

TIPTOE THROUGH THE TTIP: Lessons from the Comprehensive Economic & Trade Agreement (CETA) for Negotiators in the Transatlantic Trade & Investment Partnership (TTIP)

Introduction

With stalled multilateral negotiations at the WTO, weak economic growth and increasing competitive pressure from growing economies, Canada, the United States (the "US") and the European Union (the "EU") have sought to liberalize transatlantic trade by pursuing broad and ambitious regional agreements: (i) the Comprehensive Economic & Trade Agreement ("CETA"), which Canada and the EU concluded in August 2014; and (ii) the Transatlantic Trade & Investment Partnership ("TTIP"), which the US and the EU continue to negotiate.

The process of ratification and implementation of CETA provides a cautionary tale to those hoping for a quick conclusion to TTIP. Negotiations between Canada and the EU began in 2009; CETA was signed in principle in October of 2013, but negotiation of the text of the Agreement continued into August 2014; legal scrubbing of CETA's 1600+ pages continues, following which the text still needs to be translated into all 24 official working languages of the EU before ratification by the Canadian and EU parliaments.

Although it will be 2016 or later before CETA is officially adopted, the complete, unscrubbed, draft text of the agreement has been publicly available since September 2014.¹ Comparatively little is known about the progress of negotiations for TTIP. General information on the negotiating priorities and objectives of the US and the EU and textual proposals for "Customs and Trade Facilitation" and "Trade in Service, Investment and E-Commerce" prepared by the EU have been made public, but no draft text resulting from negotiations between the EU and the US has been released.

The intersection between CETA and TTIP suggests that the completed CETA text may provide substantial guidance as to what the final text of TTIP could look like. There are a

¹ Department of Foreign Affairs, Trade and Development Canada, "*Canada-European Union: Comprehensive Economic and Trade Agreement (CETA)*" (accessed September 23, 2015). (There are slight differences, largely formatting, between the Canadian published text and the version *published by the European Union*.)

number of negotiating similarities between the two agreements. All three parties are large, developed, economies—both Canada and the US are members of the G-7, as are the four largest EU economies; and the EU is a major trading partner for both Canada and the US. In addition, trade with the EU for both Canada and the US is somewhat liberalised already, such that both CETA and TTIP seek harmonization of regulations and standards, going beyond “traditional” negotiations to reduce tariffs and increase market access. Moreover, CETA has been recognized as a “template” for TTIP.² At the same time, concerns about the inclusion of an investor state dispute settlement (ISDS) clause in TTIP and the EU proposal to create a TTIP Investment Court, while concurrently working with other countries to develop an International Investment Court, may result in a different approach to ISDS than in CETA.

In light of the linkages between the two agreements, this paper will examine TTIP through the lens of CETA, with a particular emphasis on differences and similarities as to how the two agreements might address issues such as technical barriers to trade, trade in services and rules of origin.

Scope of CETA vs. TTIP

Both CETA and TTIP were intended as comprehensive and wide-ranging agreements. There are a number of parallels between the two agreements despite the fact TTIP is expected to comprise 24 chapters covering market access, regulatory cooperation and rules, while CETA addresses similar issues in 42 chapters. Annex A provides a listing of CETA chapters and the proposed scope for TTIP negotiations.

(1) Market Access

Under Market Access issues, U.S. and EU officials are negotiating chapters on trade in goods, customs duties, trade in services, public procurement and rules of origin. CETA contains similar chapters (see Appendix A) addressing these same topics. Given that *NAFTA* provided a framework for Canada-EU negotiations, it is likely that the framework for TTIP negotiations will be similar.

While no draft text of TTIP is available at this time, it can be assumed that the US will want to receive market access concessions similar to or better than those the EU made in CETA, and that the EU will expect the US to offer concessions of comparable value to those being given to the US.

² Former EU trade chief Karel de Gucht has publicly described CETA as a template for TTIP: See Benjamin Fox, “What the leaked EU-Canada trade paper means for TTIP” *euobserver* (August 18, 2014); Finbarr Bermingham, “Canada and EU Finalise Free Trade Agreement Described as ‘Template for TTIP’” *International Business Times* (August 6, 2014).

(2) *Regulatory Cooperation*

Since trade between the EU and the US is more liberalised than many jurisdictions already, the parties recognize that opportunities for further liberalisation of trade through TTIP must go beyond tariff reduction and consider harmonising standards and reducing technical barriers to trade. Early progress in the CETA negotiations on these issues reflected the benefits seen from both sides in this regard. Products sold in Canada, the US and the EU often meet similar standards of safety and quality, but differ in technical details and regulatory approval procedures. Compatible rules would reduce red tape and costs, paving the way for increased trade. An important aspect of TTIP will be to seek ways to cooperate on establishing new rules and facilitate compliance with each other's standards. The list of CETA chapters and TTIP proposed headings (see Appendix A) suggest similar goals in TTIP.

(3) *Rules*

In addition to enhanced regulatory cooperation, both CETA and TTIP go beyond traditional trade agreements by creating "new rules to make it easier and fairer to export, import and invest.³

The similar scope of CETA and TTIP further confirms the two agreements will likely be closely related. Although certain TTIP chapters dealing with regulatory cooperation and rules appear to be without a CETA equivalent (e.g. chemicals; cosmetics; medical devices; pesticides; textiles, vehicles, and small and medium-sized enterprises), until the content of these chapters are made public, it is not clear that TTIP will go further than CETA by including industry-specific rules in the agreement. CETA does include provisions to allow amendment to accord with any EU-US agreement on rules of origin in automotive trade.

CETA Tips for TTIP

The draft text of CETA reveals the commitments Canada and the EU have made to trade liberalisation. Both parties made significant concessions to reach a deal, and the agreement establishes new high-water marks in a number of areas, including rules of origin and public procurement. The legal scrubbing process may result in minor changes to the text; however, the substance and spirit of the agreement is likely to remain as is. Below, we focus on key areas of the agreement that are likely to have the most significant impact once implemented, and that may be closely replicated in TTIP.

Tariff Reductions

While CETA is a comprehensive agreement that addresses "non-traditional" issues in the regulatory and rules spheres, traditional market access negotiations regarding tariff

³ European Commission, "*Now online – EU negotiating texts in TTIP*" (February 10, 2015) [EC – February 10, 2015 News Release].

reduction or elimination remains a core feature of CETA. Both Canada and the EU will remove duties on 98% of their non-agricultural tariff lines. Removal of most tariffs can be expected to be a similar result in TTIP.

Agricultural Products

Meaningful tariff concessions are also being made in the politically sensitive area of agriculture. Nearly 94% of EU and 92% of Canadian agricultural tariff lines will be eliminated immediately on entry into force. Tariffs on wine, spirits and fish will be removed entirely; however, Canada's controversial supply management system will remain largely intact. Canadian high tariff rates and import quotas will continue on most dairy products, as will Canadian and EU tariffs on poultry and eggs. EU quotas and higher duties for "over quota" imports of certain staples, such as beef, pork and sweet corn, are not affected by CETA.

Nevertheless, agricultural goods were a source of significant friction between Canada and the EU. It is likely that similar issues will arise in respect of the TTIP negotiations. In CETA, there was no general move to liberalization of agricultural trade. Both Canada and the EU have significant trade restrictive policies that favour domestic agricultural production. Issues arose where there were particular sensitivities, and *quid pro quos* were accordingly sought in politically-sensitive areas. Canada was seeking to improve access for beef and pork exports to the EU. Canada was prepared to offer hormone free beef, despite the fact that Canada and the United States had won a case against the EU for its restrictions on exports of these goods. The EU pushed back on access for cheese products. These are currently subject to duty rates in excess of 200% to protect Canadian dairy producers. Since 3/4 of Canadian industrial milk production is allocated to the province of Quebec, this became an issue of particular significance to Quebec dairy farmers. Eventually, a compromise was reached with mutual agreement to increase access; but this is far from allowing for free trade in these products.

It is likely that agriculture will be equally as sensitive in the TTIP negotiations, and both sides will be prepared to use access to specific agricultural markets as a wedge issue to obtain political concessions. The U.S. will be looking for a significant expansion of its beef exports, in particular. This is going to be vigorously opposed by French and Irish interests. US Country-of-Origin Labelling (COOL) may also raise rancour with EU beef exporters as negotiators try to hammer out a deal. While the WTO has clearly ruled on numerous occasions that mandatory COOL discriminates against non-US meat products and violates US trade obligations, US lawmakers are now proposing voluntary COOL, which may also run afoul of US WTO commitments. At the same time, the EU is likely to look for politically-sensitive agricultural areas in the United States to push back. Principal targets may include income support programs for American sugar growers and the American dairy industry. It would be in the interest of consumers to have trade restrictive agricultural measures removed entirely; however, based upon the experience in CETA, it is likely that the parties

will focus upon small concessions while leaving current agricultural protection programs in place, to the extent possible.

Rules of Origin

Rules of origin are a key component of any trade agreement. They determine whether a product will be subject to beneficial tariff treatment when imported, and ensure that products will only benefit from a trade agreement when they are genuinely sourced from a party to the agreement. CETA contains a unique cumulation of origin framework, which will account for whether:

- (a) the EU and Canada both have free trade agreements with a third country; and whether
- (b) those third-country agreements also provide for cumulation of origin,

in valuing EU, Canadian and third-country components in goods for the purposes of determining whether a good should obtain preferential treatment.

NAFTA does not contemplate cumulation of origin across trade agreements and technically does not meet the second requirement of the CETA cumulation of origin framework. CETA nonetheless acknowledges the importance of NAFTA, and the significance of Canada-US supply chain integration. The classic example is the automotive industry where car parts may cross the Canada-US border up to six times before the final product is sold to a North American consumer.⁴ Canada obtained a waiver of EU rules of origin for up to one hundred thousand automobiles per year, even if EU rules of origin cannot be met in respect of those vehicles. In addition, Canada has unlimited access to the EU market for Canadian-built automobiles that can meet the EU content rules. CETA expressly recognizes the possibility of expanding allowable exports from Canada or the United States, provided that Canadian and American sources combined meet EU content rules. The same rules would apply to EU automobiles receiving value added in the United States. When the TTIP is concluded, Canada and the EU may both be able to benefit from cross-border supply chains with the US.

Adopting a cumulation of origin approach in CETA acknowledges that goods are increasingly the output of global supply chains. Given that one of the EU's stated goals for negotiation of TTIP rules of origin is "rules of origin that consider future trends in production and innovation",⁵ and given the requirement that the EU and the US have a free trade agreement in order for Canada-US goods to benefit from CETA rules of origin, a similar cumulation methodology may find its way into TTIP.

⁴ Canadian Manufacturers & Exporters "*Customs and Border Regulations*".

⁵ European Commission, "*Factsheet on Rules of origin (ROOs) in TTIP*".

American negotiators should be aware that European rules of origin may differ from those in the *NAFTA* context. In CETA, Canadian negotiators discovered that certain tariff concessions were negated where non-Canadian inputs were employed, even if those inputs represented only a small portion of the value of the goods. This affected certain food products and textiles made from imported thread. The issue in CETA was resolved by phasing in a derogation from normal EU rules of origin relating to Canadian products.

Public Procurement

Canada and the EU are both signatories to the WTO Agreement on Government Procurement ("AGP"). The AGP requires that eligible suppliers be allowed to compete freely for federal-level procurements above specified thresholds. CETA does not change these thresholds, but will extend procurement rules to the sub-federal level.

The WTO AGP also requires that parties make available a review process that provides a reasonably prompt and effective way for foreign suppliers to have bid decisions reviewed for compliance with the non-discrimination provisions. Before concluding CETA:

- Canada already had a mature procurement dispute resolution process for most federal level procurements, as required by the AGP, as well as *NAFTA* and other Canadian trade agreements. The Canadian International Trade Tribunal ("CITT") is the quasi-judicial body charged with hearing and deciding complaints for federal procurements in Canada. The complainant must either file a complaint within 10 days of learning the basis of the complaint, or it must object directly to the procuring entity and then file a detailed complaint within 10 days of the denial of the objection. The CITT then does a preliminary vetting of the complaint to determine whether it warrants further investigation. If so, the government is required to respond on behalf of its procuring agency and the complainant is permitted to file a reply. Intervention by interested parties (such as the successful bidder whose contract is being challenged) may also be allowed. The CITT will generally issue a decision within 90 days. If the complaint is valid, the CITT may recommend⁶ a wide variety of remedies such as re-evaluation of a bid, directing the award of a contract, or the payment of compensation to the complainant. There is currently no comparable regime for provincial or municipal procurement, but this is expected to change as a result of the CETA.
- The European Commission had issued directives which set minimum levels of protection to which EU member states must adhere in government procurement. The directives share some of the features of the Canadian procurement review regime, including short time frames for complaints and responses, and a flexible range of available remedies.

⁶ While the CITT "recommends" rather than "orders", the Federal Government is required to "implement the recommendations to the greatest extent possible": *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (4th Supp) [CITT Act], s. 30.18(1).

Beyond these basic requirements, member states can and do employ differing national procurement review mechanisms. A few member states have created specialised bodies responsible for the enforcement of procurement rules, but many member states rely on their courts to deal with procurement challenges.⁷

The public procurement provisions in CETA will extend the rights of Canadian and EU suppliers substantially by requiring sub-federal government entities to comply with the non-discrimination rules and bid review processes. Such entities will include state, regional / provincial and local / municipal governments, as well as public-controlled institutions in the health sector. The minimum thresholds for procurement of goods and services by sub-federal governments to become subject to the CETA standards are, in most cases, 50% higher than the existing thresholds under the AGP, and under *NAFTA* for federal level procurements.

Despite the higher thresholds, a large volume of sub-federal procurements will be subject to review. The EU's aggregate public procurement market is estimated to be the largest in the world.⁸ Recent estimates put the total value at C\$3.3 trillion.⁹ The Canadian government procurement market is smaller, but is still significant. In fiscal year 2013-14, the Government of Canada's primary procurement department issued C\$151 billion worth of contracts.¹⁰ Spending on sub-federal procurements significantly exceeds federal spending, with provincial and territorial governments collectively spending more than double the amount spent by the Federal Government. This comparison excludes the many Canadian sub-federal procuring entities such as municipalities, municipal organizations, school boards and publicly-funded academic, health and social service entities, which also make substantial purchases, and which will also be subject to CETA.

Companies that supply products to the broad range of government-related entities covered by the CETA procurement disciplines should find that Canada and the EU will become much more attractive markets for exports and/or investments. Familiarity with local bidding and procurement rules and practices, as well as the CETA standards and the highly time-sensitive domestic bid review processes will be important at all stages of government procurement processes, as well as in commercial dealings and contracts with distributors, agents or other intermediaries who are assisting with such bids.

⁷ Sue Arrowsmith, ed., *EU Public Procurement Law: An Introduction* (accessed May 29, 2015), at p. 294.

⁸ The European Commission and the Government of Canada, "*Assessing the Costs and Benefits of a Closer EU – Canada Economic Partnership*" (2008), ["Joint Study"], at p. 74.

⁹ Department of Foreign Affairs, Trade and Development Canada, "*Opening New Government Procurement Markets in Europe to World-Class Canadian Companies*".

¹⁰ Canadian International Trade Tribunal, "*Annual Report for the Fiscal Year Ending March 31, 2014*", at p. 29.

Despite the willingness of the EU to enter into such an arrangement, it is likely that U.S. constitutional issues will prevent this level of procurement access in the TTIP. For CETA, Canada had invited all of the provincial jurisdictions to the bargaining table, and the provinces have jurisdictional control over municipalities in Canada. In the United States, there has been no talk of incorporating individual states into the negotiating process. It is interesting that under the *Canada U.S. Free Trade Agreement ("CUFTA")* and under *NAFTA*, provision was made to allow the Agreement to be extended to sub-federal jurisdictions. No progress has been made in extending either *CUFTA* or *NAFTA* procurement access below the federal level.

Intellectual Property Rights

CETA increases protection for certain intellectual property rights. The most notable changes include:

- Patents — CETA extends the possible term of patent protection to partially account for the lag between patent filing and first market authorization for pharmaceuticals by between two and five years. The extended term for patent protection may encourage R&D investments, although it may be somewhat of a setback for generic manufacturers whose business model is based on releasing competing products as soon as patent protection has expired.
- Geographical Indications — Canada has agreed to recognize and protect approximately 130 geographical indications for European agricultural products, such as "asiago", "gorgonzola" and "Huile d'olive de Haute-Provence". Currently, geographical indications protected under Canadian law are limited to wine or spirits.¹¹
- Industrial Designs — Canada is not yet a party to the *Hague Agreement on Industrial Designs*, but has agreed to "make all reasonable efforts to accede" to the Geneva Act of that agreement.

These provisions are largely concessions by Canada to increase intellectual property protections in favour of EU rights holders. This should increase Canada's attractiveness as an investment destination in such areas. In addition, it would be reasonable to expect that the exports of products with the protected geographical indications will be enhanced.

American pharmaceutical protection is similar to that in the EU and this is expected to be less of an issue in TTIP than in the CETA negotiations. The more significant battle will likely arise on geographical indications. In the context of wine and spirits, Canada agreed, some years ago, to respect European geographical indications. On the other hand, there are still products in the United States being marketed as, for example, New York Champagne. There

¹¹ *Trade-marks Act*, RSC 1985, c T-13, s. 2.

are likely to be some significant battles as well relating to cheese and meat products. In CETA, this was resolved by means of grandfathering certain owners of existing copyrights in Canada on geographical indications, but requiring any new market entrants to respect EU geographical indications. The EU will likely be seeking similar concessions in TTIP.

Trade in Services

CETA liberalizes trade in services both generally and in various specific sectors. The core approach was to establish national treatment obligations which guard against discrimination relative to domestic suppliers, as well as most-favoured nation ("MFN") obligations which ensure that suppliers from a CETA jurisdiction will be treated as favourably as suppliers from any other jurisdiction. Given the federal/provincial division of powers under Canada's constitution, the provinces have important areas of regulatory authority. CETA provides significant transparency with regard to market access for services under provincial jurisdiction (subject to certain reservations).

There are detailed chapters dealing with three major sectors:

- Financial Services — the parties have guaranteed that most of their existing regulation will not become more restrictive for service providers of the other party. This chapter specifically incorporates certain provisions from other chapters and applies them to financial services, such as the national and MFN treatment obligations from both the investment and trade in services chapters.
- International Maritime Transport — The maritime transport chapter protects the abilities of carriers of the parties to contract with other service providers (including from third countries), such as when arranging for door-to-door transport or in relation to cargo-sharing arrangements. Canada has also provided greater market access, including for dredging, which was formerly limited to Canadian operators.
- Telecommunications —CETA includes significant commitments regarding openness and access to public telecommunications networks.

Labour mobility is especially critical for the delivery of various types of services. The mobility-related provisions in CETA include the following:

- A permissible length of stay is established for various types of key personnel and business visitors. This period ranges from 90 days to 3 years depending on the situation, and discretionary extensions are also possible.
- The parties will not impose limits on the number of key personnel and business visitors.
- The temporary entry benefits extend not just to contractual service suppliers, but also to a broad range of independent "professionals" (which includes most natural persons who are "self-employed").

The CETA also contains a framework for mutual recognition of licensing and qualifications that could be particularly beneficial for professionals. This is a first for Canada. While CETA does not itself provide for the mutual recognition of professional qualifications, it sets out a process whereby the parties can conclude individual mutual recognition agreements ("MRA") related to professional qualifications. One of the sources for MRA proposals is expected to be joint recommendations advanced by sector-specific regulatory bodies in Canada and the EU. CETA sets out guidelines as to what is to be contained in such a joint recommendation and a four-step decision-making process for the recognition of qualifications. It will be important for firms to engage with their domestic regulatory and self-regulatory bodies if they want to encourage the reduction of such barriers (or if they have concerns about the MRA process).

NAFTA does recognize an ability of certain service providers to work in other NAFTA countries, but this is far short of the harmonization of professional requirements contemplated by CETA. Current US restrictions are likely to set up a long and hard fought battle on this issue in TTIP.

One can expect that the U.S. will require that its domestic rules in respect of financial services be the minimum requirement for EU businesses operating in the United States. In addition, the *Jones Act* and its restriction on maritime transport between American ports are likely to constitute a major sticking point in TTIP negotiations.

Development of Common Standards

CETA generally does not require regulatory convergence, but it includes certain provisions which encourage and facilitate this objective. This theme underlies the following chapters:

- Chapter 6 (Technical Barriers to Trade) — the bulk of this chapter aims to increase regulatory cooperation, including a specific annex addressing automotive regulation, as well as increasing transparency in the regulation-making process.
- Chapter 7 (Sanitary and Phytosanitary Measures) — this chapter aids the adoption of common standards by expressly providing for reciprocal recognition of equivalent SPS practices and by requiring the transparent provision of certain information about SPS requirements for importation. One can expect a substantial fight between the EU and the US on genetically modified organisms ("GMO") in agricultural and other consumer goods.
- Chapter 8 (Customs and Trade Facilitation) — this chapter addresses many of the same topics as the recent WTO *Agreement on Trade Facilitation* ("TFA") including procedures for the efficient release of goods, Advance Rulings, and reviews of decisions of customs officials. In general, the CETA obligations are less detailed than the TFA provisions, but they were agreed at a time when the prospects for the TFA were uncertain and provide a useful fallback if the TFA is not implemented fully on a timely basis.

The regulatory convergence theme is also expressly dealt with in CETA Chapter 26 ("Regulatory Cooperation"). This chapter sets out the general objectives of regulatory co-operation, lays out expectations for activities the parties will undertake to foster regulatory co-operation, and establishes a "Regulatory Cooperation Forum" which is charged with facilitating regulatory cooperation across the spectrum of the parties' regulatory activities. For private sector participants, the key action items will be monitoring sector developments and considering whether to either support or put forward concerns about possible convergence initiatives.

The draft framework published by the EU on TTIP negotiations does seem to recognize that harmonization of standards generally is a key target of proposed negotiations. Their goal will likely be to expand mutual rights beyond the scope of the TFA.

Conclusions

There are a number of important lessons to be drawn for TTIP negotiators from CETA. With three very open and advanced market economies, there are a number of avenues for trade liberalization that are common to all three jurisdictions. The experience of Canada and the U.S. under *NAFTA* will make much of the ground in TTIP already familiar to American and EU negotiators. Nevertheless, there are certainly sectoral interests in both economies that will differ substantially from the CETA experience. The conclusion of TTIP will almost certainly lead to significant liberalization of international trade and serve as the foundation for the extension of multi-lateral trade agreements. That being said, it took many years of hard negotiating to bring CETA to fruition. TTIP will likely not be consummated in a much shorter timeframe.

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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APPENDIX A

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