



Columbia Center on Sustainable Investment

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Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues by
the Columbia Center on Sustainable Investment

No. 129 September 2, 2014

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The Canada-China BIT 2012: Perspectives and implications

by

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The Chinese and Canadian Prime Ministers signed the Canada-China bilateral investment treaty (BIT) in September 2012. This agreement was negotiated for many years, but it now appears that it will be some time before it is ratified. The Chinese authorities appear eager to ratify, but the Canadian government has held up ratification, at first for domestic political reasons and more recently due to the pending constitutional challenge of the BIT.¹

Thus, what initially appeared to be a major breakthrough in Canada-China economic relations and an important first step toward a full-fledged trade agreement has become something of a political headache for Canada's government, and possibly a disappointment for China.

The outlines of the Canada-China BIT are broadly similar to Chapter 11 of the China-New Zealand Free Trade Agreement; those familiar with the Canadian and US Model BITs will recognize many familiar elements. The BIT contains many of the standard protections of the US and Canadian Models, broad commitment to investor-state arbitration and concern for public policy protection. The BIT also includes some novel provisions on investor-state dispute settlement (ISDS), such as an extensive list of requirements for arbitrators. However, one major difference is that the BIT affords scant protection to the pre-investment phase of foreign investment, since only the most-favored-nation treatment clause applies to pre-investment protections. Contrary to some other Canadian BITs, no right of establishment is provided.

What are the implications of the Canada-China BIT for other major negotiations? The US BIT negotiations with China appear to have stalled. The Canada-China BIT goes some way toward meeting the objectives of the US Model BIT (e.g., China has accepted GATT-style exceptions) and should reassure those who are skeptical of the possibility of reaching an agreement with China that protects general public policy objectives. While the BIT does not go as far as the US Model BIT on a number of issues, such as the full definition of public policy protections, it does suggest that China is not averse to negotiating these issues. If pressed, China might be willing to go further than it has done with Canada to reach agreement with the US. The Canada-

China BIT and the Canada-EU BIT, which has been approved in principle and is undergoing legal review,² should serve as valuable guides to negotiations with China.

While the US will encounter many difficulties in the course of negotiating old and new issues with China or the EU, the principal lesson of the Canada-China BIT may be that these negotiations are moving into uncharted and politically challenging waters. Instead of praise for securing better access to the difficult Chinese market, the Canadian government was immediately vilified for committing itself to an unbalanced sellout of Canadian interests by opening Canada to investment by powerful Chinese state-owned enterprises that might run roughshod over Canadian national interests. The Harper government was so shocked that it put the ratification of the Canada-China BIT and even the International Center for Settlement of Investment Disputes (ICSID) on hold, while giving priority to the Chinese takeover of Nexen. ICSID ratification subsequently took place in 2013,³ but ratification of the BIT is on hold—despite Canada’s interests in improved investor protection in China.

Apart from standards of foreign investment protection, critics have focused on the ISDS provisions in the Canada-China BIT. All the perceived sins of omission and commission in NAFTA Chapter 11 are seen to be multiplied in the BIT’s ISDS provisions. ISDS is seen as driven by occult corporate interests, conducted by faceless and irresponsible international arbitrators, procedurally opaque, undemocratic, and in contempt of Canadian courts. The whole process is criticized as undermining legitimate public policies and threatening a “regulatory chill,” exacerbating the perceived consequences of globalization and the hollowing out of the middle class. Canadian critics of NAFTA Chapter 11 have long advanced this thesis. The European Parliament, NGOs,⁴ US politicians,⁵ and Japan⁶ have now taken up this criticism. Should US and European governments fail to present a convincing response to this thesis, few politicians will be ready to stand up to defend ISDS and perhaps even BITs. Indeed, one cannot discount the possibility that Canada and the EU will not reach final agreement on ISDS. If this happens, we may well be seeing the last days of investor-state arbitration between liberal democracies. If this were the case, it could become very difficult to convince China that ISDS is essential in an agreement between the US and the Middle Kingdom.

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¹ *Hupacasath First Nation v. Canada (Foreign Affairs)*, 2013 F.C. 900, available at <http://canlii.ca/t/g0c4g> (on appeal).

² The final text has not yet been issued, but various drafts have been made public as late as March 2014.

³ ICSID, “Canada ratifies the ICSID Convention,” November 1, 2013, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement138>.

⁴ See, e.g., “Letter to US Ambassador Michael Froman and EC Commissioner Karel de Gucht”, December 16, 2013, http://action.sierraclub.org/site/DocServer/TTIP_Investment_Letter_Final.pdf?docID=14701.

⁵ See, e.g., “Letter from US state legislators to negotiators of the Trans-Pacific Partnership urging the rejection of ISDS”, July 5, 2012, www.citizen.org/documents/State-Legislators-Letter-on-Investor-State-and-TPP.pdf.

⁶ Japan House Standing Committee on Agriculture, Forestry and Fisheries, “Resolution on Japan’s participation in the TPP negotiations (provisional translation)”, June 17, 2013, www.sangiin.go.jp/eng/report/standing-committee/20130617-TPP.pdf.

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