



**CANADA-EUROPE TRANSATLANTIC DIALOGUE:
SEEKING TRANSNATIONAL SOLUTIONS TO 21ST CENTURY PROBLEMS**

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**An EU – Canada Economic Partnership:
What Role for the Provinces?**

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Canada and the EU are reportedly set to begin negotiations for an EU – Canada Economic Partnership as early as May, during the Canada – EU summit in Prague.¹ This brief note surveys the significance of provincial participation in the project's overall scope and success. For its part, the Joint EU-Canada "Scoping Exercise" report, released March 5, 2009, underscores the role of Canadian provinces in the treaty's negotiation and implementation, stating that "The [Canadian] provinces and territories will participate in the negotiations with a view to making binding commitments in all areas falling, wholly or in part, in their jurisdiction in any agreement to the full extent that European undertakings warrant."²

In practical terms, it remains to be seen how provincial input will be managed in negotiations. The federal government clearly has a delicate task before it. It must ensure genuine representation of the voices of Canada's provinces at the negotiating table while at the same time ensuring that Canada comports itself as a cohesive negotiating party. One of Canada's perennial challenges, that of maintaining federal unity in the face of diverse provinces and territories, will figure prominently in the pursuit of an EU – Canada Economic Partnership.

Provincial involvement in this treaty project is of critical importance for at least three related reasons. First, there will likely be no deal without comprehensive provincial engagement in the project because high priority EU negotiating objectives directly include topics within provincial jurisdiction, notably provincial procurement market access and provincially regulated services.³ Second, as suggested by the aforementioned "Scoping Exercise" report and the earlier "Joint Study"⁴ completed by the two sides, interest in the treaty on Canada's and the EU's part stems from the agreement's promise in several identified areas which are within provincial jurisdiction. These include the common recognition of professional accreditation,⁵ where provincial input in negotiations will be essential to address such topics of mutual interest. Third, if provinces are not adequately included in the negotiation process there is a risk that the final results will be unpalatable to them, creating a barrier to comprehensive domestic implementation of the treaty and undermining the utility of the entire exercise. These three reasons are each examined in the paragraphs below.

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With regard to the first reason, relating to the EU's negotiating objectives, it should be noted that Canada is the first G-8 country outside Europe with which the EU has chosen to pursue a comprehensive trade agreement.⁶ The tariff barriers which remain between Canada and the EU are comparatively modest, although not insubstantial. A model of the effects of an agreement suggest that a higher proportion of potential GDP gains would result from the abatement of non-tariff barriers than from tariff reductions.⁷ Government procurement restrictions are among the non-tariff barriers which will likely be addressed in the agreement.

The "Joint Study" contained views of Canadian and European industry representatives. Representatives from both sides suggested government procurement as a priority topic for inclusion in potential negotiations.⁸ European industry representatives in particular expressed an interest in the sub-national Canadian procurement market.⁹ While both Canada and the EU are parties to the plurilateral WTO Government Procurement Agreement, Canada has offered commitments only with regard to federal procurement.¹⁰ The EU has made concessions in the WTO context at the member state level, but has not extended this concession to Canada as it would do so only on a reciprocal basis.¹¹ In sum, EU estimates suggest that Canadian and EU commitments at the WTO level cover only about 10% of the Canadian and EU procurement markets.¹² As suggested in the "Scoping Exercise" report, Canada's extension of national treatment to EU enterprises competing for provincial procurement contracts would present a significant potential gain for the EU in concluding an agreement with Canada.¹³ The EU seeks to have its enterprises compete on a level which would in fact be more favourable than that currently enjoyed by the US and Mexico under NAFTA's Procurement Chapter, although the most favoured nation commitments contained in NAFTA would likely mean that procurement concessions made to the EU would have to be extended to the US and Mexico as well.¹⁴

The second reason noted above suggests that the common areas of interest presented in the "Joint Study" and "Scoping Exercise" report will necessarily touch upon areas of provincial jurisdiction, and thus will require input from and acceptance by the provinces. For example, services market liberalization, including provisions on labour mobility and mutual recognition of professional accreditation, is one area of interest that cannot be pursued effectively without provincial engagement in the negotiation process.¹⁵ The 2008 France – Quebec agreement on the mutual recognition of professional qualifications illustrates provincial activity in this regard.¹⁶ Other potential components of an EU – Canada Economic Partnership presented in the "Joint Study" and "Scoping Exercise" report extend beyond tariff and non-tariff barrier abatement to non-traditional areas of enhanced cooperation, including joint EU – Canada initiatives related to energy, environment, science and technology.¹⁷ For the effective realization of such joint initiatives, Canada's provinces must be involved in many aspects of project formation and delivery where appropriate.

A third reason that provincial involvement in this treaty project is vital is that the ultimate value of the agreement lies in its eventual ratification and domestic implementation.¹⁸ In Canada, as elucidated in the 1937 *Labour Conventions* case¹⁹, provinces are responsible for passing domestic implementing legislation for treaties whose subject matter falls within the provincial legislative jurisdiction. This contrasts with the fact that the federal executive constitutionally holds exclusive treaty-making power.²⁰ Under Canadian law, it is thus technically possible that the federal government could negotiate and sign an international treaty with subject matter which falls within provincial competence. Under such circumstances one or more provinces could later refuse to give effect to the treaty in Canadian law, by refusing to implement it. Such a scenario would undermine the value of negotiating such a treaty – something that all sides would wish to avoid. For this reason, it is important that the Canadian provinces be included in negotiations.

Bearing in mind these three issues of importance for the provinces, it is worthwhile noting the recent concerns expressed by Newfoundland and Labrador in relation to the negotiation of an EU – Canada Economic Partnership. In a February 20, 2009 news release, the province cited several concerns with the project, including a proposed EU ban on seal products and prohibitive tariffs on seafood.²¹ The release

furthermore presented concerns relating to the federal government's ability to represent the interests of Newfoundland and Labrador at the negotiating table.²² This latter concern underscores the importance of finding a method that ensures that provincial interests are represented in the final treaty product. As mentioned, this will no doubt be a challenging and imperfect undertaking, but one that is clearly required for successful conclusion of the project given the nature of the negotiation and the subjects at issue.

An earlier attempt at a Canada – EU trade facilitation agreement, the *Trade and Investment Enhancement Agreement* (TIEA) was ultimately unsuccessful, with talks suspended in 2006.²³ It is hoped that this new approach, having a much broader agenda, may be more successful.

¹ See, e.g., Peter O'Neil, "N.L. won't stop Canada-Europe trade talks: EU", Canwest News, 10 March 2008, <http://www.canada.com/Business/stop+Canada+Europe+trade+talks/1320863/story.html>.

² "Joint Report on the EU-Canada Scoping Exercise, 5 March 2009", Canada-European Union Joint Report, 5 March 2009, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Canada-EUJointReport2009-03-05.pdf> at 3 [*Scoping Exercise Report*].

³ *Ibid.*, at 6. See also "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 at 161 [*Joint Study*].

⁴ *Joint Study, ibid.*

⁵ *Joint Study, supra* note 3 at 64 & 73.

⁶ The EU has free trade agreements with Mexico, Chile and South Africa. The EU is in trade agreement negotiations with Korea, India, Ukraine, the Gulf Cooperation Council and ASEAN countries. See, "Free Trade Agreements" European Commission, Enterprise and Industry – International Affairs,

http://ec.europa.eu/enterprise/international_relations/facilitating_trade/free_trade/index_en.htm#gulf_countries

⁷ Following implementation of an agreement, elimination of tariffs on bilaterally traded goods would accord for approximately 25% of GDP gains for the EU and 33.3% of GDP gains for Canada. *Scoping Exercise Report, supra* note 2 at 2.

⁸ As the Joint Study reports:

Both EU and Canadian respondents felt that the government procurement markets on both sides of the Atlantic had the potential to offer increased business opportunities to exporters and investors. EU respondents indicated that any future trade and investment arrangement should include procurement by sub-federal authorities.

Joint Study, supra note 3 at 179.

⁹ *Ibid.*, at 156 & 161.

¹⁰ *Ibid.*, at 76.

¹¹ *Ibid.*

¹² *Ibid.*, at 77.

¹³ *Scoping Exercise Report, supra* note 2 at 6.

¹⁴ NAFTA Chapter 10 covers procurement commitments among NAFTA parties. Covered procurements are specified in NAFTA states' Annexes to the agreement. Currently, Canada has not listed municipal or provincial entities in its annexes to NAFTA Chapter 10. See, "Annex 1001.1a-3 State and Provincial Government Entities", Chapter 10 Government Procurement, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/texte/chap10a.aspx?lang=en>. The EU – Mexico Trade Agreement does not extend procurement commitments to Mexico's sub-federal entities. See SUB-FEDERAL GOVERNMENT ENTITIES heading in "Annex VI to Decision Nr. 2/2000 of the EC-Mexico Joint Council of 23 March 2000" at 9, http://trade.ec.europa.eu/doclib/docs/2004/october/tradoc_111730.pdf.

¹⁵ *Joint Study, supra* note 3 at 64 & 73.

¹⁶ *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>.

¹⁷ *Joint Study, supra* note 3 at 105-152.

¹⁸ Canada is for the most part dualist in its approach to the relationship between international law and domestic law. This means that for treaties to have domestic legal force, they must be in a sense "converted" to the Canadian legal system, often through the passage of Canadian implementing legislation.

¹⁹ *Attorney-General for Canada v. Attorney General for Ontario*, [1937] A.C. 326

²⁰ Federal treaty-making is allotted as part of the *Royal Prerogative* constitutional power. See, e.g., Jutta Brunnée, Hugh M. Kindred & Phillip Martin Saunders, *International Law, Chiefly as Applied and Interpreted in Canada*, 7th ed., (Emond Montgomery Publication: Toronto, 2006) at 199.

²¹ “NL Expressed Concern with Canada – EU Trade Negotiation Process” Newfoundland and Labrador Executive Council News Release, 20 February 2009, <http://www.releases.gov.nl.ca/releases/2009/exec/0220n07.htm>.

²² *Ibid.*

²³ *Joint Study*, *supra* note 3 at 74 & 118.