United States Senate
COMMITTEE ON FINANCE
WASHINGTON, DC 20510–6200

May 22, 2019

The Honorable Robert E. Lighthizer
U.S. Trade Representative
600 17th Street, NW
Washington, D.C. 20508

Dear Ambassador Lighthizer:

I write to express my concerns and raise questions regarding the provisions for the enforcement of the renegotiated trade agreement with Canada and Mexico ("the new Agreement"). The new Agreement contains many modernized provisions, on topics such as digital trade, subsidies, and services, and even makes certain improvements in the chapters addressing labor and environment. While questions remain about whether the substantive obligations in the new Agreement are the best possible outcome for American workers, all of the obligations become meaningless if the United States cannot effectively and swiftly enforce them.

The new Agreement's system for resolving disputes contains some improvements, but essentially replicates the failings of the original North American Free Trade Agreement (NAFTA). Under that system, any party that wishes to avoid the establishment of a NAFTA panel to assess the party's compliance with obligations in the agreement may block the panel's formation. Initially, several disputes were fully litigated between the NAFTA parties, but no case has been resolved through NAFTA's dispute settlement mechanism since the United States blocked a panel in a case brought by Mexico in 2001.

In largely retaining NAFTA's broken dispute settlement system, the Administration made a conscious choice to enable parties to opt out of the panel-based process at will. This decision was made despite the fact that, by all accounts, the United States is the demander for the vast majority of the obligations in the new Agreement, and by extension, will need to make few changes to our domestic practices to comply with the rules in the new Agreement compared to Canada and Mexico. Despite the offensive posture of the United States in the new Agreement, the Administration has not sought the offensive tools needed to enforce it.

This choice by the Administration will have two results. First, the lack of a NAFTA forum for resolving disputes will push many of those disputes to the World Trade Organization (WTO), where possible. The WTO Agreements, in many cases, have weaker and outdated obligations — including no obligations on labor and environment — or obligations that have been interpreted by the WTO Appellate Body in a manner with which the United States disagrees. For these reasons, I am dubious that it is better to resolve disputes between the NAFTA countries at the WTO.

Second, according to Administration officials, the United States will resort to unilateral action under Section 301 of the Trade Act of 1974 in order to enforce obligations either when a panel is blocked or if the United States does not agree with the result of a panel dispute. I question whether this is an effective strategy for most disputes with NAFTA countries. Taking the recent experience with the Section 301 investigation of China's practice, it is not clear that it is a tool that can be grafted onto every trade dispute. The issues with China are many, longstanding, and incredibly harmful to U.S. workers and businesses across sectors. The tariffs that were imposed initially against $50 billion in trade have been ratcheted up to potentially capture all U.S. trade with China, including retaliatory tariffs on U.S. exports. And yet, China has not budged on any of the issues identified in the 301 investigation.

Canada and Mexico are not China. Our issues with Canada are serious, but discrete. For example, I had a dispute with Canada over discrimination against U.S. wine exports which your office advanced in the WTO dispute settlement system. New wine-specific commitments in the new Agreement intended to address Canadian practices cannot be enforced at the WTO. Moreover, I question whether 301 tariffs would be effective in resolving such a dispute where the amount of trade impacted by the bad behavior is much lower, although still critical to an important sector of the U.S. economy. Would you expect Canada to change its behavior as a result of U.S. tariffs imposed at a level proportional to the harm? Would Canada avoid responding to the unilateral action out of concern about the self-judging nature of the U.S. action? Would it, in turn, retaliate? Ultimately, what matters is how to obtain a swift and effective resolution of the harmed U.S. industry.

In Mexico's case, the most critical need is to finally improve enforcement of the labor commitments negotiated in the new Agreement; with China, arguably we do not have an agreement that covers many of its bad practices. The best way to make sure those labor commitments have meaning is to add and strengthen tools, not take them away. That means shoring up the ability to bring labor cases under dispute settlement, building on past lessons learned.

I understand from Administration officials that there are defensive concerns regarding U.S. trade remedy laws behind the Administration's apparent eagerness to opt out of panel-centered enforcement in the new Agreement. Yet, over the past few decades, the United States has only had to defend itself a handful of times at free trade agreement dispute resolution panels, and the last such occurrence was nearly 20 years ago. Moreover, the trade remedy commitments in the new Agreement do not open an obvious line of attack on U.S. laws from state-to-state dispute settlement, which in any case cannot change U.S. law without an act of Congress.

While I expressed concerns about the dispute settlement mechanism in the new Agreement before the negotiations concluded and before the president signed the agreement, I have been open to hearing arguments as to how it may actually work. So far, the Administration's justification for this mechanism has only increased my worry that the new Agreement will not be enforced.

I look forward to further engaging with you on this issue.

Sincerely,

Ron Wyden
Ranking Member
U.S. Senate Committee on Finance