Canada-EU Trade Agreement discussions on expropriation and treatment (FET) of investors

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The Comprehensive Economic and Trade Agreement (CETA) between Canada and the 28 European Union countries has been ratified by 15 member states as of February 2022 and is expected to conclude ratification in due course.

The CETA will establish a permanent tribunal of fifteen members to hear investor claims.

Each particular case would be heard by three of the fifteen members.

This new dispute resolution forum is a divergence from the standard investor-State arbitration dispute settlement mechanism.

On 29 August 2022, the European Commission issued a statement on clarifications discussed with Germany regarding investment protection in the context of the CETA agreement as follows:

"The EU and Canada are trusted and like-minded partners that share the same goals when it comes to promoting open, sustainable and fair trade. Our EU-Canada Comprehensive Economic and Trade Agreement (CETA) aims to support our common objective of climate protection. In this context, the European Commission has engaged in constructive discussions with the German Federal Government to prepare a text that clarifies

certain provisions in CETA. The result of these technical discussions is a more precise definition of the concepts of 'indirect expropriation' and 'fair and equitable treatment' of investors. The aim is to ensure that the parties can regulate in the framework of climate, energy and health policies, inter alia, to achieve legitimate public objectives, while at the same time preventing the misuse of the investor to State dispute settlement mechanism by investors.

The new draft text agreed by the Commission and the Federal Government provides legal certainty and it now needs to be supported by all other EU Member States. Once this is the case, we will consult our Canadian partners so that the new definitions can be adopted by the CETA Joint Committee as soon as possible."

The current consolidated CETA text addresses expropriation in Article 8.12(1) prohibits expropriation unless such expropriation is (a) for a public purpose, (b) under due process of law, (c) is a non-discriminatory manner, and (d) on payment of prompt, adequate and effective compensation.

Article 8.10(1) of the current consolidated CETA text obligates member states to accord to investors fair and equitable treatment and full protection and security covering general requirements as is generally seen in investment treaties including access to justice, due process, transparency, no manifest arbitrariness, no targeted discrimination, no abusive treatment of investors, and so on.

The outcome of the discussions between the European Commission and Germany will provide more precise definitions of the concepts of 'indirect expropriation' and 'fair and equitable treatment' of investors to ensure that the parties can regulate in the framework of climate, energy and health policies, inter alia, to achieve legitimate public objectives, while at the same time preventing the misuse of the investor to State dispute settlement mechanism by investors.

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