Five years on: developments and dispute resolution under the Canada-European Union Comprehensive Economic and Trade Agreement (CETA)

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Overview

The Canada-European Union Comprehensive Economic and Trade Agreement (CETA) is a free trade agreement between Canada and the European Union, which came into effect in 2017. The agreement aims to deepen the economic relationship between the two regions and facilitate the flow of goods, services, and investments.

One of the significant implications of CETA for European businesses is increased market access to Canada and vice-versa. With CETA, European businesses have gained access to a market of over 37 million consumers, providing them with a unique opportunity to expand their operations and increase their exports to Canada. Moreover, CETA eliminates tariffs on a vast majority of goods traded between Canada and the EU, making it easier and more cost-effective for investors.

CETA includes provisions for the protection of foreign investment and the resolution of investment disputes, providing European and Canadian businesses with greater legal certainty and protection in Canada and Europe. Additionally, CETA includes provisions to protect intellectual property rights, which is crucial for businesses involved in the

development and commercialization of innovative products and services.

The agreement also includes provisions for the mutual recognition of professional qualifications, which allows professionals from the EU to provide services in Canada and vice versa without the need for additional certifications. This makes it easier for European businesses to transfer employees to Canada and for Canadian businesses to hire European professionals.

CETA also includes provisions for the facilitation of trade in services, including financial services, telecommunications, and e-commerce. This makes it easier for European businesses to offer their services in Canada and access Canadian customers, while also facilitating cross-border trade in services.

However, there are still some challenges that European businesses face when doing business in Canada. The regulatory environment in Canada can be complex, and businesses must navigate a range of federal, provincial, and territorial regulations. Moreover, Canadian labor laws and environmental regulations can be more stringent than those in the EU, and businesses must be aware of these differences when entering the Canadian market.

Despite these challenges, CETA provides European businesses with a valuable opportunity to expand their operations in Canada and access a large and growing market. As the Canadian economy continues to grow and diversify, the opportunities for European businesses in Canada are likely to increase.

CETA represents a significant step forward in the relationship between Canada and the European Union and provides European businesses with increased market access and greater legal certainty in Canada. As the agreement continues to be implemented and its benefits become more apparent, it is

likely to have a positive impact on European businesses and their ability to do business in Canada.

Dispute resolution under CETA

CETA establishes a permanent Tribunal of fifteen Members to hear claims for violations of investment protection standards established in the agreement. The EU and Canada will appoint Members of the Tribunal who are highly qualified and beyond reproach in terms of ethics. This has been dubbed the 'Investment Court System'.

Divisions of the Tribunal, consisting of three Members, will hear each particular case. This structure ensures that each case is thoroughly reviewed and evaluated by a group of experts.

The CETA text now follows the EU's new approach, as set out in the recently concluded EU-Vietnam FTA and the EU's TTIP proposal. This approach emphasizes the importance of a competent and impartial tribunal to resolve investment disputes and protect the interests of both investors and states.

Decisions of the Tribunal are appealable before an Appellate Tribunal.

Decision No. 001/2021 of the CETA Joint Committee, dated 29 January 2021, sets out the administrative and organizational matters regarding the functioning of the Appellate Tribunal established under CETA.

The Decision sets out the procedures for the appointment of members of the Appellate Tribunal, including their terms of office, eligibility criteria, and conditions for removal. It also establishes the rules for the functioning of the Appellate Tribunal, including the procedures for the initiation of appeals, the conduct of appeal proceedings, and the rules for the dissemination of information to the public.

The Decision is an important step in ensuring the effective functioning of the appellate mechanism established under CETA. By establishing clear and detailed administrative and organizational rules, the decision contributes to the predictability, consistency, and transparency of the dispute resolution process under CETA.

Utility of the Investment Court System

The dispute resolution mechanism under the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) provides European and Canadian investors with a means to protect their investments in Canada and Europe respectively.

It is not possible to determine definitively whether the Investment Court System under CETA is faster or more cost-efficient than other investment dispute resolution mechanisms such as ICSID or PCA arbitration procedures, as this can vary on a case-by-case basis and depends on a number of factors.

However, proponents of the Investment Court System argue that it offers a more streamlined and efficient process compared to other investment dispute resolution mechanisms. For example, the system is designed to have a smaller pool of highly qualified arbitrators, which could result in faster decision-making and a more consistent body of case law. Additionally, the system incorporates measures aimed at reducing the costs of arbitration, such as provisions for the consolidation of claims and a streamlined procedure for document production.

Ultimately, the speed and cost-efficiency of the Investment Court System will depend on a number of factors, including the complexity of the dispute, the legal issues at stake, and the parties involved.

Moreover, by providing a transparent and predictable framework for the resolution of investment disputes, the mechanism can contribute to a more stable investment environment and increase investor confidence, which in turn could make

financing and insurance more readily available to investors.

By creating a fair and impartial forum for the resolution of disputes, the mechanism can also reduce the risks associated with investing for European investors in Canada and vice-versa, which could make it more attractive to potential investors.

Top developments since CETA was signed in 2017

Since the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) was signed in 2017, several significant developments have taken place that have impacted the implementation and benefits of the agreement. Some of the top developments include:

Expansion of Trade: Since CETA came into effect, trade between Canada and the EU has increased significantly. European businesses have gained access to a market of over 37 million consumers, providing them with a unique opportunity to expand their operations and increase their exports to Canada.

Regulatory Cooperation: CETA includes provisions for regulatory cooperation between Canada and the EU, aimed at reducing the burden of red tape and making it easier for businesses to access each other's markets. Since the agreement was signed, regulatory cooperation has increased, leading to greater efficiency and cost savings for businesses.

Expansion of Services: CETA includes provisions for the facilitation of trade in services, including financial services, telecommunications, and e-commerce. This has led to increased opportunities for European businesses to offer their services in Canada and access Canadian customers, while also facilitating cross-border trade in services.

Mutual Recognition of Qualifications: CETA includes provisions for the mutual recognition of professional qualifications, which allows professionals from the EU to provide services in

Canada and vice versa without the need for additional certifications. This has made it easier for European businesses to transfer employees to Canada and for Canadian businesses to hire European professionals.

Implementation Challenges: While CETA has had many positive developments, there have also been some challenges in its implementation. Some businesses have struggled with navigating the complex regulatory environment in Canada, and there have been concerns about the impact of the agreement on certain sectors, such as agriculture and fisheries.

Updates and Review: To address these challenges, Canada and the EU have agreed to periodically review the implementation of CETA and make any necessary updates to the agreement. This will ensure that CETA continues to provide benefits to both Canada and the EU and remains relevant in a rapidly changing global economic environment.

While there have been some challenges, CETA remains a crucial agreement that provides increased market access and greater legal certainty for European businesses doing business in Canada.

Disputes under CETA

There have not been any significant or widely reported disputes under the Canada-European Union Comprehensive Economic and Trade Agreement (CETA). The agreement has been in force since September 2017, and its dispute resolution mechanisms, including the Tribunal and the Appellate Tribunal, have not been called upon to resolve any investment disputes according to public data.

It is important to note that the resolution of investment disputes through international investment agreements can be a time-consuming process, and the outcome of disputes may not be publicly available. It is possible that disputes have been resolved through alternative means, such as negotiation or

mediation, without resorting to the formal dispute resolution mechanisms established under CETA.

There are no public cases that involve European investors taking action against Canada via an investor-State dispute mechanism. However, there have been a number of Canadian investors that have triggered bilateral investment treaty dispute resolution mechanisms against European jurisdictions such as:

- 2022: Coropi and others v. Serbia (ICSID Case No. ARB/22/14) under the Canada – Serbia BIT (2014) and the Cyprus – Serbia BIT (2005) in relation to real estate activities.
- 2020: Sukyas v. Romania (II) (PCA Case No. 2020-54) under the Canada – Romania BIT (2009) for claims amounting to USD 100 million arising out of the Romanian Government's alleged failure to restitute assets in Cinegrafia Română (CIRO Films), a film company held by the claimants' family members before its seizure by the communist regime in 1948.
- 2018: Korsgaard v. Croatia under the Canada – Croatia BIT (1997) for claims amounting to USD 200 million arising out of the Croatian Government's alleged measures to prevent the claimant from obtaining ownership over several formerly socially-owned real estate properties in Croatia.

Thales DIS Canada Inc. v. Ontario (2022)

In 2022, the Ontario Superior Court of Justice in Canada ruled on the first dispute triggering protections under CETA in a dispute between Thales DIS Canada Inc. versus the Province of Ontario in Canada.

The case concerned the procurement of the blank cards used as, among other things, drivers' licenses and health cards in Ontario. Obviously, for these forms of identification security

is a key consideration. The request for bids required that the cards be produced in Canada. Thales wished to manufacture them at a plant in Poland and considered the requirement to be discriminatory and, on that basis, contrary to CETA. The Ontario government considered the complaint. It was dismissed in a decision made by the Minister of Transportation. An application for judicial review was brought before the Ontario Courts.

The Ontario Ministry of Transport (MTO) argued that the requirement for domestic production was necessary to protect public safety under Article 19.3(2) of CETA.

The Court found this to be unreasonable and "to the extent that the domestic production requirement contravenes the non-discrimination provision of CETA and is not justified under the public safety exception".

The Court also found that there was no evidence that the MTO "even considered the application of the CETA" and had conducted the request for bids process "without any consideration of the requirements of the CETA, and whether the domestic production requirement would violate the non-discrimination provision" rendering the tendering / request for bids process unreasonable.

However – importantly was a concurring opinion by The Honourable David L. Corbett where Justice Corbett took the position that "Ontario has failed to implement a CETA-compliant dispute resolution process".

And that "Ontario's choice to resort to an internal bid dispute process to decide a claim under CETA was a breach of CETA".

In determining the jurisdiction of the Court, Justice Corbett noted Articles 19.17.4 and 19.17.5 that require Canada to "establish or designate at least one impartial administrative or judicial authority that is independent of its procuring

entities to receive and review a challenge by a supplier arising in the context of a covered procurement" and "the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge".

Justice Corbett found that Ontario is in breach of these provisions in failing "to designate at least one impartial administrative or judicial authority that is independent of its procuring entities' (Art. 19.17.4) and by failing "to ensure the supplier may appeal" a decision of the decisionmaker below (Art. 19.7.5).

Justice Corbett concluded:

"My colleague characterizes this non-compliance with CETA as a failure to "strictly comply" with CETA. I do not see it so favourably. In my view it is a flagrant and inexplicable failure to implement Ontario's obligations under CETA. The result was an unsatisfactory process, based on a dubious record, which led to a failure to understand and apply applicable international law, followed an unsatisfactory reasoning process, and approached the dispute showing deference to Ontario's policy choices on an issue for which Ontario bore the onus of proof. If this decision had been rendered by a tribunal legally entrusted to adjudicate CETA disputes, my criticism would be properly levelled at the tribunal itself. Here, I think that would be unfair. This criticism should be levelled, not at the decision-makers below, who surely did their best to address a problem they were not qualified to decide institutionally. This criticism is instead levied against the Government of Ontario, for its failure to implement CETA in accordance with its terms."

The crux of the Thales v. Ontario decision that the MTO had breached obligations under CETA is reaffirming to the expectations of investors under CETA.

However, the concurring opinion by Justice Corbett highlights the difficulties that investors may face in jurisdictions across Canada and Europe in applying and following the appropriate dispute resolution procedure under CETA, and the different applications of the CETA dispute resolution process that may be found through the various jurisdictions.

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