King & Spalding
Client Alert

MARCH 1, 2021

International Arbitration and Litigation

One Step Closer: the Canada - EU Investment Court System

For more information, contact:

Ruth Byrne
London
+44 20 7551 7524
rbyrne@kslaw.com

Amy Frey
Paris
+33 1 7300 3914
afrey@kslaw.com

Lauren Friedman
New York
+1 212 790 5350
lfriedman@kslaw.com

Marc-Olivier Langlois
Paris
+33 1 7300 3909
mlanglois@kslaw.com

Erin Collins
New York
+1 212 556 2350
ecollins@kslaw.com

Vivasvat (Viva) Dadwal
New York
+1 212 556 2223
vdadwal@kslaw.com

On January 29, 2021, Canada and the European Union (the "**EU**") took additional steps to establish the EU-Canada Comprehensive Economic and Trade Agreement (the "**CETA**")[1] by adopting four decisions required to implement its new dispute resolution system. Pending ratification, the CETA will transform investment protection for Canadian companies and nationals investing in the EU, as well as EU companies and nationals investing in Canada.

Investor State Dispute Settlement under the CETA

To encourage foreign investors to invest overseas, international arbitration agreements like the CETA provide valuable guarantees to foreign investors to protect their investments and allow companies and individuals to bring arbitration claims directly against host governments when those guarantees are violated. Canada and the EU Member States are one step closer to finalizing the investment protection provisions of the CETA, which will broaden the number of EU countries offering reciprocal investment protection to Canadian investors. Once final, the CETA protections will benefit many Canadian and EU investors that do not currently benefit from investment protection.[2]

In October 2016, Canadian and EU leaders signed the CETA, which includes an investment chapter (Chapter Eight), which will enter into force pending ratification by each EU Member State. The CETA contains a number of protections for covered investments of investors from one CETA party in another CETA party, including the obligations to accord investors from another party fair and equitable treatment and full protection and security, non-discriminatory treatment (including national treatment and most-favored nation provisions), and protections against direct and indirect expropriation without compensation.

Among the most unique aspects of the CETA is the creation of a dedicated investment court, which departs from the *ad hoc* tribunals that traditionally have decided investor-state disputes under international arbitration agreements. The investment court is to comprise a roster of 15 tribunal members, each appointed for a five-year term, which can be renewed once (the "**Tribunal**").[3] Individual cases submitted under Chapter Eight of the CETA will be decided by a "division" of three members from the

full roster, with one national of Canada, one national of an EU Member State, and the chair to be a national of a third country. The CETA also creates an internal appellate mechanism – the first appeals mechanism established to resolve disputes arising from international investment agreements (the "**Appellate Tribunal**").[4]

The Four Decisions Adopted by Canada and the EU

On January 29, 2021, Canada and the EU adopted four decisions that provide increased clarity on how the CETA's investment court system will operate in practice (together, "the **Decisions**"):

- The Appellate Tribunal Decision. This decision clarifies the procedure for the Appellate Tribunal provided under Chapter Eight of the CETA. Under Chapter Eight, the Appellate Tribunal may uphold, modify or reverse a Tribunal's award based on legal errors, manifest errors in reviewing the facts, and limited grounds set out in the ICSID Convention.[5] While the CETA provided that the appeal of an arbitral award is decided by a "division" composed of three members randomly appointed from a standing Appellate Tribunal,[6] it did not define the composition of the Appellate Tribunal. This decision establishes that the six-person Appellate Tribunal will be appointed for a nine-year term by the CETA Joint Committee, with a view to ensuring adherence to principles of diversity and gender equality.[7] Moreover, the Appellate Tribunal may sit in a division of six members where a pending case raises a serious question affecting the interpretation or application of Chapter Eight, or when both disputing parties so request, or where a majority of the Appellate Tribunal decides that it is desirable.[8]

- The Binding Code of Conduct. This decision creates a binding code of conduct for the Tribunal, the Appellate Tribunal, and mediators, expanding upon the requirements already contained in Chapter Eight.[9] Thus, while Chapter Eight prevents members of the Tribunal from acting as counsel or a party-appointed expert or witness in any pending or new investment dispute under any international agreement, the code of conduct extends this restriction to continue three years after the end of the Tribunal member's term.[10] While this restriction seeks to promote greater independence of the Tribunal members, there is a risk that the restriction will significantly reduce the already limited pool of arbitrators who are qualified to adjudicate investment treaty claims. Currently, many arbitrators on *ad hoc* tribunals also serve as counsel to parties in investment treaty cases. The code of conduct also contains explicit disclosure, confidentiality, independence and impartiality obligations.

- The Mediation Decision. While the CETA envisioned voluntary mediation to promote amicable dispute resolution,[11] this decision creates detailed mediation rules for use by disputing parties.[12]

- The Interpretation Decision. While the CETA created a forum for significant interpretative issues and to allow the CETA Parties to introduce possible improvements to the CETA, this decision allows any CETA Party (*i.e.* the EU, an EU Member State or Canada) engaged in an arbitration to refer any questions raising "serious concerns as regards matters of interpretation of the Agreement that may affect investment" to the CETA Committee on Services and Investment ("the **CSI**").[13] The CSI may recommend an interpretation to the CETA Joint Committee; interpretations adopted by the Joint Committee will be "binding on the Tribunal and Appellate Tribunal."[14]

Implications for Companies with Investments in the EU and Canada

Although the European Parliament and Canada provided their consent to the CETA on February 15, 2017 and May 16, 2017, respectively, certain portions of the CETA have only "provisionally" entered into force. The investment court and the substantive investment provisions provided in Chapter Eight require full ratification by all EU Member States. As of January 2021, 16 of the 27 EU Member States had notified the European Council of completion of their national ratification procedures for the CETA. Once the CETA fully enters into force, investors will be able to pursue relief under the CETA, and the eight existing investment agreements between Canada and EU Member States will be terminated.[15]

Notably, the Court of Justice of the European Union (the "**CJEU**") has already ruled that the investment court system under the CETA is consistent with EU law (the "**CJEU Opinion**").[16] This ruling is important – the EU's growing distaste for the investor state dispute settlement system has created significant hurdles for investors pursuing relief under bilateral investment treaties signed between EU Member States.[17] Last year, the EU Member States agreed to terminate

all bilateral investment treaties signed between them.[18] The CJEU Opinion should provide some comfort to investors who are concerned about the viability of investment protection under the CETA. In fact, the CETA will likely become a model for investment protection in the EU, as the EU has negotiated similar investment court frameworks with other countries, including Singapore, Vietnam, and Mexico.[19]

As mentioned, the CETA's investment protection provisions will not enter into force until ratification by the remaining EU Member States. Nevertheless, the latest Decisions by Canada and the EU mark an important step in finalizing the CETA framework that would govern the world's first investment court as well as the world's first appeals mechanism amongst international arbitration agreements.

---

1 Comprehensive Economic and Trade Agreement between Canada, of the One Part, and the European Union and its Member States, of the Other Part, signed October 30, 2016 (*hereinafter*, "**CETA**").

2 For investors currently protected under an existing bilateral investment treaty between Canada and an EU Member State, investment protection may decline as existing treaties may be stronger and would be replaced by the CETA.

3 CETA, Article 8.27 ("Constitution of the Tribunal"). Five members of the Tribunal are to be nationals of an EU Member State, five are to be nationals of Canada, and five are to be nationals of third countries.

4 CETA, Article 8.28 ("Appellate Tribunal").

5 CETA, Article 8.28(2).

6 CETA, Article 8.28(5).

7 With the exception of three-first time members – selected at random – who will be appointed for just six years.

8 Decision No. 001/2021 of the CETA Joint Committee of January 29, 2021 setting out the administrative and organizational matters regarding the functioning of the Appellate Tribunal, *available at* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/appellate-tribunal-dappel.aspx?lang=eng, Article 2(1).

9 Decision No 001/2021 of the Committee on Services and Investment of January 29, 2021 adopting a code of conduct for Members of the Tribunal, Members of the Appellate Tribunal and mediators, *available at* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/code-conduct-conduite.aspx?lang=eng.

10 *Id.*, Article 5(2); *cf.* CETA, Article 8.30(1).

11 CETA, Article 8.20 ("Mediation").

12 Decision No 002/2021 of the Committee on Services and Investment of January 29, 2021 adopting rules for mediation for use by disputing parties in investment disputes, *available at* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/rules-mediation-regles.aspx?lang=eng.

13 Decision No 002/2021 of the CETA Joint Committee of January 29, 2021 setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal, *available at* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/procedure-adoption-interpretations.aspx?lang=eng.

14 *Id.*, Annex to the rules of procedure.

15 CETA, Article 30.8 ("Termination, suspension or incorporation of other existing agreements").

16 CJEU Opinion 1/17 of the Court, 30 April 2019, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4976548.

17 For example, in 2018, the Court of Justice of the European Union's ("CJEU") decided that "intra-EU" BITs are illegal in *Achmea v. Slovak Republic*. *Slowakische Republik (Slovak Republic) v Achmea BV*, Court of Justice of the European Union, Judgment, Case C-284/16, March 6, 2018.

18 Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union dated May 29, 2020, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22020A0529%2801%29.

19 Investment Protection Agreement between the European Union and its Member States, of the One Part, and the Socialist Republic of Vietnam of the Other Part, signed June 20, 2019, Chapter Three (not in force); Investment Protection Agreement between the European Union and its Member States, of the One Part, and the Republic of Singapore, of the Other Part, signed October 15, 2019, Chapter Three (not in force); EU-Mexico Trade Agreement in Principle, Chapter on Investment, Section C.

kslaw.com

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 1,200 lawyers in 22 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.

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