The U.S.-Mexico-Canada Agreement: An overview of what’s changed and what remains the same

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In this international trade brief, we discuss the renegotiated NAFTA — now known as the United States-Mexico-Canada Agreement (USMCA) — including what’s changed and what’s new and how it will impact cross-border trade.

Late on Sunday, September 30, 2018, after 13 months of negotiations, and just in advance of a U.S. legislative deadline, the United States and Canada announced that they had reached an agreement on the text of a renegotiated free trade agreement. The revisions build on the agreement in principle reached between the U.S. and Mexico at the end of August, creating the successor to NAFTA, the USMCA.

The full text of the USMCA as it currently stands has been released by the U.S. Trade Representative (USTR) and can be found on its website.

As documented in our previous international trade briefs, the negotiations have been arduous and at times it seemed that a deal was unattainable. However, the parties have reached compromises that seem to curtail the more drastic changes that were initially proposed by the U.S. Administration, while maintaining some provisions that were fundamental to Canada’s agreeing to a renegotiated trilateral agreement.

WHAT HAS NOT CHANGED

Much of the difficult negotiations revolved around Canada’s insistence on maintaining certain provisions of NAFTA, contained in Canada’s list of key demands, released shortly before negotiations began. These include many of the following subject matters, which appear to have remained largely unchanged:

- Cultural Industries Exemption - Canada’s cultural industry exemption from NAFTA has been continued in the USMCA, but additional text on dispute settlement and retaliation has been added.
Chapter 19 - the binational dispute settlement process used to address anti-dumping or countervailing duties imposed by the other parties remains in the USMCA, seemingly unchanged from the original version in NAFTA except for its move to Chapter 10.

Chapter 20 - similarly, Chapter 20 of NAFTA, which deals with the state-to-state dispute settlement mechanism, is now Chapter 31 of the USMCA.

Temporary Entry Visas - another priority for Canada was maintaining and possibly increasing the scope of professionals who could be provided work visas for temporary entry under NAFTA. These provisions appear to have remained largely unchanged in the USMCA.

Steel and aluminum tariffs - the steel and aluminum “section 232” tariffs grounded on national security concerns, imposed on Canada by the U.S. earlier this year, were not addressed in the USMCA. These will be addressed outside the USMCA. However, side letters to the USMCA obligate the U.S. to seek a negotiated solution with Canada and Mexico for 60 days, before applying any new tariffs under section 232 against either of the two countries.

WHAT HAS CHANGED

The table below outlines some of the key changes from NAFTA to the USMCA:

<table>
<thead>
<tr>
<th>Subject</th>
<th>NAFTA</th>
<th>USMCA</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dairy industry</td>
<td>Canada had largely exempted its supply-managed dairy industry from its general free trade obligations under NAFTA</td>
<td>Under the USMCA, Canada must provide access to its dairy market that is currently equivalent to approximately 3.5% of the market and eliminate restrictions on milk classes 6 and 7 imports</td>
<td>Continued protection of Canada’s supply management system for dairy (and poultry) was a priority for Canada in these negotiations</td>
</tr>
<tr>
<td>Chapter 11</td>
<td>Provided for investor-state dispute settlement</td>
<td>Investor-state dispute arbitration mechanism will be phased out for claims against Canada or by Canadians in three years</td>
<td>Canada was looking to reform Chapter 11. Since there were far more U.S. claims against Canada, arguably the phase-out is effectively a “win” for Canada</td>
</tr>
<tr>
<td>Auto exports</td>
<td>NAFTA content requirement: 62.5% for passenger vehicles and light trucks, 60% for other</td>
<td>NAFTA content requirement: 75% with requirements concerning minimum hourly wages for workers (to be phased in)</td>
<td>The cap for the section 232 tariff exemption far exceeds Canada’s current auto exports to the U.S., (approximately 1.8 million vehicles per year)</td>
</tr>
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</table>
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The U.S.-Mexico-Canada Agreement (USMCA) — including what's changed and what's remained the same in the form of the new trade agreement. The USMCA includes the first-ever chapter targeting currency manipulation in a free trade agreement. The USMCA also includes a novel and potentially controversial provision related to free trade agreements with non-market economies.

WHAT’S NEW

There are several new provisions, which appear to have been adopted from the Trans-Pacific Partnership Agreement (which has since become the Comprehensive and Progressive Trans-Pacific Partnership Agreement, without the U.S. as a party) and can now be found in the USMCA. Some other provisions, as described below, relate specifically to current concerns of the U.S.

SUNSET CLAUSE

The USMCA contains a provision known as a “sunset clause,” which provides for an automatic termination after a fixed period unless the agreement is explicitly extended by the parties. Although the U.S. was initially seeking a five-year sunset clause, the USMCA extends the period to a 16-year term, with a review required within the first six years of the agreement that could lead to a renewal for another 16-year term.

| De minimis import thresholds for duty and tax collection | 50-year following life of author copyright term | 70-year following life of author copyright term | The intellectual property provisions in the USMCA largely mirror the Comprehensive and Progressive Trans-Pacific Partnership free trade deal that Canada signed earlier this year.

| De minimis | De minimis threshold is $20 for duties and sales tax (denominated in Canadian dollars) | De minimis threshold is $150 for duties and $40 for sales tax (denominated in Canadian dollars) | The de minimis threshold of $20 has not increased since 1985. Canadian retailers have indicated that these de minimis thresholds provide an unfair advantage to foreign retailers, as they only apply to consumer purchases and not purchases by retailers.

| Intellectual property | 8-year data protection for biologics | 10-year data protection for biologics |

| vehicles | Section 232 tariffs: Up to 2.6 million Canadian auto exports to the U.S. are exempt from tariffs in case of any safeguard duties imposed by the U.S. |
GREATER ACCESS TO THE B.C. WINE MARKET

To address an ongoing issue between the B.C. government and U.S. wine producers, under a side letter to the USMCA, Canada has confirmed that B.C. will eliminate its current requirement that allows only B.C. wine to be sold on grocery store shelves.

CURRENCY MANIPULATION

The USMCA includes the first-ever chapter targeting currency manipulation in a free trade agreement. The text of this chapter requires parties to publicly disclose, on a monthly basis, currency reserves data and interventions in foreign exchange markets.

TRADE WITH CHINA

The USMCA also includes a novel and potentially controversial provision related to free trade agreements with “non-market” economies, which essentially is targeted at China. Specifically, it requires notice of any intent to negotiate a free-trade agreement with a non-market economy, disclosure of the objective of the negotiations and disclosure of the text of any agreement at least 30 days before signing. It also explicitly provides for a process to terminate the USMCA, replacing it with a modified bilateral agreement (without the party that chooses to enter into a new trade agreement with a “non-market economy” country). While the Canadian government had been exploring entering into bilateral trade negotiations (to supplement the existing foreign investment promotion and protection agreement) with China, this new provision appears to limit the possibility that Canada will move forward on its own to negotiate a free trade agreement with China.

WHAT’S NEXT?

The text of the agreement released by the USTR is subject to legal review to ensure accuracy and consistency. The public release of the text by the USTR triggers the 60-day review period before U.S. President Donald Trump can sign the agreement. The review period expires in late November, which will allow the agreement to be signed by the current Mexican administration prior to the swearing in of the newly elected Mexican President on December 1.

Once signed, the agreement will proceed through the treaty ratification process of the three countries. Though it is unlikely to face major stumbling blocks in Canada and Mexico, the ratification of the USMCA in the U.S. will take place after the November congressional elections. This could present issues if, for example, the Democratic Party takes control of one or both chambers of Congress and is not satisfied with the provisions in the USMCA, or is not inclined to give U.S. President Donald Trump a political ‘win’ in the form of the new trade agreement. Therefore, though much of the heavy lifting has been completed, there is quite a bit of work that remains before the USMCA can supersede NAFTA and govern trade between Canada, the U.S. and Mexico.

Our colleagues’ need-to-know guide on IP in the U.S.-Mexico-Canada Agreement can be found here.
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WHAT'S NEXT?

The USMCA also includes a novel and potentially controversial provision related to free trade agreements. The agreement explicitly provides for a process to terminate the USMCA, replacing it with a modified bilateral agreement in the form of the new trade agreement. Therefore, though much of the heavy lifting has been accomplished, there is now a legal framework in place in which the U.S. will take part.

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Though it is unlikely to face major stumbling blocks in Canada and Mexico, the ratification of the USMCA will be a priority for the Biden administration. Therefore, the U.S. was initially seeking a five-year sunset clause, the USMCA extends the period to a 16-year term, with terminations of the USMCA to take place after a fixed period unless the agreement is explicitly extended by the parties. Although the U.S. was initially seeking a five-year sunset clause, the USMCA extends the period to a 16-year term, with terminations of the USMCA to take place after a fixed period unless the agreement is explicitly extended by the parties. Although the U.S. was initially seeking a five-year sunset clause, the USMCA extends the period to a 16-year term, with terminations of the USMCA to take place after a fixed period unless the agreement is explicitly extended by the parties. Although the U.S. was initially seeking a five-year sunset clause, the USMCA extends the period to a 16-year term, with terminations of the USMCA to take place after a fixed period unless the agreement is explicitly extended by the parties.

WHAT WENT RIGHT

The cap for the Section 232 tariffs imposed on steel and aluminum will remain in the USMCA, seemingly unchanged from the original NAFTA agreement. This will be part of the arduous negotiations that have taken place in the USMCA. However, side letters to the USMCA obligate the U.S. to seek a negotiated solution with Canada and Mexico for 60 days, before applying any new tariffs under Chapter 11. Since there were far more U.S. claims against Canada than the other way around, the negotiations have been arduous and at times contentious.

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