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Canada–European Union Trade Negotiations
10. Dispute Settlement

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Canada–European Union Trade Negotiations: 10. Dispute Settlement

(In Brief)

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CANADA–EUROPEAN UNION TRADE NEGOTIATIONS: 10. DISPUTE SETTLEMENT

1 INTRODUCTION

While negotiations for a Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (EU) cover more than 20 subject areas, there are nine of particular interest to Canadians and their EU counterparts. These nine topics are the most sensitive or difficult negotiating issues, or the source of the greatest estimated impacts should CETA negotiations succeed, or the areas of the more controversial elements. This paper discusses dispute settlement.[1]

2 NEGOTIATION ISSUES

An effective and timely dispute-settlement mechanism is one of the most important elements of any successful trade agreement. Canada's trade negotiators have indicated their intention in CETA negotiations to include a dispute-settlement process that not only reflects the strengths of the dispute-resolution mechanisms of the World Trade Organization and the North American Free Trade Agreement (NAFTA), but also takes into account the lessons learned from Canada's experience to date with those mechanisms.

Dispute settlement in trade agreements covers a range of topics, the most common of which involve anti-dumping and countervailing duty cases. Many trade agreements also include provisions to adjudicate disputes related to investment protection and, although more rare, enforceable environmental and labour provisions.

One of the challenges facing CETA negotiators is that Canada and the EU have used different approaches to dispute settlement in their previous trade agreements. Canada has tended to separate its dispute-settlement mechanisms by type of dispute. For example, the NAFTA has three chapters that contain provisions on dispute settlement: Chapter 19 deals with anti-dumping and countervailing duty cases; Chapter 11 includes provisions related to investment protection and expropriation of assets; and Chapter 20 addresses disputes related to the general interpretation of the agreement. By contrast, in its October 2009 free trade agreement with South Korea, the EU included only one chapter on dispute settlement, covering all disputes related to the agreement. Canadian trade negotiators have suggested that, although there are important differences between the Canadian and EU approaches to dispute settlement, both parties share a desire to address the flaws of the systems in their earlier agreements.

Among Canada's stated priorities in a CETA dispute-settlement mechanism are the speed of the process and an ability to address issues such as non-tariff barriers in an expedited and adequate manner. Improving the speed of the dispute-settlement process is motivated in part by Canada's experience with Chapter 19 of the NAFTA. The Chapter 19 process is intended to take a maximum of 315 days, from the request to form a binational panel to examine the issue to a final decision. However,

this timeframe has been easily manipulated by such tactics as failing to propose candidates to serve on the panel within the prescribed timeframe, leading to lengthy overall delays.

Another priority for Canada is the creation of a mechanism in the CETA to address certain Chapter 19 flaws in the timing of compensation payments. In Canada's past disputes with the United States over softwood lumber, the US imposed interim duties on lumber imports from Canada based on its preliminary findings of injury or dumping. However, Canada could not initiate a Chapter 19 process based on a preliminary finding; only a final determination can trigger a review. As a result, Canadian lumber producers were obliged to pay duties for almost a year before the panel process began. Those duties were non-refundable, even when the Canadian position was ultimately upheld.

Another notable flaw with the NAFTA Chapter 19 process is that panel decisions do not create binding precedents in subsequent cases.

On the issue of investment-protection provisions, Canada will likely pursue an investor-state dispute-resolution mechanism similar to that in Chapter 11 of the NAFTA. Canada has incorporated similar provisions in most of its subsequent trade agreements, although with some modifications based on past experiences.

Canada has never signed a trade agreement with enforceable environmental-protection provisions, and only its recent agreements with Colombia, Peru and Panama have enforceable labour-cooperation provisions. Whether Canada and the EU will include enforceable environmental and labour provisions, and a consequent dispute-settlement process, in the CETA is unclear.

NOTES

1. Other subjects covered in this series are market access in agriculture, non-agricultural market access, trade in services, investment protection, government procurement, technical barriers to trade and regulatory cooperation, intellectual property protection and labour mobility.