



NAFTA RENEGOTIATION MONITOR

A STATUS REPORT ON THE NORTH AMERICAN
FREE TRADE AGREEMENT RENEGOTIATION

Updated January 19, 2018

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INTRODUCTION AND OBJECTIVES

For more than two decades, the United States, Mexico and Canada have adhered to the North American Free Trade Agreement (NAFTA). As these countries' governments engage in a contentious renegotiation, it is imperative for businesses in all three countries to stay abreast of the process and of the impact of any changes to NAFTA.

As of early January 2018, five rounds of negotiations have taken place and more than 30 issues are on the table for discussion. Busy companies have limited resources to track and monitor the NAFTA renegotiations, and it is difficult for companies involved in international trade to follow specific issues of interest.

As a service to stakeholders across all of the key industries impacted by NAFTA, Haynes and Boone, LLP, with offices in Mexico City and throughout the United States, as well as in Shanghai and London, and McCarthy Tétrault, LLP, with offices across Canada, as well as in New York and London, have teamed up to create the NAFTA Renegotiation Monitor. This new report provides an up-to-date overview of the disposition of the most important NAFTA issues, as well as a comprehensive and straightforward reference to the topics in the current NAFTA renegotiation process. This reference comprises a table comparing the positions of the three countries on each of the topics, as well as a comment on the current status of the negotiations and prospects for resolution of each issue.

We will update our NAFTA Renegotiation Monitor report periodically to reflect the latest developments and topics of interest.

LATEST DEVELOPMENTS – as of December 2017

US Negotiating Objectives Remain Unchanged

In November USTR published an updated version of its Summary of Objectives for the NAFTA Renegotiation.

That update is noteworthy because, while it provided additional detail with respect to several s, it reflected no significant shifts.

The update clarifies the US position on Investor State Dispute Resolution (ISDS). In a nod to US sovereignty, the USTR sees limits to the authority of ISDS arbitral panels where such panels have “clearly erred.”

USTR Robert Lighthizer Expresses Frustration with the Unwillingness of Mexico and Canada to Accept U.S. Positions

“Thus far, we have seen no evidence that Canada or Mexico are willing to seriously engage on provisions that will lead to a rebalanced agreement. Absent rebalancing, we will not reach a satisfactory result.”

Canada and Mexico have reiterated that they will not continue to negotiate if President Trump gives notice of US intent to withdraw from NAFTA.

US Agriculture and Automotive Industries Are Becoming More Outspoken in Advocating Against Repeal of NAFTA

In a letter to Commerce Secretary Ross, 87 US agriculture associations and companies state, “We respectfully submit that notification of NAFTA withdrawal would cause immediate, substantial harm to American food and agriculture industries and to the U.S. economy as a whole.”

Auto trade associations representing major carmakers including GM, Toyota, Volkswagen, Hyundai and Ford have formed a coalition to convince the White House and voters that the NAFTA pact has been crucial in boosting U.S. automotive sector production and jobs.

TRADE DEFICIT

US¹

Seek meaningful reduction; require ongoing updates and re-evaluations.

CANADA

Does not feel the trade deficit with the U.S. is material or that it is proper to evaluate important trading relations merely from this perspective. If services are included, there is no deficit in U.S. trade with Canada.

MEXICO²

Does not feel the trade deficit is a proper way to evaluate the bilateral relationships between Mexico and the U.S., which encompasses many facets.

COMMENT/RESOLUTION

We are not aware of any other free trade agreements (“FTAs”) that attempt to track trade deficits between modern economies. Consumers benefit from the increased competition, notwithstanding deficits. Most FTAs are more focused on increasing the overall level of trade than apportioning it among countries. Mexico has warned as to the potential damage to cross-border trade and investment if NAFTA were terminated. For instance, only 35 percent of Mexican exports to the U.S. and 36 percent of Mexican exports to Canada would be tariff-free, and U.S. and Canadian investments would no longer be able take advantage of the preferential access Mexico has to 46 markets with which it has free trade agreements.

TRADE AMONG NAFTA MEMBERS IN GOODS AND SERVICES IN 2016



RULES OF ORIGIN AND MANDATORY U.S. CONTENT

US¹

Seek greater North American content; require minimum U.S. content, particularly for auto parts; certification and verification systems should be put in place. Eighty-five percent NAFTA origin, and 50 percent U.S. origin, has been mentioned. Tracking of origin of parts to be expanded, perhaps to include steel and electronics.

CANADA

Opposes country-specific content requirement; a product which is North American should receive duty-free or at least preferential treatment.

MEXICO²

Opposes country-specific content requirement, but acknowledges the mutual need and goal to keep the greatest proportion of supply chains as possible within North America. Wants to ensure the continued growth of the Mexican automotive sector, which in 2016 produced approximately 3.5 million automobiles, with U.S. and Canadian parts.

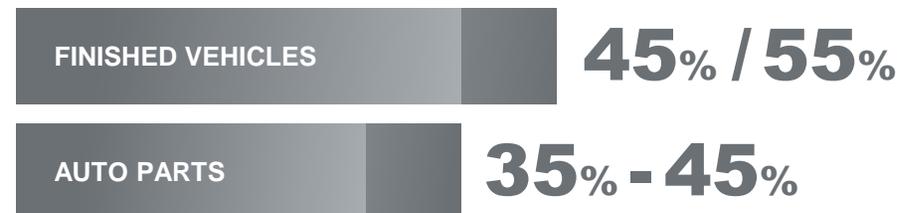
COMMENT/RESOLUTION

This has been one of the most controversial topics during the first round of renegotiation meetings. Even U.S. automakers do not see addition of a U.S. content requirement as helpful. The existing NAFTA regional value content for automobiles is already relatively high at 62.5 percent for automobiles and 60 percent for automobile parts. By way of comparison only, the TPP³ Rules of Origin for automobiles required 45 percent or 55 percent regional value content for finished vehicles, depending on the method of calculation, and 35 - 45 percent for auto parts. Businesses throughout North America have reorganized their supply chains and increased their international competitiveness in reliance on current NAFTA rules.

NAFTA REGIONAL VALUE



TPP³ RULES OF ORIGIN



MANDATORY FIVE-YEAR SUNSET

US¹

Mandate a regular, systematic reexamination of the effectiveness of the agreement.

CANADA

Sunset would destroy investment incentives that are among the chief benefits of an FTA.

MEXICO²

Re-examination would introduce economic instability.

COMMENT/RESOLUTION

Could be a deal killer. U.S., Canadian and Mexican businesses, including energy industry, see a sunset clause as counter-productive. Opposition also attributed to U.S. Departments of Agriculture and State.



LABOR ISSUES

US¹

Bring labor into core of NAFTA; conform with International Labor Organization (ILO) standards, including freedom of association and elimination of compulsory labor; abolition of child labor; elimination of discrimination; establish minimum wages, occupational health and safety rules and maximum work hours; prohibit waiver or derogation from the above; provide for equitable judicial proceedings; subject the above to NAFTA dispute resolution and establish stakeholder participation and oversight.

CANADA

Ensure that any NAFTA rules regarding labor avoid a “race to the bottom” and preserve the provincial powers to impose minimum standards.

Furthermore, Canadian negotiators urged their U.S. counterparts to commit to passing a federal law negating the “right-to-work” laws in 28 U.S. states, arguing that these laws give an unfair advantage to those states.

MEXICO²

Mexico wants NAFTA to reflect Mexico’s international labor commitments, and has expressly rejected increasing wages by means of other than market forces.

COMMENT/RESOLUTION

Mexico agreed to raise labor standards generally conforming to ILO standards in the Trans-Pacific Partnership (TPP). During the first round of negotiations between August 16th and 20th, Canada was also vocal about the need for Mexican salaries to rise in order to enable Canadian manufacturing industry to compete better with the Mexican manufacturing industry.

The Canadian government is requesting that Mexico and the U.S. ratify the eight core conventions of the International Labor Organization (ILO). Canada has proposed to use the labor chapters in the Canada-EU Comprehensive Economic and Trade Agreement (CETA) and the TPP as templates for the relevant chapter in NAFTA, but giving the corresponding provisions more “teeth.” (Currently, there is a NAFTA labor side agreement). These positions appear to be influenced strongly by Canadian organized labor. Mexico and the U.S. have ratified, respectively, seven and two such ILO conventions.

HOURLY LABOR COST COMPARISONS (2012)



Source: U.S. Bureau of Labor Statistics, International Labor Comparisons, 2013

AGRICULTURAL GOODS

US¹

Maintain existing duty-free market access; expand opportunities and eliminate non-tariff barriers (NTBs); include more stringent labor standards for Mexican agricultural workers. Limit imports when U.S. produce is “in season.”

CANADA

Opposes changes to dairy and poultry supply management systems; demands elimination of U.S. restrictions on softwood lumber imports.

MEXICO²

Concern for the impact of stringent labor standards, including the inclusion of a requirement for a higher minimum wage, on Mexican exporters, especially vegetable agribusinesses, and the strength of lobbying efforts by tomato producers in Florida and California. Mexican agribusinesses are forming a united front nationally to devise common positions and voluntarily to adopt better labor practices to ease pressure from the United States on this matter. Similar efforts were made during the negotiation of the Trans-Pacific Partnership (TPP). Mexico’s agricultural sector, enshrined in the Mexican Constitution, was very protected prior to NAFTA and many small farming jobs were lost at the hands of the U.S. agricultural sector.

COMMENT/RESOLUTION

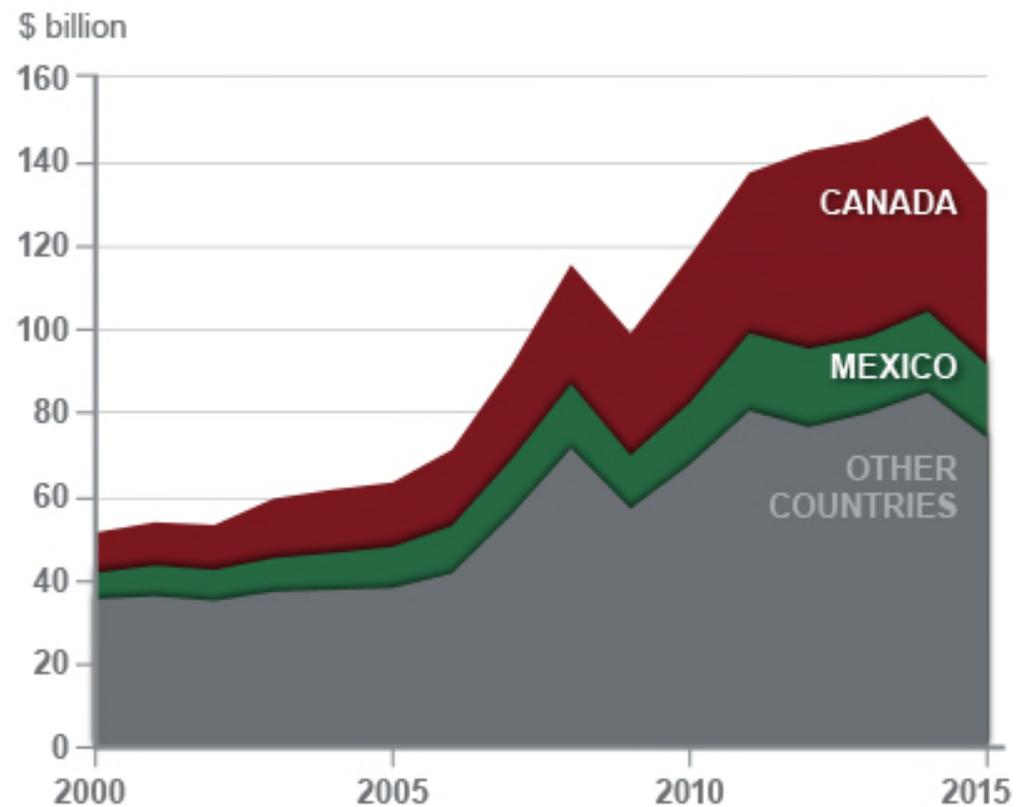
U.S. agricultural interests are wary of breakdown in NAFTA renegotiation reducing their exports, especially maize and wheat of which Mexico is a net importer. Likewise, Mexican agribusinesses, especially tomato and avocado producers, are wary of potential tariffs on their exports and the potentially adverse effect of heightened labor standards on their costs, especially in light of pressure from Florida and California producers who, in the past, have attempted to thwart Agreements Suspending Antidumping Duty Investigation on Imports of Fresh Tomatoes from Mexico (most recently in 2013).

The U.S. has indicated a desire to have Canada dismantle its dairy (and perhaps other) supply management regime, which caps production at domestic needs but uses tariffs to prevent imports, and which prevents almost any export from the United States. Canada has answered that it can talk about that issue, but only if the U.S. agrees to dismantle its heavy subsidization of its overproducing dairy (and other) agricultural goods, an unlikely scenario. Canada cannot expose its farmers to a massive surge in subsidized imports. In previous negotiations, with the U.S. and with the European Union, Canada has negotiated moderate increases in the quota allowed for duty-free exports of such goods to Canada. In Canada this is a highly politicized issue, complicated by the view of Canadian farmers that their milk is safer and more hormone-free than U.S. milk.

AGRICULTURAL GOODS CONT'D

U.S., Mexican and Canadian agro-industry representatives (including CEOs of companies such as Driscoll, Mission Produce, Sun Farms, Aneberries, as well as the chair of the United Fresh Produce Association) gathered in Mexico City on the sidelines of the renegotiation talks. These representatives presented a united front defending NAFTA and highlighting the benefits it has brought to producers and consumers in the three countries. They also rejected calls for the imposition of temporary tariffs demanded by certain producers in the U.S. (such as tomato producers in Florida).

U.S. AGRICULTURAL EXPORTS, 2000-2015



Source: USDA, Economic Research Service, with data from the U.S. Department of Commerce, U.S. Census Bureau, Foreign Trade Database.

TRADE REMEDIES

US¹

Eliminate Chapter 19 dispute settlement arbitral panels for appeals of trade remedy cases; eliminate global safeguards exclusion; exclude state-owned enterprises from analysis of domestic industry in antidumping cases; address duty evasion; facilitate imposition of measures against third-country dumping.

CANADA

Opposes elimination of Chapter 19 dispute settlement mechanism. Chapter 19 was essential to Canada's view of fair judicial review in, e.g., the last softwood lumber dispute.

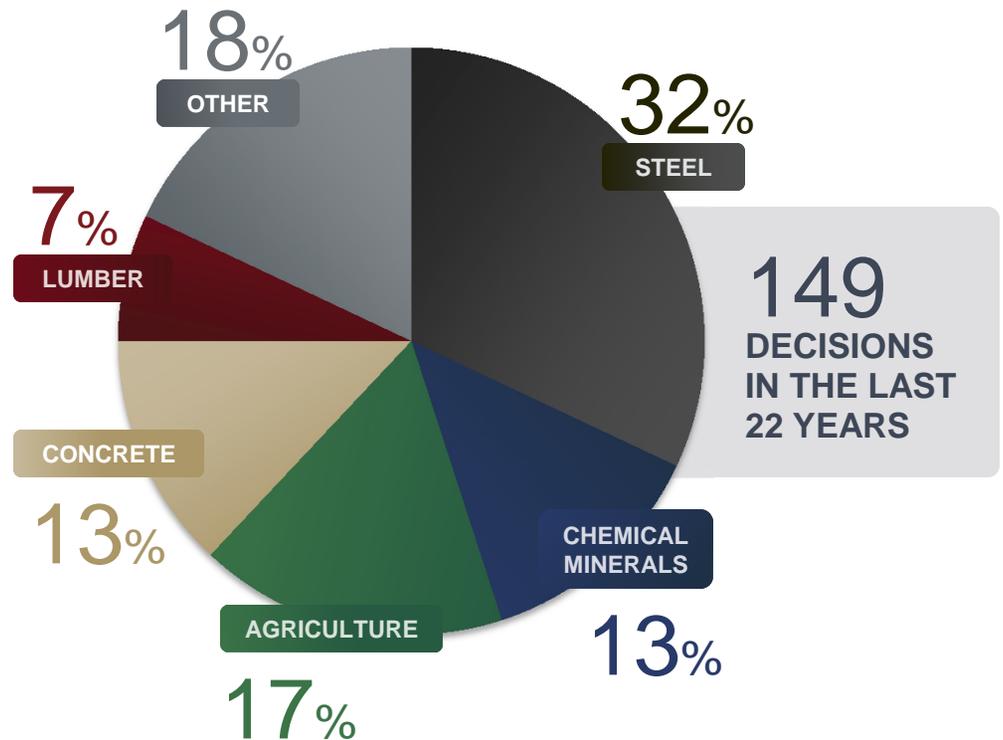
MEXICO²

Opposes elimination of Chapter 19 dispute settlement mechanism.

COMMENT/RESOLUTION

In 1989, Canada walked out of NAFTA negotiations in which the U.S. offered neither disappearance of anti-dumping /countervailing duties proceedings nor bi-national or tri-national review of administrative decisions for these types of matters.

PRODUCTS APPEALED TO NAFTA CHAPTER 19



Source: NAFTA Secretariat, Status Report of Panel Proceedings (active, completed and terminated) - NAFTA Chapter 19, 1995-2017

Reduce Bilateral Merchandise Trade Deficit

US¹

Seek meaningful reduction; require ongoing updates and re-evaluations.

CANADA

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COMMENT/RESOLUTION

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Revised Rules of Origin

US¹

Seek greater North American content; require minimum U.S. content, particularly for auto parts; certification and verification systems should be put in place. Eighty-five percent NAFTA origin, and 50 percent U.S. origin, has been mentioned. Tracking of origin of parts to be expanded, perhaps to include steel and electronics.

CANADA

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MEXICO²

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COMMENT/RESOLUTION

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Agricultural Goods

US¹	Maintain existing duty-free market access; Expand opportunities and eliminate non-tariff barriers (NTBs); include more stringent labor standards for Mexican agricultural workers. Limit imports when U.S. produce is “in season.”
CANADA	Opposes changes to dairy and poultry supply management systems; demands elimination of U.S. restrictions on softwood lumber imports.
MEXICO²	Concern for the impact of stringent labor standards, including the inclusion of a requirement for a higher minimum wage, on Mexican exporters, especially vegetable agribusinesses, and the strength of lobbying efforts by tomato producers in Florida and California. Mexican agribusinesses are forming a united front nationally to devise common positions and voluntarily to adopt better labor practices to ease pressure from the United States on this matter. Similar efforts were made during the negotiation of the Trans-Pacific Partnership (TPP). Mexico’s agricultural sector, enshrined in the Mexican Constitution, was very protected prior to NAFTA and many small farming jobs were lost at the hands of the U.S. agricultural sector.
COMMENT/ RESOLUTION	<p>U.S. agricultural interests are wary of breakdown in NAFTA renegotiation reducing their exports, especially maize and wheat of which Mexico is a net importer. Likewise, Mexican agribusinesses, especially tomato and avocado producers, are wary of potential tariffs on their exports and the potentially adverse effect of heightened labor standards on their costs, especially in light of pressure from Florida and California producers who, in the past, have attempted to thwart Agreements Suspending Antidumping Duty Investigation on Imports of Fresh Tomatoes from Mexico (most recently in 2013).</p> <p>The U.S. has indicated a desire to have Canada dismantle its dairy (and perhaps other) supply management regime, which caps production at domestic needs but uses tariffs to prevent imports, and which prevents almost any export from the United States. Canada has answered that it can talk about that issue, but only if the U.S. agrees to dismantle its heavy subsidization of its overproducing dairy (and other) agricultural goods, an unlikely scenario. Canada cannot expose its farmers to a massive surge in subsidized imports. In previous negotiations, with the U.S. and with the European Union, Canada has negotiated moderate increases in the quota allowed for duty-free exports of such goods to Canada. In Canada this is a highly politicized issue, complicated by the view of Canadian farmers that their milk is safer and more hormone-free than U.S. milk.</p> <p>U.S., Mexican and Canadian agro-industry representatives (including CEOs of companies such as Driscoll, Mission Produce, Sun Farms, Aneberries, as well as the chair of the United Fresh Produce Association) gathered in Mexico City on the sidelines of the renegotiation talks. These representatives presented a united front defending NAFTA and highlighting the benefits it has brought to producers and consumers in the three countries. They also rejected calls for the imposition of temporary tariffs demanded by certain producers in the U.S. (such as tomato producers in Florida).</p>

Industrial Goods

US¹

Maintain existing reciprocal duty-free market access and strengthen disciplines to address non-tariff barriers that constrain U.S. exports.

CANADA

Maintain existing reciprocal duty-free market access and strengthen disciplines to address non-tariff barriers that constrain exports.

MEXICO²

Maintain preferential and duty-free access to U.S. and Canadian markets for Mexican-manufactured goods.

COMMENT/RESOLUTION

Mexican and Canadian manufacturing businesses are looking to alternative markets such as Japan, Germany, and other European countries so as to diversify their markets.

Textiles

US¹

Maintain existing duty-free access and seek to improve competitive opportunities for exports of U.S. textile and apparel products while taking into account U.S. import sensitivities. Eliminate tariff preference levels that allow significant non-NAFTA origin textiles to enjoy NAFTA preferences.

CANADA

Maintain NAFTA status quo.

MEXICO²

Maintain preferential access to U.S. and Canadian markets for Mexican-manufactured goods.

COMMENT/RESOLUTION

Competition from Chinese textile and finished apparel products is a concern for Mexican industry and the government.

Harmonization and Transparency of Regulations

US¹

Promote greater regulatory compatibility with respect to key goods sectors to reduce burdens associated with unnecessary differences in regulation, including through regulatory cooperation where appropriate; ensure transparency in publication, adoption and implementation.

CANADA

Seek regulatory harmonization without yielding regulatory sovereignty.

MEXICO²

Avoid unduly burdensome rules and regulations which, in practice, are veiled trade barriers. Harmonize regulations in key goods sectors to reduce burdens associated with unnecessary differences in regulation.

COMMENT/RESOLUTION

Fundamental similarity in the three positions ought to produce mechanisms leading to simplification and mutual recognition of standards and transparency of regulatory process.

Sanitary and Phyto-sanitary Measures (SPS)

US¹

Provide for enforceable SPS obligations that build on World Trade Organization (WTO) rights and obligations; establish new and enforceable rules to ensure that SPS measures are science-based.

CANADA

Ensure continuing harmonization with WTO constraints, but also with WTO permissions which allow reliance on health risks even though they might not be certain risks.

MEXICO²

Mexico has not publicly stated a position on this issue. In general, at this time, this issue is not perceived to be one of the more contentious issues.

COMMENT/RESOLUTION

Canada, for example, will be anxious to preserve the power to impose content requirements on milk, even if some U.S. interests see those requirements as based on an exaggerated view of risk.

Customs and Trade Facilitation

US¹

Implement WTO standards; transparency; rapid release of goods; increased automation of processes and electronic payments.

CANADA

Modernize and quicken as much as possible; reduce the cost and delay of border crossing.

MEXICO²

Simplify customs rules, regulations, and procedures, and reducing waiting times for inspection at ports of entry. Harmonizing customs rules, regulations, and procedures.

COMMENT/RESOLUTION

Fundamental similarity in the three positions ought to bring mechanisms which will ease border crossing for all goods.

Dollar Value Below Which No Customs Duty Required

US¹

Increase all three countries' lower limit for duty-free imports to the equivalent of USD 800.

CANADA

Opposes high *de minimis* level as it will lead to decreased sales tax revenues for Canada and all provinces and send on-line shopping to larger, more numerous U.S. on-line sites.

MEXICO²

The Mexican Ministry of Commerce opposes an \$800 *de minimis* level because it would hurt domestic manufacturers and lead to decreased VAT revenues in Mexico. The current Mexico *de minimis* level is \$300, as a general rule, but is \$50 for e-commerce transactions.

COMMENT/RESOLUTION

Canada is concerned that, if the duty-free limit is raised, Canadian shoppers will increase the quantity of lower priced retail goods purchased in the U.S. and bring goods back across border duty-free. The contentiousness of this issue reveals that NAFTA is about more than import duties.

Technical Barriers to Trade (TBT)

US¹

Follow rules of WTO TBT; consultation and national treatment regarding adoption of standards, transparency and related areas.

CANADA

Follow WTO rules; Canada believes it already does.

MEXICO²

Mexico has not publicly stated a position on this issue. In general, at this time, this issue is not perceived to be one of the more contentious issues.

Services

US¹

Eliminate discrimination against NAFTA suppliers; eliminate requirement that data or service provider be local; allow U.S. cross-border delivery of services.

CANADA

Protect requirements that personal and private data, particularly health data, be stored where it will not be in danger of disclosure to foreign governments.

MEXICO²

Mexico has not publicly stated a position on this issue. In general, at this time, this issue is not perceived to be one of the more contentious issues.

COMMENT/RESOLUTION

The U.S. is competitive in many service sectors and will want to ensure that its companies continue to grow in this area without the impediment of undue trade barriers.

Telecommunications

US¹

Ensure market access, network connectivity access and protection of technology.

CANADA

Ensure connectivity but also domestic power to protect privacy and to enforce domestic rules.

MEXICO²

Promote a greater integration of the three countries' telecommunications markets.

COMMENT/RESOLUTION

Mexico has abolished inter-country roaming charges and certain Mexican consumer groups have advocated for this reform to be adopted on cross-border roaming charges as well.

Financial Services

US¹

Increase transparency and eliminate restrictions on cross-border flows.

CANADA

Increase efficiency of flows of financial services without reducing power of oversight.

MEXICO²

Facilitate and increase access for Mexican providers of financial services to U.S. and Canadian markets.

COMMENT/RESOLUTION

Canada is very conscious that its regulatory oversight of the financial sector spared the Canadian economy the ravages which greatly harmed U.S. consumers and the U.S. economy during the Global Financial Crisis and hence is likely to resist changes that would create additional risks in this area.

Mobility

US¹

The U.S. Summary of Objectives contained nothing on this topic. The U.S. is likely to resist any liberalization.

CANADA

Facilitate cross-border mobility of business people to support trade in services. Update list of professionals eligible for free movement.

MEXICO²

Facilitate cross-border mobility of business people and professionals to support trade in services.

Digital Trade

US¹

Commit not to impose duties on digital products such as software, video, music; non-discriminatory treatment; remove safe harbor for internet sites onto which pirated material is uploaded.

CANADA

See similar comment above as to Canadian government concern for loss of sales tax revenue stemming from U.S. sites.

MEXICO²

Foster the development of the digital economy, electronic commerce, and the provision of financial services through electronic platforms.

COMMENT/RESOLUTION

The Mexican Online Sales Association has expressed concerns of unfair competition by U.S. and Canadian e-commerce companies to expand their customer base in Mexico, because Mexican e-commerce companies are unable to acquire merchandise at the same price as their U.S. and Canadian counterparts. U.S. and Canadian companies have lower costs because they pay lower import duties and taxes on East-Asian goods. The Mexican government is pushing for uniform import duties.

Cross-Border Data Flows

US¹

No restrictions on cross-border data flow; no requirements that data be stored locally; no mandatory disclosure of software source codes.

CANADA

Allow cross-border data flows but preserve rules governing data storage, for purposes of protecting privacy.

MEXICO²

Mexico has not publicly stated a position on this issue. In general, at this time, this issue is not perceived to be one of the more contentious issues.

COMMENT/RESOLUTION

Both Canada and Mexico have data protection laws designed to protect personal identifiable information (PII). Canada may seek greater protection as to personal data protection for its citizens.

Investment

US¹

Reduce or eliminate barriers to U.S. investment; investor rights consistent with U.S. legal principles; no greater rights in U.S. for NAFTA investors than for U.S. investors.

CANADA

Preserve investor protections (perhaps without preserving NAFTA Chapter 11).

MEXICO²

Maintain non-discriminatory treatment for Mexican investors in the U.S. and Canada in accordance with international standards.

COMMENT/RESOLUTION

Foreign investment is still limited and/or capped in a limited number of economic activities in Mexico.

Intellectual Property

US¹

Implement WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS); ensure protection equivalent to U.S. level; eliminate discrimination in availability of IP rights; strong and transparent enforcement; allow market access for U.S. entities that rely on IP protection; foster access to medicines; eliminate improper use of geographic indications.

CANADA

Canada already made concessions towards the U.S. position on IP in the context of the TPP negotiations and will resist further concessions. Canada also has a strong interest in maintaining exceptions required to protect Canadian culture and the French language.

MEXICO²

Inclusion of mechanisms to achieve effective protection of intellectual property rights, promoting an equilibrium between the public interest and the interests of holders of IP rights.

COMMENT/RESOLUTION

Canada fought hard in initial NAFTA negotiations to protect its use of geographic indicators. Canada will be very careful to preserve the protections it has already negotiated, with the U.S. and with others, for Canadian geographical indicators, but also to avoid making commitments which will interfere with commitments made, for example recently to the European Community, for the protection of other jurisdictions' geographical indicators.

The recently negotiated CETA (free trade agreement between Canada and Europe) includes many commitments and compromises covering geographical indications. The 27 EU members (excluding the UK) are pressing for the inclusion of rules protecting geographic indications in the revised free trade agreement between Mexico and the European Union.

State-owned Enterprises (SOEs)

US¹

Activity in accord with commercial considerations and ensure non-discriminatory purchases and sales by SOEs; exceed WTO SCM guidelines; avoid subsidization of SOEs; limit sovereign immunity; transparency.

CANADA

Canada has greatly reduced protections for state-owned enterprises (SOEs). It will seek to preserve what is left, particularly as to alcohol.

MEXICO²

Mexico liberalized its oil and gas and power sector in 2014 allowing for greater foreign investment, but both Pemex and CFE remain important SOEs. The Mexican government has declared that a more developed and closely-integrated North American energy market should be a common goal in a revised NAFTA.

COMMENT/RESOLUTION

See comments in item entitled "Energy" on page 27.

Competition Policy

US¹

Maintain rules prohibiting anti-competitive conduct.

CANADA

Generally in line with U.S. position.

MEXICO²

Maintain and modernize rules prohibiting anti-competitive conduct, improving cooperation and exchange of information between the three governments.

COMMENT/ RESOLUTION

Agreement on this issue tentatively reached at end of third (Ottawa) round of negotiations.

Labor

US¹

Bring labor into core of NAFTA; conform with International Labor Organization (ILO) standards, including freedom of association and elimination of compulsory labor; abolition of child labor; elimination of discrimination; establish minimum wages, occupational health and safety rules and maximum work hours; prohibit waiver or derogation from the above; provide for equitable judicial proceedings; subject the above to NAFTA dispute resolution and establish stakeholder participation and oversight.

CANADA

Ensure that any NAFTA rules regarding labor avoid a “race to the bottom” and preserve the provincial powers to impose minimum standards.

Furthermore, Canadian negotiators urged their U.S. counterparts to commit to passing a federal law negating the “right-to-work” laws in 28 U.S. states, arguing that these laws give an unfair advantage to those states.

MEXICO²

Mexico wants NAFTA to reflect Mexico’s international labor commitments, and has expressly rejected increasing wages by means of other than market forces.

COMMENT/ RESOLUTION

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The Canadian government is requesting that Mexico and the U.S. ratify the eight core conventions of the International Labor Organization (ILO). Canada has proposed to use the labor chapters in the Canada-EU Comprehensive Economic and Trade Agreement (CETA) and the TPP as templates for the relevant chapter in NAFTA, but giving the corresponding provisions more “teeth.” (Currently, there is a NAFTA labor side agreement). These positions appear to be influenced strongly by Canadian organized labor. Mexico and the U.S. have ratified, respectively, seven and two such ILO conventions.

Environment

US¹

Bring environment provisions into core of agreement; establish obligations that are subject to NAFTA dispute settlement; prohibit waiver or derogation from the above; require implementation of obligations under multilateral environmental agreements; allow stakeholder participation; require fair and transparent enforcement and judicial proceedings; provide adequate sanctions for violations; provide for cooperative activities and oversight; combat illegal fishing, prohibit fisheries subsidies and promote fisheries management; protect and conserve flora, fauna and ecosystems; and combat illegal trafficking in wildlife and timber.

CANADA

Openness to environmental provisions in the core agreements but reticence to allow U.S. control over Canadian standards. No country should be able to weaken environmental protection to attract investment.

MEXICO²

Bring environmental provisions into the core of the agreement and strengthen cooperation between the three countries on environmental matters.

COMMENT/RESOLUTION

Canada is seeking the inclusion of provisions that would prevent a country from intentionally weakening climate change and environmental policies to attract investment.

Anti-Corruption

US¹

Criminalize government corruption; adopt adequate enforcement and penalties; require books and records; disallow tax deductions for corrupt payments; and encourage establishment of codes of conduct.

CANADA

No announced position but several non-NAFTA pronouncements indicating commitment to fight corruption at home and abroad.

MEXICO²

Criminalize acts of corruption by government officials and private parties affecting trade and investment.

COMMENT/RESOLUTION

Although details are yet to be disclosed, representatives of the three countries are reported to be close to reaching an agreement on the relevant chapter, which will likely have two angles: enforcement in commercial transactions between private parties and anti-bribery measures in government procurement processes.

Trade Remedies

US¹

Eliminate Chapter 19 dispute settlement arbitral panels for appeals of trade remedy cases; eliminate global safeguards exclusion; exclude state-owned enterprises from analysis of domestic industry in antidumping cases; address duty evasion; facilitate imposition of measures against third-country dumping.

CANADA

Opposes elimination of Chapter 19 dispute settlement mechanism. Chapter 19 was essential to Canada's view of fair judicial review in, e.g., the last softwood lumber dispute. Rumored flexibility in exchange for lasting settlement of lumber and aircraft subsidy disputes.

MEXICO²

Opposes elimination of Chapter 19 dispute settlement mechanism.

COMMENT/RESOLUTION

In 1989, Canada walked out of NAFTA negotiations in which the U.S. offered neither disappearance of anti-dumping/countervailing duties proceedings nor bi-national or tri-national review of administrative decisions for these types of matters.

Government Procurement

US¹

Increase opportunities for U.S. firms to sell U.S. products into NAFTA countries; exclude U.S. sub-federal coverage from commitments being negotiated; keep U.S. domestic preferences for various protected groups and for national security-related procurement; keep Buy America requirements on federal assistance to state and local projects, transportation services, food assistance, farm support etc. Limit Canada's or Mexico's access to U.S. government procurement to sales U.S. suppliers can obtain in that country.

CANADA

Opposes requirement to open Canadian procurement in the face of U.S. demand that Buy America procurement exceptions be expanded. Opposes Buy American rules for state and local construction projects. Canada has repeatedly and steadily opened federal and provincial procurement to U.S. and Mexican suppliers.

MEXICO²

Guarantee legal certainty to Mexican suppliers in such processes.

COMMENT/RESOLUTION

The one-sided U.S. demands will not be accepted by either Canada or Mexico.

Small-and Medium-sized Enterprises (SMEs)

US¹

Secure commitment to provide support for SMEs to meet NAFTA requirements and export to NAFTA markets.

CANADA

Canada does not see large or small business as needing distinct protections. It sees trade liberalization as good for all.

MEXICO²

Secure commitment to establish mechanisms to stimulate and encourage a greater participation by SMEs in regional supply chains and to export to U.S. and Canadian markets.

COMMENT/RESOLUTION

Representatives of the three countries announced completion of this section at the conclusion of the third (Ottawa) round of negotiations. Agreement includes establishment of a NAFTA SME Trilateral Dialogue and efforts to increase access of SMEs to member states' markets.

Energy

US¹

Preserve and strengthen investment, market access, and state-owned enterprise disciplines benefitting energy production and transmission; support North American energy security and independence, while promoting continuing energy market-opening reforms.

CANADA

Canada remains open to the NAFTA goal of a North American energy market and seeks to avoid new U.S. protectionism.

MEXICO²

Overhaul NAFTA's energy chapter to take advantage of the potential offered by the Mexican energy reform, support North American energy security and independence, and ultimately achieve an integrated and North American energy market and bloc.

COMMENT/RESOLUTION

Reform of these SOEs was carved out of the initial NAFTA. Mexico has hinted that a more developed regional energy market is a potential upside for the current NAFTA negotiations, but reforms to PEMEX and CFE remain politically sensitive, particularly with upcoming Mexican presidential elections in July 2018. Some private upstream companies have raised concerns about leveling the playing field vis-à-vis Pemex. Mexican government has historically rejected the inclusion of a waiver of sovereign immunity in its E&P contracts, despite ongoing petitions by the upstream industry. Obama Administration decision to block Keystone Pipeline has not been forgotten by Canadian authorities.

Dispute Settlement

US¹

For Chapter 11, establish dispute settlement mechanism that is transparent with open hearings, public determinations and openness to non-party submissions. Recent indications suggest, however, that the U.S. may want to see even more significant restrictions to arbitral rights under Chapter 11 since the U.S. no longer wishes to encourage investment by U.S. industries in NAFTA countries. Arbitration is also seen as violating U.S. sovereignty. To that end, the Updated Renegotiation Objectives could be interpreted to mean that the U.S. will allow increased review of arbitral awards. As noted in Trade Remedies above, the U.S. demands elimination of Chapter 19.

CANADA

Canada remains very open to greater transparency of all dispute settlement hearings, but is adamant about the need to preserve both Chapters 11 and 19.

MEXICO²

Modernize Chapters 11 and 19 to make dispute-settlement mechanisms more transparent, swifter, and more effective.

COMMENT/RESOLUTION

The leaders of the U.S. Chamber of Commerce, the Business Roundtable, and the National Association of Manufacturers have publicly expressed their support for a strong investor-state dispute settlement (ISDS) mechanism under Chapter 11 to resolve disputes under NAFTA. Canada would prefer to see establishment of a standing independent claims tribunal similar to the forum established in CETA.

Currency Manipulation

US¹

Ensure that the NAFTA countries avoid manipulating exchange rates in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage.

CANADA

Canada sees this as a red herring. Its currency trades freely.

MEXICO²

Keep the flexibility of the Bank of Mexico to take measures to control inflation and protect the currency from violent fluctuations.

General Exclusion

US¹

Allow for the protection of legitimate U.S. domestic objectives, including the protection of health or safety and essential security, among others.

CANADA

Canada will be relieved to have new provisions confirming for the Canadian public that Canadian governments preserve their powers and rights to see to health, environment and safety.

MEXICO²

Mexico has not publicly stated a position on this issue. In general, at this time, this issue is not perceived to be one of the more contentious issues. Mexico's position on this issue may not differ much from the U.S. position.

Five-Year Sunset

US¹

Mandate a regular, systematic reexamination of the effectiveness of the agreement.

CANADA

Sunset would destroy investment incentives that are among the chief benefits of an FTA.

MEXICO²

Re-examination would introduce economic instability.

COMMENT/RESOLUTION

Could be a deal killer. U.S., Canadian and Mexican businesses, including energy industry, see a sunset clause as counter-productive. Opposition also attributed to U.S. Departments of Agriculture and State.

KEY TAKEAWAYS

The parties agree that modernization of NAFTA is necessary, and they are making good progress on several technical issues. The negotiations have been extended into February 2018, perhaps reflecting that progress is being made but also that more time is required.

The current dynamic of the negotiating positions, however, may drive the negotiations toward possible breakdown or failure, with respect to:

- Eliminating bilateral trade imbalances
- Increasing requirements for regional and country-specific origin
- Expanding national preferences in government procurement
- Weakening investor-state and trade remedy dispute resolution regimes
- Subjecting the agreement itself to mandatory periodic sunset absent new negotiations

U.S. Chamber of Commerce President and CEO Tom Donohue expressed concern over the U.S. negotiating posture noting that “there are several poison pill proposals still on the table that could doom the entire deal.” Nonetheless, the parties have announced their intention to extend the negotiations through February 2018, suggesting that the talks have not broken down and that bargaining will continue.

If the United States holds to these positions, it is possible that President Trump will notify Congress of his intent to terminate the agreement at the conclusion of the required six-month waiting period. This in turn would trigger litigation, as several industries and some members of Congress doubt that the President’s authority to make treaties under Article II of the Constitution gives him unilateral authority to withdraw from a hybrid congressional executive agreement such as NAFTA without Congressional approval pursuant to Congress’s Article I power “to lay and collect taxes, duties, imposts and excises” and “to regulate commerce with foreign nations.” They also point to the fact that withdrawal would require Congress to revoke the extensive NAFTA implementing legislation. Pending an ultimate Supreme Court decision, a not unlikely outcome would be an extended period of uncertainty with the attendant chilling effect on trade and investment.

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REFERENCE

¹ See in general, Office of the United States Trade Representative, Summary of Objectives for the NAFTA Renegotiation (July 17, 2017 and November 2017) (“Updated Renegotiation Objectives”).

² See in general, the Mexican Ministry of Commerce report to the Mexican Senate on the “Priorities of Mexico in the Negotiations of the Modernization of the North American Free Trade Agreement,” dated July 31, 2017.

³ The U.S. withdrew from the Trans-Pacific Partnership in January 2017.

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