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How much of the Transpacific Partnership is in the United States-Mexico-Canada Agreement?

Wolfgang Alschner¹

Assistant Professor,
University of Ottawa Law Faculty

Rama Panford-Walsh

JD Candidate,
University of Ottawa Law Faculty

Abstract

The United States-Mexico-Canada Agreement (USMCA) provided the first opportunity for the Trump administration to translate its “America First” trade policy into specific treaty design. In this article, we evaluate how radical these changes have been by systematically comparing the USMCA to its predecessors. We find that, first, the USMCA copies 57 percent of its text from the Transpacific Partnership (TPP), which Trump had repudiated and unsigned once he took office. Compared to U.S. treaty practice generally, the USMCA is more of a continuation rather than a departure from prior texts. Second, we systematically investigate where the USMCA diverges from the TPP. We find that USMCA treaty design differences can be grouped in five categories: (1) structural remnants of NAFTA, such as bi-national panels to review trade remedies; (2) “America First” elements, such as tighter rules of origins; (3) modernizations, e.g. by incorporating TPP innovations on digital trade; (4) additions on non-U.S. policy priorities, such as gender rights, promoted by the other USMCA states; and finally (5) changes of a more technical nature. In sum, contrary to Trump’s rhetoric, the USMCA does not usher in a new generation of trade agreements, but it does engage in targeted innovations that are driven by varying policy considerations that include but are not limited to his “America First” agenda.

¹ Corresponding author: wolfgang.alschner@uottawa.ca. We gratefully acknowledge the research assistance of Claudia Lach. This research was supported by the Social Sciences and Humanities Research Council of Canada.

² Donald Trump, Campaign Speech, Monessen, Pa., 28 June 2016, available at: <https://www.politico.com/story/2016/06/full-transcript-trump-job-plan-speech-224891>

1. Introduction

During his main economic policy campaign speech in a metal recycling plant in Pennsylvania in June 2016, United States' presidential candidate Donald Trump contrasted his "America First" vision of economic diplomacy to the trade policy of previous U.S. administrations. He claimed that the ineptitude of U.S. politicians had cost the United States millions of manufacturing jobs and had precipitated the rise of rival powers such as China.² The Transpacific-Partnership Agreement (TPP), negotiated by the Obama Administration with 11 other Pacific States, including Mexico and Canada, posed "the greatest danger yet" as it would result in a "death blow for American manufacturing."³ Trump vowed that, if elected, he would reverse course: he would withdraw from the TPP and then negotiate a different style of trade agreements.⁴

The first major opportunity for the subsequently elected President Trump to translate his "America First" economic policy into actual agreement language was the renegotiation of the North American Free Trade Agreement (NAFTA), which he had called "the worst trade deal in history."⁵ After months of highly contentious negotiations, the United States-Mexico-Canada Agreement (USMCA), NAFTA's purported successor, was finalized in November 2018. According to the Trump administration, the USMCA "is not merely a new trade deal – it is a new paradigm for future agreements."⁶

In this article, we assess to what extent the USMCA indeed qualifies as a paradigm shift in treaty practice. On the one hand, the USMCA contains a number of well-documented innovations that closely align its content with Trump's campaign rhetoric, including its clauses on currency manipulation,⁷ tighter rules of origin in the auto sector to favor higher U.S. manufacturing content,⁸ or provisions on future trade negotiations with non-

² Donald Trump, Campaign Speech, Monessen, Pa., 28 June 2016, available at: <https://www.politico.com/story/2016/06/full-transcript-trump-job-plan-speech-224891>

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ U.S. Office of the United States Trade Representative, *2019 Trade Policy Agenda and 2018 Annual Report*, (2019) online at: https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf at 11.

⁷ C. Fred Bergstein, "A Positive Step in the USMCA: Countering Currency Manipulation", 4 October 2018, PIIE Blog, available online at: <https://piie.com/blogs/trade-investment-policy-watch/positive-step-usmca-countering-currency-manipulation>.

⁸ Jesse Goldman, et al, "USMCA Automotive Rules of Origin", 22 November 2018, BLG, available online at: https://blg.com/en/News-And-Publications/USMCA-Automotive-Rules-of-Origin?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.

market economies, which is ostensibly directed against China.⁹ On the other hand, commentators have pointed out that the USMCA retains many elements of earlier U.S. trade agreements. According to one commentator, “[t]here’s more TPP in (the new trade deal) than not.”¹⁰ So where on that spectrum between continuing and breaking with prior U.S. trade agreement practice does the USMCA sit?

We use text-as-data metrics combined with traditional legal analysis to systematically compare the USMCA to existing free trade agreements. The TPP, negotiated under Obama and explicitly refuted by Trump, serves as proxy to measure the extent to which the USMCA is embedded in a pre-Trump policy narrative. We find that the textually most similar agreement to the USMCA is in fact the TPP – they have 57 percent of their text in common. The USMCA closely tracks the structure and text of the TPP. 29 out of 30 TPP chapters have equivalents in the USMCA and 72 percent of the articles in matched USMCA chapters are found in both agreements. Furthermore, when looked at in the context of all U.S. trade agreements, the USCMA and TPP, based on their textual similarity, appear as belonging to the same generation of treaties. In other words, the USMCA, contrary to Trump’s rhetoric, does not mark a fundamental rupture in U.S. practice and has more in common with the TPP than not.

We then compare the USMCA and TPP chapter-by-chapter and article-by-article to assess where the former continues and where it deviates from existing practice. We focus specifically on areas that thus far have not attracted detailed public or academic scrutiny. We conclude that the design of the USCMA can be broken down into five conceptual categories: (1) structural remnants of NAFTA, such as bi-national panels to review trade remedies; (2) “America First” elements, such as tighter rules of origins; (3) modernizations, e.g. by incorporating TPP innovations on digital trade; (4) additionals on non-U.S. policy priorities, such as gender or indigenous rights, promoted by the other USMCA states; and finally (5) changes of a more technical nature. The interplay between these different treaty design elements will ultimately determine whether in practice, if not in design, the USMCA is a paradigm shift or a continuation of existing practice.

This article is structured as follows. First, we introduce the TPP and USMCA and the narratives that underpin them in order to frame our subsequent comparison. President

⁹ See e.g. Geraldo Vidigal, *A Really Big Button that Doesn’t Do Anything? The ‘Anti-China Clause’ in US Trade Agreements*, AMST. LAW SCH. RES. PAP. (2019).

¹⁰ Jared Bernstein quoted in: Michael Collins, “New trade deal with Canada, Mexico borrows heavily from pact that Trump abandoned”, Oct. 3, 2018, USA Today, available at: <https://www.usatoday.com/story/news/politics/2018/10/03/usmca-new-trade-deal-canada-borrows-pact-trump-abandoned/1498224002/>

Trump's rhetoric presents both agreements as polar opposites, but already the official U.S. trade policy highlights points of convergence by focusing as much on modernization as on the "America First" narrative. Second, we conduct a high-level textual analysis to situate the text of the USMCA in the universe of trade agreements. We find that it continues rather than breaks with existing practice. Third, we engage in a detailed textual comparison of the USMCA and the TPP to highlight areas of convergence and divergence and map them against Trump's rhetoric.

2. Trade narratives and the design of trade agreement

In this section, we place the TPP and the USMCA in their policy contexts. The USMCA and the TPP emerged from different trade narratives. Yet, rhetoric and legal design do not necessarily align making it necessary to investigate the extent to which different narratives manifest themselves in a different trade agreement design.

1. Introducing the TPP and the USMCA

The TPP was the culmination of a decades long effort to create a free trade area in the Asia-Pacific region.¹¹ The agreement, which originally included the United States, Canada, Mexico, Japan and eight other "like-minded" nations, offered a way to increase U.S. exports at a time when the Obama administration was crafting new trade policies in an effort to deal with the lingering effects of the global financial crisis and the rise of China as a major economic power.¹² After Trump became U.S. President, he withdrew the U.S. from the TPP.¹³ Economic arguments in favour—and a reluctance to throw away nearly a decade of negotiation—led to the remaining eleven nations forging ahead without the United States.¹⁴ The eleven TPP countries maintained the core elements of the original deal, suspended a limited number of provisions through a framework agreement, and renamed the agreement the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).¹⁵ The CPTPP was signed on March 8, 2018.

¹¹ Jeffrey J Schott, "The TPP: Origins and Outcomes", in: Robert E. Looney (ed.), *The Handbook of International Trade Agreements: Country, Regional and Global Approaches*, (Routledge: New York, 2019) at 401. While initial efforts were limited in scope and included a handful of smaller nations, the involvement of the United States in the aftermath of the 2008 economic downturn changed the nature of negotiations.

¹² *Id.* at 402-3.

¹³ Withdrawal of the United States From the Trans-Pacific Partnership Negotiations and Agreement, Memorandum for the United States Trade Representative, January 23, 2017, online: <https://www.federalregister.gov/documents/2017/01/25/2017-01845/withdrawal-of-the-united-states-from-the-trans-pacific-partnership-negotiations-and-agreement>.

¹⁴ Jeffrey J Schott, *supra* note 11, at 409.

¹⁵ *Id.* at 401.

The USMCA, in turn, is the result of an almost two-year long renegotiation of NAFTA. NAFTA had been negotiated in the early 1990s to liberalize trade between the U.S., Canada and Mexico.¹⁶ At the time of NAFTA's negotiation, there was strong political support in the U.S. for a closer integration of the North American economies.¹⁷ Following the entry into force of NAFTA, regional trade more than tripled from approximately US \$290 billion in 1993 to more than \$1.1 trillion in 2016.¹⁸ Presidential candidate Donald Trump, however, considered NAFTA as a primary reason for the loss of manufacturing jobs in the U.S. Following Trump's election in late 2016, the United States thus announced its intention to renegotiate NAFTA on May 18, 2017. The renegotiation proved contentious in part because the Trump administration appeared uncompromising in reorienting North American trade to its own benefit.¹⁹ Despite these difficulties, a deal was ultimately reached in the late hours of September 30, 2018.²⁰ The final text of the USMCA was released in November 2018 following legal scrubbing.

2. *Different trade narratives*

The TPP and the USMCA embody two very different perspectives on trade. President Obama's 2016 Trade Policy Agenda (the last issued before the election of Donald Trump) is outward-looking, focuses on multilateral agreements, and on strengthening America's global trade influence.²¹ In contrast, the 2017 Trump Trade Policy Agenda places U.S. domestic farmers and workers center-stage, and explicitly states that fair trade—from the American perspective—is “best accomplished by focusing on bilateral negotiations rather than multilateral negotiations”.²² While the language of Obama's trade policy highlights partnership and benefits (both for American and global partners),

¹⁶ Maxwell A Cameron & Brian W Tomlin, *The Making of NAFTA: How the Deal Was Done*, (Ithaca: Cornell University Press, 2000) at xi.

¹⁷ *Id.* at 7.

¹⁸ James McBride and Mohammed Aly Sergie, “NAFTA's Economic Impact”, 4 October 2017, *Council on Foreign Relations*, online: <https://www.cfr.org/background/naftas-economic-impact>.

¹⁹ The Financial Post, “America's hard-line NAFTA demands risk scuttling trade talks, insiders say,” 29 September 2017, online: <http://business.financialpost.com/news/economy/u-s-demands-on-nafta-are-said-to-risk-scuttling-trade-talks>

²⁰ The Financial Post, “A chronology of events in North American free trade talks,” 2 Oct 2018, online: <https://business.financialpost.com/pmnl/commodities-business-pmn/agriculture-commodities-business-pmn/a-chronology-of-events-in-north-american-free-trade-talks>

²¹ U.S. Office of the United States Trade Representative, *2016 Trade Policy Agenda and 2015 Annual Report*, (2016) online at: <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2016/2016-trade-policy-agenda-and-2015-Annual-Report> at 3.

²² U.S. Office of the United States Trade Representative, *2017 Trade Policy Agenda and 2016 Annual Report*, (2017) online at: <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf> at 1

Trump's trade policy centers around the forceful and partially unilateral pursuit of U.S. economic and trade interests.

Nicolas Lamp has reviewed this evolving trade discourse and distinguishes between two different trade narratives.²³ On the one hand, Lamp identifies an "Establishment Narrative,"²⁴ which dominates trade textbooks and—until recently—most trade policymaking. According to this perspective, trade is a win-win situation. In the aggregate everyone gains from trade. It is then for domestic policy makers to redistribute gains so that the losers of economic liberalization and globalization are compensated by the winners. In opposition to this "Establishment Narrative," Lamp identifies the "Trump Narrative".²⁵ Here, trade is perceived as a zero-sum game. Jobs are lost and "shipped" to another country, states gain in trade at the expense of others, and the United States has been on the losing side.

These two narratives capture the thrust of the differences in discourse between the Obama and Trump administrations.²⁶ The Obama-era trade policy puts emphasis on advancing mutually beneficial market liberalization to foster global growth and enhance welfare, including in the U.S.²⁷ Consequently, increasing exports through reciprocal market access concessions and deepening market integration including through regional and global value chains that link production processes across borders are advanced as key rationale for signing the TPP.²⁸ Trump's 2018 Trade Policy Agenda employs a different rhetoric. Under the heading of "Putting America First" it places emphasis on rebalancing trade in favour of the U.S. It seeks to roll back market access to the U.S., stop outsourcing of production, and encourage investment in the U.S. The goal is to

²³ NICOLAS LAMP, HOW SHOULD WE THINK ABOUT THE WINNERS AND LOSERS FROM GLOBALIZATION? THREE NARRATIVES AND THEIR IMPLICATIONS FOR THE REDESIGN OF INTERNATIONAL ECONOMIC AGREEMENTS (2018), <https://papers.ssrn.com/abstract=3290590> (last visited Jan 23, 2019). Lamp furthermore identifies a third "Critical Narrative", which we will not discuss in this article.

²⁴ *Id.* at 13.

²⁵ *Id.* at 2.

²⁶ These two narratives are ideal points. The respective policies may also draw inspiration from other considerations. For example, the trade policies of the two administrations also display some commonalities: both administrations stress the need to level the playing field in trade to curb unfair competition or to improve labour conditions in partner countries.

²⁷ U.S. Office of the United States Trade Representative, *supra* note 21 ("By opening the markets of the future for more Made in America goods and services, the United States can support high-wage jobs and economic strength at home." (at 7) "America's leadership on trade, including through important regional agreements like TPP and TTIP, spurs global growth and catalyzes progress at the multilateral level." (at 37))

²⁸ U.S. Office of the United States Trade Representative, "The TPP: Detailed Summary of U.S. Objectives", September 2015, available at <https://ustr.gov/sites/default/files/TPP-Detailed-Summary-of-US-Objectives.pdf>.

create jobs at home rather than abroad signalling a U.S.-centric and zero-sum view of trade.

Importantly, according to Lamp, the different trade narratives (which we have simplified considerably) produce different trade policy recommendations, which in turn have implications for the design of trade agreements.²⁹ The “Establishment Narrative” considers the root cause for disenfranchisement with trade to be a failure of domestic policies to redistribute. Therefore, its proponents argue that free trade agreements can remain unchanged, but that market liberalization needs to be accompanied by more effective domestic redistribution programs. In the “Trump Narrative”, in contrast, poorly negotiated trade agreements cause job loss and produce winners abroad and losers at home. Since trade agreements themselves are the problem, they have to be fundamentally redesigned to prevent job losses. According, Trump seeks to negotiate “better deals.”³⁰

Therefore, the two narratives should lead to fundamental differences in the design of trade agreements. Trump himself explicitly defined his vision for trade in contradistinction to the TPP and declared (and this position was restated in the 2018 Trade Policy Agenda) that “[t]here is no way to ‘fix’ the TPP.” Since its design was broken beyond repair, he withdrew the U.S. rather than renegotiate the deal. The USMCA, in turn, was to mark a radical departure from this past and usher in a new generation of trade agreements.³¹ The TPP and the USMCA are thus framed as poster children for two very different perspectives and narratives on trade. The USMCA is a product of the “Trump Narrative”; whereas the TPP emerged from the Obama administration and is embedded in the “Establishment Narrative”. The underlying narratives suggest that they should differ fundamentally in treaty design. But how different are they in fact?

3. Empirical perspectives on the impact of shifting narratives

Lamp’s categories are ideal types that map trade policy discourse rather than empirical descriptors of a countries’ trade policy. Political and bureaucratic national processes as well as the give-and-take of international negotiations necessarily results in outcomes

²⁹ LAMP, *supra* note 23 at 25–31.

³⁰ U.S. Office of the United States Trade Representative, *2018 Trade Policy Agenda and 2017 Annual Report*, (2018) online at: <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf> at 6

³¹ U.S. Office of the United States Trade Representative, *2019 Trade Policy Agenda and 2018 Annual Report*, (2019) online at: [https://ustr.gov/sites/default/files/2019 Trade Policy Agenda and 2018 Annual Report.pdf](https://ustr.gov/sites/default/files/2019%20Trade%20Policy%20Agenda%20and%202018%20Annual%20Report.pdf) at 11.

that are messier, potentially contradictory, and only partially consistent with the narratives that originally inspire them. As an empirical matter it is thus worth asking to what degree these narratives are actually reflected in the design of trade agreements. Applied to the USMCA, we thus need to investigate whether the marked shift in trade narratives from the Obama to the Trump administrations is indeed accompanied by a consistent and equally profound shift in the design of trade agreements.

On the one hand, it is undisputable that elements of the “Trump Narrative” are reflected in the design of the USMCA. As Dan Ciuriak, prolific thinker and early commentators of the agreement, has highlighted, Trump’s vision of reinvigorating U.S. manufacturing and of rebalancing trade to the U.S.’ advantage finds expression in the USMCA: the agreement, amongst others, imposes more restrictive rules of origin on imports, scales back investor-state arbitration, and introduces a periodic review of the agreement—all elements that make importing into the U.S. and investing abroad more costly and less predictable, which in turn helps retain investment and manufacturing in the U.S.³² Together with other elements such as the chapter on currency manipulation and Article 32.10 on negotiations with non-market economies directed at China, these well-publicized features of the USMCA give the impression that the agreement indeed closely aligns with the “Trump Narrative” and does embody a new paradigm in trade treaty design.

On the other hand, there are features in the USMCA that align more comfortably with pre-Trump U.S. policies and ultimately the “Establishment Narrative”. In fact, Trump’s 2018 Trade Policy Agenda identifies two objectives in NAFTA renegotiations: (1) rebalancing the agreement in favour of the U.S. and (2) modernizing NAFTA through new rules, including on digital trade, intellectual property and regulatory cooperation, to turn it into a “high standard agreement for the 21st century”.³³ This second batch of objectives is less clearly linked to the “Trump Narrative” and instead seems grounded in the “Establishment Narrative” insofar as it mirrors language used by the Obama administration to promote the TPP.³⁴ As an empirical matter, it is thus far from clear to what degree the USMCA incorporates design elements inspired by the “Trump

³² DAN CIURIK, FROM NAFTA TO USMCA AND THE EVOLUTION OF US TRADE POLICY (2019), <https://papers.ssrn.com/abstract=3369291> (last visited Jun 24, 2019).

³³ U.S. Office of the United States Trade Representative, *2018 Trade Policy Agenda and 2017 Annual Report*, (2018) online at: <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018percent20Annualpercent20Reportpercent20I.pdf> at 9

³⁴ White House Press Release, “Fact Sheet: How the Trans-Pacific Partnership (TPP) Boosts Made in America Exports, Supports Higher-Paying American Jobs, and Protects American Workers,” 5 October 2015, online at: <https://www.whitehouse.gov/the-press-office/2015/10/05/fact-sheet-how-trans-pacific-partnership-tpp-boosts-made-america-exports>.

Narrative” and to what degree the agreement reproduces prior “Establishment Narrative” practice.

In the remainder of this paper, we will thus conduct a systematic comparison between the design of the TPP and the USMCA in order to assess to whether the stark differences in the rhetoric surrounding both agreements translate into varying agreement text. Given that, first, Trump defined his own position in contradistinction to the TPP and that, second, the Obama administration promoted the TPP in language consistent with what Lamp calls the “Establishment Narrative”, we will use the TPP as a proxy for an “Establishment Narrative” treaty design. By assessing the extent to which the USMCA follows the design of the TPP we can then draw inferences about the relative importance of the “Trump Narrative” versus “Establishment Narrative” in the design of the USMCA and detect additional influencing factors.

3. Dataset and Methodology

To evaluate to what extent the design of the USMCA breaks with existing treaty practice, we systematically compare its text to other preferential trade agreements (PTAs). We rely on the recently created Text of Trade Agreements (ToTA) dataset, which contains 449 trade agreements notified to the World Trade Organization (WTO) and situate the USMCA in that universe by quantifying the textual similarity of the USMCA with all other trade agreements.

1. The ToTA Corpus

The ToTA Corpus emerged from a collaboration between the United Nations Conference on Trade and Development (UNCTAD) and university researchers to make a machine-readable and structured full text corpus of trade agreements publicly available.³⁵ The ToTA Corpus in its current form contains a total of 448 PTAs, which WTO members have notified to the organization,³⁶ as well as the TPP. Each trade agreement is represented through its full text, including footnotes, but excluding schedules and annexes. To this corpus, we have added the final text of the USMCA that emerged from legal scrubbing.³⁷

³⁵ Wolfgang Alschner, Julia Seiermann & Dmitriy Skougarevskiy, *Text of Trade Agreements (ToTA)—A Structured Corpus for the Text-as-Data Analysis of Preferential Trade Agreements*, 15 J. EMPIR. LEG. STUD. 648–666 (2018).

³⁶ For research purposes, we have also added the text of Transpacific Partnership Agreement (as signed in February 2016) to the corpus in English and Spanish.

³⁷ We are grateful to Jeremy Harris from the Inter-American Development Bank for sharing the USMCA text in XML format with us.

2. *Measuring treaty design similarity*

The question “How similar are trade agreements?” can be answered through different methodologies. On the one hand, researchers can compare the full text of agreements. Differences in treaty text are generally a good proxy for differences in treaty design, because legal language is formalistic and standardized, hence the same words typically denote the same legal concepts while different words denote different legal concepts. At the same time, using text as proxy for treaty design has shortcomings as well. Small changes to word order or the use of synonyms can produce textual differences that may not entail variation in meaning. The method thus risks overestimating legally relevant treaty design differences.

On the other hand, researchers can compare abstract design features rather than text token. Under this method, researchers identify a set of features as proxies for treaty design, e.g. the existence of clauses on currency manipulation, investor-state arbitration, or the length of patent protection etc., which are then manually or automatically extracted from treaty text. Abstract design features have the advantage of capturing only legally significant differences. Yet, they risk disregarding subtler textual divergences that may be of significance in some interpretive contexts. The method may thus underestimate legally relevant treaty design divergences.

In short, there is no “right” way to assessing similarity of trade agreements. The value-added that such analysis provides thus lies not in generating a “true” percentage of similarity, but in identifying similarity patterns and trends. Ideally, these trends should be similar regardless of what methodology is chosen.

In this contribution, we follow Alschner and Skougarevskiy in quantifying similarity.³⁸ First, we preprocess the treaty full texts by lowercasing all words and by eliminating non-word elements, such as punctuation. Second, we disaggregate the text into 5-character components, i.e. “free trade” becomes “free_”, “ree_t”, “ee_tr”, “e_tra”, “_trad”, “trade”, which, in contrast to word-frequency counts, allows us to embed word order information. Finally, we count what percentage of the 5-character components of the treaty pair overlap in both agreements. This is formally known as Jaccard distance. Treaty pairs that do not have text components in common will have a Jaccard distance of 1, or a similarity of 0 percent. Treaty pairs that are identical, in contrast, would have a Jaccard distance of 0 and a similarity of 100 percent.

³⁸ Wolfgang Alschner & Dmitriy Skougarevskiy, *Mapping the Universe of International Investment Agreements*, 19 J. INT. ECON. LAW (2016).

Quantitative legal analysis, regardless of the methodology used, needs to be accompanied by qualitative legal research to validate and contextualize findings. This is particularly crucial for similarity comparisons. An example that we further discuss below illustrates why this is the case: the USMCA government procurement chapter is very similar to the government procurement chapter in the TPP, yet both chapters differ fundamentally in scope. While the TPP procurement chapter applies to all TPP parties, the USMCA in Article 13.2(3) limits the application of the chapter to Mexico and the United States excluding Canada. A few words can make a large difference. That is why we will complement our quantitative similarity counts with qualitative legal analysis to validate, contextualize, and deepen our findings.

4. Situating the USMCA in prior PTA practice

We begin our analysis by automatically comparing the text of the USMCA to the larger ToTA corpus. We find that the USMCA is firmly embedded in the trade agreement practice of the United States. The 10 most similar agreements to the USMCA all include the United States (Table 1). These results are comparable to a similar study by Allee and Lugg relating the TPP to existing practice. They found that around 50 percent of the text of the TPP was taken from prior U.S. treaties and that all the top-10 most similar agreements included the United States. On that basis, they concluded: “U.S. treaty language is pre-eminent in the TPP, suggesting that the USA had heavy influence in writing this important new agreement.”³⁹ The same could be said about the USMCA: the United States significantly shaped the design of the treaty.

Table 1: Textual similarity of USMCA to other U.S. FTAs

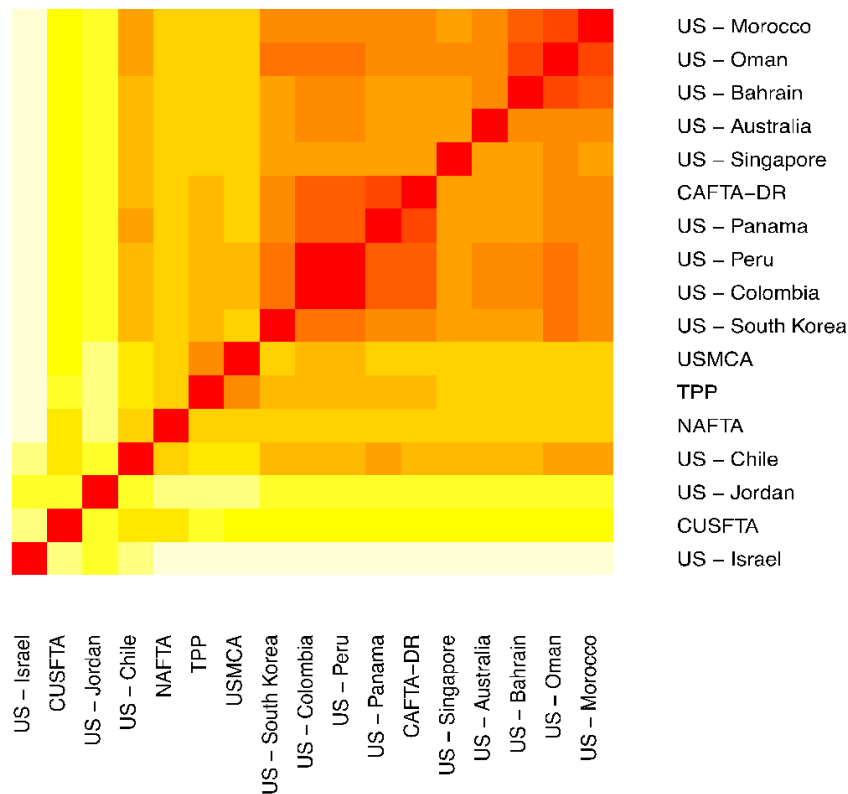
<u>Comparison Treaty</u>	<u>Similarity to the USMCA</u>
1. TPP	57 percent
2. US - Colombia	43 percent
3. US - Peru	43 percent
4. US - South Korea	43 percent
5. CAFTA-DR	42 percent
6. US - Panama	42 percent
7. NAFTA	41 percent
8. US - Oman	41 percent
9. US - Australia	41 percent
10. US - Morocco	40 percent

³⁹ Todd Allee & Andrew Lugg, *Who wrote the rules for the Trans-Pacific Partnership?*, 3 RES. POLIT., (2016) at 4.

What is more surprising given the differences in underlying trade narratives is that the TPP is the most similar agreement to the USMCA in our ToTA Corpus. The two agreements share 57 percent of their text. Hence, there is literally more TPP in the USMCA than not. Furthermore, when we visualize the larger U.S. treaty network through the similarity heat map in Figure 1, which clusters agreements together based on their similarity scores, we see that the USMCA and the TPP appear as belonging to the same cluster or group in the greater scheme of American FTA practice. Hence, although President Trump rejected the TPP and framed the USMCA as a counter-model,⁴⁰ the USMCA is deeply connected to the treaty practice Trump criticized so harshly. In fact, based on similarity scores alone the TPP and the USMCA appear to belong to the same generation of trade agreements.

⁴⁰ U.S. Office of the United States Trade representative, Press Release, “Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement”, May 2017, online: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces> at 6.

Figure 1: Similarity heat map of U.S. treaty practice



Note: Figure 1 represents the textual differences between U.S. trade agreements as a heat map. Each tile of that heat map compares a treaty pair. High textual similarity is marked by dark colors, low textual similarity is marked by bright colors. The heat map is ordered through a hierarchical clustering algorithm that places similar agreements together.

Without additional context, however, these raw numbers tell us little about how the TPP and the underlying “Establishment Narrative” continued to shape the design of the USMCA. Indeed, depending on the perspective taken, the 57 percent textual similarity can seem either surprisingly high or surprisingly low.

First, the textual similarity to the TPP can seem surprisingly high, because the USMCA is a renegotiation of NAFTA rather than of the TPP. In spite of being more than 25 years old, the original NAFTA text still exerts considerable textual influence over the USMCA with a similarity of 41 percent, making it the seventh most similar agreement to the USMCA. In fact, when it comes to institutions, the USMCA more closely follows NAFTA than the TPP. From bi-national panels reviewing trade remedies (NAFTA Chapter 19, USMCA Chapter 10) to the dedicated Secretariat supporting the work of an

inter-state commission (NAFTA Chapter 20, USMCA Chapter 30), the USMCA incorporates elements that are absent in the TPP. Similarly, on issues of inter-state dispute settlement, the USMCA's Chapter 31 "more closely resembles NAFTA than the TPP."⁴¹ This design proximity of the NAFTA to the USMCA is unsurprising given that one succeeds the other. Moreover, the TPP links a set of diverse developing and developed economies separated by the Pacific. It even contains a dedicated Chapter on Cooperation and Capacity Building (Chapter 21) to help the developing country members of the TPP, which is without equivalence in the NAFTA. The USMCA, in contrast, builds on an already more integrated North American market that links comparatively more homogenous states. Yet, in spite of these fundamental differences in scope, the TPP and USMCA share 57 percent of its content, which, against this background, then appears surprisingly high.

Second, the textual similarity to the TPP can seem surprisingly low, because the TPP and USCMA are negotiated based on the same U.S. enabling legislation. The U.S. Congress has enabled the Executive to negotiate trade agreements under an expedited procedure, called "fast track" or Trade Promotion Authority (TPA), whereby, crudely simplified, Congress defines substantive negotiation objectives and mandates a set of consultation procedures, and, in return, the Executive can negotiate an agreement and presents the final text to Congress for a yes/no vote.⁴² Kathleen Claussen has argued that this separation of powers between Legislative and Executive is the primary factor explaining the relative consistency of U.S. PTAs over time and across different administrations.⁴³ The TPP and the USMCA have both been negotiated under the same *Bipartisan Congressional Trade Priorities and Accountability Act of 2015*, which put the TPA regime –and its negotiation objectives– in place between 2015 and 2018. Since the negotiation objectives are thus the same for both the TPP and the USMCA, the 57 percent textual similarity seems surprisingly low. At the same time, the U.S. administration does enjoy some discretion to give meaning to the TPA objectives. The key question then is, within the constraints of the TPA, where did the Trump administration seek to deviate and where did it follow the TPP and, indirectly, the "Establishment Narrative"?

5. In-depth textual comparison: USMCA vs TPP

In this section, we engage in a detailed comparison between the TPP and USCMA on the chapter and article-level to identify where the Trump administration followed prior

⁴¹ David A Gantz, *The United States-Mexico-Canada Agreement: Settlement of Disputes*, ARIZ. LEG. STUD. DISCUSS. PAP. NO 19-08 2019, 6.

⁴² Kathleen Claussen, *Separation of Trade Law Powers*, 43 YALE J. INT. LAW, 333–339 (2018).

⁴³ Claussen, *supra* note 42.

practice. As first step, we need to align chapters and articles in the TPP and USMCA to make meaningful comparisons. This is challenging: the TPP has 30 chapters, while the USMCA has 34. Fortunately, both agreements are similarly structured and in the majority of cases, the chapter names are either identical or highly similar. In some cases, different names covered similar topics (e.g. Electronic Commerce (TPP) vs. Digital Trade (USMCA)) or multiple topics were covered in a single chapter (e.g. one chapter for Rules of Origin and Origin Procedure in the TPP; two separate chapters in the USMCA).⁴⁴ Finally, there are four chapters, which exist only in the USMCA but not in the TPP⁴⁵ and one that exists in the TPP but not in the USMCA.⁴⁶ Among the former is Chapter 33 of the USMCA, which sets forth new provisions on exchange rate and macroeconomic policies. In total, we were able to align 29 chapters common to both agreements, which form the basis of the below comparison.

1. *Treaty-to-Treaty comparison*

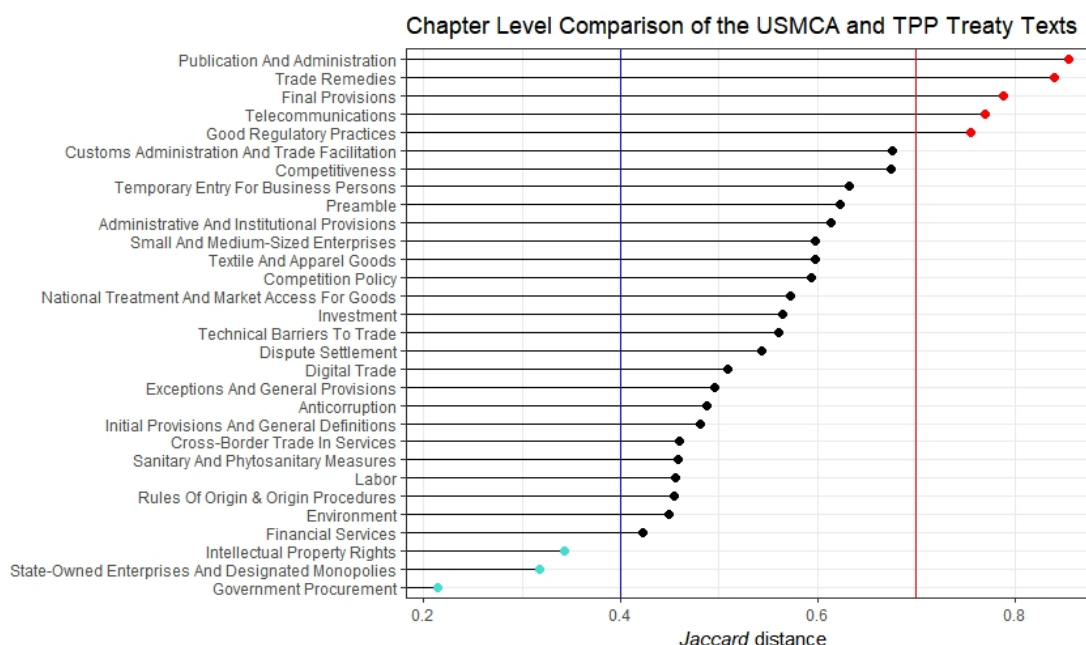
Based on this chapter-level matching, we can investigate the textual similarity across different issue areas. Since the similarity between the TPP and USMCA chapters differs significantly (see Figure 2), we place them in three baskets. First, a set of chapters, represented as red circles in Figure 2, diverge strongly between both agreements. The two most distant chapters are Publication and Administration (*Jaccard* distance = 0.86, or 14 percent similar) and Trade Remedies (*Jaccard* distance = 0.84, or 16 percent similar). Second, there are chapters of high similarity, represented as turquoise circles in Figure 2, which include Government Procurement (*Jaccard* distance = 0.21 or 79 percent similar), State-Owned Enterprises and Designated Monopolies (*Jaccard* distance = 0.32 or 68 percent similar), and Intellectual Property Rights (*Jaccard* distance = 0.34, or 66 percent similar). Third, most chapters are situated between these extremes and display between 55 percent (Environment) and 32 percent (Customs) of similarity.

⁴⁴ In order to prevent an artificial inflation of textual differences, the Rules of Origin and Origin Procedures chapters from the TPP were assessed together against the single USMCA chapter on the same topic.

⁴⁵ USMCA chapters 3 (Agriculture), 8 (Recognition of the Mexican State's Direct, Inalienable, and Imprescriptible Ownership of Hydrocarbons), 12 (Sectoral Annexes), and 33 (Macroeconomic Policies and Exchange Rate Matters).

⁴⁶ TPP chapter 21 (Cooperation and Capacity Building).

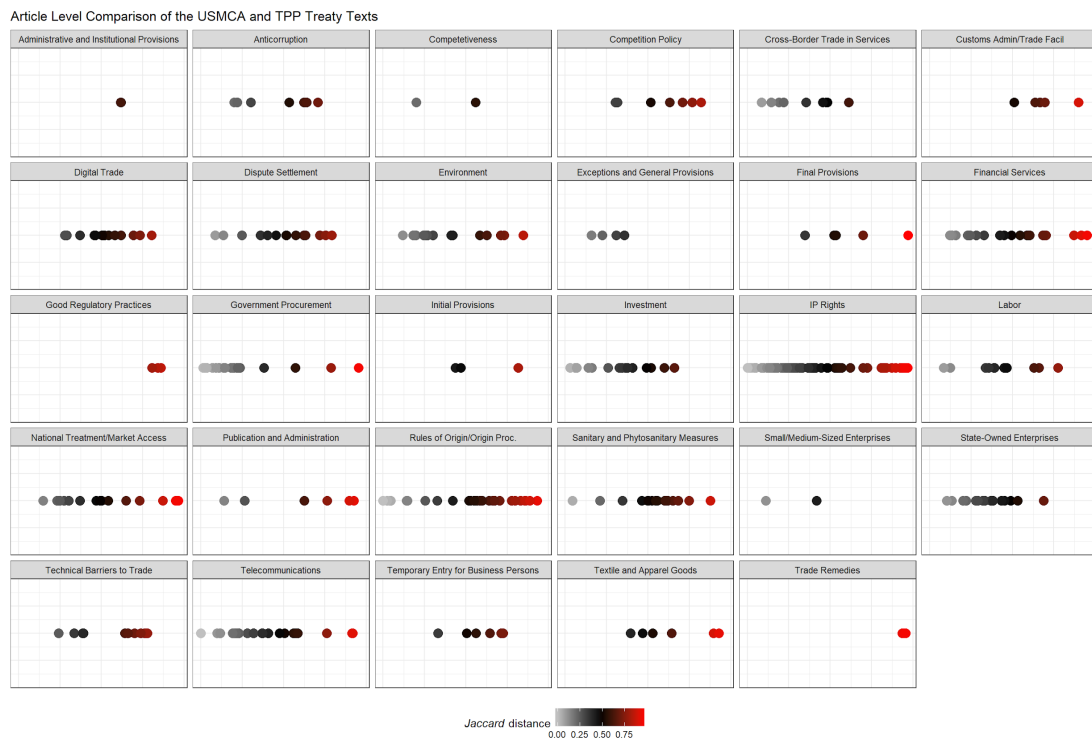
Figure 2: Chapter-wise comparison of the USMCA and TPP



Two factors can drive these similarity scores. First, some differences are due to the presence of unique articles in one treaty or the other. The TPP has 504 articles, whereas the USMCA has 528; based on an automatic article-header matching, we were able to determine that 382 articles, or 72 percent of the articles in the USMCA, are the same (at least in title) in both texts across the aligned chapters.⁴⁷ Second, some differences are the result of substantive divergences within articles on the same subject matter. Of the 29 matched chapters, 20 chapters (approximately 70 percent) contain articles present in both agreements (i.e. same or similar article title) that are substantially different in their actual article text (*Jaccard* distance of 0.75 or greater). Figure 3 tracks the incidence of such article text differences across chapters.

⁴⁷ We match article headers automatically if they are at least 40 percent similar (*Jaccard* distance of 0.6).

Figure 3: Overview of Article-level Comparisons between the TPP and USMCA



To what extent both factors – unique articles and divergent article text – impact the chapter-level differences depends on the length of chapters. For example, there are 12 articles within the USMCA IP chapter (Chapter 20), which are highly distinct from the matched TPP articles (marked as red in Figure 3). The IP chapter, is however a very long one, with 89 common articles between the USMCA and TPP. Thus, the overall effect on the chapter difference is quite small making the IP chapter one of the most similar between the TPP and the USMCA. It is therefore important to supplement the raw (dis)similarity scores with traditional legal analysis to investigate the context and significance of the textual differences.

In the rest of this section, we first investigate dis(similarity) on crosscutting issues, i.e. those found in multiple chapters before assessing high, middle and low similarity chapters in greater detail.

2. *Cross-cutting Issues: Supply Chains and Gender*

One way to contextualize the similarity scores is to look for specific cross-cutting issues that featured prominently in (some) prior trade policy documents. We have picked two such issues to compare their prevalence: (1) supply chains and (2) gender.

The desirability of regional and global supply chains is one of the issues where the Obama and Trump Trade Policy Agendas diverged most clearly. Whereas the Obama administration sought to expand American participation in international supply chains, the Trump administration seeks to steer investment into national manufacturing. Consequently, the 2016 Obama Trade Policy Agenda mentions “supply chains” 26 times and lists them as a specific TPP-related benefit for American Small Businesses.⁴⁸ In contrast, the 2018 Trump Trade Policy Agenda mentions supply chain only once and negatively while describing China’s dominance in solar cell supply chains.⁴⁹

In an example of consistency between policy and negotiated outcome, the Trump administration managed to erase all but one reference to “supply chains” in the USMCA including in passages that are otherwise copied from the TPP. The TPP mentions the term “supply chain” thirteen times. It references the promotion of regional supply chains in its preamble – the USMCA omits it; Article 22.3 of the TPP tasks a Competitiveness Committee to discuss ways to develop, strengthen, and integrate supply chains – this language was removed from the corresponding USMCA chapter (Chapter 26, Competitiveness). The only reference in the USMCA to the term is in the chapter on Small and Medium Sized Enterprises (SMEs) tasking the SME Committee in Article 25.4(2)j) to “facilitate the development of programs to assist SMEs to participate and integrate effectively into the Parties’ regional and global supply chains.” The paragraph was copied from TPP Article 24.2(2)g) and could have been an accidental inclusion.

A second cross-cutting issue relates to gender. Neither the 2016 Obama policy nor the 2018 Trump Trade Policy Agenda mentions the term. In contrast, Canada’s government under Justin Trudeau has elevated gender considerations to one of the core features of its “progressive trade agenda”.⁵⁰ The TPP references “gender” only once in the chapter

⁴⁸ U.S. Office of the United States Trade Representative (2016), *supra* note 21 at 13.

⁴⁹ U.S. Office of the United States Trade Representative (2018), *supra* note 30 at 17.

⁵⁰ Statement by Canada’s Foreign Minister Chrystia Freeland, 14 August 2017, reprinted in Maclean’s “Chrystia Freeland’s vision for a new NAFTA” available at: <https://www.macleans.ca/politics/chrystia-freelands-vision-for-a-new-nafta/> (“[Canada] can make NAFTA more progressive first by bringing strong labour safeguards into the core of the agreement; second by integrating enhanced environmental provisions to ensure no NAFTA country weakens environmental protection to attract investment, for

on cooperation and capacity building. The USMCA, in contrast, mentions the term six times, once in the investment and five times in the labour chapter.⁵¹ This illustrates that, in spite of the bargaining power of the United States, elements of the USMCA are reflections of the policy preferences of the other two parties, here Canada.

3. *High Similarity Areas: Government Procurement and IP*

Turning now to specific chapters, the most similar chapters in the TPP and USMCA are government procurement (GP) and intellectual property rights (IP). The high textual similarity between GP provisions is not surprising. In general GP chapters have converged more than other areas in PTAs.⁵² In part, this is due to the existence of the WTO plurilateral Government Procurement Agreement (GPA), which provides a common focal point around which similar chapters can converge and which was used as baseline for both the TPP and the USMCA.⁵³ However, in contrast to the TPP GP chapter that applies to all TPP members (although it does provide tailored flexibilities to developing TPP members in Article 15.5), the USMCA GP chapter only applies between Mexico and the U.S. as per Article 13.2(3). Canada's GP relations will henceforth be governed exclusively through the WTO GPA with respect to the U.S and through the CPTTP with respect to Mexico. Hence, on a closer reading the GP provisions, in terms of scope, are more dissimilar in impact than the textual metric suggested.

A manual comparison between the USMCA and TPP IP chapters yields results that are more consistent with the textual metrics. The Intellectual Property chapter was the cause of significant friction during the TPP negotiations.⁵⁴ Many contentious articles were suspended in the CPTTP when the United States left the deal, only to be resurrected in the USMCA.⁵⁵ For example, by signing on to the USMCA, Canada's copyright protection terms have been extended from previously 50 to 70 years (article 20.63) and

example, and that fully supports efforts to address climate change; third by adding a new chapter on gender rights, in keeping with our commitment to gender equality.”)

⁵¹ On the larger trend, see Raj Bhala & Wood Cody, *Two Dimensional Hard-Soft Law Theory and the Advancement of Women's and LGBTQ+ Rights Through Free Trade Agreements* (2019), <https://kuscholarworks.ku.edu/handle/1808/27757> (last visited Jun 26, 2019).

⁵² Wolfgang Alschner, Julia Seiermann & Dmitriy Skougarevskiy, *Text-as-Data Analysis of Preferential Trade Agreements: Mapping the PTA Landscape*, UNCTAD RES. PAP. (2017).

⁵³ Christopher R. Yukins, *The U.S.-Mexico-Canada Agreement (USMCA): Some Surprising Outcomes in Procurement*, 60 GOV. CONTRACT., 308–9 (2018).

⁵⁴ Michael Geist, Blog, online: <http://www.michaelgeist.ca/2017/11/rethinking-ip-in-the-tpp/>

⁵⁵ *Id.*

the protection for biologics from 8 years to 10 years (article 20.49).⁵⁶ There has also been a clarification of the definition of “broadcasting” which excludes “transmission over computer networks or any transmissions where the time and place of reception may be individually chosen by members of the public” (Article 20.57) and “trade secrets” are explicitly defined and are featured more prominently in the USMCA. Finally, most highly distinct IP articles deal with the definitions or scope of interpretation within the IP chapter (which may also be due to incorrect automated matching). When we consider these IP changes in the context of the U.S. Trade Policy Agenda of 2018, it is clear that the U.S. was able to move forward in some ways with one of its primary goals: the modernization of the NAFTA with respect to certain “21st century provisions”.⁵⁷ By closely following the TPP in this respect, the USMCA’s IP chapter thus exhibits traces of the “Establishment Narrative”.

4. Low Similarity Areas: Trade Remedies and Final Provisions

Proceeding to the low similarity areas, we find the similarity metric picks up institutional differences between the TPP and the USMCA instead of deeper substantive variation linked to differing underlying narratives. As discussed above, the differences between the TPP and the USMCA, in part, are due to the fact that the latter builds on the institutional structure of NAFTA.

With respect to trade remedies, the USMCA incorporates elements of NAFTA absent in the TPP. NAFTA Chapter 19, and its bi-national dispute resolution panels reviewing trade remedies were one of the most contentious aspects of the renegotiations. The United States considered the mechanism as an undesirable intrusion into its national sovereignty and sought to remove it.⁵⁸ Canada fought hard to preserve them to protect itself against U.S. trade defenses.⁵⁹ Ultimately, the language of Chapter 19 was retained and integrated in the USMCA’s trade remedies chapter. The retention of the bi-national review mechanism can be seen as a major concession of the Trump administration so concerned with the additional goal of “preserving national sovereignty” in the trade context.⁶⁰ Since there is no equivalent mechanism in the TPP, the dissimilarity scores

⁵⁶ Nathaniel Lipkus & Jaymie Maddox, “A need-to-know guide on IP in the U.S.-Mexico-Canada Agreement,” available online: <https://www.osler.com/en/resources/cross-border/2018/a-need-to-know-guide-on-ip-in-the-u-s-mexico-canada-agreement>

⁵⁷ U.S. Office of the United States Trade Representative (2018), *supra* note 30 at 9.

⁵⁸ U.S. Office of the United States Trade Representative (2017), *supra* note 22 at 3.

⁵⁹ Doug Beazley “Disputing The Dispute Settlement Mechanism: Chapter 19 Again”, 24 August 2017, The Canadian Bar Association, available online: <http://www.cba.org/Publications-Resources/CBA-Practice-Link/Business-and-Corporate/2017/Chapter-19-again>

⁶⁰ U.S. Office of the United States Trade Representative (2018), *supra* note 30 at 3.

are very high. While the TPP generally refers to each of the parties retaining their rights under Article VI of the General Agreement on Tariffs and Trade (GATT), the USMCA (like the NAFTA before it) goes into substantial detail about the application of domestic laws relating to antidumping and countervailing duties.⁶¹

Turning to final provisions, the textual difference between the USMCA and the TPP relate to their different structure. The USMCA in Article 34.1 regulates the transition from NAFTA to the USMCA (unnecessary in the TPP), whereas the TPP with Article 30.4 has a lengthy provision on accession (largely unnecessary and certainly unwanted by the U.S. in the USMCA) and on entry into force in TPP Article 30.5 (given that more parties are involved). The one more interesting substantive difference relates to the controversial automatic phase-out of the USMCA or “sunset clause” (without equivalent in the TPP or NAFTA). USMCA Article 34.7 (Review and Term Extension) limits the USMCA to a term of 16 years. Further, the parties must review the agreement ever six years. As the USTR points out in the 2019 Trade Policy Agenda, allowing for periodic review will provide the flexibility for each of the parties to respond to shifting technological and economic landscapes.⁶² The inclusion of the clause is a “win” for the Trump administration even though the initial time period proposed by the U.S. was even shorter.

5. Medium Similarity Areas: Dispute Settlement, Investment, and Regulatory Practices

Medium similarity areas contain some structural differences, but also link to conscious treaty design differences driven by different policy narratives. The USCMA dispute settlement chapter is an example of both. It generally follows the prior architecture of NAFTA but incorporates selected innovations from the TPP.⁶³ For example, NAFTA, in contrast to the TPP, provides for a more direct involvement of the inter-state Free Trade Commission to mediate in the resolution of disputes – an element that was retained in the USMCA.⁶⁴ At the same time, the USMCA also incorporates innovations from the TPP in relation to greater transparency in dispute settlement, e.g. making hearings open to the public.⁶⁵ Crucially, however, the USMCA fails to address NAFTA’s main

⁶¹ USMCA Chapter 10

⁶² U.S. Office of the United States Trade Representative (2019), *supra* note 31 at 15.

⁶³ For a detailed commentary on the USCMA Chapter see, Gantz, *supra* note 41; J. Anthony VanDuzer, *State-to-state Dispute Settlement Under the USMCA: A Missed Opportunity?*, in FESTSCHRIFT IN HONOUR OF PROFESSOR STEPHEN T. ZAMORA (2019).

⁶⁴ See NAFTA Art. 2007 ; USMCA Art. 31.5.

⁶⁵ See TPP Art. 28.13 ; USMCA Art. 31.11.

institutional weakness: its state-to-state dispute settlement effectively ceased to function in the early 2000s because parties could prevent the establishment of a panel by blocking the creation of a roster of potential panellists.⁶⁶ While the TPP resolved that issue by enabling the TPP's Commission to appoint panellists if the parties fail to agree on a roster,⁶⁷ a similar formulation was not taken up in the USMCA leaving the mechanism prone to blockage and less effective than its TPP counterpart. This omission was likely a conscious choice by the Trump administration to weaken dispute settlement under NAFTA in order to retain more flexibility to advance its "America First" agenda.

The investment chapter similarly continues existing practice in some respects, but also consciously breaks with it in others. On the one hand, it marks a rupture with NAFTA and most U.S. PTAs since then including the TPP: these agreements consistently included a general investor-state dispute settlement (ISDS) mechanism (apart from few exceptions such as the PTA with Australia). The USMCA does away with ISDS entirely between Canada and the United States and provides a scaled-down version of ISDS between the United States and Mexico.⁶⁸

On the other hand, the substantive USMCA investment provisions largely track the TPP with the new U.S. trade policy agenda inspired by "America First" leaving no discernable mark. Among the few differences, the USMCA lacks the clarifying language of article 9.6(5) TPP ("Minimum Standard of Treatment") and article 9.8(6) CPTPP ("Expropriation and Compensation") that a modification, reduction or failure to issue, maintain or renew a subsidy does not by itself constitute a breach of the said articles. Furthermore, USMCA article 14.9(3) retains article 1109(3) of NAFTA, which prohibits states to "require its investors to transfer, or penalize its investors that fail to transfer" income generated abroad. This clause routinely found in Canadian treaties, but omitted from the TPP and most U.S. treaties, is significant insofar as it seems at odds with current U.S. tax policy aimed at reducing off-shoring and encouraging repatriation of capital. Furthermore, TPP article 9.10(4) is omitted from the USMCA, which clarifies that states can impose a requirement on investors to employ or train local workers where that training or employment does not entail technology transfer.

⁶⁶ Simon Lester, Inu Manak & Andrej Arpas, *Access to Trade Justice: Fixing NAFTA's Flawed State-to-State Dispute Settlement Process*, 18 WORLD TRADE REV. 63–79 (2019).

⁶⁷ TPP Art. 28.11(2).

⁶⁸ For a more in-depth analysis see Valasek, Martin J., FitzGerald, Alison G., de Jong, Jenna Anna, "Major changes for investor-state dispute settlement in new United States-Mexico-Canada Agreement," October 2018, available online at: <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/91d41adf/major-changes-for-investor-state-dispute-settlement-in-new-united-states-mexico-canada-agreement>.

Similarly, TPP article 9.12(3) is omitted from the USMCA, which put in place a specific consultation procedure for non-conforming measures at the sub-national level that create “a material impediment to investment.” Finally, USMCA article 14.17 on corporate social responsibility (CSR) expands the corresponding TPP language in article 9.17 by explicitly mentioning the OECD Guidelines on Multinational Enterprises and identifying target areas of CSR such as gender, human rights, and indigenous rights. In sum, most language of USMCA’s substantive investment chapter has been taken virtually verbatim from the TPP text, with no discernable “America First”-inspired provisions.

The chapter on Regulatory Practices is a final example where some convergence and some divergence has taken place. The adoption of specific—read “U.S. friendly”—regulatory practices in the trade context was a component of the U.S. “America First” Trade Policy, with the goal of the elimination of “wasteful and unnecessary” regulations.⁶⁹ The USMCA has 17 unique articles in this chapter and only three common articles with the TPP; these have *Jaccard* distances of 0.81 to 0.87 (81-87 percent dissimilar). Hence, the USMCA builds on but goes much further than the TPP. According to Canadian Centre for Policy Alternatives (CCPA), a public interest think tank, the USMCA chapter promotes a regulatory scheme that appears favourable to business objectives in the newly inserted clauses.⁷⁰ For example, Articles 28.13 and 28.14 allow for retrospective review of any regulatory framework at the initiation of any “interested person”, which includes corporations. Such reviews must consider, among other things, the elimination of the regulation altogether; in this way, regulated persons are now in a position to de-regulate themselves. This is tempered somewhat by Article 28.2 (3) which allows the Parties to pursue their own public policy objectives. While the impact of these changes remains to be seen, the CCPA fears that the harmonization of regulations with the U.S. results in more industry involvement in decision-making and in some cases deregulation.⁷¹ In any event, the inclusion of these new articles points to the existence of “America First” policy elements.

⁶⁹ U.S. Office of the United States Trade Representative (2018), *supra* note 30 at 2.

⁷⁰ Stuart Trew, “USMCA: Red tape for public safety regulators”, October 2018, *Behind the Numbers Blog*, available at <http://behindthenumbers.ca/2018/10/24/usmca-red-tape-for-regulators/>.

⁷¹ *Id.* See also Stuart Trew, “From NAFTA to CETA: Corporate lobbying through the back door”, *Canadian Centre for Policy Alternatives* (2017) at 10-13. Online: https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2017/02/From_NAFTA_to_CETA.pdf

6. Conclusion

The USMCA does not usher in a new era in the design of trade agreements. In spite of the Trump administration's anti-TPP rhetoric and actions, the USMCA does in fact borrow more than half its text from the TPP. Both agreements that Trump characterizes as “bad deals”, NAFTA and TPP, signed by his predecessors, exert considerable textual influence over the USMCA. The USMCA thus does not mark a revolutionary break with either the global FTA network generally or existing U.S. practice specifically.

At the same time, the USMCA also includes a considerable number of noteworthy innovations. As this analysis has shown textual similarity metrics need to be accompanied by in-depth legal analysis to validate quantitative findings and to contextualize their interpretation.

This in-depth comparison of the USMCA and the TPP suggests that the USMCA is not purely a product of “America First”; nor is it a copy- and-past version of the TPP. Instead, the design of the USMCA is an amalgamation of different elements that can be broken down into five conceptual categories. First, the USMCA retains structural elements typical of NAFTA, such as bi-national panels to review trade remedies. Second, the USMCA copies from the TPP to modernize trade rules in key areas such as digital trade and as such displays elements of the “Establishment Narrative”. Third, the USMCA embodies “America First” components, such as the omission of ISDS or the sunset clause. Fourth, the USMCA also incorporates a set of Canadian (e.g. indigenous people) or Mexican policy priorities (Chapter 8 relating to sovereignty over hydrocarbons). Fifth, the USMCA implements technical tweaks that are not specifically linked to either structural choices or larger policy narratives such as the changes to the substantive investment provisions discussed above.

It is not meaningful to quantify the relative space occupied by each of these categories, given that their impact in practice is not linked to the number of words they occupy in the text. As we discussed above, few terms can have big repercussions. Yet, it is important to acknowledge that these different categories exist in the text of the USMCA. We will now have to wait and see how they will interact in practice and if one of them comes to dominate. This may indeed turn the USMCA into a paradigm shift, if not in design then in practice.