

NAFTA Replacement Announced

October 3, 2018 – Cross-Border Counselor

by T. Augustine Lo

On Sunday, September 30, 2018, the U.S. and Canadian governments announced that they had reached agreement on a new trilateral trade agreement with Mexico, which will replace the North American Free Trade Agreement (NAFTA). This long-awaited text, released late in the day as the “United States-Mexico-Canada Agreement (USMCA),” is now available for public inspection.^[1] The two governments announced this agreement just before a key deadline was set to expire at midnight.

As reported in May 2017,^[2] the Trump Administration commenced a process to renegotiate NAFTA, citing the need to update the cornerstone trilateral agreement that has governed trade among the three countries since 1994. At that time, U.S. Trade Representative Robert Lighthizer informed Congress that the renegotiation would include the key trade negotiation objectives that underpin the Trade Promotion Authority (TPA) that Congress granted in 2015, and extended in mid-2018.^[3] Adherence to that TPA framework is key, because it would allow for a simplified legislative process that avoids proposals for significant amendments.

TPA requires the Trump Administration to publish the proposed agreement 60 days before the President enters into the agreement. Because of the Trump Administration’s negotiation tactics, that deadline fell on September 30.^[4] The Trump Administration reached tentative agreement with Mexico at the end of August. Because Mr. Lighthizer initially announced his intention to renegotiate NAFTA with both Canada and Mexico, it appeared that TPA required all three countries to reach agreement. The public was kept in suspense, as Canada did not indicate its intention to join until just a few days before the deadline.

The USMCA text released late Sunday appears to cover the objectives announced in May 2017.^[5] In addition to sections that appear in the current NAFTA, there are new provisions relating to digital trade, regulatory practices, labor, environment, and small and medium enterprises. There are also enhanced provisions relating to state-owned enterprises that contains express prohibitions, and enhanced protection of intellectual

Related People

- T. Augustine Lo

Related Capabilities

- Canada Cross-Border Transactions

property. According to Mr. Lighthizer, these were the areas that required updating because of significant advancements since 1994. (It is interesting to note that these objectives also appeared in the Trans Pacific Partnership of Pacific Rim nations that the Obama Administration negotiated, and from which President Trump withdrew in early 2017.)

A notable difference from the current NAFTA is that the USMCA, unlike NAFTA, would automatically terminate if not renewed. During the sixth year, each country must give notice of its desire for the agreement to continue for another 16 years. If such consent is given, the process would repeat 6 years later.

Although the United States had indicated a desire to abolish NAFTA dispute settlement panels, it appears Canada succeeded in pressuring the Trump Administration to preserve a key aspect of the panels. Currently, NAFTA provides for a panel to review of any tariff-related measures imposed under a country's domestic laws as "trade remedies." In a major concession to Canada, the USMCA preserves the panels to review trade remedies. At the same time, the USMCA curtails a separate provision regarding disputes relating to private investments; that mechanism will be limited to certain disputes between Mexico and the United States.

Although the text has been released, the USMCA still must overcome Congressional scrutiny (as well as any obstacles to ratification in Canada and Mexico) before it can enter into force. For instance, Congress must be satisfied that the USMCA satisfies the TPA parameters to avoid a drawn-out legislative process. Because that process may not occur until 2019, the mid-term elections in November 2018 may determine whether the Republicans retain control of Congress to push through the Trump Administration's USMCA text. All eyes will be on Congress to see whether USMCA will replace NAFTA and become law.

[1] <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico>

[2] <https://www.crossbordercounselor.com/trump-administration-announces-nafta-renegotiation/>

[3] <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/june/ustr-lighthizer-welcomes-extension>

[4] <https://www.politico.com/story/2018/09/30/nafta-trade-canada-819081>

[5] <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTA%20Notification.pdf>