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ANNEX

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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 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

ANNEX

Draft DECISION No [XX/2024] OF THE CETA JOINT COMMITTEE

of...[date]

adopting 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 CETA Joint Committee,

Having regard to Article 26.1 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"),

Whereas Article 8.39.6 of the Agreement provides that the 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,

With due consideration to the Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, in which the Parties committed to monitoring the operation of the 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,

Seeking to support an inclusive approach to trade and investment, which seeks to ensure that all segments of society can take advantage of the economic opportunities flowing from trade and investment,

Recalling Statement No 36 by the European Commission and the Council of the European Union on "investment protection and the Investment Court System", entered into the minutes of the Council of the European Union in relation to the signature of the Agreement and annexed to the Council Decision (EU) 2017/37 of 28 October 2016, including the commitment that there will be better and easier access to the Agreement's investment dispute resolution mechanism for the most vulnerable users, namely small and medium-sized enterprises and private individuals,

Having regard to Opinion C-1/17 of the Court of Justice of the European Union emphasising the importance of ensuring that the Agreement's mechanism for the resolution of investment disputes between investors and states is financially accessible, in particular for small and medium-sized enterprises,

Recognising the importance of clear, transparent, and mutually advantageous rules to promote investment in the Parties' respective territories,

Desiring to support small and medium-sized enterprises by enhancing their ability to participate and benefit from opportunities created by the Agreement,

Seeking to facilitate access to, and ability to benefit from, the opportunities created by the Agreement and to support the conditions for full participation in domestic, regional, and international trade and investment,

HAS ADOPTED THIS DECISION:

Article 1: Scope and objective

The objective of this Decision is to increase accessibility and reduce the costs of resolving investment disputes between investors and states, in particular for natural persons or small and medium-sized enterprises by:

- (a) setting out supplemental rules for investors, in particular natural persons or small and medium sized enterprises, to request access to expedited procedures, for the resolution of investment disputes under Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) of the Agreement; and
- (b) establishing expedited procedures for the resolution of investment disputes under Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) of the Agreement.

Article 2: Access to the expedited procedure

1. An investor of a Party may request access to an expedited procedure for the resolution of an investment dispute in accordance with this Decision. The investor shall submit the request to the respondent and the Tribunal no later than the date of submission of a claim under Article 8.23 of the Agreement. The request shall include the following information:
 - (a) information concerning the ownership structure of the investor, and if applicable, the locally established enterprise on whose behalf the claim is submitted, or any other affiliated persons;
 - (b) the most recent financial statements of the investor and if applicable, the locally established enterprise on whose behalf the claim is submitted;
 - (c) proof that the investor is a person of a Party; and
 - (d) information concerning the number of employees of the investor and, if applicable, the locally established enterprise on whose behalf the claim is submitted.

The investor is also strongly encouraged to provide any information on why it considers the expedited procedure to be appropriate under the circumstances of the claim.
2. The respondent shall give sympathetic consideration to a request under paragraph 1 if the investor is a natural person or small or medium-sized enterprise, and the amount of damages claimed does not exceed the equivalent of SDR 40 000 000. In considering whether the investor is a small or medium-sized enterprise, the respondent shall take into consideration the size of the investor as an enterprise and, if the claim is submitted on behalf of an enterprise, the size of that enterprise, including the following factors: the number of employees, annual turnover, ownership structure, and any other factors that the respondent considers relevant.¹
3. Prior to taking a decision on a request under paragraph 1, the respondent may request additional information from the investor. To the extent that the respondent identifies a potential concern regarding the suitability of the expedited procedure, it may

¹ In the case where the respondent is the European Union or a Member State of the European Union, the Commission Recommendation of 6 May 2003 concerning the definition of “micro, small and medium-sized enterprises” (2003/361/EC), may be taken into account when considering whether the investor or the enterprise on whose behalf the claim is submitted, as applicable, is a small or medium-sized enterprise.

inform the investor and request any necessary information to address that concern. The disputing parties may discuss whether that concern can be addressed by extending the timelines set out in Articles 4 and 5 or by taking any other agreed action.

4. The respondent shall notify the claimant and the Tribunal, in writing, of its decision regarding a request under paragraph 1 within 45 days of the submission of the claim under Article 8.23 of the Agreement, unless the disputing parties agree to a different timeline for the notification. In the event that the respondent rejects the request, it shall provide a justification for its decision in its notification to the claimant.
5. In accordance with Article 8.38 of the Agreement, the respondent shall promptly notify the non-disputing Party of a request made by an investor under paragraph 1 and of its decision under paragraph 4.
6. If the disputing parties agree to an expedited procedure, Section F (Resolution of investment disputes between investors and states) of the Agreement, as modified by this Decision, applies to the dispute.

Article 3: Constitution of the Tribunal

1. A claim subject to an expedited procedure pursuant to Article 2(6) shall be heard by a sole Member of the Tribunal.
2. The sole Member of the Tribunal shall be appointed by the President of the Tribunal from the third country nationals, in accordance with the principles outlined in Article 8.27.7 of the Agreement, as modified by this Decision, within 30 days of the notification of a decision of the respondent consenting to a request under Article 2(4).
3. The sole Member of the Tribunal shall ensure his or her availability in respect of the expedited timelines set out in Article 5.
4. The sole Member of the Tribunal shall abide by Decision No 001/2021 of the Committee on Services and Investment of 29 January 2021 adopting a code of conduct for Members of the Tribunal, Members of the Appellate Tribunal and mediators.
5. If the dispute falls under Article 13.21.1 of the Agreement, a sole Member of the Tribunal shall be selected, in accordance with the principles outlined in Article 8.27.7 and Article 13.21.2 of the Agreement, as modified by this Decision.

Article 4: First session in expedited procedure

1. The sole Member of the Tribunal shall hold a first session within 30 days of the constitution of the Tribunal under Article 3.
2. The sole Member of the Tribunal shall hold the first session by videoconference, telephone, or similar means of communication, unless both disputing parties and the sole Member of the Tribunal agree it shall be held in person.

Article 5: Procedural schedule for expedited procedure

1. Unless the disputing parties agree otherwise, the following schedule for written submissions and the hearing shall apply in the expedited procedure:
 - (a) the claimant shall file, within 90 days of the first session, a principal submission on the merits, such as a memorial, of no more than 150 pages;
 - (b) the respondent shall file, within 90 days of the claimant's filing of its principal submission on the merits pursuant to subparagraph (a), a principal submission on the merits, such as a counter-memorial, of no more than 150 pages;
 - (c) the claimant shall file, within 90 days of the respondent's filing of its principal submission on the merits pursuant to subparagraph (b), a reply of no more than 100 pages;
 - (d) the respondent shall file, within 90 days of the claimant's filing of the reply pursuant to subparagraph (c), a rejoinder of no more than 100 pages;
 - (e) the non-disputing Party may file, within 60 days of the respondent's filing of the rejoinder pursuant to subparagraph (d), a written submission regarding the interpretation of the Agreement pursuant to Article 8.38.2 of the Agreement;
 - (f) the sole Member of the Tribunal shall hold a hearing within 120 days of the respondent's filing of the rejoinder pursuant to subparagraph (d);
 - (g) each disputing party shall file a statement of costs within 30 days of the last day of the hearing referred to in subparagraph (f); and
 - (h) the sole Member of the Tribunal shall render the award as soon as possible, and in any event within 180 days of the last day of the hearing referred to in subparagraph (f).
2. If the claimant fails to take any steps in the proceeding, the sole Member of the Tribunal may grant the claimant a grace period not exceeding 30 days. If the grace period is not granted, or the claimant fails to take steps within that time period, the claimant is deemed to have withdrawn its claim and to have discontinued the proceedings, in accordance with Article 8.35 of the Agreement, as modified by this Decision.
3. If the respondent fails to take any steps in the proceeding, the sole Member of the Tribunal may grant the respondent a grace period not exceeding 30 days. If the grace period is not granted, or the respondent fails to take steps within that time period, the claimant may request that the sole Member of the Tribunal address the questions submitted to it and render an award.
4. At the request of a disputing party, the sole Member of the Tribunal may grant limited requests for specifically identifiable documents relevant to the case and material to its outcome that the requesting disputing party knows, or has good cause to believe, exist and are in the possession, custody or control of the other disputing party, and shall adjust the schedule under paragraph 1 as appropriate.
5. The sole Member of the Tribunal may, after consultation with the disputing parties, limit the number, length, or scope of written submissions or written witness evidence (both fact witnesses and experts).
6. The sole Member of the Tribunal may, following a joint request by the disputing parties, decide the dispute solely on the basis of the documents submitted by the disputing parties, with no hearing and no or limited examination of witnesses or

experts. If the sole Member of the Tribunal holds a hearing under paragraph 1(f), the sole Member of the Tribunal may conduct the hearing by videoconference, telephone, or similar means of communication.

7. The sole Member of the Tribunal shall, following a joint request by the disputing parties, and no later than the date of filing of the respondent's principal submission on the merits referred to in paragraph 1(b), decide that this Decision no longer applies to the claim.
8. The sole Member of the Tribunal may, at the request of the claimant, and no later than the date of filing of the respondent's principal submission on the merits referred to in paragraph 1(b), decide that this Decision no longer applies to the claim. The claimant shall bear the costs of proceedings incurred by the respondent in the expedited procedure.
9. The sole Member of the Tribunal may, at the request of the respondent, and no later than the date of filing of the respondent's principal submission on the merits referred to in paragraph 1(b), decide that this Decision no longer applies to the claim only if there is any false or misleading information provided by the claimant that is material to the respondent's decision to consent to the expedited procedure under Article 2(4). In that case, the claimant shall bear the costs of proceedings incurred by the respondent in the expedited procedure.
10. If, pursuant to paragraph 8 or 9, the sole Member of the Tribunal decides that this Decision no longer applies to the claim, and unless the disputing parties agree otherwise, the sole Member of the Tribunal appointed pursuant to Article 3 shall be appointed as presiding Member of the Tribunal constituted under Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) of the Agreement. The new Tribunal constituted under Section F shall decide, after consultation with the disputing parties, how to take into consideration the status of the proceeding started under this Decision.
11. In all matters concerning the expedited procedure that are not expressly provided for in this Decision or in the Agreement, the disputing parties shall endeavour to agree on the applicable procedural rules. If the disputing parties do not agree on the applicable procedural rules, the sole Member of the Tribunal may decide on the matter.
12. In accordance with Article 8.28 of the Agreement, a disputing party may appeal an award rendered by the sole Member of the Tribunal under paragraph 1(h). The conduct of appeals and procedures for referring issues back to the Tribunal for adjustment of the award, as appropriate, shall be governed by Article 8.28 of the Agreement and Decision No 001/2021 of the CETA Joint Committee of 29 January 2021 setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal.

Article 6: Consolidation of claims under this Decision

When two or more claims subject to an expedited procedure pursuant to Article 2(6) have a question of law or fact in common and arise out of the same events or circumstances, a disputing party shall give sympathetic consideration to a request for consolidation of those claims. If all disputing parties agree, those claims shall be consolidated in accordance with Article 8.43 of the Agreement.

Article 7: Mediation

1. A respondent shall give sympathetic consideration to a request for mediation if the investor is a natural person or a small or medium-sized enterprise, and the amount of damages claimed does not exceed the equivalent of SDR 40 000 000.
2. In considering whether the investor is a small or medium-sized enterprise, the respondent shall take into consideration the size of the investor as an enterprise and, if the claim is submitted on behalf of an enterprise, the size of that enterprise, including the following factors: the number of employees, annual turnover, ownership structure, and any other factors that the respondent considers relevant.² The respondent may request additional information from the investor to facilitate its consideration of whether the investor is a small or medium-sized enterprise.
3. Article 8.20 of the Agreement and Decision No 002/2021 of the Committee on Services and Investment of 29 January 2021 adopting rules for mediation for use by disputing parties in investment disputes, apply to a mediation agreed to by the disputing parties under paragraph 1.

Article 8: Review of this Decision

The CETA Joint Committee may periodically review the functioning of this Decision, including the considerations referred to in Articles 2(2) and 7(2), consider other developments on enhancing the ability of natural persons or small and medium-sized enterprises to participate and benefit from opportunities created by international trade and investment, and revise this Decision, as appropriate.

Article 9 - Authentic texts

This Decision 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.

Article 10 - Entry into force

This Decision shall be published. It 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 ...

² In the case where the respondent is the European Union or a Member State of the European Union, the Commission Recommendation of 6 May 2003 concerning the definition of "micro, small and medium-sized enterprises" (2003/361/EC), may be taken into account when considering whether the investor or the enterprise on whose behalf the claim is submitted, as applicable, is a small or medium-sized enterprise.