Appendix: An Analysis of the United States–Mexico–Canada Agreement (USMCA)

Chapter 2: National Treatment and Market Access for Goods

Chapter 2 of the USMCA, which corresponds to Chapter 3 of NAFTA, reinforces many of the rules regarding market access for goods as agreed to in the General Agreement on Tariffs and Trade (GATT) and at the WTO.[1] There are limited changes to this chapter, but new sections were added regarding transparency in licensing procedures for imports and exports.[2] Additionally, a new annex addresses the treatment of automobiles and parts from Mexico should the U.S. increase its most-favored-nation rate on these products.[3]

Article 2.3: National Treatment

The principle of national treatment, which is that goods from another country must be treated no less favorably than goods from the home country, is upheld in the USMCA.[4] This principle is found in Article III of the GATT, to which the United States is party.[5] Exceptions to the national treatment principle are also included in Chapter 2 of the USMCA. These exceptions will be described in detail in the analysis of Annex 2-A of this chapter.

Article 2.7: Temporary Admission of Goods

The USMCA maintains many of the provisions on temporary admission of goods found in NAFTA. Section 8 of Article 2.7 ensures that "each Party shall allow a vehicle, or shipping container or other substantial holder, that enters its territory from the territory of another Party to exit its territory on any route that is reasonably related to the economic and prompt departure of that vehicle, or shipping container or other substantial holder."[6]

Article 2.8: Goods Re-Entered after Repair or Alteration

This article ensures that goods imported after repair or alteration are not subject to tariffs or additional duties by any Party. Section 4 of Article 2.8 adds new clarification to the terms repair and alteration by excluding processes that "[destroy] a good's essential characteristics or create[] a new or commercially different good [or] transform[an unfinished good into a finished good."[7] The freedom to choose the route that allows for the fastest and most efficient transportation should ease the facilitation of trade between the parties.

Article 2.1.1: Import and Export Restrictions

This article reaffirms that various forms of export and import controls are not permitted, including "export or import price requirements, except as permitted in enforcement of antidumping and countervailing duty orders or price undertakings," "performance requirements," and "voluntary export restraints." Section 5 of Article 2.11 also prevents a Party from requiring "a person of another Party to establish or maintain a contractual or other relationship with a distributor in its territory."[8]

Article 2.12: Remanufactured Goods

The USMCA clarifies in Article 2.12 that the prohibition of export and import controls applies to remanufactured goods. However, it does allow for a Party to impose labeling or technical requirements on remanufactured goods. This article does specify that prohibitions on used goods do not apply to remanufactured goods.[9]

Annex 2-A: Exceptions to Article 2.3 and Article 2.11

This annex lists products that are exempted from the national treatment principle and the article on import and export restrictions. Article 2.A.2 exempts for Canada "logs of all species," some "unprocessed fish," "the use of ships in the coasting trade of Canada," as well as some other items from Article 2.3 and Article 2.11 of the USMCA. "Export measures pursuant to Article 48 of the Hydrocarbons Law" in Mexico, as well as "tyres, used apparel, non-originating used vehicles, and used chassis equipped with vehicle motors" are not subject to Article 2.3 or Article 2.11 of the USMCA. Annex 2-A also allows the United States to maintain its "controls on the export of logs of all species…measures under existing provisions of the Merchant Marine Act of 1920 and Passenger Vessel Services Act," as well as some other measures in U.S.

law.[10] Such controls and exemptions allow for discrimination against these goods, which could result in higher input costs for businesses.

Annex 2-C: Provisions Between Mexico and the United States on Automotive Goods

The United States Department of Commerce is investigating if the importation of cars, trucks, and parts can be restricted under Section 232 of the Trade Expansion Act of 1962, which allows a restriction if they threaten to impair national security.[11] Currently, cars are subject to a 2.5 percent tariff rate, and trucks are subject to a 25 percent tariff rate.[12] These rates are bound at the World Trade Organization (WTO) as the highest rates that the U.S. is allowed to impose under the most-favored nation (MFN) principle, except in the case of an exception to WTO rules.[13] Under NAFTA, cars and trucks that meet the rules of origin standards are permitted to be imported into the U.S. duty-free, and that treatment is set to continue in the USMCA.[14] More details on the rules of origin treatment in the USMCA will be evaluated in Chapter 4.

Annex 2-C of this chapter contains provisions that only apply to automobile and parts traded with Mexico, should the U.S. pursue its efforts to increase its MFN rates on these goods. According to the agreement, "in the event that the United States implements any measure that increases its MFN applied rate in effect on August 1, 2018 on passenger vehicles…and on auto parts" the rate applied to passenger vehicles "that do not qualify as originating under rules of origin in Chapter 4 of NAFTA 2018 shall not exceed 2.5 [percent]."[15] However, the annex does allow the U.S. to impose an import quota on passenger vehicles from Mexico of 1.6 million per year.[16] Auto parts from Mexico receive similar assurances regarding the current MFN rates, but could be subject to a quota of $108 billion per year.[17] Under these circumstances, anything imported above these quotas would be subject to the "MFN applied rate in effect at the time of importation of the good."[18]

Chapter 3: Agriculture and Related Annexes

Agricultural trade between the United States and Canada and Mexico is extremely important for both American agricultural producers and consumers. In 2017, Canada was the top agricultural export market for the United States, while Mexico was the third-largest agricultural export market.[19] In terms of imports, Mexico and Canada are the top two largest suppliers of agricultural products into the U.S.[20]

It is therefore not surprising that agriculture is a significant focus of the USMCA. In the agreement, the Agricultural chapter[21] (Chapter 3) is packaged together with a Mexico–U.S. Bilateral annex,[22] a Canada–U.S. Bilateral annex,[23] an alcohol annex,[24] and a proprietary foods formula annex.[25]

This alone does not capture the USMCA provisions that have a direct impact on agriculture. For example, provisions in the intellectual property (IP) chapter[26] (Chapter 20) address geographical indications, which are especially prevalent in agriculture. There is also the Sanitary and Phytosanitary measures chapter[27] (Chapter 9).

Chapter 3, Section B: Agricultural Biotechnology ⬆

NAFTA does not include provisions dealing with agricultural biotechnology. The USMCA would specifically address critical biotechnology innovations in agriculture and help ensure that there are clear and timely approval processes for such technologies among the member countries.[28] Unlike TPP,[29] the USMCA does not limit its coverage to recombinant DNA technology; it also covers gene editing and appears to provide coverage for many future innovations.[30]

The USMCA also addresses what are referred to as low-level presence (LLP) occurrences. These occurrences refer to situations where imports include a low level of an unapproved crop produced with biotechnology.[31] These situations can lead to significant problems (e.g., delays, costs) as has occurred when trading with Europe.[32] The USMCA would attempt to create some practical steps to address these situations when they arise and expedite their resolution.

Annex 3-A, Article 3.A.3: Dairy Pricing and Exports ⬆

Canada has a supply-management system for dairy that utilizes tariff rate quotas (TRQs) to limit the amount of foreign dairy products entering the country. These TRQs allow the export of some dairy products into Canada without triggering tariffs, but once the quotas are exceeded, very high tariffs are triggered.[33]

Under the USMCA, Canada has agreed to allow more U.S. dairy products to enter into Canada before triggering the high tariffs, including products such as fluid milk and cheese.[34] American dairy producers will have access to up to 3.59 percent of the Canadian dairy market,[35] which is even better than the 3.25 percent included in the Trans-Pacific Partnership.[36]

U.S. dairy producers have been particularly concerned about a Canadian milk-pricing scheme established[37] in 2017 that sets artificially low prices for Canadian "Class 7 milk" and therefore undercuts U.S. exports.[38] Class 7 milk covers skim milk solids that are used to produce such things as nonfat dry milk and infant formula.[39] Under the USMCA, Canada has agreed to eliminate this Class 7 pricing scheme[40] six months after the agreement goes into effect.[41]

The practical effect of these changes is unclear. Former U.S. Secretary of Agriculture Tom Vilsack, who is the current CEO of the U.S. Dairy Export Council, has recently expressed a need "to have a wait and see attitude,"[42] including when it comes to the impact of eliminating Class 7 milk.[43]

Annex 3-A, Article 3.A.4: Grain ⬆

Currently, even if U.S. wheat is of the same quality as Canadian wheat, it still is considered to be feed grain in Canada, thereby receiving lower prices than comparable Canadian wheat.[44] The USMCA addresses this problem. Both the U.S. and Canada have agreed that they will treat each other's wheat in a manner "no less favorable than that it accords to like wheat of national origin."[45]

Mexico-United States Side Letter on Cheeses —

A side letter between the U.S. and Mexico expressly lists 33 cheeses that U.S. producers can sell in Mexico without restriction based on the names of those cheeses.[46] It is not clear what happens to the sale of cheeses that did not make this list, although their exclusion may not bode well for U.S. producers selling them in Mexico.[47]

Chapter 4: Rules of Origin

Chapter 4 dictates the amount of North American content required for duty-free treatment under the USMCA and contains some of the most substantial changes to NAFTA.[48] Rules of origin in general are regulatory barriers dictating certain production processes or supply chains for businesses, requiring them to spend time and money tracking compliance with the rules set forth.

Article 4-B.3: Regional Value Content for Passenger Vehicles, Light Trucks, and Parts Thereof ↓

Under NAFTA, the regional content requirement for passenger vehicles and light trucks was 62.5 percent.[49] Article 4-B.3 details a phase-in period for the content requirement to increase annually, reaching 75 percent for most passenger vehicles and light trucks by 2023.[50] A similar phase-in period is dictated for parts of passenger vehicles and light trucks, reaching between 65 percent and 75 percent by 2023.[51]

Article 4-B.4: Regional Value Content for Heavy Trucks and Parts Thereof ↓

The content requirement for heavy trucks is currently 60 percent under NAFTA, but Article 4-B.4 has that rate increasing to 70 percent by 2027.[52] The requirement for heavy truck parts is set to increase to between 60 percent and 70 percent by 2027.[53]

Article 4-B.6: Steel and Aluminum ↓

Article 4-B.6 adds another new burden for automotive producers by requiring that 70 percent of steel and aluminum used in the process be sourced from North America. There is no phase-in for this requirement and a similar section was not part of NAFTA.[54]

Article 4-B.7: Labor Value Content ↓

For the first time, automotive trade in North America is set to be subject to minimum-wage requirements. By 2023, a minimum of 40 percent of the production process is required to occur at $16 per hour. The use of material costs, research and development expenditures, and assembly costs are limited when calculating if a business meets this requirement. Businesses are also prohibited from including benefits and indirect employment such as management and engineering in their wage calculations.[55]

Minimum-wage laws have caused major trouble around the country, and in 2016, Congress was considering increasing the federal minimum wage from $7.25 to $15 per hour. In 2016, Heritage Foundation experts found that increasing the federal minimum wage would have had negative impacts on employment and "[made] it difficult for less skilled workers to find jobs."[56] Just as federal, state, and local governments should not be increasing minimum wages, these anticompetitive policies should not be in trade agreements.

Section 232: Side Letters ↓

On May 23, 2018, President Trump instructed the Department of Commerce to conduct an analysis of the effects of automobile and automobile parts imports under Section 232 of the Trade Expansion Act of 1962.[57] Section 232 allows the President to impose tariffs following an investigation that determines that the imports in question are injuring or threatening to injure U.S. national security.[58] The automobile investigation, which follows two similar probes into steel and aluminum imports that resulted in additional tariffs being imposed during 2018, is still ongoing. U.S. automotive trade is valued at more than $500 billion per year, with much of that trade occurring within North America.[59] Tariffs would increase the cost of doing businesses in the region.

The side letters to the USMCA regarding this topic dictate terms for Mexico and Canada, should the report by the Department of Commerce conclude that imports of automobiles and parts threaten to impair national security. Canada agreed to an import quota of 2.6 million passenger vehicles per year, no limit on truck imports, and an import quota of $32.4 billion in value of automobile parts.[60] Mexico also agreed to an import quota of 2.6 million passenger vehicles, no limit on truck imports, and a much higher quota of $108 billion in value of automobile parts.[61]

The U.S. limited the ability of each country to dispute any potential tariffs on these items through NAFTA and the USMCA except "with respect to whether the United States has excluded the number of passenger vehicles and light trucks, and the value of auto parts as set out."[62] Canada and Mexico clarified their rights to retaliate if the U.S. violates the side letter agreements, as well as clarified that either country "retains its WTO rights to challenge a Section 232 measure."[63]

In theory, these policies are meant to contain supply chains to the parties of the agreement; however, they also limit the efficiency that could be achieved by simply seeking out the best processes for production of a particular good.

The purpose of a free trade agreement (FTA) is to facilitate trade, making it easier for Americans to buy and sell with the world. The rules of origin found in Chapter 4, especially in the area of automotive production, are the definition of managed trade, not facilitated trade. They add new requirements for producers that will likely lead to higher prices for consumers.

Chapter 5: Origin Procedures

This chapter details the logistics for verifying preferential tariff treatment under the USMCA.[64] A similar chapter did not exist in NAFTA, however these procedures are meant to replace the tracing process under NAFTA.[65] Tracing required companies to maintain dozens of different certifications and oftentimes thousands of documents for each individual part, as well as retrieve proprietary pricing information from its suppliers. The aim of this chapter is to simplify the origin-certification process and reduce some of the bureaucracy found in the NAFTA process. While the new process seems to streamline certification, the elimination of rules of origin altogether would be a better way to minimize the impact on businesses of certifying the origin of their products to qualify for duty-free treatment.

Article 5.2: Claims for Preferential Tariff Treatment

This article allows an exporter, producer, or importer to submit a request for origin certification and also allows a Party to establish a process for certification. Section 3 of Article 5.2 also dictates that certification "need not follow a prescribed format" and "may be provided on an invoice or any other document." There are minimum elements for the certification, which will be explained in Annex 5-A. Additionally, certification of origin may be "completed and submitted electronically and ... [signed] with an electronic or digital signature."[66]

Article 5.3: Basis of a Certification of Origin

Article 5.3 allows for the certifier of the good to be a producer, exporter, or importer and specifies that a Party cannot require one of those three entities to complete the certification. This gives companies the flexibility to determine which entity is best equipped to complete the certification. This article also allows companies to complete certification on "a single shipment of a good ... or multiple shipments of identical goods within any period specified in the certification of origin, but not exceeding 12 months."[67]

Article 5.5: Exceptions to Certification of Origin

A certification of origin is not required for imports under $1,000 (USD), and parties are permitted to increase that margin if they so choose.[68] The existence of rules of origin requirements restricts trade, but the ability for some imports to be exempt from these rules is positive.

Article 5.7: Errors or Discrepancies

This article prevents parties from denying a certification "due to minor errors or discrepancies in it that do not create doubts concerning the correctness of the import documentation." In the case that a certification is found to be inadequate, this article allows the importer a minimum of five days to correct the documentation.[69]

Article 5.8: Record Keeping Requirements

Importers, producers, and exporters are required to keep record of origin certifications for at least five years, but may store them "in any medium, including electronic, provided that the records or documentation can be promptly retrieved and printed."[70]

Article 5.10: Determinations of Origin

An origin certification can be denied if "the good does not qualify for preferential treatment," sufficient information is not provided, the entity completing the certification "fails to respond to a written request or questionnaire for information," a verification visit is denied, "the importer, exporter, or producer fails to comply with the requirements of this Chapter," or records are not properly maintained and provided.[71]

Article 5.15: Review and Appeal

This article requires parties to treat all importers, exporters, and producers equally during the review and appeal processes for origin certification.[72]

Article 5.16: Uniform Regulations

Article 5.16 requires Uniform Regulations to be adopted by all parties "regarding the interpretation, application, and administration" of Chapters 4 through 7 of the USMCA.[73]

Article 5.18: Committee on Rules of Origin and Origin Procedures

A Committee on Rules of Origin and Origin Procedures is created under this article, but only government officials sit on the committee. The committee is tasked with ensuring that origin requirements are met by all parties,[74] however, it should also address questions on the effectiveness of these rules. There should also be representation of importers, exporters, and producers on the committee so as to allow them to communicate the impact that these rules have on their businesses and ability to trade under the USMCA.

Article 5.19: Sub-Committee on Origin Verification

The subcommittee created under this article also only includes government officials with the purpose of sharing "technical advice related to … conducting verifications of origin."[75] The committee should also include importers, exporters, and producers so as to make origin verification processes more efficient and manageable for these businesses.

Annex 5-A: Minimum Data Elements

There are nine minimum data elements required in origin certification under the USMCA: (1) indicate whether certification is done by the importer, exporter, or producer; (2) provide pertinent contact information for the certifier; (3) provide pertinent contact information for the exporter; (4) provide pertinent contact information for the producer; (5) provide pertinent contact information for the importer; (6) include a description of the good and the 6-digit harmonized tariff schedule number of the good, and indicate if certification is for a single shipment; (7) give an explanation of why the good is originating; (8) indicate the period of certification; and (9) sign and date the certification using language specified in Annex 5-A of the USMCA.[76]

Chapter 6: Textile and Apparel Goods

This chapter addresses textile and apparel goods in conjunction with Chapters 4 and 5, which address rules of origin and origin procedures, respectively. This chapter was previously Annex 300-B of Chapter 3, National Treatment and Market Access for Goods in NAFTA. It addresses handmade, traditional folkloric, and indigenous handicraft goods, rules of origin, cooperation, and verification, and sets up a committee on textile and apparel trade matters. It also has a two-part annex that sets up measurements and a change in tariff classification.

This chapter has made widespread changes to rules of origin for textile and apparel goods. Under NAFTA, there were no provisions that "took into account the inclusion of non-North American fabrics that could be imported and added to finished products without incurring non-preferential duties."[77] The agreement adopts the yarn-forward rules of origin, meaning fibers may be produced anywhere "but each component, starting with the yarn used to make the garments must be formed within the free trade area."[78] The provisions limit the inclusion of finished fabric in the form of "sewing thread, pocketing fabric, narrow elastic bands and coated fabric" that originates from regions outside North America.[79] In order to qualify for the import-duty-free treatment, apparel items such as a pocket-bag fabric must use inputs made in the USMCA area.[80]

Rules of origin often distort the market and manipulate rather than facilitate trade. In the case of the USMCA, textile and apparel goods will be subject to more restrictive tariff-preference levels (TPL) for any fabrics considered non-originating. If a product is completely originated in the USMCA region and has no material or manipulation from outside the free trade area, those rules will not apply.[81]

The agreement will cut the TPL level of product categories that have a low TPL utilization rate and expand the TPL level for some product categories that have a high TPL utilization rate.[82] For example, the TPL utilization rate for cotton/MMF exported from Canada was 4.46 percent in 2017 and will change from 88,326,463 SME under NAFTA to 40,000,000 SME under USMCA.[83] Since the utilization rate is so low, the impact will be minimal. Cotton/ MMF apparel currently exported by the United States has a 100 percent utilization rate for 9,000,000 SME under NAFTA and this will be increased to 20,000,000 SME per year under USMCA, which is a large increase and could have a great impact.[84]

Although there have been improvements with de minimis and TPL, the stricter requirements on rules of origin are not positive for this agreement. Rules of origin distort the market and will likely lead to increasing costs and therefore prices—or decreasing quality of textile and apparel, goods, or both.

Article 6.1: Rules of Origin and Related Matters

If apparel or fabric originates in the United States and contains non-USMCA materials, it must meet the rules of origin for its specific HS designation and limit non-originating fibers to "not more than 10 percent of the total weight of that component, of which the total weight of elastomeric content may not exceed 7 percent."[85] These de minimis levels are more generous than what was provided in NAFTA. This is also the case for sewing thread and yarn. If a textile includes rayon filament or rayon fiber that is not lyocell or acetate, that textile or apparel good will still be considered originating. The increased de minimis levels and extension to rayon filament and rayon fiber are steps toward liberalization that will reduce the regulatory barriers for businesses.

Article 6.2: Handmade, Traditional Folkloric, or Indigenous Handicraft Goods

Provisions are set out that give duty-free treatment to any handmade, traditional folkloric, or indigenous handicraft goods produced in the United States, Mexico, or Canada. Indigenous populations will be granted authority to certify indigenous handicrafts as they pertain to the agreement.[86] The article also states that parties may disregard the agreement in order to honor previous agreements with indigenous populations in each country.

Article 6.4: Review and Revision of Rules of Origin

There is room for renegotiation for determining rules of origin for textile and apparel goods without relitigating the entire USMCA. Article 6.4 states that a party is permitted to request a meeting to determine "whether particular goods should be subject to different rules of origin to address issues of availability of supply of fibers, yarns or fabrics in the free trade area."[87]

The United States is not allowed to apply duties to textiles or apparel that are "assembled in Mexico from fabrics wholly formed and cut in the United States and exported from and reimported into the United States ... if, after such assembly, those goods have been subject to bleaching, garment dyeing, stonewashing, acid-washing or perma-pressing."[88] There is also a quota specific to each textile product that will be placed on preferential tariff treatment for any apparel goods that meet all origin specifications but are "both cut (or knit to shape) and sewn or otherwise assembled in the territory of a party from fabric or yarn produced or obtained outside the free trade area."[89]

Article 6.6: Verification

The goal of the new provisions is to increase the use of Made-in-USA fibers, yarns, and fabrics by increasing the cost of non-USMCA materials. The agreement increases TPL levels for U.S. cotton and man-made fiber apparel exports to Canada, which has a utilization rate of 100 percent, but these products are not required to use U.S.-made yarn and fabrics. This could lead to interesting results for the utilization rate and evaluation of success of increasing Made-in-USA fibers, yarns, and fabrics.[90]

In order to carry this out, the chapter required enforcement regulations and verification protocols, mostly covered in Chapter 5—Origin Procedures—but it is also addressed in Article 6.6. This is intended to make it more difficult to procure preferential duties if the rules of origin requirements are not met. The main power in verification will come through the customs administration of the Party. Some verification will allow "importing parties to conduct visits and collect records to facilities believed to be involved in skirting origin regulations."[91] However, the party importing does not have to divulge which exporters or producers it may visit under the new USMCA rules, and for non-textile products, the rules for visits are ambiguous, which likely means that they will be determined by the exporting country.[92]

Article 6.8: Committee on Textile and Apparel Trade Matters

This article created a committee on textile and apparel trade matters, which will be used to update the textile chapter. If the agreement is ratified, the committee would be required to meet at least once a year and be made up of representatives from each country. The committee is required to review the impact of free trade on the sale of worn apparel in the United States, Mexico, and Canada and rule on textile-specific verification and customs cooperation provisions.[93]

Chapter 7: Customs Administration and Trade Facilitation

Chapter 7 of the USMCA addresses the process for trade facilitation and customs administration. This was previously covered in Chapter 5 of NAFTA, Customs Procedures. The chapter addresses increased modernization through the use of information technology, a single window system for customs documentation and data, and cooperation and enforcement to ensure confidentiality and the accuracy of claims for preferential tariff treatment.

Chapter 7, Section A: Customs Administration and Trade Facilitation

This section focuses on streamlining the trade process so that it is more efficient and transparent. There is an emphasis on the use of online publication and information technology, which is evidence of the success of modernization. The promotion of information sharing with regard to resources, such as documentation and data, for importation, exportation and transit, as well as laws, regulations, procedures, duties, taxes and other fees will help to minimize costs in trading, allowing for greater efficiency and transparency.

Article 7.3: Communication with Traders

This article addresses openness to input for procedural changes so that traders can be actively involved in communicating support, or opposition to impending regulation changes governing trade and customs, or bringing attention to emerging problems.[94] To what extent this will be readily used and enforceable is unknown but it is a nice democratic aspect of the agreement.

Article 7.7: Release of Goods

This article states that each country "must adopt or maintain simplified customs procedures for the efficient release of goods in order to facilitate trade."[95] This includes immediate release of goods upon receipt of customs declaration and fulfillment, electronic submission and processing of documentation and data, the release of goods at point of arrival without temporary transfer to warehouses or other facilities, and prior to payment of customs duties, taxes, fees, and charges imposed on or in connection with the importation of the goods provided that they are eligible and any security has been provided.[96] This is aimed at reducing the amount of time that imports sit at ports or in warehouses, allowing for a smoother and faster trading process and the opportunity to use electronic submission and processing that will expedite the customs process upon arrival.

Article 7.8: Express Shipments

Article 7.8 puts an expedited customs procedure in place for express shipments. This will allow for the submission and processing of information prior to arrival of the goods, a single submission to cover all goods contained in the shipment, and immediate release after arrival as long as data and documentation are submitted. The use of electronic systems streamlines the process, making it more efficient for ports and businesses.

No customs duties or taxes will be assessed at the time or point of importation and formal entry procedures will not be required. Instead, fixed costs will be imposed for express shipments of particular values. This is the de minimis threshold that will set the maximum value of goods that can be imported duty free.

The thresholds were raised from C$20 to C$150 for Canada and from US$50 to US$117 for Mexico.[97] However, those goods imported to Canada valued between C$40.01 and C$150 will be subject to a sales tax, and goods imported to Mexico valued from US$50.01 to US$117 will be subject to jurisdictional taxes.[98] This threshold for Canada only applies to shipments facilitated by express carriers. Any shipments carried by Canada's federal postal service will be subject to the NAFTA de minimis threshold of C$20. This means that any good imported to Canada valued over C$20 will be subject to duties and taxes.[99]

The de minimis threshold for the United States is US$800. However, footnote 3 states, "[n]otwithstanding the amounts set out under this subparagraph, 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 law is lower than that of the Party."[100] This means that the United States can lower their $800 statutory de minimis threshold to the Mexican and Canadian thresholds of US$117.[101] If the United States chooses to do this, US customers and foreign sellers will have to fill out lengthy customs forms and possibly pay tariffs and sales taxes for individual purchases that exceed $117.[102] Additionally, express shipping firms and USPS will be burdened by increased handling costs and longer delivery times.[103]

The change in the maximum de minimis values decreases burdensome rules that can reduce the ease and speed of trade. Using only the new de minimis threshold for express shipments to Canada may further increase the speed at which goods are exported to Canada. However, it should have been the aim of Canada to increase trade facilitation and have the new de minimis threshold apply to all shipments. Furthermore, the United States should be discouraged from using the reciprocity exception in footnote 3. The increased de minimis thresholds increase cross-border trade, which gives consumers access to a wider variety of goods at different prices. If the United States uses the lower de minimis threshold of $117 instead of $800, cross-border trade will decrease as business costs will increase and consumers will have to pay more and experience longer wait times for deliveries.[104]

Article 7.12: Risk Management and Article 7.13: Post-Clearance Audit ⬆

Articles 7.12 and 7.13 aim to further improve the expedition of the release of goods. Each article aims to ensure risk analysis and compliance with customs and related laws are kept in check and arbitrary or discriminatory assessments are avoided.[105] These provisions support the goal of increased efficiency and transparency, but it is not clear how easy it will be to enforce a reduction of unjustifiable assessments in regard to risk or post-clearance auditing. Therefore, the effects of this will be difficult to assess.

Article 7.20: Customs Brokers ⬆

Customs brokers are not required to file customs declarations or other import or transit documentation on behalf of an importer or any other person deemed appropriate. The ability to self-file, particularly electronically, increases the freedom of importers.

A Party may establish requirements for qualifications, licensing, or registration for customs brokers or to provide customs broker services, but they must be transparent and administered uniformly in the country. If a customs broker must be licensed, then a Party cannot impose limits on the number of ports or locations that the broker can operate in.[106] If a Party were to establish customs broker requirements, this would reduce the freedom that would exist by allowing self-filing. However, the freedom to operate in multiple ports would alleviate some of the effects of the restrictions, assuming that the requirements are not so burdensome that only a few customs brokers exist.

Article 7.22: Protection of Trade Information ⬆

Article 7.24 requires that each Party's customs administration take actions to protect the use, disclosure, retention, correction, and disposal of information collected from traders.[107] It is unclear what the confidential information may entail. Paragraph 2 states this article's necessity is to protect "confidential information from use or disclosure that could prejudice the competitive position of the trader to whom the confidential information relates."[108] Enforcing protection of information will reduce opportunities for litigation, particularly when switching to an information technology system. However, Parties should be careful about attacks that could result in data breaches to purposefully leak information to harm the competitive position of a trader.

Article 7.24: Trade Facilitation Committee —

This article facilitates the creation of a committee so that there can be increased sharing of information. The committee must be composed of government representatives of each Party.[109] This seems to be a sort of centralization of USMCA operatives, and it is doubtful that this committee would be productive. If businesses, particularly SMEs, were given the opportunity to act as representatives on the committee, the body may be productive as it would have more local information about the trading environment, which would increase the facilitation of trade between the three countries.

Chapter 7, Section B: Cooperation and Enforcement —

This section focuses on the cooperation and enforcement aspect of customs administration. Each Party must cooperate when another Party is taking measures concerning customs offenses, including ensuring the accuracy of claims for preferential tariff treatment.[110] It is emphasized that advance notice is given of any administrative changes or modifications to laws or regulations that affect importations, exportations, or transit procedures.

Specific confidential information may be exchanged between Parties if it is relevant to a case of customs offense or an offense that is likely to occur. This can be requested and provided electronically or otherwise. Verification requests may be carried out by one Party asking for a verification in the relevant Party's territory and a site visit may be permitted.[111]

Most of section B has not changed from NAFTA and is pretty standard with respect to enforcing and cooperating when there is suspicion of wrongdoing. It is generally agreed that the Parties cooperate and that the rules of the territory in which the offense took place, will apply. It is unlikely that this section will have a significant impacts on international trade.

Chapter 8: Recognition of the Mexican State's Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons

Article 8.1: Recognition of the United Mexican States' Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons

Another provision specific to Mexico, the agreement asserts that Mexico has "direct, inalienable and imprescriptible ownership of all hydrocarbons in the subsoil of the national territory, including the continental shelf and the exclusive economic zone located outside the territorial sea and adjacent thereto, in strata or deposits, regardless of their physical conditions pursuant to Mexico's Constitution." However, Mexico's government opened energy exploration to foreign investment and the agreement that Mexico at least retain its current level of openness.

Mexico's statement on mineral rights is disappointing. Though the provision is not surprising, Mexico's stated federal ownership of its natural resources is a missed opportunity to capitalize on a critical feature of the American energy renaissance: private property rights. The United States has been the world's largest oil and gas producer for seven years not just because of its abundant reserves. Much of the growth in production is occurring on private and state-owned lands, which is far outpacing production on federally owned lands.

Moreover, USMCA allows U.S. customs to accept alternate certification that oil and gas coming to the U.S. originated in Mexico or Canada. Accepting alternative documentation for the rules of origin could save Canadian oil producers tens of millions of dollars. Mixing light diluent in with Canadian oil sands to help the oil travel through pipelines made it difficult to prove the Canadian origin and therefore producers were assessed a per barrel fee.

CA-US Side Letter on Energy

The USMCA does not contain an energy chapter but does contain several energy provisions. In Article 3 of a side letter agreement on energy, the letter asserts that "The Parties recognize the importance of enhancing the integration of North American energy markets based on market principles, including open trade and investment among the Parties [...]." If the agreement would maintain those principles throughout the text, American energy companies and consumers would be in good shape.

Productively, the agreement maintains the NAFTA provision that there will be no tariffs on raw and refined oil and gas products. Maintaining no tariffs will keep important energy trade relationships intact and benefit North American energy consumers.

Chapter 9: Sanitary and Phytosanitary Measures

Sanitary and phytosanitary (plant-related) measures help to ensure a safe food supply and protect the health of animals and plants. The challenge in the international trade context is making sure countries apply these measures for legitimate health and safety reasons, and not as an excuse to protect domestic industry from foreign competition. According to the Office of the United States Trade Representative (USTR):

> Unfortunately, governments often seek to disguise measures that are discriminatory, unduly burdensome, or not based on scientific evidence as legitimate SPS [sanitary and phytosanitary] measures. These measures create significant barriers to U.S. agricultural exports, and USTR is committed to identifying and removing these barriers.[112]

NAFTA currently has a chapter on sanitary and phytosanitary measures,[113] and the USMCA appears to include language that will build upon the existing chapter.

Some of the express objectives of the USMCA SPS chapter are to:

- enhance transparency in and understanding of the application of each Party's sanitary and phytosanitary measures
- encourage the development and adoption of science-based international standards, guidelines, and recommendations, and promote their implementation by the Parties; and
- advance science-based decision making.[114]

There is no real way to ascertain the intent of a country when it develops an SPS measure (i.e. there is no way to know whether it really is for health reasons or protectionist reasons). By requiring a country to demonstrate that there is a strong scientific basis for the measure, it better ensures the rule is not a protectionist scheme and further that the rule is justified to achieve a legitimate health or safety objective.

Chapter 10: Trade Remedies

Chapter 10 of the USMCA addresses the use of trade remedies, including safeguard measures, which were previously located in Chapter 8 of NAFTA. This chapter also covers the application of antidumping and countervailing duties, which were previously addressed in Chapter 19 of NAFTA.

This chapter of the USMCA also includes a new section on preventing "duty evasion of antidumping, countervailing, and safeguard duties."[115] Duty evasion is the alleged practice of diverting or modifying supply chains to avoid tariffs or quotas in one of the Party countries. USTR identified "[creating] new procedures to address AD/CVD duty evasion, including the ability to conduct AD/CVD verification visits" as a negotiating objective in November 2017.[116] This topic was not listed as a priority in the fast-track authority given to the executive branch by Congress.[117]

Sections A and B: Safeguards and Antidumping and Countervailing Duties ↓

Sections A and B of this chapter detail the rules for the use of safeguards, as well as antidumping and countervailing duties. Safeguards are permitted under the World Trade Organization if the home country proves that a domestic industry is experiencing injury due to imports. Antidumping and countervailing duties are also permitted and address allegations of imports that are sold below cost or imports receiving subsidies, respectively. The rules and processes for the use of these remedies remained largely unchanged.

These provisions are particularly relevant today, as the Trump Administration has used trade law to unilaterally impose tariffs on imports, including imports from Canada and Mexico. While trade remedies are permitted under the WTO, they often act as a protectionist measure to favor politically sensitive U.S. industries under false claims of import injury.

Section C: Cooperation on Preventing Duty Evasion of Trade Remedy Laws ↓

Provisions on duty evasion are new to the USMCA and vaguely defined by the agreement in a footnote as "evasion of antidumping, countervailing, or safeguard duties."[118] The section does not specify how this evasion is to be identified, but the party countries did agree to "share customs information pertaining to imports, exports, and transit transactions."[119] Section C also allows a Party country to request another party to "conduct a duty evasion verification" and the agreement states the "requested party normally shall grant the other party access to its territory to participate in the duty evasion verification."[120]

On its face, this section seems to promote cooperation and information sharing, but it also provides a new mechanism for the United States to tighten the reins on globally integrated supply chains. For example, if Canada produces a car part that uses steel it imported from Japan and that steel has a U.S. antidumping duty applied, sending the final car part to the U.S. could be considered duty evasion under this section.

Heritage Foundation experts have long supported a trade policy that eliminates tariffs on intermediate goods, as more than half of all U.S. imports are used in the production of final goods.[121] The actions of a private company to establish supply chains should not be influenced by governments, except in serious cases of national defense. This section of the agreement also sets a precedent for even more prescriptive regulations on the development of supply chains in the future.

Section D: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters ↑

This section remains consistent with NAFTA and allows for the Party countries to dispute the use of trade remedies through a panel within the USMCA rather than through the WTO. The USMCA does include new provisions in Annex 10-A that reinforce "the importance of promoting transparency in antidumping and countervailing duty proceedings."[122] This annex simply emphasizes the transparency commitments made by each country within the WTO and encourages the Parties to share documents regarding trade remedies.

Chapter 11: Technical Barriers to Trade

Tariffs are just one of several protectionist tools, and so-called "Technical Barriers to Trade" (TBT) are among the most common. Such barriers include regulatory standards and compliance regimes that favor domestic products and disadvantage imports. Chapter 11[123] of the USMCA addresses various means to achieve greater regulatory "alignment" between the United States, Mexico, and Canada.[124]

Article 11.3: Incorporation of the TBT Agreement

The World Trade Organization[125] (WTO) and various trade agreements[126] over the years have created committees and commissioned reports for standardizing the countless regulations (including licensure and certification) that countries craft to protect public health, improve the environment and, in some cases, restrict foreign competition.

Universal standards do exist for some products in sectors such as agriculture, electronics, and technology, but they remain elusive for many others—in large part because federal regulatory standards reflect economic, political, and social values.

The USMCA recognizes the WTO's Technical Barriers to Trade Committee Decision on International Standards as the authority in determining whether a regulation is or is not a regulatory standard. This provides consistency in identifying existing regulatory standards.[127]

Article 11.4: International Standards, Guides and Recommendations

According to Article 11.4, the Parties recognize the role of international standards, guides, and recommendations in regulatory alignment and good regulatory practices.[128] If a Party needs to determine the existence of an international standard, guide, or recommendation, the Party should apply the TBT Committee Decision on International Standards.[129] However, the domicile of the standards body, its status as non-governmental or inter-governmental, and whether the standards body limits participation to delegations are not relevant for the determination of a standard as an international standard.[130]

No Party may give preference to the consideration or use of standards that are inconsistent with the World Trade Organization's Technical Barriers to Trade Committee Decision on International Standards.[131] In regard to any agreement or understanding that establishes a customs union or free-trade area or that provides trade-related technical assistance, each Party is directed to encourage adoption, and use "as the basis for standards, technical regulations, and conformity assessment procedures, [] any relevant standards, guides, or recommendations developed in accordance with the WTO's TBT Committee Decision on International Standards."[132]

Article 11.5, Paragraph 6: Technical Regulations

This article states that "if a Party has not used international standards as a basis for a technical regulation, a Party shall, on request from another Party, explain why it has not used a relevant international standard or has substantially deviated from an international standard."[133]

This article received a negative grade because it could place additional regulatory burdens on businesses that did not exist under NAFTA.

Article 11.6, Paragraph 1: Conformity Assessment

The USMCA directs the signatories to accord conformity assessments in the territory of another Party no less favorably than what is accorded to those located in its own territory (or in the territory of the other Party).[134] Conformity assessment bodies that are located in a nation are better equipped to understand the needs of that nation and its citizens.

Article 11.6, Paragraphs 2 and 5–7: Conformity Assessment

Article 11.6 requires Parties to permit subcontractors and non-governmental bodies to conduct conformity assessment, provided they are approved in the Party's territory.[135] Paragraph 7 of this article instructs parties to "facilitate and encourage" reliance on "mutual or multilateral recognition arrangements[136] to accredit, approve, license or otherwise recognize conformity assessment[137] bodies where effective and appropriate."[138] It also states that each Party shall "consider approving or recognizing accredited conformity assessment bodies for its technical regulations or standards, by an accreditation body that is a signatory to a mutual or multilateral recognition arrangement."[139] These provisions received a positive rating because they promote policies that aim to reduce duplicative testing, along with free market principles by allowing competitive conformity assessments.

Article 11.7, Paragraphs 1 and 8: Transparency

Paragraph 1 of Article 11.7 requires "each Party to "allow persons of another Party to participate in the development of technical regulations, standards and conformity assessment procedures by its central government on terms no less favorable than those that it accords to its own persons."[140] Paragraph 8 of this article requires regulators developing rules to "allow persons of another Party to participate on no less favorable terms than its own persons in groups or committees" developing standards.[141] Greater transparency should always be the goal, however these provisions do not promote that intended goal. Accountability plays a significant role in transparency, and allowing foreign influence in rulemaking undermines that.

Article 11.7, Paragraphs 2 and 4: Transparency

This article requires Parties to publish proposed technical regulations or conformity assessment procedures; allows Parties to submit comments on the development of technical regulations, standards and conformity assessment procedures; requires Parties to accept a request from another Party to discuss those comments in the development of the measure;[142] and requires Parties to publish final technical regulations or conformity assessment procedures and explain how substantive issues raised in comments have been addressed.[143]

Article 11.9, Paragraphs 1 and 2: Cooperation and Trade Facilitation

This article requires each Party to consider requests by a Party to implement mutual recognition of results from conformity assessment bodies in its territory and another Party's territory with respect to specific technical regulations.[144] The Parties recognize that to support greater regulatory alignment, they should "provide technical advice and assistance to improve practices related to the development, implementation and review of technical regulations, standards, conformity assessment procedures."[145]

Although such standards marked as negative may facilitate trade by streamlining regulation, they are more likely to reflect a greater degree of the political compromises inherent in international negotiations.[146] Moreover, international standards are less likely to account for the specific conditions within countries—or even continents.

Canada and Mexico certainly have a legitimate interest in the drafting and enforcement of U.S. regulations. But that interest should not accord them the very same status as citizens. The federal government must answer to Americans and put the interests of America first. In many cases, that means crafting rules that will facilitate rather than inhibit trade. But there will likely be circumstances in which trade effects would be a secondary consideration, and the USMCA should not require the United States to effectively forfeit its sovereignty.

Chapter 12: Sectoral Annexes

Annex 12-D: Energy Performance Standards

The agreement also contains an annex (12-D) that includes language about energy performance standards, which promotes voluntary energy efficiency measures and states that the parties shall cooperate on enhancing regulatory compatibility. Voluntary measures could easily become mandatory measures. Enhancing regulatory compatibility may be beneficial to bigger industries who only have to adhere to one standard, but the measures are anti-consumer. They restrict choice and nudge households and businesses into behaviors preferred by government regulators. Congress and the Administration should eliminate the current standards that exist, not encourage their use through trade deals.

Annexes 12-E: Medical Devices and 12-F: Pharmaceuticals

Annexes 12-E and 12-F address the regulation and marketing authorization of medical devices and pharmaceuticals (respectively) by the three countries. Because of the nature of these products, most national governments have special regulatory regimes governing their marketing, sale, and manufacture. Those regulatory regimes are intended to ensure that the products are safe and effective (relative to the medical conditions they are intended to treat) for patients.

Several provisions of these Annexes are helpful to ensuring that national product regulation of medical devices and pharmaceuticals is not used as cover for creating trade barriers. For instance, articles 12.E.5-1 and 12.F.5-1 state that each country "shall ensure" that in regulating the safety, effectiveness, or quality of medical devices or pharmaceuticals, products imported from a signatory country are not treated less favorably than either products imported from a non-signatory country or domestic products.[147] Similarly, articles 12.E.6-5 and 12.F.6-8 specify that signatories may not condition marketing authorization for a product on the product receiving such authorization from the country in which it is manufactured.[148] That means, for example, that in the case of a drug manufactured in Ireland, Canada could not require the manufacturer to first get approval in Ireland before permitting the drug to be sold in Canada.

In addition to avoiding potential trade barriers, some of the provisions in these annexes could also reduce regulatory burdens, thus making it generally easier and less costly for industry to bring products to market. For instance, in article 12.E.4-3 the three countries agree to recognize audits of medical device manufacturers' quality management systems conducted by authorized auditing organizations, "in accordance with the Medical Device Single Audit Program (MDSAP)."[149] Also, under articles 12.E.6-6 and 12.F.6-9, "[a] Party may accept a prior marketing authorization that is issued by another regulatory authority as evidence that a [medical device/pharmaceutical product] meets its requirements."[150] It is worth noting that this provision would include product approvals by regulators outside of the three parties, such as regulators in European countries.

Chapter 13: Government Procurement

This chapter details the scope of access to government procurement for the party countries, which was previously addressed in Chapter 10 of NAFTA.[151] Allowing access to government procurement, or purchases made by federal, state, and local governments, allows for greater competition in these purchases and the potential for better prices. Ultimately, taxpayers in the respective country are paying for government purchases, and allowing additional entities to bid on contracts can help taxpayer dollars to be used more efficiently. Chapter 13 is very similar to NAFTA, however, many of the updates or new aspects of the chapter are nearly identical to the Trans-Pacific Partnership.

Article 13.2: Scope

Paragraph 3 of the article on scope states that "this chapter applies only as between Mexico and the United States. Accordingly, for the purposes of this chapter, "party" or "parties" means Mexico or the United States, singly or collectively."[152] Due to this paragraph, Canada is not party to the USMCA agreements on government procurement. Procurement access between the U.S. and Canada will be subject to the World Trade Organization Government Procurement Agreement (WTO GPA) under this change. As a result, "U.S. firms [sic] access to Canadian procurement will be slightly reduced" and the ability to bid on new services in Canada will be limited to "the procurement of services that it lists" in the WTO GPA, according to former procurement negotiator Jena Heilman Grier.[153] Procurement access between Canada and Mexico will be covered by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the agreement between 11 trans-pacific nations that replaced the Trans-Pacific Partnership after the U.S. pulled out.[154]

This is a missed opportunity for the United States, as Mexican contractors will likely have greater access to the Canadian procurement market than American contractors. Leaving Canada out of the procurement chapter could also have negative consequences for American taxpayers due to the decrease in competition from Canadian bids.

Article 13.3: Exceptions

This article lists four exceptions to the agreements made regarding government procurement access between the parties. Those exceptions are: protection of "public morals, order or safety," "human, animal or plant life or health," "intellectual property," and goods or services "of a person with disabilities, of philanthropic or not-for-profit institutions, or of prison labor."[155] These exceptions are consistent with Chapter 10 of NAFTA, but a new paragraph was added to clarify that the second exception "includes environmental measures necessary to protect human, animal, or plant life or health."[156] Environmental issues should not be used as a scapegoat for allowing access to government procurement.

Article 13.4: General Principles

The principles of national treatment and non-discrimination are reinforced in this section. This section is very similar to NAFTA, but some modernization occurred through the addition of a paragraph regarding the "use of electronic means." Paragraph seven states "the parties shall seek to provide opportunities for covered procurement to be undertaken through electronic means, including for the publication of procurement information, notices and tender documentation, and for the receipt of tenders."[157]

Annex 13-A: Schedules of Mexico and the United States

Section A of each schedule sets the contract thresholds for procurement between the United States and Mexico. The threshold amounts are set to be adjusted for inflation, but there are dollar amount limitations for total contracts in some areas. For most agencies of the respective federal government agencies, the thresholds are set at $80,317 for goods and services and $10,441,216 for construction services.[158] These thresholds are consistent with the most recent increases set under NAFTA. For the United States, the access in this schedule is equivalent to the parameters of the Buy American Act and other various federal laws pertaining to limits on government procurement.[159]

Other agencies and government organizations are subject to higher thresholds for procurement of $401,584 for goods and services and $12,851,327 for construction services.[160] These thresholds are also consistent with the most recent increases set under NAFTA. For the U.S. there are limitations to procurement in many areas, including services in research and development, some telecommunications, ships, utilities, and dredging.[161] Mexico is also only allowed access to six non-federal government entities.[162]

Mexico allows access to other agencies and organizations at these higher thresholds, including airports, roads and bridges, electricity, water, forest, and Mexico's state-owned Petróleos Mexicanos (PEMEX).[163] Access to PEMEX procurement, however, is limited. Mexico also limits access for procurement in some services, including research and development, engineering for restoration of historical sites, some telecommunications, health and social services, financial services, and utilities.[164]

Chapter 14: Investment

Chapter 14 of the USMCA[165] replaces Chapter 11 of NAFTA.[166] For the most part, Chapter 14 of the USMCA retains some of the protections for foreign investment that were included in Chapter 11 of NAFTA. The major change is that provisions for investor-State dispute settlement (ISDS) are drastically reduced, as the provisions only apply to certain sectors in Mexico. The USMCA eliminates ISDS protections for foreign investment in Canada. As Simon Lester of Cato has observed, NAFTA was the first trade agreement to incorporate investor protections.[167] ISDS has enjoyed strong bipartisan support in Congress. The Trump Administration, however, has voiced skepticism about ISDS.[168]

Annex 14-D: Chinese Investors Excluded from ISDS ⬇

Article 1 of Annex 14-D of the USMCA,[169] excludes claimants that are "owned or controlled by a person of a non-Annex Party that, on the date of signature of this Agreement, the other Annex Party has determined to be a non-market economy for purposes of its trade remedy laws and with which no Party has a free trade agreement." This provision is clearly aimed at excluding Chinese-owned or controlled firms or persons in the U.S. or Mexico from using the ISDS process. On October 26, 2017, the U.S. Department of Commerce's International Trade Administration published a 200-page memorandum that concluded "that China is a non-market economy (NME) country because it does not operate sufficiently on market principles to permit the use of Chinese prices and costs for purposes of the Department's antidumping analysis."[170]

Annexes 14-D and 14–E: Canada Excluded from ISDS — to ⬇

The biggest change to the NAFTA ISDS provision is that, under Chapter 14 of the USMCA, Canada is excluded. ISDS will be available only to U.S. and Mexican investors with regard to their investments in each other's countries. Also, the ISDS provisions under USMCA with regard to Mexico are not as all-encompassing as they were under NAFTA.

ISDS provisions in USMCA are limited to investments in oil and gas, power generation, telecommunications, transportation, infrastructure, and other listed sectors that have a contract with the central government of Mexico (Annex 14-E-6 (b) "covered sectors"). Locking in the legal framework of ISDS protection and keeping Mexican hydrocarbons open to foreign investment will strengthen American companies' commitment in Mexico. However, the ISDS language should be strengthened. Midstream and downstream operators, such as refining, distribution and infrastructure companies, as well as renewable energy companies, and any other energy company that does not hold contracts explicitly with the central government, would not be provided with ISDS protection.

By limiting ISDS to this narrow list of sectors, the USMCA is determining which types of investment are allowed to succeed in Mexico and which are not. Heritage Foundation experts have long advocated for the inclusion of ISDS protections in trade agreements. A neutral and independent ISDS arbitration process ensures that Americans are guaranteed fair treatment, an especially important consideration for investments in developing countries. Unlike Canada, Mexico is still a developing country. As such, and as The Heritage Foundation's *Index of Economic Freedom* reports every year,[171] robust and transparent rule of law in Mexico is still a work in progress. In fact, Mexico has made relatively little progress to strengthen rule of law in the 25 years since Transparency International began its annual Corruption Perceptions Index in 1995.[172]

ISDS also provides access to binding arbitration for investors from other countries who are dissatisfied with the relief available to them in U.S. courts.[173] While the retention of ISDS provisions with regard to some U.S. investments in Mexico is an important and positive element of the USMCA, ISDS protection should be extended to all investments in Mexico. Chapter 14 should also extend ISDS protection to all investments in Canada.

Chapter 15: Cross-Border Trade in Services

Chapter 15 of the USMCA addresses the processes for trading services between the United States, Canada, and Mexico. This was previously Chapter 12, Part 5 of NAFTA. A few areas are the same: scope, national treatment, and MFN treatment. The differences lie in modernization, expanding market access for labor in the services industry, and cultural protections. This chapter does not cover the treatment of financial services, government procurement, and services supplied in the exercise of government authority, subsidies, or air services.

Article 15.5: Market Access

This article requires that there should be no limitations imposed on the number of service suppliers, the total value of service transactions, the total number of service operations or the total quantity of service output, the total number of natural persons that may be employed in a particular service sector or by a quota for the number of people a supplier may employ or the requirement of an economic needs test. Parties also cannot restrict or require specific types of legal entity or joint venture through which a service supplier must supply a service.[174]

Article 15.9: Recognition

The allowance for the Parties to recognize authorization, licensing, or certification of a service supplier is a positive provision. The agreement states that any "Party may recognize any education or experience obtained, requirements met, or licenses or certifications granted, in the territory of another Party, or non-Party."[175] If a Party does recognize the education, requirements met, or licenses or certifications granted, that Party may do so autonomously or by agreement or arrangement, and does not have to accord the recognition in territory of any other Party.[176]

This is expanded upon in Annex 15-C (Professional Services). The idea of recognition is positive and will make movement of labor and trade facilitation in professional services easier. However, since the recognition is not a requirement of the agreement, it is unclear to what extent it will be utilized. Therefore its value is ambiguous.

Article 15.12: Payments and transfers

This article addresses the financial transaction aspect that relates to cross-border supply of services. Each Party must "permit all transfers and payments that related to the cross-border supply of services to be made freely and without delay into and out of its territory."[177] It is also required that the transfers and payments "be made in a freely usable currency at the market rate of exchange that prevails at the time of transfer." It is unclear what "freely usable currency" means. It could be assumed that payments will be made the same way that trade in goods is and that pesos, dollars, and Canadian dollars are all freely usable currencies.

It also provides protections for certain legal issues. A Party may prevent or delay a transfer or payment through the "application of its laws that relate to (a) bankruptcy, insolvency, or the protection of the rights of creditors; (b) issuing, trading, or dealing in securities or derivatives; (c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; (d) criminal or penal offenses; or (e) ensuring compliance with orders or judgments in judicial or administrative proceedings."[178]

This is important for sovereignty, which creates certainty about which laws apply in particular legal cases. Essentially, it provides protections for citizens or firms to not have to pay for services if they are not required to under the law of the appropriate party. It seems that this will depend on the origination of the payment or transfer.

Annex 15-A: Delivery Services

The Annex does not apply to maritime, internal waterway, air, rail, or road transportation, including cabotage, and focuses on postal delivery services.[179] It seems to apply to the national postal services of the Parties as it mainly discusses postal monopolies, which are defined as "the exclusive right accorded to an operator within a Party's territory to supply specified delivery services pursuant to a measure of the Party."[180] Parties are not permitted to use revenues derived from the supply of postal services to cross-subsidize the supply of a delivery service not covered by the postal monopoly.

There are also provisions that prevent discrimination and require transparency, including provisions on abuse of monopoly power with respect to the supply of delivery services outside of the postal monopoly, which must comply with Article 14.4 of the Investment chapter, Articles 15.3 and 15.5 of this chapter. It seems that the purpose of this Annex is to ensure that Parties cannot require the use of their postal services when trading. This is a positive rule as it reduces the potential barriers that could be imposed by a national postal authority, which should help foster trade facilitation.

Annex 15-B: Committee on Transportation Services

The creation of a Committee for transportation services is required and lays out the powers and purpose of the committee. It is unclear how this committee will facilitate trade. It is possible that value could be added as the committee will be specialized and at a somewhat more local level than a Party government or an international body. However, it is also possible that this committee will be unproductive and a waste of resources.

Annex 15-D: Simultaneous Substitution

This Annex states that Canada must rescind its Broadcasting Regulatory Policy CRTC 2016-334 and Broadcasting Order CRTC 2016-335. The rule had prohibited Canadian cable and satellite companies showing the Super Bowl from blocking U.S. television signals transmitting the Super Bowl.[181] The aim of removing the rule is cultural protection for Canada.

Simultaneous substitution of U.S. signals was last permitted in 2016. Simultaneous substitution requires cable television, and direct broadcast satellite, and it requires IPTV and MMDS television distribution companies in Canada to distribute the signal of a local or regional over-the-air station in place of the signal of a foreign or non-local television station when the two stations are broadcasting the same programming simultaneously. The equivalent U.S. practice is called syndicate exclusivity.

Rescinding the rule will allow Canadians to reach their consumers, but "Canada may not accord the program treatment less favorable than the treatment accorded to other programs originating in the United States retransmitted in Canada."[182] In theory, this removal will not be exactly like simultaneous substitution as all programs must be treated equally. It could also mean that Canada could completely drop simultaneous substitution but not for an individual program.[183]

Bell Media, a Canadian mass media subsidiary of Bell Canada Enterprises, and the NFL were originally critics of the CRTC ruling and appealed against the decision in 2017. CRTC argued that "although it is the NFL's right, as a copyright holder, to license its program to Bell, it is not the NFL's right that the program will be simultaneously substituted—this is a benefit conferred by Canada's broadcasting regulatory regime."[184]

The rescinding of the ruling in the USMCA means that Canada can now use simultaneous substitution, which will allow the NFL to sell licenses to Bell Media so that the Super Bowl can be shown on CTV but American ads will be blocked in favor of local or regional advertisements. Allowing the Super Bowl ads to play did not facilitate trade directly, but it is possible that it facilitated trade by exposing Canadians to more American products, which increases their choice.

Rescinding the ruling does not facilitate trade. It may create more competition within the Canadian market. The allowance for the NFL to license to Bell Media seems to be positive, but overall the ruling and the rescinding of the ruling is not supportive of trade. The U.S. and Canada should perhaps address rules that make it easier for U.S. companies to sell advertisements in Canada and vice versa in order to facilitate trade so that consumers in both countries can benefit from a greater variety of goods and services.

However, the other provision of Annex 15-D states that Canada must allow U.S. teleshopping services to enter the Canadian market and be delivered by Canadian cable, satellite, and IPTV providers without restriction. [185] This seems to be positive as it will open up the market in this area between the United States and Canada and will expose Canadians to a greater variety of goods.

Annex 15-E: Mexico's Cultural Exceptions

Mexico relies on its cultural industries and negotiated for a cultural exceptions annex similar to Canada's. This Annex addresses broadcasting (radio and free-to-air television), newspaper publishing, cinema services, and audiovisual services.

Mexico set out provisions that allow foreign investment up to 49 percent in concessionaire enterprises providing broadcasting services and sole concessions and frequency band concessions may only be granted to Mexican nationals and enterprises.[186] Concessions will also be granted for indigenous social use in order "to promote, develop and preserve languages, culture, knowledge, traditions, identity and their internal rules that, under principle of gender equality, enable the integration of indigenous women in the accomplishment of the purposes for which the concession is granted."[187] It is also forbidden that a concession, facility, auxiliary services, offices or accessories, or property be transferred in any way to any foreign government or state.[188]

Similarly to Canada, Mexico requires that local and national programming be given priority over foreign programming, and more time covered by Mexicans must be shown.

With regard to newspaper and cinema services, foreign ownership is only allowed up to 49 percent for newspaper, and for cinema services, exhibitors may only "reserve 10 percent of the total screen time to the projection of national films."[189]

The limitations on investment do not facilitate trade and create burdensome rules for businesses and investors. Individuals and businesses should be granted the freedom to invest in what they see as beneficial. The attractiveness of a country for investors is a sign of the health of an economy. Foreign direct investment is a driving factor in increasing standards of living.

Restricting the amount of investment could hurt Mexico's economy since it reduces opportunities and creates uncertainty. This could harm Mexican citizens since investment is important for development.

Mexico will only make limited commitments with respect to the market access obligation for audiovisual services in order to promote and protect the values of the nation.

The cultural provisions of Canada and Mexico limit market access, which does not facilitate trade. It harms businesses and consumers in all three nations.

Chapter 16: Temporary Entry for Business Persons

The USMCA[190] appears to make no significant changes to NAFTA's chapter 16[191] on temporary entry for business persons. Under USMCA (and NAFTA), "temporary entry means entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence."[192]

There are four categories of business people covered under the Chapter: business visitors, traders and investors, intra-company transferees, and professionals. Regarding the professional category, Canadian and Mexican citizens (not permanent residents) will still be able to enter the United States in order to do professional work. U.S. citizens will be able to do professional work in Canada and Mexico.

NAFTA created a new immigration classification that allows citizens to work for up to three years in the host country, and there is no limit on how often this nonimmigration status can be renewed. In the United States, this classification is called the Trade NAFTA[193] (TN) nonimmigrant classification.

As explained by the U.S. Citizenship and Immigration Services, an applicant seeking to work in the U.S. as a TN nonimmigrant must meet the following criteria: (1) The individual is a citizen of Canada or Mexico; (2) The profession qualifies under the regulations; (3) The position in the United States requires a NAFTA professional; (3) The individual has a prearranged full-time or part-time job with a U.S. employer (but not self-employment); and (4) The individual has the qualifications to practice in the profession in question.[194]

Under NAFTA, there are more than 60 types of professionals that are eligible, ranging from accountants, economists, and librarians to land surveyors, nutritionists, and zoologists.[195] The USMCA does not change this list of eligible professionals. It does not expand the list to cover professionals that did not exist in 1994, as reportedly Canada and organizations such as the U.S. Chamber of Commerce had hoped.[196]

Chapter 17: Financial Services

Chapter 17 of the USMCA articulates how the Parties of the agreement may regulate financial institutions of another Party, investors and investments of other Parties in financial institutions within a Party, and cross-border trade in financial services. This area was previously addressed in Chapter 14 of NAFTA. The United States economy benefits greatly from foreign financial institutions and foreign investors choosing to do business here. Although the USMCA maintains a welcoming stance towards the services and capital from within the trade bloc, some unwarranted restrictions continue to persist within the financial services sector. Unfortunately, the USMCA does little to winnow these restrictions.

Heritage Foundation experts have consistently opposed protectionism and explained the economic benefits of free trade. The USMCA ensures that the three member Parties will maintain a heightened level of openness in the financial services sector. At the same time, the USMCA appears to do nothing to further open the sector to competition. The continued ability to restrict access to cross-border financial services and perpetuate government favoritism is a drag on innovation and cost efficiency.

Article 17.2: Scope ↓ to —

The USMCA financial services provisions broadly cover financial institutions, investors in financial institutions, investments in financial institutions, and cross-border trade in financial services investments. However, some favoritism of domestic financial institutions by the Parties is still permitted. Most importantly, Chapter 17's numerous provisions related to national treatment and market access do not apply to government supported loans, guarantees, insurance, and other subsidies or grants directed to domestic investors or institutions. Furthermore, these provisions do not apply to government procurement of financial services.[197] Allowing this favoritism stymies competition and innovation while also resulting in higher costs for the consumers of all Parties. A select few entrenched interests within each country benefit at the expense of all others.

Article 17.3: National Treatment ↑

USMCA ensures that investors, investments, and financial institutions of each Party are treated in a manner "no less favorable" than that accorded to the Parties' domestic counterparts in the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions, and investments in financial institutions in its territory.

Article 17.4: Most-Favored-Nation Treatment ↑

USMCA ensures that investors, investments, and financial institutions of each Party are treated "no less favorabl[y]" than those of other nations in the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions, and investments in financial institutions in its territory.[198]

Article 17.5: Market Access ↑ and ↓

Market Access Limits Are Generally Prohibited ↑

Member Parties cannot impose market access limits on cross-border financial services providers or investors (such as quotas on the number of institutions, number of employees, or total value of transactions or assets).[199]

The guarantees of investor, investment, and institutional treatment by Member Parties apply to cross-border financial services listed in Annex 17-A.[200] For situations and services not listed in this Annex, the agreement does not require Member Parties to permit cross-border trade or the solicitation of it.[201] However, once a Party permits the business of cross-border financial services, the national treatment and market access provisions do apply even if in instances not covered by the Annex.[202]

Financial services related to insurance (such as insurance for maritime shipping and commercial aviation, space launching and freight, and goods in international transit) along with a number of banking and other financial services are precluded from protectionist policies by Annex 17-A.[203]

Protectionism of a Limited Nature Is Permissible for Cross-border Financial Services: ↓

Both the United States and Canada appear to be permitted to deny access to insurance of risks other than those listed in the Annex.[204] Mexico retains the ability to enact protectionist policies related to insurance only if a domestic insurance company already authorized to operate in Mexico is "able or deems convenient to enter into such insurance proposed to it.[205]

Unlike the NAFTA agreement, the USMCA does not contain a provision ensuring that domestic persons be permitted to purchase these cross-border services so long as the services are located elsewhere.[206] NAFTA clearly stated that "[e]ach Party shall permit persons located in its territory, and its nationals wherever located, to purchase financial services from cross-border financial service providers of another Party located in the territory of that other Party or of another Party. This obligation does not require a Party to permit such providers to do business or solicit in its territory." The revised agreement does not clearly obligate the Parties to permit such cross-border purchases of financial services.

The limitation of market participants is never a good thing. More competition in a marketplace leads to greater efficiency and a lower price for the consumer. The USMCA fails to contain the same provision that NAFTA had permitting foreign financial service providers to participate in the markets of all three countries. Failure to include this provision means that there are potentially less competitors in the market.

Chapter 18: Telecommunications

Chapter 18 of the USMCA covers the telecommunications industry, a market previously governed under Chapter 13 of NAFTA.[207] Much of the USMCA chapter is the same as NAFTA. However, the USMCA includes a number of provisions meant to ensure that dominant telecommunications firms do not use their position to keep international competitors out of their market.

Reportedly, the major concern of negotiators was the dominant position held by Mexico's Movil SAB (owned by billionaire Carlos Slim). AT&T has been challenging Movil in recent years, investing large amounts into wireless infrastructure in Mexico. Regulations intended to limit Movil's ability to keep competitors such as AT&T out of the Mexican market were recently overturned by the Mexican Supreme Court. The original negotiating position for the U.S. for the USMCA was to freeze in place all existing competitive restrictions on Movil. The eventual compromise was to include such restrictions in USMCA in general terms, applicable to providers from all parties, not just Mexico.

Article 18.6: Competitive Safeguards

This article requires the Parties to maintain "appropriate" measures to prevent anti-competitive activity such as cross-subsidization. These requirements may be appropriate in some telecommunications markets, especially those which enjoyed government regulatory benefits and still enjoy a large amount of market power as a result of this government favoritism. Provisions such as the call in Article 18.6 for intervention only when "appropriate" can be pro-consumer, depending on how "appropriate" is defined and determined. [208]

Article 18.7: Resale and Article 18.8: Unbundling of Network Elements

Article 18.7 bans unreasonable conditions on resale of telecommunications services to competitors and Article 18.8 requires providers to offer access to its network on an "unbundled" (piece-by-piece) basis.[209] These articles do not permit case-by-case analysis and risk discouraging competition and investment, as potential competitors choose to "rent" telecommunications infrastructure from existing providers on an unbundled basis rather than build their own facilities. Many of the provisions—including the requirement in Article 18-8 that elements of a network be made available to competitors on an unbundled basis—were part of the United States' Telecommunications Act of 1996[210] but were not part of NAFTA, which was adopted in 1994.

Article 18.9: Interconnection with Major Suppliers

This article requires that all providers offer interconnection to their network at reasonable rates.[211] U.S. Courts long ago invalidated comprehensive forced unbundling rules written by the Federal Communications Commission.[212] There is no reason to now impose them universally across North America. The consensus (though not universally held) view among economists is that interconnection mandates may be necessary even in strongly competitive and otherwise well-functioning markets.

Article 18.16: Approaches to Regulation

Article 18.16 explicitly declares that market forces may be more appropriate than regulation in setting telecommunications.[213] That is a seemingly obvious point, but one that is not heard frequently among international regulators.

Article 18.17: Telecommunications Regulatory Bodies

This article requires that Parties keep their regulatory bodies separate from the regulated provider.[214] It was once common for regulation to be determined and enforced by the regulated entity itself, and the system is still in use in many countries today.

Article 18.18: State-Owned Enterprises

Article 18.18 prohibits treating government-owned firms more favorably than privately-owned telecommunications service providers.[215]

Chapter 19: Digital Trade

Chapter 19 of the USMCA addresses digital trade. This is a new chapter aimed at modernizing NAFTA. The chapter includes certainty in electronic contracting, the validity of electronic signatures, non-discriminatory treatment of digital services, restrictions on imposing customs duties on digital products transmitted electronically, rules associated with data, and data transfers across borders.[216]

Article 19.2: Scope and General Provisions

This article sets up the scope and general provisions of digital trade between the United States, Mexico, and Canada. The digital trade chapter does not apply to government procurement, or "except for Article 19.8 (Open Government Data), to information held or processed by or on behalf of a Party, or measures related to that information, including measures related to its collection."[217] This chapter should increase certainty for online trade and any measures that affect the supply of a service "delivered or performed electronically are subject to Chapter 14 (Investment), Chapter 15 (Cross-Border Trade in Services), and Chapter 17 (Financial Services)."[218]

Article 19.3: Customs Duties

Parties cannot "impose customs duties fees, or other charges on or in connection with the importation or exportation of digital products transmitted electronically."[219] This includes, e-books, videos, music, software, and games.[220] This increases the ease in facilitating digital trade, but the imposition of customs duties fees does not preclude a Party from imposing internal taxes, fees, or other charges on digital products transmitted electronically.[221] The requirement that customs duties fees cannot be imposed on digital products is positive and will increase access to digitally-traded goods and services.

Article 19.4: Non-Discriminatory Treatment of Digital Products

Discrimination or less favorable treatment given to digital products created, produced, contracted for, commissioned, or first made available on commercial terms in another territory, is not permitted.[222] However, this article does not apply to subsidies or grants, meaning that parties can discriminate by providing subsidies, grants, government-supported loans, guarantees, and insurance. It is good that the language requires non-discrimination as this will help facilitate trade, but with subsidies and the cultural exceptions in Chapter 15 (Cross-Border Trade in Services), it is unclear how effective it will be.

Article 19.6: Electronic Authentication and Electronic Signatures

Parties are required to accept legal validity of a signature in electronic form, ensuring that suppliers will not be restricted in their use of electronic authentication or electronic signatures.[223] This will be instrumental in facilitating digital transactions, particularly for online trade and for traders who will now be able to fill out their paperwork online as described in Article 19.9 (Paperless Trading) and Chapter 15 (Cross-Border Trade in Services).

Article 19.7: Online Consumer Protection

This article states that transparent and effective measures are imperative for protecting consumers from fraudulent and deceptive commercial activities as described in Article 21.4.2 (Competition Policy—Consumer Protection).[224] It guarantees that enforceable consumer protections, including for privacy and unsolicited communications, apply to digital products and online commercial activities.[225] The article also states that each "Party shall adopt or maintain consumer protection laws to proscribe fraudulent and deceptive activities."[226] It is not clear how proceedings would occur should legal action be taken. Consumer protection is important, but consumer protection from the competition policy chapter is likely adequate for this.

Article 19.8: Personal Information Protection

Consumer protection is expanded upon by extending protection to personal information. The article specifically addresses protection of personal information of users of digital trade. It requires that each Party adopt or maintain a legal framework that provides protection for such information and suggests using the APEC Privacy Framework and the OECD Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data. It is also stated that "each Party should encourage the development of mechanisms to promote compatibility between these different regimes."[227] This should make the process of transferring and protecting data more efficient.

Those concerned about privacy may argue that it is a downside that the article does not establish a mandatory minimum of projections but there is a footnote that states that enforcing voluntary undertakings of enterprises related to privacy is sufficient to meet the obligation. It should also be noted that the article does not preclude any of the Parties from adopting more strict privacy protections than stated in the agreement.[228] The ability to transfer data across borders will be positive for trade facilitation as it will allow business to tailor their products to the citizens of each country. Privacy concerns are warranted but it is important that policies do not harm firms in a way that will deny consumers opportunities.[229]

Article 19.10: Principles on Access to and Use of the Internet for Digital Trade

Unlike TPP, the access and use of the internet provision does not specifically reference net neutrality. It requires that devices cannot harm the network, and consumers in the territories must have the ability to access and use services and applications on the Internet and access information on the network management practices of the Internet access service supplier.[230] This allows for more freedom than a net neutrality provision. A net neutrality provision would impose unnecessary and burdensome costs that would disincentivize investment and development of networks and services, which would cut consumers off from better services that would result from innovation. However, this article does impose some elements of net neutrality regulation, such as 19.10.a which states "access and use services and applications of a consumer's choice available on the Internet, subject to reasonable network management."[231] The freedom of internet service providers (ISPs) gives everyday consumers more options for plans that best suit their needs.[232] No ISP has ever announced plans to adopt a "fast lane" pricing system and the greater market access created through trade between the United States, Canada, and Mexico will allow for the development of innovative service plans that will promote competition and benefit consumers.[233]

Article 19.11: Cross-Border Transfer of Information by Electronic Means

The restriction of the transfer of data across borders is not permitted. The article states that, "No Party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means if this activity is for the conduct of the business of a covered person."[234]

However, nothing in the Article can prevent a party from adopting a measure that is inconsistent with that paragraph in order to achieve a public policy objective as long as it is not applied in a manner that allows for unjustifiable discrimination, acts as a disguised restriction on trade, does not impose restrictions on transfers of information more than necessary to achieve the policy objective. As stated in the footnote, "A measure does not meet the conditions of this paragraph if it accords different treatment to data transfers solely on the basis that they are cross-border in a manner that modifies the conditions of competition to the detriment of service suppliers of another Party."[235] As in the EU, the allowance for free transference of data has brought up many privacy issues but it is an important aspect of facilitating trade, and by strictly banning data transfer, consumers and producers incur greater costs in the form of higher prices and less choice.

Article 19.12: Location of Computing Facilities

This article addresses data localization. It simply states that, "No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory."[236] Data localization is a difficult issue when the objective is to facilitate trade as it increases costs to businesses and requires that they can only work in a country "if they build out or lease costly separate data infrastructures in that country."[237] This limits access to foreign services and acts as a protectionist measure in an age in which the transfer of data is important for day-to-day business. There is concern from Canadians, including the Canadian provinces of British Columbia and Nova Scotia, which have strict data localization rules to secure sensitive health information. [238] However, it is not more likely that, "Canadian citizens' data can be better safeguarded in Canada, Mexican citizens' data in Mexico, and U.S. citizens' data in the United States."[239] In a study performed by Researchers Martina Ferracane and Erik van der Marcel, it was found that if countries lifted their restrictions on the cross-border flow of data, the imports of services would rise on average by five percent across all countries."[240]

Article 19.15: Cybersecurity

This article states that each Party recognizes the threats to digital trade caused by cybersecurity breaches and that each Party should build national capabilities to overcome those threats should they come to fruition. The article states that Parties should undertake "risk-based" measures and favor "self-policing according to 'consensus-based standards' over more prescriptive regulations."[241] This provision merely recognizes the threat to digital trade and does not require action, so it is unlikely it will have an impact.

Article 19.16: Source Code

Article 19.16 prevents parties from requiring "the transfer of, or access to, source code of software owned by a person of another Party, or to an algorithm expressed in that source code, as a condition for the import, distribution, sale or use of that software, or of products containing that software, in its territory." Similarly to TPP, this article does not allow the Parties to require the disclosure of source code and it bars "governments from requiring the disclosure of 'algorithms expressed in that source code' unless that disclosure was required by a regulatory body for a 'specific investigation, inspection, examination enforcement action or proceeding.'"[242] The footnote states, "Such disclosure shall not be construed to negatively affect the software source code's status as a trade secret, if such status is claimed by the trade secret owner." These protections will incentivize innovation in data as "[they] reduce[] the risk of Parties imposing mandates for algorithmic transparency on AI systems developed in other countries thereby exposing them to considerable intellectual property risks."[243] Algorithmic transparency requirements could be used to force foreign companies to reveal intellectual property that could help firms in the domestic country.[244] The article does allow for algorithmic mandates for foreign and domestic firms but it prohibits the use of it as a protectionist measure.[245]

Article 19.17: Interactive Computer Services

Interactive Computer service is defined as "any system or service that provides or enables electronic access by multiple users to a computer server."[246] This article aims to provide protection from regulation by the Parties based purely on content. The Parties are not permitted to impose "liability on a supplier or user of an interactive computer service on account of: (a) any action voluntarily taken in good faith by the supplier or user to restrict access to or availability of material that is accessible or available through its supply or use of the interactive computer services and that the supplier or user considers to be harmful or objectionable; or (b) any action taken to enable or make available the technical means that enable an information content provider or other persons to restrict access to material that it considers to be harmful or objectionable."[247] This safe harbor will allow for interactive computer services to tailor their content to their users, which will increase the quality of services for consumers.[248]

Annex 19-A

This Annex addresses rules that apply to Mexico only and states that Article 19.17 will not apply to Mexico until three years after the USMCA has been in force and that Article 19.17 is subject to "Article 32.1 (General Exceptions), which, among other things, provides that, for purposes of Chapter 19, the exception for measures necessary to protect public morals pursuant to paragraph (a) of Article XIV of GATS is incorporated into and made part of this Agreement, mutatis mutandis."[249]

Mexico is required to enact new legislation to comply as it does not have much jurisprudence with respect to interactive computer services.[250] This legislative change has the potential for increased innovation in Mexico resulting in "new Mexican-grown startups as well as open[ing] up Mexico to more relocation and job creation by non-Mexican Internet companies."[251]

The Annex also mentioned the necessity of taking measures that protect public morals. In particular, it states: "The Parties agree that measures necessary to protect against online sex trafficking, sexual exploitation of children, and prostitution, such as Public Law 115-164, the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017," which amends the Communications Act of 1934, and any relevant provisions of Ley General para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas y para la Protección y Asistencia a las Víctimas de estos delitos, are measures necessary to protect public morals."[252] It is unclear how effective this measure will be, particularly as FOSTA was not needed "to redress sex trafficking or the sexual exploitation of children," and if it will be abused.

Chapter 20: Intellectual Property Rights

This chapter creates a legal framework of minimum standards for the protection and enforcement of intellectual property rights between the United States, Mexico, and Canada. It builds on existing international agreements that address IP such as the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and treaties administered by the World Intellectual Property Organization (WIPO).[253]

The chapter is comprised of obligations on copyright and related rights, trademarks, geographical indications, industrial designs, patents, data protection for pharmaceutical and agricultural chemical products, trade secrets, and IP rights enforcement.[254] Overall, this chapter provides many protections for intellectual property that will promote innovation in North America and will afford businesses and individuals protective rights that they would receive in the United States.

Section A: General Provisions

Article 20.8 addresses national treatment and states that "[i]n respect of all categories of intellectual property covered in this Chapter, each Party shall accord to nationals of another Party treatment no less favorable than it accords to its own nationals with regard to the protection of intellectual property rights."[255] This requires equal treatment across each country as their intellectual property right laws evolve.

Section B: Cooperation

This section creates an institutional framework for intellectual property cooperation, which under Article 20. 14 creates a committee to address infringement, border enforcement of IP rights, exchanging information on the value of trade secrets, procedural fairness in patent litigation, and the coordination of recognition and protection of geographical indicators.[256]

The Parties are required to commit to ratifying or acceding to different multilateral IP agreements. This includes: the Madrid Protocol and Singapore Treaty concerning trademarks; the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure dealing with deposit of microorganisms for the purpose of patent procedures; the 1991 Act of the International Convention for the Protection of New Varieties of Plants (UPOV 91); the WIPO Internet Treaties dealing with copyright and related rights; and the Brussels Convention on the distribution of program-carrying signals transmitted by satellite.[257] This should help enforce intellectual property protections, but the committee should be more representative and include investors, business owners, executives, and entrepreneurs instead of government representatives, exclusively.

Section C: Trademarks

This section addresses the protection of trademarks and is similar to the provisions included in TPP. The sections states that there must be protection against infringement upon the use of trademarks, like brand names and symbols, and sound and scent marks. Section A, Article 20. 7(2)(a) states that each party must ratify the Madrid Protocol, which is a treaty that allows trademark owners to register in any member countries with a single application.[258] The United States and Mexico are already Madrid Protocol members, and Canada is moving toward membership as part of their Trademarks Act, which will be enacted early 2019, so this will not have a significant effect.

Article 20.17 sets out rules for types of signs that can be registered as trademarks, and this provides favorable treatment for non-traditional trademarks including sounds and scents.[259] This will be important for certain industries such as perfume manufacturers but is unlikely to have a substantial economic or legal impact.[260]

The section also states rules and procedures that promote transparency and efficiency. Canada does not currently have a system that incorporates international trademark treaties but is undertaking reform, also as part of their Trademarks Act.[261]

Section E: Geographical Indications

Some products are identified by where they come from, such as Idaho potatoes or Champagne (a sparkling wine from the region in France). In the U.S., these geographic indications are generally treated as trademarks, which convey not just the geographic source of the product but other information such as quality.[262]

A conflict arises though when a geographic name for a product no longer communicates this geography to consumers but instead conveys the type of product. The U.S. Patent and Trademark Office, as explained by the Congressional Research Service, "does not protect geographic terms that are considered 'generic' or 'so widely used that consumers view it as designating a category of all of the goods/services of the same type, rather than as a geographic origin.'"[263]

In international trade, especially with Europe, there are difficulties for U.S. producers calling their products by their common names (i.e. generic names) because other countries think those names should be protected geographic indications.[264]

The Office of the United States Trade Representative's "Summary of Objectives for the NAFTA Renegotiation" listed this important objective: "Prevent the undermining of market access for U.S. products through the improper use of a country's system for protecting or recognizing geographical indications, including failing to ensure transparency and procedural fairness and protecting generic terms."[265]

The USMCA tries to address this problem[266] between the member countries and creates a framework that should help the U.S. influence how geographic indications are addressed in future trade agreements as opposed to Europe doing so through its restrictive approach.[267]

Some specific provisions include allowing interested persons to object to the protection of a geographic indication and allowing a country to refuse protection on various grounds, including when the geographic indication is the common name for the good within the country.[268] The USMCA also includes a section listing some factors that may be considered when determining whether a term is the common name for the good.

Section F, Subsection A: General Patents

Article 20. 36 sets out what can be patented. A party cannot "limit claims for new processes of using a known product to those that do not claim the use of the product as such."[269] This provides more freedom to entrepreneurs for products they want to patent.

This subsection includes requirements for patent term adjustment (Article 20.44) to compensate patent applicants for delays considered unreasonable when processing patent applications.[270] A similar provision to this was included in TPP but was suspended once the United States withdrew. This article provides for adjustment of the term of a patent to compensate for delays in issuance five years from the filing date or three years after the request of an examination, whichever is later.[271] This provides greater protection for those forced to wait longer for patent issuance but could complicate the determination of the expiration date of a patent.[272] The United States has such a policy already in place and Canada has been granted 4.5 years to make the necessary changes to domestic law and policy.

The exclusions from the determination of a delay include any that are not attributable directly to the patent office. This will require some clarification for what types of delays would be considered unreasonable. The agreement also does not give a specific maximum term for the extension of a patent term.[273] It is likely that this task would be given to the individual parties' intellectual property agencies. This would be more appropriate as they can better understand the needs of their citizens.

Section F, Subsection C: Measures Relating to Pharmaceutical Products

A biologic is defined as, "a product that is produced using biotechnology processes and that is, or, alternatively, contains, a virus, therapeutic serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product, protein, or analogous product, for use in human beings for the prevention, treatment, or cure of a disease or condition."[274] Patents cannot be used until the pharmaceutical is ready for market, so extensions are given based on unreasonable regulatory delays. This is intended to "protect[] the innovator manufacturer's undisclosed data concerning the safety and efficacy of a new pharmaceutical product such that a generic manufacturer cannot obtain market approval for a generic version of the product before the data protection term expires, if the generic relies on the undisclosed data."[275] In Article 20.49, Canada is required to extend the data protection term for biologics by an additional two years. The minimum standard of data protection is 10 years, which the United States exceeds with a term of 12 years. Currently, Canada's data protection law gives an 8 year term for data protection with an additional 6 months extension for pediatrics, which runs from the date of first marketing approval for new pharmaceutical products containing biologics or small molecule drugs.[276] The reason for this is that children are excluded from clinical trials, so the extension is given to encourage companies to take on risks to experiment on the biologic's effects on children without testing on them. A biologic cannot be applied to a previously considered biologic. Canada has been granted 5 years to implement the additional 2 year obligation into domestic law.

It is not required that Canada provide data protection for data "which has been generated for new indications/uses of approved drugs[,] [and] [n]ew small molecule drugs will continue to be entitled to only eight years of data protection."[277] It is also not clear whether the increased term will apply retroactively to previously approved biologic drug products, which means that those currently approved may not have as great protections as those approved once the law has been implemented.

Mexican law does not have data exclusivity for anything related to biologics or small molecule drugs. It is likely that Mexico will use recognition or a harmonization of standards for drugs that originate in the United States or Canada.

Section G: Industrial Designs

Article 20.54 gives a one year grace period from the filing date for disclosures of new industrial designs by the applicant of the design or by any person who has information from the design applicant.[278] Such disclosures will not prevent the issuance of an industrial design that was filed during the one year grace period. Protection for industrial designs is granted for at least 15 years. Canada has implemented amendments to their Industrial Design Act to incorporate new legislation that applies to the grace period for industrial designs.[279]

Section H: Copyright and Related Rights

Under Article 20.58 each Party will have the "ability to tailor the legal rights held by performers and producers of phonograms in broadcasts through analog transmissions and other non-interactive means."[280] It is required that any limitations of non-interactive transmissions should not discriminate against the right of the performer or producer of the phonograms to obtain fair payment.[281]

Article 20.63 gives a term for copyright protection that is no less than 70 years after the death of an author and "provides two additional for calculating a term of protection," if it is not based on the life of a natural person.[282] The United States is already compliant with this term, as of 1998 and the Copyright Term Extension Act.[283] Mexico's copyright term is over 100 years, making it compliant also.[284] Canada has been granted 2.5 years to implement these changes. If Canada makes it retroactive, then works that are around 50 years old "may not fall into the public domain for another 20 years or more."[285] Similar provisions will also apply to corporate copyrights.

Article 20.67 relates to electronic measures for protecting copyright. In particular, it includes technological protection measures (TPMs), e.g. digital locks, which create rules that make exceptions for good faith activities and listing specific non-infringing activities or circumstances.[286] Article 20.68 provides the protection of rights management information (RMI), e.g. digital watermarks, which is defined as "information that identifies a work, performance or phonogram, the author of the work, the performer of the performance or the producer of the phonogram; or the owner of any right in the work, performance or phonogram; information about the terms and conditions of the use of the work, performance or phonogram; or any numbers or codes that represent the information referred to in subparagraphs (a) and (b), if any of these items is attached to a copy of the work, performance or phonogram or appears in connection with the communication or making available of a work, performance or phonogram to the public."[287] This article also requires each Party to establish effective and suitable legal remedies for cases of misuse of RMI.[288]

Section I: Trade Secrets

This sections sets out provisions that relate to the protection of trade secrets and enforcement through civil and criminal measures. Article 20.71 requires that a party cannot set a limit on the term of trade secret protection. Article 20.76 offers guidance for the behavior of the judiciary on confidentiality in trade secret matters and prevents judges from disclosing information that is asserted to be a trade secret before permitting a litigant to make a submission under seal privately.[289] This is an important provision as it is essential a judge can determine if something is a trade secret, but the litigant must also be given confidentiality before a judge can release it to the public. This is important for the protection of trade secrets and so that the protection of trade secrets is not abused.

Article 20.77 states that the parties are not permitted to discourage or impede the voluntary licensing or transfer of trade secrets. This is an important freedom for businesses should they sell a company that is predicated on a trade secret and want to transfer the secret with the sale, for example.

It may be required that Canada criminalize the willful misappropriation of trade secret; this includes practices such as breach of contract, breach of confidence, and inducement to breach.[290] Such protection will be important for businesses that rely on a supply chain across all three countries as it will incentivize the protection of such secrets, which are important for promoting innovation.

Section J: Enforcement

Article 20.82 uses strong language for statutory damages for infringement of IP, which requires that damages be regarded as a deterrent and fully compensatory for any harm caused by infringement.[291]

This section provides a scheme for pre-established damages for trademark infringement. These damages should 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."[292] Currently, Canada does not have statutory damages under Canadian law for trademark infringement. The agreement permits customs officials to "take control of suspected counterfeit trademark or pirated copyright goods that are imported, ready for export, in-transit, or admitted into or exiting a free trade zone or bonded warehouse."[293] This may also be extended to allow customs officials to stop shipments that are passing through Canada that are suspected of holding counterfeit or pirated products.[294] Customs officials will also be allowed to destroy "suspected counterfeit trademark goods or pirated copyright goods" if it is determined that the goods are infringing and the Canadian Intellectual Property Office or a court would not be required to make a finding of infringement prior to destruction.[295] Although it is extremely positive that the agreement has implemented what will likely be effective rules of enforcement, not allowing for due process could cause problems down the line, defeating the aims of increasing efficiency. Allowing customs officials to destroy suspected counterfeit trademark goods or pirated copyright goods should disincentivize the black market, but for those wrongly accused, there is no protection, and this could have repercussions for entrepreneurship that would reduce trade facilitation and leave consumers with less variety.

Article 20.86 creates a criminal offence if satellite signals are intercepted or equipment is made to intercept satellite signals.

Canada would not concede on ISP liability. Article 20.89 requires that legal remedies be available for copyright infringement that occurs online and safe harbors to limit the liability of ISPs. The service provider must adopt and implement policies and standard technical measures including a "notice-and-takedown" system and cannot receive a direct financial benefit from infringement activities.[296] Canada is exempt from the provision's application based on its current "notice-and-notice" system and other safeguards included in Canadian copyright law.[297]

Chapter 21: Competition Policy

Chapter 21 of the USMCA addresses competition policy in order to keep anticompetitive practices in check. This chapter was previously Chapter 15 in NAFTA, which was quite different from the new USMCA chapter. The chapter states that national competition laws can be applied in Party territory, but a Party cannot be prevented from applying their competition laws outside of their borders should they have the jurisdiction. Unlike the NAFTA chapter, Monopolies and State Enterprises are not explicitly addressed (they have their own chapter) and this chapter states that dispute settlement may not be used for any matter that arises under the competition policy chapter.

Article 21.1: Competition Law and Authorities

This article sets up the requirement of competition laws and authorities. The article states that national competition laws can be applied in Party territory, but a Party cannot be prevented "from applying its national competition laws to commercial activities outside its borders that have an appropriate nexus to its jurisdiction."[298] It is unclear what "appropriate nexus" means, so it will be up to the competition agencies to clearly define the terms in the agreement, and if disagreement arises between the countries, the authorities will have to resolve in consultations.[299]

Article 21.2: Procedural Fairness in Competition Law Enforcement

This article is completely new and stipulates that investigations must be timely and give subjects access to the concerns the agency has with their behavior, which includes the competition laws allegedly being violated.[300] An impartial judicial or administrative authority must be available for subjects presenting evidence supporting their defense. If an administrative authority presides over the case, "the decision-making body must be independent of the unit offering evidence in support of the allegation."[301] Mergers are also addressed. It is often complained that competition authorities take too long reviewing mergers, so the agreement requires that investigations be conducted on a definitive deadline or "within a reasonable time frame."[302] Early consultations are to be permitted between the competition authorities and merging companies, which would give the agencies the ability to state concerns before alleging any misconduct.

It is unclear what the effects of the procedural fairness will have, particularly as this chapter is very different from the equivalent in other U.S. free trade agreements. Usually only three provisions are stated; there should be a law, an agency, and no discrimination.[303] However, it should not have much impact as the business community in the U.S. has not had an adverse or difficult relationship with Mexican or Canadian competition authorities.[304]

Article 21.3: Cooperation

This article provides guidance on how the authorities should cooperate and coordinate between each of the countries competition authorities "to foster effective competition law enforcement in the free trade area."[305] However, the agreement should not significantly change the way the countries' competition agencies interact. The most effective cooperation between authorities comes from day-to-day consultations regarding cross-jurisdictional competition proceedings, which will be built on trust that develops from working together over time.[306]

Article 21.6: Consultations

The countries must describe how an issue affects their trade with relevant public information, and in response, the country being taken issue with must accord "full and sympathetic consideration to the concerns" of the country.[307] This is quite vague and will likely require the authorities to carefully define the parameters of "full and sympathetic consideration to the concerns."

Article 21.7: Non-Application of Dispute Settlement

The text states that "[n]o Party shall have recourse to dispute settlement under this Agreement for any matter arising under this Chapter."[308] This could provide some sort of loophole for Mexico to use their national competition authorities instead of employing dispute settlement.

Overall, it can be argued that competition policies should not be addressed in trade agreements as the purpose of trade is to increase competition. However, competitor policies are implemented because domestic competition policies cannot be used to prevent anticompetitive effects of export cartels or mergers and acquisitions that take place abroad. Domestic competition policies can only be used if it can be proven that harm was caused in the home market. There are situations in which a foreign country may misuse their competition law to impede international trade and investment "by imposing unreasonable, unjustified or discriminatory burden or restriction" on commerce.[309] It includes actions of the foreign government that may not violate a trade or an investment agreement.[310] Competition policies are often used as a protectionist tool, so there is cause to be wary of such an extensive chapter in this area.

Chapter 22: State-Owned Enterprises and Designated Monopolies

Chapter 22 of the USMCA places restrictions on state-owned enterprises (SOEs) and designated private monopolies. A similar chapter does not exist in NAFTA. SOEs are defined as an enterprise that is principally engaged in commercial activities that directly or indirectly own more than 50 percent of the enterprise or otherwise have the power to control the enterprise.[311] Non-commercial assistance means money such as grants or loan forgiveness, loans to non-credit worthy enterprises and the provision of goods or services, other than general infrastructure, on terms more favorable than those commercially available to the enterprise.[312]

Article 22.7: Adverse Effects and Article 22.8: Injury

Chapter 22 generally requires SOEs to operate in a non-discriminatory manner based on commercial considerations rather than favoring home country enterprises when making purchases or sales of goods and services. It also imposes restrictions on noncommercial assistance by government to SOEs and designated private monopolies. Specifically, SOEs and designated monopolies may not cause "adverse effects"[313] or cause "material injury to a domestic industry" by "displac[ing] or imped[ing] from the market a competing good or service or by "significant price undercutting."[314]

Article 22.10: Transparency

The parties are required to provide to the other Parties or make publicly available a list of state-owned enterprises and designated monopolies and to update the list annually.[315] Upon request, the Parties must provide substantial information about their SOEs and designated monopolies.

Article 22.12: Committee on State-Owned Enterprises and Designated Monopolies

The USMCA establishes a Committee on State-owned Enterprises and Designated Monopolies to address issues that arise.[316] Having a forum to address concerns over SOEs is a constructive way to limit their pervasiveness in the market.

Article 22.13: Exception

There are other exemptions, including exemptions for financial services, export financing, independent pension funds, and "subcentral" (state, provincial and local) SOEs and designated monopolies.[317] Paragraph 1(a) specifies that exemptions be permitted in cases of temporary national or global economic emergency.

Annex 22-A: Threshold Calculation

SOEs or designated monopolies with revenues less than 175 million International Monetary Fund Special Drawing Rights (SDRs)—about US $250 million—are exempt.[318] This amount is to be adjusted periodically for inflation. This threshold should be viewed as a positive since it limits the size of SOEs, or designated monopolies, that are exempt.

Chapter 23: Labor

Chapter 23 of the USMCA covers labor rights, protections, and policies, including the creation of a labor council made up of representatives from each country.[319] Most provisions in this chapter should be innocuous for the U.S. as the U.S. already has strong laws protecting workers rights and freedom from discrimination. However, the provisions addressing discrimination on the basis of sexual orientation or gender identity, as well as the provisions calling for "consideration" and "advancement" of provisions such as child care and nursing mothers, could be misused to impose unnecessary and costly new regulations on U.S. businesses.[320]

Heritage Foundation experts support worker rights, freedoms, and equal treatment.[321] However, those rights must be considered alongside the rights, freedoms, and equal treatment of workers who are business owners. Labor policies should have a minimal role in trade agreements, seeking to protect basic rights such as freedom from forced labor and freedom of association. Trade agreements should not be used to pursue social policy agendas.

Article 23.3: Labor Rights — to

The section on labor rights adopts four labor rights as stated in the ILO Declaration on Rights at Work, including: "freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or coercive labor; the effective abolition of child labor and, for the purpose of this agreement, a prohibition on the worst forms of child labor; and the elimination of discrimination in respect of employment and occupation."[322] The agreement also stipulates that parties must adopt and maintain statutes and regulations "governing acceptable work conditions including minimum wages, work hours, and occupational safety and health."[323]

These provisions are far less binding on the U.S. than on Mexico as the U.S. already abides by these terms. Mexico will likely have to take significant action to meet these labor terms of agreement, but the Mexican government confirmed that these terms are within the mandate provided to the incoming government per the recent elections. Although the U.S. already has laws that meet these labor terms, some of the language—particularly with respect to discrimination—could be misused to pursue a radical liberal agenda in areas such as women's compensation, sexual orientation, and gender identity.

Article 23.6: Forced or Compulsory Labor — to

This section prohibits the importation of goods produced in whole or in part through forced or compulsory labor, including forced or compulsory child labor. The U.S. already has laws prohibiting such forced labor. The agreement requires cooperation between the parties to identify goods produced through forced labor.[324]

Article 23.7: Violence Against Workers — to

This section recognizes the rights of workers to form labor organizations "free from violence, threats, and intimidation" and it requires governments to address such violations.[325] While intended to support union activities and pursue government action against employer wrongdoing, the terms could be used in the U.S. to enforce those protections in reverse—that is, to prosecute unions that engage in violence, threats, and intimidation against workers in their efforts to organize, gain members, and promote their causes.

Annex 23-A: Worker Representation in Collective Bargaining in Mexico — to

Pursuant to the terms of agreement in this chapter, the agreement specifies that "Mexico shall adopt and maintain the following provisions…[and] the incoming Mexican government has confirmed that each of these provisions is within the scope of the mandate provided to the incoming government by the people of Mexico in the recent elections."[326] Those provisions generally require Mexico to: implement laws allowing workers to engage in collective bargaining; provide an impartial body to register union elections; and allow workers to join a union of their choice through a "personal, free, and secrete vote."[327]

Article 23.9: Sex-Based Discrimination in the Workplace

Article 23.9 states that the Parties shall implement policies that "recognize the goal of eliminating sex-based discrimination in employment" and that "support the goal of promoting equality of women."[328] But then it adds an inappropriate reference to "sexual orientation and gender identity" (SOGI) policies that would actually undermine the privacy, safety, and equality of women.[329] Even though the statement's impact on the U.S. is nullified by the phrase that a Party may implement policies "that it considers appropriate," these provisions have no place in an international trade agreement.[330] A footnote to the section also states that the U.S. federal government's own hiring policies are sufficient to fulfill Article 23.9 and that no additional actions are required, including any amendments to Title VII in the Civil Rights Act of 1964. Nonetheless, inclusion of SOGI needlessly politicizes a trade agreement.[331] That is because the terms "sexual orientation and gender identity" insert social ideologies into a non-discrimination provision that is intended to protect against unjust discrimination. Unlike being female, which is an immutable characteristic, sexual orientation is, at least in part, based upon conduct, and gender identity is a subjective internal perception. Heritage Foundation experts have long opposed the expansion of antidiscrimination laws in this way.

The U.S. is party to 14 trade agreement covering 20 nations, and none have provisions relating to sexual orientation and gender identity. In the U.S., the legislative process has always been the way to ascertain or achieve consensus on such matters and decide how best to address such issues in law. The definition of "sex" as including SOGI is a subject of intense political debate and is far from settled.

In other areas of law, the Trump Administration has worked to clarify that sexual orientation and gender identity should not be confused with or conflated with sex-based discrimination. In October 2017, Attorney General Jeff Sessions issued a memo to U.S. Attorneys clarifying Title VII of the Civil Rights Act, stating that "Title VII's prohibition on sex discrimination [in employment] encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se, including transgender status."[332] The U.S. Department of Justice also filed amicus curiae briefs in two cases to clarify that Title VII's definition of sex includes neither sexual orientation nor gender identity.[333] The petitions for writs of certiorari in these two cases are currently pending before the U.S. Supreme Court.

Where SOGI policies have been enacted in the U.S., they have contributed to social tension and costly litigation due to their failure to distinguish between unjust discrimination and reasonable disagreement over issues like the definition of marriage and the best treatments for gender dysphoria.[334]

The Trump Administration should resist efforts from negotiating partners to include social ideologies like sexual orientation and gender identity into trade agreements. It should respect the will of the people as expressed through their elected representatives to enact policies that are best for Americans.

Chapter 24: Environment

Chapter 24, the environmental chapter, has broad, boilerplate language similar to all U.S. trade agreements to protect air and water quality.[335] Unlike the previous NAFTA agreement, the environmental chapter is an agreement itself, not a side agreement.

The chapter states that participating countries cannot fail to enforce environmental laws in order to influence trade and stipulates commitments and cooperation to decrease ship pollution, marine litter, and ozone depleting substance.[336] Parties will promote corporate social responsibility, encourage voluntary mechanisms to improve the environment, and work together to address invasive species. Trilateral cooperation will also combat the illegal trade of wild fauna and flora as well as combat illegal fishing and forestry trade. The chapter also dedicates a section to eliminating fishing subsidies to prevent overfishing. While eliminating fishing subsidies and grounding environmental policy in market-based, private property rights principles, most of the environmental chapter focuses on regulating trade.

In fact, many of the environmental provisions are problematic because they are not concerned directly with trade but are primarily focused on ensuring that the parties to the agreement properly develop and enforce their own environmental laws. Even provisions to prohibit nations from weakening environmental laws in order to attract trade and investment are about preserving environmental protection instead of promoting trade.

Article 24.13: Corporate Social Responsibility and Responsible Business Conduct and Article 24.14 Voluntary Mechanisms to Enhance Environmental Performance

Stipulations that are voluntary set the framework for potential mandatory requirement and regulations in the future and could lock the United States into complying with costly, ineffective regulations. Corporate social responsibility is one such example.[337] While companies may want to impose voluntary standards to virtue signal to the consumers that they are going green, those voluntary measures could easily become mandatory standards in the future. Furthermore, the standards could be used as a mechanism to squeeze out smaller competitors because a larger company will more readily absorb the costs.

Article 24.9: Protection of the Ozone Layer

Another potential concern is the commitment to reduce ozone-depleting substances.[338] The Kigali Amendment, an amendment to the Montreal Protocol, requires an 85 percent phase-down of the production and consumption of hydrofluorocarbons (HFCs) by 2036 for developed nations, and by 2046 for developing nations. However, the phase-out of HFCs is clearly motivated by their potential to contribute to climate change rather than their potential to deplete the ozone.[339] In this regard, the Kigali Amendment would inappropriately expand the scope and focus of the Montreal Protocol. Canada ratified the amendment in November 2017.

Precedent indicates that the advice-and-consent process is required for the U.S. to ratify Kigali, which the Senate should not do. The USMCA should not be an avenue to advance the objectives of the Kigali Amendment, which has little to do with ozone depletion and almost everything to do with climate change.

Chapter 24: Omitted language

In some respects, the environmental chapter has received more attention for what it does not include. One welcome and notable omission: There is no language on climate change. The parties are wise to forgo such language. Any language to reduce carbon dioxide or other greenhouse gas emissions, voluntary or otherwise, would harm energy consumers for no meaningful climate benefit.

Chapter 25: Small and Medium-Sized Enterprises

This chapter is largely an aspirational chapter where the party governments recognize the "fundamental role of SMEs in maintaining dynamism and enhancing competitiveness" in the Party states' economies. The Parties agree in principle to create various centers, incubators, and accelerators designed to increase small and medium-sized enterprises' (SMEs) role in international trade.[340] The Parties each agree to maintain a public website directed at SMEs providing information about the USMCA.[341]

Chapter 26: Competitiveness

This chapter sets up a committee of government officials to discuss and develop activities that support "a strong economic environment that incentivizes production in North America."[342] The committee has the opportunity to bring in "interested persons to provide input on matters relevant to enhancing competitiveness."[343]

Article 26.1: North American Competitiveness Committee

The negotiators for the USMCA undoubtedly had good intentions in drafting Chapter 26, which focuses on "strengthening regional economic growth, prosperity, and competitiveness."[344] Alas, establishing a Committee on Competitiveness composed solely of government officials is the wrong way to go about it.

Government interference in economic transactions invariably produces market constraints and distortions. Fill a room with government officials—even ones focused on promoting competitiveness—and chances are good that their work plan will enhance their power more than market power. Nor will any amount of goodwill overcome the fact that a committee of bureaucrats will *always* lack the immediate (and ever-shifting) knowledge to get things right across the whole of North America.

Chapter 26 is actually at war with itself. The new committee is directed to promote "economic integration,"[345] which is the antithesis of competition. Integration may help to streamline some regulatory procedures affecting trade—compliance testing, in particular—but it would foreclose the policy competition necessary to constrain government overreach.

Regulatory uniformity reduces economic freedom by limiting the policy options available to firms through relocation.

Article 26.1 (5d), (5e): North American Competitiveness Committee

Chapter 26 is not entirely without merit. For example, it does direct the new Committee on Competitiveness to identify ways to modernize physical and digital trade- and investment-related infrastructure and improve the movement of goods and provision of services within the free trade area.[346] It also calls for collective action to combat market-distorting practices by non-Parties that are affecting the region.[347]

Still, the USMCA would be more beneficial if it created a committee of business owners, executives, and entrepreneurs directed to promote policy competition among the governments of the United States, Mexico, and Canada.

Chapter 27: Anticorruption

In Chapter 27 of the USMCA, the Parties to the agreement

> affirm their resolve to prevent and combat bribery and corruption in international trade and investment. Recognizing the need to build integrity within both the public and private sectors and that each sector has complementary responsibilities in this regard, the Parties affirm their adherence to the United Nations Convention against Corruption, done at New York on October 31, 2003; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, with its Annex, done at Paris on 17 December 1997; and the Inter-American Convention against Corruption, done at Caracas on March 29, 1996.[348]

An anticorruption provision was not included in NAFTA, and the addition of Chapter 27 is an especially relevant and valuable addition to the USMCA because, as The Heritage Foundation's *Index of Economic Freedom* reports every year,[349] the rule of law in Mexico remains inadequately established and institutionalized. In fact, Mexico has made relatively little progress to strengthen rule of law in the 25 years since Transparency International began its annual Corruption Perceptions Index in 1995.[350]

The strengthening of the rule of law in all countries is one of the core principles of The Heritage Foundation.

Chapter 28: Good Regulatory Practices

Regulation affects international trade in many of the same ways it does a domestic economy—by increasing costs, forestalling innovation, and hindering competition. The consequences are compounded for traders operating across inconsistent regulatory regimes. Chapter 28 of the USMCA thus binds the parties to regulatory practices that "prevent, reduce, or eliminate unnecessary regulatory differences between jurisdictions to facilitate trade and promote economic growth, while maintaining or enhancing standards of public health and safety and environmental protection."[351]

Excessive and redundant regulation impedes international trade by increasing compliance costs for importers and exporters. The challenge for policymakers is to streamline compliance while maintaining policy competition between countries. The provisions of Chapter 28 echo the elements of regulatory cooperation already prescribed under other trade agreements and thus are duplicative. But it is preferable to focus more attention on reducing regulatory barriers than to not focus enough.

Article 28.2: Subject Matter and General Provisions

Regulatory cooperation is not a new concept, having been incorporated in the General Agreement on Tariffs and Trade and the World Trade Organization. The United States and Canada in 2011 jointly established a Regulatory Cooperation Council (RCC) to reduce differences in regulatory requirements, compliance assessment, and other related policies and procedures. The RCC in 2016 issued 23 new work plans (commitments to cooperate in specific areas of regulatory activity).

Regulatory cooperation is warranted if it results in compliance flexibility and impartiality in enforcement. For example, trade would be enhanced, not inhibited, if signatories were to grant equivalency to analogous health and safety standards despite differences in compliance methods. Likewise, equal access to rulemaking documents and regulatory guidance would help to ensure that all firms regardless of domicile are aware of their legal obligations.

Regulatory cooperation should not be confused with "harmonization." Regulatory uniformity reduces economic freedom by foreclosing policy competition between the U.S., Mexico, and Canada (in this case). Harmonization also tends to raise regulatory standards unnecessarily and, therefore, to increase compliance costs, which may not be problematic for multinational corporations, but that disadvantages small and medium-sized firms and, ultimately, consumers.

To put it another way, regulation may be misapplied as a protectionist measure, but regulatory autonomy is also an expression of sovereignty.

Article 28.6: Early Planning

Each year, Parties are required to publish a list of regulations that are expected to be adopted or proposed for adoption. This transparency will be useful for businesses so that they are informed of regulatory change that might affect them.

Article 28.7: Dedicated Website

Parties must have a website that is free and publicly available containing information about the process and developments when a regulatory authority is devising a regulation. Specifically, the website must include information covered in Article 28.9, such as:

(a) the text of the regulation along with its regulatory impact assessment, if any; (b) an explanation of the regulation, including its objectives, how the regulation achieves those objectives, the rationale for the material features of the regulation, and any major alternatives being considered; (c) an explanation of the data, other information, and analyses the regulatory authority relied upon to support the regulation; and (d) the name and contact information of an individual official from the regulatory authority who may be contacted concerning questions regarding the regulation.[352]

This will streamline and reduce time expenditure on the information tracking process for businesses who need to be aware of rules that may impact them.

Article 28.9: Transparent Development of Regulations

This requires the regulatory authorities of the Parties to publish information about the development of a regulation. The text and regulatory impact assessment, objectives, rationale, alternatives, and data, name and contact information must be published before the authority finalizes work on the regulation.[353] Canada "finalizes its work" on a regulation when a regulatory authority publishes a final regulation in Canada Gazette, Part II.[354] Mexico "finalizes its work" on a regulation when a regulatory authority issues the final act of general application and publishes it in the Official Gazette.[355] The United States "finalizes its work" on a regulation when a regulatory authority signs a final rule and publishes it in the Federal Register.[356]

This transparency again increases certainty for businesses who need such information when making plans for the next fiscal year.

Article 28.10: Expert Advisory Groups

The Parties can seek advice and recommendations from experts when preparing or implementing regulations. An expert may not be an employee or contractor of the Party. "The function of [an expert] includes providing advice or recommendations, including of a scientific or technical nature, to a regulatory authority of the Party with respect to the preparation or implementation of regulations."[357] Additionally, the Parties are required to make this information publicly available.

The Parties should use experts who are business owners, executives, and entrepreneurs who have first-hand knowledge of how regulations impact their business and customers. This will be the most beneficial in promoting trade facilitation between the United States, Canada, and Mexico.

Article 28.11: Regulatory Impact Assessment

The "good practices" to which each of the parties are obligated mirror common sense practices already used in U.S. rulemaking,[358] including the quantification of regulatory costs. Article 28.11 states that "each Party should encourage the use of regulatory impact assessments in appropriate circumstances when developing proposed regulations that have anticipated costs or impacts exceeding certain thresholds established by the Party."[359] More specifically, this article details that procedures are maintained to consider "the need for a proposed regulation," "feasible and appropriate regulatory and non-regulatory alternatives," "benefits and costs of the selected and other feasible alternatives," and "the grounds for concluding that the selected alternative is preferable."[360] Article 28.11 also includes a provision on the economic impact of regulations on small businesses.[361] These provisions received a positive rating because they reflect practices that are already utilized in U.S. rulemaking that have proven to be effective measures.

Article 28.17: Encouragement of Regulatory Compatibility and Cooperation

This article states that Parties recognize the importance of cooperation and the continued dialogue required. Paragraph 3 states that "a broad range of mechanisms including those set forth in the WTO Agreement[] exist[] to help minimize unnecessary regulatory differences and to facilitate trade or investment, while contributing to each Party's ability to meet its public policy objectives."[362] Those mechanisms include, but are not limited to, the use of international standards, guides, and recommendations, the use of scientific or technical guidance documents from international collaborations, common display and consumer information, and coordinated implementation.[363]

Regulatory cooperation is considered to be "a cross-border process for early review and collaboration on regulations to align standards so that they are as similar as possible, with an emphasis on adopting international standards."[364] This standardization can be less effective in protecting the interests of citizens than domestic policies.

Chapter 31: Dispute Settlement

Chapter 31[365] of the USMCA maintains the state-to-state arbitration provisions of Chapter 20 of NAFTA, which were used very rarely. Now that Canada has been excluded from NAFTA's investor-State dispute settlement (ISDS) mechanisms that were contained in Chapter 11, Canadian companies (especially small and medium sized enterprises) may be tempted to resort to USMCA Chapter 31 to settle investment disputes with U.S. or Mexican companies. The same possibility applies to American or Mexican companies with regard to disputes in Canada.

At this point it is not possible to predict if Chapter 31 of the USMCA will function any differently in practice than Chapter 20 of NAFTA.

Chapter 32: Exceptions and General Provisions

The contents of this chapter primarily address the manner by which the USMCA should be in accordance with WTO obligations and explicitly lists the exceptions permitted under the WTO. For the most part, Chapter 32 of the USMCA is consistent with Chapter 21 of NAFTA.[366] The two major changes that should be addressed are the exceptions on essential security and non-market free trade agreements. The former has major changes that modify the coverage and meaning of the provision, while the latter is an entirely new provision for this agreement.

Article 32.2: Essential Security

In NAFTA, the article on security exceptions cited "national security" and adopted the general security exceptions found in the GATT.[367] It stated that the agreement should not "prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests" relating to arms trafficking, actions taken "in time of war or other emergency in international relations," non-proliferation of nuclear weapons, and "obligations under the United Nations Charter for the maintenance of international peace and security."[368]

Article 32.2 of the USMCA modified this exception category to "essential security" and removed all references to specific security-related activities that would qualify under the term.[369] This move could allow the United States to continue to use broad interpretations of its security interests as it did in the case of tariffs on steel and aluminum under Section 232. The Trump Administration has already cited "economic security" as a primary concern and this broad language could allow that to be expanded to other topics that have nothing to do with the four categories of national security listed in NAFTA.[370]

Article 32.10: Non-Market Country FTA

This article is new to the USMCA and requires a Party of the agreement to notify the remaining Parties "of its intention to commence free trade agreement negotiations with a non-market country."[371] A country is "determined to be a non-market economy for the purposes of its trade remedy laws and is a country with which no Party has a free trade agreement."[372] Article 32.10 also requires the Party seeking the agreement to allow the remaining parties to review the potential agreement with a non-market economy. Under this provision, should a Party enter into an FTA with a non-market economy, the remaining Parties are allowed to terminate the USMCA and replace it with a bilateral agreement.[373]

This provision is problematic in many respects, as it not only allows for a country like the United States to prevent Canada or Mexico from seeking a trade agreement with a country such as China, but it also allows for a pseudo-termination of the USMCA. Article 32.10 also makes very clear that the U.S. has no intention of resolving its current trade dispute with China through efforts that would further liberalize trade. A trade agreement should not prevent the Party countries from advancing efforts to liberalize with trade, especially with countries which have so much to do in terms of lower trade barriers. Additionally, a primary strength of NAFTA was its creation of North America as one of the largest free trade areas in the world. The use of this provision would eliminate that crucial benefit.

Chapter 33: Macroeconomic Policies and Exchange Rate Matters

Chapter 33 addresses foreign exchange intervention,[374] commonly called "currency manipulation." First, it outlines some general anodyne provisions about the importance of strong and stable economies and market-determined exchange rates. It then states that the Parties should refrain from "competitive devaluation," and if one does intervene in the foreign exchange market of another Party, then they must inform that Party promptly. This specifically excludes actions by central banks carrying out their usual domestic functions.

The Chapter also lays out several reporting requirements. Any interventions in the foreign exchange market must be publicly disclosed within seven days after the end of each month. The other reporting requirements are currently satisfied by the Parties generally. The Chapter provides for a special Macroeconomic Committee to interpret and amend the Chapter, and both Committee and Chapter are protected from the USMCA Free Trade Commission. Formal disputes can only be made regarding the reporting requirements.

Article 33.4: Exchange Rate Practices

The Chapter defines "competitive devaluation" as "actions undertaken by an exchange rate authority of a Party for the purpose of preventing effective balance of payments adjustment or gaining an unfair competitive advantage in trade over another Party." The phrases "prevent effective balance of payments adjustment" and "gain an unfair competitive advantage" are direct quotes from the IMF Articles of Agreement IV.1.iii,[375] to which the Parties have already agreed and, in fact, affirm in this Chapter.

It is uncertain what these phrases mean exactly and how they would be adjudicated. The IMF has expounded on "gain[ing] an unfair competitive advantage" in its Public Information Notice 07/69.[376] The Chapter provides a framework for consultations between Parties regarding issues of Exchange Rate Practices. If such a consultation is unsatisfactory, then the Parties may request the IMF to examine the issue.

Since all three Parties have floating exchange rates for their currencies, the restrictions in this chapter are unlikely to impact the parties or result in disputes. It would seem they are included only to establish a precedent for future trade agreements made between the United States and other nations.

Article 33.5: Transparency and Reporting

The Chapter states that the Parties shall monthly disclose to the public information regarding foreign exchange reserves and their interventions in the foreign exchange markets. On a quarterly basis, they must disclose balance of payment information: exports, imports, and capital flows. Additionally, each Party must permit the IMF to publicly disclose their IMF Article IV Staff Reports[377] and "confirmation of the Party's participation in the IMF's [Currency Composition of Foreign Exchange Reserves] database."[378]

The three Parties each currently adhere to these reporting requirements, except for publishing their monthly interventions on the foreign exchange markets. These (and only these) obligations are enforceable through Article 33.8, which provides for formal dispute settlement.

Transparency generally enhances the ability of agents in a free market to conduct business efficiently. By increasing the information available to market participants, they are able to better optimize behavior. Additionally, they will face fewer costs associated with accounting for uncertainty.

Chapter 34: Final Provisions

Chapter 34 of the USMCA is mostly consistent with the final provisions found in Chapter 22 of NAFTA.[379] This chapter primarily address the processes for changing, withdrawing from, and reviewing the USMCA. An article was added to address the course of action that should be taken should agreements at the WTO be amended.[380] Another article was added imposing a complicated sunset process for the agreement.[381] A provision in NAFTA that guided parties should another country wish to join was not included in the USMCA.[382]

Article 34.3: Amendments

Chapter 34 allows for the USMCA to be amended should all Parties agree to do so in writing. The amendments shall take effect 60 days after each Party makes the necessary changes in their domestic laws to implement the amendment.[383] The ability to amend or update a trade agreement is important and this article will ensure that the USMCA can remain equipped to address new trade policy issues.

Article 34.4: Amendment of the WTO Agreement

NAFTA did not have a provision for how the Party countries were to address WTO reforms that could impact the operation of the agreement. The USMCA adds a provision instructing the Parties to "consult on whether to amend" in this circumstance.[384] While it is beneficial to have this provision included in Chapter 34, it would be better to require the agreement to be amended should the USMCA be in conflict with the WTO following any reforms.

Article 34.5: Entry into Force

The USMCA was signed at the end of November and now awaits approval by the legislative bodies of each party. Following this ratification, each Party is instructed to inform the other parties of its ratification. Once all parties have done this, the agreement will enter into force after 60 days have passed.[385]

Article 34.6: Withdrawal

It is common for a trade agreement to include a provision addressing withdrawal. However, instructions are not provided for how that process should occur and through which bodies it should be undertaken. The ratification process must take place through legislative procedures. The withdrawal process in Chapter 34 only requires a party to "[provide] written notice of withdrawal ... [and] withdrawal shall take effect six months after a Party provides written notice."[386] To prevent further ambiguity regarding this process, Article 34.6 should specify in greater detail the process for withdrawal, including that the respective legislative bodies must act for a withdrawal to take place.

Article 34.7: Review and Term Extension

Chapter 34 includes provisions which go beyond those typically addressing withdrawal or modification of a free trade agreement as it applies a 16-year term to the USMCA.[387] Article 34.7 details a review and termination process requiring the Parties to "meet to conduct a 'joint review' of the Agreement" by the sixth year and "each Party shall confirm, in writing, through its head of government, if it wishes to extend the term of the Agreement."[388] Should the Parties confirm extension, the USMCA term would be extended for an additional 16 years, totaling 22 years at this point. The review process would have to occur again in six years and the agreement could then be extended for another 16 years, and so on and so forth.[389]

Should any Party during the review process refrain from confirming the extension, the Parties are instructed to meet annually for the remaining 10 years of the term of the agreement. During that time, the Parties are able to agree on a new 16-year extension per the confirmation process detailed above. If a new extension is not made and the term is allowed to expire, the agreement would end.[390]

The USMCA already contains mechanisms for the Party countries to seek changes to the agreement in Article 34.3.[391] This was also the case under NAFTA, but that agreement also required annual meetings of the Committee on Trade in Goods.[392] Any provision providing a potential sunset is not only unnecessary, but could distort trade between the Parties. One of the primary strengths of any trade agreement is its ability to create market certainty for businesses, allowing them to make informed decisions on purchasing, prices, hiring, and future investment. Any potential disruptions to that certainty could cause complications when businesses are planning for the future.

Appendix Endnotes

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