

June 2020

## Implementing New NAFTA: Agreement on Everything Except the Name!

On July 1, 2020, the *North American Free Trade Agreement* will be replaced by the new *Canada-United States-Mexico Agreement* (**CUSMA**), also known in the US as the *United States-Mexico-Canada Agreement* (**USMCA**) and in Mexico as the *Tratado entre México, Estados Unidos y Canadá* (**T-MEC**). “NAFTA 2.0” would have been simpler.

The CUSMA’s most important achievement is the preservation of almost all the substantial commitments to open trade arising from the NAFTA. This stability confirms the attractiveness of Canada, the US and Mexico as bases for companies to trade and invest in a vibrant regional free trade area with nearly 500 million people and 2019 GDP of about C\$32 trillion. The agreement also makes important incremental changes in key sectors such as automotive trade, agriculture, intellectual property, and financial services, as well as broad framework law changes involving labour, the environment, digital trade, and investment. In addition, the CUSMA revises important aspects of the NAFTA dispute resolution provisions and contains long-range sunset / renewal provisions that provide private parties with much greater certainty for trade and investment decisions.

### Ratification and Implementation

Canada, the United States and Mexico signed the CUSMA on November 30, 2018. Further negotiations led to a Protocol of Amendment (**POA**) signed on December 10, 2019 that revised

provisions in key areas such as labour, rules of origin, intellectual property, the environment and dispute settlement mechanisms.

Despite the unforeseen challenges to the operations of governments and businesses in response to the COVID-19 pandemic, all three parties completed their ratification processes in April 2020. Canada's Deputy Prime Minister, Chrystia Freeland, issued a statement that identified the implementation of the agreement as a core element of the economic recovery strategy:

The Canadian government will continue to work with the United States and Mexican governments to determine an 'entry into force' date that is mutually beneficial. We want to ensure the new NAFTA will support a strong economic recovery once we have put the COVID-19 pandemic behind us – which we will.

The new NAFTA is good for Canadians, in every region and in every sector of our economy. It is good for workers, families, entrepreneurs, and businesses. It supports the prosperity of communities across our country.<sup>1</sup>

## Sectoral Changes

Some of the most notable sectors affected by the CUSMA changes include:

- Automotive – The North American local content requirement for duty-free treatment of passenger vehicles and light trucks is raised from 62.5% to 75%, and from 60% to 70% for heavy trucks. In addition, new rules of origin require that (i) at least 40% of an automotive good's labour value content arise from workers earning at least US\$16 per hour; and (ii) at least 70% of steel and aluminum content must originate from the US, Mexico or Canada in order to receive duty-free treatment. The POA elaborates that, beginning seven years after entry into force of the agreement, the steel must be melted, mixed and coated in the US, Mexico or Canada to claim duty-free treatment. Ten years

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<sup>1</sup> Government of Canada (3 April 2020), [Statement by the Deputy Prime Minister on Canada's ratification of the new NAFTA](#), available online.

after entry into force, the parties will consider potential additional origin requirements for aluminum. (See our previous commentary on changes to the North American content rules [here](#)).

- Agriculture (Supply-Managed Commodities) – Canada is providing increased market access through the implementation of tariff rate quotas for specific US-origin dairy, poultry and egg products. Canadian agricultural exporters will benefit from an additional consultation mechanism to address trade distortions, as well as obligations to facilitate trade in agricultural biotechnology products. (See our previous commentary on changes to supply-managed sectors [here](#)).
- Intellectual Property – Canada is aligning its IP protection with the US and Mexico through:
  - (i) increasing the term of copyright protection to life plus 70 years for works, and to life plus 75 years for performances and sound recordings;
  - (ii) enhancing protection for trade secrets;
  - (iii) allowing the registration of collective marks and certification marks; and
  - (iv) providing a patent term adjustment to compensate patent applicants for unreasonable delays in the processing of patent applications.

The POA removed the obligation to provide ten years of data protection for biologic pharmaceuticals, allowing Canada to retain its eight-year data protection period for such products. (See our more detailed commentary on IP issues [here](#)).

- Financial Services – Canada obtained provisions that allow its regulatory authorities to impose stricter record-keeping requirements for corporate records and central securities registers for foreign entities that are licensed and regulated in Canada. The Superintendent of Financial Institutions must have full access to the corporate records or central securities register belonging to a subsidiary of regulated foreign entities, and can

direct these entities to maintain a copy of such records and/or register in Canada. (See our more detailed commentary [here](#)).

## Framework Changes

The main areas in which the CUSMA introduces important changes to the parties' framework laws and dispute resolution processes are:

- Labour – The parties commit to higher minimum protections against discrimination as well as workplace violence, forced labour and child labour. The labour chapter also includes a new “rapid-response” mechanism that ensures the effective implementation of some of these labour obligations. The parties also have recourse to the dispute settlement mechanism in the CUSMA for failures to comply with labour-related obligations. (See our previous commentary [here](#)).
- Environment – The CUSMA reinforces previous environmental protection commitments under the NAFTA by including obligations to enforce environmental laws and not to weaken such laws in the pursuit of trade or investment. New environmental commitments include taking steps to protect the ozone layer, to promote sustainable forestry and fishery practices, and to cooperate to improve air quality. The parties also have recourse to a dispute settlement mechanism for failures to comply with environmental obligations.
- Digital Trade – The parties are making several commitments to facilitate e-commerce including that they:
  - (i) will not charge customs duties on digital products transmitted electronically (e.g. software, videos, and e-books);
  - (ii) will not restrict the legal validity of electronic signatures; and
  - (iii) will maintain or adopt consumer protection laws applicable to online commerce.

- Investment Protection – While the key substantive protections for investment are maintained (e.g. non-discriminatory treatment, a minimum standard of treatment and compensation for expropriation), the investor-state arbitration mechanism for dispute resolution will no longer be available for claims between the US and Canada and arising in respect of new investments after July 1, 2020. State-to-state dispute settlement would still be available where an investor persuades its home government to initiate a proceeding, and the available remedy would be an elimination of the non-conformity or another mutually agreed upon remedy. For claims involving investments made while the NAFTA was in force (between January 1, 1994 and July 1, 2020), investors can use the NAFTA’s investor-state arbitration mechanism for up to three years following the CUSMA coming into force. This retrenchment contrasts with the approach taken in Canada’s *Comprehensive Economic and Trade Agreement (CETA)* with Europe, which includes an innovative permanent investment dispute resolution roster as a mechanism to address the adjudication of investor damage claims against host states.<sup>2</sup> (See our previous commentary on the CETA regime [here](#)). Future disputes involving Canada and Mexico may also be subject to investor-state arbitration under the *Comprehensive and Progressive Trans-Pacific Partnership (CPTTP)* (See our previous commentary on the CPTTP [here](#)).

## Dispute Settlement

Chapter 19 of the NAFTA established a customized dispute settlement mechanism for addressing issues arising in trade remedy proceedings. However, it has been utilized infrequently, in part due to some of the procedural requirements applicable to the establishment of a panel for resolution of a specific dispute. The POA includes changes that permit the complaining party in a proposed dispute to choose panel members from a roster if the responding

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<sup>2</sup> *Comprehensive Economic and Trade Agreement* between Canada and the European Union [CETA], 30 October 2016, (provisionally entered into force 21 September 2017). The investment protection provisions in CETA will only enter into force upon ratification by all EU member states. In response to a challenge regarding the compatibility of the investment protection provisions with EU law, the Court of Justice of the European Union released a binding opinion on April 30, 2019, stating that the permanent investment dispute resolution mechanism established in CETA is compatible with EU law (*Accord ECG EU-Canada, C1/17, 2019*).

party fails to participate or fails to appear for the choosing of panel members by lot procedure.

In light of the current practical unavailability of the World Trade Organization dispute settlement mechanism for disputes involving the United States, the revised provisions in the POA which facilitate the establishment of dispute settlement panels may see increased use by the CUSMA parties in the coming years.

### Termination and Extension

The NAFTA contained a provision allowing any party to initiate the termination of the agreement by providing 6 months notice to the other parties. Under the CUSMA, a party may withdraw from the agreement upon 6 months notice, but the agreement will remain in force for the remaining parties.

During negotiations, the US tabled a provision that would terminate the agreement after 5 years unless parties agreed to an extension. However, Canada considered it important to provide greater certainty regarding the durability of the agreement, which encourages trade and investment decisions by private parties that depend on longer time horizons. The parties agreed to a “sunset clause” that provides for termination of the agreement after 16 years, unless each party agrees to an extension for another 16 years. The agreement is also subject to review every six years, at which point the parties can agree to extend the term of the agreement.

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#### a cautionary note

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