Canada Minus: How a UK-EU FTA Incorporating the Withdrawal Agreement and Northern Ireland Protocol would be Inferior to CETA

ABSTRACT:

This note considers the effect of the Withdrawal Agreement and Northern Ireland Protocol on the future trading relationship between the UK and the EU following the conclusion of the Brexit Transition Period. It suggests that these instruments will undermine the benefits of an FTA for the UK, detracting severely from the Canada-style EU FTA by imposing considerable infringement on UK economic sovereignty in relation to trade in goods with Northern Ireland and a continued role for the CJEU in a manner unlike conventional international treaties.

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Negotiations on the future relationship between the United Kingdom (UK) and the European Union (EU) following the conclusion of the 'Brexit' Transition Period in January 2021 continue at pace at the time of writing. British Prime Minister Boris Johnson has stated that the UK seeks a basic Free Trade Agreement (FTA) with the EU, along the lines of the one which the EU concluded with Canada in 2017, if not better (sometimes referred to as 'Canada-style' or 'Canada-plus').[1] This would be in keeping with the Conservative 2019 Election Manifesto which outlined that the final arrangements with the EU would keep the UK out of the EU's Single Market and Customs Union with no role for the Court of Justice of the European Union (CJEU).[2] The alternative, were such an agreement not offered by the EU, would be the so-called 'no-deal'; in other words, the parties would trade with each other on the terms of the World Trade Organization (WTO) under which neither party would receive preferential treatment vis a vis all other WTO members, as encapsulated by the Most Favoured Nation rule of the General Agreement on Tariffs and Trade.[3]

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[1] PM Speech in Greenwich (3 February 2020) <https://www.gov.uk/government/speeches/pm-speech-in-greenwich-3-february-2020>

[2] Conservative 2019 Election Manifesto, p 5.

[3] Article I

However, it is not widely appreciated in the British media,[4] that unless the UK-EU FTA replaces the Withdrawal Agreement (WA) along with its Northern Ireland Protocol (NIP) concluded between the UK and the EU in late 2019, then such an instrument would be considerably inferior to the EU-Canada treaty, correctly identified as the Comprehensive Economic and Trade Agreement (CETA), at least for the UK. Additionally, if negotiations fail and there is no FTA between the UK and the EU, then even WTO no-deal terms would be problematic, at least for the UK because of the WA/NIP. Recognition of some of the harmful features of these agreements for the UK, notably to its own internal economic integrity, unsurprisingly led to the issuance of the Internal Market Bill by the UK Parliament in the fall of 2020.[5] This instrument, currently before the UK House of Lords, sought to circumscribe some of the effects of the WA which are understood as detrimental to its interests.[6]

This note will explore how the WA and NIP undermine the prospects of a Canada-style FTA between the UK and the EU, suggesting that unless the WA and NIP are expressly replaced by an FTA which more closely resembles CETA, or, in the alternative are repudiated by the UK government as part of a no-deal WTO strategy, as it stands the UK will be left in a decidedly sub-optimal position. Under the terms of the WA and the NIP, this position is also arguably one which does not satisfy the objectives of the Brexit project, as expressed by the Conservative government. This comment begins with a short outline of CETA – the UK's aspirational, and in some sense pragmatic, blueprint for its future relationship with the EU.

CETA was in many respects a remarkable achievement in trans-Atlantic economic relations, indicative of the EU's aggressive modern strategy in bilateral trade relations across a range of sectors.[7] It removed all tariffs on 98 per cent of traded goods, either eliminating them instantly or gradually within 3, 5 or 7 years. The few areas where tariffs remain mostly comprise sensitive agricultural products like dairy. On non-tariff barriers, CETA's chapter on technical barriers to trade builds on the key provisions of the WTO TBT (Technical Barriers to Trade) Agreement, designed to improve transparency and foster closer contact between the

[4] But see D Collins, "With Friends Likes These... the UK is Better off Walking Away than Signing up to an EU Deal" City AM (12 October 2020) and M Howe, "Why Boris Should Reject this Brexit Deal" The Spectator (20 October 2020)
[5] UK Internal Market Bill 2019-21.
[6] The Internal Market Bill has been heavily criticized for breaching international law (the WA and NIP treaties). A full discussion of this issue and plausible counterarguments is beyond the scope of this comment.
[7] See e.g. P Delimatsis, "The Evolution of the EU External Trade Policy in Services – CETA, TTIP, and TiSA after Brexit" 20:3 Journal of International Economic Law 583 (2017)

EU and Canada in the field of technical regulations. Both sides agreed to strengthen cooperation between their standard setting bodies as well as their testing, certification and accreditation organizations. A separate protocol improved the recognition of conformity assessment between the parties, providing for a mechanism by which EU certification bodies will be allowed to certify goods for the Canadian market according to Canadian technical regulations and vice versa. CETA's Sanitary and Phytosanitary (SPS) Chapter preserves the rights and obligations of the EU and of Canada under the WTO SPS Agreement.

CETA achieves less on the liberalization of services, as this sector is notoriously more difficult to liberalize than trade in goods, which are less heavily regulated in most places. However, CETA does provide room for recognition of professional qualifications and licenses of services providers. Under CETA the EU guarantees to Canadian service providers its current level of liberalisation in many sectors through an annex of reservations. With regard to the supply of a service through the temporary presence of natural persons (Mode 4 under the WTO General Agreement on Trade in Services), CETA contains provisions for intra corporate transferees to facilitate the activities of both European and Canadian professionals and investors. CETA further contains an extensive set of mutually binding disciplines with respect to domestic regulation ensuring fairness, equitable treatment with domestic suppliers and transparency for licensing and qualification regimes. The agreement also establishes a framework for the mutual recognition of professional qualifications and determines the general conditions and guidelines for the negotiation of profession specific agreements, or mutual recognition agreements (MRAs), typically in regulated professions such as lawyers. CETA includes additional chapters on investment, electronic commerce, intellectual property and government procurement. Generally speaking, it is a wide-ranging international economic treaty which, while not retaining the closeness of the EU's Single Market, were it replicated for the UK-EU relationship would yield economic benefits for both parties in the short and long term.

Unfortunately, an FTA between the UK and the EU which retains the obligations of the WA/NIP would be inferior to CETA in several respects. First, under CETA, Canada is not subject to the EU's strict state aid control. Rather, CETA merely contains rules on subsidies which essentially replicate WTO disciplines (the Agreement on Subsidies and Countervailing Measures), designed to control governmental assistance which has the effect of distorting international markets. Contrastingly, the WA specifies that Northern Ireland (NI) will be

subject to non-reciprocal state aid controls by the EU.[8] Crucially, these provisions have the potential to extend to Great Britain (GB) under the terms of the NIP if a measure is capable of affecting trade between NI – a concept which could be construed broadly by the EU Commission. Under the WA, the UK has no right to prevent EU state aid that interferes with industries whether in NI or GB. Furthermore, as regards NI, the UK is prevented from imposing WTO countervailing duties to protect NI industries against EU state aid intervention because WTO rules expressly do not apply to the WA/NIP.

Remarkably and wholly unlike anything in CETA, NI must apply internally, and on trade from GB, EU Single Market laws on goods, all of which are under direct jurisdiction of the CJEU. Tied to this is the requirement for EU mandated regulatory controls on goods imported into NI from GB. This means that while NI is notionally part of UK customs territory it remains subject to EU tariffs on goods from GB if goods not proved to be "not at risk" of going on into the EU. Moreover, NI is subject to EU tariffs on goods from GB if "processed" within NI, denying benefits of lower UK tariffs (either on a WTO MFN basis or preferentially under FTAs) to NI businesses.[9] Not only do these provisions erode the territorial integrity of the UK's own Internal Market, they also frustrate the UK's ability to sign FTAs with third countries. It can be expected that the complications associated with shipping goods into or from NI would be unattractive to potential treaty partners seeking market access to the whole of the UK on unambiguous and equal terms. For example, it is difficult to imagine that the effective carving off of one segment of the UK would not undermine the UK's initiative to join the Comprehensive and Progressive Trans-Pacific Partnership as this would require extensive reservations.

Secondly, under CETA Canada is not subject to the CJEU jurisdiction whatsoever. Instead, CETA contains a neutral arbitration panel system for dispute settlement, as in many conventional FTAs. Furthermore, CETA enables the parties to use the WTO disputes system in circumstances where the dispute falls within WTO jurisdiction.[10] In sharp contrast, the WA specifies that the CJEU's direct jurisdiction will cover laws on the making and trading of goods within NI, customs and other trading rules between NI and GB and NI and the EU. The CJEU will also be able to rule on the applicability of EU state aid rules, as noted above.[11] Add to this the fact that the EU's court will have a role in adjudicating the UK's sizable

[8] Art 10 NIP
[9] Art 5 NIP
[10] Art 29.3 CETA
[11] Art 4 WA

financial obligations to the EU created by the WA as well as the rights of EU citizens in the UK (in cases begun before the end of 2028).[12] Even where direct jurisdiction does not apply (as in EU citizens' rights cases begun after 2028) the WA requires a bilateral arbitration panel to refer any question of EU law to the CJEU and to be bound by its decision.[13] The effect of this clause is that the CJEU, rather than the arbitration panel, will continue to "interpret" the rules on the rights of EU citizens in the UK for their lifetimes. It should come as no surprise that CETA does not contain a provision similar to this. Continued jurisdiction of the CJEU over FTAs is not found in any of the EU's other FTAs, except those with the former Soviet republics of the Ukraine, Moldova and Georgia. The ongoing role for the CJEU over the UK is important because, as of February of 2020, the UK no longer has a judge on the CJEU – it is a wholly foreign court.

Perhaps even more troubling in relation to dispute settlement, unlike CETA, the WA excludes recourse to the WTO disputes procedures or any other procedure outside those found in the WA. CETA allows for normal remedies for breach, including suspension of tariff concessions (as under WTO law). But the WA contains very strict provisions for the enforcement of arbitral awards by the imposition of "lump sum or penalty payments."[14] The power to impose financial penalties are unprecedented in international trade agreements, including the EU's trade and association agreements with other countries.[15]

Moreover, Canada is not required to give direct effect or supremacy to CETA under its laws. CETA is simply an ordinary international treaty, ratified by an Act of Parliament.[16] That Act, like all Acts of Parliament in Canada is subordinate to the Canadian Constitution. Yet the WA requires that it (together with the NIP) must be given direct effect within UK courts and further, must be made supreme over all laws of UK origin including Acts of Parliament,[17] an astounding surrender of sovereignty. It is barely believable that the UK conceded to this arrangement in the first place.

CETA does not require Canada to apply EU laws on goods within one of its provinces, which would effectively restrict inter-Provincial trade and therefore violate the

[12] Art 158(1) WA
[13] Art 174 WA
[14] Art 178 WA
[15] For example, Article 315 of the EU-Ukraine Agreement contains standard compensatory remedies.
[16] Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act of 2017. Section 8 states that no causes of action arise and no proceedings may be brought under the sections of the Act which implement CETA without the consent of the Attorney-General of Canada.
[17] Article 4 WA. This obligation was enacted into law via section 7A of the EU (Withdrawal) Act 2018, which was inserted by the EU (Withdrawal Agreement) Act 2020.

Canadian Constitution.[18] But under the NIP the whole corpus of EU Single Market laws relevant to the making and marketing of goods must be applied within NI, including future changes to those laws. It is inconceivable that Canada would sign a treaty which would require one of its provinces to be subjected to a different regulatory regime than the rest of Confederation. Inter-Provincial trade is one of the key pillars of Canada's federal union. Indeed, The Canadian Free Trade Act of 2017 was precisely designed to reduce any existing barriers to inter-provincial trade.[19]

Under CETA, Canadian exporters can take advantage of "home country certification" that exports comply with EU standards. This is because CETA has a protocol on the mutual acceptance of the results of conformity assessment that provides for the EU and Canada mutually to recognise testing of goods carried out in the country of export, in order to avoid the need for double testing within the EU (or vice versa)[20] provided that certain conditions are met. In contrast, the EU has (so far) refused to countenance continued testing and certification by UK based bodies – there is certainly no mention of this in the WA. This approach is bizarre since there is a vast range of certification required under EU single market law within which UK-based certification bodies are familiar and skilled at carrying out. While not explicitly precluded by the WA/NIP, it now appears unlikely that the EU will offer this to the UK.

Finally, under CETA Canada benefits from "cumulation of origin" for manufactured products under its FTAs with third countries.[21] This means that, if both the EU and Canada have free trade agreements with a third country (such as Japan), then products of that third country may be taken into account in satisfying the rules of origin that ensure tariff free access into each other's market. This cumulation of origin from third countries with which both partners have free trade agreements, known as "diagonal accumulation" is routinely agreed by the EU and is embodied in the Regional Convention on pan Euro Mediterranean Preferential Rules of Origin (PEM Convention)[22] that contains all the European and near-European(North African) countries with which the EU has FTAs. The PEM Convention also allows for cumulation between all signatories to the agreement. Without objective justification, the EU has not offered this to the UK (so far) – again it is missing from the

[18] Section 121 of the Constitution Act 1867
[19] S.C. 2017, c. 33, s. 219
[20] Article 3(2) of the Protocol
[21] CETA's Protocol on Rules of Origin, Article 3(8)
[22] OJ L54 (26 February 2013)

WA/NIP. One might have expected that the UK would have insisted on the inclusion of this in the 2019 instruments.

In conclusion, the features of a UK-EU FTA which incorporate the WA and NIP will unquestionably be an inferior instrument to CETA. In other words, unless the WA and NIP are repudiated or replaced in their entirety by new stand-alone FTA, a UK-EU FTA will be more akin to Canada-minus than Canada-plus. Such an arrangement would constitute a serious infringement on the UK's economic sovereignty in a manner that would scarcely be contemplated by another country. It remains to be seen what features of the WA and NIP will be retained in a new FTA if one is agreed. But as it stands given the extensive encroachments on sovereignty (which arguably undermine the whole purpose of Brexit) and the limited economic benefits, exiting the EU without an FTA and repudiating the WA and NIP may indeed be a preferable option for the UK. In the meantime, we can hope that an FTA which more closely resembles CETA will be agreed.