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A TRANSATLANTIC PERSPECTIVE ON CETA

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Key Points

- The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union will reinforce the transatlantic alliance between Europe and North America.
- CETA will generally be positive for businesses in Canada and Europe.
- CETA's new investor protection mechanism achieves the right balance between protecting business interests and allowing governments to regulate their societies and economies according to their democratic mandates.
- As a best-in-class trade and investment agreement, CETA should serve as a model for future trade liberalization agreements around the world.

Introduction[1]

In the twentieth century, promoting trade between countries was focused, for the most part, on tariffs. In the twenty-first century, the focus has shifted to a much broader agenda, such that we no longer speak of "trade" agreements per se, but rather of "economic partnerships," "trade and investment" or "next generation" trade agreements. This is because an important portion of these agreements focuses on non-tariff barriers (NTBs) such as standards, regulations and procedures. These "behind the border" (as opposed to "at the border") barriers have become the main source of impediments to international trade, since tariffs are now quite low (on average less than five percent), in particular between rich countries.

CETA between Canada and the European Union is generally considered to be a best-in-class next generation trade agreement that should bring important economic benefits to both partners.[2] However, in Europe, CETA has often been an afterthought because the public has, for the most part, focused on the Transatlantic Trade and Investment Partnership (TTIP), which the European Union and the United States are currently negotiating.[3] From a European perspective, this attention to TTIP makes sense, given that the United States is the largest economy in the world and the European Union's most important trading partner. Nevertheless, in spite of its relatively smaller size, Canada represents an important economic partner for the European Union, in terms of both trade and investment, and one in which the European Union has seen

1 This policy brief builds on the results of a conference on CETA between Canada and the European Union that took place in Brussels on May 18-19, 2016. The conference was jointly organized by the Centre for European Policy Studies and the Centre for International Governance Innovation and brought together Canadian and European experts and policy makers to present their views on CETA. For more details on the event, please consult the following link: www.ceps.eu/events/comprehensive-economic-and-trade-agreement-good-deal-european-union.

2 For official, early assessments of CETA, see the joint study by the European Commission and the Government of Canada (http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141032.pdf), as well as the sustainability impact assessment sponsored by the European Commission (http://trade.ec.europa.eu/doclib/docs/2011/september/tradoc_148201.pdf).

3 It has been suggested that CETA's neglect by some groups was deliberate in order to avoid linking it to the more politically controversial TTIP.

erosion of market access due to North American Free Trade Agreement (NAFTA) preferences. Canada is also a key political partner.[4] Finally, many Europeans have viewed CETA as an important basis for negotiating the TTIP.

With TTIP negotiations proving difficult and the arrival of a new US president who will possibly be less free-trade friendly than Barack Obama, CETA could be the only means for Europe to reinforce its economic links with North America for quite a while. Consequently, Europeans should pay much closer attention to CETA.[5]

For Canada, in addition to forging closer links with a long-standing partner and ally, CETA offers an undeniable opportunity to gain cheaper and easier access to an economy the size of the United States on a preferential basis vis-à-vis the United States.[6]

CETA and the Transatlantic Alliance

Canada, the European Union and the United States together represent the largest economic area in the world, accounting for half the world's GDP. In terms of trade, North Atlantic trade (including intra-EU and intra-North American trade) accounts for 37 percent of global merchandise flows, and even more when it comes to services.

Tables 1 and 2 show that transatlantic merchandise trade is important for Europe and North America, but it is less significant than their merchandise trade with Asia, where many manufacturing processes have relocated since the 1990s. Rich economies such as those found in Europe and North America are now predominantly based on services, which explains why the two regions' export and import of services across the Atlantic is much more important than it is with their Asian partners (see Tables 3 and 4).

4 See the recent Strategic Partnership Agreement that Canada and the European Union negotiated in parallel to CETA (www.international.gc.ca/europe/assets/pdfs/can-eu_spa-aps_can-ue-eng.pdf).

5 It should be noted that the European Commission's proposal of the CETA text to the Council of the European Union on July 5, 2016, has had the effect of raising the European public's awareness of CETA, although it is mainly those who criticize the agreement (mainly focused on CETA's investor protection provisions) who have been vocal and present in the public sphere.

6 Canadian firms' preferential access to the EU market vis-à-vis US firms will only hold until the European Union and the United States have agreed to the TTIP or its equivalent.

Table 1: Share of Extra-North American Merchandise Exports and Imports

	European Union	Asia
Exports to	31%	41%
Imports from	28%	55%

Source: World Trade Organization, Table I.4, Intra- and inter-regional merchandise trade, 2014 (www.wto.org/english/res_e/statis_e/its2015_e/its15_world_trade_dev_e.pdf).

Table 2: Share of Extra-EU Merchandise Exports and Imports

	North America	Asia
Exports to	26%	36%
Imports from	18%	42%

Source: World Trade Organization, Table I.4, Intra- and inter-regional merchandise trade, 2014 (www.wto.org/english/res_e/statis_e/its2015_e/its15_world_trade_dev_e.pdf).

Table 3: Share of US Services Exports and Imports

	Canada and Mexico	European Union	Asia*
Exports to	14%	31%	22%
Imports from	11%	35%	20%

Source: World Trade Organization, Table I.15, Trade in commercial services of selected economies by origin and destination, 2013 (www.wto.org/english/res_e/statis_e/its2015_e/its15_world_trade_dev_e.pdf).
* China, Japan, Hong Kong, Korea, India, Singapore and Taiwan.

Table 4: Share of Extra-EU Services Exports and Imports

	North America	Asia*
Exports to	29%	13%
Imports from	32%	14%

Source: World Trade Organization, Table I.15, Trade in commercial services of selected economies by origin and destination, 2013 (www.wto.org/english/res_e/statis_e/its2015_e/its15_world_trade_dev_e.pdf).
* China, Japan, Hong Kong, India and Singapore.

The transatlantic trade relationship is certainly one of the most important in the world, in particular in services. In terms of investment, the transatlantic partners are also of crucial importance to each other. For instance, in 2014, EU firms accounted for 70 percent of the stock of inward foreign direct investment (FDI) in the United States while US firms accounted for 40 percent of the extra-EU stock of inward FDI.[7] As for Canada, it is the European Union's third-largest investor after the United States and Switzerland, with a 3.6 percent share.[8] For its part, EU firms account for 32 percent of Canada's stock of FDI, compared to 50 percent for the United States.[9]

Given the existing close economic ties between the European Union and North America, increasing the efficiency of transatlantic economic exchanges through next generation trade and investment agreements would help boost the global competitiveness of European and North American firms, which is exactly what CETA and the TTIP aim to achieve by enhancing market access and a rules-based market economy while ensuring transparency and respect for domestic rule making. These two agreements could also help to set the trade and investment rules for the rest of the world, in particular China, as they are considered model twenty-first century agreements with an important emphasis on regulatory cooperation.

Given the mixed success of international regulatory cooperation in the past, including between the transatlantic partners, there are some serious doubts as to whether it can be made to work effectively. Although CETA contains mechanisms to facilitate and encourage regulatory cooperation between Canada and the European Union, governments and agencies on both sides of the Atlantic will have to go beyond CETA and set up a more robust institutional structure in order to foster close and regular transatlantic regulatory cooperation. This means that a lot of implementation work will still need to be carried out once CETA has come into force, assuming that it is ratified by both sides (Leblond, forthcoming 2016).

In sum, the partnership between Europe and North America is based on shared values, shared interests and shared security. It should never be taken for granted — it must be nurtured. CETA is a perfect example of the kind of nurturing that the transatlantic alliance needs in order to thrive.

7 The sources for the FDI data are the Organization for International Investment (http://ofii.org/sites/default/files/Foreign%20Direct%20Investment%20in%20the%20United%20States%202016%20Report.pdf) and Eurostat (http://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_direct_investment_statistics).

8 See Eurostat (http://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_direct_investment_statistics).

9 See Global Affairs Canada (www.international.gc.ca/economist-economiste/assets/pdfs/Data/investments-investissements/FDI_by_Country/FDIC_stocks_by_Country-ENG.pdf).

What CETA Delivers

CETA will generally be positive for businesses in Canada and Europe. Here are some of the key benefits that have been identified:

- With the removal of tariffs on virtually all goods trade except for some protected agricultural products, firms will have easier access to Canadian or European markets.
- Public procurement is another area where CETA will bring benefits to both Canadian and European businesses, since it goes further than the plurilateral Agreement on Government Procurement, which currently governs market access in this area between Canada and the European Union. CETA will give European firms much greater access to Canada's provincial and municipal government contracts and will give Canadian enterprises improved access to national and subnational public procurement opportunities in Europe.
- In terms of intellectual property rights, CETA's protection of EU-based geographical indications should be beneficial for certain European agricultural and food producers.
- With respect to trade in services, CETA is seen as going beyond the General Agreement on Trade in Services (GATS), with the negative list approach (as with NAFTA) and the improvement on the GATS bindings. Moreover, CETA's provisions to enhance the mobility of business people across the Atlantic should have positive ramifications for Canadian and European enterprises selling their services across the Atlantic.
- Firms on both sides of the pond should benefit from the measures found in CETA that will make it possible for products to be tested only once in order to be certified in both Canada and the European Union. CETA provides for a mechanism by which EU certification bodies will be allowed, according to the rules applicable in Canada, to certify for the Canadian market, according to Canadian technical regulations, and vice versa. This should reduce costs (in particular by avoiding double-testing on both sides), especially for small and medium-sized enterprises.
- It is hoped that CETA's regulatory cooperation measures will help reduce incompatibilities and increase compatibilities between Canadian and European goods and services. For this purpose, CETA's Regulatory Cooperation Forum will need to engage closely with stakeholders such as the business community. CETA must also be a living agreement, in that rules, processes and regulations on both sides of the

Atlantic have to evolve over time in line with changes to the transatlantic economy.[10]

In sum, CETA is seen as a clear benchmark in trade policy. For the European Union, its rapid ratification would demonstrate that the European Union's trade policy still works, in light of the Brexit vote and the difficulties faced by the TTIP and other trade negotiations.

CETA and Investor Protection

With its intention to set up a permanent tribunal for deciding on investor-state disputes, CETA is moving investor-state dispute settlement (ISDS) toward a judicial format rather than the usual arbitration one that is found in most bilateral investment treaties in existence today. This is the result of a shift in approach to investor protection rules in Europe, a process led by the European Commission following pressure from the European Parliament, which gained new powers in the trade and investment areas under the Lisbon Treaty (Lévesque 2016; Reinisch 2016).

In line with what the European Commission proposed for the TTIP with the United States, the final CETA text published at the end of February 2016 contains provisions in chapter 9 that would lead to the creation of a permanent investment tribunal (or court) to settle investor-state disputes arising between Canada and the European Union rather than the usual ad hoc arbitration process in which the disputing parties choose the arbitrators who will settle the matter (Lévesque 2016). The goal with this new approach is to assuage the fears associated with the traditional investor-state arbitration process, namely that the process is biased in favour of the investor and ultimately prevents democratically elected governments from adopting the laws and regulations that they deem appropriate for their society and economy.[11] Under CETA, the Canadian federal government and the European Commission would be responsible for appointing the tribunal's members, who presumably would be more partial to governments' democratic prerogative over policy rules and regulations.[12]

This new approach to ISDS has led the European business community[13] to wonder how difficult it is going to be for businesses to bring about claims against governments if the latter are the only ones that can name arbiters to settle investor-state disputes. European businesses are also concerned about the implications of CETA's reaffirmation of governments' right to regulate.

The business community's fear of CETA's investor protection mechanism being biased against it might be overdone, however, since the "state" on both sides of the Atlantic will want to make sure that its own firms will be fairly treated when they do business in the other party's jurisdiction. As a result, there is an incentive for both sides to name arbiters or judges who have a reputation for fairness and objectivity (ibid.).

Finally, some concerns have been raised as to the type and number of people who could possibly be appointed to CETA's ISDS tribunal in order to avoid real or perceived biases. Legal practitioners who tend to wear two hats (one as arbiter and the other as legal adviser to firms) should no longer be eligible. The same should apply to government officials. Academics and retired judges could potentially fill the void. But what if the volume of cases becomes such that it requires full-time tribunal members? It would then be difficult for academics to become members, as it would require them to give up or suspend their positions. Is there a danger that the pool of eligible candidates would be too small?[14]

Conclusion

The idea of transatlantic free trade is not new. It was actively promoted back in the mid-1990s; however, CETA is the first embodiment of such an idea. As such, it is viewed as a key component of the transatlantic alliance's future, even more so if it could facilitate the conclusion of the TTIP. As a best-in-class trade and investment agreement, it should serve as a model for future trade liberalization agreements around the world. In the meantime, it is hoped that Canada and the European Union will manage to ratify CETA quickly enough that it can enter into force sometime in 2017, in order for Canadian and European businesses to begin taking advantage of the benefits that the agreement has to offer and, as a result, contribute to improving the transatlantic economy.

10 For a detailed discussion of CETA's implementation in terms of regulatory cooperation, see Leblond (forthcoming 2016).

11 For a detailed discussion of investor-state arbitration and its criticisms, see de Mestral (2015).

12 In traditional ISDS cases, both the state and the investor get to name arbiters to the panel: one by the state, one by the investor and a third jointly agreed by both parties.

13 The Canadian business community appears less concerned.

14 See Lévesque (2016) for a detailed discussion of these issues.

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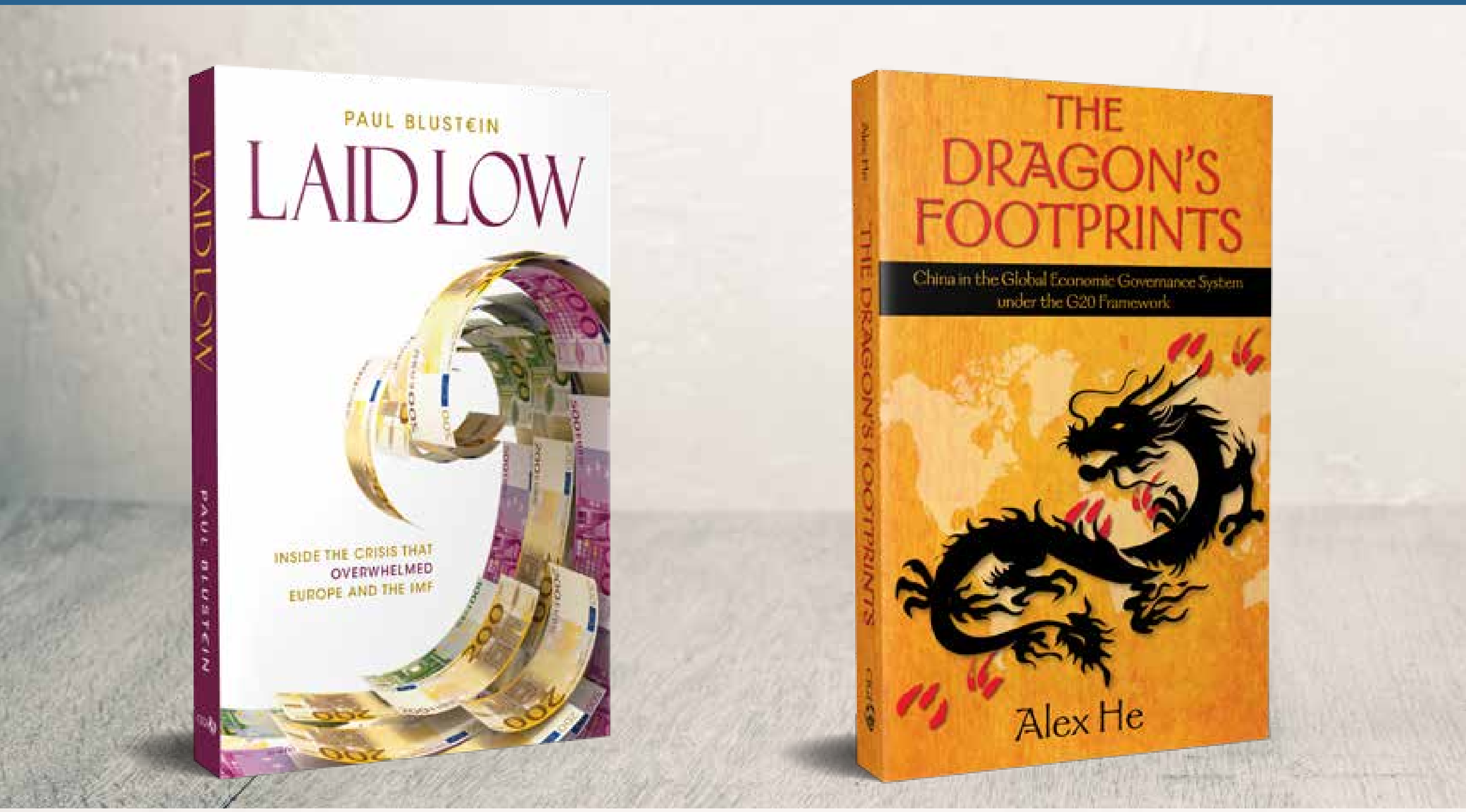

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