Fundamental Change To The Conduct Of Investor-State Arbitrations In Final CETA Text

February 29, 2016

On February 29, 2016, Canada and the European Union released the final legal text of the Canada-EU Comprehensive Economic and Trade Agreement (CETA). The most significant change in the final text compared to the text that was signed on September 26, 2014, is the fundamental change to the conduct of investor-state arbitrations.

Investor-state arbitration is the most controversial aspect of modern trade and investment agreements. The arbitration provisions enable investors to bring monetary damages claims against governments for violations of investment protection provisions.

A main criticism of the current system is the lack of certainty and predictability in the interpretation and application of investment protection provisions. Investment tribunals are composed of three arbitrators, one appointed by the investor, one appointed by the defending government and a third that is appointed either by agreement of the two parties, by the two appointed arbitrators or by the appointing authority. The *ad hoc* nature of the tribunals has led to wide variability in rulings, including instances of very different rulings on the same or similar facts, and controversial interpretations of investment protection provisions.

The final CETA text released today introduces a ground-breaking change to address this criticism that parallels the approach taken in the recently signed draft text of the EU-Vietnam free trade agreement.

Permanent Tribunal Roster Established by the Governments (no more investor appointed arbitrators)

Arbitrators will no longer be appointed by the disputing parties. Instead, they will be selected from a 15 person “expert” roster established by Canada and the EU through the CETA Joint Committee. Five of the persons on the roster will be from Canada, five from the EU and the remaining five from other countries. The three arbitrators sitting on a tribunal will be selected from the roster “on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members of the Tribunal to serve”.

The roster will enable Canada and the EU to control which experts sit on arbitrations to ensure that they are sensitive to government perspectives. Investors will no longer have any say in the appointment of an arbitrator.

Appellant Tribunal Created

To date, the creation of an appellate tribunal akin to the Appellate Body in the World Trade Organization (WTO) has only been discussed academically. The CETA brings this discussion to life with the establishment of an Appellate Tribunal that can review awards issued by Tribunals for errors in law and manifest errors in fact. This will without doubt improve the consistency and predictability of the interpretation and application of investment protection provisions.

The standard of review for legal errors appears to be very strict—namely, legal "correctness" This fundamentally departs from the prevailing standard in investor-state arbitrations which essentially entitles investment tribunals to be wrong on the law unless they act in manifest excess of powers. This new standard will significantly reduce the incentive to initiate "hail Mary" claims that have a low probability of success.

Multilateral Investment Tribunal and Appellate Mechanism

Canada and the EU have committed to pursue the extension of this new model to the multilateral stage.

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