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CETA: Note on a Joint Declaration by the Council of the European Union - October 13, 2016

This is the third note we have prepared in respect of documents purporting to present guidance concerning the interpretation of the Comprehensive Economic and Trade Agreement (CETA).[1]

The first *CETA: The Effect of an Interpretative Declaration by Canada and EU Commission* was written in response to statements by Chrystia Freeland, Canada's Minister of International Trade, and Sigmar Gabriel, German Vice Chancellor and Federal Minister for Economic Affairs and Energy,[2] indicating that "legally binding" clarifications would be issued to address public concerns about certain provisions of the proposed treaty, notably those concerning "investment protection, workers' rights and public services, as well as public procurement and the precautionary principle."[3]

Our opinion described the various forms that such a declaration might take, and discussed the limits of the influence of such an instrument on the interpretation of the CETA text. Our note described and reproduced the key provisions of both CETA and the *Vienna Convention on the Law of Treaties*, which set out the rules to be followed by a tribunal called upon to interpret and apply the provisions of CETA.

As we noted, Article 31 of the *Vienna Convention* requires that such a tribunal take into account, *inter alia*,

> *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with*

[1] http://canadians.org/media/ceta-interpretive-declaration-legal-opinion
[2] On September 19, 2016, http://canadians.org/media/ceta-interpretive-declaration-legal-opinion
[3] Statement by International Trade Minister and German Vice Chancellor on CETA, September 19, 2016 - Wolfsburg, Germany - Global Affairs Canada

> *the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty*. [emphasis added]

We explained that an interpretative declaration described by the Ministers could be an instrument within the meaning of Article 31, and be taken into account as one of several contextual elements to be considered by a tribunal seeking to ascertain the meaning of any CETA provision that it deemed to be unclear. Our opinion also described the various forms that such a declaration could take, and distinguished between a *qualified* declaration presented as a condition precedent to the approval of a Treaty, and a *mere* declaration that a tribunal would be free to reject.

Importantly, as the declaratory statement had not been made public at that time, we noted that it was: "too soon to know whether it will offer more than soporifics in an attempt to mollify CETA critics, or represent a more substantive attempt to address their concerns."[4] Nevertheless, we proceeded to provide our analysis of a prospective declaration on the assumption that it would present more than mere blandishments.

Unfortunately, that assumption turned out to be ill-founded, for on October 5, 2016, a document emerged purporting to be the interpretative declaration[5] the Ministers had promised, that notwithstanding its title, could not in fact be considered an "interpretative declaration" under international law for the simple reason it didn't offer even the pretext of interpreting the key CETA provisions at issue.[6]

While the European Commission and Canada are free to describe their document as a "joint interpretative declaration" if they choose,[7] absent any effort to actually interpret CETA provisions, it would represent an interpretative declaration in name alone and have no utility whatsoever as a means for interpreting CETA provisions.

For that reason we stated that:

> . . . no party could credibly present such a document as an "interpretative declaration" to a Tribunal called upon to determine an investor rights dispute. Moreover, in the unlikely event that should occur, a Tribunal that gave it any consideration would risk its own credibility. [8]

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[4] http://canadians.org/media/ceta-interpretive-declaration-legal-opinion
[5] "Joint Interpretative Declaration on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States"
[6] As we indicated our critique was limited to the "declarations" comments about ISDS which we understand to be the most contentious of CETA proposals. http://canadians.org/media/ceta-interpretive-declaration-legal-opinion
[7] They could do the same for a menu from McDonalds .
[8] http://canadians.org/media/ceta-interpretive-declaration-legal-opinion

Most recently a document has circulated under the title *Joint Interpretative Declaration on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States,* as "Issued by General Secretariat of the Council."

For present purposes that document is substantively the same as the draft issued on October 5, 2016. However one of the additional comments included by the Secretariat has caused some confusion, notably the statement that:

> This interpretative declaration provides, in the sense of Article 31 of the *Vienna Convention on the Law of Treaties*, a clear and unambiguous statement of what Canada and the European Union and its Member States agreed in a number of CETA provisions that have been the object of public debate and concerns.

The reference to the *Vienna Convention* has caused some to now imagine that the Secretariat's statement has somehow acquired more substance, and will exert more influence than the draft that had previously circulated – it most definitely will not. In our view, presenting a statement that does no more than tout the purported virtues of CETA but offers no clarification of its provisions as an interpretative instrument within the meaning of Vienna Convention, is mere sophistry intended either to mislead critics, or provide a smoke screen for those wishing to support CETA in its present form, most likely both. It is lamentable, in our view, that the Parties have felt it necessary to resort to such tactics in order to promote an agenda with such important and far reaching public policy and legal consequences.

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