



**CANADA-EUROPE TRANSATLANTIC DIALOGUE:  
SEEKING TRANSNATIONAL SOLUTIONS TO 21<sup>ST</sup> CENTURY PROBLEMS**

<http://www.carleton.ca/europecluster>

*Policy Brief March 2009*

**Prospects for a Deep Canada-EU Economic Agreement:  
A Closer Look at Foreign Investment\***

**Armand de Mestral, McGill University with the assistance of Daniel Suss**

Canada and the European Union are embarking on what has the potential to become a very comprehensive bilateral economic agreement. With the momentum of three important public announcements within the last five months,<sup>1</sup> Canadian and European Union authorities are showing a good deal of optimism that the formal start of negotiations on the final document will be announced as early as this May at the annual Canada-EU summit in Prague.<sup>2</sup> For Canadian International Trade Minister Stockwell Day, this is viewed as a “priority”.<sup>3</sup>

There is good reason for this, in spite of – or perhaps due to – the global economic slowdown. A desire to lessen Canada’s dependence on the American economy is no doubt a contributing factor, along with general frustrations over fruitless negotiations at the Doha Round.<sup>4</sup> There may be a mutual interest to increase North Atlantic leverage vis-à-vis the increasingly powerful Asian markets for future WTO negotiations.<sup>5</sup> In addition, there is the continuing concern regarding labour shortages given that Canada’s labour pool is growing by half the rate of 25 years ago and the rate of increase continues to decline.<sup>6</sup> And, of course, the Canada-EU joint economic study<sup>7</sup> released in October 2008 predicted a \$12 billion boost to the Canadian economy and a 20% increase in bilateral trade.<sup>8</sup>

The latest announcement delivered on March 5, 2009 in the *Joint Report on the EU-Canada Scoping Exercise*,<sup>9</sup> outlined the areas to be negotiated and included a few interesting innovations. It suggested that an agreement should introduce a more binding form of regulatory cooperation,<sup>10</sup> facilitate the mutual recognition of professional qualifications,<sup>11</sup> and include sub-central governments in everything from services trade to public procurement liberalisation and foreign investment.<sup>12</sup> The following section will discuss the potential for progress in this last issue.

---

\* Armand de Mestral is Jean Monnet Professor of Law at McGill University. Daniel Suss (BCL/LLB, McGill). The views expressed are attributable only to the author in a personal capacity and not to any institution with which they are associated.

## Investment Liberalisation: How Deep will it Go?

The *Joint Report* stated that “The agreement should include, as a minimum, all the chapters of the most ambitious EU and Canadian bilateral economic agreements to date.”<sup>13</sup> Specifically for trade in services, and foreign investment to the extent that it is covered as services supply Mode 3 (commercial presence), it insists that it “should provide for a considerably higher level of ambition than the current WTO commitments”: it should apply to all levels of government, and no mode of supply or services sector should be excluded *a priori*.<sup>14</sup> The *Joint Report*’s approach to opening up foreign investment regulation reflects that of both the Canadian government and European Commission. It aims to improve market-access (pre-establishment phase) and non-discriminatory National Treatment (post-establishment phase), to improve transparency through a clear regulatory framework, and to facilitate the free-flow of capital movements and ‘key personnel.’<sup>15</sup>

But how ambitious have these governments really been? At the WTO, TRIMS only applies to investment measures related to trade in goods,<sup>16</sup> and, while GATS nominally applies to commercial presence,<sup>17</sup> few governments have made significant concessions in their schedules, either in terms of breadth or depth. This contrasts to some degree with achievements in Canada’s FIPAs (Foreign Investment Promotion and Protection Agreement) and FTAs (Free Trade Agreements) and the EU’s Association Agreements. However, these agreements still exhibit a good deal of restraint, some of the glaring examples of which are outlined below.

Firstly, both the EU and Canada still take broad sectoral exceptions in their schedules to otherwise broad investment-liberalising clauses in the main texts of the bilateral or plurilateral agreements. These sectors overlap considerably. They include social services or public utilities, telecommunications or audio-visual services, water transport services or national maritime cabotage, air transport services and financial services<sup>18</sup> (though the latter two have been the subject of separate liberalising agreements or chapters).<sup>19</sup> Any breakthroughs in these sectors might therefore not have been expected in a new agreement were it not for statements such as that by Minister Day and Czech Minister of Industry and Trade Martin Riman in January this year expressing “a desire to increase trade and investment in key sectors, including aviation, information and communication technologies, aerospace and defence, life sciences, agriculture and agri-food, and environmental technologies.”<sup>20</sup> Fresh movement in these areas may therefore be forthcoming.

As for dispute resolution, whereas Canada has regularly included binding investor-state arbitration provisions in its FIPAs and FTAs,<sup>21</sup> the EU (as opposed to its member states’ in their numerous BITs (Bilateral Investment Treaties)) has no history in this area and there are doubts as to its capacity to commit itself to binding investor-state arbitration. It is quite possible that existing Canada EU Member State BITs will continue to govern for the time being.

Both Canada and the EU have generally managed to bind their respective sub-central governments to the investment-liberalising clauses of their various treaties *prima facie*.<sup>22</sup> However, with extensive and highly diverse carve-outs by each EU member state,<sup>23</sup> as well, given that most provincial jurisdiction is already excluded through the sectoral exceptions noted above (consider ‘social services’), there is ample room for expansion here too. Minister Day appears confident that the provinces will be compliant,<sup>24</sup> but we will simply have to wait and see the full extent of provincial penetration a Canada-EU agreement will achieve.

## Bibliography

- Bedard, Benjamin P. & Richard L. Desgagnés, “Canada: Comprehensive Canada-EU Air Transport Agreement Concluded” (15 Dec 2008) *Mondaq*, online: <<http://www.mondaq.com/article.asp?articleid=71566>>.
- Engardio, Pete, “This Would Be Bigger Than NAFTA” (27 Mar 2008) *Business Week* at 66.
- Maclaren, Roy, “We need a Euro deal ...; Roy Maclaren and Matthew B. Adler square off over whether Canada needs an EU free-trade agreement” (16 Oct 2008) *National Post* at FP.15.
- O’Neil, Peter, “Canada, EU push ahead with trade talks; Bilateral deal could be worth \$32B” (16 Jan 2009) *Edmonton Journal* at A.6.
- Sosnow, Cliff & Elysia Van Zeyl, “Canada to Deepen Trade Relations with the European Union” (21 Oct 2008) *Heenan Blaikie*, online: <<http://www.blakes.com/english/view.asp?ID=2624>>.
- “Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership”, online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/EU-CanadaJointStudy-en.pdf>>.
- “Canada Concludes Historic Air Transport Negotiations with European Union” (9 Dec 2007) *Transport Canada*, online: <<http://www.tc.gc.ca/mediaroom/releases/nat/2008/08-h237e.htm>>.
- “Canada’s Foreign Investment Promotion and Protection Agreements”, *Foreign Affairs and International Trade Canada*, online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-fastfacts-apie-faits-saillants.aspx?lang=en>>.
- “European Union Policy on Foreign Direct Investment”, *European Commission*, online: <[http://ec.europa.eu/trade/issues/sectoral/investment/index\\_en.htm](http://ec.europa.eu/trade/issues/sectoral/investment/index_en.htm)>.
- “Joint Report on the EU-Canada Scoping Exercise” (5 March 2009) online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu-report-intro-can-ue-rapport-intro.aspx>>.
- “Minister Day Announces Crucial Step Forward on Canada-EU Comprehensive Economic Agreement” (5 March 2009) News Release, *Foreign Affairs and International Trade Canada*, online: <[http://w01.international.gc.ca/MinPub/Publication.aspx?isRedirect=True&Language=E&publication\\_id=386908&docnumber=60](http://w01.international.gc.ca/MinPub/Publication.aspx?isRedirect=True&Language=E&publication_id=386908&docnumber=60)>.
- “Minister Day Confident of a New Economic Agreement with European Union” (16 Jan 2009) News Release, *Foreign Affairs and International Trade Canada*, online: <[http://w01.international.gc.ca/MinPub/Publication.aspx?isRedirect=True&Language=E&publication\\_id=386741&docnumber=11](http://w01.international.gc.ca/MinPub/Publication.aspx?isRedirect=True&Language=E&publication_id=386741&docnumber=11)>.
- Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments*, online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Canada-Peru10nov06-en.pdf>>.
- Agreement between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments*, online:

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/LETTONIE-E.PDF>>.

*Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part*, online:  
[http://ec.europa.eu/trade/issues/bilateral/countries/chile/euchlgr\\_en.htm](http://ec.europa.eu/trade/issues/bilateral/countries/chile/euchlgr_en.htm).

*Agreement on Trade-Related Investment Measures*, Art. 1, online:  
[http://www.wto.org/english/docs\\_e/legal\\_e/18-trims.pdf](http://www.wto.org/english/docs_e/legal_e/18-trims.pdf).

*Air Transport Agreement (US-EU)*, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:134:0004:0041:EN:PDF>.

*Canada-Colombia Free Trade Agreement*, online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/can-colombia-toc-tdm-can-colombie.aspx>.

*General Agreement on Trade in Services*, Art. 1(2)(c), online:  
[http://www.wto.org/english/docs\\_e/legal\\_e/26-gats\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm).

*North American Free Trade Agreement*, online: [http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/texte/index.aspx?lang=en&menu\\_id=34&menu=R](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/texte/index.aspx?lang=en&menu_id=34&menu=R).

---

<sup>1</sup> The publication of a Canada-EU joint economic study and their Summit in Quebec City (17 Oct 2008); the ministerial meetings in the Czech capital (16 Jan 2009); the release of the Joint Report on the EU-Canada Scoping Exercise (5 March 2009).

<sup>2</sup> “Minister Day Confident of a New Economic Agreement with European Union” (16 Jan 2009) News Release, Foreign Affairs and International Trade Canada, online:  
[http://w01.international.gc.ca/MinPub/Publication.aspx?isRedirect=True&Language=E&publication\\_id=386741&docnumber=11](http://w01.international.gc.ca/MinPub/Publication.aspx?isRedirect=True&Language=E&publication_id=386741&docnumber=11) > [16 Jan News Release]; Peter O’Neil, “Canada, EU push ahead with trade talks; Bilateral deal could be worth \$32B” (16 Jan 2009) Edmonton Journal at A.6 [O’Neil].

<sup>3</sup> “Minister Day Announces Crucial Step Forward on Canada-EU Comprehensive Economic Agreement” (5 March 2009) News Release, Foreign Affairs and International Trade Canada, online:  
[http://w01.international.gc.ca/MinPub/Publication.aspx?isRedirect=True&Language=E&publication\\_id=386908&docnumber=60](http://w01.international.gc.ca/MinPub/Publication.aspx?isRedirect=True&Language=E&publication_id=386908&docnumber=60) > [5 March News Release].

<sup>4</sup> Cliff Sosnow & Elysia Van Zeyl, “Canada to Deepen Trade Relations with the European Union” (21 Oct 2008) Heenan Blaikie, online: <http://www.blakes.com/english/view.asp?ID=2624>.

<sup>5</sup> Roy Maclaren, “We need a Euro deal ...; Roy Maclaren and Matthew B. Adler square off over whether Canada needs an EU free-trade agreement” (16 Oct 2008) *National Post* at FP.15.

<sup>6</sup> Pete Engardio, “This Would Be Bigger Than NAFTA” (27 Mar 2008) Business Week at 66.

<sup>7</sup> “Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership”, online:  
<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/EU-CanadaJointStudy-en.pdf>.

<sup>8</sup> 5 March News Release, supra note 3.

<sup>9</sup> “Joint Report on the EU-Canada Scoping Exercise” (5 March 2009) online:  
<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/can-eu-report-intro-can-ue-rapport-intro.aspx> > [Joint Report].

<sup>10</sup> Ibid. at 6.

<sup>11</sup> Ibid. at 5.

<sup>12</sup> Ibid. at 5-6.

<sup>13</sup> Ibid. at 3.

<sup>14</sup> Ibid. at 5.

<sup>15</sup> Ibid. at 6; for the EU see “European Union Policy on Foreign Direct Investment”, European Commission, online: [http://ec.europa.eu/trade/issues/sectoral/investment/index\\_en.htm](http://ec.europa.eu/trade/issues/sectoral/investment/index_en.htm); for Canada see “Canada’s Foreign Investment Promotion and Protection Agreements”, Foreign Affairs and International Trade Canada, online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-fastfacts-apie-faitssailants.aspx?lang=en>.

---

<sup>16</sup> Agreement on Trade-Related Investment Measures, Art. 1, online:

<[http://www.wto.org/english/docs\\_e/legal\\_e/18-trims.pdf](http://www.wto.org/english/docs_e/legal_e/18-trims.pdf)>.

<sup>17</sup> General Agreement on Trade in Services, Art. 1(2)(c), online:

<[http://www.wto.org/english/docs\\_e/legal\\_e/26-gats\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm)>.

<sup>18</sup> For the EU, see e.g. the Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, online:

<[http://ec.europa.eu/trade/issues/bilateral/countries/chile/euchlagr\\_en.htm](http://ec.europa.eu/trade/issues/bilateral/countries/chile/euchlagr_en.htm)>, Art. 95, Annex VII [EC-Chile AA]; for Canada's FTAs, see e.g. the recent Canada-Colombia Free Trade Agreement, online:

<<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/can-colombia-toc-tdm-can-colombie.aspx>>, Art 809, Annex II [Canada-Colombia FTA]; and the North

American Free Trade Agreement, online: <[http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/texte/index.aspx?lang=en&menu\\_id=34&menu=R](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/texte/index.aspx?lang=en&menu_id=34&menu=R)>, Art. 1108(3), Annex

II [NAFTA]; for Canada's FIPAs see e.g. the Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments, online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Canada-Peru10nov06-en.pdf>> Art. 9(2), Annex II [Canada-Peru FIPA];

and for one with an EU member state, see e.g. the Agreement between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments, online:

<<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/LETTONIE-E.PDF>>

Art. III(3)(c) [Canada-Latvia FIPA].

<sup>19</sup> See "Canada Concludes Historic Air Transport Negotiations with European Union" (9 Dec 2007)

Transport Canada, online: <http://www.tc.gc.ca/mediaroom/releases/nat/2008/08-h237e.htm>; It is

reportedly more far-reaching than any similar EU or Canadian agreement, see Benjamin P. Bedard &

Richard L. Desgagnés, "Canada: Comprehensive Canada-EU Air Transport Agreement Concluded" (15

Dec 2008) Mondaq, online: <<http://www.mondaq.com/article.asp?articleid=71566>>; see e.g. Air Transport

Agreement (US-EU), online: <[http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:134:0004:0041:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:134:0004:0041:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:134:0004:0041:EN:PDF)>; and the Canada-

Colombia FTA, *ibid.*, at Chapter 11 – Financial Services.

<sup>20</sup> 16 Jan News Release, *supra* note 2.

<sup>21</sup> See e.g. Canada-Colombia FTA, *supra* note 18, Art. 819; NAFTA, *supra* note 18, Art. 1116; Canada-Peru FIPA, *supra* note 18, Section C; Canada-Latvia FIPA, *supra* note 18, Art. XIII(2).

<sup>22</sup> For the EU, see e.g. EC-Chile AA, *supra* note 18, Arts. 96(b), 117(2)(i); Canada's earlier agreements did so tacitly: Canada-Latvia FIPA, *supra* note 18, Art. IV(2); Canada's later agreements did so explicitly:

Canada-Colombia FTA, *supra* note 18, Art. 803(3) and NAFTA, *supra* note 18, Art. 1102(3) and Canada-

Peru FIPA, *supra* note 18, Arts. 3(3), 49.

<sup>23</sup> See e.g. the schedules in the EC-Chile AA, *supra* note 18.

<sup>24</sup> O'Neil, *supra* note 2.