MEEKS, SHEPPARD, LEO & PILLSBURY

MEMORANDUM

TO: NYSBA International Section and Friends

FROM: Robert J. Leo
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RE: U.S. Trade Law Compliance and the USCMA

OUR FILE: NYSBA-001

The U.S. Canada and Mexico have announced the "new NAFTA", the "USMCA." As everyone knows, the negotiations were contentious, especially between the U.S. and Canada. At the time of this writing in October, the three countries have agreed and the text released. [1] However, there is still uncertainty regarding the passage and implementation of the USMCA. That uncertainty is not comforting for multinational companies, large or small. It is also difficult for their counsel, as we must advise on likely changes to the law, the effect of other trade laws and possible timelines.

Also complicating the scenario is the fact that even after the leaders of the three countries sign the agreement, expected in the U.S. on November 30, 2018, the legislative bodies of each must pass implementing legislation. In the U.S., Members of Congress have already indicated they will read the text closely to ensure that their constituents are not "harmed" by this new agreement. In fact, they might not agree to implementation of USMCA without changes or at all, if they think that will be the case. In the meantime, NAFTA will continue in force.[2]

What international trade counsel already knows from reviewing the proposed text is that if the USMCA does become the "law of three lands" that there will be changes to many NAFTA provisions, affecting many businesses in each country.

There are changes to market access for agricultural products, including dairy.[3] There are significant changes to the auto sector, including the rules of origin for automobiles requiring a larger amount of content from the U.S. and setting a minimum wage for workers in auto plants in order for the finished cars to qualify for duty free status.[4]

There are major changes to "customs facilitation" including the choice of brokers in

1 https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico

2 19 USC § 1202 - HTS General Note 12; 19 USC §§ 3301, 3311-3317, 3331-3335, 3351-3358, 3371-3372.

3 *See,* FN 1, USCMA text, section 3

4 *See,* FN 1, USCMA text, section 4

Mexico.[5] The "Customs and Trade Facilitation," Section 7 of the USCMA, also includes long-sought increases in the *de minimis* levels of Canada and Mexico for mail and courier importations into their countries.[6] The U.S. *de minimis* limit is $800 ("fair retail value").[7] Canada agreed to raise its *de minimis* level from $20 (CAD) to $150 (CAD) and Mexico agreed to raise its *de minimis* level from the equivalent of US $50 to US$100.[8]

These are just examples of the "small print" changes that will affect importers and exporters in all three countries. These changes, and the "large print" changes, will require close scrutiny by experienced Counsel in order to ably advise their clients.

Dispute Settlement

Of particular interest to traders and investors are the provisions on dispute settlement. These provisions were also contentious and Canada refused to accede to the U.S. demand to remove NAFTA Chapter 19.[9] While NAFTA Chapter 11 deals with Investor State disputes, Chapter 19 deals with dispute settlement in antidumping and countervailing duty cases. The terms of NAFTA Chapter 19 remain and are now found in Section D of the Trade Remedies section of USMCA.[10]

This "win" by Canada is especially important to Canadian and Mexican exporters as the U.S., despite "free trade", has about eight antidumping and countervailing duty orders in place against Canada and about fourteen in place against Mexico.[11]

Section 14 of the USCMA is the "Investment" section and allows for arbitration of certain claims. However, the US and Mexico have special investment dispute provisions set out in the annexes.[12]

Additionally, aptly enough, USCMA Section 31 is entitled "Dispute Settlement" and encourages Alternative Dispute Resolution between the parties.[13] The parties agreed in this section to establish a Commission to hear disputes, using their "Good Offices,""Consultation," "Conciliation," and "Mediation" to resolve them. The Section also authorizes the establishment of "Panels." These panels will be convened to establish the facts of the dispute and issue a report of their findings to present to the parties.[14]

Despite the maintenance of and changes to these dispute settlement provisions, the

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5 *See,* FN 1, USCMA text, section 7
6 *Id.*
7 19 USC 1321(a)(2)(c); 19 CFR 10.151
8 *See*, FN 5

9 The Globe and Mail, *From NAFTA to USMCA: Inside the tense negotiations that saved the trade deal* October 5, 2018, p. 28

10 *See*, FN 1, USCMA text, Section 10.
11 *See*, *http://web.ita.doc.gov/ia/CaseM.nsf/136bb350f9b3efba852570d9004ce782!OpenView&Start=22.8&Count=30&Expand=22#22*; The U.S. statutes authorizing US Processing of ADD and CVD cases are 19 USC §§ 1671-1671f – Countervailing Duty statutes and 19 USC §§ 1673-1673i – Antidumping statutes.
12 *See*, FN 1, USCMA text, Section 14 and especially Annex 14D, entitled, "MEXICO-UNITED STATES INVESTMENT DISPUTES."
13 *See*, FN 1, USCMA text, Section 31.
14 *Id.*

interpretation and application of which are best left to the experts in these fields, it is very likely they frequently will be used by the parties and investors. The contentious negotiations, the initial acrimony between the parties, continuation of the U.S. Section 232 "national security"[15] steel and aluminum tariffs against Mexico and Canada, and continuation of dumping and countervailing duty cases by the parties against each other all but guarantee that disputes will arise.

Another complicating factor is the large U.S. retaliatory tariffs against China imposed under Section 301 of U.S. trade law.[16] These tariffs have U.S. importers of goods from China looking to move operations or production out of China, including to qualify their products as NAFTA (and likely, eventually USCMA) eligible.

Where does all this leave Counsel in the age of the "new" NAFTA? We will have to continue to advise our clients, large and small, on the basics of trade and customs laws. An "international" company, whether importing or exporting to Canada, Mexico or the U.S. will have to ensure the proper classification, origin and certification of their products. All the import and export records required by law must be maintained and available upon request.[17] Our clients will have to "step up" their compliance, internal controls and internal and external communication with counsel. Any prospective or in-process M&A must take both companies trade issues into account (Attached is a M&A Trade Checklist that might help).

The bottom line is that there will likely be a "new and improved" NAFTA in the form of the USCMA and international companies will have to improve their compliance with the help of their trade and dispute resolution counsel.

If you have any questions about the interpretation or practical application of the USMCA , NAFTA or any of the existing U.S. trade laws, please do not hesitate to contact us at (1) + 212-949-7120 or robert.leo@mscustoms.com.

15 *Trade Expansion Act* of 1962 (19 U.S.C. §1862)
16 Section 301 of the U.S. Trade Act of 1974, (Pub.L. 93–618, 19 U.S.C. § 2411).
17 19 USC 1508, 1509; 19 CFR Appendix to Part 163; 15 CFR 762; 15 CFR 30.10