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TRANSATLANTIC ECONOMIC AGREEMENTS
PARSING CETA AND TTIP

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ACRONYMS

CETA	Comprehensive Economic and Trade Agreement
EC	European Commission
EP	European Parliament
GATT	General Agreement on Tariffs and Trade
GMOs	genetically modified organisms
ISDS	Investor-State Dispute Settlement
NAFTA	North American Free Trade Agreement
NCSL	National Conference of State Legislatures
RCEP	Regional Comprehensive Economic Partnership
SPS	sanitary and phytosanitary
TPA	trade promotion authority
TTIP	Transatlantic Trade and Investment Partnership
TPP	Trans-Pacific Partnership
WTO	World Trade Organization
WTO+	implies deeper integration in areas already present in WTO agreements
WTOx	refers to issues that have yet to make it on to the agenda in Geneva

INTRODUCTION

In October 2013, Prime Minister Stephen Harper announced that the Government of Canada had reached a "political agreement" with the European Union on the Comprehensive Economic and Trade Agreement (CETA). The timing of Mr. Harper's statement was not coincidental. Evidence suggests that talks between Canada and the European Union are actually continuing several months after his announcement, if only on technical elements. Nonetheless, it seems the Government of Canada wanted to signal that a successful end to Canada-EU talks was in sight, just as talks between the United States and the European Union were getting under way towards the Trans-Atlantic Trade and Investment Partnership (TTIP). The Canadian government did not want to risk a redirection of European energies away from the Canadian negotiation toward their American counterparts.

This simultaneous negotiation of two large trans-Atlantic trade agreements is an important opportunity to compare in what ways the agreements are similar and in what ways they are different. Given that the CETA talks are closer to finalization than the TTIP, this experience may be useful to determine how the TTIP negotiations might unfold, especially considering there have been suggestions that CETA is a "template" for the TTIP. These ideas are explored throughout this paper through the lens of five lessons learned so far in these negotiations: the agreements will take longer than expected; the agreements contain both "traditional" and "twenty-first century" components; the public is concerned about the agreements; regulatory convergence is difficult; and multilateralism still matters.

It is worth noting that much of what is argued here is speculation. Solid information on CETA and TTIP is sparse. The Government of Canada has released a "Technical Summary" for CETA (Canada 2013). The European Union has also made available various summaries.[1] Nonetheless, the text of the agreement has not been circulated publicly. TTIP is similar. Six rounds of talks have taken place. Draft chapters have been leaked and, while negotiating mandates have been made available, they may now be outdated.

BACKGROUND

CETA negotiations were formally launched in May 2009. Discussions had been ongoing for several years before that, but a variety of domestic and international factors, including the 2008 financial downturn, compelled Canada and the European Union to the negotiating table. TTIP talks were launched in February 2013. Discussions had also been ongoing for several years prior. The sixth and most recent round of talks took place in Brussels the week of July 14, 2014.

At first glance, CETA and TTIP are similar and different in obvious ways. Both are a breed of agreement that includes traditional trade concerns, but also go well beyond in substantial ways by seeking to integrate other provisions such as investment, intellectual property and regulatory convergence. These latter aspects tend to be understood in reference to the World Trade Organization (WTO). So-called WTO+ and WTOx components,[2] where WTO+ implies deeper integration in areas already present in WTO agreements and WTOx refers to issues that have yet to make it on to the agenda in Geneva — ostensibly make these agreements "comprehensive" or "twenty-first century." The parties to the agreements are all relatively large, developed economies. While this has not been common in the past, there are more and more instances of such negotiations. The Trans-Pacific Partnership (TPP) is the obvious example, but there is also the Regional Comprehensive Economic Partnership (RCEP) between the Association of Southeast Asian Nations, China, Japan, Australia, Korea, India and New Zealand; the EU-Japan agreement; and the Canada-Japan Economic Partnership Agreement, among others. All of these agreements are in various stages of development.

At the centre of CETA is, of course, the relationship between Canada and the European Union. The European Union is an important partner for Canada, but the European trade interactions are eclipsed by those with the United States. In 2012, the European Union took roughly nine percent of Canada's total merchandise exports, while the United States accounted for closer to 73 percent (Royal Bank of Canada (RBC) 2013, 1). Similarly, EU imports accounted for a little more than nine percent of total imports in 2012. On the other hand, the United States accounted for 62.5 percent of imports into Canada in that same year (RBC 2013, 1). So, while Canada's economic relationship with the European Union is not insignificant, it is not on a par with Canada's relationship with the United States. There are, nevertheless, numerous opportunities on a sectoral basis, including services, as well as the possibility for Canada to diversify its trade away from the United States. Canada is not one of the European Union's major trading partners. The United States, Russia and China are the European Union's major trading partners. Canada ranked twelfth on that list in 2012, behind Saudi Arabia, taking 1.9 percent of EU exports and supplying 1.7 percent of EU imports (RBC 2013, 1).

The story is a little different in the case of the TTIP. In 2012, the United States accounted for 14.3 percent of total EU trade, ranking it number one above China and Russia as the EU's largest trading partner. The largest quantity of

1 See the European Union website dedicated to TTIP at http://ec.europa.eu/trade/policy/in-focus/ttip/.

2 This distinction was introduced by Horn et al. (2010).

imports to the European Union comes from China, which accounted for 16.2 percent in 2012. The United States ranked third, behind Russia, supplying 11.5 percent of EU imports. In terms of EU exports, the United States was the largest destination by a significant margin in 2012 with 17.3 percent of EU exports. The second most significant destination for EU exports was China, which absorbed 8.5 percent in 2012 (European Commission (EC 2013c). As noted by Francois et al., "For the US, the EU is also a key bilateral trade partner. The European Union was the second most important destination for US exports (after Canada), representing 19 percent of total exports. It is also the second most important import partner (after China), supplying 17 percent of total US imports" (Francois et al. 2013, 8). "Together, the American and European economies account for roughly half of world trade. They are also each other's most important investment partners" (ibid., 5).

These statistics tell one part of the story about the important relationships that underpin CETA and TTIP. All three economies felt the effects of the 2008 financial crisis. All three are firmly integrated into global value chains and feel the increasing importance of services as a contributor to economic growth. The three trading partners also share a number of political attributes alongside long-standing friendly relationships. Nonetheless, all three have been on opposite sides of disputes at the WTO that point to important differences among them. Some of these differences will be on the table in current talks. Given these general observations, the lessons learned so far from ongoing trans-Atlantic negotiations are discussed below.

NEGOTIATION AND RATIFICATION WILL TAKE LONGER THAN EXPECTED

Trade deals go through several phases from the early days of conceptualization through negotiation to ratification and implementation. When CETA negotiations were launched in 2009, politicians promised that the negotiations would wrap up relatively quickly. That prediction was improbable at that time and created unrealistic expectations. Even now, after the October 2013 announcement, the political agreement will not go into force likely until late 2015 at the earliest. There are a number of reasons for this, which correspond to the various trade agreement phases. Despite the fanfare in October 2013, the fact is that CETA is still in the negotiation phase. Once that phase is complete, ratification and implementation will each carry specific challenges.

In the multilateral arena, there has been a steady extension of the time that it takes to reach agreement. Whereas the early rounds of the General Agreement on Tariffs and Trade (GATT) negotiations were typically completed in a matter of months, the last round to produce a substantial package, the Uruguay Round, concluded in 1996 after eight years. The Doha Round, which delivered a considerably scaled down agreement in December 2013, has continued with numerous stops and starts since its launch in 2001. These statistics, in the WTO context, are not surprising for two reasons. First, over the years an increasing number of countries have become involved in multilateral negotiations. Second, the "single undertaking" principle requires that all parties agree before anything can move forward. Thus, it stands to reason that with upwards of 150 parties (Doha had 155) involved, negotiations will take time.[3]

Preferential trade agreements, on the other hand, tend to be viewed by many as a way around intractable multilateral talks (Dieter 2009). This is misleading when it comes to agreements such as CETA and TTIP, partly because of the complexity of the issues under consideration. In general, parties have two major targets: those elements that go beyond what has been achieved in the multilateral context and those irritants that have been hard to loosen. In the first instance, they are breaking new ground; in the second, they are going back over well-trodden terrain. Both are time consuming.

While it is accurate to say that CETA is still in the negotiation stage, reports suggest that most major issues have been resolved. Ongoing discussions are allegedly focusing on "technical" issues. These reportedly include financial services, investment protection, aspects of intellectual property rights and tariff quota details for beef and pork. The implication is that technical issues are less challenging than the more substantive issues, which may be so. Nonetheless, it is worth noting two points. First, as any trade analyst at some point has likely uttered the phrase, "the devil is in the details," negotiating technical issues may ostensibly be more straightforward, but the consequences are important and the terrain can be hard going. Second, developments in the US-EU TTIP negotiation may affect substantive chapters in CETA, like those pertaining to investment and investor-state dispute settlement. This is discussed in greater detail below.

From a practical standpoint, much work has to be done once the negotiation is truly finished and a text is agreed. The agreement will go through a "legal scrubbing." Lawyers from both sides scour the agreement for any problematic wording. The text of the final agreement, which will run into the hundreds of pages, then must be translated into both official languages of Canada and the 24 official languages of the European Union. These steps alone would most certainly take us well into 2015. Inserted into this process is the thorny ratification phase. A number of factors make ratification a time-consuming aspect of the process.

3 On the relevance of these factors, see Wolfe (2013).

It is tempting to view CETA as a *bilateral* agreement — there are two parties to the agreement, Canada and the European Union. However, the fact is that many more are around the negotiating table. The Canadian Constitution gives the federal government sole jurisdiction over trade and commerce. Nonetheless, it was apparent from the start of negotiations that CETA would touch on areas of provincial and municipal jurisdiction. CETA negotiations have been depicted as path-breaking in the sense that this is the first time the provinces are "at the table." The European Union insisted that the Canadian provinces be involved throughout the negotiations to avoid any unwelcome surprises should provincial governments reject components of the negotiated text.

There are not many concerns voiced about recalcitrant provinces. The assumption seems to be that they will go along with the CETA agreement precisely because they were privy to the negotiations. Ratification does not require approval by the provincial legislatures. Formally, tabling the text in Parliament is required for ratification. Once it passes Parliament, legislation must be amended or introduced to conform to the new rules as agreed in CETA, including in provincial legislatures. This implementation stage could hold surprises. It is worth noting the governments that agreed to the CETA process may not all be in power when the final agreement is delivered. For example, in Québec, the Marois government was voted out of office in April 2014. The Liberal government in Ontario faced an election in June 2014 that strengthened its hand by replacing the minority government with a majority. While no one would suggest a complete reversal of provincial support for the agreement, this does add a wild card of unpredictability to the implementation phase of CETA. In addition, the importance of provincial support to the success of the agreement gives the provinces some leverage. For example, when agreement in principle was announced in October 2013, including details on increased quotas for EU cheese producers exporting to the Canadian market, the Government of Québec demanded compensation for the losses incurred by its dairy producers.

On the European side, it would be similarly misleading to view the European Union as a single party. While the 28 member states authorize the European Commission (EC) to negotiate trade agreements with one voice on each country's behalf, it seems increasingly clear that individual governments expect to participate directly in ratification of the agreement. Member state legislatures are not required to approve the deal for it to go into force. However, increasingly the notion of "joint competence" or "mixed competence" is under discussion, which suggests that both the EU institutions and individual member states would have to approve the agreement for it to pass muster politically. A press release issued by the European Council in May 2014 stated, "The Council noted that the Commission expects the agreement to be completed in the near future, and that member states will have sufficient time to examine the complete finalised text before it is initialled. It also took note of member states' concerns stemming from mixed competences under the agreement, and emphasised that *it will not agree to the signature and conclusion of CETA as an EU only agreement* [emphasis added]" (Council of the European Union 2014, 7).

In addition, the 2009 Lisbon Treaty requires that the European Parliament (EP) accept trade agreements, making the European Parliament a central player in trade negotiations and ratification. The fact that EP approval is required for the agreement to go into force gives it the opportunity to push for causes that it favours. Again, this is not to make the alarmist suggestion that the European Parliament will reverse the progress made so far. But, as with the Canadian provinces, it does add an element of uncertainty.

The unpredictability of the EP's role is compounded by the fact that a new Parliament was elected in May 2014. Europeans were surprised to see a number of "Euro-skeptic" members elected. In many instances, the influence of these newly elected members will be greater in the member-state context than in Brussels, since they are still a minority in the European Parliament. They will, no doubt, want to be heard and to shift the tone in the discussions, which may include opposition to CETA and TTIP. Already, several parties on the left of the political spectrum oppose a deal with the United States. The election results may also change the composition of the EP Committee on International Trade. In addition to the shift in Parliament, other changes to EU governance will be forthcoming. The term of the current Commission officially ends in October 2014. In addition, the EU Commissioner for Trade, Karl de Gucht, who has led CETA and TTIP negotiations to date, will step down in October.

The CETA experience demonstrates that obtaining an agreement, then ratifying and implementing it will take more time than anticipated. TTIP officials were surprisingly optimistic when they announced that the agreement would be concluded by the end of 2014. Repeatedly, they have been quoted that they would complete TTIP "on one tank of gas (Froman 2013)." However, to date, there have been six rounds of talks, each of which have run for a week approximately. Expectations, now, are that the TTIP will follow CETA's protracted course.

All of the elements that pertain to the European Union in CETA will resurface in TTIP (along with a range of other issues that will be unique to the US-EU negotiation). The text will have to be translated into 24 languages, the European Parliament will have to approve the text, the EU member states will likely claim "mixed competences" and seek to ratify the agreement individually and so on. Of course, first the negotiation stage must be completed. Like Canada, the United States has a federal system.

Negotiations are conducted under the auspices of the executive branch. Once a deal is negotiated, the president submits it to Congress for ratification. The legislatures of the 50 states will not be required to approve the deal officially. That said, as is the case for the Canadian provinces, the states do have considerable budgetary independence and certain policy areas are particularly sensitive. The top of that list is public procurement, which has a long history in the United States of being regulated below the federal level. During CETA negotiations, the European Union went after open procurement policies at the sub-federal level and made significant gains, as discussed below. There is every expectation that the European Union will seek a similar outcome in TTIP. American officials have already indicated that this could be a stumbling block.

A number of states introduced "Buy America" legislation in 2013 (as did Congress in 2014). Over the last several years, within the context of a variety of trade agreement negotiations, state legislatures have taken a position on procurement. In its current policy,[4] the National Conference of State Legislatures (NCSL) expressed support for free trade agreements that enhance export opportunities as long as they are, "consistent with traditional American values of constitutional federalism, and protect state legislative, judicial and regulatory authority." The NCSL went on to say, "the USTR [Office of the United States Trade Representative] should not bind a state to an international procurement agreement without formal consent from the state legislature." The NCSL favoured a "positive list" approach to negotiating not only procurement, but also services and investment. "Only state laws that are specifically committed should be covered in the agreement." These sorts of statements are enough to suggest that the US government will have to make significant efforts to ensure that the state houses are on side with any procurement chapter. The NCSL has also joined the chorus of opposition to an investor-state dispute settlement provision.

In addition to questions about the role of the American states in TTIP negotiations, questions surround the fact that the US Congress has not conferred President Obama with trade promotion authority (TPA) for these negotiations. In order to give negotiating partners confidence that any agreed text will be assessed as a whole text — either positively or negatively — the US president typically seeks and receives authorization from Congress to negotiate on its behalf. The debates leading up to the bestowal of TPA can be heated and serve to define the negotiating parameters. President Obama's team has been negotiating TTIP (and TPP) without this authorization from Congress.

A TPA bill has been introduced in Congress; however there is considerable pessimism regarding its likelihood to pass before US midterm elections in November 2014. Can TTIP go forward in the absence of TPA? Some analysts suggest that it can. For example, Watson (2013) argued that it might be better if TPP moves through Congress without TPA, and the same might be true for TTIP. Watson's point is that the current adversarial climate in Washington ensures the battle over TPA will be bitter, perhaps more bitter than the debate over an actual trade agreement, which promises appreciable gains. He predicted important trade agreements, once negotiated, will move through Congress along party lines. Watson is counting on the Republican majority in the House to assure passage, presuming a ground breaking agreement like TTIP will move through Congress in a predictable fashion. This may be so. Nonetheless, the fact remains that Watson's focus on the US ratification part of the process ignores the concern that trading partners understandably will be hesitant to reveal their hand during negotiations in the absence of the type of assurance that TPA offers. Overall, many wildcards suggest TTIP negotiations will, like CETA, take much longer than anticipated.

SOMETHING OLD; SOMETHING NEW

The common narrative about CETA and TTIP is that tariffs do not matter. This is a small part of the story. Average tariff levels are relatively low in each instance. The real story resides in the "twenty-first century elements" of the agreements — regulatory convergence, investor-state dispute settlement and so on. It is certainly the case that these agreements aspire to move into WTO+ and WTOx territory. Nonetheless, the traditional issues are not insignificant. Indeed, the Canadian Chamber of Commerce opens its analysis of CETA by saying "the most obvious benefit is a reduction in tariffs (i.e., import taxes) for traded goods" (Canadian Chamber of Commerce 2013, 1).

Reports suggest that tariff reductions will not be insignificant in CETA, for example:

> As expected, CETA will significantly liberalize the tariff treatment of non-agricultural goods. On entry into force CETA will eliminate EU duties on Canadian products for over 98% of tariff lines. Duty reductions will also occur over seven years culminating in the complete elimination of EU tariffs on 99% of tariff lines. Key sectors subject to this "phase-out" approach are automobiles, fish and seafood products. Similarly, Canada will be eliminating duties on 98.4% of its tariff lines as of the date of entry into force, which will expand to 98.8% duty-

4 Quotations are from the NCSL website at www.ncsl.org/ncsl-in-dc/standing-committees/labor-and-economic-development/free-trade-and-federalism.aspx. Accessed July 14, 2014.

> free within seven years. Automobiles are, again, one of the "phase-out" tariff lines, together with ships. (Boscariol et al. 2013)

Tariff reductions will not be insignificant in TTIP, if only because of the volume of trade in play. Reducing tariffs by one or two percent on billions of dollars of commercial activity can add up. In addition, in some sectors, tariffs have remained high. As noted by Francois et al. (2013) automobiles and processed foods are two examples that will be US targets in TTIP, "The EU average tariffs on these products are substantially higher than the US tariffs. For motor vehicles, the EU applies an average tariff (8.0 percent) that is almost eight times higher than the United States. For processed food products, EU average tariffs (14.6 percent) are more than four times higher than US average tariffs. For agriculture, forestry and fisheries average tariffs are also relatively high (about 3.7 percent) but for these products there is no difference between the EU and the US" (ibid., 14).

Tariffs also remain important as globalized production networks become more commonplace. As increasing quantities of component parts and intermediate goods cross borders and as value is added at multiple moments in the supply chain, tariffs — even low ones — can add up to a substantial amount on the final good.

This is not to suggest that a tariff-only agreement would be desirable or sufficient. It probably would not move the partners to agreement conclusion. But, lingering tariffs may provide an obstacle. Whereas many predicted that tariff elimination would be the easiest issue in the negotiations, in recent months, the United States and the European Union have indicated dissatisfaction with each other's respective tariff offers. In particular, the European Union sees the United States' offer as falling short.

If tariffs and quotas still play a central role in CETA and TTIP negotiations, they do so alongside a long list of "new" topics that justify CETA's name as an "economic and trade agreement" and TTIP's as a "trade and investment partnership." In some cases, the tangible results observed in CETA can be expected similarly in TTIP. In others, progress will be more modest. The likelihood of modest progress with regard to investment and regulatory convergence is discussed below. Nevertheless, in terms of breakthrough provisions (for good or ill) in CETA, early reports suggest that public procurement tops the list. In an analysis of CETA, lawyers at McCarthy Tétrault call the procurement chapter a "game changer" because it gives the European Union access to Canadian provincial and municipal public contracts, albeit within certain parameters.

It is worth noting that public procurement has been on the trade agenda for several years. The North American Free Trade Agreement (NAFTA) Part 4, Chapter 10 contains provisions on government procurement. Canada and the United States struck the Agreement on Government Procurement in 2010. In addition, 15 governments (including Canada, the United States and the European Union) are signatories to the WTO Agreement on Government Procurement, a plurilateral agreement negotiated as part of the Uruguay Round GATT negotiations. Despite the existence of these and other agreements, the "sub-central" or sub-federal levels of government have never been opened to foreign competition to the degree that CETA will allow. This is potentially a very lucrative development. "The EU government contracting market is worth over $2.7 trillion annually and the Canadian market well over $100 billion annually" (Boscariol et al. 2013). Some sectors will be exempt from the procurement, others will come into play above a certain threshold (according to McCarthy Tétrault, Québec and Ontario will be allowed to retain a 25 percent Canadian content requirement for procurement of public-transit vehicles) and others (including public utilities such as Québec Hydro) that have been shielded from liberalized procurement rules will no longer benefit from these protections. The specific details will only be forthcoming when the CETA text is circulated; nonetheless, the following broad contours provide important insight:

> The CETA disciplines on procurement will apply only to contracts above a certain designated threshold value. For federal contracts for goods and services this threshold is $205,000. For provincial and municipal contracts for goods and services, this threshold is $315,500. This is also the threshold for academic institutions, school boards and hospitals (also known as the MASH sector). For procurements of goods and services by Crown corporations, the threshold is $560,000. For contracts for goods and services by utilities, the threshold is double at $631,000. For construction services purchased by all levels of government, the threshold is $7.8 million across the board … Several sectors are excluded, including health services; ports and airports; procurements under $1 million in rural areas in the territories and Atlantic provinces for regional economic development purposes; public-private partnerships; procurements by ports and airports; shipbuilding and repairs; and national security procurements, that is, sensitive goods/services procured by security-mandated entities (Swick 2013).

It remains to be seen whether the European Union will be able to make the same "game-changing" gains on procurement in TTIP. The support of the fifty United States,

which at this time does not appear to be guaranteed, is crucial.

REGULATORY CONVERGENCE IS DIFFICULT

Regulatory convergence is another — perhaps *the* — key element of the "twenty-first century" agendas of CETA and TTIP. The removal of impediments to trade that are grounded in dissimilar laws and regulations, and the prospect of the associated gains, has brought the partners to the negotiating table at this time. What is known of CETA thus far suggests the agreement goes some distance in creating the frameworks and building the scaffolding for regulatory convergence. But, actual convergence is a long way off.

In May 2014, Professors Richard Parker and Alberto Alemanno produced an important report entitled, "Towards Effective Regulatory Cooperation under TTIP: A Comparative Overview of the EU and US Legislative and Regulatory Systems." Prepared for the European Commission, the report explored similarities and differences in the two systems. The authors argued that there are important similarities when it comes to transparency and participation (although manifestations of both appear at different moments in the two processes). They examined the formative and deliberative stages of the legislative and regulatory processes, identifying significant differences ranging from how legislation is passed to judicial review of laws and regulations. Ultimately, they recommended that TTIP negotiators take a sectoral approach to regulatory convergence, "TTIP negotiators may find it useful to examine sectors of particular interest with an eye to ascertaining specifically what would be needed to achieve desired levels of compatibility/alignment of TTIP-relevant regulations in those sectors. This is the "in-built agenda" of TTIP, and it may be useful to consider launching a few pilot projects to try out different approaches to regulatory cooperation — including multi-stakeholder collaborative approaches — to guide negotiators' thinking about how to design or refine the regulatory cooperation chapter (the so-called "horizontal chapter") to TTIP" (Parker and Alemanno 2014, 9). Parker and Alemanno's analysis suggests, unsurprisingly, that regulatory convergence is a complex undertaking that may require considerably more study to execute successfully. While the overall spirit of the two systems is similar, differences exist throughout the legislative and regulatory processes.

The mere fact of difference makes regulatory convergence challenging. This is, of course, compounded by the reality that regulatory differences are underpinned by entrenched domestic interests. In addition, certain regulatory approaches reflect long-standing national preferences for how to organize a sector, often stemming from value preferences, specific historical circumstances or commitments to domestic constituencies. Supply management in the Canadian dairy sector is a good example, despite the fact that many consider it to be more of a market access issue. Speculation about CETA during the negotiations centred on whether the Canadian government finally would be forced (or would use the opportunity) to dismantle the Canadian supply management system for dairy and poultry. Canadian negotiators have long noted that Canada's credibility as a serious trading partner has been harmed by its commitment to what is perceived to be a discriminatory practice. Prime Minister Harper has signalled his skepticism about supply management by working to remove a similar system in the Canadian wheat sector. Of course, Canada is not alone in providing supports to its agricultural producers. While the European Union and United States do not favour supply management, agricultural producers within each area benefit from a range of subsidies, among other allowances.

Interestingly, CETA does not dismantle supply management, as one might have expected from a twenty-first century or second-generation agreement. Instead, CETA contains provisions of a more traditional, market access sort with regard to the dairy sector. In particular, Canada did agree to raise the quota of dairy products that can enter the Canadian market from the European Union from 20,000 tonnes to 37,500 tonnes. While this is not insignificant by any means for dairy farmers, it does not signify a fundamental change to the way that the Canadian dairy sector is organized. It does not signify regulatory convergence. It does not even suggest regulatory coordination. Canadian dairy farmers have now turned their attention to TPP talks, where they fear supply management could once again be under discussion.

Dialogue about transatlantic regulatory convergence has been ongoing for years through entities such as the Trans-Atlantic Business Dialogue, the EC-US High-Level Regulatory Cooperation Forum and the Canada Europe Roundtable for Business. There is recognition that there is more than one way to pursue the ambitious goal of regulatory convergence. As one EU document on TTIP argues, "One idea would be to formally recognise that some regulations have broadly the same effect. This would mean that companies, under certain conditions, could simply comply with one set of rules in order to sell in both markets. Another idea would be for both sides to move their regulation closer to internationally agreed ways of solving the problem at hand. A third way to work, where EU and US regulations are very different, would be for regulators to cooperate more on how they put the regulation into practice" (EC 2013b, 3).

What is known of CETA thus far suggests that Canadian and EU negotiators have made commitments to mechanisms that might facilitate greater communication with regard to regulation. Movement at this time seems to be in the direction of regulatory cooperation and coordination as

opposed to convergence. The distinctions between these terms may not be stark, however, they capture two things. First, there may be a spectrum leading to convergence. Second, sectoral differences may mean that convergence is desirable or achievable in some, while coordination or cooperation may be preferable in others.

The Government of Canada's Technical Summary of CETA uses the term "regulatory cooperation" in reporting on the progress made on this front. The Summary notes that CETA contains the, "first regulatory cooperation chapter in any Canadian FTA [free trade agreement]" (Canada 2013, 7). It goes on to say that CETA provisions, "create a formal mechanism that will facilitate joint initiatives between Canadian and EU regulatory authorities; includes comparing data collection and analysis practices, reviewing lessons learned, conducting risk and regulatory impact assessments;" (ibid., 7) and "facilitates earlier access to regulatory development processes to reduce differences in approach in order to achieve more compatible measures and fewer trade barriers" (ibid., 8). CETA will also "promote cooperation related to animal welfare" (ibid.). This is not insignificant. It places a new emphasis on regulation as compared to so-called traditional trade agreements. However, it is noteworthy that these elements seem mostly to be future-oriented. They report not on efforts to align current regulation,[5] but rather on efforts to coordinate future regulation.

The ambition around regulatory convergence in TTIP may be greater than that manifested in CETA and for good reason. The United States and the European Union can be seen to represent two approaches to regulation. As other countries have developed their own regulations and standards, they have tended to fall in behind one or the other. Canada is no exception to this, leaning toward the American model, although similarities across national contexts are easily overstated.

In some sectors, there may always be significant regulatory difference. Sanitary and phytosanitary (SPS) measures are one example. The category of SPS regulation includes genetically modified organisms (GMOs), over which Europe and the United States have been fighting an ongoing battle via the WTO dispute settlement body. In 2006, a WTO panel ruled against the European Union, however the European Union soon expressed its need for extra time to comply with the ruling given the delicate political nature of the issues in play. Regardless of EU efforts to comply with the WTO ruling, there are still significant divergences between the two regulatory systems, divergences that are unlikely to be easily bridged in the near term.

5 There are some notable, but modest exceptions. For example, the parties agree to align automotive standards. However, of the 17 United Nations Economic Commission for Europe standards, Canada had already incorporated 14 into its regulatory regime. CETA will add the last three. See (Canada 2013, 6).

CETA addresses SPS issues in a general and future-oriented way. The Government of Canada's technical summary suggests that, with regard to SPS, CETA provide for a working group to explore ways to reduce the time required to approve new GMOs and to recognize equivalencies across the Canadian and European systems of inspection and certification. However, access to the EU market for GMO products does not appear to have been eased in any significant way. Similarly, while Canadian exporters of beef and pork appear to make significant market access gains in CETA through quota increases, these provisions pertain to the non-hormone meat varieties.

THE PUBLIC IS CONCERNED

Conventional wisdom tells us that societal groups will break down along the following lines when it comes to trade: labour will oppose any kind of measure that threatens jobs, and business will welcome any openings to new markets or measures that enhance its ability to compete. This depiction is insufficient for the trading environment in 2014. The conventional view presumes a mostly industrial economy and trade agreements that use tariffs and quotas as its primary instruments. It presumes that citizens who are outside of import-competing, export-oriented sectors will largely ignore trade agreements. This is an outdated narrative and, as a result, does not fully capture the range of societal concerns that are seen in response to contemporary trade agreements like CETA and TTIP.

However, this is not to say that the conventional response is absent. There is no doubt that certain sectors win while others lose in mega-regional agreements. Indeed, when "political agreement" over CETA was announced and content was leaked that pertained to increased European cheese quotas, Canadian dairy farmers protested the increased competition from European cheese producers, including demands for compensation. Nonetheless, there is a much wider range of opinion about CETA and TTIP that should be acknowledged.

Scholars such as Dani Rodrik, a noted economist, and Joost Pauwelyn, a legal scholar and former WTO official, both detected a shift in public attitudes toward trade many years ago. Rodrik states:

> There is a variety of evidence that points to more than narrow self-interest being at work in rich countries. For example, when Alan Krueger (1996) examined where the support for a Congressional bill aimed against child labor was coming from, he found that the support was strongest not in districts with a concentration of low-skilled labor, but in well-to-do districts with preponderantly skilled labor. People were against child labor not because it

> meant more competition, but because they felt it was wrong … So globalization is a hot button issue in the advanced countries not just because it hits some people in their pocket book; it is controversial because it raises difficult questions about whether its outcomes are "right" or "fair." (Rodrik 2007, 22-23)

Pauwelyn makes a related point:

> Today, however, the biggest force against free trade is driven by what I would call non-trade values, namely concerns for the environment, cultural diversity, labour standards, rural populations or poverty-struck areas. It is, in other words, no longer just import-competing producers that call for protectionist policies (even though they continue to do so), but also worried consumer, workers or plainly citizens who have doubts about free trade based on the earlier mentioned values of poverty reduction, labour standards, culture or the environment. (Pauwelyn 2008, 563)

This sort of analysis suggests that government officials should resist the temptation to discount those who raise concerns about trade agreements as the "usual suspects" who do not understand the gains from trade. Indeed, Rodrik and Pauwelyn go so far as to suggest that mechanisms be built into trade agreements — "policy space" in Rodrik's case and "safety valves" in Pauwelyn's — to address these public concerns.

Public outcry has not been significant in Canada to date. Certain civil society groups have been vocal, however, the press and the general public have not picked up the story in a significant way. Certainly, the coverage pales in comparison to the public debate that marked negotiation of Canada-US free trade, and later NAFTA. The same cannot be said in Europe. Interestingly, it took TTIP negotiations to ignite public opposition in Europe. CETA negotiations did not elicit strong opposition from the public in Europe, with specific exceptions. Animal rights groups, including supporters in the European Parliment, raised the issue of the Canadian seal hunt, suggesting that they would not ratify CETA until changes were made to the hunt. In addition, environmentalists raised concerns about development within the Alberta oil sands.

The Harper government launched a dispute at the WTO in response to the EU ban on seal products, which effectively removed the issue from CETA negotiations for a time. In May 2014, the WTO Appellate body handed down a decision that essentially accepted the EU claim that a ban on seal products is "essential to protect public morals," however it noted that the European Union was applying its seal products regime in a discriminatory fashion. The European Union may choose to comply with the Appellate Body recommendations; however this decision may also revive the seal hunt debate within the European Parliament as part of the CETA ratification process.

Negotiations between the European Union and the United States have garnered public attention to a much greater degree than those between the European Union and Canada. This additional public attention will likely affect CETA. Much of this attention is centred on the prospective provision in TTIP for an investor-state dispute settlement (ISDS) mechanism. ISDS allows foreign corporations, often in an arbitral tribunal setting, to contest a government measure that has an adverse effect on the corporate investment. Such provisions are increasingly common in trade and investment agreements. CETA contains such a provision. The CETA ISDS mechanism is apparently less permissive than some. For example, it reportedly carves out a higher threshold for arbitration in the financial services sector. An investor's claim regarding financial services would only go forward after a joint expert committee determines that the measures in dispute were not of a "prudential" nature (Canadian Chamber of Commerce 2013, 3). Nonetheless, many feel nervous about the prospects of ISDS.

Public opposition to ISDS in Europe has shifted into overdrive as TTIP negotiations have proceeded. Partly, this is due to an apparent spike in the number of investor-state disputes. ISDS cases have jumped since 2003. Whereas there were roughly 100 cases from 1959 until 2003, there were closer to 400 between 2003 and 2012 (Ikenson 2014). Ironically, the Europeans initiated the largest proportion of these cases.

Despite taking advantage themselves of ISDS provisions, Europeans have long recognized some of the fundamental regulatory differences between the United States and Europe. Many of these issues, such as European opposition to GMOs or beef hormones, have formed the basis of high-profile WTO disputes between the United States and the European Union. The prospect of ISDS in TTIP has awakened a fear in Europeans that US companies might force changes to EU regulations by claiming that they constitute a form of expropriation under ISDS guidelines. Environmental groups worry that American oil companies could use an ISDS provision in TTIP to challenge the French ban on fracking. Food safety advocates similarly worry that ISDS could be used to challenge regulations on GMOs.

These concerns have been driven home in recent months as a number of high-profile investor-state disputes have garnered attention. In 2011, tobacco producer Philip Morris took legal action against the Government of Australia. Australia has a bilateral investment treaty with Hong Kong

that includes an ISDS mechanism. With a base in Hong Kong, Philip Morris can avail itself of this provision. Philip Morris claimed Australian plans to package cigarettes in a combination of plain paper that obscure logos and grisly images that depict the negative health consequences of smoking warranted compensation for lost revenues. At the time of writing, this lawsuit is ongoing. It is not clear that Philip Morris will prevail. Nonetheless, the Government of Australia is incurring a high cost to defend its health policy. This might lead other governments to reconsider similar policies in light of the possibility of similar litigation.

Two other cases have also caught public attention. In September 2013, the American pharmaceutical company, Eli Lilly, filed suit against the Government of Canada using the investor-state dispute mechanism contained in Chapter 11 of the NAFTA agreement. Eli Lilly is claiming $500 million in compensation over the invalidation of two drug patents by Canadian federal courts. The second case comes on the heels of a 2011 decision by the German government to phase out its nuclear energy program in the wake of the 2011 Fukushima nuclear disaster in Japan. The following year, the Swedish company Vattenfall, which operates nuclear facilities in Germany, filed a request for investor-state arbitration at the International Centre for the Settlement of Investment Disputes. Vattenfall sought compensation under the auspices of the Energy Charter Treaty, a treaty that entered into force in 1998 and provides for ISDS as it pertains to the energy sector. These three cases are just a sampling of hundreds of investor-state disputes that have given rise to concerns about a government's right to regulate. Speculation is growing regarding whether governments will face charges of expropriation of corporate profits when it promotes health or environmental policies, or if governments will be constrained in their ability to respond to domestic concerns or to legislate in the public interest.

Many ask why an ISDS is necessary at all in an agreement between the United States and the European Union given that their respective court systems are well developed. Such concerns are not only being expressed by civil society groups. In March 2014, the German government said that it would seek to have ISDS excluded from TTIP and more recently, the German economic affairs minister, Sigmar Gabriel, has spoken forcefully against ISDS (Duggal 2014).

Those who favour inclusion of ISDS provisions in CETA and TTIP argue that TTIP especially (and CETA to a lesser degree) must contain a benchmark provision that can serve as a reference point in negotiations with other trading partners in future agreements where such protection might be considered much more necessary. Those in favour of ISDS see an opportunity to protect against the sorts of abuses that opponents fear. In response to public concerns, the European Union announced a public consultation in January 2013, which is set to remain open until June 2014. These concerns about TTIP are causing some to circle back to the almost-completed CETA agreement and pose hard questions about it.

Whether ISDS will end up in CETA or TTIP is an open question. Regardless of the outcome, the Europeans were wise to take a step back and initiate a public consultation on investment issues, if only to make more transparent an otherwise opaque process and to signal to citizens that their concerns are being heard.

MULTILATERALISM STILL MATTERS

As preferential trade agreements proliferate and as the largest traders opt for this instrument, there is a temptation to sound the death knell of the multilateral system. Indeed, it is a common narrative to explain the rise of preferential agreements, including the mega-regionals, as a response to the stalemate that developed at the WTO during the Doha Round. While this is not a completely inaccurate depiction, it does risk underestimating the ongoing importance of the larger, multilateral context.

With regard to the effects of agreements like CETA and TTIP, the signatories typically hope to see many of the agreement provisions "multilateralized." The individual agreements will deliver benefits that relate directly to interaction with the trading partner. However, these agreements are not just about removing specific irritants in a particular bilateral relationship to allow better access to a particular market. Instead, there is an explicit and acknowledged hope that the protocols negotiated in these agreements will extend well beyond the signatories. This will happen organically in some cases where most-favoured nation clauses exist. In other instances, this influence would derive from the adoption of trans-Atlantic standards by third countries, especially from TTIP. As Francois et al. (2013) notes, "Given that, collectively, the EU and the US would stand as the world's biggest trading block, there is a very real possibility that mutual agreement on regulations and standards would be adopted, partially, also by third countries. Thus, where the EU and the US act as a regulatory hegemon, there is scope for setting de facto common, global standards" (ibid., 29). Of course, it is important to note that many big players might, for good reason, resist trans-Atlantic influence of this type.

In addition to the inclination by the United States and the European Union to extend standards, regulations and approaches beyond their own borders, the logic of twenty-first century production seems to suggest the wisdom of negotiations that are broader than bilateral relationships, even large ones. As Baldwin (2013, 24) puts it, twenty-first century trade takes place at "the trade-investment-services-IP nexus." This nexus is a product of the global value chains that characterize production in many sectors. Fung (2013, xix) captures this phenomenon of integrated

production networks or globalized production processes as "internationally joined-up production arrangements."

Baldwin argues, "the global supply chain is really not very global — it's regional. Most of the large numbers — which indicate a strong supply chain relationship — are in the regional blocks, what I call Factory Asia, Factory North America and Factory Europe" (2013, 20). There is debate about the scale of value chains. Los, Timmer and de Vries (2014) maintain that there are signs of value chains becoming genuinely global. If preferential agreements might be better aligned to the value chains to which they respond or those that they seek to facilitate, then negotiating below the multilateral level may make sense. Nonetheless, the bilateral agreements under discussion imperfectly capture even the regional value chains.

The automotive sector is a good example. Canada is negotiating with the European Union separate from the United States. Yet, the North American auto industry is integrated in important ways that might suggest the wisdom of a joint North American negotiation with the European Union in that sector. One can see a lingering national logic to many of the agreements being negotiated. There are agreements between Mexico and the European Union, Canada and the European Union, and soon the United States and the European Union. Since many North American industries are continentalized due to NAFTA, an argument can be made that it would have made more sense for the European Union to negotiate with NAFTA parties collectively. There is no provision for this because NAFTA is not a customs union. But, it does suggest the wisdom of having all affected parties around a negotiating table, either regionally or beyond to the multilateral context.

Of course, this approach has been tried in Geneva, illustrating the challenge of moving from aspiration to execution. The WTO had started to develop agreements on twenty-first century elements, which many see as desirable. As Baldwin explains:

> Stepping from "what is" towards "what should be", it is absolutely clear that the optimal governance solution for global supply chains would be global, not regional. Indeed the firms conducting much of this twenty-first century trade find themselves faced with a spaghetti bowl of disciplines — although this is tamed by the fact that the United States, Japan and the European Union have established a system of hub-and-spoke bilateral agreements that tends to reduce conflicts for firms located in a hub. The real problem concerns the spokes such as Mexico that have deep agreements with the EU, Japan and the United States. (2013, 43)

This creates a conundrum for the trading system. It seems that the current impulse to install global value chain-friendly protocols via regional or preferential arrangements is suboptimal. Broader coordination is desirable. However, the WTO may be ill-equipped to handle such issues from a multilateral standpoint, partly due to the size of its membership and the limitations imposed by the "single undertaking." Political will to situate protocols at the WTO may be lacking. The issues themselves may lend themselves better to a plurilateral framework. There are also challenges beyond the procedural. It is important to acknowledge that preferential agreements can have negative economic and political effects. On the one hand, many have recognized the potential that global value chains offer for development. Nonetheless, under a model that develops rules to accommodate global value chains on a preferential basis, developing countries that would ultimately want to avail themselves of the economic gains of contributing to global value chains will do so under a system of rules that they did not write.

CONCLUSION

It may be overly ambitious to assume that preferential trade agreements can deliver on the twenty-first century elements so quickly. This should counsel patience in those who advocate for them and provide some reassurance for those who do not. That negotiations will take time may not be a bad thing. CETA and TTIP (alongside other so-called twenty-first century agreements) are touchstones. They reflect processes that are already under way at the same time that they seek to facilitate other advances. Wise leaders might view the extra time not as an unwanted delay, but as an opportunity both to educate the public on the complex issues and developments at the heart of the agreements and to listen carefully to their concerns.

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