September 27, 2018

The Honorable Robert E. Lighthizer
United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Dear Ambassador Lighthizer:

In accordance with section 105(b)(4) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, and section 135(e) of the Trade Act of 1974, as amended, we are pleased to transmit the report of the Industry Trade Advisory on Services on A Trade Agreement with Mexico and potentially Canada, reflecting consensus advisory opinion on the proposed Agreement.

Sincerely,

Elizabeth Benson, Chairman
Industry Trade Advisory Committee
on Services

A Trade Agreement with Mexico and potentially Canada

Report of the
Industry Trade Advisory Committee on Services

September 27, 2018

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Industry Trade Advisory Committee on Services (ITAC 10)

ITAC 10 Advisory Committee Report to the President, the Congress, and the United States Trade Representative on a Trade Agreement with Mexico and potentially Canada.

I. Purpose of the Committee Report

Section 105(b)(4) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, and section 135(e)(1) of the Trade Act of 1974, as amended, require that advisory committees provide the President, the Congress, and the U.S. Trade Representative with reports not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

Under Section 135 (e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principal negotiating objectives set forth in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 ("TPA").

The report of the appropriate sectoral or functional committee must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the sectoral or functional area.

Pursuant to these requirements, the Industry Trade Advisory Committee on Services hereby submits the following report.

II. Executive Summary of Committee Report

ITAC 10 believes the proposed Trade Agreement with Mexico and potentially Canada ("Trade Agreement") represents an important effort to update and modernize the 26-year-old North American Free Trade Agreement ("NAFTA") entered into by Canada, Mexico, and the United States, provided the pact is trilateral and includes all the original NAFTA signatories.

For some sectors, the proposed Trade Agreement includes new, high-standard commitments that will address trade concerns and allow U.S. companies to improve the efficiencies that a trade agreement among the three North American economies can continue to provide. This includes cross-sectoral commitments on technical barriers to trade/standards, small and medium-sized enterprises, and temporary entry. For individual services sectors, improvements have been agreed to when compared to the original NAFTA. These include audiovisual, distribution, engineering, energy, delivery services, financial services, legal, and medical services. In these areas, we believe that the proposed Trade Agreement on balance promotes the economic interests of the United States and provides for equity and reciprocity within the services sector. Important details on these commitments are described in the report that follows.

In other sectors and for other issues, the provisions of the Trade Agreement fall short of ITAC 10 expectations and advice, do not promote the economic interests of the United States, and do not have the Committee's support. In particular, the Committee disagrees with the decision of the United States to eliminate ISDS protections for investors in most instances and for most sectors of the economy. ITAC 10's views on this change to long-standing U.S. trade policy are detailed on the Investment section of this report and further discussed in sectoral reports on Energy and Financial Services.

ITAC 10 is also concerned regarding the Trade Agreement's termination provision. While it improves on the Administration's original five-year sunset proposal, the new proposal to establish a 16-year term with required renewal discussions every six years continues to interject uncertainty into long term economic decision-making for no clear reason.

The Committee notes that the documents related to the Trade Agreement that it was asked to provide views on were incomplete, with multiple sections remaining in brackets and others applying only to Mexico, since negotiations with Canada are ongoing.

The Committee's task is to evaluate the effects of the Trade Agreement on the services sector, but our ability to make such an assessment is limited by the incomplete text provided for review.[1] We request that the final text be provided for the Committee's review before any action is taken to enact the Trade Agreement, and that the Committee be provided the opportunity to update these views in a publicly available report.

Finally and fundamentally and as stated at the outset, ITAC 10 supports a trilateral trade agreement that includes Canada, Mexico, and the United States. While the proposed U.S.-Mexico agreement has achieved a number of positive outcomes, a trilateral agreement will maximize economic benefits for U.S. workers, consumers, farmers, and businesses, while a bilateral agreement will create serious economic complications for many sectors of the U.S. economy and for those workers and consumers who depend on them.

III. Brief Description of the Mandate of the Industry Trade Advisory Committee on Services ("ITAC 10")

ITAC 10 performs functions and duties and prepares reports, as required by Section 135 of the Trade Act of 1974, as amended, with respect to the services sector. To fulfill its mandate the ITAC meets to review negotiations with U.S. trade officials and to advise as required by law.

ITAC 10 advises the Secretary of Commerce and the U.S. Trade Representative ("USTR") concerning the trade matters referred to in Sections 101, 102, and 124 of the Trade Act of 1974, as amended; with respect to the operation of any trade agreement once entered into; and with respect to other matters arising in connection with the development, implementation, and administration of the services trade policy of the United States, including those matters referred to in Reorganization Plan Number 3 of 1979 and Executive Order 12188, and the priorities for actions there under.

[1] References to provisions of the Trade Agreement in this report (including references to specific articles and Chapters) are based off the text made available on the cleared advisors' website as of September 26, 2018.

In particular, ITAC 10 provides detailed policy and technical advice, information, and recommendations to the Secretary of Commerce and the USTR regarding trade barriers and implementation of trade agreements negotiated under Sections 101 or 102 of the Trade Act of 1974, as amended, and Sections 1102 and 1103 of the 1988 Trade Act, which affect the services sector, and performs such other advisory functions relevant to U.S. trade policy as may be requested by the Secretary and the USTR or their designees.

IV. Negotiating Objectives and Priorities of the Industry Trade Advisory Committee on Services

ITAC 10's overall goal is to liberalize trade in the wide range of services provided by U.S. businesses, thereby promoting the expansion and health of the U.S. economy and, by extension, the economies of its trading partners. This goal aligns with the principal negotiating objective of the Congress for trade in services, as stated in the 2015 TPA, which is "to expand competitive market opportunities for United States services and to obtain fairer and more open conditions of trade, including through utilization of global value chains, by reducing or eliminating barriers to international trade in services, such as regulatory and other barriers that deny national treatment and market access or unreasonably restrict the establishment or operations of service suppliers."

The services sector plays a vitally important role in the United States economy. In the United States today, services industries provide approximately 118 million jobs, or over 80 percent of total private sector employment. Most new jobs created in the United States are services jobs. Further, according to the Bureau of Economic Analysis ("BEA"), U.S. exports of services were just over $752 billion in 2016, providing a surplus of $248 billion in cross-border trade. The BEA further reported that services sales by U.S. foreign affiliates – that is, sales by U.S. services companies by their overseas operations to foreign customers – which totaled $685 billion in 2004, had increased to $1.46 trillion by 2015, the latest year for which these data are available. Services exports and sales by U.S. foreign affiliates will both benefit from the commitments included in A Trade Agreement with Mexico and potentially Canada ("Trade Agreement").

ITAC 10's objective for the Trade Agreement and other trade agreements is to achieve substantial additional market access for U.S. service industries. This means commitments to greater access to foreign markets for U.S. cross-border trade, to investment abroad, and to the temporary movement of persons who provide services. Without similar U.S. commitments extended to our trading partners, U.S. service providers will be less able to realize the full opportunities this Agreement and others like it appear to offer.

With respect to the protection of U.S. investment abroad, ITAC 10's objective is to ensure high levels of protection for U.S. investors. These include: assurance of national treatment and most-favored nation treatment, protection against expropriation without prompt and full compensation; the free transfer of capital both into and out of the country, fair and equitable treatment and full protection and security by local agencies and courts, prohibitions of performance requirements on foreign investors, and effective and efficient investor-state dispute settlement procedures.

ITAC 10 also sees an opportunity to advance U.S. policy objectives to liberalize foreign markets by focusing U.S. agencies' and private entities' efforts to provide technical assistance and trade-related capacity-building abroad, especially in developing countries and transitional economies. ITAC 10 believes that intensive technical assistance is imperative in many parts of the world if mutual trade liberalization goals are to be attained.

With respect to intellectual property, ITAC 10's objective is to achieve the highest degree of protection possible for this foundational element that is directly responsible for many of the competitive advantages enjoyed by U.S. services providers.

With respect to government procurement, ITAC 10's objective is to ensure access on a transparent, open and non-discriminatory basis to foreign government procurements for U.S. service providers and, where needed, to objective reviews of procurement decisions.

ITAC 10 believes these goals can be met, and at the same time can support efforts to protect the environment, maintain fair and humane working conditions and encourage the expansion of new technologies that foster the exchange of trade and human interactivity.

V. Advisory Committee Opinion on the Agreement

A. Crosscutting Provisions

The Committee's opinions on provisions in the Trade Agreement that cut across more than one services sector follow.

Investment

American firms are regularly challenged by traditional and new competitors in the global economy. To effectively compete, they must be able to invest in markets abroad under conditions that are equivalent to what their competitors benefit from in their home markets, and to what other international companies are able to do in those markets. Many markets have significant investment restrictions that advantage domestic companies to the disadvantage of foreign ones, including U.S., investors.

NAFTA included an early form of investment protection and dispute settlement that has been critical to ensure the protection of U.S. property consistent with U.S. legal principles and rules against theft, mistreatment and discrimination. Those provisions were similar to rules contained in the Constitution, the Administrative Procedure Act and other core U.S, laws and regulations. NAFTA also included the important investor-state dispute settlement ("ISDS") mechanism that is vital to guarantee a neutral enforcement to provide recourse for U.S. investors if their property overseas is mistreated, seized or otherwise treated unfairly. Those protections have been built on in the years since NAFTA was enacted, including to address concerns about "misinterpretations" of obligations by arbitration panels.

ITAC10 considered the revisions of NAFTA's investment provisions in the context of advances that have been made in those areas, including in TPP, but also whether changes are consistent with the 2012 Model Bilateral Investment Treaty ("BIT") and the TPA to:

- ensure a broad definition of "investment;"
- expand market access commitments by Canada and Mexico, including to lock-in reforms that have been made, particularly in Mexico;

- expand prohibitions on forced technology transfers and related distortive government mandates;
- expand ISDS enforcement for breaches of investment agreements and for all sectors of the economy; and
- expand enforcement period for investments in the case of a withdrawal from the underlying agreement.

In this context, the Trade Agreement fails to meet those important criteria. In an overly broad response to largely outdated criticism of the ISDS mechanism, the new Trade Agreement eliminates the ability of most businesses to enforce many of the Agreement's core protections through ISDS, limits recourse to ISDS to only existing investments, and adds new procedural hurdles to any company seeking to use neutral enforcement mechanisms. Reasonable changes could have been made to address any remaining, perceived concerns about the ISDS mechanisms, including clarifications related to minimum standard of treatment or the scope of indirect/regulatory expropriations.

Additionally, the Committee is alarmed that no ISDS protections would be available for business concerns in Canada, based on the assertion that such protections are not needed due to Canada's well-regarded legal protections. The Committee rejects this view for three reasons: (1) other countries with less robust legal systems will demand the same treatment (i.e., no ISDS mechanism); (2) U.S. investors will have to rely on the U.S. government to enforce the Trade Agreement's investment protections not subject to ISDS, which will politicize the process, as well as prevent investors from "being made whole;" and (3) it is out of step with the approach taken by other major jurisdictions – such as the EU – in the investment chapters of their FTAs – which will leave our competitors' investments more secure than ours. Moreover, the Committee has yet to hear a compelling reason for this change in treatment and notes the U.S. track record on ISDS with Canada has been overwhelmingly successful: U.S. investors have used ISDS in Canada and have been successful; Canadian investors have used ISDS in the United States and lost. In fact, the United States has never lost a case. We have nothing to gain by excluding Canada from ISDS protections, but much to lose bilaterally, and ultimately in all future agreements the United States enters.

Of most concern are the following new limitations:

- **<u>Elimination of Investors' Ability to Enforce Basic Property Protection and Due Process Rules</u>.** The new Trade Agreement eliminates most investors' ability to bring ISDS claims for enforcement for key protections long protected by the U.S. Constitution and U.S. law, including the following:

    - <u>Unfair treatment and full protection and security</u>: U.S. investors and U.S. investment overseas face a wide range of unfair, arbitrary, or unjust government actions that impede or harm their investments. Those actions include a lack of due process, and biased and unfair government actions that protect local industries from foreign competition.

      As a result, the original NAFTA and more than 40 other subsequent agreements required that countries provide a "minimum standard of treatment," and include "fair and equitable treatment and full protection and security" to each others' investors, enforced through individual dispute settlement.

The Trade Agreement eliminates most investors' ability to seek redress for these types of harmful actions through the ISDS mechanism. Recourse to foreign domestic courts is not a substitute, as most jurisdictions lack analogous protections in domestic law as that provided for in the Trade Agreement. (By contrast, foreign investors can challenge U.S. actions through the Due Process Clause, Administration Procedure Act and similar U.S. legal provisions.) As a result, Mexico could deny basic due process or treat investors in an arbitrary and unfair manner, and a U.S. investor would have no ability to seek to enforce their rights, unless the U.S. government agrees to bring the case (which is unlikely for actions affecting a single company, as discussed below).

- Indirect Expropriation: U.S. investors and U.S. investment overseas face direct and indirect government confiscatory and expropriatory action for which compensation is not provided. These types of actions can range from nationalizing a company's operations or forcing divestiture, to restricting an investor's ability to operate in that country. International and U.S. law require compensation to the investor when such expropriations are done for a public purpose. Without compensation, such actions directly harm both U.S. businesses and U.S. workers.

  As a result, the original NAFTA and more than 40 other subsequent agreements required that countries provide individual redress to seek compensation for both direct and indirect expropriation.

  The Trade Agreement eliminates most investors' ability to seek compensation for indirect expropriations, even though such actions are prohibited, unless compensated, by the Trade Agreement. (Likewise, indirect/regulatory expropriations without full, prompt and effective compensation are also prohibited under U.S. law through judicial interpretations of the Takings Clause of the U.S. Constitution.) Again, recourse for U.S. investors in Mexican domestic courts is not viable, as the same indirect/regulatory takings concept is not necessarily enmeshed in Mexican domestic law. And while U.S. investors could, in theory, ask the U.S. government to bring such cases, where such actions affect a single company, it is unlikely the U.S. government would do so. As a result, Mexico could use regulatory or other actions that fall short of physical seizure of assets and effectively prevent an investor from using its investments in Mexico without being challenged.

- Forced Localization and Technology Transfer: U.S. investors and investment face a variety of requirements in exchange for the ability to invest, known as performance requirements. These can include requirements to use a certain percentage of local inputs, to technology transfer, or to export of a certain percentage of production. These requirements directly harm U.S. companies and U.S. workers. As a result, the original NAFTA and more than 40 other subsequent agreements required that countries provide individual redress to seek compensation in cases of forced localization.

The Trade Agreement eliminates most investors' ability to address these types of harmful localization measures through the ISDS mechanism. As a result, Mexico could require the use of local inputs rather than American content, or force technology transfers, and the investor would have no ability to seek individual redress. While progress was made in the Trade Agreement to cover additional performance requirements that are relevant to the most innovative American companies in the modern global economy, that progress is valueless if companies are not able to enforce their rights, and instead have to rely on the U.S. government to do so.

  - Ability to Move Capital: U.S. investors and U.S. investment face foreign government restrictions on inflows and outflows of capital, as well as other currency restrictions. Such restrictions undermine the value of investment for U.S. companies and their U.S.-based activities and are often harmful to the country imposing such controls. As a result, the original NAFTA and more than 40 other subsequent agreements required that countries provide individual redress to seek compensation when countries try to limit the movement of capital.

    The Trade Agreement eliminates most investors' ability to seek redress for these harmful capital transfer measures by most investors. As a result, Mexico could prevent an investor from moving its own capital in or out of the country, and the investor would have no recourse, outside asking the U.S. government to bring a case would be unlikely.

- **Elimination of Any Protection for New Investments.** Since the Trade Agreement fails to provide most investors' ISDS enforcement rights on a pre-establishment basis, the new agreement eliminates those investors' ability to bring claims to neutral enforcement for any problem with a new investment. The lack of this protection, already included in the original NAFTA and more than 40 other subsequent agreements, will allow Mexico to prevent investments that are critical to expand U.S. exports and sales.

- **New Exhaustion Requirements.** The Trade Agreement requires most investors to seek local remedies for 30 months (18 months for financial institutions and providers of financial services) before proceeding with an ISDS claim. Delaying the resolution of disputes for investors is harmful for U.S. businesses, workers and U.S. economic activity. As a consequence, the investment protection provisions of the Trade Agreement are virtually useless for small and medium-sized enterprises. International law has moved beyond these types of exhaustion requirements. Implementing this type of outdated requirement will be damaging to the investment climate.

- **Contract Requirement for Select Industries.** A few industries, such as oil and gas extraction, infrastructure, telecommunications and power generation, are accorded more rights to seek individual redress under ISDS under the original NAFTA protections, but only if a company has a contract with the government. In doing so, the Trade Agreement picks winners and losers among U.S. industries. These protections should be available for all industries, in line with the Committee's views discussed above.

State-to-State Enforcement Is Inadequate for Investment Claims

Investor-state dispute settlement provides a neutral and transparent platform to enforce foreign government commitments to treat U.S. investors and property fairly and without discrimination. ISDS provisions appear in U.S. trade agreements with 14 countries, as well as BITs with another 37 countries. Investor-state provisions are included in over 2,600 agreements, most negotiated by European and Asian countries that, in many instances, provide foreign companies an advantage in foreign markets over U.S. industries. Environmental organizations rely on similar arbitration provisions to enforce debt-for-nature agreements with foreign governments.

Before the creation of ISDS, U.S. investors were required to petition the State Department to make claims on investors' behalf. State-to-state dispute-settlement processes in a trade agreement or at the WTO are appropriate where entire industries are affected, but advocacy by the U.S. government on behalf of an individual investor elevates a private dispute to a political and diplomatic one, complicating the ability to distinguish a company's dispute from those that are based on totally unrelated foreign policy matters. Relying solely on the U.S. government to make claims will most often lead to no claim being brought, as governments have larger issues to address with their foreign counterparts.

ISDS puts investors on the same international law footing from country to country – a footing that is largely reflective of U.S. legal standards and jurisprudence. Moreover, the investment commitments in trade agreements are not always fully incorporated into each country's own domestic legal system the way that they are in the United States. ISDS ensures U.S. investors that investment obligations are fully and effectively enforceable through a depoliticized mechanism.

We note that the Trade Agreement includes important modifications with respect to the appointment of arbitrators for investment disputes. Chapter 14, Annex D, Article 6 (5) specifies that arbitrators appointed to a tribunal for claims submitted under Article 3.1 shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, shall refrain from taking instructions from any organization or government regarding the dispute, and shall refrain during the proceedings from acting as counsel, expert, or witness in any other pending arbitration under the Annex. ITAC 10 supports these improvements on current rules, which should help to eliminate conflicts of interest that could affect the impartiality of arbitrators. ITAC 10 believes reforms in this vein are more productive than the blunt instrument of taking away the ISDS mechanism for enforcement of particular investment disciplines.

Government to Government Dispute Settlement.

ITAC 10 notes that the Trade Agreement largely replicates the approach to government to government dispute settlement under NAFTA. Two issues have been raised in connection with the efficacy of the NAFTA dispute settlement model: (1) whether insertion of the Commission in the process creates a hurdle that can either delay or prevent a Party from pursuing a claim; and (2) whether a Party can block access to dispute settlement by not establishing the required roster of potential panelists. Issue (1) arose in the context of the U.S. labor dispute with Guatemala under the US-CAFTA, while issue (2) arose with respect to Mexico's efforts to bring a NAFTA dispute over U.S. sugar restrictions.

Changes to dispute settlement procedures were included in the TPP dispute settlement chapter to address these issues. First, TPP eliminated use of the Commission as a gatekeeper to the establishment of a dispute settlement panel, including through TPP Article 28.7.4, which requires a panel to be established “on request” after expiry of a consultation requirement, and without further action by the Commission or the Parties. In contrast, the Trade Agreement maintains the Commission as a gatekeeper (see Trade Agreement Articles 31.6 and 31.7). Second, TPP addressed the problem of how panelists would be selected where a roster of panelists has not been established and/or where a Party refuses to appoint panelists. Specifically, TPP Article 28.9.2 (c) establishes a default mechanism for choosing panelists in the case of intransigent respondent Party (i.e., the default mechanism is random selection from candidates chosen by the complaining Party). In contrast, the Trade Agreement does not address the circumstances where a roster of panelists has not been developed or define how panelists will be chosen by lot, which effectively allows a Party to avoid panel establishment by refusing to establish a roster or by complicating the “selection by lot” process (see Trade Agreement Article 31.10).

The Committee strongly urges the Administration to review the Trade Agreement dispute settlement procedures (Chapter 31) to eliminate, to the extent feasible, provisions that have undermined the dispute settlement process in the past, including by adopting the improvements included in TPP dispute settlement or developing equivalent workarounds.

Small and Medium-Sized Enterprises

Trade Agreement includes a separate chapter addressing the concerns of SMEs. It recognizes the important role SMEs play in job creation and economic growth – both in the United States and abroad – and the disproportionate challenges and expenses many face when navigating international markets. These challenges include often opaque regulations, and a range of complex requirements related to technical standards, customs regulations and procedures, employment, business licensing, registration procedures, and taxation.

The Trade Agreement’s SME Chapter requires each Party to establish or maintain a public website that provides information germane to SMEs and enables them to access current, accurate, and complete information on required laws and regulations in that Party’s jurisdiction. The Parties further establish a Committee on SME Issues to identify ways to help these companies take advantage of the opportunities under the Trade Agreement, to collaborate on best practices, to explore opportunities for SME capacity building and program development, and to report regularly and consider recommended improvements in support to SMEs.

Beyond this Chapter, and of great importance to ITAC 10, the Trade Agreement offers strong services commitments integral to SMEs’ success. These include electronic payment services, e-commerce, logistics services, and delivery services. All of these will help ensure that SME opportunities will not be diminished by high costs, poor communications, or unexpected red tape, and that SMEs will have world-class support to compete from the moment they enter the Trade Agreement markets.

As of the required publication date for this report, the full text of the SME Chapter has not been agreed to by the parties and the Chapter is not closed.

<u>Standards / Technical Barriers to Trade</u>
ITAC 10 commends the Trade Agreement's enhanced Technical Barriers to Trade ("TBT") chapter as it commits partners to the strongest principles in this area to date. This high standard chapter addresses the important and foundational role standards play in underscoring U.S. competitiveness across all sectors and ensures market access for U.S. conformity assessment bodies, an important service industry. In particular, the Committee is pleased to see clear and precise language in the Trade Agreement clarifying the definition of international standards as that definition found in the WTO TBT Committee Decision on International Standards. The Trade Agreement also maintains important provisions found in NAFTA that uphold a choice in conformity assessment mechanisms and grants conformity assessment bodies national treatment, thereby ensuring market access for the testing, inspection, and certification services industry. Additionally, the strong commitments on transparency in the development of technical regulations, standards and conformity assessment procedures are commendable. Given the overall strength of the Trade Agreement's TBT Chapter, it is important that this foundational, crosscutting chapter is referenced back to in all sectoral agreements, a reference that is not clearly stated in the current text.

<u>Temporary Entry</u>
The provision of legal and other professional services may be affected by Chapter 16, which encompasses measures relating to the temporary entry of a business person of a Party into the territory of another Party. Annex 1603, Section D, sets forth provisions governing temporary entry for professionals, and states that each Party shall grant temporary entry to business persons seeking to engage in professions, upon presentation of proof of citizenship and relevant documentation. However, the annex applies to professions listed in Appendix 1603.D.1, and this Appendix has not been provided or released to cleared advisers. (We presume that lawyers, engineers, architects, and other professionals would be included on this list of professions and ask the U.S. Government to confirm this.)

B. Sectoral Issues

The Committee's opinions on Trade Agreement provisions related to different services sectors follow.

<u>Audiovisual</u>
While the U.S. has concluded negotiations on the treatment of audiovisual services with the Government of Mexico, negotiations on audiovisual services, and the treatment of the creative industries broadly, are ongoing with Canada. Moreover, the outcome with Canada could implicate the current agreement with Mexico. As such, opining on the outcome of a modernized NAFTA is challenging.

That being said, looking just at the outcome of the U.S.-Mexico negotiations, ITAC 10 is satisfied with the outcome achieved with the Government of Mexico. For some audiovisual services, such as film distribution and film production, the U.S.-Mexico agreement reflects Mexico's NAFTA obligations, which are quite strong. In addition, under the U.S.-Mexico agreement, Mexico agreed to bind its screen quota at 10 percent, effectively binding the liberalization captured by NAFTA's ratchet.

The U.S.-Mexico agreement also reflects positive movement on foreign ownership limitations within the broadcasting and cable television sectors. Mexico agreed to allow for foreign investment of up to 49 percent in the broadcasting sector and it eliminated the foreign equity cap for cable television services. Under the U.S.-Mexico agreement, Mexico also agreed to relax some of its national identity restrictions.

Importantly, with so many consumers looking to the online marketplace to enjoy audiovisual content, Mexico did not take any reservation against digital distribution models, including Internet Protocol television (IPTV).

ITAC 10 is mindful, however, that this positive outcome with Mexico could be jeopardized by the ongoing negotiations with Canada.

Canada is pressing to secure a cultural carveout in their negotiations with the U.S. Imported from the U.S.-Canada Free Trade Agreement, NAFTA is the only U.S. free trade agreement currently in force that includes a cultural carveout. Canada's carveout is highly prejudicial to the U.S. audiovisual sector, excluding the U.S. creative industries from the benefits of an agreement. A carveout wrongly suggests that fostering open markets and promoting cultural diversity are mutually exclusive.

Importantly, there is ample room for the U.S. and Canada to compromise on the treatment of the creative industries. The negative list structure offers parties effective flexibilities to promote their cultural interests and protect certain policies and programs from competition. Utilizing these mechanisms, rather than defaulting to the antiquated carveout, is a reasonable way to modernize NAFTA.

In addition, Mexico has made commitments in this agreement to strengthen its intellectual property laws to address deficiencies in comparison with international norms. Examples include the criminalization of unauthorized camcording in theaters, the criminalization of cable and satellite signal theft, and implementation of robust protections for technological protection measures. Moreover, the U.S.-Mexico agreement importantly adopts the globally-recognized three-step test as the appropriate framework for exceptions and limitations. Strong copyright protection and enforcement are critical to enabling access to the marketplace for U.S. audiovisual services and the proposed IP chapter will support the other market-opening measures in this bilateral agreement. It is worth noting, however, that the agreement exports outdated online enforcement measures that are insufficient to effectively address the scope and scale of online piracy. Future agreements should aim to modernize these elements.

Delivery Services

The Trade Agreement contains a Delivery Services Annex in Chapter 15 Cross Border Trade in Services.[2] Within the context of delivery services, ITAC 10 supports a trilateral NAFTA that includes agreement by Canada, the United States, and Mexico. To the extent that the Delivery

[2] In Article XX.2 Scope, subparagraph 2(b) it currently states, "Annex XX-B (Delivery Services) shall also apply to measures adopted or maintained by a Party affecting the supply of delivery services, including by a covered investment." However, the Delivery Services Annex is found in Annex XX-A. This appears to be a typographical error.

Services Annex would only apply to delivery services between the United States and Mexico, while the current language is laudable, ITAC 10 does not support a bilateral-only Agreement.

As drafted, and if implemented trilaterally, the Annex targets barriers that prevent a level playing field for private sector delivery service providers that compete against universal service providers, and state-owned postal monopolies. The text contained in the Annex represents a meaningful and important expansion of the scope of delivery services, with accordant assurances that each Party maintains a universal service obligation that is administered in a transparent and non-discriminatory manner. Further, the Annex includes important disciplines prohibiting cross-subsidization, which will prevent Parties from using revenues derived from the postal monopoly to cross-subsidize their own or any other delivery services not covered by a postal monopoly.

Similarly, other language in the Delivery Services Annex prohibits abuse of a postal operator's monopoly position and insists on independent regulation that is impartial, non-discriminatory, and transparent. The Annex also ensures that delivery service providers' ability to contract in the territory of another Party is not impeded. Specifically, the Annex provides that Parties may not require a supplier of a delivery service not covered by a postal monopoly to contract, or prevent such a delivery service provider from contracting, with another service supplier to supply a segment of the delivery service. This important and valuable clause preserves the right of a delivery service provider to contract locally.

The Delivery Services Annex and provisions elsewhere in the Trade Agreement will support the ability of the U.S. delivery services providers to grow their business trilaterally across North America, as well as provide seamless end-to-end service to their U.S. and global customers.

Distribution

The Trade Agreement includes direct selling, a distribution channel that has never before been detailed in an international trade agreement. The reference is included in the Chapter on Small and Medium Sized Enterprises with a comment that this type of business should be encouraged. More importantly, the reference includes a definition of direct selling that encompasses both of the services provided by distributors to companies: sales and sales-management activities.

Energy

Cross border electricity interconnection and pipeline infrastructure ensure reliable, secure, cost effective, and environmentally attractive sources of energy that underpin the economies of Canada, Mexico, and the United States. Since the NAFTA entered into force in 1994, changes in North American energy infrastructure, law and regulation, have substantially increased U.S. energy companies' interactions with Canada and Mexico. As one key example, trade in electricity and sales of natural gas and oil moving across international borders have increased substantially and are expected to grow as Canada provides cost competitive, carbon free electricity to the Northeast and Midwest United States, and Mexico modernizes and expands its energy fleet.

In 2013, Mexico amended its constitution and opened its energy markets to competition. Despite this fundamental change, Mexico continues "direct, inalienable, and imprescriptible" ownership of its hydrocarbon resources, and in some areas energy market competition is unfolding slowly.

Nevertheless, U.S. energy companies of all sizes are competing successfully following decades of Mexican monopoly control and are well qualified to address the full range of Mexico's energy needs. In a number of important respects the updated Trade Agreement will support them in their efforts to do so.

Chapter 15, Cross Border Trade in Services, addresses national treatment, most favored nation treatment, market access and local presence – the full complement of requirements that ensure fair and equitable treatment of all services suppliers. These commitments provide a framework of certainty for U.S. energy services firms, including SMEs. They ensure that services provided by the U.S. firms will be treated on an equal basis with those of their domestic counterparts. They also stipulate that the Parties will not limit market access through numerical quotas, monopolies, employment caps, or economic needs tests. These guarantees are meaningful and ensure that U.S. companies will have access equal to that of domestic suppliers. Local presence protections ensure that no U.S. energy services company will be required to establish an office or maintain residency in Mexico or Canada in order to engage in cross-border supply of its service.

Chapter 24, Environment, provides opportunities for market-based solutions to environmental problems, an approach of particular interest to many energy services providers whose environmental expertise and experience with renewable and lower carbon energy resources and technologies can provide opportunities in the NAFTA.

Because many energy services companies are highly regulated, it is essential that they have access to accurate and timely information on existing and new regulations. Chapter 28, Good Regulatory Practices, establishes specific obligations related to planning, design, issuance, implementation, and review of each Party's respective regulations. These obligations include requirements that Parties respond to inquiries about services regulations and provide notice and comment on new rules and regulations before they are implemented. They also provide mechanisms through which companies can obtain information about regulatory processes and provide written suggestions for regulatory improvements. Many of the provisions in this Chapter are of particular benefit to SMEs whose limited resources can make it difficult to learn about regulatory requirements and challenge discriminatory practices

Regarding Investment, ITAC 10 notes that this Agreement steps back from the United States' original proposal to eliminate completely investors' ability to protect their investments through the use of ISDS. In place of absolute prohibition, this Agreement selects certain sectors of the economy for ISDS coverage in Mexico but confines that coverage to companies contracting with the government. Among the covered companies are those with capital intensive energy projects (e.g., oil and gas exploration and extraction, cross-border power transmission and pipelines, and power generation). In Canada, the United States has chosen to eliminate ISDS protection completely – reasoning, that the highly developed Canadian legal system makes it unlikely that investor disputes will be poorly handled by Canadian courts. Although designated U.S. energy companies providing services in Mexico will likely be pleased to have some ISDS coverage, the coverage will not extend to new efforts including, presumably, energy infrastructure projects. In view of energy infrastructure needs, especially in Mexico, this limitation represents a significant shortcoming in this already limited proposal. ITAC 10 believes that there are serious policy and practical shortcomings in the United States' approach to this fundamental investment protection.

The Committee's views and advice on Investment and ISDS are discussed in detail elsewhere in this report.

Engineering

Engineering services hold a critical place in the U.S. economy and directly underpin a $1 trillion annual construction market in the United States. It is important to remember that any changes to professional service standards in general, and engineering services specifically, need to emphasize equal treatment for all competitors, while maintaining the public-safety based licensing requirements of each country. This requires consistent laws and regulations within each country that are transparent, consistent for all participants from nations bound by the agreement, and consistently enforced.

ITAC 10 supports U.S. Government efforts to negotiate new trade agreements designed to open international markets for U.S. engineering firms. The engineering services sector as related to design, construction, environment and infrastructure believes that it can operate successfully under the provisions of the Trade Agreement. Building on the elements of the original NAFTA, which necessarily focused on important licensure standards, comity and reciprocity among other salient matters, the Trade Agreement offers provisions that support the ability of the U.S. engineering services sector to offer creative, innovative and cost-effective solutions to North America's infrastructure challenges and the built-environment's needs. ITAC 10 finds acceptable language contained in the Cross Border Trade in Services Chapter – which may open markets in areas of technical strength of American firms – and in appropriate updates to Energy, Environment, Government Procurement, Intellectual Property, Labor, and Anticorruption Chapters.

Financial Services

NAFTA bolstered market access for insurers, banks and other financial services companies through market access commitments and rules to ensure fair, non-discriminatory treatment, as well provide certainty for investment. Due in large part to NAFTA, as of 2013, U.S. foreign affiliates in Mexico generated roughly $43 billion in sales (primarily in non-bank holding companies, manufacturing, finance, and insurance) and $128 billion in sales in Canada (primarily manufacturing, finance, and insurance). NAFTA has also led to important access to the Mexican procurement market, with U.S. insurers' Mexican subsidiaries providing insurance to two-thirds of all Mexican government employees, as well as supplying auto insurance to the Mexican government.

On balance, the Trade Agreement should expand market access for financial services companies and related service suppliers, and largely continue favorable conditions for U.S. foreign affiliate operations. As discussed below, the Trade Agreement continues many of the important market opening features of NAFTA, as well makes notable improvements on key issues, such expansion of financial services eligible for cross border trade, a clear prohibition on data and IT localization requirements (subject to regulatory access to required data), as well as other important updates. Unfortunately, the Trade Agreement weakens financial services companies' ability to enforce certain, important investment rules by eliminating recourse to ISDS. Additionally, the Trade Agreement creates uncertainty around government procurement market access for financial services firms. Additional work on ISDS and continuity of access to the Mexican procurement market should be undertaken prior to the Trade Agreement being signed.

Continuation of NAFTA Core Obligations

The Trade Agreement should continue competitive conditions through the core, U.S. FTA financial services commitments. These core obligations include:

- National Treatment & Most-Favored Nation Treatment. The chapter includes the standard national treatment and most-favored nation ("MFN") provisions, which require Parties not to discriminate against investors, financial institutions, and investments of other TPP Parties in favor of their own, or third country, investors, financial institutions or investments in like circumstances. (Articles 14.3 and 14.4)

- Market Access. The chapter prohibits parties from adopting or maintaining various measures, such as quantitative restrictions on the number of financial institutions or the total value or number of financial services transactions, or restrictions on the type of legal entity (i.e., subsidiary or branch) through which a financial institution may supply a service. As discussed below, importantly, this obligation is now extended to cross border financial services covered by Annex 14-A. (Article 14.5)

- Cross-Border Trade. The chapter requires Parties to permit, on a national treatment and MFN basis, the sale of certain financial services across borders. Each Party lists in an annex which financial services are subject to the commitment (unlike most services commitments, the cross-border financial services commitments are "positive list"). The chapter also requires Parties to permit its nationals and companies to purchase financial services from cross-border financial services suppliers of another party (i.e., consumption abroad). As discussed below, the services subject to the commitment have been expanded, as well afforded additional protections through the market access disciplines. (Articles 14.3, 14.4, Annex 14-A)

- Standstill. The agreement preserves the NAFTA cross border trade "stand still." Specifically, Article 14.6 prohibits new restrictions on cross-border trade in financial services which were permitted prior to NAFTA's entry into force (1/1/94).

- Payments and Transfers. Parties must allow payments and transfers that relate to investments in financial institutions and to the cross-border supply of the financial services covered by the cross-border trade commitment. Such transfers must be allowed to be made freely, without delay, and in a freely usable currency at the prevailing market rate. (Article 14.2)

- Investment Protections. Parties commit to provide U.S. investors in the financial services sector with additional investment protections, including adherence to a minimum standard of treatment, which requires both fair and equitable treatment and full protection and security for investments, as well commitments to compensate for damages due to civil strife, for expropriations, including indirect expropriations. (Article 14.2)

- Senior Management and Boards of Directors. Parties may not impose nationality requirements on senior management or key personnel of financial institutions of another Party and may not require more than a majority of boards of directors be residents or local nationals. (Article 14.9)

- New Financial Services. Parties committed to permitting financial institutions to supply any new financial services in their territories without adopting a new law or modifying an existing law, where local financial institutions are able to do so under such terms. (Article 14.7)

Improved and New Obligations

The U.S. government also introduced improved and new commitments and protections in the Trade Agreement that have not been included in previous trade agreements. These new commitments, described below, should be included in future trade agreements.

- Data Flows and Forced Localization. Perhaps the most significant change in the new Trade Agreement relative to NAFTA and other trade agreements is the inclusion of the commitment on the "Location of Computing Facilities" (Article 14.20). The acceptance of this commitment by Mexico and Canada in a free trade agreement will not only offer a practical improvement of conditions for U.S. financial firms operating in Canada (where data mirroring requirements exist), but also set a standard for all future trade agreements that the forced localization of data and IT infrastructure for financial firms should be prohibited. [3] The Committee greatly appreciates the Administration's pursuing this commitment, including the hard work of USTR and Treasury staff to explain the proposal to their counterparts in Canada and Mexico, and the Administration's continued prioritization of this issue. The Committee notes that achieving this outcome marks the fulfilment of one of Congress's goals as set out in trade promotion authority legislation. The Committee also notes that Article 14.19 appropriately updates the data flow language included in NAFTA.

- Application of Market Access Disciplines to Cross Border Trade. Past FTAs did not clearly apply market access disciplines to financial services included on the cross border list. Without the clear application, a Party could effectively undermine the cross border commitment with quantitative and other restrictions. Article 14.5, by specifically incorporating cross border trade commitments under Annex 14-A, ensures all the market access disciplines apply. Additionally, the market access commitment also includes a specific prohibition on requiring cross border suppliers supplying a financial service covered by Annex 14-A or by the "standstill" to maintain local offices. (Such a prohibition is without

[3] Annex 14-A currently includes a footnote reference that Canada requires cross-border financial services suppliers to maintain "records in Canada." While the Committee understands that Canada will have a 1 year transition period to comply with Article 14.20 (Location of Computing Facilities), we understand that after the 1 year transition, Canada cannot require local record keeping, except in conformity with Article 14.20. Accordingly, the Committee recommends that Canada's Annex 14-A footnote (or other aspects of the final text) be clarified to reflect the understanding that the footnote does not affect Canada's obligations under Article 14.20 after the transition period.

prejudice to licensing or other authorization requirements.[4]) This prohibition on requiring local offices for the cross border supply of covered financial services is an important clarification, as some U.S. trade partners have (incorrectly) taken a contrary position in interpreting similar language in other trade agreements.

- Expansion of Cross Border List. The Trade Agreement also expands the cross border to list to include electronic payment services, portfolio management services and investment advice (the latter two were included in past FTAs as a standalone commitment). By expanding the cross border list to include these financial services, they will benefit from national treatment, market access, and MFN treatment for the first time. (Annex 14-A)

    - *Electronic Payment Services (further described):* With respect to electronic payment services (EPS), the Trade Agreement builds on and expands commitments first made by Mexico and Canada in the Trans-Pacific Partnership (TPP) negotiations. Whereas the EPS commitment in TPP was limited by the fact that it did not provide national treatment, that has been added in the Trade Agreement. The most significant impact of the EPS commitment, if implemented fully and faithfully by all Parties, would be to limit the ability of Parties' to impose localization measures or other discriminatory requirements that could put foreign EPS suppliers at a competitive disadvantage relative to their domestic counterparts.

- Effective Enforcement Mechanism for Some Investment Protections. The Trade Agreement allows investors and financial institutions recourse to the investor-state dispute settlement (ISDS) mechanism for breaches of national treatment, MFN, and direct expropriation. Access to ISDS for breaches of national treatment and MFN, which is consistent with the U.S. Model BIT approach, is an important improvement. It will ensure that if a Party takes discriminatory action, firms and investors will be able to recoup their losses. The Trade Agreement also includes important procedural changes that ensure more expedient resolution of ISDS cases involving prudential measures. (Annex 14-C)

- Transparency. Article 14.3 includes the most rigorous transparency requirements included in any financial services chapter of a U.S. FTA to date. Parties commit to promote regulatory transparency in financial services and to ensure that all measures of general application covered by the chapter are administered in a reasonable, objective, and impartial manner. The chapter also includes obligations pertaining to the development and promulgation of such regulations, and consideration of licenses/authorizations.

Areas of Concern

While the Committee commends the U.S. government's efforts in updating and improving NAFTA, they falls short in some important respects for financial services. The issues are outlined below. The Committee urges additional work on ISDS and GP prior to signing.

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[4] Annex 14-A includes a footnote reference that Canada requires cross-border financial services suppliers to maintain "a local agent … in Canada." The Committee understands this footnote refers to agents for service of process, which is permissible under the market access prohibition on requirements for local offices discussed above.

- Exclusions from ISDS. Under the Trade Agreement, financial services firms and investors do not have access to the ISDS mechanism to enforce commitments on the minimum standard of treatment ("MST"), armed conflict and civil strife, indirect or regulatory expropriations, and transfers. These carve-outs from ISDS do not make sense and must be reconsidered.

  First, the carve-outs undermine enforcement of these disciplines, as there will not be meaningful recourse for violations. Specifically, without ISDS, investors and financial institutions will have to rely on government to government dispute settlement where violations occur. As a practical matter, as discussed above (in Section A. Cross Cutting Issues – Investment), the U.S. government is extremely unlikely to take up an individual case/claim, for myriad reasons, including resource constraints and reasons of comity. Second, on the chance that an individual claim is pursued by an Administration, it is not clear how the affected investor/financial institution would be "made whole" – as there is no known mechanism for the U.S. government to transfer an arbitral award to a private claimant. Third, the rationale the Administration used to provide other sectors (energy, telecom, etc.) with recourse to ISDS for the full suite of investment protections, applies equally to investors in financial institutions and financial institutions. (The rationale included: (1) the sectors must establish physical operations in a foreign market to access that market; (2) the sectors are highly regulated; and (3) the sectors require a significant capital investment.) Specifically, the Committee notes that regulators require financial institutions to physically operate in a jurisdiction to directly serve consumers – i.e., consumer facing businesses simply cannot be conducted on a cross border basis. Additionally, financial institutions are highly regulated (like telecom). Finally, like the other sectors which enjoy more robust ISDS protections, financial institutions are required to make significant capital investments (i.e., regulatory capital requirements) in order to operate in a jurisdiction.

  If the limitation on use of ISDS is maintained, the Committee notes two issues with respect to treatment of legacy cases. First, under Annex 11-C, the transition period for bringing ISDS claims under the original NAFTA is limited to 3 years from the date of NAFTA termination. The 3 year window is short compared to the 10 year period typically provided under terminated BITs. Second, Annex 11-C Footnote 20 applies the legacy claims provision to the financial services sector. However, the Financial Services Chapter, including Annex 14-C, does not appear to explicitly reference Annex 11-C. Specific reference may be helpful to avoid any confusion.

- Investment Protections Against Performance Requirements. The Trade Agreement does not incorporate the Investment Chapter's prohibitions on performance requirements in the Financial Services Chapter. This omission is significant with respect to the prohibitions included in Article 11.10.1 (f) and (h), which prohibit technology transfers and the requirement to utilize specific technologies. Such prohibitions are particularly important for financial services companies, which face such requirements in other markets, including China.

- Government Procurement. Under NAFTA, the Financial Services Chapter did not exclude government procurement. The Trade Agreement includes a clear carve out, which means important rules requiring non-discriminatory treatment, as well as the incorporated investment protections, do not apply. This exclusion should be corrected either through elimination of the exclusion, or through a letter between the Parties indicating that they will continue to treat foreign financial firms with domestic operations as domestic suppliers.

- NCMs. Mexico and Canada appear to have maintained NCMs in line with those notified in TPP, which overall, is a positive outcome and an improvement over NAFTA. The Committee does note that Mexico has taken NCMs with respect to insurance (Mexico Schedule III, A-9, A-10, A-11) that prohibit "foreign entities" from providing certain insurance (e.g., insuring maritime/aircraft hulls, transport vehicles where the hull/vehicle is Mexican owned or registered, surety where the insured is subject to Mexican law, etc.). The Committee understands that Mexican subsidiaries of U.S. insurers are not "foreign entities" and therefore would not fall within the scope of these NCMs.

Legal

Chapter 15 of the proposed Trade Agreement addresses cross-border trade in services, including trade in legal and other professional services. The majority of these provisions are similar to NAFTA or other free trade agreement provisions. Therefore, ITAC 10 supports these provisions, but notes that they do not appear to significantly change opportunities for U.S. lawyers and law firms providing services to Mexico. Given the largely state-based regulation of the practice of law in the United States, it is appropriate that the United States has not made significant changes to the regulatory scheme in this proposed Agreement.

Some of the most important obligations that are relevant to the supply of legal services include:

- **National Treatment & Most-Favored Nation Treatment**. Each Party is required to provide services and service providers of another Party treatment no less favorable than that provided to its own services and service providers in like circumstances or to services and service providers of any other Party or non-Party in like circumstances.

- **Market Access**. Parties are prohibited from adopting or maintaining measures that restrict or require the types of legal entities though which a service supplier may supply a service or that impose limitations on the volume or value of services or service providers.

- **Local Presence**. Parties are prohibited from requiring a service supplier of another Party to establish or maintain an office or enterprise in or be a resident in its territory as a condition of the cross-border supply of services.

- **Domestic Regulations**. Parties must ensure that all measures affecting trade in services are administered in a reasonable, objective, and impartial manner. Measures regulating the supply of services must be based on objective and transparent criteria and (for licensing procedures) not a restriction on the supply of services.

- **Recognition**. Parties may recognize the education or experience obtained, requirements met, or licenses or certifications granted in the territory of another Party or non-Party.

- **Payments and Transfers**. Parties must allow transfers and payments that relate to the cross-border supply of services to be made freely, without delay, and in a freely usable currency at the prevailing market rate.

Non-conforming Measures (NCMs)
Each Party has identified as exempt measures that relate to the provision of legal services. For example, the United States has claimed exemptions for patent attorneys and patent agents, and also a broad exemption for regional (state-level) restrictions on legal services. Appendix I-A specifically lists U.S. states maintaining a residency requirement or an in-state office requirement for the practice of U.S. law. These are similar to exemptions that the United States has maintained in other free trade agreements. Appendix II-A lists new U.S. commitments for eight U.S. states relating to the provision of foreign legal consulting services. These represent improvements to U.S. obligations under the GATS Agreement.

Mexico has also included a comprehensive list of NCMs relating to the provision of legal services, including foreign legal consultancy. (See pp. 27-28 of Mexico NCMs.) These include the following:

- Approval from the National Commission on Foreign Investment (Comisión Nacional de Inversiones Extranjeras, CNIE) is required for investors of another Party or their investments to own, directly or indirectly, more than 49 percent of the ownership interest in Mexican enterprise that provides legal services.
- Only lawyers licensed in Mexico may have an ownership interest in a law firm established in the territory of Mexico.
- Lawyers licensed to practise in another Party will be permitted to form a partnership with lawyers licensed in Mexico.
- The number of lawyers licensed to practice in another Party serving as partners in a firm in Mexico may not exceed the number of lawyers licensed in Mexico serving as partners of that firm. Lawyers licensed to practice in another Party may practice and provide legal consultations on Mexican law, whenever they comply with the requirements to practice as a lawyer in Mexico
- A law firm established by a partnership of lawyers licensed to practice in another Party and lawyers licensed to practice in Mexico may hire lawyers licensed in Mexico as employees.
- These restrictions do not apply to the supply, on a temporary fly-in, fly-out basis or through the use of web based or telecommunications technology, of legal advisory services in foreign law and international law and, in relation to foreign and international law only, legal arbitration and conciliation/mediation services by foreign lawyers.

Annex on Professional Services (and Appendix on Mutual Recognition Agreements)
Annex XX-C requires each country to consult with relevant bodies in its territory to seek to identify professional services where at least two countries are mutually interested in establishing a dialogue with the relevant bodies of other Parties with a view to facilitating trade in professional services.

The Annex also states that for such identified services, the Parties shall encourage their relevant bodies to establish dialogues with the relevant bodies of the other parties, in an effort to facilitate trade in professional services. The Annex lists a variety of issues that these dialogues may consider. The Annex also establishes a Professional Services Working Group to support such dialogues.

Finally, Appendix XX includes a detailed series of guidelines for mutual recognition agreements or arrangements (MRAs) for the professional services sector. The Appendix emphasizes that these guidelines are non-binding and are intended to be used by the Parties on a voluntary basis. The Appendix includes detailed sections relating to the conduct of negotiations and relevant obligations, as well as the form and content of MRAs.

ITAC views Chapter 15, along with the Annexes and Appendices, as generally positive and largely maintaining the status quo with regard to provision of legal services in the United States and Mexico.

Medical

The Trade Agreement improves access to telemedicine consulting service markets in Mexico, and overall is a better agreement than its predecessor for medical services.

Improvements are found in Chapter 15, Cross Border Trade in Services, Article XX.9: Recognition. The Agreement clearly encourages the establishment of mutual recognition agreements for the licensing of professional services, including medicine, and sets up a framework for future considerations. In paragraph 1, the agreement allows for mutual recognition of educational requirements, standards and licensing through agreement or arrangements, and in paragraph 3, allows for one party to the Agreement to make a comparable agreement if other Parties to the Agreement reach a mutual recognition arrangement. It also requires the outstanding Party an adequate opportunity to demonstrate its education, licensing and standards should also be recognized.

Annex XX-C, Professional Services, Mutual Recognition Agreements, the Trade Agreement outlines a pathway towards mutual recognition agreements. This pathway is much more detailed and developed than former language in the previous NAFTA agreement, or other FTAs, regarding mutual recognition, which generally call for the future establishment of a committee to study the subject.

Other improvements include Non-Conforming Measures found in Annex II – Schedule of Mexico, page 63, which lists limitations to services regarding the supply of a service from the territory of one Party to another; the supply of a service by a person in one Party's territory to another; and by the services of an investor in one Party's territory to another. In each case, Mexico did not take any limitations for Medical and Dental Services.

Under Health Related and Social Services, (item 8 on the list), A. Private Hospital Services, Mexico also did not place limitations on the supply of services in the territory of one Party by a person or an investor in the territory of another Party.

The inclusion of no limitations as NCMs in the Mexican Annex may prove to help the growth of an emerging sector of the medical field in which patient care is co-managed by specialists in the United States in collaboration with colleagues in Mexico virtually via internet-based communications. In these services, more commonly known as telemedicine or remote delivery of care, specialists in the U.S. act as advisors to their counterparts in Mexico in treating cases of complex medical care on an ongoing basis throughout the course of treatment.

In the negative, but expected because of licensing barriers, the Trade Agreement in Annex 1, Mexico Non-Conforming Measures, sub-sector Medical Services (page 24) restricts the supply of in-house medical services only to Mexican nationals licensed as doctors in Mexico. Perhaps more work via mutual recognition agreements can lead to modifications in this restriction in the future.

Trucking

The Trade Agreement's Cross Border Trade in Services chapter contains a new non-conforming measure in the area of land transportation related to long-haul trucking services, which allows the United States to limit the amount of services provided in the event of "material harm" to U.S. suppliers, operators, or drivers. ITAC 10 believes that this provision is unwarranted, given the very limited cross-border trucking services provided today. According to the Federal Motor Carrier Safety Administration, there are only 35 Mexico domiciled motor carriers authorized to operate long-haul. The provision is also vague, as it neither clearly defines what constitutes "material harm" nor how such harm would be determined and limits implemented.

Furthermore, the Committee is concerned that the provision creates a dangerous precedent that could harm U.S. services interests in future negotiations. The United States is the largest cross-border services exporter and U.S. service industries are the most competitive and innovative in the world. It is entirely possible that U.S. trading partners would want to incorporate similar provisions in future trade agreements to protect them from "material harm" from competitive U.S. services exports.

VI. **Membership of Committee**

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Independent Film & Television Alliance

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Vice President, Federal Affairs
Liberty Mutual Insurance

Ms. Brenda J. Santoro
Head of Trade Services
Silicon Valley Bank

Stephen M.H. Simchak, Esq.
Vice President, International Affairs
and Chief International Counsel
American Insurance Association

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