Dear Mr Magnette,

I am writing you to express my concerns over the added value of the declarations and the joint interpretative instrument in alleviating the concerns of Wallonia over the Investment Court System (ICS) in CETA, as expressed in the Walloon parliament’s resolution of 25 April 2016. These declarations and the joint interpretative instrument either have little legal value or are mere restatements of already existing text and do not delete or change the CETA text, nor do they provide meaningful guidance for the interpretation of CETA’s investment provisions. Accordingly, the declarations and the joint interpretive instrument cannot address Wallonia’s concerns about investment protection in CETA.

The legal status of unilateral declarations and unilateral interpretative declarations

Any unilateral statements on the part of the EU and the Member States have little legal weight, will not bind Canada, and cannot address any of the concerns of Wallonia.

Unilateral declarations can only create obligations for the State that is issuing them, not for the other Party, unless that other Party has clearly accepted to be bound by that declaration. This means that any declaration issued by the EU, its institutions, or the Member States will not bind Canada (or investors seeking to use ICS). Moreover, an interpretative declaration issued unilaterally does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties. It is not, however, a binding interpretation of the text, because it is of a unilateral character.

The extent to which the joint interpretative instrument alleviates the concerns of Wallonia over ICS
In principle, any text that is added to CETA and is approved by both Canada and the EU and its Member States can have the same legal value as the original CETA text. However, in relation to ICS, the joint interpretative instrument does not delete or amend any of the original CETA text. Perhaps even more worrying is that the joint interpretative instrument does not even attempt to interpret specific provisions of the CETA text, but merely recycles wording that is already present in CETA.

The Walloon parliament unambiguously indicated its preferences for State-to-State dispute settlement over Investor-State dispute settlement. CETA’s Investment Court System in Section F of Chapter 8 CETA is a form of investor-state dispute settlement that the joint interpretative instrument neither deletes nor amends. The joint interpretative instrument also does nothing to clarify specific provisions. To give but one example, the joint interpretative instrument does not clarify that articles 8.9 (1) and (2) CETA ensure that these provisions are interpreted in a way that governmental action aimed at or contributing to a list of non-exhaustive public interests can under no circumstances be subject to a claim by an investor.

More generally, in order for the joint interpretative instrument to have any legal value under international law it is absolutely vital that the text reflects an intention of the parties to create legal relations as between themselves. In other words, content prevails over form and legally binding language in the additional text is more important than renaming the additional document ‘joint interpretative instrument’. It is therefore essential to verify whether the language of the joint interpretative instrument is a mere public relations exercise or actually binds Canada and the EU and its Member States to commitments that reflect Wallonia’s concerns. Based on the latest available documents there is little evidence that the EU and Canadian authorities are committed to do more than a mere public relations exercise on the investment chapter.

Yours sincerely,

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