In November 2015, Canada entered into the Trans-Pacific Partnership (TPP). The TPP will be the largest and most far-reaching international trade agreement that Canada will implement since the North American Free Trade Agreement (NAFTA) in 1994 and the World Trade Organization (WTO) Agreements in 1995. Together with the Canada-EU Comprehensive Economic and Trade Agreement (CETA), which was entered into in 2014, these initiatives were part of the previous federal government’s Global Market Action Plan to diversify Canada’s international trade and investment relationships by providing new, improved and preferential access to foreign markets for Canadian businesses.

**LENGTHY, COMPLEX NEGOTIATIONS LEAD TO AGREEMENTS**

In early November 2015, the Canadian government publicly released the TPP – an agreement among Canada and 11 other Pacific Rim countries representing 40% of the global economy. The agreement is a result of seven years of negotiations and comprises 30 chapters plus schedules, annexes and side letters, totalling thousands of pages. In addition to Canada, the members of the TPP are Australia, Brunei Darussalam, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam.

A year before the TPP legal text was issued, the Canadian government and the European Union released the text of the CETA, which took over four years to negotiate. As the name suggests, this comprehensive agreement goes beyond the template of previous international trade agreements and consists of 34 chapters as well as various annexes and declarations.

These state-of-the-art international trade agreements cover subject areas previously addressed by other international trade and investment agreements, such as the reduction of tariff and non-tariff barriers, cross-border services trade (including financial services), temporary entry of business persons, intellectual property, investment protection (including investor-state arbitration), trade remedies, public procurement and dispute resolution. However, they also cover subjects not previously considered as standard features of international trade and investment agreements. For example, the TPP deals with anti-corruption, electronic commerce, rules on transfer of data and cybersecurity.

The TPP and CETA will add to the intricate web of critical trade and investment rules that Canadian businesses will need to analyze and take into account in the formulation of their business strategies.
Canadian businesses should ensure they are taking advantage of all benefits available to them under Canada’s free trade initiatives and that they are also able to respond to the competitive challenges from other businesses that will be doing the same. Both the TPP and CETA can be expected to effect fundamental shifts in the flow of goods, services and investments both from Canada and into Canada.

With the TPP negotiations concluded, the parties must now begin the process of ratification and implementation at the domestic level. Since 2008, the federal government has followed the process of tabling treaties in the House of Commons before ratification. There have been calls within Canada for the agreement to be reopened as it was negotiated by the previous government without full consultation with the Canadian public. However, this appears to be unlikely given the years of complex negotiations and balancing of competing interests required to complete the TPP.

In the case of the CETA, while the negotiations between Canada and the EU were completed in November 2014, the ratification process has been held up because of concerns raised by certain EU members, particularly Germany, in relation to the investment chapter and the investor-state arbitration mechanism within CETA. These concerns, together with the ongoing U.S. negotiations of investment standards in the context of the Transatlantic Trade and Investment Partnership (TTIP), may create pressure to modify the CETA before it receives ratification from Canada and the EU.

Here is a very high level review of the TPP and CETA:

**Tariff Elimination:** A key aim of both the TPP and the CETA, like any free trade agreement, is to reduce and ultimately eliminate tariffs to improve market access opportunities abroad for domestic producers. Not surprisingly, the agreements set out detailed tariff liberalization obligations. For instance, both the TPP and the CETA include specific provisions for the agriculture sector. Under the TPP, parties are prohibited from using export subsidies in TPP markets and must work together to discipline the use of export credits at the WTO. Under the CETA, EU tariffs on products like maple syrup, fruit, vegetables, processed pulses and grains, and sugar confectionary will be eliminated immediately upon the agreement coming into effect. Other products, like pork and beef, will be duty-free but quota-limited. The Canadian market will also be significantly liberalized with 93.6% of agricultural tariff lines set at 0% immediately on entry into force of the CETA, subject to notable exclusions for products such as poultry and eggs.

A significant change for the automotive sector is the reduction in the required level of regional value content for auto parts and light duty vehicles to benefit from the TPP tariff reduction. The TPP provides for minimum regional value content of 45% for finished vehicles and between 35% and 45% for auto parts. This is a reduction from the 62.5% regional value content provided for in NAFTA. Whether these regional value content percentages within the two agreements are directly comparable is a matter of some debate because of the different formulas for calculating regional value content under the two agreements. Nevertheless, industry experts are concerned that this reduction could be harmful to Canada’s steel sector and to automotive manufacturers and suppliers.

**Trade in Services:** Like NAFTA, the TPP and the CETA adopt a “negative list” approach (in contrast to the WTO “positive list” approach) to liberalization of services. Under the TPP and CETA, all service sectors should benefit from non-discriminatory treatment and market access, except for those expressly excluded. The TPP and CETA also include chapters focused on financial services trade – one of the largest service sectors in Canada. These chapters provide for enhanced market access commitments for Canadian financial services firms from TPP parties and the EU. They also provide protections for financial investors and a special dispute resolution framework tailored to the financial services sector. However,
like other financial services trade agreements, the TPP and CETA preserve the broad discretion of financial regulators to take measures to promote financial stability and maintain the integrity of their financial systems.

**Intellectual Property:** Both the TPP and CETA introduce additional protection for patented inventions, particularly in the pharmaceutical field. Within the CETA, unreasonable delays in approving a pharmaceutical product will lead to additional protection for up to two years following patent expiry. The TPP further provides that unreasonable delays at the Patent Office will lead to extended patent terms. Canada’s eight-year market protection for biologics has now become an international standard, with flexibility in how it is achieved. New safeguards will ensure transparency in national pharmaceutical reimbursement and removal of technical barriers in pharmaceutical review and inspection. Other important changes arising from the TPP include an increase in the copyright term from 50 to 70 years, the application of trade secrets law to state-owned enterprises and the criminalization of certain misuses of trade secrets. Furthermore, under CETA, Canada committed to introduce a geographic indication protection system and to protect over 170 marks covering various foods and beer, with limitations to protect existing public domain uses.

**Investment:** The TPP and the CETA investment chapters include what are now considered standard guarantees prohibiting expropriation without prompt and adequate compensation, and requiring investors from each of the parties to be treated in a fair and equitable manner. Both the TPP and the CETA will ensure investors are accorded both “national treatment” and “most-favoured-nation treatment,” meaning that foreign investors cannot be treated in a less advantageous manner than domestic investors or investors of any other country. The investment provisions also include access to international investor-state mechanisms for dispute settlement, enabling foreign investors to enforce their rights against the host-state of the investment in an independent international arbitration proceeding. At the same time, the TPP and the CETA preserve the right of governments to legislate and regulate in the public interest. In particular, they preserve Canada’s ability to review certain foreign investments pursuant to the Investment Canada Act. However, under both agreements, the review threshold will be raised to $1.5 billion in enterprise value for investors from the EU and original signatories to the TPP. State-owned enterprises will not be eligible for the higher threshold.

**Public Procurement:** Subject to certain exclusions and exceptions, the TPP and the CETA will expand the ability of businesses to compete in the national and sub-national public procurement markets.

**Transparency and Anti-Corruption:** Under the TPP’s Transparency heading, parties will have to ensure developments affecting other signatories are published or disclosed, including legislative updates and administrative rulings and proceedings. The TPP also requires each party to adopt legislation criminalizing the offering of an undue advantage to a domestic or foreign public official. Among other obligations, parties will also be required to ensure corporations are held liable for corruption offences and adopt measures regarding books and records, whistleblower protection and integrity of officials.

The parties to the TPP and the CETA must now complete the process of ratifying and implementing the agreements at the domestic level.

Running a business domestically and abroad without knowing the fundamental rules of international trade and investment can lead to surprises, which are more often than not unfavourable. Canada’s current free trade arrangements present many opportunities that are either not fully understood or incorporated into the strategic business plans of many Canadian enterprises. Often, businesses make critical investment decisions without fully comprehending the potential threats that exist when
competing organizations are taking or can take advantage of market liberalization initiatives.

The TPP and CETA add to an already complex web of critical trade and investment rules that Canadian businesses need to understand and integrate into their business strategies in order to remain competitive.
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