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From:	General Secretariat of the Council
To:	Trade Policy Committee (Experts - Services and Investment)
Subject:	CETA – interpretation (investment): text as discussed with Canada

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## EUROPEAN COMMISSION

Directorate-General for Trade

Directorate B - Asia (I), Services and Digital Trade, Investment and Intellectual Property  
**Investment and Intellectual property**

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### NOTE FOR THE ATTENTION OF THE TRADE POLICY COMMITTEE (SERVICES & INVESTMENT)

**SUBJECT:** *CETA – interpretation (investment): text as discussed with Canada*

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**OBJECTIVE:** *For information*

#### **REMARKS:**

Member States will find enclosed, for their information, the text of a draft Decision of the CETA Joint Committee, following discussions with Canada, to be submitted at a later stage as a proposal under Article 218.9 TFEU (Commission proposal for a position to be taken by the Union in the CETA Joint Committee).

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**1. Fair and equitable treatment**

For greater certainty, Article 8.10 shall be interpreted as follows:

- (a) The list of elements in Article 8.10.2 is exhaustive;
- (b) A claim of denial of justice under Article 8.10.2 (a) requires prior exhaustion of local remedies except if there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress.

In determining whether there is a denial of justice, the Tribunal should be mindful that it is not a court of appeal of domestic court decisions and it should not engage in reviewing the merits of domestic court decisions.

- (c) For there to be breach of denial of justice and a fundamental breach of due process within the meaning of Article 8.10.2 (a) and (b), there must be improper and egregious procedural conduct in judicial or administrative proceedings, which does not meet the basic internationally accepted standards of administration of justice and due process, and which shocks or surprises a sense of judicial propriety such as the unfounded refusal of access to courts or legal representation, failure to provide an opportunity to be heard, discriminatory treatment by the courts, clearly biased and corrupt adjudicators, complete or unjustifiable lack of transparency in the proceedings such as a failure to provide notice for the proceedings or reasons for the decision.
- (d) A measure is manifestly arbitrary within the meaning of Article 8.10.2 (c) when it is evident that the measure is not rationally connected to a legitimate policy objective, such as when a measure is based on prejudice or bias rather than on reason or fact.
- (e) For greater certainty, a measure or series of measures constitute “targeted discrimination on manifestly wrongful grounds such as gender, race or religious belief” within the meaning of Article 8.10.2(d) if the measure or series of measures single out the investor in providing differential treatment based on illegitimate grounds such as gender, race or religious belief. Article 8.10.2(d) shall not be construed as preventing the Parties from granting preferential treatment to promote gender or racial equality or otherwise address under-representation of socio-economically disadvantaged groups.
- (f) A determination that a measure or series of measures constitute “abusive treatment of investors, such as coercion, duress and harassment” within the meaning of Article 8.10.2(e), requires a finding of serious misconduct by a Party. In making this determination, relevant considerations may include the harm or threatened harm to the investor such as whether the episodes of alleged harassment or coercion were repeated and sustained; and the rationale for the Party’s actions, for example whether the authorities were acting within the scope of their authority or whether there was an abuse of power.
- (g) Under Article 8.10.4, representations made to an investor may only be taken into account to the extent they are relevant as a factor in determining a breach of fair and equitable treatment as set out in Article 8.10.2. Legitimate expectations cannot arise from representations if a prudent

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and informed investor would not have reasonably relied upon the representations in making the investment, notably because the representations were not sufficiently specific and unambiguous and did not have the requisite degree of formality such as those made in writing by the competent authority of a Party.

## **2. Indirect expropriation**

- (a) For greater certainty, an indirect expropriation may only occur if the investor has been radically deprived of the use, enjoyment and disposal of its investment, as if the rights related thereto had ceased to exist.
- (b) When assessing the “duration of the measure or series of measures” within the meaning of Paragraph 2 b) of Annex 8, consideration should be given to whether the interference with the property right is temporary, in which case it is unlikely to amount to an indirect expropriation, or permanent, although the sole fact that a measure is permanent does not establish that an indirect expropriation has occurred.
- (c) The “distinct, reasonable investment-backed expectations” in paragraph 2 c) of Annex 8-A, refer to the expectations that a prudent and informed investor could have reasonably formed and that were relied upon in making the investment. For greater certainty, whether an investor’s investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.
- (d) The impact of a measure or series of measures appears “manifestly excessive” within the meaning of Paragraph 3 of Annex 8-A if it is clearly and obviously excessive in light of the intended policy objectives.
- (e) For greater certainty, measures of a Party that are designed and applied to protect legitimate public welfare objectives in paragraph 3 of Annex 8-A include measures taken to combat climate change or addressing its present or future consequences. Such measures do not constitute indirect expropriation unless they are clearly and obviously excessive in light of the intended policy objectives.

**3. Climate Change**

- (a) The Parties reaffirm their right to regulate in the public interest to achieve legitimate public policy objectives to protect the environment as set out in Article 8.9, including by taking measures to mitigate or combat climate change or to address its present or future consequences.
  
- (b) When interpreting the provisions of the Investment chapter, the Tribunal shall give due consideration to the commitments of the Parties under multilateral environmental agreements, including the Paris Agreement. In particular, the Parties' rights and obligations under Chapter 8 should be interpreted in a manner that supports the ability of the Parties to give effect to their respective commitments to reduce greenhouse gas emissions by adopting or maintaining measures designed and applied to mitigate climate change or address its present or future consequences.

**4. Protection of essential security interests**

The Parties reaffirm that, pursuant to Article 28.6 of CETA, nothing in this Agreement shall be construed to prevent Canada and the European Union and its Member States from taking an action that either Party considers necessary to protect its essential security interests in time of war or other emergency in international relations, including any measure affecting investors or their investments.

**5. Protection of fundamental rights**

For greater certainty, the Parties' right to regulate to achieve legitimate public policy objectives, as referred to in Article 8.9 of CETA, includes measures taken for the protection of fundamental rights, as laid down in the Universal Declaration of Human Rights done at Paris on 10 December 1948.

**6. Calculation of monetary damages resulting from investor claims**

For greater certainty, monetary damages under Article 8.39.3,

- (a) shall not be greater than the loss or damage incurred by the investor, or, as applicable, by the locally established enterprise, as valued on the date of the breach;
- (b) shall only reflect loss or damage incurred by reason of, or arising out of, the breach; and
- (c) shall be determined with reasonable certainty, and shall not be speculative or hypothetical.

In making an award under paragraph x, the Tribunal shall calculate monetary damages based only on the submissions of the disputing parties, and shall consider, as applicable:

- (a) contributory fault, whether deliberate or negligent;
- (b) failure to mitigate or prevent damages;
- (c) prior damages or compensation received for the same loss including compensation received under a domestic compensation scheme; or
- (d) restitution of property, or repeal or modification of the measure.