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General Secretariat

**Brussels, 25 July 2018**

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**LIMITE**

**SERVICES  
FDI**

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**MEETING DOCUMENT**

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From:	European Commission
To:	Trade Policy Committee (Services and Investment)
Subject:	Revised draft decisions on the Appellate Tribunal, the code of conduct and the rules for mediation for the implementation of the Investment Court System (ICS) under CETA as sent to Canada

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## EUROPEAN COMMISSION

Directorate-General for Trade

Directorate F - WTO, Legal Affairs and Trade in Goods  
**Dispute Settlement and Legal Aspects of Trade Policy**

Brussels, 25 July 2018  
Trade F2/MLA/cg/4419432

*Limited<sup>1</sup>*

### **NOTE FOR THE ATTENTION OF THE TRADE POLICY COMMITTEE (SERVICES AND INVESTMENT)**

**SUBJECT: Revised draft decisions on the Appellate Tribunal, the code of conduct and the rules for mediation for the implementation of the Investment Court System (ICS) under CETA as sent to Canada**



**FOR: Information**

#### **REMARKS:**

Following discussions at the meetings of the Trade Policy Committee (Services and Investment) of 13 June, 4 July and 18 July 2018, delegations will find enclosed the revised draft decisions regarding:

1. rules setting out administrative and organisational matters for the functioning of the Appellate Tribunal, pursuant to Article 8.28.7 of CETA;
2. a code of conduct for Members of the Tribunal, the Appellate Tribunal and Mediators, pursuant to Article 8.44.2 of CETA; and
3. rules for mediation for use by disputing parties, pursuant to Article 8.44.3(c) of CETA.

The texts are provided in track changes and clean format.

Today, the Commission shared these draft decisions informally with Canada in order to have preliminary exchanges on these texts at the first meeting of the CETA Committee

on Services and Investment, which is currently scheduled to take place on 18 September 2018. Following this meeting, the Commission will debrief the Committee of the outcome of the preliminary discussions with Canada.

Work on other areas of implementation of the ICS, in particular on the selection process of the Members of the ICS, continues and the Commission intends to share its internal work with Member States after the summer. As provided in the Joint Interpretative Instrument on CETA, the aim is to conclude the work on implementation of the ICS by the entry into force of CETA.

<sup>1</sup> This document is only for use within the European institutions and Member States' public administrations:

- Distribution on a need to know basis
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**DRAFT DECISION OF THE CETA JOINT COMMITTEE  
ON THE APPELLATE TRIBUNAL**

The CETA JOINT COMMITTEE,

Having regard to Article 26.1 of the Comprehensive Economic and Trade Agreement between the European Union and its Member States, of the one part, and Canada, of the other part ('the Agreement'),

Whereas:

- 1) 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,
- 2) Article 8.28.3 of the Agreement provides that the Members of the Appellate Tribunal shall be appointed by a decision of the CETA Joint Committee at the same time as the decision referred to in Article 8.28.7 of the Agreement,

HAS ADOPTED THIS DECISION:

*Article 1*

**Composition and administrative arrangements**

1. The Appellate Tribunal shall be composed of six Members, of whom two shall be nationals of a Member State of the European Union, two shall be nationals of Canada<sup>1</sup> and two shall be nationals of third countries.
2. The CETA Joint Committee may decide to increase the number of the Members of the Appellate Tribunal by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 1.
3. The Members of the Appellate Tribunal shall be appointed for a six-year non-renewable term. However, the terms of three of the six persons appointed pursuant to Article 8.28.3 of the Agreement, to be determined by lot, shall extend to nine years. Vacancies in the Appellate Tribunal shall be filled as they arise. A person who is serving on a division of the Appellate Tribunal when his or her term expires may, with the authorisation of the President of the Appellate Tribunal after consulting with the other Members of the division, continue to serve on the division until the closure of

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<sup>1</sup> Either Party may instead propose to appoint up to two Members of the Appellate Tribunal of any nationality. In this case, such Members of the Appellate Tribunal shall be considered to be nationals of the Party that proposed his or her appointment for the purposes of this Article.

the proceedings of that division and shall, for that purpose only, be deemed to continue to be a Member of the Appellate Tribunal.

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 shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member who is a national of a third country.
6. The composition of the division 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 of the Appellate Tribunal to serve.
7. The Appellate Tribunal may sit in a Chamber 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 Chamber of six Members when both disputing parties so request or where a majority of the Members of the Appellate Tribunal decides that it is desirable. The President of the Appellate Tribunal shall preside over the Chamber.
8. The Appellate Tribunal may draw up its own working procedures.
9. The Members of the Appellate Tribunal shall ensure that they are available and able to perform the functions set out under this Decision and under Section F of Chapter Eight of the Agreement.
10. In order to ensure their availability, the Members of the Appellate Tribunal 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 the Members of the Appellate Tribunal 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 in accordance with 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, the Members of the Appellate Tribunal 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 to the Agreement equally.

## *Article 2*

### **Conduct of Appeals**

1. Either disputing party may appeal before the Appellate Tribunal an award rendered by the Tribunal pursuant to Section F of Chapter 8 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. 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 final.
3. If the Appellate Tribunal upholds the appeal in whole or in part, the decision of the Appellate Tribunal shall modify or reverse the legal findings and conclusions in the award rendered by the Tribunal in whole or in part. Its decision shall specify precisely how it has modified or reversed the relevant findings and conclusions of the Tribunal.
4. When 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. When that is not possible, it shall refer the matter back to the Tribunal to render an award in accordance with the findings and conclusions of the Appellate Tribunal.
5. As a general rule, the appeal proceedings shall not exceed 180 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Tribunal issues its decision. When the Appellate Tribunal considers that it cannot issue its decision 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. 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. The disputing party shall also provide any other security as may be ordered by the Appellate Tribunal.
7. The provisions of Articles 8.26 (Third Party Funding), 8.34 (Interim measures of protection), 8.35 (Discontinuance), 8.36 (Transparency of proceedings), 8.38 (Non-Disputing Party) of the Agreement shall apply *mutatis mutandis* in respect of the appeal procedure.

*Article 3*

**Appointment of the Members of the Appellate Tribunal**

The six Members of the Appellate Tribunal are hereby appointed in accordance with Article 8.28.3 of the Agreement. The names are set out in the Annex to this Decision.

*Article 4*

**Entry into force**

This Decision shall be published and shall enter into force on the date of entry into force of the Agreement. Done at ... on ...

**DRAFT DECISION OF THE CETA JOINT COMMITTEE  
ON THE APPELLATE TRIBUNAL**

The CETA JOINT COMMITTEE,

Having regard to Article 26.1 of the Comprehensive Economic and Trade Agreement between the European Union and its Member States, of the one part, and Canada, of the other part ('the Agreement'),

Whereas:

- 1) 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,
- 2) Article 8.28.3 of the Agreement provides that the Members of the Appellate Tribunal shall be appointed by a decision of the CETA Joint Committee at the same time as the decision referred to in Article 8.28.7 of the Agreement,

HAS ADOPTED THIS DECISION:

*Article 1*

**Composition and administrative arrangements**

1. The Appellate Tribunal shall be composed of six Members, of whom two shall be nationals of a Member State of the European Union, two shall be nationals of Canada<sup>1</sup> and two shall be nationals of third countries.
2. The CETA Joint Committee may decide to increase the number of the Members of the Appellate Tribunal by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 1.
3. The Members of the Appellate Tribunal shall be appointed for a six-year non-renewable term. However, the terms of three of the six persons appointed pursuant to Article 8.28.3 of the Agreement, to be determined by lot, shall extend to nine years. Vacancies in the Appellate Tribunal shall be filled as they arise. ~~A person appointed to replace a Member of the Appellate Tribunal whose term of office has not expired shall hold office for the remainder of the predecessor's term.~~ A person who is serving on a division of the Appellate Tribunal when his or her term expires may, with the

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<sup>1</sup> Either Party may instead propose to appoint up to two Members of the Appellate Tribunal of any nationality. In this case, such Members of the Appellate Tribunal shall be considered to be nationals of the Party that proposed his or her appointment for the purposes of this Article.



authorisation of the President of the Appellate Tribunal after consulting with the other Members of the division, continue to serve on the division until the closure of the proceedings of that division and shall, for that purpose only, be deemed to continue to be a Member of the Appellate Tribunal.

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 shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member who is a national of a third country.
6. The composition of the division 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 of the Appellate Tribunal to serve.
7. The Appellate Tribunal may sit in a Chamber 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 Chamber of six Members when both disputing parties so request or where a majority of the Members of the Appellate Tribunal decides that it is desirable. The President of the Appellate Tribunal shall preside over the Chamber.
8. The Appellate Tribunal may draw up its own working procedures.
9. The Members of the Appellate Tribunal shall ensure that they are available and able to perform the functions set out under this Decision and under Section F of Chapter Eight of the Agreement.
10. In order to ensure their availability, the Members of the Appellate Tribunal 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 the Members of the Appellate Tribunal 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 in accordance with 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, the Members of the Appellate Tribunal 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 to the Agreement equally.

## *Article 2*

### **Conduct of Appeals**

1. Either disputing party may appeal before the Appellate Tribunal an award rendered by the Tribunal pursuant to Section F of Chapter 8 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. 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 final.
3. If the Appellate Tribunal upholds the appeal in whole or in part, the decision of the Appellate Tribunal shall modify or reverse the legal findings and conclusions in the award rendered by the Tribunal in whole or in part. Its decision shall specify precisely how it has modified or reversed the relevant findings and conclusions of the Tribunal.
4. When 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. When that is not possible, it shall refer the matter back to the Tribunal to render an award in accordance with the findings and conclusions of the Appellate Tribunal.
5. As a general rule, the appeal proceedings shall not exceed 180 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate

Tribunal issues its decision. When the Appellate Tribunal considers that it cannot issue its decision 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. 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. The disputing party shall also provide any other security as may be ordered by the Appellate Tribunal.
7. The provisions of Articles 8.26 (Third Party Funding), 8.34 (Interim measures of protection), 8.35 (Discontinuance), 8.36 (Transparency of proceedings), 8.38 (Non-Disputing Party) of the Agreement shall apply *mutatis mutandis* in respect of the appeal procedure.

### *Article 3*

#### **Appointment of the Members of the Appellate Tribunal**

The six Members of the Appellate Tribunal are hereby appointed in accordance with Article 8.28.3 of the Agreement. The names are set out in the Annex to this Decision.

### *Article 4*

#### **Entry into force**

This Decision shall be published and shall enter into force on the date of entry into force of the Agreement. Done at ... on ...

**DRAFT DECISION OF THE CETA COMMITTEE ON SERVICES AND INVESTMENT ON THE CODE OF CONDUCT FOR MEMBERS OF THE TRIBUNAL, THE APPELLATE TRIBUNAL AND MEDIATORS**

The CETA COMMITTEE ON SERVICES AND INVESTMENT,

Having regard to Article 26.2.1(b) of the Comprehensive Economic and Trade Agreement between the European Union and its Member States, of the one part, and Canada, of the other part ('the Agreement'),

Whereas Article 8.44.2 of the Agreement provides that the CETA Committee on Services and Investment shall adopt a code of conduct to be applied in disputes arising out of Chapter Eight of the Agreement, which may replace or supplement the rules in application,

HAS ADOPTED THIS DECISION:

*Article 1*

**Definitions**

In this code of conduct:

- (a) "Member" means a Member of the Tribunal or of the Appellate Tribunal established pursuant to Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) of the Agreement;
- (b) "former Member" means a person who was a Member of the Tribunal or of the Appellate Tribunal and whose term has expired;
- (c) "mediator" means a person who conducts mediation in accordance with Article 8.20 (Mediation) of the Agreement;
- (d) "candidate" means a person who is under consideration for selection as a Member of the Tribunal or Appellate Tribunal;
- (e) "assistant" means a person who, under the terms of appointment of a Member, assists the Member in his or her research or supports him or her in his or her duties;
- (f) "staff", in respect of a Member, means persons under the direction and control of the Member, other than assistants;
- (g) "disputing party" means a disputing party under Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) of the Agreement;
- (h) "Party" means a Contracting Party to the Agreement.

*Article 2*

**Responsibilities to the Process**

Candidates and Members shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interest and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. Former Members must comply with the obligations established in Articles 6 (Obligations of Former Members) and 7 (Confidentiality) of this code of conduct.

*Article 3*

**Disclosure Obligations**

1. Prior to their appointment candidates shall disclose to the Parties any past and present interest, relationship or matter that is likely to affect their independence or impartiality or that might reasonably create an appearance of impropriety or bias. To this end, candidates shall make all reasonable efforts to become aware of any such interests, relationships or matters. Past interests, relationships or matters shall cover a significant period of time and at least the last five years prior to their application as Members.
2. Members shall communicate matters concerning actual or potential violations of this code of conduct in writing to the disputing parties.
3. Members shall at all times continue to make all efforts to become aware of any interests, relationships or matters referred to in paragraph 1 of this Article. Members shall at all times disclose such interests, relationships or matters throughout the performance of their duties by informing the Parties and, where relevant, the disputing parties. In order to ensure that relevant information is provided by the Members, disclosure shall be made through a standardised form with the possibility to add or enclose any document.

*Article 4*

**Duties of Members**

1. Members shall perform their duties thoroughly and expeditiously throughout the course of the proceeding and shall do so with fairness and diligence.
2. Members shall consider only those issues raised in the proceeding and which are necessary for a decision or award and shall not delegate this duty to any other person.
3. Members shall take all appropriate steps to ensure that their assistant and staff are aware of, and comply with, Articles 2 (Responsibilities to the Process), 3 (Disclosure Obligations), 5 (Independence and Impartiality of Members) and 7 (Confidentiality) of this code of conduct.

4. Members shall not engage in *ex parte* contacts concerning the proceeding.
5. Members shall stay abreast of other dispute settlement activities under the Agreement and, in particular, of decisions or awards rendered by other divisions of the Tribunal or of the Appellate Tribunal.

*Article 5*

**Independence and Impartiality of Members**

1. Members must be independent and impartial and avoid creating an appearance of bias or impropriety and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party or fear of criticism.
2. Members shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere or appear to interfere, with the proper performance of their duties.
3. Members may not use their position to advance any personal or private interests and shall avoid actions that may create the impression that they are in a position to be influenced by others.
4. Members may not allow financial, business, professional, family or social relationships or responsibilities to influence their conduct or judgment.
5. Members must avoid entering into any relationship or acquiring any financial interest that is likely to affect their impartiality or that might reasonably create an appearance of impropriety or bias.

*Article 6*

**Obligations of Former Members**

1. Former Members shall avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decisions or awards of the Tribunal or the Appellate Tribunal.
2. Without prejudice to the possibility to continue to serve on a division until the closure of the proceedings of that division, Members shall undertake that after the end of their term, they shall not become involved:
  - a. in any manner whatsoever in investment disputes which were pending before the Tribunal or the Appellate Tribunal before the end of their term;

- b. in any manner whatsoever in investment disputes directly and clearly connected with disputes, including concluded disputes, which they have dealt with as Members of the Tribunal or the Appellate Tribunal.
3. Members shall undertake that for a period of three years after the end of their term, they shall not act as representatives of one of the disputing parties in investment disputes before the Tribunal or the Appellate Tribunal.
4. If the President of the Tribunal or of the Appellate Tribunal is informed or otherwise becomes aware that a former Member of the Tribunal or of the Appellate Tribunal, respectively, is alleged to have acted inconsistently with the obligations set up in paragraphs 1 through 3 of this Article, he or she shall examine the matter, provide the opportunity to the former Member to be heard, and, after verification, inform thereof:
  - a. the professional body or other such institution with which that former Member is affiliated;
  - b. the Parties; and
  - c. the president of any other relevant Investment Tribunal or Appellate Tribunal in view of the initiation of appropriate measures.

The President of the Tribunal or of the Appellate Tribunal shall make public its decision to take the actions referred to in subparagraphs (a), (b) and (c) above, together with the reasons therefor.

#### *Article 7*

### **Confidentiality**

1. No Members or former Members shall at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding, except for the purposes of the proceeding, and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interest of others.
2. No Members shall disclose a decision or award or parts thereof prior to its publication in accordance with the transparency provisions of Article 8.36 (Transparency of proceedings) of the Agreement.
3. No Members or former Members shall at any time disclose any deliberation of the Tribunal or Appellate Tribunal, or any Member's views.

#### *Article 8*

### **Expenses**

Each Member shall keep a record and render a final account of the time devoted to the procedure and of the expenses incurred, as well as the time and expenses of their assistant and staff.

*Article 9*

**Sanctions**

1. For greater certainty, the provisions of this code of conduct shall be applied together with the obligations set out in Article 8.30.1 of the Agreement and the procedures foreseen in Article 8.30 paragraphs 2 and 3 and Article 8.30.4 of the Agreement shall apply to violations of this code of conduct.
2. For greater certainty, the CETA Joint Committee shall provide a Member the opportunity to be heard prior to the issuance of any decision pursuant to Article 8.30.4 of the Agreement.

*Article 10*

**Mediators**

The rules set out in this code of conduct as applying to Members or former Members shall apply, *mutatis mutandis*, to mediators.

*Article 11*

**Consultative Committees**

1. The President of the Tribunal and the President of the Appellate Tribunal shall each be assisted by a Consultative Committee for ensuring the proper application of this code of conduct, of Article 8.30 (Ethics) of the Agreement and for the execution of any other task, where so provided.
2. The Consultative Committees shall be composed of the respective Vice-President and of the two most senior Members of the Tribunal or of the Appellate Tribunal.

*Article 12*

**Entry into force**

This Decision shall be published and shall enter into force on the date of entry into force of the Agreement. Done at ... on ...



**DRAFT DECISION OF THE CETA COMMITTEE ON SERVICES AND INVESTMENT ON THE CODE OF CONDUCT FOR MEMBERS OF THE TRIBUNAL, THE APPELLATE TRIBUNAL AND MEDIATORS**

The CETA COMMITTEE ON SERVICES AND INVESTMENT,

Having regard to Article 26.2.1(b) of the Comprehensive Economic and Trade Agreement between the European Union and its Member States, of the one part, and Canada, of the other part ('the Agreement'),

Whereas Article 8.44.2 of the Agreement provides that the CETA Committee on Services and Investment shall adopt a code of conduct to be applied in disputes arising out of Chapter Eight of the Agreement, which may replace or supplement the rules in application,

HAS ADOPTED THIS DECISION:

*Article 1*

**Definitions**

In this code of conduct:

- (a) "Member" means a Member of the Tribunal or of the Appellate Tribunal established pursuant to Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) of the Agreement;
- (b) "~~Former~~ former Member" means a person who was a Member of the Tribunal or of the Appellate Tribunal and whose term has expired;
- (c) "mediator" means a person who conducts mediation in accordance with Article 8.20 (Mediation) of the Agreement;
- (d) "candidate" means a person who is under consideration for selection as a Member of the Tribunal or Appellate Tribunal;
- (e) "assistant" means a person who, under the terms of appointment of a Member, assists the Member in his or her research or supports him or her in his or her duties;
- (f) "staff", in respect of a Member, means persons under the direction and control of the Member, other than assistants;
- (g) "disputing party" means a disputing party under Section F (Resolution of investment disputes between investors and states) of Chapter Eight (Investment) of the Agreement;
- (h) "Party" means a Contracting Party to the Agreement.

*Article 2*

**Responsibilities to the Process**

Candidates and Members shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interest and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. Former Members must comply with the obligations established in Articles 6 (Obligations of Former Members) and 7 (Confidentiality) of this code of conduct.

*Article 3*

**Disclosure Obligations**

1. Prior to their appointment candidates shall disclose to the Parties any past and present interest, relationship or matter that is likely to affect their independence or impartiality or that might reasonably create an appearance of impropriety or bias. To this end, candidates shall make all reasonable efforts to become aware of any such interests, relationships or matters. Past interests, relationships or matters shall cover a significant period of time and at least the last five years prior to their application as Members.
2. Members shall communicate matters concerning actual or potential violations of this code of conduct in writing to the disputing parties.
3. Members shall at all times continue to make all efforts to become aware of any interests, relationships or matters referred to in paragraph 1 of this Article. Members shall at all times disclose such interests, relationships or matters throughout the performance of their duties by informing the Parties and, where relevant, the disputing parties. In order to ensure that relevant information is provided by the Members, disclosure shall be made through a standardised form with the possibility to add or enclose any document.

*Article 4*

**Duties of Members**

1. Members shall perform their duties thoroughly and expeditiously throughout the course of the proceeding and shall do so with fairness and diligence.
2. Members shall consider only those issues raised in the proceeding and which are necessary for a decision or award and shall not delegate this duty to any other person.
3. Members shall take all appropriate steps to ensure that their assistant and staff are aware of, and comply with, Articles 2 (Responsibilities to the Process), 3 (Disclosure Obligations), 5 (Independence and Impartiality of Members) and 7 (Confidentiality) of this code of conduct.

4. Members shall not engage in *ex parte* contacts concerning the proceeding.
5. Members shall stay abreast of other dispute settlement activities under the Agreement and, in particular, of decisions or awards rendered by other divisions of the Tribunal or of the Appellate Tribunal.

*Article 5*

**Independence and Impartiality of Members**

1. Members must be independent and impartial and avoid creating an appearance of bias or impropriety and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party or fear of criticism.
2. Members shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere or appear to interfere, with the proper performance of their duties.
3. Members may not use their position to advance any personal or private interests and shall avoid actions that may create the impression that they are in a position to be influenced by others.
4. Members may not allow financial, business, professional, family or social relationships or responsibilities to influence their conduct or judgment.
5. Members must avoid entering into any relationship or acquiring any financial interest that is likely to affect their impartiality or that might reasonably create an appearance of impropriety or bias.

*Article 6*

**Obligations of Former Members**

1. Former Members shall avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decisions or awards of the Tribunal or the Appellate Tribunal.
2. Without prejudice to the possibility to continue to serve on a division until the closure of the proceedings of that division, Members shall undertake that after the end of their term, they shall not become involved:
  - a. in any manner whatsoever in investment disputes which were pending before the Tribunal or the Appellate Tribunal before the end of their term;

- b. in any manner whatsoever in investment disputes directly and clearly connected with disputes, including concluded disputes, which they have dealt with as Members of the Tribunal or the Appellate Tribunal.
3. Members shall undertake that for a period of three years after the end of their term, they shall not act as representatives of one of the disputing parties in investment disputes before the Tribunal or the Appellate Tribunal.
4. If the President of the Tribunal or of the Appellate Tribunal is informed or otherwise becomes aware that a former Member of the Tribunal or of the Appellate Tribunal, respectively, is alleged to have acted inconsistently with the obligations set up in paragraphs 1 through 3 of this Article, he or she shall examine the matter, provide the opportunity to the former Member to be heard, and, after verification, inform thereof:
  - a. the professional body or other such institution with which that former Member is affiliated;
  - b. the ~~Contracting~~ Parties; and
  - c. the president of any other relevant Investment Tribunal or Appellate Tribunal in view of the initiation of appropriate measures.

The President of the Tribunal or of the Appellate Tribunal shall make public its decision to take the actions referred to in subparagraphs (a), (b) and (c) above, together with the reasons therefor.

#### *Article 7*

### **Confidentiality**

1. No Members or former Members shall at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding, except for the purposes of the proceeding, and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interest of others.
2. No Members shall disclose a decision or award or parts thereof prior to its publication in accordance with the transparency provisions of Article 8.36 (Transparency of proceedings) of the Agreement.
3. No Members or former Members shall at any time disclose any deliberation of the Tribunal or Appellate Tribunal, or any Member's views.

#### *Article 8*

### **Expenses**

Each Member shall keep a record and render a final account of the time devoted to the procedure and of the expenses incurred, as well as the time and expenses of their assistant and staff.

*Article 9*

**Sanctions**

1. For greater certainty, the provisions of this code of conduct shall be applied together with the obligations set out in Article 8.30.1 of the Agreement and the procedures foreseen in Article 8.30 paragraphs 2 and 3 and Article 8.30.4 of the Agreement shall apply to violations of this code of conduct.
2. For greater certainty, the CETA Joint Committee shall provide a Member the opportunity to be heard prior to the issuance of any decision pursuant to Article 8.30.4 of the Agreement.

*Article 10*

**Mediators**

The rules set out in this code of conduct as applying to Members or former Members shall apply, *mutatis mutandis*, to mediators.

*Article 11*

**Consultative Committees**

1. The President of the Tribunal and the President of the Appellate Tribunal shall each be assisted by a Consultative Committee for ensuring the proper application of this code of conduct, of Article 8.30 (Ethics) of the Agreement and for the execution of any other task, where so provided.
2. The Consultative Committees shall be composed of the respective Vice-President and of the two most senior Members of the Tribunal or of the Appellate Tribunal.

*Article 12*

**Entry into force**

This Decision shall be published and shall enter into force on the date of entry into force of the Agreement. Done at ... on ...

**DRAFT DECISION OF THE CETA COMMITTEE ON SERVICES AND  
INVESTMENT ON RULES FOR MEDIATION**

The CETA COMMITTEE ON SERVICES AND INVESTMENT,

Having regard to Article 26.2.1(b) of the Comprehensive Economic and Trade Agreement between the European Union and its Member States, of the one part, and Canada, of the other part ('the Agreement'),

Whereas Article 8.44.3(c) of the Agreement provides that the CETA Committee on Services and Investment may adopt rules for mediation for use by disputing parties as referred to in Article 8.20 (Mediation) of the Agreement,

HAS ADOPTED THIS DECISION:

*Article 1*

**Objective and Scope**

The objective of the mediation mechanism is to facilitate the finding of a mutually agreed solution through a comprehensive and expeditious procedure with the assistance of a mediator.

*Article 2*

**Initiation of the Procedure**

1. Either disputing party may request, at any time, the commencement of a mediation procedure. Such request shall be addressed to the other party in writing.
2. Where the request concerns an alleged breach of the Agreement by the authorities of the European Union or by the authorities of the Member States of the European Union, and no respondent has been determined pursuant to Article 8.21 (Determination of the respondent for disputes with the European Union or its Member States) of the Agreement, it shall be addressed to the European Union. Where the request is accepted, the response shall specify whether the European Union or the Member State concerned will be a party to the mediation<sup>1</sup>.
3. The party to which such request is addressed shall give sympathetic consideration to the request and accept or reject it in writing within 10 working days of its receipt.

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<sup>1</sup> For greater certainty, where the request concerns treatment by the European Union, the party to the mediation shall be the European Union and any Member State concerned shall be fully associated in the mediation. Where the request concerns exclusively treatment by a Member State, the party to the mediation shall be the Member State concerned, unless it requests the European Union to be party.

*Article 3*

**Appointment of the Mediator**

1. If both disputing parties agree to a mediation procedure, a mediator shall be appointed in accordance with the procedure set out in Article 8.20.3 of the Agreement. The disputing parties shall endeavour to agree on a mediator within 15 working days from the receipt of the reply to the request. Such agreement may include appointing a mediator from the Members of the Tribunal established according to Article 8.27.2 of the Agreement or of the Appellate Tribunal established according to Article 8.28.3 of the Agreement.
2. The disputing parties may by written consent agree to replace the mediator. If a mediator resigns, is incapacitated or otherwise becomes unable to perform his or her duties, a new mediator shall be appointed pursuant to Article 8.20.3 of the Agreement.
3. A mediator shall not be a national of either Party to the Agreement, unless the disputing parties agree otherwise.
4. The mediator shall assist, in an impartial and transparent manner, the disputing parties in reaching a mutually agreed solution.

*Article 4*

**Rules of the Mediation Procedure**

1. Within 10 working days after the appointment of the mediator, the disputing party having invoked the mediation procedure shall present, in writing, a detailed description of the problem to the mediator and to the other disputing party. Within 20 working days after the date of delivery of this submission, the other disputing party may provide, in writing, its comments to the description of the problem. Either disputing party may include in its description or comments any information that it deems relevant.
2. The mediator may decide on the most appropriate way of bringing clarity to the measure concerned. In particular, the mediator may organise meetings between the disputing parties, consult the disputing parties jointly or individually, seek the assistance of or consult with relevant experts and stakeholders and provide any additional support requested by the disputing parties. However, before seeking the assistance of or consulting with relevant experts and stakeholders, the mediator shall consult with the disputing parties.
3. The mediator may offer advice and propose a solution for the consideration of the disputing parties which may accept or reject the proposed solution or may agree on a different solution. However, the mediator shall not advise or give comments on the consistency of the measure at issue with the Agreement.
4. The procedure shall take place in the territory of the Party to which the request was addressed, or by mutual agreement in any other location or by any other means.

5. The disputing parties shall endeavour to reach a mutually agreed solution within 60 days from the appointment of the mediator. Pending a final agreement, the disputing parties may consider possible interim solutions.
6. Mutually agreed solutions shall be made publicly available. However, the version disclosed to the public may not contain any information that a disputing party has designated as confidential.
7. The procedure shall be terminated:
  - (a) by the adoption of a mutually agreed solution by the disputing parties, on the date of adoption;
  - (b) by a written declaration of the mediator, after consultation with the disputing parties, that further efforts at mediation would be to no avail, on the date that the written declaration of the mediator is made;
  - (c) by written notice of a disputing party, or of both disputing parties, on the date that the notice is given.

#### *Article 5*

##### **Implementation of a Mutually Agreed Solution**

1. Where a solution has been agreed, each disputing party shall take the measures necessary to implement the mutually agreed solution within the agreed timeframe.
2. The implementing disputing party shall inform the other disputing party in writing of any steps or measures taken to implement the mutually agreed solution.
3. On request of the disputing parties, the mediator shall issue to the disputing parties, in writing, a draft factual report, providing a brief summary of (1) the measure at issue in these procedures; (2) the procedures followed; and (3) any mutually agreed solution reached as the final outcome of these procedures, including possible interim solutions. The mediator shall provide the disputing parties 15 working days to comment on the draft report. After considering the comments of the disputing parties submitted within the period, the mediator shall submit, in writing, a final factual report to the disputing parties within 15 working days. The factual report shall not include any interpretation of this Agreement.

#### *Article 6*

##### **Relationship to Dispute Settlement**

1. The procedure under this mediation mechanism is not intended to serve as a basis for dispute settlement procedures under this Agreement or another agreement. A disputing



party shall not rely on or introduce as evidence in such dispute settlement procedures, nor shall any adjudicative body take into consideration:

- (a) positions taken by a disputing party in the course of the mediation procedure;
  - (b) the fact that a disputing party has indicated its willingness to accept a solution to the measure subject to mediation; or
  - (c) advice given or proposals made by the mediator.
2. The mediation mechanism is without prejudice to the rights and obligations of the Parties and the disputing parties under Section F (Resolution of investment disputes between investors and states) and Chapter Twenty-nine (Dispute Settlement).
  3. Unless the disputing parties agree otherwise, and without prejudice to Article 4.6, all steps of the procedure, including any advice or proposed solution, shall be confidential. However, any disputing party may disclose to the public that mediation is taking place.

#### *Article 7*

##### **Time Limits**

Any time limit referred to in this Decision may be modified by mutual agreement between the disputing parties.

#### *Article 8*

##### **Costs**

1. Each disputing party shall bear its own expenses derived from the participation in the mediation procedure.
2. The disputing parties shall share jointly and equally the expenses derived from organisational matters, including the remuneration and expenses of the mediator. Remuneration of the mediator shall be in accordance with that foreseen for Members of the Tribunal under Article 8.27.14 of the Agreement.

#### *Article 9*

##### **Entry into force**

This Decision shall be published and shall enter into force on the date of entry into force of the Agreement. Done at ... on ...