

Conference on the Canada – EU Comprehensive Economic and
Trade Agreement

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Salient Legal Issues in the Substantive Standards of Protection in CETA

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Possible sub titles:

- Its OK Nikos, don't worry
- Oui ca change, mais c'est pareil
- Well, actually it hasn't really changed much afterall
- A Private Canadian perspective
 - Recognize EU suddenly dragged into a new age of drafting
 - Yes different from old EU treaties
 - But more than enough protection still out there

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- Its OK Nikos and Hamid, don't worry, there is plenty there
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Agenda

- FET
- MFN
- Domestic regulation
- Environment chapter
- Concluding thoughts

- **Article X.9: Treatment of Investors and of Covered Investments**
- Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 6.
- A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:
 - Denial of justice in criminal, civil or administrative proceedings;
 - Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
 - Manifest arbitrariness;
 - Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
 - Abusive treatment of investors, such as coercion, duress and harassment; or
 - A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

- **Article X.9: Treatment of Investors and of Covered Investments**
- When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

FET: Arbitrations and discretion

- “The motive behind the insistence that FET is identical with the minimum standard under customary international law is evidently to minimize its practical impact. But the effect of this insistence may well be the opposite of what is intended by those who advocate it. Dolczer has pointed out that the more likely consequence will be to accelerate the development of customary law through the practice on FET clauses in treaties.”
- Christoph Schreuer, “Fair and Equitable Treatment”, pp. 125 et seq, at p. 131, in Hoffmann, Anne K, ed., *The Protection of Foreign Investments Through Modern Treaty Arbitration*, Swiss Arbitration Association, ASA Special Series No. 34, 2010.

- **Article X.7: Most-Favoured-Nation Treatment**
- 4. For greater certainty, the “treatment” referred to in Paragraph 1 and 2 **does not include investor-to-state dispute settlement procedures** provided for in other international investment treaties and other trade agreements. // **Substantive obligations** in other international investment treaties and other trade agreements **do not in themselves constitute “treatment”, and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations.**
- **Measure, general def’n:** measure includes a law, regulation, procedure, requirement or practice
- **Measure, Investment chapter:** measure includes a law, regulation, rule, procedure, decision, administrative action, requirement, practice or any other form of measure by a Party.
- (This was adjusted in the final text so that the general definition adopts that of the Investment chapter)

MFN

- **Canada, North American Free Trade Implementation Act, 1993**
- **PURPOSE**
- 4. The purpose of this Act is to implement the Agreement, the objectives of which, as elaborated more specifically through its principles and rules, including national treatment, most-favoured-nation treatment and transparency, are to
- **IMPLEMENTATION OF AGREEMENT GENERALLY**
- **S. 10: Approval of Agreement**
- 10. The Agreement is hereby approved.
- **IS THAT A MEASURE? HOW IS IT NOT A MEASURE?**

Domestic regulation

- **CHAPTER XX DOMESTIC REGULATION**
- **ARTICLE X.1: SCOPE AND DEFINITIONS**
- 1. This Chapter applies to measures adopted or maintained by a Party relating to licensing requirements and procedures and qualification requirements and procedures that affect:
- ...
- b) the supply of a service or pursuit of any other economic activity, through commercial presence in the territory of another Party, including the establishment of such commercial presence; and, ...

Domestic regulation

- **CHAPTER XX DOMESTIC REGULATION**
- "Authorisation means the granting of permission to a person to supply a service or to pursue any other economic activity. DR Published on 26 September 2014
- "Licensing requirements" are substantive requirements, other than qualification requirements, that must be complied with in order to obtain, amend or renew an authorisation;
- "Licensing procedures" are administrative or procedural rules, including for the amendment or renewal of a licence, that must be adhered to in order to demonstrate compliance with licensing requirements;
- "Qualification requirements" are substantive requirements relating to competency, that must be complied with in order to obtain, amend or renew an authorisation;
- "Competent authority" is any central, regional or local government and authority, or non-governmental body in the exercise of powers delegated by central or regional or local governments or authorities that grants an authorisation.

Domestic regulation

- **CHAPTER XX DOMESTIC REGULATION**
- 7. Each Party shall 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.

Environment Chapter

- General exceptions, Taxation:
- 5. For greater certainty, the fact that a taxation measure constitutes a significant amendment to an existing taxation measure, takes immediate effect as of its announcement, clarifies the intended application of an existing taxation measure, or has an unexpected impact on an investor or covered investment, does not, in and of itself, constitute a violation of Article X.9 (Treatment of Investors and of Covered Investments).

Environment Chapter

- **Article X.4: Right to regulate and levels of protection**
- Recognizing the right of each Party to set its own environmental priorities, to establish its own domestic levels of environmental protection, and to adopt or modify its relevant laws and policies accordingly **in a manner consistent with the multilateral environmental agreements to which they are a party and with this Agreement**, each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve those laws and policies and their underlying levels of protection.

Conclusion

- And if all else fails...
- Arbitrators have full scope to continue to take narrow or expansive views of the law as they choose
- Have an almost absolute right to be wrong in law
- No reason to think that the unpredictability will end any time soon
- And unpredictability in this game favors the investors (investors win awards, governments never win, only don't lose)