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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	11 October 2019
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2019) 458 final
Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the CETA Joint Committee established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of a decision on the procedure for the adoption of interpretations in accordance with Articles 8.31.3 and 8.44.3(a) of CETA as Annex to its Rules of Procedure

Delegations will find attached document COM(2019) 458 final.

Encl.: COM(2019) 458 final

EUROPEAN
COMMISSION

Brussels, 11.10.2019
COM(2019) 458 final

2019/0218 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the CETA Joint Committee established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of a decision on the procedure for the adoption of interpretations in accordance with Articles 8.31.3 and 8.44.3(a) of CETA as Annex to its Rules of Procedure

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the CETA Joint Committee established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part in connection with the envisaged adoption of a decision on the procedure for the adoption of interpretations in accordance with Articles 8.31.3 and 8.44.3(a) of CETA as Annex to its Rules of Procedure.

2. CONTEXT OF THE PROPOSAL

2.1. The Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part

The Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part ('the Agreement') aims to liberalise and facilitate trade and investment, as well as to promote a closer economic relationship between the European Union and Canada ('the Parties'). The Agreement was signed on 30 October 2016 and has been provisionally applied since 21 September 2017.

2.2. The CETA Joint Committee

The CETA Joint Committee is established under Article 26.1 of the Agreement, which provides that the CETA Joint Committee comprises representatives of the European Union and representatives of Canada and is be co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees. The CETA Joint Committee meets once a year, or at the request of a Party, and agrees on its meeting schedule and its agenda. The CETA Joint Committee is responsible for all questions concerning trade and investment between the Parties and the implementation and application of this Agreement. A Party may refer to the CETA Joint Committee any issue relating to the implementation and interpretation of this Agreement, or any other issue concerning trade and investment between the Parties.

In accordance with Article 26.3 of the Agreement, the CETA Joint Committee has the power to make decisions, by mutual consent, in respect of all matters when the Agreement so provides. The decisions made by the CETA Joint Committee are binding on the Parties, subject to the completion of any necessary internal requirements and procedures, and the Parties have to implement them.

In accordance with Article 26.2.4 of the Agreement, the specialised committees, including the Committee on Services and Investment, may propose draft decisions for adoption by the CETA Joint Committee.

In accordance with Rule 10.2 of the Rules of Procedure of the CETA Joint Committee and of the Specialised Committees,[1] in the period between meetings, the CETA Joint Committee may adopt decisions or recommendations by written procedure if the Parties to the Agreement decide by mutual consent. For that purpose, the text of the proposal will be circulated in writing from the co-chairs to the members of the CETA Joint Committee pursuant to Rule 7,

[1] Decision 001/2018 of the CETA Joint Committee of 26 September 2018 adopting its Rules of Procedure and of the Specialised Committees (OJ L 190, 27.7.2018, p. 13), available on the DG TRADE website at http://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157677.pdf.

with a time limit within which members will make known any concerns or amendments they wish to make. Adopted proposals will be communicated pursuant to Rule 7 once the time limit has elapsed and recorded in the minutes of the next meeting.

2.3. The envisaged act of the CETA Joint Committee

The CETA Joint Committee is to adopt a decision on the procedure for the adoption of interpretations in accordance with Articles 8.31.3 and 8.44.3(a) of CETA as Annex to its Rules of Procedure ('the envisaged act').

The purpose of the envisaged act is to clarify the procedure for the adoption of interpretations by the CETA Joint Committee of the investment provisions of the Agreement.

The envisaged act will become binding on the Parties. Article 26.3.2 of the Agreement provides: 'The decisions made by the CETA Joint Committee shall be binding on the Parties, subject to the completion of any necessary internal requirements and procedures, and the Parties shall implement them'.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

As provided in paragraph 6(f) of the Joint Interpretative Instrument on the Agreement, the European Union and its Member States and Canada have agreed to begin immediately further work on the implementation of the provisions on investment dispute resolution of the Agreement, the so-called 'Investment Court System'[2].

In accordance with Articles 8.31.3 and 8.44.3(a) of the Agreement, where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, on agreement of the Parties and after completion of their respective internal requirements and procedures, recommend to the CETA Joint Committee the adoption of interpretations of the Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunals established under Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) of the Agreement. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.

Paragraph 6(e) of the Joint Interpretative Instrument on the Agreement provides: 'In order to ensure that Tribunals in all circumstances respect the intent of the Parties as set out in the Agreement, CETA includes provisions that allow Parties to issue binding notes of interpretation. Canada and the European Union and its Member States are committed to using these provisions to avoid and correct any misinterpretation of CETA by Tribunals'.

It is therefore appropriate to clarify the procedure for the adoption of interpretations by the CETA Joint Committee of the investment provisions of the Agreement.

Pursuant to Article 26.1.4(d) of the Agreement, the CETA Joint Committee adopted its Rules of Procedure with Decision 001/2018 of the CETA Joint Committee of 26/09/2018. In accordance with Rule 14.4, the Rules of Procedure of the CETA Joint Committee apply mutatis mutandis to the specialised committees, including the Committee on Services and Investment, and other bodies established under the Agreement, unless otherwise decided by each specialised committee pursuant to Article 26.2.4 of the Agreement.

It is appropriate that the CETA Joint Committee adopts the envisaged act as Annex to its Rules of Procedure.

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[2] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (OJ L 11, 14.1.2017, p. 3).

The envisaged act includes specific rules on the procedural steps that are necessary to adopt interpretations of the Agreement by the CETA Joint Committee.

This proposal fits in with other initiatives on the implementation of the CETA Investment Court System. Specifically, since June 2018, the Commission has been working with the Member States in the Trade Policy Committee on Services and Investment of the Council and with Canada on a package of four draft decisions regarding:

– rules setting out administrative and organisational matters regarding the functioning of the Appellate Tribunal in accordance with Article 8.28.7 of the Agreement;

– a code of conduct for Members of the Tribunal, the Appellate Tribunal and mediators in accordance with Article 8.44.2 of the Agreement;

– rules for mediation for use by disputing parties in accordance with Article 8.44.3(c) of the Agreement; and

– rules on the procedure for the adoption of interpretations in accordance with Articles 8.31.3 and 8.44.3(a) of the Agreement.

Further work on other areas of implementation of the Investment Court System continues. As provided in paragraph 6(f) of the Joint Interpretative Instrument on the Agreement, '[t]he common aim is to conclude the work by the entry into force of CETA'.

It is therefore appropriate to establish the position to be taken on the Union's behalf in the CETA Joint Committee on the envisaged act in order to ensure the effective implementation of the Agreement.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing 'the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.'

The concept of 'acts having legal effects' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are 'capable of decisively influencing the content of the legislation adopted by the EU legislature'[3].

4.1.2. Application to the present case

The CETA Joint Committee is a body set up by an agreement, namely the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part ('the Agreement').

The act which the CETA Joint Committee is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding on the Parties under international law in accordance with Article 26.3.2 of the Agreement.

The envisaged act does not supplement or amend the institutional framework of the Agreement.

[3] Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to the common commercial policy.

Therefore, the substantive legal bases of the proposed decision are Article 207(3) and the first subparagraph of Article 207(4) TFEU.

4.3. Conclusion

The legal bases of the proposed decision should be Article 207(3) and the first subparagraph of Article 207(4), in conjunction with Article 218(9) TFEU.

5. AUTHENTIC LANGUAGES AND PUBLICATION OF THE ENVISAGED ACT

As the act of the CETA Joint Committee will implement the Agreement with respect to the resolution of investment disputes between investors and states, it is appropriate to adopt it in all authentic languages of the Agreement[4] and publish it in the Official Journal of the European Union after its adoption.

[4] Pursuant to Article 30.11 (Authentic texts) of the Agreement, the Agreement is drawn up in duplicate in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, each version being equally authentic.

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on the position to be taken on behalf of the European Union in the CETA Joint Committee established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part as regards the adoption of a decision on the procedure for the adoption of interpretations in accordance with Articles 8.31.3 and 8.44.3(a) of CETA as Annex to its Rules of Procedure

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(3) and the first subparagraph of Article 207(4), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) Council Decision (EU) 2017/37[5] provides for the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part ('the Agreement'). The Agreement was signed on 30 October 2016.

(2) Council Decision (EU) 2017/38[6] provides for the provisional application of parts of the Agreement, including the establishment of the CETA Joint Committee and the Committee on Services and Investment. The Agreement has been provisionally applied since 21 September 2017.

(3) Pursuant to Article 26.3.1 of the Agreement, the CETA Joint Committee shall, for the purpose of attaining the objectives of this Agreement, have the power to make decisions in respect of all matters when this Agreement so provides.

(4) Pursuant to Article 26.3.2 of the Agreement, the decisions made by the CETA Joint Committee shall be binding on the Parties, subject to the completion of any necessary internal requirements and procedures, and the Parties shall implement them.

(5) Pursuant to Article 26.1.4(d) of the Agreement, the CETA Joint Committee is to adopt its own rules of procedure;

(6) Pursuant to Article 26.2.1(b) of the Agreement, the Committee on Services and Investment is one of the specialised committees established by the Agreement;

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[5] Council Decision (EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (OJ L 11, 14.1.2017, p. 1).

[6] Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (OJ L 11, 14.1.2017, p. 1080).

(7) Pursuant to Article 26.2.4 of the Agreement, the specialised committees shall set and modify their own rules of procedures, if they deem it appropriate;

(8) Rule 14.4 of the Rules of Procedure of the CETA Joint Committee (Decision 001/2018 of the CETA Joint Committee of 26/09/2018) provides that unless otherwise decided by each specialised committee pursuant to Article 26.2.4 of the Agreement, the Rules of Procedure apply mutatis mutandis to the specialised committees and other bodies established under the Agreement;

(9) In accordance with Articles 8.31.3 and 8.44.3(a) of the Agreement, where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, on agreement of the Parties and after completion of their respective internal requirements and procedures, recommend to the CETA Joint Committee the adoption of interpretations of the Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunals established under Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) of the Agreement. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date;

(10) It is therefore appropriate to establish the position to be taken on the Union's behalf in the CETA Joint Committee on the basis of the attached draft decision of the CETA Joint Committee in order to ensure the effective implementation of the Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on behalf of the European Union in the CETA Joint Committee as regards the adoption of a decision on the procedure for the adoption of interpretations in accordance with Articles 8.31.3 and 8.44.3(a) of CETA as Annex to its Rules of Procedure shall be based on the draft decision of the CETA Joint Committee attached to this Council Decision.

Article 2

1. The Decision of the CETA Joint Committee shall be adopted in all authentic languages of the Agreement.

2. The Decision adopted by the CETA Joint Committee shall be published in the Official Journal of the European Union.

Done at Brussels,

For the Council
The President