *60 Minutes*, in "NAFTA 'a Disaster' and I'll Renegotiate, Says Donald Trump" *CBC News, Business* (25 September 2015) online: <http://www.cbc.ca/news/business/nafta-a-disaster-and-i-ll-renegotiate-says-donald-trump-1.3244280>; Bradford Wernle, "NAFTA: Free Trade, with Uneven Effects", *Automotive News* (19 September 2016) online: <http://www.autonews.com/article/20160919/GLOBAL/309199968/nafta:-free-trade-with-uneven-effects>.

<sup>3</sup> *Ibid*; Tania Kohut, "How Canada could fight a Donald Trump 'Buy American' policy" *Global News* (25 November 2016) online: <http://globalnews.ca/news/3088753/donald-trump-canada-buy-american-policies-reality-check/>

Minister Trudeau announced that Canada is willing to renegotiate NAFTA.<sup>4</sup> Representatives of Mexico also stated that they are prepared for dialogue.<sup>5</sup>

Business leaders have kept a watchful eye on the President-elect's NAFTA agenda. NAFTA proponents note that importers, and exporters and investors have established businesses based upon NAFTA's free trade rules and investment rules for 22 years. It has been the glue that has bound a strong, integrated North American economy. Some hold hope that protectionist talk will be shaped into more pragmatic policies.<sup>6</sup>

However, President-elect Trump may follow through with his plan. His views are shared by NAFTA critics who claim that Mexico has been the main NAFTA beneficiary. NAFTA has been associated with losses in the American manufacturing sector. For example, that nine out of the last ten auto assembly plants announced in the NAFTA countries have, or will be, built in Mexico.<sup>7</sup> While Trump has targeted the United States' trade relationship with Mexico, Canada could be sideswiped in any NAFTA renegotiation.<sup>8</sup>

It is hard to predict what would happen if the United States withdrew from NAFTA. There is some concern that Canadian – American business relationships could be upended. Others have suggested that cross-border trade and investment in North America could dry up, crippling some industries and sparking a trade war.<sup>9</sup> This outline is designed to provide information to help readers assess the situation. These following pages will discuss whether or not President-elect Trump can withdraw from NAFTA once he takes office and will mention some possible outcomes.

## Controversy

President-elect Trump has claimed that NAFTA, "is the single worst trade deal ever approved in the country" and that "Good American jobs" are going to Mexico".<sup>10</sup> NAFTA's potential adverse effect on jobs has been an issue even before the agreement was ratified.<sup>11</sup> Ross Perot, a 1992 U.S.

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<sup>4</sup> "Canada PM Says Ready to Renegotiate NAFTA With Trump", *AFP* (10 November 2016) online: <https://www.yahoo.com/news/canada-pm-trudeau-says-ready-renegotiate-nafta-trump-165713892.html>.

<sup>5</sup> "NAFTA Can Be Discussed, But Not Renegotiated, Says Mexico", *BBC* (11 November 2016) online: <http://www.bbc.com/news/world-latin-america-37945913>.

<sup>6</sup> Wernle, *supra* note 2.

<sup>7</sup> *Ibid*; Neil Irwin, "Donald Trump Trashes NAFTA. But Unwinding It Would Come at a Huge Cost", *The New York Times* (3 October 2016) online: [http://www.nytimes.com/2016/10/04/upshot/donald-trump-trashes-nafta-but-unwinding-it-would-come-at-a-huge-cost.html?\\_r=0](http://www.nytimes.com/2016/10/04/upshot/donald-trump-trashes-nafta-but-unwinding-it-would-come-at-a-huge-cost.html?_r=0); *Supra*, note 2

<sup>8</sup> L. Ian MacDonald, "Canada Isn't Speaking from Strength on NAFTA", *iPolitics* (10 November 2016) online: <https://ipolitics.ca/2016/11/10/canada-isnt-speaking-from-a-position-of-strength-on-nafta/>.

<sup>9</sup> *Ibid*.

<sup>10</sup> Jon Greenberg, "Was NAFTA 'Worst Trade Deal Ever'? Few Agree", *Politifact* (29 September 2016) online: <http://www.politifact.com/truth-o-meter/article/2016/sep/29/NAFTA-worst-trade-deal-ever-few-agree/>; *Washington Post*, "Transcript: First Presidential Debate" (26 September 2016).

<sup>11</sup> "Free trade", *Merriam-Webster* online: <http://www.merriam-webster.com/dictionary/free%20trade>.

presidential candidate, suggested that if and when NAFTA was signed, “You’re going to hear a giant sucking sound of jobs being pulled out of this country”. He predicted that NAFTA would cause the loss of five million American jobs. That did not happen.<sup>12</sup> Economists and politicians predicted that the United States would gain a significant number of jobs. That did not happen either. American job losses resulting from NAFTA were modest.<sup>13</sup>

Trade experts have argued that NAFTA is simply a scapegoat for other factors affecting American jobs. Such factors include China’s rise as the world’s factory, advancements in technology, robotics, and currency fluctuations.<sup>14</sup> Whatever the reason, many displaced American workers have seen their jobs moved offshore. President-elect Trump’s support includes displaced workers who do not have the means to retrain for other work.<sup>15</sup>

One striking example is in the auto industry. NAFTA has transformed the auto industry, arguably benefitting Mexico, harming Canada, and diminishing the former dominance of the U.S. Midwest.<sup>16</sup> In 2015, Mexico was the world’s fourth-largest auto exporter. In that year it produced approximately 3.5 million cars annually. By 2020, it is expected to produce 5 million autos. NAFTA critics often reference this example in order to bolster the argument that the United States must impose high trade tariffs in order to protect American jobs.<sup>17</sup>

On the other hand, some American companies and their workers depend upon the market access provided by free trade agreements, such as NAFTA. For American exporters, free trade agreements provide critical access to foreign markets. NAFTA proponents claim that it created a rising economic tide.<sup>18</sup> The following statistics illustrate the degree to which Canadian – American trade and investment has been rising:

- In 2015, the value of goods and services traded between Canada and the United States was almost CDN881 billion.

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<sup>12</sup> Kimberly Amadeo, “History of NAFTA and Its Purpose” *the balance* (10 November 2016) online: <https://www.thebalance.com/history-of-nafta-3306272>.

<sup>13</sup> M. Angeles Villarreal and Ian F. Fergusson, “The North American Free Trade Agreement (NAFTA)” *Congressional Research Service* (16 April 2015) online: <https://fas.org/sgp/crs/row/R42965.pdf>; Jon Greenberg and *Washington Post*, both *supra* note 8.

<sup>14</sup> Luis Rubio, political analyst for the Centro de Investigacion para el Desarrollo cited in *Automotive News*, *supra* note 3.

<sup>15</sup> *Ibid*.

<sup>16</sup> Mark Muro, senior fellow at the Brookings Institution, cited in Wernle, *supra* note 2.

<sup>17</sup> Abigail Stevenson, “Cramer’s Wake-Up Call for Donald Trump on NAFTA”, *CNBC Mad Money* (27 September 2016) online: <http://www.cnbc.com/2016/09/27/cramers-wake-up-call-for-donald-trump-on-nafta.html>.

<sup>18</sup> Statistics Canada referred to in Matt Lundy, “How a Trump Presidency Would Affect Canada’s Economy” *The Globe and Mail* (23 August 2016) online: <http://www.theglobeandmail.com/report-on-business/economy/how-a-trump-presidency-would-impact-canadas-economy/article31115880/>.

- Canada is the second-largest market for U.S. services exports. Canada-U.S. services trade reached approximately CDN122.8 billion in 2015 (an increase of 205.1 per cent since 1993).
- The United States was the number one destination for Canadian exported goods in 2015. Canada was the top export destination for 35 states.
- Canada was the main foreign supplier of energy to the United States.
- Canada was also the largest cumulative source of foreign direct investment into the U.S.<sup>19</sup>
- Nearly nine million U.S. jobs depend upon investment and trade with Canada.<sup>20</sup>

In sum, businesses and workers appear to have benefited from an integrated, trilateral, North American trade and investment bloc under NAFTA.<sup>21</sup> Additionally, businesses and consumer have benefited from lower prices on imported goods under NAFTA. Cancelling NAFTA and raising tariffs on goods would make imported goods more expensive.<sup>22</sup> As one commentator has remarked, “[the] tradeoff is very real and it needs to be explored”.<sup>23</sup> Canada could risk a severe economic slowdown in the absence of a free trade agreement between it and the United States.<sup>24</sup> One prediction is the potential reduction of up to 4 per cent of Canada’s GDP. This would be more severe than the 2008 recession. The impact could be more serious in Southwestern Ontario.<sup>25</sup>

### CUSFTA and NAFTA Negotiation/Implementation

If there were misgivings about NAFTA’s effects on jobs, both Republicans and Democrats supported the implementation of NAFTA. The idea of a North American free trade bloc was part of Ronald Reagan’s 1980 presidential campaign platform which included the development of a North American common market.<sup>26</sup> Congress passed the *Trade and Tariff Act of*

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<sup>19</sup> Government of Canada, “Canada and the United States, State Trade Fact Sheets” (date modified: 12 October 2016) online: [http://www.can-am.gc.ca/business-affaires/fact\\_sheets-fiches\\_documentaires/index.aspx?lang=eng](http://www.can-am.gc.ca/business-affaires/fact_sheets-fiches_documentaires/index.aspx?lang=eng). Government of Canada; Global Affairs Canada, “North American Free Trade Agreement” (date modified: 27 July 2016) online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/info.aspx?lang=eng>.

<sup>20</sup> *Supra* note 18.

<sup>21</sup> Article 102 of NAFTA sets out its purposes, including the elimination of barriers to trade and the facilitation of the cross-border movement of goods and services.

<sup>22</sup> *Supra* note 1.

<sup>23</sup> *Supra* note 17.

<sup>24</sup> Government of Canada, Global Affairs Canada, both *supra* note 19; NAFTA NOW.ORG, “North American Free Trade Agreement, Success Stories” online: [http://www.naftanow.org/success/default\\_en.asp](http://www.naftanow.org/success/default_en.asp).

<sup>25</sup> Mike Moffatt, Assistant Professor of Business, Economics and Public Policy at the Ivey Business School cited in Matthew Trevithick, “Impact on Canada of U.S. Withdrawing from NAFTA Would Be ‘Larger Than the 2008 Recession’: Mike Moffatt”, *AM980* (9 November 2016) online: <http://www.am980.ca/2016/11/09/nafta-canada-donald-trump/>.

<sup>26</sup> *Supra* note 12; Michael G. Wilson, “The North American Free Trade Agreement: Ronald Reagan’s Vision Realized” *The Heritage Foundation, Executive Memorandum #371 on Trade, Economic Freedom* (23 November 1993) online: [http://www.heritage.org/research/reports/1993/11/em371-the-north-american-free-trade-agreement\\_](http://www.heritage.org/research/reports/1993/11/em371-the-north-american-free-trade-agreement_).

1984 after he became U.S. President. This gave the President “fast-track” free trade agreement negotiating authority.<sup>27</sup>

Canadian Prime Minister Brian Mulroney negotiated the Canada-U.S. Free Trade Agreement (“CUSFTA”) with President Reagan. It was signed in 1988. It was implemented in Canada pursuant to the *Canada-United States Free Trade Implementation Act* and went into effect in 1989.<sup>28</sup>

In 1991, Canada asked to join free trade agreement between the United States and Mexico. The negotiations led to NAFTA. NAFTA was signed by Canada, Mexico, and the United States in 1992.<sup>29</sup>

In 1993, the United States, Canada, and Mexico ratified NAFTA.<sup>30</sup> The U.S. House of Representatives passed the *North American Free Trade Agreement Implementation Act* on November 17, 1993.<sup>31</sup> The bill passed the U.S. Senate on November 20, 1993.<sup>32</sup> On December 8, 1993, President Bill Clinton signed NAFTA into law. It was entered into force on January 1, 1994.<sup>33</sup> NAFTA then superseded (but did not replace) CUSFTA.

## Withdrawal from NAFTA

### Considerations

There are many factors to consider when assessing the potential consequences of a decision by the United States to withdraw from NAFTA. One factor is whether or not CUSFTA would apply. When CUSFTA was

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<sup>27</sup> The *Tariff and Trade Act of 1984*, Pub. L. No. 98-573, 98 Stat 2948 (1984), reprinted in 1984 U.S. Code Cong & AD News Supp (No. 10) (Dec. 1984) cited in N. David Palmetier, “*The Trade and Tariff Act of 1984: From the Customs Treatment of Manhole Covers to the Return of Goods from Outer Space*” (1984) 11:3, Art. 3 Syracuse J Intl L & Com at 490, footnote 1 online:

<http://surface.syr.edu/cgi/viewcontent.cgi?article=1191&context=jlilc>. The author notes that the *Trade and Tariff Act* began as a *Miscellaneous Tariff Bill*, H.R. 3398, that the Senate used H.R. 3398 as its vehicle for trade legislation, and that the Senate approved an Omnibus Trade Bill on September 20, 1984, authorizing negotiations on a bilateral trade area with Canada.

<sup>28</sup> *Supra* note 12; Government of Canada, Global Affairs Canada, both *supra* Note 19; *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, online: <http://laws-lois.justice.gc.ca/eng/acts/c-10.6/index.html>.

<sup>29</sup> Official Website of the Department of Homeland Security, U.S. Customs and Border Protection, “North American Free Trade Agreement (NAFTA)” (last published 11 July 2016) online: <https://www.cbp.gov/trade/nafta>.

<sup>30</sup> *Supra* note 12; Canadian Parliament ratified the *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 34, online: <http://laws-lois.justice.gc.ca/eng/acts/n-23.8/page-1.html>; U.S. Congress ratified *The North American Free Trade Agreement Implementation Act*, online: <https://www.congress.gov/bill/103rd-congress/house-bill/3450?q=%7B%22search%22%3A%5B%22nafta%22%5D%7D>, and on 9 December 1993, it became public law No: 103-182.

<sup>31</sup> Ayes-Noes, 234 to 200. *Ibid* at U.S. Congress.

<sup>32</sup> Yea-Nay Vote; 61 to 38. *Supra* note 11 and United States Senate, U.S. Senate Roll Call Votes 103rd Congress – 1<sup>st</sup> Session, Vote Summary, Question: On The Passage of the Bill (H.R. 4350) online: [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=103&session=1&vote=00395](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=1&vote=00395).

<sup>33</sup> All Actions: H.R. 3450 — 103rd Congress (1993-1994), Bill History – Congressional Record References online: <https://www.congress.gov/bill/103rd-congress/house-bill/3450/all-actions?overview=closed#tabs>.

implemented it established the biggest bi-lateral free trade agreement that had ever been concluded.

Under NAFTA Article 103, the NAFTA parties affirmed their rights and obligations to each other under the *General Agreement on Tariffs and Trade* and any agreements between the parties. Article 103 states that NAFTA provisions prevail to the extent of any inconsistency between NAFTA and other agreements. Therefore, CUSFTA could provide for free trade between Canada and the United States if the United States was not a NAFTA party.<sup>34</sup>

Another factor is the effect of any reset to pre-free trade status. The United States sold more goods to Canada and Mexico last year than to its next ten biggest export markets combined.<sup>35</sup> Before NAFTA was implemented, Canada imposed an average duty rate of 9.7 per cent on U.S. imports. The United States imposed an average 5.1 per cent duty rate on Canadian goods.<sup>36</sup> Businesses in Canada and the United States could see slower exports and higher costs for imported goods.<sup>37</sup>

Existing United States tariffs might remain in effect for one year after any withdrawal from NAFTA by the United States, pursuant to section 125(e) of the United States *Trade Act of 1974*. As U.S. President, Donald Trump could raise tariffs after terminating NAFTA. To raise them significantly, (say by 35 percent) he might seek to do so by invoking the *Trade Act of 1974* or other Acts of Congress, citing unfair trade practices, national security or other threats.<sup>38</sup>

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<sup>34</sup> The U.S. Department of State publication *Treaties in Force* states that, "[t]his agreement is suspended, subject to certain transition arrangements with respect to dispute settlement proceedings under Chapters 18 and 19, for such time as the United States and Canada are parties to the North American Free Trade Agreement signed at Washington, Ottawa, and Mexico City December 8, 11, 14, and 17, 1992." (p. 49, 2003). See Berkeley Law Library online: <https://www.law.berkeley.edu/library/dynamic/guide.php?id=60#toc2>. See also Cyndee Todgham Cherniak in Jeff Buckstein, "Ill Trade Winds Pose Threat to Canada", *The Bottom Line* (October 2016) online <http://www.thebottomlinenews.ca/articles/901> and Gus Van Harten in Thomas Walkom, "If Donald Trump Kills NAFTA, Canada Could Benefit: Walkom", *thestar.com* (11 November 2016) online: <https://www.thestar.com/opinion/commentary/2016/11/11/if-donald-trump-kills-nafta-canada-could-benefit-walkom.html>.

<sup>35</sup> Eric Martin, Trump Killing NAFTA Could Mean Big Unintended Consequences for the U.S., *Bloomberg Business* (1 October 2015) online: <http://www.bloomberg.com/news/articles/2015-10-01/trump-killing-nafta-could-mean-big-unintended-consequences-for-the-u-s->. This article indicates that U.S. goods exports to Canada and Mexico quadrupled since NAFTA came into force in 1994 rising to \$550 billion in 2014.

<sup>36</sup> Gary Hufbauer, analyst at the Peterson Institute for International Economics cited in Eric Martin, *ibid*.

<sup>37</sup> The next largest export markets were China, Japan, the UK, Germany, South Korea, Brazil, India, Russia, and Hong Kong. See Eric Martin, *ibid*.

<sup>38</sup> Richard A. Walawender, "Could President Trump pull the U.S. out of NAFTA?" *Mining.com* 14 November, 2016 online: <http://www.mining.com/web/could-president-trump-pull-the-us-out-of-nafta/>

The issue of whether or not American jobs would return in the absence of a free trade agreement between the United States, Canada and Mexico seems to be debateable. Those who suggest that American jobs will not necessarily return note that business operations can be reconfigured to set up in other lower-cost jurisdictions. For example, factories in Mexico could be moved to China and not necessarily back to the United States.<sup>39</sup>

Finally, the re-negotiation of NAFTA provisions or withdrawal of the United States from NAFTA raises the spectre of trade disputes. A trade war and retaliation on the part of the remaining NAFTA parties, Canada and Mexico, could be an option of last resort. Canada's options might include slapping punitive tariffs on U.S. goods, or limiting or blocking U.S. investment.<sup>40</sup>

Notably, the U.S. President-elect's transition team seeks to include two of the most contentious trade issues between Canada and the United States in NAFTA talks. The first issue is Canada's softwood lumber exports. The 2006 Softwood Lumber Agreement, which provided stability and predictability, expired on October 12, 2015. Canada and the United States have been unable to negotiate the terms of a new agreement. Canada is prepared for a World Trade Organization ("WTO") challenge to U.S. softwood lumber tariffs if a negotiated settlement can't be reached.<sup>41</sup>

The second issue is the United States' country of origin labeling ("COOL") rules. COOL involves United States meat labelling rules that require foreign beef and pork to be sold with labels stating its origin and requiring American feedlots and packing lots to keep Canadian livestock and meat separate. In 2015 the WTO stated that the COOL rules violated international trade rules. It called for their removal.

#### **Article 2205 of NAFTA**

As U.S. President, Donald Trump might issue a written notice of withdrawal to Canada and Mexico, causing the withdrawal of the United States from NAFTA. He has promised to invoke Article 2205 if Canada and Mexico won't agree to renegotiate NAFTA.<sup>42</sup> NAFTA provides for the withdrawal of a party. NAFTA Article 2205 states as follows:

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<sup>39</sup> David Gantz, trade law teacher at the University of Arizona cited in Eric Martin, *ibid*.

<sup>40</sup> Wharton, University of Pennsylvania, "The Hidden Costs of a Possible U.S.-Mexico Trade War" (5 August 2016) online: <http://knowledge.wharton.upenn.edu/article/hidden-costs-possible-u-s-mexico-trade-war/>.

<sup>41</sup> *Global Affairs Canada*, "Softwood Lumber" date modified: 2016-11-16, online: [http://www.international.gc.ca/controls-controles/softwood-bois\\_oeuvre/index.aspx?lang=eng](http://www.international.gc.ca/controls-controles/softwood-bois_oeuvre/index.aspx?lang=eng); John Winggrove and Jen Skerrit, "Canada Prepared for WTO fight on softwood Lumber, Freeland says" *The Globe And Mail* 17 October, 2016 online: <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/canada-prepared-for-wto-fight-on-softwood-lumber-freeland-says/article32399508/>

<sup>42</sup> Russell Berman, "Trump's Shockingly Specific Speech on Trade", *The Atlantic* (28 June 2016) online: <http://www.theatlantic.com/politics/archive/2016/06/donald-trumps-shockingly-specific-speech-on-trade/489194/>; Tamy Luhby, "Yes, 'President Trump' Really

### Article 2205: Withdrawal

A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.<sup>43</sup>

It is hard to say with precision what would happen if the United States issued a notice to withdraw from NAFTA under Article 2205. There are few precedents. The last time the United States withdrew from a trade agreement was in 1866.<sup>44</sup>

One U.S. trade lawyer predicted that, “U.S. importers would take the U.S. to court the next day”.<sup>45</sup> However, another U.S. lawyer has suggested that if a party sued in order to challenge the U.S. President’s authority to withdraw from NAFTA, the case would likely be dismissed, based on the ground that it raises a nonjusticiable political question. This doctrine holds that certain matters are political in nature, and are best resolved through the political process (rather than through judicial review).<sup>46</sup>

### Congressional-executive agreement

#### Introduction

NAFTA Article 2205 provides for a NAFTA party’s withdrawal from the agreement. However, NAFTA does not designate the person responsible to give notice withdrawal for the United States, or state how a withdrawal decision is to be reached. Therefore, it may be useful to consider how NAFTA was brought into force. In the United States, NAFTA is the result of congressional and executive approval processes. A U.S. President does not appear to have the authority to unilaterally repeal the provisions of the *North American Free Trade Agreement Implementation Act*. U.S. Congress has the sole power to repeal or amend this legislation.

In the United States, the process for making binding international agreements follows two separate tracks. First is the “treaty clause” under Article II of the *U.S. Constitution*. Under the treaty clause, the consent of two-thirds of the Senate is required in order for the treaty to become law. Second is the “congressional-executive agreement”. A congressional-executive agreement may be approved by Congress through the enactment of ordinary legislation passed by both houses and signed into law by the U.S. President.<sup>47</sup> NAFTA is an example of a congressional-executive agreement.<sup>48</sup>

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Could Kill NAFTA—But It Wouldn’t Be Pretty”, *CNN Money* (6 July 2016) online: <http://money.cnn.com/2016/07/06/news/economy/trump-nafta/>.

<sup>43</sup> “North American Free Trade Agreement”, Chapter Twenty-Two: Final Provisions, cited in *SICE, Foreign Trade Information System, Organization of American States*, online: <http://www.sice.oas.org/trade/nafta/chap-22.asp>.

<sup>44</sup> Tamy Luhby, *supra* note 42.

<sup>45</sup> *Ibid.*

<sup>46</sup> Walawender, *supra*, note 38.

<sup>47</sup> *U.S. Constitution*, Article II. See also Oona A. Hathaway, “The Case for Replacing Article II Treaties with Ex Post Congressional Executive Agreements”, *American Constitution Society for Law and Policy* (November 2008) online: <https://www.acslaw.org/files/Hathaway%20Issue%20Brief.pdf>.

<sup>48</sup> Jane M. Smith, Daniel T. Shedd, and Brandon J. Murrill, “Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than

### Omnibus Trade and Competitiveness Act of 1988

In 1992, the United States signed NAFTA. The U.S. President negotiated this agreement. He then submitted it to Congress under the terms of the *Omnibus Trade and Competitiveness Act of 1988 [OTCA]* and the *Trade Act of 1974*.<sup>49</sup>

### Trade Act of 1974: Fast track procedures

The *OTCA* provided that agreements negotiated under the *OTCA* could not enter into force in the United States unless they were submitted to Congress with an implementing bill and the bill was enacted into law.<sup>50</sup> This legislation has been referred to as “fast track” or “expedited consideration”. Fast track procedures are set out in s. 151(a) of the *Trade Act of 1974*. The term “implementing bill” is defined in s. 151(a) of the *Trade Act of 1974* as a bill that, amongst other things, contains a provision approving the trade agreement and necessary provisions to implement the agreement. Once enacted, the provision approving NAFTA made it a “congressional-executive” agreement.

### Legal considerations

Could President Trump issue a notice of withdrawal from NAFTA and thereby cancel this congressional-executive agreement? One author has stated that only the U.S. President is authorized to give notice on behalf of the United States to terminate a treaty or an agreement such as NAFTA.<sup>51</sup> However, the work of one U.S. constitutional lawyer suggests that such authorization is subject to congressional control, stating that:

...even a brief analysis of this unsettled area makes one conclusion clear: the case for congressional control over withdrawal from congressional-executive agreements is much stronger than the case for congressional control over withdrawal from treaties.<sup>52</sup>

In congressional-executive agreements, Congress approves the legislation necessary to authorize or to approve an agreement. The President manages the negotiations of the agreement. The President then registers the formal assent of the agreement (based on the congressional authority or assent offered), binding the United States to the agreement.

In sum, the process for the termination of congressional-executive agreements is more complex than treaty withdrawals. Further, assuming that a U.S. President can unilaterally withdraw the United States from a congressional-executive agreement by communicating the withdrawal to foreign parties, presidential withdrawal does not result in the repeal the

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Treaties”, *Congressional Research Service* under the heading “Statutory Authority for Trade Agreements” (15 April 2013) online <https://www.fas.org/sgp/crs/misc/97-896.pdf>.

<sup>49</sup> The *Trade Act of 1974*, 19 U.S.C. 2191; Jane M. Smith et al., *ibid*.

<sup>50</sup> 19 U.S.C 2903; H.R 4848, 100th Congress: *Omnibus Trade and Competitiveness Act of 1988*, s. 1103 “Implementation of Trade Agreements” online: <https://www.govtrack.us/congress/bills/100/hr4848/text>.

<sup>51</sup> Walawender, *supra*, note 38 indicates that the U.S. President has authority to revoke earlier presidential proclamations implementing U.S. tariff reductions, pursuant to section 125(b) of the *Trade Act of 1974*.

<sup>52</sup> Hathaway, *supra* note 47.

enabling statute upon which the congressional-executive agreement rests. Only Congress can repeal that statute. Legislation creating congressional-executive agreements is federal law, enforceable by the courts.<sup>53</sup>

### Executive orders

The ability of a sitting U.S. President to issue an Executive Order setting out measures inconsistent with the *North American Free Trade Agreement Implementation Act* is worth consideration.<sup>54</sup> Article II, Section 1 of the U.S. Constitution provides that, "The executive power shall be vested in a President of the United States of America".<sup>55</sup> Executive Orders have the same legal weight as legislation ratified by Congress. They may be subject to congressional recourse and court review.<sup>56</sup>

If, as U.S. President, Donald Trump issues an Executive Order providing notice of the withdrawal of the United States from NAFTA pursuant to Article 2205, other action may be required.<sup>57</sup> While the law is murky, it appears that he could not unilaterally terminate the legislation that gives rise to NAFTA once he takes office. Generally, a piece of U.S. legislation such as the *North American Free Trade Agreement Implementation Act* stands until it is repealed or amended.

### Summary

This article has provided information on whether or not President-elect Trump could unilaterally withdraw from the trade deal when he takes office. The consequences of the withdrawal from NAFTA by the United States are unclear. However, CUSFTA might provide for free trade between Canada and the United States if the United States was no longer part of NAFTA. NAFTA proponents argue that the implications of cancelling the deal could be significant and have unintended adverse consequences for the United States. NAFTA Article 2205 provides a NAFTA party with the right to withdraw from NAFTA on a six months' written notice. Assuming that, as U.S. President, Donald Trump is authorized to give notice of withdrawal under NAFTA Article 2205, it would be necessary to address the provisions of the *North American Free Trade Agreement Implementation Act*.

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<sup>53</sup> Jeffrey C. Fox, "What Is an Executive Order?" *This Nation.com* online: <http://www.thisnation.com/question/040.html>.

<sup>54</sup> See the comments of Justice Jackson in *Youngstown Sheet & Tube Co, Sawyer*, 343 U.S. 579 (1952) commonly referred to as "The Steel Seizure Case" on the limits of the U.S. President's constitutional power under Article II of the U.S. Constitution: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any powers of Congress over the matters".

<sup>55</sup> *U.S. Constitution*, Article II, Section 1, *Cornell University Law School, Legal Information Institute*, online: <https://www.law.cornell.edu/constitution/articleii>.

<sup>56</sup> Hathaway, *supra* note 44.

<sup>57</sup> Two U.S. Presidents have terminated a treaty by Executive Order, in particular: (1) President Carter terminated the Sino-American Mutual Defence Treaty with Taiwan in 1979; and (2) President George W. Bush withdrew from the Anti-Ballistic Missile Treaty in 2001. See Walawender, *supra*, note 39.



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