

A closer look at round five of the NAFTA negotiations

December 4, 2017

Round five of the NAFTA negotiations concluded in Mexico City on November 21, 2017. This round was conducted in the absence of trade ministers from all three countries in the hopes of advancing in technical areas and softening tensions between the parties.

In a joint statement, Canadian Foreign Affairs Minister Chrystia Freeland, Mexican Secretary of the Economy Idefonso Guajardo and United States Trade Representative Robert Lighthizer said that Chief Negotiators “concentrated on making progress with the aim of narrowing gaps and finding solutions. As a result, progress was made in a number of chapters.”¹ Negotiators made some progress on technical issues during this round, and the chapters on digital trade, sanitary and phytosanitary measures, anti-corruption, regulatory matters, trade facilitation and customs enforcement are reported to be near conclusion.²

Despite these advances, trade ministers still commented on the lack of progress on key issues this week. Robert Lighthizer stated, “While we have made progress on some of our efforts to modernize NAFTA, I remain concerned about the lack of headway. Thus far, we have seen no evidence that Canada or Mexico are willing to seriously engage on provisions that will lead to a rebalanced agreement. Absent rebalancing, we will not reach a satisfactory result.”³ Chrystia Freeland also expressed frustration and said, “There are some areas where more extreme (U.S.) proposals have been put forward. These are proposals we simply cannot agree to.”⁴

With respect to the progress made on less contentious portions of NAFTA, negotiators have reported that in this round they have been able to reduce the red tape for exporters and standardized food safety regulations between the three countries.⁵ Negotiations on digital trade have also seen some progress, so that countries will not be able to require disclosure of proprietary algorithms as a prerequisite for trade. This standardizes legislative precedents set in the US for the protection of proprietary algorithms. However, negotiators have yet to create similar protections for other forms of technology. Additionally, negotiators have agreed on limited civil liability for online platforms hosting third party contents. This change would create consistent accountability standards for content providers such as Facebook and Google.⁶

Time was also set aside each day of this round to discuss rules of origin. However, no substantive progress was made on US proposals to increase content requirements in the auto sector. Both Canada and Mexico have agreed to discuss auto changes but have insisted that the US proposal is too extreme. Mexico has pushed back on the US’s auto content requirements, stating that the proposals are “unviable” and would “make the region less competitive”.⁷ Idefonso Guajardo said on Tuesday that Mexico will offer a counter proposal to the US once the dimensions of the US proposal are “understood”.⁸ Canada has so far refrained from offering a counter proposal and instead made a presentation on the detriments of the US proposal to the North American automotive industry.⁹

The US proposal has also received backlash from Congress. More than 70 members of the US House of Representatives discouraged the US Administration from pursuing a boost to the current local production

requirements. The bipartisan group of lawmakers wrote a letter to the Trump Administration stating that the proposal "would eliminate the competitive advantages provided to the US auto industry under the current NAFTA rules—or lead to rejection by Canada and Mexico and the end of the agreement."¹⁰ In a related development, a delegation of Canadian Members of Parliament from three parties traveled to Washington, DC this week to meet with more than 60 Members of Congress to discuss the importance of keeping or improving NAFTA, rather than rejecting it outright, as President Trump has threatened several times in recent months.

The Mexican Chamber of Commerce (CCE) has said that the US delegation has been reluctant to cooperate in closing chapters. While Canada and Mexico are increasingly consolidating and supporting each other's proposals, the United States' willingness to show flexibility on more controversial matters is lower than its counterparts, said Moisés Kalach, Adviser to the CCE. Mr. Kalach stated: "In the report they [negotiators] gave us, we saw that the Mexican team is proposing, but the USTR (United States Trade Representative) is not responding." Mr. Kalach added that while there had been progress on some chapters, he doubted the willingness of the US negotiating team to make meaningful progress.

Another proposal that has been rejected by Mexico is a proposal relating to the seasonality of agricultural exports from Mexico and Canada by which different rules would apply to imports from Mexico and Canada depending on whether it is harvest season in the US. Regarding this proposal, Mr. Kalach said, in a radio interview, that "If you refer to the agricultural issue of seasonality, the response from the Mexican team was no, there is no part of the proposal that can be accepted, there is no counterproposal. It is simply no, it cannot be accepted." Mr. Kalach also acknowledged there is a risk that NAFTA may be terminated by the US before the conclusion of the renegotiation process.

Although government procurement was discussed on the first day of talks, no formal progress was made on this issue and the US remained firm in its position and proposal of new "Buy American" rules. ¹¹ Mexico has now responded with its own protectionist proposal, which would deny Americans access to Mexican government contracts.¹²

With respect to telecommunications, negotiators could not agree on the insertion of an Annex that would apply specifically to Mexico. The purpose of the Annex would be to prohibit America Movil (a Mexican telecommunications provider) from charging interconnection fees to competitors, such as AT&T, for calls using Movil's network. The disagreement raises sensitive issues of telecommunications reform in Mexico because an August 2017 Mexican Supreme Court case ruled against a 2014 legislative reform effort that contained the prohibition. The Court held that the interconnection fees must be set by the Mexican telecommunications provider, not by the Mexican legislator. The United States would like to enshrine the reform in a NAFTA Annex, notwithstanding the Supreme Court decision, while Mexican negotiators prefer not to address the matter.

In terms of the proposed sunset clause to terminate the agreement every five years unless the countries opted back in, on November 18, 2017, the US released updated trade objectives that appear to accommodate the Mexican proposal for periodic reviews of the trade pact without an automatic expiration. The updated trade objectives specify that the revised NAFTA should "provide a mechanism for ensuring that the Parties assess the benefits of the Agreement on a periodic basis."¹³ Canada and Mexico have also expressed flexibility on the US proposal to review NAFTA every five years, but they have insisted that it not include a clause that would automatically cancel NAFTA unless there was trilateral agreement to renew it.¹⁴

The updated trade objectives also articulate broad goals on dispute settlement, such as establishing "procedures to ensure that panels are composed in a timely manner and with the appropriate expertise", and "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."¹⁵ Further goals include "allowing arbitrators expeditiously to review and dismiss frivolous claims" and transparency throughout any process. ¹⁶ While quite vague, and perhaps indicative of support for

a set roster of arbitrators and appellate process in any revised system, these statements show support for keeping ISDS in the negotiations.

With respect to labour, Mexico recently announced that they will raise the minimum wage by 10 percent to 88.36 pesos (US\$4.71) per day.¹⁷ Unifor president Jerry Dias also appeared in Mexico's senate promising to fight for improved Mexican wages and free collective bargaining. Dias stated, "There will not be an agreement until the Mexican team agrees to free collective bargaining, the elimination of yellow unions and that Mexican workers get paid what they deserve."¹⁸

Without any real movement on the most contentious issues this round, stakeholders and negotiators are not optimistic about reaching an agreement by March 2018. Negotiators will continue to discuss more technical aspects of the agreement in Washington next month. The trade ministers will then return for round six of the NAFTA talks in Montréal, Canada, from January 23-28, 2018.¹⁹

Potential outcomes for the negotiations include: keeping the status quo - with no improvements made to NAFTA and the agreement remains in place (which we do not consider to be likely); updating the NAFTA along the lines discussed above by next summer in time for the Mexican elections; and the US providing notice of withdrawal or possibly even withdrawing from NAFTA with resulting uncertainty, lawsuits and potential Congressional reaction to follow. It is too early to predict which outcome is most likely and stakeholders will no doubt continue to press their issues with policy makers in all three countries.

Mexico and Canada continue to both engage in NAFTA talks while also looking to diversify their trading portfolios with partners in Asia and Latin America. The urgency of their efforts to find new markets and negotiate new agreements is tied directly to their level of impatience and concern with US positions on NAFTA.

Round five did not provide grounds for a great deal of optimism that an agreement will be reached soon and that the prevailing climate of uncertainty will improve. There is an increasing sense of urgency around planning for the different possible negotiating outcomes and North American companies are increasingly looking at the potential impacts of the negotiations on their value chains. As the NAFTA talks continue to unfold, our Dentons NAFTA team will monitor and report on major developments. Our team is also able to assist clients in developing customized tools to assist them in assessing and mitigating risks associated with the termination or amendment of the NAFTA. Please reach out to any of our key contacts for more information.

1. "Trilateral Statement on the Conclusion of the Fourth Round of NAFTA Negotiations", *Office of the United States Trade Representative* (November, 2017), [Trilateral Statement on the Conclusion of the Fourth Round of NAFTA Negotiations].↵

2. Alicja Sierkierska, "Deadlock on hard issues as NAFTA round concludes under cloud" *The Financial Post* (November 21, 2017) [Sierkierska].↵

3. "USTR Lighthizer Statement on the Conclusion for the 5th Round of NAFTA Renegotiations" *Office of the United States Trade Representative* (November, 2017). ↵

4. Sierkierska, *supra* note 2. ↵

5. Adrian Morrow, "NAFTA talks creep forward in Mexico" *The Globe and Mail* (November 19, 2017). ↵

6. Li Zhou, "NAFTA digital trade tweaks", *Politico.com* (November 20, 2017).↵

7. Anthony Esposito & David Lawder, "Mexico, Canada shun NAFTA autos counteroffers: sources", *Reuters* (November 19, 2017).↵

8. *Ibid*↵

9. *Ibid*↵

10. David Shepardson, "US House members oppose Trump Administration auto trade rules proposal", *Auto News* (November 15, 2017) ↵

11. Daniel Dale, "Freeland call US proposals 'extreme' as NAFTA round ends without major progress", *The Toronto Star* (November 21, 2017) ↵

12. *Ibid*↵

13. "USTR Releases Updated NAFTA Negotiating Objectives", *Office of the United States Trade Representative* (November, 2017). ↵

14. Alexander Panetta, "There are no fireworks: The hunt for news in a ho-hum NAFTA round", *The National Post* (November 18, 2017). ↵

15. Office of the United States Trade Representative, "Summary of Objectives for the NAFTA Renegotiation" at page 17 (November 2017) ↵

16. *Ibid* at pages 8-9↵

17. Sharay Angulo, "As NAFTA talks stall, Mexico raises minimum wage to \$4.71 per day", *Reuters* (November 21, 2017)↵

18. Anthony Esposito, "Unions take NAFTA wage fight to Mexican Senate" *Reuters* (November 17, 2017) ↵

19. Trilateral Statement on the Conclusion of the Fourth Round of NAFTA Negotiations, *supra* note 1.↵

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