

Time for a new trade strategy?

BY HUGO DE GRANDPRÉ January - February 2013 Issue

So many negotiations, so little time.



Cyndee Todgham Cherniak, LexSage Professional Corporation, Toronto
Photo credit: PAUL Eekhoff

As Canada starts working on the second phase of its Global Commerce Strategy, trade experts say that the Harper government has to take a careful look at its strategy for negotiating trade agreements.

"Our Government will aim to complete negotiations on a free trade agreement with the European Union by 2012. It will also seek to complete negotiations on a free trade agreement with India in 2013. In all international forums and bilateral negotiations, our Government will continue to stand up for Canadian farmers and industries by defending supply management."

Overly ambitious? What we do know is that these forecasts in the June 2011 Throne Speech have not always matched reality. Negotiations between the EU and Canada have yet to be concluded, and on a recent trade trip to India, Prime Minister Harper was forced to recognize the slow pace of trade talks aimed at boosting trade with the world's largest democracy. And while Ottawa has officially made its way into discussions concerning a potential Transpacific Partnership, more and more Canadians are adamantly demanding an end to supply management, which is the backbone of much of Canada's farming industry.

This is the backdrop against which International Trade Minister Ed Fast, last May, mandated a panel of leaders from the business world to advise him on how to proceed in the coming years. He is expected to unveil his new Global Commerce Strategy within the next few months.

The most recent draft of the White Paper on Canadian international trade dates back to 2007. At the time, the persistent deadlock in the Doha round of trade talks signalled a shift away from the multilateral approach, and Canada dove into a series of bilateral and regional negotiations. Those efforts produced a half dozen free-trade agreements with some 10 countries as well as a dozen foreign investment promotion and protection treaties, most notably one with China last year.

So what might the next step be? Should the government continue along the same path? Or has it gone too far, too fast? Should Canada take the time to better gauge its needs and the risks associated with such an intensive agenda? Lawyers and other experts weigh in.

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A new approach focused on Asia

Seven years after Harper's arrival in office, many have touted his government's record on international trade: "The last five years, we've been on the right path. We've been doing what we should be doing. And they deserve a lot of credit for that," says Cyndee Todgham Cherniak, founder of the LexSage firm in Toronto and chair of the CBA's National Commodity Tax, Customs and Trade Section.

Like Todgham Cherniak, many of the experts we contacted agree that the Conservatives are likely to pursue bilateral or regional talks over the next few years. But the question remains: how will it go about it?

The list of negotiations currently under way between Canada and prospective free-trade partners is long: currently, the government is holding discussions with no less than twenty different countries. Some talks are quite advanced; others are still at the preliminary stage. Regardless, these discussions have been initiated with a wide range of emerging or established powers, including India, Japan, South Korea, and the EU; and also with lesser players like Morocco and the Caribbean Community (CARICOM).

Meanwhile, many observers believe that, moving forward, Ottawa would do better to focus its efforts and target certain key markets. "Our resources are not unlimited," says Lawrence Herman, an international trade veteran at Cassels Brock in Toronto. "Instead of focusing on Morocco or Caricom, there are other efforts that will be more important or productive for Canada, such as the Transpacific, the European Union, Japan, and India."

Don Campbell, a senior strategy advisor with Davis LLP, agrees. Campbell recently co-signed a report for the Asia Pacific Foundation of Canada, where he advocates paying more attention to Asian markets. The recommendations include signing free-trade agreements with Japan, India, and Korea. The report's authors are urging Ottawa to take a position right away, to be ready to start free-trade negotiations with China when the time is right.

"You are going to see a very significant focus by this government — and quite rightly so — on Asia," says Campbell, also a former assistant deputy minister with the Department of Foreign Affairs, who was actively involved in negotiating the free-trade agreement between Canada and the United States in the 1980s.

But relationships like these do not form overnight. Prime Minister Harper learned this to his own detriment on his most recent trip to India. Arriving with the intention of expediting negotiations on free trade and investment protection, he left comparing the trade challenges between Canada and India to the romantic complications found in Bollywood films.

As for China, the situation is reversed: after signing an agreement on investment protection, Ambassador Zhang Junsai urged Canada to take steps toward a free-trade agreement as soon as possible — an offer that Ottawa politely declined, at least for the time being.

"Obviously, in any agreement, it takes two to tango," Campbell acknowledges.



Don Campbell, senior strategy advisor, Davis, Vancouver
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Last year, Canada and the U.S. celebrated the 25th anniversary of their free-trade agreement. In 1987, the twin towers dominated lower Manhattan, the internet had only begun to emerge, the Iron Curtain divided Europe, and students had not yet invaded Tiananmen Square.

Along with the rest of the world, trade agreements have evolved. "NAFTA, when it came into force in '93, set a standard and a precedent," reminisces John Boscariol, a partner with McCarthy Tétrault in Vancouver.

As Herman puts it, "Canada is now pursuing a new generation of free-trade agreements."

"NAFTA plus is the new word," says Todgham Cherniak. "It's like the 2.0 version... And it's more comprehensive."

Two examples of this are the Canada-EU free-trade agreement, and the Transpacific Partnership (still being negotiated). "When you're talking free-trade, it's not just about trade in goods. It's about investment, services, e-commerce, internal rules, etc. It's about many new things that were non-issues when we negotiated NAFTA," explains Herman.



John Boscariol, partner, McCarthy Tétrault, Toronto
Photo credit: Paul Eekhoff

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Just as true, concerns about trade issues are also evolving. Some observers complain that Canada has conceded too much in its investment protection treaty with China. Gus Van Harten, Professor of Law at Osgoode Hall and an investment specialist, for one, is sounding the alarm. "My own view is that the trade agenda expanded too far and to new domains and governments still haven't come to terms as to what it means," he explains.

According to Van Harten, the Canada-China treaty is one such example of a "dangerous" trend, especially in terms of the risks inherent in the arbitration mechanisms, which lack transparency.

Indeed, under the treaty's terms arbitration hearings are only open to the public with the mutual

consent of the disputing investor and the concerned state. "As a person who follows arbitration proceedings, I am extremely worried about the risks involved and the government's failure to assess them."

Sacred cows

Finally, principles such as supply management, which have long been considered sacrosanct, are now coming under intense scrutiny. On both sides of the debate, there are those who take Canada's entry into Transpacific Partnership negotiations as a sign that Canada is prepared to evolve its position on this point.

Twenty-five years ago, such a scenario was inconceivable: "We looked at that seriously when we were doing the Canada-U.S. free trade agreement in the 80s," Campbell recalls. But at the time, he goes on to explain, the Mulroney government's Quebec caucus won the day and turned it down. "The potato was a little too hot."

Today there are many who, like the former senior federal official, are not shy to call for a reimbursement of quotas to the agricultural producers who are involved.

The issue remains a sensitive one. During the last election campaign, while visiting a Quebec dairy farm, Stephen

Harper promised to protect supply management in the future. "I've never expected to see a statement as part of the Global Commerce Strategy that we're going to undo supply management. And frankly, it's a bargaining chip for Canada," says Boscariol.

"But," he believes, "Canada needs to look in the mirror."

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COMMERCE IS THE FUTURE

To jurists, more treaties means more rules, more commercial dealings, and potentially more litigation, which could also mean more work.

"This is a pretty exciting time for trade lawyers and other lawyers advising companies and countries in this area now," says John Boscariol.

With distribution contracts, partnerships, commercial agents, licences, technology transfers and the like, Xavier Van Overmeire, regional head of the international trade group at Dentons in Montreal, finds that "contractually, production levels will be pretty interesting and significant."

Boscariol and Lawrence Herman are both advising lawyers to be ready to help their clients navigate the treasures and hidden pitfalls that these types of agreements may contain. "There is going to be a hugely expanded role for international trade lawyers in this area," predicts the McCarthy Tétrault partner.

According to Cyndee Todgham Cherniak, it's never too soon to prepare. "For any interested young people, take it upon yourselves to learn about this subject while you are still in law school. Universities should offer classes on international trade — it is so fundamentally important for the Canadian economy. And pay attention to what the Harper government is doing..."

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