From Sea to Sea: Regulatory Space of Federal and Provincial Governments in Canada under CETA and TPP Investment Chapters

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Introduction: Variability of Regulatory Space under CETA & TPP

- Regulatory space and “domaine réservé”
- Different context of negotiations
- NAFTA and Model FIPA as a yardstick
- TPP: essentially US model
- CETA: mixture of Canadian and EU concerns
Outline of Presentation

I. Protection of regulatory space (NAFTA+)

II. Reduction of regulatory space (NAFTA-)

III. Contradiction in regulatory space(s) and possible solutions
I. Protection of Regulatory Space (NAFTA+)
## Limitations to the Rights of Admission and Establishment

<table>
<thead>
<tr>
<th>TPP</th>
<th>CETA</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Pre-investment stage</td>
<td>• Pre-investment stage</td>
</tr>
<tr>
<td>• Exclusion of FET &amp; expropriation (?)</td>
<td>• Explicit exclusion of FET &amp; expropriation</td>
</tr>
<tr>
<td>• Damages limited “to those sustained in the attempt to make the investment”</td>
<td>• Exclusion of ISA</td>
</tr>
<tr>
<td>• Review of foreign acquisition (SSA?)</td>
<td>• Review of foreign acquisition (Exclusion of SSA)</td>
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Carving Out of Sensitive Policy Areas in TPP & CETA

• Regulatory space different for each Party
• Right to regulate contrary to custom+ obligations
• Grandfathering of measures non-conforming to custom+ obligations

- aboriginal affairs
- social services
- air transportation
- water transportation
- fishing
- privatisation
- local government
- foreign ownership
- local development policy
## Affirmation of the Right to Regulate

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<td>• Investment activity in a manner sensitive to environmental, health or other regulatory objectives</td>
<td>• Protection of public health, safety, environment, public morals, social, consumer protection, cultural diversity</td>
</tr>
<tr>
<td>• Not otherwise inconsistent...</td>
<td>• Affecting negatively not a breach</td>
</tr>
</tbody>
</table>
Restrictions on Access to ISA

**TPP**
- Only damages in attempt to make investment at pre-investment stage
- Optional exclusion of ISA for anti-tobacco policy disputes
  - no ISA between AU & NZ
  - fork-in-the-road rule for Chile, Peru, Mexico & Vietnam

**CETA**
- No ISA at pre-investment stage
- No ISA for performance requirements
II. Reduction of Regulatory Space (NAFTA-)

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Extended Coverage of Provincial Measures

- NB Exclusive provincial power to implement treaties

**TPP**
- Grandfathering all existing provincial measures non-conforming to custom obligations

**CETA**
- Detailed negative list of ±200 specific grandfathered provincial measures
Market Access Disciplines in CETA

• Expansion of Right of Establishment

• Prohibition on various restrictions on establishment of investment (size, scale of presence, legal entity)
  
  ➢ e.g. Number of enterprises allowed in a sector
  ➢ ban on creation of new commercial monopolies?

• Additional carving out

  ➢ e.g. existing provincial monopolies
Expansion of FET?

**TPP**
- FET limited to minimum standard of treatment of aliens of custom
  - no legitimate expectations

**CETA**
- No reference to custom
- Exhaustive definition of FET
- Obligation to review content
  - legitimate expectations to be taken into account
Vanishing of “Canadian Exceptions”

**TPP**
- No cultural exemption
- Partial carving out by Canada
  - discriminatory financial contribution to Canadian cultural development
  - restriction on on-line foreign audio-visual content
- No general exceptions

**CETA**
- No cultural exemption
- Partial carving out in treaty for all Parties
- General exceptions for custom+ obligations only
  - New morality exception
  - No environment exception
III. Contradiction over regulatory space(s) and possible solutions
Earlier investment agreements of Canada

**TPP**
- 3 FTAs with 4 Parties
  - NAFTA
  - Canada-Chile FTA
  - Canada-Peru FTA
- Coexistence

**CETA**
- 7 FIPAs with 7 Parties
  - Croatia
  - Czech Republic
  - Hungary
  - Latvia
  - Poland
  - Romania
  - Slovak Republic
- Termination
Strategies to address contradictions

- Governments
  - Surgical discriminatory policies
  - *De Facto* extension of MFN treatment

- Foreign investors
  - MFN treatment based on other agreements
  - Shell corporation
Use of MFN Clause

**TPP**
- No invocation of ISA provisions
- No blanket invocation of treaty provisions
- No earlier agreement prior to TPP entry into force
  - *CETA invocable?*

**CETA**
- No invocation of ISA provisions
- Blanket invocation of treaty provisions allowed?
- No earlier agreement prior to NAFTA entry into force
  - *TPP invocable!*
## Use of Denial of Benefits Clause

### TPP
- Shell corporation owned
  - third party & economic sanctions or diplomacy
  - third party & no substantial business
  - National

### CETA
- Shell corporation owned
  - third party & economic sanctions
  - see definition of investor

### Forum to invoke?
- Timing to invoke?
- Form of invocation?
Impact of ISA on Regulatory Space

- Obligation of State to cease internationally unlawful act?
- Voluntary withdrawal of measure
- New claims based on same measure
- Reputational risk to maintain measure
A conclusion of sorts

• Difficulty for government to assess regulatory space in adopting policies

• More difficulty for State to assess outcome of claims due to variability of regulatory space

• Easier for investor to benefit from the smallest regulatory space available