

The Research on Cross-border Financial Service Trading Rules Based on USMCA

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Abstract: USA, Canada and Mexico signed and passed USMCA, which not only reallocates benefits among USA, Canada and Mexico, but also causes an important impact on the third country excluding contracting parties. In this paper, starting from cross-border financial service trading rules based on USMCA, the author analyzes the fitness between USMCA and WTO, discusses whether it conforms to the international law, and provides a support for China to cope with the variation under the USMCA protocol in a better way.

1. The basic international law principles

General Agreement on Trade and Service (GATS), Global Financial Service Agreement, Financial Service Annex, and Statement of Understanding for Financial Service Promise are normative documents to standardize financial service trading rules in WTO system. Also, Vienna Convention on the Law of Treaties is the important reference basis for treaty explanation [1]. Formation of WTO multilateral law framework develops the milestone significance on financial service trading rules and promotes the financial trade liberalization progress. To eliminate the cross-border financial service trading barriers and promote financial service trading liberation, the basic principles of refining international treaties by WTO are stated as follows.

1.1. Most-favored-nation Treatment Principle

Most-favored-nation Treatment Principle is the core principle that GATS is fit for the financial service trading field. GATS stipulates in item 1, article 2 that: “for any measures covered in this agreement, each member should unconditionally give the same service and service provider treatment the same with any other countries for any member services and service suppliers.” GATS will stipulate the most-favored-nation treatment in the form of the overall principles, so as to cover each department of participant service trade. Even if partial services are not opened as attending GATS, member states should be automatically fit for the Most-favored-nation Treatment principle as opening this department. However, the universal relevance of the Most-favored-nation Treatment Principle results in dissatisfaction of developed economic entities in negotiation. GATS refers to the practice of GATT and allows member states to reserve the universally applicable Most-favored-nation Treatment Principle

1.2. Market access and national treatment

In WTO financial service law, market access and national treatment are reflected in the specific promises. Such an obligation is not universally applicable for all service departments of member states. Instead, each member state respectively lists the controlled service departments and promise level in the respective promise table. Such a practice conforms to the feature of service trade intangibility and also reveals most member states’ aspiration of gradually opening the financial service market stage by stage. In terms of financial service trading, market access means to eliminate supervision barriers. According to stipulations in article 16 of GATS, as making a market access promise by aiming at the specific service department, each member state’s treatment for any member states and service providers shouldn’t be lower than the standards, conditions and requirements listed in the specific promise table. For the departments that make a market access promise, member states have to maintain or limit the number of service providers, service trading or

total assets, total service business or total service output, specific service department or the number of service providers' employees, legal form of service providers and maximum proportion of foreign stock rights or total foreign investments, excluding additional stipulations in the promise table.

1.3. The goodwill principle

As an ancient legal principle, the goodwill principle almost exists in each law order[2]. Since the international law was sprouting, scholars of the international law always have emphasized on the importance for national exchange in international treaties. Article 2.2 in the United Nations Charter stipulates that each member state should uphold goodwill to fulfill the obligations in this charter, so as to ensure rights of all member states as joining in this organization. As a matter of fact, the goodwill principle in the international law is a basic principle, while others directly or obviously get involved in honest, fair and rational law rules, which are derived based on it. In a sense, the goodwill principle naturally develops an important role, which runs through the negotiation, explanation and implementation of treaties.

2. The development process of cross-border financial service trading rules based on USMCA

At present, cross-border financial service trading rules based on USMCA developed by USA, Canada and Mexico were formed by experiencing three stages.

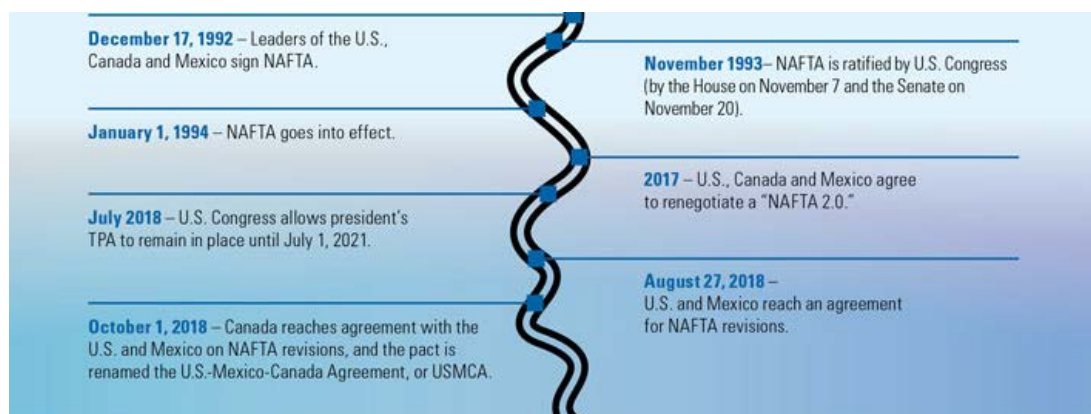


Figure 1 The Development Process of Cross-border Financial Service Trading Rules

2.1. The general stipulation stage of NAFTA

In 1994, NAFTA concluded by USA, Canada and Mexico first proposed the "cross-border financial service trading"[3], but NAFTA stipulation about cross-border financial service trading only generalize the basic treatment and ultimate goals in this field. Instead, it never gets involved in the specific detailed rules.

2.2. The framework stipulation stage of GATS

The financial service negotiation under GATS suffers ups and downs. After the end of Uruguay Round, uniform rules about financial service haven't be concluded, but Financial Service Annex and Second Financial Service Annex have been brought into GATS as the annexes. Cross-border financial service trading rules and other service trading are suitable for GATS, but don't particularly stand out the cross-border financial service trading rules, except for the framework stipulation, such as market access of service trading, national treatment, Most-favored-nation Treatment, and transparency, etc.

2.3. The specific stipulation stage of USMCA

The framework stipulation of GATS on financial service trading rules can't meet the demands of

developed countries. The NAFTA's approval of the upgraded USMCA expands the open field of cross-border financial service trade and also gives the meticulous stipulation on cross-border financial service trading rules, such as national treatment, Most-favored-nation Treatment, and market access of cross-border financial service, etc. Moreover, CPTPP and USMCA propose a new requirement for opening cross-border financial service trading. Moreover, the special rules for non-market economic entity, tax exemption and quota exemption protection, and rule of origin cause a new round dispute.

3. USMCA exceeds WTO rules and violates the international law

The agreement text of USMCA contains 34 chapters including market access, rule of origin, agriculture, trade remedy, investment, digital trade, dispute solution and intellectual property, as well as additional bilateral agreements reached between USA and Mexico, as well as USA and Canada for a total of 1812 pages[4]. On the one hand, USMCA adjusts the rules on the basis of NAFTA. On the other hand, USMCA highly fits for TPP. The repeated chapters exceed 25 places. TPP can be seen in intellectual property protection, rule of origin, and labor welfare. According to the finally confirmed clauses, the agreement text of USMCA can be comprehended from two aspects: in the first aspect, in terms of inside, USMCA is the product of mutual gaming and compromise among USA, Mexico and Canada. In the second aspect, in terms of outside, limiting outside countries of USA, Mexico and Canada is a major important goal for USMCA, which stipulates numerous special rules by aiming at the non-market economic states. The range obviously surpasses the multilateral trade rule system with the center of WTO agreement, but violates the international law.

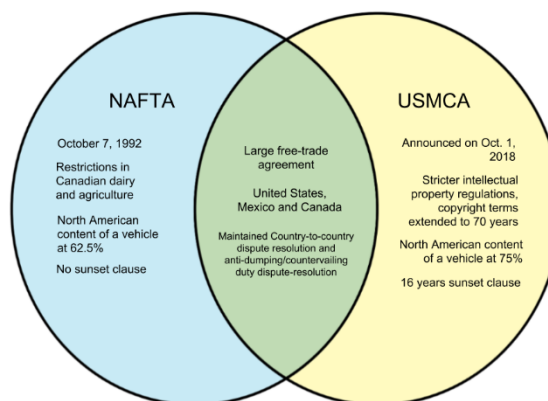


Figure 2 Comparison between USMCA and NAFTA

3.1. Violate the rights and obligations of not intervening in the third country

The special rules of USMCA for non-market economic states actually violate the obligation principle of not intervening in the third country in the international treaties. This principle is originated from the principle in the Roman Law of “no damage or benefits for the third party”. It is stipulated in the Article 14 “Treaty and Third Country” in Vienna Convention on the Law of Treaties. To be specific, the “poison pill” clause of USMCA limits the possibility that the contracting parties carry out the treaty negotiation with non-market economic states. It sets up the new obligation for the so-called non-market economic states. Even if the clause gives the option to the contracting parties, it actually weakens the negotiation capacity and contracting capacity of the contracting parties. As a result, the specific rules of USMCA non-market economic states create the new obligations to the third country, but violate the rights and obligations in the international law of not intervening in the third country.

3.2. The goodwill principle of violating the international law

In practice, USMCA violates the goodwill principle for constraint rules of non-market economic states. Firstly, USMCA negotiation doesn't conduct the goodwill negotiation with other stakeholders. The goodwill principle requires for concluding international rules and running procedure observes the strict rule of law. Standard negotiation is the important content for treaties' goodwill fulfillment. In this sense, USA, Canada and Mexico should supply related parties whose benefits are impacted with well-meaning negotiation and communication chances. Otherwise, the goodwill principle can't be met. Secondly, USMCA doesn't provide timely, full and comprehensive remedy for investors. The treaties' goodwill fulfillment has a close relationship with the rightful principle in the international law. The discriminatory treatment for investors in non-market economic states proposed by USMCA, tax exemption and quota exemption protection and rule of origin violate the timely, full and comprehensive remedy of goodwill requirements. More obviously, USMCA gets involved in violating Trade-related Investment Agreement and the disagreement stipulations in article 3 or article 11 in General Agreement on Tariffs and Trade 1994.

In addition to list the international law principles that surpass WTO range, the "poison pill" clause of USMCA violates article 24.4 in General Agreement on Tariffs and Trade 1947, article 17 in General Agreement on Tariffs and Trade 1994, and article 6.1 in General Agreement on Tariffs and Trade 1994. Therefore, global inverse globalization and unilateralism measures challenge the cross-border financial service. China should lift the flag of international rule of law with countries and citizens that love peace and development, and firmly defend the multilateral trade mechanism.

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