TRADE

# Germany should take its cue from Canada on investor rights

Barrie McKenna
OTTAWA — The Globe and Mail
Published Sunday, Aug. 03 2014

Someone might want to remind the Germans where investors in now-defunct oil giant OAO Yukos would be without independent dispute settlement. The answer: Up a creek.

An international court in the Hague recently ordered Russia to pay shareholders of the energy producer $50-billion (U.S.) for the illegal expropriation of the company's assets in the early 2000s. The record award was made possible because Russia is bound by investment treaties it has with many other countries, setting out how it can – and can't – treat foreign investors.

And yet Germany is apparently now having eleventh-hour doubts about similarly strong investor protections contained in free-trade deals that Europe is currently negotiating with Canada and the United States.

In an interview with the Globe and Mail last week, German ambassador to Canada Werner Wnendt suggested his country would like to limit those protections in the face of public concerns at home.

His objections seem a bit late in the game, and a tad disingenuous. Germany is, after all, one of the world's staunchest advocates of strong investor rights virtually everywhere else in the world.

Trade lawyer Matthew Kronby, who was Canada's lead lawyer in the European free-trade negotiations until 2012, said it's "strange" that Germany would be having reservations about what is known as investor-state dispute settlement.

"They are one of the originators of bilateral investment treaties and have as many of them as anyone else," pointed out Mr. Kronby, a partner at Bennett Jones in Toronto. At last count, Germany had bilateral investment treaties with 136 countries, including Russia, according to figures compiled by the United Nations Conference on Trade and Development.

That’s far more than either Canada, with 33, or the United States, with 46. Canada and the U.S. are also bound by the Chapter 11 investor protections in the North American Free Trade Agreement (NAFTA).

Indeed, Canada’s sometimes unhappy Chapter 11 experience helped shape its approach to its negotiations with Europe.

Canada and the U.S. built investor protections into NAFTA, worried Mexico might mistreat companies operating there. Instead, it’s been Canada that has been the most frequent target of litigation over the years. Canada has been hit with 35 lawsuits, mainly from U.S. companies and often stemming from actions by the provinces. The U.S. has been sued just 16 times; Mexico 25 times.

So, Canadian negotiators pushed European countries to put limits on the use investor-state challenges in the Canada-EU deal, Mr. Kronby said.

The Canada-EU agreement, for example, makes clear that companies can’t make the case their assets are expropriated when governments take “good faith” steps to protect health, safety and the environment. Outside parties, such as environmental groups, can also intervene and submit briefs to arbitration panels.

“It was hard effort by Canada that pulled [Germany and other European countries] to agree to a more balanced investor-state dispute settlement mechanism,” Mr. Kronby explained. “So for Germany to have swung so far the other way, and to now oppose any kind of investor-state settlement, strikes me as very far-fetched.”

Some observers have suggested that German angst about investor-state disputes has been stirred up by a recent case involving Sweden’s Vattenfall AB. The company, which operates nuclear plants in Germany, is seeking compensation for Berlin’s planned phaseout of nuclear power. Germany is making power plants pay the steep decommissioning costs.

This isn’t about Canada, which is a relatively small investor in Europe.

More likely, Germany is casting a wary eye at the U.S., where there is a more litigious business culture and a lot more two-way investment at stake. Canada-EU investor rules could set a model for the much larger U.S.-EU trade pact. The U.S. would never accept weaker protections than what Canada secures.

But Germany might want to take its cues from Canada, which knows what it’s like to be a target of U.S. litigation.

So, if Ottawa is comfortable with the investment rules, as drafted, then surely Germany and the rest of Europe should be too. And it certainly isn’t a good enough reason to put the overall agreement at risk.