GAME ON USTR RELEASES OBJECTIVES FOR NAFTA RENEGOTIATIONS

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On July 17, 2017, the United States Trade Representative ("USTR") released a summary of objectives for the United States in *NAFTA* renegotiations. The submission of this document to Congress was a necessary precondition to the initiation of trade negotiations. Most of the document is comprised of boiler plate objectives that would apply to most trade negotiations. Many of the objectives are already addressed to a certain extent under the various World Trade Organization ("WTO") agreements.

While there is little that is unexpected in this document, there are a few clues as to issues that may be of particular interest to the United States.

There are 22 general issues that are listed. Rather than address each of these, this analysis will focus on areas of interest to Canada, and on issues where the United States may put particular emphasis.

Agriculture

The USTR document identifies general goals under trade in goods, both industrial and agricultural products. In respect of Canada, the agricultural target will primarily be dairy, chicken and eggs. The objectives do seem to contemplate a reduction in American constraints on the import of agriculture goods, subject to a phase-out of tariffs that currently exist. American willingness to give on trade in agriculture products will make Canadian defence of supply-managed industries more difficult, particularly given the concessions made by Canada in negotiations for the Trans-Pacific Partnership ("TPP") and Comprehensive Economic and Trade Agreement ("CETA"). While possibly painful for Canadian producers, an American win on this issue would also be a win for Canadian consumers.

Import Value Thresholds

The United States has also expressly addressed the difference in customs rules pertaining to e□commerce. In particular, the United States wishes to see reciprocity in the scope of customs coverage. It currently has a $800 *de minimis* standard for express delivery shipments. Canada currently maintains a $20 threshold, in large part to expand the scope of goods subject to sales taxes. An American win here would benefit Canadian

consumers.

Technical Barriers to Trade

In addressing technical barriers to trade, the objectives contemplate a requirement that decisions and recommendations of the WTO Committee on Technical Barriers to Trade be applied. This is a novel concept since, in the normal course, a member country can decline to apply WTO decisions, subject to the right of the complaining country to withdraw equivalent concessions. In conjunction with sanitary/phytosanitary standards, the U.S. goal is likely to advance U.S. interests in the agricultural and chemical industries, where acceptance of new strains or new products may be subject to regulatory control in Canada or Mexico, even if approved in the United States.

It is interesting that the United States is limiting adherence to WTO decisions to technical barriers to trade. If this principle were to be applied more generally to require enforcement of all WTO decisions, that would certainly provide some comfort to the Canadian softwood lumber industry. While enhancing the enforceability of WTO decisions is an intriguing concept, the reasonable extension of such a rule across all WTO decisions is almost certainly not going to be acceptable to American negotiators.

Services

The objectives signal a goal of obtaining greater access to the telecommunications and financial services sectors. There will likely be some significant push-back from Canadian providers of internet, cable and cell phone service. On financial services, Canadian big banks already have an extensive presence in the American market, and U.S. negotiators will likely press for some form of reciprocal treatment for American financial institutions in Canada.

The Cloud

Another key objective that is of little surprise relates to abolishing restrictions on cross-border data flows. In a nutshell, this is about cloud storage, and the removal of restrictions on the use of data storage facilities located outside of Canada. Canada has certain laws that currently prevent use of data storage facilities outside of the country on the grounds of privacy concerns. Canada would likely be able to maintain restrictions on certain government data under the national security exception, but it will be pressed to recognize that privacy can be protected regardless of the physical location of the data storage facility. This issue was conceded by TPP negotiations, and it will be difficult to refuse similar concessions under *NAFTA*.

Procurement

On issues of government procurement, the United States seeks an express exclusion for state and local

government from *NAFTA* procurement obligations. Sub-federal bodies are not directly included under existing government procurement obligations, though one might argue that a failure to permit open access to procurement at these levels of government might be considered a breach of national treatment obligations, and give rise to a potential remedy under Chapter 11 of *NAFTA* (though this avenue has not yet been pursued). A desire to expressly exclude sub-federal American institutions does seem to reflect a potential concern under *NAFTA*, or in the context of WTO obligations. Press reports have suggested that Americans are going to go after provincial and municipal procurement in Canada. Given the American position, such an outcome is most unlikely, particularly given the repeated American goal of reciprocity in the negotiations.

A different plan of attack may come through the objectives relating to state-owned enterprises ("SOE"). A stated goal of the USTR is to require SOEs to accord non-discriminatory treatment with respect to purchase and sale of goods and services. This might be an alternative means of seeking access to sub-federal procurement in Canada, since there are a number of significant SOEs at the provincial level, particularly in relation to power generation and provision of health services.

Dispute Resolution

Dispute resolution is an issue that is all over the map. One stated objective is to abolish the Chapter 19 Panels which provide an alternative route to judicial review than in the courts. Canada had pushed hard for this in the Canada U.S. Free Trade Agreement, with the aim of obtaining an expedited judicial review of American anti-dumping or countervailing duty decisions. The fear at the time was that the appeal processes under American law would effectively permit an American industry to litigate smaller Canadian industries out of the American market.

The U.S. objective on Chapter 19 is somewhat incongruous given the promotion of *NAFTA* dispute settlement mechanisms elsewhere in the objectives. For example, the USTR contemplates incorporating the labour and environmental side agreements into *NAFTA*, with establishment of enforceable dispute resolution procedures applicable to each. Some caution may be warranted on the part of Canada and Mexico to the extent that environmental provisions might require active enforcement of obligations under the Paris Climate Accord (such as they are), despite the fact that the United States would not be obliged to do the same.

The U.S. contemplates an overall dispute settlement procedure, which is somewhat ironic, since such a procedure already exists under Chapter 20 of *NAFTA*. The United States has undermined the effectiveness of existing measures by repeatedly declining to appoint panelists for disputes under Chapter 20.

A further apparent contradiction on dispute resolution relates to the USTR goals on investment. One cited goal is to ensure that *NAFTA* country investors in the United States are not accorded greater substantive rights than domestic investors. Chapter 11 of *NAFTA* currently does provide investors of other NAFTA countries higher

rights than available to local investors. For example, a Canadian investor has fewer rights to a remedy for expropriation of its assets in Canada than would be available to an American or Mexican investor. In this respect, the American goal may effectively mean the end of Chapter 11 of *NAFTA*. This dispute resolution procedure has primarily benefitted of American investors over the last two decades; both the Canadian and Mexican governments might be happy to see Chapter 11 gone.

Trade Remedies

For global safeguard remedies, the U.S. is seeking to remove the higher injury standard applicable under NAFTA. In such cases, NAFTA countries must be demonstrated to be, on their own, a serious cause of injury to domestic producers before safeguard measures may be applied against them. The United States seeks to essentially remove that exception from NAFTA.

Another trade remedy goal is the possibility of instituting proceedings for third country dumping. This would mean giving companies under NAFTA a right to bring anti-dumping proceedings in another NAFTA country where their exporters are being harmed by dumping or subsidization from a non-NAFTA country. NAFTA had originally contemplated further negotiations in this regard, but no further steps were taken at the time.

Transparency

There are a number of mentions of transparency throughout the objectives defined by the USTR. One interesting aspect of the American position may result in greater transparency or access to Canadian customs data. American customs data is accessible through a number of services in which all customs information, with the sole exception of price, may be available. This information extends to goods that are transhipped to Canada through an American port. Under the Canada Border Services Agency ("CBSA") interpretation of section 107 of the *Customs Act*, absolutely no information provided on customs documents can be made public. The rule is somewhat enigmatic when one considers the extent of information on imports into Canada that may be obtained from the United States, but not from Canadian sources. If the CBSA were required to provide the same degree of transparency as is currently the case in the United States, this information would be of great interest and use to a wide range of industries throughout Canada.

Conclusions

The document outlining the USTR objectives in NAFTA re-negotiations is a very useful document in a number of respects. First, the reasoned statement of objectives should dispel the panicked myths propagated by certain members of the press. Second, it does provide a road map to assist Canadian industry in preparing submissions to government on their particular interests. Finally, it does allow the governments of both Canada and Mexico to get a sense of where concessions might be made to satisfy U.S. negotiators, while maintaining

the substantial benefits accorded to citizens of all three NAFTA countries since the agreement entered into force in 1994.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.