



NEGOTIATING OBJECTIVES REGARDING MODERNIZATION OF THE NORTH
AMERICAN FREE TRADE AGREEMENT WITH CANADA AND MEXICO

COMMENTS ON NAFTA NEGOTIATIONS

SUBMISSION BY THE COUNCIL OF THE AMERICAS
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The Council of the Americas (Council) appreciates this opportunity to provide comments concerning forthcoming negotiations among all three parties—the United States, Canada, and Mexico—to modernize NAFTA. Since 1965 the Council has promoted democracy, open markets, and economic and social development based on the rule of law, and we are widely recognized for our policy and commercial leadership throughout the Americas. The Council represents over 200 companies invested in and doing business across the Western Hemisphere, representing a significant amount of trade and cross-border investment.

The Council of the Americas Is a Long-Standing Leader on North America Issues

The Council has long been a proponent of North American economic integration based on market principles. North American integration is part of our DNA. Through our Mexico-U.S. Business Committee which later became the North American Business Committee, the Council was an early champion for the idea of freer trade as a driver of the economic agenda and job creation in all three North American economies. We were leaders in the conceptualization, formulation, and implementation of NAFTA. Our view was and remains that the United States cannot be fully effective in promoting its interests abroad if the economy is not healthy and growing. Key to a strong U.S. economy is expanding commercial integration with our North American neighbors, and the supply chains that we anticipated at the time would, and subsequently did, develop. Our efforts supported the creation and promotion of NAFTA.

After the terrorist attacks on September 11, 2001, the North American agenda expanded to become the trilateral government-led Security and Prosperity Partnership (SPP), with a commercial component, the North American Competitiveness Council (NACC), which the Council of the Americas organized as the co-secretariat. The SPP/NACC effort was replaced by the succeeding administration's bilateral High Level Economic Dialogue with Mexico, with the Council as one of the key institutional participating organizations.

NAFTA Has Directly Supported U.S. Economic, National Security, and Foreign Policy Interests

Through these and numerous additional activities, the Council was an early and consistent promoter of the view that strengthening commercial ties with Mexico, and institutionalizing and expanding such ties via a formal trade agreement, would also support Mexico's own democratic transition and create a baseline for broader economic and eventually political and security cooperation. This, indeed, proved to be the case.

Even we did not predict, however, how significant Mexico's shift would be, and how meaningful the cooperation across the full spectrum of issues important to the United States—including our national security—would become. Though difficult and vexing issues remain evident, Mexico is today a full democracy and a cooperative partner that shares the almost 2000 mile southern U.S. border. NAFTA has directly supported Mexico's transition and has contributed to a shift in attitude throughout society toward pragmatic cooperation and away from ideological confrontation. U.S. security would be directly compromised if this were not the case, as it would also be with Canada.

Meanwhile, NAFTA itself continues to provide the basic framework for the majority of North American commercial relations. Yet North America itself has changed dramatically. The global economy has also changed. NAFTA has been a success in its almost 25 years of existence, doing what it was designed to do: increase trade and investment among all three parties to the agreement. Trade among the three nations has quadrupled between 1993 and 2015. Canada, as our second largest goods trading partner and Mexico, as our second largest export market and third largest trading partner overall, are crucial to the development and success of the U.S. economy.

Now Is Time to Advance NAFTA Modernization

But NAFTA was also an experiment, the first time in history that the world's most advanced economy entered into a rules-based agreement to open its economy with a developing nation on a reciprocal basis. It was an important advance. But the agreement has not kept up with economic changes that could not be anticipated at the time it was negotiated. Neither does it incorporate political advances, such as Mexico's decision to open its energy sector to outside investors.

As a result, and as a means to build competitiveness in the global economy for the United States and to strengthen our own economic and national security, the Council continues to advocate publicly for the modernization of NAFTA to meet the demands of the 21st century.

Our primary recommendations for U.S. officials preparing to enter into such negotiations with their Canadian and Mexican government counterparts include the points that we have developed below in close consultation with our membership.

Key Council Recommendations for Priority Consideration in NAFTA Modernization

Digital Trade

The global economy has fundamentally transformed over the quarter century since NAFTA was signed, with the internet and related e-commerce being leading examples of technologies that were only nascent in 1993 and therefore not fully or adequately incorporated into the original agreement. Businesses of all sizes, across all sectors, rely on digital technologies and the free flow of data across borders to conduct their business and access new markets. We are therefore encouraged by recent comments by U.S. Trade Representative Lighthizer and Secretary of Commerce Ross recognizing the importance of digital trade in NAFTA modernization. Accordingly, we encourage the administration to include forward-looking digital trade provisions in a modernized NAFTA to ensure that businesses can transmit data across borders, without arbitrary requirements to store and process data locally as a condition of doing business. Digital trade provisions developed with input from stakeholders in all three countries would enable cooperation on critical issues of cybersecurity and intellectual property rights, and can also set a new standard for future trade agreements. Well-designed digital trade provisions in a modernized NAFTA can also address issues of incompatible digital regulatory frameworks, which disrupt the ability of companies to trade across borders. NAFTA should include a commitment to adopt high-standards legal frameworks to protect personal information, while also adopting and implementing mechanisms that ensure the compatibility of these legal frameworks. A revised NAFTA should also include provisions that ensure the development of online consumer protection and cybersecurity regulatory frameworks that strengthen trust and facilitate trade across the regional digital economy. It should avoid differentiation between financial and non-financial data. Measures to force the sharing of software source code with foreign entities should be prohibited.

Intellectual Property Rights

The intellectual property chapter should help U.S. companies protect their valuable intellectual property by establishing criminal procedures for trade secret theft, including by SOEs and by means of cyber-theft. This would also prevent governments forcing companies to disclose trade secrets as a condition of market access. The chapter should commit to ensuring the availability of mechanisms to enforce intellectual property rights, including civil and administrative procedures and remedies, and particularly provisional measures including *ex parte* injunctions and seizures and criminal enforcement. This is an important precedent for U.S. companies that face significant challenges involving trade secret theft both through employee misappropriation and by means of computer hacking. NAFTA should mandate that parties establish copyright safe harbors for internet service providers (ISPs), while providing safeguards against abuse of such regimes and not requiring those ISPs to monitor content on their networks or systems. This signifies that legitimate providers of cloud computing, user-generated content sites and other internet-related services can develop their businesses online while ensuring that internet copyright privacy be addressed.

Regulatory Practices

Simply stated, the revised agreement should increase transparency of the regulatory process, recommend coordination between regulatory entities, and consider input from global stakeholders. Auto safety standards should be a priority area for negotiation, also leading to agreement to pursue recognition of such standards in other markets. As new standards are devised for cutting-edge industries, harmonization of standards across NAFTA will facilitate U.S. competitiveness. The United States engages Mexico and Canada on two separate tracks through the U.S.-Mexico High Level Regulatory Cooperation Council (HLRCC) and the U.S.-Canada Regulatory Cooperation Council (RCC). Under the U.S.-Canada RCC, the two governments are working to identify and eliminate differences in existing regulations that do not have a public health or safety rationale. Considering the degree of integration among all three North American economies, the process of streamlining regulations and harmonizing regulatory processes should be undertaken regionally to achieve greater benefit. Enshrining these mechanisms in a modernized NAFTA would be helpful to support a more active and engaged dialogue with the Mexican government. Early engagement during rulemaking is particularly important so that the three countries avoid creating regulatory barriers in the first place.

State-Owned Enterprises

SOE's do not play a large role in North America but they are nonetheless present. Coverage of their activities within the NAFTA context should end preferential treatment (e.g., concessionary financing, state-backed guarantees, and regulatory favoritism). To the extent possible, NAFTA parties should commit to ensuring that SOEs make commercial purchases and sales based on commercial considerations and do not discriminate against the enterprises, goods and services of other parties. Claims of sovereign immunity should not be allowed to impede oversight of SOE actions and obligations, and NAFTA should seek to address potential adverse effects to another party's domestic industry by a party providing non-commercial assistance to an SOE that produces and sells goods in the territory of another party.

Financial Services

The Financial Services chapter of NAFTA has served as a strong foundation for the financial sector but lacks coverage and provisions in important areas that should be addressed in a NAFTA modernization. In addition to locking in existing levels of openness and integration in financial services, modernization should ensure the free flow of data and prohibit forced data localization, provide for a more formalized, principles-based consultative mechanism on regulatory cooperation by expanding the scope of the NAFTA Financial Services Committee to mandate more integrated cooperation on regulatory matters, and ensure that the financial sector receives the same level of investor protections and ability to enforce these protections, including for a breach of national treatment and most-favored nation treatment, through the critically-important ISDS provisions.

Customs Procedures and Border Optimization

NAFTA renegotiation provides an opportunity to improve on WTO trade facilitation commitments and collaboration for implementation, as well as ensure that customs laws and regulations do not create barriers to trade. The goal should be simplification of procedures and mutual acceptance of necessary documentation. Both the World Trade Organization's Trade Facilitation Agreement (TFA) and the World Customs Organization's Revised Kyoto Convention (RKC) provide ready-made blueprints for improving the efficiency and transparency of customs regulations and practices to which all three economies should synchronize. Both the TFA and the RKC prescribe mechanisms such as pre-arrival processing of shipment data, effective risk management techniques, and smart border processes that employ tax and duty collection mechanisms that are separate from customs release. All three elements are critical to establishing a commercial environment that is conducive to the growth of U.S. exports, especially e-commerce.

Additionally, as the United States finalizes implementation of its Single Window (ITDS) platform, customs authorities and partnering government agencies should collaborate to align requirements between the U.S. system, Canada's Single Window Initiative (SWI), and Mexico's Single Window (Ventanilla Única). Single Window allows for the electronic submission of import information by shippers to one central entity for clearance by all relevant agencies. This capability should be expanded to allow for the digitalization of all customs documentation, including customs powers of attorney and NAFTA certificates. All three platforms should be recognized by the other two governments.

Relevant to making the NAFTA relationship work better, de minimis levels should be harmonized at the U.S. level. Further, the Administration should pursue harmonization and mutual recognition of America's C-TPAT, Canada's PIP, and Mexico's AEO trusted trader programs, ensuring that all offer the same expedited release benefits at the border, such as reduced border compliance reviews. As well, security practices can only reach maximum efficacy if all stakeholders, including postal operators, are held to the same standards.

Energy Trade and the Environment

Originally excluded from NAFTA due to restrictions to foreign investment in Mexico's energy sector, energy trade has nonetheless flourished among the United States, Mexico and Canada. The energy sector is one of the foremost illustrations of integrated and interdependent commercial relations among the three countries and energy provisions in a revised agreement must support this reality. The dynamics of energy supply and demand have dramatically shifted over the past decade, due largely to the renaissance in U.S. shale production. North America is now on the verge of achieving energy self-sufficiency by 2020. Trade flows among NAFTA countries are multi-directional and robust across crude oil, refined products, natural gas and electricity. The United States, now the largest producer of crude oil and natural gas in the world, counts on Canada and Mexico as its top energy export markets, with Mexico serving as a primary outlet for surging U.S. natural gas production. This dynamic lowers the cost of inputs for Mexican industry and increases the competitiveness of NAFTA's integrated supply chains.

A revised NAFTA agreement must maintain the nature of this open and free energy trade and include provisions that support continued integration of the North American energy industry, including clean energy. Further, investment protections that support energy development and sectoral integration must also be codified and preserved under a new agreement. Standards modernization and harmonization, including human capital development and best practices on environmental matters, would also support further energy sector integration.

Government Procurement

Government procurement provisions should remove local content requirements and improve transparency to ease unreasonable restrictions. Increasing the amount of required local content through “Buy America” provisions would not significantly benefit many U.S. companies, but reciprocal measures by Canada and Mexico that raise local content requirements in government procurement would negatively impact many U.S. companies’ opportunities in these markets.

Rules of Origin

Over the 23 years since NAFTA was established, companies have developed global supply chains that source inputs from around the world based upon the rules and requirements set forth in the existing agreement. These issues are fundamental to the success of the North American economy and U.S. economic wellbeing and must be assessed and addressed carefully. If requirements become too strict or unreasonable or economically-debilitating, companies may elect to forego NAFTA’s preferential treatment and opt to simply pay MFN tariffs rather than seeking costlier North American inputs. This would actually result in *less* inputs being sourced from within North America. The Council and our members urge that an appropriate balance be struck.