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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
Subject:	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.

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2019/0219 (NLE)

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

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 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, in connection with the envisaged adoption of a decision concerning rules for mediation for use by disputing parties in investment disputes.

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 Committee on Services and Investment

The Committee on Services and Investment, which addresses inter alia matters concerning cross-border investment, is established under Article 26.2.1(b) of the Agreement. In accordance with Article 8.44.1 of the Agreement, the Committee on Services and Investment provides a forum for the Parties to consult on issues related to Chapter Eight (Investment) of the Agreement, including difficulties which may arise in the implementation of Chapter Eight (Investment) of the Agreement and possible improvements of Chapter Eight (Investment) of the Agreement, in particular in light of the experience and developments in other international fora and under the Parties' other agreements.

In accordance with Article 26.2.4 of the Agreement, the Committee on Services and Investment meets once a year, unless otherwise provided in the Agreement, or if the co-chairs decide otherwise. Additional meetings may be held at the request of a Party or of the CETA Joint Committee. The Committee on Services and Investment is co-chaired by representatives of the Parties. It sets its meeting schedule and agenda by mutual consent. It may set and modify its own rules of procedures, if it deems it appropriate. It may propose draft decisions for adoption by the CETA Joint Committee, or take decisions when the Agreement so provide.

In accordance with Rule 10.2 of the Rules of Procedure of the CETA Joint Committee and of the Specialised Committees, including the Committee on Services and Investment,[1] in the period between meetings, the Committee on Services and Investment 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 Committee on Services and Investment pursuant to Rule 7, with a time limit within which members will make known any concerns or amendments they wish

[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.

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 Committee on Services and Investment

The Committee on Services and Investment is to adopt a decision concerning rules for mediation for use by disputing parties in investment disputes ('the envisaged act').

The purpose of the envisaged act is to implement the Agreement by establishing a mediation mechanism to facilitate the finding of a mutually agreed solution between the disputing parties in an investment dispute through a comprehensive and expeditious procedure with the assistance of a mediator.

The envisaged act will become binding on the Parties.

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]

Pursuant to Article 8.44.3(c) of the Agreement, '[t]he Committee Services and Investment may, on agreement of the Parties, and after completion of their respective internal requirements and procedures adopt rules for mediation for use by disputing parties as referred to in Article 8.20'.

The envisaged act implements Article 8.44.3(c) of the Agreement by including detailed rules on the initiation of the mediation procedure (Article 3); the appointment of the mediator (Article 4); the mediation procedure (Article 5); the implementation of a mutually agreed solution (Article 6); relationship to dispute settlement (Article 7); time limits (Article 8) and costs (Article 9) of the mediation procedure. The envisaged act will enter into force on the date of entry into force of the Agreement (Article 10).

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'.

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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).

It is therefore appropriate to establish the position to be taken on the Union's behalf in the Committee on Services and Investment 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 Committee on Services and Investment 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 Committee on Services and Investment 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 26.2.4 of the Agreement.

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

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.

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[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.

5. AUTHENTIC LANGUAGES AND PUBLICATION OF THE ENVISAGED ACT

As the act of the Committee on Services and Investment 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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Proposal for a

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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

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 Committee on Services and Investment. The Agreement has been provisionally applied since 21 September 2017.

(3) Pursuant to Article 26.2.4 of the Agreement, the Committee on Services and Investment may take decisions when the Agreement so provides.

(4) In accordance with Article 8.44.3(c) of the Agreement, the Committee on Services and Investment is to adopt a decision on the rules for mediation for use by disputing parties in investment disputes.

(5) It is therefore appropriate to establish the position to be taken on the Union's behalf in the Committee on Services and Investment on the basis of the attached draft decision of the Committee on Services and Investment on rules for mediation in order to ensure the effective implementation of 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).

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on behalf of the European Union in the Committee on Services and Investment as regards the adoption of rules for mediation for use by disputing parties in investment disputes shall be based on the draft decision of the Committee on Services and Investment attached to this Council Decision.

Article 2

1. The Decision of the Committee on Services and Investment shall be adopted in all authentic languages of the Agreement.

2. The Decision adopted by the Committee on Services and Investment shall be published in the Official Journal of the European Union.

Done at Brussels,

For the Council
The President