

Canada-EU talks facing delays

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Even as Canadian and European Union negotiators sit down this week for the sixth round of free trade talks, a series of sensitive issues—both political and technical—are causing delays.

A Canadian request for inclusion of a dispute settlement mechanism similar to NAFTA's controversial Chapter 11 is stalling part of the talks, as the European Commission must obtain an extended negotiating mandate from member states.

Meanwhile, there are fresh accusations that Ontario and Quebec are not ready to open their doors to foreign bidders even as Canada and the EU grapple with how to liberalize services.

A European Commission document dated Dec. 12 states that negotiators "made it clear that [investment protection] is an important negotiating objective for Canada," and asks the European Council to allow it to hold discussions on this topic, including an investor-to-state dispute settlement mechanism.

This is a controversial provision, also included in the North American Free Trade Agreement, that allows corporations to seek compensation from states if government policies hurt their business interests. It has long served as a lightning rod for critics of NAFTA.

Although individual EU member states have agreed to such clauses in past bilateral trade deals, this would be the first time the EU as a whole would include an investor-to-state dispute settlement as part of a trade agreement.

Maurizio Cellini, counsellor for economic and commercial affairs at the EU Delegation in Ottawa, said he cannot comment about the details of such a mechanism, but added "it is very likely" that such a provision will be negotiated. The Council will most likely vote on the issue in the spring, he said.

Civil society groups like the Council of Canadians have already voiced their criticism of including such a mechanism, sending letters to members of the European Parliament, arguing it would threaten public policy and democratic governance.

One particular criticism is directed at the perceived lack of transparency, as the proposal envisions cases not going through domestic court systems, but being settled through appointed arbitrators.

Gus Van Harten, professor of international investment law at York University's Osgoode Law Hall School, said he was "scratching his head" trying to understand why Canada would be pushing for such a provision, since "it is quite likely we will see significant number of claims by European companies seeking to challenge often legitimate regulatory measures on the part of the governments."

The federal government recently handed a \$130-million cheque to US-based AbitibiBowater, which appealed for compensation under NAFTA after Newfoundland and Labrador expropriated its hydroelectricity and timber rights in 2008.

Furthermore, Mr. Van Harten said that out of 15 finalized cases Canadian investors brought around the world, none ended with compensations.

Although supporters say investor-to-state dispute mechanisms encourage foreign investment, Dan Ciuriak, former deputy chief economist at the International Trade department, said he is not in favour of these "bells and whistles" that come with free trade agreements, since they go against the rules of the World Trade Organization.

"Pushing an investor-mechanism is a tricky issue and it is something we don't have sufficient handle of in terms of cost-benefit analysis," Mr. Ciuriak said.

But Jason Langrish, executive director of the Canada-Europe Roundtable for Business, said such a mechanism would allow companies to operate without impediments and would ease the government of the burden of having to defend firms at a state-to-state level.

No offers yet

While the EU and Canada are waiting for the Commission's extended negotiating mandate, negotiators are also dealing with a delay in the exchange of formal offers on some of the deal's most sensitive issues, such as services and government procurement.

Negotiators had originally decided to table the offers prior to their meeting this week in Brussels for the sixth round of talks, according to reports. Now that won't happen until March or April.

Both parties are ambitious and would like to achieve their deadline of completing the deal by the end of 2011, but the exchange of offers is a "critical" moment that requires a solid understanding of the systems in place in both Canada and the EU, Mr. Cellini said.

"If you don't clearly get the implications of opening the market, it's difficult to judge the merit of an offer that you either make or receive," Mr. Cellini said.

Negotiators are taking more time to make sure they present substantial offers, without having to "ping-pong between the two in order to come to closer to the final picture."

"This cannot be tactical and then adjusted by little steps later on," Mr. Cellini said. "It has to be a serious offer and very close to what will be the final outcome if we want to meet the deadline."

Initial reports blamed the delay on the two sides being unable to agree on a mechanism for deciding how services will be liberalized. Canadians want to use a so-called negative list: all service sectors are liberalized except the sensitive ones, which are put on the list and remain exempted. The Europeans, on the other hand, are in favour of the positive list: everything on the list will be liberalized and what is not included is protected.

Canada has been pushing for the negative list, as the positive one is seen as more restrictive. This would be the first time the EU would use the negative list, so the European Commission has to obtain approval for the move from all 27 member states.

This is something that states have "almost agreed" on, Mr. Cellini said, as "there is a very good willingness to consider to work on the basis of a negative list."

But despite this pending "win" for Canada, provincial procurement continues to be a point of contention for Ontario and Quebec, which have been cautious about the possibility of allowing foreign bidders the right to freely compete on contracts in their jurisdictions, said Mr. Langrish.

The EU made it clear from the beginning that negotiating provincial procurement is crucial to achieving a successful, comprehensive deal. This meant provinces had to take their seats at the negotiating table and be ready to compromise over sectors, which up until now were off-limits to foreign competition.

Ontario and Quebec lack political will, but need to show more ambition, Mr. Langrish said.

Negotiating government procurement is "straight horse-trading," said Mr. Ciuriak. Opening up procurement allows provinces to obtain "better quality services for better money." However, municipalities have expressed concern over the move, as it would hinder them from prioritizing local jobs.

Overall, Mr. Ciuriak said these delays are not surprising, as trade deal "are notorious for chasing time."

"They take a life of their own and it's hard to stick to any preconceived time frame," he said.

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