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U.S. Releases Its Summary of Objectives for the NAFTA Renegotiations

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Like any good negotiator, U.S. Trade Representative Robert Lighthizer, in setting out U.S. objectives for the renegotiation of NAFTA, offered only a glimpse of what the U.S. actually will be pushing for when three-country talks among Canada, Mexico and the United States begin in Washington, DC, on August 16.[1] The U.S. statute that gives the President the authority to have a trade agreement voted up or down as a whole in Congress, without potentially deal-killing amendments, required Lighthizer to publish a statement of U.S. negotiating objectives 30 days in advance of the commencement of negotiations.[2]

The U.S. Negotiating Objectives, taking the form of a 17-page document covering more than 20 topics,[3] offer some reassurance to those hoping for constructive talks intended to modernize rather than tear up NAFTA.[4] This no doubt reflects the input of significant segments of U.S. industry and agriculture that have expressed their fears about what destruction of NAFTA would mean for the U.S. economy. The Administration’s press release accompanying the U.S. Negotiating Objectives notes that USTR received more than 12,000 written comments and heard from more than 140 witnesses during three days of public hearings.

Not surprisingly, a Canadian government source characterized the U.S. objectives as "not earth shattering." Similarly, Mexican Economy Minister Ildefonso Guajardo said that the document contains “no surprises.” Thus, there appears to have been some relief that the United States is placing greater emphasis on increasing market-access opportunities for U.S. business than on imposing quotas or tariffs on imports into the United States. In remarks to the Washington International Trade Association on July 20, the Ambassadors of both Canada and Mexico to the United States expressed a strong desire for the upcoming talks to move beyond “do no harm” to “we can do better.”

Still, not everything in the U.S. objectives was to the liking of Canada or of Mexico - or of free trade advocates. To begin with, the USTR emphasized the need to reduce bilateral trade deficits. Many economists view this as inappropriate for a free trade agreement, as trade deficits are caused more by imbalances between savings and investment than by trading arrangements. Perhaps significantly, the U.S. Negotiating Objectives are ambiguous as to whether there would need to be specific provisions addressing the trade deficits or whether the overall operation of the renegotiated treaty could be construed as an effective remedy. Nevertheless, Minister Guajardo, when interviewed during a visit to Japan, indicated his displeasure and stated that the U.S. emphasis on trade deficits reflects “mercantilist” thinking. The USTR also noted its desire to eliminate the trade remedy appeal process of NAFTA Article 19, a position sure to engender strong opposition both in Mexico and in

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[1] Office of the United States Trade Representative, Summary of Objectives for the NAFTA Renegotiation (July 17, 2017) (“U.S. Negotiating Objectives”).
[2] Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. Law 114-26 (2015) (“TPA” or “Fast Track”).
[3] Trade in Goods; Sanitary and Phytosanitary Measures; Customs, Trade Facilitation and Rules of Origin; Technical Barriers to Trade; Good Regulatory Practices; Trade in Services, Including Telecommunications and Financial Services; Digital Trade in Goods and Services and Cross-Border Data Flows; Investment; Intellectual Property; Transparency; State-Owned and Controlled Enterprises; Competition Policy; Labor; Environment; Anti-Corruption; Trade Remedies; Government Procurement; Small- and Medium-Sized Enterprises; Energy; and Dispute Settlement.
[4] As widely anticipated, many of the topics listed among the U.S. Negotiating Objectives have been the subject of previous international trade negotiations in the context of the Trans-Pacific Partnership (“TPP”).

Canada. Canada in particular has relied on Article 19 panels to overturn what Canadians believe to have been U.S. excesses in a number of trade disputes, most notably softwood lumber. The U.S. Negotiating Objectives also take direct aim at Canada's dairy and poultry "supply management" programs.

Some of the other objectives expressed in the USTR report are:

- including labor and environmental standards, with appropriate remedies for violations, in the text of the agreement;
- revising rules of origin[5] (presumably with an emphasis on the automotive sector) to "ensure the rules of origin incentivize the sourcing of goods and materials from the United States and North America"[6];
- securing access for telecommunications suppliers and ensured interconnectivity;
- eliminating restrictions on cross-border provision of financial services, such as requirements for the use of local computing facilities;
- opening markets for cross-border data flows and digital products;
- providing rights for foreign investors equivalent to (but also not greater than) those afforded to domestic investors;
- ensuring that provisions governing intellectual property rights "reflect a standard of protection similar to that found in U.S. law;" and
- increasing opportunities for U.S. firms to sell U.S. products and services into NAFTA countries while still keeping in place U.S. domestic preferential purchasing programs such as Buy America requirements on Federal assistance to state and local projects in transportation, food assistance and farm support.

Looking at the most significant potential upside of NAFTA renegotiation, the energy sector stands out as a possible "win-win" opportunity. The energy language in the U.S. Negotiating Objectives is consistent with the overall theme of the document of preserving the advantages of free trade in North America while expanding access to each of the constituent markets. For energy, the U.S. Negotiating Objectives suggests that United States policy would be to:

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

Both the Trump Administration and its predecessor have highlighted North American energy security and independence through the promotion of increased exportation of oil, natural gas and LNG. Expanding upon President Obama's lifting of the crude oil export ban, President Trump referred to domestic energy production as a "golden era" and has promised to "export American energy around the world" specifically through sales of natural gas, coal and petroleum. The President has cited positively the recent Cheniere Energy LNG exports to Eastern Europe. And, importantly, with respect to U.S. energy exports to Mexico, he has indicated that U.S. petroleum pipelines to Mexico "will further boost American energy exports," to Mexican markets.

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[5] This section of the report entitled "Customs, Trade Facilitation, and Rules of Origin," also highlights improvements in processing and release of goods once import procedures have been completed and provides for a *de minimis* shipment value below which Customs will not collect duties or sales taxes comparable to the U.S. *de minimis* shipment value of $800.

[6] The potential inconsistency between incentivizing U.S. and North American content is striking. Moreover, any significant tightening of NAFTA content for automobiles (as by requiring "tracing" for a higher percentage of components) could be counter-productive, since if the cost of doing business in North America becomes too high, auto companies could chose to move component production or entire assembly operations overseas and pay the 2.5 percent U.S. tariff on finished automobiles.

Secretary of Energy Rick Perry has expressed his goal of an “energy dominant America [that] will export to markets around the world, increasing our global leadership and our influence.” Thus, the Administration has highlighted the policy desire to expand energy exports in multiple venues and on several occasions. This is all the more striking because, in large measure due to Mexico’s insistence, energy was largely excluded from the original NAFTA.

In contrast to 1994 when NAFTA went into effect, Mexico has opened its energy market to foreign investment. Mexico now is already well on the way to modernizing its energy sector and has begun to see the benefit in the form of increased investment not only in hydrocarbons,[7] but also in the power sector, including renewables, and these developments could soften the significant economic losses currently being incurred by Pemex and make this sector more competitive. However, the Administration of President Peña Nieto, mindful of the upcoming Mexican presidential elections in July 2018, will also have to weigh political considerations and the risk of a nationalistic response to further market openings or deeper treaty commitments in this sector, which are not currently part of NAFTA.

Mexico can be expected to seek to protect and diversify its export markets, while simultaneously increasing its leverage in dealing with the United States by expanding, modernizing, and where possible, formalizing its trading relations with other blocks and countries such as the European Union, the European Free Trade Association, Japan, Turkey, and possibly in the not-too-distant future, China. The Mexican government is working closely with industry groups and chambers of commerce to devise its strategy for the upcoming negotiations, although little if any detail has been made public. U.S. agricultural negotiators, however, have noted decreased long term contracts from Mexico for U.S. grains and seeds and increased visits by Mexican purchasers to alternative suppliers in Brazil, Argentina and elsewhere.

Hard bargaining clearly lies ahead, particularly if the parties expect to complete the very complex task of renegotiating NAFTA before the start early in 2018 of the Mexican presidential campaign. Canada’s Ambassador to the United States, David MacNaughton, has pointed out that the longer uncertainty prevails, the fewer long-term economic commitments will be made, thus harming all three NAFTA economies. Thus, he continues to see a four-month renegotiation not only as desirable but also as possible. While expressing confidence that a reasonable deal could be worked out in time, he has also been careful to state, “We’re not going to rush into a bad deal.”

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[7]For example, a consortium, made up of Premier Oil of Britain, as well as Talos Energy of Texas and the Mexican company Sierra Oil and Gas, recently announced said that it had discovered a field containing more than one billion barrels of oil in shallow water 40 miles off the Mexican coast. Riverstone Holdings, an American private equity firm that specializes in energy investments, owns 45 percent of Talos Energy and 43 percent of Sierra Oil and Gas.