



Delhi Policy Group

# DPG POLICY REPORT

US trade deals under President  
Trump: What they mean for India and  
world trade

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Volume V, Issue 20

MAY 8, 2020



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## May 8, 2020

### ABOUT US

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*President Donald J. Trump is joined by Mexican President Enrique Pena Nieto and Canadian Prime Minister Justin Trudeau at the USMCA signing ceremony on the sidelines of the G20 Summit in Buenos Aires, Argentina, November 30, 2018. Source: Flickr/White House*

*U.S. President Donald Trump and Chinese Vice Premier Liu He sign the U.S. China Phase One Trade Agreement on January 15, 2020 at the White House. Source: Flickr/White House*

*U.S. President Donald J. Trump and Japan Prime Minister Shinzo Abe sign a trade agreement at the sidelines of the 74th Session of the UNGA on September 25, 2019. Source: Flickr/White House*

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ISBN: 978-81-87206-45-3 (pb); 978-81-87206-46-0 (eBook)

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# US trade deals under President Trump: What they mean for India and world trade

by  
Dr. V.S. Seshadri

## SECTION 1: Introduction

Pursuit of an aggressive trade policy has been among the major highlights of the Trump Presidency in the United States. The world was alerted to this early in his term. One of the first acts of President Trump after the assumption of office in January 2017 was to fulfil his campaign promise and withdraw the United States from the twelve-country mega-regional TPP agreement, which had been negotiated under the US's very leadership. Further, in the 2017 Annual Trade Agenda<sup>1</sup> released in March that year, the Trump Administration announced, while surveying US trade performance in previous years, that "it is time for an aggressive approach" and made it clear that it will "use all possible leverage to encourage other countries to give US producers fair, reciprocal access to their markets".

The agenda also set out four priorities that the Administration would follow:

- \* Defending national sovereignty over trade policy;
- \* Strictly enforcing US trade laws;
- \* Using leverage to open foreign markets; and
- \* Negotiating new and better trade deals.

It was further made clear that the Administration regarded its goals as better accomplished by focussing on bilateral negotiations rather than multilateral deals and by renegotiating and revising trade agreements when those goals were not met.

The agenda has certainly been aggressively followed up in these past three years, through some normal but also several questionable approaches in terms of observance of WTO rules. Pressurising partners towards a more "managed trade" outcome by a leading trading nation in the world has also raised more questions than providing answers about the future of the world trading system.

India has not remained immune. As with many other countries, its exports of steel and aluminium to the United States were slapped with additional tariffs based on security grounds from March 2018 onwards, an unprecedented

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<sup>1</sup> It can be accessed at <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2017/2017-trade-policy-agenda-and-2016>

step by any WTO member. India's exports to the US, which used to receive GSP concession for entering the US market, have also been denied<sup>2</sup> these duty benefits from June 2019 on the plea that US exports to India have not received equitable and reasonable access, undermining the generalised and non-reciprocal nature of this scheme. Negotiations between India and the US to settle the issue have not so far been successful and President Trump has called India a "tariff king" on occasions. All that could be achieved during President Trump's visit to India in February 2020 was an understanding between the two sides<sup>3</sup> to promptly conclude the ongoing negotiations, which it was hoped can become Phase one of a comprehensive bilateral trade agreement.

But the US has concluded agreements with some trade partners – Republic of Korea, Canada, Mexico, China and Japan – with all of which negotiations had commenced earlier. Discussions with the first three partners related to revisions in existing US free trade agreements with them – the Korea-US FTA and NAFTA. With both China and Japan, the US has concluded Phase-1 agreements which are expected to be followed by further agreements.

What is common between the US on the one side and each of these trade partners on the other is that they all have a trade surplus with the US – with the surplus being around US\$ 375 bn. for China, the largest, and around US\$ 20 bn. in the case of India whose trade surplus ranks tenth. Driven by the intent to seek balanced and reciprocal trade, the Trump Administration's strategy has been to use every leverage it can find to bring such trading partners to the negotiating table with a view to securing concessions that will help push the US's own exports. In the case of NAFTA and KORUS, it was the threat of US withdrawal from those agreements. In respect of China, it was the use of penal tariffs after an initial investigation under Section 301 of the US Trade Act, not any WTO sanctioned measure. As for Japan, the threat of tariff action on autos that comprise over a third of Japan's exports to the US, also under the dubious security grounds, formed a key element.

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<sup>2</sup> <https://www.federalregister.gov/documents/2019/06/05/2019-11986/to-modify-the-list-of-beneficiary-developing-countries-under-the-trade-act-of-1974>

<sup>3</sup> The Joint Statement released after the visit can be accessed at [https://mea.gov.in/bilateral-documents.htm?dtl/32421/Joint\\_Statement\\_Vision\\_and\\_Principles\\_for\\_IndiaUS\\_Comprehensive\\_Global\\_Strategic\\_Partnership](https://mea.gov.in/bilateral-documents.htm?dtl/32421/Joint_Statement_Vision_and_Principles_for_IndiaUS_Comprehensive_Global_Strategic_Partnership)

Given below is a table on US trade with some of its leading partners as relevant to this paper. The trade figures are for calendar year 2017 which is the last normal year before duties of one form or another began to be imposed. The source for the trade figures is the US Census Bureau.

**Table 1: US Trade with some leading partners of goods and services in 2017**  
(figures in US\$ billions)

	US exports of Goods	US imports of Goods	Trade balance for US in Goods	US exports of services	US imports of services	Trade balance for US in services
China	130.4	505.6	-375.2	56.0	17.5	38.5
Canada	282.4	300.0	-17.6	58.2	33.2	25.0
Mexico	243.0	314	-71.1	32.5	25.5	7.0
Japan	67.7	136.5	-68.8	46.0	33.3	12.7
South Korea	48.3	71.2	-22.9	23.9	10.9	13.0
India	25.7	48.6	-22.9	23.6	28.2	-4.6

Simultaneously, the US has also been working towards creating leverages with a view towards bringing reforms to the WTO rules. It has already succeeded in rendering the dispute settlement mechanism (DSM) of the WTO dysfunctional by declining approvals for fresh nominees to the Appellate Body (AB), that currently has only one member left after the expiry of the terms of its earlier members (this body of seven members needs to have a minimum strength of three members to hear any case). The ostensible reason given is the need for reform of the DSM, including rules for AB procedures. But with the US showing reluctance to seriously consider proposals for such reform when they were put forward, and not putting forward proposals of its own, it appears evident that this is part of its larger leveraging strategy. The US will likely agree to a resolution of this urgent issue only when its proposals on a slate of other issues may find acceptance in the WTO, which works by consensus. There is also some benefit in keeping DSM dysfunctional at this time. WTO members have no time bound recourse to challenge the legality of the various aggressive trade actions by the US.

As for WTO reform, the US has put forward certain proposals including new and very restrictive criteria<sup>4</sup> for identifying developing countries that leaves out countries like India. Further, it has been keen to pursue more stringent disciplines in the WTO on subsidies for which it has advanced proposals in collaboration with the EU and Japan. On its own, it has also recently submitted a proposal at the WTO for a draft General Council decision<sup>5</sup> on the importance of market-oriented conditions (perhaps a China inspired issue but one which could also affect other countries) to the world trading system. Digital trade is another area that is of particular interest for the US. The USMCA agreement already includes disciplines in some of these areas. Much like what happened in the case of NAFTA negotiations way back in late eighties/early nineties, when some of those NAFTA texts were used as models for inclusion<sup>6</sup> in the Uruguay Round agreements which were taking place in parallel, could we be seeing a re-enactment now for fulfilling the US agenda for bringing reforms to the WTO?

Working on leverages to bring WTO members to the negotiating table by rendering the DSM non-functional and other means, and pushing for acceptance of proposals of interest to it, can be expected to form the US's agenda at the next WTO ministerial whenever it may be held this year.

This paper is intended to examine all these elements in some detail with a view to anticipating what may be in store for India in its own bilateral negotiations with the US as well as in the context of the next WTO ministerial. In Sections 2 to 5 of this paper, we will examine each of the aforementioned four bilateral (the US-Mexico-Canada agreement is actually a trilateral FTA) agreements, each quite different in its own way, that the US has concluded with its trading partners. What will be looked at in each of these agreements will be: (a) US concerns and possible negotiating objectives at the commencement of negotiations; (b) motivating elements and leverages that brought the trade partner to the negotiating table; (c) salient aspects of outcomes; and (d), possible implications and takeaways for India. In Section 6 we shall briefly discuss as to what these agreements could mean for India in terms of our own negotiations with the US as also generally, and what they could imply for the next WTO ministerial when WTO reform could be a key item on the agenda.

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<sup>4</sup> See WTO documents WT/GC/W/757 dated 16 January 2019 and WT/GC/W/764 dated 15 February 2019

<sup>5</sup> See WTO document WT/GC/W/796 dated February 20, 2020

<sup>6</sup> See for example the US Congressional Research Report by Brock R. Williams on 'Bilateral and Regional Trade Agreements: Issues for Congress' dated 17 May 2018 which inter alia notes how some of the commitments on intellectual property rights (IPR) and dispute settlement in NAFTA for example quickly made their way into the multilateral system

## SECTION 2: Republic of Korea-US FTA Renegotiations

The Republic of Korea-US Free Trade Agreement (KORUS henceforth) was signed initially in 2007 but had to wait for a subsequent revision in 2011 before it could get US Congressional approval. It finally came into effect in March 2012. After NAFTA, it was in economic terms the most significant FTA signed by the United States.

President Trump, however, termed KORUS as a “horrible deal” that left “America destroyed” and threatened withdrawal<sup>7</sup>. The President’s Trade Policy agenda 2017 also pointed to how between 2011 and 2016, US exports to Korea had actually declined and the bilateral merchandise trade deficit for the US had more than doubled. On the agenda for negotiations were the large bilateral merchandise trade deficit with Korea and obstacles facing US exports in the Korean market.

Adding to the pressure on Korea were safeguard investigations launched by the US against washing machines and solar panel imports for which Korea was a key supplier (15.8% of US imports of washing machines and 20.7% of US imports of solar panels in 2017). Safeguard duties were finally imposed on both the items in January 2018.

Korea was also a supplier of steel and aluminium products to US and the investigations on imports, even if from all foreign sources of these items on security grounds (under Section 232 of the US Trade Act) ongoing by the US at this time, became another pressure point.

KORUS renegotiations were launched on January 5, 2018; an agreement was reached on March 26, 2018. As part of the overall deal Korea also agreed to limit its future steel and aluminium exports to the US to 70 per cent of the average volume of its exports during the period 2015-2017. The renegotiated deal was eventually signed by the two sides in September 2018, and after Korean ratification (absent any regulatory change required for the US internally it did not need US Congressional approval), came into effect from January 1, 2019. The principal elements of the deal were<sup>8</sup>:

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<sup>7</sup> See news item ‘Trump wants to end ‘horrible’ South Korea-U.S. trade deal. Koreans disagree’ at [https://www.washingtonpost.com/world/trump-wants-to-end-horrible-south-korea-us-trade-deal-koreans-disagree/2017/09/13/fb528b3e-9627-11e7-a527-3573bd073e02\\_story.html](https://www.washingtonpost.com/world/trump-wants-to-end-horrible-south-korea-us-trade-deal-koreans-disagree/2017/09/13/fb528b3e-9627-11e7-a527-3573bd073e02_story.html)

<sup>8</sup> An overview of the outcome could be seen in the brief by US Congressional Research Service on “US-South Korea (KORUS) FTA’ dated 28 December 2018 which can be accessed at <https://fas.org/sgp/crs/row/IF10733.pdf>

## Key elements of the KORUS revisions

- \* The annual quota of cars that US can export to Korea, with the cars conforming to US (not Korean) safety standards, was increased from 25,000 units per manufacturer to 50,000 units, along with a clarification about South Korean recognition of certain U.S. emissions and auto-parts standards for U.S. exports;
- \* Korea agreed to the US demand to push backwards by twenty years the duty elimination of 25 per cent on light truck imports into the US from Korea, as had been committed in KORUS, from the earlier slated year 2021 to 2041;
- \* Korea will amend its Premium Pricing Policy for global innovator drugs<sup>9</sup> to ensure its conformity with KORUS and ensure non-discriminatory and fair treatment for US Pharma exports; and
- \* On customs, a list of eight principles were agreed on expeditious and risk-based origin verifications to be applied by Korean customs in its inspection procedures for preferential treatment under KORUS, and a working group to monitor implementation.

From the Korean side, a few demands were also accepted by the US:

- \* Amending the investment chapter, including changes on the lines of TPP, such as clarifying that public welfare may be considered in national treatment determinations and that failure to meet investor expectations does not violate minimum standard of treatment provisions – in effect restricting operation of investor state dispute settlement (ISDS) in certain ways;
- \* Procedural improvements in trade remedy investigations<sup>10</sup> by adding transparency and due process requirements, including calculations of dumping margins. This was mainly to redress some Korean concerns about the US practice of using adverse facts available in certain investigations where minor errors or mistakes in the submitted documents could be

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<sup>9</sup> See the article by Shim Jae-Woo and Kim Do-Nyun, on “Drugs from U.S. likely to be more expensive after FTA deal,” *Korea Joongang Daily*, March 31, 2018 which provides some details about how the Korean policy for innovator drug pricing in effect results in favoring domestic companies. Can be accessed at <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3046309>.

<sup>10</sup> See brief by Jeffrey J. Schott and Euijun Jung on “KORUS Amendments: Minor Adjustments fixed what Trump called ‘Horrible Trade Deal’” at <https://www.piie.com/system/files/documents/pb18-22.pdf>

deemed as a failure to co-operate and therefore justification for invoking adverse facts and imposition of punitive duties; and

- \* Modifications in the Rules of Origin requirements for three product categories of textile inputs that were not available in either Korea or the US, essentially enabling South Korea to make greater use of third-party inputs in some exports to the United States.

Trade analysts have termed the renegotiated deal as a 'minor adjustment'<sup>11</sup> or a "slightly revised version",<sup>12</sup> rather than any major overhaul of KORUS. For the US, the principal gain was the postponement by twenty years of its obligation to eliminate truck tariffs on Korea that was otherwise due next year. The increase in number of cars that US manufacturers can export to Korea with US safety standards may be more for optical reasons than any real gain since US companies have not been able to come close to exporting even the earlier set annual limit of 25,000 units for each manufacturer.

For Korea, there was certainly relief at being able to restrict the revisions<sup>13</sup>. Some have also speculated that Trump agreeing to let go of Korea with only limited revisions may have had something to do also with the US security alliance with the ROK and the ongoing negotiations at that time with North Korea.

### Takeaways for India

From India's perspective the two regulatory improvements in the text, one on US trade remedy practices and another on Korean pharmaceutical regulations, are important to note. On the former, if Indian exporters to the US facing trade remedy actions have had earlier experiences with usage of adverse facts availed by US authorities owing to some minor errors in documentation, it will be important to see if the revised procedure agreed to between the US and Korea could be sought to be applied in future trade remedy actions by the US against Indian exporters. If necessary, inclusion of such a provision could also be considered in a possible deal we may arrive at with the US.

That Korea's pharmaceutical regulations generally have tended to discriminate against foreign companies is also India's experience. Suffice it to cite the very limited inroads our Pharma companies have been able to make with their

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<sup>11</sup> See brief by Jeffrey J. Schott and Euijun Jung, op cit

<sup>12</sup> See article by Simon Lester et al of CATO Institute at <https://www.cato.org/publications/free-trade-bulletin/trumps-first-trade-deal-slightly-revised-korea-us-free-trade>

<sup>13</sup> For a Korean perspective following article 'The Trump Economic Impact in East Asia after two years: The case of South Korea by Yoon Yeo Joon' may be seen at [http://www.keia.org/sites/default/files/publications/kei\\_jointus-korea\\_2019\\_3.2.pdf](http://www.keia.org/sites/default/files/publications/kei_jointus-korea_2019_3.2.pdf)

generic exports to that country, notwithstanding the fact that India also has an FTA with Korea and India's generics have found worldwide acceptance [India's exports of pharma items worldwide were US\$13.28 billion in 2018-19, with the bulk going to advanced markets like the US (39 per cent of India's exports) and EU (13 per cent). Exports to Korea were a meagre 0.1 per cent.]. Taking the cue from what the US has achieved in respect of Korean Pharma pricing regulations for innovator drugs, India too should try to prevail on Korea, in the ongoing bilateral review of the India-Korea CEPA, to revise their regulations for generic approvals to provide fast track access for Indian generics into that market, on the lines we have with Singapore or through other acceptable means.



### SECTION 3: Renegotiation of NAFTA

President Trump had called NAFTA a “disaster” and the “worst agreement ever negotiated”<sup>14</sup> during his campaign. Following up, once in office, he issued a notification to the US Congress in May 2017 of his intent to begin talks with Canada and Mexico to renegotiate and modernise NAFTA. The negotiations themselves began in August 2017 and concluded in September 2018. Congressional approval necessitated accommodating more changes and further negotiations with partners, all of which resulted in a Protocol of Amendment that was accepted by all three partner countries. The deal was finally signed by President Trump in January 2020 and will be implemented after Mexico’s ratification which is still pending.

Canada and Mexico, so dependent on the US market, had no choice but to agree to the renegotiations. When the talks were underway, there were also pressures on them coming from higher tariffs on steel and aluminium in early 2018 and subsequently the threat of tariffs on autos as well.



*President Donald J. Trump is joined by Mexican President Enrique Peña Nieto and Canadian Prime Minister Justin Trudeau at the USMCA signing ceremony on the sidelines of the G20 Summit in Buenos Aires, Argentina, November 30, 2018. Source: Flickr/White House*

<sup>14</sup> See for example the news item ‘ Donald Trump says NAFTA was the worst trade deal the US ever signed’ by Stephen Gandel in Fortune Magazine on 27 September 2016

For the US the objectives<sup>15</sup> were not only those prescribed in the Trade Promotion Authority mandate for all trade agreements, but also to specifically reduce the trade deficit with NAFTA partners (particularly Mexico) and to “rebalance the benefits” in terms of diverting trade and investments from Canada and Mexico to itself as part of its “America First” policy.

The final negotiated outcome of what has been rechristened as the US-Mexico-Canada Agreement<sup>16</sup> (USMCA) is over 2000 pages long with 34 Chapters and multiple annexes and side-letters. It will not be the attempt here to outline all its features – most of the market opening done by NAFTA has been preserved in the new agreement. Some of the changes incorporated are also traceable to TPP, even though there may be some tweaking. What we shall look at are certain key elements that characterise the revisions in the USMCA vis-a-vis NAFTA. This may help us to understand both the driving elements of the Trump Administration’s trade agenda and what are priority concerns for the US Democratic Party, which was able to make changes to the pact through the Protocol of Amendment that was a product of Congressional consideration. These key features of USMCA are:

### USMCA vis-a-vis NAFTA

1. In line with the US pursuit of greater access for its farm exports, USMCA has created fresh market openings for the US in Canada’s protected dairy and poultry sectors (apparently somewhat more than TPP) in return for more access by Canada in the US for certain agricultural products including in dairy, sugar and a few other areas. (It was stated that the United States will provide reciprocal access on a ton-for-ton basis for imports of Canada dairy products through first-come, first-served tariff rate quotas).
2. Substantial changes in the rules of origin for the auto sector that may lead to more trade and investment diversion to the US. North American content for autos and auto parts has been hiked from the already high 62.5% to 75%, with a further requirement that 40-45% of such content be made by workers earning at least US\$ 16 per hour, that is significantly higher than average Mexican wages<sup>17</sup>. Additionally, 70% of steel and aluminium used

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<sup>15</sup> A detailed analysis of the renegotiated USMCA and its various provisions may be found in the US Congressional Research Service report (R 44981) on ‘NAFTA and the United States-Mexico-Canada Agreement (USMCA)’ of 2 March 2020.

<sup>16</sup> Called as Canada-US-Mexico Agreement (CUSMA) in Canada and as Treaty between Mexico, United States and Canada (T-MEC) in Mexico

<sup>17</sup> For example as per the Mexican News Daily news item of 1 August 2018 the average wage of auto workers in Mexico is around US\$ 3 per hour. See the link <https://mexiconewsdaily.com/news/automotive-wages-in-nafta-talks/>

in a vehicle must originate in North America. What is more, in the protocol of amendment, yet another requirement was added that steel must be melted and poured within North America beginning at year seven of the agreement. For aluminium, appropriate requirements are to be considered at year 10.

3. As a concession to its partners, there is also a side letter<sup>18</sup> in the USMCA under which the US has agreed that, in the event that it imposes section 232 measures against auto imports from all sources, the measure shall exclude imports from each of Canada and Mexico for up to 2.6 million passenger vehicles on an annual basis, with all light trucks being exempt entirely. The exemption will also be made for US\$ 32.4 billion worth of auto parts from Canada. Mexico was given a higher value for auto parts (US\$ 108 billion).
4. While this was not part of the USMCA text, the US also announced an agreement among the parties for the termination<sup>19</sup> of steel and aluminium tariffs that it had earlier imposed under Section 232 of the US Trade Act. But these tariffs could get reimposed if surges in their imports occur in the US. In such an eventuality, any retaliation by Canada and Mexico would, however, be limited to steel and aluminium products.
5. Easier access for import parcels up to a *de-minimis* threshold is a unique trade agenda item for the US to capitalise on its strength in express delivery services and to *inter alia* benefit its e-commerce platforms. Under the USMCA, shipments up to US\$ 117 each in respect of Canada and Mexico will have minimal entry procedure and within this limit the duty-free threshold will be US\$ 40 and US\$ 50 respectively. For the US the duty-free threshold is set at US\$ 800. The USMCA also stipulates that the postal system cannot use revenue generated from its monopoly power in providing postal services to cross-subsidise an express delivery service. It further requires independence between express delivery regulators and providers.
6. The Labour and Environment provisions have been significantly strengthened in the USMCA and captured in separate chapters in the main text rather than in side letters which was the case in NAFTA. Dispute

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<sup>18</sup> The side letter for example in respect of Mexico as available in USTR website can be accessed at [https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/MX-US\\_Side\\_Letter\\_on\\_232.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/MX-US_Side_Letter_on_232.pdf)

<sup>19</sup> <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/may/united-states-announces-deal-canada-and>

settlement provisions of the agreement will now be fully applicable to them. Adherence to core labour principles in the ILO declaration on fundamental principles and rights at work will receive closer scrutiny. Mexican commitments to reform labour laws and practices, including towards facilitating formation of independent unions and effective collective bargaining, have been included in a separate annex. All of these will give rise to upward wage pressures for Mexico.

7. The Protocol of Amendment has tightened the enforcement provisions on labour beyond the applicability of dispute provisions. Firstly, it reverses the burden of proof by asserting that an alleged labour violation (a similar provision also applies for environment) affects trade and investment unless a respondent party can prove otherwise<sup>20</sup>. The Mexican commitments in the labour annex will also be subject to monitoring by an inter-agency committee in the US. Both the US and Canada can further request an independent panel of experts to investigate any alleged violation (rapid response mechanism) and can impose penalties in case of a positive finding.
8. The Environment provisions have also been considerably strengthened in the USMCA, including obligations in respect of protection of ozone layer, ship pollution, biodiversity, sustainable fisheries management and elimination of harmful fisheries subsidies.
9. More commitments were added at the stage of congressional consideration. A reversal in the burden of proof in respect of alleged environmental violations was incorporated, similar to that for labour. Seven specific multilateral environmental agreements were also listed down for full implementation by parties who were members even as the agreement on climate change did not make it to the list.
10. In respect of IPRs, the outcome was different in that the initial text that had set some higher minimum standards relative to NAFTA was diluted by the Protocol<sup>21</sup>. The ten-year data exclusivity protection for biologics was

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<sup>20</sup> Apparently, in the past, US complaints over these issues have been blocked or delayed by requirements that the complainant first had to prove that trade was harmed by specific labor or environmental commitment violations before seeking resolution. See the article by Mary E. Lovely and Jeffrey Schott on 'The USMCA: New Modestly improved but still costly' 17 December 2019 accessible at <https://www.piie.com/blogs/trade-and-investment-policy-watch/usmca-new-modestly-improved-still-costly>

<sup>21</sup> The Democratic Party has a more supportive approach to accessible drug prices. See the piece 'The Road to ratification: Democratic Resistance to the USMCA' by William Allan

dropped from the text. Interestingly, the Protocol also excluded extending patent protection for new uses, methods, or processes of a known product from the text.

11. Barring the foregoing, the USMCA carries most of the IPR provisions contained in TPP. It provides for patent term extension for “unreasonable delays” in patent examination, mandates patent linkage and grants five years of data exclusivity to new drugs. Copyright protection gets extended to a 70-year period. It also extends conditional protection to internet service providers against liability for digital copyright infringement.
12. The USMCA extends trade mark protection to scents and sounds. Trade secret theft gets stricter handling. Provisions include criminal and civil procedures and penalties for such theft and penalties for government officials who wrongfully disclose trade secrets, including through cyber theft and by state-owned enterprises (SOEs).
13. Revisions in the investment chapter of the USMCA take into account certain public policy concerns in recent years that shifts the balance more towards rights of governments to regulate. It recognises legitimate public welfare objectives while evaluating misappropriation. Action or inaction by any party that may not meet investor expectations may also not be, on its own, regarded as a breach of minimum standards of treatment, as in the case of the revised KORUS. On performance requirements, however, it goes a step further than NAFTA and explicitly prohibits any stipulation relating to use or purchase of technology of a party.
14. The major deviation from NAFTA, however, is in the investor-state dispute settlement (ISDS) provisions. The ISDS between Canada and the US is ended under USMCA. Between the US and Mexico<sup>22</sup>, ISDS will be limited to government contracts in energy, infrastructure, transportation and telecom sectors. In other sectors, it will become applicable only after the claimant has first exhausted national remedies.
15. In respect of the main dispute settlement provisions in the agreement,<sup>23</sup> the Protocol made a significant improvement that will ensure that

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Reinsch et al dated 16 May 2019, accessible at <https://www.csis.org/analysis/road-ratification-democrats-resistance-usmca>

<sup>22</sup> Canada and Mexico are maintaining ISDS amongst themselves through CPTPP.

<sup>23</sup> During the currency of NAFTA only three dispute panels between 1994 and 2001 completed their work. Because US was able to block a panel chair in the fourth case the Panel could not



blocking formation of panels may not be possible by any party. What appears evident from this is that the Trump administration was quite comfortable leaving the panel system as it was (and not working) and it was the Congress that had to intervene to make it more predictable and time bound through the protocol. (Does it convey a message on the state of dysfunction the AB of the WTO is in today?)

16. Canada was also able to ensure, despite apparent reservations from the US side, retention of the binational review panels on trade remedies that figured prominently in NAFTA implementation.
17. As per the USTR, the chapter on digital trade in the USMCA contains the strongest disciplines<sup>24</sup> on digital trade of any international agreement. It prohibits customs duties from being applied to digital products distributed electronically (e-books, videos, music, software, games, etc.). It disallows restrictions on cross-border transfer of data or setting data localisation norms. While the TPP had a carve-out on this commitment for financial services, there is no similar exemption in the USMCA. The text further prohibits requirements of source code or algorithm disclosure as a condition for market access. It also has provisions to protect suppliers or users of interactive computer services from any liability for content in such services that was not created or developed by them. Another provision seeks to promote co-operation in cyber security and risk based strategies and consensus based standards over prescriptive regulations for combating cyber security risks.
18. There are several chapters in the USMCA on certain regulatory and policy aspects that may be termed more aspirational or of a best practice nature and are not subject to dispute settlement. They, however, reflect the US tendency to export its laws and regulatory practices through trade agreements. These are on competition, good regulatory practices, competitiveness and business facilitation, SMEs and transparency.

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be formed exposing an issue in the panel selection process which has not been used since. See Page 35 of the report on USMCA by the US Congressional Research Service accessible at <https://fas.org/sgp/crs/row/R44981.pdf>

<sup>24</sup> It has a few more disciplines than TPP that was earlier touted as the gold standard by US on the subject. A comparison of select provisions of the digital trade chapters of TPP and USMCA may be accessed at <https://www.bsa.org/files/policy-filings/04112019tppvusmcomparision.pdf>

19. For the first time in a US FTA, there is also a provision against currency manipulation in a chapter on macro-economic policies and exchange rate matters. Only the transparency and reporting requirements are, however, subject to dispute settlement. This could become a standard feature in future US FTAs.
20. Another similar standard feature in future US trade agreements could be a chapter on state owned enterprises and designated monopolies, as featured in a detailed fashion in the USMCA. It requires such enterprises to act in accordance with commercial considerations and prohibits non-commercial assistance to SOEs engaged in the production and sale of goods, subject to certain exceptions.



*President Donald J. Trump, joined by Vice President Mike Pence and U.S. Trade Representative Robert Lighthizer, signs the United States-Mexico-Canada Trade Agreement in front of the South Portico of the White House on January 29, 2020.*

*Source: Flickr/White House*

21. Finally, there is a “poison pill” clause in the USMCA that specifies that if any Party entered into a free trade agreement with a non-market country (read China), then it will allow the other Parties to terminate this Agreement on six months’ notice and replace this Agreement with a bilateral agreement as between them. The US Commerce Secretary has commented that this was another move to try to close loopholes in trade deals that have served

to legitimise China's trade, intellectual property and industrial subsidy practices. He further indicated<sup>25</sup> that this could be a precedent that could get added to future deals.

While signing the agreement, President Trump said that the USMCA was "the largest, fairest, most balanced, and modern trade agreement ever achieved". Interestingly, House Speaker and leading Democrat leader Nancy Pelosi called the revisions as carried out through the protocol of amendment as making the text "infinitely better". Many trade analysts have, however, been far more equivocal<sup>26, 27</sup>.

### Implications and takeaways for India

The USMCA is the first FTA which has received bipartisan support in the US congress after 2011, when the last set of FTAs (with South Korea, Colombia and Panama) was adopted. It is likely to remain a standard bearer for the US trade deals for some years to come. The US will likely use provisions in the chapters on subjects like IPRs, labour, environment, SOEs, digital trade, currency convertibility, good regulatory practices etc., as possible models for future trade agreements.

Of some interest to India is the stance of the Democratic Party, which disagreed on extending the patentability criteria, in line with India's own position. The pushback seen on restricting the scope of ISDS is also in the direction of India's views on the subject. Other than these, the USMCA makes further significant inroads into disciplining behind the border issues, an approach that needs careful study on what may or may not be in India's interest. The provisions on labour in the USMCA, as further strengthened by the Democratic Party through the protocol, are of concern since they appear to have been included not so much to encourage partner countries towards greater adherence to labour standards but simply to end up causing upward pressure on wages.

What could also be worrying for India, and much of the trading world, is the intent to manage trade that is evident behind the revision of the local content

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<sup>25</sup> See Reuters news item 'US Commerce's Ross eyes anti-China 'poison pill' for new trade deals' dated 6th October 2018 accessible at <https://www.reuters.com/article/us-usa-trade-ross-exclusive/exclusive-u-s-commerces-ross-eyes-anti-china-poison-pill-for-new-trade-deals-idUSKCN1MF2HJ>

<sup>26</sup> See Trump's USMCA cannibalised NAFTA by Harry G. Broadman, 31 January 2020, Forbes magazine which also points to 'Free Trade' being omitted in its name-USMCA

<sup>27</sup> See also <https://www.piie.com/blogs/trade-and-investment-policy-watch/usmca-new-modestly-improved-still-costly>



rules for autos in the USMCA. Rules of Origin are basically designed to ensure that substantial transformation takes place in the country of export before it avails the FTA duty concession on a product. The US had earlier stretched this flexibility in the textile sector, through its well-known 'yarn forward rule' that began with NAFTA, to derive collateral benefit for the importing country (itself) by ensuring that its textile yarns and fabrics got used<sup>28</sup> for processing by the exporting country. The USMCA goes a step further now on this in the auto sector by including stipulations on usage of steel and wage rates paid for certain content of auto products, apart from hiking the North American content, all intended to "rebalance the benefits" and bring trade and manufacturing back to the US.

Will this actually work or will such stipulations only make manufacturing autos in North America uncompetitive, as consumers may prefer importing into the US at the MFN rate of 2.5%? Several trade experts have commented adversely on this aspect<sup>29</sup> of the USMCA, even as it has received bipartisan support in the US Congress. For the outside world it is of great concern, particularly if the USMCA deal gets combined with the actual imposition of tariffs on autos by the US under Section 232 of the US Trade Act. The threat of this still looms large, and the only exceptions<sup>30</sup> granted so far have been given to Canada and Mexico.

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<sup>28</sup> The extent of benefit derived by US on its trade with Mexico as a result of this rule has been well brought out in a study on 'Impact of origin rules for textiles and clothing of developing countries by Munir Ahmed, December 2007 that can be accessed at <http://www.ictsd.org/sites/default/files/downloads/2009/02/impact-of-origin-rules-for-textiles-and-clothing-on-developing-countries.pdf>

<sup>29</sup> For example Inu Manak and Simon Lester of CATO Institute have termed the auto trade provisions in USMCA as the most negative part of the agreement. See their blog 'Evaluating the USMCA' accessible at <https://www.cato.org/blog/evaluating-new-usmca-0>

<sup>30</sup> It is relevant here that in the side letters exchanged with Canada and Mexico the reasoning given for the exceptions, from a possible imposition of tariffs under Section 232 of US Trade Act, is "in order to support and enhance the existing manufacturing capacity (in autos) and mutually beneficial trade of the Parties"

## SECTION 4: US-China Trade War and Phase-1 Trade deal

The US-China trade contestation has been around for several years now, including much of the Obama years. The Trump administration, however, took a more aggressive approach. The concerns voiced from the US side were several, including the large bilateral merchandise trade deficit with China, China's SOEs operating on non-market principles resulting in over capacities and distortion in world trade, currency manipulation, cyber theft, forced technology transfer and China's programme for "Made in China 2025" that was seen as discriminatory towards foreign companies. Aspects taken up for legal action under national law by the Trump administration (presumably to create the leverage) were allegations regarding forced technology transfer, cyber and IPR theft and use of state machinery by China for strategic technology acquisitions overseas. This was in addition to the safeguard investigation underway in the US around the same time on solar modules and washing machines, for both of which China was a significant supplier, and investigations on steel imports into the US from all sources, in which again China had some share.

The investigation under Section 301 of the US Trade Act was launched in August 2017 on the following four counts:

- \* China's investment regime and practices have forced or pressurised US companies to make technology transfers;
- \* China's technology licensing regime has forced US companies to license Chinese entities on non-market-based terms;
- \* China provides state support to its outbound investments with strategic intent including for technology, which is not market driven; and
- \* Unauthorised cyber intrusions and IPR theft.

The investigation by the USTR resulted in an affirmative finding<sup>31</sup> on all counts in March 2018. President Trump decided unilaterally to impose penal duties of 25 % on US\$ 50 bn. worth of imports from China. This invited prompt retaliation from China in equal measure that gave rise to a round of counter-retaliations (see Box) which eventually stretched to four stages, amidst intermittent bilateral negotiations, over much of 2019. A Phase-1 deal was finally agreed in December 2019, which was signed on January 15, 2020.

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<sup>31</sup> See the Section 301 report accessible at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/section-301-report-chinas-acts>

## US-China trade contestation: Duties imposed by the US under Section 301 of US Trade Act and retaliations by China

### List 1

- US imposes duties of 25% on US\$34 bn. of Chinese imports on July 6, 2018.
- China imposes same level of duties for a similar sum of US imports on same day.

### List 2

- US imposes duties of 25% on US\$16 bn. of Chinese imports on August 23, 2018.
- China imposes same level of duties for a similar sum of US imports on same day.

### List 3

- US imposes 10% tariff on a further US\$ 200 bn. on September 24, 2018 which is increased to 25% on May 10, 2019.
- China imposes retaliatory duties on a further US\$ 60 bn. of US imports on September 24, 2018 with additional duties on them on June 1, 2019.

### List 4A

- US imposes 15% duties on a further US\$ 125 bn. of Chinese imports on September 1, 2019.
- China also imposes retaliatory duties now on US\$ 75 bn. of imports from US on same date.

### List 4B

- US had announced duties on a further US\$ 175 bn. of imports from December 15, 2019 to which China had also made an announcement about intended retaliation. This step was called off by both sides after they reached agreement on a Phase-1 deal.

As part of the deal the duties imposed as per list 4A were also halved in February 2020.

This therefore leaves additional duties imposed by US of 25% on US\$ 250 bn. and of 7.5% on around US\$ 120 bn. of Chinese imports and retaliatory duties by China on around US\$ 110 bn. of US imports.

China's own defence about its trade and economic relations with the US was publicly made available in a comprehensive white paper<sup>32</sup> released on September 25, 2018. The key points made were:

- \* Trade issues exist due to different economic structures, development stages and balance of advantages – nothing abnormal;
- \* US exports to China have grown by five times since 2001, much faster than its exports to the rest of the world;
- \* "Deficit" should not be focused only on goods trade. If local sales of US companies in China are also considered, there will be no deficit;
- \* China's subsidies are WTO-compliant; China has made huge efforts to protect and enforce IPRs; foreign companies have voluntarily entered into technology contracts; equity requirements are normal;
- \* Several US policies and practices have also hurt China.



*U.S. President Donald Trump and Chinese Vice Premier Liu He sign the U.S. China Phase One Trade Agreement on January 15, 2020 at the White House. Source: Flickr/White House*

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<sup>32</sup> China's white paper on US-China trade friction can be accessed from [http://english.www.gov.cn/archive/white\\_paper/2018/09/26/content\\_281476319220196.htm](http://english.www.gov.cn/archive/white_paper/2018/09/26/content_281476319220196.htm)

The Phase-1 deal<sup>33</sup> was around 90 pages long covering eight chapters, including intellectual property (IP), technology transfer, agriculture, financial services, macroeconomic policy and exchange rates, trade purchases by China and dispute resolution. While the first two chapters related to issues addressed by the 301 investigation, the most significant were the additional purchase commitments. Following briefly are China's commitments under the deal:

### China's Commitments under the Phase-1 deal

1. The IP Chapter details various procedural, regulatory and judicial steps that would be taken for expeditious and effective enforcement of China's IPR commitments under the WTO. Protection of trade secrets and confidential business information gets extensive treatment. Once prima facie evidence of misappropriation is given, burden shifts to the accused in a civil proceeding. Criminal procedures are to apply for wilful misappropriation. Unauthorised disclosure by government authorities also gets dealt with.
2. Enforcement measures are also detailed for protection of other forms of IP. On pharmaceuticals, China agreed to provide patent linkage, patent term extension for unreasonable delays (which have been defined<sup>34</sup>) in the grant of patent and the ability to provide supplemental information during patent investigation, which are all WTO plus in nature. On Geographical Indications, on which the US has a very restrictive approach, China agreed to provide for clear procedures to allow for opposition and cancellation. On all IP commitments, China was expected to submit an action plan for implementation within 30 days of signing.
3. The chapter on technology transfer commits adherence to several principles: transfers should be on market based terms and voluntary, there should be no pressure to transfer in relation to acquisitions, joint ventures and other investments, there should be no administrative requirement or licensing required which forces transfer and there will be due process and transparency. Further, no support should be provided for outbound investments for technology acquisition targeted by industrial plans.

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<sup>33</sup> The text of the Phase-1 trade deal can be accessed at [https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic\\_And\\_Trade\\_Agreement\\_Between\\_The\\_United\\_States\\_And\\_China\\_Text.pdf](https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf)

<sup>34</sup> It has been defined as more than 4 years (in USMCA it is 5) after the filing of application in China or 3 years after a request for examination of the application is made



4. The most significant and controversial element in the deal is China committing to purchase at least US \$ 200 bn. worth of additional goods from the US during the two years – January 1, 2020 to December 31, 2021 – compared to the baseline level of imports from the US in 2017. The figures have been sub-allocated<sup>35</sup> for 2020 and 2021 and also sectorally among manufactured goods, agriculture items, energy products and services. Such “managed trade” commitments with targets can perhaps be fulfilled only with active market intervention and purchases by Chinese SOEs, which paradoxically is among the key issues under bilateral contention. This aspect, as well as the WTO compatibility of such bilateral commitments, have received extensive criticism<sup>36, 37</sup> both within the US and elsewhere. The EU Trade Commissioner Phil Hogan has also, with reference to the purchases, said<sup>38</sup> that if there is a WTO compliance issue, they will take a case forward.
5. The chapter on agriculture deals with SPS issues featuring the modalities and certification processes of export facilities authorised by concerned US agencies in the dairy, poultry, beef and other areas. Some of these have been accepted by China and time bound indications have also been given for approval for others.
6. The Phase-1 deal has also provided US financial services companies significant new openings in insurance, credit rating, underwriting, asset management and other services. Commitments take the form of increased equity caps in insurance and a few other areas from April 1, 2020 relaxing regulatory requirements in several areas and moving forward applications for time bound determination to be made, including specifically on those

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<sup>35</sup> For 2020, the additional import commitment by China add up to US\$ 76.7 bn. comprising of purchases of US\$ 32.9 bn of manufactures, US\$ 12.5 bn of agri items, US\$ 18.5 bn of energy products and US\$ 12.8 bn of services. In 2021 the additional purchases committed are US\$ 123.2 bn in all and the subdivision is US\$ 44.8 bn, 19.5 bn, 33.9 bn and 25 bn respectively among the four sectors.

<sup>36</sup> See the blog ‘Trump’s Phase-1 deal relies on China’s state owned enterprises’ by Chad Bown and Mary Lovely, 3 March 2020 accessible at <https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-phase-one-deal-relies-chinas-state-owned-enterprises>

<sup>37</sup> The views of another lead trade analyst Simon Lester from CATO Institute can be seen in an article titled ‘What The U.S.-China Trade Deal May Mean For The WTO’ which appeared in an article dated 16 January 2020 accessible at <https://www.npr.org/2020/01/16/797098338/what-the-u-s-china-trade-deal-may-mean-for-the-wto>

<sup>38</sup> See the news item ‘EU trade commissioner criticises US-China trade deal’ which appeared in the Financial Times datelined 17 January 2020 accessible at <https://www.ft.com/content/6a6b5548-3877-11ea-a6d3-9a26f8c3cba4>

by VISA, Mastercard and American Express, in respect of electronic payment services.

7. The chapter on macro-economic aspects and exchange rate transparency is on the lines of the USMCA. China, which had been designated by the US as a currency manipulator on August 5, 2019 was freed of this label just before the signing of the Phase-1 deal.
8. Finally, the deal has a bilateral dispute resolution mechanism, basically a structured three-layered consultation and appeal process. However, if this results in no agreement, including on possible remedial measures, then either party can withdraw from the agreement<sup>39</sup>. There is, however, one provision in the deal which becomes relevant in the context of COVID-19, which is that in the event of a natural disaster or other unforeseeable event beyond the control of the parties that causes delays in complying with obligations, the two parties shall consult with each other.
9. As for the several rounds of penal duties and retaliations, the two sides agreed not to proceed with the fourth round of announced duties and some duties of the previous round were halved, but the rest remain<sup>40</sup>. They have also agreed to hold more discussions when further pending issues, including about the role of SOEs and subsidies, could come up.

## Implications and takeaways for India

- A. China's commitments to buy such large volumes of additional US goods in a time bound manner needs careful monitoring, as it should not result in a shift in purchases from other import sources to the US. A cursory glance at the identified products in the agreement indicates that India's exports of fishery items, cotton and naphtha could be at risk<sup>41</sup>. There could also be other potential items and this requires careful study of Chapter 6 on "Expanding trade" and its annexes in the agreement.

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<sup>39</sup> Simon Lester of CATO Institute notes this is no dispute resolution mechanism. What we have with the U.S.-China trade deal, then, is not really an enforcement mechanism but merely a process to restart the tariff war if one side is not happy about something. See his blog that can be accessed at <https://thehill.com/blogs/congress-blog/politics/480630-can-the-us-china-trade-deal-be-enforced>

<sup>40</sup> What remains are US penal tariffs of 25% on approximately US\$ 250 bn of Chinese imports and 7.5% on an additional US\$ 120 bn. On the Chinese side its retaliatory tariffs on approximately US\$ 110 bn. of imports from US remain.

<sup>41</sup> India exported US\$ 721 m of fishery items, US\$ 500 m of cotton and US\$ 2.8 bn. of naphtha to China in 2018-19.

- B. In a highly regulated area like SPS measures, the Chapter 3 on agriculture in the deal is a good example of how specificity is important at the time of signing such agreements to ensure prompt implementation. Some of our own agricultural export items are pending approval by China despite long delays. Bringing up to speed our certifying and standards agencies in this area is also as important to enable our negotiators to demand such specificity.
- C. Our financial institutions would also need to carefully vet the regulatory changes accepted by China, including about asset adequacy of foreign financial entities operating as subsidiaries in China. In certain areas, China now has agreed that the parent company's overseas assets shall be taken into consideration in order to fulfil applicable asset requirements. Such regulatory easing has to be on MFN basis as per WTO rules and should benefit all foreign financial entities.
- D. In terms of WTO plus elements in this agreement that the US could draw upon as precedents for future bilateral deals, India needs to note three of these in particular:
- \* The aforementioned TRIPS plus elements on pharmaceutical IP which China has accepted. These also figured in TPP, but were among the provisions suspended in CPTPP after the US's exit;
  - \* China's commitments on technology transfer, which is an area not within the WTO's mandate except in so far as they are covered by the TRIPS agreement. A tendency towards more rule making<sup>4243</sup> on the subject could mark a new trend. It also raises a basic question whether countries, particularly with large markets like India, should, as part of their policy, not be able to support such technology transfers for developing their defence or other strategic industries in lieu of the large market they offer. Of course, surreptitious or non-transparent ways to force such transfers are a different matter.
  - \* China's commitments on the conduct of its exchange rate policy in a trade agreement.

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<sup>42</sup> The Joint Statement of the trilateral meeting of trade ministers of Japan, US and EU issued on 14th January 2020 (a day before the signing of the China deal) inter alia stated that the ministers discussed possible elements of core disciplines to prevent forced technology transfer policies and the need to reach out and build consensus with other WTO members.

<sup>43</sup> Some countries use technology transfer as a performance requirement in respect of foreign investments. But certain investment agreements and FTAs prohibit such a performance requirement as in respect of the revised USMCA.



## SECTION 5: US-Japan Trade Agreement

In line with the Trump Administration's strategy to pursue bilateral agreements with major trade partners, Japan was a preferred candidate<sup>44</sup>. The goods trade deficit of US\$ 68 bn. with that country (US\$ 58 bn. in 2018 if both trade in goods and services were considered) ranked fourth<sup>45</sup> among bilateral trade deficits for the US. After its withdrawal from the TPP, the US moreover had the prospect of absence of concessionary access to Japan<sup>46</sup> at a time when the EU's FTA with Japan and CPTPP were coming into effect. If RCEP came into force that would make access to Japan's market even more difficult for the US.

Japan, however, appeared initially reluctant to negotiate a bilateral FTA with the US with all its attendant pressures. Rather, it was keen that the US reconsidered its decision on withdrawal from the TPP. But after the US launched an investigation into auto imports on security grounds (autos and auto parts account for around 38% of US imports from Japan) and there was a likelihood of tariffs being imposed, Japan decided to participate in the bilateral negotiations<sup>47</sup>. An important element in Prime Minister Abe's decision to agree to bilateral negotiations was also apparently a concession by the United States that Japan's market-opening in agriculture would not have to exceed the tariff and non-tariff concessions Japan had already made in its previous agreements (viz., TPP and other FTAs)<sup>48</sup>.

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<sup>44</sup> See the section on Background and Motivations in the US Congressional Research Service Report R46140 on "Stage One" of US-Japan Trade Agreements, published on December 20, 2019.

<sup>45</sup> See the US Congressional Research Service briefing on the US-Japan Trade Agreements dated accessible at <https://crsreports.congress.gov/product/pdf/IF/IF11120> dated 16 January 2020.

<sup>46</sup> Op. Cit. The briefing has for example noted that Japan's reduced tariffs and nontariff barriers on imports from TPP- 11 and EU countries, particularly on agricultural products, such as Japan's relatively high 38.5% beef tariff, threatened U.S. export competitiveness

<sup>47</sup> Even as the negotiations were underway on May 17, 2019, President Trump announced his Administration's determination that U.S. imports of automobiles and certain automotive parts threaten to impair U.S. national security. He also instructed the U.S. Trade Representative (USTR) to negotiate agreements with Japan, the European Union (EU), and others, as needed, to address U.S. concerns.

<sup>48</sup> See the blog on U.S. and Japan Agree to Launch Bilateral Negotiations on a "Trade Agreement on Goods" by Melissa Morris et al on September 28, 2018 which can be accessed at <https://www.cmtradelaw.com/2018/09/u-s-and-japan-agree-to-launch-bilateral-negotiations-on-a-trade-agreement-on-goods/>

The Trump Administration gave its statutory 90-day notice to the US Congress to commence negotiations with Japan in October 2018 and the negotiations began in April 2019. The Phase-1 deal was quickly wrapped up and announced when Trump and Abe met on September 25, 2019 on the sidelines of the UNGA. It was subsequently signed on October 7, 2019 and took effect from January 1, 2020. It comprised two agreements, one on market access for certain agriculture and industrial goods and the other on digital trade.

### Elements of the Phase-1 US-Japan trade deal

The text of the market access deal was limited to four pages but had detailed annexes giving the tariff reduction provisions and staging categories and rules of origin<sup>49</sup>. The deal involved each side agreeing to eliminate or reduce tariffs on approximately US\$ 7.2 bn. of its bilateral exports and imports. Japan's concessions extended to around 600 tariff lines in agriculture, essentially providing the same level of market access as other members of CPTPP enjoy, excepting that rice was completely excluded. As per the USTR, once the agreement was implemented, 90% of the US farm exports to Japan will enter duty free or with reduced tariff. In return, the US committed to reduce or eliminate tariffs on 241 tariff lines, 42 of them in agriculture, but more on certain industrial products of export interest to Japan like machine tools, fasteners, steam turbines, bicycles, bicycle parts, and musical instruments.



*U.S. President Donald J. Trump and Japan Prime Minister Shinzo Abe sign a trade agreement at the sidelines of the 74th Session of the UNGA on September 25, 2019.*

*Source: Flickr/White House*

<sup>49</sup> The text of the agreement and its highlights can be accessed from the USTR website at <https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-trade-agreement-text>

It did not, however, provide any relief for Japan from the impact of Section 232 tariffs on steel and aluminium, or the threat of similar tariffs on auto and auto parts, even though as Japan was keen on at least the latter's inclusion. Japan is relying on the Joint Statement issued after the Trump-Abe meeting which *inter alia* stated that "while faithfully implementing these agreements, both nations will refrain from taking measures against the spirit of these agreements".<sup>50</sup>

Even as the Phase-1 deal covers just about 5% of bilateral trade, the manner of structuring of tariff reductions, going up to 20 years in the case of Japan and 10 years in the case of the US, reveal signs of a long-term deal under evolution. In the USTR briefing on its site the hope has been expressed for further negotiations with Japan for a comprehensive agreement that addresses remaining tariff and non-tariff barriers to achieve a fairer, more balanced trade. When the Japanese Minister was queried<sup>51</sup> about a comprehensive deal, however, he appeared more circumspect, conveying that the coverage of further negotiations will depend on more bilateral consultations that were to be held.

The digital trade agreement between Japan and the US is more or less on the lines of the USMCA that is now being viewed by the US as a "gold standard"<sup>52</sup>.

### Takeaways for India

There may be no direct trade implications for India from the deal. However, the manner of Japan carefully negotiating a limited trade deal in the face of the auto tariffs threat and its calibrated positioning about further negotiations on a more comprehensive deal are noteworthy. Equally important is the unveiling by the Trump Administration of what it regards as a reciprocal and balanced deal where the trade prospects of concessions exchanged match – in this case US\$ 7.2 bn. each. The US priority is also, as in earlier cases, to secure better access for its farm products in which it expects to have sufficient competitiveness and on which tariffs are also generally much higher. It could also perhaps have the potential for more immediate electoral gains for President Trump.

Secondly, the US did not completely give up its leverage tool of the threat of auto tariffs. It has held back on it (unlike in the USMCA deal) presumably to

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<sup>50</sup> See the proceedings of the Extraordinary Press Conference by Japan Foreign Minister Motegi accessible at [https://www.mofa.go.jp/press/kaiken/kaiken4e\\_000699.html](https://www.mofa.go.jp/press/kaiken/kaiken4e_000699.html)

<sup>51</sup> *op. cit.*

<sup>52</sup> <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2019/september/fact-sheet-us-japan-trade-agreement>

pressure Japan to get back to the negotiating table for a more comprehensive agreement.

From the view point of WTO rules, the limited Phase-1 deal is also somewhat unique in that by itself it will not fulfil the requirement of Article XXIV of the General Agreement on Tariffs and Trade (GATT) under the WTO that requires FTAs to cover "substantially all trade". While the WTO permits an interim deal that can be implemented over a period of time, the scope and phasing of the FTA is normally clear at this stage, which is not so in this case. That could also hold true for India when the US-India Phase-1 deal may get finalised later this year.

## SECTION 6: India's bilateral trade talks with the US and WTO reform

### Takeaways for India's bilateral trade talks with the US

Each of the foregoing agreements entered into by the US hold lessons for India as and when the two sides get back to the negotiating table (COVID-19 permitting) for finalising India's limited Phase-1 deal with the US. That the Trump administration regards reciprocity as key is reflected in its agreements with both Canada (as part of the USMCA) and with Japan, in each of which additional market access commitments by the parties were evenly matched in terms of trade expectations. The US has also given particular preference for increased access for its agriculture products with these countries even as in the deal with China other products, including services, have figured.

These aspects will likely figure in India's Phase-1 deal as well, in which restoration of GSP may get accounted for as part of additional market access for India. Since India, unlike China, may not be able to assure minimum annual purchases, except perhaps in the energy sector, its concessions will have to be in the form of duty reductions, more like that of the agreement with Japan. India should also try and see if it can be exempted from Section 232 tariffs on steel and aluminium, as has been agreed by the US in the case of Mexico and Canada. If some assurances are required as in the USMCA that our retaliation, in case these duties were reinstated, would be limited to certain sectors, this could be considered provided their trade values were equivalent. Finally, as pointed out by this author in an earlier brief<sup>53</sup>, it would be important for India to retain its developing country status. A clear statement to this effect in a Phase-1 deal needs to be explored. More broadly, it could be argued that at least countries designated as lower middle-income economies by the World Bank (those with gross national income per capita less than US\$ 3995) should be regarded as developing countries in the WTO context.

As for an eventual comprehensive deal between India and the US, the revised USMCA, which is backed by bi-partisan consensus and which is likely to be used as a model text by the US, makes it evident that India will find it very difficult to accept, at least at its present level of development, many of the behind the border provisions in the USMCA in areas such as IPRs, labour and digital trade, just to mention a few. This is quite apart from the higher market

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<sup>53</sup> Prospects for an elusive limited trade deal and a looming big deal, Delhi Policy Brief, March 6 2020, <https://www.delhipolicygroup.org/publication/policy-briefs/india-us-trade-prospects-for-an-elusive-limited-trade-deal-and-a-looming-big-deal.html>

access demands that may arise, particularly in the agriculture sector. This also makes it important that any move towards a major deal is phased and carefully calibrated with more importance given initially to services and investment. A joint study will need to map this exercise. But preceding such a joint study, an in-depth internal study has to be undertaken and concerned Indian agencies, both within the government and others, need to examine the USMCA provisions relevant to each one of them very carefully and consider possible strategies.

## US trade agenda on WTO Reform

As for WTO reform, the US Trade Agenda 2020<sup>54</sup> gives us an idea about what US expectations could be from the twelfth WTO ministerial conference that was to be held in June this year but now stands postponed. Apart from improvements in transparency in the compliance of members with WTO obligations<sup>55</sup> and revising developing country designations<sup>56</sup>, on both of which the US has already moved proposals at the WTO, the US has also been discussing proposals with Japan and the EU on introducing tighter disciplines<sup>57</sup> on industrial subsidies and evolving some core disciplines on forced technology transfers.

The US Trade Agenda 2020 notes that considering the role of non-market economies in world trade, the WTO needs to update its rulebook with new disciplines on industrial subsidies, state owned and state influenced enterprises, forced technology transfer and intellectual property theft. As pointed out in the preceding sections of this paper, both the USMCA and the Phase-1 deal with China have disciplines on some of these aspects which could be used as model texts. The US has also put forward a specific proposal<sup>58</sup> to the WTO for a decision that will affirm how businesses should operate under market oriented conditions.

All this is apart from the US pushing actively to finalise a multilateral agreement on fisheries subsidies at the WTO, in which India is also participating, that could be ready for signature at the ministerial.

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<sup>54</sup> The "2020 Trade Policy Agenda and 2019 Annual Report" can be accessed at [https://ustr.gov/sites/default/files/2020\\_Trade\\_Policy\\_Agenda\\_and\\_2019\\_Annual\\_Report.pdf](https://ustr.gov/sites/default/files/2020_Trade_Policy_Agenda_and_2019_Annual_Report.pdf)

<sup>55</sup> See WTO document JOB/GC/204/Rev.2 dated 27 June 2019

<sup>56</sup> See WTO document WT/GC/W/764 dated 15 February 2019

<sup>57</sup> See the Joint Ministerial statement of the three ministers at [https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc\\_158567.pdf](https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf)

<sup>58</sup> See WT/GC/W/796 dated February 20, 2020



The US is, moreover, keen to have more plurilateral agreements at the WTO; it is already participating with several other members (India has not joined this initiative) in negotiating a trade related e-commerce agreement.

The US Trade Agenda 2020 has further talked about exploring a broader reset at the WTO on tariffs on which it says “the WTO currently locks in an outdated tariff framework”. This basically refers to the bound tariffs of countries which have not been reset since the establishment of the WTO, that normally gets done in a trade round. The fault for this, however, rests substantially with the developed countries including the US<sup>59</sup> in not seriously pursuing the Doha agenda as per its mandate. They have not shown adequate political will in reducing their own agriculture subsidies (domestic), which are based on an even more outdated reference price during the period 1986-1988. This formed an important element in the “give and take” envisaged in the Doha round. There has, however, been no recent proposal from the US on this score.

Finally, while the US has come out with a detailed report on perceived shortcomings in the work of the Appellate Body, it has not offered any proposal for reform, while rejecting proposals put forward by others. Meanwhile certain countries, including EU members, are going ahead with finalising an alternative multi-party interim arbitration arrangement.

It is not clear when the postponed twelfth WTO ministerial may eventually be held. With COVID-19 having a devastating impact on world trade, it is also not clear if addressing its aftermath may not form the main agenda of the rescheduled conference. But should WTO reform get featured in such a meeting, the US Trade Agenda 2020 has already made clear its objectives. The US may also leverage the AB stalemate for reaching a consensus in its favour.

### India’s need for a strategy

In the above context, India needs to formulate a strategy of its own that includes coming up with proposals on areas of interest to itself. On some topics, as on transparency<sup>60</sup> or on food security,<sup>61</sup> it has already put forward papers earlier in collaboration with other developing countries, some of which have also been updated for consideration at the twelfth ministerial. It needs to also consider carefully how it can shield itself from disciplines being proposed that

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<sup>59</sup> See for example FT editorial titled ‘The Doha Round dies a merciful death’ dated 22 December 2015

<sup>60</sup> See the proposal ‘An inclusive approach to transparency and notification requirements in the WTO JOB/GC/218 dated 27 June 2019

<sup>61</sup> On food security India is a member of the G-33 group advancing proposals. See for example the newsitem ‘G33 for policy instruments to improve food security’ which can be accessed at <https://www.twm.my/title2/unsd/2018/unsd180705.htm>

are aimed principally at economies in which the state plays a much larger role. Admittedly, WTO rules are meant for open market economies. State supported trade can provide undue advantages and result in distortions and over capacities as the world has witnessed. However, developing countries like India which are largely following market principles should not get collaterally hit with additional burdens in terms of notification, reporting etc., arising from those disciplines. And the requirement of technology transfers should not be summarily prohibited.

Moreover, if countries seek all round lowering of bound tariffs, as in the US reset idea, is there a way to get back to reviving the Doha Round or are there other ways that can also address domestic subsidies in agriculture<sup>62</sup> by developed countries on which India and China had earlier submitted a proposal? And can India's need to have a more permanent solution for its food security concerns get a resolution? If the US ideas towards drawing singular attention to high bound tariffs gets traction, then it may be necessary to refresh the minds of WTO Members about these other proposals and make it evident that dealing with tariffs will need to be part of a larger bargain in a more balanced and equitable manner.

The WTO Members will also need to introspect on how the tendency of the Trump administration to invoke security considerations and impose unjust tariffs could be dealt with. It is not clear if this is a temporary aberration or will remain a permanent feature of US trade policy. Left unaddressed, it could pose huge problems for the future of the multilateral trading system that rests on the foundations of stability and predictability.

To generate all round interest in a more balanced approach to WTO reform, could there also be a proposal to make any vaccine and remedial treatment that may emerge for COVID-19 to be made easily accessible to all with clear pathways laid out? The Doha Round was launched at a time when there was a burst of global solidarity after the 9/11 terror attack. A key outcome of the Doha ministerial was also the Doha Declaration on TRIPS and Public Health, at a time when the spread of HIV/AIDS posed a grave threat. Could we expect a similar all round give and take in the present context to arrive at a balanced outcome? Time will tell, but India should be ready to deal with all eventualities with a robust defence of its interests. Preparedness will be the key.

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<sup>62</sup> See the PIB press release on 'Joint Proposal by India & China in WTO on Aggregate Measurement of Support (AMS)' on 18 July 2017 that can be accessed at <https://pib.gov.in/newsite/printrelease.aspx?relid=170392>







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