

October 5, 2016

**CETA: The Effect of an Interpretative Declaration by Canada and EU Commission**

**(An opinion prepared for the Council of Canadians)**

On September 19, 2016, Chrystia Freeland, Canada's Minister of International Trade, and Sigmar Gabriel, German Vice Chancellor and Federal Minister for Economic Affairs and Energy, issued a statement in which they touted the virtues of the Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA). However in doing so, the Ministers acknowledged that "some of its provisions were still the subject of intense public debate" and noted particular concern about CETA provisions concerning "investment protection, workers' rights and public services, as well as public procurement and the precautionary principle."<sup>1</sup> To address these concerns, the Ministers "committed to issuing a declaration with legal status between Canada and the EU Commission."

Media accounts and statements by the Ministers describe such a declaration as offering "legally binding clarifications" to address certain "sensitive issues". Our understanding is that the text of such a declaratory statement will be presented to the EU trade committee on October 6-7 and would be made public sometime after that but before October 18, 2016 when it is to be presented to EU trade ministers.

As the declaration is yet to be made public, it is too soon to know whether it will offer more than soporifics in an attempt to mollify CETA critics, or represent a more substantive attempt to address their concerns. However, assuming that at least to some extent the declaration will offer more than mere blandishments, we have been asked for our opinion about the potential impact of such a declaratory statement on the application and interpretation of CETA provisions.

In particular we provide our answers to the following questions:

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<sup>1</sup> Statement by International Trade Minister and German Vice Chancellor on CETA, September 19, 2016 -

**1. Would a declaratory statement of clarification issued by Canada and the European Union Commission (EC) be binding on a tribunal called upon to resolve an inter-state or investor-state dispute?**

Short answer: no. A declaratory statement by Canada and the EC would not, and could not, amend the substantive provisions of the CETA text, or otherwise exclude or modify the legal effect of the Agreement, and it is highly misleading of the Ministers to state or imply otherwise. Using terms such as “legally binding”, or suggesting that it is possible to make the investor-state regime “absolutely watertight” does nothing to further informed public debate – quite the opposite, because it conveys a false understanding of the effect of an interpretative declaration on the settled text of an international treaty.

A declaratory statement, if properly adopted and approved, could provide more context for a tribunal to consider when seeking to interpret and apply CETA rules. It would in this regard join the other contextual elements of the regime, including the entirety of the CETA text, as well as its preamble, reservations, and other declarations. What it cannot do is alter the plain meaning of CETA provisions – for that, formal amendment to, or reservation from CETA is required.

**2. What would be the legal status and effect of a declaratory statement by Canada and the EC?**

Short answer: Many of the calls for reforming CETA, such as the removal of Investor-State Dispute Procedures (ISDS), or requiring that investors first exhaust domestic remedies before seeking recourse to this extra-judicial dispute regime, are entirely beyond the reach of an interpretative declaration. At best an interpretative declaration can tinker around the edges of such reforms. However, for an interpretative declaration to be effective even at the margins of treaty interpretation, the Parties must explicitly indicate that their declaration is a condition precedent to their consent to CETA. Even so, such a conditional declaration would be entirely at the mercy of the interpretation that an inter-state or investor-state tribunal might give it, and absent an amendment to the Treaty itself, nothing can displace the authority of CETA tribunals to be the ultimate arbiters of its meaning.

On the other hand, a failure of the Parties to make their interpretative declaration a condition to their approval of CETA would relegate their interpretative declaration to the status of a “mere declaration” with little prospect of it having any influence on the interpretation of the Treaty.

Finally, whether made conditional or not, broadly framed, hortatory or aspirational statements, such as those included in the Ministers’ announcement, would add little, if anything, by way of a contextual understanding of CETA provisions.

## **The Ministers' Commitment**

As noted, the Ministers' statement of September 19<sup>th</sup> expressed support for a declaratory statement to address ongoing concerns about the impact of the Treaty:

“Concerning CETA, we are aware that some provisions in particular are still subject to intense public debate. Thus we entered into a detailed discussion to achieve a common understanding on how to address these issues during the ongoing process before CETA enters into force.

In this context, we have heard the concerns expressed by the German Trade Union Federation and the Canadian Labour Congress, which we deem an important contribution to attaining clarifications on, in particular, investment protection, workers' rights and public services, as well as public procurement and the precautionary principle.”

The Ministers provided certain examples of the aspirations for such a clarifying statement as follows:

- “The provisions on investment protection in CETA abolish the existing private arbitration tribunals and establish an investment court based on the rule of law. This is a groundbreaking improvement, since the new system provides for precise definitions while fully respecting parliaments' right to regulate. We agreed, for example, that independent judges nominated by the parties to CETA are crucial and that implementing regulations must make this system absolutely watertight.
- The sustainability chapter in CETA already provides for comprehensive rules to protect workers' rights. We believe it is important that the International Labour Organization's (ILO's) core labour standards are fully ratified and applied. Since the Canadian government has already ratified one of the two remaining ILO standards and is working towards ratifying the outstanding one, we stressed our common interest in resuming the outstanding ratification process before CETA enters into force. We also looked into the dispute settlement provisions in the sustainability chapter, and we agreed to support efforts to assess whether further improvements are advisable.
- Protecting the high quality of public services is of the utmost importance and thus foreseen in CETA. We are convinced that the provisions of CETA cover the sensitivities, but we fully support that existing rules and reservations in CETA are being clarified to underscore that municipalities can take such services back into their own hands.

- We also believe that the provisions on public procurement in CETA should respect the parties' rights to include labour and social criteria in their procurement procedures and would appreciate a clarification in this respect.
- We agree and remain committed to the obligations that we have undertaken with respect to precaution on international agreements such as the World Trade Organization agreements and international environmental agreements including the Convention on Biological Diversity.”

And importantly the Ministers stated that they supported:

“ . . . the endeavour of the Canadian government and the European Commission to agree on further clarifications regarding these important areas of the agreement prior to the European Council's resolutions on CETA, the signing of the agreement in October and the start of the parliamentary ratification process. It is our common understanding that such further clarifications on the sensitive issues mentioned would support this process, and we are committed to issuing a declaration with legal status between Canada and the EU Commission.”  
[emphasis added]

It is not our purpose here to assess the substance of these proposals, and there is little here to encourage the hope that a declaration by Canada and the EC will rise above simple rhetoric. However, should the conditional interpretative declaration be more substantive, the following assessment considers the limited influence such a declaration can exert on a tribunal called upon to resolve an inter-state dispute, or investor-state damage claim.

### **The Interpretation of CETA Provisions**

The rules for interpreting and applying the provisions of CETA draw a critical distinction between the text of the Agreement and the context within which its substantive provisions are set out.

The authority of an arbitral panel to resolve an inter-state dispute is set out in Article 29.17 of the Treaty, which provides in part as follows:

#### *General rule of interpretation*

*The arbitration panel shall interpret the provisions of this Agreement in accordance with customary rules of interpretation of public international law, including those set out in the Vienna Convention on the Law of Treaties. The arbitration panel shall also take into account relevant interpretations in reports of Panels and the Appellate Body adopted by the WTO Dispute Settlement Body.*

The authority of an ISDS Tribunal is similarly set out in Article 8:31, which provides:

*When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.*

The general rule for Treaty interpretation is found in Article 31 of the *Vienna Convention* as follows:

*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

*2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

... ..

CETA Article 30.1 further provides as follows:

*Integral parts of this Agreement*

*The protocols, annexes, declarations, joint declarations, understandings and footnotes to this Agreement constitute integral parts thereof.*

Accordingly, if a declaratory statement is made and approved by the Council of the European Union, and the Parties clearly indicate their intention for it to be integral to CETA under Article 30.1, it would become part of the context within which a dispute body would interpret and apply a provision of the CETA text.

As noted, in making their announcement, the Ministers indicated that they were committed to issuing “a declaration with legal status” between Canada and the EU Commission.”<sup>2</sup> In consequence of the above-noted provisions, an interpretative declaration would have “legal status.” But as we discuss below, having “legal status” does not mean that an interpretative declaration would have any material impact on the interpretation and application of CETA provisions, and it certainly cannot exclude or modify the plain meaning of any CETA provision.

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<sup>2</sup> It is beyond the scope of this opinion to consider the modalities for adopting such a declaratory statement by the Parties, the Council, EU Members and Canadian provinces.

It is also important to note that the authority to issue binding interpretations is explicitly provided for by CETA,<sup>3</sup> but that authority is assigned to the CETA Joint Committee, not the Parties operating outside the offices of the Committee (which of course has not been established yet). Even so, the authority of the Joint Committee would be limited to interpreting CETA, and as described below, that is not authority to amend, modify or exclude its legal effect.

### **The Effect of Declaratory Statements**

Declaratory statements may take many forms under international law, and range from declarations that are intended or become legally binding under customary international law, such as the *1948 Universal Declaration of Human Rights*, to statements intended to clarify minor technical or procedural matters relating to the application of a Treaty.

In the present circumstances we are concerned with a declaration that will purport to clarify certain areas of the Agreement. In the parlance of international law this would be an interpretive declaration. As described by the UN:

“Sometimes states make "declarations" as to their understanding of some matter or as to the interpretation of a particular provision. Unlike reservations, declarations merely clarify the state's position and do not purport to exclude or modify the legal effect of a treaty. Usually, declarations are made at the time of the deposit of the corresponding instrument or at the time of signature.”<sup>4</sup>  
[emphasis added]

In other words, while an interpretive declaration can provide context for the interpretation of CETA provisions, it cannot modify or exclude the legal effect of those provisions. For that, the Parties must amend the provisions of the text, or seek a reservation from their application.

The procedures for amending CETA are set out in Article 30.2, and those specifically authorizing reservations are found in several chapters of the Agreement. Recourse to Article 30.2 is required where the Parties seek to amend the text of the Agreement and require, *inter alia*, that “the Parties exchange written notifications certifying that they have completed their respective applicable internal requirements and procedures necessary for the entry into force of the amendment ...”<sup>5</sup> Reservations must be set out in the various schedules to the Agreement.

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<sup>3</sup> CETA Article 26:1: 5:(e) empowers the Joint Committee to: adopt interpretations of the provisions of this Agreement, which shall be binding on tribunals established under Section F of Chapter Eight (Resolution of investment disputes between investors and states) and Chapter Twenty-Nine (Dispute Settlement).

<sup>4</sup> *United Nations Treaty Handbook* <https://treaties.un.org/doc/source/publications/THB/English.pdf>.

<sup>5</sup> The exception to this requirement is set out in Article 30:2 (2): Notwithstanding paragraph 1, the CETA Joint Committee may decide to amend the protocols and annexes of this Agreement. The Parties may approve the CETA

While a tribunal can be expected to read-down a declaratory statement to respect the limits of such statements, a statement that purported to amend, modify or exclude the plain meaning of a CETA provision would risk being simply disregarded or circumvented by a dispute body.<sup>6</sup>

### Mere vs. Conditional Declarations

While an interpretative declaration cannot rise to the occasion or status of a reservation, its influence as an interpretive instrument will depend upon whether it is a “mere” interpretative declaration, or one made as a condition precedent to the consent of the Parties to be bound by the Treaty.<sup>7</sup>

A mere interpretative declaration is presented by the Parties to indicate their views of the interpretation of CETA, which may or may not be accepted by an arbitral tribunal. In offering this interpretation the Parties do not rule out the possibility that their interpretation will be rejected. A “mere” interpretative declaration places no conditions on the expression by the Parties of their consent to be bound by the treaty, but simply attempts to anticipate any dispute that may arise concerning its interpretation.<sup>8</sup> In doing so, a Party gives notice that, should a dispute arise, its interpretation will be such, but it does not make that point a condition for its participation in the treaty.

In the case of a conditional declaration, the Parties declare their interpretation of the Treaty regardless of what a subsequent tribunal might conclude, and endeavor to rule out the possibility of a subsequent inconsistent interpretation of the Treaty. In doing so the Parties can be said to have issued a “qualified interpretative declaration” by making their acceptance of the Treaty subject to or conditional upon acquiescence in their interpretation.<sup>9</sup> A qualified interpretative declaration is closer to a reservation in that the Parties seek to have greater influence on the interpretation of the treaty’s text.

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Joint Committee’s decision in accordance with their respective internal requirements and procedures necessary for the entry into force of the amendment.

<sup>6</sup> David A. Gantz; *Pope & Talbot, Inc. v. Canada* The American Journal of International Law, Vol. 97, No. 4 (Oct., 2003), pp. 937-950 Published by: American Society of International Law Stable URL: <http://www.jstor.org/stable/3133692> .

<sup>7</sup> *Yearbook Of The International Law Commission 1998 A/CN.4/SER.A/1998/Add.1 (Part 1)*, and also see McRae, D. M. *The legal effect of interpretative declarations*, *British Year Book of International Law*, 1978, vol. 49, 1979, pp. 155–173.

<sup>8</sup> *Idem* at paras. 306-321.

<sup>9</sup> *Idem*.

However, even when made conditional, an interpretative declaration cannot constitute a reservation by trying “to exclude or to modify the legal effect of certain provisions of the treaty in their application” but rather only seek to impose a specific interpretation on those provisions. As explained by the Special Rapporteur to the United Nations International Law Commission, “Even if the distinction is not always obvious, there is a tremendous difference between application and interpretation,” and the cases indicate that a conditional precedent may be rejected by a tribunal for offering an interpretation of a treaty provision that is simply deemed to be incorrect.<sup>10</sup> As noted, it is the tribunal that will be the ultimate arbiter of the meaning and effect of any declaration.

Nevertheless, a qualified or conditional interpretative declaration will have greater influence than a mere declaration. So if we assume that the declaration will offer more than simple blandishments, the first measure of its likely effect will be whether the Parties clearly and explicitly state that the interpretative declaration is a condition precedent to their consent to the Treaty.

An example:

To illustrate the limits of a declaration by Canada the EC, the following considers the problem of addressing public concern about the ISDS regime embedded in CETA.

As we know, the fundamental objection to ISDS flatly rejects the notion that there is any justification for creating a regime to entitle wealthy corporations and individuals to circumvent domestic legal regimes, and the constitutional norms of sovereign states, to claim damages allegedly caused by the lawful exercise of governmental authority that would otherwise be unassailable.

Having lost the war to have ISDS removed from CETA, some groups have called for a declaratory statement requiring the exhaustion of domestic remedies as a precondition to invoking ISDS. The Ministers’ statement offers no hint of interest in such a reform. Moreover, imposing a condition precedent to the exercise of investor rights would substantively derogate from the rights accorded foreign investors and would certainly require amendment to the Treaty text. For that reason, such a reform would be well beyond the reach of an interpretative declaration, even one made a condition for the Parties approval of CETA.

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<sup>10</sup> Idem para. 324.

Furthermore, and as noted, a qualified interpretative declaration that purported to impose such a condition precedent might well be rejected or circumvented by an arbitral tribunal persuaded that it is in fact an amendment being advanced under the guise of a declaration.<sup>11</sup>

In fact even where the Treaty text itself has included a requirement to exhaust domestic remedies, investor-state tribunals have been reluctant to give it effect, and have consistently declined to dismiss claims on procedural grounds. In some cases, tribunals have relied on most favored nation (MFN) provisions to allow investors to ignore local remedy requirements by invoking ISDS provisions in other investment treaties that impose no such requirement. In other cases, Tribunals dismissed the requirement based on their judgment about the character of domestic judicial processes.<sup>12</sup>

Acknowledging the antipathy of arbitral tribunals to local remedy rules, proponents for reform have stressed the need to: make the exhaustion of local remedies an explicit condition of consent to arbitration; specify realistic time frames for those remedies (years not months); and bar claims during that period. These are requirements that are clearly beyond the reach of an interpretative declaration of CETA ISDS provisions that include no such requirements. This is particularly true given CETA provisions that explicitly address the relationship between domestic legal proceedings and ISDS and prohibit the former when ISDS is invoked.<sup>13</sup>

### **In Sum:**

When the Parties reveal their proposed declaration, it will of course be necessary to carefully examine the clarifications they offer to determine what, if any, salutary influence they may exert, but as this analysis indicates, there are very clear limits on the potential effect of such an instrument.

About these matters legal opinions are almost certain to differ, and it is possible to find competing and contradictory authority in the extensive and arcane jurisprudence and academic literature concerning international law.

However, some matters are beyond dispute. Arguably the most important is that whatever declaration may emerge, its effect on a particular inter-state dispute, or investor-state claim will ultimately be determined by a tribunal obligated to interpret and apply the un-amended provisions of the CETA text and do so in a manner that serves the Agreement's stated purposes.

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<sup>11</sup> James Crawford and Rowan Nicholson: *The Oxford Handbook of the Use and Force of International Law*, ed. Mark Weller, at p. 112.

<sup>12</sup> Matthew C. Porterfield; *Exhaustion Of Local Remedies In Investor-State Dispute Settlement: An Idea Whose Time Has Come?* The Yale Journal of International Law, Vol. 41, p. 4

<sup>13</sup> Articles 8.22:1(f) and (g).

What can also be said is that the Ministers' statement clearly encourages the view that public concerns about investment protection, workers' rights, public services, procurement and the precautionary principle can be satisfactorily addressed by a declaratory statement by Canada and the EC. We will see, of course, whether the declaration offers more than transparent rhetoric and soporifics, but if it is more substantive, even the most liberal interpretation of the effect of such declarations will leave the text of CETA in place, and un-amended.



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