

**Memorandum:
Extending CETA’s tariff benefits to the United Kingdom after Brexit**

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1. INTRODUCTION

Canada has signalled its desire to ensure that the United Kingdom continues to benefit from preferential trade arrangements with Canada after Brexit. This may be achieved in one of three scenarios. First, in the case that the UK and the European Union reach a withdrawal agreement which includes a transition period when the UK can continue to benefit from EU trade agreements, Canada has expressed its consent that the UK continue to be treated as a party to CETA. Second, in the case of a hard Brexit, Canada has expressed that it will seek to ensure “a seamless transition of CETA” via a transitional agreement with the UK that could take effect from exit day.¹ Finally, Canada and the United Kingdom have signalled their intent to forge a new bilateral trade agreement.²

This memorandum analyses how these different scenarios can be achieved under Canadian law. First, the memorandum will give a brief background on CETA, and the jurisdictions that are entitled to its benefits as defined under the treaty itself. Second, the memorandum will discuss the *Custom Tariffs* statute, demonstrating how the nexus of statute, schedule and regulations determines tariff treatment for goods. Third, the memorandum will analyse how CETA is enacted in *Customs Tariff*. Fourth, the memorandum will analyse how under Canadian law the UK can continue to receive preferential trade from Canada in the three post-Brexit scenarios listed above.

2. BACKGROUND ON CETA

2.1 General

The Comprehensive Economic and Trade Agreement is a free trade agreement between Canada and the European Union. Once fully implemented, it will achieve an elimination in 99% of tariff lines in Canada-EU trade.³

2.2 Jurisdictions that benefit from CETA: EU Member States, and jurisdictions that are within the EU customs territory (for the purposes of tariff treatment)

The Parties to CETA are Canada and the European Union. Article 1.1 of CETA adds further clarification, defining the Parties as Canada and the Member States of the European Union as defined in the Treaty on European Union and the Treaty on the Functioning of the European Union benefit from CETA.⁴

Beyond the Parties, CETA’s benefits also apply to a geographically defined territory that extends beyond the EU Member States. Article 1.3 provides that for the purposes of tariff treatment of goods, CETA also applies to the EU’s customs territory.⁵ Therefore, States like Andorra and San Marino can benefit from CETA’s tariff treatment provisions.⁶

The implementation of CETA in Canadian federal law is considered below (See 4.)

¹ *Canada Gazette*, Part I, 28 July 2018, at 2930.

² United Kingdom, PM Meeting with the Canadian Prime Minister: 18 April 2018, <<https://www.gov.uk/government/news/pm-meeting-with-canadian-prime-minister-18-april-2018>>

³ Canada, CETA: A progressive trade agreement for a strong middle class: <<http://www.international.gc.ca/gac-amc/campaign-campagne/ceta-aecg/index.aspx?lang=eng>>

⁴ Comprehensive Economic and Trade Agreement, Article 1.1., “Parties” definition.

⁵ *Ibid*, Article 1.3.

⁶ Note that this inclusion of Andorra and San Marino is subject to the CETA Protocol on Rules of Origin and Origin Procedures, described in part 5.1 of this memorandum.

3. CUSTOMS TARIFF: BACKGROUND

3.1 Overall legislative purpose and structure

Customs Tariff (the “Act”) is the federal statute that sets into law the different tariff treatments for goods entering Canada.⁷ In addition, its preamble states that it gives effect to the International Convention on the Harmonized Commodity Description and Coding System, and provides certain measures for relief against the imposition on certain duties.⁸

3.1.1 The List of Tariff Provisions

The Schedule to the Act, entitled “List of Tariff Provisions” (the “List”) sets out the detailed tariff lines for imports of goods into Canada.⁹ It is this List that the Canadian Border Services Agency uses to determine the applicable tariff to goods coming into Canada.

Below is an example of one tariff line from the List of Tariff Provisions:

Figure 1: A tariff line in “List of Tariff Provisions”, the schedule to Customs Tariff statute

Tariff Item	SS	Description of Goods	Unit of Meas.	MFN Tariff	Applicable Preferential Tariffs
9105.91.90 00	--	Other	-	14%	CCCT, LDCT, UST, MT, MUST, CIAT, CT, CRT, IT, NT, SLT, PT, COLT, JT, PAT, HNT, CEUT, UAT: Free GPT: 8% KRT: 2.5%

This excerpt from the List shows the applicable tariffs to imports of “other” types of wall clocks (identified by a Harmonized System tariff item number). Imports of these wall clocks will be subject to different tariff treatments depending on their origin. The abbreviations listed in the two right-most columns indicate the different possible tariff treatments.

“MFN” designates the most-favoured-nation tariff, which entitles goods imported from most favoured nations to a tariff of 14%.¹⁰ “KRT” designates imports from South Korea.¹¹ “CEUT” designates imports from EU countries or other CETA beneficiaries.¹²

The authority to elaborate the List derives from the Act, and the specific requirements for rules of origin derive from regulations made under the Act. Further consideration of the Brexit-related problems requires consideration of the nexus built between statute and regulation. The legislative structure of the Act is described below (see 3.1.2).

3.1.2 Overview of the Act’s structure, and key provisions

The Act is divided into nine parts, the most pertinent of which for the purposes of this memorandum is Part 2, entitled “Customs Duties.”¹³

⁷ *Customs Tariff*, SC 1997, c 36, Preamble.

⁸ *Customs Tariff*, Preamble.

⁹ *Customs Tariff*, Schedule.

¹⁰ *Customs Tariff*, s 27, “MFN” definition

¹¹ *Customs Tariff*, s 27, “KRT” definition

¹² *Customs Tariff*, s 27, “CEUT” definition

¹³ *Customs Tariff*, title of Part 2; Other parts of the Act provide for relief from duties (Part 3); regulations and order generally pertaining to public safety (Part 4), prohibited goods (Part 5), and general interpretation, amendment, and coming into force provisions (Parts 1, 6, 7, 8, and 9).

Part 2 of the Act establishes the different, possible tariff treatments under Canadian law, e.g. the general tariff, most-favoured-nation tariff, and tariff treatments arising from free trade agreements (Sections 24-52.5).¹⁴ It creates the obligation for importers to pay the appropriate customs duties (Section 20).¹⁵ Finally, it empowers the Governor in Council to adopt rules of origin applicable to specific tariff treatments (Section 16).¹⁶ (Please note, Division 4 of Part 2 of the Act sets out Emergency Measures and Safeguards, and is beyond the scope of this memorandum.)

3.2 Tariff treatments and rules of origin

Tariff treatments are established by the Act.¹⁷ In addition to the general tariff, the Act establishes several preferential tariff treatments. This includes the most-favoured-nation tariff,¹⁸ least developed country tariff,¹⁹ and the Canada-European Union tariff.²⁰

Generally, the provisions in the Act establishing tariff treatments are few and brief. For example, the provisions on the Canada-European Union tariff consists of three sections.²¹ The Act's structure allows for the government to define by regulation key definitions and rules of origin that entitle goods to a preferential tariff treatment.

In specific legislative terms, every preferential tariff treatment established in the Act makes tariff treatment subject to section 24 of the Act.²² Subsection 24(1) imposes the requirement for goods to be accompanied with proof of origin, and that the goods themselves conform to rules of origin set out in regulations made under section 16.²³ In turn, section 16 gives the Governor in Council broad regulatory powers to define the rules of origin. Specifically, the Governor in Council may by regulation:

1. Set the default rules of origin for determining when a good originates in any given country;²⁴
2. Deem goods to originate from within a country, notwithstanding that in fact the goods were produced outside of that country;²⁵
3. Deem goods to originate from outside a country, notwithstanding that in fact the goods were produced within the country.²⁶

These broad powers allow the Governor in Council to elaborate in regulation the applicable rules of origin for different tariff treatments.

¹⁴ *Customs Tariff*, ss 24-52.5.

¹⁵ *Customs Tariff*, ss 20.

¹⁶ *Customs Tariff*, s 16.

¹⁷ *Customs Tariff*, ss 24-52.5.

¹⁸ *Customs Tariff*, ss 30-33.

¹⁹ *Customs Tariff*, ss 37-40.

²⁰ *Customs Tariff*, ss 49.8-49.91.

²¹ *Ibid.*

²² *Customs Tariff*, ss 30(1), 33(1), 37(1), 41(1), 44(1), 45(1), 46(1), 49.01(1), 49.1(1), 49.41(1), 49.5(1), 49.6(1), 49.7(1), 49.8(1), 50(1), 52.1(1), 52.2(1), 52.3(1), 52.4(1), 52.5(1).

²³ *Customs Tariff*, s 24(1).

²⁴ *Customs Tariff*, s 16(2)(a)(iii).

²⁵ *Customs Tariff*, s 16(2)(a)(i).

²⁶ *Customs Tariff*, s 16(2)(a)(ii).

4. HOW CETA IS ENACTED IN *CUSTOMS TARIFF*

4.1 New tariff treatment established

CETA was enacted into Canadian federal law by the *Canada-European Union Comprehensive Trade and Economic Agreement Implementation Act*.²⁷ In order to establish a new, separate tariff treatment for EU countries and CETA beneficiaries, it amended *Customs Tariff* by adding sections 49.8 to 49.91. The tariff treatment is entitled the Canada-European Union Tariff, and is abbreviated for the purposes of the List of Tariff Provisions as “CEUT”.²⁸

Section 49.8(1) establishes the CEUT:

49.8 (1) Subject to section 24, goods that originate in an EU country or other CETA beneficiary are entitled to the Canada–European Union Tariff rates of customs duty.

4.2 Definition of “EU country or other CETA beneficiary”

Unlike the Korea Tariff, discussed briefly above, the CEUT treatment is designed to apply to goods originating from several countries. Therefore, the Act provides that the term “EU country or other CETA beneficiary” shall be defined by regulation.²⁹ That definition is provided in *Regulations Defining “EU country or other CETA beneficiary”*.³⁰ The Regulations are straightforward, consisting of two short sections which refer to the regulation’s schedule, which, in turn, lists the jurisdictions whose goods are entitled to CEUT treatment.

Notably, and in line with Article 1.3 of CETA (discussed above at 2.2), the Schedule includes members of the EU customs territory which are not EU Member States, including Andorra and San Marino.³¹

4.3 Rules of Origin Regulations

As discussed above, preferential tariff treatments are made subject to rules of origin.³² For the CEUT treatment, the rules of origin are currently set out in *CETA Rules of Origin Regulations*.³³ These Regulations are very short and incorporate by reference CETA’s Protocol on Rules of Origin and Origin Procedures.³⁴

The structure of the CETA-related regulation differs from how other rules of origin have been elaborated in Canadian law. While the CETA rules of origin are incorporated by reference, the rules of origin for the Canada-Chile Free Trade Agreement are entrenched directly into the federal regulation.³⁵

The fact that CETA’s rules of origin are incorporated by reference into federal regulation, and are not elaborated directly in the regulation, will be an additional factor that the Governor in

²⁷ *Canada-European Union Comprehensive Trade and Economic Agreement Implementation Act*, SC 2017, c 6.

²⁸ *Customs Tariff*, s 27, “CEUT” definition

²⁹ *Customs Tariff*, s 1, “EU country or other CETA beneficiary” definition:

“**EU country or other CETA beneficiary** has the meaning assigned by regulation.”

³⁰ *Regulations Defining “EU country or other CETA beneficiary”*, SOR/2017-179.

³¹ *Regulations Defining “EU country or other CETA beneficiary”*, SOR/2017-179, Schedule, s 1.

³² *Customs Tariff*, ss. 49.8, 24.

³³ *CETA Rules of Origin Regulations*, SOR/2017-175.

³⁴ *Ibid*, s 1.

³⁵ *CCFTA Rules of Origin Regulations*, SOR/97-340.

Council must consider when determining the methods to be used for extending CETA's benefits to the UK in the event of a hard-Brexit (see 5.2).

4.4 Direct Shipment Regulation

An additional regulation which forms a part of the rules of origin application to the CEUT treatment is the direct shipment requirement. This requirement is elaborated in *CETA Tariff Preference Regulations*.³⁶ In addition to the rules of origin elaborated under the CETA Protocol (and incorporated by reference into federal regulation), section 2 of this regulation requires that goods be shipped directly to Canada from an EU country or other CETA beneficiary, or that goods have travelled through third countries but have never left the control of customs authorities in those third countries.³⁷

This regulation will be another factor to consider when determining the method used for extending CETA's benefits to the UK in the event of a hard-Brexit (see 5.2).

5. HOW CANADA CAN CONTINUE TO EXTEND PREFERENTIAL TRADE ARRANGEMENTS TO THE UK

There are three post-Brexit scenarios envisaged by the Canadian and British governments:

1. The UK and EU reach an agreement which allows the UK to be considered a part of the EU for the purposes of CETA;
2. An interim agreement extending CETA benefits in the event of a "hard Brexit";
3. Establishing a new bilateral trade relationship.

Below, this memorandum will consider the legal repercussions of each of these three scenarios, and the actions that the Canadian government may need to take to give them legal effect.

5.1 The UK and EU reach an agreement which allows the UK to be considered a part of the EU for the purposes of CETA

In the event that the UK and EU reach an agreement allowing the UK to be considered a part of the EU for the purposes of CETA and other trade agreements, no changes to Canadian law should be required. However, owing to a nexus between federal regulations and CETA provisions in respect of rules of origin, some additional steps may need to be taken (described below).

In respect of the text of CETA, the UK should continue *a priori* to be covered by the provisions of the treaty. However, as mentioned, some action may need to be taken in respect of the Protocol on Rules of Origin and Origin Procedures. In the event of Brexit-with-Backstop, the UK would no longer be a member of the European Union and therefore would fall outside of the definition of "Parties" contemplated by Article 1.1 of CETA.³⁸ However, it should continue to fall within the territorial area contemplated in Article 1.3 of CETA. This article makes CETA's tariff provisions applicable to the EU customs territory.³⁹ This notion presupposes that the transitional arrangement between the EU and the UK could be defined as a customs union.

In respect of *Customs Tariff*, its schedule and regulations, no changes should be required at the domestic level. First, the *Regulations Defining "EU country or other CETA beneficiary"* could

³⁶ *CETA Tariff Preference Regulations*, SOR/2017-177.

³⁷ *Ibid*, s 2.

³⁸ CETA, Article 1.1.

³⁹ CETA, Article 1.3.

remain unchanged. The United Kingdom is currently listed in the regulation.⁴⁰ In respect of the direct shipment requirements, no changes should be required under Canadian law. The *CETA Tariff Preference Regulations* sets out the rules on direct shipment from an “EU country or other CETA beneficiary”.⁴¹ If the United Kingdom continues to be listed in the *Regulations Defining “EU country or other CETA beneficiary”*, no problem should arise in respect of direct shipment requirements.

However, to the extent that the *CETA Tariff Preference Regulations* and the *CETA Rules of Origin Regulations* incorporate via reference the CETA Protocol on Rules of Origin and Origin Procedures,⁴² some further action may need to be taken either at an international level, within the EU, or domestically within Canada.

At the international level, a joint declaration of the EU and Canada may be required. The federal *CETA Rules of Origin Regulations* and the *CETA Tariff Preference Regulations* incorporate the CETA Protocol on Rules of Origin and Origin Procedures into federal law. Article 2 of the Protocol sets out the general requirements for rules of origin and foresees that the rules elaborated in the Protocol shall be applicable as between the Parties.⁴³ “Parties” is defined in CETA as Canada and the European Union (as defined in the TEU and TFEU).⁴⁴ Therefore, notwithstanding Article 1.3 of CETA (which provides for the application of CETA to the EU customs territory) the UK after Brexit would not fall within the definition of Parties for the purposes of rules of origin. The answer to this problem may lie in Annex 7 of the CETA Protocol on Rules of Origin and Origin Procedures. Annex 7 is a short, joint declaration of the EU and Canada extending the rules of origin, *mutatis mutandis*, to Andorra and San Marino.⁴⁵ Both countries are members of the EU customs territory but are not EU Member States. This joint declaration fills the gap left between Article 1.3 of CETA and Article 2 of the Protocol. In respect of the Brexit-with-Backstop scenario, Canada and the EU could issue a joint declaration extending the rules of origin Protocol to the UK, *mutatis mutandis*.

An alternative solution may also lie within the EU. A Brexit agreement could result in changes to the Treaty on European Union and Treaty on the Functioning of the European Union that would bring the United Kingdom under the definition of “Parties” in Article 1.3 of CETA (which references the TEU and TFEU). The specific mechanisms by which this may occur is beyond the scope of this memorandum.

A final alternative may lie in domestic action within Canada. The rules of origin issue could be addressed in a manner similar to that described in part 5.2 of this memorandum. By way of summary of this point, *Customs Tariff* allows the Governor in Council to make changes necessary to the CETA rules of origin by regulation. This could entitle British goods to the benefits given under CETA. This final alternative is more appropriate for the scenario of a “hard Brexit”, but can also be pursued in this Brexit-with-Backstop scenario for considerations of expediency in light of a fast-approaching exit day.⁴⁶

⁴⁰ *Regulations Defining “EU country or other CETA beneficiary”*, SOR/2017-179, Schedule, s 1.

⁴¹ *CETA Tariff Preference Regulations*, SOR/2017-177, s 2.

⁴² *Ibid*, s 1; *CETA Rules of Origin Regulations*, SOR/2017-175, s 1.

⁴³ CETA Protocol on Rules of Origin and Origin Procedures, Article 2.

⁴⁴ CETA, Article 1.1.

⁴⁵ CETA Protocol on Rules of Origin and Origin Procedures, Annex 7.

⁴⁶ Author’s Note: I see no reason why the first option of a joint declaration under the Protocol would not be equally expedient.

5.2 Extending CETA benefits in the event of a “hard Brexit”

While the ideal scenario is one where the UK and EU reach an agreement, the structure of *Customs Tariff* should permit the Canadian government to extend the majority of CETA’s tariff benefits to the United Kingdom in the event of a hard Brexit.

It appears that section 16 of *Customs Tariff* empowers Governor in Council to make necessary amendments to the *CETA Rules of Origin Regulations* to extend CETA’s benefits to the United Kingdom. This course of action relies heavily on the nexus created between CETA provisions (notably the CETA Protocol on Rules of Origin and Origin Procedures), and domestic rules of law. The result is a surgical adaptation of regulations to avoid confusion at the borders on March 29, 2019. Furthermore, this potential course of action must be understood in the context of international ramifications (part 5.2.3) and tariff rate quotas (part 5.2.4).

5.2.1 Preliminary Note: An order under Section 49.91 of Customs Tariff not an appropriate mechanism

As described above, sections 49.8 to 49.91 of *Customs Tariff* (the “Act”) establish the Canada-European Union Tariff treatment (CEUT). Section 49.91 of the Act grants a specific power in respect of the CEUT that differs from the broad section 16 powers described in part 3.2 of this memorandum. While s. 49.91 appears to grant powers to the Governor in Council to extend CETA benefits to the UK, a closer analysis reveals that this is not the appropriate mechanism for achieving this goal. Section 49.91 is produced below:

- 49.91 (1)** The Governor in Council may, on the recommendation of the Minister, by order, amend the schedule to
- (a) extend entitlement to the Canada–European Union Tariff to any goods that originate in an EU country or other CETA beneficiary; or
 - (b) withdraw entitlement to the Canada–European Union Tariff from any goods that originate in a country if, in the opinion of the Governor in Council, those goods are not entitled to that Tariff under the Canada–European Union Comprehensive Economic and Trade Agreement.
- (2)** An order made under subsection (1)
- (a) must specify the date on which the order becomes effective;
 - (b) must, if the order partially extends entitlement to the Canada–European Union Tariff, indicate the goods to which entitlement to that Tariff is extended;
 - (c) may exempt goods from the conditions set out in subsection 24(1) and prescribe any conditions that apply; and
 - (d) must, if the order wholly or partially withdraws entitlement to the Canada–European Union Tariff, indicate the goods to which the Most-Favoured-Nation Tariff applies as a consequence.

Section 49.91 contemplates the situation when CETA parties may add, subtract, or amend tariff lines covered under the treaty. Note that the “schedule” referred to in s. 49.91(1) refers to the List of Tariff Provisions (see Figure 1 for illustration). Therefore, the amendments contemplated by this provision are ones which effect the list of goods entitled to the CEUT treatment, not the origin of those goods. However, this provision may help resolve issues of tariff rate quotas in the event of hard-Brexit (see part 5.2.4 of this memorandum).

The required action to extend CETA benefits to the UK in the event of a hard-Brexit will be a change to the rules of origin under federal regulation, and to preserve the UK’s definition as comprising a “EU country or other CETA beneficiary” described below.

5.2.2 Amended Regulations on Rules of Origin

As described above, section 16 of the Act grants the Governor in Council broad powers to regulate on rules of origin. The Governor in Council may, by regulation:

1. Set the default rules of origin for determining when a good originates in any given country;⁴⁷
2. Deem goods to originate from within a country, notwithstanding that in fact the goods were produced outside of that country;⁴⁸
3. Deem goods to originate from outside a country, notwithstanding that in fact the goods were produced within the country.⁴⁹

Therefore, section 16 of the Act empowers the Governor in Council to determine the rules under the regulations that entitle goods to the CEUT tariff treatment. Presently, the two regulations question are:

1. *CETA Rules of Origin Regulations*
2. *CETA Tariff Preference Regulations*

Both regulations incorporate via reference the CETA Protocol on Rules of Origin and Origin Procedure.⁵⁰ As described above in Part 5.1, the CETA Protocol foresees the rules of origin as applying between the Parties to CETA. After a hard-Brexit, the United Kingdom would not fall within the definition of “Parties” provided in Article 1.1 of CETA. Neither would the UK fall within the concept of an EU customs territory defined in Article 1.3 of CETA. Finally, it is also unlikely that a joint declaration between Canada and the European Union described in Part 5.1, above, would be possible.

Empowered by section 16 of the Act, the Governor in Council should be able to amend the both regulations to state that the CETA Protocol rules of origin, which are incorporated by reference,⁵¹ shall apply *mutatis mutandis* to goods arriving from the United Kingdom. This solution should entitle British imports to the CEUT tariff treatment.

No changes should be required to the *Defining “EU country or other CETA beneficiary” Regulations*, which lists the United Kingdom within the definition without any reference to an external legal instrument.⁵² Preserving this definition is key because of its nextus with statutory language used in *Customs Tariff* and the regulations, specifically:

- Section 49.8 of the *Customs Tariff* states that goods originating from an “EU country or other CETA beneficiary” are entitled to the CEUT tariff treatment.
- Section 2 of *CETA Tariff Preference Regulations* requires that for entitlement to the CEUT tariff treatment, goods must be shipped directly from an “EU country or other CETA beneficiary” (or shipped through a third-country if the goods never leave control of customs authorities)

In summary, empowered by section 16 of *Customs Tariff*, and by careful amendment of regulations which pays close attention to defined terms within CETA and the *Customs Tariff*

⁴⁷ *Customs Tariff*, s 16(2)(a)(iii).

⁴⁸ *Customs Tariff*, s 16(2)(a)(i).

⁴⁹ *Customs Tariff*, s 16(2)(a)(ii).

⁵⁰ *CETA Rules of Origin Regulations*, SOR/2017-175, s 1.; *CETA Tariff Preference Regulations*, SOR/2017-177, s 1.

⁵¹ *Ibid.*

⁵² *Regulations Defining “EU country or other CETA beneficiary”*, SOR/2017-179, Schedule, s 1.

statute itself, the Canadian government should be able to extend CETA benefits to the United Kingdom in the event of a hard Brexit.

As noted above, this must be done with a view to international ramifications and with a view to tariff rate quotas. See discussion below.

5.2.3 International Ramifications

Canada would have to consider potential international ramifications both under CETA and at the World Trade Organization.

First, if Canada extends preferential treatment to the UK without a full free trade agreement that covers “substantially all the trade” with the United Kingdom, Canada runs the risk of violating its commitment to respect the most-favoured-nation principle as entrenched in Article I of the GATT.⁵³ One possible solution to this issue is an exchange of notes where Canada and the United Kingdom signal their intent to extend the benefits of CETA between them, *mutatis mutandis*, for an interim period while a new bilateral trade relationship is negotiated.⁵⁴ should qualify as an agreement, albeit transitional, that covers “substantially all the trade” between Canada and the United Kingdom.

Second, Canada and the United Kingdom should be careful of obligations that may be contained under CETA. However, as far as I can see, CETA contains no provisions that prohibits Canada from granting identical preferential treatment to imports from a country not a party to CETA (especially in the manner described in part 5.2.2. of this memorandum, and tariff rate quotas excepted).

5.2.4 Tariff Rate Quotas under CETA

Under CETA, Canada has negotiated tariff rate quotas (TRQs) on imports of cheese and industrial cheese products.⁵⁵ This entitles a fixed amount of cheese imports to tariff-free treatment. Imports that exceed the TRQ are subject to higher tariffs. The allotment of TRQs are managed by a permits system set up under the *Export and Import Permits Act*.⁵⁶ Treatment of UK goods post-Brexit will depend on whether and what interim or final arrangement is made between the UK and the EU regarding their future relationship. This memorandum will consider: 1) The situation where the UK and EU reach an agreement where the UK can be considered a part of the EU for the purposes of CETA, and 2) the no-deal hard-Brexit scenario.

5.2.4.1 The situation where the UK and EU reach an agreement where the UK can be considered a part of the EU for the purposes of CETA

As described above (see 5.1), if the UK and EU reach a withdrawal agreement where the UK can be considered a part of the EU for the purposes of CETA, no changes should be required. The statutory and regulatory framework in Canada will already be in place to treat UK goods subject to TRQs as goods originating from an “EU country or other CETA beneficiary.” Moreover, and most importantly, such an agreement would permit the federal government under its treaty obligations to continue allocating a portion of the CETA-TRQs to UK goods.

⁵³ See *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948), at Articles I and XXIV.

⁵⁴ This is the intent expressed by the British and Canadian governments, see *supra* notes 1 and 2.

⁵⁵ CETA, Chapter 2, Annex 2-A, at para 3; see also Annual Report to Parliament on the Administration of the Export and Import Permits Act, at 18 *et seq.*, <<http://www.international.gc.ca/controls-controles/assets/pdfs/reports/eipa-2017-eng.pdf>>

⁵⁶ *Export and Import Permits Act*, ss 5, 8.

5.2.4.2 Hard Brexit

In the event of a hard-Brexit, Canada could not unilaterally allocate a portion of CETA TRQs to the UK without violating its commitments under the treaty.⁵⁷ Doing so would reduce the TRQ allocated to EU countries and CETA beneficiaries. After a hard Brexit, the UK would no longer be considered a “Party” to CETA (as defined in CETA, Article 1.1).⁵⁸ Nor would the UK fall within the scope of the territorial application of CETA (as defined in CETA, Article 1.3).

It appears that the federal government has two options in light of a hard Brexit: 1) Charge the MFN tariff treatment, and/or 2) Issue “supplemental” permits.

(a) Charging the MFN tariff treatment

For the purposes of domestic law, the Governor in Council defines the countries whose goods are entitled to MFN tariff treatment.⁵⁹ Notably, under *Customs Tariff*, goods may be entitled to MFN as well as other preferential tariff treatments.⁶⁰ The UK is currently defined as an MFN country for the purposes of *Customs Tariff*.⁶¹ Therefore, in absence of a more preferential tariff treatment, UK goods would be subject to MFN tariffs.

Above in part 5.2.2, this memorandum described how regulations can be altered to extend CEUT treatment to UK goods. If the Governor in Council takes such regulatory action, all UK goods would be entitled to CEUT treatment, including those goods that are subject to TRQs. However, as I described above, this would not be in line with Canada’s commitments under CETA. To abide by its international commitments under CETA, Canada cannot reduce the total TRQ amount to which EU countries and other CETA beneficiaries are entitled.

One solution to this is to charge the MFN tariff rate on UK goods that would have otherwise been entitled to the CETA TRQ. In order to charge the MFN tariff to UK cheeses while extending the non-TRQ CEUT tariff to other UK goods, the Governor in Council could adopt the measures I described above at 5.2.2, and then withdraw CEUT benefits over those specific goods that are subject to TRQs. The appropriate instrument for this is Section 49.91(1)(b) of *Customs Tariff*:

49.91 (1) The Governor in Council may, on the recommendation of the Minister, by order, amend the schedule to

(a) extend entitlement to the Canada–European Union Tariff to any goods that originate in an EU country or other CETA beneficiary; or

(b) withdraw entitlement to the Canada–European Union Tariff from any goods that originate in a country **if, in the opinion of the Governor in Council, those goods are not entitled to that Tariff under the Canada–European Union Comprehensive Economic and Trade Agreement.** [*Emphasis added*]

No orders have yet been made under this provision. However, its language suggests that the Schedule to *Customs Tariff* may be amended by order to withdraw CEUT entitlement for those UK goods that would be subject to a CETA TRQ. Notably, the language of s. 49.91(1)(b) empowers the Governor in Council to withdraw entitlement to the CEUT from goods that

⁵⁷ CETA, Chapter 2.

⁵⁸ CETA, Article 1.1.

⁵⁹ *Customs Tariff*, s 31.

⁶⁰ *Customs Tariff*, s 25.

⁶¹ *Customs Tariff*, Schedule, List of Countries

originate in a “country” *simpliciter* and not an “EU country or other CETA beneficiary.”⁶² As a result, the Governor in Council can treat the goods from a single country separately from the goods of the totality of EU countries or CETA beneficiaries. This should allow Canada to withdraw CEUT treatment from UK cheeses.⁶³

In absence of CEUT treatment, UK cheeses would be subject to MFN tariff treatment. As I described above, for the purposes of domestic law, the Governor in Council defines the countries to which MFN status is extended, and the UK is listed as an MFN country for the purposes of domestic law.⁶⁴ This definition does not rely on reference to an external legal instrument.⁶⁵

Notably, within the MFN tariff treatment, there is also a WTO TRQ on cheese products, below which a lower tariff rate is applied and above which a high tariff is applied (For example, see Figure 2, below).⁶⁶

This raises the same question of allocation as is raised in respect of CEUT TRQs. If the UK’s MFN status under WTO law is not settled, Canada arguably cannot allocate WTO-TRQs to the UK, as this would limit the TRQ amount available for other WTO Members. In this scenario, Canada may have to impose the MFN “over access” tariff rate, that is the high tariff rate applied to goods brought in above the TRQ.⁶⁷ On the other hand, it is likely the UK would take the opinion that its goods are entitled to MFN treatment and therefore MFN TRQs, even whilst its goods schedule is being renegotiated. In essence, the question of allocation raises the risk (however unlikely) that WTO Member States or the UK may lodge complaints against Canada to the Dispute Resolution Board in respect of its allocation of the MFN-TRQs.

⁶² *Customs Tariff*, s 2 : “**country**, unless the context otherwise requires, includes an external or dependent territory of a country and any other prescribed territory.”

⁶³ As an example of the power to extend or withdraw benefits in relation to specific goods (though not made under the same section of the Act), please see the regulation that extends MFN treatment to all ferro-chromium imports, regardless of whether or they originate in WTO Member States : *Most-Favoured-Nation Tariff Extension of Benefit Order—Ferro-Chromium*, SOR/90-303.

⁶⁴ *Customs Tariff*, s 31; also *Customs Tariff*, Schedule, List of Countries.

⁶⁵ Cf the layered definitions of “Party” and “territorial application” under CETA, and the regulations adopted domestically to enact the treaty.

⁶⁶ Government of Canada, Notice to Importers – Dairy – World Trade Organization (WTO) Cheese Tariff Rate Quota (TRQ) (Items 141 to 157 on the *Import Control List*) <<http://www.international.gc.ca/controls-contrôles/prod/agri/dairy-laitiers/notices-avis/906.aspx?lang=eng>>

⁶⁷ *Export and Import Permits Act*, s 8(1). Imposing the over-access MFN tariff treatment could likely be done as a “term and condition” of import permits.

Tariff Item	SS	Description of Goods	Unit of Meas.	MFN Tariff	Applicable Preferential Tariffs
0406.90		-Other cheese			
		---Cheddar and Cheddar types:			
0406.90.11		--- -Within access commitment		2.84¢/kg	AUT, NZT, CCCT, LDCT, UST, CT, PT, COLT, JT, PAT, HNT, CEUT, UAT: Free
	10	---- -Cheddar	KGM		
		---- -Cheddar types:			
	21	---- -Colby, Monterey Jack, Farmer or Brick.....	KGM		
	29	---- -Other.....	KGM		
0406.90.12 00		--- -Over access commitment	KGM	245.5% but not less than \$3.53/kg	

Figure 2 Tariff line for cheddar cheese

One potential solution to this difficult situation surrounding the MFN TRQs is the allocation of supplemental import permits, described below.

(b) Supplemental Import Permits

Supplemental import permits are a tool that the federal government can use to solve the TRQ-related problems related to a hard Brexit. Established under s. 8.3(3) of the *Export and Import Permits Act*, the Minister is empowered to issue supplemental import permits subject to such terms as he may deem appropriate.⁶⁸

The 2017 Annual Report submitted to Parliament on the implementation of the *Export and Imports Permit Act* states that supplemental permits can be issued to address “extraordinary or unusual circumstances”.⁶⁹ Brexit should qualify as such a circumstance. Furthermore, according to a report released by Global Affairs Canada on 31 October 2018, such supplemental import permits are already issued in respect of TRQs on cheese.⁷⁰ No further detail is given on the terms for these supplemental import permits in the report.

This tool could be used to define a supplemental “quota” of UK goods entitled to the lower TRQ, whether it be the CEUT- or WTO-TRQ treatments. In this way, the TRQ amounts set under international commitments can remain intact, while trade with the UK of TRQ-bound goods can be facilitated for the good of Canadian businesses and consumers. Whether Canada uses this tool to create a supplemental quota under the CEUT or MFN treatments is largely a political question.

5.3 Establishing a new bilateral trade relationship

Once Canada and the United Kingdom are ready to conclude a new, bilateral trade agreement, a new law amending *Customs Tariff* and other related statutes will be required to bring that

⁶⁸ *Export and Import Permits Act*, s 8(3).

⁶⁹ Annual Report to Parliament on the Administration of the Export and Import Permits Act, at 12, <<http://www.international.gc.ca/controls-controles/assets/pdfs/reports/eipa-2017-eng.pdf>>

⁷⁰ Global Affairs Canada, TRQ Imports Summary Control Year: 2018, <<https://www.eics-scei.gc.ca/report-rapport/APRMT61C-C.htm>>

agreement into force. This is because the intent of a new trade agreement would likely require commitments that are different from any existing tariff treatment under *Customs Tariff*.

The recommendations made above in part 5.2.2 appear possible because *Customs Tariff* allows the Governor in Council to determine rules of origin in such a way that by regulation, the Canadian government can define British imports as originating in an “EU country or other CETA beneficiary.” As a result, the United Kingdom accepts *in toto* the tariff rates assigned to the CEUT tariff treatment. No new tariff treatment is created. In the case of CETA-TRQs described in part 5.2.4, the “withdrawal of benefits” procedure recommended is also possible because goods coming from the United Kingdom would be entitled to an existing tariff treatment, i.e. the MFN tariff treatment.⁷¹

In contrast, a new trade deal between Canada and the UK will almost certainly necessitate defining tariff treatments that do not align perfectly with the CEUT or any other existing treatment. Therefore, a new tariff treatment, i.e. a new acronym for the List of Tariff Provisions, will need to be established. This can only be done by amending *Customs Tariff*.⁷² Even if a new UK-Canada trade deal replicates CETA entirely, an amendment should be made to *Customs Tariff* to allow for regulatory flexibility in reacting to changing circumstances. This way, the Governor in Council could treat the CEUT treatment and a hypothetical CUKT treatment entirely differently, without the surgical and admittedly convoluted solutions recommended above in part 5.2.2 and 5.2.4.

6. CONCLUSION

In summary, the best possible scenario is that the United Kingdom and the European Union strike a deal that allows Canada to continue treating the United Kingdom as a part of CETA. The necessary legislative action could then occur within the European Union, or by joint declaration between the European Union and Canada (see part 5.1). In the case of a hard Brexit, and in order to avoid confusion at the border on March 29, 2019, Canada would need to make surgical alterations to existing federal regulations to ensure that British goods could enter Canada with the benefit of CETA commitments. As was signalled by the British and Canadian governments, this would be an interim measure until a new bilateral trade agreement could be concluded. It is at this point when an amendment to the *Customs Tariff* statute would need to be made.

⁷¹ *Customs Tariff*, ss 29, 30.

⁷² See *Customs Tariff*, ss 30(1), 33(1), 37(1), 41(1), 44(1), 45(1), 46(1), 49.01(1), 49.1(1), 49.41(1), 49.5(1), 49.6(1), 49.7(1), 49.8(1), 50(1), 52.1(1), 52.2(1), 52.3(1), 52.4(1), 52.5(1) as examples for establishing new tariff treatments, and s 27 for list of defined tariff treatments.