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**THE FUTURE OF DEEP FREE TRADE
AGREEMENTS: THE CONVERGENCE OF TPP
(AND CPTPP) AND CETA?**

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The Future of Deep Free Trade Agreements: The Convergence of TPP (and CPTPP) and CETA?*

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Abstract: Focusing on TPP, CPTPP and CETA as deep free trade agreements (FTAs) that concentrate on regulatory disciplines, this paper examines a key question concerning the future of deep FTAs: do deep FTAs converge and, if so, why? It argues that, first, deep FTAs converge in their approach to trade and investment in two crucial respects: regulatory disciplines and dispute settlement. CPTPP narrows its gap with CETA through suspending rules in arguably most controversial aspects of TPP (i.e. intellectual property and investor-state dispute settlement). Differences emerge but are not unbridgeable, and convergence varies depending on the area. Second, the reasons for the convergence include shared FTA objectives (particularly regulatory protection), the development of FTA rules from WTO norms, and other factors (e.g. the lessons drawn from previous investor-state dispute settlement experience, the inherent limit of FTAs, and membership overlap). Finally, the convergence of deep FTAs has the potential to bridge most if not all differences if there is political willingness.

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1. Introduction

Deep free trade agreements (FTAs) refer to trade pacts that go beyond tariffs and focus on behind-the-border regulatory disciplines or requirements. A number of larger deep FTAs have been concluded recently and attracted a lot of attention. Although the US has withdrawn from the Trans-Pacific Partnership (TPP) that was signed in February 2016, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) was signed by trade ministers from the other 11 TPP countries on 8 March 2018, in Chile. The EU-Canada Comprehensive Economic and Trade Agreement (CETA) entered into force provisionally on 21 September 2017.¹ The significance of these pacts is illustrated by, inter alia, the number and size of economies involved in these FTAs. They will serve as a reference point for FTA negotiations (e.g. North American Free Trade Agreement (NAFTA) renegotiations) and could have spill over effects on other states (not only smaller economies but also possibly China through venues such as EU-China investment treaty negotiation and possible Canada-China Free Trade Agreement negotiation).

After CPTPP was signed in March 2018 and CETA entered into force provisionally on 21 September 2017, the overall legal analysis of these deep FTAs is largely lacking. The paper analyses a crucial but so far under-explored question: do TPP (and CPTPP) and CETA converge regarding their approaches? If so, why? It would be meaningful to review the whole of the FTA texts across different issues, which help to better understand the course of trade law. The text of these agreements is important since they do not have rich treaty practice such as that of the WTO norms, although the text does not tell the full story. Due to space and

¹ European Commission, *EU-Canada Trade Agreement Enters into Force* (20 September 2017), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1723>.

capacity limit, this paper does not attempt to analyze these FTAs in detail (both² contain many country or province specific rules that render the diversity even larger), or to discuss the merits of their rules. Instead, it endeavours to provide a panoramic view of the FTAs, identify their approaches, and explore underlying rationale.

The paper argues that these FTAs perhaps are not radically different in their approaches and largely converge in two crucial issues: regulatory disciplines and dispute settlement, which will be discussed in Parts two and three. The reasons for the convergence will then be discussed in Part four, and Part five concludes.

Three points deserve attention first. One is that divergence differs from minor differences. Here divergence or convergence refer to the underlying fundamental approach to trade taken by deep FTAs instead of minor differences in the wording or isolated arrangements. It is natural to have the latter as these deep FTAs involve different countries with their own domestic law and country-specific negotiation demands. As an example, while the scope of the investment provisions and the fair and equitable treatment (FET) could be different, generally both pacts converge in increasingly recognizing the right to regulate.

The second point is that this paper relies on the TPP text and, when necessary, the different aspects of CPTPP will be highlighted. This is for several reasons. CPTPP has largely kept the TPP text, although CPTPP suspends 22 TPP articles.³ TPP has generally reflected the US trade approach, and will likely serve as the basis of the future US FTA negotiations.⁴ The analysis of TPP helps to reflect on the approaches of the US⁵ and the TPP-11 countries, at least to some degree. The Trump administration's early proposal to renegotiate the NAFTA appears to be "very in line with existing US trade laws."⁶ The US

² For the sake of simplicity, both agreements or two FTAs mean TPP (and CPTPP) and CETA.

³ New Zealand Ministry of Foreign Affairs and Trade, *CPTPP vs TPP*(2018), available at <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/tpp-and-cptpp-the-differences-explained/>.

⁴ Inside U.S. Trade, *Agriculture secretary: NAFTA could be a 'trilateral TPP'*(2017), available at <https://insidetrade.com/daily-news/agriculture-secretary-nafta-could-be-trilateral-tpp>; Tomer Broude, et al., *The Trans-Pacific Partnership and Regulatory Space: A Comparison of Treaty Texts*, 20 JOURNAL OF INTERNATIONAL ECONOMIC LAW 391, 391 (The TPP is most similar to agreements involving the US) (2017).

⁵ For the analysis of the US trade policy after President Trump, see, e.g., Heng Wang, *Divergence, Convergence or Crossvergence of Chinese and US Approaches to Regional Integration: Evolving Trajectories and Their Implications*, 10 TSINGHUA CHINA LAW REVIEW 149, 149-185 (2018).

⁶ William Mauldin, et al., *Trump Nafta Blueprint Raises Concerns in Canada and Mexico*(2017), available at <https://www.wsj.com/articles/trump-nafta-blueprint-raises-concerns-in-canada-and-mexico-1490911670>.

administration has borrowed language from TPP as a useful template for modernizing NAFTA.⁷ It is indicated that any of the TPP provisions that Mexico and Canada agreed to is the starting point for NAFTA modification, and the intention is to push them further.⁸ The US will probably maintain this position on key issues including investment, intellectual property, e-commerce and SOEs: under the Trump administration's NAFTA negotiating objectives, the new NAFTA may "look very similar to" TPP, despite a more skeptical approach to trade in issues such as safeguard and obligatory trade deficit concern.⁹

The third point relates to the coverage of CETA. A limited number of CETA rules in the following areas fall outside the scope of provisional application,¹⁰ and therefore are not in force until the national ratification of individual EU member states: investment protection, investment market access for portfolio investment, and the Investment Court System.¹¹ As these rules at least to some extent reflect the position of the EU and Canada, they are included in the analysis but their effects need to be observed.

2. Regulatory disciplines

Tariff reduction or elimination is pursued by TPP and CETA. For instance, tariff liberalization obligations are provided for in the agricultural sector and variance exists in issues such as the different formulas for calculation of regional value content for the automotive sector.¹² Overall, most-favoured-nation (MFN) tariff rates are generally rather low and, except for products in a small number of protected sectors, securing new meaningful

⁷ Chad P. Bown, et al., *US Trade Representative "Surprised and Disappointed" Statement from Latest NAFTA Talks—Annotated and Explained* (Nov. 1, 2017), available at <https://piie.com/blogs/trade-investment-policy-watch/us-trade-representative-surprised-and-disappointed-statement>; *Closing Statement of USTR Robert Lighthizer at the Fourth Round of NAFTA Renegotiations* (2017), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/october/closing-statement-ustr-robert..>

⁸ CNBC, *First on CNBC: CNBC Transcript: U.S. Commerce Secretary Wilbur Ross Speaks with CNBC's Kelly Evans on "Closing Bell" Today* (2017), available at <http://www.cnbc.com/2017/03/30/first-on-cnbc-cnbc-transcript-us-commerce-secretary-wilbur-ross-speaks-with-cnbc-kelly-evans-on-closing-bell-today.html>.

⁹ Simon Lester, *The Trump Administration's NAFTA Negotiating Objectives* (International Economic Law and Policy Blog 2017).

¹⁰ Council Decision (EU) 2017/38 of 28 October 2016 on the Provisional Application of the Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union and Its Member States, of the Other Part (2016).

¹¹ European Commission, *CETA Explained: Which parts of CETA will the EU provisionally apply?*, EU COMMISSION (Sept. 21, 2017), <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/>. (21 September 2017), available at <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/>.

¹² Riyaz Dattu, et al., *TPP and CETA: Landmark trade deals that Canadian businesses need to understand* (2015), available at <https://legalyearinreview.ca/en/tpp-and-ceta-landmark-trade-deals-that-canadian-businesses-need-to-understand/>.

FTA tariff preferences is difficult.¹³ Both agreements are more about regulatory requirements than tariff reduction, and highlight regulatory requirements.¹⁴

2.1 Across-the-board regulatory disciplines

These agreements converge in a number of regulatory requirements that apply across chapters regarding, inter alia, transparency and regulatory coherence or cooperation. TPP and CETA transparency clauses are often nearly identical (e.g. review and appeal,¹⁵ general publication requirements,¹⁶ and administrative proceedings¹⁷) or strikingly similar (e.g. provision of information¹⁸). TPP develops additional provisions on publication,¹⁹ devotes a special section to anti-corruption,²⁰ and contains an annex on transparency and procedural fairness for pharmaceutical products and medical devices.²¹

For regulatory cooperation or coherence, these agreements have different pathways. First, CETA prefers the model of substantive regulatory convergence given the similar economic development level of the EU and Canada, while TPP predominantly highlights procedural convergence “with far greater emphasis on intra-governmental regulatory reform efforts than on inter-governmental regulatory convergence per se.”²² Second, TPP applies a top-down approach imposing regulatory coherence requirements, which goes beyond CETA in key issues like the provisions on (core) good regulatory practices. CETA prefers the bottom-up approach of regulatory cooperation. While TPP regulatory coherence rules are tempered with the term “should”,²³ CETA leans towards a “softer” grassroots approach encouraging cooperation without requiring the implementation of good regulatory practice. However, the top-down and bottom-up approaches are not always exclusive. Although FTAs tend to be top-down and impose obligations, they are well-suited with the “more bottom-up approach of regulatory cooperation, in which a range of incentives—peer pressure, reputation, market

¹³ Joost Pauwelyn, *Taking the Preferences Out of Preferential Trade Agreements: TTIP as a Provider of Public Goods?* 2 (2014).

¹⁴ Bernard Hoekman & Mavroidis Petros C., *Regulatory Spillovers and the Trading System: From Coherence to Cooperation* at <http://e15initiative.org/wp-content/uploads/2015/04/E15-Regulatory-OP-Hoekman-and-Mavroidis-FINAL.pdf>.

¹⁵ TPP Article 26.4; CETA Article 27.4.

¹⁶ TPP Article 26.2; CETA Article 27.1.

¹⁷ TPP Article 26.3; CETA Article 27.3.

¹⁸ TPP Article 26.5; CETA Article 27.2.

¹⁹ TPP Article 26.2.3.

²⁰ *Id.* at, Chapter 26, Section C.

²¹ *Id.* at, Annex 26-A.

²² Rodrigo Polanco Lazo & Pierre Sauvé, *The Treatment of Regulatory Convergence in Preferential Trade Agreements*, *WORLD TRADE REVIEW* 1(2017).

²³ See, e.g., TPP Article 25.5.

disciplines, financial assistance conditionality, name and shame, capital market and membership sanctions—are used to motivate compliance with standards.”²⁴

That said, convergence exists in strengthening regulatory cooperation. Both agreements have “a similar basic structure” regarding regulatory coherence or cooperation,²⁵ and promote good regulatory practices. The increase of coherence among different regulatory regimes had a significant role in TPP negotiations.²⁶ TPP chapter on regulatory coherence highlights good regulatory practices, including the definition of regulatory coherence,²⁷ the implementation of core good regulatory practices,²⁸ and the process of reviewing the adherence of proposed regulatory measures with good regulatory practices.²⁹ Covering a broad range of regulation under TPP, good regulatory practices are to be used in “the process of planning, designing, issuing, implementing and reviewing regulatory measures” and in “efforts across governments to enhance regulatory cooperation” to realize the objectives and advance trade and investment, economic development and employment.³⁰ Regulatory impact assessment is also encouraged in TPP.³¹ Meanwhile, CETA provides for regulatory cooperation to promote good regulatory practices.³² It calls for “compatible regulatory approaches”, including technology-neutral ones.³³ Likewise, impact assessment is to be promoted in trade and sustainable development under CETA.³⁴ The possible exchange of officials to facilitate regulatory cooperation is envisaged in CETA.³⁵ For institutional arrangements, CETA will establish a Regulatory Cooperation Forum as a specialized committee³⁶ to further regulatory cooperation, and rules on its functions and activities are set out.³⁷ It resembles the TPP committee on regulatory coherence.

²⁴ R. Michael Gadbaw, *Competition Policy*, in *ASSESSING THE TRANS-PACIFIC PARTNERSHIP*, VOLUME 2: INNOVATIONS IN TRADING RULES 88, (Jeffrey J. Schott & Cimino-Isaacs Cathleen eds., 2016).

²⁵ Joana Mendes, Participation in a new regulatory paradigm: collaboration and constraint in TTIP’s regulatory cooperation 6, footnote 19 (2016).

²⁶ Hoekman & C., 2. 2015.

²⁷ TPP Article 25.2.1.

²⁸ Id. at, Article 25.5.

²⁹ Id. at, Article 25.4.2(a).

³⁰ Id. at, Article 25.2.1.

³¹ Id. at, Article 25.5.

³² Global Affairs Canada, *Canada-European Union: Comprehensive Economic and Trade Agreement (CETA)*(2014), available at <http://international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/understanding-comprendre/overview-apercu.aspx?lang=eng>.

³³ CETA Article 21.3(d).

³⁴ Id. at, Article 22.1.3(d).

³⁵ Id. at, Article 21.7.2.

³⁶ Id. at, Article 26.2.1(h).

³⁷ Id. at, Article 21.6.

In addition, the similarity between two agreements lead them to face similar concerns over the lack of effective judicial remedies (like investment rules providing for an investor protection provision but lacking judicial remedies for adversely affected citizens, trade unions, and civil society groups) as non-transparent ‘executive governance’,³⁸ and regulatory capture (e.g., transparency commitments lacking clear delineation of the operation of consultation processes such as uncertain access by “other stakeholders and governments other than the one planning to regulate”³⁹).

2.2 Specific regulatory disciplines

A fundamental divergence exists on culture. CETA contains various exceptions for culture regarding subsidies and government support,⁴⁰ investment (establishment of investments and non-discriminatory treatment),⁴¹ cross-border services trade,⁴² domestic regulation (culture-related licensing or qualification requirements and procedures),⁴³ and government procurement.⁴⁴ Such full cultural exceptions do not exist in TPP,⁴⁵ which has a softer position on cultural policy,⁴⁶ and largely treats culture in the same manner as other sectors. With few such exceptions, specific regulatory requirements reflect more convergence than divergence. A number of major aspects are discussed here.

2.2.1 Trade in goods

Both agreements do not vary dramatically in their approach to trade in goods. Chapters on goods do not represent the majority of the FTAs, accounting for only around six out of around 30 chapters. TPP and CETA converge in managing trade, relying on WTO norms in certain key areas, and addressing non-tariff measures. The first two are common in other FTAs, while the last one incorporates stricter regulatory requirements than in older agreements.

³⁸ Ernst-Ulrich Petersmann, *CETA, TTIP, and TiSA: New Trends in International Economic Law, in MEGA-REGIONAL TRADE AGREEMENTS: CETA, TTIP, AND TiSA* 39, footnote 26, (2017).

³⁹ Lazo & Sauvé, *WORLD TRADE REVIEW*, 28 (2017).

⁴⁰ CETA Article 7.7.

⁴¹ *Id.* at, Article 8.2.3.

⁴² *Id.* at, Article 9.2.2.

⁴³ *Id.* at, Article 12.2(b).

⁴⁴ *Id.* at, Article 28.9.

⁴⁵ Michael Geist, *The Trouble with the TPP, Day 18: Failure to Protect Canadian Cultural Policy*(2016), available at <http://www.michaelgeist.ca/2016/01/the-trouble-with-the-tpp-day-18-failure-to-protect-canadian-cultural-policy/>.

⁴⁶ See, e.g., Michael Geist, *Goodbye longstanding Canadian cultural policy, hello TPP regulations*(2016), available at <http://rabble.ca/news/2016/01/goodbye-longstanding-canadian-cultural-policy-hello-tpp-regulations>.

Foremost, both FTAs lead to managed trade rather than free trade. TPP calls for managed trade rather than free trade in certain areas such as textile and apparel,⁴⁷ and similar practice exists in CETA regarding sensitive products such as dairy.⁴⁸ These agreements contain protection for these industries rather than “pure” liberalization of trade.

Second, both pacts look alike as they often build on parallel WTO norms in various key issues such as sanitary and phytosanitary (SPS) measures, and technical barriers to trade (TBT). They have few rules in trade remedies and largely rely on WTO norms, although CETA, unlike TPP, fails to codify transitional safeguard measures.⁴⁹

Concerning TBT rules, both pacts are largely based on the WTO counterpart, such as the definitions of Annex 1 to the TBT Agreement.⁵⁰ TPP develops the TBT Agreement regarding issues such as conformity assessment.⁵¹ Furthermore, the revised WTO Agreement on Government Procurement (GPA) is followed closely in CETA.⁵² TPP government procurement provisions also resemble the revised GPA regarding key issues including general principles,⁵³ and exceptions.⁵⁴

Third, TPP and CETA tighten up rules against non-tariff measures to reduce trading costs. Examples include trade facilitation, government procurement, equivalence in SPS matters and mutual acceptance of conformity assessment results. Both agreements require “simplified customs procedures for the efficient release of goods,”⁵⁵ and greatly promote government procurement.

2.2.2 Services

The similarities of these pacts are greater than the differences in services. The differences do not reflect fundamental divergence. For market opening, TPP contains strong rules for services liberalization (e.g. broader scope of cross border trade in services (CBTS), stronger provisions on market access for the CBTS and on new services) compared with

⁴⁷ *Introduction, in* ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 1: MARKET ACCESS AND SECTORAL ISSUES 4, (2016).

⁴⁸ Andrew Smith, CETA: Canada-EU Trade Agreement (Andrew Smith ed., 2013).

⁴⁹ TPP Articles 6.3-6.7.

⁵⁰ CETA Protocol on the mutual acceptance of the results of conformity assessment, Article 1; TPP Article 8.1.1.

⁵¹ TPP Article 8.6.2, 8.6.8, 8.6.9, 8.6.14, 8.6.15 (“Further to” relevant provisions of the TBT Agreement in all these clauses).

⁵² The CETA government procurement rules apply to goods and services. CETA Article 19.2.

⁵³ TPP Article 15.4.1, 15.4.2; Revised Agreement on Government Procurement Article IV:1, IV:2 (2014).

⁵⁴ TPP Article 15.3.1; Revised Agreement on Government Procurement Article III:2. 2014.

⁵⁵ TPP Article 5.10.1; CETA Article 6.3.1.

CETA. CETA is narrower in the scope of CBTS as it explicitly excludes services provided by the presence of natural persons.⁵⁶ Concerning financial services, market opening is weaker in CETA than in TPP. Regarding market access, all restrictions in Article XVI:2 of the General Agreement on Trade in Services (GATS) are reproduced in CETA's financial services rules with minor changes.⁵⁷ Like most of the recent US FTAs,⁵⁸ TPP not only adopts a remarkably similar list to the GATS regarding market access for CBTS and financial services, but also goes further to drop the reference to restrictions on foreign equity participation.⁵⁹

Overall, both pacts promote the liberalization of services trade while the right to regulate is protected. Developing from the GATS, the two agreements strongly liberalize services trade through, inter alia, the approach towards trade liberalization (negative lists used for national treatment and market access commitments, diverging from the hybrid approach under the TiSA negotiations⁶⁰), the removal of trade barriers (e.g. mutual recognition of professional qualifications, which builds on GATS Article VIII) and strengthened protection of service investors. In trade liberalization, the protection of service providers is highlighted. Many key rules are largely similar in these agreements, including important stipulations on MFN treatment, national treatment, and dispute settlement. To offer protection for financial investors, these agreements provide for dispute settlement mechanisms for financial services (see discussion below). TPP enables dispute settlement processes initiated by investors in financial services but develops sector-specific rules on procedures and compensation, and CETA contains similar clauses that call for different norms on procedure and substance for disputes concerning financial services.⁶¹

2.2.3 Investment

A closer look indicates divergence exists between investment chapters. CETA is an innovative evolution of the Canadian and European treaty practice while TPP is an application of the US model treaty.⁶² The detailed rules are not the same. For instance, CETA

⁵⁶ TPP Article 10.1; CETA Article 9.1.

⁵⁷ CETA Article 13.6.

⁵⁸ Federico Ortino, *Regional Trade Agreements and Trade in Services*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* 233, (Simon Lester, et al. eds., 2016).

⁵⁹ TPP Articles 10.5, 11.5.

⁶⁰ Services and investment in EU trade deals: Using 'positive' and 'negative' lists. (2016).

⁶¹ Panagiotis Delimatsis, *The Evolution of the EU External Trade Policy in Services – CETA, TTIP, and TiSA after Brexit*, *JOURNAL OF INTERNATIONAL ECONOMIC LAW* 1, 31 (2017).

⁶² Charles-Emmanuel Côté, *From Sea to Sea: Regulatory Space of Federal and Provincial Governments in Canada under CETA and TPP Investment Chapters*, 5, 6, 47 (2016).

provides more precise guidance regarding FET and exception clauses, and TPP provides for greater explanation of purpose and scope of national treatment provision.⁶³

Overall, investment rules arguably converge rather than diverge. They converge in attempting to improve precision in substantive obligations and relevant norms and exercising more control over investment tribunals' interpretation, which aims to ensure the consideration of regulatory powers.⁶⁴ CETA employs rules in common with TPP regarding the explicit support for the right to regulate and clearer provisions on key concepts (e.g. FET, indirect expropriation).⁶⁵

As the most important aspect of convergence on investment regulation, the right for governments to regulate gets recognition. In CETA, the right to regulate in the public interest is clearly acknowledged in the preamble and investment chapter.⁶⁶ TPP investment rules recognize the right to regulate for environmental, health and other regulatory objectives, while these measures need to be "otherwise consistent with" the investment chapter.⁶⁷ As discussed later, CETA goes further in preserving regulatory autonomy by enabling the EU and Canada, rather than investors, to select the investor-state dispute settlement (ISDS) tribunal members and members of the new appeal body. It will not be surprising if such members are selected based on their sensitivity to governments' regulatory rights.⁶⁸

Concerning FET, TPP and CETA converge in narrowed definitions. But an exhaustive or non-exhaustive list of FET is among the major differences between the two pacts in investment. For the violation of FET, a closed list of components is presented by CETA.⁶⁹ The CETA definition of FET provides for situations such as manifest arbitrariness, which is not listed in TPP. Regarding a non-exhaustive list of elements for FET under TPP,⁷⁰ it was drafted by reference to the customary international law minimum standard of treatment, which is not the case with CETA. It contrasts with the strategy of the CETA, which attempts

⁶³ Caroline Henckels, *Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP*, 19 JOURNAL OF INTERNATIONAL ECONOMIC LAW 27, 49-50 (2016).

⁶⁴ *Id.* at, 49.

⁶⁵ Gary Clyde Hufbauer, *Investor-State Dispute Settlement*, in ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 1: MARKET ACCESS AND SECTORAL ISSUES 118, (2016).

⁶⁶ CETA Preamble, Article 8.9.1.

⁶⁷ TPP Article 9.16.

⁶⁸ CBA/ABC NATIONAL, *CETA's new dispute settlement court: Q&A with Greg Tereposky*, available at <http://www.nationalmagazine.ca/Articles/March-2016-Web/CETA-s-new-dispute-settlement-court-Q-A-with-Greg.aspx>.

⁶⁹ CETA Article 8.10.2.

⁷⁰ TPP Article 9.6.2.

to improve precision by itemizing prohibited behaviors,⁷¹ and which could arguably lead to more vague terms. However, TPP echoes the recent EU agreements regarding a narrower definition of FET than that in previous agreements.⁷²

There seems to be a trend to recalibrate investment protection rules on expropriation to avoid regulatory chill. For indirect appropriation, two agreements are based on the US Model Bilateral Investment Treaty (BIT).⁷³ The focus of the US BIT approach to the recalibration of expropriation is essentially the category of indirect expropriation.⁷⁴ Further to articles on expropriation,⁷⁵ indirect expropriation is stipulated in a separate annex. Both agreements regard indirect expropriation as a measure and measures having an effect equal to direct expropriation “without transfer of title or outright seizure,”⁷⁶ in which the extent of interference with the investor’s “distinct, reasonable investment-backed expectations” is a factor.⁷⁷ TPP further amplifies measures to protect public health, which may extend to areas like the regulation of pharmaceuticals.⁷⁸ CETA stipulates that indirect expropriation exists if a measure “substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment.”⁷⁹ CETA provides more guidance concerning factors to be considered in the determination of indirect expropriation,⁸⁰ and goes beyond TPP to define rare circumstances in which regulatory measures may constitute indirect expropriation.⁸¹ However, the underlying ideology is the same, which is to recognize the regulatory space by utilizing modern text for key rules.

The investment protection level under both pacts is not necessarily higher than before. CETA investment rules look to provide the same level of investment protection for European and Canadian investors, instead of a higher level of protection.⁸² FTAs do not just provide for investor protection but reflect increased sensitivity to government regulatory space. The governments are provided with more regulatory space, and the investors will find it more

⁷¹ Henckels, *JOURNAL OF INTERNATIONAL ECONOMIC LAW*, 34-37 (2016).

⁷² Hufbauer, 110. 2016.

⁷³ Henckels, *JOURNAL OF INTERNATIONAL ECONOMIC LAW*, 41 (2016).

⁷⁴ Sungjoon Cho & Jürgen Kurtz, *Convergence and Divergence in International Economic Law and Politics*, 29 *EUROPEAN JOURNAL OF INTERNATIONAL LAW*, 199-200 (2018).

⁷⁵ TPP Article 9.8; CETA Article 8.12.

⁷⁶ TPP Annex 9-B, para 3; CETA Annex 8-A, para 1(b).

⁷⁷ TPP Annex 9-B, para 3(a)(ii); CETA Annex 8-A, para 2(c).

⁷⁸ TPP Annex 9-B, para 3(b), footnote 37.

⁷⁹ CETA Annex 8-A, para 1(b).

⁸⁰ *Id.* at, Annex 8-A, para 2(b).

⁸¹ *Id.* at, Annex 8-A, para 3.

⁸² CETA – Summary of the Final Negotiating Results. (2016).

difficult to succeed in disputes against regulations that are a normal exercise of governments' regulatory authority.

2.2.4 Intellectual property

Notably the consideration of developing countries' interests, the protection of geographical indications (GIs), and the liability of internet service providers, are probably the biggest difference between two pacts in intellectual property (IP). TPP addresses issues relevant to developing countries and their interests, while CETA does not incorporate language to this effect. TPP entails a number of new and interesting formulations on protecting traditional knowledge, or the need to find an appropriate balance in IPs, which CETA does not address as a pact among industrialized countries. CETA contains much stronger protection of GIs.⁸³ However, these differences do not reflect a fundamental divergence. TPP indicates that GIs can be protected not only through a trademark but also a *sui generis* system or other legal methods.⁸⁴ Theoretically, it does not exclude the possibility of converging, which will not be an easy task. Notably, CPTPP narrows its difference with CETA. The controversial protection for biologics in TPP is absent in CETA but it has been suspended in CPTPP.⁸⁵

Overall, convergence can be identified. Both agreements strengthen IP protection and enforcement. The EU and US tend to take a similar position on most IP issues. Recently the EU has taken an approach more like the counterpart of the US regarding IP, seeking more comprehensive requirements on IP protection and enforcement.⁸⁶ Moreover, both FTAs largely develop from the TRIPS Agreement, and contain "WTO-plus" obligations, such as the liability of internet or intermediary service providers,⁸⁷ although TPP highlights stronger protection of copyrights through means including monetary remedies.⁸⁸ They are similar regarding the exceptions to the liability of internet or intermediary service providers.⁸⁹ Enforcement is tightened up in CETA, including an interlocutory injunction against a third party involved in IP infringement.⁹⁰ TPP highlights enforcement and is the first FTA signed

⁸³ CETA Chapter 20, Sub-section C, Annex 20-C.

⁸⁴ TPP Article 18.30.

⁸⁵ TPP Article 18.51 is suspended.

⁸⁶ Michael Handler & Bryan Mercurio, *Intellectual Property, in BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* 363, (Simon Lester, et al. eds., 2016).

⁸⁷ TPP Chapter 18, Section J; CETA Article 20.11.

⁸⁸ TPP Article 18.82.5.

⁸⁹ Id. at, Article 18.8.2(b); CETA Article 20.11.2(a)(ii).

⁹⁰ TPP Article 20.37.1.

by the US that explicitly requires most enforcement measures to be available “in the digital environment”.⁹¹ CPTPP scales back IP protection, evidenced by 11 TPP IP rules being suspended (e.g. suspending an extended patent term in the case of unreasonable delays in granting a patent, or in obtaining approval for the patented medicine’s market entry), and in particular the copyright term no longer extending from 50 years to 70 years, which removes “one of the most significant quantified costs of TPP for New Zealand.”⁹² It may reflect the cautious position against the overprotection of IP.

2.2.5 Sustainable development

Both agreements build common ground regarding sustainable development, although detailed rules vary. They bear a similarity in respect of sustainable development in a narrow sense. This term itself is only touched upon in the TPP development chapter,⁹³ and CETA develops an independent chapter but only incorporates a limited number of provisions, including general provisions on the cooperation and promotion of trade supporting sustainable development,⁹⁴ transparency⁹⁵ and the Civil Society Forum.⁹⁶

Both FTAs have more convergence than divergence regarding sustainable development in the broad sense. They have not focused on climate change.⁹⁷ Regarding labor and the environment, both FTAs converge in setting more detailed or higher standards than previous FTAs, and emphasizing the enforcement of rules.⁹⁸ TPP labor and environmental disciplines are more extensive than older trade pacts. The trend of convergence also exists outside them. Certain trends emerge in the approach and wording adopted for provisions on labor and environmental protection, including the expansion on general exceptions, and conflicts

⁹¹ Id. at, Article 18.71.2; Gina M. Vetere, et al., *What’s New in the TPP’s Intellectual Property Chapter* (2015), available at <https://www.globalpolicywatch.com/2015/11/whats-new-in-the-tpps-intellectual-property-chapter/>.

⁹² New Zealand Ministry of Foreign Affairs and Trade, *Common Questions* (2018), available at <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/explaining-cptpp-2/>.

⁹³ TPP Article 23.1.5, 23.3.4.

⁹⁴ CETA Article 22.3.

⁹⁵ Id. at, Article 22.2.

⁹⁶ Id. at, Article 22.5.

⁹⁷ Katharine Murphy, *Trans-Pacific Partnership: Four Key Issues to Watch Out for*, THE GUARDIAN, November 6, 2015. 2015; David Sirota & Andrew Perez, *Top US Trade Official Defends Exclusion Of Climate Change From Trans-Pacific Partnership*, INTERNATIONAL BUSINESS TIMES, 22 January 2016. 2016. CETA Article 24.9.2.

⁹⁸ Inside CETA: Unpacking the EU-Canada free trade deal. (2014).

clauses to enable the prevailing of other agreements, and a “menu” of provisions on social obligations.⁹⁹

Both agreements are similar regarding labor issues such as procedural guarantees,¹⁰⁰ cooperation,¹⁰¹ public submissions, multilateral labor documents and institutional arrangements. They attempt to address labor issues related to trade, including public submissions in labor issues,¹⁰² on which much more detailed rules are set forth in TPP. They refer to the International Labour Organization Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998 (ILO Declaration) and the concept of Decent Work outlined by the ILO,¹⁰³ while CETA establishes stronger obligations to act under the ILO Declaration,¹⁰⁴ and to promote its principles according to the ILO Declaration on Social Justice for a Fair Globalization of 2008.¹⁰⁵ Regarding institutional arrangement, national consultative or advisory bodies need to be established or maintained under both pacts for labor issues.¹⁰⁶ These bodies appear to be open to the public and could be consulted by the FTA parties,¹⁰⁷ or the CETA Committee on Trade and Sustainable Development.¹⁰⁸

Overall, TPP contains more novel labor provisions. A number of TPP labor rules (e.g. novel stipulations regarding acceptable working conditions,¹⁰⁹ labor protection in export processing zones,¹¹⁰ trade in goods produced by forced labor,¹¹¹ and side labor consistency plans between the US and several TPP countries¹¹²) are regarded as innovative.¹¹³ Also, TPP requires domestic law to ensure acceptable work conditions in three areas (i.e. minimum

⁹⁹ Lorand Bartels, *Social Issues: Labour, Environment and Human Rights, in BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* 384, (Simon Lester, et al. eds., 2016).

¹⁰⁰ CETA Article 23.5; TPP Articles 19.8, 19.5

¹⁰¹ CETA Article 23.7; TPP Articles 19.10.

¹⁰² TPP Article 19.9; CETA Article 23.8.5.

¹⁰³ TPP Article 19.10.6(h); CETA Article 23.3.2.

¹⁰⁴ CETA Article 23.3.1.

¹⁰⁵ *Id.* at, Article 23.3.2.

¹⁰⁶ TPP Article 19.14.2; CETA Article 23.8.4.

¹⁰⁷ TPP Article 19.14.2; CETA Article 23.8.4.

¹⁰⁸ CETA Article 23.9.4.

¹⁰⁹ TPP Article 19.3.2.

¹¹⁰ *Id.* at, Article 19.4(b).

¹¹¹ *Id.* at, Article 19.6.

¹¹² See, e.g., US-Brunei Labour Consistency Plan (2016).

¹¹³ Cathleen Cimino-Isaacs, *Labor Standards in the TPP, in ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 2: INNOVATIONS IN TRADING RULES* 41, 46-48, (Jeffrey J. Schott & Cimino-Isaacs Cathleen eds., 2016).

wages, hours of work, and occupational safety and health¹¹⁴). This is unprecedented as it is “the first time the provisions have been explicitly stated as labor rights.”¹¹⁵ Additionally, TPP includes labor consistency plans between the US and a number of countries that could call for legal reform (e.g., trade unions’ right to judicial review of administrative decisions concerning trade union registration¹¹⁶). Although these plans are not effective, they could be used as a reference point in future negotiations. Essentially, the two pacts converge in increasing labor protection.

For the environment, both FTAs emphasize trade being friendly to environment protection, international standards and public participation. Resembling TPP,¹¹⁷ CETA calls for “trade favoring environment protection”, under which trade and investment in environmental goods and services are to be promoted.¹¹⁸ For certain environmental measures or mechanisms, they require or encourage the consideration of international standards.¹¹⁹ The implementation of multilateral environmental agreements (MEAs) is affirmed in TPP and CETA in a similar manner.¹²⁰

Notably, environment rules are broad in their scope, particularly in TPP. The CETA environment chapter covers areas such as trade in forest products, fisheries and aquaculture products. More than any prior trade agreement,¹²¹ TPP environment provisions cover a broad range of issues, such as the protection of the ozone layer, the protection of the marine environment from ship pollution, and marine capture fisheries, among others. Trafficking in wildlife and timber will also be addressed by TPP.¹²² TPP environmental rules represent a great advancement since NAFTA and the United States-Korea Free Trade Agreement regarding the breadth and depth of rules and their enforcement.¹²³

¹¹⁴ TPP Article 19.3.2.

¹¹⁵ Cimino-Isaacs, 47. 2016.

¹¹⁶ Malaysia – United States Labour Consistency Plan Section II.A.1(a) (November 2015).

¹¹⁷ TPP Article 20.18.

¹¹⁸ CETA Article 24.9.

¹¹⁹ *Id.* at, Article 24.8.1; TPP Article 20.11.3(b)(voluntary mechanisms to improve environmental performance).

¹²⁰ TPP Article 20.4.1; CETA Article 24.4.2.

¹²¹ Jeffrey J. Schott, *TPP and the Environment*, in *ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 2: INNOVATIONS IN TRADING RULES* 33, (Jeffrey J. Schott & Cimino-Isaacs Cathleen eds., 2016).

¹²² USTR, *The Trans-Pacific Partnership Fighting Illegal Trade*, available at <https://ustr.gov/sites/default/files/USTR%20-%20TPP%20in%20the%20Wild,%20Fighting%20Illegal%20Trade.pdf>.

¹²³ Schott, 40. 2016.

For rule enforcement, these FTAs take more similar stances regarding the enforcement of sustainable development rules (particularly on labor and the environment) than older FTAs of the US and EU. Commitments under the TPP labor chapter are subject to the state to state dispute settlement (SSDS) mechanism if labor consultation fails,¹²⁴ while the TPP environment chapter is subject to the normal TPP dispute settlement procedures with some limitations. As a new provision, prior to the initiation of the environmental dispute settlement process, the TPP party shall consider whether its environmental laws are “substantially equivalent in scope to” the environmental laws in dispute.¹²⁵ Moreover, the labor issue is connected with tariff liberalization in TPP. The US may withhold or suspend scheduled tariff reductions if certain legal reform and steps regarding the labor union is not carried out by Viet Nam.¹²⁶ Although the US has withdrawn from TPP, such a provision may be used elsewhere and have spill over effects on other parties.

Unlike TPP, labor and environment disputes exempt from strict SSDS rules of CETA such as those on compliance. Instead, these disputes are subject to procedures and rules in its labor and environment chapters,¹²⁷ and are to be decided by a Panel of Experts.¹²⁸ The process is not strikingly different from SSDS since the panel of experts is subject to the SSDS Rules of Procedure and Code of Conduct. It is expected to address CETA labor and environment disputes by issuing final reports, after which the parties may seek a mutually agreed solution.¹²⁹ Such a process is likely to exert significant effects on the parties, and help to enforce the rules. Both FTAs give labor and environment special treatment regarding dispute settlement on the one hand,¹³⁰ and allow for dispute settlement on the other hand. Although labor and environment rule enforcement is stronger in TPP, the enforcement under both agreements is not dramatically different.

2.3 Conclusion

TPP and CETA seem to converge by focusing on regulatory issues. Differences between them are not radical, and arguably are not unbridgeable. The convergence is more obvious in some areas (e.g. services, investment, and IP) than others (e.g. sustainable development and

¹²⁴ TPP Articles 19.15.12, 19.15.13.

¹²⁵ *Id.* at, Article 20.23.3.

¹²⁶ US-Viet Nam Plan for Enhancement of Trade and Labour Relations Section VIII.3 (February 4, 2016).

¹²⁷ CETA Articles 23.11.1, 24.16.1.

¹²⁸ *Id.* at, Articles 23.10.2, 24.15.2.

¹²⁹ *Id.* at, Articles 23.10.11, 23.10.12, 24.15.10, 24.15.11.

¹³⁰ E.g. *Id.* at, Articles 23.10; TPP Article 19.15.13.

regulatory coherence or cooperation). Taking investment as an example, CETA reveals a 53% textual overlap with TPP, much higher than the 35% of similarity between CETA and the most recent Germany BIT.¹³¹ Regulatory disciplines of both agreements could have common grounds in their spirit in at least two aspects.

One is that both pacts converge as deep regulatory trade pacts. CETA and TPP “serve as Western initiatives of ‘geo-political importance’ for setting new standards—through ‘regime-shifting’ and ‘regulatory competition’—for multilateral trade, investment, environmental and labour law, and consumer protection.”¹³² They deviate from traditional trade pacts which often focus on tariffs and related measures, and address new or unsolved issues arising in trade (such as e-commerce, SOEs, and labor). Overall, these agreements impose stringent regulatory disciplines and emphasize rule enforcement.

The other is that both agreements intend to find a balance between public policy and the free market. On the one hand, the right to regulate is recognized in respect of wide-ranging issues, including services trade and investment. For instance, the agreements converge in harmonizing exception stipulations across trade and investment areas, as do the newer FTAs.¹³³ GATT and GATS exceptions,¹³⁴ or similar provisions,¹³⁵ are incorporated into these agreements, which apply to trade and investment. Many of these rules safeguard regulatory space. On the other hand, various measures are taken to promote the free market. Streamlined regulation is a typical example. TPP favors light-handed regulation,¹³⁶ and so does CETA.

3. Dispute settlement

3.1 State-to-State dispute settlement

3.1.1 Coverage

Foremost, both FTAs are more ambitious than older FTAs regarding dispute settlement, and make various new areas enforceable through SSDS. Under previous FTAs, a number of areas were often excluded from dispute settlement: competition, government procurement,

¹³¹ Wolfgang Alschner & Skougarevskiy Dmitriy, *The new gold standard? Empirically situating the TPP in the investment treaty universe* 27 (2015).

¹³² Petersmann, 40. 2017.

¹³³ Cho & Kurtz, *EUROPEAN JOURNAL OF INTERNATIONAL LAW*, 189 (2018).

¹³⁴ CETA Article 28.3.1; TPP Article 29.1.

¹³⁵ CETA Article 28.3.2; TPP Article 29.1.3.

¹³⁶ Gómez-Tarragona & Daniela, *ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW*, 375 (2015).

financial services, as well as co-operation and consultation.¹³⁷ Now most of these issues are subject to SSDS in these two FTAs. Notably both FTAs subject government procurement¹³⁸ to dispute settlement provisions.

Second, special or modified rules on dispute settlement are provided for on selected issues, which often involves regulatory space or are sensitive in the domestic context. Under one or both of these agreements, these issues include labor and the environment (as discussed above), people mobility, financial services and anti-corruption. Financial services are subject to dispute settlement provisions that are modified in the financial services chapters,¹³⁹ which impose, inter alia, additional requirements on arbitrators' experience and expertise in financial services law or practice.¹⁴⁰

Third, the substantive areas excluded from dispute settlement are competition,¹⁴¹ trade remedies and certain other rules (particularly TPP bilateral instruments). Although they are not the same, these carve-outs reflect country-specific preferences for "regulated" access to dispute settlement. For instance, domestic competition regulators intend to retain their discretion. Both agreements do not subject competition and trade remedies to their dispute resolution procedures. Trade remedies and consultations on subsidies are exempt from the dispute settlement mechanism under CETA,¹⁴² and TPP narrows such an exemption to antidumping and countervailing duties.¹⁴³ In addition, other rules may not be subject to dispute resolution, which could often be found in bilateral documents¹⁴⁴ or protocols.¹⁴⁵ These areas that are exempt from the dispute settlement system often deal with WTO-extra issues (e.g. anti-corruption), and soft rather than hard law is preferred. This is because they are largely new issues.

Overall, both FTAs take similar positions to be more ambitious in dispute settlement than before, while exceptions are often made to accommodate regulatory space or country-specific preference (again arguably reflecting regulated than free trade). CETA contains fewer

¹³⁷ Victoria Donaldson & Lester Simon, *Dispute Settlement*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* 399, (Simon Lester, et al. eds., 2016).

¹³⁸ E.g., CETA Article 19.18.4.

¹³⁹ Id. at, Articles 13.20.1; TPP Article 11.21.1.

¹⁴⁰ CETA Articles 13.20.4; TPP Article 11.21.3.

¹⁴¹ TPP Article 16.9; CETA Article 17.4.

¹⁴² CETA Articles 3.7, 7.9.

¹⁴³ TPP Article 6.8.3.

¹⁴⁴ Jennifer Hillman, *Dispute Settlement Mechanism*, in *ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 2: INNOVATIONS IN TRADING RULES* 111-112, (Jeffrey J. Schott & Cimino-Isaacs Cathleen eds., 2016).

¹⁴⁵ For instance, CETA Protocol on the mutual recognition of the compliance and enforcement programme regarding good manufacturing practices for pharmaceutical products, Article 15.7.

exclusions from dispute settlement than TPP. However, it is partially attributable to the nature of CETA as a bilateral FTA between two developed economies that support FTA rule enforcement.

3.1.2 Operation

Despite having different detailed rules (some of which will be discussed below), both agreements converge in improving the efficiency of SSDS through dealing with its relationship with the WTO dispute settlement procedure (particularly incorporating clear rules regarding the choice of forum), learning from the WTO practice, and addressing the defects in the WTO system. First, they converge regarding their treatment of parallel proceedings. Parallel proceedings in the FTAs and the WTO are proscribed for the breach of an obligation that is “equivalent in substance” under CETA and WTO law,¹⁴⁶ or regarding “any matter” arising under TPP and WTO rules.¹⁴⁷ The choice of one forum will exclude the other. Absent in TPP, CETA also provides for exceptional circumstances in which the chosen forum could not deliver findings due to “procedural or jurisdictional reasons”.¹⁴⁸

Second, TPP and CETA share common rules or rationale with the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in key aspects including the role of adjudicators and the interpretation rule.

Third, both FTAs improve on WTO dispute settlement rules to address their defects or improve the efficiency of the dispute settlement system. The two pacts address sequencing problems in the DSU. The ruling on the disagreement over compliance will be made in CETA before that on the disagreement as to equivalence,¹⁴⁹ and TPP requires the panel to address both issues of compliance and equivalence.¹⁵⁰ Additionally, the provision on post-retaliation proceedings is incorporated into CETA.¹⁵¹ Such a provision could be found in US FTAs, and was proposed in the negotiation regarding the DSU.¹⁵² Similarly, TPP contains a provision for compliance review.¹⁵³

¹⁴⁶ Id. at, Article 29.3.2.

¹⁴⁷ TPP Article 28.4.

¹⁴⁸ CETA Article 29.3.2.

¹⁴⁹ Id. at, Article 29.14.6.

¹⁵⁰ TPP Article 28.20.5.

¹⁵¹ CETA Article 29.15.

¹⁵² Donaldson & Simon, 432. 2016.

¹⁵³ TPP Article 28.21.

Both FTAs strive towards improving the efficiency of dispute settlement. Procedural steps in the TPP are closer to those in a number of recent US FTAs and NAFTA, than to the WTO.¹⁵⁴ It will take no more than 350 days from the initial consultation request to the issuance of a final panel under TPP (with the stricter time limit), which may take as long as 20 months in the WTO.¹⁵⁵ CETA streamlines the WTO arbitration process and accelerates the arbitration procedure for urgent cases, including those concerning live animals or perishable foods.¹⁵⁶

Both pacts improve the effectiveness of dispute settlement. Regarding compliance with dispute settlement reports, TPP provides for the possibility of a monetary assessment, which is essentially a fine, to a fund to facilitate trade between disputing parties.¹⁵⁷ Different from the WTO law, such a fine actually replaces the retaliation by the winning party. CETA contains detailed rules of procedure for mediation (e.g. initiation of proceedings, mediator selection, rules governing mediation procedures, implementation of a mutually agreed solution, confidentiality, and costs).¹⁵⁸

3.2 Investor-state dispute settlement

Both agreements take a generally similar approach to ISDS, and face common concerns. There was strong opposition regarding ISDS under CETA, and New Zealand also used to oppose the investment arbitration in the revival of TPP (as discussed below).¹⁵⁹ The measures under the two FTAs on improving ISDS are different particularly concerning the appeal mechanism. CETA innovates with an institutionalized investment dispute court, including a permanent tribunal, an appeal tribunal and possibly a multilateral investment tribunal and appellate mechanism.¹⁶⁰ The members of the tribunal and appellate tribunal are to be appointed by the CETA Joint Committee,¹⁶¹ instead of being appointed ad hoc by the respondent state and the investor under traditional investment agreements such as TPP.¹⁶² The EU and Canada will control the selection of tribunal members and appeal members, and the investors have no role here. These innovations resemble those in the EU-Vietnam FTA

¹⁵⁴ Hillman, 105. 2016.

¹⁵⁵ Id. at, 101-102.

¹⁵⁶ Canada. 2014.

¹⁵⁷ TPP Article 28.20.8.

¹⁵⁸ CETA Annex 29-C.

¹⁵⁹ Wolfgang Alschner, *The Investment Component in Trade Agreements*, 6 (2017).

¹⁶⁰ CETA Articles 8.27, 8.28, 8.29.

¹⁶¹ Id. at, Articles 8.27.2, 8.28.3.

¹⁶² TPP Article 9.22.1.

and proposed for TTIP. They were designed by the EU Commission to encourage EU governments and civil society groups to support investor protection in TTIP and other trade agreements. However, it remains to be seen how they work in practice. In contrast, TPP incorporates the traditional investment arbitration mechanism under which the investor chooses one arbitrator and has a role in the choice of the chair-person. The divergence of ISDS can hardly be bridged in the short run, since it is unlikely that the US Government would accept this approach due to the possible opposition in Congress against TTIP. Although the ISDS appeal system has so far been rejected by the US, TPP leaves open a possibility of an ISDS appellate mechanism and emphasizes the importance of transparency in such a mechanism.¹⁶³ Such possibility is provided for in almost all of the US investment chapters since NAFTA, but it appears that the issue has not been the subject of negotiations. It will depend on the domestic political support and investment law practice.

Both agreements converge in at least two aspects: addressing problematic ISDS procedure (e.g. conflicts of interest, the lack of transparency, and inconsistent interpretation), and safeguarding regulatory space through limiting the number of treaty provisions subject to ISDS. The former convergence is found in, inter alia, avoiding inconsistent rule interpretation, providing for enhanced transparency, and strengthening the disciplines of ISDS adjudicators. TPP and CETA strengthen the disciplines on ISDS to address its problems,¹⁶⁴ which aims to ensure ISDS “embedded in an institutional set-up capable of reining in arbitral misinterpretation and conflicts of interest.”¹⁶⁵ They are similar in several major developments: the prohibition of forum shopping, the interpretation by members, and the “loser pays” principle concerning legal costs.¹⁶⁶

The other convergence is that the two pacts set up a special arrangement in issues where governments intend to shield against ISDS to safeguard regulatory space. In particular, they establish an arrangement regarding public debt and exceptions in financial services. Containing separate annexes on public debt, both agreements use nearly identical provisions limiting the access to ISDS under certain circumstances (e.g. exclusion of negotiated

¹⁶³ Id. at, Article 9.23.11.

¹⁶⁴ For similar features of ISDS provisions of CETA and TPP, see Anthony VanDuzer, *Investor-State Dispute Settlement in CETA: Is It the Gold Standard?* 14 (C.D. Howe Institute Commentary No. 459 2016).

¹⁶⁵ Wolfgang Alschner & Dmitriy Skougarevskiy, *Convergence and Divergence in the Investment Treaty Universe- Scoping the Potential for Multilateral Consolidation*, 8 TRADE, LAW AND DEVELOPMENT 152, 174 (2016).

¹⁶⁶ Hufbauer, 118. 2016.

restructuring from ISDS except for non-discrimination treatment,¹⁶⁷ a 270-day break between consultation request and the submission of an ISDS claim on a restructuring of debt¹⁶⁸). The governments endeavor to clarify the relationship between the restructuring of public debt and the ISDS claim. CETA further clarifies that “mere differences” in treatment to investors or investments due to lawful policy objectives in a debt crisis (e.g. difference due to debt restructuring eligibility) do not violate non-discrimination treatment.¹⁶⁹

Both FTAs bear a similarity concerning exceptions in financial services. TPP is innovative in its dispute settlement process that applies to determine whether a measure is due to prudential reasons or otherwise exempt.¹⁷⁰ upon the request of the ISDS respondent, it could lead to a joint determination by the financial regulators of both sides,¹⁷¹ or a new ISDS panel’s decision if the joint determination is not made,¹⁷² both of which will determine whether exceptions in the financial services chapter apply or not. Here the default position is favourable to the regulator as the home country is deemed to take the same stance as the host country if no joint determination is reached and the home country does not make submissions to the ISDS arbitration tribunal.¹⁷³ This helps to shield the right to regulate, to a certain extent, from review by the *ad hoc* arbitration tribunal. CETA takes a similar approach here except for the lack of provisions on the ISDS panel’s decision and the default position.¹⁷⁴

Both agreements shield against ISDS in other circumstances, revealing their different priorities and strategies. ISDS does not cover claims regarding the CETA investment section on the establishment of investments (i.e. market access and performance requirements), and the establishment or acquisition of a covered investment under the section on non-discriminatory treatment.¹⁷⁵ TPP does not exclude these claims from ISDS, and provides for a broad scope of claims under ISDS.¹⁷⁶ CPTPP further restricts access to ISDS, compared with

¹⁶⁷ CETA Annex 8-B, para 2; TPP Annex 9-G, para 2.

¹⁶⁸ CETA Annex 8-B, para 3; TPP Annex 9-G, para 3.

¹⁶⁹ CETA Annex 8-B, footnote 40.

¹⁷⁰ Anna Gelpern, *Financial Services*, in ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 1: MARKET ACCESS AND SECTORAL ISSUES 96, (2016).

¹⁷¹ TPP Article 11.22.2(a), 11.22.2(b).

¹⁷² *Id.* at, Article 11.22.2(c).

¹⁷³ *Id.* at, Article 11.22.4(b).

¹⁷⁴ CETA Article 13.21.

¹⁷⁵ *Id.* at, Article 8.2.4.

¹⁷⁶ TPP Article 9.19.1.

TPP, for investment screening, investor authorization, private investment contracts, and financial service.¹⁷⁷

3.3 Conclusion

Convergence exists in SSSDs in the expanded coverage of SSSDs, and the development of the WTO dispute settlement rules. They aim to ensure the FTA rules enforceability. Moreover, both FTAs develop from older rules and set out stricter requirements on ISDS process. This help to reduce abusive interpretation, making ISDS more “regulated”. Even if there is difference and particular ISDS appeal system, the convergence exists in strengthening the disciplines on ISDS procedures to address process defects and protect regulatory autonomy. Importantly, both agreements deal with similar reform objectives of “enhancing the cost- and time-efficiency” and enhanced transparency of the processes, although their detailed rules vary and CETA represents a more systemic and bold reform of ISDS.¹⁷⁸

4. Why is there convergence?

These pacts converge in their overall approaches and that the convergence could have at least several explanations. Foremost, they, differing from classic trade pacts, have the nature of regulatory agreements, and share the objectives of providing regulatory protection. This echoes a shift of the 21st century FTAs concluded by developed countries “from tariffs and (selective) market access for goods to (general) standards and regulations for goods, services, capital and IP”,¹⁷⁹ which can be found in both pacts. State parties to deep FTAs aim to reduce unwarranted regulatory differences.¹⁸⁰ Their pathways differ. It is observed that “some agreements favour an approach that fosters substantive convergence between countries (same, similar, or equivalent regulations), others promote procedural convergence inside countries (same, similar, or equivalent regulatory processes).”¹⁸¹ But these agreements converge in endeavouring to set high-level rules and reshape trade norms, and to enhance predictability.

¹⁷⁷ Rodrigo Polanco Lazo & Sebastián Gómez Fiedler, *A Requiem for the Trans-Pacific Partnership: Something New, Something Old and Something Borrowed?*, 18 MELBOURNE JOURNAL OF INTERNATIONAL LAW 298, 347 (2017); DFAT, *TPP-11 suspensions explained*(2018), available at <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/outcomes-documents/Documents/tpp-11-faqs-suspensions-explained.pdf>.

¹⁷⁸ Stefanie Schacherer, *TPP, CETA and TTIP Between Innovation and Consolidation—Resolving Investor–State Disputes under Mega-regionals*, 7 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 628, 648, 652 (2016).

¹⁷⁹ Pauwelyn, 3. 2014.

¹⁸⁰ Lazo & Sauvé, *WORLD TRADE REVIEW*, 25 (2017).

¹⁸¹ *Id.* at.

Regulatory protection, if properly managed, brings a level playing field for businesses. Largely reflecting the position of developed countries that led FTA negotiations, these factors are particularly relevant to the convergence in stricter regulatory disciplines and related dispute settlement requirements. Regulatory protection, including economizing regulatory resources through burden sharing among different regulators, is also a key driver of regulatory cooperation.¹⁸²

Meanwhile, regulatory protection is reciprocal among FTA parties. One state may both benefit from but also provide regulatory protection as an exporter or importer of trade and capital. Therefore, one needs to strike the proper balance of different considerations. On the one hand, an important underlying rationale of these pacts is to reduce the burdens and costs on businesses through reducing impediments to trade and investment liberalization (e.g. improving market opening). This is similar with older pacts. Therefore, there may be inherent incentives to converge between deep FTAs to reduce trade barriers and provide remedies when applicable. As an example, the convergence of regulations concerning professionals (e.g. mutual recognition of equivalent standards) helps to promote market opening, and the EU's objective of facilitating mobility for professionals "matches similar levels of ambition" in TPP.¹⁸³ ISDS and SSSDS help to enforce the rules.

On the other hand, the right to regulate for legitimate policy objectives (such as health, the environment, and public morals) is guaranteed and strengthened. It is reflected in the move regarding, inter alia, ISDS and exceptions. If properly managed, regulatory autonomy ensures the protection of public interest. On a related note, it helps explain why CPTPP suspends a process under TPP for reconsideration of decisions by telecommunications regulators.¹⁸⁴

Second, both FTAs develop from the WTO law and are, in certain circumstances, affected by the same practice and criteria. On the one hand, the WTO is particularly relevant for the convergence as the FTAs appear to build on WTO norms. Since basically all of the deep FTA parties have participated in the WTO rule making, they naturally build on the WTO law, particularly in WTO-covered areas, instead of starting from scratch. It helps save time and gradually reach consensus.

¹⁸² Reeve T. Bull, et al., *New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements*, 78 LAW AND CONTEMPORARY PROBLEMS 1, 3-4 (2015).

¹⁸³ Delimatsis, JOURNAL OF INTERNATIONAL ECONOMIC LAW, 11 (2017).

¹⁸⁴ TPP Article 13.21.1(d) is suspended.

As recognized in the FTA preambles, the FTA parties build on their WTO rights and obligations. The majority of deep FTAs build on the WTO law in WTO-covered areas, containing improved stipulations on transparency and information sharing, mutual recognition agreements and institutional arrangements on regulatory cooperation.¹⁸⁵ For instance, for many FTAs, investment rules on performance requirements are derived from the Agreement on Trade-Related Investment Measures.¹⁸⁶ This is the case with TPP and CETA regarding the local content requirement¹⁸⁷ and export performance requirements.¹⁸⁸ Their service trade rules also resemble the GATS with certain exceptions (e.g. the negative list approach and new rules on telecommunication and financial services).

On the other hand, they exceed WTO norms to address new or unsettled issues. TPP and CETA aim to be “transformative FTAs” that liberalize and regulate trade in goods, services, and investments far beyond WTO norms.¹⁸⁹ These rules are particularly common in deep regulatory disciplines in WTO-extra areas (e.g. labor, and environment).

Outside the WTO norms, both pacts are affected by the same documents and criteria in some aspects. Concerning indirect expropriation, TPP and CETA are “based on the US Model BIT and set out versions of the Penn Central criteria.”¹⁹⁰ They follow the latest US treaty practice, under which tribunals should consider factors including the measure’s objectives and impact on investment, and the likelihood for a non-discriminatory public welfare measure to constitute an indirect expropriation is low.¹⁹¹

Finally, other explanations for the convergence vary according to specific issues, including the FTA membership overlap (i.e. Canada), geopolitical considerations, the lessons drawn from previous ISDS experience, the FTA limits, and the possible broader tendency. Geopolitical considerations may play some role in the convergence. These FTA parties (particularly the US and EU) arguably intend to shape new-generation rules. The convergence toward modern investment rules (e.g. the provision of more regulatory space) is largely due to the growing public concerns about ISDS, which are related to the previous

¹⁸⁵ Gary Clyde Hufbauer & Cimino-Isaacs Cathleen, *How will TPP and TTIP Change the WTO System?*, 18 JOURNAL OF INTERNATIONAL ECONOMIC LAW 679, 692 (2015).

¹⁸⁶ Joshua P. Meltzer, *Investment*, in BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 285, (Simon Lester, et al. eds., 2016).

¹⁸⁷ CETA Article 8.5.1(b); TPP Article 9.10.1(b).

¹⁸⁸ CETA Article 8.5.1(a); TPP Article 9.10.1(a).

¹⁸⁹ Petersmann, 34. 2017.

¹⁹⁰ Henckels, JOURNAL OF INTERNATIONAL ECONOMIC LAW, 41 (2016).

¹⁹¹ Id. at, 49.

practice particularly since the NAFTA when ISDS gained impetus. Moreover, both FTAs probably recognize that some issues are best resolved at the WTO rather than in FTAs. The fear of free riding is a major reason why the elimination of countervailing duties is absent in both FTAs.

Both pacts could reflect potential broader trends in selected areas. The similar clause on new financial services indicates “an unequivocal trust vote to financial innovation in a post-crisis environment.”¹⁹² The desire for sustainable development in the regionals and beyond (including those on labor and the environment as discussed above) explains the rise of rules to address non-trade concerns. Regarding the design, coverage and depth of investment rules, CETA bears a closer resemblance to the “complex and comprehensive” post-NAFTA North America treaty practice than the simple pre-Lisbon pattern of European countries.¹⁹³ CETA finds common ground with TPP although the former is largely based on the Canadian and EU practice. The investment rule convergence appears to extend to other EU FTAs (e.g. the EU-Singapore FTA regarding certain investment rules¹⁹⁴) and to the investment treaty practice of major capital importing and exporting countries.¹⁹⁵

5. Concluding remarks

First, the overall approaches of these pacts largely converge towards “regulation-oriented”, rule-based, and WTO-friendly FTAs with a generally strong enforcement mechanism. They reflect shared underlying values particularly regulated rather than free trade. More recently, CPTPP narrows the difference by removing a number of controversial TPP provisions on IP and ISDS (including a provision that could limit the right to regulate financial services).

The observation that denominates the relevant analysis (of usually separated areas rather than the overall “landscape” of deep FTAs) as the divergence is questionable by systematically investigating the philosophy underlining these rules. The convergence of these FTAs could be overlooked. Importantly, two crucial aspects constitute a useful framework for understanding complicated deep FTA rules and their rationale: regulatory disciplines (across-the-board and specific disciplines), and dispute settlement.

¹⁹² Delimatsis, *JOURNAL OF INTERNATIONAL ECONOMIC LAW*, 30 (2017).

¹⁹³ Alschner & Dmitriy, 27. 2015.

¹⁹⁴ Hufbauer, 118. 2016.

¹⁹⁵ *Toward a Multilateral or Plurilateral Framework on Investment*. (2015).

That said, how should we interpret the differences between these pacts? Convergence should not be overstated. Normative convergence varies according to areas, and that differences and even occasionally stark ones (e.g. culture, appeals system in ISDS, and GIs) emerge, which need to be handled with care. The interpretation of these pacts will not be the same. However, more convergence than divergence exists in these FTAs regarding their approaches, and the differences are probably not unbridgeable for most, if not, all issues. These FTAs rarely illustrates important discrepancies in their fundamental approaches. Differences are usually not radical (e.g. labor and environment dispute resolution), often attributable to the special concerns of the parties in isolated issues (e.g. financial services market liberalization), or do not exclude the possibility of convergence in the long term (e.g. the appeals system in ISDS and GIs). Taking investment as an example, shared common policy priorities exist despite differences on policy preferences.¹⁹⁶

Second, the reasons for the convergence include the shared FTA objectives (particularly regulatory protection), FTA rules developing from the WTO norms, and other considerations (e.g. membership overlap, the lessons drawn from previous ISDS experience, FTA limit, and potential broader trends).

The differences can be explained by at least three factors. First, these agreements are regulatory ones and regulatory issues are more complicated than the tariff reduction. Negotiators of deep agreements are learning about new issues including digital trade and prefer vague but not enforceable rules.¹⁹⁷ This reflects difference more than divergence as new disciplines are at their rudimentary stage. Second, the difference could reflect the different treaty nature rather than fundamental divergence. CETA is concluded between two developed economies while TPP is one among states of different economic development levels. One example is that these FTAs contain many country or province specific rules which render the diversity even larger. The third factor is that the difference is probably often due to country-specific preferences. This is evidenced by the reduced difference between CPTPP (e.g. suspending a number of TPP rules that reflects the US position such as that on biologics) and CETA.

Third, deep FTAs have the potential to bridge most if not all the differences, but political willingness is lacking. Deep FTAs seem to accommodate each other's differences to a large

¹⁹⁶ Alschner & Skougarevskiy, *TRADE, LAW AND DEVELOPMENT*, 172 (2016).

¹⁹⁷ Robert Wolfe, *Learning about digital trade: Privacy and e-commerce in CETA and TPP*, 12 (2018).

extent, and the accommodation of future deep regionals has been envisaged in certain circumstances. For instance, CETA envisages a possible rule of origin cumulation with the US for vehicles and certain agricultural products, if TTIP is concluded, and foresees the possibility of cumulation of origin with third countries with which the EU and Canada have a FTA (such FTAs with a third country should also consider the possibility of cumulation).¹⁹⁸ Although Canada and the EU need to agree on the conditions for the cumulation, this helps to facilitate the positive interaction among FTAs, and to lay a foundation for the convergence of deep FTAs. If there is political willingness, the difference may be narrowed by new FTAs like TTIP. The convergence of deep FTAs will have a significant impact on the future of trade law.

However, political willingness seems to be lacking to facilitate further convergence due to geopolitical dynamic (e.g. President Trump's position on regionalism) and domestic consideration (evidenced by, inter alia, previous Belgian/Wallonian resistance to CETA¹⁹⁹). Deep FTAs involve complex governance issues (like environment and labor) that are much more controversial than traditional agreements. They concern the broad public policy context in which governments shape trade norms and even social policy (like public health policy's relationship with ISDS). Moreover, special attention should be given to how to enable more countries to participate in the rulemaking to solve the possible legitimate deficit in new-generation trade rules.

Finally, this conclusion needs to be regularly reviewed, since these FTA practice remain to be seen. For one thing, the regulatory disciplines are often vague and subject to different interpretations in the world of regulatory asymmetries. Many factors could cause uncertainties, including the increased influence of protectionist sentiment, and doubts regarding deep FTAs. Therefore, deep FTAs needs to be carefully analyzed and debated, both within and beyond themselves.

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¹⁹⁸ CETA – Summary of the Final Negotiating Results 7. 2016.

¹⁹⁹ David A. Gantz, *The CETA Ratification Saga: The Demise of ISDS in EU Trade Agreements?*, 49 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 361, 379 (2017).

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