THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

October 31, 2024

Via email: CUSMA-Consultations-ACEUM@international.gc.ca

To Whom it May Concern,

**Re: Consulting Canadians on the operation of the Canada-United States-Mexico Agreement (CUSMA)**

## I. Introduction

The Expert Working Group on CUSMA of the Canadian Bar Association **(CBA Working Group)** is pleased to submit its comments in response to the consultation request issued by Global Affairs Canada **(GAC)** on August 17, 2024.[1]

The Canadian Bar Association is a national organization representing over 40,000 legal professionals, including lawyers, notaries, law professors, and students across Canada. Our mandate includes promoting the rule of law, improving access to justice, advocating for effective law reform, and providing expertise on how legislation impacts Canadians' daily lives. The CBA Working Group comprises approximately 40 members with diverse expertise in areas such as international law, immigration law, competition law, intellectual property law, environmental law, Indigenous law, and trade law.

The CBA Working Group commends GAC for its proactive approach in seeking input from Canadians to inform Canada's preparations for the first joint review of CUSMA in 2026 and to establish priorities for work in 2025, including Canada's role as chair of the fifth CUSMA Free Trade Commission meeting. We offer our full support to the government as it continues its work towards these negotiations and stand ready to collaborate and provide legal expertise and advice as needed.

In this submission, we address several key areas of concern and opportunity related to CUSMA, including Dispute Settlement Mechanisms, Immigration, Digital Services Tax, Copyright, Trade Secrets, AI Regulation, Patents, Trademarks, Indigenous Rights and Cultural Protections. Each section reflects our analysis of Canada's obligations under CUSMA, current legislative frameworks, and recommendations for harmonization, improvements, and compliance.

## II. Dispute Settlement Mechanisms (Chapter 31 and 10)

The effectiveness of the Chapter 31 state-to-state dispute settlement mechanism under CUSMA has been called into question, particularly considering the U.S.'s delayed response in the U.S. Automotive

[1] Global Affairs Canada, Consulting Canadians on the operation of the Canada-United States-Mexico Agreement (CUSMA) available online.

Rules of Origin case. Such delays undermine the intended efficiency of the mechanism and limit its ability to resolve trade disputes effectively.

In contrast, disputes handled under CUSMA's rapid-response labour mechanism have been relatively efficient in enforcing labor standards. However, it remains unclear whether Canada has been subject to a claim under this mechanism. It would be beneficial for Canada to establish a landing page like that of the United States, providing transparency and easy access to information on ongoing labour disputes under the rapid-response system.

In Chapter 10 review proceedings, which address antidumping and countervailing duty determinations, significant concerns have been raised by the Canadian forestry industry, particularly regarding the ongoing softwood lumber dispute. The U.S. has been exceptionally slow in nominating panellists to NAFTA and CUSMA dispute-settlement panels, and those who have been nominated often lack independence, with some having prior involvement in the softwood lumber case while serving in the U.S. Department of Commerce or representing the U.S. industry. This situation has raised concerns that the U.S. may be attempting to weaken the Chapter 10 process in the same way it has undermined the WTO disputes body.

Delays in panel hearings are also a growing concern. The appeal from the 2017 softwood lumber antidumping case only had its hearing recently, more than five years after the appeal was initiated. Panels for subsequent appeals launched in 2020, 2021, and 2022 have yet to be composed. These delays are troubling, particularly because the procedural rules under NAFTA and CUSMA suggest that the entire process, from the request for a panel review to the issuance of the decision, should take no longer than 10 months. Historically, when the process was followed as intended, this timeline was largely respected.

To address these concerns, Canada should consider engaging in discussions aimed at improving the timeliness and impartiality of the Chapter 10 and Chapter 31 mechanisms. A more transparent nomination process for panellists and stricter enforcement of procedural timelines are crucial steps to ensure the effectiveness of these dispute resolution mechanisms. Continued consultations with the Canadian forestry industry will be important to develop strategies for managing the delays and ensuring fair outcomes.

## III. Temporary Entry for Business People (Chapter 16)

Chapter 16 of CUSMA outlines provisions for the temporary entry of business people, but several aspects of these rules require revision to better reflect modern business practices and economic realities.

For business visitors, the current limitation of six months on the duration of stay should be reconsidered, as it may not be practical in all cases. Additionally, with the rise of digital nomads, CUSMA could expand its provisions to accommodate this growing segment, offering more flexibility for remote workers who do not fit traditional business visitor categories.

In the professional's category, the list of eligible professions is outdated and should be modernized to include more current occupations. Adopting a negative list approach, as seen in other trade agreements, would allow for greater flexibility and futureproofing of the list. If a positive list remains the preferred approach, it should, amongst other things, include executives and senior managerial professionals.

A review of the educational and professional qualifications required for these professions is also necessary, as well as the licensing requirements, which can act as barriers to entry. Furthermore, some professions, such as management consultants, often lack a Canadian employer or formal employment agreement, making it impractical under the current rules. IRCC should address these challenges to ensure smoother facilitation of temporary entry for those situations where the professionals are essential and should remain covered by CUSMA, yet IRCC policies are not adapted.

For intra-company transferees, the existing restrictions on the duration of stay should be revisited. A more consistent approach within CUSMA—such as allowing three-year terms with no fixed limit for managerial roles, similar to the rules for professionals—would provide greater flexibility. Given recent restrictions, we recommend that the eligibility criteria for CUSMA intra-company transferees remain the status quo and not mirror the updated eligibility criteria for GATS intra-company transferees. We should also add a third category for trainees coming to Canada for training purposes, similar to what is found under the Canada-European Union Comprehensive Economic and Trade Agreement (CETA).

Additionally, there should be room for transfers between related, though not identical, occupations to reflect the realities of modern business structures. Flexibility should also extend to multi-year work permits to transferees who are coming to Canada for intermittent project-based work. This is particularly relevant given the geographic proximity and the practical, region-based division of territories by many multinational corporations (e.g. Eastern North America, Central North America, and Western North America, rather than strictly by country).

Across all categories, permanent residents should have the same rights as citizens under CUSMA. This would mirror the approach taken in other agreements, such as with Peru and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and would bring consistency to Canada's immigration policies.

## IV. Digital Services Tax: (art. 19.12)

The international system of taxing corporate profits is based on two factors: whether a taxpayer conducts business in a particular country or operates from a "permanent establishment" within that country. A non-resident of a country is typically subject to tax on profits that either stem from contracts entered into within that country or are attributable to a permanent establishment (a fixed place of business) in that country.

However, in the digital economy, non-resident businesses can engage with and deliver electronic goods or services to residents of a country (e.g., Canada) without maintaining a physical presence, such as employees, agents, or a permanent establishment. This allows non-residents to generate significant profits from doing business with residents without being subject to income tax in that country.

CUSMA reinforces this structure, particularly through Article 19.12, which states that "no Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory." In practice, this means that a digital service provider, such as an online streaming platform, is not required to store content on servers located in Canada. Otherwise, the presence of servers would establish a permanent establishment, thereby subjecting the provider to Canadian income tax. Since CUSMA prohibits such a requirement, the provider can operate its servers from any jurisdiction and avoid Canadian tax on profits earned from Canadian customers.

To address the loss of tax revenue, Canada introduced a Digital Services Tax (DST), which applies to both resident and non-resident businesses. This tax targets the revenue earned from doing business with Canadians or from monetizing data gathered from Canadian users.

If Article 19.12 were removed from CUSMA, Canada could mandate that digital service providers use servers or computing facilities located within the country, thereby making them subject to Canadian income tax on related profits. However, this could prompt reciprocal measures from Mexico or the U.S., requiring Canadian digital businesses to operate from within those jurisdictions. Such changes could also deter foreign businesses from entering the Canadian market, potentially limiting the choices available to Canadian consumers and businesses.

## V. Trade Secrets (art. 20.69-20.73)

CUSMA requires member states to implement statutory protections against the unauthorized use, acquisition, or disclosure of trade secrets (Article 20.69), with civil remedies available to those in control of trade secrets to prevent and seek redress for misappropriation (Article 20.70). Trade secrets must be protected if they meet the criteria, with no limit on duration (Article 20.70). Criminal penalties for willful misappropriation are required when there is commercial advantage or injury to the trade secret owner (Article 20.71). Judicial authorities must be empowered to impose provisional measures to prevent misappropriation, protect evidence (Article 20.72 and 20.73), and ensure confidentiality in proceedings, with penalties for breaches (Article 20.74). Authorities must also provide for injunctive relief and damages for misappropriation (Article 20.75) and ensure that voluntary licensing is not deterred by excessive conditions (Article 20.76). Unauthorized disclosures by government officials must be prohibited, with penalties for violations (Article 20.77).

In response, Canada has partially fulfilled these obligations with Section 391 of the Criminal Code, which criminalizes the fraudulent acquisition of trade secrets, punishable by up to 14 years in prison. However, civil remedies remain limited to common law doctrines, such as breach of confidence, fiduciary duty, or contract, and vary between provinces.

To fully comply with CUSMA, Canada should adopt a federal statute similar to the U.S. Defend Trade Secrets Act. The Canadian Bar Association supports the introduction of a Canadian Trade Secrets Act (CTSA**)**. This legislation should be consistent with Section 391 of the Criminal Code in its definition of "trade secret," and draw on international standards such as the EU Trade Secrets Directive (2016/943) for the definition of "misappropriation." The protection should extend indefinitely, as long as the trade secret remains confidential.

The CTSA should also provide for expedited seizure of stolen trade secrets and recognize that independent development or reverse engineering is not misappropriation. It should include protections for whistleblowers and remedies such as stopping unlawful use, removing goods produced from misappropriated secrets, and awarding damages. Provisions must ensure the confidentiality of trade secrets during legal proceedings, including mechanisms for preserving evidence and returning any stolen trade secrets.

Given the increasing risk of theft by foreign actors, the CTSA should include sanctions, such as penalties, trade restrictions, or immigration measures, to deter such actions. The Federal Court of Canada should be granted concurrent jurisdiction over trade secret disputes, providing an efficient forum for resolving cross-border and interstate issues. By adopting a civil statutory regime, Canada would strengthen its compliance with CUSMA and ensure robust and consistent protections for this vital form of intellectual property across provinces.

## VI. Copyright

In compliance with its obligations under CUSMA, Canada extended the term of copyright protection for literary, dramatic, musical, and artistic works from 50 to 70 years, and for performances and sound recordings from 70 to 75 years, effective December 30, 2022.

CUSMA’s provisions on Internet Service Provider (ISP) liability allowed Canada to retain its "notice-and-notice" regime for addressing online infringement. However, this regime has been widely regarded as ineffective by both intellectual property owners and users, especially in comparison to the U.S.'s "notice-and-take-down" system. To address online infringement across North America more effectively, Canada should consider removing this exception and aligning its approach with CUSMA's ISP liability requirements.

Further copyright reform should consider indigenous-owned intellectual property and the protection of traditional knowledge, ensuring these are appropriately safeguarded within Canada's copyright framework.

Regarding copyright in the context of generative artificial intelligence, the existing definitions and requirements for copyright protection should continue to apply to works created by human authors using AI as a tool. However, works generated solely by AI, with little or no human involvement, should not qualify for copyright protection. In such cases, authorship should not be attributed to the individual who facilitated the creation of the AI-generated work.

There is no current need for a *sui generis* right for AI-generated works in Canada, as there is insufficient evidence to suggest that this would appropriately balance the rights of owners, users, and the public interest.

It is crucial for Canada and other CUSMA signatories to adopt a harmonized or at least non-conflicting approach regarding AI-generated works. Additionally, adequate protection and remedies must be available to rightsholders whose copyrighted works are infringed by AI systems, AI-generated works, online platforms, and technological processes.

## VII. AI Regulation

As jurisdictions across North America and globally draft AI regulations, CUSMA signatories have an opportunity to harmonize their approaches and prevent potential trade barriers. Aligning AI regulations would create a more predictable and efficient operating environment for businesses engaged in cross-border AI development and deployment. Such harmonization would reduce compliance costs, simplify market entry, and foster innovation, strengthening the region's competitiveness.

A unified North American stance on AI regulation could position CUSMA signatories as leaders in global AI governance, offering a potential first-mover advantage. This could enhance the region’s attractiveness for AI investment, talent, and technological leadership in the digital economy.

In crafting a harmonized approach, CUSMA signatories should consider incorporating provisions from the EU AI Act, the first comprehensive multinational legislation regulating AI. Specifically, Canada could support the inclusion of the following key provisions:

- Obligations for general-purpose AI (GPAI) providers to provide detailed summaries of training data and ensure compliance with copyright laws, regardless of where the models were developed.
- Requirements for GPAI providers to obtain authorization or licenses from rightsholders for text and data mining of copyright-protected content, subject to applicable exceptions.
- Obligations for GPAI providers to maintain technical documentation and make available summaries of content used for training to facilitate enforcement of rights under the law.
- Labelling and marking requirements for deep fakes and AI-generated synthetic content.
- Application of obligations to providers placing GPAI models in the territory, regardless of where they are established or located.

CUSMA should also adopt transparency and accountability requirements, similar to those in the EU AI Act, to address challenges in determining whether AI systems have accessed copyright-protected content. This could include requirements for AI developers to maintain records of the content ingested or trained on and disclose such information when requested by rightsholders.

Furthermore, CUSMA negotiators should avoid introducing new exceptions for text and data mining (TDM) that could jeopardize personal, confidential, or copyright-protected information. Copyrighted material used in AI training should require explicit permission from rightsholders, and the availability of content on the internet should not imply authorization for web scraping. Rights holders should not be required to opt out of such uses, and AI developers should be obligated to disclose the content used in training to ensure transparency.

## VIII. Patents (art. 20.22)

Under Article 20.22 of CUSMA, Canada is required to implement a Patent Term Adjustment (PTA) for unreasonable delays in patent prosecution by the Canadian Intellectual Property Office (CIPO). Canada has introduced amendments to the Patent Act and draft regulations to comply with this requirement. However, Canada's proposed PTA implementation is narrow, with few patents expected to be eligible. For example, the Patent Act allows third parties to appeal only to shorten patent terms, and the draft regulations outline extensive periods excluded from PTA eligibility. This raises questions about whether Article 20.22 effectively restores lost patent terms due to unjustifiable delays. To better meet the intended goal, the text should be amended to allow equal appeal rights to extend or shorten the patent term and clarify that delays attributable to patent applicants should only be excluded after a reasonable response time of three months.

Under Article 20.49, CUSMA provides definitions for data protection of new pharmaceutical products. Canada's Food and Drug Regulations define an "innovative drug" as a drug with a medicinal ingredient not previously approved, excluding variations like salts or enantiomers. Some argue that Canada's definition is narrower than CUSMA's, potentially limiting data protection. However, others maintain that the current Canadian definition aligns with both CUSMA and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Given that Article 20.49 does not explicitly address whether variations of previously approved chemical entities qualify as "new pharmaceutical products," further analysis is necessary to ensure Canada's definition of "innovative drug" complies with CUSMA and international obligations.

Under the revised CUSMA, Canada is no longer required to extend data protection for biologics to 10 years. Currently, Canada provides eight years of market exclusivity for biologics and small molecule drugs, with an additional six months for pediatric studies. While there are arguments for and against extending data protection for biologics to 10 years, this issue warrants further consideration, particularly regarding its impact on innovation and market competition.

## IX. Trademarks

In line with its obligations under CUSMA, Canada amended the Trademarks Act to deem it an infringement to import goods "on a commercial scale" bearing a trademark that is "identical or cannot be distinguished in its essential aspects" from a registered trademark. This amendment strengthens protections against the unauthorized use of trademarks in cross-border commerce.

CUSMA also obligates signatories to protect collective marks, which are owned by collective organizations and used exclusively by their members. This concept is new to Canadian trademark jurisprudence and has yet to be implemented. Canada will need to review how collective marks can be integrated into the existing trademark system and make further legislative amendments to ensure compliance with CUSMA.

Additionally, CUSMA requires the establishment of a civil remedy system for trademark infringement, including pre-established damages to deter infringement and compensate rightsholders. Canada must evaluate whether statutory damages for trademark infringement are necessary or whether the current provision for exemplary or punitive damages under Canadian common law is sufficient to meet CUSMA's requirements.

## X. Indigenous Rights and Cultural Protections

In the CUSMA context, we recommend addressing Indigenous cross-border rights, strengthening cultural protections, reinforcing section 35 of the *Constitution Act, 1982*, protecting sacred sites, and establishing mechanisms for benefit-sharing and redress.

The 1794 Jay Treaty between the U.S. and Great Britain recognized the rights of Indigenous peoples to cross the U.S.-Canadian border freely, facilitating cultural ties. While partially upheld in the U.S., it lacks enforcement mechanisms under CUSMA, leaving Indigenous cross-border rights inadequately protected.

Section 35 of the *Constitution Act, 1982* affirms the Aboriginal and treaty rights of Indigenous peoples in Canada, including cultural rights over lands and heritage. However, these protections are not fully reflected in CUSMA.

Recent legal cases highlight the need for stronger recognition of Indigenous rights in CUSMA. In *R. v. Montour* (2023), the Quebec Superior Court recognized the Covenant Chain as a treaty protecting Mohawks' right to trade tobacco, finding the *Excise Act* unjustifiably infringed these rights. The case underscores the importance of Indigenous perspectives in agreements like CUSMA. Similarly, the legal victory of the Sinixt people residing in the United States, where the Supreme Court affirmed their rights to hunt and practice traditions in their ancestral lands within Canada, further underscores the importance of recognizing Indigenous cross-border rights.

CUSMA offers an opportunity to align with historical treaties like the Jay Treaty. While CUSMA includes Reservation II-C-1, which allows Canada to protect Aboriginal rights, further measures are necessary to ensure that Canada's constitutional protections do not conflict with CUSMA.

Incorporating cross-border trade and movement rights under CUSMA would restore the Jay Treaty's provisions, allowing Indigenous communities to engage in duty-free trade and unrestricted movement across the Canada-U.S. border. This would align CUSMA with both the historical significance of these rights and modern realities.

Canada is currently undertaking a process for reviewing and incorporating UNDRIP into Canadian law through the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDRIP Act). British Columbia has commenced a similar process, but the majority of Canadian provinces have not taken such steps. UNDRIP's Article 19 mandates that governments consult in good faith to obtain the free, prior, and informed consent (FPIC) of Indigenous peoples when making decisions that may impact Indigenous peoples. While CUSMA allows flexibility under Reservation II-C-1, it does not contemplate that Canada may incorporate FPIC into trade-related decisions. Permitting FPIC to be incorporated into trade decisions affecting Indigenous peoples would provide flexibility for Canada in undertaking the processes set out in the UNDRIP Act.

Environmental protection, particularly regarding Indigenous lands, remains critical. While Chapter 24 emphasizes environmental cooperation, it does not adequately safeguard Aboriginal lands from trade-related environmental impacts. Providing flexibility within CUSMA to provide Canada with the greatest flexibility in undertaking the processes set out in the UNDRIP Act, would expand the opportunities to protect Indigenous peoples and their lands from degradation. These amendments would better align CUSMA with Canada's obligations under the Jay Treaty and UNDRIP.

Overall, strengthening cross-border trade rights, providing flexibility for if and how Canada may incorporate principles of FPIC, and protecting Aboriginal lands are essential to reaffirming Canada's commitment to Indigenous sovereignty and environmental stewardship.

The CBA Working Group appreciates the opportunity to provide input on these important issues. We are committed to supporting the government's preparations for the CUSMA review in 2026 and are ready to offer further assistance as needed. Our members are available to provide expert input on any of the topics discussed in this submission.

Thank you for considering our comments, and we look forward to continued collaboration.

Yours truly,

Noel Corriveau
on behalf of the CBA CUSMA Working Group