Intelligence MEMOS

From: Lawrence Herman

To: Concerned Canadians

Date: October 9, 2018

Re: THE US-MEXICO-CANADA TRADE DEAL – ASSESSING THE CHINA CONTROVERSY

Article 32.10 of the USMC Agreement has generated a fair amount of comment since the text was released on September 30. The Article is not only unusual, it's unprecedented, part of the trade war against China being waged by the Trump administration.

The clause requires each of the three USMCA partners to consult if they enter into a free-trade agreement with a 'non-market economy' (i.e., China). It's aggressive and potentially draconian, and has prompted much hand-wringing that it will give the US a kind of supervisory role over Canadian trade policy initiatives.

But let's look more closely at the provision:

Most obviously, Article 32.10 only comes into operation when the USMCA itself comes into force, which means when all internal approval and ratification procedures are completed in Canada, US and Mexico, which could be many months away.

It only applies to free trade agreement negotiations with a non-market economy (NME) country (essentially meaning China). It doesn't cover preliminary talks, discussions, joint meetings, assessment reports or other bilateral contacts that typically occur years ahead of formal FTA "negotiations."

The article requires a USMCA party to inform the others with "as much information as possible regarding the objectives of those negotiations." This leaves open the possibility of an aggressive demand from the US for detailed information that, at least on its face, looks troubling and is one of the sources of concern being expressed.

However, some context is useful. Under US fast-track procedures, for example, the US Trade Representative is required to table detailed negotiating objectives with Congress and which are intensely scrutinized. While Canada doesn't have anything similar, when looked at in this way, an information exchange of negotiating objectives shouldn't be a terrible problem.

Article 32.10 has built-in limitations. It refers to trade negotiations with "a non-market country" – which on its face restricts its application to negotiations with a single NME country – as opposed to regional groups like the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP), with the Association of Southeast Asian Nations (ASEAN) or other multi-country groupings that happen to include an NME country, which, as it happens, is currently happening with Vietnam as part of the CPTPP.

Second, it only covers free trade agreements, not other kinds of agreements such as the 2014 Canada-China bilateral investment treaty or the investment treaty the US started negotiating with China under the Obama administration.

Third, the right to terminate the USMCA only kicks in when there is "entry" into a bilateral trade agreement with an NME country. While the term "entry" isn't explained and leaves room for interpretation, it arguably means "entry into force." Under international law, conclusion of negotiations and signature of an agreement doesn't in itself amount to a treaty "entering" into force.

Article 34.5 of the USMCA supports the point by saying the USMCA enters into force when each party completes all of its necessary internal procedures. The conclusion is that any right of termination (e.g., on the part of the US) applies only when a bilateral FTA actually enters into force as between Canada and an NME country.

Another matter of context is useful. It took Canada seven years to negotiate and conclude its trade agreement with the EU, which was signed in 2014 but even now hasn't entered into force, only being given provisional application.

Thus, even if Canada were to begin formal FTA negotiations with China tomorrow, any such agreement being (a) concluded and (b) entering into force would likely be many years down the road when, one presumes, a different US administration could be in office.

Regarding the termination clause, Article 32.10 requires both the US and Mexico to agree (as the "other Parties"). There isn't a unilateral right of the US to terminate. On the other hand, USMCA Article 34.6 (Withdrawal) gives the US an unrestricted right to withdraw from the agreement on six months written notice. The result is that Article 32.10 doesn't provide an additional source of termination rights that don't already exist in the agreement.

There is a fair amount of concern being expressed over this article, with media commentary and political statements suggesting a kind of veto or supervisory power by the US over Canadian trade policy. This is a valid worry, but is exaggerated. The reality is that Article 32.10 won't have application for many years and, even then, there isn't a "veto" by the US over contacts, exchanges, talks or even direct trade negotiations with China or any other NME country.

With such closely entwined trading partners (whatever one thinks of the present US administration), it doesn't seem unreasonable for information to be exchanged on third-party trade negotiating initiatives.

All this being said, the provision is not without risk because of its unknown effects. With an aggressive and anti-China US administration like the current one, who knows what they will do.

One way around the uncertainties would be an exchange of letters or a decision issued by the proposed Free Trade Commission (established by Article 30) verifying what is required in the application of this provision.

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