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## 'An Introduction to the United States-Mexico-Canada Agreement: Understanding the New NAFTA'

by David Gantz

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The United States–Mexico–Canada Agreement (USMCA), which is a modified and modernized version of the North American Free Trade Agreement (NAFTA), came into effect on 1 July 2020.<sup>1</sup> The USMCA consists of 34 chapters and numerous annexes and side letters, and covers a few new areas compared to NAFTA, such as small and medium-sized enterprises, state-owned enterprises, corruption, and digital trade. Like its predecessor, the USMCA will govern most economic relationships in North America, including more than \$1.1 trillion in annual trade of goods and services,<sup>2</sup> for at least the next 16 years.<sup>3</sup>

Professor David A. Gantz, the Samuel M. Fegly Professor Emeritus at the University of Arizona and the Will Clayton Fellow for Trade and International Economics at the Baker Institute/Center for the United States and Mexico, has devoted a significant part of his career to NAFTA. He has written extensively on NAFTA issues, particularly on NAFTA dispute resolution, and served as an arbitrator in several proceedings under Chapters 11 (investment), 19 (bi-national appeals of anti-dumping/countervailing duty decisions) and 20 (state-to-state dispute settlement). It is therefore no surprise that Gantz would also be the author of one of the first commentaries on the key provisions of the USMCA.

The book consists of eleven chapters that cover the most significant aspects of the USMCA. In particular, these are: (i) tariffs, customs, and rules of origin (Chapter 2); (ii) settlement of disputes (Chapter 3); (iii) labour rights and environmental protection (Chapter 4); (iv) energy production and policies (Chapter 5); (v) textiles, apparel, and agriculture (Chapter 6); (vi) intellectual property, services, and digital trade (Chapter 7); and an overview of provisions borrowed from the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (Chapter 8) and provisions that have been carried over into the USMCA from NAFTA (Chapter 9). As explained by Gantz himself, most of the chapters were originally published individually as a series of reports on the website of the Baker Institute, and have been extensively revised and updated for this book.<sup>4</sup>

The book starts with an overview of positive developments and downsides of the USMCA. According to Gantz, the key USMCA improvements are prohibitions of localization requirements for data storage and rules on e-commerce<sup>5</sup>; enhanced labour and environmental protection<sup>6</sup>; and improved market access in agriculture.<sup>7</sup> However, Gantz considers that these positive changes

<sup>1</sup>See USTR, United States–Mexico–Canada Agreement, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (accessed 26 March 2021).

<sup>2</sup>It is estimated that regional trade increased sharply over NAFTA's first two decades, from roughly \$290 billion in 1993 to more than \$1.1 trillion in 2016 (Andrew Chatzky, James McBride, and Mohammed Aly Sergie, 'NAFTA and the USMCA: Weighing the Impact of North American Trade', [www.cfr.org/backgrounder/naftas-economic-impact](http://www.cfr.org/backgrounder/naftas-economic-impact), accessed 26 March 2021).

<sup>3</sup>USMCA Article 34.7 provides that the Agreement shall terminate 16 years after the date of its entry into force, unless each Party confirms it wishes to continue this Agreement for a new 16-year term.

<sup>4</sup>David Gantz, *An Introduction to the United States–Mexico–Canada Agreement: Understanding the New NAFTA*, p. xvi.

<sup>5</sup>Gantz, p. 5.

<sup>6</sup>Gantz, pp. 6–8.

have been ‘overshadowed’ by several areas that represent a step backwards in the process of evolution of US free trade agreements (FTAs) since NAFTA. These are, first and foremost, regulations related to the auto and auto parts sector, which include: (i) an increase in the North American ‘regional value content from 62.5 to 70%; (ii) a requirement that 70% of the steel and aluminium used in auto production come from North American sources; (iii) a requirement that 40% of product value of autos and 45% of trucks must be made in facilities where workers are paid at least \$16/hour.<sup>8</sup> Other problematic areas, according to Gantz, are: reduced investor protection; a lack of effective regulation of hydrocarbon investment in Mexico; the introduction of the sixteen-year sunset clause; the elimination of protection for biologic drugs; and provisions that may impose some constraints on FTA negotiations that either party undertakes with a non-market economy.<sup>9</sup>

The remainder of the chapters elaborate on these features of the USMCA in greater detail, depending on the author’s view of their significance. Gantz adopts comparative and historical approaches and begins with an overview of the *status quo* under NAFTA before examining the novelties of the USMCA. In most chapters, he also usefully outlines the parties’ negotiating objectives and the extent to which they were achieved in the final draft of the USMCA.

Labour and environmental protection are among the areas where, according to Gantz, important changes have occurred. Two examples illustrate these changes. First, Gantz underlines that one of the difficulties in enforcement under previous FTAs has been the requirement that a violation of a labour or environmental provision must affect trade or investment between the parties in order to be challengeable. However, demonstrating that insufficient enforcement of labour or environmental rules indeed affects trade or investment has proven difficult. The USMCA addresses this problem by establishing a presumption that labour and environmental violations affect trade or investment, and thereby shifts the burden of disproving this presumption to the respondent government.<sup>10</sup>

Second, Gantz considers – rather plausibly – that the most significant innovation in the USMCA amendments is the establishment in the state-to-state dispute settlement chapter (Chapter 31) of a ‘facility-specific rapid response labour mechanism’, which contemplates a remedy to the denial of labour rights to workers.<sup>11</sup> This mechanism allows the United States and Mexico, and Canada and Mexico, to file complaints over possible denial of rights of free association and collective bargaining at individual facilities of another party.<sup>12</sup> As the first step of this process, the respondent can conduct its own review of whether a denial of right exists and, if so, remedy it within 45 days of the request. If the respondent refuses to conduct a review, the complainant can request the formation of a panel to determine whether a denial of rights exists.<sup>13</sup> The importance and effectiveness of this mechanism has already been demonstrated by the two reviews launched by the United States against Mexico. In the first request, the United States sought Mexico’s review of whether workers at a General Motors facility in Silao, State of Guanajuato, were being denied the right of free association and collective bargaining, as a result of a union election being prematurely ended due to irregularities, such as the destruction of ballots.<sup>14</sup> The second request also concerned an alleged denial of rights in an auto parts

<sup>7</sup>Gantz, pp. 9–10.

<sup>8</sup>As Gantz explains, except for R&D and engineering, only Canadian and American facilities would meet this requirement since typical auto industry wages in Mexico are \$3.60–\$3.90/hour (Gantz, p. 11).

<sup>9</sup>Gantz, pp. 14–19.

<sup>10</sup>Gantz, pp. 80 and 93.

<sup>11</sup>Gantz, p. 82.

<sup>12</sup>USMCA, Annex 31-A (United States and Mexico), Annex 31-B (Canada and Mexico).

<sup>13</sup>USMCA, Articles 31-A.4.2 and 31-A.4.4.

<sup>14</sup>United States Seeks Mexico’s Review of Alleged Worker’s Rights Denial at Auto Manufacturing Facility, 12 May 2021, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/united-states-seeks-mexicos-review-alleged-workers-rights-denial-auto-manufacturing-facility-0> (accessed 1 September 2021).

manufacturing facility.<sup>15</sup> Mexico responded to the United States' requests, and both cases were promptly settled.<sup>16</sup> These early developments demonstrate how the rapid response mechanism can transform the working conditions of Mexican workers through effective unionization and collective bargaining. At the same time, concerns have been raised about due process, since labour disputes were launched before the final procedural guidelines for petitions to the USMCA were published, as well as about the functioning and appropriateness of the rapid response mechanism more broadly.<sup>17</sup>

Gantz also elaborates on significant changes in rules governing resolution of investor–state disputes, which include elimination of investor–state dispute settlement between the United States and Canada and limited recourse to dispute settlement between the United States and Mexico.<sup>18</sup> As regards the state-to-state dispute settlement, it did not function properly under NAFTA because the parties could indefinitely delay the proceedings by refusing to appoint panelists to the roster. The USMCA has reduced the potential for such stonewalling by requiring that the parties establish a roster of panelists by the date of the USMCA's entry into force.<sup>19</sup> Gantz is cautiously optimistic in stating that 'the mechanism provides powerful incentives for parties to appoint their own rosters of potential panelists'.<sup>20</sup> Yet, as the author rightly points out, the USMCA does not specify the steps to be taken if the party fails to designate panelists to the roster.<sup>21</sup> Nevertheless, following the publication of Gantz's book, the three parties established their rosters and panelists have been appointed in two disputes.<sup>22</sup> Notably, while the default number of panelists under the USMCA Chapter 31 is five<sup>23</sup>, both panels established thus far comprise three individuals.<sup>24</sup>

Furthermore, Gantz sketches out the novelties in the areas of intellectual property and digital trade. With respect to intellectual property, he refers, in particular, to the establishment of a Committee on Intellectual Property Rights, the extended terms of copyrights and trademark protection, and the introduction of enforcement procedures for infringements in the digital environment.<sup>25</sup> With regard to digital trade, which was not covered in NAFTA, Gantz refers to the ban

<sup>15</sup>United States Seeks Mexico's Review of Alleged Freedom of Association Violations at Mexican Automotive Parts Factory, 9 June 2021, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/june/united-states-seeks-mexicos-review-alleged-freedom-association-violations-mexican-automotive-parts> (accessed 1 September 2021).

<sup>16</sup>In the first case, the remediation agreement between the United States and Mexico called for a new union vote to be held. As a result of the new vote, workers chose to reject their existing collective bargaining agreement. (United States and Mexico Announce Course of Remediation for Workers' Rights Denial at Auto Manufacturing Facility in Silao, 8 July 2021, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/july/united-states-and-mexico-announce-course-remediation-workers-rights-denial-auto-manufacturing>, accessed 1 September 2021). In the second case, the US Trade Representative reached an agreement with the company at issue, as part of which the company undertook to provide severance and backpay to workers, as well as to ensure labour rights (United States Reaches Agreement with Mexican Auto Parts Company to Protect Workers' Rights, 10 August 2021, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/august/united-states-reaches-agreement-mexican-auto-parts-company-protect-workers-rights>, accessed 1 September 2021).

<sup>17</sup>Inu Manak, Statement for the Record, Hearing on 'Implementation and Enforcement of the United States–Mexico–Canada Agreement: One Year After Entry into Force', [www.cato.org/testimony/hearing-implementation-enforcement-united-states-mexico-canada-agreement-one-year-after](http://www.cato.org/testimony/hearing-implementation-enforcement-united-states-mexico-canada-agreement-one-year-after) (accessed 1 September 2021).

<sup>18</sup>Gantz, pp. 48–49.

<sup>19</sup>USMCA, Article 31.8.1.

<sup>20</sup>Gantz, p. 66.

<sup>21</sup>Gantz, p. 65.

<sup>22</sup>In May 2021, the United States requested the establishment of a panel to examine Canada's allocation of tariff-rate quotas on dairy products. (United States Advances First USMCA Dispute Panel to Enforce Canada's Dairy Commitments, 25 May 2021, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/united-states-advances-first-usmca-dispute-panel-enforce-canadas-dairy-commitments>, accessed 1 September 2021). Furthermore, in June 2021, Canada requested that a panel be established to examine the United States' safeguard measures on crystalline silicon photovoltaic cells. (Request for the establishment of a panel by Canada – Solar Products, 17 June 2021, [www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/solar-products-produits-energie-solaire.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/solar-products-produits-energie-solaire.aspx?lang=eng), accessed 3 September 2021).

<sup>23</sup>USMCA, Article 31.9.1.

<sup>24</sup>See USMCA Secretariat, Publications, <https://can-mex-usa-sec.org/secretariat/report-rapport-reporte.aspx?lang=eng> (accessed 1 September 2021).

on data localization requirements as a major innovation without, however, elaborating on its practical implications.<sup>26</sup>

Some other areas, where changes are relatively minor, such as textile and apparels and agriculture, legitimately receive less attention from the author. With respect to textiles and apparel, Gantz explains that the USMCA increases US textile industry protection. It does so by supplementing the NAFTA ‘yarn forward’ rule<sup>27</sup> with discouraging reliance on low-cost fabrics from Asia and requiring that certain materials used in the production of apparel be made in North America in order for products to be subject to duty-free treatment.<sup>28</sup> With respect to agriculture, Gantz notes that the USMCA does not result in any major changes, apart from reducing barriers for US exports of dairy to Canada.<sup>29</sup>

The book is fairly US-centric, as it assesses developments in the USMCA mostly from the US perspective. However, certain chapters provide a review of relevant areas in other USMCA parties. For example, Chapter 5 ‘Energy production and policies’ focuses on energy policies and reforms in Mexico in light of the change from the Peña Nieto to the López Obrador administration.<sup>30</sup>

The book not only provides an overview of the key USMCA provisions, but also puts them in context of other developments in international trade. In particular, Gantz considers that the economic rivalry between the United States and China may force enterprises that produce in China for export to the United States, to seek alternative manufacturing sites in low-wage countries such as Mexico.<sup>31</sup> Furthermore, Gantz underlines the importance of an effective USMCA state-to-state dispute settlement mechanism in light of the crisis in the WTO dispute settlement system.<sup>32</sup>

The book does not provide an exhaustive analysis of all the USMCA provisions and chapters. However, it presents an excellent overview of the main provisions of the USMCA and the key differences between the USMCA and NAFTA. Gantz’s ability to explain complex economic and legal concepts in a straightforward manner make the book accessible for both specialist and non-specialist audiences. The book will be useful for practitioners, students, negotiators, business representatives, and anyone who is interested in how trade in North America works.

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<sup>25</sup>Gantz, pp. 145–148.

<sup>26</sup>Gantz, p. 167.

<sup>27</sup>The ‘yarn forward rule’ means that the yarn used to form the fabric used to produce wearing apparel or other textile articles must originate in a NAFTA country (see US Customs and Border Protection, Textile and Apparel Products, [www.cbp.gov/trade/nafta/guide-customs-procedures/provisions-specific-sectors/textiles](http://www.cbp.gov/trade/nafta/guide-customs-procedures/provisions-specific-sectors/textiles), accessed 1 September 2021).

<sup>28</sup>Gantz, pp. 124–125.

<sup>29</sup>Gantz, pp. 129–132.

<sup>30</sup>Gantz, pp. 101–121.

<sup>31</sup>Gantz, pp. 231–233.

<sup>32</sup>Gantz, pp. 233–235.