



Brussels, 26.4.2024
COM(2024) 178 final

2024/0097 (NLE)

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 supplemental rules on expedited procedures for the resolution of investment disputes between investors and states, in particular for natural persons and small and medium-sized enterprises

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 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 supplemental rules on expedited procedures for the resolution of investment disputes between investors and states, in particular for natural persons and small and medium-sized enterprises (SMEs).

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 CETA Joint Committee

The CETA Joint Committee is established under Article 26.1 of the Agreement, which provides that the CETA Joint Committee comprises representatives of the European Union and representatives of Canada and is to be co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees. The CETA Joint Committee meets once a year, or at the request of a Party, and agrees on its meeting schedule and its agenda. 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 26.3 of the Agreement, the CETA Joint Committee has the power to make decisions, by mutual consent, in respect of all matters when the Agreement so provides. The decisions made by the CETA Joint Committee are binding on the Parties, subject to the completion of any necessary internal requirements and procedures, and the Parties have to implement them.

In accordance with Rule 10.2 of the Rules of Procedure of the CETA Joint Committee and of the Specialised Committees¹, 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 Decision 001/2018 of the CETA Joint Committee of 26 September 2018 adopting its Rules of Procedure and of the Specialised Committees.

2.3. The envisaged act of the CETA Joint Committee

The CETA Joint Committee is to adopt a decision setting out supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium-sized enterprises pursuant to Article 8.39.6 of the Agreement ('the envisaged act').

The envisaged act will become binding on the Parties. Article 26.3.2 of the Agreement provides: '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'.

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 undertake 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 8.39.6 of the Agreement, '[t]he CETA Joint Committee shall consider supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium-sized enterprises. Such supplemental rules may, in particular, take into account the financial resources of such claimants and the amount of compensation sought'.

Paragraph 6(h) of the Joint Interpretative Instrument on the Agreement provides: 'Canada and the European Union and its Member States are committed to monitoring the operation of all these investment rules, to addressing in a timely manner any shortcomings that may emerge and to exploring ways in which to continually improve their operation over time'. In addition, Statement No 36 by the Commission and the Council, entered into the Council minutes on the occasion of the adoption by the Council of the decision to authorise the signature of CETA on behalf of the Union, provides: 'There will be better and easier access to this new court for the most vulnerable users, namely SMEs and private individuals. To that end: The adoption by the Joint Committee of additional rules, provided for in Article 8.39.6 of the CETA, intended to reduce the financial burden imposed on applicants who are natural persons or small and medium-sized enterprises, will be expedited so that these additional rules can be adopted as soon as possible. Irrespective of the outcome of the discussions within the Joint Committee, the Commission will propose appropriate measures of (co)-financing of actions of small and medium-sized enterprises before that Court and the provision of technical assistance'.³

Furthermore, Opinion 1/17 of the Court of Justice of the European Union provides: 'It is clear that, by means of that Statement, the Commission and the Council have given a commitment to implement, rapidly and adequately, Article 8.39.6 of the CETA and to ensure the accessibility of envisaged tribunals to small and medium-sized enterprises, even if work within the CETA Joint Committee were to be fruitless. That commitment is sufficient justification, in the context of the present Opinion proceedings, for the conclusion that the CETA, as an "agreement envisaged", within the meaning of Article 218(11) TFEU, is compatible with the requirement that those tribunals should be accessible. To quote an explanatory sentence that precedes the statements, one of which is Statement No 36, those statements "form an integral part of the context in which the Council adopts the decision to authorise the signature of CETA on behalf of the Union. They will be entered into the Council

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. 4).

³ Statements to be entered in the Council minutes (OJ L 11, 14.1.2017, p. 21).

minutes on this occasion”. The approval of the CETA by the Union is thus dependent on the abovementioned commitment by the Union to guarantee effective access to the envisaged tribunals for all EU investors subject to the CETA. It must be observed, in that regard, that, according to Statement No 36, this commitment forms part of the “principles” on the basis of which “the Commission is committed to further review, without delay, of the dispute settlement mechanism ... allowing sufficient time so that Member States can consider it in their ratification processes”. In the light of the preceding paragraph of Statement No 36, whereby the Council and the Commission confirm that the entry into force of the provisions of Section F of Chapter Eight of the CETA will not occur before the ratification of the CETA by all the Member States, it must be held that the conclusion of the CETA by the Council is envisaged subject to the premiss that the financial accessibility of the CETA Tribunal and Appellate Tribunal for all EU investors concerned will be ensured’.⁴

The envisaged act implements the abovementioned elements by including detailed rules for the resolution of investment disputes, in particular for SMEs and natural persons, to request access to an expedited procedure under the Investment Court System (Article 2). In addition, it includes detailed rules on the constitution of the Tribunal (Article 3); the first session in the expedited procedure (Article 4); the procedural schedule for the expedited procedure (Article 5); the consolidation of claims under the Decision (Article 6); mediation (Article 7) and review of the Decision (Article 8). The envisaged act will enter into force on the date of entry into force of Section F of Chapter Eight of the Agreement (Article 10).

This proposal fits in with other initiatives on the implementation of the CETA Investment Court System. Specifically, in January 2021, the Parties adopted four decisions which concerned:

- 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.

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’.

⁴ Opinion 1/17 of the Court of Justice of the European Union, 30 April 2019, ECLI:EU:C:2019:341, paragraphs 214 to 221.

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’.⁵

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 (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 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.

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.

5. AUTHENTIC LANGUAGES AND PUBLICATION OF THE ENVISAGED ACT

As the act of the CETA Joint Committee 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 Agreement⁶ and publish it in the Official Journal of the European Union after its adoption.

⁵ 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.

⁶ 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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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 supplemental rules on expedited procedures for the resolution of investment disputes between investors and states, in particular for natural persons and small and medium-sized enterprises

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) 2017/37⁷ 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) 2017/38⁸ provides for the provisional application of parts of the Agreement, including the part on the establishment of the CETA Joint Committee. The Agreement has been provisionally applied since 21 September 2017.
- (3) Pursuant to Article 26.3.1 of the Agreement, the CETA Joint Committee shall, for the purpose of attaining the objectives of this Agreement, have the power to make decisions in respect of all matters when this Agreement so provides.
- (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.
- (5) In accordance with Article 8.39.6 of the Agreement, the CETA Joint Committee is to adopt a decision setting out supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium-sized enterprises.
- (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 on the supplemental rules on expedited procedures for the resolution

⁷ 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).

⁸ 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).

of investment disputes between investors and states, in particular for natural persons and small and medium-sized enterprises in order to ensure the effective implementation of the Agreement,

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 setting out supplemental rules on expedited procedures for the resolution of investment disputes between investors and states, in particular for natural persons and small and medium-sized enterprises, shall be based on the draft decision of the CETA Joint Committee attached to this Council Decision.

Article 2

1. The Decision of the CETA Joint Committee shall be adopted in all authentic languages of the Agreement.
2. The Decision adopted by the CETA Joint Committee shall be published in the Official Journal of the European Union.

Done at Brussels,

*For the Council
The President*