EU wants investor compensation if businesses hurt by Canadian policies: documents

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The European Union wants Canada to agree to compensate European companies for any losses that stem from changes to health, environment or safety rules in Canada, according to documents obtained by The Canadian Press.

A recent draft of the investment chapter of the broad free-trade agreement that Canada and the EU are negotiating shows 50 pages of complex, widespread disagreement between the two governments over how their investors should be treated in the other's jurisdiction.

Canada initially asked for the investment protections, but as the trade negotiations reach their final hours, Europe appears to be pushing for stiffer rules than Canada wants.

Specifically, the Europeans are resisting Canada's request to carve out health, safety and the environment from rules about expropriation — even though such clauses have become standard in most of Canada's trade and investment treaties.

In the Oct. 26 draft, Canada says that "non-discriminatory measures by a party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations."

But the text remains bracketed, which means Canada is asking for this wording and Europe has not agreed.

In other European documents published on the weekend by Montreal's La Presse, EU officials bluntly reject the Canadian position.

"Canada's proposed text would permit expropriation without compensation, in order to pursue legitimate policy objectives. This should not be accepted," says the note from the European Commission to its member states, dated Nov. 6 and obtained by Quebec's CAQ party.

Instead, the EU says companies should always be fully compensated if their businesses are hurt by government policy, regardless of the good intentions of the policy.

The EU is also pushing for stronger investor rights in Canada's protected financial-services sector, the memo shows.

Canada has carved out financial services from the investor-state dispute settlement process, but the EU argues that Ottawa has set the bar too high.

The EU also wants Canada to narrow its protections of cultural industries from foreign investment.

The union is also arguing for better investor access to the telecom industry, and wants Canada to exempt its companies from the "net benefits" test the government routinely applies to approve or reject foreign takeovers, the memo says.

"They're opening up this Pandora's box," said Gus Van Harten, an associate professor at Osgoode Hall Law School and an expert on investor-state provisions.

Canada's first full-fledged experience with investor protection clauses came through Chapter 11 of NAFTA, when Ottawa was the target of several late 1990s lawsuits from investors claiming compensation for changes to environmental legislation.

The provisions were initially included in the NAFTA trade talks to protect Canadian and U.S. firms from arbitrary expropriation by the Mexican government. But it was Ottawa that was most frequently the target, and the federal government has had to pay out millions of dollars to firms who claimed damages under NAFTA.

The NAFTA governments made some adjustments to their trade agreement as a result, increasing transparency and limiting the ability of companies to sue for any policy measure. If Europe gets its way in the Canada-EU deal, transparency would be enhanced but the limitations on companies to sue would be lost, says Van Harten.

Meanwhile around the world, investor-state arbitration has exploded, he added, pointing to a recent $1.8-billion award against Ecuador in favour of U.S.-based Occidental Petroleum Corp., under the Ecuador-U.S. bilateral investment treaty.

Investor-state provisions are the basis of much of the public opposition to the recently signed Canada-China foreign investment treaty, but the EU position is more aggressive than that treaty — even though such provisions are usually designed for developing countries.

“We’re kind of rushing into the mechanism without any study, as far as I can tell. It’s very dangerous,” Prof. Van Harten said.

Both Canada and the EU have well established courts that protect investors, he added.

“So the question is, why are we doing it? ... We will be exposing ourselves to claims.”

A spokesman for International Trade Minister Ed Fast would not answer any questions about the draft investment chapter or the leaked EU memo, but Ottawa has made it clear that a trade agreement without investment protections would be archaic.

“The government is committed to a comprehensive, 21st-century agreement,” said Mr. Fast’s spokesman, Adam Taylor.

“As in all negotiations, nothing is agreed to until everything is agreed to.”

Canada’s priorities are better access to European markets for Canadian beef, pork and autos, he added.

Ministers met in Brussels last week to hammer out the most difficult issues of the trade deal, in the hope of concluding three years of talks and reaching a final agreement by the end of the year. That deadline now seems too ambitious, and negotiators will continue to meet.

Canadian officials are under intense pressure to protect supply management in the dairy and poultry industries. Many provinces and the generic drug industry also insist that Ottawa not give in to EU demands to extend patents for brand-name pharmaceuticals.

But the leaked EU memo says Ottawa wants to trade one off against the other, preparing to at least partially concede on drug patents in order to protect supply management — even though the federal government's own analysis shows that a partial concession on drug patents would cost Canadian taxpayers up to $900-million a year extra in medical expenses.

Reached in Brussels late last week, Canadian dairy industry representatives were ebullient.

"So far so good," said Wally Smith, president of Dairy Farmers of Canada after meeting with Agriculture Minister Gerry Ritz.

For the dairy industry, preserving supply management also means not tinkering with import quotas — something Europe has suggested.

Mr. Smith said Mr. Ritz told him Canadian negotiators "were not deviating in any shape or form" from their traditional defence of the supply-managed industries.