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A Confronting the Investor-State Dispute Settlement Controversy

Abstract

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There is growing public controversy over investor-state dispute settlement (ISDS) provisions in bilateral investment treaties. This article explores these concerns, some of which have been brought to light particularly by the German government's recent opposition to ISDS provisions in the Canada-Europe Comprehensive Economic and Trade Agreement, or CETA. This opposition puts up a possible roadblock to ratification of the CETA by the European Union.

The article suggests two ways to possibly assuage some of these concerns. One is to reduce the *ad hoc* nature of the ISDS system by institutionalizing dispute settlement panels within a given treaty such as the NAFTA or the CETA. That could at least help ensure broader public awareness of and comfort with the dispute settlement process.

The second idea explored here is to add an appellate process to ISDS awards, perhaps employing existing bodies such as the International Centre for the Settlement of Investment Disputes (ICSID). That would ensure that alleged errors in arbitration awards could be adjudicated at a second, higher level. There appears to be a glimmer of possible consideration of this by Canada and the EU, and it is another idea worth actively pursuing.

Keywords: appellate process, Canada-Europe Comprehensive Economic and Trade Agreement, dispute settlement panels, International Centre for the Settlement of Investment Disputes, investor-state dispute settlement

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