United States Trade Report

Congress Approves Legislation to Implement US-Mexico-Canada Agreement

White & Case, LLP

January 16, 2020

On January 16, 2020, the US Senate approved legislation implement the US-Mexico-Canada Agreement (USMCA) by a vote of 89 to 10, sending the legislation to President Trump to be signed into law. The Senate's approval follows a similarly lopsided vote in the House of Representatives, which approved the bill on December 19 by a vote of 385 to 41 (the widest margin in favor of any recent US trade agreement considered in the House). These votes occurred just weeks after the bill's introduction and publication, and despite the signing on December 10 of a "Protocol of Amendment" in which the Parties agreed on multiple, substantive changes to the USMCA text that had not previously been made public. Thus, despite Congress's approval of the USMCA, questions remain about the recent changes to the Agreement and how these and other novel USMCA provisions are reflected in the United States' implementing legislation. This report therefore examines the substance of the recent changes to the USMCA and the measures the United States intends to take in order to implement the Agreement. The report is organized as follows:

- **Section I** describes the key changes that the Parties agreed to in the Protocol of Amendment to the USMCA, signed in Mexico City on December 10;
- **Section II** provides an overview of the US implementing legislation, as well as the accompanying "Statement of Administrative Action" detailing actions the administration will take to implement the USMCA; and
- **Section III** discusses the likely next steps towards the USMCA's entry into force and the implications of the revised Agreement.

I. Key Updates to USMCA under Protocol of Amendment

Addition of "Melted and Poured" Standard for Steel to Automotive Rules of Origin

The USMCA as originally signed by the Parties provided that a passenger vehicle, light truck, or heavy truck could qualify as originating (and thus eligible for preferential tariff treatment) only if the producer could certify that, during the previous calendar year or a comparable timeframe specified in the Agreement, at least 70% of the producer's North American purchases of steel and aluminium qualified as originating (Appendix to Annex 4B, Article 6). The Protocol of Amendment ("Protocol") further tightened this rule by adding a requirement that, beginning seven years after the entry into force of the USMCA, steel may only qualify as originating for purposes of Article 6 if "all steel manufacturing processes…occur in one or more of the Parties, except for metallurgical processes involving the refinement of steel additives." The added language clarifies that "[s]uch processes include the initial melting and mixing and continues through the coating stage", and that "[t]his requirement does not apply to raw materials used in the steel manufacturing process, including steel scrap; iron ore; pig iron; reduced, processed, or pelletized iron ore; or raw alloys." Though these terms and processes are not further defined in the Agreement, the US implementing legislation for the USMCA authorizes the Secretary of the Treasury to issue regulations pertaining to the steel purchase requirement, as well as the aluminum purchase requirement (which is not subject to a "melted and poured" standard).[1] Such regulations may provide additional detail on how steel products may qualify as originating for purposes of Article 6.

Creation of "Rapid-Response" Dispute Settlement Mechanism for Labor Complaints

The Protocol added to the Dispute Settlement Chapter a new Facility-Specific Rapid Response Labor Mechanism ("Mechanism") that will apply between the United States and Mexico (Annex 31-A). The stated goal of the Mechanism is to ensure workers in the two countries are not denied the right of free association and collective bargaining. The Mechanism establishes a two-stage process for addressing allegations that workers at a specific facility are being denied such rights: (1) an initial review period, during which the Parties may attempt to resolve the issue bilaterally; and (2) a formal dispute settlement process, in which an independent panel will determine whether the alleged "Denial of Rights" exists. Where a Panel determines that a Denial of Rights exists, the complaining Party will be authorized to impose remedies targeting imports of goods or services from the facility at issue. Annex 31-B

[1] Rather, the Protocol amended the USMCA to provide that "[t]en years after entry into force of this Agreement, the Parties shall consider appropriate requirements that are in the interests of all three Parties for aluminum to be considered as originating under this Article."

establishes an analogous Mechanism between Canada and Mexico. We provide a general summary of the Mechanism below:

- **Scope.** A Party may bring an action under the Mechanism only where it concerns an alleged violation of free association and collective bargaining rights at a "covered facility", defined as a facility in the territory of a Party that (1) produces a good or supplies a service that is traded between the Parties (or competes in the territory of a Party with a good or service of the other Party); and (2) is a facility in a "Priority Sector", *i.e.*, a sector that produces manufactured goods, supplies services, or involves mining. Manufactured goods are defined as including, but not limited to "aerospace products and components, autos and auto parts, cosmetic products, industrial baked goods, steel and aluminum, glass, pottery, plastic, forgings, and cement." While this definition encompasses a wide range of activities, it does appear to exclude some important industries, such as agriculture. Moreover, the scope of the Mechanism is further limited by a requirement that alleged violations pertain to the domestic law of the party at issue. In particular, with respect to the United States, "a claim can be brought only with respect to an alleged Denial of Rights owed to workers at a covered facility under an enforced order of the National Labor Relations Board." Similarly, with respect to Mexico, a claim can be brought only with respect to an alleged Denial of Rights "under legislation that complies with Annex 23-A" of the USMCA, which concerns worker representation in collective bargaining in Mexico.

- **Step 1: Requests for Review and Remediation.** If a complainant Party "has a good faith basis to believe that a Denial of Rights is occurring at a Covered Facility", it must first request that the respondent Party conduct its own review of whether a Denial of Rights exists, and that the respondent Party attempt to remediate any such Denial of Rights within 45 days of the request. The Mechanism provides multiple avenues for the dispute to be resolved at this initial stage, *i.e.*, without the formation of a Panel or the imposition of remedies (for example, if the respondent Party determines that there is no Denial of Rights and this finding is accepted by the complainant, or if the respondent Party determines that there is a Denial of Rights and agrees with the complainant on a course of remediation). Alternatively, the complainant may request the formation of a "Rapid Response Labor Panel" ("Panel") to conduct a separate verification and determination if (1) the respondent Party does not conduct the requested review; (2) the respondent Party finds that there is no Denial of Rights but the complainant disagrees; or (3) the Parties cannot agree on a course of remediation for a Denial of Rights.

  The Mechanism also provides that, in certain circumstances, the complainant Party may impose remedies without first obtaining a determination from a Panel that a Denial of Rights exists. Pursuant to Article 31-A.4.8, if the Parties agree upon a course of remediation but the complainant considers that the Denial of Rights has not been remediated by the agreed-upon date, the complainant may "notify the respondent of its intention to impose remedies at least 15 days prior to imposing remedies." However, the respondent Party may, within 10 days of receiving such a notice, request a determination from a Panel as to whether the Denial of Rights persists, and the complainant Party will be prohibited from imposing remedies until the Panel makes its determination.

- **Step 2: Panel Proceedings and Verification.** Once a Party has submitted a petition to the USMCA Secretariat requesting the establishment of a "rapid response" Panel, the Secretariat must appoint panelists within three days.[2] Upon confirmation that the petition contains the relevant information, the Panel must issue a request for "verification" to the respondent Party (which the respondent Party may accept or refuse). If the respondent Party agrees to the verification, the Panel must conduct the verification within 30 days after the receipt of the request by the respondent Party, and observers from both Parties may accompany the Panel in any on-site verification if both Parties so request. Though the Agreement does not elaborate on what "verifications" will entail, this language indicates that they may include visits by the Panel to the covered facility at issue. Alternatively, if the respondent Party refuses the request for a verification or does not respond within seven business days, the complainant Party may request that the Panel make a determination as to whether there is a Denial of Rights, and the Panel "shall take the respondent Party's refusal to allow a verification into account." The Panel must make a determination as to whether there has been a Denial of Rights within 30 days after conducting a

[2] The Secretariat must select by lot one panelist from the complainant Party's list, one from the respondent Party's list, and one from a Joint List.

verification, or within 30 days after it is constituted if there has not been a verification, and this determination will be made public. The Agreement provides that the Panel "shall provide both Parties an opportunity to be heard" before making its determination, but it does not elaborate on the process by which Parties may provide input to the Panel.

- **Step 3: Imposition of Remedies.** After receipt of a determination by a Panel that there has been a Denial of Rights, the complainant Party may impose remedies after providing written notice to the respondent Party at least 5 business days in advance. The complainant Party is afforded broad discretion to "impose remedies that are the most appropriate to remedy the Denial of Rights." Remedies may include (1) suspension of preferential tariff treatment for goods manufactured at the Covered Facility; or (2) the imposition of "penalties" (which are not defined in the Agreement) on goods manufactured at or services provided by the Covered Facility. The Agreement places no further limitations on the form or severity of any penalties, except that they must be "proportional to the severity of the Denial of Rights and shall take the panel's views on the severity of the Denial of Rights into account[.]" In cases where a Covered Facility (or a Covered Facility owned or controlled by the same person producing the same or related goods) has received a prior Denial of Rights determination on at least two occasions, remedies may also include the denial of entry of goods (*i.e.*, an import ban on goods produced by the Covered Facility).

- **Step 4: Removal of Remedies.** After a Party has imposed remedies, the Parties "shall continue to consult on an ongoing basis in order to ensure the prompt remediation of the Denial of Rights and the removal of remedies." If the Parties reach agreement that the Denial of Rights has been remediated, the remedies must be removed immediately. If the Parties are in disagreement as to whether the Denial of Rights has been remediated, the respondent Party may request an opportunity to demonstrate to the Panel that it has remediated the Denial of Rights, and the Panel must make a new determination within 30 days. However, if the Panel then determines that the Denial of Rights has not been remediated, the respondent will be prohibited from requesting another determination for 180 days, during which time the remedies may remain in place.

- **Recourse to State-to-State Dispute Settlement.** A Party will have recourse to the USMCA's state-to-state dispute settlement procedures under Chapter 31 if it considers that another Party "has not acted in good faith" in its use of the Mechanism, either with regard to (1) an invocation of the Mechanism itself; or (2) an imposition of remedies "that are excessive in light of the severity of the Denial of Rights found by the panel[.]" If a dispute settlement panel agrees that a Party "did not act in good faith" in its use of the Mechanism and the Parties are unable to resolve the issue through consultations, the complainant may elect to "prevent the responding Party from using [the Rapid Response Mechanism] for a period of two years", or to impose another remedy permitted under the dispute settlement chapter.

Though recent US trade agreements have included labor obligations that are subject to state-to-state dispute settlement, the "rapid response" Mechanism envisioned in Annex 31-A is novel in several important respects. Whereas state-to-state dispute settlement aims to determine whether government measures or patterns of behavior violate the Agreement, the Mechanism is aimed at identifying and remedying isolated instances in which labor rights are being denied by a specific private company (regardless of whether a USMCA Party government violated the Agreement). Thus, allegations under the Mechanism might occur more frequently than state-to-state disputes concerning labor obligations, which are relatively rare, particularly given that the US implementing legislation permits US parties such as labor unions to submit petitions for action under the Mechanism.

Moreover, the Mechanism could result in remedial measures on specific companies that actually exceed the level of benefits that such companies accrue under the trade agreement. WTO and FTA dispute settlement systems traditionally limit the form and dollar value of any countermeasures authorized thereunder: violations suspend trade agreement benefits to match the level of harm experienced by the complaining party and do not permit the targeting of specific facilities. By contrast, the Mechanism gives a complaining Party discretion to suspend preferential tariff treatment **and** to impose additional, undefined "penalties" targeting offending facilities, provided that such remedies are "proportional" to the violation at issue. This could result in the goods of offending facilities being treated worse than the goods of a party not subject to the USMCA or another US trade agreement. Thus, while the Agreement

states that the goal of the Mechanism is "to ensure remediation of a Denial of Rights…not to restrict trade", it might nonetheless prompt a wave of new allegations and company-specific trade restrictions targeting Mexican facilities, particularly in the "priority sectors" specified in the Agreement.

Other Changes to Labor and Environment Chapters

The Protocol makes several additional changes aimed at making the USMCA's labor and environmental rules more easily enforceable through state-to-state dispute settlement, and expanding the scope of the environmental obligations:

- **Presumption that violations affect trade and investment.** The USMCA originally provided that, to establish a violation of an obligation pertaining to Labor Rights under Article 23.3, a complaining Party must demonstrate that the respondent failed to adopt or maintain the required statutes, regulations, or practices "in a manner affecting trade or investment between the Parties." A similar qualification applied to several other obligations in the Labor and Environment Chapters, including those set forth in Article 23.4 (Non-Derogation), Article 23.5 (Enforcement of Labor Laws), Article 23.6 (Forced or Compulsory Labor), Article 23.7 (Violence Against Workers), Article 24.4 (Enforcement of Environmental Laws), Article 24.8 (Multilateral Environmental Agreements), and Article 24.22 (Conservation and Trade), among others. The Protocol amended these provisions to establish that, "[f]or purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise". By shifting the burden of proof to the responding Party, this change may make it easier for a complaining Party to establish that a violation of the USMCA's labor or environmental commitments has occurred.

- The Protocol revised **Article 23.6.1 (Forced or Compulsory Labor)** to establish that a Party "shall prohibit the importation of goods into its territory" that are produced by forced or compulsory labor, removing the caveat that a Party may do so "through measures it considers appropriate".

- The Protocol revised **Article 23.7 (Violence Against Workers)** to provide that "no Party shall fail to address violence or threats of violence against workers, directly related to exercising or attempting to exercise the rights set out in Article 23.3 (Labor Rights)" (whereas the USMCA originally prohibited such failures only where they occurred "through a sustained or recurring course of action or inaction").

- The Protocol added in **Article 24.8 (Multilateral Environmental Agreements)** a requirement that each Party "adopt, maintain, and implement laws, regulations, and all other measures" necessary to fulfill its obligations under the following multilateral environmental agreements:

  - The Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), done at Washington, March 3, 1973, as amended;

  - The Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as adjusted and amended;

  - The Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, done at London, February 17, 1978, as amended;

  - The Convention on Wetlands of International Importance Especially as Waterfowl Habitat, done at Ramsar, February 2, 1971, as amended;

  - The Convention on the Conservation of Antarctic Marine Living Resources, done at Canberra, May 20, 1980;

  - The International Convention for the Regulation of Whaling, done at Washington, December 2, 1946; and

  - The Convention for the Establishment of an Inter-American Tropical Tuna Commission, done at Washington, May 31, 1949.

This change expands the scope of the USMCA Environment Chapter, which previously contained such an obligation only with respect to the CITES.

Intellectual Property

The Protocol makes the following notable changes to the USMCA's Intellectual Property Chapter:

- **Removal of biologics provision.** The Protocol removed Article 20.49 (Biologics), which would have required the Parties to provide market exclusivity protection for biologic medicines for a period of 10 years. This change represents a significant departure from recent US trade policy, and from the Trump administration's own stated negotiating objective to "[s]eek provisions governing intellectual property rights that reflect a standard of protection similar to that found in U.S. law."

- **Removal of 3-Year exclusivity period.** The revised USMCA retains the requirement set forth in Article 20.48 that, where a Party requires the submission of undisclosed test or other data as a condition for granting marketing approval for a new pharmaceutical product, it may not permit third persons to market the same or a similar product on the basis of that information (or the original marketing approval) for at least five years. However, the Protocol removed a requirement that the Parties also provide such exclusivity for a period of at least three years "with respect to new clinical information submitted as required in support of a marketing approval of a previously approved pharmaceutical product covering a new indication, new formulation, or new method of administration." Congressional Democrats have stated that they sought the removal of this requirement because it allegedly would enable pharmaceutical manufacturers to "delay competition and access to affordable medicines."

- **Removal of obligation to make certain patents available.** The Protocol removed the requirement set forth in Article 20.36.2 that each Party make patents available for new uses of a known product, new methods of using a known product, or new processes of using a known product. According to Congressional Democrats, this provision allegedly "would have locked in the practice of 'patent evergreening,' in which pharmaceutical companies obtain hundreds of patents related to a product to block generic competition and price reductions."

- **Limits on patent term extensions.** Article 20.46 originally required each Party to make patent adjustments available to compensate a patent owner for unreasonable curtailment of the effective patent term as a result of the marketing approval process, though it recognized that such adjustments could be subject to "conditions and limitations" that were not specified in the Agreement. The Protocol amended this provision to expressly permit the following "conditions and limitations" on patent term adjustments:

  - Limiting the applicability of the provision to a single patent term adjustment for each pharmaceutical product that has been granted marketing approval;

  - Requiring the adjustment to be based on the first marketing approval granted to the pharmaceutical product in that Party;

  - Limiting the period of the adjustment to a maximum of 5 years; and

  - If a Party makes available a period of additional *sui generis* protection, limiting the period of the additional *sui generis* protection to a maximum of 2 years.

Dispute Settlement

The Protocol made several revisions to the Dispute Settlement Chapter that aim to prevent a Party from blocking the composition of panels or the establishment of the roster from which panelists must be selected. These changes, which are summarized below, respond to concerns expressed by congressional Democrats and other stakeholders that "panel blocking" remained possible under the original USMCA.

- **Establishment of roster (Article 31.8).** First, with respect to the establishment of the roster from which panelists will be selected, the Protocol maintains the requirements that "[e]ach Party shall designate up to 10 individuals" and that "[t]he Parties shall endeavor to achieve consensus on the appointments". However, the Protocol added that "[i]f the Parties are unable to achieve consensus by one month after the date of entry into force of this Agreement, the roster shall be comprised of the designated individuals." Thus, if one or two USMCA Parties were to refuse to designate individuals to the roster, the roster would consist of the inviduals designated by the remaining Party or Parties.

- **Panel composition (Article 31.9).** The Protocol maintains the requirement that, if the Parties are unable to agree on the chair of a Panel within 15 days, the disputing Party chosen by lot "shall select within five days as chair an individual who is not a citizen of that Party." However, the Protocol added that if the responding Party "refuses to participate or fails to appear for the choosing by lot procedure", the complaining Party will be permitted to select a chair from the roster who is not a citizen of that Party. The same rule will apply if the responding Party refuses to select the two additional panelists it is required to select in order to complete the composition of a five-member panel.

These changes appear likely to prevent a responding Party from engaging in most forms of "panel blocking". However, the revised Agreement does not clarify how Panels will be composed in the event that one or more Parties have failed to designate individuals to the roster under Article 31.8. The revised Agreement at Article 31.8.1 states that "[i]f a Party fails to designate its individuals to the roster, the Parties may still request the establishment of panels under Article 31.6 (Establishment of a Panel)", but it does not specify how a panel will be composed in such circumstances. Rather, it states only that "[t]he Rules of Procedure, which shall be established by the date of entry into force of this Agreement, shall provide for how to compose a panel in such circumstances." By leaving this process to be clarified in the Rules of Procedure, the revised USMCA leaves some ambiguity, at least for the time being, as to how panels will be composed in these circumstances.

In addition, the Protocol added a requirement that the Rules of Procedure for dispute settlement panels "include rules of evidence". These rules must ensure that:

- The disputing Parties have the right to submit testimony in person or via declaration, affidavit, report, teleconference, or videoconference, and the disputing Parties and the panel the right to test the veracity of such testimony;

- The disputing Parties have the right to submit anonymous testimony and redacted evidence, in appropriate circumstances;

- The panel may request, on its own initiative or at the request of a disputing Party, that a Party make available documents or other information relevant to the dispute, and may take a failure to comply with such request into account in its decision; and

- A panel shall accept the disputing Parties' stipulations in advance of the hearing.

Congressional Democrats advocated the inclusion of such rules of evidence in the USMCA's dispute settlement procedures, on the grounds that they "will help the United States successfully litigate labor, environmental, and other fact-intensive disputes."

II. US Implementing Legislation

On December 13, 2019, the Trump administration submitted the following materials to Congress pursuant to Section 106(a)(1)(E) of the *Bipartisan Congressional Trade Priorities and Accountability Act of 2015* ("TPA 2015"):[3]

[3] 19 U.S.C. § 4205(a)(1)(E)

- A draft USMCA implementing bill, titled the *US-Mexico Canada Agreement Implementation Act* and later introduced by Reps. Steny Hoyer (D-MD) and Kevin McCarthy (R-CA) as HR 5430;[4]
- The final legal text of the USMCA as amended by the Protocol of Amendment;[5] and
- A statement of the administrative actions proposed to implement the Agreement ("Statement of Administrative Action" or "SAA").[6]

As required by TPA 2015, the implementing bill contains provisions approving the USMCA itself and the accompanying Statement of Administrative Action. In addition, TPA 2015 requires that, "if changes in existing laws or new statutory authority are required" to implement an agreement, the implementing bill must contain "such provisions as are strictly necessary or appropriate" to do so (19 U.S.C. § 4202(b)(3)). Accordingly, the implementing bill contains multiple provisions that either repeal or amend existing laws or provide new statutory authority that the Trump administration considers "strictly necessary or appropriate" in order to implement the USMCA. The bill and the SAA therefore provide some initial guidance as to how the Trump administration intends to implement novel provisions of the USMCA, such as the revised rules of origin for automotive goods, labor enforcement mechanisms, and the sunset clause. We provide an overview of the key provisions of the implementing bill and the SAA below.

Congressional Approval of USMCA

Section 101(a) of the implementing bill contains Congress's express approval of (1) the USMCA; (2) the *Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada* ("Protocol"), of which the USMCA is a part; and (3) the SAA submitted by the Trump administration. The Protocol, which the parties signed alongside the USMCA in November 2018, provides that the USMCA (which constitutes an Annex to the Protocol) "shall supersede the NAFTA" upon the Protocol's entry into force. Pursuant to Article 2 of the Protocol, the Protocol and the USMCA cannot enter into force until each Party has notified the other Parties, in writing, that it has completed the internal procedures required for the entry into force of the Protocol. The Protocol, including the USMCA, will enter into force "on the first day of the third month following the last notification." For example, if the last notification is provided on March 15, 2020, the USMCA will enter into force on June 1, 2020.

Authority to Provide US Notification Triggering Entry Into Force; Repeal of NAFTA Implementation Act

Section 101(b) of the implementing bill authorizes the President to provide written notification to Canada and Mexico that the United States has completed its domestic legal procedures (as is required for the USMCA to enter into force), but only after the President has:

- Determined that Canada and Mexico have taken the measures necessary to comply with those provisions of the USMCA that are to take effect at the time the Agreement enters into force; and
- Provided written notice of this determination to Congress in accordance with Section 106(a)(1)(G) of TPA 2015.[7] Specifically, the President may provide for the USMCA to enter into force "not earlier than 30 days after the date on which" the aforementioned notification is submitted to Congress.

Thus, the timing of the United States' notification will be subject to the discretion of the Executive Branch, and will depend in part on how quickly Canada and Mexico are able to develop and enact any measures that, in the view of the United States, are necessary to bring them into compliance with their initial obligations under the Agreement.

[4] The text of the legislation is available at https://www.congress.gov/116/bills/hr5430/BILLS-116hr5430rs.pdf.

[5] The final legal text of the USMCA is available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

[6] The SAA is available at https://www.finance.senate.gov/imo/media/doc/FINAL%20SAA%20USMCA.pdf.

[7] 19 U.S.C. § 4205(a)(1)(G))

In addition, Section 601 of the implementing bill provides that, upon the USMCA's entry into force, the NAFTA Implementation Act (which implemented the NAFTA under US law) will be repealed. The US-Canada Free Trade Agreement, which the parties suspended upon the entry into force of the NAFTA, will remain suspended while the USMCA is in force.

Implementing Actions, Initial Regulations, and Tariff Proclamation Authority

Section 103 of the implementing bill authorizes the Executive Branch to take certain actions necessary to implement the USMCA, including during the period between the enactment of the legislation and the USMCA's entry into force. The actions authorized are as follows:

- **Implementing actions**. The Executive Branch is authorized to issue new or amended regulations and to proclaim actions "as may be necessary" to ensure that provisions of the implementing bill that take effect on the date the USMCA enters into force are "appropriately implemented" on such date.

- **Initial regulations; Uniform Regulations.** The bill requires that, "to the maximum extent feasible", all federal regulations required or authorized therein (or proposed in the SAA) in order to implement immediately-applicable US obligations under the USMCA are to be prescribed within one year after the Agreement's entry into force, with certain exceptions. For example, the bill requires that the "Uniform Regulations" envisioned in the USMCA be prescribed "not later than the date on which the USMCA enters into force", consistent with the Parties' obligations under Article 5.16 of the Agreement. Article 5.16 provides that the Parties "shall, by entry into force of [the USMCA], adopt or maintain through their respective laws or regulations, Uniform Regulations regarding the interpretation, application, and administration of [Chapter 5 (Origin Procedures)], Chapter 4 (Rules of Origin), Chapter 6 (Textile and Apparel Goods), Chapter 7 (Customs Administration and Trade Facilitation) and other matters as may be decided by the Parties."

- **Proclamation authority for tariff modifications and rules of origin.** The President is authorized to implement by Proclamation the tariff modifications provided for in the USMCA, and to proclaim, as part of the HTS, the product-specific rules of origin set forth in Annex 4-B of the USMCA, including those applicable to automotive goods (see below).

Customs and Rules of Origin

Title II of the bill codifies into law the four general rules of origin set forth in the USMCA[8] and provides various customs-related authorities and directives pertaining to claims for preferential tariff treatment under the Agreement. For example, Section 207 of the bill authorizes the Secretary of the Treasury to conduct verifications to determine whether a good qualifies as originating, and sets forth the procedures for conducting such verifications. Other provisions of Title II establish requirements governing claims for preferential tariff treatment, certifications of origin, and recordkeeping requirements for importers. The bill directs the Secretary of the Treasury to prescribe any regulations necessary to implement these requirements.

In addition, Title II authorizes the Executive Branch to take a range of actions to implement the new automotive rules of origin set forth in the Appendix to Annex 4-B ("Automotive Appendix") of the USMCA. Among other changes, these revised rules will (1) increase the regional value content (RVC) requirements applicable to automotive goods; (2) establish a new "labor value content" requirement that goods must satisfy to be considered originating; and (3)

[8] Under the USMCA, a good generally will qualify as originating, and will therefore be eligible for preferential tariff treatment, if it satisfies one of the following criteria:

- The good is wholly obtained or produced entirely in the territory of one or more Parties.
- The good is produced entirely in the territory of one or more of the Parties using non-originating materials, provided the good satisfies the applicable product-specific rules of origin set forth in the Agreement.
- The good is produced entirely in the territory of one or more of the Parties exclusively from originating materials.
- The good is produced entirely in the territory of one or more of the Parties, is classified with its materials or satisfies the "unassembled goods" requirement, and meets an RVC threshold specified in the Agreement.

require vehicle producers to source a specified percentage of their steel and aluminum purchases from North American sources in order for vehicles to qualify as originating (*please refer to the W&C US Trade Alert dated October 4, 2018.*) In order to implement these requirements, the legislation provides the following authorities:

- **Labor value content (LVC) and verifications (Departments of Labor and Treasury).** Section 202A(c)(1) codifies the requirement that a vehicle will be eligible for preferential tariff treatment only if the producer of the vehicle provides a certification to the Commissioner of US Customs and Border Protection (CBP) that its production meets the labor value content requirements set forth in the USMCA. The same section authorizes the Secretary of the Treasury, in consultation with the Secretary of Labor, to prescribe regulations implementing this requirement, "including regulations setting forth the procedures and requirements for a producer of covered vehicles to establish that the producer meets the labor value content requirements[.]" Separately, Section 210 of the bill authorizes the Secretary of Labor to prescribe regulations necessary to carry out the required determinations regarding a vehicle's labor value content.

  In addition, Section 202A(e) establishes a process by which the Secretary of the Treasury, in conjunction with the Secretary of Labor, may conduct a "verification" of whether a vehicle complies with the LVC requirements in the context of a general verification of origin under Section 207. The role of each agency in such verifications will be as follows:

  - The Secretary of Labor will verify whether the production of the vehicle meets the high-wage component of the LVC requirements, including the wage component of the high-wage material and manufacturing expenditures, the high-wage technology expenditures, and the high-wage assembly expenditures.
  - The Secretary of the Treasury will verify all other components of the LVC requirements, including the annual purchase value and cost components of the high-wage material and manufacturing expenditures.

  The legislation provides that, as part of the verification process, the above agencies may request records and information from vehicle producers, including with respect to wages, hours, and job responsibilities.

- **Steel and aluminum (Treasury).** Section 202A(c)(2) codifies the requirement that a vehicle will be eligible for preferential tariff treatment only if the producer of the vehicle provides a certification to CBP that its production meets the steel and aluminum purchase requirements set forth in the USMCA. The same section authorizes the Secretary of the Treasury to prescribe regulations implementing this requirement, "including regulations setting forth the procedures and requirements for a producer of covered vehicles to establish that the producer meets the steel and aluminum purchase requirements[.]"

- **Alternative staging regime (USTR).** Section 202A(d) directs USTR to establish the procedures and requirements to implement the alternative staging regime provided for in Article 8 of the Automotive Appendix to the USMCA. Pursuant to Article 8, up to 10% (and in some instances more than 10%) of a producer's North American vehicle or light truck production may qualify as originating under less-stringent RVC and LVC requirements during a temporary transitional period following the USMCA's entry into force (*i.e.*, until January 1, 2025 or five years after entry into force of the USMCA, whichever is later). Article 8.5 provides that a Party may apply this alternative staging regime "on a producer-by-producer basis", and the implementing legislation sets forth the process by which USTR will accept requests for, and determine whether to authorize, the use of the regime by individual producers. This process will include the following:

  - **Publication of requirements.** Within 90 days after the bill's enactment, USTR must publish in the Federal Register the requirements, procedures, and guidance necessary to implement the alternative staging regime. This notice will include the procedures, calculation methodology, timeframe, specific regional value content thresholds, and other minimum requirements with which producers subject to the alternative staging regime must comply. In addition, this notice will set a deadline by which requests for the alternative staging regime must be submitted, and detail the information that vehicle producers must include in such requests "to demonstrate the actions that the producer will take to be prepared to meet all the requirements set forth in [the automotive rules of origin] after the alternative staging regime period has expired[.]" Finally, the notice

will include the criteria that USTR will consider when determining whether to approve a request for the alternative staging regime.

- **Review and approval of requests.** The legislation requires USTR to determine whether to grant requests for the use of the alternative staging regime within 120 days of receiving such requests. USTR must make its determinations in accordance with the following criteria, and make available a public list of producers that have been authorized to use the alternative staging regime:

  - USTR must authorize the use of the alternative staging regime if it determines that (1) the request covers passenger vehicles or light trucks that **do not exceed 10 percent** of the total production in USMCA countries of the requesting producer; and (2) the producer "has identified with specificity which of the requirements set forth in [the automotive rules of origin] the producer is unable to meet based on current business plans."

  - If USTR determines that the request covers **more than 10 percent** of the producer's total production in USMCA countries, USTR "shall authorize" the use of the alternative staging regime if it determines that (1) the producer "has identified with specificity which of the requirements set forth in [the automotive rules of origin] the producer is unable to meet based on current business plans"; and (2) the producer's request included a "detailed and credible plan...based on substantial evidence and reasonably calculated to bring the production of the passenger vehicles or light trucks, as the case may be, into compliance with the requirements set forth in [the automotive rules of origin] after the alternative staging regime period has expired."

  - **Revocation of alternative staging regime.** The legislation provides that USTR must revoke an authorization for use of the alternative staging regime if, at any time, it determines that the producer (1) failed to take the steps set forth in its request and therefore will no longer be able to meet the requirements of the USMCA's automotive rules of origin after the alternative staging regime has expired; or (2) provided false or misleading information in its request. In addition, in the case of a producer authorized to use the alternative staging regime for more than 10 percent of its production, USTR must revoke such authorization if the producer fails to notify USTR of material changes to circumstances that will prevent the producer from meeting the automotive rules of origin after the alternative staging regime has expired. If a producer's authorization is revoked, any claim for preferential tariff treatment under the alternative staging regime for any covered vehicle of that producer will be considered invalid. In this scenario, the importer of any such vehicle will be liable for the duties that would have been applicable if preferential tariff treatment had not applied on the date when the vehicle was entered for consumption, plus interest, "notwithstanding the finality of a liquidation of an entry[.]"

- **Interagency committee.** Section 202A(b) directs the President to establish, within 30 days of the bill's enactment, an interagency committee to provide advice "on the implementation, enforcement, and modification of provisions of the USMCA that relate to automotive goods, including the alternative staging regime", and to "review the operation of the USMCA with respect to trade in automotive goods[.]" The interagency committee will be led by USTR and will include representatives from CBP, the International Trade Commission, the Department of Commerce, and the Department of Labor. According to the SAA, the committee will "issue guidelines to facilitate implementation and enforcement of provisions of the USMCA related to automotive goods."

Labor

The implementing bill requires the establishment of several new administrative bodies to oversee the implementation and enforcement of the USMCA's labor commitments, particularly with respect to Mexico, and to recommend dispute settlement actions to USTR. In addition, the bill authorizes the Executive Branch to restrict imports of goods and services from Mexican facilities that are the subject of adverse findings under the Agreement's "rapid response" mechanism for labor disputes (described in Section I above). These new entities and authorities are summarized below.

Interagency Labor Committee and Petition Process

Within 90 days after the enactment of the legislation, the President must establish an Interagency Labor Committee for Monitoring and Enforcement ("Labor Committee") that will "monitor the implementation and maintenance" of the USMCA's labor obligations and Mexico's labor reform. Importantly, the Labor Committee also will be empowered to receive petitions and make recommendations to USTR for dispute settlement actions under the Agreement, as explained below. The Labor Committee will be co-chaired by the US Trade Representative and the Secretary of Labor, and may include representatives of other Federal departments or agencies of the President's choosing.

- **Petition process.** Pursuant to Section 716 of the bill, the Labor Committee will establish procedures for accepting two types of petitions from the public concerning alleged violations of the USMCA's labor obligations: (1) "facility-specific petitions" relating to denial of free association and collective bargaining rights at a covered facility, as defined in Annex 31-A of the USMCA (the "Rapid Response Labor Mechanism"); and (2) petitions relating to any other violation of the USMCA's labor obligations. Within 30 days after receiving a facility-specific petition, the Labor Committee must determine whether there is sufficient, credible evidence of a Denial of Rights to enable the "good-faith invocation" of the Mechanism. If this determination is affirmative, USTR (1) "shall submit" a request for an initial review of that facility under the Mechanism; and (2) shall determine, within 60 days after the Labor Committee's affirmative determination, whether to request the establishment of a rapid response panel under the Mechanism. In the case of a petition involving any other alleged violation of the USMCA's labor obligations, the Labor Committee shall determine within 20 days whether the allegation warrants further review, and shall determine within 60 days thereafter whether there is credible evidence of a violation. If the latter determination is affirmative, USTR must initiate enforcement actions under the USMCA's Labor or Dispute Settlement Chapters within 60 days, or notify Congress of its reasons for declining to initiate such action.

- **Recommendations.** In addition to making the above determinations based on petitions from the public, the Labor Committee may independently recommend dispute settlement actions to USTR based on its own monitoring activities and assessments. Where the Labor Committee determines that a USMCA country has failed to meet its labor obligations, including Mexico's labor reform commitments under Annex 23–A, the Committee "shall recommend" that USTR initiate (1) consultations under the USMCA Labor Chapter; (2) state-to-state dispute settlement proceedings; or (3) proceedings under the Rapid Response Labor Mechanism. USTR must determine within 60 days of receiving such a recommendation whether it will initiate such proceedings.

Authority to Restrict Imports Pursuant to Rapid Response Labor Mechanism

Title VII of the bill authorizes the Executive Branch to impose potentially severe penalties on imported goods from Mexico that are the subject of an adverse panel finding under the Rapid Response Labor Mechanism. The procedures for imposing such remedies are as follows:

- **Suspension of liquidation.** Section 752 provides that, if the United States requests a review of an alleged Denial of Rights under the Mechanism, USTR "may" direct the Treasury Secretary to suspend liquidation for unliquidated entries of goods from the facility that is the subject of the allegation until (1) a rapid response labor panel determines that there is no Denial of Rights; (2) a course of remediation for a Denial of Rights has been agreed to and completed within the agreed-upon timeframe; or (3) the Denial of Rights has been otherwise remedied.

- **Final remedies.** Section 753 provides that, if a rapid response labor panel determines that there has been a Denial of Rights, USTR may direct the Treasury Secretary to (1) deny entry to goods "produced wholly or in part" from any covered facility involved in the case; or (2) allow for the release of such goods only upon payment of duties "and any penalty"; and (3) apply any duties or penalties to customs entries for which liquidation was suspended; and (4) apply any other remedies that are "appropriate and available" under the rapid response labor mechanism. These measures may be imposed until the Denial of Rights has been remedied. As noted above, neither the legislation nor the USMCA itself defines or places specific limits on the types of "penalties" that may be imposed, except that (1) Article 31-A.10.1 requires that the remedy chosen be "proportional to the severity of

the Denial of Rights"; and (2) Article 31-A.10.4 permits a Party to deny entry to goods only in cases where a covered facility or the owner of a covered facility "has received a prior Denial of Rights determination on at least two occasions[.]"

Other Labor Entities

The implementing bill also directs the Executive Branch to appoint "Mexico Labor Attachés", an "Independent Mexico Labor Expert Board", and a "Forced Labor Enforcement Task Force", which will carry out the following functions:

- **Mexico Labor Attachés.** The Secretary of Labor must appoint "up to 5" full-time officers who will be located in Mexico and will assist the Interagency Labor Committee with monitoring and enforcement of Mexico's compliance with its labor obligations.
- **Independent Mexico Labor Expert Board.** The legislation establishes an Independent Mexico Labor Expert Board that will produce an annual report assessing Mexico's efforts to implement its labor reform legislation from 2019. Based on the report, the Interagency Labor Committee may recommend dispute settlement actions to USTR. The Board will have 12 members, four appointed by the Labor Advisory Committee for Trade Negotiations and Trade Policy, and eight appointed by the Congress.
- **Forced Labor Enforcement Task Force.** Within 90 days after the bill's enactment, the President must establish a task force to monitor the enforcement of the United States' prohibition on the importation of goods made with forced labor, set forth in section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307). In addition, the task force within 90 days of its establishment must establish timelines for responding to petitions alleging that goods being imported are made with child labor or forced labor. The task force also will have specific duties related to Mexico, including (1) the development of an "enforcement plan" regarding goods produced with forced labor in Mexico; and (2) reporting to the Interagency Labor Committee on concerns and allegations regarding forced labor in Mexico. The task force will be chaired by the Secretary of Homeland Security, and will include representatives from USTR, the Department of Labor, and other agencies of the President's choosing.

Other USMCA Chapters

Many of the USMCA's chapters are not discussed extensively in the implementing legislation, including those covering Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Investment, Trade in Services, Financial Services, Digital Trade, Telecommunications, Intellectual Property Rights, and State-Owned Enterprises. The SAA notes that, in the view of the administration, no statutory changes are required to implement these Chapters because US laws and regulations already are in conformity with the obligations the United States has assumed thereunder. The implementing bill therefore is largely silent with respect to these Chapters.

Sunset Provision

Article 34.7 of the USMCA, known as the "sunset" clause, provides that the Agreement "shall terminate 16 years after the date of its entry into force" unless each Party confirms that it "wishes to continue this Agreement for a new 16-year term" in accordance with the procedures set forth in the Agreement. Those procedures state that, on the sixth anniversary of the entry into force of the Agreement, the Parties will meet to conduct a "joint review" of the operation of the Agreement, review "any recommendations for action submitted by a Party", and "decide on any appropriate actions." As part of the review, each Party "shall confirm, in writing, through its head of government, if it wishes to extend the term of [the USMCA] for another 16-year period." Assuming the Agreement enters into force in 2020, this review would take place in 2026, and the Parties would decide in the review whether to extend the Agreement for another 16-year term (*i.e.*, through 2052.) The Agreement provides for such reviews to continue in perpetuity at regular intervals, with the possibility that the Agreement will terminate if any one Party withholds consent for its extension.

The implementing bill does not indicate whether Congress must vote on whether the United States consents to extending the USMCA for purposes of joint reviews conducted under Article 34.7. Section 611 of the bill requires the

President to "consult with the appropriate congressional committees and stakeholders before each joint review, including consultation with respect to…the decision whether or not to confirm that the United States wishes to extend the USMCA." Such consultations, which are to be led by USTR, must include a public hearing process and the submission of a report to Congress prior to any joint review.

Termination of USMCA

Section 621 of the implementing legislation, which covers "Termination of USMCA", provides that: (1) "[d]uring any period in which a country ceases to be a USMCA country, this Act…and the amendments made by this Act shall cease to have effect with respect to that country"; and (2) "[o]n the date on which the USMCA ceases to be in force with respect to the United States, this Act and the amendments made by this Act…shall cease to have effect." Like the NAFTA Implementation Act, which contains similar language, the USMCA implementing bill does not grant the President the authority to terminate US participation in the Agreement without the consent of Congress.

III. Outlook

With congressional approval of the USMCA now secured, the Agreement should enter into force and replace the NAFTA, but the exact timing remains uncertain. The Canadian Parliament has yet to ratify the Agreement, and although it is expected to do so early this year, the precise timing is not yet clear. Beyond that action, two other requirements discussed in this report will dictate the Agreement's implementation schedule: (1) the implementing bill grants some discretion to the President as to when the United States will formally declare that its ratification process is complete, and this will depend in part on the actions of the other USMCA Parties; and (2) the United States and the other USMCA Parties will need to develop and implement certain measures before the Agreement can enter into force, including the Uniform Regulations that will govern the day-to-day operation of the Agreement. For similar reasons, most US trade agreements have not taken effect for several months (and in some cases more than a year) after the enactment of the relevant implementing legislation. Thus, while it appears likely that the USMCA will enter into force in 2020, this might not occur until the second half of the year.

The expected entry into force of the USMCA will bring a range of new challenges for businesses engaged in North American and global supply chains. While the Agreement is in many respects a continuation of the NAFTA, it contains several novel provisions that have generated uncertainty for business and have the potential to disrupt trade. In particular, the revised automotive rules of origin – which will require producers to provide detailed information on, *inter alia*, wage rates associated with vehicle production, sourcing of steel and aluminum products, and regional value content – will entail a substantial shift from current requirements and compliance practices. Similarly, the new "rapid response" labor mechanism raises the possibility that companies will be targeted with trade restrictions based on isolated labor disputes, rather than longstanding patterns of labor violations or government actions that violate trade commitments. Moreover, and as described in this report, the US implementing legislation grants the Executive Branch broad authority to implement these and other USMCA requirements, including through regulation. Thus, substantial uncertainty remains as to how key elements of the Agreement will operate in practice. We will continue to provide updates as US government agencies issue regulations and guidance relating to implementation of the USMCA over the coming months.

Finally, the unusual process that led to the USMCA's approval by Congress may presage important shifts in US trade policy. Historically, the TPA timelines and rules prohibiting the amendment of a trade agreement's implementing legislation have been viewed by US negotiating partners as an assurance that any agreement that they sign will receive a relatively quick "up-or-down" vote in Congress. In the case of the USMCA, however, this principle effectively was abandoned, as House Democrats demanded substantive changes to the signed Agreement with the implied threat that, absent such changes, the House would vote to remove the TPA rules guaranteeing a House vote on the Agreement's implementing legislation. Though the move enabled the United States to extract additional concessions from Mexico, this erosion of TPA's procedural guarantees may make other governments more wary of negotiating trade agreements with the United States in the future. Moreover, Congress historically has insisted (and required in TPA) that trade agreements negotiated by the Executive Branch and their implementing legislation be subject to robust transparency, notification, and consultation requirements, thereby ensuring that Congress and the

public have adequate opportunity to review and debate them before any congressional vote. In the case of the USMCA, however, several Members of Congress from both parties complained of a lack of meaningful consultations during the negotiations, and the House voted to approve the implementing bill just days after it and numerous substantive changes to the original USMCA text were made public – even eschewing the normal practice of "mock markups" that allow Members to propose changes to the legislation. In addition, few Members of Congress outside of the House Democratic Working Group on the USMCA were privy to the details of the changes to the USMCA text before they were signed and released to the public. Nevertheless, both Houses of Congress (including some Members who have long advocated greater transparency in trade negotiations) voted swiftly to approve the Agreement. The result may be that the current administration and its successors feel less obligated to adhere to the letter or spirit of TPA's notification, consultation, and transparency requirements in future negotiations.

Contact us

Washington, DC

White & Case LLP
701 Thirteenth Street, NW
Washington, DC
20005-3807
United States

Brian Picone
International Trade Analyst

T +1 202 729 2427
E brian.picone@whitecase.com

Singapore

White & Case Pte. Ltd.
8 Marina View #27-01
Asia Square Tower 1
Singapore 018960

Samuel D. Scoles
Senior Trade Advisor

T +65 6347 1527
E sscoles@whitecase.com

WHITE & CASE

whitecase.com