

Two flags on poles are positioned in the background. On the left is the United States flag, and on the right is the Canadian flag. The poles are dark and stand on a dark base.

# NAFTA Renegotiation: Significant Trends and Developments in the U.S. and Canadian Trade Relations

## Partner Firms:

**Arent Fox** 

**Arent Fox LLP**  
David R. Hamill  
*Partner*

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**Blake, Cassels & Graydon LLP**  
Greg Kanargelidis  
*Partner*

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Complex problems require interdisciplinary solutions and should be approached with a practical perspective and managed with maximum efficiency. With offices in Los Angeles, New York, San Francisco, and Washington, DC, Arent Fox provides strategic legal counsel to clients that range from Fortune 500 corporations and start-ups, to trade associations and foreign governments.

Our practice breadth, geographical reach, and industry knowledge combine to provide clients with business-oriented legal advice designed to ensure they achieve their commercial goals. Through decades of service, our attorneys have understood that hard work and talent are just a starting point for being considered a premier law firm, a distinction that Arent Fox has earned from The American Lawyer, Chambers USA, and Legal 500.



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Our International Trade group provides top-quality trade law advice and strategies focused on helping our corporate and government clients achieve their international business objectives.

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## Brief Speaker Bios:



**Arent Fox LLP**  
David R. Hamill  
*Partner*

Dave represents US and foreign companies, including manufacturers, importers, exporters, distributors, customs brokers, freight forwarders, and trade associations on customs/import and export matters, including tariff classification; customs valuation and transfer pricing; entry procedures; customs brokerage; country of origin marking; intellectual property rights; enforcement, drawback and duty deferral programs; customs bonds; and foreign trade zones. Dave also has represented importers in defending against customs civil and criminal penalties, including seizures and forfeitures, conducting and managed internal investigations, and preparing customs prior disclosures. As a former legal advisor to the Chief Rules of Origin Negotiator during the North American Free Trade Agreement (NAFTA) negotiations while at the Department of the Treasury, Dave has recently been advising numerous clients, notably in the automotive sector, on potential implications resulting from possible changes in the NAFTA rules of origin and customs procedures during the upcoming NAFTA renegotiations. He has been recognized by Legal 500 and the Best Lawyers in America. Georgetown University Law Center, JD, 1987; Bucknell University, BA, 1981.



**Blake, Cassels & Graydon LLP**  
Greg Kanargelidis  
*Partner*

Greg Kanargelidis is a partner with more than 28 years of experience practising in the areas of international trade, customs and commodity tax law. He leads the International Trade Group at Blake, Cassels & Graydon LLP, and is globally recognized as one of Canada's leading international trade and customs lawyers. Greg has extensive experience representing clients on global trade and investment matters, export controls, sanctions, export/import licenses, and procurement disputes. He regularly represents clients with respect to cross-border trade and investment issues, including compliance with international agreements (such as the North American Free Trade Agreement, the World Trade Organization and its various agreements), other bilateral and regional trade and investment agreements, export controls, sanctions, export/import licenses, and procurement disputes. Greg has substantial experience in trade remedy matters, with a particular emphasis on anti-dumping investigations and appeals. He is also a noted expert in all areas of customs law and assists clients with respect to planning, compliance and appeals involving GST, excise and other commodity taxes.

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On August 16, 2017, representatives from the U.S., Canada and Mexico began the renegotiation of the North American Free Trade Agreement (NAFTA). Among the issues that the Trump Administration aims to renegotiate include reduced U.S. trade deficit, balanced trade with Canada through greater access for U.S. dairy products, tougher rules of origin, improved use of U.S.-manufactured contents for autos, elimination of dispute settlement mechanism in trade remedies cases, and a 5-year sunset clause.

Although it is uncertain when the NAFTA talks will be completed and implemented, both U.S. and Canadian companies doing cross-border trade must stay abreast of the significant developments regarding the renegotiations. It is critical that they understand the impact of the potential changes brought by NAFTA renegotiation to their business operations.

In this LIVE Webcast, a panel of key thought leaders and trade professionals will provide an in-depth discussion of the NAFTA renegotiation and its impact to the U.S.-Canada trade and investment environment. Speakers will provide practical advice on how to cope up with the possible results of the renegotiation.

Key issues that will be covered in this course are:

- A Background on NAFTA
- Key Issues Surrounding the NAFTA Renegotiation
- Bargaining between Canada and the United States
- Opportunities and Challenges
- Potential Changes to Trade and Investment Governance
- Implications for the American and Canadian Economy
- Impact of US tax bill and political dynamics
- Industry winners and losers
- Implications if the U.S. pulls out of NAFTA

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**Arent Fox** 

**David R. Hamill**  
*Partner*  
Arent Fox LLP



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*Partner*  
Blake, Cassels & Graydon LLP

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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### Talking Points

- A Background on NAFTA
- Key Issues Surrounding the NAFTA Renegotiation
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Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### Background on NAFTA

- January 1, 1989 – the Canada – United States Free Trade Agreement (CUSFTA) comes into force, with among other things, tariffs being eliminated in stages over 10 years.
- January 1, 1994 – the North American Free Trade Agreement (NAFTA) comes into force between Canada, the United States, and Mexico. As between Canada and the U.S., the NAFTA supercedes CUSFTA which is suspended while NAFTA remains in force.
- Between 1993 and 2015:
  - Total merchandise trade between Canada and the U.S. more than doubled and between Canada and Mexico increased over 8-fold
  - Canada’s goods exports to the U.S. grew at an annualized rate of almost 4.6%
  - Canada added nearly 5.2M new jobs, with unemployment rate dropping from 11.4% to 6.9%
  - US exports to Canada increased by 179%
  - US imports from Canada increased by 165%



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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### Background on NAFTA, cont'd

- As of 2015:
  - Goods and services trade between the US and Canada totalled about \$662.7B, with the US enjoying an overall trade surplus of \$11.9B
  - Goods trade between the US and Canada (the US's second largest trading partner) reached \$575B; the US goods trade deficit was at \$15B
  - According to DOC, US exports of goods and services to Canada supported an estimated 1.7M jobs in 2014
  - Top US exports to Canada include: vehicles, machinery, mineral fuels, plastics
  - Canada is the largest export market for US agricultural products, including: prepared food, fresh vegetables, fresh fruit, snack foods, beverages
  - Top US imports from Canada include: mineral fuels, vehicles, machinery, plastics
  - Canada is the largest supplier of agricultural products to the US, including: snack foods, red meats, live animals, other vegetable oils, processed fruit and vegetables



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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### Key Provisions of NAFTA

- **Tariff elimination:** Customs duties for goods originating in the NAFTA territory were either eliminated upon entry into force, or progressively phased out over a 5, 10, or 15 year period.
- **Rules of Origin:** The NAFTA introduced detailed rules of origin specifying when goods will qualify as “originating” in the NAFTA territory, entitling them to preferential tariff treatment. The rules stipulate that goods produced in part from non-originating materials must undergo a specified change in tariff classification within the NAFTA territory, or in some cases must contain a specified percentage of North American content.
- **Investment:** The NAFTA grants protection to investors in the form of commitments by member states to the most-favoured-nation and national treatment principles. The NAFTA further provides investors with the ability to challenge allegedly discriminatory measures under an Investor-State Dispute Settlement (ISDS) mechanism.
- **Dispute Settlement:** The NAFTA provides member states with the option to have antidumping and countervailing duty determinations reviewed by independent binational panels as an alternative to judicial review by domestic courts.
- **Other areas of significance:** Government procurement, intellectual property, sanitary and phytosanitary measures, cross-border trade in services, and temporary entry for business persons.



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Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### NAFTA Renegotiation

- Donald Trump was critical of the NAFTA during the election campaign in 2016
- President Trump threatened to trigger the cancellation of NAFTA but instead elected to renegotiate the Agreement after speaking with the leaders of Canada and Mexico on April 26, 2017
- The US formally triggered the NAFTA renegotiation on May 18, 2017 when USTR Lighthizer advised Congress of the Administration's intentions and negotiating objectives
- NAFTA renegotiations commenced in August 2017



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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### Negotiations: Timetable

Round 1 – Washington: August 16 – 21

Round 2 – Mexico City: September 1 – September 5

Round 3 – Canada: September 23 – September 27

Round 4 – Washington: October 11- October 15

Round 5 – Mexico: October 29 – November 2

- Intersessional “worker bee” session – Washington: mid-December

Round 6 – Montreal: January 23 – 28

Likely rounds in February and March 2018



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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### Post Negotiations – Possible Timeline to US Ratification

March 2018 – US president notifies Congress on conclusion of negotiations

September 2018 – Official signature of agreement

December 2018 – US international Trade Commission will issue report on agreement's impact

December 2018 – Agreement presentation to US Congress for approval

Early 2019 – US Congress approval (90 days after presentation)



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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### Timetable – Other Significant Events

Transition period following enactment

Role of Legislatures in Canada, US and Mexico

Rulemaking – Trade agencies

Possible 5-year sunset clause





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Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### US Administration Objectives

*“The views of the President about NAFTA, which I completely share, are well known. I want to be clear that he is not interested in a mere tweaking of a few provisions and a couple of updated chapters.”*

Negotiations will be serious, with clear and measurable “successes”

Deficits, jobs, domestic content



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Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### US Administration Objectives

*“We have had persistent trade deficits – in the last year totaling nearly \$57 billion. Thousands of American factory workers have lost their jobs because of these provisions. In recent years, we have seen some improvement in our trade balance with Canada. But over the last ten years, our deficit in goods has exceeded \$365 billion.”*  
– Robert Lighthizer, USTR



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Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### US Administration Objectives

*“Rules of origin, particularly on autos and auto parts, must require higher NAFTA content and substantial U.S. content” – Robert Lighthizer, USTR*

What this could mean:

- Less goods qualifying
- Changes in supplier strategy
- Added administrative costs



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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### US Administration Objectives – Current Automotive Proposal

85%/72.5% regional value content

50% US Content

Elimination of “Deemed Originating”

Additions to the “tracing list”

Elimination of tariff shift to qualify automotive parts



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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### US Administration Objectives

Elimination of Chapter 19, dispute resolution procedures

Making optional the Chapter 11, Investor-State Dispute Settlement (ISDS) mechanism

Enforce “Buy America/American provisions in federal procurement; allow States to adopt state restrictions

Eliminating non-tariff barriers for agricultural exports

Customs facilitation:

NAFTA certificate – Allow certification on commercial invoice, not on prescribed form

NAFTA certifications – allow importers to certify, not just foreign exporter or producer



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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### US Administration Objectives

#### Origin verification procedures

Will verifications increase as a result of the NAFTA renegotiations?

Will verifications be conducted differently by Mexican/US/Canadian authorities?

#### Five year sunset review

Two year transition period for automotive RVC rule



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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### Canadian Objectives

Canadian negotiating priorities were made public on August 14, 2017 by way of a statement given by the Minister of Foreign Affairs, Chrystia Freeland:

- Modernization of NAFTA
- Make NAFTA a more “progressive” trade agreement
  - bringing strong labour and environmental provisions into the agreement
  - introducing chapters on gender rights and Indigenous peoples
  - reforming the ISDS mechanism - right to regulate in the public interest
- Make life easier for business and people
  - cutting red tape
  - harmonizing regulations
- Increasing market access for government procurement
- Expanding the provisions on temporary entry for businesspeople
- Upholding and preserving elements that Canada deems to be in its national interest
  - AD appeal process in Chapter 19
  - preservation of Canadian culture
  - Canada’s system of supply management



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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### US-Canada Negotiations

US – called for NAFTA to be renegotiated

First three rounds - no significant developments or movement

4th Round – US offered various proposals, many of which are seen as non-starters by Canada and Mexico

Canada has requested basis (including economic justification) for US proposals

Possible Canada counterproposals forthcoming in 6th Round

Unclear whether and what will be trade-offs in negotiations

Certain changes could also take the form of a Presidential proclamation





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### Making Changes to the NAFTA – Various Paths



David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

Current NAFTA provides for three-way “consultation” to modify or add to the NAFTA

Congressional action - Trade Promotion Authority (TPA)

Bilateral negotiations

Certain changes could also take the form of a Presidential proclamation

Withdrawal from the NAFTA



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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### US Withdrawal

NAFTA provides that any country can withdraw “six months after it has provided written notice of withdrawal to the other Parties” – Article 2205

If withdrawal, NAFTA Implementation Act would remain as US law if or until Congress repealed the statute

NAFTA would remain in force for remaining two Parties

Existing NAFTA duty rates would be continued for one year



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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### US Withdrawal

This is the first US FTA which the US is renegotiating

Canada and the US have bilateral FTA

If the US decides to break from the NAFTA what happens and what would be reaction of Congress? By US industry?

In addition to Canada, if the US decides to break from the NAFTA, what will Mexico's reaction be?



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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### US Political Dynamics

Inner workings of Trump Administration

USTR Lighthizer – long history of representing domestic interests

Odd coalitions in US Congress – not just Republicans versus Democrats

Recent passage of US tax bill

Midterm elections



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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### Potential Winners and Losers

#### Potential Losers –

- US and Canadian automotive industry
- US agriculture industry
- US transportation industry
- Canadian dairy industry?

#### Potential Winners –

- E-Commerce
- Customs facilitation
- US jobs?

Winners – companies that plan ahead!



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David R. Hamill  
Partner  
Arent Fox LLP



Greg Kanargelidis  
Partner  
Blake, Cassels & Graydon LLP

### Developing an Action Plan

- Assess your company's exposure and reliance on NAFTA
- Who or what groups in your company determine NAFTA qualification of your product(s)?
- Which specific rules of origin do your company rely on and are they understood and substantiated?
- Do you periodically review this assessment?
- Do you have the necessary resources? Support from company departments? Utilization of NAFTA expertise?
- Does your company's customer rely on your NAFTA certifications?
- Whether the NAFTA changes, this is an opportunity to conduct an assessment



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Q&A:



**Arent Fox** 

**David R. Hamill**  
Partner  
Arent Fox LLP  
[david.hamill@arentfox.com](mailto:david.hamill@arentfox.com)  
202.857.8940



**Blakes**  
LAWYERS

**Greg Kanargelidis**  
Partner  
Blake, Cassels & Graydon LLP  
[greg.kanargelidis@blakes.com](mailto:greg.kanargelidis@blakes.com)  
416.863.4306

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**Key Discussion Points:**



**Arent Fox**   
**David R. Hamill**  
*Partner*  
**Arent Fox LLP**  
[david.hamill@arentfox.com](mailto:david.hamill@arentfox.com)  
202.857.8940



  
**Greg Kanargelidis**  
*Partner*  
**Blake, Cassels & Graydon LLP**  
[greg.kanargelidis@blakes.com](mailto:greg.kanargelidis@blakes.com)  
416.863.4306

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