

Overview of the Announced United States-Mexico-Canada Agreement

By [Alberto de la Pena](#), [Ed Lebow](#), and [Larry Pascal](#)

Background

After more than a year of sometimes contentious negotiations, the United States, Mexico and Canada agreed on the terms of an update to the North American Free Trade Agreement (NAFTA). Perhaps reflecting the attitude of the U.S. Administration, the words “free trade” are nowhere to be found in the title of the new United States-Mexico-Canada Agreement (USMCA). And in fact, there are many provisions in the USMCA that are designed more to control internal behavior of the parties than to ensure unfettered trade. Canada and Mexico made concessions to continue to allow their economies to be integrated with that of the far larger U.S. These concessions go so far as to include a provision whereby the other two NAFTA parties could withdraw after six months to form a bilateral agreement if one of the parties were to enter into a free trade agreement with a so-called non-market economy country such as China, which is seen by the U.S. as its principal geo-strategic and economic challenger in the coming decades.

A successful negotiation was by no means a sure thing, and Canada and Mexico, weighing the risk of an economic downturn, apparently took seriously the threats of the U.S. to terminate NAFTA without an agreed replacement. Once Mexico accepted some of the U.S. terms for modifications in rules of origin applicable to autos and auto parts, and the U.S. backed away from its insistence on five-year sunset of any new agreement, it became possible for those two countries to announce an agreement in principle late in August. This put pressure on Canada not to be left out and so to acquiesce to U.S. demands for increased access to Canada’s protected dairy market. Canada held fast to its position, but ultimately when the U.S. signaled its willingness to leave in place the so-called Chapter 19 dispute resolution process for appeals of U.S. antidumping and countervailing duty decisions, the negotiations moved quickly to a conclusion before the October 1 deadline imposed by the U.S. Interestingly, the market share for U.S. dairy products accepted by Canada is only slightly higher than that included in the Trans Pacific Partnership (TPP) that the U.S. had abandoned early in the current administration.

In terms of providing stable conditions for business investment, as noted the U.S. proposal for a five-year sunset clause was not accepted. Instead the new agreement has an initial 16-year term that is extendable in conjunction with reviews by the parties after six years.

As made public, the USMCA comprises most of the chapters of NAFTA, plus several others, many of which were found in the TPP. Among the most important differences from NAFTA are chapters on Labor and Environment, both of which were touched upon in side agreements subsequent to publication of the original NAFTA, but which were not covered in NAFTA itself and which were often criticized as weak and unenforceable.

The USMCA also includes chapters on Digital Trade, Small and Medium-Sized Enterprises, Competitiveness and Anticorruption. The Digital Trade Chapter is in fact seen as an improvement over the TPP in that the ban on data localization requirements extends to financial services. There are also significantly updated rules of origin covering not just autos, but also textiles, chemicals and other sectors. One noteworthy provision on Intellectual Property (IP) affords 10-year data protection for the data used in the development of biologic drugs, and another sets a 70-year term after the death of the author for copyright protection.

The USMCA does not include a chapter on Energy. It also significantly curtails (but does not entirely eliminate) the investor-state dispute settlement (ISDS) mechanism found in NAFTA.

Perhaps due to the hurried conclusion of the USMCA negotiations, the released draft text of the agreement lacks the tight organization of NAFTA and is accompanied by a host of Annexes and Side Letters, some of which address highly sensitive topics such as safe harbor for Mexico and Canada against any possible U.S. Section 232 national security tariffs on automobiles. The rush to agree by October 1 was the result of the interplay between circumstances in Mexico and the U.S. In Mexico, the last day President Peña Nieto could sign before the end of his term in office was November 30, 2018. In the U.S., the Trade Promotion Authority “Fast Track” law requires the president to present a text to Congress at least 60 days before signing. Thus, to get an agreed text to the U.S. Congress in time for the U.S. and the current Mexican administration to sign, that text had to be published by October 1, 2018.

Although there was a joint signing ceremony near the end of November 2018, the USMCA will not take effect until ratified by the U.S. Congress, as well as by the other parties.

The following are some other more significant elements of the agreement.

National Treatment and Market Access for Goods

As the USMCA presents itself first and foremost as a free trade agreement, it does the following:

- Keeps the benefits of tariff-free imports for a large portion of trade
- Incorporates the 1994 General Agreement on Tariffs and Trade unless otherwise provided in USMCA
- Provides a framework for faster and more transparent administrative processes to enable the delivery of goods in customs throughout the North American region
- Simplifies procedures for certifying the origin of qualifying goods and greatly expands the types of documents that can be used for such certifications
- Increases cooperation and transparency regarding the creation of regulatory barriers and evaluation of conformity procedures for certain products so as to facilitate trade among the Parties and thus prevent or avoid unnecessary barriers to trade

Agriculture

For agricultural products, the USMCA will preserve existing commitments among Canada, the United States and Mexico. This will contribute to the continued integration of the agriculture industry in North America. There is to be a revamped Committee on Agriculture Trade, which will be a forum for Parties to resolve issues in this area.

Much has been written about the reluctance of Canada to open its market to U.S. dairy products. Ultimately, Canada did accede to some U.S. demands and has allowed a phased-in 3.6 percent market share for U.S. producers, slightly higher than contemplated under the TPP. Canada also agreed to remove certain elements of its supply management system that had effectively closed its market to U.S.-produced non-fat milk solids, of which there is abundant supply due to recent increasing demand for butter. The new trade pact gradually eliminates Canadian tariffs on U.S. whey and margarine. Canada will also give new access to U.S. chicken and eggs and improve access for U.S. turkey products. For its part, Canada also secured a number of benefits, including increased access to U.S. markets for sugar and products containing sugar.

In 2017, total U.S. agricultural exports to Mexico reached \$19 billion and U.S. imports of agricultural products from Mexico totaled \$25 billion. This was comprised largely of fresh fruits and vegetables, such as tomatoes, peppers, cucumbers, berries and melons, especially during seasons of decreased production due to cold weather in the United States. Accordingly, the most significant development in the USMCA concerning agricultural trade between the United States and Mexico is that no harm was done. U.S. cattlemen were also pleased that their Mexican export markets were not disrupted, though there was some criticism of USTR's failure to secure new rules on country-of-origin labeling for meat products.

Automotive Vehicles and Component Parts

In the automotive sector, new automotive rules of origin impose higher levels of North American content in order to incentivize production and sourcing in North America (and particularly in the United States and Canada).

As to both the rules for automobiles and automotive parts, the regional North American content will increase from 62.5 percent to 75 percent by 2023 to qualify for duty-free treatment under USMCA. In addition, rather than continuing to insist on the incorporation of a specific U.S. content, the U.S. proposed, and Mexico and Canada agreed, that after a 5-year term, 40 percent (in the case of cars) and 45 percent (in the case of trucks) of the vehicle is to be manufactured by workers earning on average at least \$16 per hour. The USMCA also requires that 70 percent of the steel and aluminum used in vehicle production must be originated in North America to comply with the rule of origin.

Overall, the regional content provision is intended to increase automobile and automotive parts production in the United States. Automobiles imported without complying with the rules of origin of USMCA will be subject to standard duties (e.g. 2.5 percent for general passenger vehicle in the United States). In addition, if the U.S. makes a finding that the volume of automobile imports constitutes a risk to its national security under Section 232 of the Trade Act of 1974, a 25 percent tariff could be imposed to replace the current 2.5 percent (although the USMCA guarantees to each Mexico and Canada a quota of 2.6 million vehicles subject to a duty no higher than 2.5 percent, it is unclear if this safe harbor would apply if those vehicles do not meet USMCA minimum regional content levels).

Energy

As mentioned above, the USMCA does not include an energy chapter. It does include, however, a short chapter on hydrocarbons that ratifies Mexico's position that the State owns hydrocarbons before extraction which is consistent with Article 27 of the Mexico Constitution. This new chapter does not include any obligation or commitment of Mexico regarding its current regime of liberalized foreign investment in the energy sector. Otherwise, the applicability of other provisions in the agreement to energy would suggest that the current trade arrangements in the energy sector are largely maintained. That would include duty-free treatment of hydrocarbons and refined products, some ISDS protections for the oil and gas and energy sectors, and full access to procurement opportunities by Pemex and the state-owned power company CFE, subject to a prescribed carveout for local suppliers.

Trade Remedies and Technical Barriers to Trade

At Canada's insistence, the USMCA retains a special system of binational arbitral panels as an alternative to the respective national courts systems as a forum for appeals of adverse decisions in antidumping and countervailing duty proceedings. Although statistics do not suggest that these procedures have been overall of

significant benefit to Canada, for certain sectors, particularly forest products, NAFTA panels have served Canada's interests very well.

The agreement incorporates several provisions of the Technical Barriers to Trade Agreement of the WTO. Each Party must ensure that its technical regulations concerning labeling provide for treatment no less favorable than that applied to national products and that such measures do not create unnecessary obstacles to trade among the Parties. Each Party shall notify the other Parties of any proposed technical regulations and conformity assessment procedures that may have a significant effect on trade among the Parties.

Government Procurement

The government procurement section of the USMCA will only apply to the United States and Mexico. Canada and the U.S. will retain access to each other's procurement markets through their obligations under the WTO Agreement on Government Procurement, whereas the government procurement obligations between Mexico and Canada will be subject to the TPP. As between Mexico and the United States, the U.S. abandoned its originally stated objective of "strict reciprocity," which would have limited Mexican vendors' access to the U.S. federal market, on a dollar-for-dollar basis, to that afforded in the vendors' (substantially smaller) home market. Instead, the USMCA text ended up looking substantially similar to the text of the TPP (terminated by the U.S. but otherwise ratified by enough of the other signatories to have entered into effect), and it does not give Mexico substantially broader access to U.S. state and local procurement markets than under NAFTA. On the federal level, current Buy America provisions remain in place, though the Trump Administration has suggested that it may lower the threshold above which Buy America rules become applicable.

Investment

The USMCA contains improved minimum standards for protection of investments. It also maintains ISDS for some types of government actions (violations of most-favored nation obligations and direct expropriations) involving U.S. investments in Mexico, and vice versa. The USMCA requires, however, that investors initiate and continue (for a minimum of 30 months) proceedings in local courts before resorting to USMCA arbitration. There is an exception to this requirement, however, for disputes over government contracts involving oil and gas, power, infrastructure and telecommunications, in which limited circumstances direct resort to arbitration is permitted. Disputes between Mexico and Canada will be governed by the ISDS provisions of the TPP, to which both are signatories. There is no ISDS provision for disputes between the United States and Canada.

Digital Trade

The new Digital Trade chapter contains a robust regulation of digital trade that will facilitate the expansion of trade and investment. This chapter generally prohibits application of customs duties and other discriminatory measures to digital products distributed electronically (music, videos, software, etc.)

The USMCA seeks to protect consumers by requiring each Party to adopt or maintain laws that guard against fraudulent or deceptive commercial activities, as well as laws that protect the personal information of users of digital trade. In the same vein, the Parties must maintain or adopt measures limiting unsolicited commercial electronic communications and provide recourse against suppliers of these messages.

With regard to cybersecurity, the USMCA simply recognizes that cybersecurity threats could undermine digital trade and requires that the Parties endeavor to build entities to handle cybersecurity incidents and cooperate to identify and mitigate such threats. The USMCA protects companies' source codes and algorithms by prohibiting

a Party from requiring the disclosure of proprietary computer source code and algorithms by a person of another Party as a condition for doing business in its territory. As an additional protection to unfettered digital commerce, the USMCA specifically limits the civil liability of providers of Internet platforms for third-Party content.

Finally, and perhaps most significantly, the USMCA bars requirements for data localization, even with respect to financial services. Now companies will be able to work in all three member countries without having to establish duplicative and costly data servers. The argument in favor of data localization had been that each country is best able to protect its own citizens' information. The efficiencies from globalized data storage and the avoidance of digital protectionism were, however, ultimately seen as more important.

Intellectual Property

The intellectual property section of the USMCA sets forth the obligations of the Parties with respect to each of a broad range of types of intellectual property, including trademarks, country names, geographical indications, patents, industrial designs, copyright and related rights, and trade secrets.

As would be expected of an agreement drafted more than two decades after the entry into force of NAFTA in 1994, the USMCA introduces many new ideas reflective of how drastically technology has changed since then. For example, the way that music is purchased, listened to, and shared today using online app stores, streaming platforms, and messaging apps requires a wholly different copyright protection regime than when the biggest concerns were the importation and distribution of pirated compact discs. Nevertheless, most U.S. practitioners would probably be familiar with the new or different provisions in the USMCA, as most appear to reflect current U.S. jurisprudence. For example, copyright protection is generally set as extending 70 years after the death of the author. Indeed, the USMCA may be more about improving transparency and creating baseline consistencies among the USMCA member states than about pushing innovations in the law. To that end, the USMCA establishes a new tri-partite Committee on IP Rights that will consider such issues as enhancements of IP rights protections, strengthening border measures and approaches for reducing infringement.

For IP issues, perhaps the most attention in the negotiation of the USMCA has been paid to the term of protection afforded to biologics drugs. Biologics are compounds produced utilizing biological processes and include vaccines, genetic therapies and a host of expensive drugs used to treat conditions such as rheumatoid arthritis. Under the USMCA Canada and Mexico will increase the periods of exclusivity given to the data to produce biologic drugs to ten years, which, although less than the 12-year period of exclusivity afforded by the U.S. Food and Drug Administration, is still considered a significant gain for the U.S. pharmaceutical industry. The USMCA will also ensure that Parties are compensated by patent term adjustment for an unnecessary or unreasonable delay in the processing of a patent application. Not surprisingly, some consumer advocacy groups see such changes as weakening competition and increasing consumer costs by allowing drug companies to slow the introduction of generic drugs.

The USMCA also enhances IP enforcement over NAFTA. The number of provisions specifically requiring civil or criminal penalties for particular acts of infringement is significant. While NAFTA only required criminal penalties for willful trademark counterfeiting and copyright piracy on a commercial scale, the USMCA requires criminal penalties for at least 14 different acts of infringement, such as circumventing technological protection measures, tampering with rights management information, and performing unauthorized decoding of an encrypted program-carrying satellite signal.

Labor

The labor provisions of the USMCA are included in the main text, Chapter 23, rather than being in a side agreement as was the case with NAFTA. Chapter 23 incorporates some widely-recognized International Labor Organization (ILO) rights, such as freedom of association, collective bargaining and elimination of discrimination with respect to employment and occupation. These new provisions, aimed at Mexico, require USMCA countries to have laws providing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health, and to take initiatives to prohibit the importation of goods into their territory from other sources produced by forced or compulsory labor.

The USMCA requires the Parties to provide access to fair, equitable, and transparent administrative and judicial proceedings to ensure that labor standards and rights are more strictly enforced. In anticipation to USMCA, in September 2018, Mexico ratified ILO Convention No. 98 regarding the protection of the workers' right against any acts of anti-union discrimination and collective negotiation, thereby granting workers full power and freedom to elect whether to belong to a union. ILO Convention No. 98 was adopted in Geneva in 1949, and since 1998 has formed part of the four fundamental employment rights set forth in the ILO Declaration on Fundamental Principles and Rights at Work.

In addition, under Annex 23-A (Worker Representation in Collective Bargaining in Mexico), Mexico has agreed to take specific legislative actions to strengthen collective bargaining, including the right of workers to engage in concerted activities for collective bargaining or protection and to organize, form, and join the union of their choice. Mexico has committed to adopt legislation that will (i) prohibit employer domination or interference in union activities, and (ii) require verification that collective bargaining agreements meet the legal standard of workers support in order for them to be registered and have legal effect. In addition, collective bargaining agreements will be publicly available through the Mexico's General Law on Transparency and Access to Public Information.

Environment

The USMCA incorporates new commitments to address global environmental challenges such as ozone-depleting substances and marine pollution, illegal fishing and the depletion of fish stocks, illegal wildlife trade, species at risk, and conservation of biological diversity. It also includes a commitment to prevent and reduce marine litter, promote sustainable forestry management, and to consider intentional transnational trafficking of protected wild species as a serious crime.

The Parties acknowledge that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded by those laws for purposes of encouraging trade or investment.

To ensure effective enforcement (the absence of which was a marked deficiency of the NAFTA side agreement on environment), any person of a Party may file with the Secretariat of the Commission for Environmental Cooperation a submission asserting that a Party is failing to effectively enforce its environmental laws.

Sunset Provision and Restrictions on Agreements with Non-Market Economy Countries

The United States dropped its much-publicized demand that the agreement sunset after five years unless the Parties are able to agree to an extension. Instead, the USMCA has an initial 16-year term. After six years,

however, the Parties are required to review the agreement and can, at that time, push out the expiration to a date sixteen years later, with reviews on the same terms every six years, or they can agree to meet annually, with the possibility of later agreeing on an expiration date sixteen years in the future. Any Party may withdraw with six months prior notice.

Another noteworthy aspect of the USMCA is that in it the Parties agree that if any one of them enters in a free trade pact with a “non-market economy country,” the others can quit the USMCA after six months and form their own bilateral agreement. This is clearly intended by the United States to prevent Canada or Mexico from entering into a free trade arrangement with China. It serves both to protect against China using Canada or Mexico as a back door into the U.S. market and to contain China, which is increasingly seen by the United States as its principal global economic and strategic rival.

Conclusion

The USMCA, despite occasional concessions to U.S. manufacturing sectors such as automotive and steel, maintains the regional trade agreement among the three countries. The agreement also updates the NAFTA in many important areas where the pace of technological change may have created ambiguities or vacuums. Overall, there is enough improvement and enhanced certainty to please constituents in each of the three countries, including companies engaged in cross-border trade and investment. Nevertheless, final implementation anytime soon is by no means certain. First, the U.S. International Trade Commission (ITC) was required, under Trade Promotion Authority legislation, to produce a report on the impact of the USMCA on the U.S. economy. That report, *United States-Mexico-Canada Agreement: Likely Impact on the U.S. Economy and Specific Industry Sectors*, was released on April 18, 2019. In that report, not surprisingly, the ITC found that because most significant tariff barriers to trade within North America had previously been eliminated by the North American Free Trade Agreement (“NAFTA”), the measurable macro-economic effects of the USMCA are likely to be modest. Much of the benefit of the USMCA will come from its focus on other issues that affect trade, such as an improvement in labor standards and workers’ rights in Mexico, achieving regulatory harmonization, and eliminating barriers to investment. The USMCA is also anticipated to improve data flows and to strengthen protections for U.S. firms that rely on intellectual property rights.

The much-discussed changes in automotive rules of origin are estimated by the ITC to increase U.S. production of auto parts as well as employment in the automotive sector. The resulting higher prices (0.37% for pickup trucks and 1.61% for small cars) due to shifting from Mexico the United States of some production of parts, however, are anticipated to lead to a small decrease in consumption of motor vehicles in the United States, with 140,000 fewer vehicles (1.25%) being purchased annually.

The ITC’s model estimates that the USMCA would raise U.S. real GDP by \$68.2 billion (0.35%) and U.S. employment by 176,000 jobs (0.12%). It could be asserted that these figures do not adequately account for the growth in digital trade and e-commerce that are likely to be stimulated by the USMCA.

The next step is for implementing legislation to be drafted and introduced. It must be approved by a simple majority in both houses of Congress. There is, however, no deadline for when the legislation must be introduced. Opposition to the agreement as drafted by labor and environmental groups may contribute to delays. Demands by Canada and Mexico for rescission of the Section 232 “national security” tariffs also serve to complicate the situation.

Only after introduction of the implementing legislation does the TPA clock once again begin moving. Although the times set out under TPA appear to be short (60 days for the House and then 30 days for the Senate), the deadlines are based on legislative days, and with Congress in session only three days per week and with

numerous holiday breaks, the process could take as long as 60 weeks if the House and Senate do not act concurrently. Thus, even if the implementing legislation is introduced in the near future, Congressional action on the USMCA may get caught up in the contentious U.S. political climate leading up to the November 2020 election. (Note, four years elapsed after the completion of negotiations before the U.S.- Columbia FTA was introduced in the House of Representatives.)

The possibility of the president's terminating NAFTA to induce the Congress to act, coupled with the difficulty many elected officials find in voting for a "free trade" agreement, further contribute to current uncertainty. The ITC report will in all likelihood be pointed to by both supporters and opponents of ratification of the USMCA, with the former noting the benefits to the U.S. economy, and the latter stressing that the modest gains are insufficient to justify enactment.

The authors wish to thank numerous lawyers in the firm who contributed to this article. Refer to the [NAFTA Task Force page](#) to contact our team members.