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The United States-Mexico-Canada Agreement is Announced to Replace NAFTA

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On September 30, 2018, Canada joined the U.S. and Mexico in agreeing to the renegotiated terms of the North American Free Trade Agreement (NAFTA), now called the United States-Mexico-Canada Agreement (USMCA).[1] The USMCA is the product of a year-long and often contentious tri-party negotiation over this $1.2 trillion free trade agreement, which over time looks to achieve incremental market access and other gains for U.S. industry and for now represents a significant milestone for the Trump administration and its "America First" trade strategy. Whether the USMCA in its current form becomes law depends on required U.S. legislative review, which will not occur until after the midterm elections may have changed the make-up of Congress — but features of the agreement seem likely to draw bipartisan support.

The View from Washington

In a Rose Garden speech, President Trump hailed the announcement of the USMCA as "*truly historic news*," reminding the audience that he viewed NAFTA as "*perhaps the worst trade deal ever made*."[2] The U.S. Trade Representative (USTR) summed up the renegotiation mandate as "*[p]rotect American workers, fight for our farmers and ranchers, preserve America's competitive innovation, secure greater access for our business, and, above all, bring back jobs to America*."[3] In this respect, the fact that the USMCA is not formally called a "trade" or "free trade" agreement is somewhat telling. The U.S. got Mexico to agree first, placing pressure on Canada to potentially face tariffs if it did not join, which it did just before a midnight deadline.

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With the new NAFTA negotiated, all eyes turn to China, where thus far the U.S. has imposed tariffs on what amounts to approximately 50 percent of its imports, with no resolution in sight. Some may see the USMCA as signaling the beginning of a conciliatory phase for the Trump administration's trade policy, particularly with midterm elections upcoming. However, it seems more plausible that the Trump administration's renegotiation of NAFTA may embolden its approach towards China, now more confident that a strategy of sustained pressure backed up by the leverage of the U.S. market ultimately will force trading partners to accede to its demands.

Major Features of the Agreement

Despite its new name, the USMCA essentially is a modernized version of NAFTA. In that respect, in its larger context, business and industry can take some relief in that the global supply chains they have put in place over the last generation fundamentally can remain in place.

Industry Sectors

The USMCA will have meaningful impact on a variety of important industry sectors. For example:

- *Agriculture:* Canada agreed to provide U.S. dairy farmers with access to about 3.5 percent of its market, after President Trump's repeated criticism that Canada was imposing tariffs of 300 percent on imports from the U.S. There are also advances for U.S. exporters of wheat and poultry.
- *Automotive:* The percentage of parts required to be made in North America to qualify for duty-free treatment increases in phases over a three-to-five-year period, from 62.5 percent to 75 percent. This may have been the most complex issue in the negotiation and responds to concerns that China was sending products to Mexico for assembly and then using it as an entry point into the U.S., invoking NAFTA privileges. Also, there are requirements that 30 percent and later 40 percent of a vehicle's value be made by workers paid at least $16 an hour, to try to encourage more manufacturing in the U.S. by gradually making U.S. labor more cost-competitive.

- *Digital Commerce:* Efforts were defeated to impose requirements that data be stored locally. Though there were concerns that lack of data localization could undermine privacy protections, IT and internet companies in turn were worried about restrictions on the free flow of information.
- *Pharmaceuticals:* Intellectual property protection for biologic drugs is extended to 10 years, increasing the period before generic alternatives can be made. This matches the term in the Comprehensive and Progressive Trans-Pacific Partnership, which is the successor to the Trans-Pacific Partnership ("TPP"), the free trade agreement the U.S. pulled out of in 2017.

> **The Trump administration's renegotiation of NAFTA may embolden its approach towards China**

Trade and Investment-Related Provisions

The USMCA also contains important provisions concerning the regulation of trade and investment and the resolution of related disputes. For example:

- *Antidumping and Countervailing Duties:* The special body set up within NAFTA to adjudicate disputes concerning antidumping and countervailing duties (AD/CVD) will remain in place, as an alternative to having to litigate in domestic courts. Preserving this mechanism may have been the most important issue for Canada, which uses it to manage its massive trade with the U.S. in lumber.
- *Investor-State Dispute Settlement:* The grounds for private parties to have a direct right of recourse to sue host governments concerning treatment of their investments have been eliminated between the U.S. and Canada, as there have been concerns that these arbitral tribunals were usurping the authority of governments to regulate. As to Mexico, "ISDS" has been curtailed, e.g., to instances of direct expropriation and to some contracts in certain sectors such as energy, given the prominent role of Mexico's national oil company, Pemex, and the recent reforms Mexico has undertaken in this sector to encourage foreign investment.
- *Steel and Aluminum Tariffs:* For now, the global steel and aluminum tariffs also imposed on Canada and Mexico will remain in place, though the U.S. has indicated that it will discuss alternative arrangements, perhaps including changing to an agreed quota amount. The parties have similarly negotiated a side letter putting in

place pre-established export quotas for automobiles, to protect Canada and Mexico in the event the U.S. were to impose tariffs.

The USMCA further contains a provision unmistakably aimed at China. It provides that a party to the agreement can terminate it if either of the other two parties enters into a free trade agreement with a country either one of them considers to be a "non-market economy," as the U.S. has designated China.[4] This effectively acts as a block on Canada or Mexico entering into a trade agreement with China without the U.S. first having a say. Also, as the USTR has indicated that the USMCA serves as a template for the trade agreements the U.S. will pursue moving forward, this may be an indicator of how the U.S. may try to align trading partners against China.

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Key Takeaways

- A trilateral deal appears to have been achieved, keeping in place a hemispheric trade agreement, with an objective of seeking to shift more manufacturing from Asia.
- However, if the U.S. Congress resists approving the USMCA, the fate of what was NAFTA could become more uncertain, as President Trump opposes it and there will similarly be a new economic nationalist president in Mexico taking office in December.
- Even if the USMCA goes into effect as scheduled, key provisions such as on increased regional content will not be fully phased in until a few years thereafter, and there is no immediate tariff relief for imports from Canada and Mexico of steel and aluminum.
- Achieving agreement with Canada and Mexico would not necessarily seem to have a bearing on reaching resolution with China, where tariffs are set to increase from 10 percent to 25 percent, and where President Trump has signaled a willingness to impose additional tariffs.

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1 United States-Mexico-Canada Agreement (Oct. 1, 2018), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement.↩

2 Remarks by President Trump on the United States-Mexico-Canada Agreement (Oct. 1, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-united-states-mexico-canada-agreement/.↩

3 Id.↩

4 USMCA Art. 32.10.↩

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Mario Mancuso, P.C.

Partner / New York / Washington, D.C.

Anthony Rapa

Partner / Washington, D.C.

Lauren Friedman

Partner / New York

Sanjay José Mullick

Partner / Washington, D.C.

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