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Despite German angst, bet on CETA to go ahead

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According to recent reports based on accounts from "unnamed diplomatic sources," the German government will not support the long-awaited Canada-EU Comprehensive Economic and Trade Agreement (CETA) in its current form.

The reason cited is concern with the investor-state dispute settlement (ISDS) provision, which would accord companies the right to pursue legal action against national governments via tribunals embedded in CETA. As reported in the press, the basis of the German argument against ISDS is that their national courts are sufficient for handling corporate claims and therefore investor-state provisions are unnecessary.

Yet not long ago, the German government had agreed in principle, via the European Council – the body that represents the 28 member states of the European Union in Brussels – to having the investor-state mechanism in CETA. What changed?

Assuming media reports are correct, and this is far from certain, it appears the primary culprit is public opinion as it pertains to EU negotiations with the United States on the Transatlantic Trade and Investment Partnership agreement (TTIP).

Non-governmental organizations in Europe opposed to free trade of any description have seized upon the investor-state provision as encapsulating all that they claim is wrong with liberalized trade, generating angst among the German public and consequently, political impact.

Chancellor Angela Merkel, presiding over a coalition government and acutely aware of her electorate's suspicion of the U.S., is faced with a dilemma. If she doesn't show adequate concern, she will be vulnerable to accusations that her government is agreeing to a bill of corporate rights.

The investor-state mechanism didn't become an issue until TTIP negotiations got moving. Some now ask: How can you accord this provision to Canada, then not do the same for the U.S.? The answer is that the two negotiations are distinct; what is agreed in one will not necessary be conferred in the other.

If the German government is serious about excluding the investor-state provision from CETA, it risks undermining negotiations for which it has been the most ardent supporter.

The investor-state mechanism exists to ensure governments do not blatantly violate investor rights when they face political pressures. Governments are not only accountable to the electorate. They are also accountable to those who are investing millions, if not billions, of dollars into their economy, generating economic activity and jobs. These investments often require massive up-front capital; it can take years before a company breaks even.

Undermining investor certainty can have a huge dampening effect on the decision to locate in a given jurisdiction. Domestic courts may deliver a fair outcome, but can take so long as to undermine the rationale for investing in the first place.

Those who argue against investor-state clauses tend to cite the large figures sought by companies, and not the amount of the actual settlements. Criteria for evaluating what is a legitimate claim are stringent. The majority of cases are thrown out. Those that do make it to dispute settlement generally receive greatly reduced compensation from what was claimed.

In the 20 years the investor-state mechanism has been a feature of NAFTA, Canada has had to pay out just over $150-million under the provision. In the same period, the stock of NAFTA-generated, foreign, direct investment in the country has more than quadrupled, from $90-billion to almost $400-billion.

Regarding CETA, while German courts are indeed effective, the same cannot be said for all EU members: Canada is negotiating a deal with the EU, not just Germany.

The irony is that Germany invented the investor-state mechanism, embedding it in its earlier bilateral investment treaties. With the implementation of the Lisbon Treaty in 2009, the competency for negotiating investment migrated to Brussels and the European Commission, to the consternation of the Germans and some other member states.

If Europe is to walk tall on the world stage, it requires unified policies. Member states can’t pick and choose which ones they like and don’t like, as it would undermine the rationale that underpins the EU.

The investor-state provision may need to undergo revision in CETA. But it is a good bet that it will appear in the final agreement