

CAN INTERNATIONAL TRADE LAW RECOVER?

THE UNITED STATES-MEXICO-CANADA AGREEMENT: A GLIMPSE INTO THE GEOECONOMIC WORLD ORDER

*Sergio Puig**

The United States-Mexico-Canada Agreement (USMCA) differs in a few important ways from prior trade deals signed by the United States but reveals a glimpse of the infrastructure for a new era in international economic governance.¹ This new “*Geoeconomic World Order*,” will be characterized by great power rivalry between the United States and China, the intense use of protectionist tools to achieve strategic and political goals, and the diminished role of legal adjudication.² This approach to trade policy will likely outlast the autocratic and/or nationalistic governments emerging around the world, including the current Trump administration. While international trade law will recover, it will look different in key respects—it will be less multilateral, predictable, justiciable, and enforceable. This more transactional view of international trade law implies a limit on the role of *law* and an increase in the use of *power*.³ It may force a retrenchment of international interdependence and a revival of zones of influence prevalent during the Cold War era.

The Context of the Negotiation

Donald Trump’s campaign soundbites of “build the wall,” “make them pay,” “send them back,” and other offensive harangues against Mexicans were followed by demands to terminate a twenty-five-year-old trade deal if renegotiations were not to his liking. Given its dependency on access to U.S. markets, Mexico had to capitulate to the demands, and in so doing became the first nation to succumb to Trump’s “Art of the Deal.” The resulting agreement, timed around electoral concerns and politics on both sides of the border, may well illustrate the elements of a new era in international economic governance.

There should be no surprise that Mexico was the first to agree to sign a trade deal with the Trump administration. More than 80 percent of Mexican exports go to the United States. If the United States had suddenly terminated the North American Free Trade Agreement (NAFTA), it would have crippled Mexico’s economy by deterring productive investment and tanking Mexico’s long-term growth. This would have been particularly damaging at a time when the unilateral U.S. tariffs adopted in the name of national security on aluminum and steel had already affected Mexico.

* *Associate Professor, University of Arizona College of Law.*

¹ [Agreement between the United States of America, the United Mexican States, and Canada](#), Nov. 30, 2018, OFF. OF THE U.S. TRADE REPRESENTATIVE [hereinafter USMCA].

² Anthea Roberts et al., *The Geoeconomic World Order*, LAWFARE (Nov. 19, 2018).

³ Gregory C. Shaffer, *A Tragedy in the Making?: The Decline of Law and the Return of Power in International Trade Relations*, 43 YALE J. INT’L L. (forthcoming 2019).

The new USMCA—which is practically, albeit not technically two bilateral deals signed by the United States—is expected to take effect January 1, 2020. Legislative bodies in the three countries will have to approve the deal, a process that may take some months and could be upended by the Democrat’s takeover of the House of Representatives in the United States.⁴

USMCA and the “New Normal”

One way to understand the USMCA is as a small element in a changing global environment. While it is the product of a negotiation, key features of the agreement squarely reflect U.S. interests (some of which align with Mexican and Canadian interests) because the (still) biggest economy in the world enjoys considerable leverage over Canada and especially Mexico. In the differences with its direct predecessors—namely NAFTA, but also the Trans-Pacific Partnership (TPP) (which until January 2017 also involved the three countries)—the USMCA reveals some of the pillars of a new *Geoeconomic World Order*. This order is:

characterized by great power rivalry between the United States and China and the clear use of economic tools to achieve strategic goals. This increased convergence of economic and security thinking and strategies is likely to lead to a significant restructuring of the laws and institutions that govern international trade and investment.⁵

In essence, the post-WWII liberal era that drifted into the neoliberal world is rapidly evaporating and new institutions that will manage the future of economic interdependence are emerging. Many states are adapting in part by pushing decision-making towards the realm of national discretion and away from international oversight. This results in the curtailment of key features of the liberal order, primarily international legal adjudication. Especially in the United States, concerns over the security risks posed by interdependence and China’s economic ambitions are enhancing state control of the economy (chiefly, the general desirability of free trade and foreign investment in key sectors), and perhaps a more isolationist version of self-sufficiency and resilience.⁶

The USMCA reflects this shift. Combined, its features reduce the role of law—or, at the very least, the role of international adjudication—and increase the role of power—or, at the very least, the use of raw economic power. The ultimate goal may be to expand flexibility, policy space, or discretion to implement trade measures to protect the industrial and manufacturing base on national security grounds, to expand screening of foreign investments in critical infrastructure, and to impose new export constraints with respect to key, cutting-edge technologies—all with little risk of meaningful accountability or legal challenges on international law grounds.

For instance, in the realm of trade, one of the major shortcomings of NAFTA was its incomplete state-to-state dispute settlement process, under which a dispute settlement panel could only be established with the consent of the parties. Chapter 31 of the USMCA, which addresses dispute settlement, looks similar. It requires that by the date of entry into force of the agreement “a roster shall be appointed by consensus and remain in effect for a minimum of three years or until the Parties constitute a new roster.”⁷ Nothing ensures that the parties will follow through with such commitment and do more than they did under NAFTA—making the obligations of the treaty hard to enforce. In fact, the situation is worse than it was when NAFTA entered into force, given that by the time USMCA enters into force the World Trade Organization’s (WTO’s) dispute settlement mechanism will likely no longer be functioning and thus will not provide Canada and Mexico with a consequential alternative process.

⁴ Glenn Thrush, *Trump’s Nafta Plan Could Be Upended by Democrats’ House Takeover*, N.Y. TIMES (Nov. 12, 2018).

⁵ Roberts, *supra* note 2.

⁶ David A. Gantz, *US Needs USMCA if It’s Serious about Competing with China*, THE HILL (Nov. 15, 2018).

⁷ *USMCA*, *supra* note 1, art. 31.8.

Further, the treaty mandates a review process, plus eventual automatic expiration if the review does not confirm the parties' desire to extend the agreement. This may increase the role of power when disagreement ensues, especially if dispute settlement is unavailable.⁸

Turning to foreign investment, the treaty significantly scaled back the role of investor-state dispute settlement (ISDS), an imperfect mechanism, but one whose use until recently had been a well-established policy of the U.S. government.⁹ In principle, there is no more general recourse to ISDS between the United States and Canada (with some exceptions for Legacy Investment Claims and Pending Claims). The agreement maintains a limited version of ISDS between Mexico and the United States.¹⁰ Notably, in many instances, claims alleging the failure to provide a minimum standard of treatment or an indirect expropriation are not allowed. Establishment and acquisition claims are generally barred, and exhaustion of local remedies is almost always required. As a result, it is unlikely that a government's decision to unfairly block foreign investment will ever be reviewed by USMCA arbitrators. In fact, the United States' Better Utilization of Investments Leading to Development (BUILD) Act approved in October 2018 has increased investment surveillance and national executive discretion in this realm. Therefore, such a decision is unlikely to be significantly reviewed under U.S. domestic law either.¹¹

At the same time, the USMCA maintains a trend towards regulatory harmonization, the regulation of e-commerce, and free transfer of data reflected in the TPP Agreement. These areas are also interesting examples of balancing "soft" and "hard" law. This balancing is done by promoting the particular policy preferences within international law, but insulating decisions from international adjudicatory review. For example, the USMCA prevents parties from restricting "the cross-border transfer of information," with limited exceptions.¹² Additionally, it prevents parties from requiring firms "to use or locate computing facilities in that Party's territory as a condition for conducting business."¹³ These provisions advance the interests of larger technology companies in sustaining an unregulated internet by preventing protectionist data localization requirements that inhibit the flow of data across borders. However, like the chapter on regulatory harmonization, which emphasizes science-based risk assessment, it has very limited judicial bite.¹⁴ In fact, the treaty provides that no party to the agreement shall have recourse for dispute settlement for a matter arising under the regulatory harmonization provisions, except to address a *sustained and recurring* course of action or inaction.¹⁵

Even the most "progressive" elements of the USMCA show similar *geoeconomic* impulses and a general distaste for legal adjudication. For instance, the much-needed anticorruption provisions are nonjusticiable, evidence that the United States will continue to rely on corruption allegations at a political level—when the Foreign Corrupt Practices Act (and its disparate effects) is inapplicable—to embarrass foreign authorities.¹⁶ To be sure, the higher environmental standards or explicit protection of indigenous and labor rights prominently covering violence against workers, migrant workers, and sex-based discrimination should be celebrated, although these obligations

⁸ *Id.*, art. 34.7.

⁹ Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AJIL 361 (2018).

¹⁰ Mexico and Canada are parties to the CP-TPP, which contains ISDS protections. The full ISDS protections are available for investment agreements between U.S. investors and Mexico in the areas of oil and gas, power, infrastructure, telecommunications, and transport. See *USMCA*, *supra* note 1, at annex 14-E, para. 2(a)1.

¹¹ *Better Utilization of Investments Leading to Development Act*, 115 S. 2463 (2018).

¹² *USMCA*, *supra* note 1, art. 19.11.

¹³ *Id.*, art. 19.12.

¹⁴ *USMCA*, *supra* note 1, at ch. 28.

¹⁵ *Id.*, art. 28.20.

¹⁶ *Id.*, ch. 27. For the disparate effects of FCPA enforcement, see Rebecca L. Perlman & Alan O. Sykes, *The Political Economy of the Foreign Corrupt Practices Act: An Exploratory Analysis*, 9 J. LEGAL ANALYSIS 153 (2017).

will be difficult to enforce.¹⁷ Even the much-touted automobile provisions demanding that a percentage of a vehicle be built by workers earning at least US\$16 an hour may be of little help. Both countries negotiated a side letter allowing exports at a lower tariff rate to allow U.S. cars continued access to the U.S. market—including vehicles built with low wages—to avoid any dispute.¹⁸

With unprecedented unilateral actions against China in the background (a 25 percent tariff on US\$50 billion and an additional 10 percent tariff on US\$200 billion of Chinese goods) and the threat of more to come, the USMCA seeks to help reconfigure supply chains.¹⁹ In addition to reestablishing lower tariffs and regulatory harmonization in the region, U.S. policymakers are using the treaty to sketch a new approach in which production location should be subjected to higher levels of state oversight, making these measures harder to challenge before international mechanisms. In an island of optimism amidst profound uncertainty, Mexico and Canada stand to win something under this new framework, as the treaty may force the relocation of manufacturing to North America. But if there were any doubt as to the new approach behind the USMCA, two clauses aimed at China discourage partners from establishing free trade agreements with a “non-market economy” or granting similar enforceable investment benefits to that economy’s investors.²⁰ This could also prove to be a costly constraint on economic policy for Mexico and Canada.

The New Role for Law and for Power

The survival in the USMCA of the binational review of domestic trade remedies determinations was touted as a key victory for Canada.²¹ It is not that the review of these determinations—which involve technical aspects of when nations can impose additional duties to respond to unfair trade practices such as exporting products below cost (dumping) or exporting products that receive governmental subventions (subsidies)—is fundamental for peace, cooperation, or prosperity. But the constraint of unfettered power is key to this endeavor.

USMCA Chapter 10 maintains a role for legal adjudication in these areas as the pendulum moves away from what U.S. officials see as a “government of judges”—a complaint expressed about international dispute settlement in many fora. In addition to crippling the WTO through the blockage of judicial appointments and defiance of its dispute settlement framework, the United States has withdrawn from other international commitments (e.g., the Paris Convention and the Joint Comprehensive Plan of Action with Iran) or scaled back its participation in or support to international adjudicatory systems (e.g., ISDS, the International Criminal Court, and the International Court of Justice). To some extent, the survival of a dispute settlement process that can review decisions in a sensitive area is welcome, especially as it may be the last credible mechanism that maintains broad jurisdictional scope over certain U.S. policy decisions.

Notwithstanding the existence of the adjudicatory provisions of Chapter 10, there seems to be a notable trend in international economic law in the opposite direction. National security and economics are converging in key areas such as trade, foreign direct investment, cyber security, and other aspects of the digital realm. It signals a new era marked by an increase in the invocation of broadly defined national security prerogatives and the weakening of

¹⁷ See, e.g., *USMCA*, *supra* note 1, at chs. 23–24. The incoming chair of the Ways and Means trade subcommittee says better enforcement of labor and environmental provisions in USMCA is needed, but is proposing to address the problem through the implementing legislation (USMCA Implementation Act) rather than by reopening the text of the agreement. See Roberta Rampton, *Canada, Mexico Sign Trade Deal, Trump Shrugs Off Congress Hurdle*, REUTERS (Nov. 29, 2018).

¹⁸ *USMCA*, *supra* note 1, at MX-US Side Letter on 232 Dispute Settlement and CA-US Side Letter on 232 Process.

¹⁹ Rachel Brewster, *WTO Dispute Settlement: Can We Go Back Again?*, 113 AJIL UNBOUND 61 (2019).

²⁰ *USMCA*, *supra* note 1, art. 1 of Annex 14-D; *id.*, art. 32.10.

²¹ *Id.*, art. 10.12.

international accountability under the rule of law.²² This redefinition may be accompanied by the use of bilateral or minilateral agreements to deploy power and to expand discretion more effectively than under multilateral organizations (and its rules). In fact, the former WTO Chief has warned members to be prepared for a future without the United States as a member of this multilateral, quasiuniversal organization.²³

One way to avoid a “government of judges” that interpret loose treaty rules in ways states dislike is for negotiators to draft clear rules and to clarify rules where they prove too imprecise. The other is to preclude judges from interpreting such rules. Based on the USMCA, the United States seems to be leaning in favor of the latter option—to insulate decisions from international adjudication. With the exception of the trade remedies review process, the retrenchment of adjudicatory law-making in the USMCA may well mark a more cynical era in international economic governance, one in which power and politics have a more important role in economic affairs. In effect, as the WTO fades into irrelevance great powers will likely use the invocation of discretion, including the type reserved to national security issues, to adopt protectionist measures and shield many areas from international review. Moreover, by getting rid of restrictions on the executive branch and Congress entirely, the United States may be aiming at deploying its power without meaningful accountability.

Despite the retrenchments detailed above, the survival of the binational review process in the USMCA may suggest a path forward for those nations that see value in international legal adjudication. After being unpleasantly surprised by the initial Mexico-United States bilateral deal, Canada stood its ground on this international dispute settlement system and made it a potential deal-breaker.²⁴ Whatever happens in the treaty approval processes before the three states’ legislative bodies, the USMCA signals a new consensus in Washington—one that not only sees China’s practices of restricting market access and pushing foreign companies to hand over valuable technology as unacceptable, but also views its economic emergence as a threat to an American-led world. This can result in what Anthea Roberts calls a more autonomous (though still competitive) “spheres of influence” approach, in which trade policy is deployed to further strategic goals and to force other nations to pick a side. As reflected in the USMCA, the big loser in this new *Geoeconomic World Order* will be international legal adjudication and the international rule of law more generally.

²² Tania Voon, *The Security Exception in WTO Law: Entering A New Era*, 113 AJIL Unbound 45 (2019).

²³ Pascal Lami, *Former WTO Chief: How This Trade War Ends*, WASH. POST (Apr. 19, 2018).

²⁴ Heather Long, *U.S., Canada and Mexico Just Reached a Sweeping New NAFTA Deal; Here’s What’s in It*, WASH. POST (Oct. 1, 2018).

According to an expert familiar with the negotiations, the Canadian negotiators did not really care about ISDS and realized that the state-to-state dispute settlement that Mexico accepted in Chapter 31 was not likely to work any better than NAFTA Chapter 20. Hence, the binational review process became *the* deal-breaker.