US & Multilateral Trade Policy Developments

Japan External Trade Organization

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Contents

US General Trade Policy

US Trade Representative Seeks Public Comments and Requests ITC Assessment for US-Japan Trade Agreement

On October 26, 2018, the Office of the US Trade Representative (USTR) published a notice in the Federal Register requesting public comments on a proposed US-Japan Trade Agreement, including on US interests and priorities, in order to develop US negotiating positions.[1] On the same day, USTR Robert Lighthizer directed the US International Trade Commission (ITC) to produce a report assessing the probable economic effect of providing duty-free treatment for imports of currently dutiable products from Japan. These actions follow USTR's October 16, 2018 notification to Congress of the President's intention to enter into negotiations for a US-Japan Trade Agreement. We summarize these developments below.

USTR Request for Public Comments

USTR is inviting interested parties to provide comments and/or oral testimony to assist USTR as it develops its negotiating objectives and positions for the proposed US-Japan Trade Agreement, including with regard to objectives identified in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA). The public comment schedule is as follows:

- **November 26, 2018:** Deadline for the submission of written comments, and for written notification of requests to testify at the public hearing, as well as a summary of testimony for the public hearing.
- **December 10, 2018:** The Trade Policy Staff Committee (TPSC) will hold a public hearing beginning at 9:30 a.m., at the main hearing room of the US International Trade Commission, 500 E Street SW, Washington DC 20436.

USTR is seeking public comments and testimony on issues "including, but not limited to," the following:

- General and product-specific negotiating objectives for the proposed agreement.
- Relevant barriers to trade in goods and services between the United States and Japan that should be addressed in the negotiations.
- Economic costs and benefits to US producers and consumers of removal or reduction of tariffs and removal or reduction of non-tariff barriers on articles traded with Japan.
- Treatment of specific goods (described by HTSUS numbers) under the proposed agreement, including comments on:
  - Product-specific import or export interests or barriers.
  - Experience with particular measures that should be addressed in the negotiations.
  - Ways to address export priorities and import sensitivities in the context of the proposed agreement.
  - Customs and trade facilitation issues that should be addressed in the negotiations.
- Sanitary and phytosanitary measures and technical barriers to trade that should be addressed in the negotiations.
- Other measures or practices that undermine fair market opportunities for US businesses, workers, farmers, and ranchers that should be addressed in the negotiations.

Unlike USTR's request for comments in advance of the renegotiation of the North American Free Trade Agreement (NAFTA), the new request concerning Japan does not seek comments on digital trade, investment, intellectual property, government procurement, state-owned enterprises, competition, labor, or the environment. This indicates

[1] Click **here** to view USTR's request for comments. Copies of USTR Lighthizer's letter to the ITC and the list of agricultural products are attached for reference.

that USTR is considering a narrower scope for its negotiations with Japan, but interested parties are not precluded from submitting comments on these issues.

Interested parties can submit notifications of their intent to testify and written comments at **https://www.regulations.gov** under Docket Number USTR-2018-0034.

Request for ITC Assessment

USTR Lighthizer has requested that the ITC provide a report containing its advice as to the probable economic effect of providing duty-free treatment for imports of currently dutiable products from Japan on (i) industries in the United States producing like or directly competitive products; and (ii) consumers. This analysis will consider each article in chapters 1 through 97 of the Harmonized Tariff Schedule of the United States (HTSUS) for which US tariffs will remain in effect, taking into account implementation of US commitments in the World Trade Organization.

Furthermore, pursuant to Section 105 of TPA, USTR Lighthizer has requested a separate assessment of the probable economic effects of eliminating tariffs on a list of "import sensitive" agricultural products from Japan on (i) industries in the United States producing the products concerned; and (ii) the US economy as a whole. TPA requires USTR to request such an assessment before initiating negotiations with regard to agriculture.

Outlook

The United States cannot enter into formal bilateral negotiations with Japan until at least January 14, 2019, pursuant to the notification requirements set forth in TPA. At this stage, it is unclear whether formal negotiations will begin by that date, but USTR's recent actions suggest that it is making the necessary preparations to enter into formal negotiations with Japan as soon as permitted by TPA and to advance the negotiations quickly. Observers speculate that the Trump Administration is motivated to conclude a US-Japan deal by the recent conclusion of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which the United States abandoned in 2017, and the EU-Japan FTA. Both agreements are set to enter into force in the coming months, thereafter putting US exporters at a distinct disadvantage in the Japanese market.

United States and the Philippines Issue Joint Statement on Trade Advances

The United States and the Philippines released a Joint Statement[2] on October 22 highlighting recent advances in the bilateral economic relationship, along with priorities for ongoing cooperation. The activities are presented as occurring under the auspices of the longstanding Trade and Investment Framework Agreement (TIFA) process, and not necessarily connected to a potential bilateral free trade agreement (FTA).

Despite the Office of the US Trade Representative's (USTR) previous identification of the Philippines as a top target for a full-fledged FTA, it was not included in USTR's notification to Congress on October 16, 2018 indicating that the Trump administration would commence negotiations with the European Union, Japan and the United Kingdom. However, the window appears to remain open, as a USTR spokesperson indicated that the trade partners would "continue to discuss the best way to strengthen and expand the bilateral economic relationship, including the possibility of future bilateral FTA negotiations." Likewise, the Philippine Ambassador to the United States, Jose Manuel Romualdez, issued a statement[3] referencing continued "Philippine interest in a bilateral free trade agreement with the United States."

[2] Click **here** to view the Joint Statement.

[3] Click **here** to view the Philippine Ambassador's statement.

The Joint Statement, signed by US Trade Representative Robert Lighthizer and Philippine Secretary of Trade and Industry Ramon Lopez, has a strong focus on agriculture, while also covering electronic payments, automotive standards, and expanded benefits under the US Generalized System of Preferences (GSP). Key takeaways include:

Agriculture:

- The United States and the Philippines will collaborate on the development of cold chain processes and best practices in the Philippines, including through US technical assistance;
- The Philippines will continue to adhere to World Trade Organization (WTO)-consistent valuation of agricultural imports for the purposes of collecting duties, and prohibit the use of reference pricing;
- The Philippines agreed to promptly review US petitions for the extension of tariff rates on certain products;
- The Philippines will continue to protect geographical indications (GIs)—signs on certain geographically unique products that certify their origin—but will not provide automatic GI protection; and
- The Philippines acknowledged progress toward opening the US market to Philippine mango, young green coconuts and carrageenan.

E-payments:

- Both governments committed to continuing technical and policy discussions on the latter's National Retail Payments System and domestic retail debit and credit electronic payment transactions; and
- The United Stated acknowledged the Philippines' commitment to the overall liberalization of the e-payments sector, including cross-border payment services, an unrestricted number of service suppliers, and leveling the playing field between domestic suppliers and international suppliers.

Automotive Standards:

- The United States noted the Philippines' commitment to accepting US and other high-standard automotive standards.

GSP:

- The Philippines acknowledged progress on expanding the GSP Program to include travel goods.

Finally, the trade partners agreed to continue discussions on a range of priority issues, specifically including exemption from the United States' safeguard measures on solar cells and Section 232 tariffs on steel and aluminum. While the Philippines appears to remain at the top of the list of potential Southeast Asian FTA partners, the Joint Statement can be read as a reinvestment in the existing TIFA platform. Therefore, it is not clear at this time whether the continued discussions will proceed under the TIFA process and/or as a precursor to a more formal FTA.

Free Trade Agreement

United States, Canada, and Mexico Announce New Trilateral Trade Agreement to Replace NAFTA

On September 30, 2018, the United States, Canada, and Mexico reached a new trilateral trade agreement designed to replace the existing North American Free Trade Agreement (NAFTA) that has governed North American trade since 1994.[4] The new "United States-Mexico-Canada Agreement" (USMCA) is based largely on the bilateral agreement in principle reached by the United States and Mexico in August, though it differs from that agreement in certain respects and includes new outcomes on specific bilateral issues between the United States and Canada. The three parties also have signed side letters to the USMCA concerning potential US restrictions on automotive imports pursuant to Section 232 of the Trade Expansion Act of 1962, and potential future Section 232 proceedings.

The parties have published the draft legal text of the USMCA and are expected to sign the agreement in the coming months. We provide below an overview of USMCA and the likely next steps for the new agreement. We will provide a full analysis of the USMCA's new provisions in the coming days.

Overview of the USMCA

The USMCA is drafted as a new stand-alone agreement, rather than amendments to NAFTA. It includes transition provisions dealing with NAFTA, some modifications to those provisions taken from NAFTA, and a dozen new chapters. Whereas NAFTA included 22 chapters, the new agreement has 34 (see the Annex below for a comparison of the chapter lists). The new chapters include those on labor, the environment, digital trade, and macroeconomic policy. The USMCA also includes annexes covering alcohol and proprietary food formulas as well as bilateral side letters on distinctive products, auto safety standards, biologics, cheese names, wine, water, research and development expenditures, and Section 232.

As noted above, the USMCA broadly resembles the preliminary agreement in principle reached by the United States and Mexico in August. Like the preliminary agreement, the USMCA includes more stringent rules of origin for the automotive sector, a scaled-back investor-state dispute settlement mechanism, and a "sunset" review clause with a sixteen-year term. It also includes non-controversial "modernization" changes covering, among other things, digital trade, state-owned enterprises, sanitary and phytosanitary (SPS) measures, transparency, good regulatory practices, technical barriers to trade (TBTs), financial services, and intellectual property. These chapters largely work from those completed by the Obama administration as part of the Trans-Pacific Partnership (TPP), but do contain some significant differences.

Some provisions of the USMCA differ from the preliminary US-Mexico agreement. For example, under the preliminary agreement, Mexico had agreed to raise its *de minimis* shipment value for purposes of customs duties and taxes to $100 USD, up from $50 USD. Under the USMCA, Mexico's *de minimis* levels will remain at $50 USD for purposes of taxes and will increase to the equivalent level of $117 USD for purposes of customs duties.

The USMCA also incorporates a series of new bilateral outcomes negotiated by the United States and Canada, including the following:

[4] Click **here** to view the text of the USMCA.

- **Chapter 19.** Chapter 19 of NAFTA, which provides for binational panel reviews of anti-dumping and countervailing duty determinations made by the governments of the NAFTA parties, will continue to apply to binational panel reviews related to final determinations published by a Party before the entry into force of the USMCA. Chapter 19 will not apply to determinations published thereafter. However, a similar binational panel review system set forth in Chapter 10, Section D of the USMCA will apply between the United States and Canada with respect to final determinations made by those governments after the USMCA enters into force.[5]

- **Dairy compromise.** A key sticking point in US-Canada negotiations has been market access for US dairy products. Annex 3-B to US-Canada agricultural trade grants access to US dairy farmers to approximately 3.59 percent of current market share, higher than the 3.25 percent negotiated under TPP, according to Canadian officials. The agreement also eliminates Canada's Class 7 milk category—including milk powder and milk protein - which established a pricing scheme that would-be US exporters argued rendered their products uncompetitive.

In exchange for these market access concessions, the United States has agreed to provide new access to Canadian farmers for dairy products, peanuts, processed peanut products, and "a limited amount of sugar and sugar containing products."

- **Cultural exemption.** NAFTA's "cultural industries" exemption, cited as a priority by Prime Minister Justin Trudeau, remains intact. USMCA Article 32.6 states that the agreement does not apply to Canadian measures governing such industries, including the production and distribution of written materials, film, music, and radio communications. However, the USMCA allows parties to "take a measure of equivalent commercial effect in response to an action by another Party" under the exemption.

Section 232 side letters and current tariffs

The agreement includes four bilateral side letters on the United States' use of "national security" trade restrictions under Section 232. The first pair stipulate that Canada and Mexico will receive certain exemptions from potential US restrictions on automotive imports under Section 232. A Section 232 investigation of these goods is now underway. Specifically, should the US impose measures restricting imports of automobiles or automotive parts from Canada and/or Mexico, the United States agrees to exclude:

- 2,600,000 passenger vehicles per year from each country;

- Light trucks imported from each country; and

- Such quantity of auto parts amounting to $32.4 billion and $108 billion from Canada and Mexico, respectively.

While the US and Mexico had previously agreed under the Preliminary Agreement in Principle to continue discussions regarding the United States' ongoing investigation of automotive imports pursuant to Section 232, the USMCA side letters represent the first official confirmation of granted exclusions.

The agreement also includes a pair of side letters stipulating that, should the United States impose any new tariffs or import restrictions on goods or services from Canada or Mexico under Section 232, there must be a 60-day period before enforcement during which the parties "shall seek to negotiate an appropriate outcome based on industry dynamics and historical trading patterns." Additionally, should the United States take action under Section 232

[5] The title of Section D ("Review and Dispute Settlement in Antidumping and Countervailing Duty Matters Between the United States and Canada") indicates that the binational panel review system set forth in that Section will apply only between the United States and Canada. However, some provisions in that Section (e.g., certain definitions set forth in Section D, Article 11) refer to Mexico. It is not clear whether these references to Mexico were intentional, or if they are drafting errors. This may be clarified following a legal review of the USMCA text.

inconsistent with NAFTA, USMCA, or the WTO Agreement, Canada and Mexico may retaliate, and retain WTO rights to challenge such measures.

Notably, the USMCA is silent regarding the United States' existing Section 232 tariffs on aluminum and steel. USTR Robert Lighthizer has indicated in recent weeks that the United States would be willing to discuss possible exemptions for Canada and Mexico after the renegotiation of NAFTA is concluded. There has been some speculation that the US tariffs and Canadian/Mexican retaliation would be lifted upon the USMCA's signing, but officials have not provided concrete signals in this regard.

Outlook

The parties are expected to sign the USMCA on or shortly after November 29, 2018 (the earliest date on which the US President can sign the agreement pursuant to the timelines set forth in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA 2015)). However, the USMCA will not enter into force until all three parties have completed their domestic ratification procedures. It could therefore be months or even years before the new agreement enters into force. The timing and outcome of the ratification process is far from certain, particularly given that the US Congress will need to approve legislation to implement the agreement before it can enter into force.

As discussed above, the legal text of the USMCA does not amend the existing NAFTA text, but rather constitutes a new, stand-alone trade agreement that is designed to replace NAFTA. As a result, US implementation of the USMCA will more clearly be governed by the requirements of TPA 2015. (Some observers had previously questioned to what extent amendments to an existing FTA would be subject to TPA requirements.) However, the stand-alone nature of the USMCA sets the stage for a potential conflict between the Trump administration and Congress, wherein the Trump administration tries to withdraw the United States from NAFTA before the USMCA is in force and without Congressional approval, in order to pressure Congress to pass the USMCA implementing legislation. Indeed, it has been rumored that the Trump administration when signing the USMCA might also notify Canada and Mexico of the United States' intent to withdraw from the original NAFTA pursuant to Article 2205 of that agreement (which provides that a party may withdraw from NAFTA six months after notifying the other parties). In theory, this strategy would force Congress to choose between ratifying the USMCA within six months or allowing US participation in NAFTA to terminate with no agreement in force to replace it. This strategy would face strong resistance from Congress, especially if Democrats win control of one or both chambers in the November midterm elections, and potential legal challenges from Congress or the US business community.

In Canada, any needed implementing regulations must be debated and adopted by the House of Commons and Senate through the normal parliamentary legislative process before the government can proceed to ratification. Once the implementing legislation is adopted, the government can proceed with its decision to ratify the agreement, a process which will require the issuance of an Order in Council by the Cabinet authorizing the signature of an Instrument of Ratification.

In Mexico, once the USMCA has been signed by the parties, the Executive will send the text of the agreement to the Mexican Senate for ratification. The first stage in the Senate ratification process will be a review of the text by the Senate Foreign Relations Commission. During this process, the Commission will review the agreement and identify any provisions that may contradict Mexican law or the Mexican Constitution. Once the Commission has approved the text, it will be sent to the full Senate for approval.

Auto Rules of Origin in US-Mexico-Canada Agreement Would Bring Significant Changes

The recently-released text of the US-Mexico-Canada Agreement (USMCA) includes significant changes to the automotive rules of origin established under the North American Free Trade Agreement (NAFTA), with potential to

affect manufacturing and supply chains for domestic and foreign producers of vehicles and auto parts.[6] These changes include an increased regional value content (RVC) threshold for light and heavy vehicles and auto parts, new "labor value content" (LVC) requirements for the same, and new requirements designed to compel auto manufacturers to source steel and aluminum from North American suppliers.[7] We provide an overview of these changes below.

Regional Value Content

Passenger Vehicles, Light Trucks, and Parts Thereof

Like NAFTA, the USMCA provides that finished vehicles must contain a specified level of regional value content to be considered "originating" for purposes of the agreement. Only originating vehicles are eligible for preferential (*i.e.*, duty-free) tariff treatment under the USMCA. Whereas NAFTA required that vehicles contain at least 62.5 percent RVC to be considered originating, USMCA will increase the requirement to 75 percent for passenger vehicles and light trucks (using the "net cost" method described below). This increase will be phased in over a three-year period as follows:[8]

Date	RVC (net cost)
January 1, 2020	66%
January 1, 2021	69%
January 1, 2022	72%
January 1, 2023	75%

Under the USMCA, the RVC requirements for parts for passenger vehicles and light trucks will range from 65-75 percent net cost (or 75-85 percent under the "transaction value method," described below), also to be phased in over a three-year period:

- "Core parts," including engines, bodies, gearboxes, and shock absorbers will be subject to an RVC threshold of 75 percent net cost (85 percent transaction value).
- "Principal parts," including tires, mufflers, seats, and ball bearings will be subject to an RVC threshold of 70 percent net cost (80 percent transaction value).
- "Complementary parts," including types of valves, batteries, and lamps will be subject to an RVC threshold of 65 percent net cost (75 percent transaction value).[9]

The USMCA also establishes special rules for "super-core" auto parts, which are considered as a single part for the purposes of RVC calculations. These include the engine, transmission, body and chassis, axle, suspension and steering systems, and advanced battery. The USMCA states that a passenger vehicle or light truck may be considered as originating only if its "super-core" parts are originating.[10]

Heavy Trucks and Parts Thereof

[6] Click **here** to view the text of the USMCA.

[7] See Appendix to Annex 4-B **here**.

[8] Should the USMCA enter into force later than January 1, 2020, the phase-in schedule will commence upon the date of enforcement, with the RVC requirement increasing one, two, and three years following such date.

[9] For a complete list, see Tables A-C **here**.

[10] See Article 4-B.3.7 **here**

The USMCA also increases the RVC requirements for heavy trucks, from 62.5 percent under NAFTA to 70 percent under the new agreement, with a longer seven-year phase-in period.

Date	RVC (net cost)
January 1, 2020	60%
January 1, 2024	64%
January 1, 2027	70%

RVC requirements for parts for heavy trucks range from 60-70 percent net cost (70-80 percent transaction value), also with a seven-year phase-in. "Principal parts," including engines, bodies, and brakes, have an RVC threshold of 70 percent (80 percent transaction value). "Complementary parts," including ball bearings, couplings, and magnets have an RVC threshold of 60 percent (70 percent transaction value).[11]

Other Vehicles

Other vehicles will retain the NAFTA-era RVC requirement of 62.5 percent. These include off-road vehicles, vehicles with a compression-ignition engine, three- or four-wheel motorcycles, motorhomes, and transport vehicles for 15 or fewer persons.

Methodology for Calculating RVC

As noted above, the USMCA provides that the RVC for vehicles is to be calculated using the "net cost method." Under this method, RVC is calculated by subtracting the value of non-originating materials from the total net cost[12] to produce the vehicle and dividing this figure by the vehicle's total net cost:

$$RVC = \frac{NC - VNM}{NC} \times 100$$

NC = Net Cost (amount to produce a good)
VNM = Value of Non-Originating Material

Although NAFTA also used a net cost method to calculate a vehicle's RVC, USMCA changes key aspects of the calculation. In particular, the USMCA's eliminates both the "tracing" and "deemed originating" concepts.

- Under NAFTA, the net cost method for vehicles is used in combination with automotive components on a "tracing list" or a "deemed originating" list. If an automotive component is on the tracing list, any non-originating value within that component retains its non-originating status throughout all stages of assembly (no matter how much it is processed within the NAFTA region) and must be included in the final value of non-originating materials for the finished vehicle. Components not on the tracing list will be considered as originating where they are further processed in the NAFTA region so as to qualify under the appropriate origin rule. Finally, certain components "deemed originating" will not be included in the value of a vehicle's non-originating materials, even if they are imported from outside the NAFTA region and not further processed.

[11] For a complete list, see Tables D-E **here**. Note that part categorization (i.e., core, principal, and complementary) differ between light and heavy vehicles.

[12] This excludes costs relating to packing, shipping, marketing, and other such costs.

- By contrast, the USMCA's net cost method for vehicles does not incorporate the tracing or "deemed originating" concepts. Therefore, the full value of an automotive component could be counted as originating under the USMCA even if that component contains some non-originating materials previously on the tracing list (a concept known as "roll-up"). On the other hand, certain components that contained materials deemed originating under NAFTA might no longer be considered originating under the USMCA.

As noted above, RVC for auto parts may be calculated by either the net cost *or* the transaction value method. The method for calculating transaction value is as follows:

$$RVC = \frac{TV - VNM}{TV} \times 100$$

TV = Transaction value (amount actually paid or payable for a good)
VNM = Value of Non-Originating Material

Examples:

A passenger vehicle is made in Mexico from component parts originating both within North America and elsewhere. The value of non-originating material (VNM) is USD $2,250. The total net cost is USD $10,000. Thus the RVC is 77.5 percent (((10,000 – 2,250)/10,000) x 100), and the vehicle is therefore considered originating, and eligible for preferential tariff treatment under the agreement.

In another case, ball bearings for heavy trucks are shipped from Canada to the United States. The transaction value is $1,000,000. The ball bearings were 60 percent produced in North America (transaction value of $600,000); therefore the RVC falls below the required threshold for heavy truck "complementary parts" calculated under the transaction value method.

Steel and Aluminum

Among its new provisions, the USMCA establishes that vehicles will be considered originating only if the producer can certify that, during the previous year, at least 70 percent of the producer's North American purchases of steel and aluminium qualify as originating.[13] This requirement will apply to a vehicle producer's purchases throughout North America if the producer has more than one location in a Party where steel and aluminum is purchased, and covers direct purchases, purchases through a services center, and purchases contracted through a supplier.

Labor Value Content

Also new in the USMCA, the agreement provides that a passenger vehicle will be considered originating only if the vehicle producer certifies, on an annual basis, that its production meets a specified "labor value content" (LVC) threshold. A vehicle's LVC is calculated by summing the following percentage point values (though certain limitations apply):

- **High-wage material and manufacturing expenditures**: This expenditure is calculated as the Annual Purchase Value (APV) of purchased parts or materials produced in a plant or facility, and any labor costs in the vehicle assembly plant or facility, located in North America with a production wage rate that is at least US$16/hour as a percentage of the net cost of the vehicle, or the total vehicle plant assembly APV, including any labor costs in the vehicle assembly plant or facility.

[13] See Article 4-B.6 **here**.

- **High-wage technology expenditures**. This expenditure is calculated as the annual vehicle producer expenditures in North America on wages for research and development (R&D) or information technology (IT) as a percentage of total annual vehicle producer expenditures on production wages in North America.
- **High-wage assembly expenditures**. A producer will receive a credit of no more than 5 percentage points if the producer demonstrates that it has an engine assembly, transmission assembly, or advanced battery assembly plant, or has long-term contracts with such a plant, located in North America with an average production wage of at least USD $16/hour.

The LVC threshold for passenger vehicles will be 30 percent[14] beginning on January 1, 2020 or on the date of the USMCA's entry into force, whichever is later. It will then increase to 40 percent over a three-year period. As shown below, the agreement places limitations on the extent to which technology and assembly expenditures can contribute to the LVC calculation, and it requires that a significant portion of LVC come from material and manufacturing expenditures:

Date	LVC	Limitations
January 1, 2020	30%	Must consist of at least 15 percentage points of high-wage material and manufacturing expenditures, no more than 10 percentage points of high-wage technology expenditures, and no more than 5 percentage points of high-wage assembly expenditures.
January 1, 2021	33%	Must consist of at least 18 percentage points of high wage material and manufacturing expenditures, no more than 10 percentage points of technology expenditures, and no more than 5 percentage points of assembly expenditures.
January 1, 2022	36%	Must consist of at least 21 percentage points of high wage material and manufacturing expenditures, no more than 10 percentage points of technology expenditures, and no more than 5 percentage points of assembly expenditures.
January 1, 2023	40%	Must consist of at least 25 percentage points of high wage material and manufacturing expenditures, no more than 10 percentage points of technology expenditures, and no more than 5 percentage points of assembly expenditures.

The LVC requirement for light and heavy trucks is 30 percent, with no phase-in, of which no more than 10 percent and 5 percent may consist of technology and assembly expenditures, respectively. For heavy trucks, should the LVC total more than 45 percent, the percentage above 30 percent may be applied to the RVC requirement.

Example:

A US-based producer of Passenger Vehicle X annually spends $10,000,000 total on the vehicle's production in North America. Of this total vehicle plant APV, $3,000,000 is spent on parts, materials and labor at a US assembly plant that pays its production workers at least $16/hour. Additionally, wages paid for research and development and information technology in North America account for $150,000 of a total of $1,000,000 in annual production wages spent in North America. Finally, the producer has a long-term contract with an engine assembly plant in North America with average wages of $16/hour. In this scenario, the producer receives a 30 percentage point LVC score for its high-wage material and manufacturing expenditures, a 10 percentage point score for its technology expenditures, and a 5 percentage point score for its assembly expenditures, for a combined LVC score of 45 percentage points. Therefore, the producer's production exceeds the LVC requirement of a 40 percentage point

[14] Although the USMCA states this as a percentage, it is more accurately described as a point system, under which the three different percentage point values are summed to generate the LVC number.

score for passenger vehicles, so it will receive preferential tariff treatment under the USMCA, assuming that the RVC and steel/aluminum requirements are also met.

Outlook

The automotive rules of origin were among the most complex and contentious issues addressed in the renegotiation of NAFTA, and the US administration intends the new USMCA rules to encourage the use of North American content and high-wage labor in the US, Canadian and Mexican auto sectors. However, industry experts warn that these rules would present significant challenges for automakers and parts manufacturers – potentially forcing them to make significant changes to their current NAFTA supply chains in order to satisfy the new rules. The rules also would add a higher level of complexity and administrative burden for companies seeking to ensure compliance. Experts therefore warn that many companies might choose to pay most-favoured nation tariff rates (and try to pass those additional costs onto consumers) instead of spending the time and capital needed to qualify their vehicles as originating under the USMCA.

Fortunately, the automotive industry will have time to anticipate and adapt to these challenges, as the new rules will not take effect unless and until the USMCA is ratified by all three parties and enters into force. The timing and outcome of the ratification process is far from certain, particularly given that the US Congress will need to approve legislation to implement the agreement before it can enter into force. It could therefore be years before the new automotive rules of origin take effect (and the agreement provides that they will not take effect until January 1, 2020 at the earliest). Moreover, prior to the entry into force of the USMCA, the US government will need to issue detailed regulations regarding the new rule of origin requirements and procedures. These regulations may resolve some of the ambiguities in the current USMCA text, particularly with respect to new features such as the labor value content rule.

Overview of Chapter 4 (Rules of Origin) of the US-Mexico-Canada Trade Agreement

The US-Mexico-Canada Agreement (USMCA) announced on September 30, 2018 envisions significant changes to the rules of origin established under the North American Free Trade Agreement (NAFTA). The changes contained in the USMCA Chapter on Rules of Origin fall into two general categories:

- Updates to the general rule of origin principles found in the NAFTA, incorporating provisions and concepts from more recent trade agreements such as the Trans-Pacific Partnership (TPP); and
- Changes to the product-specific rules of origin (*e.g.*, tariff shift and regional value content requirements) for various products, including automotive goods, textiles, chemicals, and steel-intensive goods.

The changes made by the USMCA have the potential to affect manufacturing and supply chains for a wide range of industries, as certain products currently eligible for duty-free treatment under the NAFTA might not qualify under the USMCA rules (or vice-versa). We provide below an overview of the key changes and our perspectives thereon.

General Rules of Origin Principles

The general principles for determining origin under the USMCA are similar to those found in the NAFTA. Under the USMCA, a good will qualify as originating, and will therefore be eligible for preferential tariff treatment, if it satisfies one of the following criteria:

- **The good is wholly obtained or produced entirely in the territory of one or more Parties.** This rule remains largely unchanged from the NAFTA, though the USMCA makes minor updates to the definition of a "wholly obtained or produced" good.[15]

- **The good is produced entirely in the territory of one or more of the Parties using non-originating materials, provided the good satisfies the applicable product-specific rules of origin set forth in the Agreement.** The USMCA's product-specific rules of origin, like those in the NAFTA, are based on changes in tariff classification, regional value content (RVC) requirements, and/or other product-specific processing requirements (*e.g.*, the "chemical reaction rule"). RVC must be calculated using either the "net cost"[16] method or the "transaction value"[17] method (the same two methods permitted under the NAFTA). Many of the product-specific rules of origin found in the NAFTA have been revised in the USMCA, as discussed in greater detail below.

- **The good is produced entirely in the territory of one or more of the Parties exclusively from originating materials.** This rule remains unchanged from the NAFTA rule, which held that goods originate if they are produced entirely in Canada, Mexico and/or the United States exclusively from materials that are considered to be originating according to the terms of the Agreement.

- **The good is produced entirely in the territory of one or more of the Parties, is classified with its materials or satisfies the "unassembled goods" requirement, and meets an RVC threshold.** This rule, which is largely unchanged from the NAFTA, provides that a good is originating if:

  - One or more of the non-originating materials used to produce the good cannot satisfy the applicable product-specific rules of origin because both the good and its materials are classified in the same tariff heading (thus precluding a tariff shift); or

  - The good was imported into the territory of a Party in unassembled or disassembled form but was classified as an assembled good pursuant to General Rule of Interpretation 2(a) of the Harmonized System; and

  - The regional value content of the good is at least 60 percent when calculated using the transaction value method, or at least 50 percent when using the net cost method.

Updates to General Rules of Origin Provisions

The general principles for determining origin under the USMCA are similar to those found in the NAFTA, but the USMCA makes several important changes drawn from more recent trade agreements such as the TPP. Several of these changes would provide additional flexibility for traders seeking to qualify for preferential tariff treatment, compared to the existing NAFTA rules.

Increased *De Minimis* Thresholds for Non-Originating Content

The USMCA increases to 10 percent the level of non-originating content that is considered *de minimis* and therefore does not render a good non-originating, even if the good fails to satisfy an applicable tariff change or regional value

[15] For example, the USMCA expressly provides that goods obtained from aquaculture production in the territory of a Party qualify as "wholly obtained or produced" there.

[16] Under the net cost method, RVC is calculated by subtracting the value of non-originating materials from the total net cost to produce the good and dividing this figure by the good's total net cost.

[17] Under the transaction value method, RVC is calculated by subtracting the value of non-originating materials from the transaction value of the good and dividing this figure by the good's total transaction value.

content requirement. This increase also was included in the TPP, and will provide additional flexibility for traders seeking to qualify for USMCA tariff preferences. The new *de minimis* rules are as follows:

- A good will qualify as originating if the value of all non-originating materials used in its production that do not undergo an applicable change in tariff classification is not more than 10 percent of the transaction value[18] or total cost of the good (provided the good satisfies all other applicable origin requirements).[19] This *de minimis* threshold is currently 7 percent under the NAFTA.

- A good that is otherwise subject to an RVC requirement will not be required to satisfy that requirement if (1) the value of all non-originating materials used in its production is not more than 10 percent of the transaction value of the good[20]; or (2) the total cost of the good (provided the good satisfies all other applicable origin requirements). This *de minimis* threshold is currently 7 percent under the NAFTA.

Like the NAFTA, the USMCA contains a list of products that are ineligible for these *de minimis* exemptions (including many food and agricultural products).

New Provision on Treatment of "Recovered Materials"

A new rule in the USMCA provides that a "recovered material"[21] derived in the territory of one or more of the parties will qualify as originating when it is used in the production of, and is incorporated into, a "remanufactured good."[22] A similar provision was included in the TPP, and was touted as a means of facilitating trade and production of remanufactured goods within the region.

Calculation of Regional Value Content

As noted above, the USMCA provides that RVC may be calculated using the same methods (either net cost or transaction value) permitted under NAFTA. However, a new rule in the USMCA provides that, where a non-originating material is used in the production of a good, the following may be counted as originating content for purposes of calculating RVC under either method:

- The value of processing of the non-originating materials undertaken in the territory of one or more of the Parties; and

- The value of any originating material used in the production of the non-originating material undertaken in the territory of one or more of the Parties.

This provision also was included in the TPP, and will provide additional flexibility for traders seeking to satisfy RVC requirements under the USMCA.

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[18] For purposes of this provision, the transaction value is adjusted to exclude any costs incurred in the international shipment of the good.

[19] If such a good is also subject to an RVC requirement, the value of the *de minimis* non-originating materials must be included in the value of non-originating materials for the applicable RVC requirement.

[20] For purposes of this provision, the transaction value is adjusted to exclude any costs incurred in the international shipment of the good.

[21] A "recovered material" is defined as a material in the form of one or more individual parts that results from: (a) the disassembly of a used good into individual parts; and (b) the cleaning, inspecting, testing or other processing of those parts as necessary for improvement to sound working condition.

[22] A remanufactured good means a good classified in HS Chapters 84 through 90 or under heading 94.02, except goods classified under HS headings 84.18, 85.09, 85.10, and 85.16, 87.03 or subheadings 8414.51, 8450.11, 8450.12, 8508.11, and 8517.11, that is entirely or partially composed of recovered materials and:

(a) has a similar life expectancy and performs the same as or similar to such a good when new; and

(b) has a factory warranty similar to that applicable to such a good when new.

Updated Provisions on Accumulation

Like the NAFTA, the USMCA provides for "accumulation" (*i.e.*, products of one Party can be further processed or added to products in another Party as if they had originated in the latter Party). However, the USMCA replaces the NAFTA accumulation rules with updated language that is nearly identical to that found in the TPP. The USMCA accumulation rules are as follows:

- A good is originating if it is produced in the territory of one or more of the Parties by one or more producers, provided that it satisfies all applicable origin requirements;
- An originating good or material of one or more Parties is considered as originating in the territory of another Party when it is used as a material in the production of a good there; and
- Production undertaken on a non-originating material in one or more of the Parties contributes to the originating status of the good, regardless of whether that production was sufficient to confer originating status to the material itself.

New Provision on Sets, Kits, and Composite Goods

A new rule in the USMCA specifically addresses goods that are imported in sets and are classified as such as a result of the application of rule 3 of the General Rules for the Interpretation of the Harmonized System. The USMCA provides that such sets are originating only if each good in the set is originating and both the set and the goods meet all other applicable requirements of the USMCA rules of origin chapter. However, if the value of all the non-originating goods in the set does not exceed 7 percent of the set's total value, the set will qualify as originating.[23] Recent trade agreements such as the KORUS and the TPP have included similar rules for goods imported in sets.

Updated Provision on Transit and Transshipment

Under the USMCA, an originating good that is transported outside the territories of the parties will retain its originating status if the good (1) remains under customs control in the territory of a non-Party; and (2) does not undergo an operation other than unloading; reloading; separation from a bulk shipment; storing; labeling or marking required by the importing Party; or any other operation necessary to preserve it in good condition or to transport the good to the territory of the importing Party. The NAFTA text did not expressly require a good to remain under customs control while in the territory of a non-Party in order retain its originating status, though this concept is included in US Customs and Border Protection's NAFTA regulations. This additional requirement was also included in the TPP.

Product-Specific Rules of Origin

The USMCA's Annex 4-B contains significant revisions to many of the product-specific rules of origin found in Annex 401 of the NAFTA. Some of the revised rules, such as those applicable to automotive goods, are more stringent than the NAFTA rules, potentially forcing companies to alter their current supply chains in order to satisfy the new requirements. Other product-specific rules in the USMCA, such as those applicable to chemicals, might be more flexible than the existing NAFTA rules.

We provide below an illustrative list of sectors and products that are subject to revised product-specific rules of origin under the USMCA. Companies engaged in trade in the NAFTA region should carefully review the USMCA's product-specific rules of origin and assess the impact of any relevant changes.

[23] The value of the non-originating goods in the set and the value of the set must be calculated in the same manner as the value of non-originating materials and the value of the goods.

Illustrative List of Products Subject to Revised Rules of Origin Under USMCA	
General Description of Goods	**Relevant HS Chapter(s)**
• Certain automotive goods[24]	Chapters 40, 70, 83, 84, 85, 87, 90, and 94
• Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes	Chapter 27[25]
• Inorganic chemicals; organic or inorganic compounds of precious metals, of rare-earth metals, of radioactive elements or of isotopes • Organic chemicals • Pharmaceutical products • Fertilizers • Tanning or dyeing extracts; dyes, pigments, paints, varnishes, putty and mastics • Essential oils and resinoids; perfumery, cosmetic or toilet preparations • Soap, organic surface-active agents, washing preparations, lubricating preparations, artificial waxes, prepared waxes, polishing or scouring preparations, candles and similar articles, modeling pastes, "dental waxes" and dental preparations with a basis of plaster • Albuminoidal substances; modified starches; glues; enzymes • Explosives; pyrotechnic products; matches; pyrophoric alloys; certain combustible preparations • Photographic or cinematographic goods • Miscellaneous chemical products	Chapters 28-38[26]
• Plastics and articles thereof • Rubber and articles thereof	Chapters 39 and 40[27]
• Textile and apparel goods	Chapters 42, 50-63, 70, 94, and 96[28]

[24] Automotive goods are subject to new product-specific rules of origin set forth in an Appendix to Annex 4-B of the USMCA. For an overview of these rules.

[25] The USMCA provides that any good in Chapter 27 qualifies as originating if it is the product of a chemical reaction that occurred within the territory of one or more of the Parties (i.e., the "Chemical Reaction Rule"). The NAFTA did not include this option. Alternatively, goods classified in Chapter 27 will retain the option to qualify as originating through a change in tariff classification.

[26] The USMCA permits any good classified in Chapters 28-38 to qualify as originating if it satisfies one or more of eight new rules, pursuant to which specific production processes that occur within the region are sufficient to confer origin (with some exceptions): (1) the Chemical Reaction Rule; (2) the Purification Rule; (3) the Mixtures and Blends Rule; (4) the Change in Particle Size Rule; (5) the Standards Materials Rule; (6) the Isomer Separation Rule; (7) the Separation Prohibition Rule; and (8) the Biotechnological Processes Rule. Alternatively, goods classified in Chapters 28-38 retain the option to qualify as originating through a tariff change and/or regional value content requirement, though some of these specific requirements have also changed from the NAFTA.

[27] The USMCA permits any good classified in Chapters 39-40 to qualify as originating if it satisfies one or more of seven new rules, pursuant to which specific production processes that occur within the region are sufficient to confer origin (with some exceptions): (1) the Chemical Reaction Rule; (2) the Purification Rule; (3) the Mixtures and Blends Rule; (4) the Change in Particle Size Rule; (5) the Standards Materials Rule; (6) the Isomer Separation Rule; and (7) the Biotechnological Processes Rule. Alternatively, goods classified in Chapters 39-40 retain the option to qualify under a tariff change or regional value content requirement, though some of these specific requirements have also changed from the NAFTA.

[28] The USMCA defines textile and apparel goods as falling within these chapters. The specific rules of origin for textile and apparel goods must be read in conjunction with Chapter 6 of the USMCA (Textiles and Apparel), which modifies aspects of the NAFTA's rules of origin for textiles, but these changes might not implicate all textile and apparel goods. For example, the USMCA requires that certain specific components of an apparel item must be originating in order for the finished apparel item to qualify as originating. For certain products, the USMCA also modifies the tariff

Illustrative List of Products Subject to Revised Rules of Origin Under USMCA	
• Certain articles of iron or steel (*e.g.*, welded pipes and tubes, fittings, structures, wires, steel cloth, nails, tacks, and staples)	Chapter 73[29]
• Certain electronics and components (*e.g.* certain monitors and projectors, certain components used in telecommunications equipment, and certain electrical transformers and their parts)	Chapter 85[30]
• Certain parts of railway or tramway locomotives or rolling stock; containers	Chapter 86[31]
• Certain liquid crystal display (LCD) assemblies	Chapter 90[32]

Outlook

Although most of the public discussion of the USMCA's rules of origin has focused on automotive goods, the Agreement's general and specific (non-automotive) rules also could have substantial implications for manufacturers and traders operating in North America. The Office of the US Trade Representative (USTR) has touted the updated rules of origin, including those for non-automotive goods, as a "key achievement" in the USMCA that will "ensure that only producers using sufficient and significant North American parts and materials receive preferential tariff benefits." Reactions within the US business community, however, have been mixed. For example, the private sector Advisory Committee for Trade Policy Negotiations (ACTPN) noted in its assessment of the Agreement that "[s]ome members of the ACTPN appreciate that the agreement strengthens the rules of origin, notably for steel-intensive goods, to ensure greater North American content. However, some other members believe the rules will raise costs and undercut the competitiveness of U.S. producers." Representatives of the apparel industry also have expressed concerns that the revised rules of origin applicable to that sector are overly restrictive and will discourage utilization of the USMCA, whereas representatives of the chemical sector have welcomed the simplicity of the new "process rules" applicable to chemical goods under the Agreement. Many other industry groups have not yet taken a position on the revised rules, which are highly technical and will require extensive analysis to determine their impact on specific products, companies, and industries.

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preference levels set forth in the NAFTA (which permit specified quantities of non-originating yarns, fabrics, apparel and made-up textile goods to receive NAFTA tariff treatment, provided that they have undergone processing in one or more NAFTA countries).

[29] The new rules applicable to certain steel-intensive goods will be phased in, taking effect 2-3 years after entry into force of the USMCA. They generally require that the product at issue: (1) undergoes a tariff shift from outside certain steel tariff headings in Chapters 72 and 73; (2) undergoes a tariff shift from only the designated steel tariff headings in Chapters 72 and 73, provided that at least 70 percent by weight of the inputs of those designated headings is originating; or (3) satisfies an RVC threshold (these very by product, but generally range from 65-75 percent under the transaction value method or 55-65 percent under the net cost method.)

[30] The changes in Chapter 85 vary by product. For example:

- The new rules applicable to electrical transformers and their parts will be phased in, taking effect 5 years after the USMCA enters into force. They generally require that the product at issue: (1) undergoes a tariff shift from outside certain headings in Chapters 72 and 73; or (2) satisfies an RVC requirement of 55 percent (net cost) or 65 percent (transaction value).
- Certain monitors and projectors will be able to qualify as originating without undergoing a change in tariff classification, provided they satisfy an RVC requirement of 60 percent (transaction value) or 50 percent (net cost).

[31] The new rules applicable to certain parts of railway or tramway locomotives or rolling stock will be phased in, taking effect three years after the USMCA's entry into force. They generally require that the product at issue: (1) undergoes a tariff shift from outside certain steel tariff headings in Chapters 72 and 73; (2) undergoes a tariff shift from only the designated steel tariff headings in Chapters 72 and 73, provided that at least 70 percent by weight of the inputs of those designated headings is originating; or (3) satisfies an RVC requirement of 70 percent (transaction value) or 60 percent (net cost).

[32] The new rules will enable certain LCD assemblies to qualify as originating without a change in tariff classification, provided they satisfy an RVC requirement of 40 percent (transaction value) or 30 percent (net cost).

Overview of Chapter 7 (Customs Administration and Trade Facilitation) of the US-Mexico-Canada Agreement

Chapter 7 of the US-Mexico Canada Agreement (USMCA), "Customs Administration and Trade Facilitation," parallels the "Customs Procedures" Chapter of the North American Free Trade Agreement (NAFTA) in part, while introducing a range of more detailed provisions modeled off the WTO Trade Facilitation Agreement (TFA) and elements of the Trans-Pacific Partnership (TPP). The Chapter's key provisions are summarized herein.

Summary of Key Provisions

Express shipments

USMCA Art. 7.8 includes new provisions not seen in the NAFTA, modeled on TPP Art. 5.7, designed to expedite the clearance of express shipments. These procedures include:

- Submission and processing of required customs information, by single submission, prior to the arrival of the shipment (by electronic means, if possible);
- Immediate release of shipments based on "minimum documentation";
- "Fewer custom formalities" for shipments under USD $2,500.[33]
- No duties/taxes assessed at time of importation, and no formal entry procedures required, for goods below the *de minimis* threshold[34]:

Thresholds above which customs duties and taxes are levied, and formal entry procedures are required		
	Customs duties	**Taxes**
United States	USD$800	USD$800
Mexico	USD$117	USD$50
Canada	C$150	C$40[35]

However, a footnote provides that "a Party may impose a reciprocal amount that is lower for shipments from another Party if the amount provided for under that other Party's domestic law is lower than that of the Party," which would allow the United States to lower its threshold.

The Chapter does not include precise definitions of "minimum documentation" and "fewer custom formalities," so these terms will likely require elaboration through implementing regulations or country practice.

Other new provisions enhancing efficiency

- **Art. 7.7: Release of Goods** – Incorporating elements of TPP Art 5.10 and TFA Art. 7, this Article requires that Parties adopt procedures that provide for the "immediate release of goods upon receipt of the customs declaration and fulfilment of all applicable requirements and procedures," compared to within 48 hours under TPP. Parties must also adopt procedures providing for the pre-processing of goods, and for goods to be

[33] NAFTA Art. 503 states that Parties shall not require a Certificate of Origin for goods below USD$1,000. The United States has raised this threshold to USD$2,500.

[34] Since NAFTA was originally negotiated, there has been a surge in lower-value cross-border shipments, largely driven by e-commerce. While the United States raised its *de minimis* threshold to $800 in 2016, Canada and Mexico kept their limit relatively low, at C$20 and USD$50, respectively, putting a damper on US low-value e-commerce exports.

[35] Approximately USD$115 and USD$31, respectively

released at the point of arrival without requiring temporary warehousing. The Article further requires the release of goods prior to final determination and payment of any customs duties, taxes, or fees, with conditions (so long as the duties had not been determined prior to, or promptly upon arrival, and the goods are otherwise eligible for release).

- **Art. 7.9: Use of Information Technology** – The USMCA requires Parties to employ technology across all processes to increase efficiency. This includes (i) making available all forms/documents required for import/export; (ii) permitting the electronic submission of customs declarations; (iii) permitting the electronic payment of duties, taxes, and fees; and (iv) "endeavor[ing] to allow" an importer to correct multiple import declarations through a single form. This Article is similar to TPP Art 5.6, but is binding, instead of aspirational (*i.e.*, using "shall" instead of "shall endeavor").

- **Art. 7.10: Single Window** – This Article requires Parties to establish or maintain a single window system by December 31, 2018 that "enables the electronic submission through a single entry point of the documentation and data" required for importation, with a view to expanding the system to manage all import, export, and transit transactions. Whereas TFA Art. 7.10 suggests use of information technology in maintaining a single window, the USMCA requires it.

- **Art. 7.14: Authorized Economic Operator (AEO)** – This Article, similar to TFA Art. 7.7, encourages further harmonization of AEO programs, which give pre-authorized/"low risk" businesses preferred customs treatment, including reduced frequency of examination. There already exists mutual recognition between Canada's Partners in Protection (PIP)[36] and United States' Customs Trade Partnership Against Terrorism (CTPAT)[37] programs, and between CTPAT and Mexico's Operadores Económicos Autorizados (OEA).[38]

- **Article 7.25: Border Inspections** – This Article states that Parties shall coordinate amongst their relevant agencies to carry out examinations "to the extent practicable simultaneously within a single location," to expedite release. Furthermore, as appropriate, the Parties shall coordinate to "develop procedures or facilities, at adjacent ports of entry, for the efficient movement of goods."

Advance rulings

As under NAFTA Art. 509, USMCA Art. 7.5 sets out procedures for the issuance of advance rulings on a range of customs matters, providing greater certainty for traders as to how their goods will be treated at the border. While the thrust of Article 7.5 is similar to that of its predecessor, it is more limited in substantive scope (*i.e.*, what issues may be subject to an advance ruling), and includes small procedural changes.

Largely mimicking TPP Art. 5.3, the USMCA invites requests for advance rulings on four issues: (i) tariff classification; (ii) the application of customs valuation criteria for a particular case in accordance with the Customs Valuation Agreement; (iii) the origin of the good, including whether it qualifies as an originating good; and (iv) whether a good is subject to a quota or a tariff-rate quota; in addition to other matters. The NAFTA, on the other hand, enumerates nine categories of inquiry, including duty-free re-entry of goods and satisfaction of origin marking requirements. However, both the USMCA and the NAFTA include a catchall provision, allowing advance ruling on "other matters as the Parties may agree."

[36] Click **here** for an overview of the PIP program.

[37] Click **here** for an overview of the CTPAT program.

[38] Click **here** for an overview of the OEA program (in Spanish).

As for procedure, the USMCA requires that a responding Party must issue the ruling "in no case later than 120 days after it has obtained all necessary information," which is similar to the NAFTA procedures,[39] and faster than the 150-day deadline under the TPP. One difference is that, under the USMCA, a Party may request "a sample of the good for which the advance ruling was requested."

Transparency

The USMCA includes new provisions meant to enhance the transparency of customs processes, both by requiring Parties to proactively share customs rules and the reasoning behind rulings, and by encouraging the use of information technology to ensure access to information. These provisions include:

- **Art. 7.2: Online Publication** – NAFTA Art. 1802 requires that Parties publish "laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available." The USMCA expands this requirement, committing Parties to posting online eight categories of information, including a range of informational resources and contact information. These provisions are more in line with TFA Art. 1.2 and TPP Arts. 5.11 and 26.2.
- **Art. 7.3: Communication with Traders** – This Article requires that Parties "establish to maintain a mechanism to regularly communicate with traders within its territory on its procedures related to the importation, exportation, and transit of goods," so that traders can identify emerging issues. While NAFTA Art. 1802 requires that Parties, to the extent possible, "provide interested persons and Parties a reasonable opportunity to comment on such proposed measures," the mechanism established under the USMCA appears as an ongoing, open channel of communication, not necessarily tied to the consideration of a specific measure. Article 7.3 does not define the precise "mechanism" to be used, presumably leaving this up to the Parties.
- **Art. 7.4: Enquiry Points** – The NAFTA establishes points of enquiry for issue-specific matters (ie., SPS (Art. 719) and financial services (Art. 1411)), but not for general customs matters. This Article is in line with TFA Art. 3 and TPP Art. 5.11.
- **Art 7.11: Transparency, Predictability and Consistency in Customs Procedures** – Similar to TFA Art. 10.1-2 and TPP Art. 5.1, this Article requires that Parties apply their customs procedures in a transparent, predictable, and consistent manner, while allowing for differentiation of treatment based on type of good, means of transport, risk management, and other considerations.
- **Art. 7.19: Standards of Conduct** – This Article establishes a channel for traders and other stakeholders to submit complaints regarding "improper or corrupt" behaviour, including officials' use of their public service position for private gain, including any monetary benefit.

Customs compliance

- **Article 7.26: Regional and Bilateral Cooperation on Enforcement** – This Article draws on Section 3 from TPP Art. 5.2, which states that Parties shall endeavour to provide other Parties with advance notice of significant administrative or legal changes "likely to substantially affect" the agreement or the enforcement of trade laws of a Party. The Article requires that Parties take appropriate legislative, administrative, or judicial actions to enhance coordination in addressing customs offices, and to, whenever practicable, provide information to assist another Party in addressing such offenses. Elsewhere in the agreement (Article 10.5: Duty Evasion Cooperation), a Party may request that another Party conduct a duty evasion verification, to be completed within 30 days of the request.

[39] 19 CFR 181.99

- **Article 7.28: Customs Compliance Verification Requests** – While the NAFTA sets procedures for origin verifications, the procedure is slightly different under the USMCA, in that the presumption is that the verification visit will be conducted by the requested party.

Other new provisions

- **Article 7.12: Risk Management** – Similar to TPP Art. 5.9 and TFA Art. 7.4, this Article obligates Parties to maintain a risk management system to "focus its inspection activities on high-risk goods," and simplify the handling of low-risk goods.
- **Article 7.13: Post-Clearance Audit** – This Article requires Parties to adopt a post-clearance audit system in a risk-based manner. It is similar to requirements under TFA Art. 7.5, but refers to "quasi-judicial" proceedings, and requires Parties to inform the trader with respect to laws. The scope, frequency, and procedure for such audits are not defined.
- **Article 7.16: Administrative Guidance** – Introduces a mechanism by which a customs office can request guidance from a central authority on a transaction. Guidance may be requested by the office or by traders.
- **Article 7.17: Transit** – Similar to TFA Art. 11, the USMCA specifies freedom of transit through a Party's territory, if the transit is beginning and terminating beyond the frontier of the Party across whose territory the traffic passes.
- **Article 7.18: Penalties** – The USMCA specifies that "clerical or minor error[s]" do not constitute a breach of laws, regulations, or requirements, and includes a new anti-corruption clause – "No portion of the remuneration of a government official shall be calculated as a fixed portion or percentage of any penalties or duties assessed or collected."
- **Article 7.21: Customs Brokers** – The USMCA levels the playing field between self-filers and customs brokers. This Article is similar to TFA Art. 10.6, but prohibits Parties from limiting the number of ports at which brokers can operate. Mexico currently requires the use of customs brokers.
- **Article 7.22: Trade Facilitation Committee** – Establishes a new Committee, comparable to the NAFTA Committee on Trade in Goods, but with greater specificity of mandate (single windows, AEO, etc.).
- **Article 7.27: Exchange of Specific Confidential Information** – The NAFTA limits disclosure of confidential information collected during investigation, but this Article is more detailed/robust.
- **Article 7.30: Sub-Committee on Customs Enforcement** – Establishes a new Sub-Committee, with some overlap with the NAFTA's Customs Subgroup under the Working Group on Rules of Origin.

Outlook

Overall, the customs procedures envisioned under the USMCA build upon those under the NAFTA, while incorporating new elements from the TFA and the TPP related to transparency and efficiency. The USMCA's Customs Chapter establishes novel cooperative/consultative mechanisms that reflect the United States' priorities on anti-circumvention and duty evasion.

Reaction to the Customs chapter has been mixed. Though some have praised the *de minimis* threshold increase, others have argued that because the agreement allows a Party to reduce its threshold to match that of another Party (see Art 7.8 above), it is possible that the United States' level could actually decrease. Moreover, some critics have raised concerns as to whether the novel consultative/enforcement provisions could, depending on their interpretation and implementation, infringe on national sovereignty.

Overview of Chapter 11 (Technical Barriers to Trade) of the US-Mexico-Canada Agreement

Chapter 11 of the US-Mexico-Canada Agreement (USMCA), which covers Technical Barriers to Trade (TBT), represents a wholesale overhaul of the North American Free Trade Agreement's (NAFTA) Chapter on Standards-Related Measures. While the chapter draws upon elements of the Trans-Pacific Partnership (TPP) – notably as relating to incorporation of the WTO Agreement on Technical Barriers to Trade (TBT Agreement), compliance periods, cooperation, and contact points – the new USMCA TBT provisions are closest in substance to the TBT Agreement itself.

The NAFTA TBT provisions were negotiated prior to the TBT Agreement and subsequent decisions and recommendations adopted by the WTO TBT Committee, and are comparatively narrow in scope. The rewritten USMCA Chapter – by incorporating not only basic TBT Agreement substantive disciplines, but also decisions of the TBT Committee (while eschewing other bodies) – is meant to bring the trilateral trade relationship in line with international best practices. An article-by-article overview follows.

Article 11.1: Definitions

The only definition found in both NAFTA Chapter 9 and USMCA Chapter 11 is "international standard," which the former defines as "standards-related measure, or other guide or recommendation, adopted by an international standardizing body and made available to the public." The USMCA, however, specifically ties the definition to Annex 2 to Part 1 (Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement) in the Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995 (G/TBT/1/Rev.13) as may be revised, issued by the WTO Committee on Technical Barriers to Trade. TPP Art. 8.1 only shares "mutual recognition agreement." The USMCA also offers definitions for "international conformity assessment systems," "mutual recognition arrangement or multilateral recognition arrangement;" "proposed technical regulation or conformity assessment procedure;" and "TBT Committee Decision on International Standards."

Article 11.2: Scope

While significantly shorter, this Article is similar to its TPP equivalent in that it (1) establishes the Chapter's application to the "preparation, adoption and application" of standards, technical regulations, and conformity assessment procedures which may affect trade in goods between the Parties; and (2) expressly excludes technical specifications prepared by a governmental body for production or consumption requirements and sanitary or phytosanitary (SPS) measures. The USMCA also covers "any amendment thereto," but removes the TPP's reference to "government bodies at the level directly below that of the central level of government."

Article 11.3: Incorporation of the TBT Agreement

This Article, like its TPP equivalent, incorporates certain TBT Agreement provisions wholesale.[40] There are minor changes to the USMCA from the TPP with respect to the incorporation of the TBT Agreement:

- **Removed from USMCA**: Art. 2.9 (Establishing the procedure for the introduction of new technical standards where an international standard does not exist).
- **Added to USMCA**:
  - Art. 2.3 ("Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner");

[40] For details on the incorporated provisions, see the full TBT Agreement text **here**.

- Art. 3.1 (Parties' obligation to ensure compliance by local government and non-governmental bodies within their territories with the TBT Agreement's Article 2: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies);
- Art. 4.1 (Parties' obligation to ensure compliance with the TBT Agreement's "Code of Good Practice");
- Art. 7.1 (Parties' obligation to ensure compliance by local government bodies with Articles 5-6); and
- Paragraph J of Annex 3 (Reporting requirements of standardizing bodies).

- Found in the USMCA *and* TPP:
  - Art. 2.1 (Products imported from the territory of other Parties shall be treated as those of national origin);
  - Art. 2.2 (Technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, including national security, health, safety, environment and prevention of deceptive practices);
  - Art. 2.4 (Parties shall use international standards wherever appropriate);
  - Art. 2.5 (When requested by another Party, a Party shall explain the justification for new technical regulations. Where a technical regulation is prepared, adopted or applied for a "legitimate objective" as defined in Art. 2.2 and is in line with international standards, it shall be presumed not to create an unnecessary obstacle to trade);
  - Art. 2.10 (Where "urgent problems of safety, health, environmental protection or national security" arise, a Party may forego the normal notice and comment processes as necessary, so long as the Party notifies the other Parties following adoption and accept comments at that time);
  - Art. 2.11 (Parties shall publish/make available all technical regulations)
  - Art. 2.12 (Parties shall allow a "reasonable interval" between publication and enforcement of technical regulation);
  - Art. 5.1 (Where positive assurance is required that products conform with technical regulations or standards, Parties shall "grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country", and such procedures shall not create unnecessary obstacles to trade);
  - Art. 5.2 (Conformity assessment procedures shall be equitable, expeditious, and transparent, and there shall be procedures in place to review complaints);
  - Art. 5.3 (Parties retain the right to conduct "spot checks" within their territories);
  - Art. 5.4 (Parties shall use guides and recommendations from international standardizing bodies as a basis for their conformity assessment procedures, where appropriate);
  - Art. 5.6 (Establishes procedure for enacting new conformity assessment procedures where no guidance from international bodies exists);
  - Art. 5.7 (Where "urgent problems of safety, health, environmental protection or national security" arise, a Party may forego the normal notice and comment processes as necessary, so long as the Party notifies the other Parties following adoption and accept comments at that time);

- Art. 5.8 (Parties shall publish/make available all conformity assessment procedures);
- Art. 5.9 (Parties shall allow a "reasonable interval" between publication and enforcement of conformity assessment procedures);
- Paragraph D of Annex 3 ("In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country");
- Paragraph E of Annex 3 ("The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade");
- Paragraph F of Annex 3 ("Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate").

As is the case under the TPP, the Parties to the USMCA do not have recourse to the agreement's dispute settlement mechanism for disputes exclusively arising under the provisions of the TBT Agreement as incorporated. However, the USMCA also bars recourse where the dispute concerns an alleged inconsistency with the Chapter that (1) was referred or is subsequently referred to a WTO dispute settlement panel; or (2) was taken to comply in response to the recommendations or rulings from the WTO Dispute Settlement Body (or bears a close nexus, such as in terms of nature, effects, and timing, with respect to such a measure). This may relate to longstanding WTO disputes among the parties on tuna (US-Mexico) and country of origin labelling (COOL) (US-Mexico/Canada).

Article 11.4: International Standards, Guides and Recommendations

Whereas NAFTA makes basic reference to use of "relevant international standards," the USMCA offers more detailed guidance on identifying and applying such standards. The Article states unequivocally that, in determining whether there is an in international standard, guide, or recommendation, each Party shall apply the TBT Committee Decision on International Standards.[41]

This Article also builds upon equivalent TPP provisions by stating that "each Party shall ensure that any obligation or understanding it has with a non-Party does not facilitate or require the withdrawal or limitation on the use or acceptance of any relevant standard, guide, or recommendation developed in accordance with the TBT Committee Decision on International Standards or the relevant provisions of this Chapter."

Article 11.5: Technical Regulations

This entirely new Article (not included in either NAFTA Chapter 9 or the TPP Chapter 8) covers (1) Preparation and Review of Technical Regulations; (2) Use of Standards in Technical Regulations; (3) Information Exchange; and (4) Labeling.

[41] The significance of this reference is captured by the Industry Trade Advisory Committee on Standards and Technical Trade Barriers ("ITAC 14"): "Explicit reference of the WTO TBT Committee Decision underscores that standards of U.S.-domiciled standards development organizations are international for the purposes of satisfying commitments in [USMCA]. This Chapter 11 Article 4.2 and Article 4.3 provisions will preclude discrimination based on where a standards development organization is domiciled."

Among other requirements, Parties must:

- Conduct an appropriate assessment concerning any "major" technical regulations it proposes to adopt, and review technical regulations and conformity assessment procedures periodically and when petitioned by another Party;
- Consider which international standard best fulfills the Party's legitimate objectives of a technical regulation or conformity assessment procedure;[42]
- If not using an international standard, explain to the other Parties why not; and
- Ensure that technical regulations concerning labels "accord treatment no less favorable than that accorded to like goods of national origin" (i.e., national treatment) and "do not create unnecessary obstacles to trade between the Parties." This provision again could relate to past disputes on US COOL measures, which some groups in the United States have recently sought to renew.

Article 11.6: Conformity Assessment

The basic tenet of national treatment stated in this Article, that "each Party shall accord to conformity assessment bodies located in the territory of another Party treatment no less favorable than that it accords to conformity assessment bodies located in its own territory or in the territory of the other Party," is similar to that in NAFTA Art. 906 and TPP Art. 8.6. "Conformity assessment body" is not defined in the Agreement. The USMCA, like the TPP, goes further to specify that a Party shall not require conformity assessment bodies be located or operate an office within its territory.

This Article also includes TPP-like provisions on (1) transparency (*i.e.*, the requirement of Parties to respond to requests for information regarding assessment procedures and body accreditation); (2) allowing conformity assessment bodies to use subcontractors; and (3) broadening the scope of permissible accrediting bodies.

Article 11.7: Transparency

This Article grants all Parties and other stakeholders the opportunity to comment on the proposed adoption or modification of a Party's technical regulation. Similar to the NAFTA and the TPP, the USMCA requires that Parties "shall normally allow" 60 days for comment prior to adopting/modifying technical regulations, with certain exceptions. The USMCA requires electronic transmission/posting of the notification and regulation text, as well as posting of written comments on the regulatory authority's website.

Article 11.8: Compliance Period for Technical Regulations and Conformity Assessment Procedures

Whereas the NAFTA and the TBT Agreement require a "reasonable" interval between publication of requirements concerning conformity assessment procedures and their entering into force, the USMCA interprets this to mean "normally a period of not less than six months." The TPP contains the same language. If possible, Parties shall endeavour to provide a longer interval.

Article 11.9: Cooperation and Trade Facilitation

Similar to TPP Art. 8.9, this Article establishes additional criteria by which a Party may accept another Party's sector-specific proposal for cooperation, such as by (1) implementing mutual recognition or recognizing existing mutual recognition arrangements to accept results by conformity assessment bodies with respect to specific technical regulations; (2) using accreditation to qualify conformity assessment bodies; (3) unilaterally recognizing the results of conformity assessment procedures performed in the other Party's territory; and (4) accepting a supplier's declaration

[42] Per ITAC 14, "[T]his provision will enable technically equivalent standards to be referenced and used, ultimately smoothing the compliance process for manufacturers' goods."

of conformity. The Article recognizes a range of other cooperative activities to better align technical regulations, such as exchange of information and technical assistance.

Article 11.10: Information Exchange and Technical Discussions

This Article establishes the procedure for requesting that another Party engage in technical discussions or provide information on proposed or final technical regulations. Once the request is made, the Parties shall discuss the matter within 60 days, or sooner if the matter is urgent. NAFTA Art. 911 establishes similar procedures, but without any time limit.

Article 11.11: Committee on Technical Barriers to Trade

This Article establishes a TBT Committee composed of government representatives of each Party, and identifies its functions. There is significant overlap in scope and operations with the NAFTA's Committee on Standards-Related Measures, as well as the TBT Committee envisioned under the TPP. The NAFTA, however, establishes subcommittees focusing specifically on land transportation standards, telecommunications standards, automotive standards, and labelling of textile and apparel goods.

Article 11.12: Contact Points

Unlike the NAFTA, this Article requires that each Party designate a contact point for matters arsing under the TBT Chapter.

Annexes

TBT Chapter Annexes that were in the TPP have been revised and moved to "Sectoral Annexes" for cosmetics, information and communications technology, pharmaceuticals, medical devices. These annexes can be reviewed separately upon request.

Outlook

Overall, responses to the new TBT provisions have been positive. Industry groups have applauded the USMCA's expansion of technical regulation and conformity assessment acceptance; its requirements relating to regulatory transparency and stakeholder input; and its focus on harmonization of TBT regimes and overall efficiency.

Trump Administration Notifies Congress of Intention to Negotiate Trade Agreements with Japan, the European Union, and the United Kingdom

On October 16, 2018, the Office of the US Trade Representative (USTR) notified Congress that the Trump administration intends to negotiate three separate trade agreements with Japan, the European Union (EU), and the United Kingdom (UK).[43] USTR submitted the notifications pursuant to Section 105(a)(1)(A) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA), which requires the President to provide, at least 90 calendar days before initiating negotiations with a country, written notice to Congress of (1) the President's intention to enter into the negotiations; and (2) "the specific United States objectives for the negotiations[.]" The three notifications follow bilateral statements in which the governments of Japan, the EU, and the UK announced their plans to engage in negotiations with the United States. Though the United States has been unofficially negotiating with each party for weeks (if not longer), the TPA notifications mean that official bilateral negotiations may begin as early as January 14 (Japan, EU) and March 29, 2019 (UK). We provide below an overview of the three notifications and the likely next steps for the negotiations.

[43] The three notifications can be viewed **here**.

Japan

Background

The notification concerning Japan follows a joint statement issued by President Trump and Prime Minister Abe on September 26, 2018 in which the two leaders announced that "[t]he United States and Japan will enter into negotiations, following the completion of necessary domestic procedures, for a United States–Japan Trade Agreement on goods, as well as on other key areas including services, that can produce early achievements." The joint statement adds that the two countries "also intend to have negotiations on other trade and investment items following the completion of the discussions of the agreement mentioned above." The joint statement indicates that market access in the motor vehicle and agricultural sectors would be covered by the bilateral negotiations, but provides no further details about their timing or scope. Prime Minister Abe stated on September 26 that the United States has agreed to refrain from imposing any additional tariffs on automotive imports from Japan pursuant to Section 232 of the Trade Expansion Act of 1962 while the negotiations are ongoing.[44] This appears to have been a key consideration prompting Japan to agree to participate in the negotiations. Abe also noted that Japan would not exceed the agricultural liberalization to which it agreed in the Trans-Pacific Partnership, which the United States abandoned in 2017.

TPA Notification

USTR's October 16 notification to Congress provides few additional details about the timing, scope, or specific US objectives for the planned bilateral negotiations between Japan and the United States, as shown below.

- Timing. The notification states that "we intend to initiate negotiations with Japan as soon as practicable, but no earlier than 90 days from the date of this notice" (*i.e.*, January 14, 2019). This is the earliest date on which negotiations can begin pursuant to TPA, but the negotiations need not begin on that date. The notification further states that "[w]e may seek to pursue negotiations with Japan in stages as appropriate, but we will only do so based on consultations with Congress." As noted above, the joint statement also contemplates a possible second stage of negotiations "on other trade and investment items", but USTR's notification does not elaborate on this point.
- Scope and Objectives. The notification provides almost no detail about the scope of the negotiations and acknowledges that the scope has not yet been finalized, stating that "[w]e are committed to working closely with Congress, including on matters of scope[.]" The notification also provides little detail about the United States' objectives for the negotiations, stating only that "[o]ur aim in negotiations with Japan is to address both tariff and non-tariff barriers and to achieve fairer, more balanced trade" and that "[o]ur specific objectives for this negotiation will comply with the specific objectives set forth by Congress in [TPA]." Unlike the equivalent TPA notification submitted in advance of the renegotiation of the North American Free Trade Agreement (NAFTA) – which indicated that the negotiations would cover "intellectual property rights, regulatory practices, state-owned enterprises, services, customs procedures, sanitary and phytosanitary measures, labor, environment, and small and medium enterprises" – the new notification does not indicate whether the United States intends to address such issues in the planned negotiations with Japan.

USTR on October 25, 2018 published a draft Federal Register notice requesting public comments to assist the agency in developing negotiating objectives for the proposed US-Japan Trade Agreement.[45] Among other things,

[44] The joint statement does not directly reference the United States' ongoing Section 232 investigation of automotive imports but states generally that "[t]he United States and Japan will conduct these discussions based on mutual trust, and refrain from taking measures against the spirit of this joint statement during the process of these consultations."

[45] Available at **https://www.federalregister.gov/documents/2018/10/26/2018-23569/requests-for-comments-negotiating-objectives-for-a-us-japan-trade-agreement**

USTR has invited interested parties to comment on (1) general and product-specific negotiating objectives for the proposed agreement; (2) relevant barriers to trade and goods in services between the two countries; (3) customs and trade facilitation issues that should be addressed; and (4) sanitary and phytosanitary measures and technical barriers to trade that should be addressed. Written comments are due to USTR by November 26, 2018, and USTR will hold a public hearing on these issues on December 10, 2018.

European Union

Background

The notification concerning the EU follows a joint statement of July 25, 2018 in which President Trump and European Commission President Jean-Claude Juncker agreed to begin preliminary discussions on a "joint agenda" of bilateral trade initiatives, including a potential negotiation to liberalize US-EU trade in non-automotive industrial goods and services. Specifically, they agreed (1) "to work together toward zero tariffs, zero non-tariff barriers, and zero subsidies on non-auto industrial goods"; (2) to "work to reduce barriers and increase trade in services, chemicals, pharmaceuticals, medical products, as well as soybeans"; and (3) "to launch a close dialogue on standards in order to ease trade, reduce bureaucratic obstacles, and slash costs." They also established an Executive Working Group (EWG) to further discuss the new agenda. The United States agreed to refrain from imposing additional tariffs on automotive imports from the EU under Section 232 of the Trade Expansion Act while the negotiations are underway.[46] This appears to have been a key consideration prompting the EU to agree to participate in the negotiations.

The EWG has met periodically throughout September and October, and the Parties have mentioned two near-term objectives for these discussions: (1) achieving an "early harvest" outcome involving commitments to address certain technical barriers to trade; and (2) finalizing the scope of the planned bilateral negotiations on other issues highlighted by the joint statement (*e.g.*, tariffs on non-automotive industrial goods). However, the discussions have proven contentious. EU Trade Commissioner Cecilia Malmstrom stated on October 17 that the EU has requested several times "to start the scoping exercise on a limited agreement focused on industrial goods", but that the United States has not meaningfully engaged in such discussions. US officials similarly have accused the EU of "intransigence" in the EWG discussions, with Secretary Ross stressing the need for "near-term deliverables, including both tariff relief and standards", and warning that "our president's patience is not unlimited[.]" The two sides also have continued to disagree publicly on whether agricultural market access will be covered by the negotiations, with the EU insisting (consistent with the July joint statement) that agriculture be excluded and the United States insisting that it be covered by the negotiations. At this stage, it is unclear when (or if) the EWG will be able to reach agreement on the scope of the negotiations or on the "early harvest" outcomes in the area of technical barriers to trade.

TPA Notification

Notwithstanding the lack of agreement on the scope of the negotiations, USTR on October 16 notified Congress of its intention to enter into negotiations with the EU. Like the notification concerning Japan, the EU notification provides few additional details about the timing, scope, or specific US objectives for the planned bilateral negotiations, as shown below.

- Timing. The notification states that "[w]e intend to initiate negotiations with the EU as soon as practicable, but no earlier than 90 days from the date of this notice" (i.e., January 14, 2019). Like the notification for Japan, it also states that "[w]e may seek to pursue negotiations with the EU in stages as appropriate, but we will only do so based on consultations with Congress."

[46] The joint statement does not directly reference Section 232 but states generally that the parties "will not go against the spirit of this agreement, unless either party terminates the negotiations."

- Scope and objectives. Like the Japan notification, the EU notification provides almost no detail about the scope of the negotiations and acknowledges that the scope has not yet been finalized, stating that "[w]e are committed to working closely with Congress, including on matters of scope[.]" The notification also provides few details regarding the US objectives for the negotiations, stating only that "[o]ur aim in negotiations with the EU is to address both tariff and non-tariff barriers and to achieve fairer, more balanced trade" and that "[o]ur specific objectives for this negotiation will comply with the specific objectives set forth by Congress in [TPA]."

United Kingdom

Background

Since July of 2017, US and UK trade officials have been meeting under the auspices of the US-UK Trade and Investment Working Group to discuss the possibility of launching formal bilateral trade negotiations. At the first session in July 2017, the two countries announced that "[t]he Working Group is…laying the groundwork for a potential, future free trade agreement once the UK has left the EU." The Working Group has held four meetings, most recently in July 2018, to discuss the possible trade agreement.

TPA Notification

The notification concerning the UK provides more details about the scope of the the planned bilateral negotiations, but it nevertheless remains ambiguous.

- Timing. The notification states that "[w]e intend to initiate negotiations with the United Kingdom as soon as it is ready after it exits from the European Union on March 29, 2019." (The UK is barred from negotiating trade agreements while still an EU member.) We anticipate that negotiations will begin soon after Brexit is officially completed.

- Scope and objectives. The notification provides little detail about the scope of the negotiations and acknowledges that the scope has not yet been finalized, stating that "[w]e are committed to working closely with Congress, including on matters of scope[.]" Unlike the EU and Japan notifications, however, the UK notification implies a broader scope: "[a]n ambitious trade agreement between our two countries could further expand [the US-UK trade relationship] by removing existing goods and services tariff and non-tariff trade barriers and by developing cutting edge obligations for emerging sectors where U.S. and UK innovators and entrepreneurs are most competitive." Such language suggests the possibility of a comprehensive free trade agreement. The notification provides few details regarding the US objectives for the negotiations, stating that "[o]ur aim in negotiations with the UK is to address both tariff and non-tariff barriers and to achieve free, fair, and reciprocal trade" and that "[o]ur specific objectives for this negotiation will comply with the specific objectives set forth by Congress in [TPA]."

Outlook

By submitting notifications to Congress pursuant to TPA, USTR has taken the first legal step towards entering into formal bilateral negotiations with Japan, the EU, and the UK. However, key details of the proposed negotiations, including their scope, remain unsettled and will need to be agreed upon before any formal negotiations can begin. This process could take months, though the Trump administration appears to be continuing to use its ongoing Section 232 investigation of automotive imports to pressure Japan and the EU to begin the negotiations quickly. Statements by the parties have suggested that the negotiations with these countries, particularly Japan and the EU, might cover a much narrower range of issues than the comprehensive agreements negotiated by the United States in the past, but the TPA notifications are unclear on this point. It is also unclear whether key constituencies in the United States, the EU, and Japan will support narrow bilateral negotiations addressing only tariffs and a small handful

of other issues, as opposed to the more comprehensive negotiations and agreements that have become the norm among developed countries in recent years.

USTR will be required to provide more detailed information about the US objectives for each negotiation before formal negotiations can begin. Section 105(a)(1)(D) of TPA requires that the President, at least 30 calendar days before initiating negotiations with a country, publish a "detailed and comprehensive summary" of the specific objectives for the negotiations, and a description of how the agreement, if successfully concluded, will further those objectives and benefit the United States. Prior to renegotiating NAFTA, the Trump administration complied with this requirement by publishing an 18-page report listing several objectives for each of 25 proposed chapters of the agreement. Until USTR publishes similar reports concerning the proposed negotiations with Japan, the EU, and the UK, it will be difficult to assess the likely timing and substance of any future negotiations with these countries.

Overview of Chapter 5 (Origin Procedures) of the US-Mexico-Canada Agreement

The US-Mexico-Canada Agreement (USMCA) announced on September 30, 2018 contains new procedures for certifying a good as "originating" that differ significantly from those currently in effect under the North American Free Trade Agreement (NAFTA). The USMCA chapter on Origin Procedures generally adopts the model set forth in the Trans-Pacific Partnership (TPP) by allowing importers to complete a certification of origin, which can be provided on an invoice or any other document and need not follow a prescribed format. This is an important departure from the NAFTA, which utilizes a uniform Certificate of Origin that may only be signed by the exporter of the goods. However, most other elements of the NAFTA origin procedures (*e.g.*, recordkeeping requirements and verification procedures) have been retained. We provide below an overview of the new USMCA origin procedures.

New Method of Certifying Origin

Under the NAFTA, Canada, Mexico and the United States established a uniform Certificate of Origin that is used in all three countries to certify that imported goods qualify for preferential tariff treatment.[47] The USMCA, by contrast, will not utilize such a certificate and will instead follow the model used in the TPP: a certification of origin under the USMCA may be provided on an invoice or any other document (except an invoice or commercial document issued in a non-Party) and need not follow a prescribed format, provided that it contains the "minimum data elements" set forth in Annex 5-A[48] and meets other requirements of the Chapter. For example, the certification must describe the originating good in sufficient detail to enable its identification, and must be provided in the language requested by the importing Party.

As is the case under NAFTA, a certification of origin under the USMCA may apply to a single shipment or to multiple shipments of identical goods within a 12-month period, and must be accepted by a Party's customs administration for four years after its completion. The USMCA does not modify the threshold value (USD $1,000) below which a certification of origin is not required, even though some US businesses had advocated an increase in the threshold.

Under the USMCA, each Party has committed to allow a certification of origin to be completed and submitted electronically and signed with an electronic or digital signature. NAFTA did not include this obligation.

Importers Now Eligible to Complete a Certification of Origin

Under the NAFTA, a Certificate of Origin must be completed and signed by the exporter of the goods.[49] Only importers who possess a valid Certificate of Origin signed by the exporter may claim preferential tariff treatment for

[47] For the United States, the Certificate of Origin is designated as CBP Form 434, available at **https://www.cbp.gov/sites/default/files/assets/documents/2017-Apr/CBP%20Form%20434.pdf**

[48] The minimum data elements include (1) information about the certifier, exporter, producer, and importer of the good; (2) a description and the Harmonized System (HS) classification of the good to the 6-digit level; (3) the origin criteria under which the good qualifies; and (4) the blanket period (if the certification covers multiple shipments).

[49] Where the exporter is not the producer, the exporter can complete the Certificate on the basis of:

originating goods. By contrast, the USMCA (like the TPP) provides that an importer may complete a certification of origin[50] and claim preferential tariff treatment based thereupon, subject to certain requirements. For example, an importing Party may:

- Require the importer to provide documents or other information to support the certification;
- Establish in its law conditions that an importer must meet to complete a certification of origin, and prohibit the importer from providing its own certification if it fails to meet or no longer meets those conditions; or
- Prohibit the importer from: (1) issuing a certification, based on a certification or a written representation completed by the exporter or producer; and (2) making a subsequent claim for preferential tariff treatment based on a certification of origin completed by the exporter or producer.

Canada and the United States will begin allowing importers to complete a certification of origin immediately upon the USMCA's entry into force. However, Mexico will have up to three years and six months after the USMCA's entry into force to implement this requirement.

Basis of a Certification of Origin

The USMCA provides that a certification of origin may be completed by an importer "on the basis of the importer having information, including documents, that demonstrate that the good is originating." The producer or exporter of the good may complete a certification of origin on the same basis. An exporter that is not the producer of the good may also complete the certification of origin on the basis of "reasonable reliance" on the producer's written representation, such as in a certification of origin, that the good is originating. NAFTA similarly allows exporters to complete a Certificate of Origin on the basis of reasonable reliance on information provided by the producer of the good.

Obligations of Importers Claiming Preferential Tariff Treatment

The obligations of importers claiming preferential tariff treatment under the USMCA are generally the same as those provided for under the NAFTA. The importer must state that the good is originating (based on a valid certification of origin) as part of the import documentation, and must have the certification in its possession at the time the statement is made. If no claim for preferential tariff treatment is made at the time of importation, importers may request preferential tariff treatment no later than one year after the date on which the good was imported.

However, the USMCA authorizes a Party to impose the following additional obligations on importers, which were not provided for in the NAFTA:

- The USMCA expressly authorizes a Party to request that importers demonstrate that goods have been shipped in accordance with Article 4.17 of the Agreement (Rules of Origin – Transit and Transhipment). Specifically, a Party may request that the importer (1) provide documentation indicating the shipping route and all points of shipment and transhipment prior to the importation of the good; and, if the good was shipped outside the territories of the Parties; and (2) provide documents demonstrating that the good remained under customs control while outside the territories of the Parties. A similar requirement was included in the TPP.
- Similarly, if the claim for preferential tariff treatment is based on a certification of origin completed by a producer that is not the exporter of the good, the importer must demonstrate on the request of the importing Party that

- knowledge that the good originates;
- reasonable reliance on the producer's written representation that the good originates; or
- a completed and signed Certificate of Origin for the good voluntarily provided to the exporter by the producer.

[50] As indicated above, the USMCA certification of origin (unlike the Certificate of Origin required under NAFTA) need not follow a prescribed format and can be provided on an invoice or another document, provided it contains the required data elements.

the good did not undergo further production or any other operation other than unloading, reloading or any other operation necessary to preserve it in good condition or to transport the good to the importing Party.

Administration and Enforcement

The USMCA largely retains the administrative and enforcement provisions of the NAFTA with respect to origin procedures. The key provisions are as follows:

- **Recordkeeping.** The USMCA generally retains the recordkeeping requirements set forth in the NAFTA. Importers claiming preferential tariff treatment must maintain records pertaining to the importation for five years (or longer, if required by their country). Exporters or producers that complete a certification of origin must maintain records relating to the relevant good for five years (or longer, if required by their country).
- **Verification.** The NAFTA authorizes an importing Party's customs authorities to conduct verifications of an exporter or producer to determine whether goods qualify as originating as certified by the Certificate of Origin. The USMCA preserves this authority (and expands it to allow customs authorities to direct written requests and questionnaires to the importer of the goods at issue). The USMCA also makes changes to the procedures for verifications (*e.g.*, it adds a requirement that the verifying Party provide its written determination within 120 days after it has received all of the necessary information, with a possible extension of 90 days in exceptional circumstances).
- **Advance Rulings.** Like the NAFTA, the USMCA provides that a Party must, on request, provide for the issuance of a written advance ruling on whether a good qualifies as originating under the Agreement.
- **Reviews and Appeals.** Like the NAFTA, the USMCA requires a Party to grant substantially the same rights of review and appeal of determinations of origin and advance rulings as it provides to importers in its territory to an exporter or producer: (1) that completes a certification of origin for a good that has been the subject of a determination of origin under the Agreement; or (2) that has received an advance ruling on origin under the Agreement.

Outlook

The USMCA origin procedures have generally been well received by the US business community. In particular, companies have cited the elimination of the standard Certificate of Origin, the ability for importers to complete a certification, and the express requirement to allow electronic filing as improvements to the existing NAFTA process. However, some in the business community – including the Industry Trade Advisory Committee representing small businesses – have expressed frustration that the USMCA does not increase the transaction value below which a certification of origin is not required above the current level of USD $1,000.

Prior to the USMCA's entry into force, the Parties will adopt uniform regulations regarding the interpretation, application, and administration of the chapter on origin procedures, as well as Chapter 4 (Rules of Origin) and Chapter 6 (Textiles and Apparel). These regulations will provide additional details on the requirements for determining origin and claiming preferential tariff treatment under the USMCA, and should be reviewed carefully by companies planning to utilize USMCA tariff preferences.

Overview of Chapter 16 (Temporary Entry) of the US-Mexico-Canada Agreement

On September 30, 2018, the United States, Canada, and Mexico reached a deal to replace the North American Free Trade Agreement (NAFTA) with a new trade accord, the US-Mexico-Canada Agreement (USMCA). Chapter 16 of the USMCA, "Temporary Entry for Business Persons," contains very few changes to the current NAFTA Chapter 16 of the same title. By contrast, USMCA Chapter 16's structure and language differ significantly from the text of the

Trans-Pacific Partnership (TPP), which contained an abbreviated chapter followed by country-specific annexes. This report summarizes the USCMA chapter and its implications.

Overview of NAFTA Chapter 16

As noted above, the USCMA generally mirrors the original NAFTA Chapter 16, which contains the following key provisions:

- **NAFTA Art. 1603 (USMCA Art. 1604): Grant of Temporary Entry**. With certain exceptions, each Party is required to grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security.
  - **NAFTA Annex 1603 (USMCA Annex 1603): Temporary Entry for Business Persons**. Requirements for temporary entry of business persons are broken into different categories, including business visitors (Section A), traders and investors (Section B), intra-company transferees (Section C), and professionals (Section D).
  - **NAFTA App. 1603.A.1 (USMCA Appendix 1603.A.1): Business Visitors**. Business activities for which business visitors are required to be given temporary entry, ranging from research and design to general service, are set out in this section.
  - **NAFTA App. 1603.D.1 (USMCA Appendix 1603.D.1): Professionals**. Minimum education requirements and alternative credentials required for different types of professionals are set out in this section.
- **NAFTA Art. 1604 (USMCA Art. 1605): Provision of Information.** Each Party is required to provide to the other Parties materials that allow them to become acquainted with its measures relating to this Chapter. Furthermore, each Party is required to prepare, publish and make available explanatory material in a consolidated document regarding the requirements for temporary entry to allow business persons to become acquainted with them.
- **NAFTA Art. 1605 (USMCA Art. 1606): Working Group**. The Parties establish a Temporary Entry Working Group, comprising representatives of each Party, including immigration officials. The Working Group meets annually to consider the implementation and administration of this Chapter, develop measures to further facilitate temporary entry of business persons on a reciprocal basis, waiving of particular requirements for spouses of certain types of business persons, and proposed modifications or additions to this Chapter.
- **NAFTA Art. 1606 (USMCA Art. 1607): Dispute Settlement**. Allows for the initiation of proceedings under Article 2007 (Commission Good Offices, Conciliation and Mediation) regarding a refusal to grant temporary entry only if the matter involves a pattern of practice and the business person has exhausted the available administrative remedies regarding the particular matter.

Changes in USMCA Chapter 16

The changes in the USMCA are mainly related to non-substantive rewording, rearrangement of certain sections, and a few updates tied to previously negotiated revisions and additions. The most important modifications are as follows:

- **USMCA Art. 1606.2(e): A Technology Mandate for the Working Group**. The NAFTA established a Working Group, and the USMCA introduces the following point to consider at its annual meeting: “issues of common interest related to temporary entry of business persons, such as the use of technologies related to processing of applications, that can be further explored among the Parties in other fora.”
- **USMCA Annex 1603 §B(3): Temporary Entry for Traders and Investors**. NAFTA Annex 1603 Section B, which addresses temporary entry for traders and investors, states in its third paragraph that a Party may

require a business person seeking temporary entry to obtain a visa or its equivalent prior to entry. The USMCA contains additional language: "Before imposing a visa requirement, the Party shall consult with a Party whose business persons would be affected with a view to avoiding the imposition of the requirement. With respect to an existing visa requirement, a Party shall consult, on request, with a Party whose business persons are subject to the requirement with a view to its removal." This text tracks the same language already provided for in sections A (business visitors), C (intra-company transferees), and D (professionals) requiring Party consultation if a visa requirement is imposed for such categories of business persons.

- **USMCA Annex 1603 §D: Numerical Limits on Professionals**. NAFTA Annex 1603 Section D(4)-(7), in conjunction with Appendix 1603.D.4, permits Parties to establish numerical limits on professionals that may qualify for unrestricted entry. For example, the NAFTA provided for an annual numerical cap of 5,500 visas for Mexican business persons seeking entry into the United States. The USMCA removes the provisions related to numerical limits, on the basis of previous modifications that went into effect on January 1, 2004.
- **USMCA App. 1603.A.1: New Categories for Business Visitors**. NAFTA Appendix 1603.A.1 addresses different categories of business visitors. The following professions, previously classified under General Service, now have their own categories under the USMCA: commercial transactions, public relations and advertising, tourism, tour bus operation, and translation.
- **Removed: Existing Immigration Measures**. NAFTA's Appendix 1603.A.3 titled "Existing Immigration Measures" is removed from USMCA Chapter 16. This provided a citation for the regulations of each country's immigration law.

Outlook

That the USMCA contains only modest changes to NAFTA Chapter 16 has been characterized as a concession for the United States, which reportedly sought new restrictions on the temporary entry of businesspersons into the United States, if not the elimination of the Chapter entirely. That said, Canada did not achieve its objective of significantly expanding and modernizing the professionals list. This objective was supported by North American business groups, which had hoped for new visa categories for technology occupations that did not exist when the NAFTA was first announced. Overall, however, the lack of changes has been mostly applauded by these business groups, which had worried about significant disruptions caused by new visa restrictions and uncertainty surrounding the renegotiation of the NAFTA.

Australia Ratifies CPTPP; Implementation and First Round of Tariff Reductions Commence December 30

Today, Australia filed its notice of ratification of the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) trade agreement, making it the sixth (after Mexico, Japan, Singapore, New Zealand, and Canada) of 11 countries to do so. The United States withdrew from the Agreement, formerly known as the Trans-Pacific Partnership (TPP) on January 23, 2017. Australia's ratification triggers a 60-day timeline towards entry into force and implementation of the first round of tariff reductions. Notably, Australia's swift ratification as the sixth CPTPP member country will enable **two tariff reductions within three days**, the first on December 30, 2018 and the second on January 1, 2019[51], providing a competitive edge over the remaining CPTPP member countries that have not yet ratified, *i.e.*, Brunei, Chile, Malaysia, Peru, and Vietnam. The CPTPP's entry into force is expected to heighten pressure on the Trump Administration to conclude new trade agreements in the Asia-Pacific region, particularly with Japan, to prevent US exporters from being placed at a competitive disadvantage in the region.

[51] The January 1, 2019 date applies to Mexico, Singapore, New Zealand, Canada, and Australia, while Japan's second round of tariff reductions will take place on April 1, 2019.

Australia's High Commissioner to New Zealand Ewen McDonald met with New Zealand's Minister for Trade and Export Growth David Parker in Wellington to present a third party note as notification. New Zealand serves as the official depository for the CPTPP. The Australian domestic legislative process had moved quickly over the past few weeks. The Senate passed three bills needed for implementation on October 18, which received royal assent on October 19.[52]

The CPTPP incorporates nearly all of the provisions of the TPP as signed in 2016 by the original 12 parties (including the United States), except for a handful of provisions that the remaining member countries agreed by consensus to suspend following the United States' withdrawal from the Agreement. Eleven of the original 12 signatories to the TPP (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam) signed the CPTPP on March 8, 2018 after more than a year of re-negotiation following the United States' withdrawal. Most of the suspended provisions had been inserted into the original TPP text at the demand of US negotiators to safeguard the interests of various domestic stakeholders, covering such issues as market exclusivity rules for biologic dugs, copyright enforcement priorities, and investor-state dispute settlement. The CPTPP text also incorporates a few technical and procedural provisions concerning such issues as accession, entry into force, and withdrawal. According to the Australian Department of Foreign Affairs and Trade (DFAT), the 11 CPTPP countries represent approximately 500 million people and account for more than 13 percent of the global economy with a total GDP of USD 10.2 trillion.

Mexico, Japan, Singapore, New Zealand, and Canada ratified the CPTPP on June 28, July 6, July 19, October 24, and October 29, respectively. Vietnam's National Assembly is expected to move forward with ratification on November 11, while Brunei, Chile and Peru are expected to ratify within this year.

President Trump mentioned the possibility of rejoining the Agreement earlier this year, but the process would not be easy because re-entry would be subject to consensus and negotiation among the parties. Moreover, the Trump Administration has not seriously pursued re-entry, and has instead begun the legal process for initiating formal negotiations for a bilateral trade agreement with Japan. Absent a US-Japan agreement, the CPTPP's entry into force will place many US exporters at a competitive disadvantage in the Japanese market, as their exports will remain subject to tariffs that are eliminated for the CPTPP parties. Observers therefore have speculated that the conclusion of the CPTPP – and the EU-Japan FTA – has motivated the Trump administration to conclude a US-Japan deal. Moreover, export-oriented US industries that are likely to be harmed (*e.g.*, in the agricultural sector) have welcomed the bilateral negotiations with Japan and urged the Trump administration to conclude them swiftly. The upcoming entry into force of the CPTPP can be expected to heighten pressure on the Trump administration to advance the negotiations with Japan, and possibly to pursue bilateral negotiations with other CPTPP parties like Vietnam or Malaysia.

Overview of Chapter 20 (Intellectual Property Rights) of the US-Mexico-Canada Agreement

On September 30, 2018, the United States, Canada, and Mexico reached a deal to replace the North American Free Trade Agreement (NAFTA) with a new trade accord, the United States-Mexico-Canada trade agreement (USMCA). Chapter 20 of the Agreement governs intellectual property (IP) matters including trademarks, trade secrets, copyright, and patents. It is modeled on the IP chapter in the Trans-Pacific Partnership (TPP), from which President Trump withdrew in January 2017.

[52] The three bills include the (i) Customs Amendment (Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation) Bill 2018; (ii) Customs Tariff Amendment (Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation) Bill 2018; and (iii) Government Procurement (Judicial Review) Bill 2017.

Chapter 20 is highly technical and covers many different IP issues; its disciplines will therefore warrant thorough analysis to determine their specific implications for various regional stakeholders. This report provides a general summary of the IP chapter's most relevant provisions.

General Provisions

- **Collaboration.** Under Article 20.B.3, the three countries established a new Committee on IP Rights composed of government representatives from each country. This committee will deal with a wide range of IP cooperation issues, including approaches for reducing infringement and effective strategies for removing underlying incentives for infringement; strengthening border enforcement of IP rights; exchanging information on the value of trade secrets; enhancing procedural fairness with respect to choice of venue in patent litigation; and coordinating the recognition and protection of geographical indications. This is a new development. Such a committee does not exist under NAFTA, and was not included in the final TPP text.

Patents

- **Patent Law Treaty.** The USMCA requires the Parties either to give due consideration to ratifying or acceding to the Patent Law Treaty, or to adopt or maintain procedures standards consistent with the objectives of the Patent Law Treaty, which was concluded in 2000 (six years after NAFTA). This requirement will not require any changes for the United States (which ratified the treaty in 2013). However, Canada and Mexico have yet to accede or ratify the Treaty, though Canada has amended domestic patent laws to comply with the Patent Law Treaty, with the relevant provisions coming into force in 2019. A similar provision regarding the Patent Law Treaty was included in the TPP text, but did not require Parties to take action.

- **Patentable Subject Matter.** Under Article 20.F.1, "each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step and is capable of industrial application." While that language differs from the patentable subject matter language in US law, a footnote in the agreement notes that "[f]or the purposes of this Section, a Party may deem the terms 'inventive step' and 'capable of industrial application' to be synonymous with the terms 'non-obvious' and 'useful', respectively." This mirrors the NAFTA language, but the USMCA provides further clarification: "In determinations regarding inventive step, or non-obviousness, each Party shall consider whether the claimed invention would have been obvious to a person skilled, or having ordinary skill in the art, having regard to the prior art." This is also found in the TPP text.

- **Biologics.** Under Article 20.F.14, biologic medicines, which were not covered in NAFTA, will now be guaranteed market exclusivity protection for 10 years.[53] Currently, Canada provides eight years of guaranteed protection. Article 20.F.14 will require a period of market protection lasting at least 10 years from a product's date of first marketing approval. This concession, which Canada will have five years to implement, is widely viewed as Canada's most significant within the IP chapter. The United States pushed Canada and Mexico to give 12 years of protection, which is the current standard under US law. The TPP text had – controversially – provided two options for exclusivity. Under the first option, member nations could promise at least eight years of exclusivity. Under a second option, they could guarantee at least five years of exclusivity then rely on "other measures … and market circumstances … to deliver a comparable outcome."

- **Patent Term Adjustment for Unreasonable Granting Authority Delays.** The USMCA specifies that a Party shall provide adjustment of the term of a patent to compensate for Patent Office delays in issuing patents. Article

[53] That is, during the 10-year period after the date of first marketing approval of a new biologic, a Party generally must prohibit third persons from marketing the same or similar product on the basis of (1) undisclosed test or other data submitted by the person that obtained the initial marketing approval; or (2) the initial marketing approval granted to that person.

20.F.9 provides for adjustment of a patent's term to compensate for delays in issuance of a patent beyond five years from the date of filing or three years after an examination request, whichever is later. Practically, this change will provide greater protection to patentees forced to wait longer for patent issuance but may also make determination of a patent's expiry date more difficult. The United States has had such provisions in its patent laws for some 20 years, but patent term adjustment to compensate for Patent Office delay will be entirely new to Canadian patent law. Canada must implement its obligations under this provision within 4.5 years of the date the USMCA enters into force, whereas Mexico is required to comply with this obligation on the date the USMCA enters into force. The original TPP text also contained such a provision, but the eleven remaining TPP signatories chose to suspend the provision following the United States' withdrawal as a signatory. NAFTA contained a provision addressing delays, which stated that a "Party may extend the term of patent protection, in appropriate cases, to compensate for delays caused by regulatory approval processes." However, an entire article addressing patent term adjustment for unreasonable granting authority delays – with enforceable power – is new.

- **Publication of Patent Application.** Under Article 20.F.7, "each Party shall endeavour to publish unpublished pending patent applications promptly after the expiration of 18 months from the filing date or, if priority is claimed, from the earliest priority date." The use of "shall endeavour" (instead of "shall") means that this provision is non-binding, but it does call into question the current US practice, which allows a request for non-publication of patent applications until granted. This text mirrors language contained in TPP, but NAFTA did not contain a similar provision.

Copyright

- **Copyright Terms.** Copyright terms in the United States and Mexico extend for 70 years and 100 years, respectively, beyond the year the creator of the work dies. Canada has a shorter term—50 years after the creator's death. Under Article 20.H.7, the USMCA will bring Canada's copyright terms in line with those in the US. This is similar to what was provided for under the TPP text. Under NAFTA, the protection ran for 50 years instead of 70.

- **Safe Harbors.** The USMCA contemplates "safe harbors" for internet service providers (ISPs). Under Article 20.J.10, such safe harbors will shield ISPs from liability for copyright infringements that they do not control, initiate or direct, but which take place through their networks. To be eligible for the safe harbor protection, ISPs will need to expeditiously remove or disable access to infringing content and implement a policy of terminating the accounts of repeat infringers. Notably, however, ISPs will not be required to monitor their networks for infringing activity. TPP contained similar "safe harbor" provisions, but NAFTA has no such text.

- **Balancing Rights between Users and Producers.** The TPP provision "Balance in Copyright and Related Rights Systems" required a party to endeavor to achieve balance in its copyright and related rights system, considering rights protection in light of the digital environment and legitimate purposes such as criticism, news reporting and access to published works by the visually impaired. The USMCA contains no such provision, nor does NAFTA.

- **Technological Protection Measures.** The TPP included provisions relating to electronic measures for protecting copyright, but these were suspended when the United States withdrew. The USMCA revives, and in some cases revises, these provisions. In particular, Article 20.H.11 on technological protection measures (TPMs) contains rules for situations in which infringement for good faith activities is permitted. NAFTA does not contain such provisions.

Trademarks

- **Domain Names.** USMCA Article 20.C.11 requires that each party have a domain name dispute mechanism modeled on the principles of the Uniform Domain-Name Dispute-Resolution Policy (UDRP) for its "country-code top-level domain (ccTLD) domain names." In addition, there must be adequate remedies, such as transfer or cancellation, for registration of a domain name that is confusingly similar to a trademark with a bad faith intent to profit. In addition, the USMCA requires each party to provide online public access to a reliable database of contact information for domain name registrants, subject to any policies regarding privacy and personal data. The TPP text provided similar provisions, which are not in NAFTA.
- **Pre-Established Damages for Trademark Infringement.** Regarding enforcement of marks, the countries must provide for either "pre-established damages" or "additional damages" (e.g., exemplary or punitive damages) in civil proceedings with respect to trademark counterfeiting. Pre-established damages must be "in an amount sufficient to constitute a deterrent to future infringements and to compensate fully the right holder for the harm caused by the infringement." Similar provisions were included in the TPP text, but not in NAFTA.

Trade Secrets

- **Protections Granted.** The USMCA provides, in Article 20.I, that "each Party shall ensure that persons have the legal means to prevent trade secrets lawfully in their control from being disclosed to, acquired by, or used by others (including state-owned enterprises) without their consent in a manner contrary to honest commercial practices." This is consistent with NAFTA, except for the insertion of an express reference to "state-owned enterprises". Article 20.I.1 and 20.I.2 further provide requirements that each country make available civil and criminal penalties for entities that violate the provisions. This is new compared to the corresponding NAFTA text, which vaguely states that parties "shall provide the legal means" to protect trade secrets. The TPP text, by contrast, provided for criminal penalties but not civil penalties.
- **Mimicking US Law.** The trade secret regime established in the USMCA is modeled on the United States' federal Defend Trade Secrets Act of 2016 and the Uniform Trade Secrets Act, which has been adopted by individual US states.
- **No Term Limit.** Under USMCA Article 20.I.1, a party cannot limit the term of protection for trade secrets. NAFTA contained a similar requirement. The TPP text did not contain such a provision.
- **No Judicial Disclosure.** Article 20.I.5 guides the judiciary's behavior on confidentiality in matters relating to trade secrets, as it prevents judges from disclosing information asserted to be a trade secret before allowing a litigant to make submissions under seal on their interest in keeping the information confidential. NAFTA and the TPP text did not contain a similar provision.
- **No Impeding.** Article 20.I.7 prohibits a party from discouraging or impeding the voluntary licensing or transfer of trade secrets. NAFTA contained the exact same language. The TPP text, did not provide such a provision.

Enforcement of IP rights

- **Deterrent Remedies.** USMCA Article 20.J.4 incorporates stronger language regarding statutory damages for infringement of IP rights, requiring that such damages be both deterrent and fully compensatory for the harm caused by the infringement. NAFTA contained a similar provision, but the USMCA contains more extensive protections and remedies.
- **Border Measures.** USMCA provides for more robust enforcement of intellectual property rights at the border, as compared to NAFTA. Under Article 20.J.6, a Party must authorize its customs officials to "initiate border measures *ex officio* against suspected counterfeit trademark goods or pirated copyright goods under customs

control" that are imported, destined for export, in transit or admitted into or exiting from a FTZ or a bonded warehouse. Currently, "in transit" goods are off-limits and may not be detained. Moreover, under Article 20.J.6, customs officials will also be permitted to inspect, detain and destroy "suspected counterfeit trademark goods or pirated copyright goods" following a determination that the goods are infringing. Notably, these provisions do not require a court to make a finding of infringement. Rather, the provisions provide for "a procedure by which competent authorities may determine within a reasonable period of time after the initiation of the procedures . . . whether the suspect goods infringe an intellectual property right." If they do, then the goods will be destroyed or "disposed of outside the channels of commerce in such a manner as to avoid any harm to the right holder." Unlike NAFTA, USMCA makes such action mandatory, except in "exceptional circumstances." The language contained in USMCA is similar to that in the TPP text.

- **Criminal Offenses.** NAFTA contains protections for satellite signals, but USMCA expands on this language and provides more robust protections. Article 20.J.8 expands on the criminal and civil penalties for intercepting satellite signals or making equipment to facilitate such interception.

Outlook

US business groups representing IP-intensive industries already have praised the USMCA IP chapter as an improvement over past US trade agreements. For example, a coalition representing the US pharmaceutical, biotechnology, motion picture, publishing, and recording industries has praised the USMCA as a "historic achievement" and "a marked improvement of many of the intellectual property protections critical to innovators in the Trans-Pacific Partnership[.]" The Trump administration also has highlighted the chapter as one of its key achievements in the new Agreement. At the same time, some non-profit organizations and groups representing producers of generic pharmaceutical products have criticized elements of the chapter that they claim will reduce competition in the pharmaceutical industry, repeating similar criticisms raised against the TPP. As noted above, however, the USMCA's IP chapter is highly technical and will require extensive analysis to determine the new provisions' precise impact on North American businesses and individuals.

Petitions and Investigations Highlights

US Department of Commerce Issues Affirmative Preliminary Determinations in Antidumping Investigations of Imports of Glycine from India and Japan; Negative Preliminary Determination for Imports from Thailand

On October 25, 2018, the US Department of Commerce (DOC) announced its affirmative preliminary determinations in the antidumping duty (AD) investigations of imports of glycine from India and Japan, and its negative preliminary determination in the AD investigation of imports of the same from Thailand.[54] In its investigations, DOC preliminarily determined that imports of the subject merchandise from India and Japan were sold in the United States at the following dumping margins:

Country	Dumping Margins
India	10.86 to 80.49 percent
Japan	53.66 to 86.22 percent

In the Thailand investigation, DOC assigned a preliminary dumping rate of 0.00 percent to mandatory respondent Newtrend Food Ingredient (Thailand) Co., Ltd. DOC did not calculate a preliminary dumping rate for all other Thai producers and exporters because DOC did not make an affirmative preliminary AD determination.

The merchandise covered by these investigations is glycine at any purity level or grade. The subject merchandise is classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 2922.49.4300 and 2922.49.8000. In 2017, US imports of glycine from India, Japan, and Thailand were valued at an estimated USD $6.7 million, $9.5 million, and $4.4 million, respectively.

DOC is scheduled to announce its final determinations on or around March 11, 2019. If DOC makes affirmative final determinations, and the US International Trade Commission makes affirmative final determinations that imports of glycine from India, Japan, and/or Thailand materially injure, or threaten material injury to, the domestic industry, DOC will issue AD orders. If either agency issues negative final determinations, no AD orders will be issued.

[54] Click **here** to view the DOC fact sheet on the investigations.

Annex: NAFTA/USMCA Chapter Comparison

NAFTA	USMCA
Preamble	Preamble
Chapter 1: Objectives	Chapter 1: Initial Provisions and General Definitions
Chapter 2: General Definitions	Chapter 2: National Treatment and Market Access for Goods
Chapter 3: National Treatment and Market Access for Goods	Chapter 3: Agriculture
Chapter 4: Rules of Origin	Chapter 4: Rules of Origin, with Product Specific Rules
Chapter 5: Customs Procedures	Chapter 5: Origin Procedures
Chapter 6: Energy and Basic Petrochemicals	Chapter 6: Textiles and Apparel
Chapter 7: Agriculture and Sanitary and Phytosanitary Measures	Chapter 7: Customs and Trade Facilitation
Chapter 8: Emergency Action	Chapter 8: Recognition of the Mexican State's Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons
Chapter 9: Standards-Related Measures	Chapter 9: Sanitary and Phytosanitary Measures
Chapter 10: Government Procurement	Chapter 10: Trade Remedies
Chapter 11: Investment	Chapter 11: Technical Barriers to Trade
Chapter 12: Cross-Border Trade in Services	Chapter 12: Sectoral Annexes
Chapter 13: Telecommunications	Chapter 13: Government Procurement
Chapter 14: Financial Services	Chapter 14: Investment
Chapter 15: Competition Policy, Monopolies and State Enterprises	Chapter 15: Cross-Border Trade in Services
Chapter 16: Temporary Entry for Business Persons	Chapter 16: Temporary Entry
Chapter 17: Intellectual Property	Chapter 17: Financial Services
Chapter 18: Publication, Notification and Administration of Laws	Chapter 18: Telecommunications
Chapter 19: Review and Dispute Settlement in Antidumping/Countervailing Duty Matters	Chapter 19: Digital Trade
Chapter 20: Institutional Arrangements and Dispute Settlement Procedures	Chapter 20: Intellectual Property
Chapter 21: Exceptions	Chapter 21: Competition Policy
Chapter 22: Final Provisions	Chapter 22: State-Owned Enterprises
	Chapter 23: Labor
	Chapter 24: Environment
	Chapter 25: Small and Medium-Sized Enterprises
	Chapter 26: Competitiveness
	Chapter 27: Anticorruption
	Chapter 28: Good Regulatory Practices
	Chapter 29: Publication and Administration
	Chapter 30: Administrative and Institutional Provisions
	Chapter 31: Dispute Settlement
	Chapter 32: Exceptions and General Provisions
	Chapter 33: Macroeconomic Policies and Exchange Rate Matters
	Chapter 34: Final Provisions