

THE USMCA

RESETTING TRI-LATERAL TRADE ARRANGEMENTS IN NORTH AMERICA



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GORCHES Y PEÑALOSA

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Gowling WLG, BakerHostetler and MGPS professionals will be pleased to discuss resolutions to specific legal concerns you may have.

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AGENDA

Topic	Speaker
Introduction to the Webinar	Luis Ramirez
From NAFTA to USMCA – Introduction	Luis Ramirez
General Rules of Origin Principles	Wendy Wagner
Product Specific Rules of Origin	Valentina Gutierrez
Rules of Origin & Interaction with US/China Tariffs	Michael Snarr
IP & Digital Trade – Introduction	Scott Jolliffe
Patents & Trade-marks	Ana Urquizo
Copyright & Enforcement	Jackie Lesser
Trade Secrets & Digital Trade	Scott Jolliffe
Questions	Luis Ramirez

FROM NAFTA TO USMCA

USMCA is the pending agreement that will replace NAFTA

- U.S.-Mexico-Canada Trade Agreement
- Canada-United States Mexico Agreement (CUSMA)
- Tratado entre México, Estados Unidos y Canada (T-MEC)

Enters into force on July 1, 2020

USMCA brings many changes to trading relationship:

- Which commodities qualify for duty-free treatment and how (Rules of Origin & Certification)
- Substantially increased intellectual property rights (IPRs)
- Digital Trade

USMCA – RULES OF ORIGIN

General Rules of Origin principles remain consistent with NAFTA:

- Wholly obtained or produced
- Produced in a qualifying country from wholly qualifying parts
- Non-originating materials satisfy product-specific rules (tariff shifts, RVCs, etc.)
- Unassembled goods rule

De minimis content level raised from 7% to 10% (but a 7% de minimis rule remains when it comes to sets)

Value of processing of non-originating materials now may be counted toward regional value content percentage, along with the value of an originating material used in the production of the non-originating material

USMCA – CERTIFICATE OF ORIGIN REQUIREMENTS

- Certification requirements have changed in that no specific Certificate of Origin is required
- Any one of the importer, export or producer may complete the origin claim
- 9 data elements are required on an invoice or any other document

USMCA – PRODUCT-SPECIFIC RULES OF ORIGIN

Automobiles require 4 origin criteria to be met:

- Overall RVC phased in to a 75% level (from 62.5%)
- Certain parts will need to qualify as originating according to varying RVCs
- 70% of steel and aluminum must be qualifying country (melted and poured)
- Labor Value Content rule – 40% of parts of passenger vehicles and 45% of parts of light trucks must be made using labor paid at \$16/hr

Increased North American Content Requirements for Automotive Parts:

- Content requirements range from 65%-75% for passenger vehicles and light truck parts
- 60%-70% for heavy truck parts using a net cost calculation

USMCA – PRODUCT-SPECIFIC RULES OF ORIGIN

- **Acquisition of steel and aluminum** - About this point, a specific rule is established, which must guarantee that 70% of the steel and aluminum purchased must come from the region. In this sense, for a vehicle to be considered from the region, 70% of the steel and aluminum purchased the previous year must be produced in Mexico, the USA or Canada.
- **Labor Content Value (LCV)** - It is established that 40% of the value added to light vehicles and 45% to trucks must be incorporated in areas of North America where wages above \$16 an hour are offered. This is an important point, especially for Mexico, because it hopes to improve the labor conditions of workers in our country.

RULES OF ORIGIN AND US-CHINA TARIFFS

U.S. ROOs in light of China Section 301 tariffs:

- Canada and Mexico have become even more important staging grounds for transforming Chinese components into products that can enter the U.S. market duty free
- Traditional substantial transformation rather than product-specific rules
 - Product with new name, character, use
 - Work must be meaningful and complex
 - Mere assembly is insufficient

RULES OF ORIGIN AND US-CHINA TARIFFS

CAUTION

- **CBP seems to be applying a stricter substantial transformation analysis where China tariffs might be implicated**
 - Is this leading to two different bodies of law for origin analyses?
- **The *Energizer* flashlight rulings USCBP and the US Court of International Trade have also frustrated substantial transformation analyses**
 - Components with a “predetermined use” are not transformed
 - Focus on particular components with “essential character”

USMCA DE MINIMIS THRESHOLD

- **The de minimis threshold is the threshold customs valuation below which goods entering the country are not charged duty or tax on import**
 - The United States currently exempts duties for shipments under \$800
 - Canada's threshold was formerly \$20 (CDN) and Mexico's was \$50
 - The USMCA raises the customs threshold for duty free treatment to \$117 (C\$150) for Canada and Mexico
 - The tax-free threshold is set at \$50 for Mexico and C\$40 (about \$31) for Canada

THE USMCA

INTELLECTUAL PROPERTY AND DIGITAL TRADE



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INTELLECTUAL PROPERTY AND DIGITAL TRADE

Introduction

- Most comprehensive package of IP coverage of any trade agreement since TRIPS (1994)
- Brings Canada and Mexico in line with US law and practice in many of these areas
- There is a chapter on Digital Trade, which represents a first for international trade agreements
- Creates a new “Committee on IP Rights” including government representatives to continue to discuss the best ways to reduce/deter infringement, enhance border enforcement, explore the value and protection of trade secrets, and discuss restrictions on Geographical Indications
- USMCA sets the standard for US, Canada and Mexico’s negotiation of future trade agreements

INTELLECTUAL PROPERTY AND DIGITAL TRADE

New Trademark Law

- Comprehensive bill covering all IP aspects included in the USMCA

Patents

- 5-Year Patent Restoration Term
- Transparency in the Patent System
- Requirement to register Patent License Agreements is eliminated
- Undisclosed Test or Other Data for Agricultural Chemicals and Pharmaceutical Products
 - USMCA:
 - 5-year protection period for pharmaceutical products test data submitted for marketing approval
 - 10-year period for agricultural chemical products
 - Canada currently provides an 8-year period
 - US: marketing exclusivity period for small molecule drugs is status quo. The US currently provides 12 years exclusivity

INTELLECTUAL PROPERTY AND DIGITAL TRADE

Industrial Designs

- Validity
- One-year pre-application disclosure

Trademarks

- Broader definition of trade-marks
- Implementation of Treaties
- Abandoned need to register Trademark License Agreements
- Electronic Trademark System
- Geographical Indications

INTELLECTUAL PROPERTY AND DIGITAL TRADE

Copyrights

- Provides for a 70 year term for natural persons and no less than 75 years from the date of first authorized publication or performance for works not created by natural persons
- Contemplates standards for preventing the circumvention of Technological Protection Measures (TPMs) and Rights Management Information (RMI) for digital products (music, movies and books)
- Requires establishment of safe harbors for legitimate, Internet Service Providers to deter piracy
- Requires establishment of notice and take-down system for on-line copyright infringement

INTELLECTUAL PROPERTY AND DIGITAL TRADE

Comprehensive IP Enforcement Measures

- Collaborative border enforcement operations, including enhanced authority by customs to stop suspected counterfeits
- Enhanced civil and criminal penalties and injunctive relief for trademark, trade secret and copyright and related rights
- Provides for criminal procedures and penalties for direct actors, as well as aiders and abettors
- Provides for criminal and civil enforcement of theft of trade secrets against government actors
- Provides for civil and criminal enforcement procedures available to enforce digital infringement of trade-mark, copyright and other related rights

INTELLECTUAL PROPERTY AND DIGITAL TRADE

Broad Protection for Trade Secrets

- USMCA provides the most robust protection for trade secrets of any trade agreement
- It requires the adoption of laws against the misappropriation of trade secrets (including by State-Owned Enterprises)
- It requires the adoption of civil and criminal procedures and remedies for theft of trade secrets
- Requires judicial measures to prevent disclosure of trade secrets during litigation
- Prohibits any government action that impedes the licensing of trade secrets

INTELLECTUAL PROPERTY AND DIGITAL TRADE

New Digital Trade Chapter

- USMCA represents the first and most comprehensive treatment of digital trade ever: it builds on the CP-TPP (2018), covers new territory, and sets a foundation for future trade agreements
- Intended to protect digital platform services like banks, film/music/book distributors, Amazon, Google and Facebook which, on one hand are highly valued by customers, but are breaking new ground in terms of the collection, use, control, exploitation and monetization of data
- Based on the understanding that trade in digital goods, services and data are the foundation of modern developed economies, and includes
 - zero tariffs/customs on digital products and services,
 - non-discrimination (equal treatment of) of IP rights in digital products & services, and
 - no prohibitions against (foreign) location/storage of data (decentralized data)

INTELLECTUAL PROPERTY AND DIGITAL TRADE

New Digital Trade Chapter (cont'd)

- USMCA prevents discriminatory duties on digital products and prohibits restrictions on cross-border information transfer
- Ensures unimpeded data transfer and storage across borders (foreign location of data)
- Eliminates restrictions on use of digital authentication and electronic signatures
- Requires collaboration in tackling cybersecurity threats and challenges
- On privacy, USMCA pays lip service to local consumer protections (including privacy and unsolicited communications) that will continue to apply to the digital marketplace

QUESTIONS?

GET IN TOUCH



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