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Between a Rock and A Hard Place: Canada's Trade and Investment Policy Choices from NAFTA to CETA

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The signing of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) represents one of the decisive events in the European Union's and Canada's practice of negotiating trade and investment agreements. The negotiating parties have represented CETA as a "new model" comprehensive trade and investment agreement for both Canada and the European Union (EU), which reflects their 21st century trade strategies and has to facilitate their different policy choices (European Commission 2015; Global Affairs Canada 2011). It is the most comprehensive agreement either of the two partners has ever negotiated with another developed country, and its ratification planned for 2017 will be equally complicated. Most recently, in November 2015, the International Trade and Commerce Working Group of the Centre for International Policy Studies recommended that Canada ratifies CETA (CIPS 2015, 11). In brief, while supporting multilateralism and trade negotiation under the auspices of the World Trade Organization, both the EU and Canada have contributed significantly to the development of regionalism by pursuing bilateral trade negotiations and developing their own models of international trade and investment agreements.

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The EU is recognized as a unique model of a deep economic and political integration of 28 European countries, evolving from a simple customs union towards a sophisticated common market, and finally into a one-of-a-kind political and social union. On the other hand, in the 1990s, Canada created the North American Free Trade Agreement (NAFTA) with Mexico and the United States, the most complex and innovative free trade agreement at that time, regulating the flow of trade, investment, and migration among the three partners. While being an influential model of regional trade integration in the 1990s when North America was at the center of world's economic growth, NAFTA is today in the shadow of the Trans Pacific Partnership and the Transatlantic Trade and Investment Partnership (TPP and TTIP respectively) and the creation of alliances among the emerging and developing economies.

It is noteworthy that negotiations of NAFTA and CETA were surrounded by increasing hostility of civil society towards further liberalization of trade, both regionally and globally. In both the NAFTA and CETA negotiations, the general public questioned the impact of these new trade rules on the rights of nations to regulate their internal policies, such as foreign investments, environment, labour, health, etc. (Irwin 2002, 2; Mathis 2012, 74). It is therefore important to examine the evolution of Canada's trade and investment treaty negotiation from NAFTA to CETA in the context of the more general trends of negotiation of preferential trade agreements by other trade nations. In particular, that means to study how the rules related to transparency, regulatory cooperation, and the functioning of joint institutions developed in the two treaties.

Transparency has been one of the fundamental principles of international trade as well as a pillar of both the GATT (General Agreement on Tariffs and Trade) and WTO (World Trade Organization) trade regimes. In brief, regulatory transparency is a tool of good governance that protects the rights of private parties to be informed of laws, to be advised of decisions that concern their rights and interests, provided with reasoned decisions, and to seek reviews of such decisions (NERA 2005, 147). It increases the openness of the market and reduces business transaction costs.

Canada and the EU usually negotiate free trade agreement (FTA) provisions related to regulatory transparency along the lines of the GATT Article X provisions, with an emphasis on the obligations of each party to inform the other of relevant legislative proposals and to allow the other party's interested persons to comment on such proposals. Indeed, the provisions related to regulatory transparency reveal very little difference between the regulatory approaches by the EU and by Canada. Before CETA, Canadian and EU agreements with other developed countries contained less elaborate regulatory transparency provisions than do those with developing countries. NAFTA's transparency provisions contained in Chapter 18 have influenced Canada's subsequent FTA negotiations, such as the 2008 Canada-Chile FTA and 2009 Canada-Peru FTA. In sum, CETA Chapter 31 and NAFTA Chapter 18 general transparency provisions are similar. For example, they relate to regulatory transparency, and they mandate publication of both existing and proposed measures, an opportunity to comment on

proposed measures, to be heard in administrative hearings, the review and appeal procedures, etc.

While public discussions mainly focus on the need for an enhanced transparency in investor-state arbitration, there are other areas of CETA where private stakeholders could benefit from increased transparency. For example, agricultural protectionism has been a contentious issue of Canada-EU relations from the time that the parties started to negotiate the 1976 Framework Agreement for Commercial and Economic Cooperation. Therefore, CETA's Chapters 6 and 7, and Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) specific provisions on regulatory transparency related to trade in food and agricultural goods (as well as the establishment of effective systems of notification measures by each party's public agencies) are very important for Canadian exporters. Under NAFTA, the three parties agreed on transparency commitments with respect to publication and comment procedures, and they agreed in the TBT and SPS Chapters (Articles 909-910 and 718-719) to provide any interested person any relevant information. However, the two agreements significantly differ in adopted models of regulatory cooperation and institutions for regulatory cooperation.

Geographical indications (GIs) provisions in NAFTA Chapter 17 (article 1712) and CETA Chapter 22 (Article 7) are related to technical standards, yet very specific to intellectual property rights related to agricultural products issues. CETA negotiations regarding GIs have been complex because of the fact that US and Canada treat GIs protection differently. The EU protection for GIs is based in the idea that certain products' qualities are rooted in their specific conditions of production (soil, climate, cultural knowledge, etc.) and that those should be protected by a special form of intellectual property rights. GIs are protected in Canada and the US as trademarks. CETA recognizes more than 145 EU food products with GIs protection (CETA, Annex I). It could be difficult for Canada to comply with these different protections and regimes (Viju 2013, 5).

Increasingly, regulatory cooperation has become an important topic of trade negotiations. CETA is the first Canadian trade agreement with a developed chapter on regulatory cooperation in order to remove the so-called non-trade barriers in international trade. NAFTA has very few provisions on regulatory cooperation, and its institutions have little or no law-making and monitoring powers. On the other hand, the EU is very experienced in creating mechanisms and institutions of regulatory coordination in order to harmonize and synchronize the law-making processes of its member states and to ensure the functioning of the common EU market. CETA Chapter 26 on Regulatory Cooperation seems to be a compromise between Canadian and EU practice, as it provides for the establishment of a Regulatory Cooperation Forum, but does not provide for a top-down regulatory standard setting or harmonization. Instead, it facilitates negotiations towards mutual recognition agreements, "explores alternative approaches to regulation," or, "when appropriate, consider[s] the regulatory measures or initiatives of the other Party on the same or related topics." That is rather soft

streamlining of regulatory cooperation through coordination of technical regulations within the markets of Canada and the EU, and an invitation to domestic institutions to participate in development of future technical regulations. Finally, CETA's institutional framework (Chapter 30, Articles X.01 and X.02) is more complex than the one established by NAFTA (Steger 2011, 109-126), providing for a number of joint committees, sub-national bodies working together to implement agreed policy objectives.

In sum, CETA is an important innovation in designing a new comprehensive economic agreement, but it is not yet a definite new model.

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