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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	8 January 2020
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2019) 614 final/2
Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the CETA Joint Committee as regards the adoption of the List of Arbitrators pursuant to Article 29.8 of the Agreement

Delegations will find attached document COM(2019) 614 final/2.

Encl.: COM(2019) 614 final/2

EUROPEAN
COMMISSION

Brussels, 8.1.2020
COM(2019) 614 final/2

2019/0270 (NLE)

This document replaces COM(2019) 614 final of 28.11.2019.
Change of the sensitivity level, deletion of the marking "LIMITED".

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the CETA Joint Committee as regards the adoption of the List of Arbitrators pursuant to Article 29.8 of the Agreement

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 for the adoption of the list of arbitrators for Chapter 29 of the Agreement.

2. CONTEXT OF THE PROPOSAL

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') was signed on 30 October 2016. In accordance with Council Decision (EU) 2017/38, parts of the Agreement have been provisionally applied since 21 September 2017.

Article 26.1 of the Agreement establishes the CETA Joint Committee comprising representatives of both Parties. The CETA Joint Committee has the power to take decisions by mutual consent in all matters where the Agreement so provides.

Chapter 29 covers all disputes concerning the interpretation or application of the provisions of the Agreement, except as otherwise provided in the Agreement.

Pursuant to Article 29.8.1, the CETA Joint Committee is to establish a list of at least 15 individuals who are willing and able to serve as arbitrators for disputes under Chapter 29 ('the envisaged act'). The list is to be composed of three sub-lists: one sub-list for each Party and one sub-list of individuals who are not nationals of either Party to act as chairpersons.

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

A draft list of arbitrators that meets the requirements of Article 29.8 has been prepared between the parties.

The decision establishing this list of arbitrators should have been taken at the first meeting of the CETA Joint Committee, and must now be taken as soon as possible to fully implement Chapter 29 of the Agreement on dispute settlement.

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*'[1].

[1] 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.

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 between Canada, of the one part, and the European Union and its Member States, of the other part.

The envisaged act constitutes an act having legal effects. The envisaged act will be binding 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.

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 basis of the proposed decision is Article 207 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 207 TFEU, in conjunction with Article 218(9) TFEU.

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on the position to be taken on behalf of the European Union in the CETA Joint Committee as regards the adoption of the List of Arbitrators pursuant to Article 29.8 of the Agreement

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular 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) 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') was signed on 30 October 2016.

(2) In accordance with Council Decision (EU) 2017/38,[2] parts of the Agreement have been provisionally applied since 21 September 2017.

(3) Article 29.8.1 of the Agreement foresees that the CETA Joint Committee establishes a list of at least 15 individuals who are willing and able to serve as arbitrators.

(4) It is appropriate to establish the position to be taken on the Union's behalf in the CETA Joint Committee, as the envisaged decision will be binding on the Union,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the CETA Joint Committee established under the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, with regard to the adoption of the List of Arbitrators pursuant to Article 29.8 of the Agreement shall be based on the draft decision of the CETA Joint Committee attached to this Decision.

Article 2

This Decision is addressed to the Commission.

Article 3

[2] OJ L 11, 14.1.2017, p.1080.

After its adoption, the Decision of the CETA Joint Committee shall be published in the Official Journal of the European Union.

Done at Brussels,

For the Council
The President