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CPD Bootcamp 2019

Hot topics in International Trade



Overview

1. Canada's Trade Agenda Post Election

CUSMA , Election trade related promises, New Trade Agreements

2. Updated on Trade Controls/Sanctions

Arms Trade Treaty, Helms Burton Claims, and new sanctions

3. Canada & Brexit

4. Investment law reform developments

5. The Future of the WTO

CUSMA- The “New NAFTA”

- Newly negotiated agreement between Canada, US, and Mexico signed on November 30, 2018
- CUSMA has 34 chapters covering everything from trade in goods and services, investment, procurement, IP, and more
- CUSMA will replace NAFTA once agreement enters into force

New Elements & Changes in CUSMA



NAFTA to USMCA

- An increase in the CUSMA regional value content threshold for cars from 62.5% to 75, a 70% North American steel and aluminum requirement, new labour value content provision requiring that 40-45% of a car producer's activities;
- New market access for the U.S. in the form of tariff rate quotas for dairy, poultry and egg products;
- Increased protections for intellectual property;
- Increased *de minimis* thresholds for sales tax and customs duties on imports for Canada and Mexico;
- A new chapter on digital trade;
- Investor Protection and Investor-State Dispute Resolution significantly changed.

CUSMA Entry into Force

- Requires each Party to ratify the treaty
 - This includes each Party passing legislation domestically to implement new elements of the CUSMA
- Status of domestic ratification?
 - Canada- Prior to election bill tabled in the House of Commons. Now need to table and pass new bill through standard legislative process;
 - Mexico- Domestic ratification procedures complete;
 - US- Draft statement of administrative action sent to Congress.
- To govern entry into force Parties agreed to a Protocol
 - 3 months after notification of completion of internal procedures CUSMA will enter into force

Liberals Trade Related Promises

- Goal: increase Canada's exports by 50 per cent by 2025
 - Action Item: Create a Canada Commercial Consular Service to help connect companies with local legal assistance and support
- Goal: Increase Canada's internal trade
 - Action item: create a Canada Free Trade Tribunal to hear, investigate, and help resolve cases where domestic trade barriers may exist
- Goal: Protect supply management
 - Action Item: Promised support for dairy farmers once CUSMA is ratified
- Goal: Multilateral cooperation
 - Action Item: Increase funding for WTO
- Goal: Expand sanctions regime to expand victim protections
 - Action Item: For Magnitsky sanctions develop a framework to transfer seized assets from those who commit grave human rights abuses to their victims

Canada's Progressive Trade Agenda

- What is it?
 - Canada's progressive trade agenda is trade that reflects Canadian values. More specifically this includes: (a) achieving a fairer sharing of the gains from trade, with a particular emphasis on jobs for the middle class; (b) specific focus on women, Indigenous peoples, youth, and small and medium-sized enterprises (SMEs); (c) specific reference to labour and the environment; (d) safeguarding the government's right to regulate in the public interest; (e) procedural reforms to achieve greater transparency and participation of civil society in negotiations.
- Example: CUSMA has chapters on
 - Labour
 - Environment
 - Agreement on Environmental Cooperation

Canada's On-Going Trade Negotiations?

Where to Next?

- **CARICOM (Caribbean Community)**
 - (launched in 2007, no further negotiations)
- **Dominican Republic**
 - (launched in 2007, last meet in 2009, stalled but exchanging information)
- **Guatemala, Nicaragua, El Salvador**
 - (launched in 2001, no further negotiations since 2011)
- **India**
 - (launched in 2010, latest round in 2017, ongoing)
- **Mercosur**
 - (launched in 2018, first round of negotiations March 2018, ongoing)
- **Morocco**
 - (launched in 2011, last round in 2012, ongoing)
- **Pacific Alliance (Chile, Colombia, Mexico, Peru)**
 - (launched in 2017, ongoing)

Sanctions & Export Controls

Arms Trade

- On September 17, 2019, Canada acceded to the Arms Trade Treaty (ATT)
- ATT related amendments to the *Export and Import Permits Act* include:
 - New “brokering” controls: “brokering” is arranging or negotiating a transaction that would result in the movement of controlled items from one foreign country to another foreign country.”
 - Changes to the EIPA require the Minister to assess all proposed export or brokering permits for “arms, ammunition, implements or munitions of war” against criteria related to international peace and security and human rights.
 - Imposing “significant risk” standard.

Sanctions & Export Controls

Arms Trade

- Brokering permits are required for any goods or technology listed in the new Brokering Control List (BCL)
 - BCL includes the following groups on the Schedule to Canada's ECL: 2 – Munitions, 9 Arms Trade Treaty, and other goods on the ECL related to biological or nuclear weapons
- Canada is providing a new general export permit for all ATT goods, now listed in Group 9 on the ECL, destined for the United States.

Sanctions & Export Controls

Helms Burton & FEMA

- US Administration unleashes Helms Burton Title III Claims
 - Helms-Burton Act was enacted in 1996 to strengthen and increase sanctions against the Cuban government
 - Title III allows US nationals to sue any person who “traffics” in property that was seized from that individual by the Cuban government dating back to Cuban revolution, but was previously suspended
 - On April 17, 2019 US Secretary of State announced that suspension of Title III would not be renewed
 - Canadian, EU, and Mexican and other companies in Cuba may be liable to US lawsuits
 - Currently hundreds of US certified by US Foreign Claims Settlement Commission estimated from \$2 billion to \$8 billion.

Sanctions & Export Controls

Helms Burton & FEMA

- Canada's *Foreign Extra Territorial Measures Act* (FEMA), protects Canadian's against Helms Burton claims
 - Canadians can sue in Canada to recover their costs for defending Title III actions in US
 - Canadians can petition the Attorney General of Canada to order the prohibition or restriction of the identification, disclosure and production of records in Canada or controlled by Canadians
 - Canadians can petition the Attorney General of Canada for an order to commence an action in Canada for the full recovery of any amounts awarded against them in US
 - Judgments made pursuant to Title III of the Helms-Burton Act will not be recognized or enforced in Canadian courts.

Sanctions & Export Controls

Additional Sanctions Imposed in 2019

- Venezuela
 - April 15, 2019 Canada added 43 individuals to the Regulations, most of whom are high level officials of the Maduro regime
- Ukraine
 - March 15, 2019, Canada amended the *Special Economic Measures (Ukraine) Regulations* to list 89 additional individuals and one entity to signal Canada's continued condemnation of Russia's actions in Ukraine
- Russia
 - March 15, 2019, Canada amended the *Special Economic Measures (Russia) Regulations* to list 25 additional individuals and 14 entities to signal Canada's continued condemnation of Russia's actions in Ukraine
- Nicaragua
 - June 21, 2019, the *Special Economic Measures (Nicaragua) Regulations* entered into force in response to gross and systematic human rights violations
- Canada has suspended export permits for goods destined to Turkey
 - No formal sanctions, but on October 15, 2019 Global Affairs has confirmed the suspension of new export permits to Turkey

Deal or No Deal- Brexit & Canadian Business

- **Deal**

- Likely to be a Brexit transition period, during which the UK will continue to be bound by virtually all of the rules and regulations of the EU while the EU and UK negotiate their future relationship.

- **No Deal**

- No transition period and the UK would cease to be an EU member on January 31, 2020

Deal or No Deal- Brexit & Canadian Business

- **No Deal**

- In the event of a no deal temporary tariffs apply for at least 12 months which keep 87% of UK's total imports free of tariffs. Tariffs would apply to:
 - Beef, lamb, pork, poultry and some dairy for farmers that have been historically protected;
 - Finished vehicles, excluding car makers relying on EU supply chains;
 - Certain ceramics, fertilizer and bioethanol subject to antidumping and subsidies duties.

- **UK trade policy with third countries**

- UK has pursued “roll over” free trade agreements with various countries
- Roll over FTA sets clear direction to importers and exporters post-Brexit

Investment Law & Reform

- **Canada currently negotiating BITs**

- Congo, Gabon, Georgia, Ghana, India, Kazakhstan, Kenya, Macedonia, Mauritania, Mozambique

- **CETA & Investment Court**

- Most investment protections between Canada and EU are in force, but no direct dispute resolution
- Recent decisions from European Court of Justice resolved legal uncertainty
- EU Member states must now all ratify CETA before investment court can enter into force
- EU recently proposed working procedures for the investment court

Investment Law & Reform

- **Model BIT Progress & UNCITRAL Working**

Group III

- After a public consultation on its BIT program in 2018 Canada continues to work on updating its BIT program
- Over 115 states continue on-going negotiations on investment law reform under UNCITRAL Working Group III

- **ICSID Rule Amendment**

- Amendments likely to go to ICSID Administrative Council after next Member State consultation (Nov. 11-15 2019)

The Future of the WTO

- **The Situation**

- US blocking appointment of new Members to WTO Appellant Body



WORLD TRADE
ORGANIZATION

- Currently only three Members remain on WTO Appellant Body (fully composed it should have 7 Members)
- On December 10, 2019, two members terms expire, leaving only one member
- WTO Appellant Body must sit with three members
- After December 10, 2019 Parties may appeal lower panel rulings “into the void” and the adoption of those decisions causing decisions to not have any legal effect.

Future of the WTO

Consequence & Crisis

- (i) default risk of appeals “into the void” followed by a block on panel reports;
- (ii) no appeal ex post or ex ante no appeal pacts (NAPs) followed by regular adoption of panel reports by the Dispute Settlement Body (DSB) under the negative consensus rule;
- (iii) Article 25 arbitration appeals making panel and appeal reports automatically binding without DSB adoption; and
- (iv) “floating” panel reports (or interim panel reports) that are neither adopted nor appealed/blocked

Solutions

- EU and Canada have agreed on an interim appeal arbitration arrangement based on existing WTO rules.
- Other states have support this effort.
- US and China have no solution in place



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Paul Lalonde is a Partner in the Toronto office of Dentons. He heads the trade and procurement practice in Canada and is a member of the leadership committees of Dentons Global Trade and WTO and Government Procurement Practice Groups. He is an expert on international trade, anti-corruption and government contracting law. Mr. Lalonde is one of Canada's leading experts on government procurement. He has represented clients in numerous government contracting disputes, including before the Canadian International Trade Tribunal, the Federal Court of Canada and provincial tribunals. His expertise encompasses anti-dumping and countervail investigations, customs, import and export controls, international sanctions, anti-corruption compliance and investigations and international business. He regularly advises clients on Canada's international investment commitments, including Chapter 11 of the North American Free Trade Agreement, and has played a key role in some of Canada's highest profile trade disputes including those on softwood lumber, steel and agricultural products.

Mr. Lalonde has the distinction of being one of the few practitioners listed as a leader in international trade law in *Lexpert*, *Chambers Global*, the *Legal Post* and the *Guide to the World's Leading Lawyers* (Legal Media Group / Euromoney Institutional Investor), as well as in the areas of International Trade and Finance Law and

Public Procurement law in *The Best Lawyers in Canada* (Woodward/White) and in *Chambers Global*.

He is ranked as one of Canada's pre-eminent lawyers in the procurement law field and has been selected to appear in the premiere edition of the *International Who's Who of Public Procurement Lawyers* and is listed in the *Who's Who Legal: Canada 2012* and *2013* as a, "true specialist" in Public Procurement. He was also named Corporate INTL Magazine's 2011 Public Procurement Lawyer of the Year in Canada. In 2012, he was named Toronto Lawyer of the Year in International Trade and Finance Law by *The Best Lawyers in Canada* (Woodward/White). Mr. Lalonde has been recognized by *The Canadian Legal Lexpert Directory* in international trade relations and is listed in the 2013 Lexpert Guide to the Leading US/Canada Cross-border Litigation Lawyers in Canada.



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Sean Stephenson's practice focuses on international trade and investment, anti-corruption, procurement and public international law.

Throughout his practice, Sean has gained extensive experience in investment treaty arbitrations, including acting in multiple cases under the UNCITRAL Arbitration Rules with respect to all phases of proceedings in complex disputes in the Americas and Europe. He has acted in and advised on cases under the NAFTA, CAFTA-DR and bilateral investment treaties in a large number of sectors. He has also acted in commercial arbitrations under the ICDR Arbitration Rules, as well as in complex litigation before Canadian federal and provincial courts.

Sean maintains a significant international trade practice, including WTO law, free trade agreements, antidumping and countervailing duties, import and export controls, sanctions, and customs. He regularly advises and acts for private companies and governments on the full panoply of international and domestic trade law and policy. He has served as counsel in trade matters before federal boards, the Federal Court of Canada and Federal Court of Appeal

and has advocated for clients to various government departments and ministries. In all matters, he is known to use the full range of legal tools to create leverage for clients in disputes, investigations, and enforcement.

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Sean is Co-Chair of the Investment Treaty Working Group, a group under the American Bar Association's International Arbitration Committee, a committee for which he is also Vice-Chair of Projects. He is the Treaties Editor for the Canadian Bar Association's Canadian International Lawyer Law Journal, and Associate Editor for the ABA's International Dispute Resolution Newsletter. Since 2010, he has been an associate fellow with the Center for International Sustainable Development Law, where he has engaged in research relating to trade and investment and sustainable development law. He is sought after for speaking engagements and publications and frequently publishes articles and commentary on a range of international and domestic law topics, and has presented throughout North America, Europe and Asia.

Thank you

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