



18. International Trade Law

When a business is entering the Canadian economy, there are a number of international trade considerations it should be aware of – for example, the duties, taxes, and/or surtaxes that may apply to the importation of products and the trade agreements that apply to reduce those border costs. Canada’s international trade rules can have a significant impact on a business’s success in entering and operating in Canada. A selection of those rules are examined below, including:

- International trade agreements
- Government procurement
- Investment treaties
- Export and import controls
- Sanctions
- Customs and border administration
- Trade remedies
- Anti-corruption laws

International Trade Agreements

Canada is a trading nation that is heavily committed to a multilateral rules-based system and is an active promoter of plurilateral and bilateral trade agreements. It is a founding member of the World Trade Organization (WTO) and is party to dozens of other trade agreements, including the Comprehensive Economic and Trade Agreement (CETA), the North American Free Trade Agreement (NAFTA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Canadian Free Trade Agreement (CFTA). Canada recently signed the Canada – United States – Mexico Agreement (CUSMA), which will replace NAFTA once it has been ratified by the three countries.

WTO

The WTO was established in 1995 to create a rules-based trading system. It accomplished that through a number of agreements covering trade in goods, services, and intellectual property; dispute resolution; public procurement; and government trade policy. The core principles of these agreements are (a) the reduction of tariffs and (b) non-discrimination through obligations to provide national treatment and most-favoured-nation treatment of the goods, services, and investors of the member states.

NAFTA

NAFTA has governed trade between Canada, the United States, and Mexico since 1994 and brought about an integrated North American economic space for trade in goods and many services. The agreement eliminates most tariff barriers and provides investment protection, enhanced access to government procurement, and effective dispute resolution among parties. NAFTA provides a process through which US and Mexican investors can use international arbitration to challenge Canadian measures they consider to be expropriatory, discriminatory, or otherwise unfair and inequitable. Investors do not need the permission or support of their home state to bring forward such challenges.

CUSMA

CUSMA was signed on November 30, 2018, and is intended to replace NAFTA once all three countries have ratified it. With some notable exceptions, the scope and content of CUSMA reflects that of NAFTA, so it will be business as usual for most companies. The exceptions include significant changes for the auto and dairy sectors, government procurement, investor protection, and data transfers.

Greater North American content in autos and auto parts is now required, including a requirement that certain content be produced by workers earning at least US\$16 an hour, and US dairy producers have been granted increased access to Canada's lucrative dairy sector. The NAFTA rules governing government procurement have been eliminated, and suppliers in each of the three countries will lose the privileged access they enjoyed under NAFTA to the procurement markets in the other two countries. The sweeping investor protection measures found in NAFTA have also been eliminated, so US and Mexican investors in Canada will lose their right to use international arbitration to challenge Canadian measures. They will, however, retain their right to challenge Canadian measures in Canadian courts. Finally, the new agreement bans restrictions on data transfers across borders, meaning that Canada cannot require companies based in the United States or Mexico to store data within Canada.

CETA

CETA is a comprehensive trade agreement between Canada and the European Union (EU) and covers virtually all sectors of trade between Canada and the EU. It came into force provisionally on September 21, 2017, and immediately eliminated 98% of customs tariffs. Within seven years, 99% of customs tariffs on qualifying goods will be duty-free. In addition, CETA's government procurement chapter gives Canadian suppliers privileged access to the huge EU public procurement market, from the EU institutional level down through national and provincial governments to public institutions at the municipal, academic, school board, and health sector levels.

Given CETA's massive scope and coverage and enough time for its full benefits to be realized, CETA may prove to be the most significant trade agreement Canada has signed since NAFTA.

CPTPP

The CPTPP came into force on December 30, 2018, and governs trade between Canada and 10 countries (Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam). Privileged access to the Japanese market will be the most important gain for Canada in the short term, especially for Canada's agricultural industry. The member countries' obligations include (a) reducing tariffs and technical barriers and (b) providing investment protection, temporary entry for certain business persons, and access to government procurement. To ensure compliance, there is a dispute settlement process available to the member countries.

Canadian Free Trade Agreement (CFTA)

Building on the Agreement on Internal Trade, the Canadian federal government and the governments of the provinces and territories negotiated the CFTA with the aim of improving trade in goods and services within Canada. It came into force on July 1, 2017.

Government Procurement

NAFTA, the WTO Agreement on Government Procurement, CETA, and the CFTA each contain a chapter on government procurement that is aimed at increasing access to procurement opportunities and imposing rules on procuring entities to ensure fair and open procurement. When suppliers believe the Canadian procurement entity has not complied with its procurement obligations under the trade agreements, they may challenge the contract award before the Canadian International Trade Tribunal (CITT). If the CITT determines that the complaint is valid, it may recommend that a new solicitation be issued, the bids be re-evaluated, the existing contract be terminated and the contract awarded to the complainant, or the complainant be compensated for its loss of the contract.

Investment Treaties

Investment treaties, which can be stand-alone agreements or contained in a comprehensive free-trade agreement, seek to ensure that foreign investors are treated in a non-discriminatory way, both compared to domestic investors and to other foreign investors. Such treaties also require that foreign investors be given fair and equitable treatment and prohibit expropriation without compensation. Virtually all of Canada's investment treaties provide a dispute settlement process that allows the foreign investor to challenge a government measure before arbitration panels appointed by both the investor and the defending government. If the arbitral tribunal finds that the Canadian measure did not comply with Canada's obligations under the treaty, it may order that damage be paid to the investor. Such awards are enforceable against Canada under international law.

As noted above, the investor protection provisions of NAFTA were eliminated in CUSMA. Three years after CUSMA comes into force, the investor-state dispute resolution process established under NAFTA will be eliminated. Entities from the United States and Mexico doing business in Canada will no longer have access to dispute settlement procedures. Recourse under domestic law will, however, remain an option.

Export and Import Controls

Global Affairs Canada administers Canada's export controls pursuant to the Export and Import Permits Act (EIPA).

Export Controls

Three lists govern the exportation of goods and technology from Canada: the Export Control List, the Area Control List, and the Automatic Firearms Country Control List.

The Export Control List identifies goods and technology that require an export permit in order to be exported or transferred from Canada. The List is categorized into the following groups: dual-use items (items that have both a civilian and military purpose, such as computers), munitions, nuclear non-proliferation items, nuclear-related dual-use goods, missile equipment and technology, chemical and biological weapons, and miscellaneous goods and technology (including all US-origin goods and technology, certain medical products and agricultural and forest products, and strategic items). When exporting goods from Canada, it is important to first determine whether or not it is included on the Export Control List.

The Area Control List is a list of countries to which Canada maintains a virtual prohibition of any exportation of goods, technology, and services. Currently, the Democratic People's Republic of Korea (North Korea) is the only country on the List. That said, Canada does maintain sanctions against a number of other countries where the exportation of goods, technology, and services is severely limited. Canada's sanctions regime is discussed below.

The Automatic Firearms Country Control List restricts the export of firearms, weapons, and devices and identifies countries for which Global Affairs Canada might issue an export permit. In terms of the type of permit, exporters have three options: an Individual Export Permit, a Multiple Destination Permit, or a General Export Permit. An Individual Export Permit allows the export of controlled goods or technology to specific recipients in a specific country; a Multiple Destination Permit allows the export of most dual-use items to 26 countries, including the United Kingdom and South Korea; and a General Export Permit is granted to all residents of Canada and allows the export to certain specified destinations under certain conditions. Only two such permits have been issued by the Minister of Foreign Affairs, both of which were related to cryptography technology.

Import Controls

Import controls are governed by the Import Control List, which sets out a list of goods that are subject to import permit requirements. The List includes firearms; certain chemicals; and certain agricultural products, such as meat and dairy. In some cases (e.g., firearms), a permit is required before the goods can be imported into Canada. In other cases (such as agricultural goods subject to a tariff rate quota), the products may be imported without a permit but will be subject to a prohibitive tariff that can be as high as 270%.

Controlled Goods Program

The Controlled Goods Program is designed for companies in the defence industry. Companies and individuals dealing with goods or technology that are subject to the Defence Production Act must register under the Controlled Goods Program prior to possessing or transferring controlled goods. The goods listed in the Controlled Goods Regulations are generally ones of strategic significance or that have national security implications for Canada. A business involved in the export of controlled goods from Canada should be aware that registration with the Controlled Goods Program is a prerequisite to receiving an export permit from Global Affairs Canada.

It is especially important for a company to be aware of the Controlled Goods Regulations when it is acquiring a business in Canada or investing in such a business. Involvement in the research, manufacture, or sale of items on the Controlled Goods Regulations is a factor that the government will consider in assessing whether or not to conduct a national security review of an investment. An unsuccessful national security review could result in an order of divestiture.

Nuclear Products

One final control to be aware of when transporting goods to or from Canada is the Nuclear Non-proliferation Import and Export Control Regulations. In order to import or export a controlled nuclear substance, nuclear equipment or controlled nuclear information, a risk-significant radioactive source, or any product designed or modified for a nuclear end use, a licence must be obtained from the Canadian Nuclear Safety Commission. Businesses entering the Canadian market through a merger or an acquisition, or businesses that are simply changing their corporate name, should know that such licences may generally be transferred to another licensee or licence applicant as long as there is no significant change in the licensed activity.

Sanctions

Canada has five statutes that authorize the imposition of trade and economic sanctions: the *United Nations Act*, the *Special Economic Measures Act*, the *Freezing Assets of Corrupt Foreign Officials Act*, the *Criminal Code*, and the *Justice for Victims of Corrupt Foreign Officials Act*.

Global Affairs Canada is responsible for administering Canada's economic sanctions on a number of countries. Sanctions giving effect to UN Security Council resolutions are imposed under the authority of the *United Nations Act*. Sanctions imposed unilaterally by Canada are found under the *Special Economic Measures Act*. Depending on the country and the sanctions imposed, the sanctions may prohibit activities such as conducting transactions with certain individuals or entities, exporting certain products to a certain country, or transferring technical data to a person or an entity of a sanctioned country. The sanctions may also allow the Canadian government to seize or freeze assets located in Canada. This is a complex and constantly changing area involving multiple legislative schemes including sanctions imposed by Canada, measures imposed by any other countries a business operates in, and US sanctions that apply extraterritorially. Therefore, it is important for a business to screen the companies it does business with and the individuals who own or control them. Many businesses engage a third-party screening company to conduct this due diligence.

Customs and Border Administration

The Canada Border Services Agency (CBSA) administers customs laws, along with a myriad of other laws that regulate how goods may be sold on the Canadian market.

The *Customs Act* imposes a general duty to report the importation of all goods into Canada and specifies how goods are valued for duty purposes, provides the tariff preferences granted under free-trade agreements, and regulates the authority of the CBSA.

The Schedule to the Customs Tariff lists the customs duty for each item in accordance with its classification under the harmonized classification system, and importers are required to correctly classify their goods and pay the appropriate duties and taxes. In addition to levying duties, the CBSA also administers duty-relief programs and the collection of several other taxes (such as the GST/HST, excise taxes, and surtaxes) as required.

If an importer makes a mistake in its declaration, the CBSA generally has four years from the date of the importation to force the importer to correct the declaration and pay any additional duties and/or taxes that may result from the correction.

The CBSA's decisions on most issues – such as valuations, classifications, or tariff preference eligibility – may be appealed both within the CBSA and, eventually, to the CITT.

Trade Remedies

The *Special Import Measures Act* protects Canadian producers from the injurious effects of dumped or subsidized imports by providing rules and procedures for investigations into complaints of dumping and subsidies and the imposition of duties in response. Dumping occurs when a product is imported into Canada at a price that is lower than the profitable selling price of the product in the exporting country or at a price that is lower than the cost of producing the product. A subsidy is a financial or other benefit granted to the manufacturer of the exported goods by the government of the exporting country. Final anti-dumping and countervailing duties will only be imposed where the CBSA has determined that the goods have been dumped and/or subsidized and the CITT has determined that the dumping and subsidization caused, or threatened to cause, material injury to the Canadian industry. While a full investigation may take up to a year to complete, the CBSA usually imposes provisional duties within 90 days of launching an investigation.

Canada also has a domestic safeguards regime in place to protect domestic producers in cases where no dumping or subsidization is occurring but where increased volumes of imports into Canada are causing, or threatening to cause, serious injury to Canadian producers.

Anti-Corruption Laws

Canada has a number of laws to combat corruption. The *Corruption of Foreign Public Officials Act* prohibits the payment of bribes to foreign public officials for the purpose of obtaining a business advantage. Within Canada, the Act applies to both Canadians and non-Canadians. It also applies to Canadian citizens, permanent residents, and Canadian corporations in their activities outside of Canada. It applies to non-Canadians only if the offence is committed, at least in part, in Canada. The Criminal Code prohibits bribes to Canadian officials, including judges, members of Parliament, police officers, and government officials. This prohibition applies to both Canadians and non-Canadians.