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Analysis of USMCA, the New North American Trade Accord. What Changed?

At Von Wobeser y Sierra we decided to put together this up-to-the-present analysis of a new accord that—when it receives internal approval from its signatory nations—will oversee the region's international trade. We do so with an understanding of the immense importance NAFTA and its update have for our clients and friends.

Our goal is to offer a starting point for understanding this update's magnitude, importance, reach and meaning, as well as its possible impact on commercial operations and new investment in Mexico.

Our experts analyzed almost every USMCA chapter by specialty area to highlight what's new in comparison to NAFTA, in addition to pertinent legal paradigms that remain in place. To keep this first reading brief, we have only commented on those issues that in our experience are of the greatest interest or impact.

VON WOBESER Y SIERRA

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Editorial

It's October 2018 and Mexico finds itself in an unusual political, social and economic situation.

On 1 July, a majority of Mexican voters chose to change course and hand over the nation's leadership to Morena-party candidate Andrés Manuel López Obrador. Years of proven corruption and deep inequality ended up tipping the scales to the left.

Both Mexico and the international community have closely scrutinized the president-elect's every statement and action and will continue to do so until he takes office on 1 December, as a means of understanding and anticipating the direction his administration will take.

Once Mexico's elections took place, NAFTA update efforts intensified as part of an exhausting and even exclusive process. Faced with reticence from Canadian delegates, Mexico and the United States opted for bilateral negotiations in the hope that Canada would later sign on to what had been previously negotiated.

As we anticipated in an editorial from our previous issue, we were able to see that, given the three economies' interdependence and the sheer volume of its regional trade, the nations would indeed reach an agreement, despite pressuring and threats from all three signatory nation officials.

The accord that updates NAFTA was finally presented on 30 September 2018, the date on which each government made its respective announcement and the sole available document on the agreement was released. This is an unofficial document in English. It would seem more than a year-and-a-half's uncertainty regarding NAFTA's possible termination, and the political and economic consequences that would have come with it, have been put to rest.

NAFTA renegotiation ended up as a tripartite accord generally known as USMCA that, as we see it, ultimately sought to maintain NAFTA's status quo, alongside other international agreements and internal legislation. It enjoys a complement of now somewhat restrictive, highly relevant modifications in strategic areas (automotive, investment arbitration). We recognize as well an emphasis on certain economic activities and social concerns that were previously left aside, a change that became necessary after NAFTA's 24 years in effect.

We invite friends and clients to review the present analysis of issues that in our judgment are the USMCA's most relevant because of their importance to business and investment operations. We believe the information found here, as well as our review, will allow readers to draw their own conclusions.

Claus von Wobeser

Preamble

On 30 September 2018, the United States, Mexico and Canada reached an accord that brings NAFTA up to date.

The three nations have already begun their respective internal approval protocols. For now known as USMCA, the accord's entrance into effect depends on these processes' completion. In the meantime, NAFTA will remain in effect. Given its importance to the entire region, we believe the possibility that one or several nations fail to approve the USMCA—though it does exist—is exceedingly small.

There is to date no official version of USMCA. The sole available public version has been drafted in English and can be consulted on Mexico's Ministry of the Economy website. It includes the following proviso: "These texts are published for informational purposes only, subject to additional modifications and legal review; they are understood as having no necessary effect on the final agreement between its signatories."

Though national approvals are pending and there is yet no official text, at Von Wobeser y Sierra we decided to put together this specific analysis of the new accord because of NAFTA's importance—and the significance of its update—to our friends and clients. Our goal is to offer them a starting point for understanding the update's magnitude, import, scope and meaning, as well as its possible impact on business operations and new investment in Mexico.

Given the abovementioned limitations and due to the nature of our publication, the texts assembled here form no basis for legal, business or any other sort of decision-making. Neither should they be understood as containing interpretations or opinions on concrete cases.

Our experts analyzed most USMCA chapters in line with their own areas of expertise, highlighting above all notable changes in comparison to NAFTA, in addition to the legal framework that was retained from the previous accord, when relevant. To keep this first approach brief, we only comment on those chapters that are, in our experience, of the greatest interest and impact. That said, mention is made of other chapters as necessary.

We sincerely hope the publication meets its primary goal and we are entirely available to comment on its contents or address any questions to which it may give rise.

National Treatment and Market Access for Goods

This USMCA chapter takes up, maintains and expands certain terms in NAFTA's Chapter 3.

The first notable point, new to the section, is that USMCA deals with trade in remanufactured goods between the signatory nations. The US is the main global market for such goods (Chapter 4 even touches on its origin-related treatment).

Re-entering merchandise temporarily exported to another regional territory is expressly established as free from duties, regardless of how much repair or alteration it may have undergone, or its possible increase in value, in the other territory. This expands the content and scope of a current NAFTA stipulation that could facilitate and promote repair services within the signatory nations' borders.

The USMCA includes a quite liberal definition of what is to be understood by *used vehicles*. This confirms a general commitment that, starting on 1 January 2019, the three nations must eliminate any prohibitions or restrictions on importing original used vehicles (except security and environmental measures) provided these are consistent with the accord's other chapters.

In terms not unlike NAFTA's, Chapter 2 establishes a presumption-of-origin with respect to certain goods that appear on Table 2.1 in Article 2.14 (for example, automatic data-processing machines and their units), provided they are exported from the territories of the signatory nations.

Regarding Mexico-produced passenger vehicle, light truck and auto parts access to the US market, Chapter 2's Appendix 2-C includes various and significant limits. The Mexico-made passenger vehicle item, negotiated in the following terms, is especially notable: vehicles produced in Mexico that do not comply with specific origin rules from USMCA's Chapter 4 could be subject to the lesser duty between 2.5% and the most-favored-nation (MFN) rate in effect at the importation date. Therefore, if on the to-US importation date, the MFN tariff falls below that percentage, Mexican producers could benefit. The chances of as much are quite remote, however.

If during the life of USMCA, the United States adopts any measure that increases an MFN duty to be applicable as of 1 August 2018, Mexico-produced passenger vehicles that do not meet origin-rule requirements would pay the 2.5% duty at the time of their US importation, provided they comply with the current applicable NAFTA origin-rule and with the understanding that the US could limit this benefit to 1.6 million vehicles per calendar year.

The same restrictive logic would apply to light truck and auto parts, with their respective differences and particularities.

Rules of Origin, with Product Specific Rules

This USMCA chapter takes up and updates issues originally contained in NAFTA's Chapter 4 on rules of origin. In fact, the main objective Mexico pursued during the new treaty's negotiation was "to update NAFTA's origin-related stipulations to make them consistent with other, more modern disciplines that Mexico has already negotiated in more recent accords."

On a note of clear difference, duties rise from 7% to 10% of total amount or value of non-origin materials not subject to a tariff fraction increase—i.e., that do not qualify for a specific origin-rule—so that goods produced in one of the signatory nations can still be considered of regional origin and can enjoy preferential tariff (i.e., *de minimis*) treatment.

The chapter also includes a number of stipulations that seek to regulate goods' origin-determination when such commodities are put up for importation as part of goods-sets or kits, eliminating all ambiguity when it comes to enjoying preferential tariff treatment.

In very general terms, goods that come in sets or assortments have USMCA regional origins if all the goods that make them up are original and both the set and the goods comply with all other applicable requirements, or indeed, if the value of the non-original goods does not exceed 7% of the set's value.

Congruent with the inclusion of re-manufactured commodities as described in USMCA's Chapter 2, there are a number of varying stipulations that seek to recognize the original status of recovered materials, parts or components that were disassembled specifically to be used in re-conditioned goods.

Regarding specific rules of origin by product, lightweight vehicles, heavy-duty vehicles, chemicals, televisions and appliances, fiber optics, glass manufactures, titanium and steel-intense products are the merchandise categories whose specific origin rules have been most affected.

In the concrete case of origin rules for passenger vehicles, classified within sub-sections 8703.21 to 8703.90, there are various elements or factors that determine a positive origin:

1. Regional value content (RVC). Depending on the non-original material in question, an RVC of no less than 62.5% is required, and of no less than 75% under the net cost method. The RVC percentage will begin at 66% and increases on three occasions until it reaches 75% no later than 1 January 2023.

2. Aluminum and virgin-steel purchases. At least 70% of aluminum or steel purchases a vehicle manufacturer undertakes should correspond to products that originated in the USMCA free-trade zone.

3. Labor value content (LVC). Vehicle manufacturers must certify their production reaches 40% LVC.[1] This essentially means that 40% of the vehicle's value (parts, services) are produced in plants located in regions where the minimum wage is at least $16 USD per hour.

4. Essential parts. Seven parts have been designated as essential to vehicle production and these must be original to the USMCA region.

In any case, we recommend making a preliminary review of by-product origin-rule requirements as called for in USMCA, regardless of product sector, as a means of evaluating business-operations impacts.

[1] 30% at the time of USMCA's entrance into effect, to reach 40% no later than 1 January 2023. Of that 40%, 25 percentage points are to correspond to materials and manufacturing costs and 15 to research and development, IT, and engine, transmission or advance battery assembly.

Origin Procedures

Fundamentally speaking, this USMCA chapter updates NAFTA stipulations related to product origin certification and proofs-of-origin issuance, including actions each nation's authorities take to verify such certifications' validity. We should remember that origin-certifications are necessary for the enjoyment of preferential tariff treatment.

The certificate-of-origin request form is to be eliminated and it will be possible to incorporate origin-certification into invoices or other trade documents; it will be sufficient for them to include certain minimal information, including a detailed bill of lading that facilitates identifying goods and a declaration that they are original and comply with all applicable origin-regulation requirements.

Additionally, each signatory nation took on an obligation to allow certification to be drafted and transmitted via electronic media featuring electronic signatures. In any case, certifications are to meet additional requirements as Uniform Regulations may establish, to be issued in the near future.

A quite novel element is that not only producers or exporters but also importers may issue certifications of origin within the borders of either nation. That said, Mexico is not obliged to implement that measure right away, but instead must do so within three and one-half years following the USMCA's entrance into effect.

For importers to issue valid certificates of origin, they must have the information and documentation that sustain them. The USMCA has specified that producers and exporters are not required to provide certificates-of-origin nor support documentation to importers.

Regarding signatory nations' origin-verification protocols, customs administrations can choose to apply these to importers within their territorial limits or to whomever completed the certification. They can additionally take up such a procedure with importers, even when a producer or exporter may have issued a certification.

During the verification process each administration must receive information and documentation directly from importers, exporters or producers, something that represents an important step forward when it comes to reducing administrative protocols as well as burdens associated with responding to these protocols.

If producers or exporters issue commodities' origin-certifications, an importer's preferential tariff treatment cannot be denied if it has not previously received written questionnaires or the producers or exporters have not received inspector visits.

On the contrary, when importers issue their own certifications but lack sustaining information and documentation, it appears they can be denied preferential tariff treatment with no need for a previous questionnaire or producer/exporter visit.

In all cases, the Uniform Regulations all signatory nations must issue as part of the USMCA are to seek to clarify and/or regulate the abovementioned points in greater detail.

Customs and Trade Facilitation

As Chapter 7 takes up the entirety of rights and obligations the signatory nations already adopted under the WTO Agreement on Trade Facilitation, we will not examine these unduly.

The chapter establishes an obligation that the signatory nations create or maintain one or more enquiry points at which importers or exporters from any signatory nation can consult the others with regard to importation, exportation or transport protocols. Answers to these inquiries are to be provided free of charge and must be issued in the shortest possible time span.

Similarly, each signatory nation takes on responsibility for processing and issuing advance rulings before goods importation, regarding a number of issues such as tariff classification as well as the bases and criteria for customs assessment of goods to be imported. Any individual with justifiable cause may request these free both from any requirement to appear in person or any contractual or trade-related relationship within the limits of the nation where he makes the request.

If appropriate customs authorities revoke or modify an advance ruling because it is presented based on erroneous information, that revocation or modification will take immediate effect, except in cases where the requesting party has acted in good faith, in which case the revocation or modification will take effect after ninety days.

This chapter also calls for the possibility that each nation request the others undertake verification visits in their respective territories, to assemble information and documentation on producers or exporters that nation uses to investigate customs offenses inside other nations.

Signatory nations are not required to complete verification visits. Nevertheless, should they decline to carry them out, they will be obliged to provide written explanations that underlie their basis for refusal. If visits are indeed carried out, the presence of requesting-nation authorities at visit instances is to be allowed.

This is a more general protocol than the verification visit we speak of in USMCA's Chapter 10, that limits investigations to those related to compensatory, anti-dumping or safeguarding fee evasion.

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

This chapter deals exclusively with recognizing Mexico's direct, inalienable and imprescriptible ownership of hydrocarbons. While this chapter's inclusion in the USMCA has been touted as a major victory for that nation, the reality is that such a right was already a part of Mexico's federal Constitution and was reaffirmed in the Hydrocarbons Act promulgated as an outcome of the nation's 2013 energy reforms.

Nevertheless, other USMCA chapters and appendices contain a number of stipulations related to energy-sector considerations that merit brief comment, as is the case with "Chapter 2. National Treatment and Market Access for Goods;" "Chapter 4. Rules of Origin, with Product Specific Rules;" "Chapter 22: State-Owned Enterprises;" "Chapter 32. Exceptions and General Provisions", and "Appendix 14-E."

As with NAFTA, USMCA's chapters 2 and 4 prohibit tariffs on crude and refined petroleum and gas products.

The USMCA calls for a wide-ranging scheme for investor-State conflict resolution in certain priority sectors known as *covered sectors*. Given the gas and petroleum sector's intense lobbying, the USMCA's Appendix 14-E offers US and Mexican petroleum-and-gas production[1] and electric-energy-generation[2] sector investors the opportunity to submit to arbitration any claim that arises from non-compliance to substantive standards Chapter 14 stipulates regarding investment, including the right to present claims for minimum treatment violations and expropriation. In other words, US businesses that have received contracts as part of bidding rounds Mexico's National Hydrocarbons Commission has convoked or that have investments in the petroleum, gas and electric-energy-generating production sectors in Mexico can demand arbitration in response to any act on the part of the Mexican government that affects those investments and that seeks to expropriate its assets on behalf of the Mexican government.
"Chapter 22. State-Owned Enterprises," that establishes stipulations for regulating state-owned-enterprises' activities, is applicable to state-owned production enterprises (e.g., Pemex or Mexico's Federal Electricity Commission) as well as subsidiaries and affiliates that emerge from state-owned enterprise separations and reorganizations called for by energy reform, except in cases of acts related to state public-bidding processes.

Finally, the USMCA's Chapter 32 grants Mexico the right to adopt or maintain measures for any sector or sub-sector for which there is no special provision in the USMCA, provided these measures are consistent with the accord with Mexico that may be the least restrictive and that is ratified by the time of USMCA's entrance into effect. At its base, Chapter 32 recognizes Mexico's right to adopt, reform and sustain the legal framework for energy-related matters, with the understanding that it may be subject to claims provided for in ISDS Appendix 14-E stipulations when a reform contravenes energy-sector investor interests.

[1] As regards "activities related to petroleum and gas that an Appendix [14-A] signatory nations' authorities may control, such as exploration, extraction, refinement, transport, distribution and sales."

[2] As regards "public electrical energy provision services offered in the name of any of the Appendix [14-A] signatory nations."

Sanitary and Phytosanitary Measures

This chapter largely deals with commitments signatory nations had previously adopted as part of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

Of particular interest is the fact that signatory nations have pledged that any sanitary or phytosanitary measure imposed must comply with two simultaneous standards: (1) it is to be adopted based on an effective risk-analysis and (2) the compatibility of the measure to be adopted is to be contemplated in relation to measures the other signatory nations have imposed.

Each of the signatory nations is to publish projects for measures to be adopted so that other signatory nation governments as well as individuals can submit comments, including those relative to any negative impact that may be attributed to the measure. This will be omitted when a previous import-check demonstrates that the products or commodities to be imported constitute a risk, about which importers, producers or exporters are to be immediately informed.

The signatory nations are to carry out science- and risk-analysis-based pre-import inspections and avoid protectionist measures and measures that impede free trade. Additionally, upon request from any of the signatory nations, information must be provided in relation to risk-analysis processes and import inspections, their type and frequency.

To these and other ends, the signatory nations will exchange lists of senior-level government agency representatives with qualifications in sanitary and phytosanitary matters who will serve as contact points between the nations.

Similarly, commitments taken on under the aegis of NAFTA's Section B, Chapter 7 are to be reasserted and expanded. The signatory nations are obliged to set up mechanisms that expedite permit-issuance inside their borders, once the products or merchandise in question have received similar permits in any other signatory nation. The importing country can audit the exporting country to ensure equivalency between the sanitary and phytosanitary requirements and processes exists in the exporting nation and its own.

The signatory nations additionally pledge to form a Sanitary and Phytosanitary Measures Committee to evaluate phytosanitary-measure implementation in the international environment whose specific end is to avoid that those measures are used to protect local trade.

What's more, the signatory nations recognize that the multilateral identification and recognition of pest- or disease-free areas will promote trade among them, to which end they pledge to take up an immediate assessment when an exporting nation submits sufficient information to request they declare or recognize that a region or zone in the requesting country is pest- or disease-free.

With an eye to conflicts that might arise from this chapter's interpretation or implementation, the signatory nations have agreed to a conflict-resolution protocol that considers technical consultations or even the implementation of an advisory panel that includes experts on the matter.

Trade Remedies

This USMCA chapter takes up, expands and updates issues from NAFTA chapters 8 and 19 related to emergency, review and conflict-resolution measures as regard antidumping and countervailing duties, but also includes a cooperation mechanism between the signatory nations that aims to disincentivize countervailing-, antidumping- and safeguard-duty evasion.

In sum, this USMCA chapter would seek to uphold NAFTA's safeguard exclusion; update signatory nations' rights regarding the abovementioned issues in terms of the WTO and include the cooperation mechanism to prevent trade-remedy-law-evasion.

Fortunately, the signatory nations retained a countervailing and antidumping duty review mechanism in line with terms in NAFTA's Chapter 19, despite ongoing pressure from US negotiators to eliminate it.

Given that most of this USMCA chapter's content is not new, our comments will center on the trade-remedy-law duty-evasion cooperation mechanism. Generally speaking, signatory nations are obliged to:

1. Share information related to importation, exportation and transit operations that take place within national territory;

2. Implement a mechanism that allows information-sharing for entries that may involve evading antidumping, countervailing and safeguard duties;

3. Upon written request by a signatory nation, provide relevant information that has been obtained or that reasonably could be obtained on the abovementioned customs operations, free from any obligation to hand over copies of the corresponding export-request;

4. At the request of other signatory nations, participate in the sub-procedure that could lead to a duty-evasion-verification visit inside the third nation. If the visit is allowed, access should be granted to third-nation authorities for full participation, provided certain requirements are met.

It will be of interest to observe the abovementioned cooperation mechanism's implementation in the context of the signatory nation's judicial reality, particularly as regards the presence of foreign authorities during verification visits.

Technical Barriers to Trade

Chapter 11 takes up and reproduces a great many of the now obligatory stipulations for nations that are signatories to the WTO Agreement on Technical Barriers to Trade. It also recognizes the importance of decisions from the WTO's Committee on Technical Barriers to Trade.

Goals this chapter pursues include promoting transparency between nations as it relates to drafting technical regulations and protocols for so-called conformity assessment. In synthesis, any regulatory measure adopted must be issued based on scientific evidence and in accordance with existing international guides, standards and recommendations, in such a manner as to not constitute an unnecessary barrier to commercial trade.

If a regulatory measure is adopted without compliance to international standards, the party that adopted it assumes an obligation to explain to the other parties the reasoning that led to any such determination; that reasoning must evince legitimate scientific and technical bases.

The requirements each signatory nation takes on regarding import-product-labeling must be consistent with the principle of national treatment: they cannot exceed those demanded of domestic producers who market the product within their borders.

It is agreed that signatory nations will more actively promote establishing Mutual Recognition arrangements between its respective government agencies to identify every party's accreditation entities as well as the compliance-proofs each issues.

Finally, there is a call to create a Technical Barriers to Trade Committee that will follow up on commitments the signatory parties may assume, as well as the designation of a "point person" who will function as a first contact for issues related to this chapter.

Government Procurement

As regards government procurement, the USMCA limits its application to Mexico and the United States, and not Canada, a clear difference with NAFTA.

The USMCA establishes detailed regulations on requirements and guarantees with which both states must comply in government procurements realized through bidding (including procurement that Mexico's Federal Electricity Commission or state-run petroleum company, Pemex, may realize) as well as in cases of exceptions.

While in many cases this coincides with standing Mexican legislation (that nation's Acquisitions, Leasing and Public-Sector Services Act [*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público, LAASSP*] and its Public Works and Services Thereto Related Act [*Ley de Obras Públicas y Servicios Relacionados con las Mismas, LOPYSRM*]), in certain aspects this legislation goes further and specifies quite clear criteria to guarantee open bidding-process access to both nations' businesses under equal, non-discriminatory conditions.

Thus, for example, it is established that bids cannot require equipment, products or systems from a particular brand or business and that, in all cases, technical requirements are to be defined in consideration of desired functionality or ends, free from descriptions that may point to a preference for certain providers.

Another innovation is that signatory states are obliged to establish an administrative or judicial protocol for dispute resolution through which other states' aggrieved bidders can contest standards and USMCA rule violations. A minimum period of ten days has even been established for drawing up respective complaints, as has the ability to rebut accusations.

Given that Mexico's judicial system does not provide a means of defense with such characteristics and scope, its congress will surely be obliged to implement reforms either to the LAASSP and the LOPYSRM, or indeed to the Organic Federal Administrative Justice Courts Act, to regulate the defense measure for which USMCA calls.

Investment

The USMCA's Chapter 14 regulates one of the most controversial issues of the negotiation phase: resolution mechanisms for investor-state disputes. New stipulations call for the following:

1. Transitory Paradigm for Investor-State Disputes

Investment-related claims lodged in compliance to NAFTA Chapter 11 that are pending at the time of USMCA's entrance into effect can continue to be pursued as planned for resolution according to NAFTA stipulations.

Additionally, the accord calls for the possibility that such claims as related to legacy investments (i.e., an investment established or acquired between 1 January 1994 and NAFTA's end-date, that still exist on the date when USMCA enters into effect) can be resolved through arbitration in compliance with NAFTA stipulations, always provided such claims are lodged within three years of NAFTA's termination date.

2. The New Investor-State Dispute Paradigm

Application environment. The accord protects all types of covered investments, i.e., it protects investments in existence at the time of USMCA's entrance into effect or such investments as may have later been established, acquired or expanded.

Substantive protections. Not unlike for NAFTA, the accord calls for the following substantive protections for investors in all three nations (subject to certain modifications): national treatment; most favored nation; minimum treatment levels; treatment in case of armed or social conflict; expropriation and direct as well as indirect compensation via acts equivalent to that expropriation or nationalization; transfers, performance requirements and administrative requirements.

General paradigm. The accord eliminates the possibility that US or Mexican investors lodge claims against Canada before arbitration courts, and vice-versa. Nevertheless, the three countries' investors will continue to enjoy the substantive protections the accord establishes and can exercise their rights before Canadian federal courts or, in the case of Canadian investors, before Mexican or US courts.

Through arbitration, Mexican or US investors can contest non-compliance on the part of respondent nations (Mexico, US) only as regards the following substantive protections: (i) national treatment; (ii) most favored nation, *except as it relates to an investment's establishment or acquisition*, and (iii) expropriation and compensation, *except as it relates to indirect expropriation*. Also subject to arbitration can be a dispute in which the claimant has incurred loss or injury as a result of non-compliance. Disputes related to violations of the minimum treatment standard—excluding the substantive protection of fair and equitable treatment—and those related to indirect expropriation cannot be subject to arbitration. Additionally, claims related to protections under national treatment or most favored nation are to be restricted since they do not apply to investment establishment or acquisition.

Claims related to non-compliance with substantive protection standards—ineligible for arbitration or limited—can be lodged with US and/or Mexican federal courts, as appropriate.

Prior to arbitration, investors are to exhaust local remedies before an appropriate court of the respondent State and are to obtain a final ruling from a court of last resort. In cases where thirty months have passed the date in which the case before the federal court was begun (the so-called "waiting period") and the court of last resort has handed down no final ruling, investors may recur to arbitration.

Special expanded paradigms. The accord calls for an expanded and more favorable paradigm for covered[1] government contracts in the following sectors: (i) petroleum and natural gas (ii) energy-generation services, (iii) telecom, (iv) transportation and (v) infrastructure.

In these cases, US or Mexico investors can submit disputes for arbitration against a respondent State (Mexico, the US) when that State has failed to comply with *any* obligations the accord stipulates, free from applicable restrictions to the general paradigm. In these cases, there will be no limitations regarding protection standards available through arbitration. That stipulations apply to an investment's establishment or acquisition will be immaterial and there is no obligation to exhaust local remedies or observe the waiting period.

Other modifications. The accord includes stipulations that foment the existence of an effective dispute-resolution mechanism alongside transparent processes. It establishes the States' obligation to make procedure-related documents (such as submissions, memorials and summaries, hearing-transcription acts, orders, rulings and decisions) public and declares that hearings are to be open to the public. Additionally, *written amicus* curiae briefs can be accepted regarding a facts- or rights-related question that may be part of a dispute.

3. Conclusion

Mindful of limitations imposed in Chapter 14, it is possible that Canadian and US investors may channel their investments through companies from nations with which Mexico enjoys more favorable investment accords.

[1] A "covered government contract" is a written accord between a national authority of one party to this appendix and an investor or investment covered by the other party, in which the investment or the investor seeks to establish or acquire a covered investment distinct from the written agreement *per se*, and that grants rights to the covered investment or investor in the covered sector.

Temporary Entry

This USMCA chapter regulates signatory nation businesspersons' temporary entry into another signatory nation. The agreement does not apply to those looking to access another signatory nation's labor market or wishing to gain citizenship, nationality, residency or permanent employ.

As in NAFTA, priority is afforded to facilitating temporary businessperson entry by defining criteria and transparent processes. USMCA and NAFTA coincide in perceiving a need to guarantee border security, public health and national security. Similarly, a task force will remain in place, made up of representatives from the three signatory nations including each country's immigration authorities. This group is to meet no less than once yearly to implement measures that facilitate businesspersons' temporary entries, based on reciprocity.

There are two notable innovations in comparison to NAFTA. (1) It is established that every signatory nation should publish on line its requirements for businesspersons' temporary entries as well as (2) additional criteria for classifying businesspersons, specifying activities businesspeople may take up in the nations they visit, in addition to minimum academic requirements and alternative diplomas.

Financial Services

The USMCA's Chapter 17—which replaces NAFTA's Chapter 14—includes stipulations that improve and update the judicial framework for financial institutions and financial services providers, so that signatory nations arrive at complete and efficient regulation and oversight.

The changes include new concepts such as *covered persons, computing facilities and financial market infrastructures* that seek to lend greater certainty to USMCA users, as well as update and contextualize the treaty's text when it comes to recent years' technological advances that, for obvious reasons, were not pertinent at the time of NAFTA's drafting. Additionally, the new trade accord established a more precise definition of *financial service* and contains a detailed list of activities this category includes.

With regard to financial services, an important difference between the treaties is that USMCA reinforces mechanisms for its own application and eliminates restrictions related to the establishment of one nation's financial institutions in another as well as to cross-border trade, national treatment, most favored nation treatment, new financial services, data processing, senior management and boards-of-directors.

Notably, because of the moment when it was signed, NAFTA referred to the treaty Canada and the US had already established, and contained relevant differences regarding its application to Mexico, a question that has been entirely left at the margins.

The USMCA states this chapter will not be applicable to public social-security or retirement activities/services nor any others that imply public resources. Nevertheless, it will be applicable when a nation allows such activities or services be realized by a financial institution in competition with a public entity.

Neither will it be applicable to public bidding for financial services and trans-border financial-services-provision subsidies or concessions.

Except for the abovementioned restrictions, the USMCA reaffirms and guarantees principles of national treatment and most-favored-nation treatment among the signatories will frame operations on the part of investors, investments, financial institutions and cross-border financial-services providers, guaranteeing equality of conditions.

Regarding signatory nations' financial institutions, cross-border financial-services providers and investors who seek to establish financial institutions in one of the other signatory nations, or provide cross-border financial services in them, signatory nations should refrain from imposing measures, limits or restrictions to:

1. The total number of financial institutions or cross-border financial-services providers;

2. The total value of financial services transactions or assets;

3. The total number of operations to be carried out;

4. The total number of private individuals who can be hired in a particular financial services sector or that a financial institution or cross-border financial services provider may hire; and

5. The specific requirements for entities or legal vehicles through which a financial institution or a cross-border financial services provider must provide services.

Another important change is that none of the signatory nations can demand that a cross-border financial-services provider establish a representational office or other business, or be a resident of that nation, as a condition to providing cross-border financial services.

Each of the signatory nations will allow the other nations' financial institutions to provide new services, free from any need to adopt new or modify existing legislation. That said, the signatories may determine the legal or institutional form through which the new financial service must be provided as well as any authorizations this may require.

When authorization is required for the provision of a new financial service, the signatory nation is to assure that its regulatory authorities allow the interested party to present its request and move through the procedure in the most practical and well-informed way possible.

Additionally, each signatory nation is to guarantee that other signatory nations' financial institutions established within their borders enjoy access to payment and clearing systems public entities operate as part of everyday business.

As well, several conditions to facilitate that licensed suppliers provide insurance services have been recognized, such as no requirement for insurance line approvals in the case of contracting, except when these may be sold to individuals or may be obligatory, and no limits to the number or frequency of product introductions.

It is also stipulated that if any of the signatory nations has already established regulatory procedures for product approval, it must maintain or improve those procedures, as necessary, to facilitate authorized insurance-services availability.

The USMCA states that signatories must not prevent covered individuals from transferring information, including personal information, within or without the signatory nation's boundaries, via electronic or any other medium, when this is undertaken for conduct of business, and provided that the permission's terms, authorization or corresponding records are not breached.

The above does not restrict the signatory nations' right to adopt or maintain measures for protecting personal data, personal privacy and the confidentiality of individual records and accounts, with the proviso that such measures ae not used to elude USMCA commitments and obligations.

Regarding banking secrecy, a new stipulation is established that obliges signatory nations not to reveal information related to users' financial interests or accounts at financial institutions or cross-border financial services providers.

Another notable change is the inclusion of an article about the location of computing facilities, which need not be within the limits of the nation that provides the service. That said, financial regulatory authorities can access covered individuals' information in order to support and facilitate financial services provision within those national limits, alongside their regulation and oversight. This will have no effect on the protection of personal data, personal privacy and the confidentiality of both individual records and accounts.

The changes to this USMCA chapter, rather than being substantial, seek to update regulations in today's context as a way to facilitate financial services provision and promote their use among the greatest number of individuals in all three signatory nations.

Telecommunications

Unlike what NAFTA establishes for the telecommunications sector, USMCA incorporates the stipulations analyzed below with the intention of generating greater and fairer competition within that sector in the US, Mexico and Canada ("the signatory nations"), free from discriminatory treatment and monopolistic practices. This should lead to more and better access to telecommunications services.

The USMCA introduces the figure known as *major suppliers*, also known as "substantial-power agents" (*agentes con poder sustancial*) in Mexico's Federal Telecommunications and Radio-Broadcasting Act. It was established that each signatory nation will guarantee that major suppliers within its territory will not subject other countries' telecommunications-service-providers to less favorable treatment than that which they receive as regards:

1. Public telecommunications services availability, provision, rates or quality; and

2. The availability of necessary technical interfaces for interconnection.

Another indication is that the signatory nations must establish measures to prevent telecommunications-services providers from participating or continuing to engage in anticompetitive practices such as: (1) cross subsidies, (2) using information from competitors to anticompetitive ends, or (3) an obligation to deny telecommunications service-providers access to technical information on essential installations as well as the relevant trade information they need to provide service.

Another relevant USMCA issue is regulating interconnection between major suppliers. In general terms, telecommunications service-provider interconnectivity with major suppliers should be allowed under non-discriminatory criteria, at a quality no less than that which major suppliers provide and by means of transparent and reasonable, cost-oriented rates, tied to economic viability, to avoid providers having to pay for network components or installations they do not require to provide service.
The accord states that added-value-service providers are not to be subject to requirements applicable to telecommunications services providers without a consideration of legitimate public-policy objectives, the requirements' technical feasibility and the characteristics of the value-added services in question. This establishes a benchmark to the end that, in the future, any service that falls into the USMCA's added-value category can be regulated in each signatory nation legislation.

Finally, the independence and impartiality of telecommunications sector regulatory agencies is established in all three signatory nations. Such agencies ought to exist unconnected to telecommunications services providers and must have no financial interest in them. This will assure that norms regulatory agencies hand down will treat all telecommunications sector participants impartially.

Digital Trade

USMCA added the digital trade chapter in order to regulate electronic transactions that take place between the United States, Mexico and Canada ("the signatory nations") and incentivize digital-services development and trade between them.

It was established that import and export duties cannot be imposed on digital products electronically transferred between the signatory nations, such as books, software, music and other digitally coded products or products created to be sold and distributed electronically.

Additionally, the signatory nations sought to create a non-discriminatory treatment with regard to digital products that may come to be traded. In other words, neither the territory in which the digital product is produced, nor the author or creator's home nation are to be a considered when granting preferential treatment.

To facilitate electronic transactions, the signatory nations must not reject the validity of electronic signature use. Nevertheless, they can request electronic signatures or other authentication methods consumers use for certain transactions meet established standards or include official certifications.

To protect consumers from fraudulent and deceptive trade activities during their electronic transactions, the signatory nations will adopt and support effective, transparent measures for safeguarding consumer data. This is clearly an advance that enhances digital trade security and foments trade itself.

To do business within the territorial limits of any signatory nation, it will not be necessary to use servers within the territorial limits of the signatory nation with which such business is conducted. Servers for transactions can be located in any of the three territories.

As a means of protecting intellectual property and competitiveness in digital trade, the transfer of software source-code or its source-code algorithm design is to be prohibited as a condition for importing, distributing, selling or using software or products containing that software within the territorial limits of any signatory nation.

The USMCA takes cyber-security quite seriously, since digital-environment threats affect digital trade's robust development. The signatory nations are to enhance cooperation mechanisms to identify and mitigate malicious intrusions or transmission of codes that affect networks, and they are to employ mechanisms that quickly address cyber-security incidents in ways that do not disrupt digital trade.

Finally, the signatory nations will cooperate to expand government-information access and use; alongside such data as the signatory nations make public to enhance as well as generate business opportunities, in particular for small and medium-sized enterprises.

Intellectual Property

Chapter 20 includes stipulations relating to various kinds of intellectual property, such as copyrights and related rights, brands, geographical indications, patents, industrial designs and trade secrets. Aiming to safeguard such rights, minimum protection standards have been established, granting signatory nations discretion to determine their definitive scope.

Note some standards have already been established and even been exceeded in Mexican law. Examples include minimum validity timeframes for hereditary copyrights and related rights as well as the validity terms conferred on industrial design registries. That said, changes will be beneficial to the protections that may be afforded when it comes to such rights in the United States and Canada.

With regard to trademarks, their scope has been expanded for brands and requirements have been established for geographic indication issues. For brands, the limit to registering only visible signs is lifted and there are stipulations related to certification and collective marks. In Mexico, the latest reforms to the nation's Industrial Property Act (*Ley de la Propiedad Industrial*) had already expanded brands' scope and introduced the figure of geographical indications. These stipulations' inclusion in USMCA will contribute to intellectual-property systems harmonization in all three signatory states.

As regards inventions, patent- and patent-exception timeframes will remain in place, except in the case of industrial-design minimum-protection standards. Additionally, market protections have been called for in the case of new pharmaceutical products.

Legislation in Mexico as regards intellectual property has undergone recent and important reforms. As such, the USMCA intellectual property chapter's most relevant aspects have more to do specifically with observance and respect for such rights.

Notable points are the signatory nations' pledge to only use authorized software in government computers and stipulations that internet providers cooperate to protect copyrights (by disincentivizing unauthorized protected-content storage and transmission and providing information that identifies users who commit infractions, etc.). Similarly, noteworthy are tougher sanctions for certain activities, such as avoidance of technological protection measures that block access to certain materials.

Competition Policy

NAFTA's Chapter 15 was a competition-policy milestone for Mexico. Its first article obliged signatory nations to adopt or maintain measures to ban anticompetitive trade practices. Mexico was the lone nation that had to promulgate legislation for competitiveness, its first Federal Economic Competition Act (*Ley Federal de Competencia Económica*).

Now USMCA competition policy centers on promoting competition through applicable regulation and taking the appropriate measures to boost economic efficiency and consumer wellbeing.

Process-related impartiality in the application of competition legislation is a point of principal interest. Chapter 21 takes up principles national competition authorities are to observe; the most relevant include:

- Providing transparency with regard to laws, regulations and norms that order nations' competition-related investigations and protocols;
- Assuring that national competition authorities post no public proclamations that confirm or reveal the existence of pending or in-process investigations against parties that may have violated national competition law;
- Allowing individuals to enjoy reasonable opportunities for legal representation;
- Guaranteeing access to necessary information to prepare an adequate defense;
- Assuring the criteria employed to calculate fines for violating national competition statutes are transparent; and
- With regard to mergers, allowing advance counseling to exchange points-of-view on transactions, including potentially determinant questions.

The chapter additionally recognizes the relevance of cooperation and coordination among the region's competition authorities. Corresponding USMCA articles seek to support and strengthen international cooperation and coordination.

Consumer protections are another principal issue. Commitments have been established to adopt or maintain legislation that prohibits fraudulent and deceptive trade practices as well as promote cooperation and coordination in matters related to these activities. This could be a signal that Mexico may have to promulgate specific regulations to protect Mexican consumers from harmful trade practices.

State-Owned Enterprises

The USMCA establishes important restrictions regarding the scope of support signatory nations can provide to state-owned enterprises. Fundamentally, it declares state-owned businesses and monopolies must treat other nations' trade activities justly and equitably. It also prohibits state subsidies or support for state-owned businesses in bankrupt or insolvent conditions. It forbids signatory nations from occasioning harm to another signatory nation's businesses by means of such subsidies or non-trade-related supports it provides to state-owned businesses or monopolies.

At root, it seeks to enforce the principles under which state-owned enterprises were recently created in Mexico, to be treated and managed as enterprises—rather than *state-owned* enterprises—and that seek sensible administration subject to a trade framework of transparent rights that vigorously limits state intervention in their development and normal activities through exceptional supports.

Labor

USMCA's chapter on labor is an innovation in comparison to NAFTA. Its goals include reaffirming and promoting the inclusion of basic labor rights in the signatory nations' labor-related legislation; establishing a cooperation mechanism between the three countries to effectively achieve these rights' exercise; fomenting dialogue for the resolution of conflicts to which these actions can lead, and promoting transparency in labor-law application.

In line with USMCA negotiations, on 24 February 2017, Mexico promulgated a constitutional reform that adopted principles of collective bargaining and union autonomy as well as a new model for labor-related justice. Further, on 20 September 2018, Covenant 98 of the International Labor Organization (ILO) was ratified.

The USMCA's labor chapter establishes an obligation that the signatory nations implement basic labor rights into their respective regulatory frameworks; i.e., the rights the ILO's 1988 declaration includes. In concrete terms, the signatory nations pledge to:

- Recognize the goal of trading only in goods that meet the obligations this chapter establishes;
- Not repeal or reduce labor rights in order to incentivize trade or investment;
- Promote labor-related compliance via tougher inspections;
- Promote implementation of protective measures against salary discrimination;
- Create a labor council made up of government officials charged with reviewing the effective application of the measures the present chapter establishes;
- Designate an official from the Ministry of Labor (or its equivalent) as the primary contact point for dealing with matters related to the present chapter's implementation and compliance;
- Define a labor consultations protocol in which any of the signatory nations can request more information related to this chapter; in cases where such information may be insufficient, a conflict-resolution task force may be established.[1]

The chapter includes an appendix, "23-A," entitled "Collective Bargaining Representation for Workers in Mexico." In it, Mexico pledges to adopt legislation no later than 1 January 2019 that calls for a series of measures and principles related to effective recognition of collective bargaining; the existence of such legislation is in fact a condition for USMCA's entrance into effect.

The appendix's main points are the following:

- Workers' rights to participate in collective bargaining and to organize, form and join the labor union of their choice. Management's interference in union activities is prohibited.
- The creation of an independent organization charged with conciliating and documenting collective labor contracts.
- It establishes union leaders' elections via individual, free and secret-ballot voting on the part of workers.
- For a collective labor contract's initial registry, the independent organization is to verify the workplace is indeed operating, that workers have had access to a copy of the contract and that the majority of laborers agrees with the contract's ratification.
- Majority support must be verified for future collective labor contract revisions, including for those that may currently be in place. As well, contracts must be reviewed at least once in the four-year period following collective labor contract-related legislation's entrance into effect.

- It orders collective labor contracts and related documents be made public and that a central website for public consultation be created.

Labor-related legislative changes that have recently come to pass in Mexico conform to this USMCA chapter's stipulations, but the core element—specifically, secondary labor legislation—is not yet in place. It should be stressed that labor issues will take on more international relevance. A number of mechanisms, such as inspections, will oversee compliance enforcement on all new stipulations.

[1] "Capítulo 3. Solución de controversias," article 31.6: "Establecimiento de paneles."

Environment

Unlike NAFTA, that only includes a few paragraphs and a supplementary letter regarding environmental protections, USMCA Chapter 24 is given over exclusively to environmental-protection stipulations.

Like NAFTA, the USMCA declares it is inappropriate to spur investment by relaxing national environmental measures. Additionally, it calls for signatory nations to adopt voluntary measures to improve and protect the environment as these relate to trade. While this might be read as a triumph for environmentalists, the fact is that in the past this sort of declarations has not managed to avoid regulatory backsliding when it comes to environmental matters inside the signatory nations.

The signatory nations reaffirm their intention to adopt stipulations and measures to prevent and combat the emission of substances that damage the ozone layer.

Article 24.10 seeks to protect and conserve the marine environment from ship pollution. It establishes the signatory nations will take measures to prevent ships and other seagoing crafts' intentional or accidental fouling of the marine environment. This is the first time the issue of emissions-based water pollution has been included in an international accord between Mexico, the United States and Canada.

Regarding fisheries, the USMCA contains a series of express prohibitions and restrictions that seek to prevent overexploitation and fishery decline, such as (1) avoiding poison and explosives in commercial fishery harvests; (2) prohibiting shark-fin harvests; (3) disincentivizing over-fishing through measures such as access-, time- and area-restrictions as well as establishing and compliance to fishing harvest-limits, and (4) reducing, controlling and, eventually, limiting subsidies to fishing-boats and their operators as well as those who promote over-fishing and fishery overcapacity.

The Commission for Environmental Cooperation (CEC), created as part of the North American Accord for Environmental Cooperation (NAAEC), whose object is monitoring effective environmental-law application and compliance, is to remain in place.

Article 24.27, concerning submissions on enforcement matters, adopts a NAAEC transparency and public-participation measure that allows anyone from the signatory nations to declare that one of these is not effectively complying with environmental legislation before the CEC secretariat. This authority may issue recommendations in response to such a declaration or indeed may dismiss it.

Competitiveness

Mexico proposed this USMCA chapter with an understanding that its growth and development are closely related to US and Canadian competitiveness. It seeks to create an information-exchange medium and carry out actions that support regional competitiveness.

The signatory nations are to establish a Competitiveness Committee made up of representatives from the three governments. Among other actions, the Committee is to:

- Discuss effective focuses and exchange information to foment a competitive environment throughout North America that promotes trade and investment among the signatory nations;

- Assess and offer recommendations on ways to further improve competitiveness in the North American economy;

- Identify projects and priority policies to develop physical and modern digital infrastructure for trade and investment; and

- Discuss collective actions against non-member-states' practices that distort the market and affect the region.

Anticorruption

This new USMCA section describes measures for preventing and sanctioning corruption in trade relations between the United States, Canada and Mexico.

Entitled "Anticorruption," Chapter 27 establishes the signatory nations' commitment to eliminating bribery and corruption in international trade and investment in any area USMCA covers.

New stipulations recognize and reiterate adherence to principles as adopted by the Inter-American Anticorruption Convention, the OCDE Convention, the Asia-Pacific Economic Cooperation Forum as well as G-20 documents.

The chapter recognizes the need to drive integrity in the public and private sectors. Measures to promote public-service integrity include (1) establishing selection and training protocols for individuals who occupy public charges, (2) conflict-of-interest policies, (3) corruption-related crime denunciation mechanisms and (4) codes-of-conduct.

The USMCA requires signatory nations to adopt regulations that classify (1) bribery, (2) embezzlement (3) and wrongful appropriation or diversion of public resources as crimes. Notably, both public servants and private individuals who have a hand in such crimes are to be punished.

Additionally, signatory nations recognize the benefits of businesses' anticorruption compliance programs. To that end, they take on an obligation to encourage businesses to implement programs that duly prevent and detect acts of corruption.

The new accord states signatory nations' obligation to define the necessary measures for the proper management of books, records, financial statements and accounting/general audit standards so that acts of corruption are avoided.

Notably, USMCA promotes the active participation of civil-society organizations when it comes to preventing and fighting corruption in international affairs, as a means of raising awareness of its causes and consequences.

At Von Wobeser & Sierra, S.C., we celebrate USMCA approval as well as the stipulations in its anticorruption chapter, which will surely promote a culture of public-sector integrity and support the region's economic development.

Final Provisions

This USMCA chapter takes on points within NAFTA's Chapter 22 regarding amendments, entry into effect and withdrawal.

In line with that chapter, when all signatory nations have announced the conclusion of internal protocols for treaty ratification, it will enter into effect on the first day of the third month following the final approval date.

USMCA can obviously be modified and amended. Such changes would enter into effect on the date agreed to by the signatory nations or sixty days following all signatories having announced they have completed internal ratification processes. It is specified that WTO Agreement modifications will not automatically affect the USMCA, which puts the latter over the former in hierarchical terms.

In relation to USMCA withdrawal or termination, these will become effective six months subsequent to a signatory's tendering written notice of its withdrawal to the other signatories. USMCA will remain in effect with the other two signatories should a third signatory make such a withdrawal.

This USMCA chapter also includes a review and term-extension mechanism according to which, six years following its entrance into effect, will be subject to joint review and, if all signatories express in writing their desire to extend terms, it will be automatically extended for an additional sixteen years.

If any of the signatories does not confirm term-extension in writing, it may do so as part of future reviews, whether annual or at any time, until the conclusion of the treaty's original effective life.

Regarding USMCA termination, Article 32.10,[1] from another chapter, stipulates that if one of the signatories enters into a free-trade agreement with a country that has been designated as a non-market economy, the other signatories may terminate USMCA and replace it with a bilateral agreement between them. This bilateral treaty is to be made up of USMCA stipulations, excepting those that both signatories decide are no longer applicable between them.

It is also resolved that official documents are to be published in English, French and Spanish.

[1] "Chapter 32. Exceptions and general provisions."