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Transparency Norms, the World Trade System and Free Trade Agreements: The Case of CETA

Ljiljana BIUKOVIĆ*

Canada and the European Union (EU) are negotiating an ambitious Comprehensive Economic and Trade Agreement (CETA). While the content of the agreement has not yet been officially disclosed by its negotiators, the general public and the business community are already concerned about the scope and effect of CETA on the two economies and their societies. This article deals with CETA's transparency provisions. It claims that, whereas CETA has not yet utilized external transparency to ensure support for the negotiations, it does have the potential for greater regulatory transparency in technical barriers to trade (TBT)- and sanitary and phytosanitary (SPS)-related matters than that found not only in the existing World Trade Organization (WTO) agreements but also in free trade agreements (FTAs) the two parties previously negotiated with third countries.

1 INTRODUCTION

As Canada and the European Union (EU) negotiate their Comprehensive Economic and Trade Agreement (CETA), concerns are growing in the general public and in the business community in particular, about the scope and effect of this very ambitious treaty, the content of which has not yet been officially disclosed by its negotiators.

The central issue of this paper is the principle of transparency as incorporated into preferential trade agreements (PTAs) in general and CETA in particular. It claims, first, that there has been an increasing tendency for both parties' PTAs to include World Trade Organization (WTO) Plus and WTO-X area clauses[1] and, second, that CETA will include several substantive legally enforceable obligations,

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1 The 'WTO Plus' indicates that a PTA includes enhanced obligations relating to policy areas that are already covered by some of the WTO agreements (such as TBT and SPS related obligations) while the WTO-X designation indicates that the PTAs are also establishing obligations for its members in policy areas that are not covered by the current WTO agreements (human rights, competition, labour market regulation, environmental laws, etc.) See Henrik Horn, Petros C. Mavroidis & André Sapir, 'EU and US Preferential Trade Agreements: Deepening or Widening of WTO Commitments', in *Preferential Trade Agreements: A Law and Economics Analysis*, ed. Kyle W. Bagwell & Petros C. Mavroidis (New York: Cambridge University Press, 2011), 150, at 151.

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including some related to the transparency principle, that exceed the obligations contained in the WTO agreements.

2 TRANSPARENCY IN PRACTICE AND IN DEBATES

Transparency is usually cited as the core principle underpinning the rule of law and as a key element of good governance.[2] The transparency principle in the WTO agreements imposes on its members procedural and substantive legal obligations that are vital to the functioning of the rule-based trade regime: (1) to make information on the relevant laws, regulations, and other policies publicly available; (2) to notify interested parties of the relevant laws and regulations and of any changes to them; and (3) to ensure that the laws and regulations are administered in a uniform, impartial, and reasonable manner.[3] The creation in 1989 of the Trade Policy Review Mechanism (TPRM) as a means of monitoring compliance with the GATT Article X requirements signalled the increasing importance of transparency in the context of deeper economic integration.[4]

Many international organizations emphasize the importance of transparency to the development of a market economy and of society in general and define the principle in terms similar to those of the provisions of GATT Article X. The Organization for Economic Cooperation and Development (OECD) has a two-pronged definition of transparency. The first prong is regulatory transparency and is a measure of the capacity of regulated entities to express views on and identify and understand their obligations under the rule of law[5]; the second is information transparency on the part of governments.[6] Regulatory transparency protects the rights of private parties to be informed of laws, to be advised of decisions that concern their rights and interests, to be provided with reasoned decisions, and to seek reviews of such decisions.[7] Thus, legal reform that leads to regulatory transparency increases the openness of the market and reduces business transaction costs. Information transparency includes consultation with interested parties, the widespread electronic dissemination of regulatory materials, the use of

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2 Francis Fukuyama, *State-Building: Governance and World Order in the 21st Century* (Ithaca: Cornell University Press, 2004).

3 Article X GATT 1994.

4 WTO, *World Trade Report 2011; The WTO and Preferential Trade Agreements: From Coexistence to Coherence*, at 184; available online at <www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf>.

5 OECD, 'Regulatory Policies in OECD Countries from Intervention to Regulatory Governance', PUMA/RE6 (2001) 10, 21 Nov. 2001, at 41. See also the 2005 OECD, 'Guiding Principles for Regulatory Quality and Performance', available at <www.oecd.org/dataoecd/24/6/34976533.pdf>.

6 *Ibid*.

7 NERA (National Economic Research Associates) Economic Consulting, 'Regulatory Transparency: International Assessment and Emerging Lessons, A Final Report for the World Bank', 6 Jun. 2005, at 147.

plain language in drafting laws and regulations, the exercise of controls on regulatory discretion through transparent procedures, and the establishment of appeal processes.[8]

Academic debate on the principle of transparency in the international trade regime focuses on external, internal, and regulatory transparency. External transparency enables civil society to see what international trade regulators, such as the WTO, are doing while internal transparency reflects the ability of members of international organizations, such as WTO Members, to participate in the work of the organization.[9] Finally, the regulatory transparency, which constitutes an important aspect of national administrative law, is of interest as a tool of good governance.[10]

In civil society debates, the quest for full transparency includes not only the right to be informed about the process of negotiation and the final text of the treaty but also the right to be consulted on the issues being negotiated, especially when they relate to human rights, health, the environment, sustainable development and procurement. As the number of PTAs being entered into by both developed and developing countries grows, there is mounting concern in civil society about the lack of transparency.

3 PTAS AND TRANSPARENCY PROVISIONS

Almost ten years ago, the WTO Working Group on the Relationship between Trade and Investment reported that the transparency provisions in existing bilateral and regional treaties, especially those including provisions on foreign investment, were 'generally less detailed and prescriptive than similar requirements in the WTO agreements'.[11] A recent OECD study of regulatory transparency regional trade agreements (RTAs) suggests that a relative expansion of regulatory transparency provisions in RTAs is unlikely to have affected any of the OECD members' already established domestic transparency mechanisms.[12] On the other hand, the RTAs with enhanced transparency provisions have strengthened the domestic framework for those OECD countries with less developed pre-existing

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8 OECD, *supra* n. 5.

9 Robert Wolfe, 'Regulatory Transparency, Developing Countries and the WTO', *World Trade Review* 2 (2003): 157, at 158.

10 *Ibid*.

11 WT/WGTI/W109, 27 Mar. 2002, at 1. See also Robert Howse & Michael J. Trebilcock, 'The Myths of NAFTA's Regulatory Power: Rethinking Regionalism as a Vehicle for Deep Economic Integration', in *Changing the Rules: Canadian Regulatory Regimes and Institutions*, ed. G. Bruce Doern et al. (Toronto: University of Toronto Press, 1999), at 336–360.

12 Evdokia Moïsé, 'Transparency Mechanisms and Non-tariff Measures: Case Studies', (2011) OECD Trade Policy Working papers No. 111, OECD Publishing, at 4–5.

administrative law and regulatory practices.[13] Clearly, RTA negotiations are an opportunity for stakeholders from countries with developed regulatory regimes to propose transparency mechanisms that would improve the accountability of governments in developing countries and influence the level of transparency in their domestic cultures.

The above-mentioned OECD study divides the RTAs' regulatory transparency-related provisions into three broad categories: (1) general transparency provisions related to transparency in the administration of laws and regulations relevant to all matters covered by the RTA, including information availability, public consultation and due process; (2) specific transparency provisions related to goods covered by the agreement (technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) type provisions[14]); and (3) specific transparency provisions related to the regulation of services. The RTAs' general transparency provisions tend to replicate the due process provisions of GATT Article X and do not provide additional opportunities (such as additional review or appeal rights) for stakeholders to affect the process of rule-making. They normally carry no more weight than 'a best endeavours call for public consultation'.[15] In contrast, the TBT- and SPS-related RTA transparency provisions often tend to expand on corresponding WTO provisions and set out in greater detail the parties' obligations with respect to standards, technical regulations, and assessment procedures.[16] They have been used in RTAs among developed countries, developing countries and a mix of developed-developing countries. For example, some RTAs such as the Australia-United States and the Canada-Peru free trade agreements (FTAs) require each participating state to allow not only its own nationals but also private persons from the other states to participate in the development of domestic standards and technical regulations.[17] The OECD study further reveals that fewer RTAs provide for enhanced provisions relating to administration of the domestic regulation of services, specially telecommunications and financial services.[18] It appears that the negotiated trade agreements that are WTO Plus are more likely to expand the regulatory transparency arrangements beyond WTO standards.

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13 *Ibid*., at 9.
14 *Ibid*.
15 Moïsé, *supra* n. 12, at 11. The author of the study also emphasized that this type of provision is less common among non-OECD RTAs.
16 *Ibid*., at 12.
17 *Ibid*., at 10.
18 *Ibid*., at 13.

4 THE EU AND FTAS

Arrangements related to external, internal and regulatory transparency in the EU's agreements with developed countries have been rather flexible, primarily due to the similarities in the prevalent domestic transparency mechanisms of the partners. In contrast, the EU uses more elaborate political and economic conditionality in negotiating bilateral trade agreements with developing countries in order to promote its own transparency rules or otherwise mandate harmonization of those countries' regulatory policies with the EU standards;[19] thus, the principle of transparency is an important element in both aspects of conditionality.

Economic conditionality establishes different sets of rules for economic cooperation between the EU and developing countries, depending on their standing in the WTO,[20] the extent to which their market economies have developed, and their ability to cope with the competitive pressures of the free trade area created by the agreement.[21] Again, good governance (and the underlying principle of transparency) is a fundamental prerequisite for economic cooperation between the partners to an agreement.[22]

The external transparency elements – exposing to civil society how the various trade regulators work – have been left out of the EU-third countries treaty negotiation process and have instead been treated as a domestic issue for each partner. Consequently, the EU has developed its own rules on the engagement for civil society while developing countries have had to work out their own ways of 'selling' the trade arrangements to their populations and ensuring the required levels of support.[23] The recent working document of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament (EP) reveals that the EP has been eager to assess the implementation of the principle of transparency in the EU institutions as a general principle of the EU legal order, especially after the entry into force of Regulation No. 1049/2001 and the Lisbon Treaty.[24] The Committee finds that since the Lisbon Treaty transparency principle

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19 Leonardo Baccini, 'Explaining Formation and Design of EU Trade Agreements: The Role of Transparency and Flexibility', *European Union Politics* 11 (2010): 195, at 197–198.

20 For example, The Bahamas, one of thirteen CARIFORUM states, is a non-WTO Member. The CARIFORUM-EC EPA, signed in Barbados on 15 Oct. 2008 between the CARIFORUM and the EU is a comprehensive agreement covering not only trade in goods, services, IP and innovation but also *transparency* in public procurement, investment, competition , environment, and personal data protection. The agreement also has a complex Development Chapter.

21 The Copenhagen Protocol and the Barcelona Process are examples of these different arrangements.

22 <http://eeas.europa.eu/euromed/index_en.htm>.

23 For a summary of the EU's mechanisms of public participation, see Yves Bonzon, 'Comparative Analysis of Transparency and Public Participation Mechanisms in Regional Trade Agreements and Other International Regimes', EGDE Workshop (March 2008), on file with the author.

24 EP Committee on Civil Liberties, Justice and Home Affairs, Working Document (1) on the Annual Report on public access to documents, 24 Jan. 2011, DT/854597EN.doc, at 2.

is 'also linked with the principles of civic participation and of good administration' it binds not only the main EU institutions (EP, Council, Commission, the European Council, the European Central Bank and the Court of Justice) but also numerous EU agencies and services, including the European External Action Service.[25] Moreover, the Committee emphasizes that the Lisbon Treaty repealed Articles 255 and 207(3) of the former Treaty of European Community, which had allowed for some limits to transparency for the purpose of 'the preservation of the effectiveness of the decision making process'. Although the Committee accepts that certain negotiations of international agreements require a degree of confidentiality, it asks the EU institutions, especially the Council and Commission, to establish a balance between transparency and effectiveness 'at least through an indirect transparency' set up for EU citizens through their elected parliamentary representatives. [26]

Regulatory transparency provisions in the EU's PTAs and FTAs are typically limited to one general provision, which usually follows the GATT Article X requirements.[27] More stringent provisions (if any) are included in more specific areas, such as those related to the TBT and SPS obligations of the parties. In the areas in which the EU requires greater clarity from its partners and an improvement of their administration of the various measures and standards laid out, the regulatory transparency provisions are decidedly more stringent. [28]

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25 *Ibid*.

26 *Ibid*., at 4. The EU Ambassador to India, Daniele Smadja (previously EU Ambassador to Canada) was recently cited in India for saying that EU-India FTA 'negotiations are not an open book' and that it would not be appropriate to provide any details about the FTA negotiations when the talks were at a sensitive stage. See 'Free Trade Agreement Talks at "Sensitive Stage"', The Hindu, 17 Feb. 2011. In February 2011, the Corporate Europe Observatory, a citizen advocacy group, filed a complaint before the EU General Court about lack of transparency in the EU's negotiation of a free trade agreement with India. The claimant alleges that the Commission refused to forward to the citizens' group documents it did share with industry lobby groups, such as Business Europe. See <www.business-standard.com/india/news/eu-arm-being-suedindia-fta-talks/425344/>.

27 See, e.g., the FTA between the EU and Chile (EU-Chile Association Agreement (2002/979/EC) O.J. L/352, 30 Dec. 2002), where there is a general reference to transparency but details are to be developed by the parties in the course of the performance of the agreement.

28 See, e.g., Art. 4.4: technical regulations of the EU-Korea FTA (2002/979/EC) O.J. L/127, 14 May 2011) obliging the regulators of the parties or standard making bodies to give written reasoned response to these parties' submissions or comments on the rules and requiring that each party shall ensure that economic actors and other interested persons of the other party are allowed to participate in any formal public consultative process concerning development of technical regulations, on terms no less favourable than those accorded to is own legal or natural persons.

5 CANADA AND FTAS

Canada's FTAs generally contain no explicit provisions on external transparency.[29] It appears that Canada's increased interest in external transparency in negotiating international, multilateral, regional and bilateral treaties is triggered by domestic criticism of the government's own secretive decision making. Critics usually point out that the lack of external and internal transparency in the WTO and NAFTA processes make these treaties less accessible to the public than domestic judicial proceedings, less accountable to domestic democratic institutions and, ultimately, contrary to the normative principles, rules, rights and institutional practices of Canadian society.[30] On the other hand, the Canadian government maintains, as do many other governments, that increased external transparency, although it could be an important means of bolstering the legitimacy of the government and of international organizations could weaken the nation's bargaining position vis-à-vis other developed (and some developing) countries.[31]

In general, agreements between Canada and other developed countries contain less elaborate regulatory transparency provisions than do those with developing countries. For example, the Canada-EFTA Agreement signed in 2009 has modest general transparency provisions related to information availability and equally modest specific transparency provisions on the disclosure of information to authorities.[32] In contrast to the Canada-EFTA FTA, the Canada-Columbia FTA contains broad general regulatory transparency provisions (Chapter 19) as well as more detailed specific regulatory transparency provisions on telecommunications and financial services (Articles 1010 and 1111, respectively), on e-commerce (Article 1502), government procurement (Article 1407) and TBT and SPS measures (Articles 601–608 and 504, respectively).

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[29] Canada has concluded nine FTAs (including NAFTA) since 1984 and has been negotiating twelve additional agreements, including the CETA. Most of those are FTAs that involve developing countries as partners. See status of Canadian FTAs at <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx>.

[30] See one of the most recent criticisms of democratic deficit of the WTO and NAFTA 'superconstitutionalism' in Stephen Clarkson & Stephen Wood, *A Perilous Imbalance; The Globalization of Canadian Law and Governance* (Vancouver: UBC Press, 2009), at 104–113.

[31] Ana-Meri Hamada & Markus Knigge, Report on Trade, Environment, and Transparency and Participation, June 2005, Research DG, under Contract No. EVK2-CT-2002-20017 CAT&E, at 7.

[32] The Canada-EFTA contains general regular transparency provisions in Art. 37 and specific transparency provisions related to trade in services in Art. 12; Art. 20 only suggests that transparency in relation to government procurement rights be a topic for future agreement between the two parties. Moreover, Art. 12 establishes a 'best endeavour' type of obligation to provide information on any measure that might have an impact on trade in services or investment. The Canada-Israel FTA contains provisions that cover the entire agreement but are of a general rather than a specific nature. It also calls for regulatory transparency consultations between the two parties on regulatory transparency (Arts 8.5 and 8.6. and 20).

Except for its side agreements on labour and environmental cooperation, which contain provisions on public participation in advisory committees, NAFTA is very modest, almost silent, on external transparency; it focuses more on the general transparency provisions related to internal and regulatory transparency.[33] For example, the measures introduced in 2003 to enhance transparency of the NAFTA Chapter 11 investor-state arbitration (acceptance of amicus curiae briefs and the endorsement of a standard form for the Notice of Intent to initiate arbitration) were specifically intended to improve public participation in and understanding of the dispute settlement process. Yet, NAFTA has had a significant influence on the country's subsequent FTAs negotiations. For example, in the 2008 Canada-Chile FTA, the transparency rules in the Chapter on Government Procurement are based on the NAFTA provisions with the addition of some extended transparency measures.[34] The 2009 FTA between Canada and Peru is also based on NAFTA, but with extended general and specific transparency provisions.[35]

6 CETA

Despite occasional briefings by the parties on the progress of negotiations, the general view in both Canada and the EU, especially among civil society groups, is that the negotiations are, for the most part, ignoring the concerns of civil society and the public at large while supporting interests of business community.[36] This negative attitude towards the proposed agreement has its source in the fact that some of the substantive areas of negotiations to be covered in the negotiations are ones that seriously undermine the regulatory sovereignty of municipalities, provinces, and higher levels of government (the rules on government

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[33] Bonzon, *supra* n. 24, at 12.

[34] See <www.tbs-sct.gc.ca/pubs_pol/dcgpubs/ContPolNotices/2008/1217-eng.asp>. See Arts Kbis-03, 04, 06, 11 related to government procurement. Very general transparency provisions that cover the entire agreement are in Art. L-03.

[35] Canada-Peru FTA: general regulatory transparency provisions in relation to the whole agreement contained in Arts 504 and 1901–1904; specific transparency provisions contained in Arts 1010 (telecommunications), 1111 (financial services), 1404, 1407, 1410–1411, 1413 (government procurement), and1504–1506 (e-commerce).

[36] See, e.g., Open Civil Society Declaration on a proposed Comprehensive Economic and Trade Agreement between Canada and the European Union, signed by a number of organizations, available at <http://tradejustice.ca/en/section/22>. See also Centre for Civic Governance at <www.civicgovernance.ca/taxonomy/term/109>, We Are Change Toronto at <http://wearechangetoronto.org/2011/01/27/from-nafta-to-ceta-canada-eu-deep-economic-integration/>, Canadian Centre for Policy Alternatives at <www.policyalternatives.ca/newsroom/news-releases/canada-eu-free-trade-deal-could-cost-150000-canadian-jobs-study>.

procurement, for example).[37] Furthermore, some recent reports on the benefits of the CETA show just a modest economic gain for the EU and Canada as a result of further liberalization of trade between the two parties.[38]

The Government of Canada and the Commission of the EU had earlier made a non-binding commitment to a set of what they considered to be good regulatory practices and had established the Framework on Regulatory Co-operation and Transparency.[39] According to the Framework, good regulatory practice consists of consultations and the exchange of information among the domestic regulators in the two parties, the sharing of non-public information, the sharing of information on regulatory proposals, the monitoring of forthcoming regulatory proposals, the post-implementation review of regulations, etc. Although the Framework does not directly address the principle of transparency, it is obvious that in order for the two parties' regulators to act in accordance with this Framework, full transparency is required. However, the Framework encourages the Government of Canada and the Commission to act in the proposed manner but does not mandate that they do so.

As previously mentioned, both Canada and the EU usually negotiate FTA provisions related to regulatory transparency along the lines of the GATT Article X provisions, with an emphasis on the obligations of each party to inform the other of relevant legislative proposals and to allow the other party's interested persons to comment on such proposals. Indeed, the provisions related to regulatory transparency reveal very little difference between the regulatory approaches by the EU and Canada. However, in a recently concluded FTA with South Korea, the first of the EU's new generation of FTAs,[40] the EU recommended a 'best endeavour' type of obligations with respect to the duty to publish legislative proposals in advance and to provide information on and respond to questions pertaining to any existing or proposed measure.[41] The provision's wording arguably shows somewhat less of a commitment to transparency. Since the Directorate General for External Policies called the Korea FTA 'one of the most

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37 Most recently the Canadian Union of Public Employees (CUPE), the largest labour union in the country, passed a resolution (Resolution No. 233) opposing CETA and criticizing its negotiation process as being non-transparent. See <http://cupe.ca/cupe-national-convention/convention-decisions-tuesday-november-1>.

38 EU-Canada SIA Draft Final Report March 2011, Trade 10/3B/B06, available online at <http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147755.pdf>.

39 Available online at <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/eu-framework.aspx?view=d>.

40 The 2006 Communication 'Global Europe: Competing in the World' from the European Commission proposed a new generation of bilateral free trade agreements as a stepping stone for future trade liberalization. See <http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf>.

41 See EU-Korea FTA, Ch. XII, Transparency.

ambitious and complete commercial deals ever negotiated by the EU',[42] it is difficult to foresee that CETA would provide for less strict obligations.

The scope of the EU-Korea FTA is also a useful starting point of discussion about a possible scope of CETA. The EU-Korea FTA is the most comprehensive FTA of the EU already in force and it contains chapters on trade and sustainable developments with substantive commitments on labour and environmental standards, a monitoring mechanism and a clause on enhancement of the dialogue with the civil society (representative organizations of employers, workers, environmental interest and business groups, local communities, etc.). Since it has been suggested that CETA is also one of the EU's new generation FTAs, one can expect similar provisions related to trade and sustainable development to be proposed by the EU. Transparency provisions related to sustainable development could be regarded as specific regulatory transparency provisions that would have considerable impact on external transparency related to the *performance* of CETA. They could potentially provide for increased transparency in decision-making and for civil society groups to play at least a consultative role in the area of sustainable development with the actual extent of involvement of these groups to be determined in accordance with the domestic laws of the parties.[43] It is noteworthy that the current FTAs containing provisions on labour and sustainable development usually provide that each party is obliged to introduce and implement measures related to sustainable development, labour conditions and the protection of the environment, and must do so in a transparent manner and *in accordance with its domestic law*.[44] In addition, the parties of the EU-Korea FTA are required to (or *shall*) 'encourage public debate with and among non-State actors as regards the development and definition of priorities that may lead to the adoption by public authorities of such measures or of non-binding recommendations or guidance'.[45] Accordingly, it is possible to expect that the EU would propose a similar chapter and provisions to be included into CETA to mandate that the parties have access to information on the work of joint institutions formed to monitor implementation of specific chapters and provisions and on the work of domestic regulatory agencies dealing also with matters related to trade and sustainable development.

It is noteworthy that the EU-Korea FTA contains numerous provisions addressing regulatory and technical issues. This is consistent in particular with the EU's new policy towards FTAs and the Commission's 2006 Communication

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42 See The 'EU-Korea Free Trade Agreement in Practice' (Luxembourg: Publication of the Office of the European Union, 2011).
43 EU-Korea FTA, Arts 13.9–13.13.
44 WTO, 'The WTO Trade Report 2011', *supra* n. 4, at 63.
45 EU-Korea FTA, Art. 13.9.

'Global Europe: Competing in the World', which proposed a more robust and competitiveness-driven FTA as new model for EU's bilateral trade agreements. The WTO World Trade Report on patterns in the content of PTAs identifies similar trend in PTAs concluded by other countries.[46] FTAs regulation of both tariff and non-tariff barriers has thus become a priority for EU negotiators, especially in negotiating FTAs with advanced developing and developed countries where TBT measures constitute barriers to market access for EU exporters.

The transparency provisions in the Chapter on Customs and Trade Facilitation in the EU-Korea FTA, for example, *mandate* that prior to their adoption, each party shall provide interested persons the opportunity to comment on them and shall designate or mandate one or more contact points to which interested persons may address inquires on customs-related matters. The Internet is suggested as a proper source of information on available procedures, legislation and policies and as a means to ensure external transparency.[47] It is not difficult to foresee similar provisions being proposed by the EU for CETA.

Considering the importance of trade in food and agricultural goods between the EU and Canada and the impact that safety and technical standards have on market access, the CETA's TBT and SPS specific provisions on regulatory transparency are particularly important topics in the negotiations.[48] Increased transparency through an effective system of notification measures could impact standard setting by raising the awareness among each party's public agencies and private parties of the TBT and the SPS rights and obligations, by informing each party's public and private sectors of forthcoming changes in technical and SPS standards and by responding to their questions and concerns. Agricultural protectionism through non-TBT has been a contentious issue of Canada-EC relations from the time that the parties started to negotiate the 1976 Framework Agreement for Commercial and Economic Cooperation.[49] The Joint Cooperation Committee working within the loose institutional structure of the Framework Agreement was inadequate to the task of coordinating the regulatory practices of the two parties.

In general, the WTO TBT Agreement imposes the obligation on WTO Members to provide basic regulatory transparency with respect to technical standards for all industrial and agricultural products.[50] Especially important are the

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46 WTO, World Trade Report 2011, *supra* n. 4, at 129–145.

47 EU-Korea FTA, Art. 6.5.3.

48 Substantive provisions on the use of international standards, mutual recognition, voluntary standards and equivalence, as well as the relevant common institutional structure are beyond the scope of this article.

49 Christopher Kukucha, 'Provincial Pitfalls: Canadian Provinces and the Canada-EU Trade Negotiations' (2009).

50 Article 1.3 TBT Agreement.

legally enforceable obligations of WTO Members to give prior notification of any regulatory activities that deviate from internationally accepted standards[51] and to take into account the comments of the other WTO Members regarding any proposed changes in technical regulations.[52] In summary, the provisions being inserted to enhance transparency are intended to prevent the use of technical regulations as a non-tariff barrier to trade in products.

According to documents released recently by the Parliament of Canada, complaints from Canadian exporters about the complexity of the EU Regulations and standards and the European Commission's failure to facilitate trade in the most important industrial and agricultural sectors are leading Canada, in its negotiations with the EU, to push for increased transparency in TBT regulations and standards.[53] Thus, it is expected that the Canadian negotiators will insist on stricter transparency provisions than those set out in the WTO TBT Agreement, including early notification by each party of regulatory measures and standards that each proposes to adopt. It is also expected that Canada will propose that a separate chapter of the treaty be dedicated to enhanced regulatory cooperation provisions as a means of improving transparency and preventing the parties from adopting conflicting standards. TBT and SPS standard type provisions in PTAs require the parties to institute very specific domestic policies and to meet certain minimum specifications as regard institutional capacity. If the parties intend to make commitments beyond the WTO obligations, the PTAs have to provide them with legal and institutional frameworks capable of reducing non-tariff barriers to trade by enhancing regulatory cooperation and limiting their autonomy with respect to the relevant domestic policies.[54]

It is noteworthy that in its FTAs with countries that are not the EU neighbours or candidates for EU membership, the EU used to rely more on existing international TBT-related standards than on the promotion of its own 'experience', which includes the precautionary principle or application of the EU acquis.[55] In other words, in these FTAs, the EU tends to stick with the WTO framework rules while trying to strengthen transparency by adding measures such as early notification, technical cooperation and the sharing of expertise between the parties' domestic agencies.[56] For example, the EU-Chile FTA simply confirms

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51 Article 2.9.2 TBT Agreement.
52 Article 2.9.4 TBT Agreement.
53 Alexandre Gauthier & Michael Holden, Canada-European Union Trade Negotiations: 7. Technical Barriers to Trade and Regulatory Cooperation, 3 Oct. 2010, no. 2010-58-E, at 2.
54 Kenneth Heydon & Stephen Woolcock, *The Rise of Bilateralism* (Tokyo: United Nations University Press, 2009), at 72.
55 For example, the EU tried to harmonize the TBT standards and practice of Euro-Med countries to EU standards, but in the EU-Chile FTA the EU offered broad options of international standards, mutual recognition and equivalency.
56 Article 50 of the EU-CARIFORUM FTA.

the rights of the parties under the WTO TBT Agreement and contains a simple reference to transparency with no details. NAFTA provides for prior notification and for interested parties to have access to national regulatory processes. On the other hand, in the EU's first new generation FTA with Korea, TBT provisions go beyond the obligations contained in the WTO TBT Agreement.[57] Considering interests of Canadian exporters and the EU's new approach to market access in PTAs, the new CETA will probably enhance parties' transparency-related obligations beyond those stipulated in the TBT and SPS Agreements.

In addition to direct incorporation of the WTO TBT and SPS Agreements (for which both parties established domestic enquiry points), the EU-Korea FTA provides for enhanced regulatory cooperation through the establishment of a number of specialized institutions, such joint committees,[58] working groups, and coordinators[59] who monitor the implementation of the agreement and facilitate regulatory dialogue between the parties' governmental bodies and agencies. In the same way, CETA provisions could potentially provide for TBT and SPS Committees, and sub-committees and ad-hoc technical working groups as well as national standard-making bodies to facilitate implementation of the relevant CETA provisions. In terms of transparency, the CETA provisions on TBT and SPS related matters will probably require the parties to provide early notification of any new regulatory measures and to keep each other informed on any significant changes to the structure, organization and jurisdiction of their competent authorities.[60] The latter obligation is especially important considering the difference in standard-making systems between the parties and the complaints already voiced by Canadian exporters and the EU Commission.

In summary, it is possible that the CETA TBT chapter will contain a provision requiring the parties to ensure participation of interested persons at an appropriate early stage in the amendment of technical regulations and the assessment of conformity procedures and to consider the parties' comments on such regulation. Such provision allowing stakeholders from one party to participate in the

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57 'The EU-Korea Free Trade Agreement in Practice', *supra* n. 42, at 8.

58 EU-Korea FTA Art. 15.2.

59 EU-Korea FTA Art. 4.10.1: 'The Parties agree to nominate TBT Coordinators and to give appropriate information to the other Party when their TBT coordinator changes. The TBT Coordinators shall work jointly in order to facilitate the implementation of this Chapter and cooperation between the Parties in all matters pertaining to this Chapter.'

60 This will be an enhanced obligation in comparison with Ch. 4: TBT of the EU-Korea FTA.

development of the other party's technical regulations will be very important and will certainly go beyond a best endeavors duty. In that case, it will be important that the parties provide a definition of 'technical regulation' and who exactly would be considered for the purpose of this chapter to be 'an interested person' entitled to participate in the development of technical standards. Would such participation be limited only to the development of technical standards that deviate from the relevant international standards, or would it apply to any technical regulations? For example, EU-Korea FTA does not have such definitions. Assuming that CETA does not have such definitions, the question is what the impact of such transparency procedures would be on the administration of technical regulations in Canada (and in the EU). If there is also no definition of 'interested parties' in the agreement, one could understand them to be any legal persons. And suppose that there is no such transparency obligation for the federal or provincial government in Canada, or any other relevant Canadian standard-making body, would that automatically preclude EU economic actors from the consultation process?

Similarly to the TBT Chapter, CETA will certainly provide for a higher level of stringency in administering the SPS related rules for at least two reasons. First, this is a part of the EU's new strategy of negotiating FTAs, and it has already been used in EU-Korea FTA. That agreement contains specific commitments on transparency in the context of SPS issues and the applications of international standards.[61] Second, the commercial preferences in the EU have been impacting EU regulatory measures and accordingly market access of agricultural goods and products from Canada. As previously mentioned, Canadian exporters have already requested that the government negotiates enhanced transparency provisions in order to prevent agricultural protectionism.

6 PRELIMINARY CONCLUSION

CETA is following trends in the growth and development of PTAs by moving beyond WTO negotiated trade policy to cover a wider range of issues, such as services, TBT, SPS, investment, and intellectual property in greater detail and to include issues currently excluded from multilateral negotiations such as competition, sustainable development, and government procurement.[62] What implications these enhanced transparency may have on the future of CETA and the parties' existing WTO obligations towards third countries remains to be seen.

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[61] EU-Korea FTA, Ch. 5.

[62] On current trends in PTA negotiations in general and PTAs among the developed countries in particular, see WTO, *World Trade 2011, supra* n. 4. The Report specifically emphasizes that the WTO plus TBT provisions promote increased regulatory transparency; see 139–140.

Transparency is an essential factor for facilitating the efficient regulation of these areas being negotiated under CETA and also in providing public understanding of (if not support for) shared trade liberalization commitments between the parties, especially in areas of national priority. It is in the latter area that CETA has not yet utilized transparency to ensure support for the negotiations. Consequently, the picture that one may piece together from the limited information disclosed to the public on the process of negotiations is a vague one.