International Trade: A New Dawn For North American Trade
Prepared by Foley’s International Trade and National Security Practice
Foreword

The business community, lawmakers and even workers across North America breathed a collective sigh of relief on October 1, 2018, after the renegotiated NAFTA agreement was unveiled. Following negotiations that had become acrimonious and fears that Canada might be left out, the newly dubbed United States-Mexico-Canada Agreement (USMCA) yielded significant but workable changes to cross-border trade on the continent.

There are winners and losers from the pact, however. The devil is in the details of the 1,100-plus page text. The implications for business are significant and go far beyond those summarized by the media. But at a minimum, USMCA, if ratified, would maintain the vigorous tariff-free arrangement that has underpinned $1.25 trillion in cross-border trade. The agreement would bring a much-needed update to the rules, with modernized intellectual property (IP) provisions and chapters on digital trade, anticorruption, customs and trade facilitation and other improvements. It would maintain Mexico’s status as an attractive place to manufacture, improve dispute settlement processes largely pushed by Canada and provide certainty to the overall character of one of the largest and most reliable trading regions among the three countries. In the meantime, the completion of negotiations gives the business community greater clarity about the future, without which investment and output had suffered.

Of course, the new deal will not go into effect immediately. NAFTA is likely to continue governing North American trade for 18 months or more, as most of the key changes take effect in 2020 or later. After the leaders of the three countries sign USMCA, the legislatures need to ratify it. We believe all three countries are more likely than not to do so, given that the alternative is a possible end to the trade zone, which has been implicitly rejected due to the effort needed to complete USMCA text. After it is ratified, each country will need to write rules and adopt conforming legislation.

For the U.S. Congress, the final USMCA text alleviates many lawmakers’ concerns. For instance, Canada remains part of the trade zone. While the agreement includes a sunset clause, it kicks in after the current U.S. administration is out of office. The biggest industry-specific changes — for instance, an attempt to increase wages for Mexican auto workers and elevated regional content requirements in the sector — are the ones that most companies can adapt to. Finally, USMCA pries open Canadian dairy markets, which will play well in key districts.

That said, with Democrats winning the majority in the U.S. House of Representatives in the November 2018 midterm elections and Republicans continuing to control the Senate, the vote may occur at a time of heightened partisan tension. In the days after the three nations’ negotiators signed off on USMCA, some lawmakers warned that Congress would closely scrutinize the details. Senator John Cornyn, Republican of Texas and majority whip, said passage was “not a foregone conclusion.” Senator Ron Wyden, an Oregon Democrat, insisted that it should not be considered during a
lame-duck session after the midterm elections, but senior Republicans, speaking before the election, said they would do just that if their party lost the House of Representatives.

Now that they control the House, Democrats may face pressure to argue that USMCA does not go far enough to protect U.S. manufacturing jobs. While unions generally regard USMCA as an upgrade from NAFTA, they are still pushing for more. After the deal was announced, the AFL-CIO indicated that it would withhold endorsement until it understands enforcement and implementation details.

In Mexico, USMCA has been well received. Mexican negotiators had consulted closely with the country's business leaders, who generally see the deal as a reasonable update of NAFTA and a venue to maintain unrestrained market access to the U.S. market, but for steel and aluminum, discussed below. Key provisions affecting the Mexican industry — such as a requirement that by 2023, 40-45 percent of the work on a car or truck be done by workers earning $16 an hour — are less onerous than they seemed when considering the figure given by Mexican Minister of Economy, Ildefonso Guajardo Villarreal, that close to 70 percent of current passenger vehicle production already complies with that requirement. The deal will likely be ratified by Mexico’s newly seated Senate, with its majority comprised of legislators akin to President-Elect Andrés Manuel López Obrador who will be sworn in on December 1, 2018.

USMCA appears to stand a good chance of being ratified in Canada as well, although it has been criticized by both liberals and conservatives. Tracey Ramsey, a member of parliament for Canada’s left-leaning New Democrats, blasted a clause that effectively gives the U.S. veto power over a trade deal between China and Mexico or Canada, which she said is a “severe restriction on Canadian independence.” Conservative leader Andrew Scheer is calling the deal NAFTA 0.5 because of all the concessions Prime Minister Trudeau agreed to in order to get the deal done. Speaking before Parliament, he derisively quoted President Trump’s economic advisor Larry Kudlow as saying “Canada gave graciously.”

In the following pages, we’ve assembled secondary research, press reports and original analysis on USMCA and related trade matters. We have also included a collection of timely articles published by Foley attorneys whose practices focus on international regulatory issues. First, here are the headline changes imposed by USMCA:

**Dispute Resolution**

USMCA includes the language in NAFTA’s Chapters 19 (Antidumping) and 20 (catchall dispute settlement), with modifications. The biggest change is to Chapter 11’s investor-state dispute settlement (ISDS) provision, which is phased out for Canada and grants greater protection exclusively to certain sectors for Mexico: transportation services, telecommunications services, power generation, oil and gas, and ownership or management of infrastructure.

---

8  http://www.elfinanciero.com.mx/economia/mayoria-de-exportaciones-de-autos-podra-cumplir-nuevas-reglas-de-origen-guajardo
10  https://globalnews.ca/video/rd/1334967875768/?jwsource=em
11  https://www.politico.com/newsletters/morning-trade/2018/10/01/the-usmca-has-landed-358167
12  https://www.politico.com/newsletters/morning-trade/2018/10/01/the-usmca-has-landed-358167
Section 232 Trade Cases
The Trump administration’s use of Section 232 provisions to impose trade barriers was a major issue during the negotiations, particularly because Trump has initiated a process that could lead to high tariffs on automobiles. Ultimately, this concern was addressed via side letters with Canada and Mexico that effectively would exempt both countries from any eventual Section 232 barriers on automobiles. U.S. tariffs on steel and aluminum remain, although officials have indicated that talks on these are ongoing; Mexico has signaled that it is aiming for some sort of exclusion before the USMCA signing, on or before November 30, 2018.

Labor
USMCA includes measures improving the ability of Mexican workers to organize into unions. These measures, which the U.S. supported as a means of leveling the playing field and boosting domestic manufacturing, have received guarded praise from U.S. labor unions.¹³

Automotive Industry Content Rules
USMCA progressively increases the minimum amount of North American content that an automobile must contain in order to cross borders tariff-free — from 62.5 percent to 75 percent — and adds a requirement that a minimum of 40 percent of a vehicle must be built by workers earning at least $16 per hour. Automobiles that do not comply would be subject to a 2.5 percent tariff. Roughly seven in 10 vehicles manufactured in Mexico are believed to already meet the content of origin requirement. Complying with the wage standard will largely depend on how it is calculated.


Seasonality of AgriculturalExports
During negotiations, the U.S. put forward a proposal so that “injury” on antidumping investigations would be calculated exclusively during the production season of agro products. It was eventually withdrawn as it would have had a worse effect on Mexican exports than on exports from non-USMCA countries, such as Brazil or Chile. This effort has not been forgotten in the U.S. and has now turned into an effort to modify U.S. domestic antidumping laws.

Gregory Huisian
Partner and chair of Foley’s International Trade and National Security Practice

Alejandro Nemo Gomez Strozzi
Partner and member of Foley’s International Trade Industry Team
# Table of Contents

2  FOREWORD

6  MARKET INTELLIGENCE

12  HOW FOLEY & LARDNER LLP CAN HELP

13  ADDITIONAL INSIGHTS

13  UNDERSTANDING AND COPING WITH THE U.S.-MEXICO-CANADA AGREEMENT: USMCA UPDATES NAFTA RULES OF ORIGIN FOR MOTOR VEHICLES AND AUTO PARTS

13  FREE TRADE AGREEMENT IN PRINCIPAL BETWEEN U.S. AND MEXICO SOUNDS GOOD, BUT WHAT WAS REALLY AGREED UPON?

13  NAFTA RENEGOTIATIONS CREATE UNCERTAINTY FOR AUTOMAKERS

14  NAFTA: RENEGOTIATION OR MODERNIZATION, DIFFERENT GOALS?

14  THE PARABLE OF THE WIZARD AND NAFTA

14  NAFTA IN A LAND OF UNCERTAINTY

15  U.S. CUSTOMS AND THE NEW TRUMP ADMINISTRATION: YOUR TOP TEN QUESTIONS ANSWERED

15  NAFTA UNDER THE NEW TRUMP ADMINISTRATION

16  THE FOLEY INTERNATIONAL TRADE TEAM

17  ABOUT FOLEY & LARDNER LLP
Market Intelligence

The following provides detailed, early analysis of key provisions in USMCA, based on secondary research.

Dispute Resolution

USMCA makes several important changes to NAFTA's dispute provisions. In a concession to Canada, the language from NAFTA's Chapter 19 is included in USMCA. The chapter provides the framework for a country to challenge another country's antidumping and countervailing duty provisions. USMCA also includes language from NAFTA's Chapter 20, without significant changes.14

The biggest change is to the expert panels that, under NAFTA, resolved disputes between governments and investors — so-called investor-state dispute settlements (ISDS). USMCA phases out ISDS for Canada and grants greater protection exclusively to certain sectors for Mexico: transportation services, telecommunication services, power generation, oil and gas, and ownership or management of infrastructure. “The real winner on [ISDS] is Canada, which was far and away the most frequent defendant in ISDS cases,” according to an analysis by CSIS. “Now aggrieved U.S. companies will have to seek solace in Canadian courts.”15

The deal in effect “defers to domestic courts as the main mechanism for solving controversies should governments change the rules down the road,” adds a New York Times op-ed by two political scientists. This “puts a lot of faith in the transparency and competence of the legal systems of the member countries and opens the door to potential cronyism, unequal access to those systems and even corruption.... Given the changes championed by the Trump administration, investors will be especially wary of governments seeking to move the goal posts in the future. This would affect employment opportunities and job security across North America.”16

During negotiations, U.S. companies warned that if Trump weakened ISDS, it would diminish the value of investments in Canada and Mexico and, more importantly, create a precedent to devalue investor protections around the world, according to an article in Axios. “The three biggest U.S. business lobby groups have previously warned that their support of the deal could ultimately hinge on whether ISDS is included in the revised agreement,” Politico reported in February.17

USMCA's Sunset Provision

U.S. Trade Representative Robert Lighthizer pushed a proposal that would have subjected the trade agreement to review every five years, providing an out if any party decided they did not want to continue. “The idea is that if it's such a good agreement, then we'll naturally roll it over,” Lighthizer said during testimony before the House of Representatives. “If it's not a good agreement, we won’t.” The unprecedented proposal received strong pushback due to the uncertainty it would create for business. Rep. Kristi Noem, R-S.D., responded, “In my opinion trade deals are meant to foster trust between nations and eliminate uncertainty in order to create more opportunities to sell our goods overseas. A sunset provision undermines a trade deal's ability to develop necessary certainty to encourage businesses to invest.”

Ultimately there will be a review, but not until Trump leaves office, as USMCA provides for a review after six years. If all three countries agree, the deal will continue for the full 16-year term. After that the deal will expire, though there is an option to renew it for another 16 years. Although this is dramatically more palatable to investors than Lighthizer's five-year review proposal, it does introduce significant uncertainty “by making it less costly for governments to upend existing rules and threaten to exit the agreement,” according to the New York Times op-ed cited above. “Establishing periodic reviews as natural breaking points for the rules of the game would certainly shorten investors' time horizons.”18

14 https://www.politico.com/newsletters/morning-trade/2018/10/01/the-usmca-has-landed-358167
15 https://www.csis.org/analysis/exit-nafta-enter-usmca
18 https://www.nytimes.com/2018/10/01/opinion/worse-than-
There is, however, other language in USMCA that may boost uncertainty about the pact’s durability. One rule addresses trade pacts with nonmarket economies, including China. “If one country enters into a deal with China or another similar economy, the rule allows a country to give six months’ notice to terminate the three-way deal and replace it with a bilateral,” writes Politico. “This provision, which has President Donald Trump’s fingerprints all over it, is expected to be a template for future U.S. trade deals aimed at hemming in China.”19

**IP Protections**

One of the less controversial aspects of the NAFTA renegotiation is the addition of protections for intellectual property. Much has changed since NAFTA was signed in the early 1990s, particularly with respect to the internet, biotech and pharmaceutical sectors. A new, 63-page IP chapter updates or introduces provisions for copyright, trade secrets, industrial design and digital trade. It also contains more stringent protections for patents and trademarks, including for biotech, financial services and even domain names, and extends IP protection for biologics from eight to 10 years. Additionally, patent terms can be adjusted for unreasonable patent office delays.

According to the [Washington Post](https://www.washingtonpost.com/business/2018/10/01/us-canada-mexico-just-reached-sweeping-new-nafta-deal-heres-whats-it/?utm_term=.3cbd6ea861b8), “Many business leaders and legal experts believed these updates were necessary given that the original agreement was negotiated 25 years ago.”19

According to the text of the agreement:

“USMCA includes a robust labour chapter, fully subject to the dispute settlement provisions of the Agreement, that aims to raise and improve labour standards and working conditions in all three countries by building on international labour principles and rights. The labour chapter includes new provisions to prohibit the importation of goods produced by forced labour; protect against discrimination based on sex, sexual orientation and gender identity; address violence against workers exercising their labour rights; and ensure that migrant workers are protected under labour laws. To address the main labour rights violations in Mexico (specifically, the use of ‘protection contracts’ or employer-dominated union agreements), the chapter also includes an Annex on Worker Representation in Collective Bargaining in Mexico, under which Mexico commits to specific legislative actions to provide for the effective recognition of the right to collective bargaining.”22

**Mexican Labor Protections**

USMCA strengthens the ability of Mexican workers to organize into unions. From early on in the negotiations, labor provisions were important to the U.S. administration, both in appealing to the Trump base and in winning support from congressional Democrats. During negotiations, former Rep. Sandy Levin, D-Mich., argued that the failure to include international labor standards in the original NAFTA led to the eradication of U.S. manufacturing jobs and a persistent wage gap between U.S. and Mexican manufacturing sectors. Responding to these concerns, Lighthizer told a congressional committee in March that several proposals were designed to drive up Mexican wages, “including the right of workers to vote by secret ballot on collective agreements… The objective is to try to get wages up in Mexico — which makes the United States more competitive, but also creates customers for the United States,” the CBC reported.


“USMCA includes a robust labour chapter, fully subject to the dispute settlement provisions of the Agreement, that aims to raise and improve labour standards and working conditions in all three countries by building on international labour principles and rights. The labour chapter includes new provisions to prohibit the importation of goods produced by forced labour; protect against discrimination based on sex, sexual orientation and gender identity; address violence against workers exercising their labour rights; and ensure that migrant workers are protected under labour laws. To address the main labour rights violations in Mexico (specifically, the use of ‘protection contracts’ or employer-dominated union agreements), the chapter also includes an Annex on Worker Representation in Collective Bargaining in Mexico, under which Mexico commits to specific legislative actions to provide for the effective recognition of the right to collective bargaining.”22

---


In a statement, United Steelworker (USW) provided a guarded endorsement of the deal:

“[USMCA] goes farther than any prior trade agreement. That is encouraging, but it is not yet enough…. The impact of the deal must be measured not only by what is in the final agreement, but also by what Mexico adopts legislatively to implement its commitments. Also, what will the Trump administration and Congress do to ensure that the provisions of any final agreement are effectively applied, monitored and enforced? Strong text in an agreement backed up by legislative changes in Mexico will only matter if they are fully and faithfully enforced.”

The American Enterprise Institute was less convinced that the provisions would yield the intended results: “Forcing higher wages and labour protection standards on a relatively poor country such as Mexico will have unintended consequences, but that is likely an acceptable price for keeping trade in North America tariff-free.”

Automakers and suppliers have warned that killing the 24-year-old trade pact could cost 50,000 manufacturing jobs in North America and $10 billion a year in lost trade. Meanwhile, some economists suggest that NAFTA helped the U.S. auto sector compete with China — something it would not have been able to do otherwise. By creating a North American manufacturing cluster, NAFTA facilitated the development of cross-border supply chains, lowering costs, increasing productivity and improving U.S. competitiveness.

Under NAFTA, vehicles assembled in the three countries are not automatically tariff-free; cars that do not meet certain requirements face a 2.5 percent duty that would remain in effect under USMCA.

**Content Origination Standards:** Under current rules, in many cases parts representing at least 62.5 percent of the cost of passenger cars and light trucks must originate within the region in order for a vehicle to avoid the tariff. Although Trump proposed raising this to 85 percent, in the final USMCA agreement it was changed to 75 percent, to be reached within five years from when the accord goes into effect.

This is a significant change, and higher regional content requirements could boost costs and erode efficiency. Mexico’s economy minister has estimated that 70 percent of his country’s finished vehicles currently meet the elevated content origin standard, meaning that supply chain changes would be required for a significant minority of vehicles.

Over the history of NAFTA, the regional content requirement has been increased four times, so manufacturers are accustomed to making supply chain adjustments, however difficult they may be. In some cases, parts are simply not available in North America, and the elevated USMCA requirement would force manufacturers to make significant supply chain changes. The clause stands to boost output in the $90 billion Mexican auto parts industry by more than 10 percent in the next three years, according to the head of Mexico’s auto parts industry association. Asian and European automakers are expected to require the most investment to meet the standard.

**New Automotive Rules**

In many ways, renegotiating NAFTA was all about automobiles as the vast majority of the U.S. trade deficit with Mexico and Canada comes from this sector. Automotive talks were also highly sensitive because automakers have spent a generation and billions of dollars weaving supply chains among the continent’s countries. Mexico alone exports about $31.2 billion of finished automobiles per year to the U.S. USMCA would change content origination standards and impose a minimum average hourly wage requirement.

---


New $16 per Hour Wage Requirement: USMCA imposes a wage requirement for auto workers for the first time. Specifically, to qualify for tariff-free trade, by 2020 at least 30 percent of an automobile must be made by workers earning at least $16 an hour. The content minimum increases gradually to 40 percent by 2023.

Some analysts expect this to lead to increased manufacturing in the U.S. and Canada, where workers already earn more than $16 per hour. “The effect is more likely to force Mexico to import more U.S. and Canadian content for its cars than it is to encourage them to raise wages,” according to CSIS. “It will also raise car prices and make the U.S. industry less globally competitive at a time when it faces ever-growing global competition. Or, alternatively, it might persuade companies to abandon the effort to comply with enhanced content requirements and all the paperwork that goes with them and instead let their production be non-USMCA qualified and simply pay the 2.5 percent tariff.”28

Another concern is that the new wage requirement will lead to fewer small cars being manufactured in North America.29 It’s difficult to earn a profit on small cars, particularly if they are manufactured in the U.S. Margins are tight and the marketplace is crowded and competitive. Companies often manufacture small cars more to meet fuel economy standards than to make money.

“The new rule reflects President Trump’s touting of ‘fair trade,’ under which U.S. workers should not have to compete against Mexican workers with much lower wages,” explains the American Enterprise Institute. “But that view ignores the nature of value chains in the automobile industry, in which workers in different countries not only compete but also complement each other. Making a part of those production chains more expensive will make North American car manufacturing as a whole less competitive, ultimately putting at risk even jobs in the United States that President Trump purports to protect.”30

The impact of this clause will depend on how the wage standard is implemented. If calculations include higher-wage jobs, such as those in logistics and research, achieving the $16 an hour standard may not be overly challenging. Regardless of the details, companies will study the various options open to them, and it is certainly not a given that the provision will boost wages in Mexico.

Impact of Section 232 Trade Cases on Automobiles

The Trump administration’s use of so-called Section 232 cases to accomplish economic goals emerged as a major sticking point in the NAFTA renegotiations. In particular, there were fears that the administration would impose tariffs on auto imports, having imposed 25 percent tariffs on steel imports and 10 percent on aluminum in May 2018.31

In 232 cases, the U.S. Department of Commerce investigates how much of a good needs to be produced domestically to meet national defense requirements, the domestic industry’s capacity to meet that need and other factors. If the Commerce Department determines that unfair trade has damaged U.S. national security, the president has broad authority to assign remedies such as tariffs and

---

28  https://www.csis.org/analysis/exit-nafta-enter-usmca
quotas. On May 23, 2018, the department initiated a 232 investigation into auto imports. It has until mid-February 2019 (270 days) to report its findings to the president.32

Mexico and Canada’s concerns over auto tariffs have been addressed with the use of side letters to the USMCA agreement. The letters state that if the U.S. imposes Section 232 measures (such as tariffs or quotas) on auto imports, it would exempt light trucks and 2.6 million passenger vehicles from each country. The U.S. would also exclude $108 billion in auto parts imported from Mexico and $32.4 billion imported from Canada. The letters also stipulate relevant dispute resolution provisions. The side letter caps are well above the current production levels.33 The U.S. imported about $89.5 billion in light passenger cars and trucks from NAFTA members in 2017, including about 2.33 million vehicles from Mexico.34

Steel and Aluminum Tariffs for Canada and Mexico

President Trump imposed a 25 percent tariff on steel imports and a 10 percent tariff on aluminum imports, based on Section 232 national security grounds, on March 8, 2018. Trump initially spared Canada and Mexico from the tariffs, but included them on May 31, 2018, when a “new and fair agreement” with these countries was not reached. This development sparked controversy within the U.S. Republican party, with many warning that it could trigger a trade war. Trump economic advisor Larry Kudlow expressed concern that tariffs on steel imports — a move to protect a small fraction of businesses — could hurt the entire U.S. economy.35

In contrast to the Section 232 side letters on autos, the deal does not eliminate steel and aluminum tariffs, nor does it address retaliation from Canada and Mexico targeting U.S. agricultural and other products. “Senior administration officials indicated there would be further negotiations aimed at resolving those issues, but didn’t say when,” according to Politico.36

Financial Services Modernization

The contemporary financial services industry bears little resemblance to the one that existed when NAFTA was enacted in 1994. As negotiations began, the industry criticized NAFTA, as well as other treaties, as being inadequate.37 In particular, they denounced countries’ efforts to protect their domestic industry from competition by forcing banks to maintain servers in each country where they do business. This, they say, boosts costs and harms efficiency.

To address this and other barriers, USMCA includes a new financial services chapter. According to the Wall Street Journal, the agreement “largely gives the big banks the freedoms they’ve long been seeking.”

Canada’s Dairy Concessions

Canada’s dairy protections became a major sticking point during negotiations. To keep dairy prices high and make sure that Canadian dairy farmers do not go bankrupt, the Canadian government restricts both dairy imports and domestic production. Trump regarded this as unfair and tweeted often about high tariffs on U.S. dairy products.39

In the end, the two countries reached a compromise. Canada gets to keep most of its complex dairy support system but agreed to give a greater market share to U.S. dairy farmers. “U.S. negotiators say they got a major victory by forcing Canada to eliminate the pricing scheme for what are known as Class 7 dairy products,” according to the Washington Post. “That means U.S. dairy farmers can probably send a lot more milk protein concentrate, skim milk powder and infant formula to Canada (and those products are relatively easy to transport and store).”40

The deal is a “genuine win” for the American dairy industry, yet one that is eclipsed by the ongoing Canadian and Mexican tariffs imposed in retaliation to Trump’s steel and aluminum tariffs, according to CSIS. Still, “given the

33 https://www.wsj.com/articles/mexico-cites-insurance-against-u-s-national-security-tariffs-1535560749
36 https://www.politico.com/newsletters/morning-trade/2018/10/01/the-usmca-has-launched-358167
size of Canada’s dairy industry and the narrow focus on a small number of dairy products such as infant formula, the economic effects will be extremely modest — while likely triggering loud and well-organised opposition from the Canadian dairy lobby.41

The deal gives U.S. exporters an additional 3.59 percent market share, compared to 3.25 percent promised in the Trans-Pacific Partnership (TPP), Politico reports. “Maybe more significant was Canadian concessions that will eliminate a milk ingredient pricing policy that gave incentives to domestic cheese producers to use a surplus of Canadian milk protein concentrates and skim milk powder that resulted from increased butter production. The pricing policy affected U.S. exports of so-called ultrafiltered milk — a new product that wasn’t subject to tariffs under the old NAFTA. Those exports had been a major source of income for farmers and processors in Wisconsin and New York already suffering from a glut in dairy.”42

For their part, the Canadian dairy industry panned the deal.43 Dairy Farmers of Canada said it will undercut the industry, limiting exports and opening Canada to more American products. “The announced concessions on dairy in the new USMCA deal demonstrates once again that the Canadian government is willing to sacrifice our domestic dairy production when it comes time to make a deal,” said Pierre Lampron, president of Dairy Farmers of Canada. “The government has said repeatedly that it values a strong and vibrant dairy sector — they have once again put that in jeopardy by giving away more concessions,” he added.44

41 http://www.aei.org/publication/the-new-nafta-shows-trumps-protectionism-can-be-curbed/
42 https://www.politico.com/newsletters/morning-trade/2018/10/01/the-usmca-has-landed-358167
How Foley & Lardner LLP Can Help

Companies with significant operations that could be impacted by USMCA should consider lining up counsel to understand the details of the new rules, monitor ongoing developments and develop strategies for responding.

USMCA is a long and detailed treaty with implications for many sectors and companies, particularly for those in the automotive trade. The specific rules written from the treaty — for example, on how to calculate regional content or wages for workers building a vehicle — will play an important role in how the treaty is implemented and how businesses respond. Many of these rules have not yet been hammered out, and companies would be wise to follow the process closely as information becomes available. Those that best position themselves to anticipate the changes will have a competitive advantage; those that fail to heed the agreement do so at their own risk. Despite the lead time before USMCA takes effect, it is critical that companies immediately begin looking beyond the headline provisions and position themselves to comply with or capitalize on the terms of the agreement.

Billions of dollars’ worth of exports and millions of manufacturing jobs are riding on ultimate signing and passage of the deal. With that much money at stake, it behooves companies with operations, sales, imports and exports that depend on or are impacted by North American trade zone rules to closely monitor the next steps, to be proactive in monitoring their risk exposure and to assess their exposure to the growing international trade war and reordering of U.S. free trade support.

Foley is advising companies to assess the possible scenarios that may occur and evaluating the consequences for businesses. Scenarios include passage or rejection by the three countries’ legislatures, or the possibility of a country withdrawing from the deal after it has been ratified, for instance over a bilateral deal with China. Withdrawal from NAFTA is still a possibility, even if it appears less than likely.

Leveraging Foley’s experience in international supply chain management, international trade and customs as well as administrative and governmental matters, we are counseling companies dealing with the uncertainty surrounding the agreement and planning for whatever outcome manifests.

This includes:

**Analyzing the Customs Situation**

Many companies have paid little attention to rules of origin, tariff classification and who is the importer of record for products that flow among NAFTA partners because they have been duty-free. Companies with substantial international trade need to know those variables as they originate from completely different legal situations under current NAFTA and incoming USMCA.

**Evaluating Supply Chain Options**

Foley’s experience in supply chain management can be an asset to businesses looking at whether USMCA would make it more or less costly to reshore operations, and whether Mexico’s maquiladora and other trade-promotion programs can make up for any pitfalls under the new pact.

**Considering Political and Legal Avenues**

A political hurdle for companies may have a political solution. We have experience in assessing how companies may use the frequently tapped congressional Miscellaneous Tariff Bill, offering duty forbearance for specific products as well as leveraging participation in industry trade groups and other lobbying tactics.

Antidumping and countervailing duty cases are already more common and higher profile now than at any time in recent history. Companies that have not considered filing a trade case may find unexpected benefits from proactively examining what the consequences of such investigations may be.

A final consideration in the current trade environment is that some companies may be able to take advantage of the new environment to protect themselves from imports they consider to be unfairly traded. The options to do so have never been greater, including the enhanced ability to file and win antidumping and countervailing duty cases, Section 232 or Section 301 relief and safeguard protections. Foley’s experienced international team can help companies evaluate both the strength of potential cases and the best remedy to achieve protection from unfairly traded imports.
Additional Insights

**Understanding and Coping with the U.S.-Mexico-Canada Agreement: USMCA Updates NAFTA Rules of Origin for Motor Vehicles and Auto Parts**

November 8, 2018

Alejandro N. Gomez-Strozzi and Gregory Husisian

The [U.S.-Mexico-Canada Agreement (USMCA)](https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between) was announced on September 30, 2018, to replace the North American Free Trade Agreement. The new agreement makes sweeping changes regarding motor vehicles and auto parts — rules companies involved in the automotive business across the content need to understand.

Alejandro Nemo Gomez Strozzi is an international trade lawyer in the Foley Gardere Arena office in Mexico City. He advises multinational companies in the auto, steel and consumer products sectors on topics such as foreign trade, taxes, customs and trade agreements. Gomez is a past undersecretary of economy for Mexico.

Gregory Husisian is a partner and litigation attorney in Foley’s Washington, D.C., office. He is chair of the firm’s Export Controls and National Security Practice, focusing on international regulatory issues posed by Office of Foreign Assets Control (OFAC) economic sanctions, International Traffic in Arms Regulations (ITAR), Export Administration Regulations (EAR), Nuclear Regulatory Commission export controls, the Foreign Corrupt Practices Act (FCPA) and the antiboycott regulations.

**Free Trade Agreement in Principal Between U.S. and Mexico Sounds Good, but What Was Really Agreed Upon?**

August 31, 2018

Alejandro Nemo Gomez Strozzi

Faced with the possibility that the U.S. would replace NAFTA with a bilateral agreement with Mexico, this post examines the possibility that Canada would not successfully reach an agreement. It looks at four contentious issues: automobile rules of origin, seasonality of agro products, the sunset clause and dispute settlement.

Alejandro Nemo Gomez Strozzi is an international trade lawyer in the Foley Gardere Arena office in Mexico City. He advises multinational companies in the auto, steel and consumer products sectors on topics such as foreign trade, taxes, customs and trade agreements. Gomez is a past undersecretary of economy for Mexico.

**NAFTA Renegotiations Create Uncertainty for Automakers**

January 4, 2018

By Shang Kong

President Donald Trump’s renegotiating of NAFTA has thrown the economies of auto-producing regions into question. Automotive-sector companies, some of the largest beneficiaries of the agreement, have put significant capital investments on hold as they wait for clarity regarding the continent’s trade policy and the effect it will have on the complex supply chain relationships that have emerged over the near quarter century that NAFTA has been in place.

Shang Kong is an associate and business lawyer in Foley’s Detroit office. He is a member of the firm’s automotive industry team and works on transactional and securities matters.
Discussions of changes to NAFTA must involve the political as well as the technical, spanning uncontested elements such as customs procedures and barriers to e-commerce, as well as contested aspects such as rules of origin, dumping and labor and environmental matters. Should negotiations fail, and the agreement be revoked, it would be extremely costly to pull the three highly integrated North American economies apart. All of this comes with the pressure of a 2018 presidential election in Mexico, Canadian provincial elections and U.S. congressional elections.

Andres Alvarez is a foreign legal consultant in Foley Gardere’s Dallas office. He focuses on topics including international trade, customs, commercial matters and corporate law.

Alejandro Nemo Gomez Strozzi is an international trade lawyer in the Foley Gardere Arena office in Mexico City. He advises multinational companies in the auto, steel and consumer products sectors on topics such as foreign trade, taxes, customs and trade agreements. Gomez is a past undersecretary of economy for Mexico.

A whimsical telling of the renegotiation process of NAFTA, with wizards, artisans, a king and a goddess standing in for policy advisers, industrial companies, President Donald Trump and social media. The story predicts an effective update to the existing agreement.

Gregory Husisian is a partner and litigation attorney in Foley’s Washington, D.C., office. He is chair of the firm’s Export Controls and National Security Practice, focusing on international regulatory issues posed by Office of Foreign Assets Control (OFAC) economic sanctions, International Traffic in Arms Regulations (ITAR), Export Administration Regulations (EAR), Nuclear Regulatory Commission export controls, the Foreign Corrupt Practices Act (FCPA) and the antiboycott regulations.
U.S. Customs and the New Trump Administration: Your Top Ten Questions Answered
February 7, 2017
By Gregory Husisian and Robert Huey

An overview of the top 10 questions every company that imports goods into the U.S. should be asking in the wake of uncertainty under the new administration and the impact on U.S. Customs and Border Protection (CBP). During the presidential campaign, CBP was mostly mentioned by President Trump in the context of illegal immigration. Controlling the flow of people, however, is only one of the jobs of CBP, as it also regulates what goods come into the U.S. while ensuring that the goods pay the appropriate tariff. As both the gatekeeper to the U.S. and the second-largest source of U.S. government revenue, the agency is a key regulator for many importers. Many of Trump’s campaign proposals, while not explicitly directed at CBP, impact how it operates or would require implementation by the agency.

Gregory Husisian is a partner and litigation attorney in Foley’s Washington, D.C., office. He is chair of the firm’s Export Controls and National Security Practice, focusing on international regulatory issues posed by Office of Foreign Assets Control (OFAC) economic sanctions, International Traffic in Arms Regulations (ITAR), Export Administration Regulations (EAR), Nuclear Regulatory Commission export controls, the Foreign Corrupt Practices Act (FCPA) and the antiboycott regulations.

Robert Huey is a partner and international trade and transactions lawyer in Foley’s Washington, D.C., office. He is a member of the Transactional & Securities and International Practices and Automotive, Energy, Health Care and Manufacturing Industry Teams. His practice focuses on international trade and transaction matters for clients in Europe, Asia and South America.

NAFTA Under the New Trump Administration
December 5, 2017
By Gregory Husisian

Many multinational companies have structured their operations on the assumption that the free trade of goods within the NAFTA region was a given and were understandably nervous regarding the future of the agreement, given recent events. What should those companies relying on NAFTA be thinking about?

Gregory Husisian is a partner and litigation attorney in Foley’s Washington, D.C., office. He is chair of the firm’s Export Controls and National Security Practice, focusing on international regulatory issues posed by Office of Foreign Assets Control (OFAC) economic sanctions, International Traffic in Arms Regulations (ITAR), Export Administration Regulations (EAR), Nuclear Regulatory Commission export controls, the Foreign Corrupt Practices Act (FCPA) and the antiboycott regulations.
The Foley International Trade Team

If you have questions about this white paper or any issue related to international trade, please contact the authors, Gregory Huisian and Alejandro Nemo Gomez Strozzi, or any member of the Foley International Trade Team.

Andres Alvarez
Foreign Legal Consultant, Dallas
aalvarez@foley.com
214.999.4341

Thomas S. Brown
Of Counsel, San Francisco
tsbrown@foley.com
415.984.9830

Marcos Carrasco Menchaca
Partner, Mexico City
mcarrasco@foley.com
52.55.5284.8546

Jaime Dorenbaum
Associate, San Francisco
jdorenbaum@foley.com
415.984.9811

Scott L. Fredericksen
Partner, Washington, D.C.
sfredericksen@foley.com
202.295.4799

Doraluz Galindo
Associate, Mexico City
dgalindo@foley.com
52.55.5284.8563

Jaime B. Guerrero
Partner, Los Angeles
jguerrero@foley.com
213.972.4634

Alejandro Nemo Gomez Strozzi
Partner, Mexico City
agomez@foley.com
52.55.5284.8561

David A. Hickerson
Partner, Washington, D.C.
dhickerson@foley.com
202.672.5467

Robert H. Huey
Partner, Washington, D.C.
rhuey@foley.com
202.295.4043

Gregory Huisian
Partner, Washington, D.C.
ghuisian@foley.com
202.945.6149

Nathan D. Imfeld
Associate, Milwaukee
nimfeld@foley.com
414.319.7174

Adrian L. Jensen
Partner, Washington, D.C.
ajensen@foley.com
202.295.4077

Arcie I. Jordan
Partner, Austin
ajordan@foley.com
512.542.7032

Kristen M. Maryn
Associate, Washington, D.C.
kmaryn@foley.com
202.295.4158

Lisa M. Noller
Partner, Chicago
lnoller@foley.com
312.832.4363

Marla Thompson Poirot
Partner, Houston
mpoirot@foley.com
713.276.5112

Alberto Santillan-Gaitan
Associate, Mexico City
asantillan@foley.com
52.55.5201.8562

David W. Simon
Partner, Milwaukee
dsimon@foley.com
414.297.5519

Olivia S. Singelmann
Associate, Washington, D.C.
osinglemann@foley.com
202.295.4146

Christopher Swift
Partner, Washington, D.C.
cswift@foley.com
202.295.4013

John E. Turlais
Special Counsel, Milwaukee
jturlais@foley.com
414.297.5585

Lauren L. Valiente
Senior Counsel, Tampa
lvaliente@foley.com
813.225.5443

Rohan A. Virginkar
Partner, Washington, D.C.
rvirginkar@foley.com
202.295.4058

Hayley K. Wells
Associate, Washington, D.C.
hwells@foley.com
202.672.5495
About Foley & Lardner LLP

Foley & Lardner LLP looks beyond the law to focus on the constantly evolving demands facing our clients and their industries. With over 1,100 lawyers in 24 offices across the United States, Mexico, Europe and Asia, Foley approaches client service by first understanding our clients’ priorities, objectives and challenges. We work hard to understand our clients’ issues and forge long-term relationships with them to help achieve successful outcomes and solve their legal issues through practical business advice and cutting-edge legal insight. Our clients view us as trusted business advisors because we understand that great legal service is only valuable if it is relevant, practical and beneficial to their businesses.

On April 1, 2018, Foley combined with Gardere, Wynne & Sewell LLP. The combined firm operates as Foley Gardere in Austin, Dallas, Denver and Houston. In Mexico City, the firm operates as Foley Gardere Arena. All other offices operate as Foley & Lardner LLP.
Our Core Values

**Clients First**
Our clients are our first priority. When we provide quality work, value and superior service to our clients, our own success inevitably follows.

**Diversity**
We embrace diversity and are committed to the inclusion of our diverse attorneys and staff and to the success of all our people.

**Integrity**
We will adhere to high standards of ethics, professionalism and integrity and safeguard the reputation of the firm at all times.

**Trust and Respect**
The success of our partnership stands on a foundation of trust, mutual respect, collegiality, communication and teamwork.

**Stewardship and Accountability**
As stewards of the firm, we are accountable to one another and will commit our time, talent and energy to the firm’s success, growth and long-term prosperity.

**Citizenship**
We embrace our responsibilities to our communities and profession and will lead by example through civic, pro bono, professional and charitable service.

**Professional Satisfaction**
Our work should be professionally satisfying and provide competitive financial rewards while affording the opportunity to achieve a reasonable balance between professional demands and personal commitments.

**Our People**
Our people are our most valuable asset and their quality, creativity and dedication are indispensable to our success.