

Overview of Chapter 11 (Technical Barriers to Trade) of the US-Mexico-Canada Agreement

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Chapter 11 of the US-Mexico-Canada Agreement (USMCA), which covers Technical Barriers to Trade (TBT), represents a wholesale overhaul of the North American Free Trade Agreement's (NAFTA) Chapter on Standards-Related Measures. While the chapter draws upon elements of the Trans-Pacific Partnership (TPP) – notably as relating to incorporation of the WTO Agreement on Technical Barriers to Trade (TBT Agreement), compliance periods, cooperation, and contact points – the new USMCA TBT provisions are closest in substance to the TBT Agreement itself.

The NAFTA TBT provisions were negotiated prior to the TBT Agreement and subsequent decisions and recommendations adopted by the WTO TBT Committee, and are comparatively narrow in scope. The rewritten USMCA Chapter – by incorporating not only basic TBT Agreement substantive disciplines, but also decisions of the TBT Committee (while eschewing other bodies) – is meant to bring the trilateral trade relationship in line with international best practices. An article-by-article overview follows.

Article 11.1: Definitions

The only definition found in both NAFTA Chapter 9 and USMCA Chapter 11 is “international standard,” which the former defines as “standards-related measure, or other guide or recommendation, adopted by an international standardizing body and made available to the public.” The USMCA, however, specifically ties the definition to Annex 2 to Part 1 (Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement) in the Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995 (G/TBT/1/Rev.13) as may be revised, issued by the WTO Committee on Technical Barriers to Trade. TPP Art. 8.1 only shares “mutual recognition agreement.” The USMCA also offers definitions for “international conformity assessment systems,” “mutual recognition arrangement or multilateral recognition arrangement;” “proposed technical regulation or conformity assessment procedure;” and “TBT Committee Decision on International Standards.”

Article 11.2: Scope

While significantly shorter, this Article is similar to its TPP equivalent in that it (1) establishes the Chapter's application to the “preparation, adoption and application” of standards, technical regulations, and conformity assessment procedures which may affect trade in goods between the Parties; and (2) expressly excludes technical specifications prepared by a governmental body for production or consumption requirements and sanitary or phytosanitary (SPS) measures. The USMCA also covers “any amendment thereto,” but removes the TPP's reference to “government bodies at the level directly below that of the central level of government.”

Article 11.3: Incorporation of the TBT Agreement

This Article, like its TPP equivalent, incorporates certain TBT Agreement provisions wholesale.¹ There are minor changes to the USMCA from the TPP with respect to the incorporation of the TBT Agreement:

- **Removed from USMCA:**

- Art. 2.9 (Establishing the procedure for the introduction of new technical standards where an international standard does not exist).

- **Added to USMCA:**

- Art. 2.3 (“Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner”);
- Art. 3.1 (Parties’ obligation to ensure compliance by local government and non-governmental bodies within their territories with the TBT Agreement’s Article 2: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies);
- Art. 4.1 (Parties’ obligation to ensure compliance with the TBT Agreement’s “Code of Good Practice”);
- Art. 7.1 (Parties’ obligation to ensure compliance by local government bodies with Articles 5-6); and
- Paragraph J of Annex 3 (Reporting requirements of standardizing bodies).

- **Found in the USMCA and TPP:**

- Art. 2.1 (Products imported from the territory of other Parties shall be treated as those of national origin);
- Art. 2.2 (Technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, including national security, health, safety, environment and prevention of deceptive practices);
- Art. 2.4 (Parties shall use international standards wherever appropriate);
- Art. 2.5 (When requested by another Party, a Party shall explain the justification for new technical regulations. Where a technical regulation is prepared, adopted or applied for a “legitimate objective” as defined in Art. 2.2 and is in line with international standards, it shall be presumed not to create an unnecessary obstacle to trade);
- Art. 2.10 (Where “urgent problems of safety, health, environmental protection or national security” arise, a Party may forego the normal notice and comment processes as necessary, so long as the Party notifies the other Parties following adoption and accept comments at that time);
- Art. 2.11 (Parties shall publish/make available all technical regulations);
- Art. 2.12 (Parties shall allow a “reasonable interval” between publication and enforcement of technical regulation);
- Art. 5.1 (Where positive assurance is required that products conform with technical regulations or standards, Parties shall “grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country”, and such procedures shall not create unnecessary obstacles to trade);
- Art. 5.2 (Conformity assessment procedures shall be equitable, expeditious, and transparent, and there shall be procedures in place to review complaints);
- Art. 5.3 (Parties retain the right to conduct “spot checks” within their territories);

¹ For details on the incorporated provisions, see the full TBT Agreement text [here](#).

- Art. 5.4 (Parties shall use guides and recommendations from international standardizing bodies as a basis for their conformity assessment procedures, where appropriate);
- Art. 5.6 (Establishes procedure for enacting new conformity assessment procedures where no guidance from international bodies exists);
- Art. 5.7 (Where “urgent problems of safety, health, environmental protection or national security” arise, a Party may forego the normal notice and comment processes as necessary, so long as the Party notifies the other Parties following adoption and accept comments at that time);
- Art. 5.8 (Parties shall publish/make available all conformity assessment procedures);
- Art. 5.9 (Parties shall allow a “reasonable interval” between publication and enforcement of conformity assessment procedures);
- Paragraph D of Annex 3 (“In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country”);
- Paragraph E of Annex 3 (“The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade”);
- Paragraph F of Annex 3 (“Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate”).

As is the case under the TPP, the Parties to the USMCA do not have recourse to the agreement’s dispute settlement mechanism for disputes exclusively arising under the provisions of the TBT Agreement as incorporated. However, the USMCA also bars recourse where the dispute concerns an alleged inconsistency with the Chapter that (1) was referred or is subsequently referred to a WTO dispute settlement panel; or (2) was taken to comply in response to the recommendations or rulings from the WTO Dispute Settlement Body (or bears a close nexus, such as in terms of nature, effects, and timing, with respect to such a measure). This may relate to longstanding WTO disputes among the parties on tuna (US-Mexico) and country of origin labelling (COOL) (US-Mexico/Canada).

Article 11.4: International Standards, Guides and Recommendations

Whereas NAFTA makes basic reference to use of “relevant international standards,” the USMCA offers more detailed guidance on identifying and applying such standards. The Article states unequivocally that, in determining whether there is an international standard, guide, or recommendation, each Party shall apply the TBT Committee Decision on International Standards.²

This Article also builds upon equivalent TPP provisions by stating that “each Party shall ensure that any obligation or understanding it has with a non-Party does not facilitate or require the withdrawal or limitation on the use or acceptance of any relevant standard, guide, or recommendation developed in accordance with the TBT Committee Decision on International Standards or the relevant provisions of this Chapter.”

Article 11.5: Technical Regulations

This entirely new Article (not included in either NAFTA Chapter 9 or the TPP Chapter 8) covers (1) Preparation and Review of Technical Regulations; (2) Use of Standards in Technical Regulations; (3) Information Exchange; and (4) Labeling.

² The significance of this reference is captured by the Industry Trade Advisory Committee on Standards and Technical Trade Barriers (“ITAC 14”): “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 [USMCA]. This Chapter 11 Article 4.2 and Article 4.3 provisions will preclude discrimination based on where a standards development organization is domiciled.”

Among other requirements, Parties must:

- Conduct an appropriate assessment concerning any “major” technical regulations it proposes to adopt, and review technical regulations and conformity assessment procedures periodically and when petitioned by another Party;
- Consider which international standard best fulfills the Party’s legitimate objectives of a technical regulation or conformity assessment procedure;³
- If not using an international standard, explain to the other Parties why not; and
- Ensure that technical regulations concerning labels “accord treatment no less favorable than that accorded to like goods of national origin” (*i.e.*, national treatment) and “do not create unnecessary obstacles to trade between the Parties.” This provision again could relate to past disputes on US COOL measures, which some groups in the United States have recently sought to renew.

Article 11.6: Conformity Assessment

The basic tenet of national treatment stated in this Article, that “each Party shall accord to conformity assessment bodies located in the territory of another Party treatment no less favorable than that it accords to conformity assessment bodies located in its own territory or in the territory of the other Party,” is similar to that in NAFTA Art. 906 and TPP Art. 8.6. “Conformity assessment body” is not defined in the Agreement. The USMCA, like the TPP, goes further to specify that a Party shall not require conformity assessment bodies be located or operate an office within its territory.

This Article also includes TPP-like provisions on (1) transparency (*i.e.*, the requirement of Parties to respond to requests for information regarding assessment procedures and body accreditation); (2) allowing conformity assessment bodies to use subcontractors; and (3) broadening the scope of permissible accrediting bodies.

Article 11.7: Transparency

This Article grants all Parties and other stakeholders the opportunity to comment on the proposed adoption or modification of a Party’s technical regulation. Similar to the NAFTA and the TPP, the USMCA requires that Parties “shall normally allow” 60 days for comment prior to adopting/modifying technical regulations, with certain exceptions. The USMCA requires electronic transmission/posting of the notification and regulation text, as well as posting of written comments on the regulatory authority’s website.

Article 11.8: Compliance Period for Technical Regulations and Conformity Assessment Procedures

Whereas the NAFTA and the TBT Agreement require a “reasonable” interval between publication of requirements concerning conformity assessment procedures and their entering into force, the USMCA interprets this to mean “normally a period of not less than six months.” The TPP contains the same language. If possible, Parties shall endeavour to provide a longer interval.

Article 11.9: Cooperation and Trade Facilitation

Similar to TPP Art. 8.9, this Article establishes additional criteria by which a Party may accept another Party’s sector-specific proposal for cooperation, such as by (1) implementing mutual recognition or recognizing existing mutual recognition arrangements to accept results by conformity assessment bodies with respect to specific technical regulations; (2) using accreditation to qualify conformity assessment bodies; (3) unilaterally recognizing the results of conformity assessment procedures performed in the other Party’s territory; and (4) accepting a supplier’s declaration of conformity. The Article recognizes a range of other cooperative activities to better align technical regulations, such as exchange of information and technical assistance.

³ Per ITAC 14, “[T]his provision will enable technically equivalent standards to be referenced and used, ultimately smoothing the compliance process for manufacturers’ goods.”

Article 11.10: Information Exchange and Technical Discussions

This Article establishes the procedure for requesting that another Party engage in technical discussions or provide information on proposed or final technical regulations. Once the request is made, the Parties shall discuss the matter within 60 days, or sooner if the matter is urgent. NAFTA Art. 911 establishes similar procedures, but without any time limit.

Article 11.11: Committee on Technical Barriers to Trade

This Article establishes a TBT Committee composed of government representatives of each Party, and identifies its functions. There is significant overlap in scope and operations with the NAFTA's Committee on Standards-Related Measures, as well as the TBT Committee envisioned under the TPP. The NAFTA, however, establishes subcommittees focusing specifically on land transportation standards, telecommunications standards, automotive standards, and labelling of textile and apparel goods.

Article 11.12: Contact Points

Unlike the NAFTA, this Article requires that each Party designate a contact point for matters arising under the TBT Chapter.

Annexes

TBT Chapter Annexes that were in the TPP have been revised and moved to "Sectoral Annexes" for cosmetics, information and communications technology, pharmaceuticals, medical devices. These annexes can be reviewed separately upon request.

Outlook

Overall, responses to the new TBT provisions have been positive. Industry groups have applauded the USMCA's expansion of technical regulation and conformity assessment acceptance; its requirements relating to regulatory transparency and stakeholder input; and its focus on harmonization of TBT regimes and overall efficiency.

Please let us know if you have any questions.

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