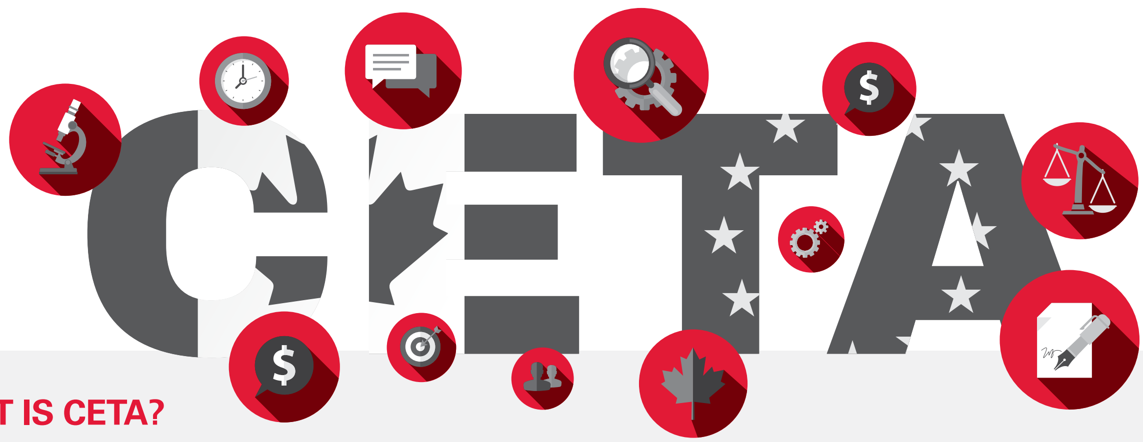
BUSINESSCLASS
KNOWLEDGE ▪ SEMINARS ▪ INSIGHTS

Blakes

A Primer on the Canada-European Union Comprehensive Economic and Trade Agreement



WHAT IS CETA?

CETA is the Comprehensive Economic and Trade Agreement between Canada and the European Union (EU) and its member states. CETA comprises 30 chapters of rules respecting trade between Canada and the EU. The agreement was signed by Canadian and EU leaders on October 30, 2016. CETA will enter into force, on a provisional basis, on September 21, 2017.

Why is CETA significant for Canadian businesses?

CETA creates a "free trade area" between the EU and Canada. For Canadian businesses, this means guaranteed "national treatment" and non-discriminatory market access to 500 million EU consumers. Canadian businesses will thus have a comparative advantage over businesses in the United States in accessing the EU market. Canadian businesses will also have access to the EU government procurement market, valued at approximately C$3.3-trillion annually. Correspondingly, CETA will likely attract EU investment in Canada as a result of EU businesses hoping to access the NAFTA region.

Among other things, CETA regulates trade in goods and services, adjusts intellectual property rights for pharmaceutical drugs, establishes an Investor-State Dispute Settlement system and regulates government procurement.

TRADE IN GOODS

How does CETA impact tariffs?

CETA eliminates duties on more than 98 per cent of Canadian tariff lines. All tariff lines on non-agricultural goods will be fully eliminated seven years after entry into force. Tariff reductions occur in stages, either three, five or seven years after implementation. However, certain goods are excluded from tariff elimination.

CETA also addresses Canada's use of Tariff Rate Quotas (TRQs), which are used to control the importation of supply-managed goods, such as dairy products. TRQs are allocated to qualified applicants and allow allocation holders to import these supply-managed goods at a reduced duty rate. The duty rates that apply to supply-managed goods imported by those who do not hold a TRQ allocation can be prohibitively high. For instance, a non-TRQ holder could pay duty at a rate of 245.5 per cent to import cheese. Under CETA, Canada has agreed to increase the amount of goods that may be imported under a TRQ at the reduced duty rate. For example, the amount of EU cheese that may be imported pursuant to a TRQ allocation will increase over a six-year period to 16,800 tonnes of cheese and 1,700 tonnes of industrial-use cheese.

The EU has also agreed to make specific market access commitments for certain Canadian goods, including shrimp, cod, common wheat as well as beef and pork in the sixth year of the agreement.

What are the "rules of origin" that goods must meet to benefit from tariff reductions?

Originating goods under CETA are those goods that (1) are wholly obtained in a party to the agreement, (2) are produced exclusively from originating materials or (3) have undergone "sufficient production" in a party, in accordance with certain listed product-specific rules of origin. These product-specific rules of origin could include tariff shifts, maximum value of non-originating materials as a percentage of the transaction value, or other requirements. Goods also qualify if the non-originating content is below the *de minimis* level set at 10 per cent of the transaction value or ex-works price of the product, higher than the seven per cent threshold in NAFTA. Parties may also benefit from the cumulation mechanism, which allows materials from a third country and has agreements with both Canada and the EU, to be considered originating materials for CETA origin purposes.

CETA allows limited quantities of certain products — agricultural products, fish and seafood, textiles and apparel and vehicles — to qualify as originating under less demanding product-specific rules of origin on a temporary basis. For instance, Canada can export 100,000 vehicles to the EU that contain up to 70 per cent "foreign content" (compared to the usual 50 per cent requirement) for an initial period of seven years after entry into force of the agreement.

Proof of origin must be given by an origin declaration that meets CETA's specifications. Origin verifications are conducted by the customs authority of the country of export upon receiving a request from the customs authority of the country of import. Proof can be applied on a blanket basis for 12 months, and may be provided either at the time of exportation or thereafter, with refunds permitted up to three years following importation.

How can Canadian businesses take advantage of CETA's trade in goods?

Canadian businesses should review the products that they currently export to or import from the EU to see if these products qualify under CETA's rules of origin. If these products do not currently qualify as originating, businesses should review their options for achieving duty-free treatment, including achieving the *de minimis* level of non-originating material or using the cumulation rule. Canadian businesses should also review all available TRQs and origin quotas in order to take advantage of annual allocations for applicable goods. Finally, Canadian businesses should review their sale and distribution contracts for CETA compliance issues while also including a requirement in supplier agreements to issue CETA origin declarations, where applicable.

TRADE IN SERVICES

CETA contains commitments to the national treatment and most-favoured nation principles. The national treatment principle commits each party to treating the service suppliers of the other party no less favourably than it treats its own service suppliers, in like circumstances. The most-favoured nation principle commits each party to treating service suppliers of the other party no less favourably than it treats service suppliers of any other country, in like situations.

CETA also prohibits the imposition of certain measures that restrict the supply of covered services, such as measures that set numerical limits on the number of service suppliers or the number of persons who may be employed in a particular service sector. Canada has taken a "negative list" approach to the liberalization of services under CETA, in that all services are "covered services" unless specifically excluded.

INTELLECTUAL PROPERTY

CETA will change the Canadian intellectual property landscape as it relates to pharmaceutical patents by mandating an additional period of patent protection for drugs in certain circumstances and streamlining the litigation process relating to generic versions of patented drugs. Unlike many industrialized nations, Canada currently has no provision for the extension of the 20-year term awarded to a patent. However, in order to comply with its CETA obligations, Canada will be permitting the holder of an eligible Canadian patent directed to a pharmaceutical invention to obtain a Certificate of Supplementary Protection that extends the term of the patent by up to two years. These certificates apply to both human and veterinary pharmaceuticals. The purpose of these certificates is to compensate patent holders for delays in obtaining regulatory approval for marketing their patented pharmaceuticals.

Also pursuant to CETA, Canada will be expanding the scope of proceedings under the *Patented Medicines (Notice of Compliance) Regulations*. These proceedings are currently summary in nature and serve to determine if the Minister of Health should be prohibited from issuing a Notice of Compliance to permit the marketing of a generic drug. Under the current system, while the generic manufacturer may appeal an unsuccessful decision resulting from the proceedings, in most circumstances no effective right of appeal is available to the unsuccessful patent holder, leaving the patent holder to commence a separate patent infringement action. As required by CETA, the proceedings under the regulations will be expanded to full actions to address patent infringement and validity issues. Both parties will also have equal rights of appeal. Actions brought under the regulations must be disposed of within 24 months. This short timeframe is expected to place a burden on all parties given the complexity of pharmaceutical patent litigation.

It is anticipated that the foregoing changes take effect on September 21, 2017.

INVESTOR STATE DISPUTE SETTLEMENT (ISDS)

CETA's Investment Chapter — though not yet fully in force as certain provisions including dispute resolution require ratification by each of the EU member states — creates a number of protections for covered investments of investors from one CETA party in another CETA party. These include obligations to accord investors from another party non-discriminatory treatment (including national treatment and most-favoured nation provisions), the obligation to accord covered investments fair and equitable treatment and full protection and security, and protections for investors against direct and indirect expropriation without compensation.

For Canadian companies investing in the EU, it is important to highlight that these protections constitute rights in many respects beyond those available under domestic law, whether in Canada or in individual EU member states. The full scope and application of these protections should therefore be appreciated, especially because an investor is capable of either strengthening or limiting the purview of such protections upon making its investment (whether the initial establishment of operations, the expansion of current operations or otherwise), particularly where such investment involves negotiations or other arrangements with government organs or agencies. Canadian investors will also want to be familiar with these protections to ensure they appreciate when their right to bring an ISDS claim under CETA is triggered, as well as the unique features of investment claims brought under CETA.

In particular, the CETA Investment Chapter contains a unique "investment court" mechanism for the resolution of investment disputes. Rather than submission of disputes to ad hoc tribunals, which is the traditional system for the resolution of investment disputes under bilateral investment treaties, the CETA Investment Chapter establishes a tribunal of 15 members, each appointed for a five-year term, renewable once. Five members of the tribunal are to be nationals of an EU member state, five are to be nationals of Canada, and five are to be nationals of third countries. The tribunal is to hear cases in "divisions" consisting of three tribunal members — one a national of Canada, one a national of an EU member state, and the chair to be a national of a third country. Tribunal members are also subject to explicit ethics provisions in CETA, requiring, among other things, independence and avoidance of conflicts of interest.

Before a dispute can be submitted to the tribunal, CETA requires a consultation period of at least 180 days, initiated by a request for consultations. The request for consultations has to be submitted within three years of when the investor knew or should have known of the breach and resulting loss, or within two years after the investor ceases to pursue claims before national courts or when such proceedings have otherwise ended (and in any event no later than 10 years after the investor knew or should have known of the breach and resulting loss). If the dispute has not been settled within 90 days of the request for consultations, and the investor intends to submit a claim to the tribunal, the investor must, where the breach is alleged to be that of the EU or an EU member state, deliver a notice to the EU requesting a determination of whether the respondent shall be the EU or the EU member state. A claim cannot be submitted to the tribunal until 90 days have elapsed from the submission of the notice requesting determination of the respondent, where applicable.

CETA explicitly makes dispute resolution proceedings subject to the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (with some modification), with hearings open to the public. The dispute resolution provisions themselves are also limited in scope to allegations of a breach of the non-discriminatory treatment provisions and the investment protection provisions of the Investment Chapter (i.e., they do not apply to provisions relating to the establishment of investments, including market access). Lastly, unlike NAFTA and other bilateral investment treaties to which Canada is a party, CETA's Investment Chapter provides for the establishment of an appellate tribunal that can uphold, modify or reverse the tribunal's award based on errors of law, manifest errors of fact (including appreciation of domestic law), and certain grounds enumerated in the ICSID Convention, such as the tribunal manifestly exceeding its powers, or a serious departure from a fundamental rule of procedure.

GOVERNMENT PROCUREMENT

How does CETA regulate procurement?

Under CETA, Canada and the EU have committed to reciprocal non-discrimination in the government procurement context. CETA opens up competition for Canadian and EU suppliers to a wider range of government procurement activities by central government (federal), sub-central government (provincial) and associated agencies (municipalities, school boards, universities and others).

Prior to procuring goods or services, a procuring entity must understand (1) whether it is covered under CETA and (2) whether the procurement in question is a "covered procurement" for the purposes of the agreement.

Which Canadian entities are covered?

CETA covers the entities identified in the Annexes to CETA's Chapter 19. These Annexes are separated into central government entities, sub-central government entities and "other entities." The central government entities are named federal government agencies whereas the coverage of sub-central government entities and other entities varies from province to province.

What is a "covered procurement"?

The classification of a given procuring entity is important: the Annex that applies to a procuring entity establishes the procurement value thresholds of goods, services and construction services at which point the procurement process becomes subject to CETA. In addition, there are separate procurement thresholds for entities that are included in the Annexes but whose core activities relate to infrastructure-based activities, including the provision of transportation networks, drinking water, electricity and gas or heat.

The procurement thresholds are valued in the Special Drawing Right (SDR), which is a basket of currencies used by the World Bank. One implementation issue facing Canadian procuring authorities is how the SDR will be applied to convert the thresholds to Canadian dollars. Ontario, for example, has announced that it intends to convert the thresholds every two years.

Subject to the thresholds, the procurement of most goods is covered while only the services and construction services identified in Annexes 19-5 and 19-6 are covered. There are also numerous carve-outs and exceptions where the procurement rules in CETA do not apply, including procurement between subsidiaries or affiliates of the same entity, the acquisition or rental of land, existing buildings or other immovable property, and measures adopted or maintained with respect to Aboriginal Peoples. These are generally consistent with exclusions found in other trade agreements, such as the C*anadian Free Trade Agreement*, Canada's domestic free trade agreement.

What obligations do procuring entities have during the procurement process?

CETA imposes a number of procedural, administrative and technical obligations for procuring entities. These obligations generally align with the government procurement obligations under the *Canadian Free Trade Agreement*, however, it is important to note that while they are similar in many respects, the government procurement provisions of these trade agreements are not identical so compliance with the *Canadian Free Trade Agreement* will not ensure compliance with CETA nor vice versa.

CETA requires procuring entities to publish notices of intended procurement, containing prescribed information, to a free-of-charge, single point of access. Procuring authorities are also encouraged to publish a notice of future procurement plans on an annual basis.

CETA also allows procuring authorities to limit conditions for participation in a procurement process. These conditions can be imposed provided that the conditions are essential to ensure that a supplier has the legal and financial capabilities and the commercial and technical abilities to undertake the work. Additionally, supplier registration systems are permitted as long as they are not instituted for the purpose of creating unnecessary obstacles to participation. Selective tendering and multi-use lists are generally permissible, subject to certain requirements, while limited tendering (sole and single source) is only allowed in certain listed circumstances.

Further, CETA also lists a number of requirements for tender documentation, identifies factors relevant for setting deadlines within the procurement process and requires that a notice of award be made public within 72 days of the award of the contract.

Finally, should there be any challenges to the procurement process, procuring entities and suppliers are encouraged to resolve their issues through consultation. In the event that they are unable to resolve these issues, these parties can appeal to the designated administrative or judicial authority. It remains to be seen how these dispute resolution requirements will be implemented in the Canadian context and what impact this will have on the procurement law framework in Canada.

CONTACT US

Intellectual Property

Santosh Chari
416-863-3166

Anthony Prenol
416-863-4292

International Trade

Greg Kanargelidis
416-863-4306

Litigation & Dispute Resolution

Iris Antonios
416-863-3349

Michael Barrack
416-863-5280

Paul Blyschak
403-260-9704

John Mather
416-863-5287

Procurement

Marianne Smith
416-863-3156

Judy Wilson
416-863-5820