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<b>Trade Policy Committee</b>	
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**Non paper: Analysing the impact of exclusions from provisional application of CETA**

***Investment Market Access & Investment Protection/Investment Court System***

Without prejudice to the Commission's and the Council's respective views on competence as regards investment in general, it is suggested that the provisions concerning investment protection and the Investment Court System in CETA should not be included in its provisional application, in light of the difficult debate in a number of Member States and of the novelty of these provisions.

Secondly, a question arises whether investment market access provisions should be provisionally applied. The Union has traditionally included investment non-discrimination and market access commitments in provisional application. Excluding them from the scope of provisional application in CETA would lead to a considerably lesser scope of provisional application as compared to all recent FTAs, departing from its consistent practice, for instance in the EU-Korea FTA.

This would considerably discourage Canadian investment in the EU, since it would be seen as less favourable treatment than that granted to other FTA partners of the EU, or at least delay considerably investment plans by Canadian firms into the EU. This would have a clear impact on job creation in the EU, given that the EU is a favourite investment destination for Canada and CETA is expected to boost this preference.

More immediately, Canada also has the right to withhold application of certain parts of CETA, and that in this case the potential scope of the Canadian withdrawal would also include "equivalent provisions" to investment market access for both services and non-services. In fact, there have already been indications by Canadian officials that if the EU were not to apply provisionally the entirety of CETA, Canada would have no choice but "mirror" the same treatment.

This would also mean that none of the commitments the EU has secured from Canada in CETA on investment market access both in services and non-services would apply. This means that all the commitments obtained from Canada for mode 3 for services the EU would not apply, leaving the EU to fall back on the GATS, and no commitments would apply for establishment in non-services sectors, including the higher thresholds for the Canadian investment control law (Canada has taken important

commitments as regards the Investment Canada Act, as a result of which it will substantially increase the threshold for review of acquisitions of Canadian companies by EU investors from the current C\$354m to C\$1.5bn).

Therefore, it is suggested that Member States consider whether or not they wish to apply provisionally the CETA provisions with respect to investment market access, while excluding from provisional application investment protection and the Investment Court System.

From a legal point of view, the exclusion of investment protection and the Investment Court System can be done by excluding the corresponding parts of the investment chapter of CETA (Chapter 8, Sections D on Investment Protection and Section F on Resolution of Investment Disputes between Investors and States) through an explicit mention in this regard the text of the Decision on provisional application. The remainder of Chapter 8, covering investment market access, would be provisionally applied. In order to do so, however, article 8.13 ("Transfers") in Section D should also be provisionally applied, because it is essential to the effective implementation of the investment market access commitments.

On the basis of the above-mentioned considerations:

- 1. Do Member States agree with the exclusion of provisions on investment protection and the Investment Court System from the scope of provisional application?*
- 2. Do Member States agree that investment market access should be covered by provisional application, as was the case in the EU-Korea FTA?*

### **Transport Services**

The Union has included transport services in their totality in the provisional application of all its modern FTA's since the EU-Korea FTA<sup>1</sup>. Continuing this consistent practice for CETA would allow Member States to benefit from the important commitments made by Canada in this sector, especially as regards maritime transport. Until now this has been done without prejudice to the Commission's and the Council's respective views on competence as regards transport services. In the most recent FTAs, the Commission and the Council have issued Declarations at the time of the Council's adoption of the Decision on provisional application to make clear their respective positions on competence as regards transport services. This pragmatic approach has allowed EU economic operators to start benefiting from valuable market access concessions already from the time of provisional application.

On the basis of the above-mentioned considerations:

*Do Member States agree that the provisions concerning transport services should be included in the provisional application of CETA?*

*Note: in CETA, the EU has obtained new market access with the liberalisation of feederling of the important maritime route between Montreal and Halifax. New market access in maritime services is particularly relevant as 80% of goods between the EU and Canada are transported by sea. Canada*

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<sup>1</sup> EU FTAs with Korea, Columbia, Peru, Central America and EU Association Agreements with Ukraine, Moldova, Georgia

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*has also taken for the first time legal commitments in dredging and the Canadian market in this sector is valued to be between €100m-300m per annum. EU companies are world leaders in dredging with a 40% global share.*

### ***Sustainable Development***

The Union has included sustainable development in the provisional application of all its modern FTA's since the EU-Korea FTA. It is important to note that CETA covers only the trade related aspects of labour and environment (confirmed in Article 22.1 which deals with scope and objectives of the Sustainable Development chapter) and does not cover the full spectrum of issues related to labour and environment. There has been an increasing demand from civil society to ensure that trade agreements go in this direction, given the intimate link between trade and environment protection and trade labour rights. This call of civil society has also been loudly echoed by the European Parliament in its Resolutions on CETA and other trade agreements. Indeed the Treaty on the European Union provides for the EU's action on the international scene to be guided by the shared values that underpin the European construction (Article 3.5 TEU). These include sustainable economic, social and environmental development.

Furthermore there are many other cases where the Union creates a framework to implement commitments undertaken by the EU and its Members States in international agreements (e.g. the EU Emissions Trading System).

In the case of fundamental ILO Conventions, it must be noted that the commitments taken by Canada to make '*continued and sustained efforts to ratify fundamental ILO Conventions which they have not done so as yet*' have in fact already proven an extremely effective tool. Canada has ratified the ILO fundamental Convention 29 on Forced labour already during the CETA negotiations (in 2011). As regards the two outstanding Conventions (Minimum Age and Right to collective bargaining) which Canada still has to ratify, the Canadian Government has indicated its intention to ratify these shortly.

In this context, excluding sustainable development from provisional application would (a) likely create a conflict with the European Parliament and be badly received by the more progressive segment of civil society in the EU, as a weakening of our commitment to ensuring trade is developed in full respect of our commitment to sustainable development; (b) give the wrong signal to Canada and possibly slow down the ratification of the missing ILO Conventions; (c) give the wrong example to third countries.

On the basis of the above-mentioned considerations:

*Do Member States agree that the provisions concerning sustainable development should be included in the provisional application of CETA?*