

German Non-paper Proposing Draft Decision of the CETA Joint Committee

This Non-Paper contains a proposal for a draft decision of the CETA Joint Committee with the aim of interpreting certain standards in the investment protection chapter of CETA. This initiative is linked to the ratification of CETA in Germany as set out in the new German Trade Agenda, which sets new priorities including with regard to investment protection and sustainability. The clarifications contained in the draft concern the “fair and equitable treatment” (FET) standard and “indirect expropriation”, the two standards which have been mainly relied on in Investor-State-Disputes until now. The goal is to further clarify these standards by way of binding interpretations and without amending the agreement, since it has already been ratified in a number of Parties.

The Draft Political Declaration for a Review-Clause would not to be part of a decision of the CETA Joint Committee, but is envisaged as a separate political declaration by the EU, the Member States and Canada.

Decision No X/2022 of the CETA Joint Committee on the interpretation of certain terms in Article 8.10, Annex 8-A and Article 8.39

THE CETA JOINT COMMITTEE,

Having regard to Article 26.1.5.e) of CETA,

Having also regard to Decision No 2/2021 of the CETA Joint Committee of 29 January 2021,

Whereas the meaning of certain terms of Article 8.10 (Fair and Equitable Treatment) and Annex 8-A (Indirect Expropriation) in accordance with Section 6 c) of the Joint Interpretative Instrument need to be further clarified,

HAS ADOPTED THIS DECISION:

1. Fair and Equitable Treatment

Article 8.10 shall be interpreted as follows:

The list of elements in Article 8.10.2 is exhaustive.

a) For greater certainty, the mere fact that an investor’s challenge of the impugned measure in domestic proceeding has been rejected or dismissed or has otherwise failed does not in itself constitute a “denial of justice” in the meaning of Article 8.10.2 (a).

b) For greater certainty, a measure or series of measures constitute a “fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings” in the meaning of Article 8.10.2(b) in cases of blatant miscarriage of justice (such as the unfounded refusal of access to courts or legal assistance, infringements of the investor’s right to be heard, manifest and unjustifiable unequal treatment of the parties before a court, deadlines that are impossible to meet, clearly biased and corrupt judges, complete or unjustifiable lack of transparency).

c) For greater certainty, a measure or series of measures constitutes “manifest arbitrariness” in the meaning of the Article 8.10.2(c) if:

- it does not contain the reasons on which it is based;
- it is patently not founded on reason or fact;
- it is based on unreasonable discretion, prejudice or personal preference; or
- it is taken in wilful disregard of due process and proper procedure.

The mere illegality or a merely inconsistent or questionable application of a policy or procedure, does not in itself constitute manifest arbitrariness as referred to in the subparagraph 2 (c).

d) For greater certainty, a measure or series of measures constitute “targeted discrimination on manifestly wrongful grounds” in the meaning of Article 8.10.2(d) if:

- the measure or series of measures is patently not founded on reason or fact or is patently founded on illegitimate grounds such as prejudice or bias;
- if a differential treatment based on gender, race or religious belief cannot be justified on the basis of objective and legitimate grounds, such as measures that are designed or applied to protect legitimate public welfare objectives, including health, the promotion of gender equality, environment (including climate protection) or safety.

e) For greater certainty, in determining whether a measure or series of measures amounts to a breach Article 8.10.2 (a), (b) or (c) the Tribunal shall consider, whether the measure or series of measures involves gross misconduct that offends a sense of judicial propriety.

f) For greater certainty, in determining whether a measure or series of measures constitute “abusive treatment of investors, such as coercion, duress and harassment” within the meaning of Article 8.12.2 (e), the Tribunal shall consider, whether a Party acted ultra vires, whether the episodes of alleged harassment or coercion were repeated and sustained.

g) Under Article 8.10.4, the Tribunal may only take into account written, specific and unambiguous representations made to an investor by the competent authority of a Party and upon which the investor reasonably relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

The Tribunal shall notably consider whether a prudent and informed investor could have reasonably formed a legitimate and justifiable expectation on the basis of such representations.

h) A “breach of another provision of this Agreement” within the meaning of Article 8.10.6 includes all provisions of chapter 8.

g) For greater certainty, when determining a breach of a provision of Chapter 8, the Tribunal shall also take into consideration the following:

- (i) the existence or absence of possible damage prevention and damage mitigation measures that were available to the investor;
- (ii) the existence of a national compensation scheme¹ in which the opportunity to participate existed and which were not pursued; or
- (iii) the voluntary acceptance of compensation by the investor under such compensation scheme, leading the Party to reasonably believe that any damage suffered by the investor has been compensated.

¹ For greater certainty, the term “national compensation scheme” does not include national insurance or guarantee schemes.

2. Indirect Expropriation

Annex 8-A shall be interpreted as follows:

a) For greater certainty, an indirect expropriation within the meaning of Paragraph 1 of Annex 8-A shall be determined to exist if the investor has been radically deprived of the economical use and enjoyment 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- the mere fact that a measure is of a permanent nature is not sufficient in itself to establish an indirect expropriation.

c) In determining whether there are “distinct, reasonable investment-backed expectations” in the meaning of Paragraph 2 c) of Annex 8-A, the Tribunal shall only take into account written, specific and unambiguous representations made to an investor by the competent authority of a Party, and upon which the investor reasonably relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

The Tribunal shall notably consider whether a prudent and informed investor could have reasonably formed legitimate and justifiable expectations on the basis of such representations.

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 manifestly disproportionate to its intended policy objectives in that it would be perceived as undeniably unreasonable in light of its purpose.

e) In light of the need for an effective and progressive response to the urgent threat of climate change, the Parties reaffirm that non-discriminatory measures of a Party that are designed and applied to combat climate change or to address its present or future consequences do not constitute indirect expropriation unless the impact of a measure or series of measures would appear wholly disproportionate in that it would be perceived as undeniably unreasonable in light of its purpose.

f) In light of Russia’s continuing war of aggression against Ukraine, the Parties reaffirm that in line with 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.

g) For greater certainty, when determining a breach of a provision of Chapter 8, the Tribunal shall also take into consideration the following:

(i) the existence or absence of possible damage prevention and damage mitigation measures that were available to the investor;

(ii) the existence of a national compensation scheme² in which the opportunity to participate existed and which were not pursued; or

(iii) the voluntary acceptance of compensation by the investor under such compensation scheme, leading the Party to reasonably believe that any damage suffered by the investor has been compensated.

3. Climate Change

² For greater certainty, the term “national compensation scheme” does not include national insurance or guarantee schemes.

In light of the commitments of the Contracting Parties under the Paris Agreement, an investor should expect that the Contracting Parties will adopt measures that are designed and applied to combat climate change or address its present or future consequences, by mitigation, adaptation, reparation, compensation or otherwise.

When interpreting the provisions of the Investment Chapter, the Tribunal should take due consideration of the commitments of the Parties under the Paris Agreement and their respective climate neutrality objectives.

Thus, the Parties confirm their understanding that the provisions of this Chapter shall be interpreted and applied by the Tribunal by taking due consideration of the commitments of the Parties under the Paris Agreement and their respective climate neutrality objectives and in a way that allows the Parties to pursue their respective climate change mitigation and adaptation policies.

4. Final Award

Article 8.39.3 shall be interpreted as follows:

For greater certainty, for the calculation of monetary damages under Article 8.39.3, account shall be also taken:

- (i) of an unreasonable failure by the claimant to act subsequent to the breach of the treaty, where it could have reduced the damages arising, or of the unreasonable incurring of expenses by the claimant subsequent to a treaty breach, which results in increasing the size of its claim; or
- (ii) the contribution to the injury by wilful or negligent action or omission of the investor or any entity in relation to whom reparation is sought.

Draft Political Declaration for a Review-Clause

The Parties to CETA agree to review Chapter 8 on investments on the basis of available evidence and bearing in mind changing international circumstances in particular with a view to ensuring a level playing field between foreign and domestic investors as well as Chapters 22, 23 and 24 on sustainability in the light of the TSD review currently undertaken by the European Union. The review of CETA should be concluded within a period of [five] years after the entry into force of the agreement and an appropriate amendment should be submitted pursuant to Article 30.2 of CETA.