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North America's Shifting Supply Chains: USMCA, COVID-19, and the U.S.-China Trade War

DAVID A. GANTZ*

I. Introduction

The United States-Canada-Mexico Agreement (USMCA) entered into force on July 1, 2020,¹ after a long and arduous journey that began in 2017 with multiple U.S. threats to terminate NAFTA and effectively ended when the Trump Administration and the Democratic Congress agreed in December 2019 on a series of amendments to the original text signed November 30, 2018.²

For purposes of this article, it suffices to note that while much of NAFTA is carried over into the USMCA, extensive modernization and innovation was accomplished, reflecting the passage of twenty-eight years since NAFTA was originally negotiated in 1991–1992.³ Overall, the most significant changes directly affecting regional trade are those affecting the auto industry; particularly, the requirements that the regional value content of automobiles and light trucks benefitting from NAFTA's origin—zero tariff status—must, after three years, increase from 62 percent to 75 percent, and that 70 percent of the steel and aluminum used in automotive production originate in North America (with the steel, after seven years, also having to

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1. Press Release, Office of U.S. Trade Rep., USMCA To Enter Into Force July 1 After United States Takes Final Procedural Steps For Implementation (Apr. 24, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/usmca-enter-force-july-1-after-united-states-takes-final-procedural-steps-implementation> [<https://perma.cc/N6XP-JD46>]; see also Agreement Between the United States of America, the United Mexican States, and Canada, Dec. 13, 2019, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [<https://perma.cc/WX3X-SWGQ>].

2. *United States-Mexico-Canada Agreement*, OFF. U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> [<https://perma.cc/46HU-246K>] (last visited Oct. 19, 2020).

3. See David A. Gantz, *The United States–Mexico–Canada Agreement: Overview and Analysis 1* (Rice Univ. Baker Inst. for Pub. Pol'y, Report No. 12.11.18, 2018), <https://www.bakerinstitute.org/media/files/files/1f9f406a/bi-report-121118-mex-usmca.pdf> [<https://perma.cc/A77M-P9DA>] [hereinafter “Gantz, Report No. 12.11.18”].

have been melted and poured in North America).⁴ With steel and aluminum, most foreign producers are saddled with 25 percent and 10 percent additional duties, respectively, based on bogus national security concerns, but China is not among those significantly affected.⁵

These provisions in themselves will require significant modifications of the supply chains utilized by the dozens of auto plants operating in North America, keeping in mind that NAFTA created the full integration of North American automotive supply chains nearly thirty years ago.⁶ Simultaneously, several other factors are forcing North American manufacturers, including but not limited to those in the automotive industry, to adjust their supply chains, creating a veritable “perfect storm” of pressures to decouple with China (and reduce dependence on other non-North American sources) for materials and components, encouraging an already significant decoupling of the U.S. and Chinese economies in the first quarter of 2020.⁷ Although this is not the place for a detailed discussion of the broader United States-China relationship, it is notable that a high official of the Trump Administration has argued for an end to “blind engagement” with China and criticized U.S. allies for not taking action to address the prospect of “a Chinese century.”⁸

The most important of the factors discussed in the article is the U.S.–China Trade War (discussed in Part III of this article) which, despite the conclusion of the “Phase One” Agreement on January 15, 2020, permits the United States to continue to impose tariffs from 7.5 percent to 25 percent on some \$360 billion worth of tariffs on Chinese imports.⁹ Many observers, including this writer, believe that these penalty tariffs, imposed originally to pressure China to improve its protection of intellectual

4. See David A. Gantz, *The United States-Mexico-Canada Agreement: Tariffs, Customs, and Rules of Origin 3*, (Rice Univ. Baker Inst. for Pub. Pol’y, Report No. 02.21.19, 2019), <https://www.bakerinstitute.org/media/files/files/6ee1ade5/bi-report-022119-mex-usmca.pdf> [<https://perma.cc/55LP-6TAK>] [hereinafter “Gantz, Report No. 02.21.19”]; DAVID A. GANTZ, AN INTRODUCTION TO THE UNITED STATES-MEXICO-CANADA AGREEMENT: UNDERSTANDING THE NEW NAFTA 24–44 (2020).

5. See discussion *infra* Section IV.

6. See Gantz, Report No. 02.21.19, *supra* note 4, at 1.

7. James Kyngé, *US-China Economic Decoupling Accelerates in First Quarter of 2020*, FIN. TIMES (May 11, 2020), <https://www.ft.com/content/115fc14f-4a8a-45da-8688-c59605a5191a> [<https://perma.cc/JMM3-47MA>].

8. See Katrina Manson, *Pompeo Calls for an End to “Blind Engagement” with China*, FIN. TIMES (July 23, 2020), <https://www.ft.com/content/825870b5-99a3-4b45-9fb3-1baa7772f011> [<https://perma.cc/HGN9-H9K9>].

9. See generally Economic and Trade Agreement Between the Government of the United States of America and the Government of the People’s Republic of China, China–U.S., Jan. 15, 2020, https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf [<https://perma.cc/7E5X-XWT3>] [hereinafter “Phase One Agreement”]; see also Peter Eavis et al., *What’s in (and Not in) the U.S.–China Trade Deal*, N.Y. TIMES (Jan. 15, 2020), <https://www.nytimes.com/2020/01/15/business/economy/china-trade-deal-text.html> [<https://perma.cc/YZ3K-HKF4>].

property,¹⁰ will be in force for the foreseeable future and will exacerbate the already significant pressures on U.S. businesses to restructure their supply chains away from China toward the United States and its two USMCA partners.

Given the unpredictability of both the Trump Administration and the Chinese leadership, it is more than a remote possibility that the tariff levels on U.S. imports on the remaining approximately \$150 billion worth of Chinese products could be increased without much warning, as this was threatened by the Administration in the Fall of 2019 when the “Phase One” Agreement was under negotiation.¹¹ Thus, in many respects, North America is expected to become the most attractive option for sourcing many parts and components and for supply chain management more broadly, even if the logistics and other complexities of more extensive decoupling from Chinese sources requires an extended period (three to five years) for many manufacturers of complex products.

The remainder of this article is organized into six parts. Part II provides additional background. Part III briefly describes the pressures on enterprises producing goods in North America to move materials and component sourcing to North America from China because of the U.S.-China Trade War. Part IV reflects on the additional pressures that national security concerns are placing on sourcing of Chinese parts and components, particularly in high-tech areas such as 5G telecommunications and as a new “cold war” develops with China. Part V discusses similar pressures arising out of the USMCA, particularly the automotive rules of origin, offering a dual benefit through avoiding penalty tariffs and assuring zero tariffs and quotas for USMCA-originating goods. Part VI addresses related pressures as a result both of COVID-19 and carbon footprint concerns to reduce or eliminate long supply lines, particularly regarding medical equipment, pharmaceutical products, and personal protective equipment. It also includes a note on the Mexican investment climate. Part VII provides a short conclusion and predictions for the future.

II. Background on the Pressures Facing U.S. Enterprises

Beyond the purely economic impact of higher tariffs imposed by the Trump Administration before and during the “Phase One” Trade Agreement, broader U.S. relations with China have been exacerbated by the

10. See OFF. U.S. TRADE REP., EXEC. OFF. PRESIDENT, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018); see generally *China Section 301-Tariff Actions and Exclusion Process*, OFF. U.S. TRADE REP., <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> [<https://perma.cc/4EYC-D67A>] (last visited Oct. 19, 2020).

11. See Jacob Pramuk, *Trump Signs Phase One Trade Deal with China in Push to Stop Economic Conflict*, CNBC (Jan. 15, 2020), <https://www.cnbc.com/2020/01/15/trump-and-china-sign-phase-one-trade-agreement.html> [<https://perma.cc/9E8C-EFXM>] (noting that because of the agreement, Trump scrapped additional tariffs earlier scheduled to be imposed).

trade war.¹² Primarily based on national security concerns and on efforts to hold China responsible for originating the COVID-19 pandemic, further penalty tariffs, export restrictions, and limitations on Chinese investment in the United States may be imposed.

At minimum, it may become impracticable for publicly traded U.S. enterprises to continue to source certain goods from China, even if they continue to produce in China for the Chinese market. The dislocations will not be limited to U.S. importers because American firms, like chip producers Qualcomm and Intel, as well as Boeing (who count China as one of their most significant markets),¹³ are likely to lose partial access to that market either because of export controls or as retaliation for U.S. tariffs on Chinese exports to the United States.

Initial concerns arose some years ago, well before the coronavirus became a worldwide catastrophe and before the United States and other governments placed blame on China for concealing the seriousness of the outbreak in China in a manner that has made it difficult for other countries, including the United States, to react promptly and effectively to the threats to the health of their own citizens and their economies.¹⁴ The pandemic has further reinforced the determination of President Trump and his key advisers (and many on both sides of the aisle in Congress) to greatly reduce or eliminate the supply chain links between U.S. manufacturers and China.¹⁵ This monumental change would be accomplished through “reshoring” production either to the United States proper (as the Administration would seemingly prefer) or, more likely in the case of labor-intensive products,

12. See Kynge, *supra* note 7.

13. See generally David Reid, *Boeing Values China's Aircraft Business at Almost \$3 Trillion over the Next Two Decades*, CNBC (Sep. 17, 2019), <https://www.cnbc.com/2019/09/17/boeing-says-china-needs-to-spend-almost-3-trillion-on-new-planes.html> [<https://perma.cc/DL3R-HWNW>].

14. The gross incompetence of the Trump Administration in promptly and effectively addressing the COVID-19 threats is evident to everyone outside the Administration but will not be addressed here. See Nectar Gan, *Coronavirus Has Created a Rift Between the US and China That May Take a Generation to Heal*, CNN (May 8, 2020, 11:38 PM), <https://www.cnn.com/2020/05/08/asia/us-china-relations-nationalism-intl-hnk/index.html> [<https://perma.cc/CSR8-C5HN>]; see also Alice Ollstein, *5 Ways the Trump Administration Fell Short of its Own Pandemic Goals*, POLITICO (April 4, 2020, 1:44 PM), <https://www.politico.com/interactives/2020/trump-pandemic-goals/> [<https://perma.cc/TD95-W6EP>] (criticizing the Administration *inter alia* for disregarding guidance from past administrations on combating a pandemic).

15. See, e.g., Chloe Taylor, *Companies Will Shift Supply Chains Away from China After Coronavirus Crisis, Mark Mobius Predicts*, CNBC (April 21, 2020, 11:58 AM), <https://www.cnbc.com/2020/04/21/supply-chains-will-move-away-from-china-after-coronavirus-mark-mobius.html> [<https://perma.cc/R9WV-3UDH>]; see also Humeyra Pamuk & Andrea Shalal, *Trump Administration Pushing to Rip Global Supply Chains from China: Officials*, REUTERS (May 4, 2020, 12:09 AM), <https://www.reuters.com/article/us-health-coronavirus-usa-china/trump-administration-pushing-to-rip-global-supply-chains-from-china-officials-idUSKBN22G0BZ> [<https://web.archive.org/web/20201015131549/https://www.reuters.com/article/us-health-coronavirus-usa-china/trump-administration-pushing-to-rip-global-supply-chains-from-china-officials-idUSKBN22G0BZ>].

“nearshoring” production to Mexico.¹⁶ For some products, final assembly and production of parts and components would be split between the United States and Mexico or Canada. It is evident that the process, stimulated by most of the factors addressed herein, is already taking place.¹⁷ In 2018, the U.S. market imported \$0.131 of production from low cost Asian producers for every \$1 worth of domestic manufacturing output; currently the ratio has fallen to \$0.121 to \$1.¹⁸

A year or two ago, this process would have been even more difficult to achieve because of the uncertainty surrounding the replacement of NAFTA. Most potential investors otherwise inclined to create or expand manufacturing activities and related employment in North America were simply not willing to do so while NAFTA and its potential USMCA replacement were in doubt.¹⁹ Although some new investment has likely been postponed because of the pandemic, the entry into force of the USMCA has greatly reduced that particular source of investor uncertainty.²⁰ In time, probably within several years, most businesses operating within North America will have become comfortable with the USMCA's new rules of origin, and thus feel more confident in expanding their operations in North America under generally reliable and transparent rules of the game. The timing of any investment surge will depend in part on the speed of the U.S. and Mexico's economic recovery from the recession brought about by COVID-19 and the massive reduction in U.S. GDP, as well as the unemployment it has caused (14 percent as of the second quarter of 2020 and a predicted 10.1 percent for 2021).²¹ Given that both Mexico and Canada depend on the United States to take 75 percent or more of their

16. See Andra Durkin, *Can We Measure Whether “Reshoring” Is Real?*, HINRICH FOUND. (May 21, 2020), https://www.hinrichfoundation.com/research/tradestivas/measure-reshoring/?utm_source=HS_email&utm_medium=email&utm_content=88463826&_hsenc=p2ANqtz—RupbI1MILVqSx6jNUfEdRIIdYZA3P-n8SuvPNYqy85pCuoFw8g8IDq-W5KtRNqV-N50JH5UfT2A4Za1c_dePYxCHpEkDaF2xFQCN9-IJ5Vfz-RvA&_hsmi=88463826#Xs0rS5DgKR.email [https://perma.cc/N3E4-H3CC] (coining the term “nearshoring” for bringing manufacturing from Asia to Mexico or Canada).

17. See Taylor, *supra* note 15.

18. See Durkin, *supra* note 16 (quoting Patrick Van den Bossche et al., *Trade War Spurs Sharp Reversal in 2019 Reshoring Index, Foreshadowing COVID-19 Test of Supply Chain Resilience*, KEARNEY INST. 2 (2020), <https://www.kearney.com/documents/20152/5708085/2020+Reshoring+Index.pdf/ba38cd1e-c2a8-08ed-5095-2e3e8c93e142?t=1586268199800> [https://perma.cc/Ry76-8FHQ]).

19. Frances Donald, *NAFTA Uncertainty Hurting Business Investment: Manulife's Donald*, BNN BLOOMBERG (May 2, 2018), <https://www.bnnbloomberg.ca/economics/video/nafta-uncertainty-hurting-business-investment-manulife-s-donald~1334693> [https://perma.cc/84MT-VXKQ].

20. *Id.* Some aspects remain. For example, in the automotive industry new and complex rules of origin are unclear and, in any event, will require a learning curve of months or years before stakeholders are comfortable with the new requirements. *Id.*

21. See Phil Swagel, *CBO's Current Projections of Output, Employment, and Interest Rates and a Preliminary Look at Federal Deficits for 2020 and 2021*, CONG. BUDGET OFF. (Apr. 24, 2020), <https://www.cbo.gov/publication/56335> [https://perma.cc/2STM-34QD].

exports,²² once the U.S. economy begins to recover, Mexico and Canada will hopefully not be far behind.

Much of the public discussion of supply chain reorientation suggests that when U.S. enterprises reduce or eliminate dependence on China for their materials and components, the United States should be substituted for production processes that can be highly automated and/or are subject to severe national security concerns. But products as well as parts and components which remain labor intensive should logically be produced in Mexico, where average hourly manufacturing labor costs are still only about 15 percent to 20 percent of those in the United States.²³

Moreover, and of particular importance for those who seek resourcing all manufacturing to the United States rather than North America, it is notable that goods produced in Mexico for export to the United States typically contain about 40 percent U.S. content (25 percent from Canada), while for those sourced in China, the U.S. content is only about 4 percent.²⁴ Other advantages (as well as disadvantages) of producing in Mexico are discussed later in this article. Even if enterprises decide that they should not be dependent on single-source suppliers ever again, North America remains the most attractive means of hedging bets.

III. The U.S.-China Trade War Impact on USMCA Implementation and North American Regional Trade

In broad terms, U.S. strategy toward China has, according to the Trump Administration, been guided by the following principles: “(1) protect the American people, homeland, and way of life; (2) promote American prosperity; (3) preserve peace through strength; and (4) advance American

22. See Sharay Angulo, *Mexico's Dependence on U.S. Demand Spells Trouble for Weak Economy*, REUTERS (Aug. 1, 2019, 2:54 PM), <https://www.reuters.com/article/us-mexico-economy-analysis/mexicos-dependence-on-us-demand-spells-trouble-for-weak-economy-idUSKCN1UR5LT> [<https://web.archive.org/web/20190802094906/https://www.reuters.com/article/us-mexico-economy-analysis/mexicos-dependence-on-us-demand-spells-trouble-for-weak-economy-idUSKCN1UR5LT>] (reporting that over 80 percent of Mexico's exports go to the United States); *Canada's Staggering Trade Dependency on the U.S. Looks Like a Liability*, FIN. POST (Mar. 15, 2018), <https://business.financialpost.com/news/economy/canadas-staggering-trade-dependency-on-the-u-s-looks-like-a-liability> [<https://perma.cc/XJ9W-4NDM>] (reporting that 74.79 percent of Canada's 2017 exports went to the United States).

23. *Average Labor Costs in Mexico vs. United States*, TETAKAWI (Feb. 13, 2020), <https://insights.tetakawi.com/average-labor-costs-mexico-vs-usa#:~:text=datapercen20from percent20Tradingpercent20Economicspercent20indicates,widpercent20rangepercent20of percent20manufacturing percent20positions> [<https://perma.cc/EXK9-ZH7H>] (reporting \$16.07 to \$25.98 in the United States compared to \$2.40 to \$3.04 in Mexico).

24. See generally Pia M. Orrenius, *Economic Outlook Deteriorates Due to COVID-19: Short and Long Run Implications for North American Supply Chains*, FED. RESERVE BANK DALLAS (May 13, 2020), <https://www.bakerinstitute.org/media/files/files/00d93381/orrenius-baker-inst.pdf> [<https://perma.cc/W4HW-D3U4>].

influence.”²⁵ Whether the Administration’s China policies have been consistent with these goals (particularly with number four) is beyond the scope of this article. But execution of the policy through nearly the first four years of the Trump Administration has been primarily through penalty tariffs.²⁶ For more than two years, the United States has imposed high tariffs on most imports from China, ostensibly as punishment for China’s violation of international intellectual property norms, including theft of IP, forced transfer of IP to joint venture partners as a condition of doing business in China, and widespread hacking of IP owned by both private enterprises and the U.S. Government.²⁷ Unrelated to the IP concerns are the Trump Administration’s efforts to manage (and hopefully) reduce the large and growing annual trade deficit with China, even though other factors like a strong U.S. dollar and weak U.S. savings rates are among the core causes.²⁸

After difficult negotiations between the United States and China throughout 2019, the two countries—as noted in the Introduction—concluded a Phase One trade agreement on January 15, 2020.²⁹ Significantly, it did not deal with what many believe is the most significant underlying problem with China: the government’s massive (and often WTO illegal) subsidies of various productive sectors in China, including those which are part of China’s “Made in China 2025” effort to become the world leader in such areas as robots, semiconductors, artificial intelligence, and electric automobiles, among others.³⁰

In addition to intellectual property, the Phase One agreement seeks opening of the Chinese financial services market and provides limits on currency manipulation.³¹ It also includes detailed mechanisms for setting the appropriate standards—mostly health standards—in dairy and infant formula, poultry, beef, live breeding cattle, pork, processed meat, aquatic products, rice, and pet food.³² China also agreed to revise its tariff-rate-quotas measures for wheat, rice, and corn, and to establish procedures allowing the importation of genetically modified products and other biotechnology products.³³

25. OFF. U.S. TRADE REP., EXEC. OFF. PRESIDENT, UNITED STATES STRATEGIC APPROACH TO THE PEOPLE’S REPUBLIC, (May 26, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/05/U.S.-Strategic-Approach-to-The-Peoples-Republic-of-China-Report-5.20.20.pdf> [<https://perma.cc/U6B2-HRAL>].

26. See generally FINDINGS OF THE INVESTIGATION INTO CHINA’S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, *supra* note 10, at 153.

27. *Id.*

28. See Kimberly Amadeo, *US Trade Deficit with China and Why It’s So High*, THE BALANCE (Oct. 12, 2020), <https://www.thebalance.com/u-s-china-trade-deficit-causes-effects-and-solutions-3306277> [<https://perma.cc/WTV4-8976>].

29. See Phase One Agreement, *supra* note 9.

30. Eavis et al., *supra* note 9.

31. See Phase One Agreement, *supra* note 9, at Art. 5.2(1).

32. *Id.* at Annex 6.1.

33. *Id.* at ch.1–6.

In a managed trade approach to reducing the U.S. trade deficit, China promised the United States to buy \$200 billion more in U.S. goods in 2020 and \$257.5 billion in 2021.³⁴ In 2020, this would include \$77.7 billion of manufactured goods, \$32.0 billion of agricultural, \$52.4 billion of energy products, and \$37.9 billion of services products.³⁵ This increase, if achieved, would constitute a 92 percent increase from 2017 to 2021.³⁶

What is perhaps most surprising about the agreement and most significant for trade between the United States and China is that the United States is permitted to maintain existing penalty tariffs of 7.5 percent to 25 percent on \$370 billion worth of imports.³⁷ The United States promises not to impose 15 percent tariffs on the remaining \$160 billion worth of Chinese goods imports and to reduce existing tariffs on \$120 billion of Chinese imports from 15 percent to 7.5 percent.³⁸ But should China not meet its import commitments under the Agreement, for example because the pandemic essentially forced closure of the Chinese economy for the first quarter of 2020,³⁹ there is nothing to prevent the Trump Administration from terminating the Phase One agreement and imposing higher tariffs on the already penalized imports and/or imposing tariffs on the remaining \$160 billion worth.⁴⁰ While as of mid-2020 it appeared that both the U.S and China expected Phase One implementation in the agreed manner,⁴¹ in my view there is no certainty that the United States will maintain this viewpoint, either because China cannot or will not meet its import quotas, or because the Trump Administration believes that termination of the agreement is desirable for domestic political purposes. This doubt was confirmed in May, when President Trump said he was “having a very hard time with China” and was considering imposing tariffs on China because of its role in creating a worldwide pandemic.⁴²

34. *Id.* at Art. 6.2.1.

35. See generally *id.*; see also Eavis et al., *supra* note 9.

36. Eavis et al., *supra* note 9.

37. Bob Davis et al., *U.S., China Sign Deal Easing Trade Tensions*, WALL ST. J. (Jan. 15, 2020, 7:01 PM), <https://www.wsj.com/articles/u-s-china-to-sign-deal-easing-trade-tensions-11579087018> [<https://perma.cc/TNT4-9ZP9>].

38. Scott Horsley, *Trump Signs ‘Phase 1’ China Trade Deal, but Most Tariffs Remain in Place*, NPR (Jan. 15, 2020, 5:00 AM), <https://www.npr.org/2020/01/15/796305300/trump-to-sign-phase-one-china-trade-deal-but-most-tariffs-remain-in-place> [<https://perma.cc/6AS3-A2JE>].

39. See generally Kitty Fok et al., *COVID-19 Impact on China’s Economy and ICT Market*, INT’L DATA CORP. (Doc.No. CHE46110220, Mar. 2020), <https://www.idc.com/getdoc.jsp?containerId=CHE46110220> [<https://perma.cc/76SW-X3GD>].

40. Horsley, *supra* note 38.

41. See Brett Fortnam, *USTR: Phase-one Implementation Expected in Timely Manner, Despite COVID-19*, Vol. 38, No. 20 INSIDE U.S. TRADE 168776 (May 8, 2020, 9:11 AM), <https://insidetrade.com/daily-news/ustr-phase-one-implementation-expected-timely-manner-despite-covid-19> [<https://perma.cc/KLR8-PFY7>].

42. Josh Wingrove, *Trump Casts Doubt on Future of China, Trade Deal After Phone Call*, BLOOMBERG (May 8, 2020, 10:19 AM), <https://www.bloomberg.com/news/articles/2020-05-08/china-u-s-trade-teams-agree-to-work-to-implement-trade-deal> [<https://perma.cc/F4W5-E7G3>].

While the effort to halt further escalation of the ongoing trade war between the United States and China should be applauded, whether the Agreement is anything more than an uneasy truce of two years' duration or less or will be a step toward effectively addressing the underlying and changing landscape in the bilateral relationship and the global economy remains to be seen. In any event, termination of penalty tariffs currently applicable to \$370 million of Chinese source imports is unlikely for many months or even years. Moreover, the likelihood of the successful negotiation of a Phase Two agreement, which would deal at least in part with illegal Chinese subsidies of steel and other products, seems slim indeed.⁴³

What does this mean for purposes of implementing the USMCA? American manufacturers who continue to rely on China as a source (particularly a sole source) of raw materials and intermediate goods do so at their peril.⁴⁴ It might have been reasonable a year and a half ago to hope that the trade war would eventually be eliminated or at least reduced in scope through agreement. No more. The costly and time-consuming process of restructuring global value chains, which some multinational enterprises are much better equipped to undertake than others,⁴⁵ inevitably must continue—hopefully with a thoughtful, measured approach. This restructuring must continue even though many U.S. and other multinational enterprises will continue to invest in China to serve a market of potentially 1.4 billion consumers, and if, for economic reasons for U.S. sourcing of non-sensitive products, China will continue to be the preferred producer.⁴⁶

IV. National Security and Other Restrictions

Directly related to the trade war, U.S. concerns over national security aspects of dependence on China to source high-tech goods, pharmaceutical products, and personal protective equipment such as that used to combat the coronavirus are increasing.⁴⁷ The high-tech worries over espionage and IP theft are reflected in the United States' decisions not to source 5G telecommunications equipment from the giant telecommunications firm Huawei and not to sell key components, including certain semiconductors to

43. See Eavis et al., *supra* note 9.

44. See Wingrove, *supra* note 42; see also David A. Gantz, *The USMCA's Future in Context* (Rice Univ. Baker Inst. for Pub. Pol'y, Report No. 06.16.20, 2020), <https://www.bakerinstitute.org/files/16026/> [<https://perma.cc/SKV8-LFWV>] [hereinafter "Gantz, Report No. 06.16.20"].

45. See Claire Jones, *Onshoring Won't Protect Us*, FIN. TIMES (May 11, 2020), <https://ftalphaville.ft.com/2020/05/11/1589180995000/Onshoring-won-t-protect-us/> [<https://perma.cc/2HTJ-BTUQ>].

46. See Trefor Moss, *Neither Coronavirus nor Trade Tensions Can Stop U.S. Companies' Push into China*, WALL ST. J. (May 19, 2020, 5:30 AM), <https://www.wsj.com/articles/neither-coronavirus-nor-trade-tensions-can-stop-u-s-companies-push-into-china-11589880603> [<https://perma.cc/2F43-JHTB>].

47. See Ana Swanson, *Coronavirus Spurs U.S. Efforts to End China's Chokehold on Drugs*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/business/economy/coronavirus-china-trump-drugs.html> [<https://perma.cc/G56S-HXS4>].

Huawei, and other high tech Chinese firms such as LTE in the future.⁴⁸ At the time of this writing, the effective dates are still being discussed.⁴⁹ This policy, which is strongly supported by both Democrats and Republicans in Congress, seems highly likely to make it difficult or impossible for many U.S. and other non-Chinese high-tech enterprises to continue their dependence on China for materials and components.⁵⁰

Concerns regarding Chinese government cybersecurity violations are not new. These violations include efforts to steal ship-maintenance data and missile plans, prompting a review of cyber vulnerability to improve protection of military technology.⁵¹

The impact of a high-tech decoupling on supply chains will often be reciprocal, with costs for American firms that are exporting to, rather than importing from, China.⁵² For example, in May 2020 the Trump Administration announced a rule change “that will make high-tech chips destined for Huawei subject to U.S. export control licensing requirements if those chips are produced with U.S.-controlled equipment or if the chip’s design are of U.S. origin.”⁵³ Chip makers such as Qualcomm and Intel will be directly affected.⁵⁴ China accounts for roughly two-thirds of their global revenues, and China (including Taiwan) accounts for about 15 percent of Apple’s revenues.⁵⁵ China has also threatened to retaliate by investigating companies such as Apple with extensive production and sales in China and suspending purchases of Boeing aircraft.⁵⁶ Huawei will also be further encouraged to develop its own chips that in a few years will permit it to

48. See David McCabe et al., *U.S. Charges Huawei with Racketeering, Adding Pressure on China*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/02/13/technology/huawei-racketeering-wire-fraud.html> [<https://perma.cc/65CT-R6AJ>].

49. See Jon Porter, *U.S. Delays Full Huawei Ban yet Again Until May 15*, THE VERGE (Mar. 12, 2020, 10:10 AM), <https://www.theverge.com/2020/3/12/21176530/huawei-us-ban-extension-length-rural-providers-network-infrastructure> [<https://web.archive.org/web/20200913010530/https://www.theverge.com/2020/3/12/21176530/huawei-us-ban-extension-length-rural-providers-network-infrastructure>].

50. McCabe et al., *supra* note 48.

51. Gordon Lubold & Dustin Volz, *Chinese Hackers Breach U.S. Navy Contractors*, WALL ST. J. (Dec. 14, 2018, 5:09 PM), <https://www.wsj.com/articles/u-s-navy-is-struggling-to-fend-off-chinese-hackers-officials-say-11544783401> [<https://perma.cc/TD7D-BPG9>].

52. See Brett Fortnam, *Commerce Expands Export Controls to Cover More Chips Destined for Huawei*, Vol. 38, No. 21 INSIDE U.S. TRADE 168824 (May 15, 2020, 12:13 PM), <https://insidetrade.com/daily-news/commerce-expands-export-controls-cover-more-chips-destined-huawei> [<https://perma.cc/9QC4-H4YX>].

53. *Id.* at 1.

54. *Id.*

55. *The Great Decoupling: The Trump Administration Wants a US-China Commercial Split*, THE ECONOMIST (Aug. 13, 2020), <https://www.economist.com/business/2020/08/13/the-trump-administration-wants-a-us-china-commercial-split> [<https://perma.cc/S4X3-SHUN>].

56. Fortnam, *Commerce Expands Export Controls to Cover More Chips Destined for Huawei*, *supra* note 52.

manufacture 5G equipment and cell phones independently of U.S. component sources.⁵⁷

The deteriorating U.S.–China political, economic, and security relationship is driving efforts by the some members of Congress and others in the United States to hold China financially accountable for its early efforts to conceal the full dangers of COVID-19 from the United States and other countries, which complicated and delayed those countries' responses to the pandemic and the resulting human and economic suffering.⁵⁸ The likelihood of further ruptures in the U.S.–China political and economic relationships, particularly when U.S. legislation is being contemplated,⁵⁹ is increased by such actions as China's lame efforts to blame U.S. military personnel who visited China late in 2019 for bringing COVID-19 with them;⁶⁰ woeful treatment of Muslim and other minorities;⁶¹ increasingly strident relations with Taiwan; new legislation that has eliminated most remaining autonomy for Hong Kong;⁶² and unilaterally seizing and militarizing portions of the South China sea that belong to Vietnam, the Philippines, and other Asian nations.⁶³ For example, Chinese government agencies are accused by the United States of seeking to hack U.S. vaccine data, presumably in an effort to give China a competitive edge in developing

57. See Emily Feng, *The Latest U.S. Blow to China's Huawei Could Knock Out its Global 5G Plans*, NPR (May 28, 2020, 11:49 AM), <https://www.npr.org/2020/05/28/862658646/the-latest-u-s-blow-to-chinas-huawei-could-knock-out-its-global-5g-plans> [https://perma.cc/WMU5-4KK2].

58. See Curt Anderson, *US Virus Patients and Businesses Sue China Over Outbreak*, CONCORD MONITOR (May 10, 2020, 6:19 PM), <https://www.concordmonitor.com/US-virus-patients-and-businesses-sue-China-over-outbreak-34270168> [https://perma.cc/Y7J5-6T3A] (discussing lawsuits filed by various individuals and businesses against China; success in such actions seems unlikely); Jessica Chen Weiss, *Can the U.S. Sue China for COVID-19 Damages? Not Really.*, WASH. POST (Apr. 29, 2020, 9:58 AM), <https://www.washingtonpost.com/politics/2020/04/29/can-us-sue-china-covid-19-damages-not-really-this-could-quickly-backfire/> [https://perma.cc/N3DF-Q4BQ].

59. Isabelle Icsó, *Lawmakers Mull Supply Chain Legislation, COVID-19 Response Coordination*, Vol. 38, No. 25 INSIDE U.S. TRADE (June 15, 2020), <https://insidetrade.com/daily-news/lawmakers-mull-supply-chain-legislation-covid-19-response-coordination> [https://perma.cc/9UKF-CB2L] (noting a plethora of conflicting bills in both House and Senate).

60. See Lisa Winter, *Chinese Officials Blame US Army for Coronavirus*, THE SCIENTIST (Mar. 13, 2020), <https://www.the-scientist.com/news-opinion/chinese-officials-blame-us-army-for-coronavirus-67267> [https://perma.cc/22PV-JFQ3].

61. See Conor Finnegan & Victor Ordonez, *China Conducting Mass Sterilization on Muslim Minorities that Could Amount to Genocide: Report*, ABC NEWS (June 29, 2020), <https://abcnews.go.com/Politics/china-conducting-mass-sterilization-muslim-minorities-amount-genocide/story?id=71519132> [https://perma.cc/6EPH-CXVG].

62. See Eleanor Albert & Lindsay Maizland, *Democracy in Hong Kong*, COUNS. ON FOREIGN RELS. (June 30, 2020), <https://www.cfr.org/background/democracy-hong-kong> [https://perma.cc/4KCH-SKNH].

63. See *South China Sea Dispute: China's Pursuit of Resources 'Unlawful', Says US*, BBC NEWS (July 14, 2020), <https://www.bbc.com/news/world-us-canada-53397673> [https://perma.cc/4SC5-AEEZ].

coronavirus vaccines,⁶⁴ at a time when Chinese diplomats in their relations with the United States, the European Union, and Australia among others appear to have replaced diplomacy with intimidation.⁶⁵

These factors have also carried over to Chinese foreign investment in the United States, particularly relating to the reluctance of the Committee on Foreign Investment in the United States (CFIUS) to approve inward investment from China.⁶⁶ Experts suggest that these concerns are leading to greater scrutiny by CIFUS of health and biotechnology sectors as well as critical technologies; careful review of “predatory acquisition” of undervalued enterprises, including those in critical technologies, and acquisitions that could further exacerbate dependence on China for personal protective equipment and ventilators.⁶⁷ At the same time, CIFUS is under pressure to maintain an open investment regime because investment could be a significant positive factor in the U.S. economic recovery from the pandemic.

This new and broader level of U.S.–Chinese conflict will make it politically as well as economically difficult for many publicly traded American enterprises to continue their close relationships with China, at least when it comes to imports into the United States, even if they are willing to pay the high import tariffs.⁶⁸ It is also likely to encourage some non-U.S.-owned enterprises to produce high-tech goods in the United States to minimize future disruptions (and possibly curry favor with the U.S. government).⁶⁹ For example, the giant Taiwanese silicon wafer manufacturer, Taiwan Semiconductor Manufacturing Company (TSMC), announced plans in May 2020 to construct a \$12 billion state-of-the-art plant in Phoenix, Arizona, with wafer production expected to begin in 2024.⁷⁰ This plant, if completed, will assist the U.S. chip industry to reshore some of its own production, reducing dependence on Asia and allowing

64. David E. Sanger & Nicole Perlroth, *U.S. to Accuse China of Trying to Hack Vaccine Data, as Virus Redirects Cyberattacks*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/10/us/politics/coronavirus-china-cyber-hacking.html> [https://perma.cc/9QUE-T3H8].

65. Kathrin Hille, *‘Wolf Warrior’ Diplomats Reveal China’s Ambitions*, FIN. TIMES (May 11, 2020), <https://www.ft.com/content/7d500105-4349-4721-b4f5-179de6a58f08> [https://perma.cc/AG4V-RM6Q].

66. See Himamauli Das, *Insight: Five CFIUS Enhanced Enforcement Trends During Covid-19*, BLOOMBERG, (May 19, 2020, 3:01 AM), <https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-five-cfius-enhanced-enforcement-trends-during-covid-19> [https://perma.cc/CLP2-JRQ7].

67. *Id.*

68. See Keith Johnson & Robbie Gramer, *The Great Decoupling*, FOREIGN POL’Y (May 14, 2020, 5:48 PM), <https://foreignpolicy.com/2020/05/14/china-us-pandemic-economy-tensions-trump-coronavirus-covid-new-cold-war-economics-the-great-decoupling> [https://perma.cc/M2QH-HF2A].

69. *Id.*

70. The Associated Press, *Taiwan Company to Build Semiconductor Factory in Arizona*, NEWS BREAK (May 15, 2020), <https://www.newsbreak.com/arizona/phoenix/news/1566748166925/taiwan-company-to-build-semiconductor-factory-in-arizona> [https://perma.cc/8CCF-NGDK].

manufacturers to preserve their domination of the global chip industry.⁷¹ In the pharmaceutical product area, the Trump Administration recently committed more than \$350 million to support a new company in Virginia for the manufacture of generic medicines and ingredients, initially focused on the COVID-19 pandemic, to replace imports from China and India.⁷²

U.S. national security concerns with China, even if exaggerated, go beyond telecommunication and industrial espionage.⁷³ Some members of Congress have expressed concerns that TikTok, a Chinese social media app that is popular also in the United States, constitutes an espionage risk because of its access to Americans' data, to the point where it may be blocked in the United States as a security risk.⁷⁴ It follows that Chinese military officials, recently indicted in the United States, were responsible for stealing data for Equifax in 2017.⁷⁵ The Trump Administration gave TikTok's parent ninety days from August 14 to divest itself of TikTok or face TikTok's closure.⁷⁶ Another likely area of concern is new electric vehicles

71. See Richard Waters, *U.S. Chip Industry Plots Route Back to Homegrown Production*, FIN. TIMES (Aug. 2, 2020), <https://www.ft.com/content/ff7996bb-1309-4921-89c1-11aa8e6507de> [<https://perma.cc/UBX7-SH7C>] (discussing the current dependence of U.S. chip producers on Asian countries to make its silicon chips, possibly with U.S. government subsidies of the industry).

72. See Sheryl Gay Stolberg & Katie Thomas, *Trump to Tap New Company to Make COVID-19 Drugs in the U.S.*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/us/politics/trump-coronavirus-drug-manufacturing.html#:~:text=WASHINGTON%20%E2%80%94%20The%20Trump%20administration%20will,mostly%20in%20India%20and%20China> [<https://perma.cc/5L4Y-XZHL>]; Press Release, Trump Campaign, *Trump Campaign Announces President Trump's 2nd Term Agenda: Fighting for You!* (Aug. 23, 2020), <https://www.donaldjtrump.com/media/trump-campaign-announces-president-trumps-2nd-term-agenda-fighting-for-you> [<https://perma.cc/X7WZ-WZQX>] (Trump campaign promises that if Mr. Trump is re-elected he will "end our reliance on China," and bring back 1 million jobs from China through a combination of tax credits, favorable treatment of tax deductions for pharmaceuticals and robotics, and barring federal contracts for enterprises that outsource to China.).

73. See Christy Cooney, *Clock Is Tik-ing US May Ban TikTok Over Concerns the Chinese App 'Poses National Security Risks for America'*, THE SUN (July 9, 2020, 6:16 PM), <https://www.thesun.co.uk/news/12051400/tik-tok-ban-us-china-app-users-communist-party> [<https://perma.cc/N2QY-CGS9>].

74. *Id.*; Michael Sykes, *Bipartisan Senators Request National Security Investigation into TikTok*, AXIOS (Oct. 24, 2019), <https://www.axios.com/tik-tok-national-security-china-schumer-cotton-3c4889e5-3ff7-4a7b-a90f-b6f58e126827.html> [<https://perma.cc/7HRT-U43T>].

75. Katie Benner, *U.S. Charges Chinese Military Officers in 2017 Equifax Hacking*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/02/10/us/politics/equifax-hack-china.html> [<https://perma.cc/TE9K-JXFC>].

76. Queenie Wong et al., *The TikTok Saga: Everything You Need to Know*, CNET (Sept. 13, 2020, 7:11 AM), <https://www.cnet.com/news/the-tiktok-saga-everything-you-need-to-know> [<https://perma.cc/ZE67-ERJR>]; Echo Wang & David Shepardson, *Exclusive: TikTok to Challenge U.S. Order Banning Transactions with the Video App*, REUTERS (Aug. 21, 2020, 4:34 PM), <https://www.reuters.com/article/us-usa-tiktok-trump-exclusive/exclusive-tiktok-to-challenge-u-s-order-banning-transactions-with-the-video-app-idUSKBN25H2QG> [<https://web.archive.org/web/20200919005030/https://www.reuters.com/article/us-usa-tiktok-trump-exclusive/exclusive-tiktok-to-challenge-u-s-order-banning-transactions-with-the-video-app-idUSKBN25H2QG>].

(particularly those manufactured in China or with Chinese computer systems), which are highly likely to have sophisticated communications systems like those in the Tesla, where a central computer system is in constant contact with each vehicle.⁷⁷ Similarly, broad support exists for reducing or eliminating dependence on China for certain rare earth minerals, even though the long-term process of diversifying suppliers away from China means seeking sources that are outside the United States.⁷⁸

Still, the policy raises serious risks for the United States' high technology sector. The Information Technology Industry Council (ITC) has argued that actions of the government designed to address "very legitimate risks . . . could create unintended negative consequences for U.S. competitiveness, technological leadership, and—ironically—national security" because they are often wrapped up inappropriately with other trade and economic policy goals.⁷⁹ Essentially, ITC is arguing that a national security pretext should not be used to support unrelated economic and trade objectives, or to accidentally harm U.S. global competitiveness in the sector.⁸⁰ Those consequences, particularly in the area of artificial intelligence, could result from proposed U.S. visa policies limiting access to Chinese scientists—many of whom have been trained in the United States.⁸¹ One U.S. expert notes that "[t]hese are some of the brightest minds in China, and they're choosing to work for American research labs, teach American students, and help build American companies."⁸² If such collaboration were banned, the U.S. technology sector could have difficulty maintaining its edge in this field.

Alleged "national security" concerns led the Trump Administration to impose 25 percent tariffs on an expanded list of steel and aluminum derivative items in January 2020.⁸³ Except for a few situations where quotas were substituted for tariffs, the restrictions remain in place for all such

77. See Kirsten Korosec, *Tesla's Full Self-Driving Computer Is Now in all New Cars and a Next-Gen Chip Is Already 'Halfway Done'*, TECH CRUNCH (Apr. 22, 2019, 3:00 PM), <https://techcrunch.com/2019/04/22/teslas-computer-is-now-in-all-new-cars-and-a-next-gen-chip-is-already-halfway-done> [https://perma.cc/9BWS-VBHT].

78. See Isabelle Ieso, *Deputy USTR Nominee: Addressing Rare Earths Dependency Should be a Priority*, Vol. 38, No. 30 INSIDE U.S. TRADE 169271 (July 22, 2020, 3:51 PM), <https://insidetrade.com/daily-news/deputy-ustr-nominee-addressing-rare-earths-dependency-should-be-priority> [https://perma.cc/R9AK-5GLG] (quoting Deputy USTR nominee Michael Nemelka).

79. Doug Palmer, *Tech Calls for Change in Trump's National Security Tactics*, POLITICO (June 8, 2020, 10:00 AM), <https://www.politico.com/newsletters/morning-trade/2020/06/08/tech-calls-for-change-in-trumps-national-security-tactics-788324> [https://perma.cc/LN7G-5LJR] (quoting and commenting on an ITI policy paper).

80. See *id.*

81. Paul Mozur & Cade Metz, *A U.S. Secret Weapon in A.I.: Chinese Talent*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/09/technology/china-ai-research-education.html> [https://perma.cc/CYV8-RH2E].

82. *Id.* (quoting MarcoPolo analyst, Matt Sheehan).

83. Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States, 85 Fed. Reg. 5281 (Jan. 24, 2020).

imports except those from Canada and Mexico.⁸⁴ The tariffs on imports from Canada and Mexico were terminated in May 2018⁸⁵ because Canada and Mexico made it clear to the United States that they would not move forward with approval of the USMCA while the tariffs remained in place.⁸⁶ 10 percent tariffs on Canadian aluminum were reinstated by the United States in August 2020 although they were lifted again a month later.⁸⁷

Ironically, the original section 232 tariffs on steel and aluminum, which do not significantly affect imports from China,⁸⁸ are a major policy step that may discourage some new manufacturing in the United States. But steel and aluminum imports into Canada and Mexico are no longer affected, except with regard to auto production, discussed below.

V. USMCA Pressure to Transfer Production to North America: The Auto Sector Example

Automobiles and auto parts typically account for more than 25 percent of total NAFTA trade in manufactured goods and about 950,000 jobs in the United States.⁸⁹ Some automotive components cross the Canada and/or Mexico borders as many as eight times before they are assembled into a finished automobile in one of the three NAFTA countries.⁹⁰ It is thus not surprising that this was the focus of the NAFTA renegotiations and that these changes will build on other pressures to shift current Chinese supply chains to North America and to the United States.

The elements of the USMCA that directly address the auto industry include modifications to the NAFTA rules of origin and related content

84. Press Release, Off. U.S. Trade Representative, United States Announces Deal with Canada and Mexico to Lift Retaliatory Tariffs (May 17, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/may/united-states-announces-deal-canada-and> [<https://perma.cc/X2FS-PV3D>].

85. *Id.*

86. Arian Morrow & Campbell Clark, *Canada, U.S. Nearing Agreement to Lift Metals Tariffs, Cease Trade War*, *GLOBE & MAIL* (May 16, 2019), <https://www.theglobeandmail.com/business/article-mexico-close-to-deal-with-us-to-lift-tariffs-waiting-for-canada> [<https://perma.cc/B26G-K7ZM>].

87. Adjusting Imports of Aluminum into the United States, 85 Fed. Reg. 49921 (Aug. 14, 2020); Press Release, Off. U.S. Trade Rep., USTR Statement on Canadian Aluminum (Sept. 15, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/september/ustr-statement-canadian-aluminum> [<https://perma.cc/3CGH-P387>].

88. See Mrinalini Krishna, *Where Does the U.S. Import Steel From?*, *INVESTOPEDIA* (June 25, 2019), <https://www.investopedia.com/news/where-does-us-import-steel/> [<https://perma.cc/Y7GF-K9Q2>] (showing that China in 2018 was not among the top ten U.S. sources of imported steel).

89. *Automotive Industry: Employment, Earnings and Hours*, BUREAU LABOR STATISTICS, (Oct. 2018), <https://www.bls.gov/iag/tgs/iagauto.htm> [<https://perma.cc/EJM4-3W4C>].

90. See Kristin Dziczek et al., *NAFTA Briefing: Trade Benefits to the Automotive Industry and Potential Consequences of Withdrawal from the Agreement*, 7, *CTR. FOR AUTO. RSCH.*, (Jan. 2017), https://www.cargroup.org/wp-content/uploads/2017/01/nafta_briefing_january_2017_public_version-final.pdf [<https://perma.cc/SH87-2L37>].

requirements, plus some protections for Mexico and Canada should the Trump administration, as has periodically been threatened, impose 20 percent to 25 percent tariffs on U.S. auto and auto part imports (presumably on “national security” grounds under Section 232 of the Trade Expansion Act of 1962).⁹¹ Automotive trade was extensively “managed” under NAFTA and is subject to more extensive government mandates under the USMCA.⁹² Whether these increasingly strict rules in the medium or long term will help or hurt the North American auto and auto parts industries will not be known for at least half a decade under the USMCA rules. USMCA obligations for the automotive industry include raising the percentage of regional value content required for automobiles and light trucks from 62.5 percent to 75 percent.⁹³ These requirements are to be phased in over three years from the date the USMCA goes into effect;⁹⁴ certain “core” components such as engines, advanced batteries for electric cars, and transmissions must originate in North America.⁹⁵ In addition, 70 percent of the steel used in the manufacture of cars and small trucks must originate in USMCA countries.⁹⁶ The full significance of the 70 percent rule was clarified only in the December 10, 2019, protocol of amendment.⁹⁷ In a further step, apparently designed by the Trump Administration rather than the Democratic Congress, the steel rules (but not those relating to aluminum), were further tightened.⁹⁸ Steel automotive products such as chassis and bodies, will not count toward the 70 percent after a seven-year grace period unless the steel is “melted and poured” in North America.⁹⁹ Ten years after the USMCA enters into force the parties will consider similar requirements for aluminum.¹⁰⁰

Also, and significantly for Mexico, 40 percent of the production value of cars and 45 percent for light trucks must be from enterprises that pay workers at least \$16 per hour.¹⁰¹ Some, but probably not many, employees of Mexican automotive enterprises that conduct research and development and/or assemble advanced components such as batteries, engines, and

91. 19 U.S.C.A § 1862.

92. See Doug Palmer & Adam Behsudi, *Trump Holds off on Auto Tariffs, but Threat Still Looms*, POLITICO (May 17, 2019, 5:07 PM), <https://www.politico.com/story/2019/05/17/donald-trump-auto-tariffs-1330014> [<https://perma.cc/5F5G-5QPR>].

93. *Id.*

94. *Id.*

95. United States-Mexico-Canada Agreement ch. 4, app. 7.3, Nov. 30, 2018, 116 H.R. 5430 [hereinafter USMCA].

96. *Id.* at ch. 4, app. 6.

97. *Id.* at amend. sec. 2.

98. Matthew Kronby et al., *The Amended USMCA: Six Takeaways for Business*, LEXOLOGY (Dec. 19, 2019), <https://www.lexology.com/library/detail.aspx?g=64db2e84-3cc5-4835-b49f-1b8f79dc0fbf> [<https://perma.cc/3L3Y-7FAU>].

99. USMCA, *supra* note 95, at ch. 4, app. 6.

100. *Id.*

101. *Id.* at app. 7.

transmissions in Mexico would count toward up to 15 percent of these thresholds if the workers are paid at this level.¹⁰²

Because typical auto industry hourly wages in Mexico are approximately \$3.60 to \$3.90 (a level some studies attribute in part to the lack of union support for workers),¹⁰³ this wage requirement means most of the materials and components counting toward the 40 percent to 45 percent content rule must be produced in the United States or Canada.¹⁰⁴ It is possible that wages in Mexico will eventually increase to the \$16/hour level; Mexican President Andrés Manuel López Obrador (AMLO) may seek to implement policies encouraging higher wages for Mexican workers, including policies that support workers' rights to organize independent unions, as required under the USMCA.¹⁰⁵

Few objective observers would agree that the more protectionist rules for vehicles and auto parts will benefit auto manufacturers or consumers, and it remains to be seen whether the changes will benefit workers in the industry. Accurately estimating the additional North American production costs due to the more restrictive rules of origin and related minimum salary requirements is almost impossible, in part because they likely will vary company by company and vehicle model by vehicle model. The \$16/hour wage requirement [will also] impose a significant [tracking] and record-keeping burden on enterprises that produce finished passenger vehicles or light trucks and on associated parts suppliers, at least temporarily. This will likely add to vehicle manufacturing costs in North America compared to automotive production costs in Asia or the European Union.¹⁰⁶

In the interim, producers of small trucks in Mexico for the U.S. market will have to be particularly careful. If they fail to meet the rules of origin, the non-preferential MFN tariff is 25 percent, compared to only 2.5 percent for

102. *Id.* These calculations are subject to complex tracing rules, which likely will add to auto manufacturing costs in North America, although some of the NAFTA tracing rules for parts and components have been relaxed.

103. *Study Points to Large Wage Gaps for Mexican Auto Workers*, MEXICO NEWS DAILY (July 2, 2014), <https://mexiconewsdaily.com/news/study-points-large-wage-gaps-mexican-auto-workers/> [<https://perma.cc/2CRU-9363>]. The \$16/hour rate is not indexed to inflation, although with inflation in the United States averaging about 2 percent per year (\$0.32), the lack of indexing probably would not significantly help Mexico. See *U.S. Inflation Rate 1960–2020*, MACROTRENDS, <https://www.macrotrends.net/countries/USA/united-states/inflation-rate-cpi> [<https://perma.cc/8MBM-E6GE>] (last visited Oct. 21, 2020).

104. See *Automotive Industry Salary in Canada*, NEUVCO, <https://neuvco.ca/salary/?job=automotive%20Industry#:~:text=the%20average%20Automotive%20Industry%20salary%20in%20Canada%20is%20%2433%2C150%20per,up%20to%20%2456%2C355%20per%20year> [<https://perma.cc/M6VN-898Y>] (last visited Oct. 21, 2020) (showing Canadian average auto salary as \$17 per hour); see also *Automotive Worker Salary*, ZIP RECRUITER, <https://www.ziprecruiter.com/Salaries/Automotive-Worker-Salary> [<https://perma.cc/6PVQ-BVM2>] (last visited Oct. 21, 2020) (showing American average auto salary as \$17 per hour).

105. USMCA, *supra* note 95, at annex 23-A.

106. GANTZ, *supra* note 4, at 36.

autos.¹⁰⁷ Still, one can reasonably expect that within a few years, the major North American auto producers will have devised means of minimizing the costs, given the phase-in period and potential detailed regulatory guidance the U.S. government is providing.¹⁰⁸

The overall economic impact of these provisions on the North American auto industry depends on several other factors, such as the increased cost of steel and aluminum due to U.S. tariffs and quotas on steel and aluminum imported from most countries, other than Australia, that the Trump administration imposed in June 2018 on Section 232 “national security” grounds.¹⁰⁹ Given the costs to North American auto producers of complying with the requirements of the rules of origin, particularly those relating to sourcing of steel and labor cost minimums, one can reasonably expect American and other North American vehicle sales to fall, although predicting the magnitude of the decrease—and the resulting job losses, if any—is difficult. In the short term, the fact that most of the auto related rules of origin were not being applied strictly by U.S. authorities until January 1, 2020 should have given the auto industry additional time to adjust to the new rules.¹¹⁰

In the future, it can be assumed that some of the auto parts currently sourced in China will be shifted either to Mexico or to the United States (or perhaps in some cases to Canada). The increase in North American content requirements by 12.5 percent¹¹¹ will likely result in a shift of lower priced parts, now imported from China, to Mexico rather than Canada or the United States because of Mexico’s much lower labor costs,¹¹² unless their production in the United States can be extensively mechanized. At the same time, while the North American value content is increasing from 62.5 percent to 75 percent, it is obvious this means that 25 percent of the total content may still be obtained from non-North American sources.¹¹³

107. See ‘American Cars First’ – Uncertainty About Car Tariffs Persists, BDI (Mar. 11, 2020), <https://english.bdi.eu/article/news/american-cars-first-uncertainty-about-car-tariffs-persists/> [<https://perma.cc/L7JQ-76MA>] (discussing U.S. and European tariffs on cars and light trucks).

108. USMCA, *supra* note 95, at annex 4-b, ch. 73.

109. Australia is the only country exempted to date, as of December 2018. See Michael Cowden, *Australia Joins 232 Tariff Exemption Parade*, FASTMARKETS AMM (Mar. 12, 2018), <https://www.amm.com/Article/3793254/Australia-joins-232-tariff-exemption-parade.html> [<https://perma.cc/DKB9-YCPY>].

110. USMCA, *supra* note 95, at annex 4-b, ch. 73.

111. See Owen Stuart, *How Will the Shift from NAFTA to USMCA Affect the Auto Industry?*, INDUS. WEEK (Oct. 12, 2018), <https://www.industryweek.com/the-economy/article/22026500/how-will-the-shift-from-nafta-to-usmca-affect-the-auto-industry> [<https://perma.cc/Z9WY-CSXJ>].

112. See, e.g., Brandon Gaille, *16 Pros and Cons of Doing Business in Mexico*, BRANDON GAILLE (Sep. 16, 2019), <https://brandongaille.com/16-pros-and-cons-of-doing-business-in-mexico/> [<https://perma.cc/E6CR-M87F>] (listing some pros and cons).

113. Mark High, *Summary of Automotive Provisions of USMCA*, DICKSON WRIGHT, (Sept. 23, 2020), <https://www.dickinson-wright.com/news-alerts/summary-of-automotive-provisions-of-usmca> [<https://perma.cc/N6WC-J6T3>].

For Mexican auto production, sourcing some components from China, elsewhere in Asia, and the European Union will still be feasible, even if the Trump administration ultimately imposes 20 percent to 25 percent tariffs on auto parts from those countries under Section 232.¹¹⁴

One may also speculate that the steel content requirements, with the increased fabrication (“melted and poured”) requirements for USMCA treatment, [might] stimulate investment in Mexico’s basic steel production because production costs will likely be lower in Mexico than in Canada or the United States, even as steel production in the developed parties becomes increasingly automated.¹¹⁵

The extent of a shift of both parts and steel production to Mexico, from China or elsewhere, will be affected to some extent by whether uncertainties regarding the investment climate under President Lopez-Obrador are favorably resolved.¹¹⁶ Whether these positive changes for Mexico will offset the potential loss of some production in Mexico because of the \$16/hour requirements remains to be seen.

VI. COVID-19, Environmental Factors, and Mexico’s Investment Climate

Beyond U.S. pressures in deteriorating U.S.-China relations to make China pay for the costs of COVID-19, discussed in Part IV, perhaps the most succinct argument for why COVID-19 has convinced many countries that regional trade is preferable over the current dependency on China comes, not from the United States, but from French Finance Minister Bruno La Maire:

Do we want to still depend at the level of [ninety] per cent or [ninety-five] per cent on the supply chain of China for the automobile industry, for the drug industry, for the aeronautical industry[,] or do we draw the consequences of that situation to build new factories, new productions, and to be more independent and sovereign? That’s not protectionism—that’s just the necessity of being sovereign and independent from an industrial point of view.¹¹⁷

114. Gantz, Report No. 02.21.19, *supra* note 4.

115. GANTZ, *supra* note 4, at 39.

116. See Colby Smith, *Investors Face Big Call as Mexico’s López Obrador Prepares Budget*, FIN. TIMES (Dec. 11, 2018), <https://www.ft.com/content/52a1e866-fc4e-11e8-ac00-57a2a826423e> [<https://perma.cc/9WA3-EDYU>].

117. Stephen Olson, *Managing Supply Chain Risk in a Post-COVID-19 World*, EAST ASIA FORUM (May 6, 2020), <https://www.eastasiaforum.org/2020/05/06/managing-supply-chain-risk-in-a-post-covid-19-world/> [<https://perma.cc/DG98-T3XW>].

While admittedly, France is one of the most protectionist nations in the European Union, the sentiments are shared in dozens of other nations in Europe as well as in the United States, Japan and probably Canada as well.¹¹⁸

While concerns about over-dependence on China pre-date COVID-19 by well over a decade, the issue has been exacerbated by problems related to the pandemic, particularly the difficulty of obtaining protective gear for medical and first response personnel from China (and elsewhere in Asia) and the realization that the United States depends on China (and India) for 70 percent to 90 percent of its various medicines and/or critical ingredients used in the manufacture of medicines.¹¹⁹ There have always been trade-offs between the cost benefits of just-in-time inventory management and extreme, often single-source, specialization of production, and the economic and non-economic vulnerabilities that such supply operations present, not only for public health but for the economic health of those U.S. enterprises that have become so dependent on China.¹²⁰ It seems reasonable to believe that security of supply will, in the near future, become a much more important factor, either on its own or because the U.S. Congress and public pressure force them to do so.

The result is likely to favor, *inter alia*, shorter supply chains. Even if Chinese production must be moved elsewhere, producing the goods elsewhere in Asia, such as in Vietnam, does not in itself resolve the long supply chain or single-source problems. At present at least, production of many finished goods in Vietnam are still dependent on parts and components from China.¹²¹ Moreover, because Vietnam maintains a large and growing trade deficit with the United States (exacerbated by some shifting of production from China to Vietnam),¹²² enterprises have no real assurances, particularly if Mr. Trump wins a second term, that Vietnam would not become the focus of uncertain but possibly significant tariff threats or other pressures from the United States.

Thus, where production of labor-intensive materials and components is made more efficient by the availability of lower wage cost production as well as shorter supply chains, the obvious choice for enterprises in United States (and Canada) is Mexico under the USMCA.¹²³ The benefits of production

118. See Swanson, *supra* note 47; Shin Kawashima, *Is Japan Pulling Its Companies Out of China?*, THE DIPLOMAT (May 11, 2020), <https://thediplomat.com/2020/05/is-japan-pulling-its-companies-out-of-china/> [https://perma.cc/H24U-D2XM].

119. Swanson, *supra* note 47.

120. Olson, *supra* note 117.

121. See Manisha Mirchandani, *Coronavirus Exposes Dependency of Southeast Asia's Manufacturers on China*, BRINK NEWS (Mar. 15, 2020), <https://www.brinknews.com/coronavirus-exposes-dependency-of-southeast-asias-manufacturers-on-china/> [https://perma.cc/82TF-XTYL].

122. The U.S. trade deficit with Vietnam in 2019 was \$55.797 billion, up from \$39.498 billion in 2018. *Trade in Goods with Vietnam*, U.S. CENSUS, <https://www.census.gov/foreign-trade/balance/c5520.html> [https://perma.cc/3PE8-E6RK] (last visited Oct. 21, 2020).

123. Earl Anthony Wayne, *Coordination Is Key to Reenergizing US-Mexico Trade*, THE HILL, (May 29, 2020, 2:00 PM), <https://thehill.com/opinion/finance/499898-better-coordination-is-key-to-reenergizing-us-mexico-trade> [https://perma.cc/X6AC-UCA6].

in Mexico over other lower wage cost countries are significant.¹²⁴ Among the most important are: (a) proximity to the United States and to America's still critical interstate highway system, meaning a truck from Mexico can reach all parts of the United States within a few days, compared to three weeks or more for a container from Shanghai;¹²⁵ (b) an adequate supply of increasingly skilled workers;¹²⁶ (c) relative political stability (at least for now);¹²⁷ (d) a language (Spanish) that is common to that spoken by over 40 million Americans;¹²⁸ (e) respect for rules of the game that are guaranteed by USMCA; a relatively open and transparent economy,¹²⁹ thanks in part to more than twenty-five years of NAFTA obligations; and (f) some (although reduced from NAFTA) opportunity for foreign investors to resort to investor-state dispute settlement where major disputes with the government arise,¹³⁰ along with (g) an openness to international commercial arbitration.¹³¹ In addition, as noted in the introduction, goods produced in Mexico typically have a 40 percent U.S. content, while similar goods produced in China typically contain less than 5 percent U.S. content.¹³² Thus, Mexico, and to a lesser extent Canada for high-tech goods, could be among the beneficiaries of the Trade War, given the length of supply chains when Asian parts and components are imported into North America and the other advantages of production in North America of both components and finished goods.¹³³

Mexico of course has its share of disadvantages. Corruption at all levels of the government and drug related violence have remained rampant or increased during the first two years of President Lopez-Obrador's presidency, despite his campaign promises to significantly reduce both.¹³⁴ The legal system, including the court system, has improved somewhat since the advent of NAFTA in 1994, but still has gaps in terms of the competence

124. Gaille, *supra* note 112.

125. See *Why Are Global Companies Manufacturing in Mexico*, CO-PRODUCTION INT'L, <https://www.co-production.net/manufacturing-in-mexico.html> [<https://perma.cc/6SF6-WU8H>] (last visited Sept. 13, 2020).

126. Gaille, *supra* note 112.

127. *Mexico: Political Stability*, GLOBAL ECON., https://www.theglobaleconomy.com/Mexico/wb_political_stability/ (last visited Oct. 24, 2020).

128. *Hispanics in the US Fast Facts*, CNN (Mar. 6, 2020, 4:06 PM), <https://www.cnn.com/2013/09/20/us/hispanics-in-the-u-s-/index.html#:~:text=ANpercent20estimated percent2041 percent20millionpercent20US,topercent20thepercent202018percent20Censuspercent20survey> [<https://perma.cc/3XG2-FHCW>].

129. Gaille, *supra* note 112.

130. USMCA, *supra* note 95, at ch. 14, annex 14-D. Such protections under USMCA do not extend to disputes between U.S. investors and Canada.

131. See *International Arbitration: 2019 (Mexico Chapter)*, MONDAQ LTD. (Sept. 2, 2019).

132. Orrenius, *supra*, note 24.

133. *Id.*

134. Shannon K. O'Neil, *Mexico's Lopez Obrador Is Stoking Corruption, Not Fighting It*, BLOOMBERG OPINIONS (Feb. 4, 2020, 9:00 AM), <https://www.bloomberg.com/opinion/articles/2020-02-04/mexico-s-lopez-obrador-is-stoking-corruption-not-fighting-it> [<https://perma.cc/NV9Z-5BX2>].

and political independence of judges, and litigation is a very slow and costly affair.¹³⁵ But compared to China, where the courts are operated and controlled by the Communist Party and the only other authorized means of resolving disputes (including those between foreign businesses and state-owned enterprises) is arbitration that may be influenced by the Chinese government,¹³⁶ the Mexican judicial system is probably somewhat less feared by foreign investors.

A major caveat, however, relates to the fact that President Lopez-Obrador, with a term that continues until December 1, 2024, is an anti-business populist who strongly favors government production over private enterprise in such sectors as petroleum and electricity.¹³⁷ A series of actions since his inauguration December 1, 2018 has eroded investor confidence, including termination of a half-finished airport project in Mexico City,¹³⁸ threatening privately owned clean energy producers with changes that may put them out of business,¹³⁹ and terminating an internationally owned brewery already under construction in Mexicali.¹⁴⁰ He has also effectively halted the opening up of the petroleum sector implemented by his predecessor President Pena-Nieto, by the suspending the issuing of new leases at least through 2021¹⁴¹ and affording expanded powers as a “national champion” to the corrupt, often incompetent, and near-insolvent national oil monopoly, Pemex.¹⁴² It is also evident that the Mexican government has

135. *See id.*

136. *See China Aims to Revamp Justice System but Communist Party to Retain Control*, REUTERS (June 16, 2014, 3:35 AM), <https://www.reuters.com/article/us-china-justice-revamp/china-aims-to-revamp-justice-system-but-communist-party-to-retain-control-idUSKBN0ER0RR20140616> [<https://web.archive.org/web/20191225072648/https://www.reuters.com/article/us-china-justice-revamp/china-aims-to-revamp-justice-system-but-communist-party-to-retain-control-idUSKBN0ER0RR20140616>].

137. *See* Kate Brown de Vejar & Marcelo Paramo Fernandez, *Mexican Renewable Energy Projects Affected by New Measures*, DLA PIPER (May 19, 2020), <https://www.dlapiper.com/en/us/insights/publications/2020/05/mexican-renewable-energy-projects-affected-by-new-measures/> [<https://perma.cc/3V72-LWCW>].

138. *AMLO Deals Another Blow to Foreign Investor Confidence in Mexico*, MAZATLAN POST (Mar. 24, 2020), <https://themazatlanpost.com/2020/03/24/amlo-deals-another-blow-to-foreign-investor-confidence-in-mexico/> [<https://perma.cc/JN49-AFPH>].

139. *See* Brown de Vejar, *supra* note 137 (noting that new government resolutions “will have a significant negative impact on the profitability, and indeed the viability, of multiple solar and wind energy farms in Mexico”).

140. *See AMLO Deals Another Blow to Foreign Investor Confidence in Mexico*, *supra* note 138.

141. *See* Sergio Chapa, *Mexico’s New President Takes Nationalistic Tone on Energy During First 100 Days in Office*, HOUS. CHRON. (Mar. 21, 2019, 7:49 PM), <https://www.houstonchronicle.com/business/article/Mexico-s-AMLO-takes-nationalist-tone-on-energy-13704506.php> [<https://perma.cc/Y2SU-6F22>].

142. Jude Webber & Colby Smith, *Pemex Slapped with Second ‘Junk’ Rating*, FIN. TIMES (April 17, 2020), <https://www.ft.com/content/478975eb-fb3d-443b-a94f-78e2324b1338> [<https://perma.cc/JUK7-93EM>].

shown significantly less ability to deal with the COVID-19 pandemic even compared to the United States.¹⁴³

It is thus too soon to tell whether Mexico will be a major beneficiary of the decoupling from China, because the factors noted immediately above may convince some potential investors to invest elsewhere than Mexico (including the United States or Canada). As one observer has noted, despite the Mexican government's efforts to tout Mexico as an alternative to China, "Mexico in some ways is its own worst enemy. On paper, it should be doing better than it is, but there's real concern about the predictability of the investment climate."¹⁴⁴

The Trump Administration has long pressured U.S. manufacturing enterprises, particularly those in the automotive industry, to bring their production back to the United States.¹⁴⁵ Those objectives are reflected in some of the major changes in the USMCA's automotive rules of origin, as discussed in Part IV, above, and by the section 232 "national security" tariffs imposed on virtually all steel imported from everywhere except Canada and Mexico (which were exempted as of March 2018), which import restrictions were expanded to certain derivative products in January 2020.¹⁴⁶ Although it is an exaggeration to contend that "the era of offshoring U.S. jobs is over,"¹⁴⁷ some success with this objective may well occur, and may well be continued even if Mr. Trump is not reelected.

If these considerations are fully assessed, production in the United States may be favored even over Mexico, at least for many of the inputs for complex products, particularly if the investment climate in Mexico deteriorates further. The difference in wage costs between the United States and Mexico is still typically about six to one.¹⁴⁸ But this disparity may decrease in the future. Under USMCA, as amended with the demands of the democratic Congress, Mexican labor costs may well increase gradually due to the requirements for effective and transparent collective bargaining,

143. See Azam Ahmed, *Hidden Toll: Mexico Ignores Wave of Coronavirus Deaths in Capital*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/05/08/world/americas/mexico-coronavirus-count.html> [https://perma.cc/5EBQ-UCST].

144. See Kevin Seif, *As U.S.-China Rift Grows, Mexico Tries to Lure American Businesses to Move Operations Closer to Home*, WASH. POST (Aug. 13, 2020, 5:00 AM), https://www.washingtonpost.com/world/the_americas/us-mexico-china-factories/2020/08/12/c29f4a9a-d0f1-11ea-8c55-61e7fa5e82ab_story.html?utm_campaign=WP_post_most&utm_medium=email&utm_source=newsletter&wpisrc=nl_most [https://perma.cc/Z6MV-UPHW] (quoting Eric Miller of Rideau Potomac Strategy Group).

145. See Robert E. Lighthizer, *The Era of Offshoring U.S. Jobs Is Over*, N.Y. TIMES (May 11, 2020), <https://www.nytimes.com/2020/05/11/opinion/coronavirus-jobs-offshoring.html> [https://perma.cc/XTE9-V4DT] (noting President Trump's lack of support for business offshoring).

146. See discussion *supra* Section III.

147. Lighthizer, *supra* note 145, (arguing that "[m]any companies have realized that offshoring creates risks that often outweigh the incremental efficiencies. Long supply lines flow at the whim of local politics, labor unrest[,] and corruption.").

148. *Study Points to Large Wage Gaps for Mexican Auto Workers*, MEX. NEWS DAILY (July 2, 2014), <https://mexiconewsdaily.com/news/study-points-large-wage-gaps-mexican-auto-workers/> [https://perma.cc/5EX4-CXQA].

along with strict enforcement provisions in the USMCA and in the U.S. implementing legislation.¹⁴⁹ Some observers believe that the USMCA's "rapid response" mechanism for complaints that specific Mexican enterprises are not meeting the collective bargaining and other requirements, particularly in "priority sectors," including mining and manufacturing, will be utilized soon now that the USMCA has entered into force.¹⁵⁰

A broad consensus also exists among production experts that the pandemic as well as other factors discussed earlier will accelerate the movement in U.S. manufacturing toward more automation.¹⁵¹ For example, a spokesperson for AMP Robotics suggested in April 2020 that the firm has seen a "significant" increase in orders for its robots that use artificial intelligence.¹⁵² Other labor and robotics experts have opined that

social-distancing directives, which are likely to continue in some form after the crisis subsides, could prompt more industries to accelerate their use of automation. And long-simmering worries about job losses or a broad unease about having machines control vital aspects of daily life could dissipate as society sees the benefits of restructuring workplaces in ways that minimize close human contact.¹⁵³

Automation increases could thus partially offset the cost advantages of supply chain reliance on Mexican production, at least for parts and components as well as finished goods production that is adaptable to higher degrees of automation than is presently the case.¹⁵⁴ The same is true where enterprises in the United States have been forced to rebalance the financial advantages of Chinese-based supply chains with the economic and non-economic costs of such reliance.¹⁵⁵

North American production and shorter supply lines may also be favored by some enterprises which are intent on reducing their carbon footprint through reducing the length of their supply lines.¹⁵⁶ Materials and components sourced in North America enjoy far shorter supply lines than those imported from China and elsewhere in Asia.¹⁵⁷ A container ship

149. See United States-Mexico-Canada Agreement Implementation Act, H.R. 5430, 116th Cong. §§ 717—19 (2018). See generally GANTZ, *supra* note 4.

150. See *Analysts Predict Early Flurry of Activity Under USMCA Rapid Response Tool*, WORLD TRADE ONLINE (May 11, 2020, 3:50 PM), <https://insidetrade.com/daily-news/analysts-predict-early-flurry-activity-under-usmca-rapid-response-tool?s=NA> [<https://perma.cc/JK87-8549>].

151. See, e.g., Michael Corkery & David Gelles, *Robots Welcome to Take Over, as Pandemic Accelerates Automation*, N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/04/10/business/coronavirus-workplace-automation.html> [<https://perma.cc/PTR8-5P8N>].

152. See *id.*

153. *Id.*

154. Perre Harren & David Simchi-Levin, *How Coronavirus Could Impact the Major Supply Chain by Mid-March*, HARV. BUS. REV., (Feb. 28, 2020), <https://hbr.org/2020/02/how-coronavirus-could-impact-the-global-supply-chain-by-mid-march> [<https://perma.cc/HU9H-2A5D>].

155. *Id.*

156. *Id.*

157. *Id.*

requires about three weeks to travel from Shanghai to the ports of Los Angeles and Long Beach, with nearly a month door to door.¹⁵⁸ A truck loaded in Monterrey, Mexico (Mexico's financial and commercial capital) can reach most of the major population centers in the United States within about three days.¹⁵⁹ If enterprises realize that they must abandon China for other locales, some will decide to take advantage of this disruption by becoming "greener" at the same time. As one former trade negotiator and lawyer has observed,

[f]or years you've had a situation where companies are looking at their supply chains and they are recognizing that they are globally diverse and that they do have a large carbon footprint—that their operations are not environmentally sustainable . . . Onshoring products, vertically integrating production and creating a more regional supply chain are among the options companies are considering to minimize their exposure.¹⁶⁰

VII. Concluding Observations

As this discussion indicates, a multiplicity of pressures is forcing enterprises operating in the United States to abandon or at least significantly reduce their dependence on Chinese sources. This near-term combination of the U.S.-China Trade War, national security concerns, the entry into force of the USMCA, COVID-19, and carbon footprint concerns, are combining to stimulate extensive changes in the way global enterprises conduct their business as it relates to the United States.

It is estimated that up to 26 percent of global exports with a value of \$4.6 trillion, could move to new source countries within the next five years.¹⁶¹ These changes in many respects will be costly to the businesses involved, increasing their production costs and the costs to consumers in the United

158. *Shipping from China to the US: Costs, Times & Everything You Need to Know*, FREIGHTOS, <https://www.freightos.com/shipping-routes/shipping-from-china-to-the-united-states/> [<https://perma.cc/5KSR-5GX2>] (last visited Oct. 23, 2020).

159. *Compare Distance from Houston to Monterrey*, DISTANCE CALCULATOR, <https://www.distancecalculator.net/from-houston-to-monterrey> [<https://perma.cc/CV53-8ZHS>]; *with Distance from Los Angeles to Monterrey*, DISTANCE CALCULATOR, <https://www.distancecalculator.net/from-los-angeles-to-monterrey> [<https://perma.cc/RJ38-HFQ9>] (driving distance from Monterrey, Mexico to Houston, Texas is about five-hundred miles, eight to ten hours of driving, where a truck can head toward Los Angeles or the U.S. east coast via Interstate 10 in less than two more days).

160. See Collinson: *Pandemic Foreign 'Rethink' of Corporate Sustainability, Supply Chains*, WORLD TRADE ONLINE (May 1, 2020, 9:00 AM), <https://insidetradetrade.com/daily-news/collinson-pandemic-forcing-%E2%80%98rethink%E2%80%99-corporate-sustainability-supply-chains> [<https://perma.cc/TQR7-5MY7>] (quoting former U.S. trade negotiator Nicole Bivens Collinson).

161. Rana Foroohar, *The Great Trade Unwinding*, FIN. TIMES (Aug. 9, 2020), <https://www.ft.com/content/3a21c843-43ed-4e94-b78e-635947050c71> [<https://perma.cc/PM4G-3XHA>].

States (and many other countries) of the finished goods that are sold, probably reducing shareholder profits as well. It is possible that some producers forced to diversify their sourcing from China will not survive or will survive only in a reduced capacity. Maximization of profits and minimization of production costs in the future will require balancing with the need to diversify supply chains. Various proposals have been made to encourage resourcing to the United States and reduce the costs for businesses of doing so, including reduced U.S. income taxes, payment of moving expenses, and additional financing through the U.S. Development Finance Administration, which up to now has lent funds only for projects outside the United States.¹⁶² The first two would require Congressional action.

The Trump Administration has also threatened to impose tariffs on U.S. enterprises that fail to move manufacturing back to the United States, although it is unclear how such sanctions would work.¹⁶³

Nor is this reshoring limited to the United States. The Japanese government has promised \$2.2 billion to bring production back to Japan, and in July announced that 87 percent of companies had been paid to shift production either back to Japan or into other Southeast Asian nations.¹⁶⁴ Here, as presumably will be the case with the United States, the departures from China are not simply to Japan but to preferred locations where lower cost labor is available, such as Vietnam.¹⁶⁵

It is possible that some of the excess costs of decoupling for the United States and other like-minded countries such as Japan could be reduced through innovative approaches by importers and producers. One expert has suggested that this could occur, at least for PPE, through the use of a “stress test.”¹⁶⁶ In this approach, companies are asked “to demonstrate how they will meet large surges in demand and destruction of global supply—that will

162. See Aime Williams, *Trump's New Tool to Bring Factories Home from China*, FIN. TIMES (May 20, 2020), <https://www.ft.com/content/1f88d7be-cac1-45f5-96e4-3ecb1d346a2e> [<https://perma.cc/A69A-F3M3>].

163. See Saleha Mohsin et al., *Trump Threatens Tariffs for U.S. Companies That Won't Move Jobs*, BLOOMBERG L. (Aug. 20, 2020, 4:58 PM), <https://www.bloomberg.com/news/articles/2020-08-20/trump-threatens-tariffs-for-u-s-companies-that-won-t-move-jobs> [<https://perma.cc/35BW-QYM8>].

164. Simon Denyer, *Japan Helps 87 Companies to Break from China After Pandemic Exposed Overreliance*, WASH. POST (July 21, 2020, 6:05 AM), https://www.washingtonpost.com/world/asia_pacific/japan-helps-87-companies-to-exit-china-after-pandemic-exposed-overreliance/2020/07/21/4889abd2-cb2f-11ea-99b0-8426e26d203b_story.html [<https://perma.cc/N7WM-F5WS>].

165. James Carbone, *Vietnam Becomes an Option for Low-Cost Electronics Manufacturing*, SOURCE TODAY (April 27, 2017), sourcetoday.com/supply-chain/article/21866768/vietnam-becomes-an-option-for-lowcost-electronics-manufacturing [<https://perma.cc/85SY-4ZPK>] (showing Vietnam's average hourly compensation as less than both Mexico and China).

166. See *Murphy Urges U.S. to Embrace Global Trade, Supply Chains Amid Pandemic*, WORLD TRADE ONLINE (July 23, 2020, 5:48 PM), <https://insidetrade.com/trade/murphy-urges-us-embrace-global-trade-supply-chains-amid-pandemic> [<https://perma.cc/SA3W-G2VR>] (quoting Prashant Yadav, senior fellow at the Center for Global Development).

bring some more emphasis of moving from a very 'just-in-time' driven philosophy of inventory and manufacturing and secondly it could bring about diversification of supply."¹⁶⁷ The resourcing/ near-sourcing process could also be facilitated if, as U.S. and Mexican officials are discussing, the United States and Mexico establish a consultation mechanism that would align the North American region's "essential sectors" and help enterprises to focus on supply chains that could be reshored.¹⁶⁸

American enterprises that export to China, particularly those producing high-tech products in the United States such as Intel and Qualcomm, will likely see their exports to China reduced or eliminated.¹⁶⁹ Retaliation by China may also affect some unrelated industries; Apple iPhone sales in China may decline and China may refuse to purchase Boeing aircraft in the future.¹⁷⁰ Even though the complexity of China-based supply chains means they cannot be shifted elsewhere overnight, it is also reasonable to expect China over the longer term to seek more diversified external relations that will permit China to maintain its now dominant place in the global supply chain despite reduced trade and reduced dependence on the United States and to increase its prominence in such areas as artificial intelligence, 5G communications, robotics, and electric vehicles.¹⁷¹ At the same time China may be expected to increasingly focus on its growing domestic market.¹⁷² Its policies including increasing government subsidies are expected as well to stimulate Chinese companies' expansion into international markets, along with existing incentives designed to improve technological innovation.¹⁷³

A sensible approach to reshoring or nearshoring could reduce but not eliminate the pain. Prioritizing products and technology that raise intellectual property, national security, or public health threats is wise. But there is little benefit of any kind in seeking to restrict apparel, shoes, consumer electronics, auto parts, or basic steel, among others. If restrictions are imposed on such sectors it will be because of rampant protectionism for industries that would be declining in the United States without or without Chinese competition, not for legitimate strategic reasons. It seems to me

167. *See id.*

168. *U.S., Mexico Eye Consultations to Align 'Essential' Sectors, Reshore Production*, WORLD TRADE ONLINE (July 31, 2020, 10:49 AM), <https://insidetrade.com/daily-news/us-mexico-eye-consultations-align-%E2%80%98essential%E2%80%99-sectors-reshore-production> [<https://perma.cc/GUY7-728Z>].

169. Jeanne Whalen, *US Tries to Narrow Loophole that Allowed China's Huawei to Skirt Export*, WASH. POST, (May 15, 2020, 4:22 PM), <https://www.washingtonpost.com/business/2020/05/15/us-closes-huawei-loophole/> [<https://perma.cc/TM26-UVBA>].

170. *Id.*

171. *Id.*

172. *See Frank Tang, China Eyes 'Diversified' Relations as US Becomes Increasingly Hostile, Beijing Economic Adviser Says*, SOUTH CHINA MORNING POST (May 30, 2020, 2:00 PM), <https://www.scmp.com/economy/china-economy/article/3086497/china-eyes-diversified-relations-us-becomes-increasingly> [<https://perma.cc/9H2Z-R8BC>] (interviewing Cai Fang, vice-president of the Chinese Academy of Social Sciences).

173. *See id.*

that a level of managed trade and industrial policy that has not been seen—or at least freely acknowledged—in the United States in the past is almost inevitable for the future, as both major political parties favor a more active government role in shaping the U.S. economy.¹⁷⁴ This was evident, *inter alia*, in comments from Ambassador Lighthizer, who has called for a new “industrial policy” to support reshoring policies in the United States, with a focus not only on PPG but also low- and high-tech goods.¹⁷⁵ Whether such policies will be implemented in a wise manner is more difficult to predict.

The confusion for business is increased by conflicting statements within the government. In June, in contrast to the quotation above, U.S. Trade Representative Robert Lighthizer told Congress that he did not believe complete decoupling from China was feasible, “[d]o I think that you can sit down and decouple the United States economy from the Chinese economy? No. I think that was a policy option years ago. I don’t think it’s . . . a reasonable policy option at this point.”¹⁷⁶ The next day, he was contradicted by President Trump, who stated that the Administration has not ruled out “a complete decoupling from China.”¹⁷⁷ Much of this posturing makes no practical sense. As Representative Stephanie Murphy has observed, “having exclusive domestic sourcing is both unrealistic and counterproductive. It would just leave us as vulnerable to shocks here at home as to ones abroad.”¹⁷⁸

American enterprises will continue to invest in China, but in the future, it seems likely that the bulk of that investment will be in production for the local Chinese market or for exports to third countries. In some sectors, such as high-tech communications equipment, other products with national security implications, and pharmaceutical products, private businesses that do not voluntarily reshore risk being forced to do so by the U.S. government. As one observer has accurately noted,

governments are becoming more likely to utilize interventionist policies to foster higher levels of domestic production, reduce foreign dependence, and ensure greater supply chain security during a time of

174. See Jeanne Whalen, *To Counter China, Some Republicans Are Abandoning Free-Market Orthodoxy*, WASH. POST (Aug. 26, 2020, 6:00 AM), <https://www.washingtonpost.com/business/2020/08/26/republicans-favor-industrial-policy/> [<https://perma.cc/2V88-T9J2>] (discussing the views of congressional members of both parties).

175. See *Lighthizer Calls for Post-Pandemic U.S. Industrial Policy*, WORLD TRADE ONLINE (June 4, 2020, 5:05 PM), <https://insidetrade.com/daily-news/lighthizer-calls-post-pandemic-us-industrial-policy> [<https://perma.cc/V57B-V9QP>].

176. See *Trump: Lighthizer Was Wrong – ‘Complete Decoupling from China’ Still an Option*, WORLD TRADE ONLINE (Jun. 18, 2020, 4:30 PM), <https://insidetrade.com/trade/trump-lighthizer-was-wrong-%E2%80%93-complete-decoupling-china-still-option> [<https://perma.cc/KG6Y-U2ZB>].

177. See *id.*

178. See R. K. Morris, *Toward Resilient Medical Supply Chains*, TTALK QUOTES (Global Bus. Dialog, Inc., Wash. D.C.), July 23, 2020, No. 58 of 2020, https://myemail.constantcontact.com/FROM-A-HEARING-ON-MEDICAL-SUPPLY-CHAINS.html?soid=1101547782913&aid=_6HN3_JEqXM [<https://perma.cc/X7VP-KWQT>].

intensifying geopolitical tensions. And companies will do what they need to do in order to avoid getting caught in the crossfire.¹⁷⁹

Separating the effects of the various considerations supporting the reduction or elimination of Chinese supply chains may be difficult and will not be the same among all business sectors and individual enterprises, but it seems to me that the changes they are bringing about are both cataclysmic and irreversible. In my view, the advent of the USMCA has made this supply chain revision potentially less difficult and complex than it might otherwise have been, by providing a satisfactory, if not ideal, locus nearby for manufacturing labor intensive parts and components (Mexico), and at the same time encouraging many businesses to consider a highly automated form of production in the United States. In some instances, Canada may also benefit, not because of lower labor costs, but because in some high-tech sectors foreign-born technicians and engineers will because of strict U.S. immigration restrictions be easier to bring to R&D facilities in Canada than those located in the United States.¹⁸⁰ Such reshoring or nearshoring may not result in a large volume of job creation, except possibly in Mexico. It should, however, help to prepare the United States and the rest of North America for what promises to be a decades-long bitter economic (and political) conflict with China.

In the final analysis, given the potential foreign and national security policy implications of these changes, former Congressman Dan Coats has urged,

[t]he U.S. response must be coherent, disciplined[,] and sophisticated. It must balance capabilities and objectives. Reverting to a Cold War mentality will drive us toward belligerent posturing that has little or no chance of changing Chinese behavior and could, on the contrary, provoke overreactions and dangerous miscalculations on both sides. Above all, we must create a deliberate strategy that is aimed at managing this great-power conflict rather than vanquishing a foe. This is very hard work, requiring patience, conviction[,] and broad political support. It also requires the full participation of our allies, both in the region and elsewhere.¹⁸¹

179. Stephen Olson, *TSMC's New US Facility Signals Managed Decoupling*, HINRICH FOUND. (May 18, 2020), https://hinrichfoundation.com/trade-research/global-trade-research/thought-leadership/tsmcs-new-us-facility-signals-managed-decoupling/?utm_source=HS_email&utm_medium=email&utm_content=88066825&_hsenc=p2ANqtz—nyFFPn4LLZ-Iq0EtwrGuYF1VroLm7lcl1Vw5-YJ3J83KIUpehcXuHBPBLCV_IeOYb13chVnh3c2P8sejlkQZRZPJocymQedOiq1nFayGRji1Y0Y&_hsmi=88066825 [https://perma.cc/A7LA-3ERC].

180. See Alana Semuels, *Tech Companies Say It's Too Hard to Hire High-Skilled Immigrants in the U.S.—So They're Growing in Canada Instead*, TIME (July 25, 2019, 3:18 PM), <https://time.com/5634351/canada-high-skilled-labor-immigrants/> [https://perma.cc/Y3FS-H9JG].

181. Dan Coats, *There's No Cold War with China – And if There Were, We Couldn't Win*, WASH. POST (July 28, 2020, 1:53 PM), <https://www.washingtonpost.com/opinions/2020/07/28/new-cold-war-between-us-china-is-dangerous-myth/> [https://perma.cc/QJ4S-THVF].

