



NAFTA and the Preliminary U.S.-Mexico Agreement

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Overview

On August 31, 2018, President Trump notified Congress of his intention to “enter into a trade agreement with Mexico – and with Canada if it is willing.” This notification and an announcement on August 27, 2018, that the United States and Mexico had reached a preliminary agreement in principle—subject to finalization and implementation—served as the culmination of a year of talks among the NAFTA partners. Talks with Canada have not concluded, and it is unclear whether Congress would support an agreement that does not include Canada. The United States and Mexico stated that they would like to sign the agreement before Mexico’s president-elect is scheduled to take office on December 1, 2018. The final text of the agreement is not expected to be released until the end of September, pursuant to U.S. Trade Promotion Authority (TPA) requirements.

USTR issued three fact sheets for the preliminary agreement between the United States and Mexico: Modernizing NAFTA into a 21st Century Trade Agreement; Strengthening North American Trade in Agriculture; and Rebalancing Trade to Support Manufacturing. This insight is based on the USTR factsheets.

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U.S.-Mexico “Preliminary Agreement in Principle”: Key Provisions

Market Access

NAFTA provides national and non-discriminatory treatment and market access for goods and services among the United States, Mexico and Canada. Between 1994 and 2009, NAFTA eliminated most tariffs and nontariff barriers on North American goods that meet specific rules of origin.

- The preliminary U.S.-Mexico trade agreement maintains duty-free treatment for goods meeting the rules-of-origin requirements.

Motor Vehicles

NAFTA phased out tariffs on automotive imports among the three countries, as long as they meet the rules-of-origin requirements of 62.5% content for autos, light trucks, engines, and transmissions, and 60% for all other vehicles and automotive parts.

- The United States and Mexico agreed to new motor vehicle rules of origin and procedures, including product-specific rules, and requiring 75% North American content.
- The agreement contains a wage requirement in the rules of origin requiring 40%-45% of auto content be made by workers earning at least \$16 per hour.
- The proposed rules would streamline certification and verification of rules of origin and promote stronger enforcement.

Investment

NAFTA removed significant investment barriers, ensured basic protections for NAFTA investors, and provided a mechanism for the settlement of disputes between investors and a NAFTA country. Mexico secured exceptions for its energy sector from certain provisions.

A controversial aspect of the NAFTA investment chapter in the renegotiation is the investor-state dispute settlement (ISDS) mechanism, which the Trump Administration reportedly proposed to eliminate.

- The U.S.-Mexico deal includes modified ISDS language. The oil and gas, infrastructure, energy generation and telecommunications sectors reportedly will have similar ISDS provisions as in NAFTA. For other sectors, ISDS may be limited to direct expropriation or failure to give national treatment.

Energy

NAFTA includes reservations for investment in the Mexico’s energy sector, in respect to its 1917 Constitution, which established Mexican national ownership of all hydrocarbons resources. Mexico’s

NAFTA Key Dates

- **August 12, 1992.** The United States, Canada, and Mexico conclude negotiations for a NAFTA.
- **December 17, 1992.** President George H.W. Bush and leaders of Mexico and Canada sign the agreement in their respective capitals.
- **August 1993.** President Bill Clinton signs NAFTA side agreements on labor and environment.
- **November 20, 1993.** Congress approves NAFTA implementing legislation.
- **January 1, 1994.** NAFTA enters into force.
- **May 18, 2017.** The Trump Administration sends a 90-day notification to Congress of its intent to renegotiate NAFTA.
- **August 16, 2017.** Renegotiations on NAFTA begin.
- **August 27, 2018.** United States and Mexico announce that they have reached a bilateral agreement in the negotiations. Negotiations with Canada continue.
- **August 31, 2018.** President Trump sends notification to Congress of his intention to enter into a trade agreement with Mexico, and with Canada “if it is willing,” by the end of November 2018.

2013 energy reforms opened its energy sector to production-sharing contracts with private and foreign investors while keeping the ownership of Mexico's hydrocarbons under state control.

- The proposed bilateral agreement would lock in Mexico's 2013 Constitutional reforms and the current legal framework for private energy projects in Mexico.
- President-elect of Mexico, Andrés Manuel López Obrador, reportedly, is not seeking to change its current domestic legal framework.

Labor and the Environment

NAFTA marked the first time that provisions on worker rights and the environment were associated with an Free Trade Agreement (FTA). Provisions require all parties to enforce their own labor and environmental laws, and encourage greater cooperation through a consultation mechanism. The enforcement provisions apply mainly to a party's failure to enforce its own laws in a manner affecting trade.

- The new agreement commits Mexico to specific legislative actions to provide for the effective recognition of the right to collective bargaining.
- The bilateral agreement requires the parties to adopt and maintain "in law and practice labor rights as recognized by the International Labor Organization (ILO)," to effectively enforce their own labor laws, and not to waive or derogate from these laws.
- The environmental chapter includes obligations to strengthen law enforcement networks. It prohibits some of the most harmful fisheries subsidies and includes provisions related to illegal trafficking, marine species, air quality, marine litter, and sustainable forest management.

Services

NAFTA contains core obligations on services in specific chapters on cross-border and financial services, but provisions in many chapters may affect services trade. Core services commitments include national treatment, most-favored nation treatment, and prohibition of local presence requirements to access markets.

- The proposed U.S.-Mexico agreement provisions go beyond those in NAFTA, including a prohibition on local data storage requirements for financial services.
- It would expand application of national treatment and market access obligations for certain cross-border services and additional procedures relating to ISDS for financial services regarding expertise of arbitrators and the application of certain exceptions.

E-Commerce, Data Flows, and Data Localization

Since NAFTA's implementation in 1994, technological advancements have fundamentally changed how firms trade and do business across international borders. New barriers have emerged, which existing trade rules often do not address. More recent U.S. FTAs include core provisions prohibiting customs duties on electronically-transmitted products and ensuring that digitally-delivered goods and services are also subject to FTA commitments.

- The U.S.-Mexico agreement reportedly includes digital trade provisions similar to the proposed Trans-Pacific Partnership (TPP) including on data flows and minimizing data localization requirements, acceptance of electronic signatures, and limits on source code disclosure requirements.
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- The preliminary agreement would raise Mexico's *de minimis* shipment value level to \$100, up from \$50. The current level in the United States is \$800. Imports valued below this would receive expedited customs procedures. NAFTA does not include provisions on a *de minimis*.

Intellectual Property Rights (IPR)

NAFTA's commitments on intellectual property rights were significant in the evolution of international trade agreements. NAFTA includes protections for copyrights, patents, including exclusivity periods for test data (5 years for pharmaceuticals), trade secrets, trademarks, and geographical indications, as well as specific requirements on enforcement.

- New bilateral provisions include 10 years of data protection for biologics. U.S. law currently requires 12 years.
- The agreement would extend the minimum copyright terms under NAFTA to 75 years.
- It would require criminal and civil penalties protections for trade secret theft, including by state-owned enterprises.

Sunset Clause

The Trump Administration reportedly sought to include a "sunset clause" in the NAFTA negotiations in which the parties would review the agreement every five years and terminate it unless all parties agreed to renew it. No other U.S. FTA, including NAFTA, has such a provision.

- The preliminary agreement does not include a termination clause; instead the agreement reportedly would have a review in year six at which point the parties could either opt to negotiate any problems that have emerged or extend the agreement for another 16 years.

Other Provisions

Negotiations with Canada continue on contentious issues such as dairy market access, the Chapter 19 dispute settlement mechanism, which provides for binational panel to hear appeals to trade remedy decisions in each country, and government procurement, among other issues. Some issues "resolved" between the United States and Mexico may continue to be the subject of negotiations with Canada. Nonetheless, to follow TPA guidelines, the final text must be released by the end of September if the stated goal of signing the agreement by December 1, 2018, is to be reached.

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