US & Multilateral Trade Policy Developments

Japan External Trade Organization

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General Trade Highlights

US Trade Representative Seeks Comments on Negotiating Objectives for Trade Agreements with the European Union and the United Kingdom

The Office of the US Trade Representative (USTR) has published notices in the Federal Register requesting public comments to inform its negotiating objectives for proposed US trade agreements with the European Union (EU)[1] and the United Kingdom (UK)[2]. These actions follow USTR's October 16, 2018 notification to Congress of the President's intention to enter into formal negotiations with the EU and the UK. USTR also has held informal preliminary discussions with EU and UK trade officials in recent weeks regarding the proposed agreements, among other issues. We provide an overview of the Federal Register notices and the outlook for both negotiations below.

Requests for Comments on Negotiating Objectives

USTR is inviting interested parties to provide comments and/or oral testimony to assist the agency as it develops its negotiating objectives and positions for the proposed trade agreements with the EU and the UK, including with regard to the negotiating objectives identified in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA). The public comment schedules are as follows:

Agreement	Schedule
US-EU	• **December 10, 2018:** Deadline for the submission of written comments and for written requests to testify, as well as a summary of planned testimony at the public hearing. • **December 14, 2018:** The Trade Policy Staff Committee will hold a public hearing beginning at 9:30 a.m. in Washington, DC.
US-UK	• **January 15, 2019:** Deadline for the submission of written comments and for written requests to testify, as well as a summary of planned testimony at the public hearing. • **January 29, 2019:** The Trade Policy Staff Committee will hold a public hearing beginning at 9:30 a.m. in Washington, DC.

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 agreements.
- Relevant barriers to trade in goods and services 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 the EU and the UK.
- 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.

[1] The Federal Register notice pertaining to the proposed US-EU Trade Agreement is available **here**.

[2] The notice pertaining to the proposed US-UK Trade Agreement is available **here**.

Unlike USTR's request for comments in advance of the renegotiation of the North American Free Trade Agreement (NAFTA), the new requests concerning the EU and the UK do not specifically request comments on digital trade, investment, intellectual property, government procurement, state-owned enterprises, competition, labor, or the environment. However, 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 Numbers USTR-2018-0035 (for the EU) and USTR-2018-0036 (for the UK).

Outlook

The United States cannot enter into formal negotiations with the EU or the UK until at least January 14, 2019, pursuant to the notification requirements set forth in TPA. However, the UK cannot begin formal negotiations with the United States until it formally exits the EU on March 29, 2019, and the EU cannot begin formal negotiations with the United States until the European Council approves a negotiating mandate authorizing the European Commission to do so. Some European trade officials have expressed hope that the Commission will approve a negotiating mandate by early 2019, but the precise timing remains unclear.

Initial preparations for the US-UK negotiations appear to be proceeding constructively under the auspices of the US-UK Trade and Investment Working Group, which held its fifth meeting from November 2 to 7. At the fifth meeting, the two countries held discussions to "ensure that both sides are well-prepared to open trade negotiations after the UK leaves the EU in 2019" and covered topics including "industrial and agricultural goods; services and investment, including financial services; digital trade; intellectual property rights (IPR); regulatory issues related to trade; and Small and Medium-Sized Enterprises (SMEs)." This suggests the possibility of a comprehensive free trade agreement, consistent with previous statements by the Trump administration about the proposed US-UK agreement.

By contrast, initial preparations for the US-EU negotiations remain contentious, primarily due to the ongoing disagreement over whether agricultural market access will be covered by the negotiations. Since President Trump and European Commission President Jean-Claude Juncker issued a joint statement in July indicating that the parties would seek an agreement covering "non-auto industrial goods", the EU has insisted (consistent with the statement) that agriculture be excluded, whereas the United States has insisted that it be covered by the negotiations.

The disagreement over agriculture was not resolved at a November 14 meeting between EU Trade Commissioner Cecilia Malmstrom and USTR Lighthizer, after which Commissioner Malmstrom warned that the EU would not enter into the negotiations if USTR includes agricultural market access in the list of US negotiating objectives it is required to publish under the TPA law. Commissioner Malmstrom later reiterated that the EU is willing to discuss "a very limited agreement on industrial goods only." On the other hand, an agreement excluding agriculture would face significant political obstacles in the United States, where the agricultural sector traditionally has been one of the most vocal advocates of new trade agreements. President Trump has repeatedly criticized the EU for restricting imports of agricultural products from the United States, and he recently reiterated this criticism in a November 26 interview.

It is therefore unclear when formal trade negotiations between the US and the EU will begin. Moreover, though the United States has promised not to impose its threatened tariffs on automotive imports from the EU under Section 232 of the Trade Expansion Act as long as the parties continue to negotiate a bilateral trade agreement, it is unclear how long the United States will adhere to this commitment if preliminary discussions on the scope of the agreement remain stalled. This tension was evident following Commissioner Malmstrom's recent meeting with USTR Lighthizer, when she warned that the EU is already compiling the list of US goods that it will target with retaliatory tariffs should the United States move forward with Section 232 measures on EU automotive goods.

Free Trade Agreement

Overview of Chapter 17 (Financial Services) of the US-Mexico-Canada Agreement

The Financial Services Chapter of the new US-Mexico-Canada Agreement (USMCA) expands significantly on that of its predecessor, the North American Free Trade Agreement (NAFTA), in ways that could have important implications for financial institutions and investors operating in North America. Notably, the USMCA Financial Services Chapter introduces new disciplines that go beyond not only the NAFTA, but also the more recent Trans-Pacific Partnership (TPP), including on issues such as data localization, investor-state dispute settlement, cross-border trade in financial services (including electronic payment services), and market access. We summarize the Chapter and the most significant changes below.

Overview

The USMCA Financial Services Chapter applies to measures adopted or maintained by a Party relating to: (1) a financial institution of another Party; (2) an investor of another Party, and an investment of that investor, in a financial institution in the Party's territory; and (3) cross-border trade in financial services. Like the NAFTA Financial Services Chapter, it includes disciplines on national treatment and most-favored nation (MFN) treatment,[3] various investment protections and procedures for investor-state dispute settlement (ISDS), commitments not to restrict cross-border trade and to allow data transfers, and transparency obligations. However, the USMCA expands on the NAFTA in important ways, including by adding new disciplines on data localization, allowing recourse to ISDS for breaches of the national treatment and MFN obligations, and adding new market access disciplines.

Prohibition on Data Localization Measures

The USMCA is the first US trade agreement to place express limitations on a Party's ability to impose data localization measures in the financial services sector. Article 17.20 of the Agreement prohibits a Party from requiring a covered person[4] to use or locate computing facilities in that Party's territory as a condition for conducting business there, so long as the Party's financial regulatory authorities, for regulatory and supervisory purposes, have access to information that the covered person uses or locates outside the Party's territory.[5] Where a Party's financial regulatory authorities lack access to such information, the Party may require the covered person to use or locate computing facilities in its territory, but only after providing the covered person with a "reasonable opportunity to remediate" the authorities' lack of access to the information.

The TPP Chapter on Electronic Commerce included a general prohibition on data localization measures, but measures relating to the financial services sector were not subject to the prohibition. This omission was controversial, and the US financial services industry initially withheld its support for the TPP due to the industry's exclusion from the data localization obligation. The USMCA language, by contrast, has been well-received by the industry, and resembles the approach proposed by the United States in the now-defunct Trade in Services Agreement (TiSA) and Transatlantic Trade and Investment Partnership (TTIP) negotiations.

[3] The "most-favored-nation" obligation requires a Party to accord to an investor, financial institution, investment, financial service, or financial service supplier of another Party treatment no less favorable than it affords to those of any other Party or a non-Party, in like circumstances. The 'national treatment" obligation requires a Party to accord to an investor, financial institution, investment, financial service, or financial service supplier of another Party treatment no less favorable than it affords to its own investors, financial institutions, investments, financial services, or financial service suppliers, in like circumstances.

[4] For purposes of this requirement, a "covered person" means (1) a financial institution of another Party; or (2) a cross-border financial service supplier of another Party that is subject to regulation, supervision, and licensing, authorization, or registration by a financial regulatory authority of the Party.

[5] This obligation will not apply to existing measures of Canada for one year after the entry into force of the USMCA.

Changes to the Scope of ISDS

The USMCA's Financial Services Chapter, like those of the NAFTA and the TPP, allows investors and financial institutions recourse to ISDS for alleged breaches of certain obligations of the Agreement. The NAFTA and TPP Financial Services Chapters made ISDS available for breaches of certain investment disciplines (*e.g.*, those relating to expropriation, transfers, and minimum standard of treatment), but not for violations of the MFN or national treatment obligations. By contrast, the USMCA Financial Services Chapter makes ISDS available for breaches of the MFN and national treatment obligations, consistent with the approach taken in the United States' 2012 Model Bilateral Investment Treaty. The US financial services industry has welcomed this change.

On the other hand, the USMCA Financial Services Chapter does not make ISDS available for breaches of certain commitments that were subject to ISDS in NAFTA and/or the TPP, such as minimum standard of treatment, transfers, armed conflict and civil strife, and indirect expropriation. The US financial services industry has criticized these limitations on ISDS. Moreover, the USMCA only makes ISDS available between the United States and Mexico, excluding Canada entirely (except for certain "legacy claims" filed within three years after the NAFTA is terminated).[6]

Expanded Market Access Disciplines

The USMCA prohibits a Party from imposing certain market access restrictions with respect to financial institutions or investors of another Party, such as limitations on (1) the number of financial institutions; (2) the total value of transactions or assets; (3) the total number of financial service operations or quantity of output; (4) the total number of employees; or (5) the specific types of legal entity or joint venture through which a service may be supplied. The NAFTA did not include such disciplines. The TPP included similar market access disciplines, but the USMCA goes beyond the TPP by also applying these disciplines with respect to cross-border supply of the financial services specified by a Party in its schedule to Annex 17-A (Cross-Border Trade) to the Financial Services Chapter (discussed in greater detail below).

Expanded Cross-Border Trade Commitments

The USMCA requires a Party to allow, on a national treatment basis, the cross-border supply of the financial services specified by that Party in its schedule to Annex 17-A (Cross-Border Trade) to the Financial Services Chapter. This commitment is applied on a "positive list" basis (*i.e.*, it applies only to the financial services listed in a Party's schedule, or to a cross-border financial service supplier of another Party seeking to supply or supplying such services). Notably, the USMCA Parties have gone beyond their cross-border trade commitments in the TPP by expanding their schedules to include (1) electronic payment services; (2) investment advice; and (3) portfolio management advice. As a result, the USMCA's national treatment and market access disciplines will apply to the cross-border supply of these financial services between the Parties. The TPP, by contrast, included stand-alone commitments by the Parties to allow the supply of these services, but they were not included in the Parties' schedules to the cross-border trade Annex and thus were not subject to national treatment or market access disciplines.

Expanded Transfer of Information Provision

The NAFTA requires a Party to allow a financial institution of another Party to transfer information into and out of the Party's territory "for data processing" where such processing is required in the ordinary course of business. The TPP includes a similar obligation that is limited to transfers for the purpose of data processing. The USMCA contains a broader obligation requiring a Party to allow a financial institution or cross-border financial service supplier of another Party to transfer information, including personal information, into and out of the Party's territory when such activity is for the conduct of business within the scope the institution or supplier's license, authorization, or registration.

[6] A forthcoming White & Case Trade Alert on the USMCA Investment Chapter will discuss these changes in greater detail.

Incorporation of Additional Investment and Services Disciplines

The USMCA's Financial Services Chapter, like the NAFTA's, expressly incorporates provisions of the Investment Chapter that require a Party to refrain from expropriating covered investments and to allow financial transfers relating to covered investments to be made into and out of its territory (among other provisions). However, like the TPP, the USMCA incorporates additional investment disciplines (and some services disciplines) into the Financial Services Chapter, including requirements to: (1) adhere to a minimum standard of treatment; (2) afford non-discriminatory treatment in case of armed conflict or civil strife; and (3) allow all transfers and payments relating to the cross-border supply of services.[7] However, the USMCA Financial Services Chapter does not incorporate the Investment Chapter's prohibition on performance requirements,[8] and the US financial services industry has criticized this omission.

Outlook

The USMCA Financial Services Chapter generally has been well received by the business community. In particular, the financial services industry has celebrated the new disciplines on data localization as a significant improvement over past agreements, and as a new standard that should be followed in all future agreements. The industry also has welcomed the expansion of ISDS to cover MFN and national treatment violations, as well as the expanded commitments on market access and cross-border trade in financial services. Most industry criticism of the Chapter has focused on the loss of ISDS coverage for breaches of a Party's commitments on minimum standards of treatment, armed conflict and civil strife, indirect expropriations, and transfers, which industry representatives argue will undermine enforcement of these disciplines.

Overview of Chapter 2 (National Treatment and Market Access for Goods) of the US-Mexico-Canada Agreement

Chapter 2 of the US-Mexico-Canada Agreement (USMCA), which covers National Treatment and Market Access for Goods, maintains NAFTA's trade liberalization core, namely that no Party shall adopt new customs duties, or increase existing duties, on any originating good. However, the USMCA introduces several substantive changes to NAFTA's goods chapter, including new provisions on temporary admission of goods, licensing transparency provisions modelled on the Trans-Pacific Partnership (TPP), and a stricter definition for remanufactured goods. The Chapter's key provisions are summarized herein.

Art. 2.2: Scope

Like the NAFTA, this Chapter only applies to trade in goods.

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[7] This commitment is incorporated into the Financial Services Chapter to the extent that cross-border trade in financial services is subject to obligations pursuant to Article 17.3.3 (National Treatment), Article 17.5.1 (b) and (c) (Market Access), and Article 17.6 (Cross-Border Trade Standstill).

[8] Article 14.10 (Performance Requirements) of the USMCA provides that no Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce certain requirements, or enforce certain commitments or undertakings, including:

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use, or accord a preference to a good produced or a service supplied in its territory, or to purchase a good or a service from a person in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with the investment;

(e) to restrict sales of a good or a service in its territory that the investment produces or supplies by relating those sales in any way to the volume or value of its exports or foreign exchange earnings; or

(f) to transfer a technology, a production process, or other proprietary knowledge to a person in its territory.

Art. 2.3: National Treatment

The USMCA, like the NAFTA Art. 301, requires that Parties accord national treatment to the goods of another Party in accordance with the General Agreement on Tariffs and Trade (GATT), and incorporates Art. III of the GATT 1994[9] into the Agreement.

The language is nearly identical. Per USMCA Art. 2.3.2, "national treatment" means "*with respect to a regional level of government, treatment no less favorable than the most favorable treatment that regional level of government accords to any like, directly competitive, or substitutable goods, as the case may be, of the Party of which it forms a part.*" The NAFTA refers to "*a state or province*" instead of "*regional level of government.*"

The Article specifies that its provisions do not apply to the measures set out in Annex 2-A: Exceptions to Article 2.3 (National Treatment) and Article 2.10 (Import and Export Restrictions).

Art. 2.4: Treatment of Customs Duties

This Article, similar to the NAFTA Art. 302 on Tariff Elimination, states that Parties shall not "*increase any existing customs duty, or adopt any new customs duty, on an originating good.*" However, whereas the NAFTA calls for the "progressive elimination" of customs duties in accordance with the Parties' Schedules, the USMCA has no such language, and states simply "*each Party shall apply customs duties on originating goods in accordance with its Schedule to Annex 2-B.*" This change likely reflects the fact that almost all customs duties on trade among the Parties had already been eliminated under NAFTA and the US-Canada Free Trade Agreement; as such, there is no need for a staged reduction in customs duties.

Art. 2.4.3 states that, upon the request of a Party, the Parties shall consider accelerating *or* broadening (as opposed to *only* "broadening" under the NAFTA) the scope of the elimination of customs duties set out in their respective Schedules.

Art. 2.5: Drawback and Duty Deferral Programs

The USMCA retains the NAFTA Art. 303 restrictions on drawback and duty deferral programs, which refund certain duties, taxes, and fees paid on imported goods that are subsequently exported or destroyed. This means that Parties may *not* refund, reduce, or waive:

- Duties paid on goods (i) subsequently exported to the territory of another Party; (ii) used as a material in the production of another good that is then exported to another Party; or (iii) substituted by an identical or similar good used as a material in the production of another good then exported to another Party; in an amount that exceeds the lesser of (a) the total amount of customs duties paid or owed on importation; and (b) the amount of duties paid to another Party on the good that has been exported to another Party; and
- On condition of export: (i) an antidumping or countervailing duty; (ii) a premium on imported goods arising out of a tendering system in respect of the administration of quantitative import restrictions or quotas; or (iii) customs duties on a good imported into its territory and substituted by an identical or similar good subsequently exported to another Party.

The USMCA removes the NAFTA's restriction on drawback for "a fee applied pursuant to section 22 of the U.S. Agricultural Adjustment Act."

The USMCA, like the NAFTA, exempts goods imported into the territory of a Party but deemed to be exported by reason of (i) delivery to a duty-free shop or (ii) delivery for ship's stores or supplies for shops or aircraft. Whereas

[9] Art. III of the GATT 1994, available **here**, prohibits Parties from applying measures such as internal taxes and other regulations to imported or domestic products so as to protect domestic production.

NAFTA exempts such goods that are delivered for use in joint undertakings of two or more Parties and that will subsequently become the property of the Party into whose territory the good was deemed to be *imported*, however, the USMCA instead exempts such goods where they were deemed to be *exported.*

This Article specifically exempts certain cane sugars (HTSUS subheadings 1701.13.20 and 1701.14.20) that are re-exported from Canada or Mexico to the United States. For United States-Canada trade, the Article also exempts imported citrus products and other goods.

All other provisions in Article 2.5 are nearly identical to those under the NAFTA.

Art. 2.6: Waiver of Customs Duties

This Article, similar to NAFTA Art. 305, states that "*No Party shall adopt or maintain any waiver of customs duties where the waiver is conditioned, explicitly or implicitly, on the fulfillment of a performance requirement*." The USMCA, however, removes the NAFTA provision allowing a Party to demonstrate that waivers granted by another Party have an adverse impact on the commercial interests of a person of that Party, or on the other Party's economy, thus requiring the Party granting the waiver to cease to grant it or make it generally available.

Art. 2.7: Temporary Admission of Goods

This Article allows for temporary duty-free admission for certain goods. It is similar in content to NAFTA Art. 305. Among its changes, the USMCA:

- Specifies that, in addition to admission for goods intended for display or demonstration, so too shall their "*component parts, ancillary apparatus and accessories*" be admitted;
- Requires that such goods shall "*not be put to any use other than exhibition or demonstration*";
- For all temporary admissions, specifies that the goods must "*be otherwise admissible into the Party's territory under its law*";
- Requires that, subject to domestic law, Parties shall extend the time limit for temporary admission at the request of the person involved;
- Requires that, where possible, the goods be released simultaneously with the entry of the accompanying person;
- Allows goods to be exported through a port other than the port through which it was admitted; and
- Specifies that shipping containers and other such holders shall be subject to procedures established to allow for their temporary admission (at least 90 days).

Art. 2.8: Goods Re-Entered after Repair or Alteration

This Article retains the core of NAFTA Art. 307, that no Party shall apply a customs duty to a good, regardless of origin, that was sent to another Party for repair or alteration. It specifies, however, that this is the case even if the repair/alteration has increased the value of the good. The USMCA also clarifies that "repair or alteration" does *not* include an operation or process that (i) "*destroys a good's essential characteristics or creates a new or commercially different good*"; or (ii) "*transforms an unfinished good into a finished good*."

Art. 2.9: Duty-Free Entry of Commercial Samples of Negligible Value and Printed Advertising Materials

Like under the NAFTA Art. 306, "[n]o Party shall apply a customs duty to commercial samples of negligible value or to printed advertising materials imported from the territory of another Party, regardless of their origin," with some conditions.

Art. 2.10: Import and Export Restrictions

This Article, like NAFTA Art. 309, states that "*no Party shall adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation or sale for export of any good destined for the territory of another Party*," except in accordance with GATT 1994 (and, in the NAFTA, "*any equivalent provision of a successor agreement to which all Parties are party*"—this reference is removed in the USMCA). The USMCA specifically notes that the GATT 1994, and therefore the USMCA, prohibits (i) import licensing conditioned on the fulfilment of a performance requirement; and (ii) voluntary export restraints inconsistent with Article VI of the GATT 1994, as implemented under Article 18 of the SCM Agreement and Article 8.1 of the AD Agreement. These points are found verbatim in the TPP Art. 2.10.

The USMCA adds a provision, also shared by the TPP, prohibiting Parties from requiring a person of another Party to establish or maintain a contractual or other relationship with a distributor in its territory as a condition for engaging in importation.

Art. 2.11: Remanufactured Goods

This new Article specifically applies Art. 2.10 to prohibitions and restrictions on remanufactured goods. It also states that Parties may require that remanufactured goods (i) be identified as such for distribution and sale; and (ii) meet all technical requirements that apply to equivalent goods in new condition, thus setting a strict definition for these goods.

Article 2.12: Administrative Fees and Formalities

Mirroring TPP Art. 2.14, this new Article requires that any fees/charges imposed in connection with importation/exportation be "*limited in amount to the approximate cost of services rendered*," and so do not represent an indirect protection or tax. Similarly, no Party shall require consular transactions, including fees/charges, in connection with an importation by another Party, and no Party shall adopt customs user fees on originating goods (for the United States, this applies only to the merchandise processing fee; and for Mexico, this only applies to the *derechos de trámite aduanero*).

Article 2.13: Export Duties, Taxes, or Other Charges

This Article, like NAFTA Art. 314, states that Parties cannot "*adopt or maintain any duty, tax, or other charge on the export of any good to the territory of another Party, unless the duty, tax, or charge is also applied to the good when destined for domestic consumption*." The NAFTA also allows the adoptions of such charges if also applied to "*exports of any such good to the territory of all other Parties*," but the USMCA removes this exception. As such, the USMCA newly prohibits almost all export duties on trade among the Parties.

Article 2.14: Most-Favored-Nation Rates of Duty on Certain Goods

This Article identifies a range of high-tech goods subject to Most Favored Nation (MFN) duty rates. The listed goods in USMCA (Tables 2.1-3) and NAFTA (Annexes 308.1-3) are identical. They include, among others: automatic data processing machines, electronic integrated circuits, metal oxide varistors, other computer parts, and color cathode-ray television picture tubes.

Article 2.15: Transparency in Import Licensing Procedures

This new Article, similar to TPP Art. 2.12, requires that a Party notify other Parties as to its import licensing procedures, if any, and lays out the procedure for doing so. These include publishing advance notice of any new/modified licensing procedure online. (Opaque or burdensome import and export licensing procedures are a common form of non-tariff barrier to trade in goods.)

Article 2.16: Transparency in Export Licensing Procedures

Similar to USMCA Art. 2.15, this new Article establishes guidelines for publication of export licensing procedures. These include all procedures/criteria for applying for a license, points of contact, and any available exemptions. Parties must also, upon request of another Party, furnish information on the number of licenses granted, and any measures taken to restrict domestic production or consumption or to stabilize production, supply, or prices for the relevant good. This Article is similar to TPP Art. 2.13.

Article 2.17: Committee on Trade in Goods

The USMCA establishes a Committee on Trade in Goods, similar in function to that established under the NAFTA Art. 316. While the USMCA offers more details as to the Committee's functions, it does not include NAFTA's requirement that the Committee meet "at least once each year."

Outlook

US industry response to the USMCA Chapter 2 has been mostly positive. In particular, businesses have expressed support for its maintenance of duty-free treatment for originating goods, the strict definition of remanufactured goods, and the new TPP-like transparency provisions. However, there has been widespread criticism[10] from US industry of the USMCA's maintenance of the NAFTA's restrictions on duty drawback and deferral, which are seen as benefitting exporters by reducing the cost of imported inputs. US exporters argue that, without drawbacks/deferrals, they are at a disadvantage relative to their Canadian and Mexican competitors, who may benefit from targeted duty-rate reductions on such imports. Nevertheless, this issue is unlikely to determine overall industry support for or opposition to the Agreement.

Overview of Chapter 22 (State-Owned Enterprises) of the US-Mexico-Canada Agreement

On September 30, 2018, the United States, Mexico, and Canada reached an agreement to replace the North American Free Trade Agreement (NAFTA) with a new trade accord, the US-Mexico-Canada Agreement (USMCA). Chapter 22 of the USMCA, "State-Owned Enterprises and Designated Monopolies," contains new disciplines pertaining to state-owned enterprises (SOEs) that go far beyond those currently in effect under the NAFTA. The USMCA's core SOE disciplines are modeled on those included in the Trans-Pacific Partnership (TPP), with some notable changes that expand their scope and place further limitations on the provision of "non-commercial assistance" by governments to SOEs. We summarize the Chapter and the key changes from prior agreements below.

Overview of the SOE Chapter

The USMCA SOE Chapter applies to "the activities of state-owned enterprises, state enterprises, and designated monopolies of a Party that affect or could affect trade or investment between Parties." The Chapter incorporates (with modest changes) the same core disciplines found in the TPP: (1) a commitment that a Party's SOEs and designated monopolies, in their purchase or sale of a good or service, not discriminate against the enterprises of other Parties (*i.e.*, they must essentially provide Most Favored Nation (MFN) and National Treatment) and act in accordance with "commercial considerations"; (2) a requirement that courts and administrative bodies have jurisdiction over commercial claims against SOEs; (3) a requirement that Parties not provide SOEs with "non-commercial assistance" that causes adverse effects or material injury to another Party; and (4) reporting and transparency requirements. The NAFTA, by contrast, includes only a limited obligation that a Party's state

[10] See, e.g., Reports of the Industry Trade Advisory Committees on Automotive Equipment and Capital Goods (ITAC 2); Chemicals, Pharmaceuticals, Health/Science Products and Services (ITAC 3); Consumer Goods (ITAC 4); Energy and Energy Services (ITAC 6); Small and Minority Business (ITAC 9); and Textiles and Clothing (ITAC 11).

enterprises accord non-discriminatory treatment in the sale of their goods or services to investments in the Party's territory of investors of another Party.

Core Disciplines in the USMCA

- **Article 22.4: Non-discriminatory Treatment and Commercial Considerations.** This provision requires SOEs, in their purchases or sales of a good or service, (1) to act in accordance with "commercial considerations" (*i.e.*, with respect to "price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale; or other factors that would normally be taken into account in the commercial decisions of a privately owned enterprise in the relevant business or industry"); and (2) to provide non-discriminatory treatment – essentially, MFN treatment and national treatment – to other Parties' suppliers or consumers of that good or service. The non-discrimination requirement applies also to "a good or service supplied by an enterprise that is a covered investment in the Party's territory[.]"

- **Article 22.5: Courts and Administrative Bodies.** This provision requires each Party (1) to provide its courts with jurisdiction over civil claims against an enterprise owned or controlled through ownership interests by a foreign government based on a commercial activity carried on in its territory.; and (2) to ensure that any administrative body that the Party establishes or maintains that regulates a state-owned enterprise exercises its regulatory discretion in an impartial manner with respect to enterprises that it regulates, including enterprises that are not state-owned enterprises. The former provision requires USMCA Parties to adopt the so-called "restrictive" view of sovereign immunity by eliminating immunity for the commercial activity of SOEs, expansively defined to include any entity "controlled through ownership interests by a foreign country."

- **"Non-Commercial Assistance"**

  - **Article 22.6: Non-commercial Assistance.** These provisions apply new anti-subsidy rules that generally reflect disciplines in the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), but (1) target the "adverse effects" of "non-commercial assistance" to SOEs in any market (not just a USMCA Party market); and (2) contain new terms that are not bound by current WTO (SCM Agreement) jurisprudence and therefore potentially subject to broader interpretation in the USMCA context. Article 22.1 (Definitions) defines non-commercial assistance as "assistance that is limited to certain enterprises," including direct transfers of funds or potential direct transfers of funds or liabilities; "the provision of goods or services other than general infrastructure, on terms more favorable than those commercially available to the enterprise"; and "the purchase of goods on terms more favorable than those commercially available to the enterprise." The agreement provides little guidance on these requirements, nor does it establish rules for how to determine whether certain terms (*e.g.*, price) are "more favorable." A Party must not – and must ensure that its SOEs do not – cause "adverse effects" to the interests of another USMCA Party or cause "material injury" to another Party's domestic industry through the provision of "non-commercial assistance."

  - **Article 22.7: Adverse Effects.** This Article provides general guidelines for finding "adverse effects" for the purposes of determining non-commercial assistance under Articles 22.6.4 and 22.6.5. Specific adverse effects include displacing or impeding certain imports of a like good, or causing price suppression, price depression, or lost sales. Non-commercial assistance that a Party provides before the signing of the Agreement is deemed not to cause adverse effects. This provision generally reflects SCM Agreement disciplines on finding adverse effects in a WTO dispute.

  - **Article 22.8: Injury.** This Article provides general guidelines for finding "injury" for the purposes of determining non-commercial assistance under Article 22.6.6. The term "injury" is taken to mean material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the

establishment of such an industry. This provision generally reflects SCM Agreement disciplines on finding material injury in a national-level anti-subsidy (countervailing duty) investigation.

- **Article 22.10: Transparency.** This Article requires Parties to (1) provide to the other Parties or make publicly available on an official website a regularly-updated list of its SOEs, and (2) promptly notify the other Parties or make publicly available on an official website the designation of a monopoly or expansion of the scope of an existing monopoly and the terms of its designation. Furthermore, on the written request of another Party, a Party is required to promptly provide information in writing (1) concerning an SOE or a government monopoly, provided that the request includes a reasoned explanation of how the activities of the entity affect or could affect trade or investment between the Parties, and (2) regarding any policy or program that the Party has adopted or maintains that provides for the provision of either non-commercial assistance or any equity capital (regardless of whether the equity infusion also constitutes non-commercial assistance) to its SOEs. These written responses are subject to a variety of requirements, such as containing a list of enumerated information provided in paragraph 5 of Article 22.10, ranging from the form of the non-commercial assistance provided under the policy or program (*e.g.*, grant or loan), to statistical data permitting an assessment of the effects of the non-commercial assistance on trade or investment between the Parties. Additionally, procedures are provided for to withhold confidential information or not respond in these written responses.

Notable Changes from the TPP

Although the USMCA's core SOE disciplines generally track those in the TPP, the USMCA amends the TPP rules in several important ways:

- **Expanded coverage.** The USMCA expands the chapter's coverage by (1) removing the general exemption of sovereign wealth funds from the chapter's disciplines (the exemption applied to everything except "non-commercial assistance")[11]; (2) removing the general exemption for an SOE's provision of "goods or services exclusively to that Party for the purposes of carrying out that Party's governmental functions"[12]; and (3) defining SOEs to include entities in which a Party—
  - holds more than a 50 percent "indirect" ownership share. Footnote 7 clarifies that, "[f]or the purposes of this definition, the term 'indirectly' refers to situations in which a Party holds an ownership interest in an enterprise through one or more state enterprises of that Party. At each level of the ownership chain, the state enterprise – either alone or in combination with other state enterprises – must own, or control through ownership interests, another enterprise"; or
  - "holds the power to control the enterprise through any other ownership interest, including indirect or minority ownership."[13] [14]

[11] *Compare* TPP Article 17.2 to USMCA Article 22.2.

[12] *Id.*

[13] *Compare* TPP Article 17.1 to USMCA Article 22.1.

[14] Footnote 8 defines "control," as follows:

> *[A] Party holds the power to control the enterprise where, through an ownership interest, it can determine or direct important matters affecting the enterprise, excluding minority shareholder protections. In determining whether a Party has this power, all relevant legal and factual elements shall be taken into account on a case-by-case basis. Such elements may include, among others, the power to determine or direct commercial operations, including major expenditures or investments; issuances of equity or significant debt offerings; or the restructuring, merger, or dissolution of the enterprise.*

- **New categories of prohibited "non-commercial assistance" (Article 22.6).** The USMCA adds three "prohibited" categories of non-commercial assistance that Parties and their SOEs may not provide directly or indirectly (including by entrusting or directing a private party) to another SOE:
  - loans or loan guarantees provided by a state enterprise or SOE of a Party to an uncreditworthy SOE of that Party;
  - non-commercial assistance provided by a Party or a state enterprise or SOE of a Party to an SOE of that Party, in circumstances where the recipient is insolvent or on the brink of insolvency, without a credible restructuring plan designed to return the SOE within a reasonable period of time to long-term viability; or
  - conversion by a Party or a state enterprise or SOE of a Party of the outstanding debt of a SOE of that Party to equity, in circumstances where this would be inconsistent with the usual investment practice of a private investor.

These measures are *per se* "limited to certain enterprises" (*i.e.*, specific and thus subject to discipline where they cause injury to a Party's domestic industry or "adverse effects").

- **Removal of "adverse effects" exceptions.**[15] The USMCA eliminates the TPP's exemptions from a finding of "adverse effects" for two kinds of non-commercial assistance: (1) provided within 3 years after the signing of the Agreement pursuant to a law that is enacted, or contractual obligation undertaken, prior to the signing of the Agreement; or (2) arising from the initial capitalization of an SOE, or the acquisition by a Party of a controlling interest in an enterprise, that is principally engaged in the supply of services within the territory of the Party.

Other Provisions in the USMCA

The remaining provisions of the USMCA SOE Chapter, which are summarized below, generally track the TPP:

- **Article 22.2: Scope.** This Article establishes the Chapter's application to "the activities of state-owned enterprises, state enterprises, and designated monopolies of a Party that affect or could affect trade or investment between Parties." It also expressly carves out a range of activities, including, among others: (1) certain regulatory or supervisory activities of a central bank or monetary authority of a Party, (2) certain regulatory or supervisory activities of a financial regulatory body of a Party, (3) activities undertaken by a Party for the purpose of the resolution of a failing or failed financial institution, and (4) government procurement.
- **Article 22.3: Delegated Authority.** This Article provides that each Party shall ensure that when its SOEs, state enterprises, and designated monopolies exercise any regulatory, administrative, or other governmental authority that the Party "has directed or delegated to such entities to carry out", those entities act in a manner that is not inconsistent with that Party's obligations under the Agreement. TPP contained a provision that is virtually the same, though the USMCA specifies that this provision should be consistent with Article 1.3 (Persons Exercising Governmental Authority). The NAFTA similarly provides that, where a Party's state enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, the state enterprise must act in a manner that is not inconsistent with the Party's obligations under the NAFTA Investment and Financial Services chapters.
- **Article 22.11: Technical Cooperation.** This Article provides that the Parties are required to "engage in mutually agreed technical cooperation activities" where appropriate and subject to available resources. This includes (1) exchanging information, (2) sharing best practices on policy approaches, and (3) organizing

[15] *Compare* TPP Article 17.7 to USMCA Article 22.7.

international seminars, workshops, or other appropriate forum for sharing technical information and expertise related to SOEs. The TPP Article on this subject was virtually identical.

- **Article 22.12: Committee on State-Owned Enterprises and Designated Monopolies.** This Article establishes a Committee on State-owned Enterprises and Designated Monopolies, composed of government representatives of each Party, which shall meet annually. The Committee's functions include: (1) reviewing the operation and implementation of this Chapter; (2) at a Party's request, consulting on any matter arising under the Chapter; (3) developing cooperative efforts, as appropriate, to promote the principles underlying the disciplines contained in the Chapter in the free trade area and to contribute to the development of similar disciplines in other regional and multilateral institutions in which two or more Parties participate; and (4) undertaking other activities as the Committee may decide. The TPP Article on this subject was almost identical.
- **Article 22.13 and Annex 22-A: Exceptions.** This Article provides for a range of exceptions to the aforementioned SOE disciplines. For example, a Party and its SOEs may take actions otherwise inconsistent with those disciplines in the context of adopting or enforcing measures to respond temporarily to a national or global economic emergency. The Article also adopts the "threshold calculation," introduced in the TPP previously, to exempt an SOE or designated monopoly from requirements of the Chapter if its annual revenue falls under a certain threshold. Specifically, if in any one of the three previous consecutive fiscal years the annual revenue derived from the commercial activities of the SOE or designated monopoly was less than a threshold amount – calculated using the formula provided in Annex 22-A – the SOE is exempted from obligations provided for under the Chapter. The TPP Article on this subject was almost identical.
- **Article 22.14 and Annex 22-C: Further Negotiations.** This Article provides that within six months of the date of entry into force of the USMCA, the Parties will begin further negotiations so as to extend the application of the disciplines in the Chapter, in accordance with Annex 22-C. That Annex notes that the negotiations will cover (1) extending the application of the obligations in the Chapter to SOEs that are owned or controlled by a sub-central level of government, and designated monopolies designated by a sub-central level of government; and (2) extending the Chapter's disciplines on Non-Commercial Assistance (Article 22.6) and Adverse Effects (Article 22.7) to address effects caused in a market of a non-Party through the supply of services by an SOE. The Parties will meet on a quarterly basis, and will endeavor to conclude these further negotiations within three years after entry into force of the Agreement. The TPP Article on this subject differs in timing: instead of within six months, the time frame was within five years of the date of entry into force.
- **Article 22.15 and Annex 22-B: Process for Developing Information.** This Article provides that Annex 22-B (Process for Developing Information Concerning State-Owned Enterprises and Designated Monopolies) shall apply in any dispute under Chapter 31 (Dispute Settlement) of the Agreement. Annex 22-B essentially permits disputing Parties to obtain "information relevant to the complaint that is not otherwise readily available," and provides a system for doing so. The TPP Article on this subject was almost identical.

Outlook

The inclusion of TPP-style SOE disciplines in the USMCA has generally been welcomed by the US business community, including segments thereof that have called for strict rules on SOEs in US trade agreements (*e.g.*, the steel and agricultural industries). Though SOEs play a relatively small role in the US, Canadian, and Mexican economies, it is expected that the US government will seek to use the USMCA SOE Chapter as a template for future agreements, including with countries in which SOEs are more prevalent. Thus, the Chapter is potentially an important development in the evolution of international trade rules. The "TPP-plus" elements of the USMCA SOE Chapter are relevant in this broader context. The TPP's SOE disciplines were widely viewed as having been authored with China in mind, but were criticized by some US industries as being too narrow (for example, some

commentators argued that the TPP's definition of an "SOE" was not broad enough and would allow many Chinese entities to evade the TPP's disciplines). This may have been the impetus for the expanded provisions included in the USMCA.

Overview of Chapter 15 (Cross-Border Trade in Services) of the US-Mexico-Canada Agreement

The US-Mexico-Canada Agreement's (USMCA) Chapter 15 on Cross-Border Trade in Services represents a significant revision to the North American Free Trade Agreement's (NAFTA) Chapter 12 on the same subject, but contains more modest changes to the Trans-Pacific Partnership's (TPP) services chapter (Chapter 10). Because the NAFTA services disciplines were negotiated before the completion of the WTO General Agreement on Trade in Services (GATS), the USMCA is meant to bring the trilateral trade relationship in line with modern US trade agreements and international standards.

An article-by-article overview follows:

Article 15.1: Definitions

This Article revises NAFTA Article 1213 (Definitions) and contains definitions of cross-border trade in services or cross-border supply of services; enterprise; professional service; service supplied in the exercise of governmental authority; and service supplier of another specialty air service. The TPP contained the same definitions and several others not included in the USMCA, but contained no definition of professional service.[16]

Article 15.2: Scope

This Article defines the scope of the Chapter, which is very similar to the NAFTA Chapter's scope, except that it (a) expands the scope to cover access to or use of telecommunications networks or services in connection with the supply of a service; (b) expressly applies Articles 15.5 (Market Access) and 15.8 (Development and Administration of Measures) to measures adopted or maintained by a Party relating to the supply of a service in its territory by a covered investment; and expressly applies Annex 15-A (Delivery Services) to measures adopted or maintained by a Party affecting the supply of delivery services, including by a covered investment. The Article also maintains the same general exclusions (financial services, government procurement, services supplied in "the exercise of governmental authority," subsidies and air services). Other than some specific provisions on air services, this Article is essentially the same as TPP Article 15.2.

Article 15.3: National Treatment

This Article commits Parties to provide "national treatment" to another Party's services or service suppliers (i.e., treatment "no less favourable" than that provided to domestic services and service suppliers). The Article is very similar to both the NAFTA and TPP provisions on national treatment, though it clarifies the NAFTA coverage to include not only service suppliers but also the services themselves.

Article 15.4: Most Favored Nation (MFN)

This Article maintains NAFTA's general MFN commitment (also present in TPP) – i.e., that each Party must accord to another Party's services or service suppliers treatment "no less favourable" than the treatment it accords to the services or service suppliers of any other Party or a non-Party. Like the national treatment commitment, this Article clarifies the NAFTA coverage to include not only service suppliers but also the services themselves.

[16] The USMCA states, "professional service means a service, the provision of which requires specialized post-secondary education, or equivalent training or experience, and for which the right to practice is granted or restricted by a Party, but does not include a service provided by a tradesperson, or a vessel or aircraft crew member."

Article 15.5: Market Access

This Article replaces NAFTA Article 1207 (Quantitative Restrictions) and is essentially the same as that in the TPP. It is more restrictive than Article 1207 and prohibits Parties from imposing any limitation on (i) the number of service suppliers; (ii) the total value of service transactions or assets; (iii) the total number of service operations or the total quantity of service output; or (iv) the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ. The Article also prohibits Parties from restricting or requiring a specific type of legal entity or joint venture through which a service supplier may supply a service.

Article 15.6: Local Presence

This Article mirrors NAFTA Article 1205 and prohibits a Party from requiring a service supplier of another Party to have a local presence or to be a resident in the Party's territory as a condition for the cross-border supply of a service.

Article 15.7: Non-Conforming Measures

This Article is similar to the NAFTA Article 1206 (Reservations) and essentially identical to the corresponding TPP article. It exempts from the disciplines in Articles 15.3 (National Treatment), 15.4 (MFN), and 15.6 (Local Presence) the measures listed in each Party's Annex I and the sectors listed in each Party's Annex II. The Article adds to the NAFTA provisions a new consultations process for regional (e.g., state-level) non-conforming measures that create a "material impediment to the cross-border supply of services."

Article 15.8: Development and Administration of Measures

This Article replaces NAFTA Article 1210 (Licensing and Certification) and is more detailed than the corresponding provisions in TPP on Domestic Regulation (Article 10.8) and Transparency (Article 10.11). Like the TPP, Article 15.8 requires Parties to ensure that a measure of general application affecting trade in services is administered in a "reasonable, objective, and impartial manner." The Article adds disciplines (objectivity, transparency, non-discrimination, efficiency, reasonableness, etc.) on licensing and qualification measures affecting trade in services, as well as applications, fees, technical standards and information related to such licenses/qualifications.

Article 15.9: Recognition

This Article is new to NAFTA/USMCA but essentially identical to TPP Article 10.9 (Recognition). It establishes a permissive mechanism whereby a Party, in determining whether a service supplier satisfies established criteria for supplying that service (e.g., via licensing) "may" recognize any education, experience, requirements, licenses or certifications obtained in the territory of another Party or a non-Party. The Article adds, however, that once a Party provides such recognition, it must (1) permit another Party to demonstrate the same or similar level of qualification (and thus be similarly recognized), though it does not provide for that recognition automatically; and (2) not use such recognition in a way that would discriminate against another Party.

Article 15.10: Small and Medium-Sized Enterprises

This Article contains new provisions, for both NAFTA and TPP, calling on Parties to "endeavor" to enhance commercial opportunities in services for small- and medium-sized enterprises (SMEs).

Article 15.11: Denial of Benefits

This Article revises the corresponding NAFTA Article 1211, and permits a Party to deny the Chapter's benefits to another Party's service supplier where (1) the supplier is owned or controlled by a person of a non-Party and the denying Party has adopted a measure with respect to the non-Party (or a person of the non-Party) that prohibits a transaction with the enterprise or that would be violated if the Chapter were applied the enterprise; or (2) the service supplier is an enterprise owned or controlled by a person of a non-Party, or by a person of the denying Party, that has

no substantial business activities in the territory of any Party other than the denying Party. This Article is essentially the same as TPP Article 10.11.

Article 15.12: Payments and Transfers

This Article, new to the NAFTA/USMCA but essentially the same as TPP Article 10.12, requires a Party to permit transfers and payments relating to the cross-border supply of services to be made (1) "freely and without delay into and out of its territory" and (2) "in a freely usable currency at the market rate of exchange that prevails at the time of transfer," except (3) with respect to bankruptcy, securities trading, financial laws, criminal offenses and judicial proceedings.

Annexes

Chapter 15 of the USMCA contains several new annexes related to the provision of cross-border services, including on delivery services (15-A), transportation services (15-B), professional services (15-C), broadcasting services (15-D), and Mexican cultural exceptions. As noted above, the Parties also have listed non-conforming measures (Annex I) and sectors (Annex II) that are generally exempt from Chapter 15's disciplines.

These Annexes can be reviewed in detail upon request, but notable changes include the following items—

- New Annex 15-A on "Delivery Services" allows Parties to maintain a postal monopoly, but imposes disciplines on the monopolies' relationship to other delivery service providers and on a Party's regulation (licensing, fees, non-discrimination, etc.) of those providers. The Annex is similar to, but broader than, the TPP's Annex 10-B on "Express Delivery Services" (i.e., delivery services performed on only "an expedited basis").
- New Annex 15-D contains new rules (i) prohibiting Canada from substituting Canadian commercials during the Super Bowl's live broadcast; (ii) committing the United States and Canada to ensure that their respective copyright laws allow for retransmission of original, over-the-air programming only with the copyright holder's authorization; and (iii) committing Canada to ensuring that home shopping programming is broadcast in Canada with authorization.
- New Annex 15-E on "Mexico's Cultural Exceptions" allows Mexico to maintain new reservations (exceptions) from general non-discrimination disciplines relating to broadcasting, newspaper publishing, cinema, and audiovisual services, "[i]n order to preserve and promote the development of Mexican culture."
- The US Annex I non-conforming measures—
  - Maintained US NAFTA exceptions for atomic energy; export certificates (a business service); security-related export controls; mining; OPIC programs; air transportation (including cabotage); land transportation (including trucking); customs brokerage; small business registration for securities trading; patent-related services; and regional (e.g., state-level) regulations.
  - Removed US NAFTA exceptions for aircraft repair; telecommunications; agricultural chemicals; and waste management.
  - Added US exceptions for radiocommunications.
- The US Annex II non-conforming measures—
  - Maintained US NAFTA exceptions for social services; minority affairs; and maritime transportation (e.g., the Jones Act).
  - Removed US NAFTA exceptions for legal services; and newspaper publishing.

- Added US exceptions for communications (cable TV and satellite); land transportation (Mexican long-haul trucking); gambling; anything "not inconsistent with" US GATS commitments (listed in Annex II-A); and international agreements relating to aviation, fisheries or maritime matters.

Outlook

The USMCA's Services Chapter and related annexes have been generally well-received by the US business community as protecting NAFTA's services liberalization gains and providing additional liberalization for US service providers in the audiovisual, delivery, distribution, energy, engineering, financial services, and medical sectors. These same entities expressed concerns about the USMCA's limited investment protections, Canada's and Mexico's lists of non-conforming measures, and the United States' new exception for Mexican providers of long-haul trucking services. Only the investment concerns, however, could affect US business groups' ultimate decision as to whether to support or oppose the final agreement, while the trucking restrictions could garner some support from the Teamsters or other US labor unions – a specific goal of USTR Lighthizer and the Trump administration.

Multilateral Highlights

New WTO Trade Policy Review of the United States

The United States has set out an uncompromising position on the key objectives of the Trump Administration's trade policy in its background document for the forthcoming WTO Trade Policy Review (TPR) of the United States, which will take place on 17 and 19 December 2018. The United States will emphasize its intention to pursue its trade objectives, notably to protect U.S. national security and ensure "free and fair trade", through the aggressive enforcement of U.S. trade laws and cooperation with like-minded countries since, in its view, the multilateral system has proved itself to be too weak and unwieldy (because of the "consensus principle") to be used for the task.

In the "Government Report" for the United States' TPR, the United States has said that: "[T]he United States is committed to reforming the global trading system in ways that lead to fairer outcomes for U.S. workers and businesses, and more efficient markets for countries around the world. U.S. trade policy is driven by a pragmatic determination to use the leverage available to the world's largest economy to secure these objectives. Our trade policy is steadfastly focused on the national interest, including retaining and using U.S. sovereign power to act in defence of that interest."

With regard to the need for reform of the WTO, the United States has set out five major areas of concern.

- First is that the WTO dispute settlement system has appropriated to itself powers that the WTO Members never intended to give it. Panels and the Appellate Body have, through their findings, sought to add to or diminish WTO rights and obligations of Members in a broad range of substantive areas. In particular, the activist approach of the Appellate Body on procedural issues, interpretative approach, and substantive interpretations does not respect WTO rules as written and agreed by the United States. Not only has this distorted or undermined the WTO rules, it has also increasingly frustrated the ability of Members to negotiate by imposing on them policy constraints that they have never agreed to.

- The negotiating arm of the WTO has failed also because a proportion of the WTO membership has used its developing country status to avoid undertaking substantive obligations under WTO Agreements. The United States sees an acute need for the WTO to change how it approaches questions of development, since providing the same development flexibilities to high- or high-middle income developing countries as are provided to low- or low-middle income countries make it challenging to find balance in the application of existing obligations or the development of new commitments.

- Also with regard to WTO negotiations, the United States has stated that "… it considers the Doha Round to be a thing of the past" and that it will not negotiate on the basis of the DDA mandates or old DDA texts. The United States is engaged in the current negotiations on fisheries subsidies and on Electronic Commerce, and in these and other potential future negotiations "… the United States seeks to work with those Members who are ready and able to negotiate free, fair, and reciprocal agreements, with the expectation that participants to these agreements will contribute commensurate with their status in the global economy." The United States makes no commitment, therefore, to seeking multilateral outcomes from these negotiations.

- The very poor record of transparency and notifications by WTO Members has undermined the integrity of the WTO rules and the likely success of future negotiations in areas such as fisheries subsidies.

- WTO rules have failed to constrain market-distorting policies and practices, and instead have been used by some Members unfairly to impose market access barriers and to disguise state intervention as well as dumping and

subsidies to the disadvantage of United States' producers and exporters. In some cases, the United States has sought recourse through WTO dispute settlement: the United States cites in that regard "… China's discriminatory regime for technology licensing, agricultural market access in China, India, and Indonesia, China's excessive agricultural domestic support, Indian prohibited export subsidies, and the EU's subsidies benefitting large civil aircraft." However, the weaknesses in the WTO dispute settlement system limit the value of this approach. In other cases, therefore, the United States is seeking recourse instead through application of the full range of its trade laws, including Sections 232 and 301 of its legislation.

The United States' TPR will provide other Members with an opportunity to question the United States on all aspects of its trade policies. It is expected that some Members, such as China and India, will be extremely critical, but that the United States is unlikely to engage substantively through this process. On some issues, in particular the United States' concerns with the Appellate Body and with the poor record of WTO notifications, there is already a process underway in the WTO Dispute Settlement Body and various WTO committees where the issues are being discussed (although not necessarily resolved). Otherwise, however, the United States has appeared to prefer to engage with other Members outside the WTO consultative framework to try to resolve its concerns bilaterally.

It is unusal for a WTO Member to use the TPR exercise as a platform to challenge the rest of the membership in this way on fundamental issues, particularly when several Members, including Japan and the EU, as well as WTO Director-General Azevedo have made serious efforts to engage with the United States and encourage it to bring its complaints and concerns back under the umbrella of the multilateral system through a programme of WTO reforms. This uncompromising position of the United States adds to the doubts of many observers that the United States has any intention for the time being of relaxing its aggressive, unilateral approach to trade policy.