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USMCA Provisions on Intellectual Property, Services, and Digital Trade

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INTRODUCTION

One of the changes taking place in the U.S. economy today is the increasing interrelationship among goods, services, and intellectual property (IP). While it is not the purpose of this discussion to analyze this relationship in any detail, it is worth noting that the United States–Mexico–Canada Agreement (USMCA), as with other regional trade agreements beginning with the North American Free Trade Agreement (NAFTA), has recognized the importance of all three sectors to the U.S. economy and to encouraging U.S. trade. Increasingly, issues relating to the digital economy, which incorporate aspects of both IP and services, are critical to fostering global trade.

It is difficult to overemphasize the importance of IP and services to the U.S. economy. According to the U.S. Department of Commerce and the U.S. Patent and Trademark office, "IP-intensive industries support at least 45 million U.S. jobs and contribute more than 6 trillion dollars to, or 38.2 percent of, U.S. gross domestic product (GDP)."[1] Some 81 U.S. industries are identified as relying on patents, copyright, or trademark protections extensively, including software publishers, sound recording, auto and video equipment producers, cable and subscription programming, performing arts companies, and radio and television broadcasting.[2] Total merchandise exports of IP-intensive industries amounted to $842 billion in 2014, with licensing rights worth $115.2 billion in 2012.[3] As a recent report noted,

> *Intellectual property (IP) protection affects commerce throughout the economy by: providing incentives to invent and create; protecting innovators from unauthorized copying; facilitating vertical specialization in technology markets; creating a platform for financial investments in innovation; supporting startup liquidity and growth through mergers, acquisitions, and IPOs; making licensing-based technology business models possible; and, enabling a more efficient market for technology transfer and trading in technology and ideas.*[4]

As the Commerce Department further observes,

> *The services sector is an important part of the U.S. economy. According to [the Census Bureau's Bureau of Economic Analysis], in 2009 services accounted for 79.6 percent of U.S. private-sector gross domestic product (GDP), or $9.81 trillion. Services jobs accounted for more than 80 percent of U.S. private-sector employment, or 89.7 million jobs.*[5]

What is particularly important for this discussion is that the U.S. has long enjoyed a trade surplus in services. In 2009, U.S. exports of services totaled $502 billion, with a surplus of $132 billion, a larger surplus in services than any other country.[6] In 2016, the U.S. enjoyed a services trade surplus with Canada and Mexico amounting to a combined $31 billion, compared to a $86.8 billion goods deficit with those countries.

What is particularly important when reviewing the services chapter of the USMCA is that the U.S. has long enjoyed a trade surplus in services. In 2009, U.S. exports of services totaled $502 billion, with a surplus of $132 billion, a larger surplus in services than any other country.

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The United States also enjoyed surpluses each year between 2004–2015.[7]

Thus, even if most of the chapters of the USMCA, like NAFTA, primarily address various aspects of trade in goods, some are focused directly on IP and services, and many of the innovations in USMCA, such as the chapters on telecommunications, competition law, small and medium-sized industries, and state-owned enterprises, encompass trade in services as well as goods and depend on the parties' respect for rules protecting IP.

Because of its relationship to IP and services, this report includes discussion of the new USMCA chapter on digital trade, which, among other things, prohibits localization requirements for data storage and bans tariffs on goods that are delivered digitally. It also briefly addresses the possible impact of the reduced protection for U.S. investment in Canada and Mexico (discussed in detail in an earlier report) on the IP and services sectors.

INTELLECTUAL PROPERTY

Chapter 17 of NAFTA was negotiated like the rest of NAFTA in 1991–1992, several years before the World Trade Organization's (WTO) Agreement on Trade Related Aspects of Intellectual Property (TRIPS)[8] entered into force January 1, 1995. At the time, a draft of TRIPS was available, but no one, including the NAFTA negotiators, could be sure that the Uruguay Round negotiations would be successfully concluded.[9] The similarities of NAFTA Chapter 17 and TRIPS are greater than the differences,[10] but both are severely out of date given that they were negotiated at a time when the internet was in its infancy and trade secrets were given little attention internationally, just to refer to a few elements. Under such circumstances, the Trans-Pacific Partnership (TPP, now the Comprehensive and Progressive TPP, or CPTPP), and later USMCA, provided valuable opportunities to modernize the IP relationships among the NAFTA and USMCA partners, in many cases reflecting innovations taking place in U.S. trade agreements concluded well after NAFTA entered into force.[11] Much of USMCA's IP chapter is taken from TPP with relatively minor changes. However, significant additions, deletions and changes are reflected in the December 2019 USMCA Protocol of Amendment.[12] Both are discussed herein.

The IP chapter in USMCA mentioned above encompasses 64 pages including annexes, so it is impractical in a report of this length to cover all aspects, particularly given the significant changes in the fields. However, agriculture-related IP issues, such as geographic indications, are discussed in an earlier report.

USMCA's Chapter 20 is a combination of concepts that were included in NAFTA more than 25 years ago, innovations since 1994 found in many other U.S. Free Trade Agreements (FTAs), more recent changes embodied in the TPP, and a few that are USMCA-specific.

A. Committee on IP Rights

Among the highlights of the USMCA changes are the establishment of a Committee on Intellectual Property Rights (IPRC).[13] A certain skepticism of new committees is warranted, given the general reluctance of the parties to schedule meetings.[14] Still, it seems reasonable to hope that given the significance of the subject matter and the committee's obligations to exchange information, strengthen border enforcement of IP rights, consider issues relating to trade secrets and procedural fairness in patent litigation, and act as a mediator in disputes over geographical indications,[15] the mechanism will be utilized frequently. Observers have suggested that the new provisions on trade secrets are among those that "could increase the importance of the Committee moving forward."[16]

B. Extended Copyright and Trademark Protection

Reflecting again changes in U.S. trade policy since NAFTA was negotiated, USMCA provides for a requirement that the USMCA parties afford protection for copyrights of at least 70 years after the author's death, a period that is, for example, beyond the 50 years under Canadian law. If the life of a natural person is not the basis for measurement (e.g., for an enterprise such as Disney), the term must be at least 75 years when the work was first published or 70 years after the end of the year of creation.[17] This compares to only 50 years under NAFTA.[18]

Protection of trademarks exceeds that found in NAFTA but is consistent with the TPP requirements. Initial registration shall be for a term of at least ten years, and parties must maintain an electronic system for applications for and maintenance of trademarks.[19]

C. Enforcement in the Digital Environment

It may well be that one of the most important innovations for American copyright and trademark owners is the requirement that IP enforcement procedures must be made available for the digital environment when infringement takes place. This includes an obligation to provide "enforcement procedures that permit effective and expeditious action by right holders against copyright infringement covered under this Chapter that occurs in the online environment."[20] Circumvention of "effective technological measures" (e.g., any copying measures) are explicitly made subject to criminal penalties in most circumstances.[21] Detailed requirements for enforcement are also specified. Each party's national law is to provide "legal incentives for Internet Service Providers to cooperate with copyright owners to deter the unauthorized storage and transmission of copyrighted materials or, in the alternative, to take other action to deter the unauthorized storage and transmission of copyrighted materials." These laws are also meant to protect Internet Service Providers by "precluding monetary relief against Internet Service Providers for copyright infringements that they do not control, initiate or direct, and that take place."[22] It is evident that the drafters sought and presumably achieved a balance of interests in this controversial area.

D. Enhanced Protection of Trade Secrets

Extensive protection of trade secrets was not a major element of NAFTA although it was addressed.[23] Subsequent agreements have recognized the importance of protecting trade secrets in a high technology society. Patent protection is extensive once a patent has been granted, but in order to obtain a patent, the person seeking the patent must disclose extensive information regarding the invention to demonstrate that it is novel, non-obvious, and has utility, information that becomes public once the patent is granted.[24] Thus, if an enterprise wishes to keep its proprietary technology for making a product secret, it may decide to rely on trade secret protection, protection that depends on keeping the process confidential through restricting knowledge of it to those who need to know and concluding confidentiality agreements with employees.[25] Intangible assets, including trade secrets, are protected in the United States under both state and federal law,[26] but such protection may be less effective elsewhere.

The trade secret provisions are based on the TPP but go somewhat further, particularly to protect against trade secret theft by state-owned enterprises. Among these innovations are a restriction on national laws limiting the term of protection for trade secrets, requirements that judges adjudicating trade secret matters not disclose confidential information, and prohibitions against a party discouraging or impeding voluntary licensing of trade secrets.[27] Criminal penalties for willful misappropriation of a trade secret are required under national law.[28]

E. Patent Terms for Pharmaceutical Products

USMCA initially followed an approach taken in U.S. FTAs, at least since 2006, whereby a patent term can be extended when issuance has been delayed. It also includes provisions requiring that pharmaceutical companies' test data be treated as confidential for at least five years,[29] presumably to discourage rapid entry of generic competitors into the market. These provisions were not uniform and gave the parties somewhat more flexibility in certain FTAs, such as the one with Peru.[30]

However, the amendments, in a significant achievement for those Democrats who have chafed at the extensive protection

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given pharmaceutical enterprises for their branded drugs against generic competition, make significant changes. In particular, the availability of patent term extensions when unreasonable delays result in an effective shorting of the legal patent term has been modestly curtailed. The new provisions limit the extension to five years and permit generic competitors to sell or import a competing product for "purposes related to generating information to meet requirements for marketing approval for the product."[31] Other changes make it easier for a potential competitor to access the branded drug's previously undisclosed test data, and authorize a USMCA party to provide incentives for persons who successfully challenge the validity of a patent or demonstrate non-infringement and to disclose publicly information regarding the patent and patent terms that have been granted.[32] The USMCA provision that permitted patents to be available for new uses of a known product was also removed.[33] These modifications were characterized by the House Committee on Ways and Means as ensuring fair competition and "maintaining the balance between competition and incentives for innovation" reflected in U.S. law but not in the USMCA. This was accomplished according to the release inter alia by incorporating a "revised regulatory review provision to clarify the circumstances in which generic and biosimilar companies may use a patented invention so that they can obtain marketing approval on day one of patent expiration" and "revised data protection provision to incorporate limitations in U.S. law that foster generic competition."[34]

Most controversially in the original USMCA intellectual property chapter, the parties were to be required to afford data protection for at least ten years to biologic drugs.[35] The agreed term under TPP, as in Canadian law, was only eight years,[36] although under USMCA, Canada had five years to implement the new requirements.[37] The ten-year term became controversial in the U.S. as well as Canada, even though current U.S. law provides for eleven years, because some members of Congress were concerned that incorporating a ten-year term in the agreement would make it more difficult for a future Congress to reduce protection for biologic drugs.[38] The negotiations between the Trump administration and the Democratic Congress resulted in the deletion of the article requiring such protection for biologic drugs.[39] Some objections were lodged by Republic members,[40] but did not result in significant Republican opposition to the compromise.

F. Enforcement Generally

Enforcement of IP rights has been a major concern of U.S. rights holders and the U.S. government since well before NAFTA. In this respect USMCA becomes the cutting edge. As the United States Trade Representative (USTR) observed after conclusion of the negotiations,

For the first time, a trade agreement will require *all* the following:

- *Ex officio* authority for law enforcement officials to stop suspected counterfeit or pirated goods at every phase of entering, exiting, and transiting through the territory of any Party.
- Express recognition that IP enforcement procedures must be available for the digital environment for trademark and copyright or related rights infringement.
- Meaningful criminal procedures and penalties for unauthorized camcording of movies, which is a significant source of pirated movies online.
- Civil and criminal penalties for satellite and cable signal theft.
- Broad protection against trade secret theft, including against state-owned enterprises.[41]

These obligations are the subject of detailed requirements in the text, including situations where criminal penalties rather than civil penalties must be provided.[42] Among the more important for the U.S. are "Border measures," whereby "Each Party shall provide for applications to suspend the release of, or to detain, suspected counterfeit or confusingly similar trademark or pirated copyright goods that are imported into the territory of the Party."[43] This language undoubtedly reflects continuing frustration with the reluctance of Canada (not Mexico) to develop mechanisms to interdict counterfeit goods at the border, particularly with regards to shipments from Asia that find their way across the U.S. border after arrival at the Port of Vancouver.[44] USMCA also strengthens provisions for statutory damages for infringement. It specifies that the damages amount be both fully compensatory and sufficient to serve as a deterrent.[45]

> Canada resisted U.S. demands in one significant area:
>
> > *One item which Canada did not concede relates to ISP liability. Article [20.89] requires legal remedies for instances of copyright infringement occurring online and safe harbours to limit the liability of internet service providers (ISPs). The language of this provision was tightened to limit when ISPs can benefit from safe harbours, requiring the service provider to adopt and reasonably implement certain policies and standard technical measures including a "notice-and-takedown" system, in addition to not receiving a direct financial benefit from infringing activities . . . [An annex to the IP chapter is intended to clarify that Canada is exempt from the provision's application based on its current "notice-and-notice" system and other safeguards in Canadian copyright law.]*[46]

G. Conclusion

If one considers the enormous changes in the scope and coverage of IP in regional trade agreements to which the U.S., Mexico, and Canada have become parties, particularly the TPP and the more than a dozen U.S. FTAs concluded since 2003,[47] the USMCA provisions primarily reflect the latest iteration of that evolutionary process, with a minor rollback reflecting the Administration's need for Democratic Congressional support for approval of the USMCA. Modernization of the WTO's TRIPS Agreement is impossible because of the demise of the Doha Development Round of multilateral trade negotiations,[48] and most non-U.S. regional trade agreements, including those negotiated by the European Union (EU), contain only much more modest, largely unenforceable IP provisions.[49] Under such circumstances, the only apparent route to modernizing international intellectual property rules has been through regional trade agreements such as USMCA and the TPP/CPTPP, although the balance in the area of branded versus generic drugs is still in flux.

SERVICES

A. Treatment of Services Generally

NAFTA incorporated three services chapters: Chapter 12, addressing cross-border services; Chapter 13, addressing (not very effectively) telecommunications services; and Chapter 14, addressing financial services. At the time, NAFTA's services provisions were far reaching, going well beyond what was ultimately incorporated in the WTO's General Agreement on Trade in Services,[50] particularly regarding market access for financial services in Mexico. Mexico agreed to allow Canada and the U.S. access to its financial services markets (banking, brokerage, and insurance) over specified periods of time, with limits placed both on the percentage of ownership in each domestic bank and other financial institution permitted and in terms of the overall foreign participation in the Mexican financial system, with a multi-year phase-in in most cases.[51] However, the Mexican financial crisis beginning in December 1994 made most of the phase-in provisions irrelevant; the new (as of December 1) Ernesto Zedillo administration decided that increased liquidity was essential to permit the Mexican economy to recover and waived the NAFTA restrictions on foreign investment in the banking sector (not simply for Canada and the U.S. but generally), resulting, inter alia, in most domestic banking assets being acquired by foreign interests over a period of several years.[52]

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The cross-border services chapter in NAFTA was also relatively comprehensive for its time, including various professional services, the highly controversial cross-border trucking services, and investment market-opening measures, among many others. Still, it is accurate overall to suggest that the changes to the cross-border services and financial services provisions in the USMCA compared to NAFTA are relatively minor, although they may be significant for some providers in certain instances. In contrast, NAFTA's largely ineffective telecommunications chapter has been substantially expanded and improved in the USMCA.

B. Cross-Border Services

With cross-border services, despite the relatively extensive market access requirements under the original NAFTA, coverage has not changed in some sectors. For example, air services are excluded except for maintenance, including line maintenance and specialty air services, as is government procurement.[53] The general obligations relating to national treatment, most favored nation (MFN) treatment, and market access from NAFTA are continued.[54]

For professionals, a challenge for cross-border services regulation is recognition by the other party of the educational and licensing qualifications of the foreign person providing services, whether in medicine, accounting, engineering, law, or other disciplines. NAFTA went further in some disciplines (e.g., engineering services) than in others (e.g., legal services).

For example, lawyers licensed in Canada and the U.S. are subject to national treatment in Mexico.[55] This means that a U.S. lawyer who is a citizen of the U.S. may be authorized to practice in Mexico, but only if she has the education required of Mexican nationals and a cédula issued by the Mexican government after the candidate has completed the requisite level of Mexican higher education. In other words, there is no recognition of a U.S. law degree or bar membership in Mexico. Under USMCA, a party has the option of recognizing the education, experiences, or licenses granted by another party, but it is not required to do so.[56] Mutual recognition of professional qualifications is encouraged in USMCA through hortatory provisions designed to encourage relevant bodies (such as the three national bar associations) "to establish dialogues with the relevant bodies of the other Parties, with a view to facilitating trade in professional services."[57] At least with legal services, similar language in NAFTA did not produce significant results, and in my view there is little likelihood that it will do so under USMCA. In all NAFTA parties, foreign legal consultants are recognized, whereby a lawyer qualified for practice in one country may provide legal services related to the law of the country in which he or she is authorized to practice or relating to international law in the country of another party.[58] Guidelines are provided in USMCA for "mutual recognition agreements" or similar arrangements for professional services.[59]

Reflecting the somewhat greater importance given to small and medium-sized enterprises (SMEs) in USMCA than in NAFTA,[60] the chapter provides a weak obligation: "With a view to enhancing commercial opportunities in services for SMEs, and further to Chapter 25 (Small and Medium-Sized Enterprises), each Party shall endeavor to support the development of SME trade in services and SME-enabling business models, such as direct selling services, including through measures that facilitate SME access to resources or protect individuals from fraudulent practices."[61]

One of the stranger innovations of the USMCA cross-border services chapter mandates changes in Canadian broadcast rules designed to permit the National Football League (NFL) to sell licenses to Bell Media, a Canadian enterprise. With the change, the NFL can license the Super Bowl to Bell Media, which in turn will permit licensing the content to Canadian TV stations. These TV stations will then be permitted to substitute Canadian advertising for the advertising viewed by U.S. audiences.[62] This is an obvious commercial benefit for the NFL, and probably for Canadian TV stations, although it will deprive some Canadians who would otherwise enjoy viewing American Super

Bowl advertisements—which, in the view of many including myself, are often more interesting that the football games—of such opportunities.[63]

Canada has long enjoyed a "cultural industries" exception to some trade obligations under NAFTA.[64] A similar exemption applies to Canada under USMCA, with some limitations, although programming services, as noted immediately above, remain covered.[65] For the first time, Mexico also achieves "cultural exceptions" in USMCA. The U.S. and Mexico recognize "that states have the sovereign right to preserve, develop and implement their cultural policies, to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and to preserve their cultural identity."[66] The Mexico-specific provisions preserve a list of exceptions to market access national treatment, some of which were included in the NAFTA annexes. In USMCA, the exceptions deal mostly with radio and TV broadcasting, newspaper publishing, cinema services, and audiovisual services.[67] In my view it is doubtful that the restrictions on radio and TV broadcasting will be considered objectionable to most potential U.S. suppliers, although, unlike Canada, the majority of the Mexican population does not live within 90 miles or so of the U.S. border. However, restrictions on cinema services may be considered more objectionable, and there is some irony in the restriction given the fact that dozens of movies made by American producers have been filmed in Mexico.[68]

One of the most contentious aspects of NAFTA's cross-border services chapter was reciprocal obligations on the part of Mexico and the U.S. to permit each other's trucks to carry international cargoes from one country to the other, after a multi-year phase-in period.[69] For a variety of reasons, which are well beyond the scope of this book, beginning in 1995 the U.S. refused to comply with the NAFTA requirements, allegedly on the basis of safety concerns but, in the opinion of some, largely for political reasons.[70] The matter was one of a few that was the subject of a decision rendered by a Chapter 20 dispute settlement panel in 2001.[71] However, the dispute over Mexican truck access continued in one form or another until 2019.[72]

The USMCA significantly modifies the NAFTA obligations. In effect, it permits the U.S. to continue the existing practices of permitting approved Mexican trucking enterprises to operate in the U.S., but also allows the U.S. to terminate such practices (see USMCA, annex II-U-7):

> *[T]he United States reserves the right to adopt or maintain limitations on grants of authority for persons of Mexico to provide cross-border long-haul truck services in the territory of the United States outside the border commercial zones if the United States determines that limitations are required to address material harm or the threat of material harm to U.S. suppliers, operators, or drivers. The United States may only adopt such limitations on existing grants of authority if it determines that a change in circumstances warrants the limitation and if the limitation is required to address material harm. The Parties shall meet no later than five years after the entry into force of this agreement to exchange views on the operation of this entry.*

Procedures are established for reviewing the cross-border services practices; elimination of them is not automatic but requires *inter alia* an investigation and determination by the International Trade Commission.[73] There is little public evidence to indicate that Mexico's negotiators fought hard to preserve the NAFTA rights, presumably because the economic impact of Mexican truck access was not substantial.[74] Interestingly, Mexico did not impose a reciprocal limitation.

C. Financial Services

USTR suggests that the major achievements of the USMCA compared to earlier trade agreements including NAFTA are certain "core obligations" including:

- National treatment, to ensure that U.S. financial service suppliers receive the same treatment as local suppliers.

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- Most-favored-nation treatment, to ensure that U.S. financial service suppliers receive the same treatment as those from other countries.
- Market access, which prohibits imposition of certain quantitative and numerical restrictions that would limit the business of U.S. financial services suppliers.[75]

Other observers have offered a more mixed evaluation:

> *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.*[76]

The USMCA is explicitly forward-looking by establishing a standstill prohibiting restrictions on cross-border trade that were not in place as of January 1, 1994 (or with national treatment)[77] and by requiring all parties to allow market access for other parties to any newly established financial services, subject only to the proviso that the host party allows its domestic financial services providers to engage in the new types of services.[78] Where public entities in the NAFTA parties operate payment and clearing systems, financial institutions of other NAFTA parties must be granted access, except with respect to another party's lender of last resort facilities.[79]

The USMCA parties also made significant efforts to strike a reasonable balance among privacy, business decisions of financial institutions, and the need of financial regulators for information. Thus, "No Party shall prevent a covered person from transferring information, including personal information, into and out of the Party's territory by electronic or other means when this activity is for the conduct of business within the scope of the license, authorization, or registration of that covered person," subject to the right of any Party to "protect personal data, personal privacy and the confidentiality of individual records and accounts, provided that such measures are not used to circumvent this Article."[80]

Further, "The Parties recognize that immediate, direct, complete, and ongoing access by a Party's financial regulatory authorities to information of covered persons, including information underlying the transactions and operations of such persons, is critical to financial regulation and supervision, and recognize the need to eliminate any potential limitations on that access."[81] At the same time, localization requirements for computing facilities are prohibited as long as financial regulators have access to the information that is processed or stored in such facilities.[82]

Not surprisingly, the financial services chapter does not apply to measures adopted or maintained with respect to a party's government procurement of financial services or subsidies provided by a party with regard to cross-border supply of financial services by another party.[83] The chapter also includes a proviso that the parties will seek to develop regulatory procedures to expedite the offering of insurance services by licensed suppliers.[84]

Several other chapters of USMCA could have a significant impact on financial services. For example, limitations on exchange rate manipulations (to be discussed in a later report), a first for U.S. trade agreements, could obviously affect banking operations in North America.[85]

D. Telecommunications Services

NAFTA's telecommunications services chapter (13) was of only limited utility, in retrospect. The provisions sought to assure liberalization of telecommunications services (at the time primarily telephone and value-added services) through non-discrimination (among the NAFTA parties and in comparison to other countries through MFN requirements), open access to and use of public networks, and support for freer flow of information.[86] Telecommunications services under NAFTA were also affected by technical barriers to trade (chapter 9) and by the cross-border services (chapter 12) discussed above, which, provided that telecommunications and most other services were afforded non-discriminatory treatment, benefitted from the absence of commercial presence requirements and from the professional licensing and certification procedures stipulated in that chapter.[87]

In NAFTA, the most important innovations included guarantees of access and use of public telecommunications networks or services by nationals of another party, including broadcasters and cable system operators.[88] These access and usage rights included the purchasing or leasing of equipment to interface with the public network, interconnections, attachments to the public network, and the performance of related operating functions, all designed to assure that U.S. telecommunications companies could participate effectively in the growing Mexican market.[89] During the years immediately after NAFTA entered into force, one of the primary disputes between the U.S. and Mexico arose over the connection fees charged by Mexican telephone networks (primarily the Mexican near-monopoly, Telmex, owned by billionaire Carlos Slim) to U.S. long-distance carriers such as AT&T, including fees for the millions of calls to Mexico originating each year in the U.S. The carriers and the U.S. believed these fees were unreasonable because they exceeded cost-oriented rates, and the U.S. also objected to Mexico's alleged failure to prevent anti-competitive practices by major telecoms suppliers (e.g., Telmex). After extended and unsuccessful consultations, the U.S. chose to challenge the allegedly unreasonable interconnection fees, not in NAFTA but before the WTO, where the U.S. ultimately prevailed on the key issues.[90] The case suggests that NAFTA's Chapter 13 failed to meet U.S. expectations in terms of liberalizing the Mexican telecommunications market.

In USMCA, much of the NAFTA's Chapter 13 remains. However, several significant changes have occurred to discourage dominant telecommunications firms in Mexico from trying to exclude international telecommunications firms from the Mexican market. Some observers have suggested that the U.S. negotiators were concerned with efforts of Movil SAB, the dominant mobile network, also owned by Carlos Slim, to restrict competition. AT&T reportedly has been investing heavily in the Mexican wireless market in recent years and expanding its wireless infrastructure.[91]

After Mexico's Supreme Court overturned the country's legal restrictions designed to prevent Movil from excluding competitors, USMCA negotiators adopted general restrictions on such anticompetitive practices in the telecommunications markets of all three NAFTA parties.[92]

The various competitive safeguards in USMCA are designed to preclude anticompetitive practices such as cross-subsidization between different types of service providers (e.g., cell phone service and land line service) and the failure of the local carriers to provide technical information about facilities needed for competitors to provide services.[93] Access to a network must be offered on an "unbundled" basis so suppliers can, inter alia, rent telecommunications infrastructure rather than having to build their own infrastructure.[94] Interconnection criteria with major suppliers are specified in detail and fees must be reasonable.[95] Such criteria reflect the requirements of the (post-NAFTA) 1996 U.S. Telecommunications Act.[96]

Reflecting the greater concern with state-owned enterprises elsewhere in USMCA compared to NAFTA,[97] and perhaps reflecting the desire of the United States to deal effectively with a potential problem in future trade agreements with certain countries, this chapter provides that "No Party shall accord more favorable treatment to a supplier of telecommunications services in its territory than that accorded to a like service supplier of another Party on the basis that the supplier receiving more favorable treatment is owned or controlled by the central level of government of the Party."[98] A (luke-warm) effort to address the high cost of roaming services in some jurisdictions is also included, with the requirement that "The Parties shall endeavor to cooperate on promoting transparent and reasonable

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rates for international mobile roaming services that can help promote the growth of trade between the Parties and enhance consumer welfare."[99] In my Canadian experience, reasonable roaming rates are more likely to be achieved by agreements between major Canadian wireless services providers such as Bell Canada and Rogers and their U.S. counterparts—Verizon, AT&T, T-Mobile, and Sprint.

DIGITAL TRADE

For obvious reasons, NAFTA did not incorporate a chapter on digital trade. In this report, it seems appropriate to consider digital trade in the same chapter as IP and services because of the close interrelationships. (For example, copyright law cuts across several of these sectors).

In the USMCA, the digital trade chapter was in my view one of the most important modernizing elements adapted from the TPP. USTR, with considerable justification, boasts that "The new Digital Trade chapter contains the strongest disciplines on digital trade of any international agreement, providing a firm foundation for the expansion of trade and investment in the innovative products and services where the United States has a competitive advantage."[100] This language is a clear and welcome recognition of the enormous importance of the global sale of digital products produced in the U.S. Note also the relationship between the promotion of openness of digital trade in this USMCA chapter and the promotion of simplified procedures for exports of small shipments by U.S. enterprises such as Amazon, as required in USMCA, Chapter 7. Enterprises like Amazon are creatures of the internet, but most of the goods ordered from Amazon must still be shipped from bricks-and-mortar warehouses using standard shipping services, whether the packages are destined for customers in the U.S., Canada, or Mexico.

Some of the obligations reflect unsuccessful efforts made for several decades in other fora, such as the WTO, to prevent to the application of customs duties or other discriminatory measures from being applied to such products as e-books, videos, music, computer software, video games, and the like.[101] Similarly, cross-border transfers of electronic information are not to be prohibited or restricted for business purposes, with exceptions for non-discriminatory public policy objectives that are not arbitrary, unjustifiable discrimination, or a disguised restriction on trade.[102] One of the most important obligations is a ban on parties requiring a person subject to the chapter "to use or locate computing facilities in the Party's territory as a condition for conducting business in that territory" or "require the transfer of, or access to, a source code of software owned by a person of another Party . . . as a condition for the import, distribution, sale or use of that software."[103]

Other obligations reflect more basic non-discrimination[104] and the modern need for legal frameworks governing electronic transactions, electronic authentication, and electronic signatures.[105] The chapter also recognizes the need for protecting consumers from fraudulent or deceptive commercial activities.[106]

Certainly, one of the most controversial areas of digital trade today is protection of personal consumer information (or lack of effective protection). The USMCA language may be more important from what it does *not* do.[107] It does include a laundry list of key principles, ensuring compliance with protective measures:

> *The Parties recognize that . . . key principles include limitation on collection; choice; data quality; purpose specification; use limitation; security safeguards; transparency; individual participation; and accountability. The Parties also recognize the importance of ensuring compliance with measures to protect personal information and ensuring that any restrictions on cross-border flows of personal information are necessary and proportionate to the risks presented.*[108]

As others have observed, there is no mandatory minimum level of protections and no ban on the parties relying on voluntary undertakings by enterprises to protect privacy.[109] Many Americans are among those who would generally be reluctant to rely on voluntary undertakings given the frequency of massive personal data breaches in recent years, including those where Marriott, Equifax, eBay, Yahoo, and Target were the offenders.[110]

Consequently, USMCA seeks to protect consumers, whereby "The Parties recognize the importance of adopting and maintaining transparent and effective measures to protect consumers from fraudulent or deceptive commercial activities."[111] Parties are also required to maintain consumer protection laws designed to prohibit fraudulent and deceptive commercial activities and to cooperate with each other to enhance consumer welfare.[112]

However, interactive computer service providers, those with a "system or service that provides or enables electronic access by multiple users to a computer service," are not to be treated as information content providers in determining liabilities for harm related to information storage or processing, or when the supplier acts in good faith.[113] In theory, this "safe harbor" would permit service suppliers to tailor content to users, thereby increasing the quality of the services for consumers.[114]

An annex to the digital services chapter imposes special requirements on Mexico. It provides a three-year grace period for Mexico's obligations relating to interactive computer services and confirms that those requirements are subject to USMCA's general exceptions.[115] Mexican compliance is also required to be both effective and consistent with Mexico's Constitution (and implies the need for new legislation),[116] but Mexico preserves, under the scope of "public morals," its legislation is designed, inter alia, to protect against online sex trafficking and sexual exploitation of minors.[117]

Largely hortatory language provides that the parties will "endeavor" to build their national capacities for incident response and strengthen mechanisms for cooperation, with the caveat that "risk-based approaches may be more effective than prescriptive regulation."[118] The parties also agree to promote open access to government-generated public data and "endeavor to cooperate to identify ways in which each Party can expand access to and use of government information, including data that the Party has made public, with a view to enhancing and generating business opportunities, especially for SMEs."[119]

Interestingly, the USMCA chapter is no longer the most comprehensive digital trade chapter. A United States-Japan agreement (separate from the trade agreement) goes further, including coverage of information and communications technology that uses cryptography.[120] Parties to the agreement may not require the suppliers to "transfer or provide access to any proprietary information relating to cryptography."[121] Among the exceptions, no party under the agreement can be required to allow data access if it would jeopardize a party's "essential security interests."[122]

INVESTMENT RELATING TO INTELLECTUAL PROPERTY AND SERVICES

Investment issues, particularly the reduction of the protection of foreign investment in most sectors involving Mexico and its elimination after a three-year transition period as between the U.S. and Canada, were discussed in an earlier report. However, it is notable that investment disputes often arise within the IP and services sectors. NAFTA's Chapter 11 specifically covered intangible property.[123] The Industry Advisory Committee expressed "serious concerns" about the exclusion of investment protection:

> *Many foreign investments have a significant intellectual property component and many IP-intensive industries must make foreign investments in order to compete effectively in those markets. ITAC-13 believes it is not beneficial to the U.S. economic interest to curtail rights for U.S. companies to protect their IP investments in overseas markets.*[124]
>
> *Several Chapter 11 cases have focused on alleged violations of intellectual property rights.*[125]

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Similar issues arise from the relationship between services and investment, since many cross-border and financial services activities cannot be undertaken without investments, sometimes substantial ones, in the host country. In the most obvious example, the dispute between the U.S. and Mexico over cross-border trucking addressed the U.S.'s failure to permit Mexican trucks to enter the U.S. and a prohibition on Mexican investment in U.S. trucking enterprises, both of which were overturned by the Chapter 20 panel.[126]

At the conclusion of the USMCA negotiations, the Services Advisory Committee on USMCA objected strongly to the reduction of Investor-State Dispute Settlement (ISDS) protections with Mexico and their elimination with Canada:

> *[T]he new Trade Agreement eliminates the ability of most businesses to enforce many of the Agreement's core protections through ISD [against Mexico], limits recourse to ISDS to only existing investments, and adds new procedural hurdles to any company seeking to use neutral enforcement mechanisms . . .*
>
> *Additionally, the Committee is alarmed that no ISDS protections would be available for business concerns in Canada, based on the assertion that such protections are not needed due to Canada's well-regarded legal protections. The Committee rejects this view for three reasons: (1) other countries with less robust legal systems will demand the same treatment (i.e., no ISDS mechanism); (2) U.S. investors will have to rely on the U.S. government to enforce the Trade Agreement's investment protections not subject to ISDS, which will politicize the process, as well as prevent investors from "being made whole;" and (3) it is out of step with the approach taken by other major jurisdictions – such as the EU – in the investment chapters of their FTAs – which will leave our competitors' investments more secure than ours.*[127]

Presumably, the impact of eliminating ISDS for IP and services will not become fully apparent until several years after USMCA has entered into force, when the three-year grace period for NAFTA Chapter 11 will no longer be available to U.S. companies providing IP and services to Mexico and Canada. Given the enormous importance of IP and services exports for the U.S., as noted in the introduction to this report, it is not unreasonable to predict that this omission will be among the costliest for the U.S. and U.S. enterprises of any of the USMCA changes.

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ENDNOTES

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12. Protocol of Amendment to the United States-Mexico-Agreement, December 10, 2019, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/protocol-amendments.

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14. This IPR Committee is not required to meet until a year after entry into force of the USMCA. USMCA, art. 20.14.4.

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in the U.S.-Mexico-Canada Agreement," *Osler*, October 2, 2018, https://www.osler.com/en/resources/cross-border/2018/a-need-to-know-guide-on-ip-in-the-u-s-mexico-canada-agreement (an excellent summary of USMCA's IP innovations).

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30. United States-Peru Trade Promotion Agreement, April 12, 2006, art. 16.10, https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text. See Nancy Pelosi Statement on the USMCA Protocol, "Prescriptions Drugs," December 10, 2019 (noting that the changes reflect key principles that had been included in trade agreements with Peru, Panama and Colombia).

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43. USMCA, art. 20.84.1.

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50. General Agreement on Trade in Services, Annex 1B to the WTO Agreement, April 15, 1994, https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm.

51. NAFTA, Annex VII, VII-M-I to V-M-22.

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56. USMCA, art. 15.9.1.

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65. USMCA, art. 32.6; annex 15-D.

66. USMCA, annex 15-E.

67. USMCA, annex 15-E.

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69. NAFTA, annex I, I-M-63, I-M-64; I-M-67. I-M-68, I-U-18, I-U-19 and I-U-20. (Cross-border trucking services were not an issue as between the U.S. and Canada.)

70. For a full discussion of the issues up to 2001, see *In the Matter of Cross-Border Trucking Services*, Secretariat File No. USA-MEX-98-2008-01, Final Report of the Panel, February 6, 2001, paras.35-100, https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports. Disclosure: I was one of the five members of the Chapter 20 panel.

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99. USMCA, art. 18.25.1.

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