

European Union's Free Trade Agreements: Overview and Prospect Examples of Korea, Canada and USA

The recent Free Trade Agreements ('FTAs') negotiated between the European Union with Korea, Canada and the United States of America illustrate a major evolution in the role that these FTAs could play in a globalised economy. Countries want to abolish tariff barriers, but at the same time protect their economy. Non-tariff barriers and the Investor-State Dispute Settlement Tribunal are key legal elements included in those FTAs.

Introduction – EU was Founded on FTAs

Some of the 'Founding Fathers' of the European Union were lawyers. This probably explains why they used law as a tool, first to secure the peace in Europe and to enhance the European economy benefits. The EU was founded on an economic basis in 1957 with the European Economic Community ('EEC'). The 1960s was a decade of rising economic strength and the EU countries decided to stop charging custom duties: the founding acts of the EU were Fair Trade Agreements. Nowadays, the EU's trade policy is becoming more ambitious than ever, with its ongoing negotiation with the USA on the Transatlantic Trade and Investment Partnership ('TTIP') which reached the thirteenth round of talks on 25 to 29 April 2016. However, public opinion seems to be alarmed by the prospect of such an agreement, both in the member States of the EU, especially in France, and in the USA, fearing there might be a race to the bottom in agricultural, social and health regulations. Aware of these concerns, the EU is trying to make the talks as transparent as possible by publishing the negotiating texts and factsheets, while aiming to sign the final agreement before the end of this year.¹

Enlarging the market opportunities beyond European borders has been the EU's core strategy in foreign trade policy for two decades. After creating strong bonds with some countries in development, such as Mexico, the CARIFORUM States, Cameroon, Madagascar, Mauritius, the Seychelles and Zimbabwe through the Economic Partnership Agreements in the 2000s, the EU made a change of course by looking for partners with an equivalent level of development. It was in this framework that the EU signed its first 'New Generation Free Trade Agreement (FTA)' with the Republic of Korea on 6 October

2010, entered into force on 1 July 2011. It was indeed a highly ambitious treaty, with a large scope of liberalisation and a fast removal of most of the tariff and non-tariff barriers to trade. The next major step was made by the Comprehensive Economic Trade Agreement ('CETA') with Canada; the negotiation ended in 2014 and the legal review of the agreement ended on 29 February 2016. The text is waiting to be ratified by the EU Parliament.

These are the key trade agreements for the EU, worth a deeper insight not only from the legal point of view but also in terms of their economic benefits. Moreover, if the customs duties, mostly removed by these agreements without difficulty, are not the main issue anymore, there are still some challenges in the matter of non-tariff barriers ('NTB') to trade. The latter consist of all sorts of measures and acts such as legislation or technical regulations which could possibly prevent foreign exporters from penetrating the market.

Thus, the current issue for the EU and its trade partners is resolving the question of how to lift efficiently those NTB, often constitutive of a grey area challenging to define. This requires, of course, a sustainable dialogue between the parties to the Agreement but economic actors should also be given clear information on these matters.

EU-Korea FTA: Achievements and Remaining Challenges

As article 12.2 of the EU-Korea FTA provides, the parties to the FTA, conscious of 'the impact which their respective regulatory environment may have on trade between them', agreed to 'pursue an efficient and predictable regulatory environment for economic operators'. In other terms, the goal of the FTA consists of creating a beneficial environment for trade by abolishing various kinds of barriers to trade.

At the fifth year since its entry into force, the EU-Korea FTA appears to be a fine success for both sides. It became a model for the EU's following FTA negotiations with other partners all over the world. Nevertheless, there is still more to be done, especially in the matter of deleting NTB.

A Large Scope of Liberalisation of the Trade in Goods and Services

Since its negotiation, the EU-Korea FTA was presented as a deep and comprehensive trade agreement, implying a progressive but fast removal of all the customs duties



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on the trade of goods and services. It also provides for investments in services and industrial sectors, a stronger protection of intellectual property (that is, geographical indications) and improvements in competition rules. Globally speaking, this bilateral agreement went further than the General Agreement on Tariffs and Trade ('GATT') and General Agreement on Trade in Services ('GATS') of the World Trade Organization ('WTO'), setting up consequently a considerable free trade zone among the EU and its member States including France, and Korea.

Such liberalisation was necessary, provided that the trade balance between the EU and Korea was unprofitable for the first EU countries. Indeed, according to the statistics from the Directorate General for Trade of the European Commission, about 68 percent of Korean exports entered the EU market duty free, whereas only 15 percent of the EU exports benefitted from the same treatment.²

Article 2.3 of the FTA provides a large definition of customs duty which includes 'any duty or charge of any kind imposed on, or in connection with, the importation of a good, including any form of surtax or surcharge imposed on, or in connection with, such importation'. Article 2.5 and the following articles establish the elimination of the customs duties, pursuing a progressive schedule, to make almost the entire importation and exportation duty-free within five years. On 1 July 2016 practically all of the



duties were abolished, except for a limited number of agricultural products.

In addition, the customs procedures should comply with some general principles such as efficiency and transparency, provided in Chapter VI on trade facilitation. The aim is to prevent the administrative measures from forming a burden for exports and imports of the goods. Thus, all the procedures related to customs must be simplified and predictable.

Strong Economic Impacts: Regulation of the Asymmetric Trade Balance

Some analyses show that the announcement of the conclusion of a FTA between Korea and the EU was enough to increase the trade exchange in both parties by mitigating the political uncertainty and creating a favourable atmosphere for trade. Furthermore, they consider that the FTA enhanced the probability to export by 10 percent.³ It would mean that the agreement produced some positive results in trade even before its entry into force.

One of the major advantages that the EU took from the FTA with Korea is undoubtedly the rebalancing of the trade flows between the two partners. The statistics are highly instructive: EU trade flows which always had been negative started to find balance after the entering

into force of the FTA in 2011 (about -3.8 billion euros, compared to -11.6 billion euros in 2010), to become positive in 2013 (4 billion euros), which means only one year and a half after the partial liberalisation from July 2011.⁴

From Korea's point of view, this surplus could be seen as an undesired outcome of the FTA. However, the current situation is partially due to the decrease in demand in the European market since the financial crisis in 2012. The analysts consider that without the FTA, the negative impact of the crisis on Korean exports to Europe could have been more important.⁵

Considering all these facts, the FTA has finally been beneficial for both Korea and the EU. This Agreement, meaning the legal formalisation of a negotiation, is the best example of what could be the role of law: a tool to enhance the global economy benefits and at the same time meet the primary function of law, that is, to secure such benefits.

Elimination of the NTB: Remaining Challenges

The removal of the NTB consists mainly in harmonising the technical standards whose difference from a country to another represents a significant obstacle to trade. Both parties of the FTA agreed on several key points in reducing the technical barriers: the reference to international standards (ISO, CEI, UIT) in the sector of consumer electronics; a common definition of pharmaceutical products; and the mutual recognition of the standards in motor vehicles. Especially the latter allowed the European market to open widely to Korean companies in the sector.

In order to go further on these questions which require important technical studies, the Agreement also set up seven specialised committees, seven working groups and an Intellectual Properties Dialogue. These structures led to permanent discussions between the parties to the FTA on future regulatory developments and implications.

Drawing lessons from the experience in the FTA with Korea, the EU and its member States moved on to the next stage, looking for even more ambitious FTAs with the world's biggest economic powers, that is, Canada and the USA. Concerning Canada, the negotiation is concluded, waiting to be signed this year, with the entry into force expected for 2017.

CETA: A Larger Scope of Liberalisation with an Optimisation of Certifying Procedures

Introduction

The FTA which will tie commercial relations between the EU and Canada is called the Comprehensive Economic Trade Agreement ('CETA'). The name reveals the philosophy of the Agreement, in the same vein as the EU-Korea FTA, emphasising the need to pursue deep commercial relations.

But the negotiators are expecting more from the CETA. Cecilia Malmström, European Commissioner for Trade, and Chrystia Freeland, Minister of International Trade of Canada, declared together that 'CETA represents the new standard of progressive trade agreements'.⁶ Indeed, the EU and Canada set up the elimination of most of the tariff lines in trade in goods and enlarged the opportunities for trade in services by opening public procurement to EU operators in more favourable conditions than what was offered by the North

American Free Trade Agreement ('NAFTA') concluded between Canada, the USA and Mexico that came into effect on 1 January

Canada will be EU's most important trade partner with which it signed a FTA.

1994. It is a comprehensive agreement which liberalises a considerable amount of goods for trade and protects the foreign investment between the parties by establishing a dispute settlement mechanism ensuring a non-discriminatory treatment among investors.

Eventually, the main target of the CETA was to enable European companies to enter the first market within the world, that is, the North American market. Starting with Canada, on the basis of the successful EU-Korea FTA, this was the first necessary step for the EU before negotiating and finalising the TTIP with the USA.

Going Further in the Elimination of Customs Duties

The majority of tariffs will be eliminated on the first day the Agreement enters into force, except for some sensitive categories of products which will be progressively eliminated or reduced.

The CETA provides that 100 percent of the industrial tariff lines will be fully eliminated and 99.6 percent of them upon entry into force in Canada and 99.4 percent in the EU. It means that most industrial products will be duty-free immediately when the FTA becomes binding. According to the expectations, EU exporters would save on average 470 million euros per year and Canadian exporters about 158 million euros.⁷

Agricultural products will also benefit from the immediate liberalisation upon the entry into force and it concerns 90.9 percent of all the agricultural tariff lines in the Canadian market and 92.2 percent on the European side. The two parties to the Agreement also agreed on the prohibition of all forms of export subsidies to fully liberalised products. However, some quotas are specified for sensitive agricultural products such as dairy, beef, pork, sweet corn and common wheat.⁸

Elimination of NTBs by Conformity Assessment

Built on the main provisions of the WTO Agreement on Technical Barriers to Trade, the CETA hopes to strengthen the implementation bodies in charge of certification and accreditation.



Thanks to the recognition of conformity assessment between Canada and the EU, which will be subject to a future protocol, both parties will be allowed to certify their own exports according to the other's technical regulations. This undoubtedly encourages exports by preventing double testing and, thus, the extra costs which are constitutive of considerable obstacles to trade for small- and medium-sized companies. The latter can then expect to benefit from the CETA to enlarge their markets across the Atlantic.

Although being an efficient way of optimisation, the conformity assessment somehow caused concern in public opinion, fearing a race to the bottom in standards. However, the negotiators believed in the convergence of the standards from both sides and emphasised the fact that the differences in regulation can result in 5 to 20 percent of charges to export, due to doubled procedures, translations of certifications and other numerous customs formalities. The main idea is optimising the procedures and not dismantling the whole security standards existing respectively in both parties to the Agreement.

Investor-State Dispute Settlement (ISDS) Mechanism

Finding a balance between protecting foreign investors' rights and the State's sovereignty in regulating general welfare is a delicate issue. Aware of the need to provide investors with a stronger protection in this matter, the EU introduced some important innovations, while preserving the State's prerogatives.

The new institutional structure for the tribunal in charge of ISDS is one of these innovations. Under the CETA, the investment dispute settlement will not be dealt by a tribunal appointed *ad hoc*. There will be a permanent tribunal with appellate mechanism (article 8.27 of the final text not yet come into effect) with open hearings and the publication of all the submitted documents. This shows the negotiators' will to set up a fair dispute settlement for investors, while being transparent and acceptable for the State and the public.

With entry into force of the CETA, Canada will be EU's most important trade partner with which it signed a FTA. The issues that this Agreement implies are significant. The successful experience from the EU-Korea FTA enlightens its prospect, thus the economic forecasts are optimistic. Could this dynamism go furthermore, with the conclusion

of the TTIP by the end of this year, as expected? Although being in the same vein as the two FTAs reviewed by this article, the TTIP is subject to more criticisms and scepticism, which do not make negotiations easier. One thing is certain: this is the EU's next major challenge to overcome in its foreign trade policy. The outcome of the negotiations is eagerly awaited.

On April 2016, France, a major funding member of the EU, announced that it is not willing to support the negotiations of the TTIP anymore. Initially the French President brought his full support to achieve a successful negotiation of the TTIP. Now, the French government and the public opinion fear the unbalanced and unfavourable outcomes of the TTIP, more than its expected benefits for the European and French economies. More specifically, the issues are concentrated on the following business sectors: agricultural products with the fear of the liberalisation of GMOs in French and European markets and foreign direct investment with its ISDS mechanism, blamed for the lack of transparency.

If the FTAs imply mostly economic issues and benefits, or at least expectations, in a global worldwide economy, they also are the legal reflection of something bigger than short term business expectations in order that the EU not be excluded from the mundialisation. EU countries want to take an active part in this mundialisation. If the challenge looks economic at first, it is however a political one. The political issues between 28 European countries of major importance and third party countries among also the top 15 countries in the world, cannot be resolved easily and within a short period of time. Those FTAs have to reflect all of these issues and anticipations of our future world. Like any agreement, FTAs shall be balanced and renegotiated on regular basis to evolve and remain adapted to the objectives of the parties.

Dealing at this level, with such major countries, is a big challenge. Governments and public opinion cannot expect more than what the law can offer: a framework and a tool for negotiation that should not hide the targets of the parties to an agreement.

International business lawyers like us have a role to play in these FTA negotiations and implementation. Legal issues such as NTB (the provisions under Chapter 4 of the EU-Korea FTA and Chapter 4 of the CETA), intellectual property (Chapter 10 of the EU-Korea FTA and Chapter



20 of the CETA covering a large array of rights such as copyright and related rights, trademark rights, rights in geographical indications etc), arbitration in the matter of investment (in particular Chapter 8 of the CETA), procedures, provided in the FTAs, are our knowledge, our work, our tools and we should know better than anyone else how to use them and make them also meaningful for non-legal people, companies, and governments to achieve each other's goals.

Notes:

- 1 From the statement by M Ignacio García Bercero, EU Chief Negotiator for TTIP, in the Conclusion of the 13th TTIP negotiation round on 29 April 2016, available at http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154480.pdf.
- 2 Csilla Lakatos and Lars Nilsson, 'The EU-Korea Free trade Agreement: Anticipation, Trade Policy Uncertainty and Impact', Chief Economist and Trade Analysis Unit, European Commission's Directorate General for Trade.
- 3 *Ibid.*
- 4 European Commission's communication, 'European Union, Trade in Goods with South Korea', 26 April 2016, available at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113448.pdf.
- 5 European Commission's Annual Report COM(2015) 139 final, 26 March 2015.
- 6 See <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1483>.
- 7 European Commission, 'CETA-Summary of the Final Negotiating Results', available at http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf.
- 8 *Ibid.*



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