



THE FLORIDA BAR
INTERNATIONAL LAW SECTION

INTERNATIONAL LAW DESKBOOK 2026 SECOND EDITION

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International Standard Book Number: ISBN: 978-1-7344705-1-2
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Published 2026

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Chapter 9 – Trade Remedies

John Anwesen¹

9.1	INTRODUCTION
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9.1 INTRODUCTION

Trade remedies are legal instruments designed to protect domestic industries from the adverse effects of foreign competition. Traditionally, these measures have been employed in response to specific instances of import surges or unfair trade practices, such as dumping or subsidization, where foreign competition has been deemed injurious to domestic producers. Trade remedies address economic behavior that undermines free-market efficiency – not to stifle competition, but to promote it by targeting and countering unfair and injurious practices.

In recent years, however, the usage of legal instruments protecting domestic industries has expanded beyond these conventional economic concerns. Increasingly, legal mechanisms have been deployed against perceived threats to U.S. national security or in response to declared emergencies. While these actions diverge from the traditional rationale of addressing economic unfairness, they share a common impact: the protection of domestic industries. In this Chapter, we include these broader applications of trade remedies because they shield domestic industries – irrespective of their underlying motivations, whether rooted in national security, emergency response, or other considerations – even if they depart from classical theories of economic efficiency.

The legal foundations for trade remedies stem from national laws. Many countries, including the United States, established domestic legal frameworks to address unfair trade practices and import surges long before the creation of modern multilateral trade agreements,² such as the General Agreement on Tariffs and Trade (GATT) in 1947 and the 1994 World Trade Organization (WTO) Agreement, which incorporated the GATT following multiple rounds of negotiations.

The WTO was established in 1995 after the ratification of the Uruguay Round Agreements. Various international agreements concerning goods and services established the WTO. Now the WTO includes 166 member countries. WTO functions include administering trade agreements, serving as a forum for negotiations, and providing a dispute settlement process.

¹ John Anwesen is the founder of a boutique international trade law firm, Lighthill PC, located in Washington, D.C., and Oregon.

² For example, the U.S. Antidumping Act of 1916 and the Countervailing Duty Law of 1897 were enacted well before the GATT.

The Uruguay Round Agreements Act (URAA) implemented the various WTO agreements into U.S. law.³ URAA is the federal legislation by which the WTO agreements became part of federal law. Congress also expressly approved the Statement of Administrative Action (SAA) proposed to implement the agreements that was submitted to the Congress in the URAA.⁴

The WTO's dispute settlement system sometimes yields interpretations of rights and obligations under the WTO agreements that differ from those of U.S. agencies and courts. The relationship between international trade law, WTO obligations, and U.S. domestic law is often highly contentious. On the one hand, the *Charming Betsy* doctrine posits that “[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains ...”⁵ On the other hand, WTO dispute settlement decisions are not binding on U.S. courts.⁶ The U.S. Court of Appeals for the Federal Circuit appears to have reconciled those two positions by considering a WTO decision as persuasive – not binding – authority where neither the statute nor legislative history supported the agency’s position.⁷ More recently, the U.S. Court of International Trade reasoned that Congress “[sunk] *Charming Betsy* canon” by directing that no action may be brought arising out of the Uruguay Round Agreements and that when a trade agreement and federal statute collide, the statute governs.⁸ The issue is likely to reach the appellate court again and subsequently the Supreme Court, with the ultimate decisions potentially varying based on the status of the given trade agreement as a treaty and the details concerning the conflicting statutory scheme.⁹

9.2 CONGRESSIONAL AUTHORITY AND DELEGATION

The U.S. Constitution empowers Congress to set import tariffs. Article I, Section 1 of the U.S. Constitution vests all legislative powers in Congress, and Article I, Section 8 grants Congress the authority to “lay and collect duties” and to “regulate commerce.” Congress has delegated some of these powers to the President. Thus, any Executive action imposing tariffs must be based on a delegation of authority from Congress through existing or newly enacted statutes. Additionally, another fundamental aspect of US international trade law arises out of Congress’ power over foreign commerce – importing is considered a privilege and not a right.¹⁰

³ Pub. L. No. 103-465, 108 Stat. 4809 (1994); *see also* 19 U.S.C § 3511.

⁴ 19 U.S.C. § 3512(d) (The SAA “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.”).

⁵ *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118, (1804).

⁶ *Corus Staal BV v. Dep’t of Com.*, 395 F.3d 1343, 1349 (Fed. Cir. 2005) (WTO rulings cannot serve basis for overturning agency actions “unless and until such a ruling has been adopted pursuant to the specified statutory scheme.”; *see also* *Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1291 (Fed. Cir. 2008) (“The determination whether, when, and how to comply with [WTO decisions] involves delicate and subtle political judgments that are within the authority of the Executive and not the Judicial Branch.”).

⁷ *Allegheny Ludlum Corp. v. United States*, 367 F. 3d 1339, 1348 (Fed. Cir. 2004).

⁸ *Nippon Steel Corp. v. United States*, 732 F. Supp. 3d 1353, 1374 (Ct. Int’l Trade 2024) (citing 19 U.S.C. § 3512(c)(1)(B) and 19 U.S.C. § 2504(a)).

⁹ *See* Thomas William France, *The Domestic Legal Status of the GATT: The Need for Clarification*, 51 WASH. & LEE L. REV. 1481 (1994).

¹⁰ *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904) (“As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations . . .”).

9.2.1 Key U.S. Trade Remedy Statutes

- Tariff Act of 1930 (Sections 337, 338, and Title 19 for AD/CVD)
- Trade Act of 1974 (Sections 122, 201, 301)
- Trade Expansion Act of 1962 (Section 232)
- International Emergency Economic Powers Act (IEEPA)

9.2.2 Institutional Framework

Each of these agencies and the Office of the President performs functions and delivers public services in areas well beyond trade remedies and enforcement. The list below offers a brief description of functions related to trade remedies and to remedies arising from emergency or national security concerns.

- **Office of the President:** Takes final action on IEEPA measures; Section 122 balance-of-payments measures; Section 201 safeguard measures based on ITC recommendations; Section 232 national security measures based on Commerce determinations; Section 301 measures as directed by USTR; and Section 338 discriminatory duties. Also has authority to disapprove ITC determinations under Section 337 during the 60-day Presidential review period for policy reasons.
- **U.S. Trade Representative (USTR):** Conducts Section 301 investigations of foreign trade practices that violate trade agreements or are unjustifiable, unreasonable, or discriminatory; determines appropriate action; and implements remedial measures. May request ITC to initiate Section 201 investigations. Represents the United States in WTO dispute settlement proceedings related to trade remedy measures.
- **U.S. Department of Commerce (Commerce or the DOC):** Administers antidumping and countervailing duty proceedings, including investigations, administrative reviews, and scope and circumvention determinations. Conducts Section 232 national security investigations and provides recommendations to the President.
- **U.S. International Trade Commission (Commission or the ITC):** Conducts injury determinations in antidumping and countervailing duty proceedings. Conducts Section 201 safeguard investigations and provides remedy recommendations to the President. Administers Section 337 investigations of unfair import practices, particularly intellectual property infringement, and issues exclusion orders and cease and desist orders. May provide views regarding economic impact in Section 301 investigations if requested by USTR. Ascertains discriminatory acts against U.S. commerce under Section 338 and brings such matters to the President's attention with recommendations.

The role of the Customs and Border Protection (CBP) is ministerial in the trade actions discussed below – CBP enforces and collects duties at ports of entry. CBP, however, has additional authorities with respect to enforcement of trade remedy proceedings to find and determine evasion of existing duties imposed by the other agencies.

Chapter 12 – International Tax

Jeffrey S. Hagen¹

12.1	INTRODUCTION TO INTERNATIONAL TAX
12.2	TERRITORIAL V. WORLDWIDE TAXATION
12.3	DAYS SPENT IN THE UNITED STATES AND EXCEPTIONS
12.4	INCOME TAX TREATIES, TIEBREAKER RULES, AND TAX CREDITS
12.5	ESTATE TAX STRUCTURING FOR NONRESIDENTS
12.6	INBOUND CONSIDERATIONS
12.7	OUTBOUND CONSIDERATIONS
12.8	THE FUTURE? DIGITAL SERVICE TAXES, CONSUMPTION TAXES, AND THE OECD
12.9	CONCLUSION

12.1 INTRODUCTION TO INTERNATIONAL TAX

When you think about “tax law,” if thoughts arise like the right way to balance a profit and loss statement, how to carefully and correctly complete a tax return, or how to calculate interest, you might want to read this chapter. What you are visualizing may be closer to what an accountant does. Tax law touches nearly every type of transaction – whether a deal is taxable to the seller, what is the tax rate based on a multi-tier structure with entities in several different jurisdictions, will this be taxable upon receipt by my heirs if I die, or would one type or entity or another be more beneficial – these are all important questions that tax lawyers answer. Even more complex than U.S. tax law, international tax law considers local laws in foreign jurisdictions in combination with U.S. laws, client preferences, and how the United States taxes nonresidents depending on certain activities. Not considering international tax ramifications when structuring a real estate transaction, advising a client with respect to his or her immigration status and how that may impact, or how to effectively run a business with U.S. income streams, can have a significant impact on the quality of advice you provide. This chapter is not meant to teach you how to advise regarding international tax issues. What this chapter is meant to do is to enable you to issue spot, to be able to tell your client “I think there is a tax issue associated with that plan.” Then seek out such tax advice from an expert (and not from ChatGPT).

This chapter covers the following international tax topics:

- The difference between how the United States taxes its residents and how most other countries in the world tax their residents
- The impact of where an individual is physically present on taxation
- What happens when more than one country has a right to tax a person or business
- Important tax considerations in the case of death of a client
- Important tax considerations for a client thinking of coming to the United States
- Important tax considerations for a client thinking of leaving the United States
- Potential future changes in tax law

¹ Jeffrey S. Hagen is a partner at Harper Meyer LLP, located in Miami, Florida. The opinions expressed in this chapter are his own, and not necessarily the opinions of the firm or its clients.

12.2 TERRITORIAL V. WORLDWIDE TAXATION

A key difference in how the United States taxes income of its citizens and residents lies within worldwide taxation.² If your client is a U.S. citizen, has a green card, or is present in the U.S. for enough days (described further in Section 12.3), the client will be considered a U.S. income tax resident.³ With that classification comes taxation on worldwide income earned by that person. To illustrate this, income earned in Spain by a U.S. citizen living permanently in Spain who has not been present in the United States for 50 years would still be taxable by the United States. Additionally, a U.S. green card holder and citizen of Colombia, who earns very little money in the United States so far but still benefits immensely from his or her operating business in Colombia, would be fully taxable in the United States on all income produced in Colombia. U.S. citizenship and/or U.S. income tax residency brings U.S. taxation on all income earned in any country, in every year, no matter where the client spends more time or where the client earns the most income. Of course, as this chapter will go on to explain, there are certain exceptions, treaties, credits, and planning tools to create structures which are less punitive, but as a baseline rule, this is essential to remember.

Most of the rest of the world uses territorial taxation. That is, if the income is earned in a particular country, then it is that particular country which taxes it.⁴ Countries often do not tax foreign source income, as such income would typically be taxed in the jurisdiction where it is earned. The simplicity of territorial taxation can reduce compliance, which can be a significant burden when dealing with worldwide taxation of multijurisdictional income. It can also be a chore to educate clients about the stark difference in taxation between their home countries and the United States when they move here or do business here. Many clients focus only on immigration advice when moving to the United States, and years later after living here realize they have not been compliant in the United States in terms of reporting and paying tax on income they continue to earn in their home countries. There are substantial penalties for not reporting the receipt of foreign source income, ownership of foreign corporations, and ownership or control of foreign bank accounts.⁵ Non-willful noncompliance is not an excuse under our law to not pay or to file the required information reports.

Of course, non-U.S. residents also earn income from within the United States. Such persons are usually required to pay income tax on U.S. source income on a Form 1040-NR (NR stands for Non-Resident), with certain limited exceptions.⁶ Foreign-owned trades and businesses earning income within the United States and abroad would only pay U.S. income tax on income that is “effectively connected” with the United States.⁷ Most non-U.S. businesses, if they are well advised, are careful to operate in the United States in a manner which ensures such businesses have a lower exposure to tax risk. A foreign corporation would typically either form a subsidiary U.S. entity to house its U.S. operations, or it may register to do business in the United States itself (also known as a branch), and would file a Form 1120-F (F stands for Foreign) annually to report and pay tax on U.S. income.

² IRC § 61(a).

³ IRC § 7701(a)(30).

⁴ Mark P. Keightley, *U.S. International Corporate Taxation: Basic Concepts and Policy Issues*, CONG. RES. SERV., R41852, Dec. 21, 2016, <https://www.congress.gov/crs-product/R41852>.

⁵ See Penalties for not filing in Instructions for Form 5471, Form 8865, Form 8938, and Form 114.

⁶ See Instructions for Form 1040-NR.

⁷ IRC § 864(c).

12.3 DAYS SPENT IN THE UNITED STATES AND EXCEPTIONS

As articulated in the prior section of this chapter, being considered a U.S. taxpayer in any particular year can have significant tax consequences for your client. Usually, a non-U.S. client needs legal advice to truly understand how to not fall into traps for the unwary, so that the wide-ranging impacts of U.S. taxation do not unintentionally apply to the client. If you take anything from this chapter, understanding this section is both paramount and easily transferrable into your practice. There are two main ways for a non-citizen to qualify as a U.S. income tax resident for a particular calendar year: (i) the green card test, and (ii) days spent in the United States (the “substantial presence test”).⁸

The first way, known as the “green card test,” applies if your client has obtained and been admitted on an immigrant visa (a green card) such as an EB-1, EB-2, EB-5, etc. This automatically causes your client to be a U.S. taxpayer, no matter how many days he or she spends in the United States. If a green card holder maintains his or her green card in eight out of fifteen consecutive taxable years, the green card holder is considered a “long-term resident,”⁹ which would have certain effects on the person upon relinquishing the green card¹⁰, which are discussed further in Section 12.7 (Outbound Considerations).

The second way, and surely the most common way to accidentally and unknowingly become a U.S. income tax resident, is based on days spent physically present in the United States. If an individual spends 183 days or more in the United States in a calendar year, such individual is considered a U.S. income tax resident for such calendar year, subject to exceptions to be discussed shortly. Additionally, not only the current calendar year is reviewed for this purpose. If an individual spends less than 183 actual days in the United States during a calendar year, but 183 days or more under a formula known as the substantial presence test, then such person can also be considered a U.S. income tax resident during the calendar year.¹¹ The substantial presence test is calculated as follows: *Days in U.S. in Current Year + 1/3rd of Days in U.S. in Prior Year + 1/6th of Days in U.S. in the Year Two Years Prior = Days in the U.S. for Current Year* under the test. As an example, if a client spent 150 days in the United States for three consecutive years, under the substantial presence test, the client would be a U.S. income tax resident in the third year (150 + 50 + 25 = 225 days). As another example, if a client spent 120 days in the United States for three consecutive years, under the substantial presence test, the client would not be a U.S. income tax resident (120 + 40 + 20 = 180 days). The 120 day per year rule is colloquially known as the “120 days safe harbor.” A final point with respect to this rule is that the individual must spend at least 31 days in the United States in a particular year to qualify under this test as a U.S. taxpayer.¹²

Some tax advisors will simply tell foreign clients to limit their days spent in the United States to 120 days based on these rules. This is not necessarily complete advice, as there is a way to spend up to 182 actual days within the United States each year, even with the application of the substantial presence test. If a non-U.S. person maintains a “closer connection” to their home country, the person can file a Form 8840 (Closer Connection Exception Statement) with the IRS.¹³ The two-page form has a number of questions and factors such as location of homes, businesses, bank accounts, cars, and voting eligibility, which assist the IRS in determining whether the individual has more of a closer connection to the United

⁸ IRC § 7701(a)(30).

⁹ IRC § 877(e)(2).

¹⁰ IRC § 877A.

¹¹ IRC § 7701(b)(3).

¹² IRC § 7701(b)(3)(A)(i).

¹³ IRC § 7701(b)(3)(B) and Form 8840.

Chapter 22 - International Litigation

Arnoldo B. Lacayo, Jennifer Mosquera, Miguel Rivero,
John Livingston, and Alejandro Rodriguez Vanzetti ^{1,2}

- 22.1 INTRODUCTION
- 22.2 OBTAINING JURISDICTION
- 22.3 THE ISSUE OF STANDING
- 22.4 INDISPENSABLE OR NECESSARY PARTIES
- 22.5 SERVICE OUTSIDE OF THE UNITED STATES
- 22.6 ANTI-SUIT INJUNCTIONS
- 22.7 MAINTAINING THE STATUS QUO: PROVISIONAL REMEDIES
- 22.8 FORUM NON CONVENIENS
- 22.9 EXTRATERRITORIAL APPLICATION OF U.S. LAW
- 22.10 CHOICE OF LAW AND FORUM SELECTION ISSUES
- 22.11 CONFLICTS OF LAW
- 22.12 COLLECTION AND USE OF EVIDENCE IN INTERNATIONAL LITIGATION
- 22.13 PRIVILEGE
- 22.14 CLASS ACTIONS
- 22.15 RECOGNITION AND ENFORCEMENT OF JUDGMENTS
- 22.16 THE ROLE OF COMITY IN RECOGNITION OF FOREIGN JUDGMENTS, ORDERS, OR DECREES

22.1 INTRODUCTION

In the twenty-first century, legal practitioners of every stripe will confront international issues during the course of their work. This is particularly true for practitioners consulted and engaged in the context of a brewing dispute or an already-filed legal action. Deals, contracts, inheritances, and divorces regularly implicate cross-border issues. Torts, insolvencies, intellectual property, investigations, and a myriad of other legal practice areas and specializations are similarly confronted with international issues daily. This Chapter covers the international litigation timeline, from pre-suit investigations and remedies designed to garner evidence across borders to post-judgment recognition and enforcement of foreign judgments. In between, an international practitioner will find topics related to venue, personal jurisdiction, subject matter jurisdiction of overlapping federal and state court systems, international service of process, cross-border discovery, and other international litigation doctrines and tools such as comity, stays, and injunctions. This Chapter also introduces statutory and treaty-based tools that may aid in the prosecution or defense of an international case. In sum, this Chapter is intended to be a comprehensive primer designed to assist an international practitioner to craft a better international litigation strategy and resolve international disputes in a more efficient and successful manner for clients.

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² The authors acknowledge and are grateful for the contributions of Juan J. Mendoza, Cristina Vicens Beard, Amanda E. Finley, Bruno de Camargo, Andrés H. Sandoval, Raul Torrão, and Melodie Khosrovani.

22.2 OBTAINING JURISDICTION

It is important for lawyers practicing international law to be cognizant of jurisdictional issues because they arise frequently in international cases. Personal jurisdiction is the court's ability to exercise control and enter an enforceable judgment against a defendant. Subject matter jurisdiction is the court's ability to enter a judgment as to the subject of the case, and also relates to the amount of money in controversy.

Under Florida law, in order for a nonresident defendant to be subject to the state's long-arm jurisdiction, two requirements must be met as set forth in *Venetian Salami Co. v. Parthenais*.³ First, the plaintiff must allege sufficient facts to bring the action within the ambit of the Florida long-arm statute, Florida Statute section 48.193. Second, the defendant must have sufficient minimum contacts with the state to satisfy federal due process requirements.⁴

Procedurally, if the allegations in the complaint sufficiently establish personal jurisdiction, then the burden shifts to the defendant to contest the jurisdictional allegations in the complaint or to claim that the federal minimum contacts requirement is not met, by way of affidavit.⁵ If properly contested, the burden then returns to the plaintiff to refute the evidence submitted by the defendant, by affidavit or similar sworn proof.⁶ If "[i]t is evident that these affidavits cannot be reconciled . . . the trial court will have to hold a limited evidentiary hearing in order to determine the jurisdiction issue."⁷

Under federal law, the process for obtaining personal jurisdiction over a defendant is similar. The plaintiff must plead sufficient facts to establish a *prima facie* case of jurisdiction over the nonresident defendants.⁸ "The district court must accept the facts alleged in the complaint as true, to the extent they are uncontroverted by the defendant's affidavits."⁹ If the parties' evidence conflicts, the court "must construe all reasonable inferences in favor of the plaintiff."¹⁰ The court conducts a two-part analysis to determine whether the long-arm statute is satisfied and to ensure that the defendant's due process rights are not violated.¹¹ The applicable three-part test for due process requires that the claims arise out of at least one of the defendant's contacts with the forum; the defendant purposefully availed itself of the forum; and exercising personal jurisdiction comports with traditional notions of fair play and substantial justice.¹²

Florida courts may also obtain jurisdiction over defendants who participated in a conspiracy that occurred at least in part in Florida. "Florida courts have held that the state's long-arm statute can support personal jurisdiction over any alleged conspirator where any other co-conspirator commits an act in

³ *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499 (Fla. 1989).

⁴ *Id.* at 502 (citing *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)).

⁵ See *Venetian Salami*, 554 So. 2d at 502; *Clement v. Lipson*, 999 So. 2d 1072, 1075 (Fla. 5th DCA 2009) (citing *Wendt v. Horowitz*, 822 So. 2d 1252, 1225 (Fla. 2002)).

⁶ *Id.*; *Unc Ardco, Inc. v. Luckner*, 685 So. 2d 29, 30 (Fla. 4th DCA 1996).

⁷ *Venetian Salami*, 554 So. 2d at 503 (emphasis added); see also *Instrumentacion, Ltda. v. Philips Elecs. N. Am. Corp.*, 951 So. 2d 1001, 1003 (Fla. 3d DCA 2007).

⁸ See *USA Mgmt. Grp., LLC v. Fitness Publications, Inc.*, No. 14-22477-CIV, 2015 WL 11233075, at *1 (S.D. Fla. Mar. 4, 2015).

⁹ *Van Vechten v. Elenson*, 920 F. Supp. 2d 1284, 1288 (S.D. Fla. 2013).

¹⁰ *Id.* at 1289.

¹¹ See *Taylor v. Moskow*, 2017 WL 5239503, at *2 (S.D. Fla. Jan. 26, 2017), *aff'd*, 717 F. App'x 836 (11th Cir. 2017).

¹² See *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1355 (11th Cir. 2013).

Florida in furtherance of the conspiracy, even if the defendant over whom personal jurisdiction is sought individually committed no act in, or had no relevant contact with, Florida.”¹³ “[A]cts of the conspiracy are imputed to individual co-conspirators for the purposes of determining personal jurisdiction.”¹⁴ “[A]llegations need not rise to the level to survive a motion to dismiss [but] ‘must at least make out a colorable, factually supported claim’”¹⁵

Florida courts are courts of general jurisdiction, meaning they can adjudicate claims as to civil, criminal, probate, and family law matters. Florida circuit courts have subject matter jurisdiction over actions in which the matter in controversy exceeds \$30,000, exclusive of interest, costs, and attorney’s fees.¹⁶ In determining whether the trial court has subject matter jurisdiction, the controlling standard is the amount claimed and in good faith placed in controversy, not the amount actually recovered.¹⁷

Federal courts have significantly more limited subject matter jurisdiction. In civil cases, federal courts’ subject matter jurisdiction arises in cases involving a federal question or diversity of citizenship of the parties. Federal district courts have original jurisdiction over issues dealing with a federal question or federal statute, pursuant to 28 U.S.C. § 1331. Federal district courts have diversity jurisdiction over cases in which the defendants all are citizens of another state or country than the plaintiff and the amount in controversy is at least \$75,000, under 28 U.S.C. § 1332. These specifications for subject matter jurisdiction are strictly enforced and construed.

22.3 THE ISSUE OF STANDING

The case-or-controversy requirement of Article III of the U.S. Constitution requires plaintiffs to establish their standing to sue.¹⁸ The purpose of the standing requirement is to prevent the judicial process from being used to usurp the powers of the U.S. government.¹⁹ The issue of standing is relevant to international disputes because a foreign party or litigant must have standing to maintain a lawsuit in the U.S. As the Supreme Court has confirmed, foreign parties and governments are extended the privilege of

¹³ *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1281–82 (11th Cir. 2009) (citing *Machtlinger v. Inertial Airline Servs., Inc.*, 937 So. 2d 730, 734–36 (Fla. 3d DCA 2006); see also *Wilcox*, 637 So. 2d at 337 (when a party “has successfully alleged that any member of that conspiracy committed tortious acts in Florida in furtherance of that conspiracy, then all of the conspirators are subject to the jurisdiction of the state of Florida”); see also *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 584–85 (Fla. 2000).

¹⁴ *Taylor*, 2017 WL 5239503, at *4.

¹⁵ *Id.*

¹⁶ FLA. CONST, art. V, § 20(c)(3); FLA. STAT. §§ 26.012(2)(a), 34.01(1)(d)(4) (2021).

¹⁷ See *Metro. Drywall Sys., Inc. v. Dudley*, 472 So. 2d 1345 (Fla. 2d DCA 1985).

¹⁸ U.S. CONST. art. III. For standing, Florida requires that the party prosecuting the claim is the real party in interest or be expressly authorized by statute to bring the claim on behalf of the real party in interest. See FLA. R. CIV. P. 1.210.

¹⁹ “In its broadest sense, standing is no more than having, or representing one who has, ‘a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.’” *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1183 (Fla. 3d DCA 1985) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972)); *Brown v. Firestone*, 382 So. 2d 654, 662 (Fla. 1980) (“[T]his Court has long been committed to the rule that a party does not possess standing to sue unless he or she can demonstrate a direct and articulable stake in the outcome of a controversy.”)

Chapter 27 – Doing Business in Canada

Daniel Kiselbach¹

27.1	OVERVIEW OF GOVERNMENT
27.2	BUSINESS ORGANIZATIONS
27.3	TAX
27.4	CUSTOMS AND TRADE
27.5	FOREIGN DIRECT INVESTMENT (FDI) INCENTIVES
27.6	INTELLECTUAL PROPERTY
27.7	IMMIGRATION
27.8	EMPLOYMENT

27.1 OVERVIEW OF GOVERNMENT

27.1.1 Levels of Government

A federation of ten provinces and three territories, Canada is a constitutional monarchy and parliamentary democracy. There are three levels of government – federal, provincial and municipal. Both the federal government and each of the provinces have their own elected legislatures which all follow the British model of parliamentary democracy and are subject to the limits imposed by the Canadian Charter of Rights and Freedoms.² Some Indigenous communities across Canada exercise governmental powers over designated geographic areas in accordance with agreements or treaties made with provincial or federal governments.

27.1.2 Legal System

The basic principles governing Canada are set out in the Constitution Act, 1867, and the Constitution Act, 1982. These Acts distribute legislative responsibility for specific matters between the federal and provincial governments. The federal government has jurisdiction over policy areas of national importance such as foreign affairs, national defence and criminal law. Conversely, provincial governments have exclusive power over matters of local importance such as education, hospitals, property, and civil rights. Federal and provincial governments may share jurisdiction over certain policy areas, like taxation. However, if there is a conflict between federal and provincial legislation, the doctrine of paramountcy will render the provincial law inoperative to the extent of the conflict. In other words, federal law will prevail over provincial law.

Canada's legal system is largely based on common law, except in Quebec, which operates under a civil law system. Judicial independence is a cornerstone of Canada's constitutional framework. Each province has both provincial courts and superior courts. Provincial courts deal with regulatory offences, criminal matters and family law disputes. Compared to provincial courts, the jurisdiction of superior courts is broader and supreme court judges can hear any type of case, civil or criminal. The federal court system

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² CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.

is separate from the provincial court systems. It is composed of the Federal Court, the Federal Court of Appeal and the Tax Court of Canada. As creatures of statutes, federal courts do not have inherent jurisdiction and may only hear matters specifically assigned to them by certain statutes such as the Federal Courts Act.³

The Supreme Court of Canada has final authority over all questions of Canadian law. Only cases which present a question of public importance significant enough to warrant consideration by the country's highest court will be granted leave to appeal.

27.1.3 French Language Requirements

There are specific legal and linguistic requirements for establishing and operating a business in Quebec. The Quebec Language Charter⁴ mandates the use of French in various aspects of business, including communication, marketing, contracts, and signage. It applies to all enterprises operating in Quebec, including those originally constituted or incorporated in another jurisdiction. In 2022, the Quebec legislature passed an amendment to the Quebec Language Charter which requires businesses to adhere to strict obligations regarding the use of French in marketing, advertising, trademarks, software, contracts and various other documents like receipts and invoices. Businesses which fail to comply with the Quebec Language Charter may be subject to fines, prohibitions on obtaining government contracts or permit suspensions.

27.2 BUSINESS ORGANIZATIONS

Foreign entities seeking to do business in Canada may choose from several legal vehicles, including partnerships, limited partnerships, business trusts and co-ownerships. Each type of organization comes with specific tax consequences and registration requirements which should be considered. The corporation with share capital remains the most popular type of business organization.

27.2.1 Corporations

A Canadian corporation is a separate legal entity with the capacity to enter into contracts, own property and conduct business in its own name, independent of its individual owners. The corporate structure offers limited liability protection to shareholders. Most corporations are incorporated under federal, provincial, or territorial statutes which establish rules and procedures for incorporation, amalgamation, liquidation, share capital and the rights and duties of shareholders, directors and officers. The process to incorporate typically requires filing Articles of Incorporation, or other constituting documents, which set out the corporation's name, share structure, restrictions on the transfer of shares and the number of directors who will control the corporation. Corporations with share capital may have different classes of shares with different rights. In most provincial jurisdictions, the Articles of Incorporation are public documents and more detailed rules about the corporation's structure and operations are contained in non-public bylaws.

Corporations must comply with naming requirements under the applicable incorporation statute.⁵ A corporation's name must be unique and cannot be the same as or similar to that of another corporate

³ Federal Courts Act, R.S.C., ch. F-7 (1985).

⁴ Charter of the French Language, C.Q.L.R., ch. C-11 (1977).

⁵ Business Corporations Act, S.B.C., ch. 57, § 23 (2002).

entity. Some corporations choose to incorporate under a number name (e.g. 123456 British Columbia Ltd.) and are assigned a number by a governmental authority. Corporations carrying on business in Quebec must use a French version of its name.⁶

27.2.2 Federal or Provincial Incorporation

The choice of incorporation jurisdiction typically depends on factors such as the convenience of the incorporation process, requirements for Canadian resident directors, and other similar considerations. A corporation is generally required to register in all jurisdictions in which it operates which usually involves payment of registration or filing fees and renewing its incorporation status on an annual basis. For this reason, many corporations opt for federal over provincial incorporation for the flexibility it offers.

27.2.3 Types of Corporations

Corporations with share capital and non-share capital corporations are both permitted under federal and provincial statutes. Some provinces' statutes also allow for unlimited liability companies (ULCs).⁷ As hybrid companies, ULCs do not offer limited liability protection for shareholders but remain separate legal entities for Canadian income tax purposes. As such, ULCs have become a popular tool for cross-border tax planning, particularly between Canada and the U.S. Importantly, however, the use of ULCs involves complex tax considerations, including anti-hybrid rules in the Canada-U.S. Income Tax Convention.

27.2.4 Residency Requirements for Directors

The CBCA and the province of Saskatchewan require that at least 25% of directors be resident Canadians.⁸ Most other provinces do not have a residency requirement for directors, which is said to generate an enhanced business environment because a larger pool of investors is able to serve as directors.

27.2.5 Rights and Obligations of Directors

Directors, whether of private or public corporations, have a duty to act honestly and in good faith with a view to the best interests of the corporation.⁹ This duty requires them to exercise their powers with the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Of course, directors must make decisions that are lawful and comply with governing statutes, regulations, incorporating documents and shareholder agreements. Directors are also required to disclose any conflicts of interest.¹⁰ Since directors can be held personally liable for breaching their duties, many corporations purchase directors' and officers' liability insurance.

27.2.6 Director and Shareholder Meetings

Director and shareholder meetings may be held anywhere in the world, in-person, by telephone or via other electronic means. While director's meetings may be held at any time (as long as notice

⁶ Charter of the French Language, *supra* note 4, § 63.

⁷ Business Corporations Act, *supra* note 5, § 51.1; Business Corporations Act, R.S.A., ch. B-9, § 15.1 (2000); Companies Act, R.S.N.S., ch. 81, § 12 (1989).

⁸ Canada Business Corporations Act, R.S.C., ch. 44, § 105(3) (1985).

⁹ *Id.* § 122.

¹⁰ *Sharbern Holding Inc. v Vancouver Airport Centre Ltd.*, [2011] 2 S.C.R. 175.



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