UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

USCIB Comments on Negotiating Objectives Regarding NAFTA Modernization

Docket Number: **USTR-2017-0006**

June 12, 2017

On May 18, 2017, the Administration notified Congress of its intention to initiate negotiations regarding modernization of the North American Trade Agreement (NAFTA). The United States Council for International Business (USCIB) supports modernization of NAFTA as part of a broader strategy to open international markets for U.S. companies and remove barriers and unfair trade practices in support of U.S. jobs.

Twenty-three years ago, NAFTA opened trade and investment opportunities with Canada and Mexico, our second and third largest trading partners, which together purchase one-third of our exports. Since the implementation of NAFTA, U.S. trade with these two markets has more than tripled, with a positive impact on U.S. GDP of 0.5%, or several billion dollars of added growth per year. The Peterson Institute for International Economics has found that NAFTA did not foster a noticeably growing U.S. trade deficit, nor did trade with Mexico noticeably raise U.S. unemployment.

To take NAFTA into the 21st century and ensure that it remains a single high-standard tripartite agreement, new high priority issues not envisioned in the early 1990s but of concern for business today should be addressed, in accordance with the negotiating objectives of the 2015 Trade Promotion Authority (TPA) legislation. These include electronic commerce (e-commerce), telecommunications, digital trade, cross border data flows, and state-owned enterprises. Several other areas currently covered by the agreement also require an update, including intellectual property protections, regulatory cooperation, technical barriers to trade, customs and trade facilitation, and services. In many cases, the language agreed during the Trans-Pacific Partnership (TPP) negotiations on these topics provides a useful foundation upon which to build for NAFTA modernization, as Secretary Ross and Ambassador Lighthizer have remarked. In some cases, however, new language or other models will be needed. Finally, in other areas where NAFTA disciplines have stood the test of time, we urge the Administration to focus on ensuring those provisions not be weakened.

National Treatment and Market Access

Modernization of NAFTA provides several opportunities for improved market access. Importantly, with all remaining duties and quantitative restrictions having been eliminated, as scheduled, since January 1, 2008, U.S. business should continue to have access to the Canadian and Mexican markets on that basis. This is particularly relevant to the consumer products industry. Sectoral exceptions and carveouts to the broad reciprocal tariff-free treatment should continue to be avoided, and to the extent possible, remaining exclusions and limits should be eliminated.

In terms of market access of particular sectors, NAFTA currently provides that all parties shall progressively eliminate their customs duties on originating textile and apparel goods.[1] This chapter should remain intact in a modernization. NAFTA must maintain all current zero-tariff rates and market access for traded goods.

USCIB requests the United States add (in the Market Access chapter or other appropriate chapters) specific commitments on trade in agricultural goods, to include provisions on modern agricultural biotechnology and provisions for managing incidents involving low-level presence of products of modern agricultural biotechnology.

In addition, a modernized NAFTA should ensure that Harmonized Tariff Schedule of the United States (HTS) Chapter 98 (Special Classification) provisions remain duty-free (i.e. remain a zero rate of duty); recycled and recyclable scrap, and recycling equipment remains duty free; maintain the current zero percent tariff rates (i.e. tariff rate and duty-free treatment) for cosmetics and personal care products; and provide for the reduction and, where possible, elimination of tariffs on commodities. Furthermore, putting in place a mechanism to ensure that market access commitments are updated as new version of the international Harmonized System Nomenclature are implemented (e.g., HS2022) would ensure there would be no narrowing or loss of market access treatment for U.S. business.

The high-tech sector is particularly affected with respect to Mexico, which has only a limited domestic tariff reduction or elimination program in place. Mexico, unfortunately, is neither a member of the World Trade Organization (WTO) Information Technology Agreement (ITA), nor of its recent expansion effort. Mexico's commitment in NAFTA to participate in the ITA and the expansion agreement, with immediate staging and full implementation, would be of significant value to the U.S. tech and other related sectors.

[1] NAFTA Annex 300-B

NAFTA does not currently include provisions related to biopharmaceutical pricing and reimbursement. Since the initial agreement was concluded there has been an uptick in application of foreign government price controls and market access restrictions. Sustaining R&D investment and ensuring availability of new medicines for patients requires policies that appropriately recognize the value of innovative pharmaceuticals, for example, by making determinations through competitive market-based mechanisms. As such, NAFTA should seek to codify provisions building on TPA, which has a mandate to eliminate measures such as price controls and reference pricing.

In Canada, for example, the Patented Medicines Pricing Review Board (PMPRB) is seeking to update its pricing guidelines and the Ministry of Health has recently announced its intent to update pricing regulations. Changes to the PMPRB mandate could affect how Canadian pharmaceutical prices are established and benchmarked against pricing in other markets, which could potentially impact patient access to medicines.

In addition, a modernized NAFTA should include provisions ensuring that decisions on pricing and requests and applications for the reimbursement of biopharmaceutical products or medical devices should be adopted and communicated within a reasonable and specified period before implementation. This includes allowing stakeholders a meaningful opportunity to participate in the development of rules and regulations pertaining to the biopharmaceutical sector.

Lastly, an updated NAFTA should also resolve another long-standing market access issue related to trucking. For example, Mexico has restrictions in place against foreign-owned courier companies operating trucks on Mexican Federal highways. Any resulting agreement should 1) lift existing restrictive or prohibitive practices in Canada and/or Mexico; and 2) prohibit this an any similar practices from being established.

Rules of Origin

More than 95 percent of the world's consumers live outside of the United States. A modernized NAFTA should reflect today's global value chains. This means it should not impose new rules of origin (ROO) that would disrupt these value chains in significant ways. Some USCIB members have indicated that there are product-specific or sector-specific rules that should either be maintained or changed based on varied experience since NAFTA entry into force. ROOs should be as flexible and efficient as possible to ensure that maximum sectors can qualify under this

agreement. Particular attention should be paid to ROOs in existing agreements where best practices can be leveraged, such as the U.S.-Korea free trade agreement (FTA) (KORUS).

An updated NAFTA should ensure or provide:

- Permit cumulation of other FTA inputs;
- Provisions allowing duty-free treatment for goods with a *de minimis* value (less than ten percent) of non-originating content;
- Adopt Track IV ROO changes which would reduce qualifying transactional costs and burdensome record keeping; and
- Improvements to ROO requirements in a way that would reflect NAFTA supply chains and support increased trade, including in cosmetics and personal care products. Certifying products are NAFTA-sourced is a regulatory burden and level of proof is hampering trade.

Customs and Trade Facilitation

Effective and expedited movement of goods trade among and between partner countries is essential for U.S. business. The United States, Canada, and Mexico have all ratified the WTO Trade Facilitation Agreement (TFA) which entered into force in February 2017. Any future FTAs, or updates of existing FTAs, between countries that have ratified the TFA should embody its mandatory provisions (e.g., publications of laws, regulations, and import/export procedures, advance rulings on customs classification and origin, release of goods, express shipments, penalties), and go well beyond soft commitments (i.e., we shall endeavor to's). Examples of doing more with respect to soft commitments include: requiring advance rulings on customs valuation; securing specified customs *de minimis* threshold; incorporating the global gold standard for temporary admissions – ATA Carnet with expanded coverage; or creating an interoperable single window system. Particular focus should be paid to updating customs processing, including acceptance of digital documentation for audits.

There should be a comprehensive Customs and Trade Facilitation chapter, covering customs and trade facilitation-related matters that have historically been provided for in other FTA chapters and additional provisions as outlined below.

Also, e-commerce and express delivery should be recognized as specific sectors. Harmonized customs clearance procedures should be agreed upon for these sectors and implemented in the three countries alike.

A modernization of NAFTA also provides the opportunity for both Mexico and Canada to increase their domestic *de minimis* threshold under which imported products would be exempt from payment of imports and taxes and subject to streamlined customs procedures. An increase in the respective *de minimis* thresholds in Mexico and Canada would create significant opportunities for American small and medium businesses to export to these countries, and would eliminate protectionist policies that artificially support Canadian and Mexican retailers at the expense of domestic consumers.

Today, the United States maintains an $800 USD *de minimis* threshold. Low-value imports are also subject to informal entry processes that reduce the paperwork burden, which is of particular benefit to U.S. small and medium sized companies. Mexico maintains two rates of *de minimis*: a $50 USD rate applied to express carriers and a $300 USD rate applied to Mexico Post, which is also afforded less cumbersome clearance processes. Canada's *de minimis* threshold is $15 USD, the lowest in the industrialized world and among the lowest globally.

The Canadian government's administrative cost to implement Canada's current *de minimis* threshold exceeds the revenue collected on low value imports. The C.D. Howe Institute found that the Canadian Government spends four times more than it collects in duty and tax revenue on low-value ecommerce purchases.[2] Further, in its 2017 Spring Report to Parliament, the Canadian Auditor General found that there is no net revenue to the government from charging duties on postal shipments with a value of less than $200 CAD.[3] Even the "on person" *de minimis* threshold for Canadians is $800 CAD, meaning that Canadians who travel internationally can return with up to $800 CAD in purchases before duties and taxes are applied. It is important that any enhanced NAFTA should also harmonize simplified clearance processes for low-value shipments.

Mexico has recently proposed changes to its customs procedures that will disadvantage U.S. e-commerce companies exporting to Mexico by eliminating a streamlined process for express shipments. Further, it would prevent some products, commonly purchased online, including footwear and apparel from receiving *de minimis* treatment. The U.S. government should make it a priority in NAFTA modernization to ensure that U.S. e-commerce platform companies and other U.S. exporters have a level playing field as it relates to stipulated *de minimis* thresholds and simplified clearance process.

[2] C.D. Howe Institute, Rights of Passage: The Economic Effects of Raising the *de* minimis Threshold in Canada, June 23, 2016. https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/E-brief_Rights%20of%20Passage_June16.pdf.
[3] See http://www.oag-bvg.gc.ca/internet/English/parl_oag_201705_02_e_42224.html.

Another important topic for discussion is a harmonized informal entry threshold. The United States and Canada have an informal entry process for goods valued under $2500 USD, which allows for simplified clearance processes with minimal documentation requirements. The informal entry process varies in Mexico. A truly simplified informal entry process in Mexico would help facilitate increased U.S. exports into Mexico.

ATA Carnets have always been tools of trade facilitation. They facilitate international business by avoiding extensive customs procedures, eliminating payment of duties and value-added taxes for temporary admissions. ATA Carnets are key tools used by U.S. businesses to, for example, showcase technologies, which often results in further market entry or expansion through selling their goods into the market as permanent consumption entries: ultimately promoting U.S. exports and resulting in increased U.S. jobs. As noted above, NAFTA improvements provide the opportunity to specifically include ATA Carnets, the global gold standard for temporary admissions, in the updated agreement. Moreover, this would allow the three NAFTA parties to go beyond their existing commitments and to afford broader specified coverage for ATA Carnet akin to the fullest scope of coverage that could be provided for under the World Customs Organization (WCO) Convention on Temporary Admissions, commonly referred to as the Istanbul Convention. In addition, we believe this is an opportunity for the parties to address existing non-tariff barriers to trade resulting from domestic implementation of the ATA System.

In addition to the items above, below is a non-comprehensive list of specific customs provisions that USCIB is seeking in a modernized NAFTA:

- Maintain existing Merchandise processing fee (MPF) and Derecho de Tramite Aduanero (DTA) eliminations. DTA elimination is key to the competitiveness of U.S. products in Mexico;
- Establish a means to certify the shipper for NAFTA eligibility vs. shipment-by-shipment, style-by-style certification;
- Eliminate Duty Drawback/Duty Deferral program restrictions contained in Article 303;
- Permit substitution drawback;
- Change the direct for export rule to allow storage and shipments not always from the actual producer to permit storage and shipment;
- Address concerns related to use of minimum prices and reference price databases;
- Unfettered facilitation (i.e., movement of product across borders) for the recycling industry;
- Seek regulatory harmonization between the parties, particularly as each party works to implement and operationalize a single window program;

- Establish substantive, meaningful, and truly functional mutual recognition between respective trusted trader programs;
- Significant increases of Mexico's and Canada's *de minimis* thresholds, bringing them into closer alignment to the $800 USD threshold of the United States;
- Establish or maintain informal clearance procedures for low value shipments;
- Allow electronic submission of customs documents prior to arrival to allow for border authorities to conduct an automated risk assessment;
- Establish simplified clearance for consolidated shipments;
- Allow customs payments electronically;
- Commitments for regularly-scheduled meetings between NAFTA regulators to address among other topics, trade facilitation for the cosmetics and personal care product sector. Establish common, simplified approaches to processing low-value shipments;
- Consider a single common customs entry to be recognized as an export entry from one country and an import entry by another, particularly if there is an existing MRA for AEO programs in place;
- No changes made to "Made in America" claim requirements;
- Common criteria for "Made in" declarations; and
- Establish a NAFTA-wide maximum time period for governments to issue advance rulings.

Oil & Gas Sector

It is important for U.S. industry in the oil and gas sector that a modernized NAFTA preserves strong investment protections and continues to provide national treatment for U.S. investors in Canada and Mexico's hydrocarbon sectors. One component of this is tariffs. A modernized agreement should include tariff elimination for all HTS codes for hydrocarbons and hydrocarbon products, and for key goods that are inputs into the U.S. oil and natural gas industry. Moreover, automatic liberalization of U.S. natural gas exports to Canada and Mexico should be preserved.

A modernized NAFTA should streamline the Mexican regulatory barriers on importing petroleum and biofuels to Mexico. This includes improving the onerous and slow process to receive licenses and permits to physically conduct business in Mexico. It also includes product testing requirements. Currently all product for import to Mexico must be tested by a Mexican approved lab. Between time delays (sample time to approval for import), significant cost of sampling per load (individual truck or railcar vs shore tank) and additional product testing required when title

transfers in Mexico there is a barrier to trade. There is significant opportunity to make Quality Assurance and Quality Control in Mexico be more representative of U.S. standards.

Regulatory Coherence / TBT / SPS

NAFTA should preserve current rules and expand upon WTO rules for technical barriers to trade (TBT) and sanitary and phytosanitary standards (SPS), as well as seek to implement horizontal commitments to facilitate regulatory cooperation to promote regulatory coherence and the use of good regulatory practices, including public consultation and assessment of the costs, benefits, and alternatives to regulation. A modern regulatory cooperation chapter should also acknowledge and expand the work of the U.S.-Canada Regulatory Cooperation Council, the U.S.-Mexico high level Regulatory Cooperation Council, and mechanisms for trilateral regulatory cooperation and institute mechanisms to advance concrete sectoral regulatory alignment agendas to remove unnecessary barriers to trade. NAFTA modernization also provides an opportunity to implement WTO-plus standards for enforceable SPS standards and TBT disciplines, to ensure SPS and TBT measures are based on science, developed transparently, meet legitimate objectives, and do not discriminate against U.S. businesses. A modernized NAFTA should also include updated provisions on conformity assessment.

NAFTA should also include provisions requiring acceptance of electronic labeling and warranties (e-labeling and e-warranty), by which technology products can electronically provide compliance markings and statements attesting to the products' compliance to standards, technical specifications, codes and regulations, as well as warranties.

To set a gold standard for trade rules, NAFTA should commit parties to science and risk analysis as the foundation for measures to protect public health and safety, mirroring U.S. food and agricultural safety policy. The United States should update NAFTA to include a separate, enforceable chapter detailing WTO-plus SPS provisions including commitments for parties to base SPS standards on timely and robust risk assessment and risk management procedures.

For example, U.S. trading partners should implement meaningful public consultation in rule-making; conduct appropriate risk assessments; avoid duplicative or unnecessary testing, certification, and registration requirements; and implement mechanisms for rapid communication to allow transparent, timely resolution of any shipment detentions or input disruptions. One potential mechanism could be to permit independent confirmatory testing of products held for SPS

reasons at a port of entry. NAFTA should also adopt cooperative technical consultations for agriculture trade, as well as establish single contact points for inquiries about parties' SPS measures.

A modernized NAFTA should preserve and deepen regulatory convergence across a wide array of sectors, including consumer products, build on existing efforts to promote risk and science-based approaches to chemical regulation within the region, and harmonize product specifications for the recycling industry.

In addition, key good regulatory principles agreed under the TPP TBT Cosmetics Annex should be included, such as risk-based regulations that recognize that cosmetic products are generally expected to pose less risk to human health; timely, reasonable, objective, and transparent marketing authorization processes for cosmetics; no requirements for certificates of free sale for cosmetics; no animal testing requirements for cosmetics, unless no validated alternative method is available; avoidance of re-testing or re-evaluating cosmetic products that differ only with respect to shade extensions or fragrance variant; transparent and consistent rules and procedure for reviews related to cosmetic products, in addition to the following objectives: Reference in full to the International Nomenclature of Cosmetic Ingredients (INCI) as the basis for ingredient names to be included on cosmetic product labels; a voidance of re-testing or re-evaluating cosmetic products that differ only with respect to shade extensions or fragrance variant; and, transparent and consistent rules and procedure for reviews related to cosmetic products.

NAFTA should set a gold standard for future U.S. trade agreements by ensuring that TBTs do not unnecessarily impede trade without scientific basis, for example by imposing discriminatory nutrition labeling requirements. In a modernized TBT chapter, NAFTA should include an annex protecting the confidentiality of proprietary formulas for prepackaged foods and food additives.

An update of NAFTA should also include language regarding information and communication technology (ICT) products that use cryptography. Provisions on encryption should include prohibiting parties to impose or maintain a technical regulation or conformity assessment procedure that requires a manufacturer or supplier to provide access to a product's encryption technologies or other information (e.g. private key, algorithm specification) as a condition of manufacture or sale. Moreover, such provisions should ensure that the circumstances under which encryption disclosures are permitted are clearly defined and limited in scope, as well as pursuant to legal procedures. Governments should not be permitted to request source code.

Government Procurement

The Government Procurement chapter has served our members well since NAFTA has been in effect. The beneficiaries of this agreement are the broad array of American exporters to the Canadian or Mexican public sector. USCIB urges that this chapter remain intact given its importance for maintaining integrated supply chains, and that the parties explore ways to modernize the commitments in ways that reflect the 21st century needs of governments as they provide services to their citizens. Dismantling this chapter could also negatively impact U.S. exports to state-owned enterprises in Mexico and Canada. It is also important that a modernized NAFTA ensure full technology choice in government procurement. There are opportunities to promote greater opportunity for high standard U.S. products by encouraging lifecycle or sustainable procurement to promote technologies.

Investment

USCIB supports strong investor and investment protections. Those protections, which include robust investor-state dispute settlement (ISDS) rule-of-law provisions, currently available in NAFTA, must be preserved.

Since the inception of NAFTA, the United States has conducted two extensive reviews of the U.S. Model Bilateral Investment Treaty (BIT); in 2004 and again in 2012. This latest Model BIT should serve as the basis for an updated investment chapter in a modernized agreement with Canada and Mexico. The Model BIT for example includes provisions on greater transparency in proceedings and addresses concerns regarding state-led economies, including issues regarding domestic technology transfers.

What constitutes an investment must be defined broadly, to include investment agreements, without carving out any industries or sectors from the protections of this chapter. The pillars of the investment chapter also must remain intact, including national treatment, most-favored-nation (MFN) treatment, minimum standard of treatment, guarantees for compensation in case of expropriation, free transfers, prohibition of performance requirements, and ISDS. It is also critical that an updated NAFTA include rules prohibiting Parties from requiring companies to transfer their technology, production process, or other proprietary information to persons in their respective territories as a condition of market access.

Trade in Services

Services are vital to the U.S. economy, accounting for almost 80% of GDP, and services jobs account for more than 80% of private sector employment. A modernized NAFTA should eliminate current barriers to trade in services, and ensure that new services introduced after the negotiating parties reach an agreement, benefit from market access, national treatment and all other provisions on services, in the services chapter. The United States should ensure an updated NAFTA does not enshrine outdated "cultural exceptions". Indeed, no services sector carve-outs, and any non-conforming measures (NCMs) must be narrowly drawn for specific purposes, subject to a ratchet and with a built-in review. The modernization is an opportunity to review Canada's numerous market limitations in the context of pay TV and wherever possible these limitations should be removed. Finally, it is essential that the online space be free of investment restrictions and discriminatory policies.

A modernization should also continue to ensure market access and national treatment for the cross-border supply of marketing services, including services involving data analytics.

Financial Services

The Financial Services chapter of NAFTA has served as a strong foundation for the financial sector but lacks coverage and provisions in important areas that should be addressed in a NAFTA modernization. In addition to locking in existing levels of openness and integration in financial services, a modernization should ensure the free flow of data and prohibit forced data localization, provide for a more formalized, principles-based consultative mechanism on regulatory cooperation by expanding the scope of the NAFTA Financial Services Committee to mandate more integrated cooperation on regulatory matters, and ensure that the financial sector receives the same level of investor protections and ability to enforce these protections, including for a breach of national treatment and most-favored nation treatment, through ISDS.

Since the inception of NAFTA, much has changed in the way we do business. For example, electronic payment services (EPS) have drastically changed the landscape of day-to-day business activity. Currently, NAFTA does not contain any provisions that would guarantee the right of U.S. EPS suppliers to provide EPS cross-border. Provisions that should be included in a modernized agreement are those that would ensure market access and national treatment for cross-border EPS. A market access commitment would prohibit the imposition of numerical restrictions (e.g. quotas) on cross border EPS, while a national treatment commitment would prohibit measures that discriminate against foreign EPS in favor of EPS supplied by domestic entities.

Intellectual Property

Intellectual property protection is vital to a thriving U.S. economy, including American jobs, with nearly 40 million jobs directly or indirectly attributed to "IP-intensive" industries. A modernized NAFTA should include strong protections combined with effective enforcement for patents, trademarks, copyright, and trade secrets.

In the patent space, the modernization provides an opportunity to include effective and clear patent standards, cooperation and transparency provisions on patenting, promoting the development and availability of innovative and generic medicines, and enabling health protections. For trademarks, an agreement should include clear and predictable trademark disciplines, and provide for fair, efficient, and accessible procedures.

The agreement should also provide effective protections and enforcement measures for copyright and related rights, including effective civil and criminal remedies, adequate and effective rules against circumvention of technological protection measures, and criminal penalties against unauthorized camcording. The agreement should also include limitations and exceptions consistent with the internationally recognized 3-step test. The agreement should ensure that legal remedies are available to address online copyright infringement, in addition to incentives for rightsholders, Internet Service Providers, and other relevant intermediaries to cooperate to effectively address and deter copyright infringement, such as through copyright limitations of liability for online providers. In a modernization of NAFTA, limitations of liability for Internet intermediaries should respect and promote economic growth, innovation, creativity, and free flow of information.

Finally, the agreement should provide for protection of undisclosed test and other data generated to obtain marketing approval of biopharmaceuticals, medical devices and agricultural chemicals. While Mexico has issued guidelines to implement regulatory data protection, the guidelines are not codified in national regulations or legislation. Further, they do not explicitly recognize biologics as new chemical entities. A modernized NAFTA should clarify that regulatory data protection applies to both small molecule and biologic medicines, and reflect U.S. law (e.g., 12 years of regulatory data protection of biologics).

NAFTA IP provisions overall are significantly less robust than more recent U.S. FTAs. A NAFTA modernization therefore provides a significant opportunity to update the IP chapter of the agreement, both by clarifying certain obligations to address existing enforcement concerns and by

introducing new obligations that are critical to promoting the research and development needed to bring new drugs to market.

Regarding the patent provisions, a NAFTA modernization provides an opportunity to address Canada's inconsistent "patent utility" standard. The doctrine, which has resulted in 28 court decisions invalidating biopharmaceutical patents for lack of utility, is inconsistent with international practice. Specifically, we should secure a legislative fix that brings Canadian law back into compliance with Canada's *existing* NAFTA obligations. It also provides an opportunity to reinforce Canada's patent obligations, such as by clarifying that an invention "is industrially applicable if it has a specific, substantial, and credible utility". Another opportunity for improvement would be the creation of a 30-month NAFTA "priority period" that would automatically apply within the NAFTA region, without extra expense, for patent applications filed at one of the three relevant IP offices.

In addition, NAFTA modernization provides an opportunity to ensure mechanisms to provide early and effective resolution for patent disputes such as patent linkage and preliminary injunctive relief. Such mechanisms can prevent potentially infringing follow-on products from entering a market and potential disruptions to patient treatment. For example, within the context of the Comprehensive Economic Trade Agreement (CETA) with the EU, Canada agreed to give innovators, in the context of proceedings under the Patented Medicines (Notice of Compliance) Regulations, a right of appeal equivalent to the one that already exists for generic companies. The changes are intended to bring a measure of fairness by giving innovators the restoration for some of the time lost between the filing date of the patent application and the date when the pharmaceutical product is granted market authorization (up to two years), a measure already in place in most other OECD countries. Despite these commitments in CETA, the proposed regulations that will implement the IP commitment by Canada actually undermine the commitment made to introduce an effective right of appeal and a patent term restoration system.

NAFTA modernization also provides an opportunity to improve NAFTA Chapter 17 in relation to the protection of trade secrets protection. The current chapter contains basic language providing for the protection and enforcement of trade secrets and should be upgraded to enshrine the highest standards. Certain favorable NAFTA trade secret provisions could be left in place, whereas unduly burdensome NAFTA requirements that limit trade secret owners' ability to effectively address misappropriation should be eliminated, or revised. For example:

- NAFTA Article 1711, which defines trade secrets and requires the Parties to provide civil judicial procedures to address misappropriation, reflects less clarity and should be replaced.

- NAFTA Article 1711, paragraph 2, requires the distillation of trade secrets to writing or some other medium. This requirement should be eliminated from the text, given that similar requirements in national laws have created difficult and unnecessary hurdles for legitimate owners of trade secrets seeking to address misappropriation.
- Whereas NAFTA currently only requires the establishment of a civil cause of action for trade secret misappropriation, a revised chapter should require the establishment of civil as well as criminal procedures to address trade secret misappropriation.
- In addition, NAFTA Articles 1715 and 1716, which address certain procedural aspects of civil IP litigation, should be replaced by provisions which are more specific and more favorable to rights holders.

The United States should also ensure that U.S. IP rights are not unjustifiably restricted by TBT and SPS measures that are not based on scientific evidence, do not achieve a legitimate objective, and/or that discriminate against U.S. businesses. Restrictions on marketing, branding, and IP rights (icons, logos, mascots, colors and markings) of foods and beverages are inconsistent with existing international obligations, unjustifiably limit the marketing and branding of lawfully registered and legally trademarked products, and represent disguised barriers to trade. Specifically, a modernized NAFTA should also address and prevent the misuse of geographical indicators to ensure they do not unjustifiably restrict trade in common agricultural products.

NAFTA also needs to be updated to ensure that Mexican law adopts the global standard of 10 years of data protection for agricultural chemicals. This provision is part of the TPP Agreement, which Mexico agreed to, as well as all of the United States FTAs prior to TPP and post NAFTA.

Digital Trade / E-Commerce / Cross border data flows / Telecommunications

A modernization of NAFTA provides opportunities for modern rules relevant to the digital economy. The language agreed in the TPP provides a useful foundation from which to build in those areas. To modernize NAFTA for the current century, strong electronic commerce and telecommunication provisions, going beyond what is provided by the WTO, GATS and the WIPO Internet treaties, must be included, including with respect to digital services. Providing access to public telecommunications services, including leased circuits, is particularly important.

Specifically regarding cross-border data flows, NAFTA currently does not contain provisions requiring countries to permit the cross-border flow of data necessary to conduct business, and

prohibiting data localization requirements. A modernized NAFTA should require Canada, Mexico and the United States to allow cross-border data flows for companies in all sectors, including health and financial services. In addition, the agreement should prohibit customs duties on electronic transmissions and the value of data being transmitted. Moreover, in order to build trust and facilitate trade in the digital economy, the agreement should ensure that each country maintains a high standards legal framework for the protection of personal information and implement compatibility mechanisms, including the APEC Cross Border Privacy Rules system.

A modernized agreement also should include provisions on source code. In addition to generally prohibiting any party to require the transfer of source code as a condition for import, distribution, sale or use of any software, any provision should include language regarding source code disclosures to ensure that exceptions for critical infrastructure are more clearly defined and limited in scope. The text should reflect the concept that source code disclosure cannot be a condition of market access. In addition, there should be an exception for law enforcement.

An update of NAFTA should include the following non-exhaustive list of commitments:

- Non-discriminatory treatment of digital products and services;
- Prohibiting customs duties on digital products;
- Protecting the free movement of cross-border data;
- Prohibiting data localization requirements;
- Cooperation and interoperability for legitimate data transfer mechanisms;
- Reasonable network access for telecommunications suppliers;
- Promoting and enabling a competitive regulatory environment for telecommunications policy and regulations;
- Promoting infrastructure and scarce resource sharing;
- Preventing unnecessary regulation on digital services;
- Prohibiting requirements to transfer source code as a condition for import, distribution, sale or use of any software; and
- Increasing transparency in the process of developing laws and regulations affecting the Internet.

Competition

USCIB urges the Administration to consider the important roles that due process, transparency, and predictability in legal proceedings, particularly in connection with competition proceedings,

can have in the promotion of trade and investment between nations and therefore include a cutting-edge comprehensive competition chapter in an updated NAFTA. The fundamental fairness of competition law proceedings abroad can have a profound effect on the willingness of the private sector to trade with and invest in foreign nations. Competition law, by its nature, regulates nearly every economic action of private entities, including foreign investors and traders. Thus, it is of paramount importance that a nation's competition law proceedings are fundamentally fair, fully incorporating due process, transparency, and predictability, so that the U.S. companies are treated consistently across NAFTA. International norms for procedural due process are clearly identified by a number of organizations, including the International Competition Network (ICN), a network of more than 130 competition agencies worldwide that "advocate(s) the adoption of superior standards and procedures in competition policy around the world….".[4] As the ICN has explained, "[p]rocedural fairness protections do not depend on the type of system or the country." In other words, there are certain elements of competition law proceedings, regardless of the jurisdiction, that are required to provide procedural fairness and due process. USCIB respectfully submits that the Administration should include in NAFTA the core elements essential to ensuring due process in competition law proceedings. Strong, cutting edge competition provisions will create a more hospitable environment for foreign trade and investment and continue to strength the longstanding economic bond between the North American partners.

State-Owned Enterprises

Mexico and Canada have more state-owned enterprises (SOEs), provincial or regional corporations, crown corporations etc. than there are in the United States. The Administration should negotiate strong SOE provisions, to ensure a level playing field when SOEs, state-championed or state-supported enterprises compete with the private sector. Such provisions should be broad in coverage, cover commercial considerations and non-discriminatory treatment, immunity and impartial regulation, transparency, and provide that the chapter be subject to state-to-state dispute settlement.

Labor and Environment

Recognizing the relation of labor and environmental policy to trade and trade policy, the U.S. government has supported the inclusion of labor and environment provisions in important bilateral

[4] See http://www.internationalcompetitionnetwork.org/

and regional trade agreements since NAFTA and its two side agreements came into effect January 1, 1994: The North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC).

U.S. FTAs negotiated post-NAFTA have clarified and evolved trade-associated labor and environmental provisions to include increased levels of enforceability, enhanced cooperation, and development of environmental impact assessments. Inclusion of labor provisions consistent with those negotiated under TPP would help ensure that Canadian and Mexican enterprises were not using inadequate labor standards as a basis for unfairly competing with U.S. enterprises. USCIB has participated actively to inform those negotiations on behalf of its members, and intends to do so should these issues be included in a modernized NAFTA.

In that connection, a significant attribute of the NAAEC was the creation of the North American Commission for Environmental Cooperation (NACEC), which set out a collaborative working relationship across the three countries to share environmental information and experience, and settle complaints through a facilitative discussion. We would see this approach as important to continue and even strengthen in an updated NAFTA.