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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	17 November 2023
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2023) 708 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 interpretation of Article 8.10, Annex 8-A, Article 8.9.1 and Article 8.39.3 of CETA in accordance with Article 26.1.5(e) of CETA

Delegations will find attached document COM(2023) 708 final.

Encl.: COM(2023) 708 final



EUROPEAN
COMMISSION

Brussels, 17.11.2023
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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 interpretation of Article 8.10, Annex 8-A, Article 8.9.1 and Article 8.39.3 of CETA in accordance with Article 26.1.5(e) of CETA

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 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 interpretation of Article 8.10, Annex 8-A, Article 8.9.1 and Article 8.39.3 of CETA in accordance with Article 26.1.5(e).

2. CONTEXT OF THE PROPOSAL

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

CETA 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. 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 26.1.5(e) of the Agreement, the CETA Joint Committee may adopt decisions on the interpretation of the provisions of this Agreement, which shall be binding on tribunals established under Section F of Chapter Eight (Resolution of investment disputes between investors and states) and Chapter Twenty-Nine (Dispute Settlement).

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, 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.

¹ Rules of Procedure of the CETA Joint Committee, Annex to 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. 19), available eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2018:190:FULL

2.3. The envisaged act of the CETA Joint Committee

The CETA Joint Committee is to adopt a decision on the interpretation of Article 8.10, Annex 8-A, Article 8.9.1 and Article 8.39.3 of CETA ('the envisaged act').

The purpose of the envisaged act is to provide certain further clarifications notably with regard to the standards of "fair and equitable treatment" and "indirect expropriation", as well as Article 8.9.1 and Article 8.39.3 of CETA.

The envisaged act will become binding on the Parties pursuant to Article 26.3.2 of the Agreement.

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

The envisaged act relates to the provisions on fair and equitable treatment and indirect expropriation which are already circumscribed in CETA and in Section 6 of the CETA Joint Interpretative Instrument. The envisaged act aims to further clarify how those standards should be understood, in light of the current situation and especially the climate emergency. The envisaged act also related to Article 8.9.1. and Article 8.39.3 of CETA. The envisaged act will clarify the provisions according to the Parties' intention, without amending CETA.

The proposed position fits in with other policies, rules or initiatives of the Union.

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*'².

4.1.2. Application to the present case

The CETA Joint Committee is a body set up by an agreement, namely CETA.

² 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.

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 and upon the tribunals established under Section F of Chapter Eight (Resolution of investment disputes between investors and states) and Chapter Twenty-Nine (Dispute Settlement) under Article 26.1.5(e) 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 bases of the proposed decision should be Article 207 TFEU in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the CETA Joint Committee will clarify certain provisions of the Agreement, it is appropriate to adopt it in all authentic languages of the Agreement³ and publish it in the *Official Journal of the European Union* after its adoption.

³ 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.

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 interpretation of Article 8.10, Annex 8-A, Article 8.9.1 and Article 8.39.3 of CETA in accordance with Article 26.1.5(e) of CETA

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

Whereas:

- (1) Council Decision (EU) 2017/37⁴ 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) 2017/38⁵ provides for the provisional application of parts of the Agreement. The Agreement has been provisionally applied since 21 September 2017.
- (3) Pursuant to Article 26.1.5(e) of the Agreement, the CETA Joint Committee has the power to adopt decisions on the interpretation of the provisions of this Agreement, which shall be binding on tribunals established under Section F of Chapter Eight (Resolution of investment disputes between investors and states) and Chapter Twenty-Nine (Dispute Settlement).
- (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.

⁴ 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).

⁵ 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).

- (5) The CETA Joint Committee is to adopt, by written procedure, a decision on the interpretation of Article 8.10, Annex 8-A, Article 8.9.1 and Article 8.39.3 of CETA.
- (6) 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, as it clarifies the above-mentioned articles,

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 interpretation of Article 8.10, Annex 8-A, Article 8.9.1 and Article 8.39.3 of CETA, in accordance with Article 26.1.5(e) of CETA, shall be based on the draft decision of the CETA Joint Committee attached to this Council Decision.

Article 2

After its adoption, the Decision adopted by the CETA Joint Committee referred to in Article 1 shall be published in the Official Journal of the European Union.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President