

The Honorable Robert E. Lighthizer
United States Trade Representative
600 17¹¹¹ Street, N.W.
Washington, D.C. 20508

Dear Ambassador Lighthizer:

In accordance with section 105(b)(4) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, and section 135(e) of the Trade Act of 1974, as amended, I am pleased to transmit the report of the ITAC 5 on the Trade Agreement, reflecting majority and additional advisory opinions on the proposed Agreement.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel B. Pickard". The signature is stylized with a long horizontal stroke extending to the left and a large, circular flourish on the right side.

Daniel B. Pickard
Chair
ITAC 5

A Trade Agreement with Mexico and Potentially Canada

Report of the Industry Trade Advisory Committee on Forest Products, Building Materials,
Construction, and Nonferrous Metals

September 27, 2018

September 27, 2018

ITAC 5 - Industry Advisory Committee on Forest Products, Building Materials, Construction, and Nonferrous Metals

The Honorable Wilbur L. Ross, Jr.
Secretary of Commerce
Department of Commerce
Herbert C. Hoover Building
Washington DC 20230

Ambassador Robert E. Lighthizer
United States Trade Representative
Executive Office of the President
600 17th Street, NW
Washington, DC 20508

RE: Report of the Industry Trade Advisory Committee on Forest Products, Building Materials, Construction, and Nonferrous Metals regarding A Trade Agreement with Mexico and potentially Canada

Dear Secretary Ross and Ambassador Lighthizer:

1. Purpose of the Committee Report

Section 105(b)(4) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, and section 135(e)(1) of the Trade Act of 1974, as amended, require that advisory committees provide the President, the Congress, and the U.S. Trade Representative with reports not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

Under Section 135 (e) of the Trade Act of 1974, as amended, the Committee members will include an advisory opinion as to whether, and to what extent, the agreement promotes the economic interests of the United States and achieves the applicable overall and principal negotiating objectives, as well as a revised advisory opinion as to whether the agreement provides for equity and reciprocity within the sector or functional area.

For these reasons, the ITAC 5, the Industry Advisory Committee on Forest Products, Building Materials, Construction, and Nonferrous Metals submits the following report.

2. Executive Summary of Committee Report

In general, ITAC 5 supports the U.S. - Mexico Trade Agreement and sincerely hopes that the United States and Mexico can continue to work together in the most effective manner possible in the interest of fair trade. However, we do believe there is room for improvement within the agreement. Certain members indicate that their approval would be contingent upon the extension of the ISDS protections in both Mexico and Canada for the US mining and manufacturing industries.

Certain members of ITAC 5 would also like to emphasize that trade with Canadian firms is vitally important to U.S. manufacturers, producers and forestry owners. It is their profound hope that the final document will be a trilateral US-Canada-Mexico agreement.

3. Ability to Review Documents and Comment

As an initial matter, we strongly believe that the ITAC expertise and knowledge should be utilized to maximize the advisory and statutory role we play in the formulation of any and all trade agreements; and members should be consulted early and often. Historically, there have been concerns in regard to a lack of timely consultation between previous Administrations and the ITAC's. We are mindful of the unusual circumstances concerning this most recent round of negotiations. However, we wish to emphasize that in order for us to meet our mutual objectives, as outlined in Section 135 of the Trade Act of 1974, as amended, and including the legislative history thereof, we should work together in a more collaborative manner than was our experience in the past (particularly with respect to the Trans-Pacific Partnership (TPP)). ITAC 5 appreciates the addition of monthly trade advisor briefings and the ability for trade advisors to obtain briefings during negotiating rounds, but notes that not all advisors are able to travel to each negotiating round. ITAC-5 strongly recommends that all Committees should have complete and timely access to the future negotiating documents and understand the direction that governments participating in the negotiations plan to pursue.

4. Bilateral vs. Trilateral Agreement Framework

We welcome the opportunity to review a draft of multiple chapters of a new trade agreement between the United States, Mexico and potentially Canada. Certain members of ITAC 5 strongly recommend that the final agreement be a trilateral rather than just a bilateral US-Mexican agreement. Canada and the United States have had extraordinarily close relations since the settlement of boundary disputes in the 19th century because of the proximity of our large land masses, the natural intertwining of our market-oriented economies, the movement of our citizens, the sharing of air and water resources and, of course, our shared values, similar heritages and shared experiences in conducting the great wars of the 20th century and intelligence operations. The reasons that have justified the updating of the 1993 NAFTA, including new or revised provisions dealing with enforcement, intellectual property rights, digital age services and the environment apply to our relations with Canada as well as with Mexico, and their effectiveness will be sorely compromised if the new agreement does not include Canada as well as Mexico. Indeed, several members of ITAC 5 would emphasize that the uncertainty of not including Canada in the final agreement (and consequentially the uncertainty in regard to legal obligations toward Canada), would have a significant negative effect on U.S. businesses and their investment decisions.

5. Sunset Provisions

Certain members of ITAC 5 state their concern in regard to the 16-year sunset period. These members wish to stress the importance of certainty in regard to business decisions, and which may be undermined by the provision that allows for a review every six years. These members note that there are other, less potentially disruptive, options that would allow for renegotiation of treaty obligations. These members of ITAC 5 are supportive of a periodic mechanism that provide for updating the agreement as appropriate circumstances arise. Other members are generally supportive of sunset mechanisms.

6. Trade Remedies

The Agreement has met the Administration's objective of strengthening existing procedures and create new procedures to address AD/CVD duty evasion, including the ability to conduct AD/CVD verification visits. ITAC 5 members support the commitments in the agreement to combat duty evasion and hope that the enhanced cooperation in the agreement will result in a reduction of the practice.

ITAC 5 notes its concerns in regard to exempting Mexico from future safeguard investigations. Safeguard investigations (also known as "Section 201 investigations") are important trade remedy actions that authorize the International Trade Commission to examine whether a particular import is causing or threatening to cause serious injury to a domestic industry. Once an import is deemed to be injurious, Section 201 provides the President with a range of remedies to restore healthy competition to the marketplace. For certain members of ITAC 5 the removal of Mexico from future safeguard cases is of grave concern.

ITAC 5 supports the principle that trade promotion agreements should in no way weaken the U.S. trade remedy laws. Some ITAC 5 members support the Administration's position that NAFTA Chapter 19, which allows a binational panel of appointed judges to review and potentially remand national administrative determinations in antidumping and countervailing duty cases, should be eliminated. While, other ITAC 5 members feel that the provision has been appropriate in ensuring these cases do not undermine U.S. trade objectives and U.S. industries that rely on that trade. Approximately seventy-one cases have been brought under NAFTA Chapter 19 since the agreement entered into force. More than half of these (43) were cases where U.S. antidumping or countervailing duty determinations were challenged by Mexico or Canada. Some ITAC 5 members believe that these panels have not served U.S. interests and this system should be eliminated. These members contend that U.S. law provides ample opportunity to appeal questions regarding the application of U.S. trade remedy laws before an independent judiciary, and no outside review is warranted. Other members cite the need for all member country actions including antidumping or countervailing duty determinations to be done in accordance with our trade obligations.

7. Rules of Origin

We support the Administration's efforts to secure stronger protections in the US-Mexico Free Trade Agreement to ensure that benefits from the agreement go to producers in the member-countries rather than foreign producers that falsely claim their goods meet the origin requirements. We support the strengthening of these procedures and the penalties provisions.

8. Government Procurement

The Agreement includes a comprehensive government procurement chapter that balances access to markets with the desire to encourage the purchasing of U.S. manufactured goods in federal procurement actions.

While ITAC 5 generally endorses the government procurement provisions and the resulting incentives to increase production in the United States, certain members wish to acknowledge the realities of the global supply chain. These members note that certain products, including specific wood species, are not commercially available in the United States. These members also wish to emphasize the complexity of, and need for, the provision of services from international sources.

Certain ITAC 5 members strongly support U.S. government procurement policies, such as the Buy America and Buy American laws, that ensure preferences for U.S. goods in U.S. government procurements when those goods are the most appropriate choice for the project. Access to U.S. government procurements is essential for U.S. manufacturers that do not have significant export markets. While some members support restricting the government procurement obligations to projects that are conducted by the national government and not including projects that are conducted by state and local governments using some federal funds; other members fully support the prohibition at the federal, state, and local levels. Some members of ITAC 5 support a bar from government procurements for any suppliers that have been determined by any party's government to have engaged in a pattern of unfair trade practices, such as transshipment or mismarking. These members contend that access to government procurements should be reserved for those companies that have shown their commitment to play by the rules.

9. Investor State Dispute Settlement

Consistent with Members of ITAC 5's desire to have an agreement that includes all three NAFTA countries we also support the ISDS protections being extended to all industries. We strongly oppose the Administration's current position that if the agreement includes Canada that the ISDS provisions would not extend to Canada, nor does ITAC 5 support the proposed text that ISDS does not extend to all industries in the case of a bilateral agreement with Mexico.

Foreign direct investment is one of the most important vehicles to bring goods and services to foreign markets. In many cases, manufacturers, such as manufacturers of paper and paperboard packaging materials, need to locate close to their foreign customers for cost and logistical reasons.

U.S. companies operating overseas, however, face risk, uncertainty and challenges in international markets, which, if remedies are not available, harm investment and economic activity. Foreign government have engaged in numerous unfair, expropriatory and other activities that have undermined foreign investments, resulting in the loss of U.S. exports and U.S. economic activity. As a result, strong protections and market-opening obligations enforceable through direct neutral enforcement mechanisms have long been a bipartisan priority of the U.S., and have been a negotiating priority in trade promotion authority since 1984. The original NAFTA and more than 40 other U.S. agreements recognized the importance of a wide range of protections both for existing and new and expanded investments that individual investors could enforce through a neutral and objective investor-state dispute settlement (ISDS) mechanism.

A major failing of the new agreement is that it eliminates the ability of most businesses to enforce most of the core protections, limits the available protections only to existing investments and adds new hurdles to all companies to use neutral enforcement mechanisms. Also, of great concern is the prospect that no ISDS protections would be available vis-a-vis Canada.

The experience of one paper company demonstrates why it is vital for ISDS to apply to investments in Canada. In 2008, the Province of Newfoundland expropriated without compensation extensive property, including facilities and water rights, of the American company AbitibiBowater. The company exercised its rights under NAFTA Chapter 11, which precipitated negotiations and a settlement of \$130 million, the compensation AbitibiBowater should have received had the provincial government properly purchased the properties. Chapter 11, was the company's only recourse after Newfoundland legislated to bar such claims from its courts, protected the American company from an unlawful expropriation without fair and equitable compensation.

ISDS protections are also critically important to the U.S. mining industry. We emphasize that while US mining companies primarily invest in the United States, many also have operations overseas as concentrations of useful minerals rich enough to form ore deposits are rare phenomena. As such, US companies must invest in locations where the natural resources are available and commercially exploitable. This sector is also more vulnerable internationally due to the tremendous up-front capital costs that can total as much as a \$1 billion before any minerals are produced or processed.

We note, however, that certain members wish to indicate their concerns in regard to ISDS protections for foreign investments into the United States. These ITAC 5 members would highlight the fact that the U.S. legal system, which include an independent judiciary, has adequate due process protections, such that no additional outside review is warranted. Moreover, these members would state their concern that these provision would result in an unnecessary intrusion on U.S. sovereignty.

10. Environment

Most notably the Administration has succeeded in ensuring that the Environment provisions have been incorporated into the core of the Agreement rather than a side agreement. In addition, the

agreement establishes strong environmental obligations that are the subject to the same dispute settlement mechanisms that applies to the other enforceable obligations of the Agreement. ITAC 5 supports the Environment Chapter in which the Parties agree to effectively enforce their environmental laws; and not to weaken environmental laws in order to encourage trade or investment. They also agree to fulfill their obligations under the Convention on International trade in Endangered Species of Wild Fauna and Flora (CITES), and to take measures to combat and cooperate to prevent trade in illegally taken wild fauna & flora, including combatting illegal logging and associated illegal trade. In addition, the parties agree to promote the legal trade in associated products.

In particular, ITAC 5 is pleased to see strong support for sustainable forest management in the agreement which notes that forest products, when sourced from sustainably managed forests contribute to global environmental solutions, including sustainable development, conservation and sustainable use of resources and green growth. ITAC 5 supports the provisions of the agreement that seeks to promote sustainable forest management and promote the trade in legally harvested products. We also note the inclusion of provisions to enhance the effectiveness of inspection of shipments containing wild fauna and flora and urges that forest products to be able to move quickly through all inspections including those related phyto-sanitary measures. To implement these measures we support the development of electronic phyto and electronic CITES certificates that allow for pre-shipment approval or disapproval to streamline the port inspection process.

11. Technical Barriers to Trade

The TBT chapter provides for non-discriminatory rules for developing technical regulations, standards and conformity assessment procedures, while preserving Parties' ability to fulfill national objectives. ITAC 5 supports the continued support for ensuring combatting technical barriers to trade.

12. Sanitary and Phytosanitary (SPS) Measures

The Agreement builds on the WTO SPS rules for identifying and managing risks in a manner that is no more trade restrictive than needed. Sadly, in times of trade disputes it is often the use of SPS measures that are the first soft barriers to trade. Delays for shipments or blocking of products due to SPS concerns are extremely costly and burdensome for the trade. It is critical that traders fully understand any requirements and are able to ensure all conditions are met prior to shipment. ITAC-5 supports the text of the SPS chapter. We urge that U.S. trade agencies take steps to ensure that the commitments and obligations of the SPS chapter are fully and effectively implemented.

13. Customs and Trade Facilitation

The agreement provides for transparent customs laws and regulations and providing for the release of goods without unnecessary delay. Delays in customs clearance are extremely costly for traders, manufacturers and retailers. Importantly, the Chapter provides clear support for single window

and electronic filing. ITAC 5 supports continuing the U.S. movement to electronic filing and would like to see it extended to electronic CITES filings among the Parties and other trading partners.

Very truly yours,

A handwritten signature in black ink, consisting of a large, loopy 'D' followed by 'B. Pickard'. The signature is written over a horizontal dashed line.

Daniel B. Pickard
Chairman, ITAC 5

Industry Trade Advisory Committee
On
Forest Products, Building Materials, Construction, and Non-Ferrous Metals
ITACS

CHAIRMAN

Daniel B. Pickard, Esq.
Partner, Wiley Rein LLP
Representing Diamond Sawblades
Manufacturers' Coalition

VICE CHAIRMAN

Cindy L. Squires, Esq.
Executive Director
International Wood Products Association

John E. Arnett, Esq.
Government Affairs Counsel
and Secretary/Treasurer
Kelley Drye & Warren LLP
Representing Copper & Brass Fabricators, Inc.

Mr. Michael G. Brummer
President
Michael Brummer & Associates Inc.
Representing Fitzpatrick & Weller, Inc.

Ms. Dana L. Cole
Executive Director, Corporate Secretary
and Treasurer
Hardwood Federation

Mr. Edward G. Elias
President
APA - The Engineered Wood Association

Jesse E. Gary, Esq.
Executive Vice President, General Counsel
and Secretary
Century Aluminum Company

Mr. Robert W. Glowinski
President and Chief Executive Officer
American Wood Council

Mr. Michael H. Goodman
President
Metallurgical Products Company

Mr. Jacob Handelsman
Senior Director, International Trade
American Forest and Paper Association

Mr. Jeffrey S. Henderson
President
Aluminum Extruders Council

Mr. Gerard (Jerry) L. Hingle, Jr.

President and Chief Executive Officer
International Trade Associates
Representing Southern Forest Products
Association

Mr. David E. Kretschmann
President
American Lumber Standard Committee, Inc.

Mr. Stephen G. Letko
Counselor to the President
Weldbend Corporation

Ms. Mary M. Mann
Director, Global Government Relations
International Paper Company

Mr. Joseph C. Pickard
Chief Economist and Director
of Commodities
Institute of Scrap Recycling Industries, Inc.

Mr. William G. Portnoy
Vice President, Sales and Marketing
Buffalo Armory

Mr. Michael D. Riess
President
Materials Management Corporation
Representing International Precious Metals
Institute

Mr. Paul Sedor
Vice President, Member and Industry Relations
Metal Powder Industries Federation

Ms. Veronika M. Shime
Vice President, International Policy
National Mining Association

Mr. Larry W. Webb
President
Quemetco Metals Limited, Inc.