Intelligence MEMOS

From: Konrad von Finckenstein

To: The Honourable Chrystia Freeland, Minister of Global Affairs

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Re: TWEAKING NAFTA

After his bilateral meeting with Prime Minister Trudeau on February 13th, President Donald Trump commented that he only wished to "tweak" NAFTA, and wanted to deal bilaterally with Canada first. Frequently mentioned candidates for tweaking are rules of origin, dispute settlement and Chapter 11.

With respect to the first two, one should remember that:

Rules of origin, as set in the Canada-US Free Trade Agreement (CUSFTA), did not work and left far too much discretion to custom administrators on how to interpret the various rules. Hence the three sides wrote the very detailed uniform rules to limit, if not eliminate, any discretion. Any rewrite of these rules has to avoid the re-emergence of interpretation discretion for customs administrators as it will invariably be used against imports.

The dispute settlement provisions were the centre piece of CUSFTA and merely repeated in NAFTA. Market access free from harassing trade protection actions based on loose interpretation of US laws, enacted by administrative agencies and deferred to by US supervising courts was one of Canada's key concerns. The dispute settlement provisions assured a just administration of anti-dump and countervail law in accordance with each country's jurisprudence. The existence of binational panels has had a restraining effect on improper or stretched findings of either anti-dumping, subsidy or injury. It would be a mistake to tinker with these, as any change carries the likelihood of lessening the moderating effect of binational panel reviews on US trade protection actions.

As far as Chapter 11 is concerned, it was only inserted in NAFTA at the insistence of the US. During the CUSFTA negotiations Canada resolutely resisted such a provision insisting that the judicial systems of both the US and Canada were sufficient to deal with any claims for expropriation or actions tantamount thereto. The US, having no such faith in the Mexican system, insisted on the present Chapter 11; however, insofar as a tweaked NAFTA will apply between Canada and the US, there is no need for this Chapter.

Yet President Trump's main focus is the preservation of US jobs, and nowhere has this point been addressed or contemplated. On this matter, he will need to show results. Rather than waiting for a US proposal in this respect Canada should give thought to a provision that meets his goals. Prohibiting the giving of incentives for the purpose of relocating operations might be an option. A very modest precedent can be found in the Agreement on Internal Trade, in s.4 of Annex 608.3:

> "4. No Party shall provide an incentive that is, in law or in fact, contingent on, and would directly result in, an enterprise located in the territory of any Party relocating an existing operation to its territory…"

Thought should be given to how this provision could be amplified and operationalized. It could meet President Trump's needs and would not be at Canada's expense.

The Hon. Konrad W. von Finckenstein, Q.C., is a Senior Fellow at the C.D. Howe Institute, and was formerly the Chair of the Canadian Radio and Telecommunications Commission, a Federal Justice, and Commissioner of Competition.