INTERNATIONAL TRADE

NAFTA: THE CLOCK IS TICKING

by Daniel D. Ujczo

As Dickinson Wright predicted in a series of prior NAFTA briefing notes (see below), the United States Trade Representative (USTR) Robert Lighthizer issued a notice to Congress on Friday, August 30, 2018 of "President Trump's intent to sign a trade agreement with Mexico—and Canada, if it is willing—90 days from now." The notice started the 90-day clock on consultations with Congress and stakeholders regarding the preliminary United States-Mexico Trade Agreement announced earlier this week (our most recent briefing note on the US-Mexico agreement is included below). Canada and the US will reconvene for their negotiations on Wednesday, September 6 and attempt to resolve any outstanding issues as soon as possible. The text of the full agreement is due on or before October 1, 2018. The final agreement thereafter will advance through Mexico's legislative process and be prepared for signatures by the three countries by the close of November 2018 and before the transition to the new President of Mexico, Andrés Manuel López Obrador (AMLO). The US (and Canada) thereafter will proceed to ratification/implementation by Congress (and the Parliament of Canada), which will not occur until after the next Congress is seated in 2019 (and the run-up to Canada's planned October 2019 federal elections).

1. **The Text, the Text, the Text** - The US and North American business and business communities and civil societies need the text of the preliminary United States-Mexico Trade Agreement. This past week witnessed conflicting reports as to whether Mexico had agreed to a cap on its auto exports to the US (it did not, except in the event the US imposes Section 232 auto tariffs, there), whether the US and Mexico agreed to dollar for dollar government procurement/Buy America proposals as demanded by the US, whether the US and Mexico agreed to eliminating Chapter 19 dispute resolution, and several other key issues. The warp speed nature of the negotiations undoubtedly led to some confusion between the parties. One trend stands out: where Mexico says it remained silent on certain issues (e.g., Chapter 19), the US presumed that silence was acquiescence in/acceptance of the US proposal. This may cause more theater during the 30-day drafting process. Companies need to remain on high alert.

2. **Canada -** There were several credible reports this week that Canada and the US were on pace to not only issue the notice of agreement, but to reach a "high-level deal" with details to be worked out in September. The "deal" appears to have stalled for the moment largely due to the convergence of the "Three Sets of Ts" identified by Dickinson Wright throughout this NAFTA renovation; namely, timing & tempo, tenor & tone, and topics & targets.

    - *Timing and Tempo* - Canada and the US simply ran out of time in order to reach a "high-level" deal by the Friday notice deadline. While Mexico and Canada may have shared intelligence prior to this week, Canada did not have most of the text of the US-Mexico agreement in principle (in several areas, the text did not exist) before the Canadian delegation's arrival in Washington, DC on Tuesday. The need to get up to speed presented a threshold challenge where there were only four working days to reach a high level deal.

    - *Tenor and Tone* - The Friday dash to get a high-level deal faced added drama when the *Toronto Star* published President Trump's "off the record" comments in an earlier *Bloomberg* interview indicating that the US would not concede to any of Canada's requests. President Trump later confirmed those remarks in a tweet and appearance in North Carolina. This external theater reflected the US tactics in the negotiating room. While USTR may have come with "good faith" and "good will" as described by Canadian officials, USTR did not come in a "giving mood" toward Canada. Against that backdrop, the parties wisely called a timeout until next Wednesday.

    - *Target and Topics* - The most significant impact of the earlier US-Mexico agreement in principle was that it took away the one potential "win" for Canada this week—specifically, the "sunset clause." All expectations were that Canada would be brought in and the three parties would discuss sunset in a trilateral manner this week; however, Mexico and the US already reached an agreement on that issue by Monday. This left Canada without a key win, achieved on its own, and the need to find one in a few days. The major outstanding issues between the US and Canada remained dairy (where the first real substantive discussions have begun), Chapter 19 dispute resolution (which USTR Lighthizer publically has disliked for years and is synonymous with "softwood lumber" for many members of the US Congress), the cultural exemption for Canada in areas such as arts, television, and communications, intellectual property rights (particularly with pharma), the de Minimis exception, government procurement/Buy America, and Chapter 11 investor state dispute resolution. Canada and the US do appear to making quick work on areas that were near completion before the summer hiatus. The parties also agreed to close the environment and labor chapters, which are key to Canada's progressive agenda and significant wins. Several of Canada's leading auto trade associations largely endorsed the new auto rules of origin struck by the US and Mexico (which largely incorporated Canada's proposals from the Winter), but there will be some discussions on a few points as well as concerns about Section 232 auto tariffs.

3. **Talking Not Walking** - The worst case scenario for the week would have been if either Canada or the US walked away from the negotiating table. This would have raised significant challenges to the US notice of a deal with Mexico, stopped the clock, and, consequently, missed the timing to get a deal before

AMLO takes office. It must be emphasized that the new NAFTA will be extremely difficult to achieve once AMLO takes office on December 1st. The clock is ticking between the US and Mexico. Canada and the US are talking not walking. This is significant for companies as we move toward ensuring some predictability in the North American market.

4. **Congress** - The decision as to whether the US could have a bilateral deal with Mexico, absent Canada, is a political question, not a procedural matter. USTR confirmed that it shares this view during a stakeholder call. Meanwhile, as expected, members of Congress from both sides of the aisle, as well as leading industry and labor groups, expressed their support throughout this week for a trilateral-only deal. This support will hold firm throughout September. For the present, the US holds the leverage in the negotiating room and Canada hold the leverage in Congress and the stakeholder communities. There is a lane to get a deal with this balance in place.

   However, once the text is due in late September/early October, the support for Canada will face challenges. These include: (1) the holding up of what appears, on the surface, to be a good deal with Mexico that achieves new auto, labor, agricultural, and other measures; (2) the need to end Mexico's retaliation on US farm country due to the Section 232 steel and aluminum tariffs, which is of particular importance as the US settles in for the long haul disputes with China; and (3) the likely rhetoric from the White House that Canada is holding up the deal to protects its markets in areas such as dairy and lumber to the harm of US consumers (e.g., "Canada is treating us unfairly"). All of this will occur during the heart of the midterm elections. There is strong support for a trilateral deal, but that support is not infinite.

5. **Progress not Perfection** - This week witnessed progress, not perfection in the NAFTA renovation. As with any renovation (think Tom Hanks in the "Money Pit"), it always takes longer ("two weeks"), costs more, and is more disruptive than ever imagined. The process is moving forward, and, in spite of the theater of this week, the 90-day countdown to get a deal signed by the end of November is procedurally on track. There undoubtedly will be political and practical challenges over the coming days and weeks. Dickinson Wright will continue to monitor and share all intelligence. Please contact us with questions.

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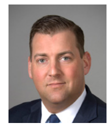

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