

July 18, 2017

NAFTA Consultations
Global Affairs Canada
Trade Negotiations – North America (TNP)
Lester B. Pearson Building
125 Sussex Drive
Ottawa, ON K1A 0G2



Minister Freeland,

On behalf of the Ontario Chamber of Commerce (OCC), which represents 60,000 employers across the province, I am writing this letter in support of the attached submission from the Canadian Chamber of Commerce (CCC). The importance of the upcoming NAFTA renegotiations to Ontario business cannot be overstated, given how a strong Ontario-U.S. relationship has positively contributed to Canadian economic prosperity. Last year alone, Ontario was the largest Canadian export market for the U.S. and was the top customer for 30 of America's 50 states.

As Canada, Mexico and the United States approach a re-opening of NAFTA, the OCC echoes the sentiment of the CCC that this negotiation should be regarded as an opportunity to bring the agreement into the 21st century so that it better reflects the way we do business today.

In its submission to the NAFTA Negotiating Team at Global Affairs Canada, the CCC notes that it is critical the Canadian government enter this negotiation with a "shopping list". The OCC is broadly supportive of this approach; however, we feel it is important to emphasize some areas of priority for Ontario business.

The priorities of Ontario's business community include:

Climate policies

Increased input costs imposed on the private sector through the newly-minted cap and trade program mean that Ontario may become less competitive vis-à-vis competitor jurisdictions that are taking little to no action on climate change. This results in a situation in which Ontario loses jobs and investment as capital makes an economically and environmentally damaging shift in production to those competitor jurisdictions. Disparities between the NAFTA signatories regarding climate policies may alter the competitiveness of specific industries. While we do not believe climate policies themselves are appropriate matters for this negotiation, measures introduced because of those policies are relevant to NAFTA as they distort trade and impact Ontario business.

Confronting counterfeiting

The presence of counterfeit markets is associated with many negative effects to the overall economy, including lost taxes for governments, potential health and safety risks for consumers, a loss of sales and revenue to companies and potential lost brand value for corporations. Estimates of Canada's black market for pirated and counterfeit goods has been valued at more than \$30 billion a year.

Regulatory cooperation

Efficient regulation boosts economic performance and enhances the public interest. Within the complex relationship between Canada and the United States, a lack of regulatory commonality imposes huge costs for little public benefit. The OCC believes that the absence of regulatory cooperation hinders investment in Canada by creating distortions and friction in the market.

Rules of origin (ROO) burden reduction

The rules of origin set out in NAFTA were designed for a 20th century trading relationship and, as such, are now frustratingly out of date. Beyond the administrative costs, academic literature has shown that ROO, while they eliminate trade deflection, also distort trade flows and reduce efficiencies in the production process. This impacts purchasing and assembly decisions as well as manufacturing productivity in the highly-integrated North American supply chain.

We hope that the governments of Canada and Ontario can maintain the important working relationships with the U.S. that will lead to continued shared prosperity. We believe that the attached CCC submission, on behalf of the many employer voices within Canada's Chamber Network, provides an excellent set of guidelines toward achieving that goal.

Sincerely,



Richard Koroscil
Interim President & CEO
Ontario Chamber of Commerce

CC:

Hon. Justin Trudeau
Prime Minister of Canada

Hon. Chrystia Freeland
Minister of Foreign Affairs

Hon. Marie-Claude Bibeau
Minister of International Development and La Francophonie

Hon. Francois-Philippe Champagne
Minister of International Trade

Hon. Kathleen Wynne
Premier of Ontario

Hon. Brad Duguid
Minister of Economic Development and Growth

Hon. Michael Chan
Minister of International Trade

David MacNaughton
Canada's Ambassador to the United States

Steve Orsini
Secretary of the Cabinet

Perrin Beatty
President, Canadian Chamber of Commerce



**Submission to the NAFTA Negotiating Team at
Global Affairs Canada**

on

**Re-negotiation of the North American Free Trade
Agreement**

June 15, 2017

Introduction

In 1994, the North American Free Trade Agreement (NAFTA) came into effect, creating one of the world's largest free trade zones and laying the foundations for strong economic growth and rising prosperity for Canada, the United States, and Mexico.

Since then, Canada's trade with the US has risen by 254% to \$670 billion, while trade with Mexico has grown by a staggering 900% to \$41 billion. NAFTA has created millions of jobs (about 14 million American jobs depend on trade with Mexico and Canada, according to the US Chamber of Commerce).

The agreement has systematically eliminated most tariff and non-tariff barriers to free trade and investment between the three NAFTA countries. This has increased trade and investment levels in North America, bringing strong economic growth, job creation, and better prices and selection in consumer goods. Finally, NAFTA improves our competitiveness by providing businesses with better access to materials, technologies, investment capital, and talent available across North America.

Canada approaches the re-negotiation of a new North American Free Trade Agreement in a defensive posture. We did not seek this negotiation and in the climate of hostility towards trade which is currently evident in the United States, we would prefer it was not launched now.

But the Canadian Chamber of Commerce believes Canada should nonetheless regard the negotiation as a chance to overhaul a critical, but aged, agreement, and to seek the maximum benefits that can be realized. While all negotiation involves both gains and losses, the Chamber believes there are opportunities amid the perils. Canada's list of its demands should be as long as the list of concessions our trade partners may seek.

Canada's Agenda

The Chamber of Commerce strongly believes Canada should enter these negotiations with a “shopping list” of objectives and not just a defensive posture on items we believe the U.S. or Mexico will propose.

Some Canadian priorities would include:

- **E-commerce**

One of several deficiencies in the NAFTA, arising from the passage of time and the evolution of commerce, is the lack of reference to the rapidly growing online marketplace. This is an area of the negotiations in which both Canada and the U.S. have offensive agendas, which may be complimentary.

The taxation of digital commerce is a relatively new aspect of trade cooperation. Although it's currently largely a market for entertainment products, the digital marketplace will soon grow to impact goods and services as well. All three NAFTA nations have an interest in the taxation of the online market. The NAFTA negotiation may be an appropriate opportunity to expand cooperation in this issue.

American legislators are raising data localization rules and cloud computing issues (privacy, access by security agencies) and there is some suggestion that the two countries may have shared views. The free flow of data is essential. This may also be an area for alignment, as we agreed in the TPP.

- **Regulatory Cooperation**

Efficient regulation boosts economic performance and enhances the public interest for which the regulation is created. In the enormous and complex relationship between Canada and the United States, a lack of regulatory commonality imposes huge costs for little public benefit.

Recognizing this, the two countries have cooperated on the creation of new regulations, and in amendments to existing regulatory processes to ensure our shared economy is as seamless as possible. The Canadian Chamber regards this as a pragmatic and useful exercise, one which encourages investment in Canada by removing distortions and friction in the market.

The Chamber urges the inclusion of the Regulatory Cooperation effort in the NAFTA framework, with a chapter which set out process guidelines so the exercise remains consistent and ongoing.

- **Reduce the administrative burden of rules of origin**

The rules of origin set out in the NAFTA, designed for a trading relationship of the 1990's, are out of date. Product descriptions of goods traded 20 years ago are no longer adequate for today's complex manufactures and parts that did not exist at the time the NAFTA was negotiated.

Working with outdated rules of origin has implications for business in how their products are classified, but also on how regional content is calculated. This impacts purchasing and assembly decisions and ultimately, manufacturing productivity in the highly-integrated North American supply chains.

Modern agreements like the CETA provide greater clarity on methods of calculation and remove burdensome requirements like content tracing, a requirement still in effect under NAFTA. Modernization

of NAFTA rules of origin will provide greater certainty to North American manufacturers and exporters, providing more accurate product descriptions and clearer methods to calculate regional content.

- **Reduce onerous extra-territorial U.S. financial regulation**

The Foreign Account Tax Compliance Act (FATCA) is an example of costly regulation imposed on Canada by the US to address a specific domestic concern. The law was enacted in 2010 by Congress to target non-compliance by U.S. taxpayers using foreign accounts.

FATCA is enormously costly to Canada's banks and insurers because it requires foreign financial institutions to report to the IRS information about financial accounts held by U.S. taxpayers, or by any entity in which U.S. taxpayers hold a substantial ownership interest.

The Canadian Chamber supports international cooperation on tax administration, but only in a reciprocal environment. But the approach employed in this case effectively threatens Canadian investment and trade in an effort to address an entirely separate issue.

- **Trade remedy cooperation**

Canada should consider proposing new cooperative undertakings within NAFTA concerning trade rule enforcement. One would expect that a trade complaint affecting one of the NAFTA partners would likely be a concern to the others.

Cooperation in trade remedies would therefore be a logical progression for the NAFTA nations. A provision which required all three nations to notify one another and share certain information when any one of them initiated a trade investigation would underline the cooperation between them and the integration of their economies.

- **State to State dispute mechanism (Chapter 20)**

NAFTA's Chapter 20 has only been used three times in the history of the agreement. In a renegotiation, Canada should seek improvements to include greater certainty in panel appointments. The CETA agreement, once implemented, will have a fixed roster of people appointed by governments.

- **Mobility of workers**

NAFTA is rapidly becoming outdated, in terms of reflecting the kinds of occupational designations which have sprung up in the last two decades since the agreement was originally signed.

Canada has for some time argued to expand the NAFTA visa-exempt categories for temporary entry. The United States State Department previously developed an expanded annex for visa-exempt categories but it was never acted upon due to lack of support from USTR.

Outdated or ambiguous job lists present challenges for businesses to allow entry of professionals whose occupations did not exist at the time the NAFTA was negotiated. Already, disagreements have arisen in areas such as healthcare, advanced practice nursing and allied professions. Unless resolved, this

ambiguity will create increasing challenges as jobs change further through technology and new work arrangements, and undermine the goal of professional mobility.

These disagreements demonstrate the need for a more effective mechanism to keep job profiles updated and reflective of the real economy, as an ongoing process. An agreement basing worker mobility on outdated professional categories from a single fixed point in time will hinder innovation and economic growth.

Any future agreement should contain mechanisms to keep professional categories updated and relevant, and should discourage entry being granted and withdrawn arbitrarily, creating instability for workers and employers alike.

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Outdated or ambiguous job lists present challenges for businesses, including in key sectors like healthcare, to allow entry of professionals whose occupations did not exist at the time the NAFTA was negotiated.

- **Climate policies**

Disparities between the NAFTA signatories regarding climate policies may alter the competitiveness of specific industries. While we don't believe climate policies themselves are appropriate matters for this negotiation, measures introduced as a result of those policies are relevant to NAFTA as they distort trade. Canada may wish to assert its right to level the playing field by invoking relevant environmental exceptions under the WTO, NAFTA and other trade agreements.

- **Presidential Review of Pipelines and Transmission Lines**

NAFTA contains extensive provisions ensuring that Canada cannot interfere with energy exports. Articles 603 – 607 detail the specific, and very limited, conditions under which Canada can curtail exports in response to armed conflict, concerns about nuclear proliferation, etc. It is surprising, then, that the United States retains the authority for the President to issue a permit allowing the construction of an energy pipeline or transmission line to cross the international border.

This provision was not created by legislation. Instead it was created by President Lyndon Johnson in 1968 in Executive Order 11423, which states “. . . the proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities connecting the United States with a foreign country.”

The requirement for a presidential permit authorizing oil and gas pipelines and hydro transmission lines has been a significant irritant for Canada. The former Chief Executive declined to issue a permit for a high profile application, despite the conclusions of the Department of State which repeatedly found no significant environmental or market damage. The current Chief Executive has suggested he would use the permit to require the use of domestically-sourced steel. Neither of these situations respect the purpose of the NAFTA nor its Chapter 10.

Canada should seek a provision of the new NAFTA removing this mischievous requirement for pipelines and transmission lines crossing the Canada/US national border.

American Agenda

Reviewing the comments of political figures and the issues raised by legislators in their confirmation proceedings for nominees of the new administration, the Canadian Chamber has identified some issues which will likely be included in a U.S. list of issues. Our list includes issues on which we believe Canada should be inflexible, and others where we would endorse concessions.

- **Changes to U.S. government procurement rules**

The President's inaugural address pledged to "Buy American and Hire American." The most obvious manifestation of that strategy would be in national preferences for procurement at the federal or state levels.

This is a serious scenario, a clear violation of the spirit of the agreement as expressed in article 1003 of the agreement. We regard this as one of only a few un-negotiable issues. Treating businesses equally regardless of their nationality was the central purpose of the NAFTA and the very definition of "fair trade."

The probability of eventual Canadian retaliation in the face of explicit protectionist measures makes the situation doubly hazardous for Canadian business. We urge the Canadian government to make this one of its highest priority issues in both the negotiations and in dialogue with our NAFTA partners more generally. Canada should seek unfettered access to state and local procurements in addition to the federal level.

- **Disruption to rules of origin**

The rules of origin set out in the NAFTA, designed for a trading relationship of the 1990's, are out of date. Product descriptions of goods traded 20 years ago are no longer adequate for today's complex manufactures and parts that did not exist at the time the NAFTA was negotiated.

Working with outdated rules of origin has implications for business in how their products are classified, but also on how regional content is calculated. This impacts purchasing and assembly decisions and ultimately, manufacturing productivity in the highly-integrated North American supply chains.

Modern agreements like the CETA provide greater clarity on methods of calculation and remove burdensome requirements like content tracing, a requirement still in effect under NAFTA. Modernization of NAFTA rules of origin will provide greater certainty to North American manufacturers and exporters, providing more accurate product descriptions and clearer methods to calculate regional content.

- **Foreign ownership restrictions in certain industries**

Canada has myriad legislated restrictions on investment by non-nationals in industries such as telecommunications, broadcasting, airlines, insurance, banking, uranium mining, liquor retailing, etc.

Each of these was created with a specific public policy purpose, often many years ago. Our liquor importation rules are traced back to the end of Prohibition, our ownership restrictions on uranium mining were a product of the Cold War. The Canadian Chamber has long argued that restricting the nationality of investors is not the most useful way to regulate industries.

There is no economy-wide principle at stake. These restrictions are highly selective and we can't make a single blanket recommendation regarding their retention. Each needs to be evaluated on its current impact and value to determine if Canada should retain it.

In a NAFTA negotiation Canada should be guided by these assessments and show flexibility. We should remember that, just because our trade partners target these rules doesn't mean Canada has to defend them all.

- **Confronting Counterfeiting**

In 2015 the USTR featured Canada on its "Notorious Markets" list, which identifies countries which host or permit online piracy and counterfeiting. In 2016 the focus shifted to Canada's weak response to in-transit counterfeit goods; "The United States remains deeply concerned that Canada does not provide customs officials with the ability to detain pirated and counterfeit goods that are moving in transit or are transshipped through Canada."

The Canadian Chamber has repeatedly demanded the government strengthen the resources and authorities needed by Canada Customs to interdict counterfeit goods. We have also noted the WIPO obligations Canada has pledged to respect regarding online piracy and counterfeiting; undertakings we made to all the signatories, not just the U.S.

- **Chapter 19: Anti-dumping and Countervailing Duties**

One of the key reasons why Canada sought a formal Free Trade agreement with the United States was to seek relief from lengthy and expensive court proceedings. Before the bilateral was negotiated, assertions of dumping were common and easily launched, effectively serving as a means of harassment.

The bi-national panel created in Chapter 19 was a solution which had some effect in the early years of the Agreement. Indeed, it was the most emblematic aspect of the special relationship which engendered it. But it has been the target of U.S. criticism and in recent years has been a slower and less effective remedy for disputants.

Notwithstanding U.S. discontent, Canada should vigorously defend Chapter 19. The alternative is already known and is highly unsatisfactory. The trading relationship between us is many times larger and more complex than it was in the early 1980s, and there is no reason to suppose the litigation processes in Canada or the United States are better equipped to adjudicate trade disputes than they were thirty years ago. Elimination of the dispute resolution provisions concerning Anti-dumping and countervail is a formula for reducing bi-national trade. If we return to the pre-Free Trade era, with Canadians ensnared in endless litigation in U.S. courts, the entire purpose of this negotiation will be in doubt"

- **Currency manipulation**

At present, American preoccupation with currency is directed towards China. Canada's currency floats freely, so it should not attract hostile attention. But Canada will have to be vigilant to ensure that provisions targeting other parties don't affect us in collateral ways.

- **Intellectual property**

The United States has expressed concern about Canada's Patent Court's demand for heightened utility requirements; a standard which has led to the removal of patent protection for two dozen products in the last decade. The Canadian Chamber has repeatedly asked the Canadian government to legislate to clarify the standard and bring Canada into line with other nations. Given this, we do not support an aggressive defense of this issue.

The Canadian Chamber has long advocated increased protection for creators and innovators under Canadian Copyright and Patent laws. The Chamber has also long urged the government to strengthen patents for pharmaceuticals developed here, a position we reiterated in the negotiations with the European Union.

- **Agricultural income support mechanisms**

Arguably the most intractable issue in trade negotiation, all over the world, is agriculture. The North American situation is no different, with governments in all three nations deeply involved in the farming economy with a myriad of interventions including high defensive tariffs, farm income support programs, subsidies and supply management arrangements.

The Canadian Chamber believes a comprehensive review of these trade-impacting interventions would make success of NAFTA negotiations less likely and much more protracted, and we neither advocate nor expect such a comprehensive effort. Specific, limited measures are more feasible, but they must be entered into with a clear understanding that all the parties are equally implicated. There's no truth to the suggestion that Canada's policies are out of line with the other parties.

A principle of reciprocity would have to accompany any significant changes to agricultural support programs in the three nations.