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Goodbye NAFTA, Hello USMCA: A New Framework for Investment, IP and the Digital Economy

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The new United States Mexico Canada Agreement announced on October 1, 2018, will replace the North America Free Trade Agreement and significantly alter the legal framework of what has arguably been the most successful cross-border trading relationship in the world. We focus here on what businesses operating in the technology and life sciences sectors need to know about the provisions affecting (1) investment protection, (2) digital trade and (3) intellectual property.

1. Investment protection significantly restricted

The robust protections that foreign investments currently enjoy under NAFTA against unfair interference by a State will be eliminated or significantly restricted under the USMCA:

- Investment arbitration will be eliminated between Canada and the United States. If a US investor in Canada is the target of unfair action by Canada, its only direct recourse will be the Canadian courts. The same will be true of Canadian investors in the United States.
- Investment arbitration between the US and Mexico will be severely curtailed. Notably:
  - Substantive protections for most foreign investments will be limited to discrimination and direct expropriation.
  - Claimholders must pursue remedies in local courts for at least 30 months before commencing arbitration under the USMCA.
  - A broader range of substantive protections will exist only for a limited category of State contracts, notably investments in infrastructure, energy, transportation and telecommunications contracts.

The good news is that until the USMCA is ratified, NAFTA's substantive and procedural protections remain in place. The USMCA also provides that investors with pre-existing investments (investments made before the USMCA comes into force) may still bring claims under NAFTA for up to three years after NAFTA terminates.

Accordingly, United States investors in Mexico and in Canada who have a potential claim should seriously consider availing themselves of NAFTA protections while they still can.

In addition, US investors in Canada seeking broader treaty protections should consider restructuring their investments through another country with which Canada has an investment treaty. Canada and Mexico will continue to maintain extensive investment protection through their membership in the Comprehensive and Progressive Trans Pacific Partnership, which is expected to enter into force in the coming months.

2. The USMCA sets North American ecommerce on a new course

When NAFTA was negotiated 25+ years ago, electronic commerce in its current form did not exist. The USMCA's Digital Trade chapter, for the first time, puts in place joint rules of the road for North America. Here are some of the highlights:

No customs duties on cross-border sales of digital products and increased duty thresholds for other products

- Customs duties and other charges will be prohibited for cross-border sales of digital products distributed electronically (such as e-books, videos games and music).

- Canada will raise its *de minimis* shipment value level for duties on cross-border electronic sales of goods from CAD$20 a day to CAD$40. Canada will also provide for duty-free shipments of goods up to CAD$150.
- Mexico's threshold for duties will increase from $50 to $100 and will provide for duty-free shipments up to the equivalent of $117.

Prohibition on performance requirements

- The parties agree they will not require the use or location of computing facilities in their territory (data localization) as a condition for conducting business in their territory.
- The parties agree they will not require the disclosure of software source code, or the algorithms expressed in that source code, as a condition for the import, distribution, sale or use of that software, or products containing that software, in their territory.

Free movement of information

- The parties undertake not to restrict or prohibit the cross-border transfer of information, including personal information, by electronic means if this activity is for the conduct of business.
- The parties undertake to promote a risk-based approach to cybersecurity.

Non-discrimination

- The parties commit to non-discriminatory treatment of digital products.
- The parties undertake to recognize the validity of e-signatures and of e-documents.

Regulation of ecommerce

The parties commit to:

- Protect personal information for users of digital trade, taking into account relevant international principles and guidelines.
- Pass consumer protection laws against fraudulent and deceptive ecommerce activities.
- Adopt measures limiting unsolicited commercial electronic communications.
- Apply principles of necessity and proportionality in the regulation of digital trade, and seek input from stakeholders in the development of relevant regulatory schemes.
- Voluntarily restrict their right to treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted or made available by the service.

Because many of these principles require the passage of implementing legislation, companies impacted by these points of agreement must continue tracking both the final text of the USMCA and its proposed implementing legislation.

3. Significant enhancements to and harmonization of intellectual property rights

The USMCA substantially enhances available protections for intellectual property rights across North America, ensuring a more level playing field among the three countries. The changes largely reflect current US practice, meaning that enhancements to IPRs going forward most typically will be felt in Canada and in Mexico.

Highlights include:

Increase in data protection for biologics

- The data protection term for biologics has been extended to 10 years from the date of the first marketing approval. Currently, Canada does not distinguish between biologics and small molecule drugs, and the data protection term is eight years.
- The parties have five years from the entry into force of the USMCA to make changes in their respective domestic laws.

Patents

- Patent term extension will be available to compensate for unreasonable delays by the patent granting authority. The USMCA defines "unreasonable delay" to include a delay in the issuance of a patent by more than five years from the date the application is filed, or three years after a request for examination has been made, whichever is later. This protection currently does not exist in Canadian patent law.

Copyrights

- The minimum copyright term of 50 years in NAFTA has been extended to life of author plus 70 years after first authorized publication (or 75 years for those works with a copyright term that does not depend on the life of a person).
- The agreement introduces "safe harbor" rules for ISPs, generally limiting their liability for copyright infringement they do not control, similar to the "notice-and-takedown" procedures currently in force in Canada and the United States.

Trademarks

- The USMCA guarantees protection of non-traditional marks such as sound marks, collective marks and scent marks.
- It requires pre-established statutory damages for trademark infringement at "an amount sufficient to constitute a deterrent to future infringements and to compensate fully the right holder for the harm caused by the infringement." This feature currently is not present in some parties' domestic laws.
- The parties must implement an electronic system for the application and maintenance of trademarks.
- The parties agree to ratify and accede to the Madrid Protocol (international registration of trademarks) and to adopt trademark classifications in accordance with the Nice Classification.

Domain names

- Parties must adopt a domain name dispute mechanism modeled on the principles of the Uniform Domain-Name Dispute-Resolution Policy, as well as adequate remedies for the infringement of a domain name.

Enforcement of IP rights

- The USMCA grants law enforcement officials the power to stop suspected counterfeit or pirated goods at every phase of entering, exiting and transiting through the territory of any party.
- The parties recognize that IP enforcement procedures must be available for the digital environment and for trademark and copyright infringement.
- The USMCA foresees criminal procedures and penalties for unauthorized recording of movies, a significant source of pirated movies online.
- It provides for civil and criminal penalties for satellite and cable signal theft.
- It stipulates broad protection against trade secret theft, including against State-owned enterprises.

These undertakings are made on a State-to-State level and do not create direct private rights of enforcement under the USMCA itself. The provisions will be enacted in domestic law and enforced through corresponding domestic remedies.

Concluding remarks

The proposed USMCA must now go through domestic legislative review, legal review and subsequent formal ratification. Features may change, and the USMCA is unlikely to enter into force before late 2019 at the earliest.

The current draft text suggests substantial changes are on the horizon in North America with regard to investment protection, digital trade and intellectual property. Cooley lawyers stand ready to address the implications of the new USMCA with clients in all sectors.

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Key Contacts

Marc Suskin **New York**	**msuskin@cooley.com** **+1 212 479 6466**
Rachel Thorn New York	rthorn@cooley.com +1 212 479 6465

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