

INTERNATIONAL TRADE

NAFTA: USTR SUMMARY OF OBJECTIVES RELEASED JULY 17, 2017

by Daniel D. Ujcz

Introduction

The North American Free Trade Agreement (NAFTA) modernization process advanced on July 17, 2017 with the release by the Office of the United States Trade Representative (USTR) of the NAFTA negotiating objectives summary. <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-releases-nafta-negotiating>. Specifically, Section 150(a)(1)(D) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA-2015 or “fast track”) requires that USTR at least 30 days prior to the launch of formal negotiations publish and thereafter regularly update “a detailed and comprehensive summary of the specific objectives with respect to the negotiations, and a description of how the agreement, if successfully concluded, will further those objectives and benefit the United States” (hereinafter the “30-day letter”). The 30-day letter included 22 sections and 170 specific listings and sub-listings of USTR’s objectives. As discussed below, nine of these sections addressed NAFTA-specific issues. The remaining sections largely incorporated broad-based language crafted by Congress in TPA-2015 and, or, customary provisions found in any modern trade agreement. With the release of the 30-day letter, all procedural momentum is moving toward the launch of formal NAFTA negotiations on or immediately after August 16, 2017.

The Government of Canada (Canada or GoC) accordingly has closed its formal stakeholder consultation process as planned. Without any domestic legal requirement to do so, the GoC is unlikely to publish its objectives prior to the launch of formal negotiations. For its part, the Mexican Ministry of Economy (SE) launched a website in late-June to accept formal NAFTA comment submissions until July 26, 2017. This ongoing public consultation was complementary to the 90-day consultations held between the SE and the Strategic Advisory Council on International Negotiations (Consejo Consultivo Estratégico de Negociaciones Internacionales) throughout February to May 2017. All preliminary NAFTA consultations therefore will be completed by the scheduled launch of the formal negotiations.

While a number of related trade issues loom (e.g., Canada-U.S. Softwood Lumber, Section 232 steel decision) before the mid-August NAFTA launch, the 30-day letter provides some further insight as to the targets and topics of the NAFTA modernization process. We address each in turn.

Targets and Topics

TPA-2015 Compliance

As a threshold matter, USTR’s 30-day letter faces some controversy from members of the U.S. Congress as to whether its terms meet the letter and spirit of a “detailed and comprehensive summary of the specific objectives” as required by TPA-2015. While these concerns largely fall along party lines with Republican members of the Senate Finance Committee and House Ways and Means Committee cautiously

applauding the letter, and Democrat members claiming a lack of specificity, the issues of Congressional consultations and transparency are areas that will require constant vigilance by NAFTA stakeholders. Specifically, TPA-2015 requires enhanced consultations with Members of Congress and stakeholders unlike any witnessed in prior U.S. trade negotiations. Indeed, beyond consultations with the committees of jurisdiction and the separate House and Senate Advisory Groups on Negotiations (see TPA-2015 Section 104), the USTR *shall* meet with any individual Member of Congress regarding objectives, status, and changes to laws required by the negotiations, as well as provide all pertinent documents to the Member upon request. Consistent with this enhanced oversight responsibility, the Trade Subcommittee of the House Ways and Means Committee has scheduled a hearing for July 18, 2017 regarding NAFTA, and several Democrat Members of Congress have announced their intent to request documents pertaining to USTR’s objectives relating to labor and environment. Congress nevertheless will be more focused on the healthcare debate, Russia’s alleged involvement in the 2016 elections, and the 12 appropriations bills that need completed (as well as addressing the debt ceiling) than NAFTA before departing Washington, D.C. for the August 2017 recess. NAFTA stakeholders, however, should be inclined to monitor regional and local U.S. media as Members of Congress return to their district where NAFTA undoubtedly will be an issue at county fairs, festivals, and town-halls (if any).

The Framework of the 30-Day Letter

The framework of the 30-day letter reflects USTR’s attempts to meet its enhanced consultation obligations pursuant to TPA-2015. Specifically, the 30-day letter includes the following:

- 22 Sections
- 3 of these Sections include a total of 8 sub-headings including *Trade in Goods* (Industrial Goods, Agricultural Goods), *Customs, Trade Facilitation, and Rules of Origin* (as the heading provides: subheadings for Customs and Trade Facilitation, and Rules of Origin), and *Trade in Services, Including Telecommunications and Financial Services* (again, as the heading provides: Services, Telecom and Financial Services)
- 170 negotiating objectives and sub-parts to those objectives.

The Role of TPA-2015 in Defining the Specific Targets and Topics

The 22 sections target various trade negotiating objectives as prescribed by Congress in TPA-2015’s Section 102 save for the first section: “Improve the U.S. trade balance and reduce the trade deficit with the NAFTA countries.” (See 30-Day Letter at 4). USTR emphasizes in its press release accompanying the 30-day letter that “for the first time USTR has included deficit reduction as a specific objective for the NAFTA negotiations.” President Trump ordered a review of all countries with whom the U.S. maintains a trade deficit (see Presidential Executive Order Regarding the Omnibus Report on Significant Trade Deficits dated March 31, 2017) and the report was completed by the close of June 2017. All indications are that the report will be released to the public in the coming weeks. NAFTA stakeholders should be aware of the issuance of this report; however, it is noteworthy that U.S. Secretary Ross recently advised that deficits were of minor concern in the Canada-U.S. relationship. The issue remains for U.S.-Mexico trade,

a fact cited in the press releases accompanying the launch of the 30-day letter. Nevertheless, the term “deficit” does not appear in any of TPA-2015’s provisions (nor, notably, in the formal Introduction of the 30-day letter, see p.2).

Three (3) sections follow in exact terms the language provided by Congress in TPA-2015:

1. Intellectual Property (p.9)
2. Investment (p.9)
3. Currency (p.17)

In short, these sections are “cut-and-paste” from TPA-2015. Sources have advised that USTR and the Trump Administration have not adopted specific NAFTA negotiating objectives in these areas (which would include the controversial NAFTA Chapter 11/investor-state dispute resolution mechanism).

Six (6) sections adopt broad language customarily utilized in trade agreements (including current NAFTA) and that included, in part, in TPA-2015:

4. Technical Barriers to Trade (p.6)
5. Good Regulatory Practices (p.7)
6. Transparency (p.10)
7. Competition Policy (p.11)
8. Anti-Corruption (p.6)
9. General Provisions (p.21)

While these provisions may prove to be active areas during the formal negotiations—as presently submitted to Congress, they do not appear to be negotiating objectives specifically developed by the NAFTA modernization process. Consequently, these areas do not appear to be areas where the U.S. expects protracted negotiations with Canada and Mexico.

The Role of TPA-2015 and the Trans-Pacific Partnership (TPP)

The U.S. Administration has indicated on several occasions that prior negotiations performed on the TPP would potentially guide the NAFTA modernization process. Four (4) sections of the 30-day letter draw directly from TPA-2015 and the TPP:

10. Digital Trade in Goods and Services and Cross-Border Data Flows (p.7)
11. Labor (p.12)
12. Environment (p.13)
13. Small and Medium-Sized Enterprises (p.16)

With regard to the separate Labor and Environment provisions, each section opens with a call to “bring” what are currently NAFTA side agreements into “the core of the Agreement.” The remaining provisions largely adopt (in almost precise terms) the language of TPA-2015 and the general provisions of similar sections in the TPP. With the exception of bringing in the side agreement (which does not apply), the SME section also mirrors this hybrid TPA-2015/TPP approach. As a result, there is little “new” as part of the NAFTA negotiations with regard to these provisions (as presently proposed).

The digital trade section adopts the key principles of TPA-2015 and the TPP including not imposing customs duties on digital products, non-discrimination of digital products, a prohibition on imposing restrictions on cross-border data flows, barring data localization requirements, and prohibiting source code disclosure. While these are “modernized” provisions in the NAFTA, there is little specificity provided as to the scope of these issues. Additionally, the section does not address areas regarding safe harbors for consumer reviews and litigation that have been requested by e-commerce companies as well as members of the U.S. Senate (e.g, Senators Thune and Wyden). While this section likely will be a focus of the formal negotiations, it is somewhat surprising as to the lack of specificity in this area.

A Caution Regarding Comparisons to the TPP

The hybrid TPA-2015 and TPP approach of the foregoing sections, as well as the inclusion of TPP-related clauses in the below provisions, creates temptation to characterize the next NAFTA as a “TPP for North America”. This notion misses the mark in several ways. First, the TPP imposes extensive requirements on the parties, requires changes in domestic laws and procedures, and establishes various codes of conduct and standards. Nothing in the 30-day letter suggests that USTR is looking to that type of broad-based agreement. Of greatest significance, it must not be ignored that the U.S. withdrew from the TPP and voices inside the White House (e.g., Peter Navarro) consider that a hallmark achievement. Similarly, the TPP faced strong criticism in Congress and there is no evidence of a shift in that view. While TPP concepts may apply to the new NAFTA, stakeholders should be vigilant in ensuring that their interests are part of these current negotiations. Relying on the TPP to make it whole-cloth into the NAFTA is a bad bet.

The Remaining 9 Sections—The Good

Of the remaining 9 sections, there are multiple areas that reflect USTR’s positive efforts to expand North American trade:

- “Don’t Go In Reverse”—There are more nearly 10 references to “maintaining,” “keep,” “expand,” and “build on” the North American relationship. This is not a tear-it-up document and reflects the “Do No Harm” approach espoused by many North American stakeholders.
- Regulatory Cooperation / Convergence—There are than a half-a-dozen references to regulatory cooperation and convergence in North America. These “behind the border” provisions were a critical ask of the business community to remove the red-tape while maintaining global leadership in health, safety, and environmental standards. This area is perhaps the largest “win” for the North American business community.
- Customs and Trade Facilitation—The “at the border” provisions incorporate the decade since 9-11 of gains made in North America in the wake of 9-11. The provisions incorporate many of the “Beyond the Border” processes and those found in modern trade agreements.
- Rules of Origin (ROO)—While difficult to call a full adoption of the North American production platform, USTR is not calling for

anywhere near the 100% North American ROO discussed during the campaigns and early days of the Trump Administration. Vigilance is required, but the 30-day letter does provide some optimism.

- **Sanitary and Phytosanitary Measures**—The 30-day letter expands the language found in TPP and TPA-2015 and appears to welcome the establishment of new “mechanisms” to advance to address animal and plant health and safety issues in North America.
- **The “Committees”**—The 30-days letter calls for the establishment of a number of Committees to address issues such as the border, labor, environment, and TBTs.
- **Food Safety**—There is important emphasis throughout the 30-day letter on “food safety” measures in North America and aligning these efforts. This is critically important as the U.S. and Canada each undergo large scale upgrades of their food safety regimes.
- **Omissions**—Any North American document that does not include an explicit reference to any of Softwood Lumber, Mexican Sugar, and Country-of-Origin Labelling issue is progress for Canada-U.S.

The Remaining 9 Sections—The Not-So-Good

- **Agricultural Goods**—While the agricultural goods provisions are largely about ensuring market access (a positive), the language addressing U.S. eliminating non-tariff barriers for agricultural exports including “discriminatory barriers, restrictive administration of tariff rate quotas, other unjustified measures that unfairly limited access to markets for U.S. goods, such as cross-subsidization, price discrimination, and price undercutting” is extremely broad. Indeed, the language is broader than included in the agriculture-friendly TPA-2015. While this does not suggest a dismantling of areas such as Canada’s supply management regime, it is an area that will require vigilance.
- **Government Procurement**—While the 30-day letter unsurprisingly seeks to enforce the U.S. policy on Buy American/America in federal governmental procurement, it breaks the trend of modern trade agreements to open procurement markets at the federal and sub-national (state/province) levels. Indeed, USTR is specifically exempting state and provinces from open procurement measures thereby allowing “Buy State X” provisions. This places significant importance on state-to-province and regional agreements as parallel agreements to the NAFTA.
- **Import Sensitive Items**—Repeated reference to import sensitive items and textiles appear to be aligned with TPA-2015; however, these will require vigilance.
- **Chapter 19**—In one of two specific references in the 30-day letter, USTR bluntly calls for the elimination of NAFTA Chapter 19 dispute resolution. Canada has called this a “red line.” It is important to note that USTR raises Chapter 19 for two reasons. First, Chapter 19 is synonymous with softwood lumber in the minds of most Members of Congress. This was a specific request at various NAFTA meetings by Congress; consequently, it had to be in this

letter. Secondly, USTR does provide an opening to establish a new dispute resolution regime for North America. The Parties should take that opportunity.

- **Enforcement**—Arguably, the strongest provisions of the 30-day letter focus on the U.S. trade remedies/enforcement provisions. In short, the U.S. wants free reign to police the North American neighborhood from invasion from China and other deemed bad actors. The USTR position appears to asserts that the U.S. will open the front door to most North American trade; however, the only access will be through that front door and don’t bring any uninvited guests with you. These provisions set the stage for protracted discussions on aligning U.S., Canada, and Mexico approaches to the rest of the world and trade enforcement, if possible.

The Remaining 9 Sections—The Ugly

- **Workforce Mobility and Development**—The 30-day letter does not explicitly address the most pressing issue confronting Canada-U.S. and North American trade; namely, workforce mobility. Without addressing the legitimate movement of business visitors and professionals, North America will not have an effective services sector. Similarly, without addressing workforce development for those that have been displaced by trade, the new NAFTA could be a tough sell to the electorate in the U.S. Midwest.

The Remaining 9 Sections—The Most Interesting?

- **Trade in Services**—The Trade in Services section of the 30-day letter appears to be the most interesting. The provisions capture the broad language of the TISA and appear to recognize concepts such as negative lists. There may be a way to couch business immigration into this area; however, it may be a tough road.

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FOR MORE INFORMATION CONTACT:



Daniel D. Ujcz is Of Counsel in Dickinson Wright’s Columbus office. He can be reached at 614.744.2579 or dujcz@dickinsonwright.com.



Brenda C. Swick is a Member in Dickinson Wright’s Toronto office. She can be reached at 416.594.4052 or bswick@dickinsonwright.com.



Bruce C. Thelen is a Member in Dickinson Wright’s Detroit office. He can be reached at 313.223.3624 or bthelen@dickinsonwright.com.