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CETA, the NAFTA Problem and Brexit
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CETA Rules of Origin

- Emphasis on simplifying procedures
- Common approaches to recordkeeping and certification
- Protocol on Rules of Origin and Origin Procedures
- Tolerance threshold (*de minimis*) is 10%

CETA Certificate of Origin

- Completed and signed by exporter
- Submitted by importer to domestic customs authority upon request
- Can be statement on an invoice or referencing invoice
- Further documentation may be required
- May apply to multiple shipments of identical products for up to 1 year
- Single origin declaration is sufficient for goods imported in installments
- Verifications and appeal mechanisms

CETA Rules of Origin Regulations

- Records kept by all parties for 3 years
- Failure to maintain records can lead to denial of preferential treatment
- Emphasis on fairness
  - Small discrepancies and minor typose should not lead to denial of preferential treatment
- Canadian and EU customs authorities are to cooperate
- Verifications must be completed within 12 months
- Advanced rulings can be issued to exporters

CETA and Rules of Origin revisited

- Origin verifications conducted by home states
- Verification procedures still being drafted
- CBSA Customs Notice 17-29:
  - “The new CETA Verification of Origin of Exported Goods Regulations are being proposed… The regulations set out methods, other than a verification visit, that may be used in order to verify the originating status of goods exported from Canada to an EU country or other CETA beneficiary. These methods are the review of a verification questionnaire completed by the exporter or producer of goods, the review of the written response of the exporter or producer to a verification letter, or the review of other information received by the exporter or producer or by the producer or supplier of a material used in the production of the goods. These regulations will also set out what premises or places may be entered for the purpose of a verification visit, indicate that a verification visit may only be conducted if a written notice of intention to conduct the visit has been sent, and specify the way certain documents are to be provided.”

Rules of Origin: navigating a complex maze of standards

- Each FTA adds another origin regime that must be adhered to
- Adhering to origin regimes means devoting resources to compliance
- Administrative compliance costs: 1%-8%
- Trade diversion costs

Cumulation

- Cumulate all inputs and trading processes between states that share FTAs so long as rules of origin for first exporter and final importer are complied with

- Canada promotes cumulation in its FTAs, including with:
  - Chile, Colombia, EFTA, Honduras, Israel, Jordan, Panama and Peru

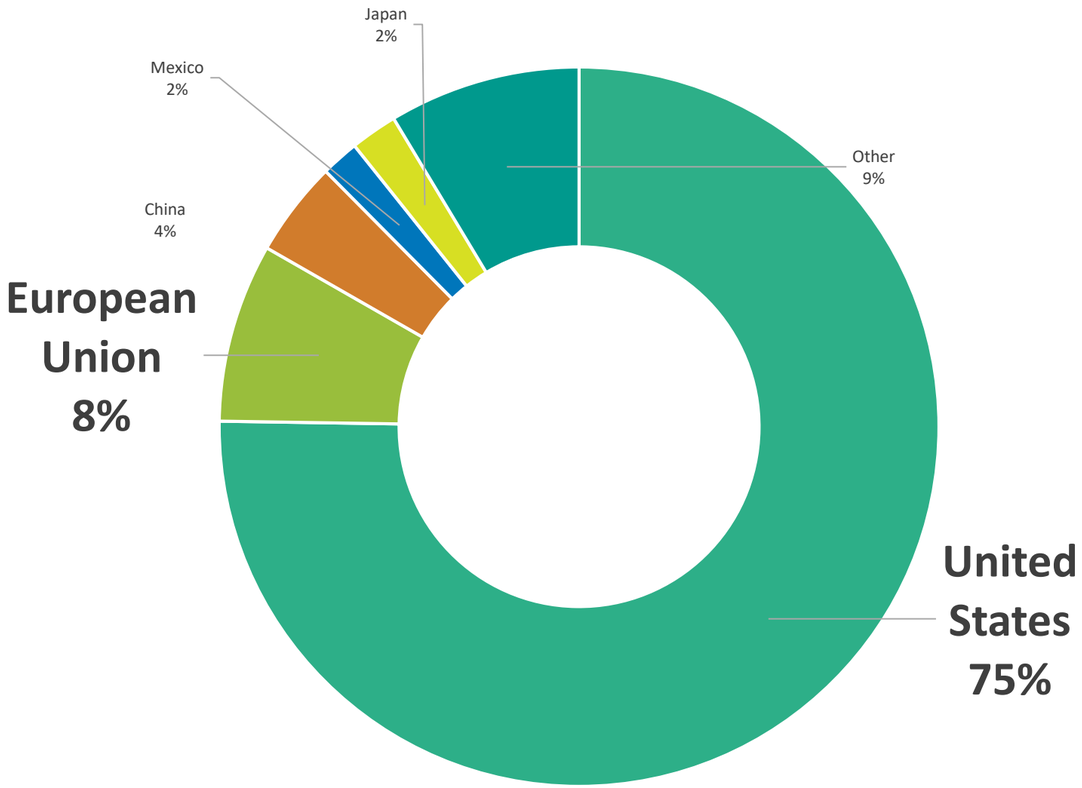
- Cumulation as a part of CETA for third parties that have FTAs with Canada and the EU
  - TTIP could broaden the scope of originating goods

The NAFTA problem

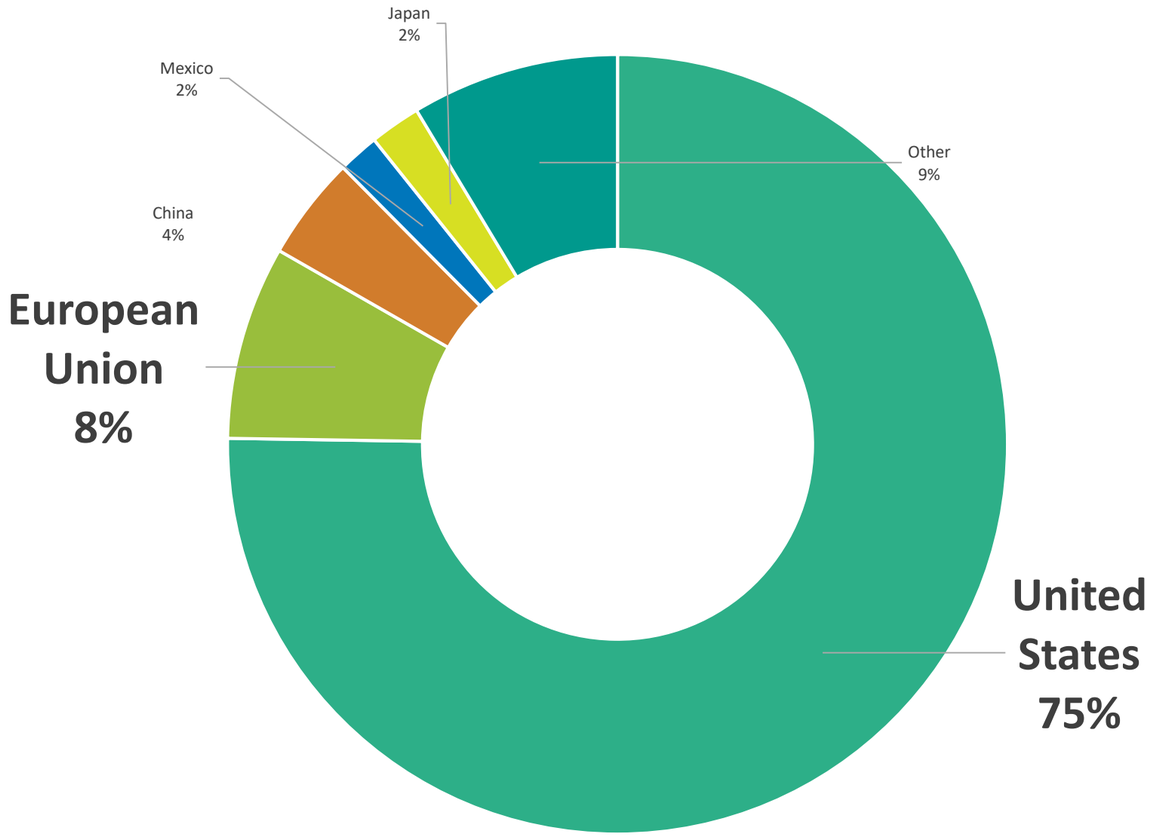
- The Canadian economy is not only Canadian, it is also North American
- CETA automotive rules permit 70% non-originating materials in a quota of 100,000 vehicles
  - Expires one year after entry into force of TTIP
  - What about Mexico?
- CETA or NAFTA? Weighing compliance and opportunity costs
  - More restrictive rules of origin in NAFTA could increase labour costs

NAFTA v CETA: Follow the money, or the opportunity?

Canadian Goods Exports by Country 2016



Canadian Goods Exports by Country 2016



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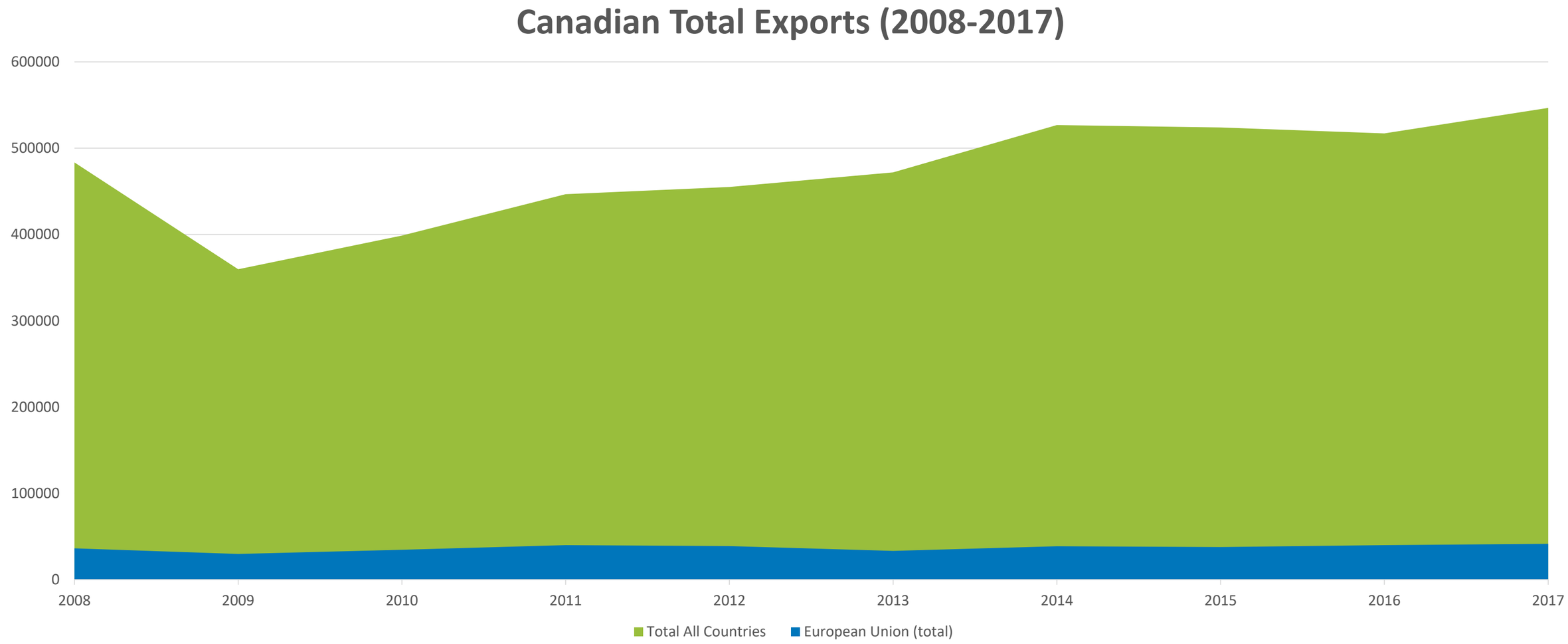
Canada/EU trade relationship snapshot: Exports to EU consistently around 7-8% of Canadian exports



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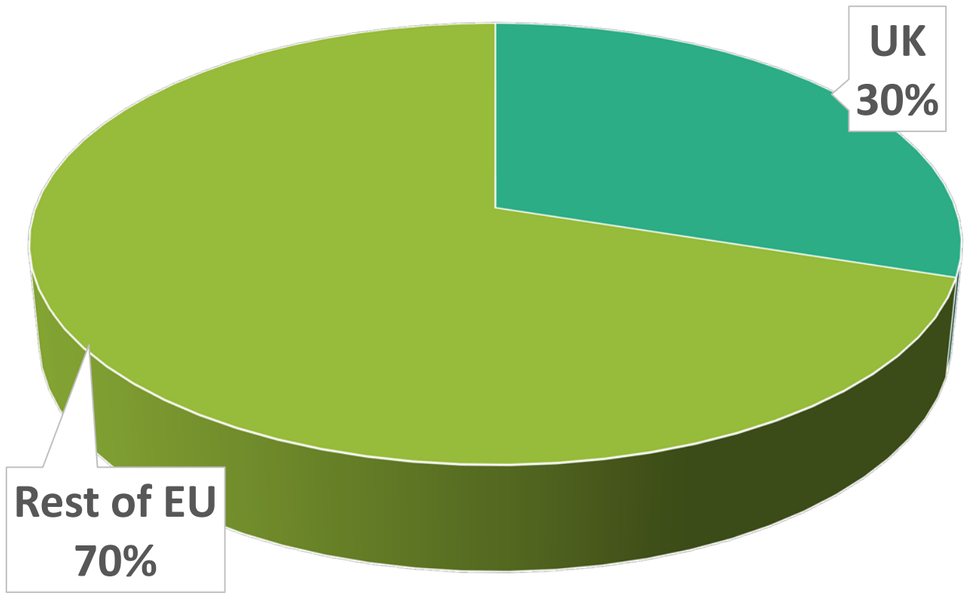
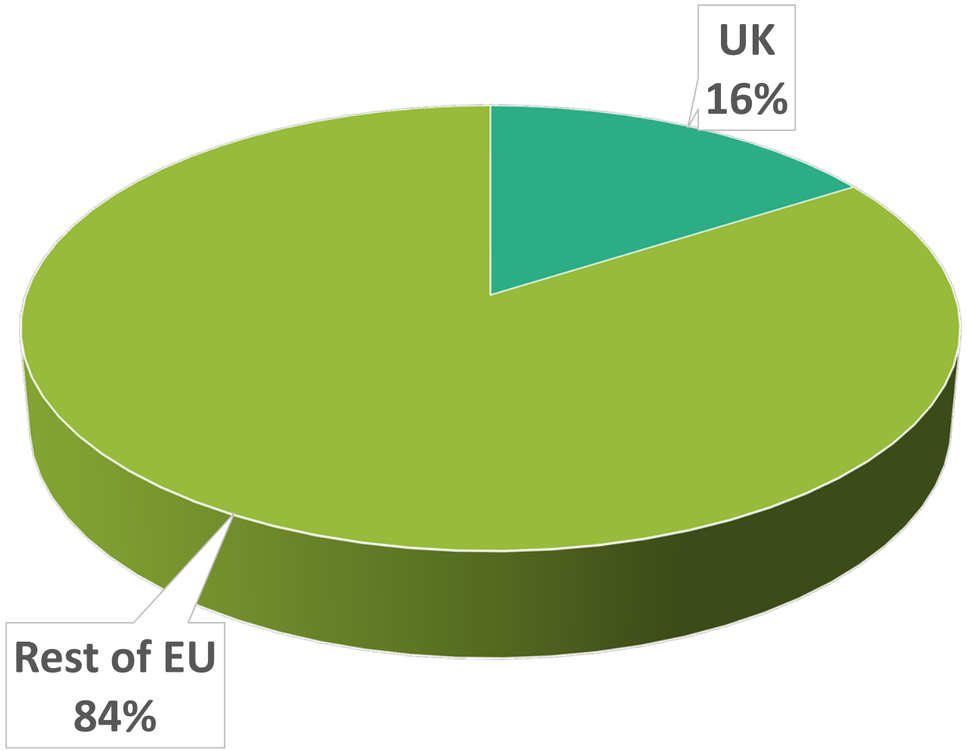
The Canada-UK relationship

Canada-EU Bilateral Trade



Breakdown of EU Economy (by GDP)



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CETA without the UK

- Canada losing its most important economic partner in the EU
- CAD $40 billion in Canada-UK bilateral trade
- 700,000 UK firms operating in Canada
- Over 1,100 UK firms owned/controlled by Canadian interests
- Exports of Canadian goods increasing annually by 5%
- UK estimated CETA would boost the UK economy by CAD $2.15 billion each year

- Now what?

Developments of EU Trade and Investment Agreements

John Grayston and Giani Pandey

ICPA Amsterdam, the Netherlands

June 2018

Overview

- Events in 2017 and 2018: CETA, Singapore Opinion 2/15, EU-Japan agreement, EU-Mexico
- Trade agreements currently negotiated and to be concluded
- Other relevant trade issues: Brexit

The scope of the EU competence in Common Commercial Policy

Article 3 TFEU

1. The Union shall have **exclusive competence** in the following areas:

(e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is **necessary to enable the Union to exercise its internal competence**, or insofar as its conclusion may affect common rules or alter their scope.

Article 207 TFEU

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, **foreign direct investment**, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

In light of the additional scope of the EU exclusive competence in the field of foreign investment, the Commission interpreted “the new investment” competence broadly inserting substantial and procedural provisions on investment into the new EU trade agreements. The EU Member states protected its saying, stating that the EU exclusivity in the field of investment was only limited to “portfolio” investments and that any external aspects of substantial and procedural issues of investments law fell within the area of shared competence between EU and Member States. The Commission took also the opportunity to propose establishment of the multilateral investment court. Foundations of the court would be envisaged in the EU trade agreements, setting up the institutional framework replacing scattered BITs investment arbitration. In light of the disagreement on the scope of competence, the Commission referred the Singapore Agreement for the Advisory Opinion of the Court to decide upon the scope of exclusivity of the EU.

In Singapore Opinion 2/15, the Court confirmed that the shared competence of the EU extends over: Investor-to-state Dispute Settlement (ISDS), the Non-direct Foreign Investment, State-to-State dispute settlement relating to portfolio investment and ISDS.

Moreover, the Court also clarified that the EU has exclusive competence over trade in matters related to all aspects of Intellectual Property, aspects of sustainable development and environmental protection.

The EU initiative with the multilateral investment court

The EU is the world's largest exporter and importer of foreign direct investment. Investment, both inward and outward, brings jobs and economic growth. That's why encouraging and retaining investments is vital for ensuring economic growth and jobs in the EU.

Since 2015, the Commission has followed a new approach to investment dispute settlement, which implies including the Investment Court System (ICS) in the EU's bilateral agreements. The institutional framework for such court system will later be transposed to the multilateral level with the possibility for the third countries to opt-in to the Multilateral Investment Court. The main problem behind the idea of the court is that there is no uniform scope of investment provisions, nor initiative for the multilateral investment treaty with substantive provisions.

The Commission has in parallel been working on the multilateral investment court project. The new approach was a direct response to problems identified with the traditional ad-hoc mechanism for arbitrating investment disputes and with the Investor-State Dispute Settlement (ISDS), including its lack of legitimacy, consistency and transparency. The ICS, by comparison, is based on the features of a permanent public domestic or international court, including independent judges, transparent and efficient proceedings, as well as a mechanism for appeals. However, due to its bilateral nature, the ICS cannot resolve disputes under the whole multitude of existing investment treaties. The multilateral investment court initiative therefore aims to replace existing bilateral mechanisms – including those in the over 1,400 investment treaties concluded by EU member states and other interested countries - with a permanent body to decide on international investment disputes. The multilateral investment court is intended to be an international court empowered to hear disputes over investments between investors and states that will have accepted its jurisdiction over their bilateral investment treaties.

Recent developments concerning investment policy and future perspectives:

- On 6th March 2018, in Achmea ruling, the CJEU ruled that intra-EU BITs are not compatible with the EU law. Achmea ruling (C-284/16) is a clear indication that the CJEU in Opinion 1/17 is likely to find also the Investor Court System in CETA problematic for the autonomy of EU law. This means that as Singapore agreement, the new trade agreements will have to be split into the traditional FTAs and investment protocols.
- On 20th March 2018, the Council provided the Commission with the negotiating mandate for setting up the multilateral investment Court.
- In April 2018, the Commission began the negotiations and submitted proposal within UNCITRAL to obtain support of interested countries.
- Most likely, at the end of the 2019, the CJEU will render that investment court provisions as envisaged within CETA are not compatible with the autonomy of the EU law. However, the efforts invested at the level of UNCITRAL might be sufficient to keep multilateral negotiations going till such court is created (at least 10-15 years to go) or initiative is foregone. At that moment, the EU should pass through another "constitutional momentum", arguably already reached with the moment of Brexit, which might extend the scope of the EU exclusive competence to these aspects of investment policy.

16th May 2017 – CJEU opinion on EU-Singapore Agreement

The CJEU's Opinion over EU-Singapore FTA resulted in splitting the Singapore agreement into two instruments:

- **<u>The EU-Singapore Free Trade Agreement:</u>**
  - covers only matters that fall under EU exclusive competence,
  - will require the approval of the Council and the consent of the European Parliament.

- **<u>The EU-Singapore Investment Protection Agreement</u>:**
  - includes matters of shared competence between the EU and the Member States
  - will require the approval of the Council and the consent of the European Parliament.
  - will require ratification by the EU's Member States according to their respective internal procedures

16th May 2017 – implications of the CJEU opinion on EU-Singapore to other EU Trade Agreement

The implications of such restriction over the scope of the EU exclusive competence in the Common Commercial Policy are following:

- It will cause the excessive delays in the ratification process of the EU trade agreements and accruing their benefits, direct implications for concluded (CETA, EU-Vietnam) and negotiated agreements (suspended TTIP, EU-China Investment Treaty, EU-Mexico and EU-Mercosour Agreements) with incentives to remain within the remit of core-trade issues,
- The additional level of complexities in ratification of the potential EU "Brexit" Agreement,
- Counter-constructive approach towards removal of the EU-wide Investment Agreements (BITs signed by the EU Members).

21 September 2017 – CETA provisionally enters into force

- Over 90% of the provisions will begin taking its effect from September 2017,cutting of 98% on custom duties on trade in goods.

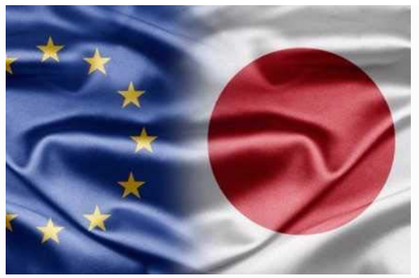
The particularly sensitive sectors will be subjected to longer phase-outs.

- Lead to significant improvements in public procurement market access.
- Liberalization of trade in services and significant opportunities for the EU manufacturing industry.

A request by Belgium is pending before the CJEU asking for clarification on the legality of the new Investor Court System in CETA (Opinion 1/17).

Achmea ruling (C-284/16) is a clear indication that the CJEU in Opinion 1/17 is likely to find also the Investor Court System in CETA problematic for the autonomy of EU law. This means that as Singapore agreement, the new trade agreements will have to be split into the traditional FTAs and investment protocols.

6th July 2017 – EU-Japan Economic Partnership Agreement



The EU-Japan trade deal will cover almost 30% of the world's economic production.

In terms of actual benefits the agreement will:

- Remove the total value of tariffs imposed on European imports by Japan amounting annually to EUR 1.1 billion (particularly 85% of EU exports of beef, pork and wine will be eliminated).
- Secure more harmonized, transparent and less burdensome procedures related to technical product requirements affecting EU automotive, chemical and food processing sectors.
- Ensure protection of geographical indications (over 200 EU products).
- Provide for services liberalization with specific transition periods per sector.

Overview of the time frame and issues related to implementation of the new EU trade agreements

18th April 2018 –European Commission proposes signature and conclusion of Economic Partnership Agreement with **Japan** and trade and investment agreements with **Singapore** for the approval of the Council and the European Parliament.

Both agreements can be expected to provisionally enter into force by the end of 2018, together with Vietnam Trade Agreement concluded at the end of 2017.

Delayed entry into force of the investment chapters and issue of the multilateral investment Court

Due to the shared scope of the competence, the investment chapters in all of these agreements and the CETA are subject to ratification by the Parliaments in the EU.

CETA ambitiously envisaged creation of the bilateral investment court, as the first step towards creation of the multilateral investment court. Due to Wallonia's veto over investment chapters in CETA, Belgium referred the matter to the CJEU (Opinion 1/17). Feasibly some of the countries will withhold their ratification till the Opinion is rendered, which will not be before the end of 2019. The Court will decide about the compatibility of creation of such court with the autonomy of the EU law, which is unlikely to be positive .

Overview of the Proof of Origin across different EU Trade Agreements – Procedural Obligation

There are different types of proof of origin depending on the specific set of rules of origin. In general terms, you may prove the originating status of the goods by:

a. **Invoices declarations made out by the exporter in the EU.**
    - **For registered exporters**
        - Article 18 of CETA ROO Protocol, Annex 2 for declaration's template,
        - Article 15 of EU-South Korea, Annex 3 for declaration's template,
        - Articles 16-17 of EU-Singapore Free Trade Agreement, Annex E for declaration's template,
        - Article 3-17 of EU-Japan Economic Partnership, Annex 3-D for declaration's template.
    - **For non-registered exporters**, this may be the case for consignments up to 6000 Euros. In some cases invoices declarations or origin declarations may also be made out by the exporter in the EU country for consignments beyond 6000 Euros, but the exporter will need to be an approved exporter. Exceptions in EU FTAS extend over low value shipments, travelers items.

b. **Certificate issued by the EU customs administration**
    - The exporter needs to address the customs administration or public authority of the EU, applying for one of these certificates: FORM A (for GSP regime), EUR MED (for some concrete cases in the PanEuromed system) or EUR 1 (all the rest of the cases).

Overview of the Proof of Origin across different EU Trade Agreements – Substantive Obligation

Under preferential rules of origin products originating in contracting parties have to meet certain requirements concerning their content:

EU Trade Agreement	Shoes - CN Code/s and product description under EU FTAs	Applicable duty rate	Working or processing, carried out on non-originating materials, which confers originating status
CETA	Duty free exports/imports	As of provisional from 21st September 2017	Protocol on ROO, Product specific rule for sufficient production pursuant to Article 5 64.01-64.05 A change from any other heading, except from assemblies of uppers affixed to inner soles or to other sole components of heading 64.06 (shoe components).
EU – South Korea FTA	Korean schedules: 6403911000 Dress shoes 6403912000 Mountaineering footwear 6403913000 Lace-boots	No duty as of the provisional entry into force (2011)	Protocol on ROO, Annex II List of working or processing required to be carried out on non-originating materials in order that the product manufactured can obtain origin status Manufacture in which the value of all the materials used does not exceed 50 % of the ex-works price of the product,
EU-Japan Economic Partnership (not yet in force)	Japanese schedules, different rates to variety of products including: 640391.011 Footwear for gymnastics, athletics or similar activities	Basic rate: 27% ad valorem, 1st year: 24,5% (,,,) 11th year: duty free	Annex 3-B Product specific rules • all non-originating materials used in the production of the product must undergo a change in tariff classification at the 4-digit level (i.e. a change in Chapter) of the HS- except from headings 64.01 to 64.05 and from assemblies of uppers affixed to inner soles of subheading 6406.90 and : o maximum value of **non-originating materials of** 50 % (EXW); or o Regional value content 55 % (FOB).
EU – Singapore (not yet in force, FTA part pending approval in the Council)	EU schedules: different rates to variety of products including: 6403 91 11 Women shoes of less than 24 cm,	Basic duty rate : 8%	Protocol on ROO, Appendix 2 to Annex I, Working or processing, carried out on non-originating materials, which confers originating status Manufacture from materials of any heading, except from assemblies of uppers affixed to inner soles or to other sole components of heading 6406 (shoe components)

26th April 2018 - The European Union and Mexico 'in principle' agreed on the new association agreement.

- Practically all trade in goods between the EU and Mexico will now be duty-free,

including in the agricultural sector.

- Simpler customs procedures will further benefit the EU's industry, including in sectors like pharmaceuticals, machinery and transport equipment.
- EU firms will be able to more easily sell financial and other services in Mexico.
- EU companies will be able to compete for public contracts in Mexico.
- Among other things, the EU and Mexico have committed to effectively implementing their obligations under the Paris Agreement on climate change. It will also be the first EU trade agreement to tackle corruption in the private and public sector.
- EU can also suspend the agreement, if there is a serious breach of human rights in Mexico.

The previous EU-Mexico trade agreement came into force in 2000.

EU agreements under negotiations

EU-Vietnam Agreement is expected to be signed and enter into force by the end of 2018.

- EU-China Investment Treaty,
- EU-Mercosour Agreement,
- EU-Indonesia Agreement,
- EU and India expressed the commitment to strengthen economic partnership,
- EU-Chile association agreement,
- EU-UK Brexit agreement,

22nd May 2018 – The Council approved the negotiating directives proposed by the Commission to conclude the agreements with Australia and New Zealand.

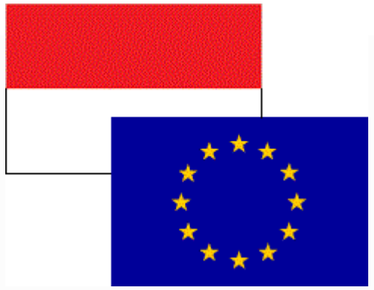
EU – MERCOSOUR Association Agreement

The XXXIIth negotiation round of the Trade Part of the EU-Mercosur Association Agreement took place from 21 February to 2 March 2018 in Asuncion, Paraguay.

Negotiations covered the following areas: (1) Trade in Goods; (2) Wines and Spirits; (3) Rules of Origin; (4) Technical Barriers to Trade; (5) Sanitary and Phytosanitary Measures; (6) Services and Establishment; (7) Government Procurement; (8) Intellectual Property (including Geographical Indications); (9) Trade Defence Instruments (10) SMEs; (11) Subsidies; (12) State-Owned Enterprises; and (13) Institutional Affairs.

The Parties continued working on market access with a view to address their respective export interests. The EU clarified its requests on key sectors such as automotive and dairy. Mercosur signalled strong sensitivities on these sectors.

EU – Indonesia Trade Agreement



EU negotiators were in Surakarta from 19 to 23 February 2018 for the 4th round of trade and investment negotiations with Indonesia.

Over the course of the round the negotiating teams covered the full range of issues in the free trade agreement, including trade in goods, technical barriers to trade, services, investments, the investment court system, rules of origin, trade and sustainable development, intellectual property rights and government procurement.

There was no exchange tariff offers during the round. The process of preparing respective market access offers on goods and services is continuing with a view to exchanging these in the near future.

During this round, the teams made progress on the chapters on food and plant health, technical barriers to trade, investment and services.

EU – UK Brexit Agreement

19th March 2017 – Commission proposes the draft agreement on withdrawal of the UK from the European Union and the European Atomic Energy Community.

The key aspects of the agreement are:

- The transitional period will last from Brexit day on 29 March 2019 to 31 December 2020.
- EU citizens arriving in the UK between these two dates will enjoy the same rights and guarantees as those who arrive before Brexit. The same will apply to UK expats on the continent.
- The UK will be able to negotiate and sign ,own trade deals during the transition period, but not implement them.
- The UK will still be party to existing EU trade deals with other countries.
- The UK's share of fishing catch will be guaranteed during transition but UK will effectively remain part of the Common Fisheries Policy, yet without a direct say in its rules, until the end of 2020.
- Northern Ireland will effectively stay in parts of the single market and the customs union

in the absence of other solutions to avoid a hard border with the Republic of Ireland.

29th March 2019 – Brexit, potential start of the transitional arrangement

EU – China Investment Agreement and EU internal legislation on investment

Negotiations for the Investment Agreement began in 2013. The negotiations aim to:

- improve investment for European and Chinese investors by creating investment rights and guaranteeing non-discrimination,
- improving transparency, licensing and authorisation procedures,
- providing a high and balanced level of protection for investors and investments,
- rules on environmental and labour-related aspects of foreign investment,

In 2016, China and the EU established a joint negotiating text. 17th round of negotiations took place in Beijing in May 2018.

Proposal for EU FDI Screening Regulation

The EU has no single foreign direct investment (FDI) screening mechanism comparable to well-established schemes in Australia, Canada, Japan, and the USA. Currently, less than half of EU Member States have legislation in place that allows them to review FDI on grounds of security or public order in line with their commitments under international and EU law. On 13 September 2017 the European Commission published a proposal (COM(2017)487) for a regulation establishing a legal framework for the screening of FDI inflows into the EU. The Commission proposes among others:

•basic requirements for Member States' FDI screening procedures: the possibility of judicial redress for decisions adopted under FDI screening mechanisms, non-discrimination between different third countries, transparency as well as time-limits to be respected;

•a non-exhaustive list of factors that may be taken into consideration in the screening process;

•a new Commission competence to screen FDI and issue a non-binding opinion if:

i) FDI in a Member State **may affect** the security or public order of projects or programmes "**of Union interest" in the areas of research, space, transport, energy and telecommunications**;; the respective Member State would be required to "take utmost account of the Commission's opinion and provide an explanation to the Commission in case its opinion is not followed";

ii) FDI in a Member State **may affect the security or public order of another/other Member State/s**; the latter may submit its/their respective comments and the Commission subsequently may issue a non-binding opinion; in these cases the respective Member State would be obliged to "give due consideration" to the Commission's opinion and the comments of other Member State/s.

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