

## NAFTA: USTR Revised Negotiation Objectives— What's New and Why

- Late on Friday, 17 November, 2017, the US Trade Representative's office quietly released an updated *Summary of Objectives for the NAFTA Renegotiation*, its legally required detailed report to the US Congress—and to the American public—on the White House's goals for the ongoing talks to 'renegotiate and modernize' NAFTA.
- The updates to the *Summary* appear to serve at least three purposes:
  1. They reflect announced and developing agreements between the three NAFTA countries in specific areas of the trade pact;
  2. They insert into the *Objectives* some of the 'poison pill' proposals put forward by the US negotiators in previous rounds that are likely to prevent consensus on a new NAFTA; and
  3. They represent attempts by the US to lay down precedents for future trade agreements and other aspects of US foreign policy.
- Altogether, the 17 November update to the USTR's NAFTA *Objectives* makes the prospects even more remote for a three-way agreement on renegotiating and modernizing the trade pact by the US-imposed extended deadline of end-March, 2018.

### UPDATE TO THE US OBJECTIVES IN RENEGOTIATING NAFTA MAKE CONSENSUS HARDER TO REACH

Without any fanfare, the Office of the United States Trade Representative (USTR) released late on the afternoon of Friday, 17 November a revised *Summary of Objectives for the NAFTA Renegotiation*. The new document provides an update to the original *Summary*, published three months ago on 17 July, 2017, which staked out the White House's positions going into the talks on 'renegotiating and modernizing' the North American Free Trade Agreement (NAFTA). While the July *Summary* represented the first time that the USTR's Office has released objectives before international trade negotiations have begun, the revised November *Summary* is the first instance in which the USTR has provided a second, updated version of its negotiating objectives. This paper reviews the updated *Summary* with a view to detailing what has changed and why these changes have been introduced.

With this revision to the US negotiating objectives, the USTR has made it even harder for the three NAFTA Parties to form a consensus on renegotiating and modernizing the accord by the current deadline of 30 March, 2018. The fact that the updated *Summary* incorporates some provisional agreements on individual Chapters of NAFTA is little consolation: trade negotiations are closed up all at once or not at all since every element features offsetting concessions and gains for all three countries involved. The fact that the USTR acknowledges some areas of accord between the Parties in no way biases the rest of the negotiations toward an easier conclusion. In fact, the update puts a sharper point on many areas of stark disagreement that will become more difficult to resolve with this revision of the *Objectives*.

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## **SUPERFICIALLY THIS IS A REPORT TO CONGRESS THAT REFLECTS PROGRESS SO FAR**

The revised *Summary* responds, in part, to the expectation under the 2015 *Bipartisan Trade Priorities and Accountability Act* (the *Trade Priorities Act*, Section 105(a)(1)(D)) that detailed and comprehensively summarized specific negotiation objectives would be published 30 days prior to initiating trade talks and updated regularly. Senate Financing Committee ranking member Ron Wyden (Democrat–Oregon) complained in early November to the USTR’s office and in [interviews](#) that the USTR’s failure to that point to update the July *Summary* amounted to a breach of the *Trade Priorities Act* that could compromise the renewal of the President’s Trade Promotion Authority (TPA), which expires on 1 July, 2018.

Some elements of the November update reflect the 17 October [announcement](#) at the conclusion of the fourth round of talks that the three Parties had “substantively completed discussions” in the NAFTA Chapter on competition, and had made progress in “several other negotiating groups, including customs and trade facilitation, digital trade, good regulatory practices, and certain sectoral annexes.” Similarly, some new USTR *Objectives* reflect the 27 September [statement](#) at the end of the third round of talks that a new Chapter on small- and medium-sized enterprises (SMEs) had been “effectively concluded” and that “meaningful advancements” had been made in the areas of telecommunications, competition policy, digital trade, good regulatory practices, and customs and facilitation.

## **FORMAL INTEGRATION OF SEVERAL ‘POISON PILLS’ INTO THE US OBJECTIVES**

The update also represents an effort to bake into the *Objectives* several of the recent ‘poison pill’ proposals that the US negotiators put on the table during the fourth round of NAFTA talks during 11–17 October in Washington, DC. Notably, the *Objectives* now include:

- A stated desire to tighten NAFTA’s rules of origin to favour “production” rather than “sourcing” in the US, with particular implications for vehicle and parts manufacturing;
- Language that points toward a possible ‘sunset clause’ that could see NAFTA up for review on a regular basis;
- Specific and pointed intentions to undo Canada’s dairy, poultry, and egg supply-management systems; and
- More detailed passages on the White House’s interest in substantially modifying, to the point of fully undoing, NAFTA’s dispute-settlement mechanisms.

## **THE USTR IS ALSO FIGHTING SEVERAL BATTLES BEYOND NAFTA**

The just-released update to the *Summary* additionally appears to reflect US responses to a number of recent non-NAFTA developments, not all of which are directly in the realm of international trade. These issues include: intellectual property rights concerns with China; alleged Russian use of social media to sway the 2016 US Presidential election; efforts to suspend legislation that limits competition and may raise costs on shipping goods to Puerto Rico as it rebuilds from Hurricane Maria; trade actions on Bombardier jets, BC wine, and softwood lumber; and the arrival of CETA, CPTPP, and the Global Magnitsky Acts. Further details are provided in box 1.

## **THE UPDATES, POINT BY POINT**

The appendix of this note details the major updates in the new *Summary* with a view to highlighting those that are most likely to be material to the further conduct of the NAFTA talks, those that are likely to shape a possible renegotiation and modernization of NAFTA, and those that may be intended to set precedents for the creation or revision of other trade agreements and policy actions. The list in the appendix is not exhaustive and intentionally omits small changes and revisions that do not appear strategically important at this point; we welcome readers’ feedback on any substantive oversights in interpretation we may have made. The USTR’s updates to the *Objectives* are quoted verbatim, even where there are problematic wrinkles in the USTR office’s copy editing. For easy reference, the updates are listed and discussed in the appendix under the same thematic headings and in the same sequence in which they appear in the revised November *Summary of Objectives for the NAFTA Renegotiation*.

**AGREEMENT BY END-MARCH 2018 LESS LIKELY**

The 17 November update to the USTR's *Summary of Objectives for the NAFTA Renegotiation* make prospects even more remote for a trilateral agreement on the renegotiation and modernization of NAFTA by the US-led deadline of end-March, 2018. Although some elements of the update bring into the *Objectives* provisional agreements on revisions to a few Chapters of NAFTA, other aspects of the update make a trilateral consensus on renegotiating and modernizing NAFTA more difficult to achieve. The update hardens the US stance with respect to several points on which Canada and Mexico have indicated that they cannot accept the current US proposals. Additionally, other aspects of the update complicate the NAFTA talks by adding into the negotiations efforts by the US to set precedents for other trade agreements and to deal with other distinct foreign-policy challenges.

In sum, the new US *Summary of Objectives for the NAFTA Renegotiation* further reduces the chances that a three-way agreement on revising the pact will be reached during Q1-2018.

**Box 1. The USTR is preoccupied with much more than NAFTA in its updated *Negotiation Objectives***

Elements of the new text in the USTR's revised NAFTA *Objectives* appear to respond to a variety of issues that go well beyond recent developments in the trade negotiations with Canada and Mexico:

- **US investigations of trade with China.** On 14 August, 2017, the White House requested the USTR to initiate an investigation into the impact of Chinese laws, policies, and practices on US intellectual property; on 18 August, 2017, the USTR launched action under Section 301 of the *Trade Act of 1974*. US Commerce Secretary Ross indicated on 22 September, 2017, however, that a decision on possible action to impose tariffs on foreign steel and aluminum under Section 232 of the *Act* would be deferred until a tax-reform package had been passed;
- **Social media and the 2016 US Presidential election.** The [\*Wall Street Journal\*](#) disclosed on 15 September, 2017 that US Justice Department Special Counsel Robert Mueller had "obtained a search warrant for the contents of Facebook accounts associated with Russian operatives trying to undermine the 2016 presidential election";
- **Jones Act.** The worst hurricane to hit the US island territory of Puerto Rico in 85 years made landfall on 20 September, 2017 and the ensuing destruction and efforts to recover sparked calls for suspension of the [\*Merchant Marine Act of 1920\*](#). The Act limits shipments between US ports to US-made ships operated by American firms; it is argued that these restrictions impose higher costs for goods on Puerto Rico, Hawaii, and Alaska by dulling competition in shipping. A 10-day waiver was provided from 28 September, 2017, but it was allowed to lapse without renewal;
- **Bombardier-Boeing.** Following a complaint by Boeing, on 26 September, 2017, the US Commerce Department made the first of a series of moves to impose countervailing and anti-dumping duties on Bombardier's CSeries jets. Bombardier responded by announcing on 23 October the sale of a controlling share of the jet line to Airbus in order to locate assembly for US orders at an Airbus plant in Alabama, and thereby circumvent tariffs on sales into the US;
- **CETA.** On 11 September, 2017 the Canada-European Union Comprehensive and Economic Trade Agreement (CETA) passed into provisional force;
- **BC wine.** The US moved on 2 October, 2017 to file a second [complaint](#) at the World Trade Organization (WTO) stemming from its perception that BC unfairly discriminates against foreign wines by allowing only domestic wine to be sold from grocery-store shelves, with imported products relegated to "stores within a store" separate from BC wines;
- **Global Magnitsky.** On 18 October, 2017 Canada's *Justice for Victims of Corrupt Foreign Officials Act (Bill S-226)*, commonly known as the '*Magnitsky Act*', passed into law through royal assent. The *Act* allows the Canadian government to impose sanctions and travel bans on foreign officials responsible for gross human-rights violations. The *Act* is named for Russian whistleblower Sergei Magnitsky, who died in a Moscow prison in 2009 after accusing officials of tax fraud. It mirrors the US's own 2015 *Global Magnitsky Human Rights Accountability Act (PL 114-328, Subtitle F)*;
- **CPTTP.** On 10 November, 2017, 11 countries at the Asia-Pacific Cooperation (APEC) Summit in Vietnam agreed on a modified framework to bring the Trans-Pacific Partnership (TPP) into force as the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) without the participation of the United States. Several US-sponsored demands, particularly those centred around intellectual property protections, were suspended in the move to CPTPP; and
- **Softwood lumber.** Canada requested on 14 November, 2017 a NAFTA Chapter 19 panel review "in regard to the final determination of the US Department of Commerce in the countervailing duty investigation of softwood lumber from Canada." The Commerce Department decision is still subject to USITC approval or rejection.

## APPENDIX. WHAT'S CHANGED SINCE JULY, WHY IT'S CHANGED, AND WHAT IT MEANS

This appendix details the changes that have been made to the USTR's *Negotiation Objectives* since the first version was released in July.

- **Trade in Goods.** In addition to the existing over-arching objective of improving the US trade balance and reducing the US trade deficit with the NAFTA countries, the new *Summary* adds:

- “Increase transparency in import and export licensing procedures”; and
- “Discipline import and export monopolies to prevent trade distortions.”

Both points likely indicate stepped-up US efforts to undo Canada's agricultural and food-product supply-management systems.

- **Industrial Goods.** A new objective is added:

- “Expand market access for remanufactured goods exports by ensuring that they are not classified as used goods that are restricted or banned”; and
- Key goods sectors are specifically mentioned where greater regulatory compatibility is sought, namely: “pharmaceuticals, medical devices, cosmetics, information and communication technology equipment, motor vehicles, and chemicals, and on issues such as energy efficiency.”

The additional objective may reflect an effort to pre-empt aspects of the CPTPP on remanufactured goods, while the new details on areas where greater regulatory compatibility is sought may indicate points where provisional agreements have been reached on harmonizing codes—or where fresh lobbying has placed a new US priority on reaching provisional agreements.

- **Agricultural Goods.** Several new points are added to the *Objectives* on agriculture that reflect the US ‘poison-pill’ demands to end Canadian agricultural supply management and marketing restrictions on alcohol:

- Under the goal to “Expand competitive market opportunities for US agricultural goods in NAFTA countries,” the text replaces “by reducing or eliminating remaining tariffs” as the means to achieve this goal with “including by eliminating remaining Canadian tariffs on imports of US dairy, poultry, and egg products.” The White House is clearly following up on President Trump's April 2017 [assertion](#) in Wisconsin that Canada makes business for US dairy farmers “very difficult” and that he “will not stand for this.” His comments were made despite US Department of Agriculture statistics that have shown until recently that the US dairy trade has enjoyed a surplus with Canada;
- In seeking to eliminate non-tariff barriers to US agricultural exports, the *Objectives* now mention specific “unjustified technical barriers, including to US grain and alcohol beverages,” a pointed reference to the US complaint to the WTO regarding BC's treatment of foreign wines;
- The update adds: “Seek to eliminate unjustified measures that unfairly limit access to Canada's markets and unfairly decrease market access opportunities in third countries for US dairy products, such as cross subsidization, price discrimination, and price undercutting.” The new point reflects the US dairy industry's complaints regarding the decision by Ontario's dairy producers to drop prices on ultrafiltered milk, a move that priced out US competitors;
- On efforts to promote greater regulatory compatibility on agricultural goods, the updated *Summary* now includes “regulations and standards for processed foods and beverages,” in order to ensure all dairy, poultry, and egg products are covered in a revised NAFTA; and
- Still on agricultural goods, the update adds an effort to anticipate new intellectual property and environmental issues in agricultural biotech: “Establish specific commitments for trade in products developed through agricultural biotechnologies, including on transparency, cooperation, and managing low level presence issues, and a mechanism for exchange of information and enhanced cooperation on agricultural biotechnologies.”

- **Sanitary and Phytosanitary Measures (SPS).** A small addition is made to reference WTO rights and obligations regarding SPS “certification and risk analysis.” The inspiration for this change is unclear to us.

- **Customs, Trade Facilitation, and Rules of Origin.** On rules of origin:
  - The aim to “Promote cooperation with NAFTA countries” now prioritizes specific efforts to “prevent duty evasion” ahead of both combatting customs offenses and ensuring that goods that satisfy the rules of origin receive NAFTA benefits; and
  - The text has also been sharpened to call for rules of origin that “incentivize production in North America as well as specifically in the United States” in place of the original draft that called more generally for the establishment of rules to “incentivize the sourcing of goods and materials from the United States and North America.”

The new version of this goal underscores the US ‘poison-pill’ demand to tighten US and NAFTA content requirements, in line with Commerce Secretary Ross’ particular focus on [vehicles](#). The US push to tighten NAFTA’s rules of origin may also represent an indirect attempt to complicate Canada and Mexico’s participation in the CPTPP, where content requirements for tariff preferences are generally lower than under NAFTA.

- **Good Regulatory Practices.** The section has had “and Transparency; Publication and Administration of Measures” added to its title. Additionally:
  - To “Applying other good regulatory practices” the update now appends “such as internal coordination mechanisms and transparency in the use of expert regulatory advisory committees”;
  - The update further adds “Reinforce commitments to”:
    - “Promptly publish laws, regulations, administrative rulings of general application, and other procedures that affect trade and investment; provide opportunities for public comment on measures before they are finalized; and
    - Establish and maintain mechanisms to review and if warranted, correction of final administrative actions.”

The updates on good regulatory practices represent an effort to affirm the White House’s intent to eliminate NAFTA’s dispute-settlement mechanisms, render them optional, and/or replace them with domestic alternatives.

- **Trade in Services.** No changes are provided to the *Objectives* on **Telecommunications** and **Financial Services**, but three other updates were made:
  - A new point, “Retain flexibility for US non-conforming measures, including US non-confirming measure for maritime and long-haul trucking services.” This addition could block efforts to undo or temporarily suspend the Jones Act; it may also be invoked to limit Mexican long-haul truckers’ access to the US. More broadly, it implies a US desire for a large number of carve-outs in services trade under a revised NAFTA. Rather than modernizing NAFTA, this points to a potential gutting of the agreement as it pertains to services;
  - To the *Objective*, “Establish rules to prevent governments from mandating the disclosure of computer source” the update appended “or algorithms” to the end. This would ensure governments cannot force firms to disclose how their algorithms display advertisements and other content in exchange for trade opportunities; and
  - An additional new goal, “Establish rules that limit non-IPR civil liability of online platforms for third party content, subject to NAFTA countries’ rights to adopt non-discriminatory measure for legitimate public policy objectives.” This new point may have been added in response to a possible White-House desire to indemnify social-media companies against possible legal action stemming from their inadvertent facilitation of alleged Russian efforts to influence US and perhaps other elections. The exception for public-policy objectives appears to be a carve-out in response to US efforts to limit, amongst other things, on-line sex trafficking.
- **Investment.** With the White House gunning to end Investor-State Dispute Settlement (ISDS) under NAFTA’s Chapter 11, several new points are added on investment that introduce specificity to US efforts to “Establish rules that reduce or eliminate barriers to US investment in all the sectors in the NAFTA countries, including the following rules”:
  - “National treatment and most-favoured-nation treatment”;

- “Prohibitions on restrictions on transfers of investment-related capital”;
- “Prohibition on performance requirements, including forced technology transfer and technology localization.” This appears directed toward any future trade negotiations with China and toward providing support for the goal under **Financial Services** to eliminate national laws that require financial institutions to keep a copy of their data stored on local servers.
- “Prohibition on expropriation without prompt, adequate and effective compensation, consistent with US legal principles and practice”; and
- “A minimum standard of treatment under customary international law, consistent with US legal principles and practice.”

The update further adds:

- “Provide meaningful procedures for resolving investment disputes, while ensuring the protection of US sovereignty and the maintenance of strong US domestic industries”;
- “Improve procedures for resolving investment disputes, including ensuring that arbitrators act impartially and independently, allowing arbitrators expeditiously to review and dismiss frivolous claims, and providing NAFTA countries with tools to ensure the coherence and correctness of the interpretation of investment rules”;
- “Ensure that dispute settlement hearings are open to the public and that all key documents related to the proceedings are promptly made public”; and
- “Establish a mechanism to allow *amicus curiae* submissions in dispute settlement proceedings from businesses, unions, nongovernmental organizations, and other members of the public.”

This suite of updates appears to establish the shape of a replacement for ISDS constituted along national rather than trilateral lines. The final two points would add substantial costs and burdens to the new process that would make it more difficult for Parties to bring cases forward.

- **Intellectual Property (IP).** The updates on IP re-assert some US-sponsored language that was recently suspended from the TPP:
  - The previous reference to “accelerated and full implementation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), particularly with respect to meeting enforcement obligations under TRIPS,” has been watered down with a reference simply to “ratify or accede to international treaties reflecting best practices”;
  - A series of additional points appear directed toward the incorporation of TPP language on intellectual property that was recently suspended in the move to CPTPP:
    - “Provide a framework for effective cooperation between Parties on matters related to the adequate and effective protection and enforcement of intellectual property rights”;
    - “Promote transparency and efficiency in the procedures and systems that establish protection of intellectual property rights, including making more relevant information available online”; and
    - Greater specificity on provisions that reflect a standard of protection similar to that found under US law, namely: “protections related to trademarks, patents, copyright and related rights (including, as appropriate, exceptions and limitations), undisclosed test or other data, and trade secrets”; and
  - A new additional point spells out an expectation that NAFTA’s Parties will “Provide the means for adequate and effective enforcement of intellectual property rights,” to ensure that the new commitments spelled out above are matched with resources to realize them.

Altogether, these points, if agreed, would likely bind Canada and Mexico to the stricter US-led protections on IP that both countries managed to avoid when the US withdrew from the TPP. The remaining 11 countries suspended these US-sponsored provisions in the move to provisional agreement on the CPTPP.

- **Transparency.** The dedicated section on transparency has been entirely removed, though some transparency concerns have been inserted elsewhere.
- **Procedural Fairness for Pharmaceuticals and Medical Devices.** A new *Objective* is added that seeks “standards to ensure that government regulatory reimbursement regimes are transparent, provide procedural fairness, are non-discriminatory, and provide full market access for United States products.” This new goal may indicate a US interest in exposing Canadian provincial medical systems to greater US involvement.
- **Competition Policy.** Given that the Parties’ trilateral statement at the conclusion of the fourth round of talks indicated “substantively completed discussions” on competition law, the updates in this section likely reflect text agreed by the negotiating teams. The new language:
  - Specifies efforts to “establish or affirm basic rules for procedural fairness on competition law enforcement” including by “allowing representation by counsel; recognizing privileged communications; providing for the protection of confidential and privileged information and communications; ensuring access to information necessary to prepare an adequate defense, providing an opportunity to present rebuttal evidence and cross-examine witnesses; and ensuring resolution of competition law cases before an impartial administrative or judicial authority.” Some of these points—such as cross-examination—may reflect aspects of the Bombardier-Boeing dispute and may also conflict with Québec’s civil-law tradition; and
  - Spells out that fines for violation of competition law should be set with respect to only profits earned in the national jurisdiction where the violation occurred.
- **Labour.** The update does not appear to include any changes to the labour section, which implies a continued lack of clarity on how the *Objectives* laid out here are consistent with many States’ right-to-work legislation.
- **Environment.** No changes are introduced to this section either, which remains silent on climate change. The lack of any updates on both labour and the environment may represent a hardening of the US position in these areas—or a sign that officials were not minded to further ratchet up tensions on these points.
- **Anti-corruption.** Following the passage of the Canadian *Magnitsky Act*, the updates here transform “encouragement” of the establishment of codes of conduct to promote high ethical standards into an expectation of “requirements” and add a new *Objective* on the promotion of “active participation by the public in efforts to combat corruption.”
- **Trade Remedies.** The new *Summary* adds a goal to “Facilitate the ability to impose measures based on distorted costs of inputs due to ongoing subsidization or dumping.” This new measure could be directed toward, *inter alia*, steel, the CSeries jets, softwood lumber, and seasonal produce.
- **Government Procurement.** Important changes are introduced here to support “America First”:
  - “Ensure reciprocity in market access opportunities for US goods, services, and suppliers in Canada and Mexico.” US statements imply a particular meaning of “reciprocity” that limits Canadian and Mexican actors to shares of the US public-procurement market that are equal to the US-dollar size of their own government-procurement markets. This would leave non-NAFTA actors with potentially greater access to US government procurement opportunities than Canada and Mexico would enjoy under a revised trade pact. Minister Freeland **noted** this US proposal “would give Canadian companies the same access to US government projects as firms based in Bahrain”;
  - In line with the US and Canada *Magnitsky Acts*, an expectation to “Establish obligation and procedure to combat corruption in procurement” is added; and
  - A goal to “Establish requirements that promote transparency in procurement statistics;” in other words, the Parties would be asked to prove their ‘reciprocity.’



- **Small- and Medium-Sized Enterprises.** The update adds the following goal, which likely reflects the provisional agreements already reached on SMEs: “Establish a NAFTA trilateral SME dialogue which may include the private sector, non-governmental organizations, and other SME stakeholders to provide views and information to the SME Committee.”
- **Dispute Settlement.** This section now features *Objectives* clearly in line with the US administration’s interest in unwinding NAFTA’s dispute-settlement mechanisms on investment under Chapter 11, trade under Chapter 19, and the operation of NAFTA itself under Chapter 20—and avoiding mechanisms akin to those being established under CETA. The update has added:
  - A goal to “Establish procedures to ensure that panels are composed in a timely manner and with appropriate expertise.” In and of itself, this point is not likely to meet objections from Canada or Mexico; and
  - An expectation to “Provide mechanisms for ensuring that the Parties retain control of disputes and can address situations when a panel has clearly erred in its assessment of the facts or the obligations that apply.” This likely refers to the US goal to make dispute settlement an optional—and, consequently, toothless—process. Canada and Mexico have indicated that they could not agree to this.
- **General Provisions.** The update adds a goal to “Provide a mechanism for ensuring that the Parties assess the benefits of the Agreement on a periodic basis.” In other words, the US has put its interest in a “sunset clause” directly into its negotiating objectives, but it has done so in a manner softer than official rhetoric by avoiding mention of automatic termination.

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