



International Business Bulletin

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This newsletter is designed to highlight new issues of importance in international trade and business related law. We hope you will find it interesting and welcome your comments.

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“The Canada-Korea Free Trade Agreement cover[s] ... trade in goods and services, investment, government procurement, non-tariff barriers, environment and labour cooperation, and other areas of economic activity.”

CANADA ANNOUNCES FREE TRADE AGREEMENT WITH THE REPUBLIC OF KOREA

Henry J. Chang

Introduction

On March 11, 2014, Prime Minister Stephen Harper and President Park Geun Hye of the Republic of Korea (South Korea) announced that Canada and South Korea had concluded negotiations on a new free trade agreement. The Canada-Korea Free Trade Agreement (the “CKFTA”) will cover virtually all aspects of Canada-South Korean trade, including trade in goods and services, investment, government procurement, non-tariff barriers, environment and labour cooperation, and other areas of economic activity.

The final text of the CKFTA is still being drafted so it has not been made public yet. However, the Government of Canada has published a Final Agreement Summary¹, which provides some insight into what will appear in the CKFTA.

Trade in Goods

The CKFTA will eliminate duties on non-agricultural and agricultural goods. A brief summary of these provisions appears below.

South Korean Tariff Elimination

The following will occur once the CKFTA comes into force:

- a) Duties on 90.2% of non-agricultural tariff lines will be immediately eliminated. There will also be transition periods of 5, 7, 10, 11, and 12 years for the remaining tariff lines.
- b) Duties on 70% of fish and seafood tariff lines will be eliminated within the first 5 years. 100% of tariff lines will be duty free within 12 years.
- c) Duties on 85% of forestry and value-added wood products tariff lines will be eliminated within the first 5 years. 100% of tariff lines will be duty free within 10 years.
- d) There will be a progressive elimination of duties on 86.8% of agricultural tariff lines, although some of these duties will take many years to be phased out. In addition, South Korea has excluded selected agricultural products from duty elimination, including most dairy products, poultry and poultry products, ginseng and its products, rice and rice products, refined sugar and most tobacco products.

¹ <http://international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/overview-apercu.aspx>.

“One of the most controversial issues has been the proposed elimination of the duties currently applied to South Korean automobiles.”



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Canadian Tariff Elimination

The following will occur once the CKFTA comes into force:

- a) Duties on 81.5% of all non-agricultural product lines will be immediately eliminated. There will also be transition periods of 3, 5, 10, and 11 years on the remaining tariff lines.
- b) Duties on 77.2% of fish and seafood tariff lines will be eliminated within the first 5 years. 100% of tariff lines will be duty free within 3 years.
- c) Duties on all wood and forestry tariff lines will be eliminated immediately.
- d) Duties on 50.7% of agricultural tariff lines will be eliminated immediately. A further 36.3% of duties on agricultural tariff lines will be eliminated over five years. However, Canada will exclude certain agricultural products from duty elimination, including all those that apply to over-quota supply-managed products (i.e. dairy, poultry and eggs). In addition, tariff rate quotas for supply-managed goods will not be increased.

One of the most controversial issues has been the proposed elimination of the duties currently applied to South Korean automobiles. It has prompted strong objections from Ontario's automobile industry, which claims that the elimination of this duty will result in an even greater trade imbalance with South Korea. Although these objections are certainly understandable, the implementation of the CKFTA may not be as significant, since many of the

South Korean cars sold in Canada this year are already expected to enter the country duty free from the United States pursuant to the North American Free Trade Agreement (the "NAFTA").

Services, Investment, and Related Matters

Overview of Cross-Border Trade in Services

Canada's trade in services obligations under the CKFTA are considered substantially similar to its obligations under the NAFTA and its more recent free trade agreements with Peru, Colombia, and Panama. This includes a non-binding mutual recognition agreement framework that provides common standards for the licensing or certification of suppliers of professional services.

The CKFTA uses a "negative list" approach for listing reservations to the obligations of the cross-border trade in services chapter. This means that a market is fully open unless otherwise listed in a reservation. This approach will provide increased predictability for service providers.

The services chapter of the CKFTA includes a Most Favoured Nation clause. This provision will ensure that, if additional benefits are granted by one treaty party to a future trade agreement partner, these benefits will also be extended to the other treaty party.

The CKFTA also uses a "ratchet mechanism" for future liberalization. If one treaty party liberalizes a law, policy, or regulation that makes it easier to perform services or engage in invest-

“The CKFTA ... encourages financial sector officials in Canada and South Korea to communicate with one another in order to prevent unnecessary barriers to entry ...”

ment activities in that country, it automatically becomes that treaty party’s obligation under the CKFTA.

The CKFTA retains the right of the treaty parties to regulate and maintain their sovereign control over the development of natural resources. It also excludes services provided in the exercise of government authority, including health, public education, and other social services sectors and activities. Finally, it excludes continued preferential treatment given to Aboriginal and minority groups.

Financial Services

The CKFTA recognizes the role that banks, insurance companies and other financial institutions play in the economy by including special provisions for financial services. This includes special dispute settlement rules for financial services and recognition of the right of the parties to take measures to protect the stability and integrity of the financial system. The CKFTA also encourages financial sector officials in Canada and South Korea to communicate with one another in order to prevent unnecessary barriers to entry into the financial services sector or to resolve issues arising from such barriers.

Telecommunications

The CKFTA will ensure that all players in the telecommunications market have fair access to networks and services, and ensure that regulators act impartially, objectively and in a transparent manner.

E-Commerce

The CKFTA includes a commitment that both parties will refrain from applying customs duties, fees or other charges on digital products that are transmitted electronically. There are also provisions in the CKFTA aimed at building trust and confidence in the digital environment, such as the online protection of e-commerce users’ personal information.

Temporary Entry of Business Persons

The temporary-entry provisions in the CKFTA are intended to address the immigration barriers that business persons face when crossing the border. Although the final text of the CKFTA has not been finalized, we can make certain assumptions if we refer to Canada’s prior free trade agreements.

According to the Final Agreement Summary, the temporary-entry provisions will include broad coverage for contract service suppliers (i.e. professionals employed by a Canadian company), including those in the science, engineering and information technology fields, and coverage of key sectors of interest to Canada for independent professionals (i.e. self-employed professionals contracted directly by a South Korean or South Korean company), including architects, engineers, management consultants and veterinarians. As a result of the CKFTA, these professionals will not need to obtain a labour market opinion or to satisfy an economic needs test. Spouses of traders and investors, intra-corporate transferees, contract service suppliers and independent professionals will also be covered by the CKFTA.

“It will also allow eligible entrepreneurs/business owners to obtain work permits for their executive and supervisory employees, as well as those who possess essential skills.”

The above description sounds very much like the temporary-entry provisions² contained in the North American Free Trade Agreement (“NAFTA”) and in the free trade agreements that Canada has entered into with Chile, Colombia, and Peru. As a result, we can assume that the CKFTA will likely provide for the following temporary-entry provisions, which will be available to citizens (but not permanent residents) of each treaty party:

- a) The CKFTA should include additional business visitor exemptions, which are based on the six stages of the business cycle: (1) research and design, (2) growth, manufacture and production, (3) marketing, (4) sales, (5) distribution, and (6) after-sales service.
- b) The CKFTA should establish a new temporary category for professionals who seek to perform pre-arranged services at a professional level. Typically, only the professions that are specifically listed in the agreement are eligible for this status. It is expected that the list of professions will be similar, but not necessarily identical, to the list of eligible professionals listed in Appendix 1603.D.1 to Annex 1603 of the NAFTA³. Spouses and dependent children should be entitled to dependent status for the same duration as the principal applicant.
- c) The CKFTA should include a provision for intra-company transferees. This category would allow executives, managers, or specialized knowledge workers who are cur-

rently employed abroad by a multinational company to transfer to a parent, subsidiary, affiliate, or branch office of the same company located in the territory of the other treaty party. Spouses and dependent children should be entitled to dependent status for the same duration as the principal applicant.

- d) The CKFTA should include a provision for treaty traders. This category would allow entrepreneurs/business owners who are engaged in existing substantial trade between South Korea and Canada to obtain work permits in furtherance of that trade. It will also allow eligible entrepreneurs/business owners to obtain work permits for their executive and supervisory employees, as well as those who possess essential skills. Spouses and dependent children should be entitled to dependent status for the same duration as the principal applicant.
- e) The CKFTA should include a provision for treaty investors. This category would allow entrepreneurs/business owners, who have made a substantial investment in an active business enterprise located in the territory of the other treaty party, to obtain work permits in furtherance of that enterprise. It will also allow eligible entrepreneurs/business owners/companies to obtain work permits for their executive and supervisory employees, as well as those who possess essential skills. Spouses and dependent

² <http://www.americanlaw.com/cdnnafta.html>.

³ <http://www.americanlaw.com/1603d1.html>.

“Canada and South Korea have agreed to promote fair competition and prevent market distortion by state-owned entities.”

children should be entitled to dependent status for the same duration as the principal applicant.

Investment

The CKFTA's investment chapter should allow investors to benefit from a more transparent and predictable environment. It sets out the respective rights and obligations with respect to the treatment of Canadian investors in South Korea and South Korean investors in Canada.

Among other things, the investment chapter provides for protection against discriminatory treatment, including at the pre-establishment stage of an investment (i.e. when an investment is undergoing the permit and approval process), which will assist investors in accessing the market of the other treaty party. It also provides for protection from expropriation without prompt and adequate compensation. However, Canada will retain the ability to review certain foreign investments pursuant to the *Investment Canada Act*⁴.

As in the services chapter, the investment chapter also applies a “negative list” approach. In other words, all markets will be considered fully open to citizens of the other treaty party unless they are specifically listed in a reservation.

The CKFTA also grants investors access to international arbitration to resolve disputes through the investor-state dispute settlement provisions. These dispute settlement provisions

should ensure greater protections for investors against discriminatory and arbitrary practices.

Competition Policy

The CKFTA will include commitments to ensure that:

- a) The treaty parties maintain measures to prohibit anticompetitive business conduct;
- b) These measures are applied in accordance with the principles of fairness, transparency and non-discrimination;
- c) The treaty parties will cooperate on an ongoing basis, in order to prevent anti-competitive business conduct; and
- d) The competition policy provisions of each treaty party are not subject to any form of international dispute settlement.

Monopolies and State Enterprises

Canada and South Korea have agreed to promote fair competition and prevent market distortion by state-owned entities. In furtherance of this objective, the CKFTA's monopolies and state enterprises chapter will establish rules intended to regulate the behaviour of monopolies and state enterprises, to ensure that they operate in a non-discriminatory manner. However, monopolies and state enterprises that have public service obligations will have flexibility to continue serving those public interests. The treaty parties will have the ability to designate or maintain an entity as a monopoly or state enterprise.

⁴ R.S.C., 1985, c. 28 (1st Supp).

“In addition to non-discriminatory treatment, foreign suppliers will have access to all the information necessary to submit a bid as well as a right to challenge procurement decisions if the rules have not been followed.”

Government Procurement

Canada and South Korea are among the fifteen parties to the existing World Trade Organization (“WTO”) Agreement on Government Procurement (“GPA”). The CKFTA’s government procurement chapter is intended to enhance the treaty parties’ existing commitments under the GPA.

A revised GPA is expected to come into force, for those parties that have already ratified it, on April 6, 2014. The ten parties that have already ratified the revised GPA are: (a) Liechtenstein, (b) Norway, (c) Canada, (d) Chinese Taipei, (e) the United States, (f) Hong Kong, (g) China, (h) the European Union, (i) Iceland, (j) Singapore, and (k) Israel. South Korea has not yet ratified the revised GPA but it will become effective between Canada and South Korea once this has occurred.

Under the CKFTA, Canadian suppliers will benefit from additional access to procurement by South Korean federal government agencies for contracts valued above 100 Million Won (\$100,000CAD). Similarly, South Korea will have access to procurement opportunities by the same Canadian federal government entities as those listed in the GPA, for contracts valued above \$100,000CAD. In addition to non-discriminatory treatment, foreign suppliers will have access to all the information necessary to submit a bid as well as a right to challenge procurement decisions if the rules have not been followed.

The CKFTA does not cover provincial, territorial or municipal government procurement. However, Canada and South Korea will have commitments relating to sub-national procurement once the revised GPA comes into force.

Intellectual Property

The CKFTA’s intellectual property provisions adopt Canada’s existing copyright, trademark, and patent regimes rather than providing for any additional intellectual property protections.

Copyright

The CKFTA reflects Canada’s regime as updated by the *Copyright Modernization Act*⁵, which brought Canada into compliance with the World Intellectual Property Organization’s two Internet treaties. It also reiterates other aspects of Canada’s regime, including the protection of technological protection measures (technology designed to protect copyrighted material), protection of rights management information, and special measures against copyright infringers on the Internet (no change to Canada’s notice and notice regime, which defines the responsibility of Internet service providers in respect of copyrighted material on their networks).

Trademarks

The CKFTA reflects existing aspects of Canada’s trademarks regime, including those pertaining to trademark registration, application and cancellation as well as to well-known trademarks.

⁵ S.C. 2012, c. 20.

“The CKFTA patent provisions are consistent with Canada’s current regime, which includes criteria regarding patentability and exclusions from patentability.”

Enforcement

The CKFTA includes provisions providing for civil and criminal remedies and border measures consistent with Canada’s existing regime and the proposed measures that appear in Bill C-86.

Patents

The CKFTA patent provisions are consistent with Canada’s current regime, which includes criteria regarding patentability and exclusions from patentability.

Public Health Concerns

The CKFTA recognizes the importance of the WTO’s Declaration on Trade-Related Aspects of Intellectual Property Rights and Public Health.

Geographic Indications

The CKFTA includes provisions relating to the protection of geographical indications. Specifically, it requires South Korea to protect the terms “Canadian whisky” and “Canadian rye whisky” as geographical indications. It also required Canada to protect the terms “Goryeo Hongsam” (Korean red ginseng), “Goryeo Baeksam” (Korean white ginseng), “Goryeo Susam” (Korean fresh ginseng), and “Icheon Ssal” (Icheon rice), including their translations, as geographical indications.

Dispute Settlement and Institutional Provisions

Dispute Settlement

The CKFTA will utilize three-person dispute settlement panels, with panellists appointed through an ad-hoc appointment process rather

than a process based on a standing roster of candidate panellists. The CKFTA will also provide for accelerated timelines for disputes involving perishable goods and motor vehicles. In addition, the dispute settlement provisions will allow for hearings that are accessible to the public and will permit panels to consider submissions by non-governmental persons.

Institutional Provisions

The Institutional provisions set establish how the CKFTA will be interpreted, implemented and managed. For example, they state the treaty parties’ joint commitments and aspirations and affirm the right of governments to regulate in the public interest. They also describe how the CKFTA may be amended, how it may be terminated, and what matters may be excluded in order to preserve autonomy and flexibility in key areas of public policy. For example, the following exclusions appear in the CKFTA:

- a) A general exception for measures related to the protection and promotion of cultural industries through policies and programs;
- b) A taxation article to ensure protection for existing taxation measures, as well as broad exceptions to ensure the ability of governments to implement efficient tax policies that are consistent with their overall social and economic objectives;
- c) A general exception for certain measures, including those necessary to protect human, animal or plant life or health, or relating to the conservation of exhaustible natural resources; and

⁶ <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6370314>.

- d) An exception for measures taken to protect national security.

Environment and Labour

Environment

The CKFTA includes environmental obligations, which include commitments to:

- a) Maintain high levels of environmental protection, the effective enforcement of environmental laws, and not waiving or derogating from such laws to promote trade or investment;
- b) Ensure transparency and public participation in the making of such laws; and
- c) Reaffirm commitments to multilateral environmental agreements Canada and South Korea have ratified.

The CKFTA also provides for a dispute resolution process designed to address any questions regarding compliance. This process includes a review by an independent panel of experts whose recommendations will be made publicly available.

Labour

Labour provisions that are similar to those found in Canada's recent labour cooperation agreements, such as those with Colombia,

Honduras, Jordan, Panama and Peru. They are intended to ensure that national labour laws and policies in Canada and South Korea comply with international labour standards. The provisions also include a clause preventing either party from derogating from its labour laws in order to encourage trade or investment. In addition, they provide for an enforceable dispute settlement mechanism to help ensure that labour obligations are respected.

Conclusion

Despite the fact that certain industry sectors have expressed concern about how it will adversely affect their industries, the implementation the CKFTA should ultimately result in a net benefit for Canada as a whole. ■

EXPECT THE BEST

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