



**CANADA-EUROPE TRANSATLANTIC DIALOGUE:  
SEEKING TRANSNATIONAL SOLUTIONS TO 21<sup>ST</sup> CENTURY PROBLEMS**  
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## **An EU – Canada Economic Partnership: Legal Considerations and Possible Treaty Scope**

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On October 17, 2008, Canada and the EU announced their intention to begin negotiating an EU-Canada Economic Partnership as early as possible in 2009.<sup>1</sup> The precise contents of such an agreement are undefined at this stage, as treaty terms remain to be clarified at the negotiating table. Such prematurity notwithstanding, this brief paper highlights some possible elements of an EU-Canada Economic Partnership, with particular attention paid to (1) the domestic negotiating restrictions of Canada and the EU and (2) the scope for regulatory convergence which exists between the two sides.

Given the current global economic climate, it is not certain what practical priority an EU-Canada agreement will have in the coming year. Perhaps an agreement promising fewer trade and investment barriers will be prioritized as a means of stimulating business and contributing to market confidence. Conversely, perhaps an agreement will not be actively pursued in the immediate term, with policy-makers' focus instead on market stabilization initiatives. Regardless of the precise strategies taken, it is certain that the eventual conclusion of a comprehensive agreement will require committed focus on both sides.

Several factors have been facilitative recently of an EU-Canada trade treaty. First, the WTO Doha Development Round's unsuccessful conclusion in July has left Canada and the EU with renewed openness towards bilateral and regional trade liberalization. Second, key personalities and their dedication to Canada-EU relations explain renewed interest in a Canada-EU agreement. For instance, Quebec Premier Jean Charest has made trans-Atlantic economic and cultural relations a significant leadership priority and has pushed hard for legal developments required to deepen trans-Atlantic relations.<sup>2</sup> In addition, France currently holds the Presidency of the Council of the European Union, and President Nicolas Sarkozy has lent French enthusiasm to relations with Quebec and Canada in Council activities.<sup>3</sup> It remains to be seen how the Czech Republic, incoming EU Council President effective January 1, 2009, will view the EU-Canada Economic Partnership dossier.

Pursuit of a new agreement is supported by several broad rationales. For instance, some perceive a need for Canada to diversify its trade patterns.<sup>4</sup> On the EU side, there is an interest in obtaining Canadian market access on a level more on par with that held by the US.<sup>5</sup> In general, some regard the EU-Canada trading framework to be well overdue for an update.<sup>6</sup> This view is underscored by the fact that

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negotiations of a previous Trade and Investment Enhancement Agreement (TIEA) between Canada and the EU were suspended in 2006 and were ultimately not pursued.<sup>7</sup> It is hoped that the challenges to the TIEA's negotiation may be overcome to permit the realization of an EU-Canada Economic Partnership.

### **Possible Agreement Contents**

Released in October 2008, a 192 page joint EU-Canada study on the possible yields of an Economic Partnership surveys a wide range of potential treaty areas, including address of tariff and non-tariff trade and investment barriers, as well development of cooperation programs in non-traditional areas such as the environment, labour mobility, energy and technology.<sup>8</sup> Overall, the study presents the EU-Canada trading relationship as significant but underdeveloped. While tariffs are noted to be generally low, some tariff peaks are evident including on agricultural goods, processed foods and seafood.<sup>9</sup> The report notes, furthermore, that even low tariffs have a negative impact upon trade efficiency and may cause trade diversion.<sup>10</sup> Canada's Most Favoured Nation obligations outlined in the NAFTA would suggest that existing NAFTA zone tariffs cannot be undercut in an EU-Canada Economic Partnership. Despite such limitations, tariff reductions where peaks remain will likely be among the lowest-lying fruit available to Canadian and EU treaty negotiators, at least with regard to tariffs on non-agricultural products.<sup>11</sup>

There are numerous non-tariff barriers in trade and services between the EU and Canada which negotiators may or may not address, including those in taxation and securities regulation.<sup>12</sup> The joint study cites industry identification of various non-tariff barriers in Canada (such as those related to quotas, sanitary approvals, provincial marketing of alcoholic beverages, labelling and packaging requirements and technical and safety standards) and the EU (including those related to certification problems, labelling and packaging requirements, health and safety standards and sanitary and phyto-sanitary measures).<sup>13</sup>

### **Domestic Competency Issues**

It is worth noting that neither agricultural subsidies nor investor-state dispute settlement are extensively discussed in the joint EU-Canada study, although such topics may well be covered in an eventual Economic Partnership agreement. With regard to agriculture, this omission may suggest a political desire on the part of both sides to avoid delving into the contentious topic. With regard to investment dispute resolution, non-inclusion of investor-state arbitration may relate to EU domestic competency limitations. The joint study writes that "EU-Canada cooperation on investment promotion takes place not at EU-Canada level but at EU Member State-Canada level."<sup>14</sup> In fact, if EU practice with Mexico and Chile is followed, investor-state will likely not be included in an agreement with Canada.<sup>15</sup>

As the possible exclusion of investor – state arbitration might suggest, both Canada and the EU are challenged in the treaty-making process by domestic limits on their ability to make treaty commitments. Both sides will need to pursue consensus with their sub-central jurisdictions in order to negotiate a comprehensive EU-Canada Economic Partnership which addresses non-tariff barriers. Some non-tariff barriers to trade and investment identified in the joint study relate to topics that are not exclusively controlled by either the federal Canadian government, or the EU, but are rather the domain of sub-central jurisdictions such as Canadian provinces or EU member states.<sup>16</sup>

For example, provincial procurement market access appears to be a high priority for the EU,<sup>17</sup> but it may be difficult for Canada to secure provincial support for Canada-wide commitments in this area.<sup>18</sup> Another challenging negotiation topic will be non-tariff barriers related to labour mobility, a complex area that touches upon the recognition of accreditations governed at the provincial level, (i.e., driver's licenses and professional accreditations of physicians, nurses, teachers and lawyers). For Canada to negotiate effectively with the EU, some level of consensus within Canada on challenging topics must be found. This may mean that new ways of including provinces in the treaty negotiation process may need to be sought,

in order to ensure that Canada is able to negotiate effectively with the EU and to offer efficient implementation of potential treaty contents.<sup>19</sup>

### **Regulatory Harmonization and Non-Tariff Barriers**

Some non-tariff barriers relate to substantive differences in the regulatory approaches of the two jurisdictions. As some critics of a potential EU-Canada deal have noted,<sup>20</sup> the EU has tended to adopt a precautionary approach to risk in situations where Canada has not, leading to several WTO disputes.<sup>21</sup> The extent to which Canada and the EU may be able to narrow the gap between their regulatory approaches will likely vary from issue to issue. Furthermore, Canada's relationship with the US, and its historic regulatory alignment with that country on some issues, may limit the harmonization concessions that Canada will make to the EU in the negotiation of an EU-Canada Economic Partnership.

Some harmonization options appear, upon cursory review by an admitted non-specialist, to be potentially feasible without alienation of the US or insurmountable friction between federal and provincial levels of government. For instance, perhaps some product labelling changes, towards further consistency with EU standards, will reduce a market barrier to EU exporters without undue compromise of Canadian policy objectives. Canada must not lose sight of its overall objectives in pursuing such regulatory harmonization, however, in order to avoid having its policy interests diluted in the face of those of the much larger EU. Common policy interests between the EU and Canada, despite size differences, certainly do exist, as suggested by the recent conclusion of the landmark EU-Canada "Open Skies" Aviation Agreement.<sup>22</sup>

There are further harmonization issues which are likely to be challenging. The Canadian trademark owned by Maple Leaf Foods on "Parma Ham" may have to be revisited in order to be consistent with the EU's approach to geographical indicators protection. It is unclear whether the EU will insist upon geographical indicator protections additional to those seen at the WTO in an Economic Partnership agreement with Canada. EU producers also appear to take issue with divergent Canadian labelling requirements for food and chemicals, as well as the requirement of veterinarian certificates for the import of cheeses.<sup>23</sup>

Another challenging harmonization topic is environmental regulation. For example, the EU's chemical policy as contained in the REACH Directive<sup>24</sup> may hold that small chemical impurities imported within large quantities of Canadian ore are considered dangerous according to the Directive and may not be granted entry to the EU market (e.g., nickel ore).<sup>25</sup> Also, some Canadian forestry products may be barred under the EU's Green Public Procurement policy, due to the use of particular processing practices.<sup>26</sup> The extent to which regulatory harmonization is an appropriate method of addressing such issues remains to be seen.

In sum, an EU-Canada Economic Partnership could see Canada harmonize some regulatory policy with the EU to minimize non-tariff trade barriers. This would need to be realized carefully, however, so as to ensure consistency with Canadian policy objectives and continued fluidity in the Canada-US trading relationship. Moreover, the economic benefits of lifting non-tariff barriers to trade and investment with the EU are admittedly difficult to quantify, warranting thorough evaluation processes in advance of harmonization decisions.<sup>27</sup>

### **Conclusion**

Overall, the potential economic gains from a deepened economic relationship with the EU are substantial. The joint study's modelling suggests estimated annual GDP gains for Canada and the EU would rise by 2014 to about €8.2 billion and €11.6 billion respectively.<sup>28</sup> It should be noted that Canada currently has a trade deficit with the EU (valued at €9 billion for trade in goods in 2007)<sup>29</sup> and an Economic Partnership's probable effects on the Canada - EU trade balance will require careful study, particularly since Canada's

trading relationship with individual EU member countries varies widely. The economic modelling presented in the joint study found that Canada would have a foreseeable benefit from an economic agreement with the EU through increased incomes, efficiencies and economic dynamism but also found that an agreement would potentially widen Canada's trade deficit with the EU.<sup>30</sup>

To conclude, this brief paper has sought to survey possible contents and challenges associated with an EU-Canada Economic Partnership, noting especially the role of both sides' domestic competency to negotiate such an agreement, as well as the practical scope which exists for regulatory harmonization in the face of non-tariff trade and investment barriers. In addition to addressing trade and investment barriers, an important thrust of an EU-Canada agreement may be the development of new common initiatives in a range of important policy areas including the environment, energy, labour mobility, telecommunications and electronic commerce. Regardless of the final terms of an Economic Partnership, it is clear that Canada and the EU are allies that ought to work together towards the attainment of common goals.

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<sup>1</sup> "2008 Canada-EU Summit Statement", European Commission and Government of Canada, 17 October 2008, [http://international.gc.ca/missions/eu-ue/summits\\_sommets/summit\\_quebec-2008\\_joint-declaration-eng.asp](http://international.gc.ca/missions/eu-ue/summits_sommets/summit_quebec-2008_joint-declaration-eng.asp).

<sup>2</sup> See, e.g., *Entente France-Québec sur la reconnaissance mutuelle des qualifications professionnelles*, (in force, 17 October 2008), <http://www.mri.gouv.qc.ca/fr/informer/ententes/pdf/2008-12.pdf>.

<sup>3</sup> See, e.g., Peter O'Neil, "Summit will give Canada-EU trade pact big push: Sarkozy", Canwest News, 16 October 2008, <http://www.canada.com/topics/news/story.html?id=1dab638b-1fc5-4119-a465-fec47a95cf59>.

<sup>4</sup> See, e.g., Campbell Clark & Eric Reguly, "Ottawa, EU seek new trade pact; As U.S. economy stalls, liberalized accord on services with Europe gaining favour" *The Globe and Mail*, 17 October 2008, at B1, <http://www.theglobeandmail.com/servlet/story/RTGAM.20081016.r-banks-eu17/BNStory/Business/>.

<sup>5</sup> See discussion of NAFTA trade diversion in Selen Sarisoy Guerin & Chris Napoli, "Canada and the European Union: Prospects for a Free Trade Agreement", Centre for European Policy Studies, CEPS Working Document No. 298/July 2008, at 22-24, [http://shop.ceps.eu/BookDetail.php?item\\_id=1686](http://shop.ceps.eu/BookDetail.php?item_id=1686).

<sup>6</sup> See e.g., Dan Lemaire & Wenguo Cai, "Lost over the Atlantic? The Canada-EU Trade and Investment Relationship", Conference Board of Canada, 2006, at 1, <http://www.conferenceboard.ca/documents.aspx?DID=1673>.

<sup>7</sup> *Joint Study*, *infra* note 8 at 118.

<sup>8</sup> "Assessing the costs and benefits of a closer EU-Canada economic partnership", A Joint Study by the European Commission and the Government of Canada, 17 October 2008, [http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc\\_141032.pdf](http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141032.pdf) [*Joint Study*]. The Joint Study discusses bilateral cooperation programs in a range of areas, including in science and technology, energy, fisheries and the environment. *Joint Study* at 105-152.

<sup>9</sup> *Ibid*, at 33-37.

<sup>10</sup> *Ibid*, at 165.

<sup>11</sup> *Ibid*, at 39.

<sup>12</sup> Guerin & Napoli, *supra* note 5 at 19.

<sup>13</sup> *Joint Study*, *supra* note 8 at 31.

<sup>14</sup> *Ibid*, at 177.

<sup>15</sup> *EC-Chile Association Agreement*, 3 October 2002, [http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc\\_111620.pdf](http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_111620.pdf); *EU-Mexico Economic Partnership, Political Coordination and Cooperation Agreement*, 1997, (in force, 2002), [http://ec.europa.eu/external\\_relations/mexico/index\\_en.htm](http://ec.europa.eu/external_relations/mexico/index_en.htm).

<sup>16</sup> *Joint Study*, *supra* note 8 at 37-49.

<sup>17</sup> *Ibid*, at 161 & 169.

<sup>18</sup> In fact, Canada has not made significant procurement commitments for sub-national entities even at the WTO level. *Joint Study*, *supra* note 8 at 169.

<sup>19</sup> In the treaty-negotiating context, the EU's relationship with its sub-central jurisdictions is structured somewhat differently from that of the federal Canadian government with the Canadian provinces. Before the European Commission (the executive branch of the EU) can negotiate a treaty it must have a specific negotiating mandate deliberated upon and approved by the European Council (the body representing the EU's Member States). See, e.g., *Council Decision 2002/979/EC of 18 November 2002 on the signature and provisional application of certain*

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provisions of an Agreement establishing an association between the Community and its Member States, of the one part, and the Republic of Chile, of the other part. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002D0979:EN:HTML>>. See also, *EU Bulletin EU 9-1999*, Negotiating directives adopted by the Council on 13 September, *Draft political and economic association agreement between the Community and its Member States, of the one part, and the Argentine Republic, of the other part*, <<http://europa.eu/bulletin/en/9909/p104077.htm>>.

<sup>20</sup> Bill Dymond & Michael Hart, "A Canada-E.U. FTA is an Awful Idea", *Policy Options*, July 2002, 27 at 30 <http://www.irpp.org/po/archive/jul02/dymond.pdf>.

<sup>21</sup> WTO disputes such as those related to hormone use in beef production and approval of biotechnology in food products reflect this difference in approach. Details on WTO disputes may be found at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_subjects\\_index\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm); See: *Canada - Continued Suspension* (Complainant: European Communities) WTO Dispute DS321; *EC - Hormones* (Complainant: Canada) WTO Dispute DS48; *EC - Approval and Marketing of Biotech Products* (Complainant: Canada) WTO Dispute DS292;

<sup>22</sup> "Breakthrough in EU-Canada negotiations on far-reaching aviation agreement", *Europa Press Release*, 9 December 2009, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1914&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>23</sup> *Joint Study*, *supra* note 8 at 39.

<sup>24</sup> Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1907:EN:NOT>.

<sup>25</sup> Guerin & Napoli, *supra* note 5 at 18.

<sup>26</sup> Guerin & Napoli, *supra* note 5 at 18.

<sup>27</sup> *Joint Study*, *supra* note 8 at 40.

<sup>28</sup> *Ibid*, at 28.

<sup>29</sup> *Ibid*, at 22. Due to Canada's trade surplus with the US, Canada has an overall trade surplus but has trade deficits with most countries.

<sup>30</sup> *Ibid*, at 57.