U.S. International Trade Commission Investigation No. TPA-105-003

American Chemistry Council
Public Comment on the Impact of the U.S.-Mexico-Canada Agreement (USMCA) on the Business of Chemistry

December 20, 2018

The American Chemistry Council (ACC) appreciates the opportunity to provide public comment on the impact of the USMCA on the business of chemistry in North America. Throughout the negotiations that produced the USMCA, ACC underlined our firm support for the North American Free Trade Agreement (NAFTA) and its continued existence and opposed U.S. withdrawal from NAFTA. We presented a unified North American chemicals industry perspective together with our association partners in Canada and Mexico, respectively, the Chemical Industry Association of Canada (CIAC) and the Asociación Nacional de la Industria Química (ANIQ).

ACC's general conclusion is that on balance the USMCA will benefit U.S. chemical manufacturers and the business of chemistry in North America. Our comments below detail the positive elements of the USMCA that reflect our priorities for NAFTA modernization, as well as the elements that fell short of our priorities.

USMCA Benefits to U.S. Chemical Manufacturers

***A trilateral agreement*:** Without question, the fact all three NAFTA parties have committed to a trilateral agreement in USMCA is a positive development worthy of ACC support.

***Zero tariffs*:** We are pleased that the three parties eliminated all tariffs under the USMCA, similar to the original NAFTA. Certainty that tariffs will remain at zero between the parties will support the investments that chemical manufacturers are making in North America.

***Regulatory Cooperation*:** ACC views this outcome as an unqualified win, which reflects the original proposal we made with ANIQ and CIAC. The provisions outline specific areas of cooperation (e.g. GHS alignment, data sharing, protection of confidential business information, development of chemical inventories, risk assessment, and scientific criteria) where regulators could create efficiency gains in their regulatory work and avoid duplication of effort and resources, in particular as Mexico revises its own chemical management regime. Above all, these provisions preserve the rights of the governments to regulate to protect human health and safety and the environment. Additionally, the good regulatory practices chapter is state of the art and builds on U.S. accomplishments in the Trans-Pacific Partnership negotiations.

***Chemicals Rules of Origin*:** ACC's joint proposal with ANIQ and CIAC advocated for making chemical rules of origin clear, transparent, and simple. By and large, the USMCA text moves in this direction with a menu of options for chemicals rules of origin, which includes a chemical reaction option, and limited exceptions to those rules. It also makes it easier for exporters to provide documentation to customs authorities on the origin of their products. A major benefit relative to the original NAFTA is that chemical manufacturers will no longer be required to determine regional value content to have origin conferred.

***Digital trade*:** ACC has advocated for facilitating digital trade throughout North America, along with establishing strong protections for cross border data flows. Chemical manufacturers generate data for a variety of purposes, including for regulatory compliance, technical innovation, employee development, and global customer management. The USMCA's assurance that this data can flow freely across borders in North America is a significant achievement. The USMCA also contains practical innovations important to chemical manufacturers, such as allowing for electronic filing options and digital signatures, which will further facilitate digital trade.

ACC Concerns with USMCA Outcomes

Investor-State Dispute Settlement: Despite the above positive outcomes, ACC is concerned about the diminished investment protections that the USMCA offers U.S. chemical manufacturers. In particular, the provisions on investor-state dispute settlement (ISDS) are NAFTA-minus and may result in less economic benefits to the business of chemistry in North America. ACC has identified a number of concerns with the ISDS provisions, including the following:

- Canada has opted out of ISDS.
- ISDS from the original NAFTA will only apply to claims involving legacy investments in Canada (investments made between January 1, 1994 and the date of termination of the original NAFTA) for three years after termination.
- The U.S. chemicals sector cannot make claims on all the investment provisions in USMCA with respect to potential violations in Mexico. U.S. chemical manufacturers would only be able to make claims on post-establishment national treatment and most favored nation violations and direct expropriations. This limited set of claims is insufficient, as expropriations in the chemicals sector are usually indirect, regulatory takings).
- The limitation of sectors who can make the full set of claims (oil and natural gas, power generation services, telecommunication services, transportation services, and infrastructure) seems arbitrary. We believe that all sectors, including chemicals, should be able to make the full set of claims, consistent with the investment provisions in the original NAFTA.
- The requirement that a U.S. investor must have a contract with the Mexican government to make a claim is also a non-starter for the chemicals sector, since it is very unlikely that a chemical company would be supply chemicals directly to a government.
- USMCA requires that investors making claims on potential violations by Mexico must first obtain a final decision from a court of last resort or wait 30 months after initiating a proceeding in a domestic court (i.e. the exhaustion period). 30 months is far too long and costly for investors to wait. Such a period would also serve as a disincentive to making ISDS claims in the first place. Also, it seems that a claimant could bypass these requirements if it

can prove that the recourse to domestic remedies was obviously futile or manifestly ineffective. This could be a very high bar for an investor to clear.

- Given the above, ACC has concerns whether the precedent that the USMCA sets on ISDS is the right one for U.S. chemical manufacturers. The United States will have diminished leverage to ask trading partners to accept high standard ISDS outcomes in a trade agreement.
- ACC would not support the ISDS provisions in the USMCA as a model for future U.S. trade agreements.

In light of the above concerns, we believe that the three parties should revisit the outcomes on ISDS. We would like to offer the following constructive solutions to fixing these outcomes:

- *Ideal world*: Canada should opt back in and all sectors can make claims on the full set of ISDS provisions (e.g. no selected sectors, no contract requirement).

- *Adding chemicals to the list of selected sectors*: If the ideal world scenario is not possible, then we recommend elimination of the contract requirement in Annex 14-E of the USMCA text and the inclusion of less arbitrary standards for sectors allowed to make claims on the full set of ISDS provisions.

Term and Review Provision (i.e. sunset)*:* The USMCA allows the parties – in specific the heads of governments – to decide whether to opt out after 6 years and leaves the door open for a sunset after 16 years. The parties must undertake a performance review of the agreement at 6 years. If they identify implementation problems, then they can perform annual reviews to address those problems. They also can decide to extend the lifespan of USMCA by another 16 years at any point after the initial performance review. ACC has concerns on whether this approach give U.S. chemical manufacturers sufficient business and political certainty to invest in new chemical facilities or expansions.

Prohibition on Duty Drawback: The original NAFTA contains a prohibition on the use of duty drawback, but subsequent U.S. trade agreements do not. ACC had asked for an elimination of this prohibition in the negotiations. This was an important ask for several ACC members, including those participating in the meeting. We understand that Ambassador Lighthizer personally was opposed to elimination the prohibition.

***Withdrawal from NAFTA*:** ACC remains concerned that sudden U.S. political withdrawal from either NAFTA or the USMCA remains a real possibility. Without NAFTA, the chemical industry would face extreme tariff uncertainty on exports and a loss in demand for U.S. chemicals equivalent to 45 percent of our current export levels if tariffs were to escalate. American chemicals are an important positive contributor to the U.S. trade position, and our industry expects accelerated export growth due to new chemical industry investments coming online. Canada and Mexico are our top export destinations. A NAFTA withdrawal would wipe out the accelerated export growth on which our industry is counting.

The USMCA's Impact on Trade in Chemicals

Some of the key features of NAFTA that have been essential to driving the integration of North American manufacturing and the planned expansion of the US chemical industry would remain in place with the USMCA. By reducing trade barriers, the USMCA is expected to result in increased and growing trade amongst the United States, Canada, and Mexico. In addition to maintaining a duty-free environment, the USMCA should prevent non-tariff barriers for chemicals trade within the region. While assessing the positive impact of reducing non-tariff barriers can be challenging, estimating the benefits of continued duty-free trade is very straightforward.

ACC has found that duty-free chemicals trade in North America is critical to the competitiveness of US chemical manufacturers. The USMCA prevents the re-introduction of tariffs on North American trade and resulting tariff burden that would lead to lost demand for U.S.-made chemicals. Without a regional free trade agreement, at a minimum, Canada and Mexico could decide to levy World Trade Organization (WTO) most-favored nation tariffs on imports from the United States, but they would have the ability to raise their tariffs on U.S. imports to their maximum WTO tariff bindings.

In that scenario, U.S. chemical producers could see a $9 billion annual tariff burden on their exports to Canada and Mexico, which would result in lost demand for chemicals. That lost demand translates to reduced U.S. production and up to 21,000 jobs eliminated in the U.S. chemical industry. The USMCA means preventing a contraction in U.S. chemical exports (up to $22 billion) and contraction downstream in the products that use U.S. chemicals as inputs (up to $7 billion). All told, because the USMCA would maintain a duty free trading environment, it would prevent an estimated $29 billion in lost chemicals demand.

Foreign Direct Investment by U.S. Chemical Manufacturers in Canada and Mexico

Mexico and Canada together represent 11.2 percent of total direct U.S. investment abroad in chemicals. U.S. FDI (stock) in Canada in chemical manufacturing was $17.6 billion in 2017. About 5 percent of all U.S. FDI in Canada is in chemical manufacturing. U.S. FDI (stock) in Mexico in chemical manufacturing was $6.3 billion in 2017. About 6 percent of all U.S. FDI in Mexico is in chemical manufacturing.

U.S. exports to Canada and Mexico are important to U.S. economic growth and support millions of American jobs. Investments made by U.S. multinational corporations (MNCs) in Canada and Mexico reflect the importance of North American supply chains and the importance of U.S. partnerships with both countries in manufacturing goods. The employment of vertical supply chains that cross the U.S.-Canada and U.S-Mexico borders enables U.S. MNCs to produce goods that are competitive in the world marketplace and it allows production to have a higher degree of U.S. content in the final product, which helps to sustain jobs in the United States.

U.S. investment in Canada and Mexico has enabled America manufacturers to thrive in foreign export markets and in the U.S. domestic market. U.S. FDI has been complementary to investment and job creation in the U.S. because extending supply chains into Canada and Mexico has strengthened the competitiveness of American businesses. This successful partnership is why we observe a significant amount of related party trade between the U.S. and Canada and U.S. and Mexico and a steady stock of U.S. direct investment in both countries. U.S. direct investment in Canada and Mexico is led by manufacturing - including chemical manufacturing