International trade

In recent years, Canada has aggressively negotiated and concluded numerous new trade agreements that were built upon, and have gone beyond, the North American Free Trade Agreement (NAFTA) model. In addition, Canada continues to activity negotiate, finalize and conclude bilateral investment treaties designed to protect Canadian investors abroad.

Canada currently has free trade agreements with 15 countries or regions and is in the process of negotiating nine (9) additional agreements and exploring at least five (5) new agreements.

In late 2018, Canada and the United States stabilized their trading relationship with the conclusion of negotiations and the signing of the United States Mexico Canada Agreement (USMCA). This agreement is a replacement for NAFTA and should alleviate investor uncertainty and reduce the tensions in the Canada-US trading relationship that experienced much turmoil in 2018. Mexico ratified the new agreement in June 2019, while Canada and the United States have not yet done so.

Additionally, on December 30, 2018, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) entered into force for Canada, Japan, Mexico, New Zealand, Australia, and Singapore. On January 14, 2019, the CPTPP entered into force for Vietnam. Brunei Darussalam, Chile, Peru, and Malaysia are the final countries that still need to ratify the agreement.

While integration provides enhanced opportunities, it also emphasizes the need to comply with the legal framework for trade and customs within Canada, including rules relating to
importation, the use of trade agreements, export controls and sanctions regimes. Strategic use of free trade and investment agreements also highlights the necessity to understand the recourses available when disputes arise.

The year 2019 saw the trend towards nationalism recede in some ways. Canada and the United States were able to repair their relationship by signing the USMCA in late 2018, and they ended the retaliatory tariffs on one another’s goods in May 2019. For the time being, the relationship between the two countries appears stable.

1. Importation of goods
2. Anti-dumping and countervailing duties
3. Export controls and sanctions
4. Controlled goods regime
5. Investor-state disputes
6. Canada's blocking legislation: The Foreign Extraterritorial Measures Act
7. Proactive trade compliance

1. Importation of goods

a. Duties and tax

In Canada, customs duties are levied on imported goods that are classified under the Schedule to the Customs Tariff, in accordance with the harmonized system of customs classification. Duties represent the principal tax levied on goods imported into Canada. In addition to customs duties, imported goods and some services are subject to the federal Goods and Services Tax (GST), and Provincial Sales Tax (PST) or, in certain provinces and territories, the Harmonized Sales Tax (HST). For more information on the GST, see the chapter on taxation.

While tariff classification is based on the harmonized system, goods may be classified differently in Canada compared to other countries. In addition, not all countries have identical tariff codes, meaning an item listed under one tariff code in a foreign country may be listed under a completely different code in Canada. This often raises the question of whether the components within an imported product undergo the necessary tariff shift to claim preferential treatment under a trade agreement.

There are many special tariff items under the Customs Tariff that allow for duty relief, such as goods destined for particular end uses. Canada also has duty-relief programs for temporary importations, goods exported from Canada and returned after repair, alteration
or certain forms of processing, as well as duty drawbacks and deferrals.

In addition to duties, the possibility exists that the import may be subject to additional duties, tariffs and surtaxes due to anti-dumping or countervailing measures (discussed below), safeguards and retaliatory tariffs and countermeasures. The latter category of measures are generally rare, but may have a large impact on amounts payable upon import, and therefore determining the proper classification and origin of the product becomes particularly important (see section c. Rules of origin below).

b. Valuation

Classification of a product under the Customs Tariff determines the rate of duty, which is then applied to the value for duty to calculate the duty payable. Canada’s system of customs valuation is based on the World Trade Organization’s (WTO) Customs Valuation Code, which has been implemented into Canada’s Customs Act.

Transaction value is the primary valuation method for imported goods. It is the price actually paid or payable for the goods sold for export to a purchaser in Canada, subject to certain upward and downward adjustments.

Issues relating to transaction-value methodology often arise in related-party transactions due to the requirement that the value for duty reflect an arm’s-length transaction. For instance, there is often tension between transfer-pricing objectives from tax and customs perspectives: a balance must be achieved to establish a transfer price that maximizing tax-planning objectives while considering customs duty implications and requirements.

c. Rules of origin

Preferential rates of duty are accorded to products that originate in a country with which Canada has a free trade agreement, such as NAFTA, CPTPP, CETA, or agreements between Canada and Panama, Peru, Israel, Chile and other states. Whether a product “originates,” from one of those nations and therefore benefits from a trade agreement, is determined by rules of origin. These rules may involve complex calculations and an analysis of both the tariff classification and the value of the components that make up an imported product.

d. Appeals
Tariff classification, valuation and origin issues may all be appealed at the first level internally with the Canada Border Services Agency (CBSA), and then to the Canadian International Trade Tribunal (CITT), an independent tribunal.

e. Import restrictions

Canada maintains quantitative restrictions in the form of tariff rate quotas, which are primarily applied to sensitive agricultural products under the authority of the Export and Import Permits Act (EIPA), which authorizes an import control list. A permit must be obtained to import these products at a within access rate of duty, unless a permit exemption applies.

2. Anti-dumping and countervailing duties

The Special Import Measures Act (Canada) deals with dumping by foreign manufacturers and exporters, as well as subsidies received by foreign manufacturers. Dumping occurs when goods are sold for export at a price lower than that at which they are domestically sold in the country of origin under comparable conditions and terms of sale. The difference between the "normal" value and the export price is the margin of dumping.

A subsidy is a financial or other benefit that is granted by the country of origin's administration to a manufacturer of exported goods. Subsidies may be subject to countervailing duties.

While the CBSA determines the amount of dumping or subsidy, Canada does not impose duties on the dumped or subsidized goods unless the CITT finds that the dumping or subsidization has caused, or threatens to cause, material injury to a domestic producer. In recent years, dumping and subsidy actions before the CITT have often resulted in success for foreign manufacturers; however, anti-dumping and countervailing orders remain in place on a number of products, and, in particular, on steel and other primary commodities.

The year 2019 saw significant changes introduced to Canada's anti-dumping and countervailing duties regime. These changes increase the frequency of CBSA reviews of anti-dumping levels as well as altering the CBSA's methods of calculating certain costs of production to determine normal values. These amendments were made to address transactions between associated parties (e.g. a subsidiary or affiliated company) and "particular market situations" which encompasses a broad range of potential government actions that may distort the market.
Additionally, Canada changed laws around its imposition of safeguards, which are special tariffs that can be enacted on short notice to protect Canadian industry. In 2018, Canada imposed safeguards on several classes of steel products. While most of these safeguards ended in spring 2019, the amendments allow Canada to re-impose these safeguards on steel products as early as October 2019.

3. Export controls and sanctions

a. Export controls

Canada has a comprehensive regime for export controls and sanctions administered primarily by Global Affairs Canada (GAC), with enforcement assistance from the CBSA.

Three lists established under the authority of the EIPA govern exports of goods and technology from Canada to various destinations: the Export Control List, the Area Control List and the Automatic Firearms Country Control List.

Under the EIPA, it is an offence to export or transfer goods or technology included on the Export Control List, or export or transfer goods to a destination on the Area Control List, except under the authority of a permit. Canada does not have a "licensing" system similar to the U.S., which makes it necessary for each exporter of a controlled good or technology to apply for a permit where one is required.

The Minister of Foreign Affairs has issued several general export permits (GEPs) that allow exports of controlled goods or technology to specific destinations without the requirement to apply for an exporter-specific permit (assuming certain conditions are met). For example, in an effort to streamline the process for the export of certain controlled goods and technology, GAC has introduced a GEP authorizing the export of most controlled dual-use goods and technology (with some exceptions) to certain eligible destinations, provided the exporter complies with specific conditions. GEPs also exist with respect to export of cryptographic goods and technology, including for technology related to the development and production of such products.

In the absence of an applicable GEP, exporters must apply for an individual export permit (IEP) to export controlled goods or technology, or to export to a controlled destination. "Broad base" categories of permits are available to authorize multiple shipments to multiple destinations over a certain time period.

Detailed schedules to the Export Control List, which itemize the specific controlled goods
and technology, are included in the Government of Canada's A Guide to Canada's Export Controls, which is available online at international.gc.ca.

While Canada's export control regime focuses on "export or transfer" rather than "origin," item 5400 of the Export Control List respects U.S. controls on the re-export of U.S.-origin goods by requiring a permit to export U.S.-origin goods and technology from Canada. GEP No. 12 allows the export or transfer of U.S.-origin goods and technology without an individual export permit, except to Cuba, North Korea, Iran, Syria or any destination on Canada's Area Control List.

Export permits are not required for most controlled goods or technology destined to a final consignee in the U.S. Items that do require an export permit to the U.S. are identified on the Export Control List with a statement indicating that the control applies to "all destinations."

No goods or technology may be exported or transferred from Canada to a country on the Area Control List without an individual export permit. The only country currently listed on the Area Control List is North Korea.

Bill C-47, An Act to amend the Export and Import Permits Act and the Criminal Code (amendments permitting the accession to the Arms Trade Treaty and other amendments) received Royal Assent on December 13, 2018. The new law makes several amendments to the EIPA and Criminal Code to regulate arms brokering and to obligate the Minister of Foreign Affairs to apply the assessment criteria required by the Arms Trade Treaty when considering the granting of export and brokering permits. Once passed, it would prohibit those captured by the legislation from brokering transactions involving the movement of arms from one foreign country to another foreign country, without a permit.

A number of specific export controls are imposed by legislation administered by government departments other than GAC. These controlled products include, for example, wheat and barley, certain cultural property, rough diamonds, endangered species, ozone-depleting substances, nuclear substances, select equipment and information, hazardous waste, and certain wild plants and animals.

b. Sanctions

Canada has three main statutes that authorize the imposition of trade and economic sanctions: the United Nations Act, the Special Export Measures Act, and the Justice for Victims of Corrupt Foreign Officials Act. The latter came into force on October 18, 2017,
and enables Canada to impose sanctions against foreign nationals in a foreign state for human rights abuses or against foreign public officials and their associates who are responsible or complicit in acts of significant corruption. Related measures may be imposed under the Criminal Code (listing of terrorist entities) and Freezing Assets of Corrupt Foreign Officials Act, under which Canada may acquiesce to a demand by a country in turmoil to freeze the assets or restrain the property of certain of its government officials or politicians.

In addition to export controls under the EIPA, regulations passed pursuant to these acts impose various other measures, such as limitations on official and diplomatic contacts, and restrictions on economic activity between Canada and states that are the targets of sanctions, and the creation of "designated persons" lists - and the seizure or freezing of their property situated in Canada as well as a prohibition on doing business with them anywhere in the world. Export controls are normally limited to arms and related material and technical assistance, but may be broader for a particular state, such as Canada's very extensive sanctions on Syria and sector-specific sanctions on Russia.

4. Controlled goods regime

Public Works and Government Services Canada manages the Controlled Goods Program (CGP), which requires mandatory registration and regulation of persons and entities who examine, possess or transfer defence goods as defined in Canada's Defence Production Act. The CGP was created in 2001 to strengthen the Canada-U.S. agreement on defence trade controls, and is essential for maintaining the Canadian exemption with respect to the U.S. International Traffic in Arms Regulation (ITAR) regime.

In October 2011, the CGP began implementing the Enhanced Security Strategy, which imposes heightened security requirements on registered persons and entities. These requirements were adopted to allow Canadian registrants to make use of the new ITAR dual-national rule, which amends the treatment of dual- and third-country nationals in a manner that resolves the conflict that existed between ITAR restrictions and Canadian human rights laws that prohibit discrimination based on nationality.

5. Investor-state disputes

Canada is party to a number of trade and investment agreements that allow foreign investors to bring claims against the Canadian government for a breach of an obligation
owed to the investor (by either the federal or provincial governments) under one of Canada’s investment treaties.

- The requirement to accord national treatment and a minimum standard of treatment
- The prohibition against the adoption of certain performance requirements (e.g., domestic content requirements)
- The commitment to pay compensation for expropriation

Canadian investors abroad can also bring similar claims against their host country’s government under the numerous investment treaties between Canada and foreign countries.

The USMCA will introduce significant changes to the investor-state arbitration scheme for Canada. Under the new agreement, Canada is completely excluded from the investor-state arbitration provisions. There will no investor-state arbitration claims against Canada and Canadian investors will not be allowed to file claims for damages against the USA or Mexico. American and Mexican investors, however, will continue to have access to investor-state arbitration against each other, but the rights in the USMCA are significantly limited when compared to what was available under NAFTA.

Importantly, Canadian and Mexican investors will still have access to investor-state arbitration under the CPTPP.

6. Canada's blocking legislation: The Foreign Extraterritorial Measures Act

The Foreign Extraterritorial Measures Act () provides for the enactment of orders to prevent Canadian companies from complying with extraterritorial measures of other countries.

There is currently only one order in force under FEMA: the Foreign Extraterritorial Measures (United States) Order. This Order creates a dangerous "catch-22" for related Canadian and American companies by prohibiting a Canadian company from complying with American extraterritorial measures that restrict trade between Canada and Cuba.

If the company complies with U.S. law, it faces serious sanctions under FEMA. On the other hand, if it does not comply with U.S. law, it may face serious sanctions under U.S. laws that prohibit trade with Cuba. The FEMA order also imposes an obligation on Canadian companies to "report" communications received that relate to an extraterritorial
measure of the U.S. pertaining to Cuba, and imposes strict penalties for non-compliance to this obligation.

FEMA applies to any company incorporated and carrying out work in Canada, meaning that a subsidiary of a U.S. company registered in Canada and carrying on activities in Canada, even if minor, would be captured under the FEMA order and subject to its reporting and compliance obligations. As a result, FEMA issues often arise in the context of mergers between Canadian and U.S. companies where the Canadian companies have existing Cuban businesses or when a U.S. company establishes a Canadian affiliate or subsidiary.

7. Proactive trade compliance

Failure to comply with the numerous laws and regulations governing trade with Canada can result in serious penalties and prosecution, as well as disruptions to business operations. In Canada, the CBSA can require a company to revise and correct any incorrect import for up to 4 years after the improper classification is made. This financial risk is compounded by the ability of the CBSA to impose administrative monetary penalties (AMPS) for errors.

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