

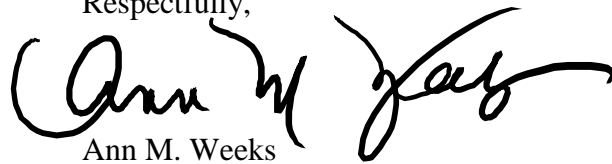
September 27, 2018

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

Dear Ambassador Lighthizer:

In accordance with section 5(b)(4) of the Bipartisan Trade Priorities and Accountability Act of 2015, and section 135(e) of the Trade Act of 1974, as amended, I am pleased to transmit the report of the Industry Trade Advisory Committee on Standards and Technical Trade Barriers on The Trade Agreement with Mexico and potentially Canada, reflecting a consensus advisory opinion on the proposed Agreement.

Respectfully,

A handwritten signature in black ink, appearing to read "Ann M. Weeks". The signature is fluid and cursive, with a large initial "A" and a long, sweeping tail.

Ann M. Weeks

Chair

ITAC on Standards and Technical Trade Barriers

The Trade Agreement with Mexico and potentially Canada

Report of the  
Industry Trade Advisory Committee on Standards and Technical Trade Barriers

September 27, 2018

**Date:** 27 September 2018

**Committee:** Industry Trade Advisory Committee on Standards and Technical Trade Barriers

**Subject:** Industry Trade Advisory Committee on Standards and Technical Trade Barriers (herein ITAC 14): Advisory Committee Report to the President, the Congress and the United States Trade Representative on The Trade Agreement with Mexico and potentially Canada.

## **I. Purpose of the Committee Report**

Section 5(b)(4) of the Bipartisan Trade Priorities and Accountability Act of 2015, and section 135(e)(1) of the Trade Act of 1974, as amended, requires that advisory committees provide the President, the U.S. Trade Representative, and Congress 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 on whether, and to what extent, the agreement promotes the economic interests of the United States, and achieves the applicable overall and principle negotiating objectives set forth in the Trade Act of 2002.

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, ITAC 14 hereby submits the following report.

## **II. Executive Summary of Committee Report**

ITAC 14 commends USTR for achieving significant advances in many areas of The Trade Agreement with Mexico and potentially Canada relevant to its scope. Specifically, Chapter 11 Technical Barriers to Trade (TBT) and Chapter 28 Good Regulatory Practices are exceptional examples of trade agreement modernization – reinforcing the core of the WTO TBT Agreement and expanding beyond the achievements of the former Trans-Pacific Partnership text.

Sector Annexes likewise contained advancements in scope, with ITAC 14 calling out illustrative examples in the Medical Device, Information and Communication Technology Equipment and Chemicals annexes. At the same time, concern remains that the largely TBT-related sector annexes are not explicitly tied to the horizontal disciplines of the TBT Chapter. The absence of such an explicit reference sets a dangerous precedent for future trade agreements where trading partners would interpret Chapter 11 disciplines as not applying to sector annexes.

Finally, ITAC 14 prefers that The Trade Agreement with Mexico and potentially Canada be trilateral for the reasons denoted in our original negotiating guidance (see Section IV below). Having said that, the significant advances of the TBT and GRP Chapters in The Trade Agreement with Mexico and potentially Canada go a long way toward addressing legacy pain points in NAFTA, and ITAC 14 wishes to see them ratified and implemented as soon as possible.

### **III. Brief Description of the Mandate of ITAC 14**

The Committee shall perform such functions and duties and prepare reports as required by Section 135 of the Trade Act of 1974, as amended, with respect to the sector and functional advisory committees.

The Committee advises the Secretary of Commerce and the 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 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 thereunder.

In particular, the Committee provides detailed policy and technical advice, information, and recommendations to the Secretary 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 products of its 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 ITAC 14**

ITAC 14 submits that standards, technical regulations, and related conformity measures (i.e. “TBTs”) are the keys to realizing the fullest potential that a modernized NAFTA would bring to the United States. Three primary factors make addressing TBT issues a key priority:

1. The far-reaching impact that TBTs have on global trade and U.S. exports. The June 2016 U.S. Department of Commerce report “Standards and Regulation: Measuring the Link to Goods Trade” underscores this point. The report estimated that technical regulations notified to the World Trade Organization (WTO) in 2015 affected 92 percent of U.S. goods exports and 93 percent of global goods exports.
2. The growth in the wide application of technical regulations and standards to products *and* increasingly to services.
3. U.S. trading partner efforts to achieve a competitive advantage through requiring other trading partners to adopt their technical requirements and conformance models.

When ITAC 14 (then ITAC 16) provided its negotiating objectives for the modernization of the North America Free Trade Agreement (NAFTA), we encouraged such modernizations to build upon core WTO disciplines and to strengthen provisions negotiated in the former Trans-Pacific Partnership text. The recommended negotiating objectives of ITAC 14 thus included:

1. **Preserve the trilateral nature of NAFTA and protect current levels of access.** Though global supply chains in the 21<sup>st</sup> Century necessitate a modernized NAFTA, the original NAFTA enabled the establishment of these effective regional supply chain networks that benefit many U.S. manufacturers and services providers. Modernizing NAFTA on a trilateral basis thus must be the cornerstone to avoid undercutting the current benefits that U.S. companies enjoy and to uphold the Administration’s “do no harm” pledge. ITAC 14 believes

that the benefits of TBT and GRP commitments are optimized when they extend beyond bilateral agreements.

2. **Overhaul the entirety of the TBT Chapter to maximize the competitiveness of U.S. goods and services.** This objective has four basic elements. One, ensure the acceptance and use of U.S. standards. Two, remove impediments to national treatment of conformity assessment service providers to facilitate trade for manufacturers. Three, consider sectoral annexes and ensure TBT-related elements are either embedded in the TBT Chapter directly or explicitly reference governance by the TBT chapter. Four, strengthen the enforcement of the commitments.
3. **Address shortcomings in critical areas with TBT-related consequences to ensure U.S. companies have reciprocal and fair access to overseas' markets.** Achieving successful market access and fair and reciprocal treatment oftentimes relies upon the interplay and strength of provisions in related chapters. TBT-driven benefits can be eroded if such corresponding chapters as intellectual property, state-owned enterprises, sanitary and phytosanitary standards, customs, and services provide exceptions to the application of TBT commitments. With increased data flows and the connectedness of products, negotiating Digital Trade and E-Commerce provisions that reinforce TBT principles will mitigate technical barriers from limiting further expansion of U.S. products and services.
4. **Codify best practices in commitments to Good Regulatory Practices (“GRPs”) to optimize regulatory and trade outcomes.** The process by which governments develop and implement standards, technical regulations and conformity measures significantly affects the compliance burden of manufacturers and the market access of their products. They likewise affect the cost burden and market access of related (conformity assessment) service providers. Getting GRPs “right” through updated NAFTA provisions addresses the root cause of many existing TBTs and can minimize future ones, as well as enhance regulatory compatibility. Codified GRPs then serve to drive more ambitious policy objectives such as regulatory cooperation while upholding direct private sector participation on an equal basis; addressing common issues while mitigating unnecessary differences in regulatory approaches; and resulting in resource efficiencies for both industry and government.

## **V. Advisory Committee Opinion on the Agreement**

The sector coverage as listed above for ITAC 14 includes The Trade Agreement with Mexico and potentially Canada Chapter 11 Technical Barriers to Trade and Chapter 28 Good Regulatory Practices. Parts of other Chapters directly intersect with the sector coverage of ITAC 14, including:

- Chapter 8 Energy (specifically 8.a Energy Performance Standards),
- Chapter 12 Sectoral Annexes
  - 12a. Information and Communication Technology (ICT Equipment)
  - 12b. Pharmaceuticals
  - 12c. Medical Device
  - 12d. Cosmetics Products
  - 12e. Chemical Substances
- U.S. – Mexico Bilateral Side Letter on Automotive Safety Standards
- Chapter 19 Digital Trade

### **Chapter 11 Technical Barriers to Trade**

The TBT chapter promotes a more integrated and efficient regulatory environment (based on science), helps eliminate unnecessary burdens on cross-border trade (in both goods and services), and provides more certainty for businesses and the public. When you combine these TBT improvements with strong advancements in related provisions in other parts of The Trade Agreement with Mexico and potentially Canada, we unlock the greatest benefit for U.S. interests and can provide a beacon for other trading partners in the transformation of their own regulatory and standards systems.

Specific advancements to underscore include:

**Recognition of “international standards” as defined by the WTO.** NAFTA predated the Decision of the TBT Committee (G/TBT/1/Rev.10) (of the WTO) on international standards, which clarified that standards satisfying the Code of Good Practice principles of standards development (e.g. balance, openness, due process, etc.) are in fact “international”. Explicit reference of the WTO TBT Committee Decision underscores that standards of U.S.-domiciled standards development organizations are international for the purposes of satisfying commitments in The Trade Agreement with Mexico and potentially Canada. This Chapter 11 Article 4.2 and Article 4.3 provisions will preclude discrimination based on where a standards development organization is domiciled.

**The ability of regulators to reference multiple standards.** Chapter 11 Article 5.3 obligates a Party to consider all standards that satisfy the legitimate objective of a technical regulation or conformity assessment procedure. Introduction of this provision will enable technically equivalent standards to be referenced and used, ultimately smoothing the compliance process for manufacturers’ goods.

**Improved market access terms for conformity assessment service providers.** Chapter 11 Article 6.2 removes in-country presence requirements on conformity assessment service providers. This provision improves significantly the ability of such service providers to establish laboratories on a business-case basis, and enables the provision of cross-border services. Article 6.5 likewise enables such providers to leverage their global network of laboratories and external partner laboratories to serve manufacturer clients conveniently and efficiently for improved access to markets. Clarification of how, and under what timeline, Parties will meet these commitments is important to obtain early in the implementation discussions.

#### Chapter 28 Good Regulatory Practices

The GRP chapter likewise introduces novel and strengthened GRP provisions that improve foundational regulatory processes, transparency, and quality. These serve as a new high-water mark for such commitments in trade agreements by codifying the systemic practices that enable more full implementation of other chapter provisions such as those on TBT, Transparency and Procedural Fairness, and Trade Facilitation among others. Together, the provisions driver greater degrees of accountability through transparency and public engagement at all points in the rule-making process and in the retrospective review commitments.

Significant provisions include those on: information quality in the development of regulations, maintaining a dedicated website of regulatory information, use of plain language, transparent development of regulations, regulatory impact assessments, obligations related to final publication, retroactive review, annual reporting, regulatory cooperation, and the committee on GRP. Chapter 28 Article 5 is essential to ensure that quality data and science underpin all related

policies. This provision also is critical for the promotion of greater regulatory transparency and reducing potential future areas of regulatory divergence.

Chapter 8.a Energy Performance Standard, Chapter 12 Sector Annexes, Chapter 19 Digital Trade Related TBT and GRP advancements were made in the sectoral annexes called out in section II. above. Among notable improvements are the Medical Device annex agreement to recognize audits of device manufacturers' quality management systems that are in accordance with the requirements of the Medical Device Single Audit Program (MDSAP) and the ICT annex codifying commitments to operationalize the U.S.-Mexico Telecom Mutual Recognition Agreement and to harmonize standards. The inclusion of the Chemicals sector annex will strengthen and align the U.S. risk-and science-based approach to chemical regulation throughout the region.

At the same time, ITAC 14 is concerned that the Chapter 8.a Energy Performance Standard and the Chapter 12 Sector Annexes are neither embedded as annexes in the TBT chapter where bracketed text was crafted to subject them to the Chapter 11 TBT horizontal disciplines, nor contain explicit references in the sector annexes themselves that such TBT-related commitments shall be governed by the Chapter 11 TBT horizontal disciplines. This seems inconsistent both with the TPP best practice and with The Trade Agreement with Mexico and potentially Canada Chapter 19 Digital Trade Article 2.4 in which electronically-rendered services are explicitly subject to horizontal obligations in the investment and services chapters. While we can presume that all Parties to this agreement interpret the TBT-related sectoral commitments as being governed by Chapter 11, the absence of such an explicit reference sets a dangerous precedent for future trade agreements where trading partners would interpret Chapter 11 disciplines as not applying to sector annexes. If a provision similar to that in Chapter 19 Digital Trade cannot be added to Chapter 8 and Chapter 12 sector annexes, then ITAC 14 asks that the U.S. negotiators require implementation and work plan documents for those chapters to include the referenced language.

Additional Chapters indirectly factor into the effectiveness of overall advancements made in the core Chapters noted above. These additional Chapters include:

- Chapter 2 National Treatment and Market Access for Goods
- Chapter 15 Cross Border Trade in Services
- Chapter 20 Intellectual Property and 20a Med-Pharma Annex
- Chapter 22 State-Owned Enterprises
- Chapter 24 Environment

**Chapter 2 National Treatment and Market Access for Goods:** ITAC 14 appreciates the continuity in the provisions of The Trade Agreement with Mexico and potentially Canada that require that re-manufactured goods satisfy the same technical requirements as new products.

**Chapter 15 Cross Border Trade in Services:** As it intersects with TBT matters, Chapter 15 excludes from its scope those services related to the "exercise of government authority." We understand that because Mexico and Canada leverage the private sector in support of fulfilling their regulatory mandates, those private conformity assessment service providers can make business-case-driven decisions about where and how to deliver the services. Validation of this understanding during implementation is recommended. Otherwise, ITAC 14 perceives Chapter 15 as upholding related provisions negotiated in Chapter 11.

**Chapter 20a Med-Pharma Annex:** The Trade Agreement with Mexico and potentially Canada text includes provisions for procedural fairness in medical device reimbursement, which provide transparency to the process by which national (but not state or provincial) health care authorities in the Party countries set medical device reimbursement rates. The procedures require that countries act within a reasonable time period, that the rules used are made public, that applicants can comment in the decision process, that the basis for decisions is available to the applicants, and that an appeals process is likewise available to the applicants. These TPF provisions are closely related to, and complement those of, the GRP and TBT chapters in providing tools to remove non-tariff barriers for U.S. exporters.

**Chapter 22 State-Owned Enterprises:** As it intersects with TBT matters, Chapter 22 carves out services non-discrimination exceptions related to the “exercise of government authority.” We understand that because Mexico and Canada leverage the private sector in support of fulfilling their regulatory mandates, those private conformity assessment service providers can make business-case-driven decisions about where and how to deliver the services. Validation of this understanding during implementation, perhaps as part of the “Further Negotiations” clause under Chapter 22 and the “Committee on TBT” structure in Chapter 11, is encouraged.

**Chapter 24 Environment:** The inclusion of the Environment Chapter is a significant improvement. In alignment with the GRP and TBT chapters, the provisions included in this chapter further promote cooperation on environmental policy and ultimately sustainable development. The proposed text helps ensure that parties coordinate on developing environmental policies and that they are integrated into trade and investment policies in order to reduce NTBs and foster transparent, effective, enforceable and mutually coherent regulatory systems. The recognition and promotion of “Voluntary Mechanisms to Enhance Environmental Performance” is greatly appreciated, as many industry sectors implement voluntary programs and/or standards to enhance environmental, health, and safety performance.

## **VI. Membership of Committee**

### **CHAIR**

Ms. Ann M. Weeks  
Vice President, Global Government Affairs  
UL LLC

### **PRIMARY VICE CHAIR**

Mr. S. Joe Bhatia  
President and Chief Executive Officer  
American National Standards Institute

### **SECONDARY VICE CHAIR**

Mr. Daniel J. Mustico  
Vice President, Government and Market Affairs  
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Mr. Steven J. Bipes  
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Ms. Alexa S. Burr  
Director, Regulatory and Technical Affairs  
American Chemistry Council

Mr. Jeffrey H. Grove  
Vice President, Global Policy and Industry Affairs  
ASTM International

Ms. Heidi C. Hijikata  
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Mr. David Y. Ling  
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Hewlett-Packard Enterprise

Mr. Angus B. Low  
Manager, Global Products Standards, and Regulations  
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Mr. David L. Miller, P.E.  
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Mr. Wayne E. Morris  
Consultant  
Representing Illinois Tool Works

Mr. Michael F. Violette  
President  
Washington Laboratories, Ltd.

Mr. Christopher B. Winkel  
Product Compliance and Support Manager  
Caterpillar Inc.