In our last international trade brief, we explained the implications of the U.S. administration announcing that it would no longer continue the suspension of Title III of the Cuban Liberty and Solidarity Act of 1996. In this international trade brief, we discuss the European Court of Justice decision that the investor-state dispute resolution mechanism in the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) is compatible with EU primary law, and the ratification process to fully implement CETA.

In an opinion released on April 30, 2019, the European Court of Justice (the ECJ) confirmed that the investor-state dispute resolution mechanism set up by the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) is compatible with EU primary law.

As we have previously discussed, CETA is a comprehensive and progressive free trade agreement that covers most aspects of the Canada-EU economic relationship and is intended to significantly increase trade and investment ties between Canada and the EU. Section F of Chapter 8 establishes an investor-state dispute settlement (the ISDS Mechanism), which enables investors to enforce their rights against the host state of the investment before an international arbitration tribunal. The ISDS Mechanism within CETA provides for novel procedures in several respects including by setting up an institutionalized appellate system, which could then become part of a multilateral investment system with an investment court.

The ISDS Mechanism became a flashpoint during CETA’s negotiation. In particular, the Belgian regional government of Wallonia threatened to block CETA from being signed, backing down only when the Belgium federal government undertook to seek an opinion from the ECJ on whether the ISDS Mechanism was compatible with EU legal framework, including fundamental rights.

In its recent opinion, the ECJ found that the ISDS Mechanism was compatible with EU primary law on the basis that it:

* did not conflict with the EU’s legal order or the ECJ’s exclusive jurisdiction over questions of EU law;
did not infringe the general principles of equality and the “practical effect” requirement of EU law; and

- was compatible with the right of access to courts and the right to an independent and impartial judiciary.

The ECJ’s decision paves the way for the full implementation of CETA in the EU. CETA is currently provisionally in effect within the EU pending ratification from certain member states. As noted in a recent media article, a number of states had postponed their ratification of the agreement pending the release of the ECJ opinion. Therefore, the Court’s positive opinion is expected to further efforts to obtain full ratification of CETA and bring it into final force.

Early data from Statistics Canada indicates that CETA has already boosted trade between Canada and the EU, although it appears that EU businesses captured greater benefits than Canadian businesses.

Canada’s trade ties are still overwhelmingly focused on the United States, which sources about 75% of Canada’s total merchandise exports. CETA has been championed by the Canadian government as one of the ways in which Canada can diversify its international trade and investment opportunities. The government’s efforts toward diversification have extended beyond the EU and include countries that are members of the CPTPP.

[1] The investor-state dispute resolution system permits investors to bring international arbitration proceedings against a host state for measures that are harmful resulting in serious harm to their investments in that country. (See our previous brief on this topic.)
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