Limiting how and what government regulates

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The CETA chapter on domestic regulation (Chapter 12) is not, as sometimes claimed, about establishing a level playing field for foreign and domestic firms. Rather, it prescribes and limits how Canadian and EU governments may regulate the private sector even when there is no discrimination that directly or indirectly favours local companies. In relation to the international GATS (General Agreement on Trade in Services) negotiations, questions have been raised about whether it is legitimate for trade panels to be given the right to rule on societal choices over non-discriminatory regulation.[1]

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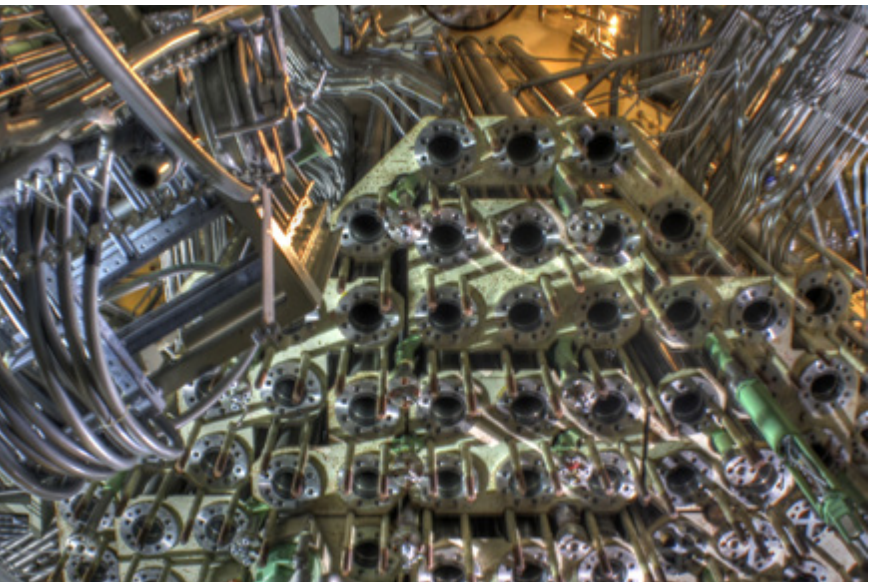
Should the process for approving a nuclear reactor, a food processing plant, or a bank be, first and foremost, *'as simple as possible'*, as CETA's domestic regulation chapter requires? Or should the public interest qualify how simple the process should be, and determine what other criteria may be more important in setting rules to protect the public?

Despite the significance of these questions, the requirement in Chapter 12 for maximum simplicity and its other limitations on non-discriminatory regulations have sparked relatively little debate. This is unfortunate because CETA negotiators have exponentially expanded the reach of such domestic regulation provisions far beyond what is being considered at other negotiating tables. Chapter 12 would govern not only the regulation of services but also *'of all other economic activities'*. It would provide multiple avenues to attack the regulatory authority of governments over and above the ones created through CETA's investment chapter and other sections of the agreement.

Furthermore, CETA negotiators have left key terms in Chapter 12 undefined—terms that are either untested or have been given very different legal interpretations in past trade disputes (e.g. at the World Trade Organisation). Consequently, CETA panels will have largely free rein to determine the extent of the chapter's deregulatory effects.

1 Mireille Cossy, *'Determining "likeness" under the GATS: Squaring the circle?'*, World Trade Organisation Economic Research and Statistics Division, Staff Working Paper ERSD-2006–08, September 2006, p. 44.



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KEY PROVISIONS

Article 12.2 – Scope

As specified in Article 12.2, the rules in Chapter 12 (described below) apply not only to licensing and qualification requirements and procedures, but any measure relating to these regulations.[2] Reading in Article 1.1's definition of *'measure'*, that means any *'law, regulation, rule, procedure, decision, administrative action, requirement, practice or any other form of measure by a Party'* can be challenged as a violation of the domestic regulation chapter. For example, Chapter 12 would apply not only to specific requirements attached to mineral exploration permits, but also to laws relating to these permits, such as Swedish legislation restricting exploration near residential neighbourhoods.[3]

The scope of the chapter is further expanded by the fact its constraints on domestic regulation are not limited to services; they also apply to measures regulating the *'pursuit of any other economic activity'* that involves the establishment of a commercial presence, which could include mining, fracking, food processing, and chemical and pharmaceutical manufacturing. In addition, Chapter 12 has an even broader scope than other parts of the agreement, with no exceptions for local government regulations such as zoning.

Chapter 12 does not apply to licensing requirements, licensing procedures, qualification requirements, or qualification procedures *'pursuant to an existing non-conforming measure'* set out by Canada and the EU in their schedules to Annex I. In other words, existing measures that are exempted from CETA's services and investment rules are also excluded from the domestic regulation chapter. A significant concern, however, is that only a narrow subset of the stronger Annex II reservations—which are meant to protect or carve out legislative or regulatory space for existing and future measures—are protected from Chapter 12.

For example, although many EU member states have taken Annex II reservations for the generation of nuclear energy (in an attempt to shield policy in this area from future trade disputes), in Chapter 12 only *'audiovisual services…health, education, and social services, gambling and betting services, and the collection, purification, and distribution of water'* are expressly protected. In other words, where European countries are still licensing nuclear reactors, measures related to nuclear

2 According to the definitions within Chapter 12, licensing procedures means *'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'*; licensing requirements means *'substantive requirements, other than qualification requirements, that must be complied with in order to obtain, amend or renew an authorisation'*; qualification procedures means *'administrative or procedural rules that must be adhered to in order to demonstrate compliance with qualification requirements'*; and qualification requirements means *'substantive requirements relating to competency that must be complied with in order to obtain, amend or renew an authorisation'*.

3 *'Guidance for Exploration in Sweden'*, SveMin 2012. Unlike a number of other EU countries, Sweden has not registered any Annex I reservations for *'Mining and Quarrying'*, so its regulations regarding this sector are fully covered by Chapter 12.

energy would be fully subject to Chapter 12 requirements, including that the licensing and qualifications requirements be *'as simple as possible'* and not involve *'undue'* delays.

Article 12.3 (7) – Domestic regulations must be 'as simple as possible'

Chapter 12 makes it a violation for the Canadian federal government, the EU, provincial governments, member states and all local governments, except where Annex I and II reservations apply (see above), to adopt or maintain licensing and qualification procedures that are not *'as simple as possible'* or that *'unduly complicate or delay the supply of a service, or the pursuit of any other economic activity'* (Article 12.3 [7]). Since CETA's financial services chapter fully incorporates Chapter 12, CETA panels will be empowered to decide whether licensing procedures for banks are as simple as possible. Even the reforms to strengthen supervision and risk management recommended by the Basel Committee on Banking Supervision could be considered *'unduly complicated'* and therefore a violation of Chapter 12 if they are adopted.

The requirement to keep procedures *'as simple as possible'* is not qualified by any other consideration. For example, Canada's capital city of Ottawa has a rule to keep the language of its zoning bylaw *'as simple as possible'*, but this is balanced with *'the legal requirement for clear and precise legislation'*.[4] Likewise, the European Parliament's 2014 amendments to the EU directive on environmental impact assessment required member states to *'simplify'* environmental assessment procedures, but not to make them *'as simple as possible'* as CETA demands.[5]

How might a CETA panel determine whether MEPs had made licensing procedures *'as simple as possible'*? It could look at what is possible in different European jurisdictions. Despite EU directives, some central and eastern European countries have granted approvals to projects in sensitive areas without a proper environmental assessment.[6] This obviously makes licensing procedures a lot simpler for companies and may satisfy the panel that stronger requirements in another jurisdiction—even if they abide by EU directives—violate CETA's domestic regulation chapter.

The EU itself has advocated a broad interpretation of the term *'as simple as possible'* as it applies to regulation. In a WTO challenge against Argentina over import licensing, the EU argued that a requirement to ensure procedures are *'as simple as possible'* meant applicants should not have to contact *'numerous government entities'*. It is possible, then, that CETA could eventually require or lead to single-desk licensing systems, regardless of the constitutional authority of different levels of government over the same project. The EU also argued in that case that a licensing procedure requiring the submission of information *'not related'* to a license could not be construed as being *'as simple as possible'*. This was an invitation to future trade panels, established under CETA or any other agreement, to determine what information can be required for a license.[7]

Article 12.3 (1) and (2) – Other criteria limiting domestic regulations

Under Chapter 12, regulatory criteria must be *'clear and transparent, objective, and established in advance and made publicly*

4 City of Ottawa Zoning By-law—General Rules of Interpretation (Sec. 10-28)

5 Directive 2014/52/EU of the European Parliament and of the Council amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, 16 April 2014.

6 *'Implementation of Environmental Impact Assessments in Central and Eastern Europe'*, Ceeweb for Biodiversity Report, 2013 (http://www.ceeweb.org/wp-content/uploads/2012/01/Implementation-of-Environmental-Impact-Assessments-in-Central-and-Eastern-Europe.pdf).

7 WTO, Argentina – Measures Affecting the Importation of Goods – Reports of the Panel, 22 August 2014, para. 6.506. The panel declined to rule on these EU arguments.

accessible' (Article 12.3 [2]), making it a CETA violation if any of these five separate obligations are not met. Panels established as part of a trade dispute under CETA would interpret the meaning of these obligations in light of the objective to preclude *'the competent authority from exercising its power of assessment in an arbitrary manner'* (Article 12.3 [1]). While this may sound benign, keep in mind that past trade and investment dispute panels have given the word *'arbitrary'* very different meanings, from involving *'some degree of impropriety'* to not being *'founded on reason or fact'* to depending *'on individual discretion'*.[8]

In practice, licensing procedures that provide a role for ministerial discretion or public opinion could conflict with CETA's requirement in Chapter 12 that these procedures be based on *'objective'* criteria.[9] For example, the *Canadian Environmental Assessment Act* empowers the government to require more from assessments than what is strictly prescribed in the act's regulations if, in the minister's opinion, an activity could cause either adverse environmental effects *'or public concerns related to those effects'*.[10]

Development approval processes also often incorporate public consultation to obtain the opinions of local residents. Germany's building code, for example, mandates public participation in the planning process, enables *'aggrieved citizens'* to be heard on development proposals, and requires taking *'due account of the interests of neighbours'* if there are to be deviations from an official plan. The code also allows authorities to make decisions based on *'public interest'*, which could be challenged as a non-objective criterion under CETA's domestic regulation chapter.[11]

CETA's requirement for criteria (i.e. underlying licensing and qualification requirements and procedures) to be *'established in advance'* creates the same problems that have been raised in relation to GATS reform proposals for similar provisions.[12] As the chair of the GATS domestic regulation negotiations warned, *'a strict interpretation to the word "pre-established" might suggest that it would impose a significant limitation on the right of Members to modify their regulations'*.[13] Two examples of regulatory reform help illuminate the danger of this language in CETA.

Rocked by repeated food scandals—including the 2008 death of 21 people due to listeria contamination,[14] and a 2011 E. coli contamination at one of Canada's largest beef processing plants[15]—the Canadian government introduced a food safety act that imposed new licensing requirements on the meat processing industry.[16] Likewise, a UK inquiry into the fraudulent sale of horse meat recommended that meat traders and brokers be subjected to new regulations.[17] But CETA negotiators have made such licensing changes vulnerable

8 Christoph H. Schreuer, *'Protection against Arbitrary or Discriminatory Measures'*, in Catherine A. Rogers and Roger P. Alford, The Future of Investment Arbitration (Oxford University Press, 2009) pp. 183–198.

9 Article 12.3(3) states that ministerial discretion is consistent with the *'established in advance'* and *'publicly accessible'* criteria, but leaves it open to challenges on the basis that this discretion is exercised in an arbitrary manner, is not objective, or any other conflict with CETA.

10 Canadian Environmental Assessment Act, 2012 (S.C. 2012, c. 19, s. 52) (http://laws-lois.justice.gc.ca/eng/acts/C-15.21/page-3.html#h-8).

11 German Law Archive, *'Planning and Construction Law: Federal Building Code'* (http://germanlawarchive.iuscomp.org/?p=649).

12 *'Pre-established Regulations & Financial Services'*, Max Levin, Harrison Institute of Public Law, 19 May 2010.

13 Working Party on Domestic Regulation, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Annotated Text, Informal Note by the Chairperson, Room Document (14 March 2010), para. 68.

14 Ontario Ministry of Health and Long Term Care, *'2008 Listerosis Outreak'* (http://www.health.gov.on.ca/en/public/publications/disease/listeria_2008.aspx).

15 Bill Curry, *'XL Foods recall was product of preventable errors, review finds'*, Globe and Mail, 5 June 2013.

16 Canada Food Inspection Agency, *'New Requirements for Industry'* (http://www.inspection.gc.ca/food/action-plan/initiatives/testing-and-labelling-safeguards/eng/1368749785056/1368749850595).

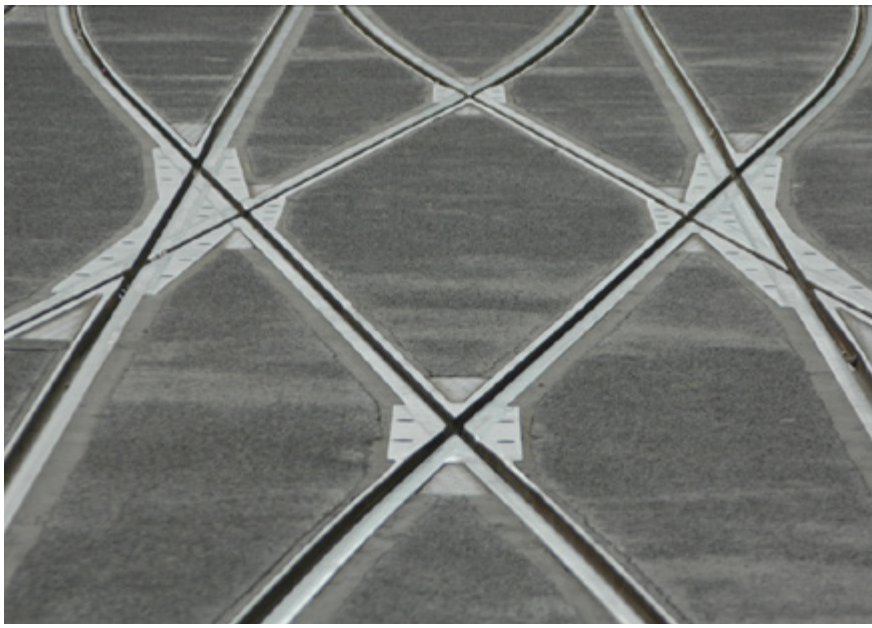
17 UK Government, *'Elliott Review into the Integrity and Assurance of Food Supply Network'*, Recommendations 30 and 31, December 2013.

to trade and investment disputes by not defining and setting constraints on what *'established in advance'* means (e.g. in advance of what?). Panels have been given leeway to impose strict interpretations that could limit the right to introduce new regulations.

Under Chapter 12, governments also have to ensure that licensing and qualification procedures and decisions are *'impartial with respect to all applicants'* (Article 12.3 [10]). Canada has taken reservations for aboriginal and minority affairs, i.e., it has reserved *'the right to adopt or maintain a measure conferring rights or privileges to a socially or economically disadvantaged minority'*. But the EU and its member states have not preserved their policy space to offer preferences for minority groups. European obligations under CETA may conflict with international and domestic law, such as the obligation to allocate exclusive fishing and hunting rights for the Sami people in Sweden.[18] CETA itself does not meet the impartiality standard, by making it easier for small and medium-sized businesses to use the provisions of the agreement.[19]

Chapter 12 further requires that qualification and licensing fees be *'reasonable'* and *'commensurate with the costs incurred'* and that they do not *'restrict the supply of a service or the pursuit of any other economic activity'* (Article 12.3 [8]). Since charging any fee restricts economic activity more than charging no fee at all, governments at all levels will be under pressure to keep their fees as low as possible.

Although local governments in particular are experiencing ever-shrinking sources of revenue, they will be prevented by CETA from raising funds from licensing fees for general operations. Even where governments have decided to lower fees so that they only cover the costs of administering a license, they might still face a trade dispute on claims the fees are not *'reasonable'*. The EU's authorisation fees for electronic communications networks, for example, may include *'costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control'*.[20] These fees would be vulnerable to dispute under CETA.



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HURRY UP APPROVALS, SLOW DOWN NEW REGULATION

The overall thrust of CETA's chapters pertaining to regulation is to speed up the regulatory process for business but put obstacles in the path of governments attempting to introduce new rules. In the chapter on technical barriers to trade, for example, governments are required

18 David Crouch, *'Sweden's indigenous Sami people win rights battle against state'*, The Guardian UK, 3 February 2016.

19 CETA Articles 8.19(3), 8.23(5), 8.27(9), 8.39(6), 19.9(2)(d) provide for special treatment of small and medium enterprises under the agreement.

20 European Union, *'Authorisation of electronic communications networks and services – summary'* (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l24164).

to give equal standing to persons (investors or companies) from the other Party in public consultations on proposed regulations: *'each Party shall permit persons of the other Party to participate on terms no less favourable than those accorded to its own persons'*.[21] Governments also have to give positive consideration if they receive requests from a CETA Party (Canada or the EU) to extend the comment period and to delay the implementation of a regulation.

In contrast with these provisions to slow down or block the introduction of new regulations, Chapter 12 imposes obligations that would tend to pressure governments to speed up regulatory approvals. Chapter 12 states: *'Each Party should establish the normal timeframe for the processing of an application'* and *'ensure that the processing of an authorisation application, including reaching a final decision, is completed within a reasonable timeframe from the submission of a complete application'* (Article 12.3 [13]); *'shall initiate the processing of an application without undue delay'* (Article 12.3 [11]); and *'shall ensure that an authorisation is granted as soon as the competent authority determines that the conditions for the authorisation have been met, and once granted, that the authorisation enters into effect without undue delay'* (Article 12.3 [5]).

Based on these rules, any licensing process that involves *'undue delays'* could be challenged under CETA, regardless of whether these delays are caused by events, such as public opposition that prevents the construction of pipelines, court challenges to fracking, or other circumstances over which governments have little or no control.

For example, the European Commission has the authority to conduct formal investigations into proposed member state projects, such as the construction of nuclear power stations, to determine whether any state aid is being provided to these projects in violation of EU rules. Commission officials have said they are under no time pressure to complete these investigations, even though they may cause significant delays to projects that have already been licensed by local authorities.[22] The Commission's official description of its state aid procedures specifies that *'There is no legal deadline to complete an in-depth investigation'*, and member states must wait for the Commission's decision before proceeding.[23]

With CETA's requirements for project applications to be processed within a *'reasonable timeframe'*, and approvals implemented without *'undue delay'*, European governments could be caught between a CETA rock and a European Commission hard place in meeting their legally binding obligations.

21 CETA Article 4.6.1

22 *'EU regulators investigate EDF British nuclear project'*, Reuters UK, 18 December 2013 (http://uk.reuters.com/article/uk-eu-britain-nuclear-idUKBRE9BH0GF20131218).

23 European Commission, *'Competition – State aid procedures'* (http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html).