USMCA

Towards a new era of integration of the North America Market

Challenges and oportunities from an analytical legal perspective

GOODRICH
RIQUELME
ASOCIADOS

Towards a new era of integration of the North America Market

Challenges and oportunities from an analytical legal perspective

GOODRICH
RIQUELME
ASOCIADOS

INTRODUCTION

Undoubtedly, from an economic perspective, NAFTA has been one of the most relevant successes in worldwide history of trade integration. Since its beginnings in 1994, trade has tripled, and the North American region has been highly competitive on investment attraction, considering that production chains have efficiently interlinked the comparative advantages in the three countries, in a wide range of goods' and services' sectors. This has also led to the expansive generation of employment in practically all the provinces and states of the member countries. In this vein, nowadays, our region represents almost 30% of global nominal GDP.

Although in the last two decades, international commerce in the United States has strongly increased, it is clear that the combined importance of Canada and Mexico for American trade has maintained its levels by 30% of the total volume of said country. This is twice than the current participation of China, which is around 15%. Moreover, NAFTA trade represents around 40% of the American-exportations' growth during the existence of the trade agreement.

While NAFTA's renegotiation emerged in a context of certain protectionist rhetoric, the truth is that the pragmatism of the trilateral relation has been imposed, and thanks to good negotiating teams, as well as a very active participation of the private sector, the USMCA could be considered as a treaty that, not only offers a reasonable certainty for investments and trade, but also, updates the most

relevant topics of the international trade regime, endorsed by institutions such as WTO and by modern regional agreements as TPP.

In 85 years of existence, Goodrich Riquelme has sought to take the lead in the critical study of the applicable legal instruments, in order to construe –with a constant sense of innovation and excellence- creative and strong solutions for our clients in over 35 countries, represented by a range of Fortune 500 companies, practically in all economic sectors.

Our analytical vocation is maintained through the integral study of USMCA. In order to achieve that, we have integrated an interdisciplinary task force, whose mission has been, on one hand, to contrast the contents of USMCA with those of NAFTA and other current regimes of commerce and investment worldwide, as well as offering to our new clients, a practical vision on how to minimize risks and make the most out of the treaty.

Therefore, we are ready to deepen on the detailed consulting, like a tailored suit for each one of our clients.

We sincerely appreciate your reading,

BOARD OF DIRECTORS
GOODRICH RIQUELME Y ASOCIADOS

Mexico City, Spring 2019

GLOSSARY

CP TPP: Comprehensive and Progressive Agreement for Trans-Pacific Partnership, before TPP (Transpacific Partnership).

ICSD: International Central Securities Depository.

OCDE: Organization for Economic Cooperation and Development.

ILO: International Labor Organization.

WTO: World Trade Organization.

Parties: Canada, United Stated (also referred to as USA) and United Mexican States (also referred to as Mexico).

S&Ms: Small and Medium Sized Enterprises.

National Anticorruption System: In charge of coordinating social actors and authorities ofdifferent levels of government, in order to prevent, investigate and punish corruption.

NAFTA: North American Free Trade Agreement.

USMCA: United States-Mexico-Canada Agreement.

UNCITRAL: United Nations Commission for International Trade Law.

INDEX

CUSTOMS AND TRADE FACILITATION

The purpose of modernizing NAFTA, now USMCA, is based on diversification and deepening of trade relations in the North American region.

In order to accomplish that, one of the main actors in the development of trade relations among member countries of a trade treaty is the Customs Administration, whose main purpose is to create the necessary instruments to facilitate operations in foreign trade operations carried out in the different sectors.

In this order of ideas, it was necessary to update the established mechanisms in NAFTA negotiated 25 years ago, adhering to foreign trade situations and current economic and financial globalization, which requires a dynamism in all the productive sectors.

Therefore, all aspects to highlight in this modernization and now considered in USMCA, are as follows:

- Establishes provisions related to the facilitation of custom operations in order to expedite the exchange of goods among the parties, such as: issuance of anticipated resolutions on the origin of goods for the application of tariff preferences, simplified customs procedures for urgent shipments, joint inspections by border customs authorities.

- Points out the creation of a Sub-Committee on Customs, to address issues related to potential or real customs offenses to discuss joint initiatives in matters of mutual preoccupation in customs and foreign trade matters.

- Improves the combat against customs crimes in the field of illegal trade practices.

We consider that the aforementioned inclusions of USMCA, will benefit the procedure of import and export of goods, accelerating with this the compliance on customs regulations obtaining as a result an increase on the trade flow, as well as regional investment, with a better legal-customs certainty among those involved in the foreign trade operations. fostering trade bonds and a better transaction of customs operations.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/07%20Customs%20%20and%20Trade%20Facilitation.pdf

RULES OF ORIGIN

In this new trilateral trade agreement named USMCA, the Origin Criteria considered in the current NAFTA prevails, as well as the fulfillment of the Specific Origin Regulation, because of change of tariff classification or because of Regional Value Content or both, as the case may be, to confer the products the origin of the region of the celebrating Parties of said trade agreement and may enjoy the application of preferential tariff rates.

Emphasizing – by its importance and complexity in its fulfillment the Regulation of Specific Origin – those for the respective merchandise of the following industrial sectors:

- Automotive.
- Chemical.
- Optical fibre.
- Mineral.
- Textile and confection.

We even consider that the new Regulation of Specific Origin for the Automotive Industry, according to USMCA, not only is it stricter than the 62.5% of the Regional Value Content provided in NAFTA, but its methodology is more complex, as it requires the fulfillment of the following points:

To enjoy an exempt tariff.

- 75% of Regional Value Content of a motor vehicle must be generated in the United States of America, Canada, and Mexico.
- 40% shall be elaborated in areas with a high wage of 16 dollars per hour.
- 70% of the steel and aluminum used in the production of the motor vehicle shall originate from said countries
- 75% of the value of the vehicle shall originate from the region (engine, chassis & body, gearbox, axles, suspension, steering system, batteries, etc.)

As of USMCA's entry into force, there will be a transition period of three years in order to comply with the new Regulation on Specific Origin in question. In the event of non-compliance, the sanction to be paid is the 2.5% tariff of the Most-Favored-Nation.

On the other hand, in the Integral and Progressive Treaty of Trans-Pacific

Partnership (CPTPP), pending ratification by the Mexican Senate, the Regional Value Content by the Net Cost Method to consider vehicles as originating from the Region of said trade agreement is 45%.

We consider that this is one of the reasons that motivated the condemnation and exit of the United States of America from said trade agreement.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/04%20Rules%20of%20Origin.pdf

ORIGIN PROCEDURES

This new trade agreement modernizes the certification plan of origin of goods generating greater legal certainty among customs authorities of the Parties of said trade agreement and also among producers, exporters, and importers of the goods covered in USMCA.

On the other hand, it was decided to eliminate the current certificate of origin format provided in NAFTA, allowing now the certification of origin of the goods through the trade invoice or through any other trade document, as long as the information provided in Annex 5-A of USMCA is declared.

Modernization of verification of origin procedures in USMCA is worth noting because of the following:

In NAFTA, the substantiation of the verification of origin procedures through questionnaires is foreseen in the following legal systems:

- In Administrative Regulations regarding the applications of NAFTA provisions in the matter of verification of origin;
- In the provisions of the Fiscal Code of the Federation.

In USMCA, it is determined that the substantiation of the verification of origin procedures of goods may be initiated by any of the following means:

- Information questionnaires requiring documentation or;
- Verification visits at the producers' and/or exporters' Industrial Plant.

The USMCA details the steps and stages that are to be followed by customs authorities of the Countries that are part of this trade agreement, in the verification of origin procedures when these begin through questionnaires or verification visits, specifying, in the case of questionnaires, the deadlines for responding them and the consequences of not certifying the origin of the goods.

The USMCA aligns the provisions of the verification of origin procedures of the goods provided in USMCA to the provisions on these procedures referred to in the other Free Trade Treaties or Trade Agreements executed and signed by Mexico after NAFTA.

Finally, in USMCA it is anticipated that those importers who fail to comply with the provisions established in this Chapter on Origin Procedures shall be subject to civil, criminal or administrative sanctions, as appropriate, by the country party of the aforementioned Trade Agreement.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/04%20Rules%20of%20Origin.pdf

NATIONAL TREATMENT AND MARKET ACCESS FOR GOODS

The geographic location of NAFTA member countries allowed, at the time, that the access of goods into the markets of said countries were reflected in the increase of sectors such as: agriculture and cattle raising, food and beverages, automotive, construction, electric, textile, etc., finding its support, in the preferential tariff applicable to originating goods, as well as the gradual reduction of tariffs.

With the modernization of NAFTA, member countries shall continue to accord equal treatment to the goods and services of the signatory countries of said trade agreement, ensuring compliance with the principle of "national treatment", which refers "to give others the same treatment than nationals".

Said principle shall be applied once the good or service is introduced into the market of any of the countries Party that enter into this trade agreement.

To give certainty to the application of national treatment and access of goods into the market, new trade

provisions are established in USMCA to ensure a greater transparency and legal certainty in the implementation of non-tariff measures, thus avoiding restrictions on market of USMCA's member countries.

The new trade provisions are now reflected in USMCA through the modernization and implementation of the following principles of the national treatment and access of goods into the market are:

- Free trade for all originating goods.
- Elimination of tariff barriers.
- Prohibition on the application of taxes on the export of goods.
- Drawback and Duty Deferral Programs.
- Prohibition of performance requirements for the issuance of import permits and tariff deferral programs.
- Modernization in the matter of temporary importation of goods reimported goods after repair; commercial samples not subject to commercial, and printed advertising materials, etc.
- Trade of remanufactured goods in the region.
- Creation of the Committee on Trade in Goods as a forum of consultation among member countries of USMCA.
- Internment of goods originating in the region free of duty to the United States of America.

Mexico as a country promoting foreign trade and, with globalized view, shall continue promoting trade policies in order to ensure the growth and strengthen of Trade in Goods avoiding the imposition of tariffs and restrictions on foreign trade, thus generating a greater investment in the country that will impact in the creation of new sources of employment.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/National%20Treatment%20Market%20Access%20Goods.pdf

INVESTMENT

This chapter of USMCA establishes the concept of investments, its scope, the regulation of transfers, performance requirements, national treatment, most favored nation, minimum level of treatment, corporate social responsibility, direct and indirect expropriation, dispute settlement, arbitration, arbitration in the case of public debt and exceptions, the application of arbitration to disputes arising from contracts related to oil and natural gas sectors, electricity supply, supply of transportation services, ownership, and infrastructure management.

In a relevant way, the concept of protected investment comprises an extended catalogue of what is considered as 'investment', including futures, obligations, and other derivatives, administration contracts among others, as well as those in which the income and revenue-sharing is established and similar contracts, intellectual property rights, licenses, permits and authorizations, tangible and intangible assets, as well as related rights such as encumbrances, mortgages, pledges and leases.

The concept of transfer is amended to include contributions to capital, royalties, management fees, and technical services stating that, in general, "covered investment" may be done freely and at the prevailing exchange rate at the time of the operation, thus seeking, certainty on the application that no restrictions on the exchange rate will be applied to its investments.

In terms of performance requirements, "purchase, use, or accord a preference of technology, or those who prohibit the purchase, use and accord a preference of technology" are included apart from those originally mentioned in NAFTA, specifically regulating that no requirements may be adopted, nor shall they enforce agreements to impose specific royalties and terms, with the intention of assuring the investors that they shall not be subjected to the application of regulations such as those that were in force during the existence of the Law on the Registration of Technology Transfer and the Use and Exploitation of Patents and Trademarks, which undertook the registration of technical knowledge transfer contracts and limited royalties payments.

With regard to expropriations or seizures, USMCA includes the

additional concept of an indirect one, seeking to avoid concealed acts that impede the development of investment in a contrived way.

In the matter of dispute settlement, specifically arbitration, contrary to the provisions of NAFTA, parties themselves may submit, through mutual covenant, to any arbitral institution other than ICSD and UNCITRAL, including the settlement of disputes of those claims initiated before the entry into force of USMCA, preventing that these will be conducted in accordance with NAFTA, which is consistent with the negotiation carried out for said investment. The section on Dispute Settlement, in terms of Public Debt, even if it prohibits the issuance of awards, regulates the possibility of issuing in this matter, only in certain cases, and when certain requirements are met.

Moreover, the section on Dispute Settlement also regulates violations relating to the principles of national treatment and most-favored-nation, as well as those related to contracts signed by the State, in the oil and natural gas sectors, supply of electrical power, supply of transport services, ownership, and administration of infrastructure, all these aspects are regulated in such a specific way that certainty of the way in which disputes will be resolved. In the case of claims of the aforementioned violations, the arbitrament may grant pecuniary compensation with the applicable interest or, otherwise, the restoration of property.

In the investment chapter, we can sense the security of which the investor can benefit from in the oil, natural gas, supply of electricity, supply of transport services, and infrastructure sectors, and regarding technology contracts, since USMCA tries to avoid the execution of an exchange control act, as well as limitations to the sovereign trade right of negotiation of the parties to decide freely the percentages of royalties payments and validity in their contracts, in addition to regulate by clear rules the way to settle disputes, contributing all this to a greater attraction of foreign investment.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/14%20Investment.pdf

AGRICULTURE

USMCA aims to regulate the applicable measures of the signatory States regarding trade in goods of the agricultural sector, including goods with biotechnology applied to them. The above aims to innovate, encourage and strengthen a market of free trade in agricultural products in the region; increasing the robustness and appropriate structure of tools for transparency and cooperation between the signatory States.

It is important to mention that the new Treaty promotes the elimination of tariff barriers, as well as excessive national subsidies to the agricultural sector that could generate disturbances on the free market. It also highlights the commitment among signatory States to work jointly within the WTO framework in order to strengthen the transparent trade in the agricultural sector, as well as the measures applied for domestic assistance, free market access, and export competitiveness.

It continues to foresee (as in NAFTA), the formation of a Committee on Agricultural Trade, composed by Governmental representatives of each of the signing States. It highlights the expansion of its functions, such as the integration of a forum for the signatory States to enable the analysis, consultation, promotion, and resolution of conflicts in tariff disputes.

The section concerning the promotion and exchange of information between signatory States, concerning trade in the application of biotechnology in agricultural products, is of the upmost importance. It aims to innovate and form a solid protection to this subtype of agricultural market.

Additionally, in the field of biotechnology it is proposed that the signatory States have a detailed list to be posted online with respect to (i) requirements for applicants of permits or authorizations to trade an agricultural product with applied biotechnology, (ii) a summary of the risks and assessments of security linked to the permit or authorization, and (iii) a list of agricultural products with applied biotechnology that have an authorization within the territory of the corresponding signatory State.

Such as NAFTA, USMCA provides free-tariff access to agricultural products, as well as the operation of the Committee on Trade Commerce,

however it broadens its functions which allows a new protection and more solid cooperation among the signatory States. USMCA does not envisage the application of seasonal tariffs to imports of agricultural products, with which Mexico increases competitiveness and increases the opportunity for its domestic producers to export their goods.

The impact on trade in agricultural products (even those that are considered as commodities) in the region is definitely positive, not only because it gives legal certainty to the signatory States, but because it demonstrates stability and calm to the international markets that the 3 (three) nations could dialogue and materialize their negotiations on an agreement such as USMCA.

For Mexico, it is important to consider that the objective is not only to increase its competitiveness in the agricultural sector, but to increase the industrialization of this sector to continue its growth.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/03%20Agriculture.pdf.

CROSS-BORDER TRADE IN SERVICES

This chapter makes reference to the scope of cross-border services under the principles of national treatment, the most-favored-nation treatment, determining the bases under which there is access to the markets, without requiring the necessary local presence, with a framework of non-discriminatory measures that promote trade among the three countries, also considering a recognition mechanism for the service providers in order to encourage development of small and medium-sized enterprises, remaining the section on denial of benefits in a more limited way.

It is highlighted that, in order to allow access into the market, the Parties shall not maintain or take measures to restrict service providers, in terms of the number of suppliers, value of the transaction, or specific people to employ for the services. It is worth mentioning that the purpose was to establish a way for freeing the rendering of services including guidelines for the execution of mutual recognition agreements or agreements for the professional services sector.

It is established that Canada shall resume its broadcasting regulatory

policy, broadcast networks (CRTC-2016-334), and broadcasting order (CRTC 2016-335) requiring regulations in regard to copyrights to USA and Canada, and where applicable, USA shall ensure authorization for its distribution in Canada, enabling negotiation of distribution agreements with Canadian distributors for cable and satellite services.

The Parties have also recognized Mexico's cultural exception-clause in order to keep and promote the development of its culture, therefore reserving for itself the sole concessions of bands and frequency bands, guaranteeing the respective rights to indigenous people and indigenous communities. Mexico reserved for itself, against national treatment, the exceptions in which this kind of concessions may not be transferable or assigned to any foreign government. Participation may not be higher than 49% in these cases. Mexico equally reserved the foreign investment that could participate in said sector, which may not exceed 49% in case of publications that are written for national audience and recipients abroad; likewise, for film exhibitions, it reserved a 10% for national films projections. Additionally, Mexico has reserved market access commitments for audiovisual services.

Let us recall that NAFTA marked the principles for cross-border services development, including various reserves and quantitative restrictions, considering there were no unnecessary barriers to trade, in which procedures are established for licenses and certifications in the matter of professional services, with specific provisions for contracts for cross-border services in the case of foreign legal services and its future release, as well as procedures for temporary licenses for engineers and civil engineers and all other engineering specialties that Mexico designates as checkpoints for ground transportation.

In conclusion, USMCA is positive for the completion of businesses and cross-border services provision by providing guidelines and bases for its development and provision beyond the borders of the State party, general and uniform criteria for different activities.

The For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/15%20Cross%20Border%20Trade%20in%20Services.pdf

COMMITTEE ON TRANSPORTATION SERVICES

Cross-border transportation has always been a complicated issue, especially between Mexico and the United States. 24 years after NAFTA, its evolution has been poor, however, it is undoubtedly a strategic factor for trade relationships between both countries, and hence it cannot be left out of USMCA. The above is evidenced with the weak position that Mexico has had, as it is the case of the report USA-MEX-98-2008-01 of the NAFTA Arbitration Panel, in which it was determined that USA did not comply with its obligations allowing the crossing of Mexican ground transportation through its border with Mexico, therefore, violating the treaty and the principle of international reciprocity.

Annex 15-B included in this chapter on Cross-border Trade in Services establishes that the parties shall organize a Committee on Transportation Services no later than 6 months after the entry into force of the treaty, which shall be composed of a representative designated by each party. They may invite representatives of other private entities in order to contribute to the discussion. They shall endeavor to meet within one year as of USMCA's entry into force.

NAFTA provided that, in the matter of transportation, the parties should establish "points of contact" among the interested parties (in transportation through the border) and the respective government entities, in order to facilitate any requirement or procedure. It established a review process to be done during the fifth year after the date of entry into force of said treaty, unlike USMCA, which does not establish any kind of mechanism or procedure to assess the progress of the Committee. It is evident that the progress on this important matter has been minimum because, although the parties have committed to review the progress of the previous treaty, it has not been as expected.

Political factors, such as the US transports unions, have overcome the spirit of reciprocity and cooperation, which has also been aggravated by various facts in the relationship such as immigration, the prohibition of foreigners to participate in ground transportation provided in article 6 of the Mexican Foreign

Investment Law, among others. However, this has only resulted in a decline of growth on the trade networks since; as of 1994, year in which the previous treaty was signed, there have been very few transporters who have managed to cross the border without difficulty, both Mexican and American. We shall wait for the results of the meetings of the Committee and verify if the parties are willing to open this sector and that there is competition among service providers of different nationalities.

We hope that the respective Comitee will be an actual forum for promoting cross-border transportation, as it is a reality that the exchange of goods is less efficient than it could be with an appropriate and productive cooperation framework for the Parties.

The For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/15%20Cross%20Border%20Trade%20in%20Services.pdf

FINANCIAL SERVICES

The purpose of this chapter is to regulate the actions to be taken by a signatory State with respect to (i) financial institutions of another signatory State, (ii) investors of another signatory State, and investments of said investors in financial institutions in territory of the signatory State; and (iii) cross-border trade in financial services.

The included provisions oblige the parties to promote and monitor the integrity of its participants within the financial system in order to, not only to increase and improve the conditions of financial trade in the region, but to protect the stability of the financial market.

This chapter seeks to particularize provisions which allow the appropriate and free cross-border rendering of financial services between the Parties, the above facilitates service providers to operate in their territory without the need to incorporate themselves in the territory of the other in which it seeks to operate; however, governments reserved their right to issue special regulations on the subject. Neither will it be required as a requirement for

financial service providers to operate in foreign territory the need of installing macro-centers or data processing servers or computers, however, this does not imply that they can loose their compliance standards in terms of protection and privacy of its users' personal data. It is contemplated that no Party shall prevent the transfer of information by electronic or other means, including personal information, within and outside its territory.

For Mexico, the Ministry of Finance and Public Credit is the authority considered responsible, which shall serve as a point of contact in order to initiate a consultation on a disagreement with the referred chapter.

It is important to mention that like NAFTA, USMCA continues forcing the financial sector to exercise trade without discrimination, through cooperation and obligation to respect the two most relevant principles of international trade, that is to say, the principles of (1) most-favored-nation, and (2) national treatment, which allow to have a competitive market without discrimination to the product of the nationality of the financial service provider.

USMCA expands the number of terms defined in NAFTA, the above gives more uniformity and certainty to the implementation of this chapter and trade relations in the financial sector.

The Committee on Financial Services under NAFTA will continue to exist, therefore, there is certainty on the fulfillment and protection of free trade in the financial sector, the representation of Mexico in said Committee will be in charge of an official of the Ministry of Finance and Public Credit.

Continuing to respect the principles of international trade such as most-favored-nation and national treatment represent an excellent signal for the financial sector, since it avoids any kind of discrimination for foreign investment, therefore promoting a more solid and integrated regional trade.

It is important to mention that the Mexican regulation of the financial system, has allowed to consolidate it and to keep it intact to the volatility of the global economy, however, business opportunities in the financial sector

are exponential, since it is not yet a mature market; undoubtedly, the low banking of the Mexican population is a challenge, however, promotion and innovation in the use of new technological tools in the sector encourage the growth of the financial market in Mexico and in the region, therefore, regulations such as the USMCA, or the law to regulate financial technology institutions (colloquially known as Fintech Law), generate a highly positive outlook for Mexico and, consequently, for the entire region.

Clearly, the use of digital platforms has allowed flexibility and acceleration of financial services to end users, therefore, it is important to understand the great opportunity of growth that this industry has, as well as the challenges in the field of cybersecurity and data protection which will have to be dealt with.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/17%20Financial%20Services.pdf

DIGITAL TRADE

The incorporation of regulations on digital trade contained in USMCA is something new, through it, parameters are established so that the parties adopt internal legislation as well as regulations for interaction among these in regard to trade by electronic means. Both globalization and technology advance have allowed the world of e-commerce to develop in such a way that it was necessary to regulate it, since they were not foreseen in NAFTA.

The respective chapter in USMCA develops and regulates, among other issues, the prohibition of imposing import/export fees or tariffs on digitally commercialized products, non-discrimination to other parties' products, consumer protection, personal data protection, principles of internet access for digital trade, unsolicited commercial information, which the Parties undertake to adopt measures to limit it, and cooperation on cybersecurity, personal data protection, and access for handicap individuals.

Among the highlights is the legal framework to be adopted by the Parties for domestic electronic transactions, because they shall be harmonized with the principles of the UNCITRAL Model Law on Electronic Commerce

(UNCITRAL 1996), which in Mexico entered into force in the year 2000. The Elimination of barriers in order to facilitate authentication of electronic signatures, whose regulation in Mexico is harmonized with the principles of UNCITRAL, the access to government data open where the parties agree to facilitate access to such information in order to generate benefits for those who consult it especially for small and medium-sized enterprises. Other considerations are included with regard to small and medium-sized enterprises, for example, the need to facilitate the interaction of IT services as they are vital to the growth of this type of trade.

While it was necessary to include this chapter, the intention to do so is very limited, excluding services provided through electronic means, which are regulated in Chapter 14 (Investment), 15 (Cross-Border Trade in Services) and 17 (Financial Services), however, the foregoing may be somewhat inadequate since the provision of services also requires the protection of personal data, consumer protection, and cybersecurity measures, since in the digital world it is very common, as is the case of troubleshooting and online-gaming services. It is also a somewhat ambiguous chapter as to whether the provisions cover trade in physical products through electronic means or if it only aims to regulate digital products.

On the other hand, the legislation on the digital trade in our country is relatively new. Evidence of this is that the Federal Civil Code, the code of Commerce and Protection Act Federal consumer were reformed in 2000 in order to include provisions on digital trade. However, stemming from the large supply and demand of e-commerce that exists, it will be necessary for Mexico to review, update and improve laws and regulations concerning data protection and protection of the online consumer; the above since Mexico has fallen behind, since the advancement of technology allows, for example, the capture of patterns of behavior, voice or fingerprint and the current legislation may be ambiguous or remiss in this respect. Likewise, responsibility, sanctions, and preventive measures must be established to denounce, punish or prevent abuse by national merchants of any of the member countries.

Including considerations for small and medium-sized enterprises in this chapter can result in great benefits and as a result the growth of many of those

who have chosen to offer their products and services through electronic means, as it represents ease and other economic benefits such as the reduction of some of the costs they would incur if they were offered differently.

In general, the chapter covers all points of vital importance for e-commerce and opens the doors for improvement of the current regulation, strengthen networks of digital trade, and therefore generate growth in sectors that offer products and services susceptible to trade digitally.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/19%20Digital%20Trade.pdf

COMPETITION POLICY

The USMCA Competition Policy Chapter regulates matters pertaining to the competition authorities of each Party in its respective territory, cooperation and the possibility of entering into consultations with said authorities, the corresponding procedure for the enforcement of competition laws, and transparency of the information related to economic competition. It is important to emphasize that competition laws have evolved and become more robust, as the most important aspects of the chapter focus on the establishment of due process in the enforcement of the respective competition laws, especially on the imposition of sanctions for anti-competitive practices, the inclusion of cooperation between competition agencies, and transparency of information.

The purpose of the chapter in question is to give continuity to the NAFTA Competition Policy, Monopolies and State Enterprises Chapter, since the latter laid the foundations for a reform on the matter in Mexico, in addition to the creation of the Federal Commission on Competition (Comisión Federal de Competencia Económica). The new chapter, in addition to recognizing the efforts of the competent agencies to prevent monopolistic practices, promotes and seeks the active cooperation of such organizations to exchange information and provide mutual legal assistance between the Parties, including useful training programs to establish best practices.

Besides confirming the provisions contained in the NAFTA Competition

Chapter, the USMCA includes due process in the enforcement of competition laws in the specific case that sanctions are imposed for anticompetitive practices. This procedure will consist of the Parties ensuring, before imposing sanctions, that a person that is subject to the imposition of a fine is afforded an opportunity to obtain information regarding the specific laws that were violated, access to information obtained by the competent authority to have the necessary resources to prepare an adequate answer to the sanction, the right to be heard and present evidence, including rebuttal evidence, the right to present witnesses to support the position against the decision of the authority and, finally, to contest an allegation of the authority regarding the fine imposed for the anticompetitive activities. In the same vein, it also provides the basis for determining the amount of the sanction, which includes an objective element of great importance in this type of topics.

Another novel aspect included in the USMCA on Competition relates to transparency of information, through the establishment of a commitment to publicly share information related to practices, policies, and procedures adopted by the authorities in the exercise of their duties.

Changing and including in the USMCA aspects as important as defining the sanctions procedure in relation to monopolistic activities and establishing a framework of transparency, are a big step forward in ensuring domestic and foreign companies the efficiency of free market competition through due process of the enforcement of the regulatory framework of each country. Moreover, each country acknowledges the importance of cooperation and coordination internationally and the work of the Competition Committee of the Organization for Economic Cooperation and Development and the International Competition Network.

By signing this chapter, Mexico confirms its commitment to ensure economic agents free market access, the efficiency thereof, and to protect consumers against anti-competitive business practices, which has been reflected in the "Competition Policy Efficiency"

indicator of Global Competitiveness of the World Economic Forum, moving from the 115th place in the 2012-2013 edition to 64th in the 2017-2018 edition.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/21%20Competition%20Policy.pdf

SMALL AND MEDIUM-SIZED ENTERPRISES

The importance of SMEs is undeniable, since they have fostered economic growth, market diversity and, according to the OECD, SMEs are one of the most important sources of employment in the territories of the Parties, as in the case of Mexico, United States, and Canada; thus, including SMEs in the USMCA opens up a much more formal space for them in international regulation, as these were not contemplated by NAFTA.

This chapter addresses different cooperation measures to increase trade and investment opportunities for SMEs. The Parties will have to promote, among others, collaboration centers, incubators, and accelerators, and export assistance centers to create international networks. Additionally, collaboration will be strengthened to promote SMEs owned by individuals belonging to under-represented groups such as women, indigenous peoples, youth, among others, including rural and agricultural SMEs. Another innovative aspect has been to encourage the use of different platforms, such as the Internet, to establish contact with suppliers, buyers, and potential international partners. Each Party will have to provide access to information regarding the benefits and opportunities of international business through a website. This technological platform must have links to other websites of the Parties, to the websites of government agencies related to the development of SMEs, information regarding relevant trading or investing aspects in the territory of the other Parties. In addition to the foregoing, the website has to include information on customs, tax, intellectual property, registration of companies, and financing programs.

To identify, create, improve, and exchange ideas to improve support for SMEs, a Committee on SMEs Issues is created, in which the parties, through a representative, will establish the progress and development in the field of SMEs, which will be monitored by the committee through reports. Some of the highlighted tasks of this Committee will be the promotion of digital trade, an annual meeting of SMEs to inform about relevant aspects aimed at the private sector, employees, non-government organizations, academic experts, companies owned by under-represented groups, and other stakeholders from the countries.

As mentioned above, SMEs are a fundamental part of the economy, since they allow the creation of a large number of jobs and the economic activation of various sectors. Thus, we believe that including this chapter opens the door to many Mexican producers and traders to venture into international trade.

A major step in the immediate past by Mexico was the reform to the General Business Corporation Law (Ley General de Sociedades Mercantiles) with respect to simplified stock companies (sociedad por acciones simplificada), which is a regulatory vehicle that facilitates the incorporation of SMEs.

However, the provisions of the USMCA will imply a great learning and development opportunity for Mexican SMEs as most are lagging behind on this matter, compared with SMEs in the United States of America and Canada, since only one-fifth of SMEs in Mexico export their goods or services to other countries, while the United States of America and Canada export around 95% and 87%, respectively.

For the respective chapter, please visit:: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/25%20Small%20and%20Medium%20Sized%20Enterprises.pdf

ANTI-CORRUPTION

The Chapter on anti-corruption represents one of the new topics included in the USMCA, as it was non-existent in NAFTA. Its main objective is to criminalize various

activities such as unjust enrichment and embezzlement; it also promotes the implementation of compliance programs and codes of ethics for public and private companies. On the other hand, it is important to highlight the great impetus and importance that is given to the training of public officials in order to promote transparency and integrity in the exercise of public functions.

First, it defines the concepts of bribery, extortion, undue advantage, and facilitation payments. All of these practices are classified as offenses and, therefore, State Parties are incited to legislate internally to criminalize such conduct; but above all, Article 27.6 provides the obligation to effectively enforce national anti-corruption law, for which a system for the dissemination of information must be established for raising awareness regarding the serious effects of corruption and the means available for the general population to report acts of corruption anonymously.

Secondly, it exalts the need for the participation of all market sectors, namely, public servants, private companies, and consumers. Participation is thus divided into different activities: (i) training; (ii) internal controls; (iii) transparency; and (iv) sanctions.

However, unlike NAFTA, Chapter 27 of the new version of the USMCA contributes to strengthening, invigorating, and consolidating the National Anti-Corruption System in Mexico since, on this occasion, the Mexican State must incorporate accounting prohibitions that will enrich the National Anti-Corruption System, for example, the prohibition of establishing off-the-books accounts, recording non-existent expenses or liabilities with incorrect identification of their objectives, the use of false documents, and the intentional destruction of accounting documents earlier than foreseen by domestic law.

In this order of ideas, to comply with their international obligations and, at the same time, reinforce the National Anti-Corruption System, public and private enterprises established in Mexico are compelled to comply with new accounting regulations and with the implementation of internal anti-corruption programs, which will definitely

favor the eradication of corruption in our country.

In conclusion, the international mandate on anti-corruption through organizations such as the United Nations, the International Chamber of Commerce, the Trans-Pacific Partnership, the European Union, the USMCA, is categorical: zero tolerance.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/27%20Anticorruption.pdf

GOOD REGULATORY PRACTICES

Chapter 28 promotes the adoption of good practices, such as: transparency, objective analysis, accountability, and predictable regulation to trade between the Contracting Parties, thus avoiding technical barriers to trade imposed by highly bureaucratic, duplicate, and divergent regulations for private individuals. The obligations of this chapter are aimed ad administrative regulatory authorities of the central level of government issuing general provisions that are mandatory for individuals.[1]

This chapter seems to encourage the adoption of risk-based regulatory methodologies prepared with scientific, technical, and economic information that is true and reliable, justifying the limitations imposed on individuals and granting greater freedom in the adoption of international standards in their activities, unlike prescriptive regulatory methodologies. We emphasize that both the CPTPP and the USMCA require the preparation of regulatory impact assessments, as well as a risk analysis which seek to mitigate the regulatory limitations and relevance of the measure.

Additionally, the Parties are required to have mechanisms in place to monitor the effectiveness of the regulations. The benefit for individuals is high, since efforts will be directed to having up-to-date and effective regulations for the production sectors, which allows the parties to suggest better health, welfare, and environment protection, without translating into insurmountable barriers to trade.

[1] Mexico excluded from the chapter the regulation on tax matters, public servants responsibilities, agrarian and labor, financial services, anti-money laundering measures, functions of the public prosecutor's office, and issues relating to defense and navy.

It highlights the obligation imposed on the authority to adopt internal mechanisms to enable public consultation, coordination, and review in the development of regulations. These inter-party consultation processes are also found in the Agreement on Technical Barriers to Trade of the WTO and were provided in Article 909 of NAFTA; however, these provisions are limited to technical regulations, considered the Mexican official standards, and their notices had the same wording as the regulation.

We emphasize that the USMCA and the CP TPP do not incorporate the technical aspect of the regulation, but rather give the Parties freedom to define the proposed regulatory measures, which must be published with a concise description on an annual basis, a point of contact, and sectors possibly affected. In the same way, it provides that the development processes the regulations must be transparent.

The above will force regulators to create planned and coordinated work programs that will allow individuals to participate more actively in the preparation of all types of regulations. Currently, the consultation process for Mexican official standards is the most consolidated; with this chapter, communication channels between the government and individuals will have to be strengthened for any administrative regulation.

It promotes the exchange of scientific and technical information between the three countries, allowing Mexico to benefit from their experience. Both the CP TPP and the USMCA establish a Committee composed of representatives of the Governments of the Parties, which will foster regulatory compatibility and cooperation.

Nonetheless, unlike other trade agreements, the USMCA is subject to the application of a dispute settlement system applicable in cases where a provision of the chapter is continually transgressed.

The main risks involved in this chapter are to considerably increase the time for drafting the regulations and, in this spirit of generating similar rules for all the Parties, the regulation is decontextualized with respect to the needs and possibilities of the authorities and Mexican society; therefore, we must be aware of any enactment of laws and regulations.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/28%20Good%20Regulatory%20Practices.pdf

ENERGY PERFORMANCE STANDARDS

The purpose of this Sectoral Annex is to standardize the technical regulation of energy efficiency issued by central authorities, as well as the procedures for its testing, including water use and efficiency. Like the previous chapter, this annex seeks cooperation between the Parties to develop mechanisms for information exchange and regulatory compatibility.

The obligation is imposed on the Parties to have online resources in which the authorities responsible for the preparation, development, adoption, review, and application of energy performance standards and testing, report:

a) A description of its authority.

b) Name of public servants who will act as a point of contact.

The main objective is to harmonize product test procedures so that trade flows faster and consumers are certain that any of the countries has the same quality standards and that the products are compatible. Cleverly, each Party is allowed, according to its specific operating conditions, to create procedures with specific characteristics that are functional for its needs.

The Annex promotes the creation of programs and mechanisms that contribute to improving energy performance for different products, considering environmental protection and benefits to all consumers.

The main challenge of our country will be to generate appropriate schemes to adopt best international practices and to have the necessary resources to continue with the improvement processes for energy performance standards.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/28%20Good%20Regulatory%20Practices.pdf

GOVERNMENT PROCUREMENT

The USMCA government procurement chapter maintains obligations and prohibitions that were regulated by NAFTA, for instance, the obligation to define procurement requirements based on objective and international criteria. However, it adds provisions that aim to fight corruption in government procurement processes and to promote the use of electronic means in such processes.

First, it is important to point out that the chapter keeps its principles of non-discrimination and services procurement through objective criteria. On the other hand, entities are authorized to disqualify suppliers for (i) bankruptcy or insolvency; (ii) false declarations; (iii) deficiencies in the performance or execution of government contracts; (iv) final judgments in respect of serious crimes or serious offenses; (v) professional misconduct or actions that adversely reflect on the commercial integrity of the supplier; and (vi) failure to pay taxes.

Nevertheless, we can emphasize that in regard to NAFTA, the aforementioned chapter maintains impartial review mechanisms and bodies that allow to resolve and address non-conformities of suppliers in government procurement processes. It also maintains the prohibition on imposing compensatory measures (e.g., national content) for the qualification and selection of suppliers in procurement processes.

In this regard, it is necessary to specify that the purpose of this chapter is to adopt best international practices, seeking to implement and introduce electronic means in the procurement process in order to reduce costs and publicize them. It is important to highlight the importance that is given to prevent and penalize corruption in procurement processes.

In conclusion, this chapter should be considered an update that seeks to regulate actual trade needs of the region. Although new sections are included, these seek to eradicate corruption and discrimination in government procurement procedures. Thus, the main risk that economic agents will face will be possible over-regulation and oversight in government procurement processes, which, while this may discourage acts

of corruption, it may also have positive effects such as allowing Mexican economic agents to participate in government procurement processes of the Parties.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/13%20Government%20Procurement.pdf

STATE-OWNED ENTERPRISES AND DESIGNATED MONOPOLIES

Although recently created in the Mexican legal context —since these result from the constitutional reform of December 2013—, state-owned enterprises were already included in NAFTA. However, their regulation under NAFTA was superficial considering that it only recognized the right of the parties to have state-owned enterprises and, on the other hand, they had to ensure that the actions of such state-owned enterprises abided by the principles of the treaty.

In contrast, the USMCA provides a detailed regulation of the activities and restrictions of state-owned enterprises and designated monopolies (entities that are authorized as the sole provider of certain goods or services).

In the same vein as the NAFTA, under the USMCA, each Party es responsible for ensuring that its state-owned enterprises and designated monopolies act in accordance with the terms of the treaty.

The new treaty contains terms that seek to ensure non-discriminatory treatment in the participation of state-owned enterprises and designated monopolies in commercial activities in the Member countries. Thus, the parties are required to give equal treatment (no less favorable) when engaging with state enterprises of another state party, as if engaging with a company of their own, both when purchasing or acquiring and when providing or offering a service or good.

A relevant update on the regulation of state-owned enterprises arising from the new treaty corresponds to the restrictions on non-commercial assistance. In this regard, certain non-commercial assistance activities to state-owned enterprises are

prohibited—whether by the Member States as part of other state-owned enterprises.- Such prohibited activities include loans or loan guarantees; or with respect to the conversion of debt into capital. A prohibition that stands out in the regulation is that Parties cannot cause adverse effects to the interests of any other party through the use of non-commercial assistance to their state enterprises. In the event of injury to other member states or other state-owned enterprises, the USMCA provides methods for the determination of the injury and the level of the injury.

Finally, the USMCA imposes on the parties transparency obligations as to the identity and actions of state-owned enterprises and designated monopolies. In addition to providing a public list identifying each of the state-owned enterprises and designated monopolies —together with the scope of such monopolies or the extent of their scope— each Member State is also required to disclose —at the request of another member state— the relevant information of the activities of its state-owned companies or monopolies, if the requesting state adequately justifies an explanation of why the activities of the monopoly or state-owned enterprise in question affects or violates trade or investment between the parties.

To ensure compliance with the obligations of the parties with respect to state-owned enterprises and their monopolies, the creation of a compliance committee is provided, whose functions include reviewing the operation and implementation of the respective regulations and serving as an advisory body regarding the obligations of the parties.

The state-owned enterprises and state monopolies has undergone an absolute transformation since its predecessor in NAFTA, to suit the needs of current commercial activities. The restrictions that are imposed on the activities of these entities, aimed at maintaining the operating balance that justifies their existence in their own jurisdiction, will undoubtedly be a challenge in terms of implementation for cross-border activities of state-owned enterprises and designated monopolies. Note that commercial activities in one of the state Parties do not arise from the same reality of the other members. Consequently, day-to-day operations of these privileged state enterprises could easily transgress the

existing balance in other jurisdictions, causing injury to free trade or to the sale and production of goods and services. Inter-State committees will be responsible for the creation of defined regulations and methods of implementation sufficient to ensure that the freedoms of a Member State allow it enterprises and monopolies to maintain their interests in line with the interest of the other member countries without causing injuries to such international markets.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/22%20State%20Owned%20Enterprises.pdf

LABOR

In this chapter, Mexico commits to the effective application of the fundamental labor rights provided in its labor laws and to supplement the implementation process of the Constitutional Reform on Labor Justice published in February 2017.

Specific provisions on collective bargaining are provided for Mexico, such as:

- To guarantee the right of workers to engage in negotiation activities for collective bargaining and to organize or join the union of their choice.
- To establish and maintain independent and impartial bodies to register union elections and resolve disputes relating to collective bargaining agreements.
- To establish requirements for the registration of collective bargaining agreements.
- To guarantee the transparency of collective bargaining agreements negotiated.

It also, stipulates the commitment to address cases of violence directly related to the exercise of labor rights, and to protect against gender discrimination in the workplace.

Unlike NAFTA's side agreement on labor, , which essentially contemplated

the obligation of the signatory countries to comply with their laws on occupational safety and health, minimum wage, and child labor, as well as a dispute resolution system for such matters, the USMCA Labor Chapter focuses particularly on freedom of association and collective bargaining.

A new era draws near with implicit challenges in collective labor relations in our country, not only due to the USMCA Labor Chapter, but also due to the recent approval of ILO Convention 98 by the Senate and, particularly, due to the adjustments to the Federal Labor Law in compliance with the constitutional reform enacted in February 2017.

One of the aspects that companies will have take into account is that the Law will foreseeably require unions to demonstrate that they represent workers as a condition for the authority to accept both calls to strike requesting the execution of collective contracts and the registration of the agreements with the competent authorities. It is undeniable that the foregoing will imply a shift in current paradigm and evolution of labor law in Mexico; therefore, employers must be prepared to comply with the new provisions that may be promulgated for that purpose.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/23%20Labor.pdf

ENVIROMENT

Recognizing the importance of a healthy environment for long-term economic and social well-being of present and future generations of each country and the international community, Canada, United States, and Mexico, the new the USMCA dedicates an entire chapter to environmental protection and conservation, which it completely equates with health and human life.

In continuity of the Mexico-United States Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, and consistent with international will, as established in the CPTPP, the States undertake to jointly address common environmental issues: (i) emissions to the atmosphere; (ii) marine fauna; (iii) sea pollution; (iv) species trafficking; (v) biodiversity; (vi) invasive species; (vii) mass fishing; (viii) forests; and (ix) environmental services.

The Parties accept that the environment and its protection and conservation are intimately related to the economic, social, and cultural well-being of the population, especially for local communities, including indigenous peoples. In this way, the USMCA firmly promotes procedures for properly assessing the social and environmental impacts of a given project in order to identify, minimize, and, to the extent possible, prevent the possible effects on the environment that includes the community living therein. Thus, the instrument known as an Impact Assessment (Manifestación de Impacto) extends to review the social and environmental impact too, which responds effectively to the people's Right to Consultation, as it has been demonstrated that excluding the population from projects that are carried out in their communities has crippling effects; on the contrary, their proper integration is a success factor.

However, the State is responsible for disseminating to the greatest extent the available environmental information, whether legal or technical, to promote environmental awareness in the individuals, but also to verify that the public consultation procedure is carried out properly; nevertheless, it is relevant that, from the date of entry into force of this Treaty, the State has the obligation to ensure appropriate access to environmental justice, whether administrative or judicial, through a fair and transparent procedure, without excessive costs or time limits, which diligently investigates the events reported, the alleged violator, and that finds a way to repair damages, but above all, that applies the applicable sanctions .

In this order of ideas, if the State fails to implement and enforce environmental laws, interested persons are have the right to request the intervention of the Commission for Environmental Cooperation which, if considered appropriate, would initiate a process aimed at forcing the State to enforce environmental laws.

Therefore, if a commercial activity has adverse effects on the environment or on the population, the person who carries out such activity is liable under domestic and international law.[2]

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/24%20Environment.pdf

This chapter covers the recognition and strategies of the Parties with a wording aimed at meeting different objectives.

[2] Including, but not limited to, the Paris Convention and the Kyoto Protocol, since Mexico has signed them and are part of its legal framework.

INMIGRATION AND TEMPORARY ENTRY

The first objective is for the Parties to identify common professional services to facilitate performance and accessibility for the person to carry out its activity. (15-C Professional Services). This recognition of profession gives citizens greater opportunities to freely exercise their profession, thus enriching their professional capabilities and raising the level of competitiveness and training. It also seeks to facilitate temporary entry in accordance with the principle of reciprocity and to establish transparent and efficient criteria and procedures (16- Temporary Entry for Business Persons), and to promote investment between the Parties, recognizing that the human factor is essential for companies to meet their objectives and promote the expansion of products and services. To fulfill this purpose, personnel must make business trips between countries and facilitate mobility between them.

Chapter 23 seeks to recognize the vulnerability of migrant workers, providing security and guidelines for free performance.

Citizens with a professional degree or license to practice , who certify that they have sufficient professional capabilities to carry out their activity. However, according to the USMCA, at least two of the Parties must have a mutual interest in establishing a dialogue on problems related to the recognition of professional skills, licenses, or registration. We believe that openness can be good because it allows citizens to be recognized as professionals in a country that is not their country of origin, and it also opens the door to diversity and culture to enrich knowledge.

Similarly, the entry and exit of business people between the countries of the USMCA promotes the market among all participants. The broad recognition of professionals in the agreement allows barriers to business entry to decrease and thus promote competition, which will be reflected in a better offer of products or services and will also benefit business distribution channels.

Negotiating and recognizing wages, rights, and employee benefits ensures personal integrity and dignity.

In contrast with the NAFTA, in respect of the Professional Services, Temporary Entry for Business Persons, and Migrant Workers Sections, there are really no relevant differences that imply an advantage or disadvantage.

However, it provides that countries must double efforts to instruct Educational Institutions more globally and to promote the exchange between the Parties, directed at allowing access to education and culture that is achievable for students or professionals, and to recognize professions that do not require a revalidation to practice such professions.

Although people from the US and Canada currently do not require a visa to enter these countries, those who wish to enter Mexico must consider:

a) Prove financial capacity du ring stay.

b) Provide a letter from the com pany supporting the business trip.

c) Not receive a salary or remuneration in Mexican territory.

d) Not exceed 180 days of stay.

e) Have a passport that is valid for at least 6 months from the date of entry into Mexico.

It should not be forgotten that those interested in working or residing in Mexico must obtain the applicable work visa. One of the risks to be considered is the current change of government, which may result in longer response time and more requirements for obtaining approvals; however, the foregoing will have to be proven factually when the time comes.

The respective chapters can be found at:

15C-https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/15%20Cross%20Border%20Trade%20in%20Services.pdf

16-https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/16%20Temporary%20Entry.pdf

23- https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/23%20Labor.pdf

INTELECTUAL PROPERTY

The USMCA Intellectual Property Chapter contemplates relevant changes within each of the concepts that the subject involves; undoubtedly, the most notable changes are in terms of the validity of pharmaceutical patents.

Each Party is now free to adopt and implement in its laws the pertinent legal provisions that it deems appropriate for safeguarding and defending the rights acquired by right holders in each country. While NAFTA already contemplated the possibility of adopting most of these measures, the USMCA contemplates stricter provisions for the protection of intellectual property rights. The objective is clear: to promote and protect innovation and creativity, considering that, to achieve this objective, means are required to facilitate the dissemination of information related to intellectual property in order to promote competitiveness between the Parties.

In relation to trademarks, the scenario is considerably extended, since geographical indications, certification marks, collective marks, and sounds are recognized. It also recognizes the possibility of any third party with a better right, which considers that such right has been infringed by the filing of an application for trademark registration, to oppose the registration. This possibility is compatible with recent reforms of the Industrial Property Law (Ley de Propiedad Industrial), which represents great progress for our country, as the relevant adjustments and concepts are already contemplated by the Law.

At this point, it is important to note that even if these reforms are in force, there is still a lack of regulation clarifying certain deficiencies and gaps in the reformed Law. The correct application of these concepts will undoubtedly translate into the possibility of reducing the grant of erroneous registrations, as well as the famous brand hijacking.

As discussed above, one of the most important changes contemplated by the USMCA refers to pharmaceutical patents and the validity thereof, since now an adjustment of the patent term will be made available to the patent owner to compensate the patent owner for delay in the period of approval and grant of its patent. Notwithstanding the foregoing, it is important to consider that such regulation will have limitations, and its application will be linked to the satisfaction of certain conditions, which include its application only to pharmaceutical

patents and/or if the granting process of granting has unwarranted delays.

This will certainly delay generic drug competition, since the possibility of exploitation of the patent by the competition or any third party will be limited to ten additional years.

In Mexico, we are ready to fully comply with the provisions contained in the new agreement; over the course of more than 20 years, our Industrial Property Law has been adapted to the needs that technological changes demand and, with the recent amendments to the Law, holders of intellectual property rights in Mexico will have greater certainty and means to defend their rights.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/20%20Intellectual%20Property.pdf

SANITARY AND PHYTOSANITARY MEASURES

The new treaty, USMCA, like NAFTA, gives each Party the freedom to adopt or maintain relevant sanitary or phytosanitary measures in accordance with international guidelines or recommendations. Compared with NAFTA, we could define the Sanitary and Phytosanitary Measures Chapter as a strengthened chapter that provides for the first time specific time periods for dispute settlement involving these issues in an expeditious manner —which provides certainty and an expeditious resolution of disputes over perishables between members of the treaty, while maintaining international trade union interference outside of Mexico, thereby observing the principles of the ILO. This situation is a comparative advantage that we do not have with any other trading partner to date.

It is important to emphasize that this chapter requires the three member countries to make publicly available the details on the approval process for crops produced with biotechnology, which did not occur before, encourage producers to submit concurrent applications for approval, and ensure that decisions on those applications are made in a timely manner.

Furthermore, where an import into a member country is found to have a low level presence of an unapproved

crop produced with biotechnology, the importing country will be required to act quickly so as to not unnecessarily delay the shipment. To ensure such a situation in a timely manner, as well as others related to the USMCA, it will promote the creation of a Working Group for Cooperation on Agricultural Biotechnology to help with information exchange and advance transparent, science, and risk-based regulatory approaches and policies, not only between member countries but also in other countries and international organizations.

On the other hand, the relevance of this chapter also lies in the elimination of the possibility that any of the parties will adopt in the future restrictions of any kind on the agricultural sector, demanding increased transparency in the regulations on the matter and regulatory alignment between the three nations, which will unquestionably open the range of possibilities for the parties, thus generating more freedom by imposing measures at a domestic level.

The signed treaty —in an annex titled "Transparency for Pharmaceutical Products and Medical Devices"— includes several specific provisions of specific manufacturing sectors, which incorporates inspections of the quality management systems of manufacturers of medical devices and pharmaceutical products, according to the standards of the medical device single audit program, situation that makes the inclusion of these devices transparent in the health care programs administered by the federal government, thus improving health quality of the general population.

With regard to the marketing of these devices, it is worth noting that each party will have to the right whether to grant or deny marketing authorization based on clinical data, information on performance, and labeling information.

Another relevant issue will be re-authorizations. The Annex mentioned above provides that a product subject to re-authorization may be marketed while the grant thereof is resolved.

Therefore, one of the main benefits for our country is that it will be able to maintain the health care

programs administered by the federal government, unchanged, and it will be able to protect the purchase of medicine that the federal government makes through a government procurement process. The challenge will undoubtedly be to establish clear rules to achieve transparency in the inclusion of pharmaceutical products and medical devices in health care programs, and protect the health care programs mentioned above.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/09%20Sanitary%20and%20Phytosanitary%20Measures.pdf

TELECOMUNICATIONS

The USMCA, hand in hand with technological advance —as expected—has updated the telecommunications chapter in regard to the existing regulation of NAFTA. The historical context of negotiation and signing of the old treaty is worth noting, which ensured incipient access to telecommunications networks and services of member countries and provided the conditions under which value-added services had to be facilitated.

The new treaty recognizes the complexities that current telecommunications represent, including the treatment that must be given to major service providers and the necessary mechanisms to safeguard competitiveness. In this last category, the former treaty provided a weak draft of traditional antitrust regulations fashionable in those years. It even acknowledged the existence of monopolies held or established by the member states, and at the same time stated that such a nation had to ensure that such monopoly[3] did not incur anti-competitive practices affecting individuals or entities handoff another Party. On the contrary, the USMCA does not refer to any monopoly, it only treats major service providers as major suppliers, to which non-discriminatory rules will apply among other member states in relation to the provision of services and interconnection of their technical interfaces.

The inclusion of regulations on collaboration between telecommunications

[3] Anti-competitive and antitrust provisions are regulated in the Chapter on Economic Competition..

service providers in the member states deserves special mention, as they seek to prevent unreasonable measures or burdensome terms and conditions for interested parties of other nationalities in terms of (i) provisioning and pricing of leased circuits services; (ii) co-location of equipment of both parties for network interconnection and access; (iii) access to poles, ducts, conduits, and easements or rights of way; and (iv) facilitation of access to submarine cable systems.

A new aspect in USMCA is the creation for the first time of a specialized Committee the main functions of which will be to ensure the implementation and operation of the agreement and it establishes discussions associated with the content of the specific chapter among the parties.

Another equally innovative component is the creation of a mechanism for dispute settlement, which recognizes the supervisory nature of the internal bodies of the regulatory agencies on telecommunications in each country, providing private parties with the right to initiate before said bodies an administrative appeal on the rights provided in the USMCA including the rules of access and use, the obligations of telecommunications services suppliers, the application of safeguards, resale and unbundling of telecommunications services.

It also provides the possibility of initiating a reconsideration by the same regulatory body in the event that a decision in the appeal proceedings were unfavorable to the interests of a party. Lastly, the USMCA provides in its dispute and controversy settlement mechanics that judicial authorities could resolve in last instance on the raised controversies.

In short, the new international agreement has echoed the needs and realities of a changing and interdependent sector of technological evolution. Without a doubt, the creation of a regulatory committee that will oversee the implementation of the disciplines of the treaty in each jurisdiction and the methods for dispute settlement entails the necessity to reform federal and state law and regulation unification will represent a challenge for the legislative branches of each state member. On the other hand, the participants of the sector, whether they

be telecommunication service providers or their contractors and subcontractors, will find in the rules of the treaty mechanisms that will facilitate incursion in international markets both in terms of access to infrastructure and in terms of cross participation in neighboring markets.

For the respective chapter, please visit: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/18%20Telecommunications.pdf

DISPUTE SETTLEMENT

USMCA contemplates substantial changes regarding arbitration between States and investors, but it maintains the commercial dispute settlement mechanisms (antidumping, countervailing duties and obligations of the Party States) already existent in NAFTA. Let us recall that NAFTA Chapter 19 establishes the mechanism of binational panels to resolve claims against antidumping measures and countervailing duties, while Chapter 20 sets forth binational panels of experts to settle said disputes among States and determine if one of the parties has violated its obligations set forth in the treaty. The USMCA maintains the content of both chapters without major changes. Given the current policy of the US Government on foreign trade, these dispute settlement mechanisms are expected to be used in the coming years against the tariffs and countervailing duties imposed by such Party.

In contrast, arbitration between investors and one of the Parties, as regulated in USMCA Chapter 14 , has important differences with respect to NAFTA Chapter 11. Most of these changes involve limitations on investor rights.

Arbitration procedures initiated before the termination of NAFTA will not be affected; they will continue to be governed by Chapter 11 until their conclusion. On the other hand, even after the termination of NAFTA and entry into force of the USMCA, investors will have a three year period to file arbitration claims under Chapter 11 (including Canadian investors and Mexican or US investments in Canada), in the case of pre-existing investments, so-called "legacy investments" in the current text of the USMCA. A legacy investment

is an investment that has been established or acquired during the term of NAFTA and that continues to exist on the date of entry into force of the USMCA.

The main differences between the USMCA and NAFTA in terms of dispute settlement between investors and States are the following:

a) Canada is excluded with respect to the application of Chapter 14; said chapter will apply only to disputes concerning investments by Mexican investors in the USA or of US investors in Mexico. It is them that may resort to the investor-State arbitration contemplated in the USMCA. The USMCA will eliminate the possibility for Mexican or US investors to resort to arbitration regarding their investments in Canada or vice versa: Canadian investors may submit arbitration claims regarding their investments in Mexico or the United States under Chapter 14

b) After the entry into force of USMCA, disputes regarding investments in Canada made by US or Mexican investors, or investments in the United States or Mexico by Canadian investors, may be submitted to arbitration under NAFTA Chapter 11 for a period of three years, provided these are pre-existing investments. Additionally, regarding investments by Mexican investors in Canada, or by Canadian investors in Mexico, it will be possible to resort to arbitration in terms of the CP TPP, once it enters into force.

c) A stricter requirement is imposed to first exhaust domestic procedures, before resorting to arbitration, investors must go to the courts of the Party where they have invested and wait for the court of highest jurisdiction in such country to issue a ruling, or otherwise, 30 months after initiating the action. Disputes concerning government contracts in "protected" sectors (called "covered government contracts") are exempt from this requirement. Likewise, investors will be exempt from going to national courts when it is "obviously useless or manifestly ineffective". We will have to wait and see how this ambiguous exception is interpreted.

The foregoing will also represent an important challenge for Mexican courts, which will have to seek

adequate specialization to settle this type of disputes submitted for their consideration.

d) The period for filing claims will be four years from the date when the claimant becomes aware of the violation or loss. NAFTA includes a term three year term.

e) Claims that may be submitted to arbitration are limited, chapter 14 allows claims to be filed regarding violations of the following obligations: (i) national treatment (when less favorable treatment is given to foreign investors than to nationals); (ii) most-favored-nation (in case more favorable treatment is given to investors from other countries that are not part of USMCA), and (iii) direct expropriation (nationalization of the property owned by foreign investors). In cases of claims regarding national treatment and most-favored-nation, the Court must take into account if different treatment of the investor is due to legitimate public welfare objectives. Investors may not submit to arbitration claims for violations of national or most-favored-nation treatment obligations that relate to establishing or acquiring an investment, violations of the obligation of fair and equitable treatment or indirect expropriation, unless that the disputes are over covered government contracts of the State party in which the investment is located.

f) USMCA considers contracts between the Mexican or US government and investors of the other State Party in the oil and natural gas, power generation, transport, infrastructure, and telecommunications sectors to be "protected". In these cases, arbitration under Chapter 14 is permitted even in the case of claims relating to indirect expropriations and violation of the obligation of fair and equitable treatment. In these cases, there is no requirement to go to the courts of the host country beforehand, and the statute of limitations for filing the claim is three years.

Under the USMCA, many of the documents submitted by the parties in the arbitration will be made public immediately after their submission. The same will happen with the transcripts of the hearings and the orders, decisions, and award of the

tribunal. The hearings will be open to the public, although the court will be able to adopt measures to protect confidential information. NAFTA only contemplated the publicity of awards.

It will be important to monitor the progress of the entry into force process of the USMCA and the expiration of the term of NAFTA since the dates of these events will determine the terms to file arbitration claims each treaty. Given the differences between NAFTA 11 and USMCA Chapter 14, investors that have possible claims against a Party must have adequate advice to determine the desirability of filing a claim during the term of NAFTA or during three thereafter (provided it is a legacy investment).

After a 3 year term following the expiration of the term of NAFTA, the possibility of recourse to arbitration under NAFTA or the USMCA will be eliminated when a Canadian investor, or a Mexican or US investment in Canada is involved. For this reason, we recommend that those that may be affected by this change inquire about their rights under the law of each country and under the CP TPP, once it enters into force. Even where the arbitration between the investor and the Party that is contemplated in the trade treaties is not available, there will be the possibility of resorting to domestic courts or, if an arbitration clause is included in the contracts, to arbitration according to the rules that have been agreed.

We also consider it important to consider the changes that can be made to the specific Arbitration rules upon the entry into force of the USMCA, since, as was the case with NAFTA, the USMCA provides that Arbitration Rules must be established, which may be different, and their analysis must be thorough.

For the respective chapter, please visit:

14-https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/14%20Investment.pdf

31-https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/31%20Dispute%20Settlement.pdf

GOODRICH
RIQUELME
ASOCIADOS

For further information please contact:

Enrique Díaz
ediaz@gra.com.mx

David Enríquez
denriquez@gra.com.mx

Luis Pérez
lperezdelgado@gra.com.mx

www.goodrichriquelme.com