

Trumping Capacity Gap with Negotiation Strategies: The Mexican USMCA Negotiation Experience

By

Amrita Bahri and Monica Lugo*

Abstract

In the past few months, we have witnessed the “worst deal” in the history of the United States become the “best deal” in the history of the United States. The negotiation leading to the United States-Mexico-Canada Agreement (USMCA) appeared as an “asymmetrical exchange” scenario which could have led to an unbalanced outcome for Mexico. However, Mexico stood firm on its positions and negotiated a modernized version of North American Free Trade Agreement. Mexico faced various challenges during this renegotiation, not only because it was required to negotiate with two developed countries, but also due to the high level of ambition and demands raised by the new US administration. This paper provides an account of these impediments. More importantly, it analyses the strategies that Mexico used to overcome the resource constraints it faced amidst the unpredictable political dilemma in the US and at home. In this manner, this paper seeks to provide a blueprint of strategies that other developing countries could employ to overcome their negotiation capacity constraints, especially when they are dealing with developed countries and in uncertain political environments.

Introduction

Many regional trade negotiations, including the recent renegotiation of North American Free Trade Agreement (NAFTA), have shown that developing countries in such negotiations can play a defensive role and resist ambitious proposals from developed countries with stronger economies. They can also be offensive and table new proposals to promote their interests. Moreover, the Seattle Ministerial in 1999, together with the Doha Ministerial in 2001 and the Bali Ministerial in 2013 have shown that developing countries can not only negotiate powerfully and influence outcomes, but also resist and block trade negotiations.¹ Yet, developing countries face multiple challenges that impede their effective participation in international trade negotiations. With resource constraints, small trading stakes and weak negotiating clout, they often find themselves on an uneven playing field when they participate in negotiations with developed countries. There are many structural factors such as the lack of negotiating experience, inadequate knowledge and information on economic impact of trade policy decisions, and unequal bargaining power which affects the participation of developing and least

* Dr. Amrita Bahri, Assistant Professor of Law, Instituto Tecnológico Autónomo de México (ITAM), Co-Chairholder, WTO Chair Program for México; Monica Lugo, Deputy Director General, Mexican Ministry of Foreign Affairs; Former Negotiator of USMCA.

¹ Sheila Page, ‘Developing Countries: Victims or Participants, Their Changing Role in International Negotiations’, Globalisation and Poverty Programme, Overseas Development Institute 2003, <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2418.pdf> (accessed 1 March 2019)

developed countries in international trade negotiations.² In other words, developing countries can face “capacity-constraints” while participating in trade negotiations.

The expression “capacity-constraint” in the context of this study refers to a situation where lack of required resources can impede a country’s ability to conduct effective negotiations. The problem of insufficient negotiating capacity becomes even more severe if an agreement is being negotiated between one or more developing countries on one hand and developed nations on the other. This situation can be more appropriately described as the problem of “capacity-gap” between the developing and the developed world.³ The term “capacity-gap” in this context refers to a situation where one participant in the negotiation process may have insufficient resources that are required for negotiation as against other participants that, owing to their level of economic growth, nature of economic sectors and trading stakes, may have no difficulties in mobilizing the required resources.⁴

One example that demonstrates the issue of “capacity-gap” is the United States-Central America-Dominican Republic Free Trade Agreement.⁵ During its negotiation in 2003-2004, large asymmetries were observed between the United States (US) on one hand and the Central American countries on the other. The most obvious asymmetry was the one related to the economies of these countries.⁶ Moreover, many institutional deficiencies were felt in the Central American countries while negotiating this agreement with the US. This is because the negotiating institutions and entities in Central America were not as developed and well equipped as the ones in the US.⁷ They lacked the experience of trade negotiations, and they also lacked the resources that were required for negotiation such as legal expertise, finance and an organized private sector’s support. The fact that these countries had to come together to justify having a trade agreement with the US can partly be attributed to the lack of capacity these countries had for negotiating on their own.⁸ Moreover, the individual size of these economies and their markets would not have made an economic sense for the US to negotiate the deal without this association

² Julio J. Nogues, ‘Unequal Exchange: Developing Countries in the International Trade Negotiations’ (April 2002) 4, Murphy Institute Conference on ‘The Political Economy of Policy Reform’, at <http://www.tulane.edu/~dnelson/PEReformConf/Nogues.pdf> (accessed 5 March 2019)

³ Amrita Bahri, *Public Private Partnership for WTO Dispute Settlement: Enabling Developing Countries* (Edward Elgar, 2018), 25-26

⁴ The resources required may include information, evidence, human resource, number of lawyers or economists or other subject matter experts, and finances.

⁵ Central America-Dominican Republic Free Trade Agreement (CAFTA-DR), US Customs and Border Protection, at <https://www.cbp.gov/trade/free-trade-agreements/cafta-dr> (accessed 25 March 2019)

⁶ Salazar-Xirinachs, Jose M. and Jaime Granados, ‘The United States-Central America Free Trade Agreement: Opportunities and Challenges’, Institute for International Economics Conference on Free Trade Agreements and U.S. Trade Policy (May 7-8, 2003, Washington DC) 227

⁷ *Ibid.*, 229

⁸ J. F. Hornbeck, ‘The U.S.-Central America Free Trade Agreement (CAFTA): Challenges for Sub-Regional Integration’, CRS Report for Congress (1 June 2004), 7, at https://www.everycrsreport.com/files/20040601_RL31870_ae9714e4ecb354e669cbdd934e5050f5957aa2e9.pdf (accessed 5 January 2019)

between five developing countries. Perhaps, gaining access to these five markets was also not adequate for the US as Dominican Republic was invited to join this negotiation in 2004.

The recent renegotiation of NAFTA was different, as it required its members to renegotiate an agreement which had been in place for 24 years. In a typical negotiation for a new agreement, the worst-case scenario could be to not have any agreement and thus to maintain the status quo. However, in this negotiation, the worst-case scenario was to demolish a trade instrument which had accelerated free trade and liberalization in North America since the 1990s. Mexico and Canada wanted it to survive; the nationalism-struck US administration seemed ready to discard it unless it was made to work for it. This dynamic created considerable political challenges in addition to the technical complexities of modernizing this agreement. Moreover, Mexico was a developing country with certain negotiating constraints, facing two developed countries with a relatively higher political and economic clout. Hence, there was a noticeable capacity-gap between the negotiating countries. Furthermore, the fact that Mexico during this negotiation had to deal with the populist US administration and the changing political landscape at home made this experience even more challenging.

This brings us to the *first question* that this paper seeks to answer. Can developing countries negotiate effectively with developed countries in challenging political conditions? Mexico's experience clearly demonstrates that, with appropriate capacity-building strategies, developing countries can negotiate effectively with developed countries even amidst uncertain and hostile political environments. Mexico has a wealth of trade negotiation capacity it has built through 25 years of negotiating experience, expertise and close coordination with relevant stakeholders. Yet, the recent renegotiation of NAFTA was a major challenge for Mexico. This brings us to the *second and third questions* that this study seeks to answer. What barriers did Mexico face during the NAFTA renegotiation? How did Mexico approach these challenges? Can the Mexican experience guide other developing countries on how to strengthen trade negotiation capacity and negotiate effectively even in challenging political environments? This paper responds to these questions with a pragmatic approach and first-hand insights gathered through empirical research.

The capacity-building strategies discussed in this article might have strengthened the negotiation-capacity of Mexico; however, they may not be as effective for other developing countries. The term "developing countries" is quite heterogeneous in nature, as it ranges from small developing countries which are predominantly based on subsistence agriculture, to large and emerging economies like China, Brazil, Mexico and India. These diversely developed countries have very different levels of development, market size, and foreign trade interests. Moreover, they have diverse experience of international trade negotiations. In this context, the findings in this article may not be relevant more generally to all developing countries but only to a specific group of developing countries that may be categorized as middle-income emerging economies with interest and some experience in trade negotiations. In particular, emerging economies can observe the kind of challenges that they themselves can face in trade negotiations

with the current US administration and with other countries demonstrating tendencies of protectionism and nationalism. This case study can provide some guidance on how such tendencies can be handled with target-oriented and research-led negotiation strategies.

This paper is based on several semi-structured interviews that the authors have carried out with the help of selectively designed and individuated sets of questions. The interviewees were identified through purposive snowball sampling approach as it enabled the authors to make an ‘initial contact with a small group of people’ that were related to the area under investigation and then utilize these to establish further related contacts.⁹ Different perspectives from government officials, private sector representatives, trade lawyers and academics were taken into account. The claims made by government officials were verified and cross-checked against the observations provided by private sector representatives and vice versa. Their claims and perceptions were further corroborated, endorsed or refuted with the help of current scholarship, media reports and official studies.

From NAFTA to USMCA: Taking Stock of the Wins and Losses

In August 2017, the US, Mexico and Canada commenced the process of renegotiating NAFTA. Through this renegotiation, Mexico sought to modernize the agreement with four key “principles”. The first principle was aimed at promoting regional competitiveness through elimination of barriers to trade in goods and services, promotion of foreign investment, regulatory improvements, and expansion of free and preferred access to markets. The second principle was to make the agreement more inclusive and sustainable by incorporating new generation provisions on labor, environment, Small and Medium Size Enterprises (SMEs), and anti-corruption, among others. The third principle was to avail the opportunities that the new technological era has to offer with the introduction of disciplines on intellectual property, e-commerce, digital trade and financial technologies. The fourth and final principle was to maintain a predictable trade and investment environment by strengthening the dispute settlement mechanism and establishing regulation on government purchases, competitiveness and state-owned enterprises.¹⁰

The goals and expectations are the foundation to any successful negotiation. ‘The more specific your vision of what you want and the more committed you are to that vision, the more likely you are to obtain it.’¹¹ The four principles (as described above) defined the path of negotiation for the Mexican negotiators. They helped the negotiators to ignore the surrounding political

⁹ Alan Bryman, *Social Research Methods* (Oxford University Press 2012) 202

¹⁰ Secretaría de México (México), ‘Prioridades de México en las negociaciones para la modernización del Tratado de Libre Comercio de América del Norte’, at <https://www.gob.mx/se/articulos/prioridades-de-mexico-en-las-negociaciones-para-la-modernizacion-del-tratado-de-libre-comercio-de-america-del-norte?idiom=es> (accessed 23 February 2019)

¹¹ G. Richard Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* (Penguin Books 2000), 26-27

environment and remain focused on their goals of negotiation.¹² In addition, Mexico defined several “red lines” it would not cross during this negotiation. These limits affirmed Mexico’s staunch opposition to the following US demands: the elimination of the dispute settlement mechanisms; amending rules of origin and establishing quantitative trade restrictions; backtracking on access to government procurement contracts; inclusion of an automatic 5-year sunset clause, season-driven trade remedy measures and quotas in agriculture; and withdrawing access for cross-border trucking services.¹³ These issues became the most significant obstacles in the NAFTA renegotiation. The US demanded them; Mexico and Canada opposed them.

The new agreement - United States, Mexico and Canada Agreement (USMCA) – was signed at Buenos Aires on 30 November 2018. It seems to have several possible wins and losses for Mexico. The first apparent loss is the existing and ongoing US tariffs on the steel and aluminum imports from Mexico. Currently, Mexican steel and aluminum respectively is subject to 25 and 10 percent duty in the US.¹⁴ Mexico has retaliated against these tariffs by imposing duties against certain imports from the US.¹⁵ It has also challenged these duties at the WTO Dispute Settlement Mechanism (DSM).¹⁶ These actions clearly show Mexico’s frustration against these measures; however, it seems that Mexico has chosen to go somewhat lenient on this issue. This renegotiation could have been an opportunity to persuade the US to withdraw these tariffs from Mexico and Canada. However, Mexico decided to deal with these tariffs through WTO’s DSM and the imposition of similar retaliatory tariffs on US imports.¹⁷

The second loss could be the weakening of the dispute settlement mechanism in the new agreement. It is true that the substantive provisions that protected foreign investment in Chapter 14 of the USMCA are quite similar to the provisions in Chapter 11 of NAFTA; however, the scope of Investor-State Dispute Settlement (ISDS) has gone through a significant reduction in the new agreement. The limited substantive basis for investment claims and elimination of investor’s right to claim breach of minimum standard of treatment under Article 14.6 or Article 14.8 – the two most widely used cause of actions under NAFTA - goes to show how this mechanism has weakened the protection that was given to investors under the original NAFTA.¹⁸

¹² Interview with a former negotiator (details withheld)

¹³ The ‘red lines’ were explained in the Presentation by Kenneth Smith Ramos, Chief Negotiator from Mexico, ITAM University (14 November 2018); The demands of the US can be found in: USTR, ‘Summary of Objectives for NAFTA renegotiation’ (November 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf> (accessed 14 March 2019)

¹⁴ White House Press Release, ‘Presidential Proclamation on Adjusting Imports of Steel into the United States’ (8 March 2018), at <<https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/>> (accessed 6 September 2018)

¹⁵ Secretaría De Economía (Mexico), ‘Decreto Por El Que Se Modifica La Tarifa De La Ley De Los Impuestos Generales De Importación Y De Exportación’ Diario Oficial De La Federación, (5 June 2018), at https://www.dof.gob.mx/nota_detalle.php?codigo=5525036&fecha=05/06/2018 (accessed 1 February 2018)

¹⁶ United States – Certain Measures on Steel and Aluminium Products, Request for consultations (WT/DS551/1, 5 June 2018)

¹⁷ Interview with a former negotiator (details withheld)

¹⁸ Articles 14.6 and 14.8, USMCA

Furthermore, there will be no ISDS mechanism between the US and Canada, and the investment protections between Mexico and Canada will have to be governed by the disciplines established in CPTPP. These changes seem to be aligned with the repeated criticism by the US administration of international dispute settlement mechanisms with binding and compulsory jurisdictions.¹⁹ This development could be seen as a loss as it is a major departure from what Mexico was seeking to achieve, i.e., strengthening of the dispute settlement provisions to provide stronger enforcement of rights under the new regime.

The third negative impact of this agreement for Mexico is the new labor value content requirement. This rule will require that at least 40 percent of auto content and 45 percent of heavy truck content are made by workers earning at least USD 16 per hour.²⁰ Currently, the hourly wage rate in the manufacturing sector in Mexico is USD 3.20. On the other hand, this figure is as high as USD 21.89 in the US manufacturing sector and almost USD 19.93 in Canada.²¹ It is too early to tell whether this rule would have the impact of shifting production and manufacturing of automobiles from Mexico to high wage rate areas such as the US and Canada. If this were to happen, it could jeopardize the employment of workers in this industry in Mexico. The rule may create more jobs for workers in the US and Canada, as it seeks to create a level-playing field between the Mexican, Canadian and US workers employed in this industry.

In addition to wages, an annex to the labor chapter requires Mexico to reform its labor laws.²² In line with this requirement, Mexican Congress and Senate have recently passed the labor reform bill which strengthens the rights of trade unions to have greater transparency and control over their contracts.²³ It provides workers with a legal right to collective bargaining with employers through strong representation and the right to vote for their union representatives through secret ballot system. This development is a major win for Mexican workers. The US democrats have shown some skepticism on its enforcement; however, the current Mexican administration seems fully disposed to its proper enforcement in the near future.²⁴

Changes made in “regional value content” requirements could have some negative consequences for Mexico. The new agreement requires 75 percent of the value of a vehicle to be produced in

¹⁹ ‘Statement by the United States at the Meeting of the WTO Dispute Settlement Body’ (May 23, 2016), at <https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf> (accessed 13 August 2018)

²⁰ Article 7.3, Appendix ‘Provisions Related to the Product-Specific Rules of Origin for Automotive Goods’, Annex 4b, USMCA

²¹ Trading Economics [US Database, Feb 2019; Mexico and Canada Database (Dec 2018), <https://tradingeconomics.com/> (accessed 1 March 2019)]

²² Annex 23 A, USMCA

²³ Secretaría de Gobernación (México), Decreto por el que se reforman, adicionan y derogan diversas disposiciones [labor dispositions], Diario Oficial de la Federación (1 May 2019) <https://www.dof.gob.mx/nota_detalle.php?codigo=5559130&fecha=01/05/2019> accessed 9 May 2019

²⁴ Morning Trade (Politico, 6 May 2019) <<https://www.politico.com/newsletters/morning-trade/2019/05/06/trump-puts-pressure-for-quick-china-deal-432521>> (accessed 9 May 2019)

the United States, Canada or Mexico.²⁵ The old agreement had a similar clause with a threshold of 62.5 percent.²⁶ In line with the President Trump's nationalist agenda, the higher threshold is aimed to reduce the import of automotive parts from Asia, thereby boosting North American automotive manufacturing and jobs.²⁷ According to the Mexican Ministry of Economy, 68 to 70 percent of Mexican automotive exports to the United States already comply with the new rules of origin, which will allow most Original Equipment Manufacturers to continue to export without major disruption.²⁸ However, the remaining 30-32 percent of Mexican automobile industry that does not already comply with the regional value content requirements at the moment might have to undergo substantial adjustments in the future. It is too early to determine how USMCA might change trade equations and dynamics in this region, and whether it will lead to continuing trade benefits for Mexico; however, it seems to have secured several wins for Mexico.

In his first 100 days in office, President Trump announced that the US intended to withdraw from NAFTA if it was not renegotiated.²⁹ This threat led to multiple challenges being raised against President Trump's constitutional authority to withdraw from NAFTA without gaining the Congressional approval.³⁰ It was nevertheless a credible threat for Mexico, mainly because it had recently seen the US withdraw from Trans-Pacific Partnership (an agreement that the US had negotiated for almost eight years).³¹ The withdrawal from NAFTA would have been much more complicated for the US as it had been in operation for 24 years, yet a slight possibility of losing this agreement became significantly disconcerting for Mexico. If NAFTA would have died, it would have been difficult for Mexico to continue receiving the level of benefits it has been receiving under NAFTA from any other trade agreement (such as CPTPP or Pacific Alliance) due to NAFTA's significant geo-political advantage. With heavy dependence on the US markets, Mexico had no alternative but to ensure that the US did not leave the table until the members arrived to an agreement.³² Given these factors, the Mexican negotiators have referred to the survival of this regional paradigm as a 'win for Mexico'.³³

²⁵ Articles 3 and 4 (See note 20)

²⁶ Article 403, NAFTA

²⁷ Simon Lester and Inu Manak, 'The Rise of Populist Nationalism and the Renegotiation of NAFTA', *Journal of International Economic Law* (2018) 151, at 161

²⁸ 'El ABC de las nuevas reglas para exportar autos a Estados Unidos' (Expansión, 8 October 2018), at <https://expansion.mx/economia/2018/10/08/claves-para-entender-la-nuevas-reglas-para-autos-en-el-usmca> (accessed 14 March 2019)

²⁹ The White House, 'Remarks by President Trump in meeting with Manufacturing CEOs' (23 February 2017), at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-manufacturing-ceos/> (accessed 9 February 2019)

³⁰ Congressional Research Service, 'The President's Authority to Withdraw the United States from the North American Free Trade Agreement (NAFTA) Without Further Congressional Action' (5 March 2019), <https://fas.org/sgp/crs/row/R45557.pdf>

³¹ Interview with Mexican Negotiator, Mexican Ministry of Economy (15 March 2019, Mexico City)

³² These strategies are discussed at page 17-24

³³ Interview with a government official, Mexican Government (details withheld)

Another win for Mexico from this renegotiation was the US withdrawal of its demand for the inclusion of five-year sunset clause.³⁴ This proposal was aimed to ‘weaken the permanency of trade agreements’ to strengthen the notion of national power and reduce the ‘political risk insurance’ from businesses that seek to move their production out of the US.³⁵ In USMCA, the parties have agreed that the initial term would be sixteen years, with a review after six years when the parties can decide on whether to extend the agreement for another sixteen years.³⁶ This could be a win for Mexico as a five-year sunset review would have killed the pact unless it was renegotiated every five years. Such a clause would have reduced the potential of long-term investment in the region due to uncertainty on whether the agreement would survive after every five year review. Under the sunset clause, in the worst-case scenario (that is, absent a consensus to extend the agreement pursuant to the first six-year review), the treaty would be terminated on year sixteen. In this vastly evolving technological era, this six-yearly review will give the parties an opportunity to assess whether it requires any modernization in a timely fashion.

Finally, Mexico benefits from the modernization of this agreement because with the inclusion of new provisions and chapters on labor, SMEs, protection of environment, anti-corruption, gender justice and digital commerce, future trade between these countries might become more inclusive and progressive in nature.³⁷ However, the implementation of these new generation provisions has been seen as a challenging task, either due to the absence of clearly-defined enforcement mechanisms, lack of binding commitments, or the vagueness with which these provisions are drafted. Canadian civil society organizations for example have alleged that the environment chapter in USMCA is “weak”, “unenforceable” and “boilerplate” in nature.³⁸ Similar criticism has been advanced by the civil society groups and political organizations in the US against the labor provisions.³⁹ The permissive language with which gender-specific provisions in the USMCA and CPTPP are drafted further illustrate that the benefits from and success of such provisions cannot be taken for granted.⁴⁰

A systemic assessment of the negotiation’s outcome shows that this negotiation led to some zero-sum and other non-zero-sum scenarios for its parties. For example, the inclusion of provisions on gender justice, anti-corruption, e-commerce and trade digitization could be seen as a win for all

³⁴ USTR Ambassador Robert Lighthizer hearing on the renegotiation on NAFTA at the US Senate (21st March 2018), at https://www.c-span.org/video/?c4720505/lighthizer-brady-isds_ (accessed 14 March 2019)

³⁵ See note 27, at 164,

³⁶ Article 34.7, USMCA

³⁷ Chapters XVII, XIX, XXIII, XXIV, XXV and XXVII, USMCA

³⁸ Bob Weber, ‘New trade deal doesn’t address climate change: environmentalists’ (National Post, 1 October 2018), <https://nationalpost.com/pmn/news-pmn/canada-news-pmn/new-trade-deal-doesnt-mention-climate-change-environmentalists> (accessed 8 August 2019)

³⁹ Marc Jarsulic, Andy Green, and Daniella Zessoules, ‘Trump’s Trade Deal and the Road Not Taken: How to Evaluate the Renegotiated NAFTA’ (Centre for American Progress, 1 February 2019), <https://www.americanprogress.org/issues/economy/reports/2019/02/01/465744/trumps-trade-deal-road-not-taken/> (accessed 8 9 August 2019)

⁴⁰ See for example, Articles 23.4 and 24.9, CPTPP; Articles 23.9 and 23.12, USMCA

three countries. However, changes in regional and labor value contents is a zero-sum outcome that may in the short run work in favor of the US and Canada.

Challenges and Obstacles: Mexico's Renegotiation Experience

The renegotiation of NAFTA was an atypical trade negotiation as it took place alongside the emergence of "populist nationalism"⁴¹ in the US. This changing political climate, coupled with the differences in negotiation capacity of the participating countries, exacerbated the difficulties Mexico faced during this negotiation. This section provides a discussion of the challenges that Mexico faced under the following points.

1. Conflict of Interests

In international trade negotiations, the public and private stakeholders can have different and often conflicting interests. Government is in theory the guardian of national interests and the industries represent special economic interests. In certain trade negotiations, the national interests and special economic interests may not converge. Close interaction between government and private sector is often quite crucial in trade negotiations; however it may not be possible for them to coordinate and exchange resources if the national interest clashes with the special economic interest of an industry. Grossman and Helpman confirm that the exchange of information between government and special interest groups (including business entities) will be hampered in situations where interest groups and policymakers do not share similar objectives.⁴²

During the renegotiation of NAFTA, there were certain occasions where the industries had business interests that were directly in conflict with the national interests or with other industries' business interests. This erected another challenge for Mexican negotiators: balancing and reconciling the conflicting interests. Let us try to understand this challenge with the help of an example. The renegotiation of NAFTA invoked one of the most contentious health issues: fighting obesity. The US proposed that the renegotiated agreement should restrict the labeling authority of the government departments in the US, Mexico and Canada.⁴³ Its position was backed by the prepackaged food and nonalcoholic beverages industry, which claimed that this move could protect the 'existing market access and remove remaining barriers'⁴⁴. This issue led to an intense battle amongst the negotiators, health regulators and food industry in Mexico and across the hemisphere. The food industry was demanding that the governments' ability to label

⁴¹ See note 27, at 151-2

⁴² Elhanan Helpman and Gene Grossman, *Special Interest Politics* (MIT Press, 2001) 23; For further details on regulatory capture and lobbying emerging from private participation, see Tony Makkai & John Braithwaite, 'In and Out of the Revolving Door: Making Sense of Regulatory Capture' (1992) 12(1) *Journal of Public Policy* 61

⁴³ US Chief Negotiator Robert Lighthizer, Senate Hearing, <https://www.c-span.org/video/?c4720040/us-trade-policy-agenda&start=3040>

⁴⁴ GMA, Comments for NAFTA Public Hearing (27-29 June 2017), https://www.gmaonline.org/file-manager/20170622_GMA_Comment_for_NAFTA_Public_Hearing.pdf

products for warning the consumers of various health risks should be curtailed in the newly negotiated agreement. However, a multitude of health experts, academics and health organizations in Mexico (and in Canada) staunchly opposed this demand which in their view would have severely limited the ability of health officials to regulate labeling of prepackaged food and nonalcoholic beverages in order to control growing health problems such as obesity and diabetes.⁴⁵ Consumer associations, health groups and researchers in the US joined Mexico and Canada in criticizing the US initiative to undermine the nutrition labeling in all member countries. They referred to this move as a ‘misuse of the negotiations [...] to undermine public health and labelling transparency on food and beverages...’⁴⁶

This debate came at a time when Mexican and Canadian health officials, together with other countries, had been discussing better labeling options to warn the consumers of health risks related to the consumption of highly processed products with high levels of sugar, fat and salt. In Mexico, the National Institute of Public Health (INSP) had recently issued a document in which they highlighted the importance of improving the labeling policies that are currently in place.⁴⁷ Chile’s introduction of strict labeling requirements in 2016 with prominently printed stop-sign warnings on the front of food products fueled these efforts further.⁴⁸ Hence, this demand from the food industry was seen as a move to practically handcuff the health officials from acting in the public health interests in their respective countries. This is a glaring example of a situation where the Mexican negotiators faced the difficult challenge of aligning the interests of food industry with that of its national interest.

It was impossible for the negotiators to make both sides happy because their conflicting interests were not reconcilable. Nevertheless, a combination of factors helped the negotiators in persuading the US to drop its demand. The first factor was the unbending reluctance shown by Canada to even consider this proposal. Alongside this renegotiation, Canada was undergoing a review of its own legislations to strengthen its domestic labeling requirements, and hence even giving slight consideration to the US proposal would have been in conflict with the parallel developments taking place in Canada.⁴⁹ Hence, concerted efforts with Canada on this issue

⁴⁵ Open Letter to Canadian and Mexican Authorities on the Protection of Front-of-Pack Nutrition Labeling (18 April 2018), https://centdegres.ca/wp-content/uploads/2018/04/canada-mexico-letter-on-nafta-and-fop_180418_embargoed.pdf

⁴⁶ Letter to Ambassador Robert E. Lighthizer (NGOs, Researchers and Academic Institutions, 18 April 2018), <https://cspinet.org/sites/default/files/attachment/NAFTA%20USTR%20Organizations.pdf> (accessed 8 August 2019); Sharon Anglin Treat, ‘With labeling plan leaked, what else lurks in Trump’s NAFTA?’ Institute for Agriculture & Trade Policy, 2 April 2018) <https://www.iatp.org/blog/lurking-in-trumps-nafta> (accessed 8 August 2019)

⁴⁷ INSP Webpage, <https://www.insp.mx/epppo/blog/4680-etiquetado.html>

⁴⁸ Organización Panamericana de la Salud, Aprobación de Nueva Ley de Alimentos en Chile: Resumen del Proceso (Santiago, 2017), <http://www.fao.org/3/a-i7692s.pdf>

⁴⁹ Regulations Amending Certain Regulations Made Under the Food and Drugs Act (Nutrition Symbols, Other Labelling Provisions, Partially Hydrogenated Oils and Vitamin D), (Canada Official Gazette Part 1 Vol. 152, No. 6, 10 February 2018), <http://gazette.gc.ca/rp-pr/p1/2018/2018-02-10/html/reg2-eng.html> (accessed 8 August 2019); Forward Regulatory Plan 2019-2021: Regulations Amending the Food and Drug Regulations - Healthy Eating

helped Mexico to approach the US with a strong foot-hold. In addition to this, Mexican negotiators approached their US counterparts with a multitude of scientific evidence and factual details. These documents included statistics on the high level of junk food and beverage consumption in Mexico, the alarmingly increasing rates of obesity (especially amongst its child population), and the incomprehensibility of the existing labeling content in Mexico.⁵⁰ Hence, a conjoint push-back from Mexican and Canadian negotiators persuaded the US to drop this proposal. The USMCA maintains the status quo with respect to the labeling issues.

Another example of this conflict could be the discussions over patent data protection of biological pharmaceutical products.⁵¹ The US, together with the Mexican Association of Pharmaceutical Research Industries, demanded a longer period of time for the release of patent protection.⁵² They claimed that it was crucial to have that protection for the development and experimentation of new biological drugs.⁵³ On the other hand, the generic pharmaceutical industry in Mexico, together with the Canadian Generic Pharmaceutical Association, demanded a shorter timeframe to accelerate their access to new product patents.⁵⁴ The negotiators were faced with the challenge of reconciling these contradictory interests.

The Mexican negotiators used their experience from the then recently concluded TPP negotiation in resisting this proposal from the US. During TPP negotiation, the US proposal for the inclusion of twelve years patent protection was resisted and staunchly opposed by several negotiating countries. This coordinated front presented by several countries including Chile, Singapore and Australia led to the US giving up on this proposal. Hence, for renegotiating NAFTA, Mexican negotiators were guided by their TPP experience as they could directly use their understanding of this issue and the well-articulated arguments and evidence presented by several countries during

Provisions including Front-of-Pack Labelling, Other Labelling Provisions, Industrially Produced Trans Fats and Vitamin D, <https://www.canada.ca/en/health-canada/corporate/about-health-canada/legislation-guidelines/acts-regulations/forward-regulatory-plan/plan/healthy-eating-provisions-front-pack-labelling-other-labelling-provisions-industrially-produced-trans-fats-vitamin-d.html> (accessed 8 August 2019)

⁵⁰ The written arguments advanced by the Mexican official negotiating this issue are on file with the authors. Here are two of the evidence used by the negotiator: D Stern, L Tolentino, S Barquera, 'Revisión del etiquetado frontal: análisis de las Guías Diarias de Alimentación (GDA) y su comprensión por estudiantes de nutrición en México' (Instituto Nacional de Salud Pública, Primera edición, 2011), <https://elpoderdelconsumidor.org/wp-content/uploads/2015/07/Etiquetado-Evaluaci%C3%B3n-GDA-por-Barquera-y-col.pdf> (accessed 9 August 2019); Encuesta Nacional de Salud y Nutrición de Medio Camino 2016 (ENSANUT MC 2016), Secretaría de Salud, 31 de octubre de 2016, <https://www.gob.mx/cms/uploads/attachment/file/209093/ENSANUT.pdf> (accessed 9 August 2019)

⁵¹ A joint statement from representatives of the generic drug industry is provided in page 2 https://www.accessiblemeds.org/sites/default/files/2017-09/Trilateral-NAFTA-Priorities-Letter-9-12-17.pdf?_ga=2.258113738.1925343581.1547750879-125871227.1547750879

⁵² Statement showing PhRMA request to extend period to 12 years: <http://phrma-docs.phrma.org/sites/default/files/pdf/Data-Exclusivity-for-Biologics-Fact-Sheet.pdf>

⁵³ El Financiero, 23 de octubre de 2018. <https://www.elfinanciero.com.mx/empresas/inversiones-de-farmaceuticas-subirian-212-por-t-mec>

⁵⁴ Letter addressed to John Melle, Ken Smith and Steve Verheul from Association for Accessible Medicines, Canadian Generic Pharmaceutical Association and President, Biosimilars Canada, Mexican Association of Generic Medicines (AMEGI) (12 September 2017) [on record with authors]

TPP negotiation.⁵⁵ With this previous experience, evidence and understanding, they resisted and rejected the US proposal and concluded this clash by agreeing to a period of ten years in the new agreement. The US Democrats have criticized this development, as they have argued that such a timeframe would increase the cost of access to healthcare and pharmaceutical drugs.⁵⁶ It is anticipated that they will raise this issue to impede the ratification process of USMCA in the US.

2. Psychological Barriers and Uncertain Political Environment

With the uncertain manner of decision-making that President Trump had demonstrated in his first two years at the Oval Office, Mexican negotiators found themselves in a difficult situation. They knew the US position could change drastically from one day to the other, and they had to be prepared for this.⁵⁷ ‘All it took to take a decision was a single tweet by the US President. This is how he threatened to withdraw from NAFTA, actually withdrew from TPP and from the Paris Agreement.’⁵⁸ At the same time, Mexico was facing multiple protectionist threats from the US. As discussed before, these threats included the possible US withdrawal from NAFTA, and a potential imposition of tariffs on Mexican automotive exports to the US. It is highly likely that these threats could have increased the pressure on Mexico to promptly conclude the renegotiation.⁵⁹

The discussions relating to border wall did further damage to Mexico-US relations and undoubtedly created a tense environment between their negotiators. However, Mexican negotiators claim that they remained patient and ignored the verbal volleys constantly thrown by the US President.⁶⁰ It is also worth mentioning that in the original NAFTA negotiation, all three partners had shared the same philosophical outlook (i.e., benefits of trade liberalization) and hence it was carried out in a friendly manner. However, this negotiation took place amidst displays of aggressiveness by the US. Dealing with the White House that was exercising heavy political pressure on Mexico was quite challenging. However, what helped in this situation was a clear division of responsibilities and well-established rules of engagement. The negotiating leads of chapters and their respective teams were dealing with technical issues; the minister level officials and chief negotiators were invested in handling the political and diplomatic aspect of this negotiation.⁶¹ They were also dealing with the ‘poison pills’, i.e., the most contentious aspects of the negotiation which needed more than just technical solutions.

⁵⁵ Interview with a government official, Mexican Government (details withheld)

⁵⁶ Letter address to Robert A. Lighthizer from Committee on Ways and Means, US House of Representative (dates 3 May 2019) [on record with authors]

⁵⁷ See note 27, at 152

⁵⁸ Interview with a government official, Mexican Government (details withheld)

⁵⁹ Interview with Chief Negotiator, Mexican Ministry of Economy (15 March 2019, Mexico City)

⁶⁰ Discussions with a trade lawyer (details withheld)

⁶¹ Interview (note 59)

3. Changing Political Landscape in Mexico

The renegotiation of NAFTA commenced in August 2017. After various rounds of negotiation that were conducted in a trilateral and bilateral setting, the US and Mexico first announced a preliminary bilateral agreement on 27 August 2018. A month later, the US and Canada announced their bilateral agreement. This timeline helps us to appreciate how the time factor was significant for Mexican negotiators amidst the changing political landscape in Mexico. The renegotiation of NAFTA commenced under the administration of President Peña Nieto. The Presidential Elections of July 2018 went in favor of the National Regeneration Movement. Its candidate Andrés Manuel López Obrador won the elections and took the Presidential office on 1st December 2018. At that time, President Obrador was known for his mixed views regarding free trade and liberalization. There was some skepticism on whether his administration will support the renegotiation of NAFTA, as President Obrador has previously expressed his support in favor of many protectionist actions such as increase in the national content in value chains, grant of subsidies to the agricultural sector to achieve food self-sufficiency, and increased use of international trade defense mechanisms.⁶² Hence, there was a fear that Mexican ideology that has long supported trade liberalization could undergo a change with the change of administrations.

The US and Canada were aware of these circumstances. They knew that President Peña Nieto's administration would prefer to close this renegotiation before the new government came into power. They knew that the Mexican negotiators were feeling the pressure and were doing their best to close the negotiation before December 2018. However, a negotiator confirms that the then Minister of Economy and the Chief Negotiator gave clear instructions to the negotiators that they should work in the best interests of the Mexican economy and ignore the political time-clock clicking against the former administration.⁶³ The Mexican leadership was doing its best to ease this pressure and send public signals that Mexico would not rush into closing a deal for merely political reasons. What also helped in this situation was the coordination that was being formed between the outgoing and the incoming administrations promptly after the elections in Mexico.⁶⁴

4. Lack of Human Resource and Declining Negotiation Experience

Developing countries commonly face human resource constraints during international negotiations, which impede their efforts to carry out the required assessments of costs and benefits for specific proposals. Page frames this problem in the following words: 'Compared to the delegations of leading industrialized countries, developing negotiating teams have fewer

⁶² Juan Calor Cruz Vargas, 'Propuesta económica de AMLO es "proteccionista y cerrada, critica el CCE' (Proceso, 12 March 2018), <https://www.proceso.com.mx/525812/propuesta-economica-de-amlo-es-proteccionista-y-cerrada-critica-el-cce>

⁶³ Interview with a former negotiator (details withheld)

⁶⁴ This point is explained on page 23

delegates, are underpaid, and enjoy inferior technical support before and during meetings.’⁶⁵ Mexican negotiators confirm that they sometimes felt very similar resource constraints. The negotiators for various chapters were sometimes outnumbered by the relatively higher number of counterparts they had to work with from the US and Canada.⁶⁶ This human resource constraint was aggravated by the fact that, alongside the USMCA, Mexico was negotiating other agreements which increased the demand of human resource, experience and subject-matter expertise on the Ministry of Economy.⁶⁷

There is no doubt, for example, that the number of lawyers in Mexico with expertise in trade negotiations has increased in the last two decades. However, the in-house team of legal counsels working with the negotiators was sometimes outnumbered by the number of lawyers on the other sides of the table. With a limited number of legal experts in this department, many of whom were leading the negotiation of certain chapters, there was a noticeable need for a standing team of external lawyers that could have been consulted from time-to-time by the negotiators directly. Mexican Ministry of Economy has a panel of external lawyers they consult on various international trade law issues.⁶⁸ However, the negotiators did not have the liberty of directly consulting these private lawyers. The negotiators were required to reach out to the Legal Advisory department at the Ministry whenever they needed legal inputs and advice. It was only the Legal Advisory department that could then reach out to the external lawyers when they required specialized opinion. In practice, this was done on selective occasions.⁶⁹

In addition, the capacity gap in this respect became wider as these legal counsels were working on several negotiations at the same time.⁷⁰ However, parallel trade negotiation experience may have led some negotiators in ‘familiarity heuristic’ scenario. This psychological phenomenon suggests that ‘peoples’ ability to see events as likely to happen depends on how easily they can recall specific past information associated with that event.⁷¹ The negotiators’ familiarity with the issues under negotiation they might have dealt with during other trade negotiations, particularly the recent negotiations leading to the modernization of the Mexico-EU Free Trade Agreement, Pacific Alliance and CPTPP, may have influenced their decision-making during this renegotiation. This familiarity component could have given them the required confidence on the negotiating table with their counterparts. Understanding of typologies used in discussions, substantive knowledge of legal provisions, procedural awareness of how discussions take place

⁶⁵ Page (see note 1), at 8

⁶⁶ Interview with a former negotiator (details withheld)

⁶⁷ Such as Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Economic Complementation Agreements with Brazil and Argentina, Agreement for the Promotion and Reciprocal Protection of Investment, Free Trade Agreement with EU, Pacific Alliance with Columbia, Chile and Peru, and other bilateral agreements

⁶⁸ RRH Consultores S.C. (Mexico), Pillsbury Winthrop Shaw Pittman LLP (US) and Tereposky & DeRose LLP (Canada)

⁶⁹ Interview with a trade lawyer (details withheld)

⁷⁰ The Ministry of Economy’s response to an official consultation made by the authors (details on record)

⁷¹ Russell Korobkin and Chris Guthrie, ‘Heuristics: Heuristics and Biases at the Bargaining Table’, (2004) *Marquette Law Review* 87(4), 795, at 807

at the negotiating table and rules of engagement, required protocols and such other things made this negotiation experience less daunting for them. Moreover, the increasing trade diversity for Mexican economy further supported the negotiating experience and the overall confidence of the negotiators. This shows that familiarity component is not merely a driving factor to achieve trade diversification; it is the catalyst to trade diversification as well.

In December 2018, weeks after the renegotiation concluded, almost sixty percent of the trade officials working at the Foreign Trade Division of the Ministry of Economy were asked to leave by the new administration.⁷² This means that the experience baggage that the Mexican Government fostered over many years was laid to waste, or at least the Mexican government will not be the one collecting the fruits of experience. This brain-drain is a common phenomenon which has often taken place with the change of governments in Mexico, and it can explain why a higher number of officials that were engaged as negotiators for the original NAFTA are now working with the private sector.⁷³ It shows how oftentimes the private sector ends up taking advantage of the experience of former government officials and the resources that the government invested in training those officials.

These challenges do not only signify the problems that Mexico has faced; they echo the concerns of other developing country negotiators as well. Other developing countries facing similar asymmetrical negotiating scenarios can relate to these challenges. They can examine these difficulties that they could potential face in negotiating trade agreements with countries that have relatively stronger bargaining positions and an uncertain yet somewhat protectionist approach towards trade policies. This moves the discussion to the subsequent questions this paper seeks to answer: If Mexico encountered these challenges during the renegotiation of NAFTA, how was it able to secure a seemingly favorable agreement? Can other developing countries derive lessons from the Mexican experience? The following section provides an overview of the key strategies that enabled Mexico to overcome its negotiation challenges.

Overcoming Challenges: The Strategies Used

1. Experience Counts: Composition of Mexican Negotiating Team

Lack of human resource was to some extent offset by the previous negotiating experience that Mexican negotiating leads had. Many leading members of the team of negotiators included officials who were part of the original NAFTA negotiation.⁷⁴ In addition, Mexican administration tried to cultivate fresh trade negotiation expertise and experience by putting

⁷² Interview with former government official, Mexican Government (details withheld)

⁷³ Some of them are Herminio Blanco, Jaime Zabludovsky, Jaime Serra and Luis de la Calle

⁷⁴ For example, Ildefonso Guajardo, who was the Minister of Economy during this renegotiation, has almost 25 years of experience in trade negotiations as he was involved in the negotiation of the original NAFTA and many subsequent trade negotiations.

young officials at the forefront of other trade negotiations. In these negotiations, these government officials with none or very limited prior experience were not just shadowing senior trade negotiators, they were in fact made to participate actively. They were encouraged to attend the negotiation meetings, work externally and internally with negotiators from other countries, government departments and industries in Mexico.⁷⁵ In this manner, the in-house experience that was created and cultivated by the Mexican government in other bilateral and multilateral negotiations was subsequently used in NAFTA renegotiation.

International trade negotiations require more than just legal expertise. In such negotiations, the positions are formed and issues are presented, accepted or dismissed on the negotiating table only after they are analyzed from the legal, economic, political, diplomatic and societal point of views. Government officials need to ensure that the proposals are not inconsistent with existing domestic law or international agreements that their country is a party to. They need to assess the economic viability and impact of such proposals and provisions on different economic sectors in their country. Moreover, it is important that they understand and assess the possible diplomatic repercussions a new agreement may have. Finally, these decisions are to be taken in light of the political landscape of their country. The composition of the negotiating team shows that the Mexican government employed a multidisciplinary approach in selecting the profile of suitable negotiators. Their team consisted of trained trade lawyers, seasoned economists, international relations experts and political scientists.⁷⁶ This multidisciplinary composition of the negotiating team enabled the officials to assess the scenarios and issues from different perspectives.

2. Advancing Ahead with Easily Negotiable Chapters: The First-Stepper Addressers' Approach

As discussed earlier, the Mexican administration defined four key objectives that it sought to achieve through this negotiation.⁷⁷ However, the demands made by the US were not only in conflict with some of these negotiating principles but they were also clearly protectionist in nature.⁷⁸ The US demands were ushered in by the wave of populism and nationalism in the US trade policy under President Trump's administration.⁷⁹ As observed by Lester and Manak, these claims and arguments were 'centered on a zero-sum view of international trade, where any country's win is considered another's loss.'⁸⁰ They were completely contradictory to the liberalization-friendly principles defined by the Mexican administration. This goes to show that this negotiation was not merely an effort to find an agreement on technical issues of trade; it also required its members to align and reconcile their contradictory views on the benefits of trade liberalization.

⁷⁵ Interview with a former negotiator (details withheld)

⁷⁶ Interview with a former negotiator (details withheld)

⁷⁷ These are described on page 4

⁷⁸ Discussed before on page 5

⁷⁹ See note 27, 152

⁸⁰ Ibid, 153

The Mexican negotiators dealt with the protectionist tendencies by gradually advancing on the less problematic areas and leaving the more contentious issues for the latter rounds of negotiation.⁸¹ In the initial rounds, they plucked the low hanging fruits, i.e. they focused on achieving agreement on issues that could easily be negotiated with minimal conflicts. Psychologists would probably say that Mexicans were the ‘addressers’ in this conflict resolution scenario.⁸² According to Turner and Weed (1983)⁸³, there are three kinds of responders in conflicting situations: addressers, avoiders and attackers. Addressers are those that are willing to take certain risks and initiatives to resolve conflicts by making their opponents agree with them on certain issues to begin with. The addressers can either be first-steppers or confronters. The first steppers are those that initiate the dialogue by establishing some trust between them and their opponents. This building of trust is crucial for the subsequent settlement of conflicts. Mexicans employed the approach of ‘first-stepper addressers’. This is because they tried to advance on easier issues at the early stages of renegotiation to strengthen their ties of trust and confidence with their counterparts in the US. Once the less-confrontational issues were settled, and hence the parties felt that they were a few steps closer to striking an agreement, the Mexican negotiators started to deal with more difficult issues on the table with a very firm and strongly resistant approach. They addressed each critical issue with a counteroffer. Moreover, by delaying the settlement of most contentious issues to latter stages, the Mexican negotiators were possibly trying to also increase the ‘sunk cost’ of this negotiation for their counterpart negotiators.⁸⁴ This seems to be an effective negotiating strategy, especially when countries are attempting to negotiate amidst uncertain and hostile political conditions.

3. Working Hand-in-Hand with Industries: “Cuarto de Junto”

In today’s globalized world, the role that private stakeholders play with the help of their resources and expertise in the process of trade policy-making at the multilateral, regional and bilateral levels cannot be ignored. Multiple scholarships have analyzed the manner in which the private stakeholders can possibly contribute in the formation of norms at the multilateral level through WTO dispute settlement procedures.⁸⁵ Literature has also briefly discussed how the private sector can play a significant role in drafting international norms through negotiated trade agreements.⁸⁶ Private industries and companies are the key beneficiaries and victims of

⁸¹ Interview with a former negotiator and an industry representative (details withheld)

⁸² Turner S Pitman and F Weed, *Conflict in Organizations* (Englewood Cliffs: Prentice-Hall, 1983)

⁸³ Ibid

⁸⁴ Philipp C Wichardt, Daniel Schunk, Patrick W Schmitz , ‘Participation costs for responders can reduce rejection rates in ultimatum bargaining’, *Economics Letters* (2009) 103(1), 33, at 36

⁸⁵ Chad P Bown and Bernard M Hoekman, ‘WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector’ 8(4) *Journal of International Economic Law* (2005) 861; Gregory C Shaffer, Michelle Raton Sanchez Badin and Barbara Rosenberg, ‘The Trials of Winning at the WTO: What Lies Behind Brazil’s Success’ 41(2) *Cornell International Law Journal* (2008) 383

⁸⁶ Jessica Callista, ‘Public–Private Consultation for Free Trade Agreement Negotiations in Canada and Indonesia’ TPSA Research Report (January 2018),

international trade laws and policies, and hence some form of public-private coordination in the conduct of trade negotiations is embedded in their very nature of free trade agreements (FTA).⁸⁷

A consultation mechanism between government and private sector for conducting trade negotiations can be referred to as “public private partnerships” or “public private consultation arrangements”. A recent report notes that with this arrangement in place, ‘the private sector will have clear mechanisms to convey their views (based on their knowledge, practices, and experiences) to government negotiators, who will receive timely information and inputs from the private sector needed for successful FTA negotiations’.⁸⁸ This mechanism can keep private sector sufficiently informed, supplement the government’s negotiation capacity and resources with privately-owned resources and information, and ensure that the negotiation process is well-informed and inclusive in nature. To make these negotiations even more inclusive and comprehensively-informed, governments can also engage non-business stakeholders in this process.⁸⁹ This engagement can enhance a country’s negotiating-capacity as NGOs, academics, think tanks and research centers can gather, disseminate and analyze the information and evidence required in trade negotiations⁹⁰; however, many scholars have observed that the plurality of this engagement could hamper or otherwise slow-down the processes of decision- and policy-making at international fronts.⁹¹

Oddell observes that a ‘strong backing by the private sector of the US negotiators has been a key issue in explaining many of its negotiating successes.’⁹² Moreover, Canada also made extensive use of public private consultation mechanism in various negotiations (including CPTPP and USMCA) through electronic contact points, call for comments, consultation meetings, press releases, and conferences and seminars.⁹³ Mexico has also engaged its industries in its previous negotiations and this renegotiation, albeit differently. This interaction in Mexico is carried out with the help of an institutionalized mechanism known as “Cuarto de Junto” (“The Room Next Door”).⁹⁴ This mechanism was initially designed for original NAFTA negotiation back in the 1990s; however, it was very different to the mechanism used for recent negotiation in terms of its structure, composition and nature of participation. Since the 1990s, this mechanism has evolved as per the needs and circumstances of different trade negotiations Mexico has been involved in.

[http://bahar.co.id/sites/default/files/PPC%20for%20FTA%20Negotiations%20-%20Jessica%20Callista%20\(Jan%202018\).pdf](http://bahar.co.id/sites/default/files/PPC%20for%20FTA%20Negotiations%20-%20Jessica%20Callista%20(Jan%202018).pdf) (accessed 9 August 2019)

⁸⁷ Hyun-jung Je, *Public–Private Relationships in Trade Policy-making* (World Scientific, 2018)

⁸⁸ Callista (note 86), at 4

⁸⁹ Ernst-Ulrich Petersmann, ‘Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?’, 18(3) *Journal of International Economic Law* (2015) 579

⁹⁰ Callista (note 86), at 5-7

⁹¹ Philip M. Nichols, ‘Realism, Liberalism, Values, and the World Trade Organization’, 23(2) *University of Pennsylvania Journal of International Economic Law* 725, at 735; Erin Hannah, James Scott, Rorden Wilkinson, ‘Reforming WTO-civil society engagement’ 16(3) *World Trade Review* 427

⁹² John Oddell, *Negotiating the World Economy* (Cornell University Press 2000)

⁹³ Callista (note 86), 14

⁹⁴ Interview with an industry stakeholder (details withheld)

To prepare for the NAFTA renegotiation, the affected industries got together and formed a structure which was a mirror-image to the structure of Mexico's negotiating team.⁹⁵ This meant that "Cuarto de Junto" had an industry counterpart to every lead negotiator; both counterparts from the government and industry worked in close coordination with each other. The counterpart from the industry provided all required advice, technical information and research inputs; the government negotiator used this advice and information to assess the situation and defend the affected industry's interests during negotiation meetings. The leads would inform their industry counterpart on the key issues, reforms and countries' positions on a regular basis; the industry representatives on the other hand reviewed the proposals and assisted the negotiators in defining their position.⁹⁶ This mechanism helped the negotiators in three ways. It assisted them in aligning the interests of private stakeholders in situations of conflicts. It provided the information and evidence required for preparing proposals and dealing with counter-proposals. Moreover, it enabled the industries to engage in research-led systemic lobbying in the US.

4. Research-Led Approach: "Cuarto de Inteligencia"

'Information-based bargaining'⁹⁷ is the key to any successful negotiation experience. It is not only important to gather information on the trade concerns of various industries and economic sectors in the nation, but a variety of information is required to also know what your counterpart is capable of. It is crucial to understand the counterpart's legal framework and its governmental structure. It is important to know the nature of its economy and the key problems and concerns its economic sectors face. This information is required to anticipate the claims other countries could make during the negotiating process and then to filter out those claims which are perhaps not up for negotiation from those which could somewhat be negotiated. Mexican negotiators were mindful of this, and hence they carried out this background research before every round of negotiation. However, they struggled initially with the collection of data that was required to demonstrate how important Mexico was to the US economy. Massive information was needed to show the economic damage the US economy would incur from losing NAFTA altogether, as this information was required to elevate the political cost for the US to withdraw from NAFTA. This challenge was overcome with the help of a research-led strategy, referred to as 'Cuarto de Inteligencia' or the 'Intelligence Room', which the Mexican industries employed during this negotiation.

The research specialists in this team were entrusted with the responsibility of investigating and analyzing the nature and importance of trade between the US and Mexico. To begin with, the team gathered data on the trade and investment flows between the US and Mexico. They then studied the trade performance of the producers and exporters in the US that have business

⁹⁵ Ibid

⁹⁶ Interviews with three former negotiators and four industry stakeholders (details withheld)

⁹⁷ Shell (see note 11), xv

partners in Mexico. Thereafter, they assessed the importance of these trade relations for the US private actors across different industries and economic sectors.⁹⁸ They arrived at some really interesting findings, which enabled the Mexican industry to prepare a solid case in favor of NAFTA's survival.⁹⁹ For example, they studied the impact of losing this agreement on the state of Indiana, which is a republican state. The state of Indiana exports majority of its fructose products to Mexico, and hence, the US withdrawal from the agreement would have caused a financial havoc in this state.¹⁰⁰ The other powerful research input that convinced the US to remain on the table was the findings by the 'intelligence room' on the corn exports. The Midwestern region in the US, often referred to as the Corn Belt of the US, has dominant corn production and exportation. They export a very high percentage of corn to the Mexican market and hence the US withdrawal from the agreement could have had severe repercussions on the economic health of these states.¹⁰¹ The 'Intelligence Room' presented all its findings in state-wise reports.

We can draw an analogy between the lobbying approach that the Mexican industry employed and the behavioral tendency of 'loss aversion', which relates to an 'individual's stronger desire to avoid losses than to experience comparable gains.'¹⁰² This theory indicates that individuals can get twice as affected by the prospective of losing than they could be by the prospective of gaining.¹⁰³ The reports prepared by the 'Intelligence Room' were used purely for lobbying purposes by the Mexican industries. The industry representatives presented these reports to their counterpart industries and to the local decision-makers in a number of states which had important trading stakes in Mexico.¹⁰⁴ Interestingly, these reports did not emphasize on the gains these states in the US might experience if NAFTA survives; these reports instead focused on the losses several industries in these states would incur if NAFTA does not survive. For example, the report prepared for the state of Ohio starts with the following sentence: 'Ohio top exports to Mexico could face duty as high as 50 percent. Thousands of Ohio companies in Mexico [will be] negatively affected.'¹⁰⁵ These statements in the intelligence reports affirm how Mexican industry increased the impact of lobbying in the US through the 'loss aversion' tendency. This is a powerful bargaining technique that other countries can employ in politically demanding situations such as the one presented in this article. More particularly, it can be useful in situations where a country wants the other party to remain on the negotiating table.

⁹⁸ Interview with a representative from Cuarto de Inteligencia team (details withheld)

⁹⁹ These findings were presented in the form of reports. Some of these reports are on file with the authors.

¹⁰⁰ Interview with an industry representative (details withheld)

¹⁰¹ See note 99

¹⁰² D Kahneman & A Tversky, 'Prospect Theory: An Analysis of Decision under Risk' *Econometrica* (1979) 47, 263, at 278

¹⁰³ *Ibid*

¹⁰⁴ Interview with a representative from Cuarto de Inteligencia team (details withheld)

¹⁰⁵ These reports are on file with the authors

The government-industry coordination approach should be considered with a word of caution. Public Choice Literature has shown that the delegation of research-work, collection of data by industry, and other forms of coordination such as private-led lobbying and regular consultations can lead to issues relating to regulatory capture. This can mainly happen in developing countries which have poor observance of “rule of law” and problems relating to corruption, rent-seeking and wealth inequality.¹⁰⁶ These arrangements can better-enable resourceful business actors to protect their exporting interests through such negotiations; however, countries may find it difficult to grant similar level of protection to the exporting interests of resource-constrained, developing and small-scale industries. In other words, the formation of government-industry partnerships in certain countries may lead to a situation of discrimination between the *haves* and the *have-nots* industries, and that may lead to the government prioritizing some interests above other business interests.¹⁰⁷ These concerns can nevertheless be mitigated with robust and transparent regulatory provisions. An effective regulation is a vital prerequisite for a balanced exchange of resources, and it should aim to ensure that a partnership arrangement is regulated in such a way that the interests of a nation and a private sector are balanced with each other, and that the protection of latter does not lead to the infringement of former.

5. Inter-Ministerial Coordination and Preparation of Transition Plan in Changing Political Landscape

A strong inter-ministerial coordination was required to prepare a comprehensive and well-informed position of Mexico with respect to all the chapters and provisions of the agreement. An internal regulation of the Ministry of Economy requires its officials to engage other relevant ministries and public departments in consultations and gain their approval on matters relating to international trade affairs. This is known as a requirement to gain “visto bueno”.¹⁰⁸ In compliance with this provision, the negotiators held various consultation meetings with the relevant government agencies to present to them the proposals and revisions related to every single provision of the respective chapter they were negotiating. Negotiators had the obligation to make sure that public stakeholders were agreeable with the texts accepted or proposed by Mexico. This close interaction and constant communication amongst different government departments were crucial for the effective conduct of this negotiation. The inter-ministerial coordination strategy provided more credibility and comprehensiveness to the new agreement. This coordination was facilitated by the multi-disciplinary composition of the negotiators’ team. Different profiles and subject-matter expertise enabled the negotiators to have smooth communication with different government departments.

¹⁰⁶ For literature on regulatory capture, see note 42

¹⁰⁷ For an illustration in the context of dispute settlement, see Amrita Bahri, ‘Handling WTO Disputes with Private Sector: The Triumphant Brazilian Experience’ 50(4) Journal of World Trade (2016), 641 at 669

¹⁰⁸ Artículo 18 (II), Reglamento Interior de la Secretaria de Economía, Diario Oficial (9 September 2016), at <http://www.diputados.gob.mx/LeyesBiblio/regla/n163.pdf> (accessed 12 March 2019)

Another example of coordination can be seen in the way the outgoing and the incoming administrations in Mexico were working together in the final months of this negotiation. The negotiations were concluded before the outgoing administration left the office; however, it was crucial to engage the incoming administration as they had to carry out the ratification work. Even before it came into power, the new administration appointed a transition team that was responsible for shadowing the team of negotiators in the final months of this process. The establishment of this transition team, which worked closely with the negotiators in the final phase, was a crucial development to ascertain a concerted and coordinated approach. The timeline of this negotiation and the changing political landscape demanded such an approach. This engaged the incoming government in the negotiation, and at the same time, it enabled the transition team to appreciate the agreement from a practical perspective. This also ensured that both administrations had the shared responsibility to conclude the agreement and subsequently ratify it. This united approach showed to the other parties that the NAFTA renegotiation was not just a priority for the outgoing government, but for the incoming government and for the country as a whole. This approach could have possibly contributed to the recent obstacle-free ratification of the agreement in Mexico.

Conclusion

With Mexico as a case study, this paper has shown that developing countries can negotiate effectively with developed countries; however, it generally takes more efforts to arrive at a mutually advantageous agreement for the ones with weaker political and trading clout. During a negotiation process, developing countries can face various challenges in the form of capacity-constraints, conflict of interest situations and adverse political environments. These impediments can be overcome with well-thought strategies such as the ones discussed in this study. If developing countries can strengthen their negotiating capacity, they will be in a stronger position to ensure that the agreement leads to reciprocal exchanges and benefits between its parties. Higher capacity can also put them in a better position at the negotiating table even with unpredictable and populist administrations. It can eventually help them to advance proposals favoring their interests and confront ambitious proposals for trade concessions from the other side of the table in adverse political conditions.¹⁰⁹

Puig has argued that the legal order of international trade is bound to undergo major changes. It might become less multilateral and more regional and bilateral in the future. In his words, '[the] more transactional view of international trade law implies a limit on the role of *law* and an

¹⁰⁹ There is a divided scholarship on whether there is a positive or a negative correlation between trade agreements and economic growth. For scholarship on relationship between trade agreements and economic growth, see Jung Hur and Cheolbeom Park, 'Do Free Trade Agreements Increase the Growth of the Member Countries' 40(7) *World Development* (2012) 1283; Francisco Rodriguez and Dani Rodrik, 'Trade Policy and Economic Growth: A Skeptic's Guide to the Cross-National Evidence' 261, in Ben S. Bernanke and Kenneth Rogoff, *NBER Macroeconomics Annual 2000* (MIT Press, 2001)

increase in the use of *power*.¹¹⁰ This to some extent suggests that the challenges of the legal order we are going to face in the near future will require developing countries to enhance their power in terms of better trading stakes, market access and overall negotiating clout. These can be developed with the expansion of preferential market access networks through favorable trade agreements. Striking favorable trade deals in turn is reliant on a country's capacity to negotiate trade agreements. Hence, this article is a timely attempt at analyzing several capacity-building strategies that other countries can consider and perhaps employ in their future trade negotiation attempts with the US and other similarly populist administrations.

These strategies are not one-size-fit-all solutions to negotiation capacity-building. Multiple international as well as domestic variables are needed for any negotiation approach to be effective. These factors can include the personality of the negotiators, cultural differences, linguistic barriers, trading stakes, political and diplomatic environments, and nature of industries. These negotiation strategies enabled Mexico to achieve favorable results in the NAFTA renegotiation. Other countries can analyze the suitability of these strategies and adapt them to their own requirements and situational contexts. As the first attempt by the US to translate its nationalist-oriented trade talks into policy-making, the renegotiation experience of NAFTA can inform other US trade partners on what they can expect in their future trade relations. If the US can threaten to close its door to Mexico and Canada – two of its most significant trade partners– it can do so with the others. The ongoing US-China trade battle demonstrates this point further. The US trade partners need to remain vigilant and develop their negotiation capacities that can respond to the emerging protectionist trends in international trade.

¹¹⁰ Sergio Puig, 'The United States-Mexico-Canada Agreement: A Glimpse into The Geoeconomic World Order' American Journal of International Law 113 (2019) 56, at 59