THE CANADIAN BAR ASSOCIATION
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Canada-United Kingdom Free Trade Consultations

CANADIAN BAR ASSOCIATION
COMMODITY TAX, CUSTOMS AND TRADE, INTERNATIONAL LAW, IMMIGRATION LAW, COMPETITION LAW AND FOREIGN INVESTMENT REVIEW SECTIONS AND CANADIAN CORPORATE COUNSEL ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Canadian Bar Association's International Law; Commodity Tax, Customs and Trade; Immigration and Competition Law and Foreign Investment Review Sections; and the Canadian Corporate Counsel Association (CBA Sections), with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Sections.

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I. INTRODUCTION

We are writing on behalf of the Canadian Bar Association's International Law, Commodity Tax, Customs and Trade, Immigration and Competition Law and Foreign Investment Review Sections, and the Canadian Corporate Counsel Association (CBA Sections) in response to Global Affairs Canada's consultation on an anticipated bilateral Canada-U.K. free trade agreement and a possible U.K. accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

II. BILATERAL CANADA-U.K. FREE TRADE AGREEMENT

A. Model Free Trade Agreement

The CBA Sections recommend that Canada use this opportunity to continue to review its model free trade agreement (FTA). Canada should rely on the experience and lessons learned from the CPTPP negotiations when negotiating a Canada-U.K. agreement.

B. National Treatment and Most-Favoured Nation Treatment

Consistent with Article 2.3 of the Comprehensive Economic and Trade Agreement (CETA), Canada should ensure that Canadian goods are accorded "national treatment" by the U.K. in its market. This is a cornerstone principle of the World Trade Organization (WTO) and is in virtually all of Canada's trade agreements. We also encourage Canada to include a "most-favoured nation" treatment provision, to ensure that Canadian exporters benefit from the best treatment the U.K. grants to any of its trading partners.

C. Tariff Elimination

Tariff elimination is a fundamental component of any FTA. For Canada-U.K. trade, the existing tariff elimination schedule in the CETA should be carried forward in a new bilateral agreement. Canada should also consider an accelerated elimination schedule for any remaining duties to benefit Canadian exporters.

D. Rules of Origin

A bilateral agreement between Canada and the U.K. should include the most recent provisions of the CPTPP and the Canada-United-States-Mexico Agreement (CUSMA). For example:

- treating recovered materials as originating if used in the production of, and incorporated into, a remanufactured good;
- an accumulation provision, treating an originating material from a country with which both Canada and the U.K. have a FTA as "originating" for purposes of qualifying a good produced in Canada or the U.K. under the bilateral treaty;
- *a de minimis* provision exempting a good from meeting tariff shift or regional value content rules if the value of non-qualifying materials is 10 percent or less of the value of the finished good.

Canada should consult with the automobile manufacturing and automobile parts industries to learn the degree to which customized automobile provisions in the CETA should be carried into a Canada-U.K. FTA. During the seven-year CETA negotiations, the automobile industry rule of origin, safety standard requirements and other auto-related provisions were highly customized.

E. Trade Remedies

The U.K. has been the target of 14 anti-dumping investigations initiated by Canada since 1985, with one of those cases currently in force (refined sugar). Consistent with Chapter 3 of the CETA, Canada should reserve its rights – under the WTO Antidumping Agreement and Subsidies and Countervailing Measures Agreement – to investigate and, if warranted, impose trade remedies against the U.K. These remedies should include anti-dumping and countervailing duties, surtaxes or other measures in safeguard inquiries.

F. Trade Facilitation and Customs Clearance

Trade facilitation is a key component of negotiations and should include raising and maintaining *de minimis* import levels below which no value-added taxes (VAT) or duties are collected, equivalent to the CUSMA levels.

A trade agreement should empower entrepreneurs and small businesses by creating a more seamless transatlantic market. E-commerce has reshaped the global trade landscape and modern technology allows us to rethink traditional methods of customs clearance. We recommend reducing the administrative burden of clearing goods.

Both countries should commit to clearing goods with minimal documentation, and digitizing customs documentation (bills of lading, customs documents, etc.). Also, both countries should commit to a single window concept: to electronically submit all necessary information that complies with customs and other government agency requirements in a single declaration. A harmonized code for e-commerce goods should be considered to simplify business between Canada and the U.K.

We recommend that both countries give traders adequate notice of the entry into force of a Canada-U.K. FTA, including advance publication of the amended customs procedures. Though this is typically Canada's practice, during the U.K.'s withdrawal from the European Union, traders were not made aware of how to claim preferential tariff treatment for Canada-U.K. trade until shortly before the CETA preferential treatment expired. Once a Canada-U.K. FTA is agreed to, we recommend that both countries give traders adequate notice so they can update their internal customs compliance procedures.

G. Trade in Services

Services are an integral part of manufacturing, agriculture, and nearly all other sectors of both countries' economies. Services are also a key part of supply chains. Transportation and delivery services are crucial to the efficient delivery of goods and the maintenance of optimum supply chains. As a result, an agreement should include full market access and national treatment commitments in transportation and logistics services.

H. Small and Medium Sized Enterprises

To reduce trade barriers for small and medium sized enterprises (SMEs), an FTA should facilitate communication between SMEs and government officials, similar to the CETA Joint Committee's Recommendations on SMEs to establish a public website and contacts.

I. Export Controls

The COVID-19 pandemic has led countries to rethink how they use their export controls. Over the past year, many countries imposed export restrictions on a wide range of final goods (e.g., masks), inputs (e.g., ingredients for vaccines) and foodstuffs. This has disrupted cross-border supply chains, distorted domestic prices and unevenly distributed goods worldwide – creating a cascading worldwide effect as countries respond to these trends.

While the WTO Agreements and the CETA contain few disciplines on the use of export restrictions, we recommend that a Canada-U.K. FTA contain dedicated provisions on the use of export restrictions. Specifically, we recommend that the agreement provide that export restrictions – both quantitative export restrictions and export duties – should be used as a measure of last resort, on a temporary basis, and only to the extent necessary to address critical resource shortages. Further, if that provision is to be given any effect, it should not be subject to the general exception or an essential security exception of the dispute resolution chapter. Lastly, when export restrictions are used, countries should be diligent about fulfilling their WTO notification obligations.

J. Competition Law and Policy

Canada and the U.K. have well-established competition laws and institutions and long track records of enforcement. For any bilateral FTA with the U.K., we recommend including a competition-specific chapter with commitments no less comprehensive than those in the CPTPP Chapter 16. In addition, given the close and longstanding relationship between the countries' competition authorities, there may be opportunities to go beyond Chapter 16.

We generally support the approach to negotiating competition provisions described in the Competition Bureau's December 2019 submission to the OECD Global Forum on Competition (Competition Bureau OECD Submission).[1]

To ensure that the benefits of trade liberalization are not offset by anti-competitive conduct, we encourage the inclusion of all the key competition-related provisions identified at Annex II of the Competition Bureau OECD Submission. We further encourage the Canadian trade negotiations team to closely monitor the negotiation of chapters that touch on the cross-cutting issues related to competition policy identified at Annex III of the Competition Bureau OECD Submission.

In September 2020, the Competition Bureau and the U.K. Competition and Markets Authority agreed to a Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (MMAC), together with the competition agencies of the U.S., Australia and New Zealand.[2]

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1 See "Competition Provisions in Trade Agreements".

2 See "Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities".

In negotiating the competition provisions of any bilateral FTA, Canada should be careful to avoid inconsistencies between the FTA and the MMAC. In addition, we encourage Canada to embrace any opportunity to establish guidelines for potentially contentious areas of increased cooperation arising under the MMAC, for example, by strengthening protections against the disclosure and use of privileged information between Canadian and U.K. competition authorities where the existence of privilege is contested between the authority and a party under investigation.

K. Foreign Direct Investment (FDI)

The U.K. is Canada's fourth largest source of FDI ($62.3 billion) and second largest destination for outbound investment ($107 billion) in 2019. Accordingly, FDI review is an important aspect of any bilateral or multilateral free trade agreement negotiations with the U.K. We recommend that the following topics be considered.

The Canada-U.K. Trade Continuity Agreement (TCA) substantively replicates the CETA. We understand that an agreement with the U.K. could contain substantively similar provisions.

In June 2020, the CBA Competition Law and Foreign Investment Review Section explained that the inclusion of net benefit review thresholds in FTAs including the CETA, CUSMA and CPTPP has potential implications for Canada's future flexibility to make changes to the applicable net benefit review thresholds in the *Investment Canada Act* (ICA).[3]

For example, pursuant to the CETA, Canada must set a trade agreement investor threshold of $1.5 billion for EU investors, adjusted in accordance with the applicable methodology. The CETA also commits Canada to setting a threshold for state-owned investors from any country of $369 million, adjusted in accordance with the applicable methodology.[4]

This methodology permits Canada to make inflation-linked increases and reductions in the ICA thresholds (in 2021, for example, the thresholds were reduced to $1.565 billion and $415 million respectively). However, because the CETA enshrines minimum net benefit review thresholds, the agreement appears to have the effect of fettering Canada's discretion

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3 CBA Submission to the Industry, Science and Technology Committee on its study of the *Investment Canada Act,* June 16, 2020; online

4 See paragraphs 1 and 3 of Reservation I-C-1 in Annex 1 of the Schedule of Canada-Federal to the CETA.

to reduce the net benefit thresholds significantly, for example to respond to a devaluation of companies in sensitive and critical sectors of the economy.

The same thresholds and adjustment methodology are also in the CUSMA and the CPTPP. Using the same reservations related to thresholds in any FTA with the U.K. would be consistent with the "most favoured nation" principle that is widely accepted in international trade agreements. From a practical perspective it will also simplify foreign investment review for Canadian businesses and foreign investors, as well as their advisors and the Investment Review Division in Innovation, Science and Economic Development Canada, by avoiding the need to make determinations about differing thresholds in transactions which may involve parties from the U.K. as well as the EU or CUSMA or CPTPP member countries.

We recommend that Canada negotiate treatment for U.K. investors under the ICA in any future FTA that is consistent with the treatment of investors originating in jurisdictions with which Canada already has trade agreements, including the CETA, CUSMA and CPTPP.[5]

L. Corporate Social Responsibility (CSR) and the Environment

We recommend that the U.K. and Canada promote the development and implementation of industry practices that encourage corporate social responsibility. This would include policies to encourage businesses to view growth through the lens of a triple bottom line: 1) financial returns (profit); 2) social returns (people); and 3) environmental returns (planet).

We encourage cooperation between Canadian and U.K. CSR experts who can share information and best practices to support a decarbonized economy, green growth, employee development and sustainable communities. The United Nations Sustainable Development Goals (SDGs) should be used to design policies encouraging concrete action in CSR with metrics to evaluate performance. This can tie into existing policies in other areas including fair labour laws and regulations, anti-corruption and bribery laws, minimum wages, working hours, carbon reduction, diversity and anti-pollution measures. An example may be policies that offer tax benefits to corporations that encourage employee share ownership.

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5 Canada appears to intend that the U.K. benefit from the trade agreement investor ICA threshold. As a result of the Canada-U.K. TCA coming into force on April 1, 2021, U.K. private sector investors are now subject to the trade agreement net benefit review threshold, $1.565 billion in enterprise value in 2021.

Canada and the U.K. have an extensive history of co-operation on climate change issues. The TCA incorporated Chapter 22[6] of the CETA, which provides a framework for cooperation in trade and the environment. Canada and the U.K. also cooperated in the low carbon economy with the *Canada-United Kingdom Partnership on Clean Growth and Climate Change* and other multilateral areas through instruments such as the *Paris Agreement*.

Canada and the U.K. must continue to work together to ensure high standards for environmental protection in all sectors of the economy and to expand their commitment with more detailed benchmarks. Given the rapid pace of climate change, an FTA should allow countries to nimbly respond to any climate-related crisis. This may be achieved by allowing easier revisions to the chapter on trade and the environment, separate from the rest of the FTA.

M. Transparency and Anti-corruption

We recommend that both countries reaffirm their commitment to anti-corruption by including a dedicated chapter in a free trade agreement. This chapter could be modeled on the CUSMA Anti-corruption chapter, which includes shared commitments to address bribery, protection of whistleblowers, integrity of bookkeeping, public official integrity and private sector engagement in anti-corruption efforts. We also recommend including collaboration between anti-corruption agencies in both countries.

N. Human Rights

We recommend that a Canada-U.K. FTA acknowledge the importance of human rights. The agreement should acknowledge the crucial role of human rights in ensuring that all individuals can participate in each country's economic system to earn a livelihood and live with dignity. We encourage Canada to emphasize the importance of Indigenous rights in Canada, and that any U.K nationals doing business in Canada need to respect the rights of Indigenous Peoples in Canada. Further, any obligations imposed on Canada in an agreement with the U.K. must be consistent with Canada's existing obligations to Indigenous Peoples in Canada.

O. Gender and Trade

There is no dedicated trade and gender chapter in the TCA and the CETA. Instead, the CETA Joint Committee issued a recommendation on trade and gender in 2018. There are dedicated

6 Chapter 22 of the *Comprehensive Economic and Trade Agreement*

trade and gender chapters in the *Canada-Chile FTA* and the recently modernized *Canada-Israel FTA*.

Canada should include a dedicated trade and gender chapter in a Canada-U.K. agreement to help eliminate all forms of gender-related discrimination, including, employment discrimination.

P. International Treaty Obligations

Even though the U.K. has withdrawn the Internal Market Bill's measures that breached its EU Withdrawal Agreement, we remain concerned about the possibility of the U.K. introducing legislation that could breach its international obligations. These measures would offend the principle of *pacta sunct servanda*, a bedrock of international law and would be inconsistent with the U.K.'s record as a contributor to, and observer of, international law. Further, given that the U.K. intends to forge independent trading relations with various countries, its trading partners must be reassured that it will honour its treaty obligations.

Q. Data Security, Privacy and Digital Trade

Data security and privacy is important for international trade. Currently, the TCA, incorporating the CETA by reference, addresses privacy in the financial services, telecommunications and e-commerce sections. A Canada-U.K. FTA could consider expanding the role of data privacy for the entire agreement, perhaps by creating a separate chapter on Trade and Data. Data privacy should be harmonized with other international agreements, including the *Digital Economy Partnership Agreement*.

A Canada-U.K. FTA presents an opportunity to address nascent technologies or industries that will soon likely play a larger role in cross-border commerce. To this end, we recommend that this new chapter address digital trade areas, such as a common framework for algorithms and artificial intelligence, financial technology cooperation, and government procurement.

R. Electronic Contracting

We recommend that a new FTA between Canada and the U.K promote electronic signatures and electronic contracting. Currently, every Canadian province and territory has a statute creating functional equivalency between paper and electronic signatures (*e.g., Electronic Commerce Act (Ontario)*). In the U.K, the *Electronic Communications Act 2000* has a similar purpose. However, legislation from each country uses different electronic signature

standards. Canada and the U.K. should explore harmonization or mutual recognition options to improve cross border dealings.

Further, several established industries, such as banking and finance, refuse to use electronic signatures. Both countries should enact policies to incentivize the use of electronic signatures and change culture around contracting in all industries.

S. Videoconference and Arbitration

We recommend that the dispute settlement provisions – both general dispute settlement and investment dispute settlement – allow for remote or hybrid hearings. In the event of a future pandemic or worldwide emergency, remote or hybrid hearings will be crucial to ensure uninterrupted dispute settlement mechanisms. Canada should consider including remote or hybrid hearings in its model FTA. Older dispute settlement provisions typically do not contemplate them, which has consequences for establishing consent to arbitrate. In all contexts, remote hearings also make dispute settlement more accessible to cost-conscious users (e.g., SMEs).

While the procedural and logistical aspects of remote hearings may be left to the parties to agree on later, consideration should be given to minimum cybersecurity standards, electronic exchange and service of documents, measures to ensure that witnesses are not influenced, and default arbitration rules if the parties do not choose arbitration rules.

T. Exceptions

Subject to our comments on export restrictions above, we recommend including an "exceptions chapter" to contemplate pandemics or other worldwide emergencies as bases for invoking an exception. Where the CETA incorporates GATT XX(b) by reference, in times of emergency, it would be preferable to dispense with the "necessity" analysis under WTO jurisprudence and permit parties to quickly react to fluid circumstances.

U. Global Mobility

Generally: While the TCA replicates the mobility terms of the CETA, we recommend that a specific Canada-U.K. agreement be prioritized. As the TCA has not been ratified yet, U.K. nationals currently qualify for work permits only under significantly stricter parameters than those that existed prior to December 31, 2020.

Promoting international investment and trade requires removing barriers to the movement of individuals. Any bilateral FTA between Canada and the U.K. should include comprehensive allowances for the entry of professionals and technicians, intra-company transferees, business visitors, and investors.

A new agreement should lean towards broader, more flexible approaches in the CPTPP and the CETA. Enhancing mobility also requires deepening mutual credential recognition for professionals and technicians qualified under U.K. and Canadian regulatory regimes.

Professionals and Technicians: We recommend using a "negative list" approach for professional and technical occupations, as in the CPTPP. This is preferable to the "positive list" approach in agreements such as the CUSMA and enhances access to NOC B occupations. Positive lists routinely exclude more occupations than they include, which makes them ill-equipped to respond to changing labour market conditions. As new roles are created, roles that may be essential to Canadian and U.K. innovation in an increasingly digitized world, a negative list can seamlessly handle these labour market transitions.

Should a "positive list" approach be taken Canada must include roles that will be key to succeeding in an increasingly globalized and technologically advanced world. Canada already recognizes the U.K. as our most important science, technology and innovation partner in Europe – second only to the U.S. globally.[7] This should be reflected in any positive list to facilitate the entry of engineers, scientific technicians, researchers, information technology workers and specialists, particularly in the fields of clean energy and artificial intelligence.

A Canada-U.K. FTA also presents an opportunity to combine previous approaches in other FTAs to allow professionals to work on *both* an employed and contractual basis. We would like to see this category include contractual services suppliers and independent professionals. While there are limitations to replicating the CETA's approach to professionals entirely – i.e., limiting professionals to only contractual work – there is value in recognizing independent contractors' roles in the modern workforce. This is especially true as the gig economy expands and more individuals are expected to become independent contractors.

Intra-Company Transferees (ICTs): Even without a TCA or FTA, U.K. citizens currently qualify for an ICT work permit that is exempt from a Labour Market Impact Assessment

7 See tradecommissioner.gc.ca/united-kingdom-royaume-uni

(LMIA). This is facilitated by existing law and the GATS in recognition of the significant economic benefit a global workforce can offer Canada.

We recommend an expansion of ICT provisions beyond what is generally allowed. The Canada-Peru FTA is a precedent, where it takes only six months of applicable foreign experience to qualify for an ICT work permit, instead of one year under general provisions.

There is also precedent to broaden eligibility qualifications for specialized knowledge ICT work permits. Under the CPTPP, individuals are expected to have either 1) proprietary knowledge of the company's product or services, *or* 2) an advanced level of knowledge of the company's processes and procedures. Under the current framework between Canada and the U.K., *both* these criteria must be met for a specialized knowledge ICT work permit. We recommend that a Canada-U.K. FTA adopt the CPTPP's less restrictive approach.

Business Visitors: Business Visitors are critical to ensuring the free flow of goods and services between countries. We recommend an expansive approach to defining the activities that can be conducted by Business Visitors under a Canada-U.K. FTA. Services also play a key part in the global supply chain. Specifically, transportation services are crucial to the efficient delivery of goods and optimizing supply chains. A Canada-U.K. FTA should include full market access and national treatment commitments in transportation and logistics services.

Given the close ties between Canadian and U.K. manufacturers in the automotive, agricultural, healthcare and energy sectors, it is important to protect the right to perform after-sales and after-lease services without the need to obtain a work permit. We recommend further expanding this area to recognize not just installation, repair and maintenance work, but to cover the hands-on building and construction work that may come along with these tasks.

Investors and Traders: The close cultural, historical and socioeconomic ties between Canada and the U.K. would be best served if a Canada-U.K. FTA contained both Investor and Trader Work Permit options.

Like the CETA and the CPTPP, a category for Investors should be open to individuals who will establish, develop or administer an investment. While the CETA limits applicants to those who are in a supervisory or executive role, we recommend adopting the approach of the CPTPP, which adds a third category open to individuals with an essential skill for the new venture.

An agreement on Investor Class work permits is especially important given that that IRCC has announced that it stopped processing Owner/Operator category LMIA-exempt work permits as of April 1, 2021. Investor Class work permits will be critical to fostering innovation and entrepreneurship between Canada and the U.K. We recommend that this work permit category be open to permanent residents, or those with Indefinite Leave to Remain in the U.K., just as the CPTPP allows permanent residents of Australia and New Zealand to use this category.

The well-established trade between Canada and the U.K. also supports adding a Trader category of work permit in any agreement. Although there is no such category in the CETA, the CUSMA allows certain individuals – executive, supervisory, with essential skills and activities involve substantial trade in goods or services – to access this work permit. As with the CUSMA, a Canada-U.K. FTA should allow self-employed individuals to access this work permit category.

III. UNITED KINGDOM'S ACCESSION TO THE CPTPP

A. Generally

We generally support the accession of the U.K. to the CPTPP. However, the U.K.'s accession does not preclude a bilateral agreement. For example, Canada has agreements with Chile and Peru even though those countries are signatories to the CPTPP. We recommend that Canada pursue a flexible and permissive FTA with the U.K. regardless of whether it joins the CPTPP.

B. Foreign Direct Investment (FDI)

FDI review is an important aspect of any FTA with the U.K. Like the CETA, the CPTPP includes a commitment[8] to the net benefit review thresholds for: (a) investors of an original signatory for which the CPTPP has entered into force; and (b) state-owned investors from any country, each adjusted according to the applicable methodology.

As the U.K. is not an original signatory to the CPTPP, its accession to it may not result in the U.K. benefiting from the trade agreement investor ICA threshold (paragraph 1 in Annex 1-Schedule of Canada). To ensure a consistent approach to Canada's foreign investment commitments and considering the most favoured nation principle and the practical

[8] See paragraphs 1 and 3 in Annex 1-Schedule of Canada (in the Investment Canada Act section),

administrability of foreign investment review in Canada, we recommend that Canada support the same treatment for the U.K. as other CPTPP members for foreign investment review.

IV. CONCLUSION

We appreciate Global Affairs Canada seeking input on a potential bilateral Canada-U.K. free trade agreement and a possible U.K. accession to the CPTPP. We encourage the negotiation team to consult the CBA Sections during negotiations where necessary. We believe an opportunity to give more targeted expert input would strengthen Canada's positions.