

**MAY 8, 2019**

For more information,
contact:

Rambod Behboodi
Geneva: +41 22 591 0802
rbehboodi@kslaw.com

Iain MacVay
London: +44 20 7551 2127
Mobile: +44-7767-881323
imacvay@kslaw.com

King & Spalding

Washington, D.C.
1700 Pennsylvania Avenue,
NW
Washington, D.C. 20006-
4707
Tel: +1 202 737 0500

Geneva
Quai du Mont Blanc
1201 Geneva
Switzerland
Tel: +41 22 591 0800

London
125 Old Broad Street
London EC2N 1AR
United Kingdom
+44 20 7551 75005

European Court Clears Path for International Investment Court Established Under Canada-EU CETA

The Comprehensive Economic and Trade Agreement (“CETA”) is a free-trade agreement between Canada and the European Union. While most of the treaty’s provisions have applied provisionally since September 21, 2017, the treaty’s Investment Court System (“ICS”) and substantive investor protection rules are not covered by the provisional application. Formal entry of CETA into force depended in part upon whether the ICS complied with EU law.

The European Court of Justice (“CJEU”) ruled on April 30, 2019, that the ICS provisions of CETA are consistent with the EU Treaties because tribunals formed under CETA would not be in a position to apply or interpret EU law. It thus swept away the last legal hurdle to the entry into force of CETA. The full version of the treaty, including the ICS, will come into force when all EU Member States ratify the Agreement. The ruling also ushers in a new investment court structure that could form the basis of an ambitious International Investment Court for the settlement of investor-State disputes.

CETA

Signed by the heads of government of Canada and the EU on October 30, 2016, CETA has been in force provisionally for well over a year. Economically, it is the second most important trade liberalization agreement for Canada, after the NAFTA, representing the removal of nearly €600 million in tariffs on bilateral trade. CETA also contains a number of significant substantive and institutional developments, of which the proposed ICS is among the most innovative.

THE ICS (AND, EVENTUALLY, AN INTERNATIONAL INVESTMENT COURT)

Replacing the traditional investor-State dispute settlement (“ISDS”) system was one of the key political objectives of the EU in concluding



CETA. As well, in the light of Canada's own experience with NAFTA's Chapter 11, a reformed ISDS mechanism that attempts to address the changed legal, institutional, and democratic environment since the entry into force of the NAFTA appeared more attractive than adopting a more traditional ISDS provision. Crucially, the ICS maintains the key feature of ISDS: investors may submit claims directly to an independent tribunal.

The new "Investment Court System" of CETA represents a departure from prevailing ISDS models. It is inspired by existing (and more-or-less well-functioning) dispute settlement mechanisms in other fora, and seeks to address the observed so-called "democratic deficit" of the traditional ISDS mechanism. Specifically:

- There is a move away from *ad hoc* tribunals. Instead, the parties will establish a permanent court comprising professional and independent adjudicators.
- The Tribunal of First Instance will be overseen by an Appeal Tribunal.
- The meetings of the ICS will be open to the public and there is provision made for *amicus* submissions by civil society.

The ICS is expected to form the core of a new International Investment Court, linking to similar structures built into a number of other recent EU trade agreements.

Each of these represents an opportunity, but also – given the experience of other international tribunals – a potential challenge. We will write about these in due course.

The scope of the ICS gave rise to concerns that it would be incompatible with the treaties establishing the European Union, and the CJEU has now definitively resolved that issue. The ICS will be used to resolve disputes under the Investment Chapter of CETA, which introduces new substantive rules to replace the traditional rules of bilateral treaties entered into by many EU Member States. These new rules define, relatively narrowly, the principle of Fair and Equitable Treatment found in traditional Bilateral Investment Treaties and introduce more robust rules on non-discrimination. There is also a new, and unique, prudential exception Annex covering investor-state disputes on financial services.

THE CJEU RULING: ICS IS CONSISTENT WITH THE EU TREATIES

The "doubts" raised by Belgium before CJEU concerned the compatibility of the proposed judicial structure governing investor-State disputes in the context of CETA had three parts:

1. Was the ICS consistent with the principle of autonomy of EU law and the exclusive jurisdiction of the Court of Justice of the European Union for the interpretation of EU law;
2. Did the ICS respect the principle of equal treatment and of the requirement of effectiveness of EU law; and
3. Was the ICS compatible with the Charter of Fundamental Rights, in particular of the right of access to a court and right to an independent and impartial tribunal under the Charter.

The CJEU answered all three in the affirmative.

In a remarkable opening to its analysis, the CJEU observes that:

the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court that is created or designated by such agreements as regards the interpretation and application of their provisions.



The CJEU then identifies the source and the nature of the autonomy of the EU legal order, as well as the judicial system that oversees that legal order. The ICS stands outside that system; it does not have the authority to interpret and apply EU law; they do not have the authority to issue rulings that have the effect of preventing the operation of EU institutions; they are not, therefore incompatible with the principle of autonomy.

What about the principle of equal treatment? The question has a long and difficult history in Canada, as ISDS effectively constitutionalizes property protection for foreign investors, but not Canadian ones. What about the EU framework? The CJEU notes the difference in treatment, but stresses that the situation of Canadian investors “is not comparable to that of enterprises and natural persons of Member States that invest within the Union.”

Finally, the CJEU addressed the concern that, “the ISDS mechanism may, in practice, be accessible only to investors who have available to them significant financial resources.” The Commission and the Council, it noted, had “given a commitment ... to ensure the accessibility of envisaged tribunals to small and medium-sized enterprises.” The commitment was “sufficient justification” to satisfy the requirement of accessibility.

In the light of the above, the CJEU found the ICS chapter “compatible with EU primary law.”

WHAT NEXT?

CETA is only provisionally in force, and the ICS is not yet in place until all EU Member States ratify the full treaty. But the path ahead appears clear following the CJEU ruling as the 16 Member States that had not ratified pending this ruling must now advance their ratification processes. Watch this space for more information on developments related to investor-State disputes in Canada-EU relations.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,000 lawyers in 20 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.”

ABU DHABI	CHICAGO	HOUSTON	NEW YORK	SILICON VALLEY
ATLANTA	DUBAI	LONDON	PARIS	SINGAPORE
AUSTIN	FRANKFURT	LOS ANGELES	RIYADH	TOKYO
CHARLOTTE	GENEVA	MOSCOW	SAN FRANCISCO	WASHINGTON, D.C.