



# CETA's Legal and Political Implications for the TTIP

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# Introduction



- ▶ Completion of CETA Negotiations (except for investment chapter?) raises significant challenges for EU and US:
  - ▶ Is CETA a ceiling or a floor for TTIP, or of limited relevance?
  - ▶ Risks of trade diversion for US and Canada under NAFTA
  - ▶ Political risks for Canada if US negotiates a better deal
  - ▶ Political risks for US if CETA is judged more beneficial or if TTIP negotiations fail
  - ▶ Increasing the need for amendment of NAFTA



## Introduction, cont'd



- ▶ Areas of particular concern:
  - ▶ Rules of origin
  - ▶ Investment
  - ▶ Financial services
  - ▶ Agricultural tariff barriers (esp. grain and dairy)
  - ▶ SPS and related regulatory coherence matters
  - ▶ Government procurement
  - ▶ Geographical indications
  - ▶ Intellectual property
  - ▶ Labor and Environment



## Negotiating Similarities



- ▶ EU is a major trading partner for both US and Canada
- ▶ Canada and the US have many other FTAs
- ▶ Canada and US have similar legal systems and cultures (except for Quebec)
- ▶ Major export goods include various manufactured items, including autos and auto parts, plus agricultural products
- ▶ Both have strong financial sectors
- ▶ Both protect domestic agriculture
- ▶ Both (with most of EU) are high wage cost economies



## Negotiating Differences



- ▶ U.S. economy is nine times that of Canada (\$16.245 trillion v. \$1.881 trillion)
- ▶ U.S. has 314 million people, Canada only 35 million
- ▶ Other things being equal, access to U.S. market should be more important to the EU than access to the Canadian market
- ▶ With a parliamentary system in which the prime minister's party normally has an absolute majority approval of CETA by Canada should be easier than in U.S. with its divided government and need for Trade Promotion Authority to conclude TTIP



# Rules of Origin



- ▶ Autos and auto parts prime example of NAFTA integrated industry
  - ▶ Most autos made in NAFTA have parts content from all three countries
  - ▶ US somewhat more self-sufficient than Canadian production, but still dependent on Mexican parts and components
  - ▶ Restrictive R/A will prevent many potential auto exports to EU, given high (10%) EU auto tariffs
- ▶ Quota system accepted by Canada for exports not meeting Canadian content requirements probably not acceptable to US
- ▶ Cumulation provision for US parts and components with 45% limit on non-originating goods requires cumulation with Mexican parts in order to work well



## Foreign Investment/ISDS



- ▶ Opposition has developed in EU, particularly Germany, to including ISD in TTIP (and to accepting investment chapter in CETA)
- ▶ Makes little sense logically for Germany to object to ISDS in TTIP or CETA
  - ▶ Germany has 126 BITs in force and EU members well over 1,400—half those world-wide-- in aggregate
  - ▶ CETA formula much more friendly to host governments than old BITs
- ▶ Arguably, ISDS isn't essential in nations with strong, independent judiciaries (all except Bulgaria and Romania)—but even US and Canadian governments (especially states and provinces) occasionally take arbitrary and unreasonable actions



## Foreign Investment, Cont'd



- ▶ CETA precedent (unless ISDS is deleted) makes it virtually impossible for US to accept TTIP without ISDS
- ▶ Many strong TPA/TPP/TTIP supporters in Congress will balk at exclusion of ISDS, which will be obligatory under new version of TPA
- ▶ US-China BIT negotiations could be adversely affected
- ▶ ISDS in CETA but not in TTIP likely to encourage some US enterprises to invest in EU countries through Canadian subsidiaries
- ▶ Some EU enterprises may invest in US through Canadian subsidiaries, taking advantage of NAFTA Chapter 11



## Services



- ▶ Canada was willing to go further on some services, particularly financial services, than United States, which for unstated reasons is resisting financial services' inclusion in TTIP
- ▶ CETA preserves broad “prudential” exception, with clarifying guidelines
- ▶ US situation complicated by lack of barriers (since 1999) between investment and commercial banking by same enterprises (Glass-Steagall Act)
- ▶ Financial services in CETA follows a “positive list” approach, still opposed by USTR



## Services, Cont'd



- ▶ Post Great Recession financial system regulatory process remains in flux due to disagreements between Republicans and Democrats over implementation of Dodd-Frank
- ▶ Cross-border services depart from national treatment in allowing more favorable market access within the EU and among Canadian provinces, an approach that the US may oppose
- ▶ EU officials have publicly asserted that EU has better access to Canadian services market than do US and Mexico under NAFTA (not surprising 23 years after NAFTA concluded)
- ▶ US remains extremely restrictive on maritime transport ; there will be no equivalent to Ch. 16 in the TTIP



## Government Procurement



- ▶ NAFTA does not impose obligations on sub-national entities, such as states or provinces
- ▶ Only 37 US states are covered by WTO's GPA; they have adhered voluntarily
- ▶ Coverage in CETA of Canadian provincial and municipal government services would provide EU enterprises with substantial advantages over U.S. enterprises under either NAFTA or GATS unless TIPP contains same obligations



## Agricultural Market Access



- ▶ Many of major sensitive areas—dairy products, wheat, other grain, meat products—are similar in Canada and US so TRQs can be expected
- ▶ CETA includes obligation to eliminate agricultural export subsidies conditional on tariff elimination; US doesn't use export subsidies (as contrasted with domestic subsidies) so should be willing to go at least this far
- ▶ Neither CETA or TTIP will come close to eliminating market access barriers for agricultural trade



# SPS/TBT & Regulatory Cooperation



- ▶ May be most important area for many US multinational enterprises
- ▶ Canada-EU approach is process oriented:
  - ▶ Mechanism for joint initiatives
  - ▶ Early access to regulatory development process
  - ▶ Procedures to request other's technical regulations be treated as equivalent
  - ▶ Scope and coverage of protocol for acceptance of the other's test results and product certification still under discussion
  - ▶ SPS Joint management committee to discuss issues before they become problems



## SPS & Regulatory Cooperation



- ▶ Can US and EU agree to go further?
- ▶ EU's early proposals include:
  - ▶ “veterinary equivalence” agreement
  - ▶ Harmonization of technical regulations on car safety or at least an “equivalency” approach
  - ▶ Regulatory cooperation on chemicals, with especially on setting priorities for testing dangerous substances (with perceived risk of slowing an already slow testing process according to CIEL)
- ▶ USTR plans to table new SPS proposal in October or November, which supposedly will go beyond WTO's SPS Agreement
- ▶ Agency turf battles complicate cooperation



# Intellectual Property



- ▶ Additional protection for generic pharmaceutical products is prospective only under CETA, with special protection for Canadian produced generics; applies on average after drug on market for eight years
- ▶ Suggests that US and EU are closer on better protection for pharmaceuticals than other trading partners, including US' TPP partners
- ▶ Trademark protection agreed to by Canada does not go beyond current Canadian obligations under other agreements (which US considers inadequate)
- ▶ Protection of GIs in CETA likely to appeal to US since basic names such as “brie” or “gouda” (as distinct from “Brie de Meaux” or “Gouda Holland” or “Black Forest Ham” are grandfathered for existing Canadian producers



# Labor and Environment



- ▶ US historical insistence on enforceable labor and environmental standards , with penalties, may be more attractive to EU than it has been to TPP Parties (where all others, including Canada, Australia, Mexico and New Zealand, have been opposed)
- ▶ CETA contains mostly soft obligations and NAAEC type language but subject to a form of dispute resolution; (without penalties for non-compliance) ; Obama Administration may be forced to seek more from EU
- ▶ TTIP like CETA may have a sustainable development chapter but will avoid climate change
- ▶ CETA obligation to implement ratified ILO conventions; US, unlike Canada and EU, has not ratified most ILO accords



## Concluding Thoughts



- ▶ Many complications arise when one economic entity (EU) at different times concludes individual FTAs with the members of another FTA (NAFTA)
- ▶ Major distortions include those related to rules of origin, particularly with industries that are integrated within NAFTA, government procurement and services
- ▶ Differing provisions inevitably will inevitably alter competitive situation within NAFTA, particularly between Canada and the US and Mexico and Canada
- ▶ When and if CETA, TTIP and revised EU-Mexico FTA are all concluded, 21-year old NAFTA will almost certainly require significant changes to remain effective



## Concluding Thoughts, Cont'd



- ▶ Eventual ratification of CETA by Canada and EU is likely, but no longer certain; further delays become more likely, with change in EU Commission November 1
- ▶ TTIP negotiations risk significant further delays if TPA isn't enacted by the end of March and TTP is not concluded by mid-year, given US presidential election
- ▶ Whether political will necessary to conclude a “wide and deep” TTIP exists either in the EU or in US remains uncertain
- ▶ Risk increases that “mega-RTAs” CETA, TTIP and/or TTP will join the Doha Round and FTAA in ranks of failed trade liberalization agreements, because of internal political bickering that prevents the parties from completing the process.