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Making Sense of the CETA

An Analysis of the Final Text of the Canada-European Union Comprehensive Economic and Trade Agreement

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Regulation

Domestic Regulation

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Key Points

Unless otherwise noted, all Articles, Annexes and Appendices referenced in this section refer to ***Chapter 14*** *of the August 2014 final version of the CETA text first leaked by German broadcaster ARD and now available at: http://eu-secretdeals.info/ceta.*

- The CETA will take the Parties to the agreement into uncharted waters with the threats it poses to their right to regulate. The CETA imposes novel obligations on governments that go far beyond the traditional trade agreement requirement not to discriminate between foreign and local corporations.
- Imposing limits on non-discriminatory regulations has proven to be very controversial in the context of the WTO negotiations on services. Yet the CETA's Domestic Regulation chapter (Chapter 14) applies domestic regulation restrictions not only to services but as well to "the pursuit of any other economic activity" (Article 1.1[b]).

- With its broadly worded restrictions on non-discriminatory regulations, the CETA reaches into areas that are not trade-related to dictate to governments specific criteria their regulations must meet.
- The CETA imposes requirements on governments to provide corporations with licensing procedures that are "as simple as possible" and do not "unduly complicate or delay" their activities (Article 2.7). The public interest in thorough assessments will be sacrificed to the benefit of corporations in construction, mining, oil and gas, and other sectors where applications often invoke public opposition.
- The CETA Parties have not taken reservations or exclusions to ensure regulations in many highly sensitive areas are safe from challenge. With the rare exception, no reservations have been scheduled to protect local government regulatory authority.[28]
- The wide variations among EU member states and Canadian provinces in the reservations they have listed suggest the difficulty governments have had coping with the agreement's "top-down" structure.
- With the CETA's top-down structure, governments have to accurately predict how, despite the CETA's complexity and novel provisions, every single one of their existing regulations might be vulnerable to challenge, and ensure they precisely word reservations to avoid such challenges. If they were concerned about protecting the policy space of future governments, they would have had to somehow foresee where new regulations may be needed and ensure these were included in the list of sectors where Chapter 14 does not apply.
- Government claims that the right to regulate has been protected in the CETA are unjustified given the weakness of regulatory protections and exclusions in the agreement and past panel rulings on the limits to the right to regulate under trade agreements.

Analysis of Key Provisions

Definitions and scope

- The CETA's Domestic Regulation chapter (Chapter 14) draws on language in the WTO General Agreement on Trade in Services (GATS), defining its scope very broadly not only as covering licensing requirements and procedures and qualification requirements and proced-

ures but also as all measures "relating to" these regulations and procedures (Article 1.1).[29]

- The CETA departs in a highly significant way from the GATS, applying domestic regulation restrictions not only to services but as well to "the pursuit of any other economic activity" (Article 1.1[b]). Mining, oil and gas, forestry, and fishing are just some of the "other economic activities" captured by this broad scope.

- Unlike the GATS where the draft restrictions on domestic regulation might only apply where governments have committed particular services in a "bottom-up" way, the CETA's Chapter 14 applies to the regulation of all activities unless specific reservations and exclusions have been made (Articles 1.2[a] and 1.2[b]).

- The obligations in Chapter 14 apply to all existing licensing and qualification requirements and procedures unless specific reservations to exclude them have been set out in Annex I. For example, licensing requirements and procedures for the sale of firearms will have to conform to the CETA's regulatory restrictions as no CETA Party has excluded these regulations from their Chapter 14 obligations.[30]

- The CETA Parties have strictly limited their policy space for the adoption of new regulations, as Annex II reservations for the adoption of new measures only apply to a narrow subset of these reservations.[31] For example, Canada has not exempted the education sector, so Chapter 14 will full apply when provinces license private education institutions. Canada's broad Annex II reservation for oil and gas pipelines does not apply to Chapter 14.

- Every level of government — central, regional and local — is covered as well as any "nongovernmental body in the exercise of powers delegated by central or regional or local governments or authorities that grants an authorization" (Article 1.3).

- The reservations governments have scheduled differ widely, with some governments not taking any reservations to protect their regulatory capacity in critical sectors. For example, Poland has listed a reservation for licensing in the energy sector including for LNG installations and electricity distribution but the U.K. has only taken a reservation in the energy sector for licensing oil and gas exploration on its continental shelf. British Columbia and Alberta have taken

broad reservations to be able to maintain their rights "to adopt or maintain *any measure* relating to" the oil and gas sector. However, because the provinces did this under Annex II rather than Annex I, in contrast with Newfoundland, Nova Scotia and PEI, Chapter 14 fully applies to their oil and gas sector. , France, Romania, Ireland, the Czech Republic and Denmark have all banned or placed moratoria on licensing fracking operations but they have not scheduled an Annex I reservation for fracking as Bulgaria has.

Restrictions on regulations

- Parties to the agreement have to ensure that the licensing and qualification requirements and procedures are based on particular criteria to preclude regulators from acting in "an arbitrary manner" (Article 2.1). Specifically, covered regulations will have to be: "a) clear and transparent; b) objective; c) established in advance and made publicly accessible" (Article 2.2).
- Parties have to ensure "that licensing and qualification procedures are *as simple as possible* and do not *unduly complicate or delay* the supply of a service or the pursuit of any other economic activity" (emphasis added) (Article 2.7). Making licensing procedures "as simple as possible" sets an absolute value on the ease with which corporations can get their projects approved to the detriment of all other considerations.
- None of these criteria have been defined so that the CETA provisions themselves are not "clear and transparent" and leave too much discretion to dispute panels to determine what negotiators meant. For example, an analysis of the word "objective" has turned up various meanings for how it is used in the WTO context alone.[32]
- If a dispute panel interpreted "objective" to mean "not subjective," regulations could be overturned if they are based on the regulator's necessarily subjective balancing of different factors such as public input, the scenic impacts of a development and environmental considerations.
- Development and building permits would appear to fall under a broad definition in Chapter 14 of licensing and general community plans could be captured under "measures relating to" these permits.

Yet the CETA Parties have listed no reservations under construction and only two under distribution services to protect local government planning authority. Unlike the CETA's investment chapter, the domestic regulation chapter has no exemption for zoning.

- At the local government level, consideration is often given to public opinion — arguably a subjective consideration — in planning decisions. The City of London, for example, makes public consultation an integral part of its planning approval process. If "objective" is interpreted as meaning "not biased," London's promotion of socio-economic equality through its planning policies could be ruled not objective because it biases these policies in favour of disadvantaged groups. London also requires that a major development proposal has to be assessed by a committee if the public registers as few as four objections against it — a requirement that a dispute panel could rule is "arbitrary," because four objections is an "arbitrary" threshold, not "as simple as possible," unduly complicated, and/or causing undue delays.[33]

- The CETA obligation that regulations must be "established in advance" begs the question, in advance of what? Alternative interpretations include: before any investment is made, before an application is submitted, or before an application is approved. In examining similar wording, the chair of the WTO services negotiations stated it could mean regulations cannot be changed and commented that this would impose a significant limitation on the right of member countries to modify their regulations.[34]

- Since the CETA Parties have chosen to have restrictions on regulations apply not only to services but as well to the pursuit of undefined "economic activities," the CETA could undermine the ability of governments to re-regulate in areas like oil and gas development, mining, and forestry where they have experienced negative consequences from deregulation.

- For example, giving mining companies CETA-enforced rights to have licensing permits "pre-established" could have prevented the British Columbia provincial government from re-regulating to address one of the world's worst mining spills. In response to this recent spill, the B.C. government has imposed new reporting requirements, independ-

ent inspections and delayed the approval process for a new mine,[35] which are all requirements that were not "established in advance."

- Dispute panels could determine that public input, environmental assessments and archaeological studies do not constitute a process that is "as simple as possible." They could also rule that these requirements "unduly complicate or delay" economic activity. In Canada, the LNG industry has requested that the government eliminate requirements for environmental assessments for gas terminals on the basis that the time required posed a "barrier to industry."[36]
- Requirements for authorizations from multiple agencies or levels of government could be challenged as not making the licensing process "as simple as possible" and unduly complicating or delaying approvals. For example, requiring local government permits for the construction of oil and gas pipelines could be challenged under these Chapter 14 criteria.

The right to regulate

- The CETA preamble states that the Parties to the agreement recognize "the provisions of this Agreement preserve the right to regulate within their territories." However, dispute panels have interpreted similar statements in a very restricted way, suggesting the right to regulate only extends so far as Parties to an agreement have not undertaken obligations that limit that right.[37]
- The CETA Chapter 32 exceptions do not apply in the latest draft to its domestic regulation chapter, with the result that if regulations are challenged using provisions of the chapter governments cannot defend them as "necessary" to protect such concerns as human health or the environment. Even if the exceptions are applied, the necessity of a measure can be a very difficult standard to meet.[38]

Regulatory Co-operation

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Key Points

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- The chapter on regulatory co-operation has to be seen in the context of other trade agreements and the EU Commission's position on regulatory co-operation in TTIP.[39] The question is whether the CETA text could be used to apply a far-reaching model of regulatory co-operation that would allow business lobby groups to exert undue influence in the regulatory process. Due to the vagueness of the provisions in this chapter, this seems to be the case.
- The planned objectives and activities in the chapter will affect the integrity of regulation and in practice will prioritize trade interests above other legitimate interests. Since this regulatory co-operation process will be set up to function permanently after the CETA is ratified, it will affect the regulatory and legislative process and undermine democracy and public oversight in the Parties indefinitely.
- One of the chapter's key principles is that regulatory co-operation should prevent and eliminate unnecessary barriers to trade, enhance competitiveness and enhance innovation. Often these barriers are rules and regulations that protect consumers and the environment.
- The CETA will create a Regulatory Co-operation Forum but this new body is only vaguely described, lacks accountability and remains open to the direct influence of business lobbyists.
- A trade and investment agreement should not deal with rule-making, which is ultimately a constitutional issue.

Analysis of Key Provisions

- The regulatory co-operation chapter may create obstacles and delays when it comes to introducing new regulations. Article X.2.4 states that the "Parties may undertake regulatory co-operation activities, on a voluntary basis." However, "if a Party refuses to initiate regulatory co-operation or withdraws from such co-operation, it should be prepared to explain the reasons for its decision to the other Party." Therefore, the Parties must provide an explicit justification if they decide not to accept a regulation as equal.

- Article X.4.4 states that the Parties will endeavor to share "proposed technical or sanitary and phytosanitary regulations that may have an impact on trade with the other Party at as early a stage as possible so that comments and proposals for amendments may be taken into account." This means that information on future legislation could be shared with the other Party even before it has been shared with their Parliaments. If that were the case, the other Party could make amendments and comments before the country's own parliament got their hands on the draft legislation.

- Chapter 26 includes a possible attack on the precautionary principle, by requiring the Parties to "establish, when appropriate, a common scientific basis" (Article X.4.14[d]). An attack on the precautionary principle could weaken EU environmental protection laws and could hinder the EU's introduction of new rules and regulations to protect the environment in the future.[40]

- Article X.6 creates a new body — the so-called Regulatory Co-operation Forum (RCF). Its role is only vaguely described and lacks accountability, which gives a lot of power to the European Commission to shape the role of the RCF. The RCF may be open to the direct influence of business lobby groups. An entry point is Article X.6.3, which states, "The Parties may together invite other interested parties to participate in the meetings of the RCF."

- Article X.8 on "Consultations with Private Entities" points in the same direction. This provision allows the European Commission to set up close consultations with business lobby groups. There is no guarantee or requirement that the input of other "interested persons," whose voices might not otherwise be heard, be included. The pub-

lic, regulators and parliamentarians might not be aware of these consultations until a legislative proposal is presented.

- The fact that the European Union's contact point for Chapter 26 is the Directorate-General for Enterprise and Industry further suggests that these provisions are open to business influence (see Article X.9).
- Related to the chapter on regulatory co-operation is the chapter on Conformity Assessment (Chapter 27). These provisions require the two Parties (Canada and the EU) to appoint outside bodies to conduct assessments on product standards, whether they are equivalent or not. The assessments of these outside bodies have to be accepted. That could put important decisions on regulation and standards in the hands of private bodies. (For a full list of covered products see Chapter 27, Annex I.)

Cultural Exceptions

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Key Points[41]

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- Canada's cultural exception strategy in the Comprehensive Economic and Trade Agreement (CETA) is threefold:
    1. Expressing cultural considerations in the CETA preamble;
    2. Including an exception for "cultural industries," which is limited to selected CETA chapters; and
    3. Making reservations on specific cultural sectors, regulations and laws, and institutions in the annexes to the CETA.
- The CETA's innovative preamble recognizes cultural diversity protection and promotion as legitimate policy objectives, explicitly refers to the UNESCO *Convention on the protection and promotion of the di-*

versity of cultural expressions, and recognizes the right of states to implement cultural policies and to support national cultural industries.

- The CETA includes an asymmetric cultural exception. For Canada, the exception applies to cultural industries. For the European Union, the exception applies only to audiovisual services.
- The CETA's cultural exception is partial as it is only applicable for certain CETA chapters.
- With respect to province-specific offers, Québec took extra care to mitigate the CETA's negative impact on its cultural policy.
- In conclusion, the best intentions of the negotiating Parties pertaining to the protection and promotion of cultural diversity are there, at least enunciated in the CETA preamble, but the absence of a general exception clause protecting culture is a missed opportunity for both Canada and the EU.

Context

- Rules on international trade and foreign investment may in some cases conflict with legitimate and necessary state policies and regulations aiming at protecting and promoting national cultural identities and cultures.
- WTO and investment tribunal jurisprudence shows that principles of free trade undermine national cultural policies. Liberalization of trade in goods puts at risk subsidy policies on cultural goods, and tariffs and quotas on foreign cultural goods. Similarly, free trade in services rules negatively impact on national policies on audiovisual productions. Bilateral and regional investment liberalization agreements allow foreign investors and large multinational corporations to challenge national regulations on historical and cultural buildings and sites.
- Reconciling rules on free trade and cultural policies has been a rising global concern for the past decades, especially since the creation of the WTO. Former WTO Director General Renato Ruggiero declared in 1997 that, "Managing a world of converging economies, peoples and civilizations, each one preserving its own identity and culture, rep-

resents the great challenge and the great promise of our age. We are only on the threshold of this new era and the future is still unclear."

- It is in this context of growing concerns about the impact of free trade on national identities and cultures that the UNESCO General Conference adopted the *Convention on the protection and promotion of the diversity of cultural expressions* in 2005. Recognizing the "sovereign right" of states "to formulate and implement cultural policies and to adopt measures to protect and promote the diversity of cultural expressions," the UNESCO Convention is the leading international legally binding instrument, which introduced the idea of "cultural exception" in positive international law. Some hope that, since then, culture should no longer be considered as a commercial product, as any other tradable good or services, in international trade law.
- During the bilateral negotiations on the CETA, Québec and France pushed hard to respect and explicitly include a "cultural exception" in the trade deal. Although Canadian and European political leaders and negotiators agreed on the principle, leaked documentation showed that the negotiating parties disagreed on the scope of the cultural exemption and on how to fulfill Canada and EU member state obligations under the UNESCO Convention. This is reflected in the final text.

Analysis of Key Provisions

Cultural considerations in the CETA preamble

- The CETA preamble includes an explicit recognition of the legitimacy of national cultural policies and references the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions*.
- The preamble of a trade agreement may contribute to mitigating the negative impact of liberalization measures it contains. As a treaty must be interpreted "in the light of its object and purpose," trade agreements that include cultural considerations should be interpreted as more "cultural friendly."
- Thus, in cases where free trade rules are in contradiction with cultural protection and promotion policies, panelists or arbitrators would

be more likely to conclude that there is no breach of Canada's international obligations on trade liberalization.

- WTO jurisprudence shows that panelists give some weight to preambles of multilateral commercial treaties. For instance, in the WTO case *United States–Shrimp*, the agreement establishing the WTO, which recognizes the objective of sustainable development and the protection and preservation of the environment, has been decisive in interpreting a provision of the GATT.
- The inclusion of cultural considerations in the CETA preamble is desirable, but as the sole "cultural exception" strategy it is insufficient to protect cultural diversity and to give life to the UNESCO Convention, as well as to ensure that the CETA would have no negative impact on cultural policies at the national and regional levels.
- The CETA preamble aims a the following:
    - Recognizing the promotion and the protection of cultural diversity as a legitimate policy objective;
    - Reaffirming all CETA state Parties' obligations under the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions; and*
    - Recognizing that states have a right that is twofold: (1) the right to preserve, develop and implement cultural policies, and; (2) right to support cultural industries for the purpose of strengthening the diversity of cultural expressions, and preserving their cultural identity, including through the use of regulatory measures and financial support.
- The explicit mention of the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions* is a unique and welcome innovation that should contribute to giving life to the convention and to fulfilling Canada's obligations toward cultural protection and promotion.

"Asymmetric" and "partial" cultural exception

- In the context of the CETA negotiations, it has become clear that Canada and the EU had different interpretations on the scope of the cultural exception. According to Europeans, the cultural exception

should be strictly limited to "audiovisual services." In contrast, Canada suggested a larger scope for the cultural exception to include all cultural industries, which covers "books, magazines, periodicals or newspapers," "film or video recordings," "audio or video music recordings," "music in print or machine-readable form," and "radio-communications" for the general public.

- The coexistence of two concepts of the cultural exception based on different interpretations of international obligations of the CETA Parties under the UNESCO Convention has led to the creation of an asymmetric cultural exception under the transatlantic trade agreement. In fact, Parties to the CETA agreed on including an exception applicable to "cultural industries" for Canada and to "audiovisuals" for the EU.
- The asymmetric cultural exception is "partial" as it is only applicable in the following CETA chapters:
  - Cross-border Trade in Services;
  - Domestic Regulation;
  - Government Procurement;
  - Investment; and
  - Subsidies.
- The "cultural exception" is not "general" and remains inapplicable to key CETA chapters, including National Treatment and Market Access for Goods (Chapter 3).
- In addition, it is worth noting that Canada and the EU have agreed to "import" Article XX of the GATT on General Exceptions, and to make it applicable to all CETA chapters. However, Article XX of the GATT includes no "cultural exception" *per se* as the provisions limit its scope to the "protection of national treasures of artistic, historic or archaeological value."
- The asymmetric cultural exception in the CETA may negatively impact on the UNESCO Convention's effectiveness and disregard its objective and purpose of protecting the cultural heritage *of and for* the whole of humanity. Moreover, Canada's and the EU's joint decision of a "partial cultural exception," limited to selected chapters as opposed to a general Article XX-type cultural exception, may not be the most effective strategy for protecting and promoting cultural diversity.

Canada's reservations

- In separate annexes to the CETA core agreement text, Canada has submitted the federal government's reservations, some of which seek to protect Canadian cultural policy against liberalization disciplines.
- Canada's key "cultural reservations" concern particularly the investment chapter. For instance, in some cultural industries Canada may refuse a foreign investment if the investment is determined to be incompatible with national "cultural policies, taking into consideration industrial, economic and cultural policy objectives."
- Also, foreign investment in cultural businesses is subject to specific rules under the CETA. Canada federal Annex 1 states, "the specific acquisition or establishment of a new business in designated types of business activities relating to Canada's cultural heritage or national identity may be subject to review...in the public interest."
- As Canadian provinces have participated in the trade deal negotiations, they were invited to submit their own "offers" to the EU, including reservations in areas of provincial jurisdiction. Few "cultural reservations" were made, but Québec's special attention to a "cultural exception" is worth noting. For example, the Québec government included a broad reservation on government procurement market access, making explicit that procurement liberalization disciplines would not apply for public contracts "by Québec entities of works of art from local artists or to procurement by any municipality, academic institution or school board of other provinces and territories with respect to cultural industries." Québec's reservations also provide that the Government Procurement chapter would not apply to "any measure adopted or maintained by Québec with respect to cultural industries."
- In conclusion, and although Canada's exception on "cultural industries" is much broader than the EU's focus on audiovisuals, Canada should have abandoned its traditional concept of cultural exception. In order to fully give life to the UNESCO *Convention on the protection and promotion of the diversity of cultural expressions*, and also to other international legal instruments on the protection of cultural heritage to which Canada is a party, the CETA cultural exception should have been enlarged to cover all types of cultural activ-

ities and heritage, including intangible, underwater, immovable and movable, and natural heritage.

- Although the inclusion of cultural considerations in the CETA preamble is a step in the right direction, it remains insufficient if this strategy is not strengthened by adding a general broad exception on all types of cultural heritage applicable to all of the CETA chapters.