

Section 4: Investment Protection

Article X.9: Treatment of Investors and of Covered Investments

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 7.
2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:
 - a. Denial of justice in criminal, civil or administrative proceedings;
 - b. Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
 - c. Manifest arbitrariness;
 - d. Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
 - e. Abusive treatment of investors, such as coercion, duress and harassment; or
 - f. A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph ~~4~~³ of this Article.
3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. [The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision.]

The following will be added to Section 6 42(3) as part of the functions of the Committee on Services and Investment:

d) recommend to the Trade Committee the adoption of any further elements of the fair and equitable treatment obligation pursuant to Section 5 Article 9(4) (Treatment of Investors and of Covered Investments).

4. When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.
5. For greater certainty, 'full protection and security' refers to the Party's obligations relating to physical security of investors and covered investments.
6. For greater certainty, a breach of another provision of this Agreement, or of a separate international Agreement, does not establish that there has been a breach of this Article.

Article X.11: Expropriation

1. Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation"), except:

- (a) for a public purpose;
- (b) under due process of law;
- (c) in a non-discriminatory manner; and
- (d) against payment of prompt, adequate and effective compensation.

For greater certainty, this paragraph shall be interpreted in accordance with Annex X.9.1 on the clarification of expropriation. 1)

2. Such compensation shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value. (---)

Annex X.11: Expropriation

The Parties confirm their shared understanding that:

1. Expropriation may be either direct or indirect:

- a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
- b) indirect expropriation occurs where a measure or series of measures by a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

2. The determination of whether a measure or series of measures by a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

- a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
- b) the duration of the measure or series of measures by a Party;
- c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and
- d) the character of the measure or series of measures, notably their object, context and intent.

3. For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

Article 5 Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with the **customary international law minimum standard of treatment of aliens**, including fair and equitable treatment and full protection and security.
2. The concepts of 'fair and equitable treatment' and 'full protection and security' in paragraph 1 do not require **treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens**.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Article 13 Expropriation (*footnote)

1. Neither Party shall nationalize or expropriate a covered investment either directly, or indirectly through measures having an **effect equivalent** to nationalization or expropriation (hereinafter referred to as 'expropriation'), except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation.
2. Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('date of expropriation'), (...)

(*) For greater certainty, Article 13(1) shall be interpreted in accordance with Annex B.13(1) on the clarification of indirect expropriation.

Annex B. 13(1) Expropriation

The Parties confirm their shared understanding that:

- a) **Indirect expropriation** results from a measure or series of measures of a Party that have an **effect equivalent to direct expropriation** without formal transfer of title or outright seizure;
- b) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
 - i) the **economic impact** of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
 - ii) the extent to which the measure or series of measures interfere **with distinct, reasonable investment-backed expectations**; and
 - iii) the **character of the measure** or series of measures;
- c) **Except in rare circumstances**, such as when a measure or series of measures are **so severe in the light of their purpose** that they cannot be reasonably viewed as having been **adopted and applied in good faith**, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, **do not constitute indirect expropriation**.



EUROPEAN COMMISSION

Directorate-General for Trade

Trade B2 Investment

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	COUNCIL OF THE EUROPEAN UNION
Trade Policy Committee (Services and Investment)	
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**NOTE FOR THE ATTENTION OF THE TRADE POLICY COMMITTEE
(SERVICES AND INVESTMENT)**

SUBJECT: *EU CANADA FTA NEGOTIATIONS: INVESTMENT CHAPTER*

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OBJECTIVE: *For information*

REMARKS:

Member States will find attached the latest consolidated text of the CETA Investment Chapter.

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