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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 5.8.2009
COM(2009) 418 final

Proposal for a

COUNCIL DECISION

on a Community Position concerning the Rules of Procedure for Dispute Settlement and the Code of Conduct for Arbitrators provided for by the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part

EXPLANATORY MEMORANDUM

The Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part was signed on 15 October 2008, and it is provisionally applied as of 29 December 2008.

Article 216 of the Agreement provides for the adoption by the Joint CARIFORUM-EC Council of Rules of Procedure to govern dispute settlement and a Code of Conduct for Arbitrators under the Agreement within three months of provisional application of the Agreement. It is thus necessary to adopt such rules at the first meeting of the Joint Council.

Proposal for a

COUNCIL DECISION

on a Community Position concerning the Rules of Procedure for Dispute Settlement and the Code of Conduct for Arbitrators provided for by the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 300(2), second subparagraph thereof,

Having regard to the proposal from the Commission¹,

Whereas:

- (1) The Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, was signed on 15 October 2008, and is provisionally applied as of 29 December 2008.
- (2) Article 216 of the said Agreement calls for the adoption by the Joint CARIFORUM-EC Council of Rules of Procedures to govern dispute settlement under the Agreement. Article 221(2) thereof refers to a Code of Conduct for Arbitrators to be annexed to the Rules of Procedure.
- (3) The Community should determine the position to be taken with regard to the adoption of the Rules of Procedure for Dispute Settlement and the Code of Conduct for Arbitrators in the Joint CARIFORUM-EC Council,

HAS DECIDED AS FOLLOWS:

Sole article

The position of the Community in view of the adoption of a decision by the Joint Council on the Rules of Procedure for Dispute Settlement and the Code of Conduct for Arbitrators provided for by the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, shall be based on the draft decision of the Joint Council annexed to this Decision.

¹ OJ C [...], [...], p. [...].

Done at Brussels, [...]

For the Council
The President
[...]

**LEGISLATIVE FINANCIAL STATEMENT FOR PROPOSALS HAVING A
BUDGETARY IMPACT EXCLUSIVELY LIMITED TO THE REVENUE SIDE**

1. NAME OF THE PROPOSAL:

Council Decision on a Community Position concerning the Rules of Procedure for Dispute Settlement and the Code of Conduct for Arbitrators provided for by the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part.

2. BUDGET LINES:

Chapter and Article: Administrative resources of the Commission to cover interpretation and venue costs.

Amount budgeted for the year concerned – only in the event a dispute arises: In case of unforeseen needs, resources could be drawn from the following budget lines:

20.02.01 – External trade relations, including access to the markets of non-Community countries

20.01.02.11.00.02.40 – Réunions ne comportant que les personnes de la Commission (internes)/Conférences

3. FINANCIAL IMPACT

Proposal has no financial implications

Proposal has no financial impact on expenditure but has a financial impact on revenue – the effect is as follows:

(€million to one decimal place)

4. ANTI-FRAUD MEASURES

5. OTHER REMARKS

ANNEX

DECISION No 2/200.. OF THE JOINT COUNCIL

**set up by the Agreement establishing an Economic Partnership Agreement between the
CARIFORUM States, of the one part, and the European Community and its Member
States, of the other part**

**concerning the adoption of the Rules of Procedure for Dispute Settlement and the Code
of Conduct for Arbitrators and Mediators**

THE JOINT CARIFORUM-EC COUNCIL,

Having regard to the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part (hereinafter referred to as the “Agreement”), signed in Bridgetown, Barbados on 15 October 2008, and in particular Articles 216 and 221(2) thereof,

HAS DECIDED AS FOLLOWS:

Article 1

The Rules of Procedure for Dispute Settlement and the Code of Conduct for Arbitrators and Mediators under the Agreement are set out in Annex I and II respectively.

Article 2

The European Community shall bear the expenses derived from all organisational matters regarding consultations, mediation and arbitration, with the exception of the remuneration and the expenses to be paid to the mediators and arbitrators, which shall be shared².

Article 3

This Decision shall enter into force on

Done at ... 200..

² It is understood that the remuneration of officials, representatives or advisors of any Party involved in the organisation of the hearings will not form part of the expenses deriving from organisational matters.

ANNEX I

Rules of Procedure for Dispute Settlement under Part III of the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part

Article 1

General provisions

1. In Part III (Dispute Avoidance and Settlement) of the Agreement and under these rules:
 - “adviser” means a person retained by a Party to advise or assist that Party in connection with the arbitration panel proceeding;
 - “assistant” means a person who, under the terms of appointment of a member of an arbitration panel, conducts research or provides assistance to the member;
 - “complaining Party” means any Party that requests the establishment of an arbitration panel under Article 207 of the Agreement;
 - “Party complained against” means the Party that is alleged to be in violation of the provisions referred to in Article 203 of the Agreement;
 - “arbitration panel” means a panel established under Article 207 of the Agreement;
 - “representative of a Party” means an employee or any person appointed by a government department or agency or any other public entity of a Party;
 - “day” means a calendar day, unless otherwise specified.
2. The Party complained against shall be in charge of the logistical administration of dispute settlement proceedings, in particular the organisation of hearings, unless otherwise agreed.
3. The Parties shall exchange a list of dates of their official holidays and rest days on the first Monday of every December for the following year. If a period referred to in these Rules of Procedure ends on an official holiday or rest day of either of the Parties, the period shall be deemed to be expiring on the next business day. No documents, notifications or requests of any kind shall be deemed to be received on an official holiday or rest day.

Article 2

Notifications

1. The Parties and the arbitration panel shall transmit any request, notice, written submission or other document by e-mail, with a copy submitted on the same day by

facsimile transmission, registered post, courier, delivery against receipt or any other means of telecommunication that provides a record of the sending thereof. Unless proven otherwise, an e-mail message shall be deemed to be received on the same day of its sending.

2. A Party shall provide an electronic copy of each of its written submissions to the other Party and to each of the arbitrators. A paper copy shall also be provided.
3. The designated point of contact for all notifications for the CARIFORUM States shall be the CARIFORUM Coordinator, provided for under Article 234(1) of the Agreement, and for the EC Party shall be the Directorate General of Trade of the European Commission. The Parties shall immediately inform each other of any change in the designated point of contact.
4. Minor errors of a clerical nature in any request, notice, written submission or other document related to the arbitration panel proceeding may be corrected by delivery of a new document clearly indicating the changes.
5. Depending on the object of the provisions under dispute, all requests and notifications addressed to the CARIFORUM-EC Trade and Development Committee shall also be copied to the other relevant sub-committees established under the Agreement.

Article 3

Commencing the arbitration

1. Unless the Parties agree otherwise, they shall meet the arbitration panel within ten days of its establishment in order to determine such matters that the Parties or the arbitration panel deem appropriate, including the remuneration and expenses to be paid to the arbitrators, which will be in accordance with WTO standards. Members of the arbitration panel and representatives of the Parties may take part in this meeting via telephone or video conference.
2. (a) Unless the Parties agree otherwise within seven days from the date of the establishment of the panel, the terms of reference of the arbitration panel shall be:

“to examine, in the light of the relevant provisions of the Agreement, the matter referred to in the request for establishment of the arbitration panel, to rule on the compatibility of the measure in question with the provisions of the Agreement identified in the Request for Establishment and to make a ruling in accordance with Article 209 of the Agreement.”

(b) The Parties must notify the agreed terms of reference to the arbitration panel within five days of their agreement.

Article 4

Initial submissions

The complaining Party shall deliver its initial written submission no later than twenty days after the date of establishment of the arbitration panel. The Party complained against shall deliver its written counter-submission no later than twenty days after the date of delivery of the initial written submission.

Article 5

Working of arbitration panels

1. The chairperson of the arbitration panel shall preside at all its meetings. An arbitration panel may delegate to the chairperson authority to make administrative and procedural decisions.
2. Unless otherwise provided, the arbitration panel may conduct its activities by any means, including telephone, facsimile transmissions or computer links.
3. Only arbitrators may take part in the deliberations of the arbitration panel, but the arbitration panel may permit its assistants to be present at its deliberations.
4. The drafting of any ruling shall remain the exclusive responsibility of the arbitration panel and must not be delegated.
5. Where a procedural question arises that is not covered by the provisions of the Agreement or these Rules, the arbitration panel, after consulting the Parties, may adopt an appropriate procedure compatible with the Agreement and these rules, and which ensures an equal treatment of the Parties.
6. When the arbitration panel considers that there is a need to modify any time limit applicable in the proceedings or to make any other procedural or administrative adjustment, it shall inform the Parties in writing of the reasons for the change or adjustment and of the period or adjustment needed. The arbitration panel may adopt such change or adjustment after consulting the Parties. The time limits in Article 209 of the Agreement shall not be modified.

Article 6

Replacement

1. If an arbitrator is unable to participate in the proceeding, withdraws, or must be replaced, a replacement shall be selected in accordance with Article 207(3) of the Agreement.
2. Where a Party considers that an arbitrator does not comply with the requirements of the Code of Conduct included in Annex II and for this reason should be replaced, this Party should notify the other Party within 15 days from the time at which it came to know of the circumstances underlying the arbitrator's material violation of the Code of Conduct.

Where a Party considers that an arbitrator other than the chairperson does not comply with the requirements of the Code of Conduct, the Parties shall consult and, if they so

agree, remove the arbitrator and select a replacement following the procedure set out in Article 207(3) of the Agreement.

If the Parties fail to agree on the need to replace an arbitrator, any Party may request that such matter be referred to the chairperson of the arbitration panel, whose decision shall be final.

If the chairperson finds that an arbitrator does not comply with the requirements of the Code of Conduct, she or he shall select a new arbitrator by lot from the list of individuals referred to under Article 221 of the Agreement in which the original arbitrator appeared. If the original arbitrator was chosen by the Parties pursuant to Article 207(2) of the Agreement, the replacement shall be selected by lot from the lists of individuals that have been proposed by the complaining Party and by the Party complained against under Article 221 of the Agreement. The selection of the new arbitrator shall be done within five days of the date of the submission of the request to the chairperson of the arbitration panel.

3. Where a Party considers that the chairperson of the arbitration panel does not comply with the requirements of the Code of Conduct, the Parties shall consult and, if they so agree, replace the chairperson and select a replacement following the procedure set out in Article 207(3) of the Agreement.

If the Parties fail to agree on the need to replace the chairperson, any Party may request that such matter be referred to one of the remaining members of the list of individuals selected to act as chairpersons under Article 221(1) of the Agreement. Her or his name shall be drawn by lot by the chairperson of the CARIFORUM-EC Trade and Development Committee, or the chairperson's delegate. The decision by this person on the need to replace the chairperson shall be final.

If this person decides that the original chairperson does not comply with the requirements of the Code of Conduct, she or he shall select a new chairperson by lot among the remaining list of individuals referred to under Article 221(1) of the Agreement who may act as chairpersons. This selection of the new chairperson shall be done within five days of the date of the submission of the request referred to in this paragraph.

4. The arbitration panel proceedings shall be suspended for the period taken to carry out the procedures provided for in this Article.

Article 7

Hearings

1. The chairperson shall fix the date and time of the hearing in consultation with the Parties and the other members of the arbitration panel, and confirm this in writing to the Parties. This information shall also be made publicly available by the Party in charge of the logistical administration of the proceedings if the hearing is open to the public. Unless a Party disagrees, the arbitration panel may decide not to convene a hearing.

2. Unless the Parties agree otherwise, the hearing shall be held in Brussels if the complaining Party is the CARIFORUM States and in the territories of the CARIFORUM States if the complaining Party is the EC Party. If the dispute concerns a measure maintained by a Signatory CARIFORUM State, the hearing shall take place in the capital of that State unless the State gives written notice to the panel within ten days of its establishment that another venue should be used.
3. The arbitration panel may convene one additional hearing only in exceptional circumstances. No additional hearing shall be convened for the procedures established under Articles 211(2), 212(2) and 214(2) of the Agreement.
4. All arbitrators shall be present during the entirety of any hearings.
5. The following persons may attend the hearing, irrespective of whether the proceedings are open to the public or not:
 - (a) representatives of the Parties;
 - (b) advisers to the Parties;
 - (c) administrative staff, interpreters, translators and court reporters; and
 - (d) arbitrators' assistants.

Only the representatives and advisers of the Parties may address the arbitration panel.

6. No later than seven days before the date of a hearing, each Party shall deliver to the arbitration panel a list of the names of persons who will make oral arguments or presentations at the hearing on behalf of that Party and of other representatives or advisers who will be attending the hearing.
7. Pursuant to Article 216 of the Agreement, the hearings of the arbitration panels shall be open to the public, unless the arbitration panel decides otherwise. However the arbitration panel shall meet in closed session when the submission and arguments of a Party contains confidential commercial information. The panel shall, in consultation with the Parties, decide on appropriate logistical arrangements and procedures to ensure that hearings which are open are managed in an effective way. These procedures could include the use of live web-broadcasting or of closed-circuit television.
8. The arbitration panel shall conduct the hearing in the following manner:

Argument

 - (a) argument of the complaining Party
 - (b) argument of the Party complained against.

Rebuttal Argument

 - (a) argument of the complaining Party

- (b) counter-reply of the Party complained against.
- 9. The arbitration panel may direct questions to either Party at any time during the hearing.
- 10. The arbitration panel shall arrange for a transcript of each hearing to be prepared and delivered as soon as possible to the Parties.
- 11. Each Party may deliver a supplementary written submission concerning any matter that arose during the hearing within fourteen days of the date of the hearing.

Article 8

Questions in writing

- 1. The arbitration panel may at any time during the proceedings address questions in writing to one or both Parties. Each of the Parties shall receive a copy of any questions put by the arbitration panel.
- 2. A Party shall also provide a copy of its written response to the arbitration panel's questions to the other Party. Each Party shall be given the opportunity to provide written comments on the other Party's reply within seven days of the date of receipt.

Article 9

Confidentiality

The Parties shall maintain the confidentiality of the arbitration panel hearings where the hearings are held in closed session, in accordance with Article 7(7). Each Party shall treat as confidential any information submitted by the other Party to the arbitration panel which that Party has designated as confidential. Where a Party submits a confidential version of its written submissions to the arbitration panel, it shall also, upon request of the other Party, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public no later than fifteen days after the date of either the request or the submission, whichever is later. Nothing in these rules shall preclude a Party from disclosing statements of its own positions to the public.

Article 10

Ex parte contacts

- 1. The arbitration panel shall not meet or contact a Party in the absence of the other Party.
- 2. No member of the arbitration panel may discuss any aspect of the subject matter of the proceedings with one Party or both Parties in the absence of the other arbitrators.

Article 11

Amicus curiae submissions

1. Pursuant to Article 217 of the Agreement, the arbitration panel may receive unsolicited written submissions, provided that they are made within fifteen days of the date of the establishment of the arbitration panel, that they are concise and in no case longer than fifteen typed pages, including any annexes, and that they are directly relevant to the issues under consideration by the arbitration panel.
2. The submission shall contain a description of the person making the submission, whether natural or legal, including the nature of their activities and the source of its financing, and specify the nature of the interest that the person has in the arbitration proceeding. It shall be drafted in the languages chosen by the Parties in accordance with Article 218 of the Agreement and Article 14 of these Rules of Procedure.
3. The arbitration panel shall list in its ruling all the submissions it has received that conform to the above rules. The arbitration panel shall not be obliged to address in its ruling the arguments made in such submissions. Any submission obtained by the arbitration panel under this rule shall be submitted to the Parties for their comments.

Article 12

Information or technical Advice

Where, pursuant to Article 217 of the Agreement, a panel solicits information or technical advice from entities other than the Parties, it shall notify the Parties of its intention to seek such information or technical advice and provide them with the opportunity to submit comments. The panel shall take into consideration the comments of the Parties on any information or technical advice received in cases where the panel takes into consideration such information or technical advice in the preparation of its ruling.

Article 13

Urgent cases

In cases of urgency referred to in Chapter 2 of Part III of the Agreement, the arbitration panel, after consulting the Parties, shall adjust the time limits referred to in these rules as appropriate and shall notify the Parties of such adjustments.

Article 14

Translation and interpretation

1. During the consultations referred to in Article 204 of the Agreement, and no later than the meeting referred to in Article 3(1) of these Rules of Procedure, the Parties shall endeavour to agree on a common working language for the proceedings before the arbitration panel.

2. If the Parties are unable to agree on a common working language by that date, the rules set out in Article 218(2) of the Agreement shall apply.
3. The Party complained against shall arrange for the interpretation of oral submissions into the languages chosen by the Parties.
4. Arbitration panel rulings shall be notified in the language or languages chosen by the Parties.
5. Any Party may provide comments on any translated version of a document drawn up in accordance with these rules.

Article 15

Calculation of time-limits

Where, by reason of the application of Article 1(3) of these Rules of Procedure, a Party receives a document on a date other than the date on which this document is received by the other Party, any period of time that is calculated on the basis of the date of receipt of that document shall be calculated from the last date of receipt of that document.

Article 16

Other procedures

1. These Rules of Procedure are also applicable to procedures established under Articles 211(2), 212(2) and 214(2) of the Agreement. However, the time-limits laid down in these Rules of Procedure shall be adjusted in line with the special time-limits provided for the adoption of a ruling by the arbitration panel in those other procedures.
2. In the event of the original panel, or some of its members, being unable to reconvene for the procedures established under Articles 211(2), 212(2) and 214(2) of the Agreement, the procedures set out in Article 207 of the Agreement shall apply. The time limit for the notification of the ruling shall be extended by fifteen days.

ANNEX II

CODE OF CONDUCT FOR MEMBERS OF ARBITRATION PANELS AND MEDIATORS

Article 1

Definitions

In this Code of Conduct:

- (a) "member" or "arbitrator" means a member of an arbitration panel established under Article 207 of the Agreement;
- (b) "mediator" means a person who conducts a mediation in accordance with Article 205 of the Agreement;
- (c) "candidate" means an individual whose name is on the list of arbitrators referred to in Article 221 of the Agreement and who is under consideration for selection as a member of an arbitration panel under Article 207 of the Agreement;
- (d) "assistant" means a person who, under the terms of appointment of a member, conducts research or provides assistance to the member;
- (e) "proceeding", unless otherwise specified, means an arbitration panel proceeding under the Agreement;
- (f) "staff", in respect of a member, means persons under the direction and control of the member, other than assistants.

Article 2

Responsibilities to the process

Every candidate and member shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests 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 and 7 of this Code of Conduct.

Article 3

Disclosure obligations

1. Prior to confirmation of her or his selection as a member of the arbitration panel under the Agreement, a candidate shall disclose any interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceeding. To this end, a candidate shall make all reasonable efforts to become aware of any such

interests, relationships and matters. These disclosure requirements shall not extend to the identification of matters whose relevance to the issues to be considered in the proceedings would be insignificant. They shall take into account the need to respect the personal privacy of those to whom this Code applies and shall not be so administratively burdensome as to make it impracticable for otherwise qualified persons to serve on panels.

2. A candidate or member shall only communicate matters concerning actual or potential violations of this Code of Conduct to the CARIFORUM-EC Trade and Development Committee for consideration by the Parties.
3. Once selected, a member shall continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in paragraph 1 of this Article and shall disclose them. The disclosure obligation is a continuing duty which requires a member to disclose any such interests, relationships or matters that may arise during any stage of the proceeding. The member shall disclose such interests, relationships or matters by informing the CARIFORUM-EC Trade and Development Committee, in writing, for consideration by the Parties.

Article 4

Duties of members

1. Upon selection a member shall perform her or his duties thoroughly and expeditiously throughout the course of the proceeding, and with fairness and diligence.
2. A member shall consider only those issues raised in the proceeding and necessary for a ruling and shall not delegate this duty to any other person.
3. A member shall take all appropriate steps to ensure that his or her assistant and staff are aware of, and comply with Articles 2, 3 and 7 of this Code of Conduct.
4. A member shall not engage in *ex parte* contacts concerning the proceeding.

Article 5

Independence and impartiality of members

1. A member must be independent and impartial and avoid creating an appearance of impropriety or bias and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, and loyalty to a Party or fear of criticism.
2. A member 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 her or his duties.
3. A member may not use her or his position on the arbitration panel to advance any personal or private interests and shall avoid actions that may create the impression that others are in a special position to influence her or him.

4. A member may not allow financial, business, professional, family or social relationships or responsibilities to influence her or his conduct or judgement.
5. A member must avoid entering into any relationship or acquiring any financial interest that is likely to affect her or his impartiality or that might reasonably create an appearance of impropriety or bias.

Article 6

Obligations of former members

All former members must avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decision or ruling of the arbitration panel.

Article 7

Confidentiality

1. No member or former member shall at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding except for the purposes of that 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. A member shall not disclose an arbitration panel ruling or parts thereof prior to its publication in accordance with the Agreement.
3. A member or former member shall not at any time disclose the deliberations of an arbitration panel, or any member's view.

Article 8

Expenses

Each member shall keep a record and render a final account of the time devoted to the procedure and of her or his expenses.

Article 9

Mediators

The disciplines described in this Code of Conduct as applying to members or former members shall apply, *mutatis mutandis*, to mediators.