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from: European Commission
to: Trade Policy Committee
Subject : EU Canada Comprehensive Economic and Trade Agreement – landing zones

Delegation will find attached a note by the Commission services on the above-mentioned subject

CETA Landing Zones – November 2012

EU-Canada free trade negotiations have entered their final phase. Both sides work with the objective of finalising this year. For the EU, this means that the Commission would present a deal - either a full deal *ad referendum* or the options for such a full deal - to the Foreign Affairs Council in Trade Ministers format of 29 November. To this end, and to iron out remaining differences of substance, a meeting between the Trade Commissioner and his Canadian counterpart is planned on 22 November. Commission services also plan to discuss the preparation of this meeting, as well as the prospects of the Trade/FAC, at the TPC Full Members of 09 November.

The two sides will continue to work to reduce the number of topics for the Ministerial discussion. At this stage, however, it is impossible to make a precise forecast. Therefore, this paper addresses all topics which might stay open until the last minute. At the same time the Commission services expect an early resolution, at least *ad referendum*, of a number of issues, and Member States will be informed regularly of such developments. This should be the case, in particular, of Rules of Origin (in relation to which a full state of play paper will be discussed with Member States' experts in parallel with the present Landing Zones paper), the Trade in Goods Text (very close to completion), SPS (where technical work is ongoing), monopolies and state enterprises and sustainable development (also very close to completion). The TBT and Subsidies chapters have been concluded recently (text will be sent to MS in short). Finally, this paper builds on, and should be read in conjunction with, the paper "CETA State of Play - October 2012" recently circulated to Member States (Document TPC m.d. 415/12 of 16 October). With all the elements mentioned above, Member States have as complete a picture of the setting for the final stage of the negotiations as possible.

Nevertheless, Member States are advised to consider that the degree of precision that the Commission services are able to offer in this paper necessarily varies from one topic to another, often as a function of Canada's tactics and willingness to clarify its position on the most sensitive issues. This is the case, in particular, of dairy market access, which is seen by Canada as a final issue. As a consequence, the Canadian interest on access for beef and pork as well as a set of EU offensive points that have been linked by Canada to agriculture will come to final negotiation at the same time. This concerns in particular the remaining open points in the areas of GIs, Wines and Spirits, IPR and Procurement market access. In the investment and services related areas we expect a discussion on remaining open issues that are more difficult on substance and could therefore not be resolved at technical level.

Overall, our key challenge remains that our list of offensive interests is larger than the Canadian one, which puts Canada at a tactical advantage in this end game. On the other hand, Canada will, at this point, also have to take into consideration that the EU market to which it gains preferential access is much larger than its own. The proposed landing zones have also been looked at from the perspective of the fall-out on future negotiations, in particular the US.

1. Trade in Goods

The full analysis of both the provisions of the Trade in Goods Chapter and of the tariff offers as they stand is set out in the paper "CETA State of Play - October 2012". Missing from that analysis were a number of key products for which offers have not yet been exchanged: beef, pork and sweet corn (78 lines) for the EU; and products under the supply management

regime: dairy, poultry, eggs (98 lines) for Canada. There is agreement that these products will not be totally liberalised, and new market access will be granted in the form of TRQs. The Canadian position that beef and pork not only condition dairy, but also GIs, GP and other EU offensive issues complicates matters, but also offers opportunities for the overall balance of the negotiations. The parameters for the final stage of the negotiations for these products are set out in the Annex to this paper.

2. Wines and Spirits

The full analysis of the provisions of the Wines & Spirits Chapter is set out in the paper "CETA State of Play - October 2012". The parameters for the final stage of the negotiations for the remaining open issues are set out in the Annex to this paper.

3. Intellectual Property Rights

The main remaining open issues concern pharmaceutical patents and geographical indications, which are key offensive issues for several Member States.

3.1 On pharmaceutical patents we have three requests to Canada:

- (1) **Introduction of supplementary protection certificates (SPC), also known as Patent Term Restoration (PTR).**
- (2) **Extension of the period of data exclusivity:** The EU has requested 8+2 years to create a level playing field with its own regime. Canada's current legislation foresees 6+2 years, but Canada is reluctant to consolidate this timeframe, and only wants to commit 5+1 years, which is the minimum WTO standard.
- (3) **Introduction of a right of appeal under Canada's marketing authorisation regime.**

These requests are strongly supported by Canada's own research-based pharmaceutical industry, but strenuously opposed by generic drugs producers, who are attempting to frame the debate in Canada in terms of higher costs for the public health services. Given the high degree of political sensitivity, both at the Federal and Provincial level, Canada has not made any move on this issue in the negotiations and clearly any decision on the EU requests will be taken at the highest political level at the end of the negotiations. Neither Member States nor the EU industry have indicated any priority among the three issues. Any Canadian move will be linked to the negotiation result on the offensive agricultural market access issues of Canada, and will condition our ability to deliver on all three issues.

3.2 On Geographical Indications:

The full analysis of the provisions of the Geographical Indications Chapter is set out in the paper "CETA State of Play - October 2012". The parameters for the final stage of the negotiations for the remaining open issues are set out in the Annex to this paper.

4. Public Procurement

The Public Procurement market access offer that Canada made in July 2011 is the most ambitious and comprehensive offer Canada and its Provinces have made to any partner,

including the US. It also outreaches the mutual commitments between the different Canadian Provinces in the Agreement on Internal Trade (AIT). The outcome regarding the inclusion of regional and local government entities, including agencies, crown corporations, and the MASH sector (municipalities, academia, schools, and hospitals) is highly satisfactory. Thus, the offer fulfils our expectations, including regarding the expansion of procurement to the sub-central level (Provinces and Territories) and to Canadian Crown Corporations and already now provides for very considerable added value with regard to the existing situation. However, there do remain some important gaps in areas of EU interest, and Canada is keeping for the end game certain additional concessions, especially at the provincial level. The EU should insist, at a minimum, on:

- (1) **On Public Urban Transport**, Canada must provide full access and in particular eliminate all local content requirements for EU operators.
- (2) **On Energy**, Canada must provide a significant overall improvement to its coverage, in particular in Quebec, Ontario and Newfoundland.
- (3) **Provincial Regional Development Clauses** must be either eliminated or redrafted so as not to undermine Canadian Provinces' market access commitments.

As to ports and airports we should keep them within the coverage of CETA under a 'catch all'-definition (the Canadian ports and airports that are not government run are located on publicly-owned land, and therefore a procurement commitment would catch them in the future if their status of operation were to change).

Canada has not committed shipbuilding at the federal level and in a number of important Provinces. However, recent rounds of public shipbuilding orders have exhausted the public portfolio order for at least two decades. Moreover, Canadian shipyards are not likely to have the capacity to fulfil possible additional orders, thereby opening a space for competitive European shipbuilders. Thus, the EU should not pay for *de facto* valueless concessions in this area.

6. Services and Investment

6.1 Services and Investment Market Access

On services and investment market access we are already on par with NAFTA, but some important offensive interests for the EU remain open. The primary focus of these interests from the outset of negotiations, apart from financial services, which is a discussion on its own, has been on investment (establishment), since Canada, unlike the EU, maintains a number of general and sectorial barriers to investment both at Federal and at Provincial level. Of these, the primary target remains exempting EU investors from the Investment Canada Act (discretionary screening of FDI for economic reasons: "net benefit to Canada"); the other horizontal restrictions (discriminatory treatment of established companies; residency and nationality requirements for senior management and boards of directors, performance requirements) are also important but have a lesser impact. The other key target remains telecoms, where we should aim at a transitional period for full liberalisation (or, as a fallback, at least at a ratchet to benefit from planned autonomous liberalisation) and - most important - an overall improvement in relation to broad provincial restrictions in energy, agri-food, mining and natural resources extraction in general.

On cross-border services, we should aim at improvements in at least two of our remaining priorities: postal services; maritime transport (feeder); air transport (selling and marketing of air transport services); distribution (wholesale and retail).

Areas where the EU could further improve its offer, if worth doing so in terms of additional Canadian concessions, could include research and development, private education, testing and analysis. Linked into this and still under internal examination is the Canadian request for MFN for services.

Canada would certainly argue that this package is unbalanced in favour of the EU, to which we would have to reply that the EU is a larger market. However, it is true that most of the Canadian requests would only entail binding existing liberalisation for the EU, whereas most of our outstanding requests do require genuine new market access from Canada. An additional argument on our part could be that we have also accepted, for the first time, the negative list approach for services and investment market access (however, we need to bear in mind that Canada has accepted for the first time our approach for public procurement, that Canada has also for the first time listed its provincial level measures and undertaken a market access commitment in a bilateral agreement, and that our offer for services and investment market access has a very high number of "Annex II" reservations, not only protecting existing measures but also maintaining complete policy space for the future).

6.2 Financial services

Canada has recently provided a complete and comprehensive offer on market access for financial services. If confirmed by the still on-going technical analysis - this could be a positive element in the negotiations, as Canada's offer in this sector is its most ambitious ever and appears to be of comparable quality and level of ambition to the EU's own offer for this sector, and indeed may even be slightly better.

This would leave the major question of the rules applicable to this sector. It will be recalled that Canada's practice in its FTAs is to treat financial services as a special case notably with regard to investment protection due to their high level of regulatory oversight and potential systemic impact, resulting in Canada undertaking fewer core obligations and thus providing for a lower level of protection for investments and investors in financial services than other services. Their proposal includes significantly reduced standards of protection for investment protection (as regards expropriation and free transfer), the application of the prudential carve-out to these two standards, and reduced access of investors to investor-state-dispute settlement, by filtering all disputes in order to assess whether the dispute concerns a prudential measure. In this scheme, if both Canada and the EU were to agree that this is the case, the dispute would in fact be prevented from proceeding.

It is clear that some sort of special treatment for this sector is a very deep red line for Canada. To cater for this, we could (a) accept the principle that the prudential nature of a regulatory measure that has an impact on an established investor could also be taken into account, and (b) accept that investor to state arbitration concerning a prudential regulatory measure be reviewed by the two parties (the EU and Canada) to determine its prudential nature and whether there are strong reasons, jointly agreed, for the arbitration not to proceed, provided this takes place in a short time frame.

In exchange for this - and assuming that the first positive impression on Canada's market access intentions for financial services is confirmed - Canada would have to accept (i) that all investment protection standards apply equally to financial services (including Fair and Equitable Treatment and NT, MFN, all subject to ISDS) as we cannot accept a lower level of protection for this sector; (ii) that no investor to state arbitration can be blocked unless both the EU (with an internal decision taken according to our normal rules) and Canada fully agree; (iii) that there are no limitations to state to state dispute settlement.

6.3 Public Utilities

As discussed with Member States at the Trade Policy Committee on 5 October, the Commission services have confirmed to Canada that the EU's reservation on public utilities continued in the EU's offer will remain in its present form (that is, with language derived from the EU's GATS reservation). Canada has reluctantly accepted this, but has requested a change in the EU's drafting, which would help Canada in the presentation of this to its Provinces. Member States' experts are being consulted, with the understanding that no change should detract from the conclusions of the TPC on 5 October.

6.4 Cultural Services

Canada requested originally the complete exclusion from the CETA of all "cultural activities". This is not acceptable for the EU because, irrespective of the question of market access and trade liberalisation for these activities, it would result in unreasonable outcomes, such as denying European operators active in culture-related fields the benefit of the better copyright protection we have negotiated, or allow discrimination of European investors in Canada.

We should try to persuade Canada to move to a more targeted approach which would retain the current substantive scope of their traditional cultural carve-out but focused explicitly on services and investment through an Annex II reservation which maintains that same substantive scope. In this case, there should be room for a satisfactory solution, which reaffirms the two sides' shared strong commitment to protecting their respective cultural policies, while taking account of the differences of detail between them. In such a scenario, the discussion would have to focus on the following elements:

- (1) Concerning the substantive scope of a cultural exception, clearly the EU would be seeking the exclusion of audio-visual services, as per our established policy. Canada would certainly want to exclude a number of other areas as well. While we should not object to this as a matter of principle, we do have important commercial interests in areas like retail and distribution, news agencies, printing and publishing, and areas such as telecom satellite transmission should not be linked to culture (these are all areas mentioned by Canada as examples of what their traditional approach covers).
- (2) Even if Canada could be persuaded to take commitments in some of these areas, we may still be confronted with cultural exceptions covering a different range of activities for the two sides. This would be a reflection of different policies and different historical and geographical situations, as well as the fact that the EU could not accept a broader carve-out, since we already have international commitments.

6.5 Temporary Entry (Mode 4)

Mode IV is a priority offensive interest for the Canadian Provinces and Territories, and in particular Quebec. The points left for the end game are sensitive in several Member States, and it is not possible to find a solution on a unified basis (as a same position for all Member States). Hence, the Commission is looking at Member State-specific commitments where necessary.

(1) Presence: Market Access, National Treatment (NT), Most Favoured Nation (MFN)

Canada requests that **Market Access** (the right to enter a country temporarily in order to provide a service in the country temporarily, without quotas or economic needs tests) and **National Treatment** apply throughout the service providers' period of stay ("stay" or "presence"). Canada requests this treatment for all the service providers legitimately present in the host country, irrespective of whether the Parties have taken any explicit commitments in this agreement.

As regards **MFN**, whereas both Parties agree that MFN shall not apply to commitments regarding the *entry* of natural persons, Canada requested to retain an MFN obligation regarding the treatment given by a Party to natural persons of the other Party once they are *present* in its territory.

Member States have been consulted on a proposal which could provide a workable compromise, in line with our normal practice in FTAs: (a) accept a MA commitment on "presence" because it would not change in substance the traditional EU position, but only clarify and provide greater legal certainty with regard to similar commitments undertaken in other EU FTAs; (b) accept a NT commitment on "presence" because we have already applied it hitherto to the category of *key personnel* and *trainees* and should not have problems to extend it to contractual services suppliers (CSS) and independent professionals (IPs); (c) limit these commitments to the categories/ sectors explicitly committed for mode 4 in CETA, in order to avoid an (undesirable) significant widening of scope.

This may still not be sufficient to achieve an agreement with Canada and we suggest we should also be able to accept an MFN commitment on "presence", provided that it would not concern the entry provisions, because it would be of limited actual economic value but of visible significance to Canada.

(2) New mode 4 categories: Investors and short term business visitors

CETA would include 2 mode 4 categories that are new as compared to previous EU practice, namely: Investors: considered as part of the key personnel, they are characterised by committing a "substantial amount of capital". They are granted a 1 year stay period. And Short-term business visitors, similar to the "business sellers" category known to the EU's standard template, but involving a wider range of activities. Under CETA, short term business visitors would be waived work permits for a period of 90 days.

A (very) few other Canadian requests have been discussed with MS and can be accommodated with MS-specific reservations where necessary. However, there is one outstanding issue, concerning "transportation operators", for which Canada requests the binding of the current practice not to require work permits for airline or ship crews. We could try to meet this request, but we should avoid creating a precedent for forthcoming negotiations (and in particular for land transportation with countries in the Euromed region).

(3) Technicians and technologists

Technicians and technologists are lower-skilled categories in the sense that they do not possess a university degree, as required under the EU standard CSS/ IP provisions. The difference between both categories is that technologists follow a deeper and longer theoretical training (at least 3 years post-secondary learning), as compared to technicians (2 years). Canada requested that both technicians and technologists are accepted as CSS / IP for 2 types of professions: "engineering" technicians/ technologists and "applied science" technicians/ technologists.

Lower-skilled categories are a traditional red-line for the EU and have only been committed once, in Cariforum. Therefore, we should not accept the Canadian request as such, especially for *technicians*. However, some Member States could accept that *technologists*, who appear to approximate the level of qualification granted by a university degree, would be recognised as equivalent to holders of university degrees. Member States would have the possibility to opt out from this recognition, though. Those who have already signalled their wish to be carved out are CY, DE, ES, FI, IT, LT, NL, UK.

(4) Conditions for Contract Service Suppliers (CSS) and Independent Professionals (IP)

We have agreed with Canada, *ad referendum*, that the length of stay for CSS and IPs would be a maximum period of 12 months within a period of 24 months. However Canada further requests that the EU removes some of its traditional requirements applying to CSS and IPs, notably requirements on (a) maximum duration of the corresponding services contract of 12 months; and (b) the condition that "*the number of persons covered by the service contract shall not be larger than necessary to fulfil the contract*", where this condition is provided for under law (which Canada considers to be an arbitrary necessity test).

Canada's request touches on a delicate matter of policy, as the conditions in question are part of the set of requirements that the EU demands to recognise the CSS/ IP categories. Some Member States are strongly attached to such conditions, which they see as a safety net to avoid abuse of the mode 4 provisions (i.e., impact on their local labour markets under cover of mode 4 activity). Thus, the first condition above on maximum duration of 12 months seeks to avoid a *de facto* occupation of national jobs by foreign professionals (e.g., with a 3-years services contract served by 3 consecutive shifts of CSS staying 1 year each). Consequently this request should not be accepted. However, it may be possible to explore some flexibility as regards the 2nd clause, on the number of persons necessary to fulfil the contract, and we are discussing with MS experts alternative language that would preserve the Member States' objective of preventing abuse.

(5) Spouses

Canada requests a binding commitment to issue both residence and work permits for the accompanying spouses (or family members in general) of service suppliers under mode 4. Member States are generally opposed to the inclusion of spouses as a new mode 4 category and, more broadly, to the handling of what they consider immigration issues in the context of trade agreements.

This request could be addressed, however, through a reference to future EU legislation in a separate annex or protocol (that is, the current Commission proposal for an intra-corporate

transferees - ICT - Directive), subject to a number of limitations (only family members of ICTs, not those of other categories of services providers, such as CSS or IPs; right of residence for family members in accordance with the outcome of the draft ICT Directive, but not an automatic right to enter the labour market in the host country).

(6) Economic needs test (ENTs)

Canada requested horizontal elimination of ENTs for CSS and IPs. However, the fact that nearly all remaining ENTs in the EU offer are in Member States' legislation makes it impossible to accommodate such request.

7. Investment Protection

It will be recalled that, in spite of the late start of this phase of the CETA negotiations, and of the complexity of the issues, where both sides have sharp differences of view, it is nevertheless unlikely that the whole cluster of services and investment issues could be closed without investment protection. Canada is *demandeur* for investment protection but has many barriers to investment market access, several of which are priority EU offensive interests (see point 6.1. above), is very defensive about them, and will no doubt seize any pretext for withholding concessions. This would rule out possible fall-backs such as *rendez-vous* clauses.

Protection for the large amount of EU FDI stock in Canada is also very important for the EU, not least in view of some Canadian practices, in particular at the provincial level, which raise concerns. Protection standards would also ensure a level playing field for EU investors with US and Mexican ones on the Canadian territory. Finally, we must take into account possible precedents that could be set for future negotiations (notably with the US). Given the complexity of the issues, and the limited room for manoeuvre that we feel the EU has on this issue, a possible compromise should be presented to Canada as a package.

(1) Non application of ISDS to market access investment issues

For the EU it is critical to ensure that Investor to State Dispute Settlement (ISDS) does not apply to market access related issues of investment.

(2) Treatment of investments in the financial services sector

Canada proposes to apply reduced investment protection to investments in the financial services sector, excluding the application of the standard of fair and equitable treatment and no recourse to Investor-to-State dispute settlement for alleged breaches of National Treatment and Most-Favoured Nation Treatment (see section 6.2 of this paper). This is not acceptable for the EU as there are no sound reasons why investors in the financial sector should be treated differently compared to other investors when regulators adopt measures for prudential reasons. Section 6.2 above explains the maximum compromise that the EU could envisage to take into account Canadian legitimate concerns and red lines on this point.

(3) Exclusion of cultural goods and services from investment protection

Canada proposed to exclude cultural goods and services from investment protection. The EU does not seek a right to invest in cultural sectors but once an investment is made according to applicable legislation, it should be protected (see section 6.4 above for further details of the

cultural services issue). Thus, while sharing Canada's concerns as to the protection of cultural policies, the EU should not agree to Canada's proposal as formulated.

(4) Application of National Treatment reservations

The EU needs to ensure that National Treatment reservations taken for market entry of an investment as well as the maintenance or operation of an investment are not nullified by an unrestricted National Treatment for investment protection.

Annex I contains reservations for non-conforming measures that reflect existing legislation, which clearly need to be excluded from commitments. These NT reservations, therefore, must prevail over the NT obligation for investment protection.

Annex II contains reservations for non-conforming measures that are meant to provide policy flexibility for the future. Like Annex I reservations, Annex II reservations cover any existing legislation with discriminatory elements. Unlike Annex I reservations, Annex II reservations are not subject to the ratchet. Therefore any relaxation of existing policies is not automatically consolidated under the Agreement. Annex II reservations also imply that future policies and legislation could be more restrictive than existing ones. Annex II reservations indicate a higher degree of policy sensitivity, and the effectiveness of these reservations must be protected.

(5) Performance requirements

The EU should not accept reservations to performance requirements that are WTO-minus.

(6) The Standard of Fair and Equitable Treatment

Canada proposes that the standard of Fair and Equitable Treatment (FET) be limited to "the treatment which is required by the customary international law minimum standard of treatment of aliens". This is problematic for the EU, as it may significantly reduce the level of protection for investment afforded by the FET standard itself. A possible solution to this question of interpretation of the FET standard could be to spell out the criteria for its application, thereby codifying a generally accepted outcome of jurisprudence that both sides are comfortable with.

(7) Annex on indirect expropriation

The EU could accept the Canadian proposal for an annex on indirect expropriation that would provide guidance on the interpretation of this concept. However, Canada's proposed text would permit expropriation without compensation, in order to pursue legitimate policy objectives. This should not be accepted. The EU has proposed a text that codifies existing practice (of both arbitral practice under Member States BIT's and the European Court of Human Rights) and fully maintains the principle of compensation when indirect expropriation occurs.

(8) Use of 'in like circumstance' for National Treatment (NT) or Most-Favoured Nation Treatment (MFN)

Canada proposes this reference to provide guidance to arbitral tribunals when establishing discrimination based on nationality. In Member States' BITs this reference is hardly ever

used. However, the interpretation that is given to the NT and MFN standards in both Canadian and Member States' BITs is not different. There is also consensus that arbitral tribunals would always apply some form of comparison, when looking at the specific situations at hand, to determine whether discrimination has occurred. This concept has been accepted as such in the OECD national treatment instrument, which contains a reference to "like situations". Thus, it should be possible to find compromise language to express this concept.

(9) The application of the 'umbrella clause'

The EU has proposed to include a provision that ensures that a State respects any undertaking it has entered into towards an investor and subjects contractual obligations as well to the investment protection standards of the agreement. For Canada this is not acceptable. The EU should nevertheless continue insisting on the inclusion of this clause.

8. Investor-to-State Dispute Settlement (ISDS)

The key controversial question in this respect relates to the scope of application of ISDS (see section 7, point (1) above): for the EU it is critical to ensure that Investor-to-State Dispute Settlement (ISDS) does not apply to market access-related issues of investment.

As to the rules of operation of the ISDS itself, a number of detailed issues are being discussed and Member States' experts have been fully debriefed. For the purposes of this paper, it is useful to flag the following, in respect of which there remain substantive differences with Canada:

- (1) The standing of locally established investment to use ISDS: the EU's position is that such investors should be permitted to directly use ISDS (as in e.g. the Energy Charter Treaty), rather than force them to do so through their foreign parent company (as Canada proposes). The EU has concerns that the Canadian system may create a number of technical problems making it more difficult for EU investors to access ISDS and questions remain on the compatibility of the Canadian system with ICSID.
- (2) The inclusion of annexes on transparency, on a code of conduct for arbitrators and on a mediation mechanism; the latter two are novelties for Canada, but it should be possible to persuade it to accept and to move to finish these annexes.
- (3) Canada normally excludes from ISDS decisions taken under the Investment Canada Act. This is not acceptable. However, the issue may become moot if Canada accepts the EU position that EU investors should be exempted from the Investment Canada Act altogether (see Section 6.1 of this paper) and/or upon agreement that ISDS does not apply to market access (see Section 7.1 of this paper).