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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) 460 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 as regards the adoption of rules for mediation for use by disputing parties in investment disputes

Delegations will find attached document COM(2019) 460 final - ANNEX.

Encl.: COM(2019) 460 final - ANNEX

EUROPEAN
COMMISSION

Brussels, 11.10.2019
COM(2019) 460 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 as regards the adoption of rules for mediation for use by disputing parties in investment disputes

ATTACHMENT

DRAFT

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

of…

adopting rules for mediation for use by disputing parties in investment disputes

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 8.44.3(c) of the Agreement provides that the CETA Committee on Services and Investment may adopt rules for mediation for use by disputing parties as referred to in Article 8.20 (Mediation) of the Agreement,

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) "agreement to mediate" means an agreement made pursuant to Article 3(4) of this Decision; and

(d) "mediator" means a person who conducts mediation in accordance with Article 8.20 (Mediation) of the Agreement.

Article 2

Objective and Scope

The objective of the mediation mechanism is to facilitate the finding of a mutually agreed solution through a comprehensive and expeditious procedure with the assistance of a mediator.

Article 3

Initiation of the Procedure

1. Either disputing party may request, at any time, the commencement of a mediation procedure. Such request shall be addressed to the other disputing party in writing.

2. If the request concerns an alleged breach of the Agreement by the authorities of the European Union or by the authorities of the Member States of the European Union, and no respondent has been determined pursuant to Article 8.21 (Determination of the respondent for disputes with the European Union or its Member States) of the Agreement, it shall be addressed to the European Union. If the request is accepted,

the response shall specify whether the European Union or the Member State concerned will be a disputing party to the mediation[1].

3. The disputing party to which such request is addressed shall give sympathetic consideration to the request and accept or reject it in writing within 10 days of its receipt.

4. If the disputing parties agree to a mediation procedure, they shall sign an agreement to mediate in writing setting out rules agreed to by the disputing parties, which shall include the rules in this Decision. The agreement to mediate may include an agreement not to commence or not to continue any other dispute settlement proceedings relating to the problems or disputes that are subject to the mediation procedure:

   (a) while the mediation procedure is pending; or

   (b) if the disputing parties have reached a mutually agreed solution.

   An agreement pursuant to subparagraph 4(b) shall cease to apply if a disputing party, or both disputing parties, provide written notice, transmitted by way of a letter to the mediator and the other disputing party, terminating the mediation procedure.

Article 4

Appointment of the Mediator

1. If both disputing parties agree to a mediation procedure, a mediator shall be appointed in accordance with the procedure set out in Article 8.20.3 of the Agreement. The disputing parties shall endeavour to agree on a mediator within 15 days from the receipt of the reply to the request. Such agreement may include appointing a mediator from the Members of the Tribunal established according to Article 8.27.2 of the Agreement or of the Appellate Tribunal established according to Article 8.28.3 of the Agreement.

2. The disputing parties may by written consent agree to replace the mediator. If a mediator resigns, is incapacitated or otherwise becomes unable to perform his or her duties, a new mediator shall be appointed pursuant to Article 8.20.3 of the Agreement and in accordance with paragraph 1.

3. A mediator shall not be a national of either Party, unless the disputing parties agree otherwise.

4. The mediator shall assist, in accordance with the Decision of the CETA Committee on Services and Investment on the Code of Conduct for Members of the Tribunal, the Appellate Tribunal and Mediators, the disputing parties in reaching a mutually agreed solution.

Article 5

Rules of the Mediation Procedure

[1] For greater certainty, if the request concerns treatment by the European Union, the disputing party to the mediation shall be the European Union and any Member State concerned shall be fully associated in the mediation. If the request concerns exclusively treatment by a Member State, the disputing party to the mediation shall be the Member State concerned, unless it requests the European Union to be a disputing party.

1. Within 10 days after the appointment of the mediator, the disputing party having invoked the mediation procedure shall present, in writing, a detailed description of the problem to the mediator and to the other disputing party. Within 20 days from the receipt of this submission, the other disputing party may provide, in writing, its comments to the description of the problem. Either disputing party may include in its description or comments any information that it deems relevant.

2. The mediator may decide on the most appropriate way of bringing clarity to the problem concerned. In particular, the mediator may organise meetings between the disputing parties, consult the disputing parties jointly or individually, seek the assistance of or consult with relevant experts and stakeholders and provide any additional support requested by the disputing parties. However, before seeking the assistance of or consulting with relevant experts and stakeholders, the mediator shall consult with the disputing parties.

3. The mediator may offer advice and propose a solution for the consideration of the disputing parties who may accept or reject the proposed solution or may agree on a different solution. However, the mediator shall not make a determination on the consistency of any measure at issue with the Agreement.

4. The procedure shall take place in the territory of the Party that is a disputing Party, or by mutual agreement in any other location or by any other means.

5. The disputing parties shall endeavour to reach a mutually agreed solution within 60 days from the appointment of the mediator. Pending a final agreement, the disputing parties may consider possible interim solutions.

6. On request of the disputing parties, the mediator shall issue to the disputing parties, in writing, a draft factual report, providing a brief summary of (1) any measure at issue in these procedures; (2) the procedures followed; and (3) any mutually agreed solution reached as the final outcome of these procedures, including possible interim solutions. The mediator shall provide the disputing parties 15 days to comment on the draft report. After considering the comments of the disputing parties submitted within this period, the mediator shall submit, in writing, a final factual report to the disputing parties within 15 days. The factual report shall not include any interpretation of the Agreement.

7. In accordance with Article 8.20.5 of the Agreement, the mediation procedure shall be terminated by written notice of a disputing party, or of both disputing parties, transmitted by way of a letter to the mediator and the other disputing party, on the date that the notice is given.

Article 6

Implementation of a Mutually Agreed Solution

1. If a mutually agreed solution has been adopted by the disputing parties each disputing party shall take the measures necessary to implement the mutually agreed solution within the agreed timeframe.

2. The implementing disputing party shall inform the other disputing party in writing of any steps or measures taken to implement the mutually agreed solution.

Article 7

Relationship to Dispute Settlement

1. The procedure under this mediation mechanism is not intended to serve as a basis for dispute settlement procedures under the Agreement or another agreement. A disputing party shall not rely on or introduce as evidence in such dispute settlement procedures, nor shall any adjudicative body take into consideration:

   (a) positions taken, admissions made or views expressed by a disputing party in the course of the mediation procedure;

   (b) the fact that a disputing party has indicated its willingness to accept a solution to the measure subject to mediation;

   (c) advice given, proposals made or views expressed by the mediator; or

   (d) the content of a draft or final factual report by a mediator.

2. Subject to Article 3(4) of this Decision, the mediation mechanism is without prejudice to the rights and obligations of the Parties and the disputing parties under Section F (Resolution of investment disputes between investors and states) and Chapter Twenty-nine (Dispute Settlement).

3. The disputing parties' agreement to mediate and any mutually agreed solutions shall be made publicly available. The versions disclosed to the public may not contain any information that a disputing party has designated as confidential. Unless the disputing parties agree otherwise, all other steps of the mediation procedure, including any advice or proposed solution, shall be confidential. However, any disputing party may disclose to the public that mediation is taking place.

Article 8

Time Limits

Any time limit referred to in this Decision may be modified by mutual agreement between the disputing parties.

Article 9

Costs

1. Each disputing party shall bear its own expenses derived from the participation in the mediation procedure.

2. The disputing parties shall share jointly and equally the expenses derived from organisational matters, including the remuneration and expenses of the mediator. Remuneration of the mediator shall be in accordance with that foreseen for Members of the Tribunal under Article 8.27.14 of the Agreement.

Article 10

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 …