

The Investor State Dispute Settlement process issue - Oh, Canada: Surprise loser in US-EU trade deal

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Controversy over TTIP threatens to delay ratification on a smaller pact with Canada.

A surprising casualty is emerging in the trade debate between the United States and European Union: Canada.

Almost overnight, the pact struck between Ottawa and Brussels in September has been delayed to early 2016. There is little chance the deal, which covers nearly €80 million of annual trade and was four years in the making, will take effect until 2017.

What went wrong?

“ISDS” became a buzzword in current negotiations between the US and EU. Wrangling over the Investor State Dispute Settlement process — arbitrary courts of lawyers from both sides that help settle rows — now threatens to upend Canada’s own deal.

“I’m worried about the political opposition” in Europe, said Jayson Myers, president and chief executive of Canadian Manufacturers and Exporters, a trade association representing about 10,000 companies. With CETA, “important market entry costs and regulatory restrictions will be dropped, which have held many Canadian companies back from developing their business on the other side of the Atlantic, and EU enterprises vice-versa.”

When Brussels and Ottawa started negotiating more than five years ago, most politicians did not know what ISDS meant, and hardly anyone but a few legal specialists paid attention to this section of the agreement.

That changed when Brussels started negotiating with the US in July 2013. A possible free-trade agreement between regions that exchange about €826 billion in goods and services a year, turned ISDS into a hotly debated issue.

“Everyone is aware of this mechanism now, and many Parliamentarians do not want it as it is right now,” said Rory Macrae, a partner at the public affairs agency g+, which specializes in trade issues.

The European Parliament is currently debating a draft resolution demanding major changes to the US agreement, formally known as the Transatlantic Trade and Investment Partnership.

Many members want to completely exclude ISDS from the American treaty, whereas some plead for major changes such as a court mechanism for dispute settlements, with the EU and US appointing independent judges, limited lawsuit possibilities and an appeal procedure.

Cecilia Malmström, the European commissioner for trade, talked last week about “substantially reforming” that section of the US deal.

Commission spokesman Daniel Rosario, however, remains confident that the Canadian pact, which is currently in the final phase of the so-called ‘legal scrubbing’, will be done before the summer. Even so, translating the 1,600-page document into the 24 EU official languages could take another six months, before it can go to the Parliament.

Nevertheless, there are many members of parliament now posing one critical question: “Why should we ratify the Canadian trade pact, which includes an ‘outdated’ version of ISDS that no one wants to accept in the American deal?”

“It is clear to the Commission that if they put an agreement on the table that does not fulfill our demands on ISDS, then we will let it fail,” said Bernd Lange, chair of the Parliament’s committee on international trade and a member of the Social Democrats party. The Canadian agreement “is a good agreement, but the part about ISDS needs to be changed.” Lange’s words are far more than an empty threat: In February, he co-authored a critical report on ISDS together with several European Social Democrat ministers and should be able to expect large parts of the Social Democrats, the second biggest group in the parliament, to back his position. Other groups like the Greens and the Left are also opposing ISDS, and Parliamentarians from other fractions have issued criticism as well.

Commission wants last-minute-changes

Negotiators at the Commission know the current Canadian pact will be a tough sell that probably won’t make it through the legislative process. That’s why Malmström is now trying to use the ‘legal scrubbing’ to modify the agreement’s articles about ISDS at the last minute. Her spokesman, Daniel Rosario, expressed hope that some ‘fine tuning’ around investment dispute settlements “may be feasible.”

But it is a narrow path.

Legal scrubbing is intended to remove language ambiguity, typos and other inconsistencies. “It should not be rewriting, but cleaning only,” said Bernard O’Connor, an experienced trade lawyer in Brussels.

The only way to bring such modifications into the agreement would be if Canada explicitly signs off on it. Otherwise, the other side could demand to renegotiate further issues as well, which risks that “the whole agreement will be reopened,” O’Connor said.

That risk is real. Special interest groups are trying to get involved in the fine-tuning process. Bavarian beer brewers, for example, now want to add changes to improve the protection of their trademark.

Canada’s Prime Minister Stephen Harper has been waiting for some time. A final conclusion on the deal was announced in October 2013, but little has happened since.

Last September, Harper made a second declaration about the definite end of negotiations with the former Commission President José Manuel Barroso, believing that things would finally speed up.

Susanne Connolly from the Mission of Canada to the EU, said: “The Government of Canada is pleased...negotiations have concluded. We reached a balanced outcome and one that contains the most progressive provisions on ISDS ever negotiated...Moving towards implementation of CETA as soon as possible is a priority.”

As things stand now, the make-or-break moment could come next spring. The Canadian agreement will need to pass the European Parliament and most likely also the 28 national parliaments.

Until then, many obstacles lay ahead.

Myers, head of the Canadian Manufacturers and Exporters, predicted: "If Europe and Canada cannot conclude a deal, then there is very little chance that Europe and the US can either."

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P.S.

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<http://www.politico.eu/article/canada-may-be-loser-in-us-eu-trade-deal/>