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LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject: Draft INTERPRETATION OF THE CETA JOINT COMMITTEE regarding Article 8.10, Annex 8-A, Article 8.9 and Article 8.39 of the Comprehensive Economic and Trade Agreement (CETA)

Draft

INTERPRETATION No .../2024 OF THE CETA JOINT COMMITTEE

of ...

**regarding Article 8.10, Annex 8-A, Article 8.9 and Article 8.39
of the Comprehensive Economic and Trade Agreement (CETA)**

THE CETA JOINT COMMITTEE,

Having regard to Article 26.1.5.(e) of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part¹ ('the Agreement'), done at Brussels on 30 October 2016,

¹ OJ EU L 11, 14.1.2017, p. 23.

Recalling the common understanding expressed in Section 6 of the Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States²,

Aiming to further clarify the intentions of the Parties under Chapter Eight (Investment), with respect to certain elements of Article 8.10 (Treatment of investors and of covered investments) and Annex 8-A (Expropriation), Article 8.9 (Investment and regulatory measures) and Article 8.39 (Final award) of the Agreement,

HAS ADOPTED THE FOLLOWING INTERPRETATION:

² OJ EU L 11, 14.1.2017, p. 3.

1. Fair and equitable treatment

For greater certainty, the fair and equitable treatment obligation in Article 8.10 of the Agreement 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 if 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 should not engage in reviewing the merits of domestic court decisions.

- (c) For there to be a 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, or a complete or unjustifiable lack of transparency in the proceedings, such as a failure to provide notice of 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 where a measure is based on prejudice or bias rather than on reason or fact.

- (e) 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 to 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 such a 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, such as 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 that 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 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 for example because they were not 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-A of the Agreement, 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 of the Agreement, 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 Party concerned provided the investor with binding written assurances and on the nature and extent of governmental regulation or on 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 of the Agreement 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 referred to in paragraph 3 of Annex 8-A of the Agreement include measures taken to combat climate change or to address its present or future consequences. Such measures do not constitute indirect expropriation unless their impact is clearly and obviously excessive in light of the intended policy objectives.

3. Climate Change

- (a) The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives to protect the environment as set out in Article 8.9.1 of the Agreement, including by taking measures to mitigate or combat climate change or to address its present or future consequences.
- (b) When interpreting the provisions of Chapter Eight (Investment) of the Agreement, the Tribunal shall give due consideration to the commitments of the Parties under multilateral environmental agreements, including the Paris Agreement³, done at Paris on 12 December 2015. In particular, the Parties' rights and obligations under Chapter Eight (Investment) of the Agreement 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 or combat 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 the Agreement, nothing in the Agreement shall be construed as preventing a Party from taking an action that it 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.

³ OJ EU L 282, 19.10.2016, p. 4.

5. Protection of fundamental rights

For greater certainty, the Parties' right to regulate in order to achieve legitimate policy objectives, as referred to in Article 8.9.1 of the Agreement, includes measures taken for the protection of fundamental rights, as laid down in the Universal Declaration of Human Rights, adopted at Paris on 10 December 1948.

6. Calculation of monetary damages resulting from investor claims

(a) For greater certainty, monetary damages under Article 8.39.3 of the Agreement shall:

- (i) 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;
- (ii) only reflect loss or damage incurred by reason of, or arising out of, the breach; and
- (iii) be determined with reasonable certainty, and shall not be speculative or hypothetical.

- (b) The Tribunal shall calculate monetary damages based only on the submissions of the disputing parties, and shall consider, as applicable:
- (i) contributory fault, whether deliberate or negligent;
 - (ii) failure to mitigate or prevent damages;
 - (iii) prior damages or compensation received for the same loss including compensation received under a domestic compensation scheme; or
 - (iv) restitution of property, or repeal or modification of the measure.

Done at ...,

For the CETA Joint Committee
The Co-Chairs
