



LOOPSTRA NIXON'S CANADA-
U.S. CROSS BORDER PRACTICE



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CANADA-U.S. CROSS BORDER BULLETIN USMCA: NAFTA RENEGOTIATED

What's the deal with NAFTA? What's changed, what's remained and what's outstanding?

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After more than a year of negotiations, the United States, Mexico and Canada have reached a tentative trilateral trade agreement, which now has 34 chapters and numerous side letters. The United States-Mexico-Canada Agreement ("USMCA") was settled upon during the final hours of September 30, 2018, just ahead of the U.S. appointed deadline of October 1, 2018. The USMCA updates and restates the North American Free Trade Agreement ("NAFTA"), which only had 22 chapters and took effect in 1994. A finalized renegotiation of NAFTA has alleviated much of the uncertainty among investors and industry operating within North America.

This bulletin provides a summary and overview of key provisions in the USMCA and changes with respect to NAFTA. Additionally, it details the deal terms that were negotiated but remained unchanged from NAFTA and trade issues that were discussed by the parties but never settled.

AMENDMENTS AND NEW PROVISIONS UNDER THE USMCA

Effective Date and Term. The agreement will take effect pending the ratification by the legislatures of each of the three countries. The USMCA will have a term of 16 years, with an opportunity for the parties to jointly review and rectify any problems within the first six years. This is largely consistent with the sunset clause previously demanded by the U.S., which would have permitted the repeal of NAFTA within five years. Under Chapter 32 of the USMCA, any party who proposes to enter into a free trade agreement with a "non-market country" will provide the other USMCA parties a right to review the proposed agreement and an opportunity to withdraw from the USMCA with six months' notice. These provisions will extend bargaining power to USMCA parties who are not parties to negotiations of other free trade agreements.

Dairy and Agriculture. Under Chapter 3 of the USMCA, U.S. dairy farmers are regranted access to Canada's highly protected dairy market, which provides concessions to market share in addition to the quotas granted by Canada under other trade agreements between Canada and certain pacific rim countries and the European Union. Canada's "supply management" system, a highly escalated issue during the negotiations, will remain largely in place, but certain supply-managed sectors, such as dairy, eggs and poultry, will make concessions. Canada's milk Class 6 and milk Class 7 policies will be eliminated within six months, which previously allowed processors to buy domestic supplies of ultra-filtered milk at subsidized prices - thereby increasing competition faced by Canadian dairy farmers.

Rules of Origin and Workers in the Automotive Sector. Under Chapter 4 of the USMCA, 75 percent of auto content must originate in North America, up from the current 62.5 percent. U.S. auto-tariffs will be triggered at a threshold of 2.6 million units per annum. Furthermore, at least 40 percent, depending on the vehicle classification, of an automobile's high wage material expenditures must be manufactured by workers whose wages are at least US\$16 per hour. These provisions will likely shift various stages of production away from Mexico and other low-wage countries.

Dispute Settlement Systems. NAFTA's Chapter 19 enabled an independent binational panel, often used by softwood lumber companies, to review cases related to anti-dumping and countervailing duties. A similar binational panel, to address trade disputes between Canada and the U.S., will remain in place under Chapter 10 of the USMCA, despite efforts by the U.S. to eliminate it in favour of the U.S. courts system. State-to-state dispute settlement systems under Chapter 20 will also remain in place under Chapter 31 of the USMCA. The investor-state dispute settlement systems under Chapter 11 will be phased out within three years between the U.S. and Canada, with certain exemptions granted to sectors such as oil and gas, telecommunications and infrastructure for investors against the Mexican government.

Pharmaceuticals and Intellectual Property. U.S. pharmaceutical companies will now be able to sell pharmaceutical products in Canada for 10 years before facing competition from generic producers, replacing the previous eight-year market protection period. Furthermore, Chapter 20 of the USMCA provides that copyrights will extend to 70 years after an author's death in Canada – up from the previous 50 years, bringing Canada in line with the U.S. and the European Union.

Duties and Retail. Chapter 7 of the USMCA now allows Canadians to purchase more goods from the U.S., which may shift retail consumer behaviour for shopping online and along border cities. Under the USMCA, Canadian and U.S. shoppers will not pay duty on purchases of US\$150 or less. This is a significant increase from the previous *de minimus* threshold of US\$20. In addition to duties being less expensive, U.S. goods also become more convenient as the reduction in duties will result in less paperwork and shipping delays at the Canada-U.S. border.

Digital Commerce and Privacy. Under Chapter 19 of the USMCA, parties are prohibited from affording less favourable treatment in respect of customs and duties to digital products produced by another party. Furthermore, the USMCA deems electronic signatures to be legally valid. Other provisions also provide for anti-spam rules and protection of personal information, resulting in some harmonization of such legislation among the parties. The USMCA will likely improve digital commerce and address modern concerns that were not contemplated at the time NAFTA was negotiated.

TERMS PRESERVED FROM NAFTA

Professional Visas. The information technology sector that employs many highly skilled professionals did not exist when NAFTA was first agreed to. As a result, Canada sought to expand upon NAFTA's Chapter 16 to increase the number of temporary work visas available to business professionals. No change, however, has been made to NAFTA's work visa provisions.

Cultural Industries. Canada sought to maintain longstanding cultural protections during negotiations to preserve Canadian "sovereignty" and "identity". Longstanding protections for Canadian cultural industries under NAFTA, such as publications, film, television, radio and music will be maintained under Chapter 32 of the USMCA.

TERMS NOT AGREED UPON

Environmental Regulations. Prime Minister Justin Trudeau had publicly stated that Canada sought to explicitly include the word "climate change" in the new agreement, as well as obtaining a commitment from each country to reduce emissions and shift to low-carbon economies. There is no mention of "climate change" under the USMCA, and there are no binding commitments by any of the parties in respect of the environment.

Gender and Indigenous Rights. Canada's Minister of Foreign Affairs Chrystia Freeland had stated her intention to establish new chapters within the USMCA dedicated to gender equality and indigenous rights. As currently constituted, no such language exists in the USMCA.

Government Procurement. One of Canada's key economic goals was to open subnational procurement in the U.S. to allow Canadian businesses to bid on more U.S. government (state and municipal) contracts. There will be no change, however, to the "Buy American" restrictions on government procurement.

Tariffs. The USMCA does not immediately lift any existing U.S. tariffs on steel and aluminum imports from Canada and Mexico or any retaliatory measures contemplated. As it currently stands, there is no expected timeline for the elimination or exemption of these tariffs.

Historical Timeline of NAFTA Renegotiations

August 16, 2017	Canada, the U.S. and Mexico meet in Washington for the first round of NAFTA renegotiations.
September 5, 2017	Conclusion of the second round of NAFTA renegotiations
September 27, 2017	Conclusion of the third round of NAFTA renegotiations
October 17, 2017	Conclusion of the fourth round of NAFTA renegotiations.
November 21, 2017	Conclusion of the fifth round of NAFTA renegotiations.
January 29, 2018	Conclusion of the sixth round of NAFTA renegotiations.
March 1, 2018	President Donald Trump announces intention to impose a 25 percent tariff on steel imports and a 10 percent tariff on aluminum imports.
March 5, 2018	Conclusion of the seventh round of NAFTA renegotiations with no further meetings scheduled among the countries.
June 1, 2018	The U.S. formally imposes tariffs on steel and aluminum under Section 232 of the <i>Trade Expansion Act of 1962</i> which permits the restrictions on imports in the interest of national security.
July 1, 2018	Canada enacts retaliatory tariffs against the U.S.
August 27, 2018	The U.S. and Mexico reach a preliminary trade agreement.
September 30, 2018	Canada agrees to sign on to the USMCA.

The USMCA introduces significant changes to the North American business climate for both domestic and foreign participants, affecting both the economic and legal conditions under which investors and businesses operate. To discuss how the USMCA will affect your legal compliance and business strategy or how we can help you with your cross-border legal issues, please contact Allan Ritchie or any member of our cross-border team.

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Canada-U.S. Cross Border Practice

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Our deep understanding and expertise in areas such as cross-border M&A, litigation, restructuring and corporate reorganizations, banking, tax, securities and regulatory liability allows us to anticipate, identify and deal efficiently and effectively with matters on behalf of our clients on both sides of the Canada-U.S. border.

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