

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 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, I am pleased to transmit the report of the Industry Trade Advisory Committee for the Digital Economy on the Trade Agreement with Mexico and potentially Canada, reflecting our consensus advisory opinion on the proposed Agreement.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Sanford", with a horizontal line extending to the right.

Jennifer H. Sanford  
Chair  
Industry Trade Advisory Committee  
on the Digital Economy

Trade Agreement  
with Mexico and potentially Canada

Report of the  
Industry Trade Advisory Committee on the Digital Economy

September 25, 2018

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Industry Advisory Committee for the Digital Economy

**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 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.

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 Advisory Committee for the Digital Economy hereby submits the following report.

**II. Executive Summary of Committee Report**

Overall, the International Trade Advisory Committee on Digital Economy (ITAC-8 or Committee) believes that the trade agreement with Mexico represents an affirmative step forward in advancing U.S. trade policy in a number of areas. The Committee notes that the United States did not secure a commitment for Mexico to join the Information Technology Agreement (ITA) and has not informed the Committee about the market access provisions in Government Procurement. However, the Chapters on Market Access, Technical Barriers to Trade, the Annex on Information and Communications Technologies (ICT), Cross-Border Trade in Services, Telecommunications, Digital Trade and Intellectual Property Rights (IPR) are generally quite advanced and beneficial to the interests of the U.S. digital economy sector.

Specifically, the Committee supports the Telecommunications Chapter, because it includes numerous commitments that should foster increased opportunities for market access and trade for U.S. providers in Mexico's telecommunications market. These include provisions to ensure nondiscriminatory access for U.S. companies to Mexico's public telecommunications services, including submarine cable landing stations. The Chapter also includes provisions that effectively

bind Mexico to its Telecommunications Reforms passed in 2013 as well as to implementing regulations promoting effective competition. The Chapter also includes an innovative provision on flexibility in approaches to regulation, an updated section on light-touch approaches to value added services, and safeguards to help protect technology choice, all these measures being well-suited to today's telecommunications sector in which technology is evolving rapidly.

The Committee supports the Digital Trade Chapter because of its numerous important commitments that should foster increased opportunities for growth in digital trade benefiting the United States. For example, the Digital Trade Chapter includes two notable provisions to address the high priority objectives of this ITAC and the Congress regarding cross-border data flows and avoidance of requirements to use or locate computing facilities locally. Related to digital trade users, the Parties have recognized the benefits of consumer choice and information regarding use of the Internet and have committed to having legal frameworks to protect personal information of users and to taking steps to address spam. The Chapter also creates conduit status for "interactive computer service providers" from liability for third party content, consistent with U.S. law.

The Committee supports revisions to the Cross Border Trade in Services Chapter. Including telecommunications services and "service suppliers" in the Chapter supports both the distribution and sale of the products and services of the digital economy. Ensuring that no special corporate entity is required for foreign businesses to do business in a signatory country removes barriers for small to medium businesses that may not have the resources to navigate non-standard entities.

Balanced protection of intellectual property rights (IPR) is critical to the functioning of the digital economy. NAFTA provides equitable treatment for the rights of IPR holders and those of other digital economy participants, and its provisions discussing the combination of copyright remedies and safe harbors will play a key role in the effectiveness of NAFTA as a whole. To the extent NAFTA signatory countries maintain legal regimes that differ from the IPR provisions in NAFTA, those differences should be addressed in annexes to the IPR Chapter. The inclusion of protection for trade secrets also strengthens the ability of companies in signatory countries to have confidence in their businesses.

Representing the consensus viewpoints of digital economy stakeholders, the Committee believes that the IPR Chapter is consistent with the Committee's overall IPR priorities, and we support this Chapter; however, the Committee recommends small modifications be made in the definitions of "Internet Service Provider" (ISPs).

### **III. Brief Description of the Mandate of the Industry Advisory Committee for the Digital Economy**

The Committee provides detailed policy and technical advice, information, and recommendations to the Secretary and the United States Trade Representative (USTR) regarding trade barriers, negotiation of trade agreements, and implementation of existing trade agreements affecting its sectors; 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 Advisory Committee for the Digital Economy**

The Committee strongly supports significantly increasing U.S. exports, and boosting the global competitiveness of U.S. industry and American workers. The prevention and elimination of foreign trade barriers, which impede the ability of U.S. providers of information and communications technology (ICT) goods and services to participate in international markets, will help to accelerate U.S. economic growth, facilitate technological innovation and create well-paying jobs.

The 21<sup>st</sup> Century is seeing the rapid expansion of digital trade routes, increasing access to more export markets for many goods and services (including digital and digitally-enabled products), enabling the creation and export of new applications and business models – such as cloud computing services and artificial intelligence (AI) – and generally benefitting exports by improving U.S. business efficiency and technology leadership. The Committee urges the prioritization and pursuit of the following objectives as the U.S. government advances its trade agenda bilaterally, plurilaterally, regionally and multilaterally. The Committee also stands ready to support and advise the U.S. Government in its pursuit of these objectives.

##### **A. Goods Issues**

1. Eliminate tariffs on all ICT products (hardware and software) and components, including computer, telecommunications and networking equipment; medical equipment; and scientific instruments.
  - a. Gain new signatories to the Information Technology Agreement (ITA), expedite the phase out of tariffs under the ITA, ensure that as products covered by the ITA evolve technologically they retain zero duty treatment, and continually seek to expand the product coverage under the ITA.
2. Eliminate discriminatory taxes that create barriers to trade.
3. Support government recognition of global, market-led, voluntary standards developed through an open and transparent process. Ensure that standards and conformity assessment requirements do not create unnecessary barriers to trade.
4. Enable trade facilitation through streamlined customs procedures, transparent and nondiscriminatory advanced rulings, simplified country of origin requirements, liberal rules of origin, globally-harmonized classification decisions, and fair customs valuation.
5. Reduce technical barriers to trade.
  - a. Ensure that product testing, licensing and certification requirements, certificate of origin mandates and customs procedures are fair, transparent and streamlined. Eliminate those procedures that are duplicative, increase costs to users and delay the availability of products to market.
  - b. Promote the implementation of international standards and adherence to international norms. Use existing bilateral processes to address standards and

regulatory issues, including product, data security, and cyber security mandates, as well as source code disclosure requirements.

6. Where product regulations are deemed necessary, they must be nondiscriminatory, and be based on sound- and widely-accepted scientific principles and available technical information, and should not impede the effective functioning of the market. Consistent with existing WTO rules, regulations – including conformity assessment requirements – should be the least trade restrictive possible.

## **B. Services Issues**

1. Increase the number of countries with obligations in telecommunications services, and increase the range of services covered in country schedules. Ensure that telecommunications services are liberalized on a technology-neutral basis and are competitive. Promote independent regulatory authorities and transparency in the regulatory process. Ensure nondiscriminatory access to, and use of, public telecommunications networks and services.
2. Obtain full market access and national treatment for computer- and computer-related services. Ensure that technologically-evolving IT services, including those that are delivered electronically, continue to be covered by trade agreements and prevent barriers to these services from developing (for instance, linking the regulatory approval of digital services with location of infrastructure requirements, or imposing local content requirements).
3. Maximize the liberalization of all services – including new services – that can be delivered electronically to create global competitiveness
4. In the interest of technological and competitive neutrality, seek commitments that Parties not apply greater regulatory obligations to a category of service based on its integration with another more regulated category of service, the least burdensome level of regulatory obligations apply to the integrated service, and market access commitments apply based on the service provided, not the entity that provides the service.
5. Seek commitments to address current and potential regulatory barriers to evolving ICT services through measures to simplify regulatory requirements such as excessive reporting obligations, application of consumer-based regulatory requirements to enterprise services, and complex and lengthy licensing processes.

## **C. E-Commerce Issues**

1. Electronically-delivered goods and services should receive no less favorable treatment under trade rules and commitments than like products delivered in physical form. Software and other digital products should be duty-free.

2. Oppose the creation of customs classification requirements for digitally-enabled goods and services.
3. Engage in the WTO and other appropriate international fora to promote a market-led approach to e-commerce.
4. Make permanent the WTO moratorium on customs duties on electronic transmissions.

**D. Intellectual Property Issues**

1. Seek to create a strong, fair, transparent, and internationally-harmonized system for the protection of intellectual property (copyright, patents, trademarks, and trade secrets).
2. Combat global software piracy, and technology product counterfeiting.
3. Seek commitments to achieve an appropriate balance in copyright systems, including through copyright exceptions and limitations, such as copyright safe harbors for Internet Service Providers (ISPs), comparable to those in U.S. law.
4. Continue to include conduit protection language in trade agreements in order to allow those who create and use content to be responsible for their actions, consistent with recent changes in U.S. law.

**E. Government Procurement Issues**

1. Seek market access and transparency in government procurement.
  - a. Expand the membership of the WTO Government Procurement Agreement.
  - b. Seek a WTO Agreement on Transparency and Nondiscrimination in Government Procurement.
2. Promote global use of electronic publication of procurement information, including notices of procurement opportunities.
3. Oppose product and restrictive cyber security mandates, and restrict source code disclosure requirements, as conditions of market access in government procurement.
4. Require governments to refrain from imposing localization requirements in government procurement.

**F. Regulatory Issues**

1. Promote development and use of the least trade-restrictive regulations if necessary in order to achieve a specific public policy objective and to ensure the free flow of information across borders.
2. Ensure that proposed regulation is: 1) developed, implemented and enforced in a transparent manner; 2) justified by cost-benefit analysis and quantitative risk assessment;

3) developed with the early notice and full participation of domestic and foreign stakeholders at every stage; 4) is technology neutral; and 4) subject to appeal and independent review.

3. Promote environmental regulations that are based on sound science and have been subjected to rigorous cost-benefit analysis.

#### **G. Localization and Cross-Border Data Flows Issues**

1. Obligate governments to refrain from mandating local data storage or imposing localization requirements on data infrastructure and facilities which impede cross-border data flows. Commitments to refrain from localization requirements should apply to all sectors, including financial services and manufacturing.
2. Oppose local content requirements in products and services.

#### **H. Privacy and Security Issues**

1. Promote approaches to data security and privacy that encourage the development of the most appropriate and least trade restrictive privacy protections, while ensuring the free flow of information across borders. In particular, trade agreements should build on best practices developed by public/private partnerships (e.g., the U.S.-EU Privacy Shield and the APEC Cross-Border Privacy Rules) as a way to ensure both adequate privacy protections and broad market access. Maintain U.S. leadership in supporting these frameworks.
2. Continue U.S. leadership in the development of privacy and cyber security, including supply chain, best practices.
3. Recommend government cooperation to promote the implementation of voluntary risk-based cybersecurity approaches within and across both the public and private sectors in order to avoid prescriptive or discriminatory cybersecurity regulation.
4. Oppose product and restrictive cyber security mandates, and prohibit source code disclosure requirements, as conditions of market access (e.g., certification of equipment/software, service licensing); and procurement.
5. Protect innovation in encryption products to meet market demand for features that protect security and privacy, while allowing access to communications to law enforcement, consistent with current U.S. law. Oppose mandates for “back doors” to encryption algorithms that would degrade the safety and security of data, and the trust of end-users. Ensure that commercial cryptographic products are not subject to local regulations or requirements, e.g., implementation of non-standard algorithms, limited key lengths, key escrow or management or other restrictions that deviate from international standards and norms.



**I. Enforcement**

1. Promote technology-neutral, equitable, and transparent enforcement.
2. Ensure that all countries comply with their obligations under free trade agreements.
3. USTR should apply all available tools to ensure that our trading partners comply with their obligations under trade agreements. While consultations and negotiations can be effective and more expeditious than litigation, the WTO dispute settlement process should be reserved for situations when other approaches have not worked.

**J. Other Issues**

1. Enable global operations of U.S.-based companies by opening markets abroad, avoiding restrictions on worldwide sourcing.
2. Promote the adoption of the strongest possible protections and access for U.S. investors overseas in U.S. trade agreements and Bilateral Investment Treaties.
3. Ensure U.S. and WTO trade rules are balanced, and do not impose unreasonable, unfair or unnecessary barriers or costs on U.S. exporters and importers.
4. Ensure fair competition with state-owned, state-supported and state-invested enterprises.
5. Urge trading partners to notify government subsidies, consistent with WTO obligations, and abide by OECD guidelines for export credit agencies.

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

The International Trade Advisory Committee on Digital Economy (ITAC-8 or Committee) appreciates the opportunity to comment and advise the Office of the USTR and the U.S. Department of Commerce (Commerce) on the digital economy-related provisions of the recently-negotiated trade agreement with Mexico. USTR staff has indicated repeatedly that the text of the agreement is not final and that negotiations continue with both Mexico and Canada. The fluctuating nature of the agreement makes it difficult for the Committee to provide definitive guidance to USTR and Commerce on the agreement; however, the Committee endeavors in the text below to assess the agreement as it was posted to the cleared advisors' website on August 31, 2018.

To begin, the Committee strongly believes that the North American Free Trade Agreement (NAFTA) should remain a trilateral trade agreement, and we appreciate that USTR and Commerce are working diligently and in good faith to include Canada in a final agreement.

Below, the Committee provides assessments of the following Chapters:

- National Treatment and Market Access for Goods
- Technical Barriers to Trade
- Rules of Origin
- Customs and Trade Facilitation
- Annex on ICT
- Government Procurement
- Cross-Border Trade in Services
- Telecommunications
- Digital Trade
- Intellectual Property Rights
- Non-Conforming Measures

### **National Treatment and Market Access for Goods**

While the overall provisions related to national treatment and MFN are laudable, the Committee is disappointed that the Administration did not take this opportunity to negotiate Mexico's membership in the Information Technology Agreement (ITA). ITA accession has been a long-standing U.S. trade policy objective, benefitting the international competitiveness of the U.S. technology sector. The ITA has resulted in significant opportunities for U.S. exports and helped make the technology supply chain more efficient. The Committee hopes the Administration will not let another trade agreement negotiation go by without ITA accession on its list of must-have objectives.

In the technology sector, many products are designed to be modular – that is, to have certain parts and components swappable in case of a malfunction in one part of the device. So the provisions in this Chapter concerning the ability to export and import for repair are welcomed.

Moreover, the provisions related to remanufactured goods are beneficial. The technology industry seeks to prolong the useful life of its products through repair, refurbishment, remanufacturing and reuse. It is important that the industry be able to continue to trade in remanufactured products in order to pursue economic and environmental goals.

### Technical Barriers to Trade

In the wake of the original NAFTA enactment, technical barriers to trade have come to be widely acknowledged as a major trade concern and potential threat to the growth of U.S. exports. In response, the post-NAFTA period has seen the emergence of a robust body of WTO mechanisms specifically intended to address TBT concerns. The revised NAFTA provides much-needed updates to the existing text to reflect those changes, incorporating key elements of the WTO's Agreement on Technical Barriers to Trade and references to the *Decision of the Committee on Principles for Development and International Standards with relation to Articles 2, 5 and Annex 3 of the Agreement*.

In addition, the revised NAFTA introduces important provisions to address more recent TBT challenges, including some that have raised concerns for ICT firms beyond North America. The text reflects significant strengthening of some of the TBT provisions that appeared in KORUS. Of particular relevance are a ban on localization requirements for conformity assessment and a commitment to protect the confidentiality of business data during testing and certification procedures by government bodies. We hope these highly constructive provisions may set a precedent for other trade agreements.

The prohibition on localization requirements related to conformity assessment represents a thoughtful response to a growing commercial concern outside the NAFTA region. Government demands that companies use only testing and certification facilities on their home territory frequently collide with the complexities of ICT global supply chains, posing a substantial commercial burden. Thus we appreciate the localization ban, which marks a meaningful step forward since KORUS. The revised language also significantly expands on the existing commitment in NAFTA that location of conformity assessment facilities “not cause unnecessary inconvenience.”

Also new to U.S. trade agreements is language granting member countries the right to ask how confidential business information will be protected during conformity assessment procedures by government bodies. A separate provision requires that a complaint process exist for such government-affiliated testing and certification procedures, with the potential for corrective action to be taken in the event problems arise. Both offer useful safeguards to help improve IPR protection. Current NAFTA language is considerably less rigorous, merely requiring that parties accord to confidential information from other members the same treatment they would provide to their own nationals, and protect commercial interests to the extent possible under their law.

Since ITAC 8's objectives include ensuring that proposed regulation is justified by careful analysis and assessment, we are pleased to see the inclusion of text requiring that parties undertake an assessment of proposed major new regulations. The original NAFTA merely says a party “may” conduct a risk assessment.

Worth highlighting too is the inclusion of a commitment to non-discriminatory standards-setting that surpasses provisions in KORUS. The text prohibits government preferences for standards developed in a manner that did not accord equal treatment to foreign standards-setting participants. Again, we hope this text will set a precedent.

The revised NAFTA substantially bolsters current commitments relating to the mutual recognition of conformity assessment procedures. For example, it puts the burden on a government to explain why it won't accept results from conformity assessment bodies in other NAFTA countries.

Reflecting the incorporation of WTO TBT principles, the updated NAFTA includes important improvements from the original in a number of other areas, including extensive procedures related to notification. It also covers requirements for publication of final regulations and conformity assessment procedures and obligates parties to explain how stakeholder comments were considered in making final determinations.

Other commercially-meaningful elements include a periodic review of regulations and conformity assessment procedures, with parties allowed to discuss the possibility of adopting less trade-restrictive options if they exist, and a commitment that governments will seek to provide a six month-plus adjustment period, after the publication of regulations or conformity assessment procedures, before they come into force.

In addition, we appreciate the affirmative commitment by all parties to promote regulatory alignment, jointly develop initiatives that facilitate trade with regard to technical regulations, standards and conformity assessment, and to that end, establish a TBT Committee.

In sum, we endorse the updated provisions in the NAFTA TBT chapter, which not only modernize the text with regard to WTO TBT practice, but also incorporate very significant new commitments to combat technical barriers.

### Rules of Origin

The Committee appreciates the inclusion of provisions related to remanufacturing. As noted above, the U.S. technology sector remanufactures products regularly, in line with environmental stewardship endeavors, so these commitments help allow for the continued and expanded reuse of technology products.

### Customs and Trade Facilitation

Customs and trade facilitation processes have evolved tremendously since NAFTA entered into force in 1994. This chapter provides an excellent opportunity to update this agreement and recognize the progress made in the WTO Trade Facilitation Agreement (TFA).

As the United States, Mexico and Canada are working to move toward electronic import-export single window systems and regulatory coherence among Partner Government Agencies (PGAs), it is imperative that these systems are not only compatible, but interoperable. Given the

great strides in these electronic systems, this Chapter offers the opportunity to make clear that all government agencies involved in the customs clearance process are participating in the single window.

In addition, timing and transparency will help ensure that Parties realize the benefits possible by this updated text. Specifically, it is important to include clear parameters around the time Parties have to respond after an inquiry or around a delay in the release of goods. It is also important, that Parties make notice of penalties available on the Internet.

We believe that implementation of these commitments will improve trade processes and competitiveness throughout North America.

### Annex on Information and Communication Technology (ICT) Equipment

The ICT annex includes several important and sectorally-significant protections related to technical barriers to trade. In particular, we wish to highlight the commercial relevance of a ban on forced information disclosure related to encryption as well as affirmative text asserting that companies can employ e-labeling.

Most notably, the revised NAFTA bans governments from forcing companies to provide specific information about cryptography, including algorithms, as a pre-condition for market access. Cryptography language first appeared in TPP, to which the United States is no longer a party. This would therefore be the first time such language has appeared in a U.S. trade agreement – a significant achievement. There is very considerable value in this provision, and we note that the language has helpfully been expanded to ban requirements not only for companies to partner but also to “otherwise cooperate” in development, sale, distribution, etc. of a cryptographic product.

That said, we would note some concerns in light of substantial exemptions that appear in the updated NAFTA language – especially broad language that carves out networks owned or controlled by the government. ITAC 8 expressed reservations about such language in our 2015 report on the Transpacific Partnership (TPP) Agreement. We noted at the time that in some countries with extensive government intervention and a number of state-owned enterprises, this category could include extensive parts of the digital infrastructure. In 2015, we expressed the hope that in future trade agreements, the exception pertaining to banks and other financial institutions would be subject to greater scrutiny and if required, drafted more narrowly.

To the contrary, the encryption exception in the updated NAFTA has been expanded and now also applies not only to government-controlled networks, but also to government-owned user devices, regulation of financial instruments, and in instances where the manufacture and use of the ICT good is for government purposes. If the concern relates primarily to central banks, we believe there is an argument for this carve-out to be significantly tightened to focus on that user base.

However, setting aside our reservations about these significant exemptions, we nonetheless appreciate the very important new mechanism in the updated NAFTA to protect IP in cryptographic products.

Another commercially-significant provision in the ICT annex is e-labeling text. This new language requires parties to allow regulatory information, such as that for electromagnetic compatibility and radio frequency, to be displayed electronically – effectively allowing companies that sell devices with a screen to employ e-labels rather than affix physical labels to devices. Measures to facilitate the growth of e-labeling have been understandably embraced by industry given the growing requirements for certification labels around the world even as digital devices are shrinking in size. Building on the ICT annex, provisions in the TBT chapter stipulate that rules for labeling not pose unnecessary obstacles to trade. In short, we particularly value the entirety of language that relates to e-labeling in the updated NAFTA.

Also helpful to the ICT industry are provisions encouraging parties to implement the APEC *Mutual Recognition Arrangement for Conformity Assessment of Telecommunications Equipment*. We are optimistic that the MRA for telecommunications equipment between the United States and Mexico, which has recently begun to be implemented, will be successfully and fully operationalized.

In addition, a provision establishing that governments “shall” accept a supplier’s declaration of conformity (SDOC) for information technology equipment (as long as they have satisfied the appropriate requirements) likewise marks progress. This is considerably stronger than text in KORUS, which said an importing party “may” rely on an SDOC. Moreover, the updated NAFTA ICT annex is buttressed by language in the NAFTA TBT chapter that calls on governments, as a means to facilitate the acceptance of conformity assessment results, to consider requests for sector-specific cooperation including an SDOC.

### Government Procurement

In some countries, the government is the largest purchaser of information and communications technologies (ICT) products and services. Therefore, strong commitments to transparency and nondiscrimination in government procurement opportunities is essential.

The Committee opposes the Administration’s “dollar-for-dollar” proposal, which represents a step backwards from the nondiscriminatory access that’s available in the current NAFTA. The Committee supports an approach to government procurement that provides market access at least at the level provided for under the current NAFTA. In fact, the Committee notes that in USTR’s NAFTA-related negotiating objectives communicated to Congress, Government Procurement includes, “Increase opportunities for U.S. firms to sell U.S. products and services into the NAFTA countries.” The dollar-for-dollar approach would appear to be inconsistent with USTR’s stated goal.

The Committee notes that at the subcentral level in Mexico, providers are required – in some cases – to establish a “local” entity in order to compete for a tender. The Committee hopes that Mexico’s commitments apply to the subcentral-government level and combat this kind of discrimination.

The Committee also observes that “offsets” are but one means governments use to impose countertrade measures. Other countertrade measures may include licensing requirements, technology transfer requirements or similar requirements that are as burdensome as a pure “offset” would be. The Committee would be pleased to work with USTR going forward to see if this kind of discrimination can also be included among the obligations that governments undertake in trade agreements.

While it is useful to review the rules portion of the Chapter on Government Procurement, it is impossible to comment on the adequacy of Mexico’s commitments absent the Annexes that spell out Mexico’s market access obligations. As such, the Committee must withhold final assessment of this Chapter, awaiting agreed text.

### Cross-Border Trade in Services

The agreement text provided to the Committee provides wide coverage for services important to the businesses represented by it. Of critical importance to the businesses is the modernization of the scope of this chapter to include services that are provided by, or distributed through, telecommunications networks. This change, coupled with the use of a negative list approach, creates certainty that services delivered over the Internet are within its scope. The Committee appreciates this approach and supports the use of it in this and future trade agreements.

The Committee also supports the inclusion of the term “service suppliers” in most of the provisions of this section. Service suppliers make up an increasing part of the digital economy. Including service suppliers ensures that the broad based Internet economy benefits from national and most favored nation provisions in the revised NAFTA.

We appreciate the addition of “Market Access” provisions to this Chapter. The Committee has supported this provision in other agreements. The prohibition on quantitative restriction on the supply of services, as well as a prohibition on requiring the use of particular entity types to do so, creates an even footing for companies in signatory countries. It also removes barriers for small to medium sized entities who may not have the resources to explore trade specific corporate entities.

The Committee is encouraged by the addition of provisions that require transparency in licensing and governmental authorization processes. This extends to provisions in this Chapter that help move signatories towards the use of creating open and participatory processes to develop technical standards. Internet based businesses have deep experience creating and facilitating open standards processes and believe that these processes remove barriers to business.

### Telecommunications

The Committee supports the Telecommunications Chapter because it includes numerous important commitments that should foster increased opportunities for market access and trade for U.S. providers in Mexico’s telecommunications market. The highlights described below illustrate strengths in the Agreement on which we base our support.

The Chapter ensures that U.S. providers will have access to and use of the public telecommunications services, including leased circuits, on reasonable and nondiscriminatory terms and conditions. The Chapter also includes “WTO-plus” obligations for all public telecommunications services suppliers, including interconnection, resale, roaming, number portability, dialing parity, and access to numbers. More rigorous commitments apply to major suppliers regarding affiliate relationships, competitive safeguards, resale, interconnection, leased circuits, co-location, and access to poles and other structures. The Parties also commit to endeavor to cooperate in promoting transparent and reasonable rates for international mobile roaming and to permit roaming for devices that are not transient. In a provision covered less frequently in FTAs, the Chapter also applies some of these major supplier obligations for purposes of ensuring access to submarine cable landing stations. The Chapter recognizes that a supplier of mobile services is not a major supplier unless a Party determines that the supplier meets the definition of major supplier, thus maintaining consistency with regulatory flexibility for such services in the United States.

The Chapter includes a number of helpful provisions important for an effective approach to regulatory frameworks in the 21<sup>st</sup> Century. These include provisions on value-added services updated from legacy NAFTA, on flexibility in choice of technology, and on approaches to regulation. The last provision recognizes that economic regulation may not be necessary where competition exists and that regulatory needs and approaches differ market by market. Parties may choose to engage in direct regulation or to rely on market forces and may forbear from applying existing regulation under certain conditions. This recognition of regulatory flexibility is well-suited to a sector like telecommunications in which technology is evolving rapidly and competition is increasingly dynamic.

The Chapter also includes beneficial provisions that effectively bind Mexico to its 2013 Telecommunications Reforms (as well as implementing regulations) promoting effective competition. The Mexico-specific footnote protects the following specific reforms: The independence of the regulator IFT is protected, with formal independence from the President and the associated political pressure. Mexico must also maintain its regulatory approach regarding a Preponderate Economic Agent (PEA) ensuring that the PEA is also defined as a “major supplier” under the Agreement, including a provision requiring asymmetric obligations for PEAs (e.g., nondiscriminatory repurchase terms for telecommunications services, interconnection obligations, unbundled infrastructure access requirements, and antitrust regulation obligations). This provision tracks Subsection III of the 8th Transitory Article of the 2013 Reform. The provision requires that any changes in asymmetric (and other) regulation of the PEA must seek to advance effective competition and prevent monopolistic practices. This combination of measures provides a light “ratchet” preventing backsliding on regulation of the PEA. Finally, with respect to Mexico’s Amparo Appeal process, the Agreement preserves the requirement that regulatory decisions by the IFT are not suspended while legality or constitutionality is litigated. This provides a backstop against any constitutional amendment designed to permit the PEA to delay regulation through legal challenges. All the above provisions will be beneficial to U.S. businesses active in Mexico.

The Chapter establishes a Committee on Telecommunications to be composed of government representatives of each Party that we believe will be an effective channel to help ensure market



access and an enabling environment for cross-border services. The Committee's purpose will include ensuring effective implementation of the Chapter by enabling responsiveness to technological and regulatory developments, with the option of inviting private sector experts to attend the meetings.

### Digital Trade

The Committee supports the Digital Trade Chapter because it establishes new trade commitments between the Parties to facilitate growth of the global digital economy. These go far beyond the scope of the original NAFTA. Highlights include strong commitments to enable cross-border data flows, prevent forced localization, protect consumers, promote interoperability among the Parties on personal information protection, and provide safe harbors against intermediary liability for platforms under identified circumstances. The Parties also agree to cooperate around a number of topics important to digital trade.

The Chapter continues the concept of "digital products" in terms of trade as defined in previous agreements. The Chapter contains commitments from the Parties not to impose customs duties, fees, or other charges in connection with the importation or exportation of digital products transmitted electronically and to accord non-discriminatory treatment of digital products. The Chapter includes two very important provisions to address the high priority objectives of this ITAC and the Congress regarding cross-border data flows and avoidance of local data storage and facilities location requirements. First, the Chapter includes the firm commitment that the Parties shall not prohibit or restrict the cross-border transfer of information by electronic means, including personal information. Second, the Chapter introduces a commitment that no Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory. These two commitments are vital to the United States for maximizing the economic and societal benefits of growth in digital trade and are important models for other trade agreements.

The Chapter includes a non-binding statement in which the Parties recognize the benefits to consumers of being able to access and use services and applications of their choice, connect their choice of devices to the Internet, and access information on their providers' network management practices.

The Committee also supports the commitments in the Chapter ensuring that the Parties will have legal frameworks to provide for the protection of the personal information of users of digital trade. The Parties agree to take into account principles and guidelines of relevant international bodies such as APEC and the OECD. The Chapter both recognizes that the Parties may use a range of differing approaches, it also encourages mechanisms to facilitate compatibility, and they specifically recognizes that the APEC Cross-Border Privacy Rules (CBPRs) system is a valid mechanism to facilitate transfer of data while protecting personal information. The Parties also commit to cooperate around use of the CBPRs and promotion of mechanisms for interoperability between systems covering cross-border data transfers. Other new provisions include commitments to take steps to address unsolicited commercial electronic messages (spam) and to cooperate generally around global digital trade cybersecurity matters. The Parties have also

committed to facilitate public access to and use of government information. These are beneficial and innovative provisions that will benefit U.S users and suppliers of digital services.

The Committee applauds a commitment in the Chapter not to require access to source code of software or algorithms (the latter a first-ever provision). In addition, the Committee strongly supports a new provision that is consistent with U.S. law. Potential copyright intermediary liability is covered in the Intellectual Property Rights Chapter, not in the Digital Trade Chapter. The Committee appreciates providing Mexico time to draft laws consistent with this provision.

### Intellectual Property Rights

The new text offered in the IPR section represents a significant improvement over the current text of the revised NAFTA. This section reflects the critical role that a nuanced understanding of IPR plays in the digital economy and, in particular, avoids restrictive prescriptions that would impact the ability of digital economy businesses to innovate. In particular, ITAC-8 appreciates and supports that NAFTA signatory countries would be required to provide for both civil and criminal penalties for trade secret theft.

The members of ITAC-8 understand the importance of robust enforcement of IPR in the context of a digital economy. The revised NAFTA's inclusion of language ensuring that enforcement remedies are proportional to harm helps ensure that these provisions are applied in a just and equitable manner. However, we are disappointed that USTR did not include language relating to needed balance in the protection of copyrighted material in the IPR Chapter. ITAC 8 notes that including language of this nature was a key consideration of both House and Senate approval of Trade Promotion Authority as set out in the respective committee reports.

ITAC-8 strongly supports the inclusion of language that considers the rights and responsibilities of IPR holders balanced with the rights and interests of ISPs. While the provisions of the revised NAFTA providing for safe harbors is acceptable, there are definitional aspects that may create uncertainties in both U.S. law as well as in the interpretation of the IPR chapter when the revised NAFTA is implemented.

In particular, the definition of "Internet Service Provider" includes the phrase "without modification of their content." In the ITAC 8's consensus view, this phrase too narrowly prescribes the role of companies who facilitate digital commerce. In addition, in the corresponding Section 512 of the Digital Millennium Copyright Act (DMCA) (17 U.S.C. 512), this provision applies only to "transitory digital network communications" rather than to the broad category of ISPs. The limitation set out in the DMCA is appropriately narrow. ITAC-8 therefore recommends that the proposed NAFTA provision be modified to reflect the definition set out in the DMCA, or, as an alternative, that the proposed NAFTA text regarding the definition of an ISP be included in the list of "functions" of an ISP rather than the definition of an ISP.

ITAC-8 also questions the inclusion of footnote 107, which excludes from the definition of an ISP entities who do not "initiate" the chain of transmission. In order for Internet transmissions to

occur they must be initiated. Because the term “initiate” is imprecise, in the context of Internet transmissions, its potential use in NAFTA creates the possibility to render the definition of “Internet Service Provider” too narrowly. Similar to the use of the phrase “without modification of their content” described above, this provision as set out in the DMCA applies only to “transitory digital network communications.” ITAC-8 therefore recommends that footnote 107 be deleted altogether, or, in the alternative, the footnote be applied only to the narrow category “transitory digital network communications” set out in the DMCA, rather than the definition of ISPs in general.

ITAC 8 notes that Canada’s copyright infringement safe harbors differ from those of the United States, and possibly from the provisions set out in NAFTA. We strongly recommend that, to the extent the Canadian government requires accommodation of their laws, such an accommodation be accomplished through an addendum to NAFTA or side letter to NAFTA, rather than modification of the IPR section as a whole.

#### Non-Conforming Measures (NCMs)

The NCM Annexes on Communications appear relatively standard, and the Committee has no concerns.

## **VI. Membership of Committee**

Mr. Arun K. Bhumitra  
Chief Executive Officer  
Arjay Telecommunications

Mr. Steven D. Domenikos  
Chairman and Chief Executive Officer  
Ierion/RelayDental, Inc.

Mr. Jake E. Jennings  
Assistant Vice President  
AT&T

Ms. Elizabeth (Lisa) I. Malloy  
Director, Policy Communications and  
Government Relations  
Intel Corporation

Ms. Jennifer A. Manner (Vice Chairman)  
Senior Vice President, Regulatory Affairs  
EchoStar Corporation

Ms. Jennifer H. Sanford (Chairman)  
Director, International Trade and Energy Policy  
Cisco Systems, Inc.

Brian E. Scarpelli, Esq. (Vice Chairman)  
Senior Policy Counsel  
ACT-The App Association

W. David Snead  
Co-Founder, Board Chair and Working Public Policy Chair  
Internet Infrastructure (i2) Coalition

Ms. K.C. (Kathlene) Swanson  
Director, Global Policy  
Telecommunications Industry Association

Mr. Roszel C. Thomsen II  
Founder and President  
Alliance for Network Security

Stephen Zirschky, Esq  
General Counsel  
WatchGuard Technologies, Inc.