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New NAFTA : 8 major changes

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Authors

Pierre Marc Johnson

Counsel

Pierre-Olivier Valiquette

Lawyer

Canada and the United States reached an agreement on the renegotiation of the North American Free Trade Agreement (NAFTA) on September 30, 2018 which was the deadline imposed by the United States. This new agreement, now called the *United States-Mexico-Canada Trade Agreement*[1] (hereafter the "**USMCA**" or the "**Agreement**"), changes the legal framework that has been in place for the last twenty years.

Some concerns have already surfaced since the negotiations ended: How will the USMCA affect Canadian businesses? Pending further analysis of the USMCA, which is expected to come into force in 2020, here is a short summary of the changes made to NAFTA by the new Agreement.

Wider American access to Canadian dairy, egg and poultry markets

American complaints about access to the dairy market go back long before the Donald Trump presidency since the United States have been in a chronic surplus situation for many years.

With respect to dairy products:

1) After having lost access to 3.25% negotiated under the Trans-Pacific Partnership (TPP) when it withdrew from it in 2017, the United States obtained an opening of 3.6% of the Canadian market. For Canadian producers, this means an increase in market access by American producers.

2) Canada has agreed to dismantle the Class 7 price agreement concluded in 2016, which limited American exports of ultra filtered milk used to produce dairy products.

The USMCA will also have an impact on other food sectors:

Canada has granted the United States greater access for eggs, turkey, poultry, hatching eggs and chicks, a measure that will take effect when the USMCA comes into force.

However, the Canadian Government has announced that it will compensate producers for the increased import quotas.

In return for these concessions, Canada has gained greater access for its exports of refined sugar and sweetened products, as well as for certain dairy products.

American tariffs justified by national security (Section 232): no end in sight

Although this was a central concern for Canada, the United States did not agree to lift the tariffs on steel and aluminum imposed in the name of national security. The United States indicated that these discussions were independent of the USMCA and will be addressed separately in the indefinite future.

That being said, the USMCA provides for an exemption from automobile tariffs for any future tariff that the United States may impose in this sector (subject to certain limits).

Intellectual property: new standards

The USMCA largely adopts the requests made by the United States during the TPP negotiation:

1) Copyright protection will be extended twenty years, from 50 to 70 years.

2) Data protection relating to drugs manufactured from biological cells has been extended two years, from eight to ten years, which will have an impact on manufacturers of generics.

3) Protection of certain geographical names.

Sales tax and customs duties: *de minimis* levels will be increased

The *de minimis* level in force at the moment for sales tax and customs duties is $20, an amount that has not changed in fourty years and above which Canada could impose tariffs.

With the new Agreement, the *de minimis* threshold will now rise to $40 for sales tax to be imposed and $150 for customs duties to be applied. This is a Canadian “victory” over the initial demand of the United States to raise this threshold to $800, which would have dramatically disrupted the retail trade in Canada.

Preservation of the cultural exception

A “victory” for Canada, the cultural exception remains. Therefore, no foreigner will be able to acquire Canadian media, whether written, radio or television. However, its application to digital content remains uncertain.

Dispute resolution mechanisms: victories and defeats

Chapter 19 is retained, providing the possibility for Canada to seek arbitration if tariffs and quotas were to be imposed for dumping or subsidizing in a manner contrary to American legislation and to the rules applied in international trade. Stability in this area was of vital importance to Canada. This chapter has historically enabled Canada to win major victories against the United States , particularly in the softwood lumber sector.

However, Chapter 11 on the settlement of investor-State disputes, protecting investment in other member States of the free trade area, has almost entirely disappeared; it will now only apply to certain investments made prior to the entry into force of the USMCA.

However, the dispute settlement mechanism between investors and the State will remain in force with Mexico under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

The automobile sector: refocusing on North America

Canada has obtained an exemption of tariffs for vehicles it will export to the extent that vehicle exports do not exceed 2.6 million units per year (about 1 million more than current production) and USD $32.4 billion in parts.

In return, the United States has obtained a change in the rules of origin: vehicles free of tariffs must henceforth comprise not 62.5% of parts manufactured in North America but 75%. With this, fewer foreign parts will be able to be included in assembling vehicles manufactured in the area, which could mean an increase in demand for Quebec’s automotive parts industry.

In addition, eventually 40% of the parts will have to come from plants paying at least USD $16 per hour. In parallel, the agreement provides that the process for unionization of workers will have to be easier. Although this element will not have a great impact on Canada, Mexico on the other hand will be greatly affected.

The sunset clause: an American concession

A contentious and insistent demand by the United States concerned the adoption of a *sunset clause* providing for renegotiation or termination of the agreement every five years. Such a provision would have created uncertainty for businesses and would have had an impact on investments.

What is now provided is a first term of 16 years. Six (6) years after coming into force, a review process will then be initiated to assess the Agreement’s operation. Upon completion of the review, the parties may indicate their intention to pursue a second term of 16 years under the same conditions; alternatively they may negotiate new terms.

And what next?

It is expected that the text will be signed on November 30, 2018. However, approval by the US Congress will not take place until 2019 and entry into force will probably not take place before 2020. In the meantime, NAFTA remains in force.

In anticipation, we will continue to study the USMCA and its potential impact on our clients. Our team remains available to answer any questions related to this matter.

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1. The text of the new agreement was published on September 30 on the U.S. Trade Representative's website.