

December 18, 2019

USMCA: Amendment and Key Changes

Overview

On December 10, 2019, the United States, Canada, and Mexico agreed to a protocol of amendment to the proposed U.S.-Mexico-Canada Agreement (USMCA). The amendments include modifications to key elements of the original text in regard to dispute settlement, labor and environmental provisions, intellectual property rights (IPR), and steel and aluminum requirements in the rules of origin for autos. On December 13, the Trump Administration submitted to Congress the proposed USMCA implementing legislation, which also reflects the recent amendments. On the same day, the United States-Mexico-Canada Implementation Act (H.R. 5430) was introduced in the House of Representatives. On December 16, the bill was introduced in the Senate (S. 3052).

U.S. Trade Representative and some Members of Congress negotiated proposed changes to the USMCA. USTR then negotiated the amendments with USMCA parties. Mexico was the first country to ratify the agreement in June 2019 and approve the amendments by a 107-1 vote in the Mexican Senate on December 12. Canada has not ratified the agreement.

Congress is expected to consider USMCA under TPA rules, which is the time-limited authority that Congress uses to consider implementing legislation for trade agreements under expedited procedures, provided that they meet certain statutory requirements. Under TPA, Congress has a maximum of 90 legislative days to vote on the agreement.

Dispute Settlement

Some Members of Congress criticized the 1994 North American Free Trade Agreement (NAFTA), and subsequent USMCA, for an ineffective dispute settlement process. The NAFTA mechanism was used for three cases in its 25-year history, the last in 2000. The amended USMCA includes:

- **Panel Blocking.** The revisions prevents the ability of a party to block establishment of a dispute settlement panel by ensuring the formation of a panel in cases where a party refuses to participate in the process of selecting panelists.
- **Rules of Procedure.** The amendment revises the guidelines for the Rules of Procedure for panels to give the parties the right to submit testimony, the right to test the veracity of submitted testimony, the right to submit anonymous testimony, and for the panel to accept agreed stipulations prior to a hearing, among other issues.
- **Free Trade Commission.** The revised language dispute process by eliminating the consultative role of the USMCA Free Trade Commission, which acts as a

secretariat for the agreement, as an intermediate step to resolve disputes.

Labor

USMCA revised NAFTA by adding more enforceable labor provisions and an annex with Mexican commitments to reform its labor laws and practices. Numerous policymakers remained concerned about enforcement and the full implementation of Mexican labor reforms. Amendments to USMCA include the following:

- **“In a Manner Affecting Trade and Investment.”** Original provisions required a party to prove a violation regarding worker rights occurred “in a manner affecting trade and investment.” The amendment shifts the burden of proof by stating that a panel shall presume a violation affects trade and investment unless otherwise demonstrated.
- **Forced Labor.** Text on forced labor commitments was changed by removing language that a party could adopt measures it “considered appropriate” to stop the importation of goods produced by forced labor. The modified language is intended to close what some saw as a possible loophole.
- **Violence Against Workers.** Language that a party would have to prove that a violation was in a “sustained or recurring” pattern was removed. In addition, the amended agreement shifts the burden of proof to the responding party by stating that a panel shall presume that a failure to comply affects trade or investment unless the responding party demonstrates otherwise.
- **Rapid Response Mechanism.** A new “rapid-response” mechanism would provide for an independent panel investigation at “covered facilities,” as opposed to a government inspection, for suspected denial of the right of free association and collective bargaining. For the United States, covered facilities would be limited to those that have previously been proven to have violated U.S. law. For Mexico, a claim can be brought only with respect to an alleged worker rights violation under Mexico’s labor reform commitments under USMCA. Violations could result in a suspension of preferential tariffs or potential penalties on goods manufactured at or services provided by the covered facility.
- **Mexico’s Labor Reform Monitoring.** USMCA implementing legislation creates a new interagency committee and reporting requirements to Congress on Mexico’s implementation of labor reforms. Also establishes key benchmarks for Mexico’s implementation processes and for labor attachés based in Mexico.

Environmental Provisions

To address some congressional concerns about the enforceability of environmental provisions, the amendments to USMCA revised the environment chapter to expand the coverage, enforcement, and monitoring functions of the agreement. Some of the amendments to USMCA are analogous to those in the labor chapter.

- **“In a Manner Affecting Trade and Investment.”** The revised text asserts the presumption that an environmental dispute affects trade and investment unless a respondent party can prove otherwise.
- **Multilateral Environmental Agreements (MEAs).** The revisions require each party to adopt, maintain, and implement laws, regulations and other measures to fulfill the following MEAs to which they are a party:
 - Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)
 - Montreal Protocol on Substances that Deplete the Ozone Layer
 - International Convention for the Prevention of Pollution from Ship (MARPOL)
 - Ramsar Convention on Wetlands
 - Convention on Antarctic Marine Living Resources
 - International Whaling Convention
 - Inter-American Tropical Tuna Convention

The USMCA, as originally signed, only made explicit reference to CITES, MARPOL, and the Montreal Protocol.

- **Interagency Monitoring Committee.** USMCA changes create in the implementing legislation an Interagency Environment Committee for Monitoring and Enforcement analogous to the labor chapter, and establishes environment-focused attachés in Mexico City to monitor compliance with the agreement.
- **Border Environment Cooperation.** The implementing legislation authorizes for grants under the U.S.-Mexico Border Water Infrastructure Program, the Trade Enforcement Trust Fund and a recapitalization of the North American Development Bank (NADB).

Motor Vehicle Rules of Origin

To address U.S. concerns about North American vehicle production, the amendments further tightened the motor vehicle rules of origin.

- **Steel Production.** USMCA added a requirement that 70% of a motor vehicle’s steel and aluminum must originate in North America to receive duty-free benefits. The revisions state that steel must be melted and poured within North America to be considered as originating, beginning at year seven of the agreement. For aluminum, the parties shall consider appropriate requirements at year ten.

Intellectual Property Rights

The amendment changed some of the patent and regulatory exclusivity provisions of USMCA. Some observers criticize these provisions, long included in previous U.S. free trade agreements (FTAs), as contributing to the rise of drug costs.

The pharmaceutical industry and other observers contend that patent and regulatory exclusivity protect U.S. creativity and innovation.

Regulatory Exclusivity

- **Biologics.** The revised agreement removes a 10-year period of data exclusivity, under which a biosimilar cannot use clinical trials generated by the reference (branded) biologic to obtain marketing approval. The United States currently provides a 12-year period of exclusivity, Canada eight years and Mexico five years.
- **Exclusivity Period.** A three-year exclusivity period was removed which would prevent a generic manufacturer from using clinical data submitted in connection with an application for marketing approval for new uses of a previously-approved product.
- **Regulatory Review.** The revised text clarifies that the regulatory review exception allows a person other than the rights-holder to use, sell, or import a product covered by an existing patent to generate information used in the marketing approval process.

Patents

- **Patent Availability.** The revised text precludes the availability of patents for new uses, methods, or processes of an existing product.
- **Patent Term Extension.** The revisions limit the circumstance when an adjustment is available to extend a patent term for delays in the market approval process.
- **Patent Linkages.** The changes modify the patent linkage provision to provide for “effective rewards,” such as a period of market exclusivity, for a successful challenge to the validity or a finding of non-infringement of a patent.

De Minimis

USMCA raised the De Minimis customs threshold for duty-free treatment to \$117 for Canada and Mexico. A footnote that would have allowed the United States to lower its \$800 threshold to maintain reciprocity was dropped.

Outlook

Numerous policymakers welcomed the changes to the proposed USMCA, stating that they include stronger and more enforceable labor and environmental provisions and that the removal of data exclusivity for biologic drugs will foster generic competition and lower prices. Other policymakers are concerned about the rolling back of previous trade liberalization measures affecting the motor vehicle industry and in regards to IPR protection.

For more information, see CRS In Focus IF10997, *Proposed U.S.-Mexico-Canada (USMCA) Trade Agreement*, by Ian F. Fergusson and M. Angeles Villarreal, and CRS In Focus IF10038, *Trade Promotion Authority (TPA)*, by Ian F. Fergusson.

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