ACCESSING EUROPEAN MARKETS FROM NORTH AMERICA

OPPORTUNITIES AND DIFFICULTIES CREATED THROUGH THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT BETWEEN CANADA AND THE EU

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INTRODUCTION

After almost being derailed by the small Belgian region of Wallonia, the Comprehensive Economic and Trade Agreement (CETA)[1] was signed by Canada and the European Union in Brussels on the 30th of October 2016. After seven years of negotiation and despite the recent obstacles faced by Canada and the European Union, once fully ratified, CETA will eventually eliminate 99% of the tariffs between Canada and the European Union. At a time when U.S. trade policy seems poised to potentially take a protectionist turn, the present article will explore not only the opportunities stemming from facilitated access to European markets for Canadian companies, but will also examine, though a practical approach, the potential opportunities for U.S. and other foreign investors to use Canada as a springboard into European markets. Finally, it will also look at some of the challenges that Canadian markets may face as a result of this new treaty. Readers are reminded that at the time of the writing of this article, the incoming U.S. administration has indicated that it wishes to renegotiate the North American Free Trade Agreement and that any changes to this agreement could have an effect on the ability of corporations wishing to import goods of Canadian origin into the U.S. from Canada under the agreement as it stands currently.

OPPORTUNITIES FOR CANADIAN BUSINESSES

REDUCTION IN TARIFFS

According to the government of Canada, tariffs are currently imposed on approximately 75 percent of Canadian goods entering the EU. Upon its entry into force, 98 percent of the tariff lines imposed on Canadian goods by the European Union will be removed, and eventually, over a period of seven years, another 1% of tariff lines will be removed.

As a result, many Canadian goods will become more competitive in EU markets allowing Canadian exporters to have a significant advantage over other exporters that are not eligible to benefit from the tariff reductions provided by CETA. For example, maple-syrup producers will see the removal of the 8 percent tariff imposed on Canadian made maple-syrup.

REGULATORY COOPERATION

CETA also provides for greater regulatory cooperation between Canada and the European Union through the establishment of a Regulatory Cooperation Forum. This Forum is established to discuss regulatory issues that can affect both Canadian and European exporters in order to better develop cooperation in regulatory and policy development processes.

TRADE IN SERVICES

According to the Canadian government, the EU is the largest importer of services in the world, and in 2015 it imported $16.5 billion in services from Canada. With certain exceptions, CETA will cause Canadian services providers to receive the same treatment as EU services providers, thereby making it easier for Canadian services providers to access European markets. CETA will also establish a streamlined process for the recognition of foreign qualifications making it easier for Canadian professionals to provide services in the EU and have their qualifications recognized.

OPPORTUNITIES FOR U.S. AND FOREIGN INVESTORS

RULES OF ORIGIN

Under CETA's rules of origin provisions a product is deemed to have originated in Canada or the EU, if it has been wholly obtained, produced exclusively from originating materials or has undergone sufficient production in Canada or the EU. With respect to what constitutes sufficient production, CETA sets out a product-specific rule of origin which stipulates the minimum amount of production required on non-originating material for the resulting product to achieve originating status.

For example, in the automobile industry the rules of origin provide that Canadian automakers will be able to export up to 100,000 vehicles per year duty free provided that the value of all non-originating materials used does not exceed 70 per cent of the transaction value or ex-works price, or 80 per cent of the net cost of the vehicle. After this initial quota is met, the value of all non-originating materials used must not exceed 50 per cent of the transaction value or ex-works price of the vehicle.

Combined with the investment provisions set-out below, the rules of origin under CETA provide interesting opportunities for U.S. companies that are willing to set up manufacturing facilities or subsidiaries in Canada. In doing so, they will not only be able to benefit from CETA but also from existing trade agreements between Canada and the United States in order to get their products into both European and North American markets duty free.

FOREIGN INVESTMENT

CETA has very comprehensive investment provisions that limit the imposition market access restrictions on investors and companies and provide certain protections for investors.

Examples of the new investment provisions included in CETA are:

Market Access

Under CETA, Canada and the EU cannot adopt or develop limitations on the participation of foreign capital in terms of a maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment nor can they impose limitations that restrict or require specific types of legal entities through which a company may carry out an economic activity.

Performance Requirements

Canada and the EU cannot impose or enforce requirements with regards to an investment that would require a certain level or percentage of export of a good or service or impose a preference to goods produced in one party's territory as opposed to goods produced in the other parties' territory.

Non Discriminatory Treatment

Canada and the EU must treat each other's investors no less favorably than they treat their own or other third country investors in their territory. Additionally, Canada and the EU may not require that corporations appoint to senior management or board of director positions, natural persons of any particular nationality in order to benefit from the provisions of CETA. This is particularly interesting for U.S. companies who wish to set up subsidiaries or facilities in Canada and wish to have the senior management and board of director positions be filled by U.S. citizens.

Investment Protection

CETA also provides certain protection for investors, preventing Canada and the EU from expropriating or nationalizing investments except under certain situations and following strict guidelines. It prohibits restrictions and delays in transfers relating to investments made and provides investors with access to an independent tribunal, with the power to award compensation, in situations where investors feel they have suffered damages as a result of breaches in CETA's investment provisions.

Easing of Investment Restrictions

As a result of CETA, the net benefit review threshold under the Investment Canada Act will be raised from $600 million to $1.5 billion, thus simplifying the acquisition process for foreign investors wishing to purchase large Canadian companies.

PRACTICAL APPLICATION

Concretely, for U.S. and other foreign investors, the existence of CETA means that Canada is now an even better springboard for companies seeking access to European markets. By prohibiting restrictions based on the presence of foreign capital and foreign participation in investments, U.S. and foreign investors can easily take advantage of the reduction of trade restrictions between Canada and the EU, through investment in Canadian companies or more directly through the creation of subsidiaries in Canada. U.S. companies may also want to consider manufacturing products in Canada in order to use the same production center to take advantage of both NAFTA and CETA.

POTENTIAL CHALLENGES FACED BY CANADIAN MARKETS

INCREASED COMPETITION FOR CANADIAN MARKETS

One of the potential challenges faced by Canadian markets as a result of CETA is the increase in competition for smaller businesses and producers. Under CETA, Europe will be able to export almost 92% of its agricultural and food products to Canada duty free. This has certain Canadian producers worried about the potential for competition and how their products will fare if there is an influx of European goods into the Canadian market. For example, Quebec's cheese producers are worried about their products as a bilateral quota of 17,700 pounds of cheese will be imported under CETA.[2]

DISPUTE RESOLUTION PROVISIONS OF CETA

CETA provides for the creation of an independent tribunal for the resolution of disputes, including the power to award compensation for damages. The concern is that the ability of companies to sue governments under CETA, may create a situation where companies or investors can dictate government policy changes or create an atmosphere in which governments will find it difficult to enact legitimate regulatory or policy changes for fear of incurring liability.

CONCLUSION

Despite its opponents and the potential difficulties that it may create for some industries and businesses, there is no doubt that CETA opens up new opportunities in Canada for U.S. and foreign investors, especially in a time when some other governments are turning to more protectionist policies and outlooks. In a world in which there is talk of building walls, Canada is building bridges, and it remains to be seen how much traffic there will be.

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[1] Copy of the agreement is available online at: http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng

[2] http://www.cbc.ca/news/canada/montreal/ceta-quebec-cheese-1.3829391