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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) 457 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 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 setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal

Delegations will find attached document COM(2019) 457 final - ANNEX.

Encl.: COM(2019) 457 final - ANNEX



Brussels, 11.10.2019
COM(2019) 457 final

ANNEX

ANNEX

to the

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 setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal

ATTACHMENT

DRAFT

DECISION No [.../2019] OF THE CETA JOINT COMMITTEE

of...

setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal

The CETA JOINT COMMITTEE,

Having regard to Article 26.1 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 8.28.7 of the Agreement provides that the CETA Joint Committee shall adopt a decision setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal,

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; and
- (c) “Member” means a Member 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

Composition and administrative arrangements

1. The Appellate Tribunal shall be composed of six Members appointed by the CETA Joint Committee with a view to the principles of diversity and gender equality. For the purposes of this appointment:
 - (a) two Members shall be selected from nominations proposed by Canada;
 - (b) two Members shall be selected from nominations proposed by the European Union; and
 - (c) two Members shall be selected from nominations proposed by Canada or the European Union, and shall not be nationals of either Canada or any Member State of the European Union.

2. The CETA Joint Committee may decide to increase the number of Members by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 1.
3. Members shall be appointed for a nine-year non-renewable term. However, the terms of three of the first six persons appointed pursuant to Article 8.28.3 of the Agreement shall be limited to six years. Those three persons shall be determined by lot with one Member selected from each of the groups of Members appointed pursuant to subparagraphs 1(a), 1(b) and 1(c). In principle, a Member serving on a division of the Appellate Tribunal when his or her term expires may continue to serve on the division until the closure of the proceedings of that division, unless the President of the Appellate Tribunal after consulting with the other Members of the division decides otherwise, and shall, for that purpose only, be deemed to continue to be a Member. Vacancies in the Appellate Tribunal shall be filled as they arise.
4. The Appellate Tribunal shall have a President and Vice-President responsible for organisational issues, who shall be selected by lot by the Chair of the CETA Joint Committee for a two-year term from among the Members who are nationals of third countries. They shall serve on the basis of a rotation. The Vice-President shall replace the President when the President is unavailable.
5. The division of the Appellate Tribunal constituted to hear each case under Article 8.28.5 of the Agreement shall consist of three Members, of whom one Member has been appointed pursuant to subparagraph 1(a), one Member has been appointed pursuant to subparagraph 1(b) and one Member has been appointed pursuant to subparagraph 1(c). The division shall be chaired by the Member who has been appointed pursuant to subparagraph 1(c).
6. The composition of the division of the Appellate Tribunal hearing each appeal shall be established in each case by the President of the Appellate Tribunal on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members to serve.
7. The Appellate Tribunal may sit in a division of six Members where a case pending before a division raises a serious question affecting the interpretation or application of Chapter Eight of the Agreement. The Appellate Tribunal shall sit in a division of six Members when both disputing parties so request or where a majority of Members decides that it is desirable. The President of the Appellate Tribunal shall preside over the division of six Members.
8. The Appellate Tribunal may draw up its own working procedures.
9. Members shall ensure that they are available and able to perform the functions set out under this Decision and under Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) of the Agreement.
10. In order to ensure their availability, Members shall be paid a monthly retainer fee to be determined by the CETA Joint Committee.
11. The fees referred to in paragraph 10 shall be paid equally by both Parties into an account managed by the Secretariat of ICSID. In the event that one Party fails to pay the retainer fee, the other Party may elect to pay. Any such arrears will remain payable, with appropriate interest.
12. The fees and expenses of Members on a division constituted to hear a claim, other than the fees referred to in paragraph 10, shall be determined by the CETA Joint

Committee and allocated among the disputing parties on the same basis as Article 8.39.5 of the Agreement.

13. Upon a decision by the CETA Joint Committee, the retainer fee and the fees for days worked may be transformed into a regular salary. In such an event, Members shall serve on a full-time basis and the CETA Joint Committee shall fix their remuneration and related organisational matters. In that event, the Members shall not be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Appellate Tribunal.
14. The Secretariat of ICSID shall act as Secretariat for the Appellate Tribunal and provide it with appropriate support. The expenses for such support shall be met by the Parties equally.

Article 3

Conduct of Appeals

1. Either disputing party may appeal before the Appellate Tribunal an award rendered by the Tribunal pursuant to Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) within the time frame established by Article 8.28.9(a) of the Agreement and the grounds set out in Article 8.28.2 of the Agreement.
2. If the Appellate Tribunal upholds the appeal in whole or in part, it shall modify or reverse the legal findings and conclusions of the Tribunal in whole or in part. The Appellate Tribunal shall specify precisely how it has modified or reversed the relevant findings and conclusions of the Tribunal.
3. If the facts established by the Tribunal so permit, the Appellate Tribunal shall apply its own legal findings and conclusions to such facts and render a final award. If that is not possible, it shall issue a decision referring the matter back to the Tribunal to render an award in accordance with the findings and conclusions of the Appellate Tribunal. If possible, the Appellate Tribunal shall refer the matter back to the same division of the Tribunal that was previously constituted to decide the matter.
4. The Appellate Tribunal shall reject the appeal where it finds that the appeal is unfounded. It may also reject the appeal on an expedited basis where it is clear that the appeal is manifestly unfounded. If the Appellate Tribunal rejects the appeal, the award rendered by the Tribunal shall become the final award.
5. As a general rule, the appeal proceedings shall not exceed 180 days from the date a disputing party formally notifies its decision to appeal to the date the Appellate Tribunal issues its decision or award. If the Appellate Tribunal considers that it cannot issue its decision or award within 180 days, it shall inform the disputing parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its decision or award. Every effort should be made to ensure that the appeal proceedings should not exceed 270 days.
6. A disputing party lodging an appeal shall provide security for the costs of appeal as determined by the division of the Appellate Tribunal constituted to hear the case. The disputing party shall also provide any other security as may be ordered by the Appellate Tribunal.
7. The provisions of Articles 8.20 (Mediation), 8.24 (Proceedings under another international agreement), 8.26 (Third party funding), 8.31 (Applicable law and

interpretation), 8.34 (Interim measures of protection), 8.35 (Discontinuance), 8.36 (Transparency of proceedings),¹ 8.38 (Non-disputing Party), 8.39 (Final award) and 8.40 (Indemnification or other compensation) of the Agreement shall apply *mutatis mutandis* in respect of the appeal procedure.

Article 4

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 ...

¹ For greater certainty, the notice of appeal, the notice of intent to challenge a Member and the decision on challenge to a Member shall be included in the list of documents to be made available to the public under Article 3(1) of the UNCITRAL Transparency Rules.