There seems to be enough political support for the agreement on both sides of the Atlantic for CETA to come into force on a provisional basis sometime in 2017, says Patrick Leblond
After a lull since the publication of the final text of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (EU) at the end of February, CETA is now back at the forefront of Canadian and European trade agendas. On July 5th the European Commission announced that it had formally proposed the signature and ratification of CETA to the Council of the EU (formerly known as the Council of Ministers). The Commission, EU member states and the Canadian federal government are expected to sign the agreement at the next Canada-EU Summit, scheduled to be held in Brussels on October 27-28, 2016.

However, given the ‘mixed’ nature of the agreement from the EU’s standpoint, there are concerns that CETA may never see the light of day. Nevertheless, there seems to be enough political support for the agreement on both sides of the Atlantic for CETA to come into force on a provisional basis sometime in 2017. When it does so, a lot of work will nonetheless remain to be done by Canada and the EU to implement the agreement’s non-tariff related elements.

Ratification
With its proposal, the Commission has made clear that it wanted to move forward with CETA’s ratification in order to show that the EU would continue functioning normally in spite of the Brexit vote. It also wished to confirm the EU’s commitment to maintain and deepen trade and investment links with the rest of the world. There are legitimate fears on the EU’s side that the failure to sign and ratify a free trade agreement with a close economic and political partner like Canada would leave the EU’s trade policy in tatters.

The Commission, nevertheless, had to take into account member states’ concern about people’s scepticism vis-à-vis globalization and free trade, also made vivid by the unexpected Brexit vote in the UK. As a result, for expediency reasons, it presented CETA as a ‘mixed’ agreement to the Council of the EU rather than as an agreement that is considered to be under the EU’s exclusive competence. Apparently, several EU member states threatened to vote
against CETA (with enough votes for a blocking minority in the Council) if the Commission did not propose the agreement as a mixed agreement.

In its proposal, however, the Commission clearly indicated that it was of the opinion that, from a legal standpoint, CETA is not a mixed agreement. Ultimately, it will be up to the EU Court of Justice, which has been asked by the Commission to provide an opinion on the nature of the EU-Singapore Comprehensive Free Trade Agreement, to shed light on the legal nature of CETA. Because the Court’s opinion is not expected before the end of 2016 or the beginning of 2017, the Commission felt that it could not wait that long before setting the EU’s CETA ratification process in motion. This explains why it went ahead with the mixed-agreement proposal in spite of its own position on the matter.

If the Commission had sent CETA as an EU-only agreement, then a qualified-majority vote would have been required in the Council of the EU to approve the agreement, unless the ministers unanimously voted in favour of

**Stakeholders ... will need to keep the feet of Canadian and EU politicians and bureaucrats close to the CETA fire**
changing the legal nature of the agreement to mixed one. CETA as a mixed agreement now means, however, that trade ministers in the Council will have to unanimously vote in favour of the agreement for it to move to the European Parliament (EP), where only a majority is required for approval.

Consequently, Bulgaria and Romania's threat to vote against the agreement, in order to get Canada to lift its visa requirement for Bulgarian and Romanian citizens, has become real. For this reason, Canadian immigration minister John McCallum visited Brussels in early July to discuss the issue. Canadian officials from the Department of Immigration, Refugees and Citizenship are said to have visited Bulgaria and Romania over the summer in order to try to settle this issue and prevent these two countries from vetoing CETA in the Council.

The Canadian government’s commitment to lift visa requirements on Mexican nationals, which was announced at the end of June when Mexican president Pena Nieto visited Ottawa, provides a good degree of optimism that Canada will be able to settle the Bulgarian and Romanian visa matter in time for the Canada-EU Summit at the end of October.

CETA as a mixed agreement also means that the EU member-states' national (and in some cases subnational) parliaments will vote to ratify the agreement. These votes are considered by member states essential in order to increase the democratic legitimacy and acceptance of CETA in particular and free trade in general. This means that if a national parliament were to vote against CETA, then the agreement’s so-called ‘mixed’ elements would not be in force in that particular member state. For instance, CETA’s investment-state dispute settlement tribunal would not have jurisdiction in the member state in question. In other words, Canadian firms that wanted to launch a dispute against that state’s government would not be able to do so under CETA’s investment chapter rules. They would have to resort to the rules set forth by the existing bilateral investment treaty between Canada and this particular EU member state.
The real issue is what happens between ratification at the EU level (by the Council of the EU and the European Parliament) and ratification by national parliaments. Assuming the CETA will be ratified at the EU level, then the agreement will apply on a provisional basis until national parliaments have had their say. In those member states where the latter will have voted in favour of CETA, then the agreement will apply in its entirety. The much-debated question between the Commission and the member states is the scope of CETA’s provisional application: ie. what parts of the agreement will be carved out until national parliaments have approved (or not) CETA?

At the time of writing, there seems to be a consensus on the provisional carving out of the investment protection (investor-state dispute settlement) elements of CETA’s investment chapter. Whether the chapter’s market access portion will provisionally apply is still under negotiation. The same applies to CETA’s chapter 14 on International Maritime Transport Services, though Canada would welcome its provisional exclusion since the EU has an offensive interest in this case. In all, it is estimated that around 95 per cent of the CETA text would apply on a provisional basis until the national parliaments have had their say.

On the Canadian side, CETA’s ratification should not be an issue. Technically, a cabinet decision is all that is necessary for the agreement to be ratified; it requires approval neither by the federal parliament nor by provincial parliaments. The only say that Canadian parliaments may have over CETA is if implementation legislation has to be passed in order to modify existing laws so that they accord with CETA provisions.

**Implementation**

With ratification now under way, CETA is expected to come into force provisionally sometime in 2017. Immediately, business firms will be able to take advantage of the elimination of tariff lines on a large number of goods traded between Canada and the European Union. However, there are a number of obstacles to trade and investment that will remain, notably those related to standards, rules, regulations and procedures.
This is because CETA is much more than a traditional free trade agreement focused on the elimination of tariffs. It addresses a much wider range of issues with a view to increasing trade, labour and investment flows between Canada and the European Union: for example, regulatory cooperation, labour mobility, investor protection, public procurement, electronic commerce and intellectual property. Differences and duplications between Canada and the European Union on such issues represent additional transaction costs for Canadian (European) firms doing or wanting to do business with or in the European Union (Canada). These costs ultimately reduce the economic welfare of Canadians and Europeans.

If these so-called second-generation free trade issues are not dealt with in CETA’s implementation phase, economic experts will most likely conclude that CETA has not performed according to expectations if they are asked to evaluate the agreement’s economic impact 10 years after its entry into force. Such a conclusion will only reinforce the existing scepticism that many people have toward free trade and make it harder politically to negotiate new agreements or expand existing ones in the future. The problem in CETA’s case, however, would not be the agreement itself but the effectiveness and completeness of its implementation.

The term ‘implementation’ herein is not limited to the adoption of implementing legislation to make existing laws conform with CETA’s provisions, which is how the legal literature tends to define implementation. It means much more. It implies the adoption of concrete (ie. practical) rules, standards and procedures (in Canada as well as the European Union) so that businesses can take advantage of provisions, such as, for example, the one that aims to facilitate the mobility of professionals, technicians and businesspeople between Canada and the European Union.

Making this kind of implementation possible requires a high degree of cooperation not only between Canada and the European Union, but also between the various levels of government in each jurisdiction. In many instances, it also requires close coordination across departments or ministries within each level of government.
In other words, Canada and the European Union have to develop institutions and procedures that will allow Canadian firms to export products, services and people to the European Union (and vice versa) without having to undertake lengthy and costly steps (assuming they exist in the first place), which would represent significant obstacles to CETA’s goal of liberalizing trade and investment between Canada and the European Union.

For example, if an agricultural good has to obtain an official certification that it meets sanitary or phytosanitary standards (SPS) in order to be consumed in both Canada and the European Union, then it would make sense to develop a procedure whereby the enterprise producing this good would only need to have it certified once by one certification agency, which would be recognized by both Canadian and EU authorities.

Otherwise, the need to go through two separate certification processes — one in Canada and one in the European Union — may prove too costly for a firm, which may then decide that exporting the good in question to the other CETA party may not be profitable after all. This would be a lost opportunity in terms of trade and value creation (lost revenues and profits for the producer, lost variety for consumers, and so on).

This is why stakeholders, most especially the business community, on both sides of the Atlantic will need to monitor closely the implementation work being done to identify issues or areas that are not being dealt with in a properly and timely fashion. In other words, they will need to keep the feet of Canadian and EU politicians and bureaucrats close to the CETA fire.

To manage CETA’s implementation in an effective and timely manner (ie. get the job done), the agreement has actually foreseen a complex institutional architecture with the CETA Joint Committee, the contact points and the specialized committees. However, this CETA institutional structure needs to be linked with the rest of the machinery of
government operating at the federal and provincial levels in Canada and at the supranational and national levels in the European Union.

Conclusion
CETA has come a long way, but it has yet to reach the end of the road. First, it has to navigate successfully through the EU’s complex ratification process, given the agreement’s proposed mixed nature. Second, once ratified, Canadian and European governments will have a lot of work to accomplish in terms of implementation if they want to realize the full extent of CETA’s potential benefits. Such is the nature of 21st century free trade agreements that aim to reduce, if not remove, trade and investment barriers that are located not at the border but beyond it.

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