

Europeans put spotlight on Ottawa's investment restrictions

CAMPBELL CLARK

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Talks for a Canada-Europe trade deal haven't attracted the kind of clamour that surrounded free trade with the United States in 1988, but the Europeans do have a wish list that includes some of Canada's sacred cows: They want exemptions from our foreign-investment restrictions.

The European Union is asking for a deal that would prevent Canada from simply nixing European takeovers of big Canadian companies the way Ottawa quashed the Australian takeover of Saskatchewan's Potash Corp.

The trade negotiations still haven't reached the nitty-gritty stage, so each side can ask for anything. And it would be hard for the Harper government to deal away politically sensitive foreign-investment restrictions.

But the rejection of the Potash Corp. takeover has made it a more pointed issue. After decades when Canadian governments never used foreign-investment law to block a takeover, Stephen Harper's Conservatives have done it twice in three years. It has caused some Europeans to question whether they can rely on an open-door investment policy in Ottawa.

The EU wants a far-ranging trade deal with Canada, or none at all, because it might serve as a precedent for deals with bigger markets. And whether they win it in the end or not, they're asking for a

concession Canada has never made before. They want European companies to be treated like Canadian companies when they launch a takeover bid here, so they can't simply be blocked by a politician's decision that it's not good for Canada – such as Industry Minister Tony Clement's move to block BHP Billiton's proposed \$40-billion purchase of Potash Corp.

The EU's trade commissioner, Karel De Gucht, in Ottawa to meet with Canadian Trade Minister Peter Van Loan, said a lot of trade is now tied to investment flows, and Europe wants an agreement that deals with both.

"We want market access, yes, for all our investments," Mr. De Gucht said in an interview, describing it as an "important goal" for the EU.

The Potash Corp. deal was rejected under the net-benefit rule of the Investment Canada Act, which gives the industry minister the power to reject a foreign takeover if he decides it's not in Canada's economic interest.

"That's something that in our mind cannot be unilaterally decided. Because if it's framed like that then it's obviously a barrier to trade," Mr. De Gucht said. "This is part of the negotiations."

Mr. De Gucht said it's one thing for a foreign takeover to be rejected for the same reasons that would prevent one Canadian company from buying another, such as competition laws that prevent unfair competition. But it's something else again when the rules are applied differently to foreigners. "What we are really aiming for is national treatment," Mr. De Gucht said.

According to other EU officials, that includes exemptions to foreign-ownership restrictions in areas such as telecommunications, where federal laws require Canadian control. The Harper government announced in March that it would reduce those restrictions, but later

delayed the controversial decision to some time in late 2011 or 2012.

The Canada-EU trade negotiations, launched in 2009, are going into a sixth round, and haven't yet reached the stage where negotiators swap one demand for another.

"At the moment, we've got all these requests out here that are very ambitious and go well beyond what each side will do at the end of the day," said Canada's chief negotiator for the EU trade deal, Steve Verheul. "We haven't gotten into detailed discussions, issue-by-issue or sector-by-sector yet."

Mr. Verheul wouldn't say whether Canada would be willing to negotiate exemptions from foreign-investment reviews. But he said there are negotiating tactics at work: The Europeans know what issues are sensitive for Canadians, and vice versa, and each side asks for things that will be difficult for the other to give, so they can trade off concessions.

There are other sensitive issues for horse trading. The EU wants Canada to accept its "geographic indicators" on foods so that Canadian versions of Parma ham, for example, would have to be labelled something like "Canadian Parma ham." It will insist European firms get wide-ranging access to bid on provincial and municipal contracts, such as equipment for hydro plants and subways.

Larry Herman, a trade lawyer with Cassels Brock, said it would be hard for the Canadian government to sell a trade deal that gives the EU broad exemptions from major foreign-investment restrictions unless it gets some deep concessions in return. But the EU is driving a hard bargain because it wants a deal with Canada only if it's wide-ranging enough to be a pattern for deals with bigger markets such as the United States.

But the fact that Ottawa is using foreign-investment rules to block takeovers – the Potash Corp. rejection was widely seen as a response to political pressure at home – has given trading partners new arguments that they need guarantees for their companies. Whether that ends up as a bargaining chip or in a real deal, the Europeans are putting Canada’s investment restrictions on the table.