International Trade and Investment Practicum

THE APPLICATION OF NON-DISCRIMINATION OBLIGATIONS TO MONOPOLIES AND STATE (TRADING) ENTERPRISES

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List of Abbreviations

Abbreviation	Long Form
CETA	Canada-European Union Comprehensive Economic and Trade Agreement
GATT 1994	General Agreement on Trade in Tariffs 1994
MFN	Most Favoured Nation
MSE	Monopoly State Enterprise
NAFTA	North American Free Trade Agreement
STE	State Trading Enterprise
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
The Understanding	The Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994

Executive Summary

This memorandum is a non-confidential summary of a confidential memorandum prepared for a Beneficiary in the International Trade and Investment Law Practicum course taught by Professor Debra P. Steger in the Fall 2016 semester at University of Ottawa, Faculty of Law. Meghan Blom, Paul Burbank, and Hunter Fox were the student team who research and prepared both the original memorandum for the Beneficiary in the course as well as prepared this summary.

This memorandum provides an analysis of the scope of non-discrimination obligations upon monopoly state enterprises (MSEs) and state (trading) enterprises under the *General Agreement on Trade in Tariffs* 1994 (GATT 1994), the *North American Free Trade Agreement* (NAFTA), and the *Canada-European Union Comprehensive Economic and Trade Agreement* (CETA). Specifically, this memorandum answers the question as to whether there is one obligation for non-discriminatory treatment or two in each of the three agreements.

Section one of the memorandum answers the first legal question on the scope of non-discrimination obligations in GATT Article XVII. That is, whether the non-discrimination obligation is a separate obligation from "acting in accordance with commercial considerations". The results of interpretation are that Article XVII:1(a) and (b) contain only one obligation. The analysis suggests that the non-discrimination obligations under GATT Article XVII:1(a) and (b) incorporate both MFN and national treatment-type obligations. These obligations are tempered by "commercial considerations". In this way, the non-discrimination principles of Articles I and III are modified for Article XVII to allow state enterprises to function effectively. Moreover, an examination and interpretation of the language in subparagraphs 1(a) and (b) reveals that the two subparagraphs are necessarily linked.

Section two explains how the non-discrimination obligations of NAFTA Chapter 15 differ from GATT Article XVII. NAFTA Chapter 15 establishes a similar relationship with respect to non-discrimination for monopolies. NAFTA Article 1503 requires that state enterprises provide non-discriminatory treatment, defined as the better of MFN and national treatment, in its sale of goods to investors of another party. Unlike GATT Article XVII, acting "in accordance with commercial considerations" does not operate to satisfy a state enterprise's non-discrimination obligations.

Article 1502, however, contains a single obligation for monopolies: a monopoly must not discriminate in its purchase or sale of the monopolized good or service. This single non-discrimination obligation can be satisfied in two ways. Firstly, a party can prove that it is not discriminating by showing that it is acting "in accordance with commercial considerations". In this respect, acting "in accordance with commercial considerations" is one way that a monopoly is not discriminating in its purchase and sale of the monopolized good or service. Secondly, the monopoly can depart from acting "in accordance with commercial considerations" in its purchase and sale of the monopoly good or service, but only if it is complying with terms of its designation that are neither discriminatory nor lead to certain types of anti-competitive conduct.

Section three examines the non-discrimination obligations imposed on MSEs under CETA Chapter 18. Chapter 18 incorporates elements from Article XVII of the GATT and follows a similar interpretative analysis as found in NAFTA Chapter 15. As similarly found in Article XVII, Chapter 18 affirms that the relationship between non-discrimination and commercial consideration, as it prescribes that all enterprises captured by its 'covered entity' definition, accord non-discriminatory treatment, which is the better of national treatment and MFN. All entities except for monopolies, are

deemed to meet the non-discrimination obligations when they act "in accordance with commercial considerations".

In contrast to GATT Article XVII and NAFTA Chapter 15, Chapter 18 contains an explicit 'commercial considerations exception,' whereby in specific circumstances, monopolies and state enterprises are not required to act "in accordance with commercial consideration". The exceptions use general language, perhaps broadening the scope of their application. As the most recent agreement, it appears that CETA Chapter 18 resolves some of the ambiguity in NAFTA Chapter 15 and GATT Article XVII, and affirms the single obligation relationship between non-discriminatory treatment and commercial considerations.

Context

This memorandum will assess the scope and content of the non-discrimination obligations imposed on MSE's under three agreements: GATT 1994 (Article XVII), NAFTA (Chapter 15) and CETA (Chapter 18). Specifically, the memorandum will respond to the specific legal questions:

1) What is the scope of the non-discrimination obligations in Article XVII of the GATT 1994?

2) What does the obligation to act in a manner consistent with the "general principles of non-discriminatory treatment" in GATT 1994 require?

3) In particular, is the requirement only that a state enterprise or MSE "act solely in accordance with commercial considerations" a separate obligation or is it part of the obligation to act in a manner consistent with the "general principles of non-discriminatory treatment" in GATT 1994?

4) How does the scope of the non-discrimination obligations imposed on state enterprises/MSEs under Article XVII of the GATT 1994 differ from the non-discrimination obligations imposed on state enterprises under:
    a. Chapter 15 of the NAFTA; and
    b. Chapter 18 of the CETA?

Section one answers the first legal question through a process that addresses the second and third questions. *First*, the scope of the non-discrimination obligations will be assessed in relation to the requirement to act "in accordance with commercial considerations". *Second*, this assessment will allow us to conclude on whether acting "in accordance with commercial considerations" in its purchases and sales satisfies MSE's non-discrimination obligations.

Sections two and three answer the fourth legal question through an interpretation of the non-discrimination obligations in NAFTA Chapter 15, and CETA Chapter 18 respectively. As in section one, this analysis clarifies the relationship between the non-discrimination obligations and the requirement to act "in accordance with commercial considerations". In arriving at these conclusions, the meaning of "in accordance with

commercial considerations" will be parsed out to provide clarity on *how* a particular state enterprise's commercial considerations will be assessed. Sections two and three both conclude by highlighting the differences between the scope of the non-discrimination obligations under those agreements and GATT 1994.

The individual sections that analyse each agreement's relevant material—GATT Article XVII, NAFTA Chapter 15, and CETA Chapter 18—will begin with their own introductory road map detailing the interpretive process that we take. The individual sections will conclude with express responses to the legal questions set out above.

1. Section 1: What is the Scope of Non-Discrimination Obligations in Article XVII of the GATT 1994?

1.1. Introduction

1.1. The GATT 1994[1] Article XVII contains provisions governing state enterprises of Members. These provisions contain rights that allow Members to establish and maintain state enterprises, while containing obligations restricting the actions of state enterprises.[2] The purpose of these obligations is to prevent Members from evading their GATT obligations for non-discrimination and fair trading by establishing a state enterprise. The obligations in Article XVII can therefore be seen as 'anti-circumvention' provisions.[3]

1.2. Legal Issue

1.2. The following analysis is determined to answer the first legal question, which addresses the scope of the non-discrimination obligations in Article XVII of the GATT 1994. Particularly, whether a monopoly or state enterprise can satisfy its obligations by acting "solely in accordance with commercial considerations"[4] or whether Article XVII also incorporates the non-discrimination principles in Article I (MFN) and Article III (national treatment) of the GATT 1994.

1.3. In addressing this legal question, the main issues discussed in this section include;

i. The types of enterprises captured under Article XVII;

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[1] *General Agreement on Tariffs and Trade* (GATT 1947), 30 October 1947, 55 U.N.T.S. 187, Can. T.S. 1947 No. 27 (entered into force 1 January 1948); *General Agreement on Tariffs and Trade* (GATT 1994), 15 April 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 at Article XVII:1(a), 3 [GATT]; Understanding on the Interpretation on Article XVII of the General Agreements on Tariffs and Trade 1994 [Understanding]

[2] *Ibid* at art. XVII:1.

[3] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para 85.

[4] GATT, *supra* note 1, art. XVII:1

ii. The general principles of non-discrimination included in Article XVII;

iii. The relationship between Article XVII:1 subparagraphs (a) and (b);

iv. The meaning of "acting in accordance with commercial considerations" and "customary business practices" when applies to state enterprises; and

1.3. Types of Enterprises Captures under Article XVII

1.4. Article XVII and the Understanding on the Interpretation of Article XVII (The Understanding) delineate the types of enterprises that are captured by the obligations:

> "if it establishes or maintains a State enterprise…., or grants to any enterprise, formally or in effect, exclusive or special privileges,".[5]

1.5. The Understanding provides a working definition of what enterprises are being referred to in Article XVII;

> "Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level of direction of imports or exports".[6]

1.6. The working definition contains key information to assist in the interpretation of "state trading enterprise". First, it explains that it can include both governmental and non-governmental enterprises (or entities that are private in nature). Second, it references "exclusive or special rights or privileges" and provides two examples, "statutory or constitutional powers". Both examples provided in the Understanding should be interpreted as non-exhaustive lists because the word "including" directly precedes both sets of examples.

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[5] *Ibid* at art. XVII:1(a).
[6] Understanding, *supra* note 1 at para 1.

1.3.1.1. Interpreting the terms 'Exclusive or Special Privileges'

1.7. These words are found in Article XVII:1(a), the Understanding, as well as referenced in the *ad* Article to Article XVII.[7] Article XVII:1(a) specifies;

> "if it establishes a State enterprise, wherever located, or grants to any enterprise, formally or in effect exclusive or special privileges".[8]

1.8. The terms "exclusive or special privileges" are intended to capture enterprises that wouldn't fall under the definition of a state enterprise, but may be able to distort trade because the Member has afforded them special rights.

1.3.1.2. Conclusion

1.9. Article XVII and the Understanding clarify what types of enterprises the obligations of Article XVII should be imposed upon. This includes both governmental and non-governmental enterprises. Additionally, it includes state enterprises that have been granted formally or in effect any exclusive or special privileges. The use of the terms 'exclusive or special privileges' are intended to close an interpretative gap by preventing Members from providing enterprises special benefits and distorting trade.

1.4. Evaluating the General Principles of Non-Discriminatory Treatment in Article XVII

1.10. The purpose of the memorandum is to examine whether Article XVII contains its own non-discrimination obligations or if it includes the general principles under Articles I and II of the GATT. Panels and the Appellate Body have referenced, but have been unable to conclude whether the, "general principles of non-discriminatory treatment," in Article XVII:1(a) refers to MFN treatment and national treatment.[9]

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[7] GATT, *supra* note 1 at *ad* Art. XVII:1(a).
[8] *Ibid*.
[9] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 107, 124; Panel Report, *Korea – Various Measures on Beef.*

1.11. The relevant text of GATT Article XVII is written;

> "such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders."[10]

1.12. The Appellate Body in *Canada – Wheat Exports and Grain Imports* does not examine which types of discrimination are included within the general principles of non-discriminatory treatment.[11] However, both the Panel and the Appellate Body in that case accept that the phrase "general principles of non-discriminatory treatment" includes the MFN principle.[12]

1.4.1.1. Article I; MFN incorporation into Article XVII

1.13. Appellate Body jurisprudence on Article XVII has recognized that the MFN principle is included in Article XVII.[13] The Appellate Body in *Canada – Wheat Exports and Grain Imports* upheld the panel's finding that the general principles of non-discriminatory treatment in Article XVII:1(a), "includes the general principles of most-favoured nation treatment as enshrined in Article I:1".[14] This reasoning is consistent with other panel reports as well as the negotiating history of the GATT.[15]

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[10] GATT, *supra* note 1 at art. XVII:1(a).
[11] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 87-88.
[12] *Ibid* para. 95; Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.48.
[13] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 95; Appellate Body Report, *Korea – Various Measures on Beef*, para. 753.
[14] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para 6.86.
[15] An analysis of the negotiating history of GATT suggests that the intention of Article XVII was to refer only to a most-favoured-nation type obligation. The original U.S. Suggested Charter included only an obligation that state enterprises would afford equitable treatment to enterprises of all other members. While this wording was changed in Geneva to the present wording, review of the delegates discussions shows that they continued to refer to 'general principles of non-discrimination' as only entailing an MFN type obligation see John H. Jackson, *World Trade and The Law of GATT* (United States: The Bobbs-Merrill Company Inc, 1969) at 346.; Korea – Various Measures on Beef, *supra* note 16.

1.4.1.2. Article III; National Treatment Incorporation into Article XVII

1.14. The issue is not if Article III applies to the enterprises covered by Article XVII, but whether Article XVII itself includes a national treatment-type obligation. The Appellate Body report in *Canada – Wheat Exports and Grain Imports* did note that Article XVII was never intended to be the sole source of disciplines on state enterprises.[16] The implication exists that the goal of Article XVII is not to regulate every aspect of a state enterprise, but instead to regulate a narrower range of state enterprises' actions. This would favour an interpretation that did not incorporate national treatment into Article XVII. However, if Article XVII is an anti-circumvention provision it would not make interpretative sense to prevent a MFN-type discrimination while allowing national treatment-type discrimination.

1.15. To ascertain whether a national treatment-type obligation is included in Article XVII:1 the words of subparagraph (a) and (b) must be interpreted using the *Vienna Convention on the Law of Treaties* by looking at the ordinary meaning of the words, their context, and in the light of their objective and purpose.

1.4.1.3. Ordinary Meaning of 'General Principles of Non-Discriminatory Treatment'

1.16. The dictionary meaning of the term "general" is "participated in by, involving, or affecting, all or nearly all, the parts of a specified whole".[17] The dictionary meaning

[16] *Ibid* at para. 98. This is evidence through other Articles in the GATT 1994 that place disciplines on state trade enterprises, including; Article II:4, *ad* Note Articles XI, XII, XIII, XIV and XVIII.
[17] *The Oxford English Dictionary*, 2ed, sub verbo "general".

of "principles" is "a fundamental truth or law; motive force".[18] However these words are tempered by the words following them, "non-discriminatory treatment".

1.17. "Non-discriminatory" has been examined by the Appellate Body to have an ordinary meaning that denotes 'differential' treatment.[19] With the marriage of both terms comes the ordinary meaning of "general principles of non-discriminatory treatment" which is interpreted as the main fundamental provisions of differential treatment.

1.18. The dictionary meaning of the term "general" is "participated in by, involving, or affecting, all or nearly all, the parts of a specified whole".[20] The dictionary meaning of "principles" is "a fundamental truth or law; motive force".[21] However these words are tempered by the words following them, "non-discriminatory treatment".

1.19. "Non-discriminatory" has been examined by the Appellate Body to have an ordinary meaning that denotes 'differential' treatment.[22] With the marriage of each term comes the ordinary meaning of "general principles of non-discriminatory treatment" which is interpreted as the main fundamental provisions of differential treatment.

1.20. The dictionary meaning of the term "general" is "participated in by, involving, or affecting, all or nearly all, the parts of a specified whole".[23] The dictionary meaning of "principles" is "a fundamental truth or law; motive force".[24] However these words are tempered by the words following them, "non-discriminatory treatment".

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[18] *The Oxford English Dictionary*, 2ed, sub verbo "principle".
[19] Appellate Body Report, *EC – Tariff Preferences*, para 153.
[20] *The Oxford English Dictionary*, 2ed, sub verbo "general".
[21] *The Oxford English Dictionary*, 2ed, sub verbo "principle".
[22] Appellate Body Report, *EC – Tariff Preferences*, para 153.
[23] *The Oxford English Dictionary*, 2ed, sub verbo "general".
[24] *The Oxford English Dictionary*, 2ed, sub verbo "principle".

1.21. "Non-discriminatory" has been examined by the Appellate Body to have an ordinary meaning that denotes 'differential' treatment.[25] With the marriage of each term comes the ordinary meaning of "general principles of non-discriminatory treatment" which is interpreted as the main fundamental provisions of differential treatment.

1.22. The dictionary meaning of the term "general" is "participated in by, involving, or affecting, all or nearly all, the parts of a specified whole".[26] The dictionary meaning of "principles" is "a fundamental truth or law; motive force".[27] However these words are tempered by the words following them, "non-discriminatory treatment".

1.23. "Non-discriminatory" has been examined by the Appellate Body to have an ordinary meaning that denotes 'differential' treatment.[28] With the marriage of each term comes the ordinary meaning of "general principles of non-discriminatory treatment" which is interpreted as the main fundamental provisions of differential treatment.

1.24. The dictionary meaning of the term "general" is "participated in by, involving, or affecting, all or nearly all, the parts of a specified whole".[29] The dictionary meaning of "principles" is "a fundamental truth or law; motive force".[30] However these words are tempered by the words following them, "non-discriminatory treatment".

1.25. "Non-discriminatory" has been examined by the Appellate Body to have an ordinary meaning that denotes 'differential' treatment.[31] With the marriage of each term comes the ordinary meaning of "general principles of non-discriminatory treatment" which is interpreted as the main fundamental provisions of differential treatment.

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[25] Appellate Body Report, *EC – Tariff Preferences*, para 153.
[26] *The Oxford English Dictionary*, 2ed, sub verbo "general".
[27] *The Oxford English Dictionary*, 2ed, sub verbo "principle".
[28] Appellate Body Report, *EC – Tariff Preferences*, para 153.
[29] *The Oxford English Dictionary*, 2ed, sub verbo "general".
[30] *The Oxford English Dictionary*, 2ed, sub verbo "principle".
[31] Appellate Body Report, *EC – Tariff Preferences*, para 153.

1.4.1.4. Immediate Context of "Non-Discriminatory Treatment"

1.26. The words immediately following "general principles of non-discriminatory treatment" read, "prescribed in this Agreement". Combined with the ordinary meaning above, the words appear to be referencing the main, fundamental provisions of differential treatment in the GATT 1994. Both MFN and national treatment are foundational tenets of the GATT.

1.4.1.5. Further Context from Subparagraph (b): "Due Regard"

1.27. The text of Article XVII:1(b) is written;

> (b) "The provisions of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations…".[32]

1.28. The words "having due regard to the other provisions of this Agreement" can offer context to interpret the obligations contained in subparagraph (a). The ambiguity of this phrase raises a question of how much weight should be given to "other provisions". The Appellate Body in *Canada – Wheat Exports and Grain Imports* did not comment on these words. Other articles of GATT 1994 have incorporated other provisions by explicit reference, however this was not the case for subparagraph (b).

1.29. Panels have interpreted "due" to mean, "what is just, proper regular, and reasonable".[33] Merriam-Webster defines "due regard" as "with the proper care or concern for".[34] The Oxford dictionary defines "regard" as "consider or think of in a

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[32] GATT, *supra* note 1 at art. XVII:1(a-b).
[33] Panel Report, *EU – Biodiesel*, para. 7.294.
[34] *The Oxford English Dictionary*, 2ed, sub verbo "due regard".

specified way".[35] The preceding sentence specifies that "having due regard" is related to the provisions in subparagraph (a), namely the general principles of non-discriminatory treatment. The use of the word "Agreement" following "due regard" is understood to mean the GATT 1994.

1.30. That is, enterprises must take in account the other provisions of GATT 1994 when making any such purchases or sales. The degree to which these other provisions must be considered will change depending upon the specific circumstances of the transaction that the state enterprise is engaging in. This could be interpreted to be like the 'accordion' analogy that the Appellate Body has used in other disputes.[36] Applied to Article XVII, the obligation of 'general principles of non-discrimination' expands or contracts depending upon factual circumstance of the alleged discrimination in relation to the type of commercial consideration involved.

1.31. In other words, the general principles of non-discrimination in subparagraph (a) could include both a MFN-type obligation and a national treatment-type obligation depending upon the nature of the enterprise involved and the nature of the alleged differential treatment. This interpretation builds upon, but is consistent with the Appellate Body's process espoused in *Canada – Wheat Exports and Grain Imports*.[37]

1.4.1.6. Relevant Negotiating History

1.32. This interpretation also addresses a situation identified by the Uruguay Round negotiators, namely, "whether laws, regulations or requirements directed particularly at the internal operations of state-trading enterprise are subject to the provisions of Article

[35] *Ibid*.
[36] Appellate Body Report, *Japan – Alcoholic Beverages*, p. 24.
[37] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 110.

III".[38] This is especially important in relationship to state enterprises which could be classified as an import monopoly that also has a monopoly on distribution in the domestic market. As the negotiators point out, in this type of situation there is a lack of competitive forces to restrain the ways in which internal measures affecting the state enterprise could be used to afford the domestic product protection.[39]

1.33. The same point was noted in the GATT Panel, *Canada – Import, Sale of Alcoholic Drinks*. In that report the Panel remarked in obiter that they, "saw great force in the argument that Article III:4 was also applicable to state-trading enterprise at least when the monopoly of the importation and monopoly of distribution in the domestic market was combined."[40] On the other hand, the negotiating history from the GATT 1947 seems to indicate that only MFN was intended to be included. [41]

1.4.1.7. Object and Purpose of Article XVII

1.34. Logically the interpretation that both MFN and national treatment are included makes sense given that Article XVII is an "anti-circumvention" provision. [42] The 'general principles of non-discriminatory treatment' should be responsive to the specific types of discrimination that may result. The phrase "having due regard" shapes the way "general principles of non-discriminatory treatment" is interpreted in each

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[38] Note by the Secretariat on the Negotiating Group on GATT Articles, 1988, MTN.GNG/NG7/W/15Add para 22.
[39] *Ibid.*
[40] GATT Panel Report, *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, para. 4.26.
[41] Analysis of the negotiating history shows there are instances to suggest that only MFN and not National Treatment were intended to be included. During drafting of the GATT 1994 there is explicit acknowledgement by the relevant sub-committee that the intention was only to have MFN obligation apply. A U.S. proposal submitted during the Uruguay Round to explicitly subject state trading enterprises to the National Treatment obligation was not accepted. See Ernst-Ulrich Peterman, "GATT Law on State Trading Enterprises: Critical Evaluation of Article XVII and Proposals for Reform" in T. Cottier and P. Mavroidis (eds.), *State Trading in the Twenty-First Century* (The University of Michigan Press, 1998), at 71.
[42] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 85.

dispute. In this way, it seems likely that the obligations of the Article XVII can be interpreted to include a national treatment-type obligation in certain circumstances.

1.4.1.8. Conclusion

1.35. In sum, an interpretative assessment of the ordinary meaning and language found in Article XVII:1, context, as well as in light of the GATT's object and purpose indicates that the general principles of non-discrimination incorporates both a MFN-type obligation and a national treatment-type obligation.

1.5. Relationship between Article XVII:1 subparagraph (a) & (b)

1.36. The relevant text of Article XVII:1(a) and (b) reads;

> 1. (a) "...act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders"
>
> (b) "The provisions of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations…".[43]

1.37. The Appellate Body in *Canada – Wheat Exports and Grain Imports* found that, "subparagraph (a) is dependent upon the content of subparagraph (b), and operates to clarify the scope of the requirement not to discriminate in subparagraph (a)".[44] Therefore, an examination on how subparagraph (b) tempers the obligation in (a) will be completed. This includes analysing the opening phrase "shall be understood to require".

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[43] GATT, *supra* note 1 at art. XVII:1(a-b).
[44] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 89.

1.5.1.1. ‘Shall be Understood to Require”

1.38. The Appellate Body in *Canada – Wheat Exports and Grain Imports* found that the text “shall be understood to require” in subparagraph (b) makes clear that the remainder of the subparagraph operates to clarify the scope of the obligation in subparagraph (a) to provide non-discriminatory treatment. The Appellate Body cross-references to subparagraph (c), the *ad* note to Article XVII:1, as well as the terms “such enterprises” and “such purchases or sales” in subparagraph (b) as evidence to support subparagraphs (a) and (b) are necessarily linked.[45] Therefore, any analysis of discriminatory treatment in Article XVII requires examining both subparagraphs (a) and (b).

1.5.1.2. Conclusion

1.39. The language of subparagraphs (a) and (b) shows that they are linked together forming a single obligation that is contained in subparagraph (a) and tempered by subparagraph (b). The following section provides a more detailed analysis on the interpretation of “in accordance with commercial considerations” before concluding on the scope of non-discrimination obligations in Article XVII.

1.6. Accordance with Commercial Consideration & Customary Business Practices

1.40. Identifying the relationship between the non-discrimination obligations and commercial considerations must be rooted in the type of discrimination alleged. This section will detail how the Appellate Body in *Canada – Wheat Exports and Grain Imports* has interpreted commercial considerations and customary business practice.

[45] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 89.

This section will explain the terms place in Article XVII and its relationship to the principles of non-discrimination.

1.41. The relevant text of subparagraph (b) states,

> "…make any such purchases or sales solely in accordance with commercial considerations,* including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other Members adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales."[46]

1.6.1.1. Acting "Solely in Accordance with Commercial Considerations"

1.42. The Appellate Body endorsed the interpretation of 'commercial considerations' as, "considerations pertaining to commerce and trade, or considerations which involve regarding purchases or sales 'as mere matters of business' ".[47] Per the Appellate Body, commercial considerations includes a range of considerations that are defined, "by the type of business involved (purchases and sales), and by the economic consideration that motivate actors engaged in business in the relevant markets".[48]

1.43. The determination of whether a state enterprise is acting "in accordance with commercial considerations" for the purpose of subparagraph 1(b) must be done on a case-by-case assessment that must be made in light of the type of discrimination alleged. The Appellate Body affirmed that, "in order to know whether the conditions in (b) are satisfied [acting in accordance with commercial considerations], a panel must know *what* constitutes the conduct alleged to be inconsistent with the principles of non-discriminatory treatment in the GATT".[49] Abstract discussions of what it means to be acting 'commercially' must be avoided. Only a specific factual analysis can determine

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[46] GATT, *supra* note 1 at art. XII:1(b).
[47] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 140.
[48] *Ibid*.
[49] *Ibid*.

the type of considerations that are commercial with respect to the purchases and sales in the relevant markets, and how those considerations influence the actions of market participants, including the state enterprise in question.

1.44. The first clause of subparagraph 1(b) includes a non-exhaustive list of the types of considerations that may be commercial depending on the alleged type of discrimination in the relevant market(s), "price, quality, availability, marketability, transportation and other considerations of purchase or sale".[50] Use of the term "including" and reference to "other conditions of purchase or sale" signify that the listed considerations are not exhaustive. This is consistent with the Appellate Body's requirement of a factual, case-by-case analysis of commercial considerations. The determination of what exactly 'commercial considerations' is can only be made in the light of the type of discrimination that is alleged.

1.45. Examining the Appellate Body's reasoning in *Canada – Wheat Exports and Grain Imports* helps to clarify the reasoning above because "in accordance with commercial considerations" requires factual analysis. For example, the United States claimed that the Canada Wheat Board's (CWB) statutory obligation to maximize revenues—not profit--created an incentive to discriminate between markets in a manner that was not "solely in accordance with commercial considerations". 'Commercial' enterprises, the US argued, always maximize profits. Both the Panel and Appellate Body concluded that the CWB's legal mandate was to ensure the highest returns possible for Canadian wheat producers and through its "reasonable pricing" standard.[51] Though this may have enabled export sales below those that other commercial actors

[50] GATT, *supra* note 1 at art. XVII:1(b).
[51] Panel Report *Canada – Wheat Exports and Grain imports*, *supra* note 18 at para 6.130.

could offer in those markets, the reasons for the sales were all inherently commercial given its role as a marketing agency for agricultural products: predictable, orderly sales that, collectively, maximize gains for producers.[52] The CWB was not statutorily obligated to maximize profits; the United States claim that it was not acting 'commercially' in an abstract sense did not mean that it was not acting "in accordance with commercial considerations".

1.6.1.2. Analysis of 'Adequate Opportunity to Compete'

1.46. The second clause of subparagraph 1(b) continues:

> "…and shall afford the enterprises of the other [members] adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales"[53]

1.47. Attention must be paid to "such purchases or sales" because two interpretations of this phrase have been advanced in jurisprudence. On one hand, it may refer to enterprises *competing for* the purchase or sale transaction with the state enterprise. On the other, it could mean enterprises that wish to *compete with* the state enterprise for the transaction.

1.6.2.1. Purchases & Sales Refers to Transaction with the State Enterprise

1.48. The Appellate Body in *Canada – Wheat Exports and Grain Imports* found that the second clause of subparagraph (b) requires that enterprises of other Members are afforded adequate opportunities to compete *for* the purchases and sales businesses of the state enterprise.[54]

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[52] AB Report *Canada – Wheat Exports and Grain Imports, supra* note 2 at fn 2.
[53] GATT, *supra* note 1 at art XVII:1(b).
[54] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 161.

1.49. The Appellate Body rejected the alternative interpretation put forward the United States that "purchases and sales" referred to those of enterprises that wished to compete *with* the state enterprise.[55]

1.50. The words "purchases or sales are found in both subparagraphs (a) and (b),

> 1. (a) "…such enterprise shall, in its purchases or sales involving either imports or exports…"
> (b) "…to compete for participation in such purchases or sales."[56]

1.51. Reference to "*such* purchases and sales" links the words 'purchases and sales' in subparagraphs (a) and (b), meaning that it refers to the purchase and sales *of* the state enterprise. The United States' is incorrect because it leads to a conclusion that 'purchases or sales' has distinct subjects – and therefore distinct meanings – within the subparagraphs of Article XVII. The Appellate Body has previously determined that where the same wording used there is a strong presumption that they mean the same thing.[57] This inconsistency in the United States' reasoning adds further weight to the conclusion reached by the Appellate Body.

1.6.1.3. 'Customary Business Practice' Operates to Prevent Discrimination

1.52. Neither Article XVII nor the other provisions of the GATT 1994 provide a definition of what "customary business practice" means. This leads to ambiguity in the second clause of subparagraph (b). The relevant text reads,

> "The provisions of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard for other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations…*and shall afford the enterprises of the other*

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[55] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 156.
[56] GATT, *supra* note 1 at art. XVII:1(a-b).
[57] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 268.

Members adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales."[58]

1.53. The Oxford Dictionary provides relevant meanings of the constituent terms in 'customary business practice'. "Customary" is defined as "according to the customs or usual practices associated with a particular society, place, or set of circumstances".[59] "Business" is defined as "commercial activity".[60] "Practice" is defined as "(1) the Actual application or use of an idea, belief, or method, as opposed to theories relating to it; (2) customary, habitual, or expected procedure or way of doing something". [61]A possible ordinary meaning of the phrase could be 'the expected procedure or practices of a business when engaging in commercial activity'.

1.54. The immediate context surrounding the phrase is the purchases or sales transactions *with* the state enterprise. The state enterprises' purchases or sales must be either non-discriminatory or "in accordance with commercial considerations". The conjoining term 'and' makes clear that this phrase is a continuation of the first part of subparagraph 1(b). It is not an independent clause. Thus, the "expected procedure or practices of a business when engaging in commercial activity" must be interpreted in a way that gives effect to the requirement to act "in accordance with commercial considerations".

1.6.1.4. Conclusion

1.55. The Appellate Body confirmed that commercial considerations must be assessed in light of the type of discrimination alleged. This requires that there be a factual determination of whether there are legitimate commercial reasons, based on the

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[58] GATT, *supra* note 1 at art. XVII:1(b). Emphasis added.
[59] *Supra* note 23, sub verbo "customary".
[60] *Ibid*, sub verbo "business".
[61] *Ibid*, sub verbo "practice".

enterprise's legal mandate, for the practices it engages in. There should be no abstract discussion of 'commerciality'. Additionally, the state enterprise has an obligation to allow an adequate opportunity to compete *for* its business. It is not obliged to ensure that enterprise of other Members can compete *with* it.

1.7. General Conclusion of Article XVII

1.56. It is concluded that the non-discrimination obligations in Article XVII include a MFN-type obligation and seems likely that, at least in some circumstances, a national treatment-type obligation. Article XVII does not directly incorporate the obligations of Article I and III, but rather incorporates the general principle of discrimination coming from them. This is because state enterprises are entitled to exploit the advantages they enjoy to their economic benefit.[62]

1.57. In this way, Article XVII:1(b) the "general principles of non-discrimination" identified in subparagraph (a) are tempered by "acting in accordance with commercial considerations" in subparagraph (b) to create one obligation as well as a *lex specialis* test. Therefore, the scope of non-discrimination obligations in Article XVII requires an analysis of both subparagraphs. A state enterprise can satisfy its obligations to act in a non-discriminatory manner by acting "in accordance with commercial considerations", as provided in subparagraph (b).

1.58. From the interpretation in the above section and the guidance of the Appellate Body in *Canada – Wheat Exports and Grain Imports* there is not a precise legal test that can be extracted. Instead, there is a *process* that can be followed for how a MSE can meet their obligations in Article XVII.

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[62] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 149.

2. SECTION TWO: What is the Scope of the Non–Discrimination Obligations in NAFTA Chapter 15?

2.1. Introduction

2.1. This section interprets key provisions of NAFTA Chapter 15 to clarify the scope of the non-discrimination obligations imposed on monopolies and state enterprises in the Agreement. By analysing the text of Chapter 15 and relying on broader context, where appropriate, through the rules of treaty interpretation of the VCLT, this section will accomplish three goals. *First,* it will provide interpretive guidance on the key provisions of Chapter 15 and clarify the scope of the non-discrimination obligations imposed on state enterprises and monopolies. *Second,* it will assess the relationship between commercial considerations and the non-discrimination obligations, establishing that acting "in accordance with commercial considerations" is not a separate obligation. Properly construed, the requirement to act "in accordance with commercial considerations" is one way that a monopoly establishes that it is respecting the principles of non-discriminatory treatment. *Third,* the section will conclude by comparing the scope of non-discrimination obligations in Chapter 15 to those in GATT Article XVII.

2.2. Defining State Enterprises & Monopolies: Types of Enterprises That Are Captured by Chapter 15

2.2. The text of Chapter 15 provides explicit definitions for three classes of enterprises: state enterprises, monopolies, and government monopolies. Briefly clarifying the scope of the three defined forms of enterprises will assist in the subsequent application of the non-discrimination obligations.

2.2.1.1. Definition of State Enterprise in Article 1505

2.3. Article 1505 defines "state enterprise" as "an enterprise owned, or controlled through ownership interests, by a party".[63] The Annex 1505 also provides a country-specific definition of state enterprise. With respect to Canada, a state enterprise is defined as:

> "a Crown corporation within the meaning of the *Financial Administration Act* (Canada), a Crown corporation within the meaning of any comparable provincial law or equivalent entity that is incorporated under other applicable provincial law".[64]

2.4. The definition in Article 1505 uses the term "ownership interests" as a condition for owning or controlling a state enterprise. Accepting the common meaning of ownership as rights or proprietorship, the level of control a Party has over a state enterprise becomes a determinative factor. It follows that an entity would be a state enterprise within the meaning of Article 1505 if a Party has a *controlling interest* in the enterprise under relevant domestic law.

2.2.1.2. Definition of Government Monopoly in Article 1505

2.5. Article 1505 of NAFTA defines the term "government monopoly" as:

> "monopoly that is owned, or controlled through ownership interests, by the federal government of a Party or by another such monopoly".[65]

2.6. As with the definition of state enterprise, the term "ownership interests" is raised again. However, "ownership interests" in this definition is specific to either the federal government of a Party or "by another such monopoly."

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[63] *North American Free Trade Agreement, Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, CAN TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994) at arts 1505 [NAFTA].
[64] *Ibid* at Annex 1505
[65] *Ibid at* art 1505.

2.2.1.3. Definition of Monopoly in Article 1505

2.7. The term "monopoly" is defined in Article 1505 of NAFTA as;

> "means an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant."[66]

2.2.3.1. "Consortium or government agency"

2.8. "Government agencies" are creatures of statute, suggesting that statutory bodies like agencies, boards and commissions can be both monopolies and state enterprises, depending on the authority granted to them.

2.9. A monopoly can also be a "consortium", which is commonly defined as "an association, typically of several companies"[67] as well as "a group of people, companies, etc., that agree to work together".[68] By including consortia, it appears that the drafters of Chapter 15, sought to apply discipline on markets with oligopolistic market structures, even when there is not a *sole* purchaser or supplier in the form of a monopoly. This interpretation is consistent with the object and purpose of Chapter 15, which is to prevent circumvention of parties' non-discrimination obligations through a modified market structure, even if it is not formally monopolistic.

2.2.3.2. Interpretation of "a designated monopoly operating in the relevant market in the territory of the party"

2.10. The definition contains a necessary condition that must be satisfied for an entity to be considered a monopoly, this includes,

> "an entity…in any relevant market in the territory of a Party <u>is designated</u> as the sole provider or purchaser of a good or service"

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[66] *Ibid* at art. 1505.
[67] *Supra* note 23, sub verbo "consortium".
[68] *Supra* note 23, sub verbo "consortium".

2.11. The condition contains two key phrases. First, the reference to a 'relevant market' in the territory of a Party can be understood as the *geographic* scope of the monopoly privileges granted for a particular *product*, as per the definition of "market" in Article 1505.

2.12. Second, the term designate is defined in Article 1505 of NAFTA as:

> "designate means to "establish, designate or authorize, or to expand the scope of a monopoly to cover an additional good or service, after the date of entry into force of this Agreement".[69]

2.13. Applying the key terms from the definition of 'designate' to the definition of monopoly, it can be inferred that designate describes a title or permission given to the monopoly – "as the sole provider or purchaser of a good or service". The definition confers power to the Party to establish, authorize or expand the "scope of a monopoly". This requires probing the benefit or permission a Party provides to a monopoly.

2.2.1.4. Conclusion on Definitions in Chapter 15

2.14. Chapter 15 explicitly refers to three types of enterprises: *state enterprises*, *government monopolies* and *monopolies*, marking the first departure from GATT Article XVII which only disciplines state enterprises. This is because the remainder of Chapter 15 applies separate disciplines on an entity if they fall into one of these classifications. A *state enterprise* flows directly from a controlling ownership interest by a NAFTA Party. In Canada, this includes a controlling interest by a provincial government. A *government monopoly* is an entity with monopoly privileges that is owned directly by a federal government that is a Party to the agreement. A *monopoly*

[69] *Ibid at* art 1505.

can be any entity if it has been designated by a party to have monopolist privileges in a relevant geographic and product market in its territory, paralleling in some respect the reference to "exclusive and special privileges" in GATT Article XVII.

2.15. The next step is to assess the non-discrimination obligations that apply to the various classes of enterprises above.

2.3. Scope of Non-Discriminatory Treatment Obligation: How Non-Discrimination is Interpreted in NAFTA

2.16. Before examining the different obligations set out in Articles 1502 and 1503, this section will analyse the definition of non-discriminatory treatment and the general principles of non-discriminatory treatment in the Agreement. This examination is necessary because different chapters contain distinct definitions of national treatment and MFN. NAFTA Parties have also affirmed their right and obligations to the GATT 1994, including Article XVII. This will influence the scope of non-discriminatory treatment obligations for state enterprises and monopolies. As explained in greater detail in this section, determining which definition of national treatment or MFN treatment will be used depends on the type of alleged discriminatory conduct taken by the state enterprise, government monopoly, or monopoly.

2.4. Definition of "Non-Discriminatory Treatment" in NAFTA

2.17. Article 1505 provides a definition of "non-discriminatory treatment":

> "non-discriminatory treatment means the better of national treatment and most favoured nation treatment, as set out in the relevant provisions of this Agreement."[70]

The use of the word "Agreement" in the definition refers to the agreement as a whole, not exclusively Chapter 15.

[70] *Ibid*.

2.18. NAFTA Article 103(1), "Relations to Other Agreements" specifies that Parties to NAFTA affirm their existing rights and obligations with respect to the GATT.[71] However, Article 103(2) specifies:

> "In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement."[72]

2.19. The Parties' must observe their obligations the GATT 1994 unless conflict arises between NAFTA and the GATT 1994. In such an event, the NAFTA interpretations will prevail to the extent of the inconsistency. This is important as it influences which interpretation of national treatment and MFN will be used, and in turn shape the scope of the non-discrimination obligations on entities.

2.4.1.1. Interpreting National Treatment in NAFTA

2.20. Examining NAFTA in its entirety reveals that many chapters contain specific national treatment definitions. This includes, chapter 3 "National Treatment and Market Access for Goods", chapter 10 "Government Procurement", chapter 11 "Investment", chapter 12 "Cross-Border Trade in Services", chapter 14 "Financial Services", and chapter 17 "Intellectual Property". National treatment is not defined in Chapter 15.

2.21. Under the doctrine of *lex specialis*,[73] the relevant definition of national treatment will depend on the specific and corresponding type of discrimination alleged.

2.4.1.2. Interpreting MFN in NAFTA

2.22. Various chapters also contain specific MFN definitions, including Chapter 3 "National Treatment and Market Access for Goods", Chapter 11 "Investment", Chapter

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[71] *Ibid at* art 103(1).
[72] *Ibid at* art 103(2).
[73] "Principle. No. I.3.2 – Lex-specialis-Principle" *Trans-Lex*, online at < https://www.trans-lex.org/910000/_/lex-specialis-principle/>.

12 “Cross-Border Trade in Services”, and Chapter 14 “Financial Services”. There is no definition of most-favoured-nation provided in Chapter 15.

2.23. As with national treatment, the doctrine of *lex specialis* applies to these definitions of MFN by providing a chapter-specific definition of MFN depending on the type of discrimination alleged.

2.5. Disciplines Imposed Upon State Enterprises: Article 1503

2.24. Articles 1502 and 1503 outline the obligations for monopolies and state enterprises, respectively.[74] It is necessary to properly classify the enterprise to determine which obligations apply. Article 1502 is titled “Monopolies and State Enterprises,” but the subparagraphs to this section only reference monopolies.[75] Conversely, Article 1503 is titled “State Enterprises,” and the subparagraphs solely refer to state enterprises.[76] The following section will analyse the scope of non-discriminatory treatment imposed on state enterprises by Article 1503.

2.5.1.1. Textual Analysis of Article 1503(2) & 1503(3)

2.25. Article 1503(2) only establishes obligations for state enterprises in relation to Chapters 11 (Investment) and 14 (Financial Services).[77] The obligation is further restricted to only apply when the state enterprise is exercising, “regulatory, administrative or other governmental authority that the Party has delegated to it”.[78] A

[74] *Supra* note 60 at c 15.
[75] *Ibid at* art 1502.
[76] *Ibid at* art 1503.
[77] *Ibid*. Note that this is less expansive than the obligations placed on monopolies in 1502, which receives subsequent treatment in this memorandum.
[78] *Ibid*.

non-exhaustive list of authorities is included, "such as the power to expropriate, grant licenses, approve commercial transactions or import quotas, fees or other charges".[79]

2.26. Article 1503(3) provides that:

> "Each Party shall ensure that any state enterprise that it maintains or establishes accords non-discriminatory treatment in the sale of its goods or services to investments in the Party's territory of investors of another Party".[80]

2.27. Given the circumstances in which a state enterprise must not discriminate–in the sale of its goods or services of investments of another party–parties are most likely to rely on the MFN or national treatment definition in Chapter 11. This is because the alleged discriminatory conduct would relate to investments and the specific definitions of MFN and national treatment in that Chapter will apply.

2.5.1.2. No Commercial Considerations in Article 1503

2.28. There are no commercial consideration exceptions outlined in Article 1503. Although Article 1503(2) provides a non-exhaustive list of actions that are commercial in nature, these are not exceptions that permit state enterprises to discriminate. The primary commercial consideration exception is found in the Article 1502(3), as explained in the subsequent section on monopolies.

2.5.1.3. Conclusion on NAFTA State Enterprises

2.29. Article 1503(2) and (3) establish obligations for state enterprises, specifically, when it acts inconsistently with specific provisions of Chapter 11 and Chapter 14 and only in relation to the sale of goods or services to investors of another Party. Although this requires referring to two other Chapters, the scope of the non-discrimination

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[79] *Ibid*.
[80] *Ibid at* art 1503(3).

obligations placed on state enterprises in Chapter 15 is narrower than those in GATT Article XVII in one respect: it only applies in relation to the sale of good or services to investors. Moreover, there is no explicit commercial consideration exception as provided in Article XVII of the GATT 1994.

2.6. Disciplines Imposed upon Monopolies under Article 1502

2.30. The following sections will assess the disciplines imposed on monopolies in Article 1502. It begins by setting out the relevant text for the non-discrimination obligations imposed on monopolies. Analyzing the scope of the non-discrimination obligations imposed on monopolies requires assessing the role that commercial considerations have in the process. The following sections will ultimately show that acting "in accordance with commercial considerations" is the *primary way that a monopoly can prove that it is not discriminating in its purchase and sale of the monopoly good*. In this respect, it is an example of respecting the principles of non-discriminatory behaviour by a monopoly, not a separate obligation. The section will conclude by assessing the exceptions to acting "in accordance with commercial considerations", namely, when the monopoly is acting pursuant to the terms of its designation in a non-discriminatory manner. The first step will be to identify the types of entities that are monopolies for the purposes of Article 1502.

2.6.1.1. Monopolies Exercising Governmental Authority

2.31. Article 1502(3)(a) imposes an obligation on monopolies where they are exercising delegated governmental authority.[81] This obligation applies to both privately owned or governmental monopolies as Article 1502(3)(a) states,

[81] *Ibid at* art 1502(3)(a).

> "Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately owned monopoly that it designates and any government monopoly that it maintains or designates..."[82]

2.32. In contrast to Article 1503(2) which imposes a similar obligation on state enterprises only in relations to Chapters 11 and 14, Article 1502(3)(a) is applied to the "Party's obligation under this Agreement".[83]

2.33. Article 1502(3)(a) states:

> "Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately owned monopoly that it designates and any government monopoly that it maintains or designates: (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges."[84]

The reference to any "privately owned monopoly… and any government monopoly," means that this subparagraph covers all monopolies within the scope of Chapter 15.

2.7. Scope of Non-Discriminatory Treatment in Article 1502

2.34. Article 1502(3)(b-d) contain the principal non-discrimination obligations for privately-owned and government monopolies. Subparagraph (c) contains the principal non-discrimination obligation, which operates along with subparagraph (d) to provide an exception to the obligation that the monopoly acts solely "in accordance with commercial considerations".[85] The following sections will first expand on the requirement to act "in accordance with commercial considerations" before discussing the exceptions contained in (c) and (d). This is necessary to address an ambiguity that arises: will a monopoly's commercial considerations will be assessed based on the

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[82] *Ibid*.
[83] *Ibid at* art 1502(3)(a).
[84] *Ibid*.
[85] *Ibid at* art 1502(3)(b)-(d).

normative market in which it operates or in an assumed competitive or mixed market? It will then conclude on the scope of the non-discrimination obligations and its relationship to commercial considerations.

2.7.1.1. Article 1502(3)(b) – Commercial Considerations

2.35. Article 1502(3)(b) states:

> "(b) except to comply with any terms of its designation that are not inconsistent with subparagraph (c) or (d), acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale;"[86]

2.36. Subparagraph (b) includes the same non-exhaustive list of considerations as GATT Article XVII.[87] The relevant definition of "in accordance with commercial considerations" must be interpreted before considering the relationship between commercial considerations and the exception carved out for the non-discrimination obligations in subparagraphs (c) and (d).

2.7.1.2. Defining Commercial Considerations

2.37. Article 1505 defines "in accordance with commercial considerations" as:

> "consistent with normal business practices of privately held enterprises in the relevant business or industry". [88]

2.38. The constituent elements of this definition require a VCLT interpretation because it is preliminary step in reaching a conclusion on the relationship between the non-discrimination obligations and commercial considerations in NAFTA Chapter 15.

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[86] *Ibid* at art 1502(3)(b).
[87] GATT, *supra* note 1 at art XVII:1(b): "price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale".
[88] *Supra* note 60 at art 1505.

2.7.1.3. 'Normal' Business Practices Are Those That Would be Expected in Relation to The Considerations Listed in the Text

2.39. "Business" is defined as "commercial activity"[89] and "practice" is defined as "(1)the actual application or use of an idea, belief, or method, as opposed to theories relating to it, (2) customary, habitual, or expected procedure or way of doing something".[90] A reformulated ordinary meaning of "normal business practices" is "the procedure that is expected in the ordinary course of trade".

2.40. The core text surrounding the phrase "in accordance with commercial considerations" is the best place to seek context pursuant to Article 31(2) of the VCLT. Recall the non-exhaustive list of considerations in 1502(3)(b): "price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale". Collectively, the relationship in the text appears to suggest that the enumerated considerations are all "terms and conditions of purchase and sale". The 'business practices' in question must therefore be those that would normally be applied to the terms and conditions of purchase and sale.

2.7.1.4. The Comparator Group for the Normal Business Practice is the Relevant Industry, not Market

2.41. The normal business practices discussed above are those of "privately held enterprises in the relevant business or industry" [91] and this phrase can be examined for context pursuant to Article 31(2) of the VCLT. The drafters chose the word 'industry'

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[89] *Supra* note 23, sub verbo "business".
[90] *Ibid*, sub verbo "practice".
[91] *Supra* note 60 at art 1505.

over ‘market’, possibly reflecting the fact that the geographic and commercial ‘market’ in question cannot have private enterprises because it is monopolized.

2.42. Chapter 15 defines *market* but does not provide a definition of *industry*. NAFTA Chapter 8 provides relevant context under 31(2) of the VCLT because it defines “domestic industry” as “the producers as a whole of the like or directly competitive good operating in the territory of a party.”[92] Building on the reformulated ordinary meaning of normal business practices above, the definition of commercial considerations calls for an analysis of the procedure that is expected in the ordinary course of trade by private traders of the like or directly competitive goods.

2.43. Though it is distant from the core context in NAFTA Chapter 15 itself, GATS Article IX may shed some light on the meaning “Business Practices” [93] within the definition of “in accordance with commercial considerations”. This is because Article IX:1 explicitly refers back to GATS Article VIII, which includes, *inter alia*, disciplines on monopolies, including almost identical disciplines and phrasing to those in Article 1502.[94] GATS Article IX:1 states that members “recognize that certain business practices…may restrain competition and thereby restrict trade in services”.[95] That article requires that Members consult with the aim of eliminating these practices. Viewed in light of this context, the constituent terms in the definition of “in accordance with commercial considerations” prevents monopolies from restraining competition and trade by requiring that they conduct themselves in a manner similar to those of private traders of the like or directly competitive product in the ordinary course of trade.

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[92] *Ibid* at art 805.
[93] *General Agreement on Trade in Services* (GATS), 1869 UNTS 183 (1994), at art IX.
[94] For example, GATS Article XVIII:2 uses similar phrasing to that found in 1502(3)(d) to prohibit monopoly cross-subsidization.
[95] *Ibid*, at art 1.

2.7.1.5. "Relevant Market" in 1502(3)(b) does not modify the industry-based analysis of commercial considerations

2.44. Though the text of article 1502(3)(b) provides relevant context for interpreting the definition of "in accordance with commercial considerations", the reference to "relevant market" does not change the fact that commercial considerations appears to require and industry-based assessment. There are two reasons for this. First, the drafters deliberately chose to include "industry" in the definition, even though "market" is a defined term in Chapter 15. Second, "relevant market" immediately follows the phrase "monopoly good or service", which necessarily must have a limited geographic and commercial scope. As a result, relevant market appears to serve as a limitation on the scope of the monopoly good or service, not modify the definition of commercial considerations.

2.8. Key Relationship: Monopolies, Non-Discrimination, and Commercial Considerations

2.45. Article 1502(3)(b) contains two exceptions that govern the relationship between commercial considerations and the obligation to provide non-discriminatory treatment. When a monopoly listed in the chapeau to 1502(3) is (1) complying with any terms of its designation and (2) they are *not inconsistent* with subparagraphs (c) and (d), the monopoly is not required to act "in accordance with commercial considerations". The next headings will expand on this by assessing subparagraphs 1502(3)(c) and (d), which are specifically noted in the text of subparagraph (b). These subparagraphs contain the essence of the relationship between non-discriminatory treatment and commercial considerations and will be followed swiftly by a conclusion to the questions listed in the introductory roadmap.

2.8.1.1. Providing Non-Discriminatory as Required in 1502(3)(c)

2.46. Recall that non-discriminatory treatment in NAFTA Chapter 15 is the better of MFN and national treatment. This requires a chapter-specific analysis based on the type of discrimination alleged in accordance with the doctrine of *lex specialis*. For example, if a NAFTA party claimed that a monopoly in the cross-border services industry was providing its own nationals with more favourable treatment than providers from another party, we would look to the corresponding definition of national treatment in Chapter 12 "Cross-Border Trade in Services".

2.47. This non-discrimination obligation contained in 1502(3)(c) only applies to the monopoly's "purchase or sale of the monopoly good or service in the relevant market". As with GATT Article XVII, this obligation only applies to purchases and sales. For there to be actual discrimination in the scope of 1503(c), it must occur in the monopolized geographic market for that good or service.[96]

2.48. A monopoly will never be found to be in violation of Article 1502 if it can demonstrate that it acted "in accordance with commercial considerations". Even if it cannot, a party can demonstrate that the monopoly was complying with terms of its designation and was not in violation of its non-discrimination obligations with respect to the good or service in question, as set out in the relevant chapters of the agreement.

2.8.1.2. Avoiding Anti-Competitive Business Conduct as Required in Article 1502(3)(d)

Article 1502(3)(d) states,

[96] Recall that 'market' is a defined term under NAFTA Article 1505: "the geographic and commercial market for a good or service".

> "(d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, its subsidiary or other enterprise with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, cross subsidization or predatory conduct".[97]

2.8.1.3. Discriminatory Provision of a Monopoly Good or Service

2.49. Article 1502(3)(d) proscribes anti-competitive conduct by a monopoly in a non-monopolized market if that conduct would "adversely affect an investment of an investor of another party".[98] Prohibited conduct includes "discriminatory provision of the monopoly good or service, cross-subsidization, or predatory conduct". "Discriminatory provision" is defined as treating:

a) a parent, a subsidiary or other enterprise with common ownership more favorably than an unaffiliated enterprise, or
b) one class of enterprises more favorably than another, in like circumstances.[99]

2.50. Just as monopolies are prevented from harming traders of other parties by other parts of Chapter 15, (3)(d) is included to prevent parties from circumventing their obligation to investments and investors of other parties through the discriminatory provision of a monopoly good or service.

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[97] *Supra* note 60 at 1502(3)(d).
[98] *Ibid* at 1502(3)(d).
[99] *Ibid* at art 1505.

2.8.1.4. The Anti-Competitive Practices in Non-Monopolized Markets Cannot "Adversely Affect" an Investment of Another Party's Investors

2.51. Oxford Dictionary defines the phrase "adversely affect" as "preventing success or development; harmful; unfavourable" and "have an effect on; make a difference to".[100] Analysed within the context of the immediately surrounding language in 1502(3)(d), the prohibited discriminatory provision must have "unfavourable, or harmful effects on an investment from another party's investor.

2.52. As a result, a NAFTA Party will violate 1502(3)(d) when a monopoly it maintains or designates adversely affects an investor of another party through the discriminatory provision of a monopolized good or service in a non-monopolized market.

2.9. Comparing the Scope of Non-Discrimination Obligations in NAFTA Chapter 15 and GATT Article XVII

2.53. The third legal question requires a comparison between the non-discrimination obligations on MSE's in NAFTA Chapter 15 and Article XVII of the GATT 1994.

2.54. The first notable difference is that NAFTA Chapter 15 distinguishes between monopolies and state enterprises and disciplines each based on the economic power that they wield. This stands in contrast to the provisions of GATT Article XVII, which does not distinguish between different types of state enterprises in the actual text of the agreement.

2.55. GATT Article XVII does not define the "general principles of non-discrimination" thereby leaving it to the Appellate Body and Panels to interpret the

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[100] *Supra* note 23, sub verbo "adverse" and "affect".

phrase. As discussed in Section One of this memorandum, the general principals evoke a national treatment and most-favoured-nation 'type' obligation, as the alleged discrimination must be rooted in a factual analysis based on the specific entity in question. NAFTA Chapter 15 addresses this textual ambiguity in GATT Article XVII by clearly defining non-discriminatory treatment as the "better of national treatment and most-favoured-nation treatment as set out in this agreement", referring to the chapter-specific definitions of those non-discrimination obligations throughout the rest of the agreement.

2.56. The separate disciplines applied to each enterprise in Chapter 15 marks an additional departure from the non-discrimination obligations in GATT Article XVII. The non-discrimination obligations on state enterprises in Article 1503 only apply to the sale of goods or services to investors of another party and these enterprises cannot satisfy these obligations by proving that it is acting "in accordance with commercial considerations".

2.57. Article 1502 subjects Monopolies to similar disciplines to those applied to all state enterprises in GATT Article XVII. As with GATT Article XVII, the non-discrimination obligation in 1502(3)(c) applies to both purchases and sales of the monopolized good or service. Likewise, 1502(3)(b) and (c) establish a relationship where acting "in accordance with commercial considerations" satisfies the obligation not to discriminate. In this respect, the text of NAFTA Chapter 15 appears to make explicit the process for analysis outlined in Section One of this memorandum.

2.10. Conclusion of NAFTA Chapter 15

2.58. Departing from the single term 'state enterprise' in the GATT Article XVII, Chapter 15 refers to three types of enterprises: *state enterprises*, *government monopolies* and *monopolies*. The remaining text of Chapter 15 applies distinct non-

discrimination obligations depending on whether the MSE in question is properly classified a state enterprise or one of the types of monopoly. In the case of a state enterprise, this means the better of national treatment or MFN treatment as set out in Chapters 11 (Investments) and 14 (Financial Services).

2.59. A monopoly, however, is required to act in a manner that is consistent with the party's obligations in the entire agreement when it is exercising governmental authority and must provide the better of national and MFN treatment in its purchase and sale of the monopolized good or service. This is a *single obligation* that can be established in two ways. *First*, it can establish that it is not discriminating by showing that it is acting solely "in accordance with commercial considerations". Through interpretation of the definition of commercial considerations, this appears to require an industry-focused analysis of the normal terms and conditions of purchase and sale. This *leans* toward an interpretation that the monopoly will not be assessed on the normative *market* that it monopolizes, but rather, the normal behaviour of firms in the particular *industry* in which it operates. What remains unclear is he extent of the geographic scope of that industry; the definition of "in accordance with commercial considerations" specifically employs the term *industry* instead of *market*. For the purpose of effective treaty interpretation, however, the relevant industry must have some limit on geographic scope. *Second*, a monopoly may depart from its commercial considerations, but only if it is complying with its terms of designation and continues to provide the better of national and MFN treatment and does not engage in anti-competitive conduct.

2.60. In sum, a monopoly satisfies its non-discrimination obligations by acting "in accordance with commercial considerations" or acting in accordance with its terms of designation, so long as those terms are not discriminatory. To reiterate, a monopoly will

never be found to be in violation of Article 1502 if it can demonstrate that it acted “in accordance with commercial considerations”.

3. SECTION THREE: What is the Scope of the Non-Discrimination Obligations in CETA Chapter 18?

3.1. Introduction

3.1. This section interprets Chapter 18 of the CETA in order to clarify the scope of non-discrimination obligations imposed on MSEs in the Agreement. Through analysing the text of Chapter 18 and relying on the rules of treaty interpretation of the VCLT, this section will answer four questions. *First*, it will provide an interpretative guidance as to which entities are captured by the term 'covered entity' in Article 18.1 of the CETA. *Second*, it will clarify the scope of non-discrimination obligations imposed on 'covered entities' and explain the different components that operate to clarify those obligations. *Third*, it will explain the relationship is between commercial considerations and non-discrimination, establishing there is a single-type obligation with carved out exceptions for specific 'covered entities'. *Fourth*, to conclude, the final section will compare the scope of non-discrimination obligations in Chapter 18 to NAFTA Chapter 15 and GATT Article XVII.

3.2. The Incorporation of the other Agreements into the CETA

3.2. In order to clarify the scope of the non-discrimination obligations, the first step is to examine the legal effect of the incorporated agreements. Article 18.2(1) states:

> "The Parties confirm their rights and obligations under Articles XVII:1 through XVII:3 of the GATT 1994, the Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994, and Articles VIII:1 and VIII:2 of the GATS, all of which are hereby incorporated into and made a part of this Agreement".[101]

[101] *Comprehensive Economic and Trade Agreement*, Canada-European Union, online <http://eur-lex.europa.eu/ legal-content/EN/TXT/?qid=1467909007204&uri=COM:2016:443:FIN#document2> at art 18.(2)(1).

3.3. The Parties have confirmed their rights, obligations, and incorporation of Article XVII of the GATT 1994, the Understanding, Article VIII of the GATS. Incorporation results in the specified provisions to have a legal effect on Chapter 18 and affirms that they are a component to the entire Agreement.

3.4. However, neither Chapter 18 nor the Agreement as a whole specify what should be done in the event of a conflict between the text of CETA and the incorporated agreements. In the absence of such a provision the governing principle from the VCLT Article 30 applies, *Application of successive treaties relating to the same subject matter*, and affirms that the later treaty, the CETA, governs the earlier treaty but "only to the extent of the relations between the parties to the later treaty".[102] As Article 30(3) of the VCLT outlines, if the "subsequent treaty is silent on the effect of the incompatibility between its provisions and those of the prior treaty, the subsequent treaty, as between the parties to it, impliedly abrogates any incompatible terms of the prior treaty".[103] This interpretative understanding is reaffirmed in Article 1.8 of the CETA "Extent of Obligations" which specifies "each party is responsible for the observance of all the provisions of this Agreement".[104] Therefore, in the event of incompatibility between the two agreements, the provisions in the CETA would prevail.

3.3. Defining 'Covered Entity' in Article 18.1

3.5. Article 18.1 uses the term 'covered entity' to define the four types of enterprises captured by its Chapter 18 obligations.[105] It is important to distinguish between the types enterprises included under the term 'covered entity' as the non-discrimination

[102] Currie John, *Public International Law* (Toronto: Irwin Law Inc, 2008) at 110.
[103] *Ibid* quoting Article 30(3) of the *Vienna Convention Law of Treaties*.
[104] *Supra* note 104 at art 1.8(1)
[105] *Ibid* at art 18.1.

obligations alter depending upon the type of entity identified. As such, the subsequent section delineates the different entities captured by the term 'covered entities'.

3.3.1.1. Monopoly

3.6. The word "monopoly" is the first entity listed under Article 18.1(a).[106] There is no definition of the term 'monopoly' within Chapter 18 or the Agreement. The ordinary meaning of the term, 'monopoly' is, "the exclusive possession or control of the supply of or trade in a commodity or service".[107] Unlike NAFTA Chapter 15, which provides the qualifier of 'government monopoly' or 'privately-owned monopoly' to distinguish between two types, the CETA provides for no such distinctions.[108] As a result, the term 'monopoly' is interpreted to be consistent with its ordinary meaning which intends to capture both private and public monopolies.

3.3.1.2. Party Created and Sustained Oligopolies

3.7. Article 18.1(b) states that,

> "a supplier of a good or service, if it is one of small number of goods or services suppliers authorised or established by a Party, formally or in effect, and the Party substantially prevents competition among those suppliers in its territory".[109]

3.4.2.1. Oligopolies are Captured by Chapter 18

3.8. The dictionary definition of "oligopoly" is, "a state of limited competition, in which a market is shared by a small number of producers or sellers".[110] This definition is nearly identical to wording used in Article 18.1(b), "one of small number of goods or service suppliers". This phrase is not referenced in any other provision in the CETA.

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[106] *Ibid* at art18.1(a).
[107] *Supra* note 60, sub verbo "monopoly".
[108] *Supra* note 105 at art 18.1(a).
[109] *Ibid* at art 18.1(b).
[110] *Supra* note 60, sub verbo, "oligopoly".

Looking to the incorporated agreements, GATS Article VIII, contains nearly identical wording. The relevant text from GATS Article VIII states;

> "The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory".[111]

3.9. The use of similar language reinforces an interpretation that the words under Article 18.1(b) likely are intended to capture an oligopoly or oligopoly-type entity.

3.4.2.2. Only Where the Party Prevents Competition

3.10. The final phrase of Article 18.1(b) includes the words, "…and the Party substantially prevents competition among those suppliers in its territory".[112] The inclusion of these words means that the obligations only apply to the oligopoly-type entity where the Party *itself* is restricting competition or may be manipulating natural market forces. If the oligopoly-type situation arises without a Party substantially preventing competition it would not be captured by the definition of Article 18.1(b).

3.3.1.3. Moving Beyond Entities: Party Action Affecting Markets

3.11. The text of Article 18.1(c) states,

> "any entity to which a Party has granted, formally or in effect, special rights or privileges to supply a good or service, substantially affecting the ability of any other enterprise to supply the same good or service in the same geographical area under substantially equivalent conditions, and allowing the entity to escape, in whole or in part, competitive pressures or market constraints".[113]

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[111] *Supra* note 107 at art 8(5).
[112] *Ibid* at art 18.1(b).
[113] *Ibid* at art 18.1(c).

3.12. The opening phrase references, "a Party granting, formally or in effect, special rights or privileges to supply a good or service". This language is nearly identical to the language found in GATT Article XVII:1(a), the purpose of which is to capture entities that are not state enterprises, but have been afforded special rights or privileges that can result in market distortion.

3.13. The second part of 18.1(c) is broken into two separate situations that must occur for the entity to be captured. The first relates to the ability for other enterprises to compete and the second is triggered when the entity is allowed to avoid natural competitive pressures or market restraints. 18.1(c) is not referring to a specific type of entity, but rather the action taken by a Party to provide special rights or privileges to an entity. This could include for example, government regulations. Therefore, if the action of providing special rights or privileges has the impact of producing both outcomes, then the action will be captured by the wording of 18.1(c).

3.3.1.4. State Enterprises

3.14. Article 1.1 of the CETA defines 'state enterprise' as "an enterprise that is owned or controlled by a Party".[114] These terms denote the level of control a Party has over an enterprise. For a Party to have ownership interest over an enterprise, this would likely call for greater than fifty percent ownership. However, 'control' may also involve ownership interests that do not amount fifty plus one, but occur because a Party has indirect control.

3.3.1.5. Conclusion of 'Covered Entity'

3.15. In contrast to GATT Article XVII or NAFTA Chapter 15, the CETA uses one term to encompass the varying classifications of MSEs. The characterizations of entities

[114] *Ibid* at art 1.1.

have broadened, as it includes state enterprises, oligopolies, monopoly subsidiaries, and government actions. This expansion in definitions results in an increased breadth of application on the Parties to the CETA, as more categories of enterprises will be captured by the obligations provided in Chapter 18.

3.4. Scope of Non-Discriminatory Obligations: Defining "Non-Discriminatory Treatment" in CETA

3.16. In order to answer the legal question on the scope of the non-discrimination obligations imposed on 'covered entities', an interpretation of the term 'non-discriminatory treatment' must be completed. Non-discriminatory treatment is defined in Article 18.1 as "the better of national treatment and MFN treatment as set out in this Agreement".[115] Chapter 18 does not provide a definition for national treatment or MFN. However, other chapters in the CETA provide varying definitions. Therefore, it is necessary to explain under which circumstances a Party can rely on a specific definition of national treatment or MFN, as this shapes the non-discrimination obligations.

3.4.1.1. MFN in CETA

3.17. The definition of non-discriminatory treatment references MFN in relation to the "Agreement". The use of the word "Agreement" is interpreted to mean CETA in its entirety. Article 1.5 of the CETA affirms the Parties' rights and obligations to the WTO Agreements, including the GATT 1994.[116] Additionally, Article 1.6 stipulates that,

> "This Agreement refers to or incorporates by reference other agreements or legal instruments in whole or in part, those references include: 1. related annexes, protocols, footnotes, interpretative notes, and explanatory notes…".[117]

[115] *Supra* note 107 at art 18.1.
[116] *Ibid* at art 1.5.
[117] *Ibid* at art 1.6.

3.18. The incorporation the WTO Agreements including the GATT 1994, subsequent agreements, and interpretative notes provides contextual support that the original text, under Article I, is included. MFN is a foundational pillar of the GATT 1994 and other trade agreements, meaning the original text would also likely be included in the CETA.

3.19. In addition to the incorporation, different chapters in the CETA provide a nuanced definition of MFN, including Chapter 8 "Investment", Chapter 9 "Cross-Border Trade in Services", and Chapter 13 "Financial Services". Following the doctrine of *lex specialis*, which definition a Party relies on will depend in part on the type of alleged discrimination. Should a violation of MFN occur, as it relates to investments, Parties can rely on the Chapter 8 definition. If a MFN violation occurs and the alleged conduct does not fall into one of the definitions within the CETA, Parties can refer to the original language and interpretation of MFN as defined in Article I of the GATT.

3.4.1.2. National Treatment in CETA

3.20. Unlike MFN, Article 2.3(1) of the CETA incorporates the original text of national treatment as provided in GATT 1994. Article 2.3(1) outlines that:

> "Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of the GATT 1994. To this end Article III of the GATT 1994 has been incorporated into and made a part of this Agreement".[118]

3.21. Article 2.3 confirms that Article III becomes a component to the CETA and has binding legal effect. However, such as seen with the MFN definition, different chapters in the CETA, including Chapter 8 "Investment", Chapter 9 "Cross-Border Trade in Services", and Chapter 13 "Financial Services", provide varying definitions of nation treatment. Applying the doctrine of *lex specialis*, which definition of nation treatment a Party will rely on depends on the type of discrimination being alleged. Where the

[118] *Ibid* at art 2.3.

alleged discrimination does not fall under one of the chapters that contains a more nuanced definition, the Party can rely on the original text of Article III in GATT 1994.

3.4.1.3. Conclusion on Definition of MFN and National Treatment

3.22. MFN and national-treatment obligations are both included in CETA and apply to the "covered entities" listed in Article 18.1. National treatment has expressly been incorporated into CETA by virtue of Article 2.3, while MFN has been incorporated by Articles 1.5 and 1.6. The incorporation includes the original language of Articles I and III of the GATT 1994, subsequent agreements and interpretations. However, due to the varying definitions and the doctrine of *lex specialis*, which definition a Party uses depends on the type of alleged discrimination.

3.5. Disciplines Imposed Upon 'Covered Entities': Article 18.4

3.23. This principal article on non-discriminatory treatment, Article 18.4, provides that:

> "each Party shall ensure that in its territory a covered entity accords non-discriminatory treatment to a covered investment, to a good of the other party, or to a service supplier of other party in the purchase or sale of a good or service".[119]

3.24. 18.4(1) states that a Party has an affirmative obligation to ensure that all 'covered entities' accord better of national treatment and MFN in three specific circumstances: (1) to a covered investment; (2) to a good of the other party; and (3) to a service supplier of other party in the *purchase or sale* of a good or service.

[119] *Ibid* at art 18.4(1).

3.5.1.1. Article 18.4(2): The Relationship Between Non-Discriminatory Treatment & Commercial Considerations

3.25. The non-discrimination obligations provided in article 18.4(1) are tempered by the wording of Article 18.4(2), which states:

> "If a covered entity described in paragraphs (b) through (d) of the definition of "covered entity" in Article 18.1 acts in accordance with Article 18.5.1, the Party in whose territory the covered entity is located shall be deemed to be in compliance with the obligations set out in paragraph 1 in respect of that covered entity".[120]

3.26. Article 18.4(2) refers only to 'covered entities'(b) through (d), and not entity (a), 'monopoly'. The following words, "acts in accordance with Article 18.5(1)," references Article 18.5(1) 'Commercial Considerations', which requires Parties to ensure that 'covered entities', "*shall* act in accordance with commercial considerations".[121] The words, "shall be deemed to be in compliance with the obligations set out in paragraph 1," reference the 'non-discriminatory treatment' obligations provided in 18.4(1). The legal effect of this exception under Article 18.4(2) is that 'covered entity' will be deemed to be in compliance with non-discriminatory treatment, if it is acting "in accordance with commercial considerations".

3.27. However, monopolies are treated differently than other 'covered entities'. Monopolies cannot satisfy their non-discrimination obligations by meeting the commercial considerations threshold. The exclusion of monopolies is likely due to their significant market power and exclusive control over the supply of or trade in a commodity or service.

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[120] *Ibid* at art 18.4(2).
[121] *Ibid* at art 18.5(1).

3.28. This link between 18.4 and 18.5 reaffirms the same type of relationship as found between subparagraph 1(a) and (b) in Article XVII, and indicates that there is one legal test for non-discriminatory treatment. The explicit reference to commercial considerations in Article 18.4(2) appears to be closing any interpretative gaps that were present in Article XVII:1.

3.6. Article 18.5 – Commercial Considerations

3.29. Article 18.5(1) states that,

> "Each Party shall ensure that a covered entity in its territory acts in accordance with commercial considerations in the purchase or sale of goods, including with regard to price, quality, availability, marketability, transportation, and other terms and conditions of the purchase or sale, as well as in the purchase or supply of services, including when such goods or services are supplied to or by an investment of an investor of the other Party".[122]

3.30. Article 18.5(1) requires that all 'covered entities' act "in accordance with commercial consideration" obligations in two circumstances: (1) in the *purchase or sale* of goods; and (2) in the *purchase or supply* of services, including when good or services are supplied to or by an investment of an investor of the other party.[123] To fully understand the scope of this obligation, the relevant definition of "in accordance with commercial considerations" must be interpreted before considering the relationship between commercial considerations and the scope of non-discrimination obligations.

3.6.1.1. Defining 'Commercial Considerations'

3.31. Article 18.1 defines 'in accordance with commercial considerations' as,

> "consistent with customary businesses practices of privately held enterprise in the relevant business or industry".[124]

[122] *Ibid* at art 18.1.
[123] *Ibid* at art 18.5.
[124] *Ibid* at art 18.1.

3.32. The principal components of this definition require a VCLT interpretation as it is the first step in reaching a conclusion on the scope of commercial considerations within Article 18.5 and its relationship with the non-discrimination obligations.

3.6.1.2. Customary Business Practices Are Related to Commercial Considerations

3.33. The dictionary definition and reformulated ordinary meaning from the prior GATT analysis is worth restating. "Customary" is defined as "according to the customs or usual practices associated with a particular society, place, or set of circumstances"[125] and "practice" is defined as the "actual application or use of an idea, belief, or method, as opposed to theories relating to it; (2) customary, habitual, or expected procedure or way of doing something".[126] Customary business practice is an assessment of the way that a privately held enterprise actually conducts business in a particular industry. As with Article XVII, this calls for a factual analysis of actual behaviour; abstract constructions and arguments must be avoided.

3.34. Article 18.5(1) provides a non-exhaustive list of commercial considerations: "price, quality, availability, marketability, transportation, and other terms and conditions of the purchase or sale".[127] The text suggests that the enumerated considerations are all "terms and conditions of purchase and sale". Therefore, the 'customary business practices' provided in the definition of commercial considerations must be those that would customarily apply to the terms and conditions of purchase and sale, including the enumerated list provided in Article 18.5(1).

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[125] *Supra* note 23, *sub verbo* "customary".
[126] *Ibid*, sub verbo, "practice".
[127] *Supra* note 107 at art 18.5(1).

3.6.1.3. Business Practices of 'Privately Held Enterprise'

3.35. The definition of commercial considerations in the CETA references "business practices of privately held enterprise in the relevant market or industry" rather than "enterprises" as found in NAFTA. As identified previously, the deliberate choice to eschew a market-based analysis in favour of an industry-standard analysis suggests that a confined geographic and commercial scope was not intended for assessing commercial considerations.

3.36. The CETA does not provide any definitions of these terms, nor do the incorporated agreements. The common understanding is that either 'business' or 'industry' refer to commercial activities more broadly. The Oxford dictionary defines "business" as a "commercial operation or company"[128] and "industry" as a "particular form or branch of economic or commercial activity".[129] Combining the ordinary meaning to the immediately surrounding word "relevant", business and industry can be interpreted to encompass comparisons to other private enterprises in the like or directly competitive entity operating in the territory of a party. The definition is not referencing an individualized market or the business practice of one entity. It does not appear relevant that privately-held enterprise is not pluralized as it does not modify the industry-focused analysis in any meaningful way. Additionally, it would be contradictory to the object and purpose of Chapter 18 to allow a single entity to set the standard for an industry wide practice.

3.37. It should be noted, however, that there is a risk in interpreting 'commercial considerations' as an industry-wide standard rather than following a 'relevant market analysis'. Relying on an industry-wide standard permits a broad interpretation of

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[128] *Supra* note 60, sub verbo "business".
[129] *Ibid*, sub verbo "industry".

'commercial considerations' as it does not confine the geographic scope or potential comparator industries. As a result, there are potentially wide-ranging options as to what would be deemed 'commercial'. This could be particularly challenging in situations where a Party must defend the actions of an entity, as the assessment of commercial considerations does not have a clearly defined scope. However, the drafters' choice to use the words relevant *industry* and *business* lends interpretative support that purpose of interpreting commercial considerations and identifying a comparator group should be understood in the context of a relevant *industry*, not a market.

3.7. Applying the interpretation of 'commercial considerations' to the obligations in Article 18.5(1).

3.38. Article 18.5(1) sets out an affirmative obligation on Parties to ensure that covered entities shall act "in accordance with commercial considerations" in two circumstances. The subparagraph provides a non-exhaustive list of relevant commercial considerations including,

> "with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale, as well as in the purchase or supply of services including when such goods or services to supplied to or by an investment or an investor of another party".[130]

3.39. Applying the definition of 'commercial considerations', the commercial practices listed in Article 18.5(1) are required to be consistent with the expected customary practices of a privately held enterprise engaging in commercial activity in the relevant business or industry. In other words, the considerations must those would customarily apply in the relevant business or industry. For monopolies, it will not be in

[130] *Ibid.*

the market in which they monopolize but rather the customary behaviour of private enterprises in the particular industry or business in which it operates.

3.40. Therefore, should a 'covered entity' be acting in accordance with one of the listed considerations and such consideration is customary to the practice of a privately held enterprise in the relevant business or industry it operates, then such entity will likely be found to be acting "in accordance with commercial considerations".

3.8. Article 18.5(2): Commercial Considerations Exceptions

3.41. Article 18.5(2) creates an exception for specific covered entities' whose conduct is consistent with Article 18.4 and Chapter 17. An understanding of this provision is necessary as it shapes whether a 'covered entity' is required to abide by its commercial consideration obligations. As article 18.5(2)(a) and (b) states, there are two specific situations under which this exception applies:

> "(a) in the case of a monopoly, to the fulfilment of the purpose for which the monopoly has been created, or for which special rights or privileges have been granted, such as public service obligation or regional development; or,
> (b) in the case of a state enterprise, to the fulfilment of its public mandate".[131]

3.8.1.1. Exception (1): Purpose for Which Monopoly is Created

3.42. Under subparagraph 18.5.1(a), the commercial consideration obligations do not apply to monopolies in two circumstances: (1) fulfilment of the purpose for which it has been created; (2) for which special rights or privileges have been granted, such as public service obligation or regional development.

3.43. The first exception, fulfilment of purpose, is somewhat vague. There may be multiple reasons as to why a monopoly has been created. There are standards or criteria

[131] *Ibid* at art 18.5.

in the CETA that allow for an assessment into whether the monopoly has satisfied this requirement.

3.44. The second exception for monopolies, "which special rights or privileges have been granted" supplements the first exception, 'fulfilment of its purpose'. As identified with the first exception, there are many ways by which special rights or privileges can be provided to a monopoly – some of which may could overlap with the fulfilment of purpose. Two examples are listed, public service obligation or regional development, however the use of the words "such as" indicates that this is a non-exhaustive list. As a result, there is potential to conflate the two exceptions thereby extending the range of possibilities where a monopoly can exercise the exception under Article 18.5(2)(a).

3.45. Although the language is somewhat general, these exceptions are only authorized when a monopoly acts consistently with both Article 18.4 and Chapter 17. This narrows the situations in which a monopoly will be relieved of its commercial considerations obligations. Moreover, the broad wording may be an advantage for a Party, where its monopoly is alleged to be violating its commercial considerations. In such circumstances, the vague wording of the exceptions could provide a Party greater interpretative flexibility to defend that the actions of its monopoly and claim that the commercial consideration obligations do not apply.

3.8.1.2. Exception (2): Fulfilling a State Enterprises' Public Mandate

3.46. Article 18.5(2)(b) provides a nearly identical exception for state enterprises, when fulfilling its public mandate. There is no definition for 'public mandate' in the text of CETA[132], as well as no criteria as to what constitutes a 'public mandate' thereby

[132] The consolidated text of the CETA previously included a definition for "public mandate" this has since been removed.

potentially broadening the scope as to what would fall within this exception. Examining a state enterprises mandate or policy documents may assist in determining what a 'public mandate' may include. Therefore, the interpretative analysis of the exception for state enterprise similarly follows to that provided for monopolies and may potentially allow for greater use of this exception, particularly where a state enterprise is violating its commercial consideration obligation.

3.8.1.3. Conclusion on Commercial Consideration in Article 18.5

3.47. In conclusion, under Article 18.5, commercial considerations must be consistent with the customary business practices of a privately held enterprise in the relevant business or industry. The definition of commercial considerations is not limited by geographic scope, but rather refers to the industry wide practices or standards of a privately held enterprise operating in the relevant business or industry. Additionally, all covered entities are required to abide by the commercial consideration obligations in 18.5. However, exceptions are provided for monopolies and state enterprises when they are acting consistently with both their non-discrimination obligations in 18.4 as well as chapter 17. The exceptions are somewhat ambiguous as they refer to the general practices.

3.9. Comparing the CETA to the GATT and NAFTA

3.48. Comparing the obligations imposed on 'covered entities' under the CETA Chapter 18 to Article XVII and NAFTA Chapter 15, there are notable differences and similarities. Chapter 18 restates a similar one-obligation relationship between non-discrimination and commercial considerations. The circular relationship between 18.4 and 18.5 builds upon the same type of relationship found between subparagraph 1(a) and (b) in Article XVII, whereby a 'covered entity' can satisfy its non-discrimination obligations if they are found to be acting "in accordance with commercial

considerations". Monopolies are explicitly excluded from this link and cannot meet the non-discrimination obligations by acting "in accordance with commercial considerations". However, monopolies are given a special exception to commercial considerations if their conduct is consistent with their non-discrimination obligations and chapter 17.

3.49. Unlike GATT Article XVII, CETA Chapter 18 explicitly exempts covered entities from their commercial consideration obligations where they are satisfying their non-discrimination obligations. While the same principle has been applied to GATT Article XVII, it has come from the Appellate Body rather than being written directly in the text of Article XVII.[133] NAFTA Chapter 15 contains a similar exception, where a monopoly does not have to act "in accordance to commercial considerations" where its complying with the terms of its designation that is consistent with non-discrimination obligations and anti-competitive practices. This exception could be interpreted as being a type of policy or public function that is similar to the exceptions provided in the Chapter 18.5(2)(a) and (b). Finally, unlike GATT Article XVII and NAFTA Chapter 15, Chapter 18 is unique in that it provides one definition for all the differing entities.

3.10. Final Conclusion: Scope of Non-Discrimination Obligations

3.50. The scope of non-discrimination obligations imposed on 'covered entities' under the CETA are influenced by several components. First, with respect to defining non-discriminatory treatment, the CETA incorporates both non-discrimination principles, Articles I and III of the GATT 1994. However, different chapters in the CETA contain differing and nuanced definitions of MFN and national treatment.

[133] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 145.

Therefore, depending the type of definition relied on, a Party may be required to meet slightly different non-discrimination obligation.

3.51. Second, Article 18.4 lays out the principal 'non-discrimination obligation' and prescribes that all covered entities accord non-discriminatory treatment in three specific circumstances. However, there are exceptions for 'covered entities' described in subparagraphs (b) through (d) to satisfy their non-discrimination obligation by acting "in accordance with commercial considerations" under Article 18.5. This link between Article 18.4 and 18.5 echoes a similar relationship as found between subparagraphs (1)(a) and (b) in GATT Article XVII. The definition of commercial consideration in 18.5 tempers and is necessarily linked to the non-discrimination obligations. In that sense, it explicitly restates a similar one obligation test for non-discriminatory treatment.

3.52. Third, Article 18.5 imposes an affirmative obligation on Parties to ensure that 'covered entities' act "in accordance with commercial considerations". In practice, "acting in accordance with commercial considerations" will be satisfied if Parties rely on one of the considerations listed in 18.5(1) it the private enterprises customary practice follows an industry wide practice. Unlike GATT Article XVII, Article 18.5 also allows monopolies and state enterprises to be exempt their commercial considerations in specific situations.

3.53. In sum, the scope of non-discrimination obligations in Chapter 18 of the CETA build upon a similar commitment seen in both GATT Article XVII and NAFTA Chapter 15. Both MFN and national treatment are included as principles of non-discrimination, which are obligations a Party can meet if their 'covered entity' acts "in accordance with commercial considerations". There is one non-discriminatory legal test for 'covered entities' listed under 18.1(b)-(d). Monopolies, however, cannot derogate from their

non-discrimination obligations. CETA chapter 18.5 also allows for exceptions to commercial considerations. The vague language provided in the exceptions under Article 18.5(2) potentially broadens the circumstances under which an entity can exercise the exceptions. This may be advantage for Parties where their monopolies are state enterprises are alleged to be violating their commercial consideration obligations.

4. Final Conclusion of the Memorandum

4.1. Across all three of the agreements, the non-discrimination obligation mandates and includes the foundational principles of MFN and national treatment. The NAFTA and the CETA elaborate on this obligation and provide differing definitions of MFN and national treatment which, under the doctrine of *lex specialis*, are tailored to the type of discrimination alleged.

4.2. Each agreement also affirms the one-obligation type relationship between commercial considerations and non-discrimination obligations. All three outline that commercial considerations tempers the meaning of non-discrimination. Entities can meet their non-discrimination obligations where they act "in accordance with commercial considerations". However, each of the agreements provides a slightly nuanced interpretation of this relationship.

4.3. Both the NAFTA and the CETA provide more explicit definitions for key words, including the differing state enterprises, non-discriminatory treatment, and 'acting accordance with commercial considerations'. These definitions have guided the interpretative analysis of these agreements and have provided greater understanding on the scope of the non-discrimination obligations imposed on MSEs and the relationship of commercial considerations

4.4. Unlike the GATT 1994, both the CETA and the NAFTA provide specific exceptions for entities, where their commercial consideration obligations do not apply. This is unique to these two agreements and is not found in Article XVII of the GATT 1994. Both chapter 18 in the CETA and chapter 15 of the NAFTA provide a definition for acting "in accordance in commercial considerations". An analysis of this term leans towards the interpretative understanding that an entities' commercial practice will be assessed against the normal or customary behavior of private enterprises in the

particular industry in which it operates. It is noted, however, that this interpretation takes a broad approach and may raise interpretative challenges in the assessment of commercial considerations.

4.5. Departing from the single term 'state enterprise' provided in Article XVII:1 of the GATT 1994, the NAFTA and the CETA expand the types of entities captured by their non-discrimination obligations. Chapter 15 of the NAFTA refers and provides definitions for three types of enterprises: *state enterprises*, *government monopolies* and *monopolies*. The remaining text of chapter 15 applies distinct non-discrimination obligations depending on whether the MSE in question is properly classified a state enterprise or one of the types of monopoly. In contrast, chapter 18 of the CETA provides one term, 'covered entity', to define all of the differing entities captured by its obligations. The CETA goes one step further than the NAFTA and includes a Parties' action of granting special rights or privileges to *any* entity as a type of 'covered entity'. This broader description appears to be closing an interpretative loop hole by ensuring that Parties are not circumventing their obligations by means of an 'action'.

4.6. All three agreements affirm that entities can satisfy their non-discrimination obligation by acting "in accordance with commercial considerations". However, the nuanced interpretation qualifies this general understanding each agreement provides on this specific relationship. Chapter 15 of the NAFTA and chapter 18 of the CETA contains caveats to this relationship as well as provide opportunities for specific entities to depart from their commercial consideration obligations all together. Depending on the type of entity being assessed, the type of discrimination alleged, and the specific agreement in use, a Party may have greater or less flexibility on the scope of the non-discrimination and commercial consideration obligations.

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