

The USMCA: Updating NAFTA by Drawing on the Trans-Pacific Partnership

David A. Gantz, J.D., J.S.M., Will Clayton Fellow in Trade and International Economics, Center for the United States and Mexico



INTRODUCTION

As the first report in this series indicated, significant portions of the United States–Mexico–Canada Agreement (USMCA) have been taken either verbatim or with some modifications from the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). This was a very logical approach given that the North American Free Trade Agreement (NAFTA) was negotiated more than 27 years ago (in 1991–92), and what was at the time the world’s most modern and deepest free trade agreement (FTA) was the Trans-Pacific Partnership (TPP) as negotiated by the Obama Administration on behalf of the United States and 11 other countries.¹ Many of the most important CPTPP/TPP innovations have been discussed in other reports. These include provisions for the protection of the environment and for the protection of investors in Mexico’s petroleum sector, in addition to provisions for intellectual property (IP), telecommunications services, and, perhaps most importantly, digital trade.

However, this is not to suggest that other changes adopted from the TPP, many of which have been based on post-NAFTA trade agreements concluded by the United States,² are unimportant either to the NAFTA parties or to their stakeholders. While it is difficult at this early date to accurately predict which ones will have a significant

impact on the future of North American trade, several of them, such as those relating to state-owned enterprises (SOEs) and special sectoral standards, have the potential to have a major impact. The USMCA also confirms that it may be easier to reach agreement on some innovations where there are only three parties at the table, compared to 12 with the original TPP (even if all the NAFTA parties were among the 12).

SMALL AND MEDIUM-SIZED ENTERPRISES

The USMCA’s Chapter 25 expands somewhat on the TPP’s Chapter 24 although the USMCA chapter, like that of the CPTPP, is largely aspirational. It should be noted that small and medium-sized enterprises (SMEs) were not addressed in NAFTA. The TPP chapter was limited to information sharing and the creation of a SME Committee. Information sharing was to consist of the creation of a website that would make available the entire agreement and its annexes (already available at multiple sources). There was also a vague obligation to provide website links to the equivalent websites of other parties and their agencies and to include other “appropriate entities” that would be useful to traders or investors, preferably in English.³ The SME Committee was designed to assist SMEs in “taking advantage of the commercial opportunities under this agreement.”⁴ The committee was required

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to meet within one year of the entry into force of the CPTPP with further meetings “as necessary.”⁵ This meant that any future meetings would be subject to the views of the parties and the committee members, an approach that does not give one a great deal of confidence that the committee will have much of an impact. Matters arising under the SME chapter are exempt from state-to-state dispute settlement.⁶

The USMCA expands this somewhat by requiring the parties to “recogniz[e] the fundamental role of SMEs in maintaining dynamism and enhancing competitiveness of their respective economies, [and to] foster close cooperation between SMEs of the Parties and [to] cooperate in promoting jobs and growth in SMEs.”⁷ The parties also emphasize the “integral role of the private sector” in SME coordination.⁸ This could have been more difficult in the CPTPP given the fondness of Brunei, Malaysia, and Vietnam for the state-controlled sectors of the economy. The USMCA also goes beyond the CPTPP by committing the parties more specifically to increasing SME trade and investment opportunities through cooperative measures to strengthen small business support infrastructure. It also promotes SMEs owned and operated by underrepresented groups, enhances cooperation among the parties for information exchange and best practices, and encourages the use of web-based platforms to share information.⁹

The USMCA provisions, to some extent, reflect an understanding of how difficult it is to encourage and support SMEs so that they can operate internationally. I discussed this problem with colleagues at a conference in Nova Scotia in September 2019 and with several small business stakeholders, primarily in the hospitality industry. Most of those queried in this unscientific evaluation were aware of NAFTA and the fact that it may soon be replaced. However, most of them had not taken any direct advantage of NAFTA and had no idea whether anything in the USMCA would lead to more business with Americans and (much less likely) Mexican nationals. None of them had even heard of the Comprehensive Economic and Trade Agreement between the European

Union (E.U.) and Canada that entered into provisional force in September 2017, despite efforts by the Canadian government and business groups to publicize it.¹⁰

There are of course many provisions in the USMCA that would assist SMEs as well as larger enterprises in taking advantage of North American trade. These include, among others, enhanced customs and trade facilitation provisions (to a limited degree), increased de minimis thresholds for packages, better access for dairy, greater labor obligations for Mexico, better IP enforcement, better regulatory cooperation, and coverage of digital trade.¹¹ Still, the situation under the USMCA once it enters into force is mixed:

The USMCA does provide for some new trade promoting opportunities for SMEs, but there are equally as many challenges and uncertainties. Not every sector will be impacted in the same way or to the same extent . . . SMEs and businesses around the country still have work to do in order to analyze the changes and assess the impacts on their finances, supply chains, and investment decisions if and before the agreement enters into force, most likely sometime in 2020.¹²

REGULATION OF STATE-OWNED ENTERPRISES AND DESIGNATED MONOPOLIES

NAFTA addressed competition, monopolies, and state enterprises together in one short chapter,¹³ mostly in a hortatory fashion and without dealing effectively with any of the three. Most significantly, while neither monopolies nor state enterprises were barred, each NAFTA party was obligated, through regulatory control and administrative supervisions, to ensure that a monopoly “acts in a manner that is not inconsistent with the Party’s obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial

transactions or impose quotas, fees or other charges.”¹⁴ Parties were also obligated to ensure that a monopoly would act in a non-discriminatory manner toward investors, goods and service providers.¹⁵ Similar language applies to state enterprises.¹⁶

The USMCA expands on party obligations in these areas, although it remains to be seen after the USMCA has been in force for several or more years whether the requirements can be effectively enforced. The chapter includes a definition of SOEs, similar to that found in the CPTPP¹⁷ but considerably more detailed. This perhaps reflects the U.S.’s serious concerns with the World Trade Organization’s (WTO) approach to SOEs, where the Appellate Body has imposed unreasonable standards for demonstrating that Chinese SOEs are “public bodies” and thus subject to the WTO’s subsidies disciplines.¹⁸ In the USMCA, an enterprise is a SOE if a party owns more than 50% of the share capital directly or indirectly, controls directly or indirectly more than 50% of the voting rights, has the power to control the enterprise through any ownership interest, including a minority interest, or holds the power to appoint a majority of the board of directors.¹⁹ For many observers, such bright-line rules make much more sense than the vagueness of the WTO Agreement on Subsidies and Countervailing Duties, which has given the Appellate Body an opportunity to exclude the term “public body” and thus exclude many SOEs that are effectively controlled and heavily subsidized by the government from the WTO subsidies disciplines.

Interestingly, the USMCA chapter applies to SOEs, state enterprises, and monopolies that could affect trade or investment within North America or activities “that cause adverse effects in the market of a non-Party.”²⁰ Essential elements, inter alia, are intended to assure that a party’s SOEs “act in accordance with commercial considerations in its purchase or sale of a good or service,” and that the enterprise “accords to a good or service supplied by an enterprise of another Party treatment no less favorable than it accords to a like good or a like service supplied by enterprises of the Party, of any other Party or of a non-Party” and treats covered investments in a non-discriminatory manner as well.²¹ As in NAFTA, similar rules

apply to designated monopolies.²² Small entities, with revenues of less than about \$250 million, are excepted.²³

Other provisions of the lengthy chapter include requirements that courts be provided with jurisdiction over civil claims against enterprises based on commercial activity carried on in a party’s territory and restrictions on subsidies.²⁴ Among other transparency requirements, each party within six months after the entry into force of the USMCA must publish a list of such enterprises on an official website and update the list annually.²⁵ The USMCA creates a SOE and Designated Monopolies Committee, similar to the Working Group on Trade and Competition under NAFTA.²⁶

Energy issues have been discussed in Chapter 5. However, the USMCA was signed November 30, 2018, one day before Andrés Manuel López Obrador became president. This is significant, because one of López Obrador’s key policies to date has been to significantly increase the powers and authority of Mexico’s petroleum monopoly, Pemex. As observers have noted,

*Pemex is the centerpiece of Mr. López Obrador’s aspiration to overturn what he sees as more than three decades of ‘neoliberal’ economic policy. One of his first moves after taking office was to order the oil company to add the motto “For the recovery of sovereignty” to its Mexican-eagle logo.*²⁷

These policies have been followed even though many are skeptical as to whether Pemex can effectively construct its new \$8 billion gasoline refinery or whether it can halt Mexico’s declining oil production over the past 15 years when no major new oil fields are scheduled to come online. Most of this is to be accomplished without significant participation of the private sector, some of whom have been alienated, inter alia, by a three-year moratorium on new lease auctions.²⁸

There is no evidence to date that the expansion of Pemex and the reduction of private enterprise participation in oil exploration and development is a violation of the USMCA’s Chapter 22 on SOEs. However, the situation bears watching.

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COMPETITION LAW

As noted earlier in this chapter, NAFTA itself did not deal effectively with competition law. In the USMCA, competition law is addressed in a chapter separately from monopolies and state enterprises. It is worth noting that dealing in substantive detail with competition issues is difficult in international agreements because of conceptual and enforcement differences among major nations, both developed and developing.²⁹ The USMCA, however, reflects what is probably the most modern attempt to deal with competition issues in a regional trade agreement to which the United States is a party. The basic principle requires that “Each Party shall maintain national competition laws that proscribe anticompetitive business conduct to promote competition in order to increase economic efficiency and consumer welfare and shall take appropriate action with respect to that conduct.”³⁰ It must also “endeavor to apply its national competition laws to all commercial activities in its territory” with a party having the right of “applying its national competition laws to commercial activities outside its borders that have an appropriate nexus to its jurisdiction.”³¹

Other aspects of the chapter are designed to encourage procedural fairness in enforcement, cooperation, and coordination between national authorities. For example, the parties are encouraged to make competition enforcement and advocacy policies as transparent as possible and must hold obligatory consultations on the request of any party.³² Another provision requires parties to “adopt or maintain national consumer protection law or other laws or regulations that proscribe fraudulent and deceptive commercial activities.”³³ Matters arising under this competition chapter are excluded from investment dispute settlement under Chapter 14 (which applies only to U.S.–Mexico disputes) and general state-to-state dispute settlement under Chapter 31.³⁴

The CPTPP’s competition chapter was similar in most respects. The most significant difference compared to the USMCA was the inclusion of a provision designed to require “each Party [to] adopt

or maintain laws or other measures that provide an independent private right of action.”³⁵ Remedies are not specified, presumably because most other nations do not accept U.S. laws that provide for treble damages in private anti-trust actions.³⁶ The CPTPP also provided a lukewarm technical cooperation requirement, indicating that “the Parties shall consider undertaking mutually agreed technical cooperation activities, subject to available resources.”³⁷

COMPETITIVENESS AND BUSINESS FACILITATION

The United States explained the purpose of the Competitiveness and Business Facilitation Chapter in the TPP as follows:

*The Competitiveness and Business Facilitation chapter creates mechanisms by which governments can make the assessments and get the information they need to assess the agreement’s overall contribution to its participants’ competitiveness. To do so, it establishes means to regularly review whether implementation of the agreement is leading to the anticipated gains in regional competitiveness.*³⁸

NAFTA had no equivalent committee.

In the TPP, it was evident from the language that effective encouragement of good supply management practices was the major focus of the chapter, with the Competitiveness Committee obligated to “explore ways to promote the development and strengthening of supply chains within the free trade area.”³⁹ A distinct provision was included requiring the committee to “explore ways in which this Agreement may be implemented so as to promote the development and strengthening of supply chains in order to integrate production, facilitate trade and reduce the costs of doing business within the free trade area.”⁴⁰ The committee, which was mandated to meet within one year of the date of entry into force of the agreement (but thereafter only “as necessary”), was composed only of government representatives. However, it was directed

to “establish mechanisms appropriate to provide continuing opportunities for interested persons of the Parties to provide input on matters relevant to enhancing competitiveness and business facilitation.”⁴¹

The competitiveness chapter of the USMCA, while in some respects resembling the TPP, is less ambitious. It makes no mention of supply chains or the facilitation of their development, for reasons unknown. Here, as in the TPP, the committee is composed entirely of government officials and is not required to convene again after the first meeting.⁴² The committee may seek advice from appropriate experts, but stakeholders have no direct input.⁴³ Parties are individually directed to establish opportunities for interested persons to provide input on matters relating to enhancing competitiveness.⁴⁴ One might have wished that the mechanisms for stakeholder input had been developed in more detail in this chapter. It is of course possible that the three USMCA governments will make effective use of the Competitiveness Committee, but there is certainly no guarantee that it will have any impact, particularly if private stakeholder input is not actively solicited.

ADDRESSING CORRUPTION

Although missing in NAFTA, anti-corruption provisions have been a part of most U.S. FTAs since the Dominican Republic–Central America–United States Free Trade Agreement (CAFTA–DR), including the USMCA. Including coverage in the USMCA makes obvious sense. While none of the three parties are free of corrupt activities, Mexico has long battled endemic corruption from the presidential level to that of the local policeman. As one observer summarizes the situation,

Corruption is a significant risk for companies operating in Mexico. Bribery is widespread in the country’s judiciary and police. Business registration processes, including getting construction permits and licenses, are negatively influenced by corruption. Organized crime continues to be a very problematic

*factor for business, imposing large costs on companies. . . . Mexico’s anti-corruption laws are almost never enforced, and public officials are rarely held liable for illegal acts. New anti-corruption laws were passed in 2017, but their effectiveness has not been proven yet.*⁴⁵

This status is confirmed by Transparency International, which ranked Mexico 138 out of 180 reviewed countries in 2018.⁴⁶ (Canada ranks number nine, the United States, number 22).⁴⁷

Moreover, during his presidential campaign, President López Obrador made rooting out corruption one of the key objectives of his presidency, although it is unclear whether he has made any progress. During the early months of his presidency there were no major prosecutions of public officials, and more than 70% of the government contracts were awarded directly without competitive bids.⁴⁸ Thus, at the time this report was written, one may reasonably question whether López Obrador’s administration will be able to reduce endemic corruption in Mexico, or even whether he is serious about doing so.

In the CPTPP, transparency and corruption were combined in a single chapter as has often been the case in earlier U.S. FTAs.⁴⁹ However, corruption is addressed in a separate chapter in the USMCA. Innovations are limited, with the parties reaffirming their adherence to the Organization for Economic Cooperation and Development, the United Nations and similar conventions against foreign bribery, and the principles developed by the Asia–Pacific Economic Cooperation Forum and the Group of Seven.⁵⁰

GOOD REGULATORY PRACTICES AND REGULATORY COHERENCE

As tariffs have gradually been reduced, better regulatory practices and increased conformity of such regulations among nations have become increasingly important to international traders, even though such efforts in trade agreements have had only limited success. In analyzing the effects

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of a “hard” Brexit, for example, in sectors where tariffs are low, the non-tariff barriers reflected by compliance paperwork and other administrative requirements could cost more than new most-favored-nation tariffs.⁵¹ In commenting on the regulatory coherence chapter of the TPP, the Office of the United States Trade Representative (USTR) noted the objectives:

Through the Regulatory Coherence chapter, the United States is seeking to foster an open, fair, and predictable regulatory environment for U.S. businesses operating in Asia-Pacific markets, including through principles that are central features of the U.S. regulatory process, such as transparency, impartiality, and due process as well as coordination across the government to ensure a coherent regulatory approach.⁵²

The terms “good regulatory practices” and “regulatory coherence” encompass several related areas as the quotation indicates. Arguably, a first attempt in this area was in NAFTA, where the parties addressed what at the time was an important aspect of transparency: “Publication, Notification and Administration of Laws.”⁵³ Under the TPP, the parties focused on “promoting mechanisms for effective interagency consultation and coordination” as well as implementation of “core good regulatory practices.” In the TPP, the United States and other parties recognized that regulatory coherence was an ongoing process and set up a committee that was designed to give the parties and their stakeholders opportunities “to report on implementation, share experiences on best practices and consider potential areas for cooperation.”⁵⁴

The USMCA expands considerably on the TPP, addressing in much greater scope and detail an area of great importance to the USMCA stakeholders who rely on effective supply chain management to take full advantage of the benefits of duty-free, quota-free North American trade. The commitment is well-summarized at the outset of the chapter:

The Parties recognize that implementation of government-wide practices to promote regulatory quality through greater transparency, objective analysis, accountability, and predictability can facilitate international trade, investment, and economic growth, while contributing to each Party’s ability to achieve its public policy objectives . . . The application of good regulatory practices can support the development of compatible regulatory approaches among the Parties, and reduce or eliminate unnecessarily burdensome, duplicative, or divergent regulatory requirements. Good regulatory practices also are fundamental to effective regulatory cooperation.⁵⁵

These objectives are supported by requirements, inter alia, to create a central regulatory coordination body in each country, to implement processes for international consultation, to improve coordination and review processes, to disseminate reliable and high-quality information, and to support early planning for new regulations.⁵⁶ As elsewhere (e.g., the SME chapter) a dedicated website is an obligation to include all information required to publish a regulation.⁵⁷ Transparent development of regulations, a concept that can be traced to NAFTA as noted above, is also obligatory.⁵⁸ The regulatory process is to be enhanced through USTR’s expert industry advisory groups and the encouraging of regulatory impact assessments,⁵⁹ long a feature of U.S. practice.⁶⁰ While the term “regulatory coherence” appears to have been generally avoided in the USMCA, regulatory “compatibility and coherence” is encouraged.⁶¹ The USMCA establishes a Committee on Good Regulatory Practices, similar to the TPP’s Committee on Regulatory Coherence.⁶²

Whether the chapter is unique or is a model for coverage of good regulatory practices in future trade agreements remains to be seen. Efforts to achieve a greater degree of regulatory coherence were a major area of disagreement in the now dormant Transatlantic Trade and Investment Partnership negotiations between the E.U. and the Obama Administration.⁶³ It has

been suggested that the USMCA chapter was drafted with the understanding that it could be a model for a similar chapter in planned trade agreement discussions between the U.S. and the E.U., if those discussions ever move forward.⁶⁴

SANITARY AND PHYTOSANITARY MEASURES AND TECHNICAL BARRIERS TO TRADE

Logically, sanitary and phytosanitary measures (SPS) could have been dealt with in an earlier report with other provisions affecting agriculture, but given the close structural relationship between the USMCA's SPS chapter and the chapter on technical barriers to trade (TBT), both are addressed here.

Given that NAFTA negotiations were completed in the fall of 1992, several years before the Uruguay Round of Multilateral trade negotiations were completed,⁶⁵ it was not surprising that SPS measures were included in NAFTA's chapter on agriculture and TBT provisions in a separate chapter, both in somewhat different structures than found in the WTO agreements.⁶⁶ As the Agricultural Advisory Committee noted, "The existing NAFTA was groundbreaking as it was one of the first free trade agreements that establish the framework of rules and disciplines leading to the development, adoption, and enforcement of sanitary and phytosanitary measures (SPS measures)."⁶⁷

The SPS and TBT chapters of the CPTPP and the USMCA were designed not only to update NAFTA but to update the WTO's SPS and TBT Agreements, which were also somewhat out of date after nearly 25 years⁶⁸ but could not be modernized because of the failure of the Doha Round of multilateral trade negotiations. Despite the similar approaches in the agreement, the SPS measures deal exclusively with human, animal, and plant safety issues, while the TBT provisions deal with technical regulations, standards, and conformity assessments of all other products.

Sanitary and Phytosanitary Measures

The WTO's SPS Agreement and the SPS chapter of the USMCA are essentially a set of procedures to deal with a dichotomy: governments must protect humans, animals, and plants from health risks and at the same time should avoid using spurious suggestions of risks in order to protect domestic agriculture. USTR has succinctly stated the problem:

*The United States supports SPS measures taken by governments to protect their people, animals and plants from health risks. Unfortunately, governments often seek to disguise measures that are discriminatory, unduly burdensome, or not based on scientific evidence as legitimate SPS measures. These measures create significant barriers to U.S. agricultural exports, and USTR is committed to identifying and removing these barriers.*⁶⁹

In the TPP, the SPS provisions were the model for and closely resemble those in the USMCA. USTR further explained the approach:

*This [ensuring the safety of food supplies] involves ensuring that our partners use science and risk analysis as a foundation for SPS measures, which mirrors U.S. food and agricultural safety policy. As examples, they must use appropriate import check and restriction policies focused on direct threats to health and safety, avoid duplicative or unnecessary testing requirements where food already meets accepted international standards, and use transparent procedures for developing regulations—including opportunities for public comment.*⁷⁰

Given the difficulty at the outset in determining whether a country's measures to restrict agricultural imports are truly designed to protect human, animals, or plants, or rather to protect domestic producers, the approach followed in essentially all SPS mechanisms is to require the country to show that there is a strong scientific basis for the measure. They must

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also give weight to internationally accepted standards over those that have been developed by individual countries.

In the past, the United States and Canada were parties to a long-running dispute between the North American beef producers and the E.U. over the E.U.'s ban on the importation of beef fattened with growth hormones. Despite efforts over many years, the E.U. was never able to demonstrate that there was any health risk to humans by ingesting beef grown with hormones, and the Appellate Body of the WTO so decided. However, for political and environmental reasons, the E.U. refused to permit imports of such beef. In 2013, the U.S. and the E.U. reached an agreement or "mutually acceptable solution" that permitted a certain quantity of U.S. exports of beef that had not been fattened with hormones.⁷¹

The TPP was said to have incorporated "new rules that will ensure that science-based SPS measures are developed and implemented in a transparent, predictable, and non-discriminatory manner, while at the same time preserving the ability of U.S. and other regulatory agencies to take necessary steps to ensure food safety and protect plant and animal health."⁷² The USMCA chapter also incorporates the definitions from the WTO's SPS Agreement,⁷³ with some innovations of its own, presumably reflecting the willingness of all three USMCA parties to go beyond what had been agreed on only a few years earlier in the TPP. According to the Report of the Agricultural Policy Advisory Committee, the USMCA makes several major changes that aim to:

[include] provisions which increase transparency on the development and implementation of SPS measures; advance science-based decision making; improve processes for certification, regionalization and equivalency determinations; conduct systems-based audits; improve transparency for import checks and additional measures to ensure more expeditious border crossing; and enhance compatibility of measures.⁷⁴

In the USMCA, as with earlier SPS versions, the focus is on procedures designed to assure that restrictions are based on science and risk analysis, with a preference for the use of international standards, as noted above, rather than more arbitrary efforts to protect local producers.⁷⁵ Efforts are made to encourage adaptation to regional conditions, with recognition of pest or disease-free areas, so as to encourage trade in those areas.⁷⁶ Transparency concerns are evident throughout.⁷⁷ Import checks must be based on actual potential risk, with the parties required to inform importers and exporters within five days (down from a week under the TPP) if a shipment is being restricted or prohibited for reasons related to food safety or animal or plant health.⁷⁸

Emergency measures are permitted but only if parties disclose the scientific basis for such measures.⁷⁹ Since most countries maintain certification requirements, the chapter mandates that the information required relates only to SPS issues, is based on recognized international standards, and is otherwise appropriate.⁸⁰ Other provisions address equivalency (where different testing procedures achieve the importing party's level of protection) and "enhanced compatibility,"⁸¹ along with information exchange, food safety audits, and consultations. A Committee on Sanitary and Phytosanitary Measures will be created to meet annually unless otherwise decided.⁸² Such committee work is apparently to be supplemented by technical working groups that can function either on an ongoing or an ad hoc basis.⁸³ Disputes over SPS measures are subject to state-to-state dispute settlement under the USMCA Chapter 31, with the panel encouraged to seek advice from experts chosen by the panel in consultation with the disputing parties.⁸⁴

Technical Barriers to Trade

Like the SPS Agreement, the USMCA TBT chapter builds on NAFTA, the WTO, and the TPP. The USMCA chapter incorporates the WTO's TBT Agreement and its explanatory notes by reference.⁸⁵ It also reflects one of the earliest treatment-of-standards issues

in any trade agreement, in NAFTA Chapter 9.⁸⁶ Chapter 9 was raised by Mexico in a Chapter 20 state-to-state dispute, “Cross-Border Trucking Services and Investment.”⁸⁷ Mexico had argued, inter alia, that the U.S. failure to implement its cross-border trucking services and investment obligations was not justified by the standards chapter.⁸⁸ That argument, however, was not discussed in detail in the Cross-Border Trucking Services Report because the United States chose not to rely on Chapter 9 as a defense.⁸⁹ Rather, the panel believed it necessary to address Chapter 9 because both Mexico and Canada (in the latter’s submission to the panel) noted that “under Article 904, the United States has the right to set a level of protection relating to safety concerns, through the adoption of standards-related measures, notwithstanding any other provision of this Chapter” and must be “in accordance with this Agreement.”⁹⁰

As with the WTO SPS Agreement, many WTO members believed that the TBT Agreement could be improved beyond its original version. They therefore included a provision in the agreement itself that the TBT Committee would review the agreement in three years and every three years thereafter “with a view to recommending an adjustment of the rights and obligations of this Agreement where necessary to ensure mutual economic advantage and balance of rights and obligations.”⁹¹ Such reviews never progressed beyond very preliminary stages, which resulted in the United States and many other countries seeking (successfully) to include improved TBT provisions in regional trade agreements, such as the CPTPP and the USMCA.

The TBT chapter should be read in conjunction with the section of this chapter discussing good regulatory practices. While the TBT chapter of the USMCA is considerably more detailed and far-reaching than the CPTPP chapter, the importance of technical barriers to U.S. trader interests is well set out in USTR’s commentary on the CPTPP chapter:

TPP’s Technical Barriers to Trade (TBT) chapter helps create an open, transparent, stakeholder-based system of standards-setting . . . It ensures that

*technical standards-setting, conformity assessment procedures, and technical regulations are fair and transparently developed, with opportunities for meaningful input and “bottom-up” participation in standards-setting.*⁹²

The Industry Trade Advisory Committee on Standards and Technical Trade Barriers (Standards Committee) provides a useful summary of the achievements of the USMCA negotiations in its report: “Chapter 11 Technical Barriers to Trade (TBT) and Chapter 28 Good Regulatory Practices [discussed in part G of this chapter] are exceptional examples of trade agreement modernization – reinforcing the core of the WTO TBT Agreement and expanding beyond the achievements of the former Trans-Pacific Partnership text.”⁹³ The Standards Committee faulted USTR only for failing to tie industry specific annexes in Chapter 14 explicitly to the TBT chapter and noted that other chapters such as Chapter 8 (energy) and 19 (digital trade) are directly affected by standards issues.⁹⁴

The USMCA chapter reflects several structural differences from the CPTPP. For example, as reflected in the Standards Committee’s report, the USMCA emphasizes the importance of having U.S. standards treated as international standards for business. Thus, standards which satisfy the “Code of Good Practice principles of standards development (e.g., balance, openness, due process, etc.) are in fact ‘international.’”⁹⁵ This objective is reinforced in the USMCA Chapter 11, since it requires the USMCA parties to “apply the TBT Committee Decisions on International Standards” and prohibits the parties from applying “additional principles or criteria other than those in the TBT Committee Decision on International Standards in order to recognize a standard as an international standard.”⁹⁶ It may well be that achieving greater regulatory “alignment” was simpler for USTR in the USMCA than the CPTPP because Mexico and Canada, over the NAFTA years in particular, have already embraced many U.S. origin technical standards because of the duty-free, quota-free regional trade.

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Still, the basic approach of the USMCA does not in principle differ from earlier agreements. Thus, in addition to incorporation of the WTO TBT Agreement, the USMCA supports international standards, guides, and regulations in regulatory alignment.⁹⁷ A party that has not used international standards in the preparation and implementation of technical regulations can be challenged for failing to do so.⁹⁸ The chapter also encourages the USMCA parties to permit sub-contractors and non-governmental bodies to take conformity assessments and favors mutual recognition of such assessments.⁹⁹ Additionally, it forms a Committee on Technical Barriers to Trade (TBT Committee), again composed of government representatives, to “strengthen their joint work in the fields of technical regulations, standards, and conformity assessment procedures.”¹⁰⁰

Some have expressed concerns that the United States has given Canada and Mexico a disproportionate role in the drafting of U.S. regulations (and vice-versa).¹⁰¹ However, this appears to be a minor risk, given the economic domination of the USMCA by the United States and the fact that for Mexico and Canada, some 75% of total exports go to the United States. This does not assure complete conformity in standards and technical regulations, but it gives all parties an incentive not to diverge significantly from a common approach.

Standards Set Out in Sectoral Annexes

A separate USMCA chapter addresses technical standards for chemicals, cosmetics, information and communications technology, energy performance standards, and medical devices and pharmaceuticals, as defined therein.¹⁰² It thus impacts, to some extent, products treated in other USMCA chapters, such as those affecting TBT, communications, IP, and good regulatory practices, among others.¹⁰³ The sections of the chapter generally apply along the following lines (with chemical substances as the example):

This Annex applies to the preparation, adoption, and application of technical regulations; standards; conformity

*assessment procedures; measures relating to hazard communication, labeling, and communication of information on the use and storage of chemical substances and chemical mixtures, and on response in the workplace to hazards and exposures; and import and export permits for chemical substances and chemical mixtures by a Party’s central level of government.*¹⁰⁴

The various sub-chapters also require the parties to publish online information regarding central government competent authorities charged with implementing and enforcing measures related to the sector and to state the objectives of enhancing regulatory compatibility. Exchange of information on methodologies for assessing chemical substances (in this instance) is also mandated.¹⁰⁵

ENDNOTES

1. “Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),” Government of Canada, modified March 3, 2018, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/index.aspx?lang=eng&ga=2.137201392.1186738.1570397124112869.4463.1562952965>. The Trans-Pacific Partnership became the Comprehensive and Progressive TPP (CPTPP) after U.S. withdrawal, with the other 11 parties agreeing on a list of modifications. In most respects the original TPP text remained as negotiated. It was signed by the parties on February 4, 2016 and is in force for seven of the 11 parties as of February 2020.

2. See, e.g., “Central America–Dominican Republic–United States Free Trade Agreement (DR–CAFTA),” Foreign Trade Information System, August 5, 2004, http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/CAFTADRin_e.asp. (addressing corruption in Chapter 18, Section B).

3. CPTPP, arts. 24.1, 24.2.

4. CPTPP, arts. 24.2, 24.3.

5. CPTPP, art. 24.2.4.

6. CPTPP, art. 24.3.
7. USMCA, art. 25.1.1.
8. *Ibid.*
9. USMCA, art. 25.2.
10. “Text of the Comprehensive Economic and Trade Agreement,” Government of Canada, modified April 19, 2018, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>.
11. “USMCA (NAFTA 2.0): What it Means for SMEs,” *Trade Moves LLC*, October 22, 2018, <http://www.trademoves.net/trademoves-blog/usmca-nafta-20-what-it-means-for-smes>.
12. *Ibid.*
13. NAFTA, ch. 15.
14. NAFTA, art. 1503.3(a).
15. NAFTA, art. 1502.3(c).
16. NAFTA, art. 1503.2.
17. CPTPP, art. 17.1.
18. USTR (Office of the United States Trade Representative), “Statement on WTO Appellate Report on China Countervailing Duties,” July 16, 2019, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/july/statement-wto-appellate-report-china>. This shows the concerns most recently stated by USTR: “Today’s appellate report recognizes that the United States has proved that China uses State-Owned Enterprises (SOEs) to subsidize and distort its economy. Nonetheless, the majority in the report says that the United States must use distorted Chinese prices to measure subsidies, unless the U.S. provides even more analysis than the hundreds of pages in these investigations. This conclusion ignores the findings of the World Bank, OECD working papers, economic surveys, and other objective evidence, all cited by the United States.”
19. USMCA, art. 22.1.
20. USMCA, art. 22.2.1.
21. USMCA, art. 22.4.1(a), (b).
22. USMCA, art. 22.4.2. (Applicable to private enterprises enjoying monopoly status through government approval).
23. USMCA, art. 22.13.5; annex 22-A.
24. USMCA, arts. 22.5, 22.6.
25. USMCA, art. 22.10.
26. See USMCA, art. 22.2; NAFTA, art. 1504.
27. Jude Webber and Michael Stott, “Mexico: López Obrador Makes a Big Bet on Oil,” *Financial Times*, October 3, 2019, <https://www.ft.com/content/d5c3c1c0-e432-11e9-b112-9624ec9edc59>.
28. *Ibid.*
29. See, e.g., D. Daniel Sokol, “Troubled Waters Between U.S. and European Antitrust,” *Michigan Law Review* 115, no. 6 (2017): 955, http://michiganlawreview.org/wp-content/uploads/2017/04/115MichLRev955_Sokol.pdf. See also, Francisco Gonzalez de Cossio, “International Aspects of Competition Law,” 2003, <http://www.unis.edu.gt/ap/fetch/international-competition.pdf>.
30. USMCA, art. 21.1.1.
31. USMCA, art. 21.1.2.
32. USMCA, arts. 21.2, 21.3, 21.5, 21.6.
33. USMCA, art. 21.4.2.
34. USMCA, art. 21.7.
35. CPTPP, art. 16.3.2.
36. See Leon B. Greenfield and David F. Olsky, “Treble Damages: To What Purpose and to What Effect?” *British Institute of International and Comparative Law*, Feb. 2, 2007, <https://www.wilmerhale.com/-/media/a/7cc10f22c4b9447899185d6bc48dc37f.pdf>.
37. CPTPP, art. 16.5.
38. USTR, “TPP Chapter 22 Summary: Competitiveness and Business Facilitation,” 2016, <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Competitiveness-and-Business-Facilitation.pdf>.
39. TPP, art. 22.2.3(d).
40. TPP, art. 22.3.1.
41. TPP, arts. 22.2, 22.4.
42. USMCA, art. 26.1.2.
43. USMCA, art. 26.1.8.
44. USMCA, art. 26.2.
45. “Mexico Corruption Report,” *Gan Integrity*, July 2018, <https://www.ganintegrity.com/portal/country-profiles/mexico/>.
46. “Corruption Perceptions Index 2018,” *Transparency International*, 2018, <https://www.transparency.org/cpi2018>.
47. *Ibid.*

48. See Azam Ahmed and Kirk Sample, “A New Revolution? Mexico Still Waiting as López Obrador Nears Half-Year Mark,” *New York Times*, May 10, 2019, <https://www.nytimes.com/2019/05/10/world/americas/amlo-mexico-lopez-obrador.html>.
49. CPTPP, ch. 26; CAFTA-DR, ch. 18.
50. USMCA, arts. 27.2.2, 27.2.3.
51. See Alex Chadwick, “The Realities of Trade after Brexit: A New Perspective from Baker McKenzie,” *Baker McKenzie*, 2017, 2, <https://www.bakermckenzie.com/-/media/files/insight/publications/brexit-tradeflows.pdf>.
52. USTR, “TPP Chapter 25 Summary: Regulatory Coherence,” 2016, <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Regulatory-Coherence.pdf>.
53. NAFTA, ch. 18.
54. USTR, “TPP Chapter 25 Summary.”
55. USMCA, art. 28.2.
56. USMCA, arts. 28.3–28.6.
57. USMCA, art. 28.7.
58. USMCA, art. 28.9.
59. USMCA, arts. 28.10–28.11.
60. See John Morrall and James Broughel, “The Role of Regulatory Impact Analysis in Federal Rulemaking,” Mercatus Center, April 10, 2014, <https://www.mercatus.org/publications/regulation/role-regulatory-impact-analysis-federal-rulemaking>. Morrall and Broughel observe that “Regulatory impact analysis (RIA) is a tool regulators use to help guide them through the decision-making process when promulgating regulations” and has been used in the United States by executive branch agencies since 1981.
61. USMCA, art. 28.17.
62. USMCA, art. 28.18; TPP, art. 25.6.
63. See “Analysts: USMCA Good Regulatory Practices Chapter a Baseline for EU Deal,” *World Trade Online*, November 15, 2018, <https://insidetradetrade.com/daily-news/analysts-usmca-good-regulatory-practices-chapter-baseline-eu-deal>.
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65. WTO (World Trade Organization), “Marrakesh Agreement Establishing the World Trade Organization,” April 15, 1995, https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm. This includes the TBT Agreement and SPS Agreement in Annex 1A.
66. See NAFTA, ch. 7, section B, and ch. 9 (standards related measures).
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72. *Ibid.*
73. USMCA, art. 9.1.
74. USTR, “Report of the Agricultural Policy Advisory Committee.”
75. USMCA, art. 9.6.
76. USMCA, art. 9.8.
77. See, e.g., USMCA, art. 9.13.

78. USMCA, art. 9.11.
 79. USMCA, art. 9.14.
 80. USMCA, art. 9.12.
 81. USMCA, arts. 9.7, 9.9.
 82. USMCA, art. 9.18.
 83. USMCA, art. 9.18.
 84. USMCA, art. 9.20.
 85. USMCA, art. 11.1.1.
 86. NAFTA, ch. 9.
 87. NAFTA Secretariat, “Decisions and Reports,” <https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports>. See “In the Matter of Cross-Border Trucking Services,” Secretariat File No. USA-MEX-98-2008-01, Feb. 6, 2001.
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 89. *Ibid.*, para. 183.
 90. *Ibid.*, paras. 271-272 and footnote 309.
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 92. USTR, “TPP Chapter 8 Summary: Technical Barriers to Trade (TBT),” 2016, <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Technical-Barriers-to-Trade.pdf>.
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 94. *Ibid.*
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 96. USMCA, arts. 11.4.2, 11.4.3.
 97. USMCA, art. 11.4.1.
 98. USMCA, art. 11.5.6.
 99. USMCA, arts. 11.7.7, 11.9.1, 11.9.2.
 100. USMCA, art. 11.11.1.
 101. Tori K. Whiting and Gabriella Beaumont-Smith, “An Analysis of the United States – Mexico – Canada Agreement,” *Backgrounder*, The Heritage Foundation, no. 3379, (Jan. 28, 2019): 24, <https://www.heritage.org/trade/report/analysis-the-united-states-mexico-canada-agreement>.
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 103. See USMCA, ch. 11, 18, 20, and 28.
 104. USMCA, art. 12.A.2.
 105. See, e.g., USMCA, arts. 12.A.3, 12.A.4, 12.A.5.

AUTHOR

David A. Gantz, J.D., J.S.M., is the Will Clayton Fellow in Trade and International Economics at the [Center for the United States and Mexico](#) whose work focuses on international trade and economics. He is also the Samuel M. Fegtly Professor of Law Emeritus at the University of Arizona’s James E. Rogers College of Law and director emeritus of the international trade and business law program. Gantz has written extensively on World Trade Organization and NAFTA trade law and dispute resolution issues, as well as a range of other international trade matters.

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Cite as:
Gantz, David A. 2020. *The USMCA: Updating NAFTA by Drawing on the Trans-Pacific Partnership*. Baker Institute Report no. 02.21.20. Rice University’s Baker Institute for Public Policy, Houston, Texas.

<https://doi.org/10.25613/wykt-vk02>