Council of the European Union

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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) 459 final - ANNEX
Subject:	ANNEX to the Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Committee on Services and Investment 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 of the other part as regards the adoption of a code of conduct for Members of the Tribunal, the Appellate Tribunal and mediators

Delegations will find attached document COM(2019) 459 final - ANNEX.

Encl.: COM(2019) 459 final - ANNEX

EUROPEAN
COMMISSION

Brussels, 11.10.2019
COM(2019) 459 final

ANNEX

ANNEX

to the

Proposal for a Council Decision

on the position to be taken on behalf of the European Union in the Committee on Services and Investment 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 of the other part as regards the adoption of a code of conduct for Members of the Tribunal, the Appellate Tribunal and mediators

ATTACHMENT

DRAFT

DECISION No […/2019] OF THE COMMITTEE ON SERVICES AND INVESTMENT

of…

adopting a code of conduct for Members of the Tribunal, the Appellate Tribunal and mediators

The CETA COMMITTEE ON SERVICES AND INVESTMENT,

Having regard to Article 26.2.1(b) of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part ("the Agreement"),

Whereas Article 8.44.2 of the Agreement provides that the CETA Committee on Services and Investment shall adopt a code of conduct to be applied in disputes arising out of Chapter Eight of the Agreement, which may replace or supplement the rules in application,

HAS ADOPTED THIS DECISION:

Article 1

Definitions

For the purposes of this Decision, the following definitions apply:

(a) the definitions in Article 1.1 (Definitions of general application) of Chapter One (General definitions and initial provisions) of the Agreement;

(b) the definitions in Article 8.1 (Definitions) of Chapter Eight (Investment) of the Agreement;

(c) "assistant" means a person, other than a person employed by the ICSID Secretariat, who, under the terms of appointment of a Member, assists the Member in his or her research or supports him or her in his or her duties;

(d) "candidate" means a person who has submitted an application or is otherwise aware that he or she is under consideration for selection as a Member;

(e) "mediator" means a person who conducts mediation in accordance with Article 8.20 (Mediation) of the Agreement; and

(f) "Member" means a Member of the Tribunal or of the Appellate Tribunal established pursuant to Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) of the Agreement.

Article 2

Responsibilities to the Process

Candidates, Members and former Members shall avoid impropriety and the appearance of impropriety, and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved.

Article 3

Disclosure Obligations

1. Candidates shall disclose to the Parties any past and present interest, relationship or matter that is likely to affect, or that could reasonably be seen as likely to affect, their independence or impartiality, that creates or could reasonably be seen as creating a direct or indirect conflict of interest, or that creates or might reasonably be seen as creating an appearance of impropriety or bias. To this end, candidates shall make all reasonable efforts to become aware of any such interests, relationships or matters. The disclosure of past interests, relationships or matters shall cover at least the last five years prior to a candidate submitting an application or otherwise becoming aware that he or she is under consideration for selection as a Member.

2. Members shall communicate matters concerning actual or potential violations of this code of conduct in writing to the Parties and, when relevant to a dispute, to the disputing parties.

3. Members shall at all times continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in paragraph 1 of this Article. Members shall at all times disclose such interests, relationships or matters throughout the performance of their duties by informing the Parties and, where relevant, the disputing parties.

4. In order to ensure that relevant information is provided by candidates and Members, disclosures shall be made through a standardised form with the possibility to add or enclose any document, and in accordance with any other procedures established by the Parties.

Article 4

Independence, Impartiality and Other Obligations of Members

1. In addition to the obligations established in Article 2 of this Decision, Members shall be and shall appear to be independent and impartial, and shall avoid direct and indirect conflicts of interest.

2. Members shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party, disputing party or any other person involved or participating in the proceeding, fear of criticism or financial, business, professional, family or social relationships or responsibilities.

3. Members shall not, directly or indirectly, incur any obligation, accept any benefit, enter into any relationship, or acquire any financial interest that is likely to affect or appear to affect their independence or impartiality.

4. Members shall not engage in *ex parte* contacts concerning the proceeding.

5. Members shall perform their duties thoroughly and expeditiously throughout the course of the proceeding and shall do so with fairness and diligence.

6. Members shall consider only those issues raised in the proceeding and which are necessary for a decision or award and shall not delegate this duty to any other person.

7. Members shall take all appropriate steps to ensure that their assistants are aware of, and comply with, Articles 2 (Responsibilities to the Process), 3(2) and (3) (Disclosure Obligations), 4(1)-(5) (Independence and Impartiality and Other Obligations of of Members), 5(1) and (3) (Former Members) and 6 (Confidentiality) of this Decision *mutatis mutandis*.

8. Members shall take appropriate account of other dispute settlement activities under the Agreement and, in particular, of decisions or awards rendered by the Appellate Tribunal.

Article 5

Obligations of Former Members

1. Former Members shall avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decisions or awards of the Tribunal or the Appellate Tribunal.

2. Members shall undertake that for a period of three years after the end of their term, they shall not act as representatives of any of the disputing parties in investment disputes before the Tribunal or the Appellate Tribunal.

3. Without prejudice to the possibility to continue to serve on a division until the closure of the proceedings of that division, Members shall undertake that after the end of their term, they shall not become involved:

   (a) in any manner whatsoever in investment disputes which were pending before the Tribunal or the Appellate Tribunal before the end of their term;

   (b) in any manner whatsoever in investment disputes directly and clearly connected with disputes, including concluded disputes, which they have dealt with as Members of the Tribunal or the Appellate Tribunal.

4. If the President of the Tribunal or of the Appellate Tribunal is informed or otherwise becomes aware that a former Member is alleged to have acted inconsistently with the obligations set up in paragraphs 1 through 3 of this Article, or any other part of this Decision while a Member, he or she shall examine the matter, provide the opportunity to the former Member to be heard, and, after verification, inform thereof:

   (a) the professional body or other such institution with which that former Member is affiliated;

   (b) the Parties;

   (c) if it involves a specific dispute, the disputing parties; and

   (d) the President of any other relevant international court or tribunal in view of the initiation of appropriate measures.

   The President of the Tribunal or of the Appellate Tribunal shall make public its decision to take the actions referred to in subparagraphs (a) through (d) above, together with the reasons therefor.

Article 6

Confidentiality

1. Members and former Members shall not at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding, except for the purposes of the proceeding, and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interest of others.

2. Members shall not disclose an order, decision, or award or parts thereof prior to its publication in accordance with the transparency provisions of Article 8.36 (Transparency of proceedings) of the Agreement.

3. Members or former Members shall not disclose any deliberation of the Tribunal or Appellate Tribunal, or any Member's views, except in an order, decision or award.

Article 7

Expenses

Each Member shall keep a record and render a final account of the time devoted to the procedure and of the expenses incurred, as well as the time and expenses of their assistant.

Article 8

Sanctions

1. For greater certainty, the provisions of this code of conduct shall be applied together with the obligations set out in Article 8.30.1 of the Agreement and the procedures foreseen in Article 8.30 paragraphs 2 and 3 and Article 8.30.4 of the Agreement shall apply to violations of this code of conduct.

2. For greater certainty, the CETA Joint Committee shall provide a Member the opportunity to be heard prior to the issuance of any decision pursuant to Article 8.30.4 of the Agreement.

Article 9

Mediators

1. The rules set out in this Decision as applying to candidates shall apply, *mutatis mutandis*, to persons who are aware that they are under consideration for appointment as mediators.

2. The rules set out in this Decision as applying to Members shall apply, *mutatis mutandis*, to mediators from the date on which he or she is appointed as mediator to the date on which:

   (a) the disputing parties adopt a mutually agreed solution;

   (b) the mediator provides a written declaration resigning from his or her duties as mediator; or

   (c) a disputing party, or both disputing parties, provide written notice by way of a letter transmitted to the mediator and the other disputing party terminating the mediator or the mediation procedure, whichever is earlier.

3. The rules set out in this Decision as applying to former Members shall apply, *mutatis mutandis*, to former mediators.

Article 10

Consultative Committees

1. The President of the Tribunal and the President of the Appellate Tribunal shall each be assisted by a Consultative Committee for ensuring the proper application of this code of conduct, of Article 8.30 (Ethics) of the Agreement and for the execution of any other task, where so provided.

2. The Consultative Committees shall be composed of the respective Vice-President and of the two most senior Members of the Tribunal or of the Appellate Tribunal.

Article 11

Entry into force

This Decision shall be published and shall enter into force on the date of entry into force of Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) of the Agreement, subject to the Parties' exchange of written notifications, through diplomatic channels, certifying that they have completed the necessary internal requirements and procedures.

Done at … on …