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Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Adrian P. Torres (adrian.p.torres@gmail.com)

Canada's non-reciprocal BIT with China: Would the US or Europe do the same?

by

Gus Van Harten*

The Canada-China bilateral investment treaty (BIT) – ratified by Canada on September 12, 2014, after a two-year delay following its signature in 2012 – provides a useful reference for future investment negotiations involving Canada or China and other countries.

To China's advantage, the BIT is especially remarkable for its non-reciprocal elements. These elements go beyond the usual non-reciprocity of BITs between capital-exporting and capital-importing states because the Canada-China BIT reflects a formal non-reciprocity in the terms of the treaty, as well as effective non-reciprocity. This raises the question of whether other states, especially the United States (US) and the European Union (EU), would agree to similar concessions with China.

First, the Canada-China BIT allows a right of market access by Chinese investors to Canada, but not vice versa. Unlike any other investment treaty concluded by Canada, this BIT provides for most-favored-nation (MFN) treatment, but not national treatment, at the pre-establishment stage of investment. Since Canada has given pre-establishment national treatment rights to foreign investors from third countries in other BITs, while China has not, the MFN clause in the Canada-China BIT will extend the rights enjoyed by these third-country investors in Canada to Chinese investors. Yet, Canadian investors will obtain such rights in China only if – and it is a big if – they are given by China to third-country investors in a future BIT.

Hence, it was inaccurate for Armand de Mestral to conclude in a recent *Perspective* that “the BIT affords scant protection to the pre-investment phase of foreign investment” and that “no right of establishment is provided.”¹ These statements are only true for Canadian investors in China, not for Chinese investors in Canada.

Second, the BIT is also non-reciprocal due to the relatively extensive liberalization and transparency of the Canadian economy as compared to the Chinese economy. This is because the BIT excludes from its post-establishment national treatment obligation any existing measure (including any “law, regulation, rule, procedure, decision, requirement, administrative action, or practice”) of either country that

discriminates against the other's investors, effectively locking in the resulting non-level playing field between the two countries.

In light of this, assertions by Canadian proponents of the BIT that it will give robust protection to Canadian investors are questionable. How difficult will it be for a Chinese authority, at any level, to pressure or punish a Canadian investor by requiring the investor to comply with a discriminatory requirement or practice that existed at the time the BIT entered into force?

Third, the BIT has a broader carve-out for investment screening decisions by China than by Canada. Canada's carve-out is limited to decisions under a federal statute, the Investment Canada Act. On the other hand, China's carve-out covers any of its "Laws, Regulations and Rules relating to the regulation of foreign investment." By implication, the treaty allows China at any level of government to block Canadian investments, while limiting Canada's screening powers to those of the federal government and to monetary thresholds and other limitations under the Investment Canada Act. Thus, even if Canadian investors one day obtained a right of establishment in China – e.g., by piggybacking on a future treaty between China and the US that incorporated pre-establishment national treatment – China would still retain broad powers to reject Canadian investments.

Fourth, the Canada-China BIT departs from Canada's usual treaty practice – which largely tracks the US model and current European approach – in other important ways:

- It scales back Canada's and the other NAFTA states' position on transparency in investor-state arbitration. In particular, the treaty allows either government to settle an investor lawsuit without public knowledge after it is filed, but before an award is issued.
- It allows a complex "reach-back" on MFN treatment that undermines the reliability of language in the BIT aimed at preserving regulatory flexibility.
- It omits reservations to the BIT's obligations on performance requirements, including a reservation for preferential treatment of aboriginal peoples that is found in all of Canada's other relevant treaties – a deplorable concession, given the lack of economic opportunities and poor living conditions of Canada's aboriginal population.
- It has a minimum lifespan of 31 years, including a 16-year effective minimum term and a 15-year survival clause for existing investments at the time of termination. Most of Canada's BITs can be terminated on one year's notice, with no minimum term, plus a 10 to 20-year survival clause.

Will other states accept these elements in a BIT, or will China move fully to the US or EU model? The Canada-China BIT signifies China's willingness to accept some elements of the latter, and highlights areas in which the US or EU could sacrifice significant concerns.

As for the Canada-China BIT, beyond concerns about flaws in investor-state arbitration, there were clear reasons for Canada to reject this treaty on its terms. Its quiet ratification by Canada's federal Cabinet leaves the question: what would justify Canada agreeing to a deal that is formally and effectively non-reciprocal? Is it remotely possible that the US or the EU would do the same?

* Gus Van Harten is Associate Professor at Osgoode Hall Law School. This *Perspective* is based on a comparison of the text of the Canada-China BIT with other relevant treaties concluded by Canada, most modeled on NAFTA and broadly similar to the US model BIT and the European Commission's current approach to investment treaties. The analysis is elaborated in a forthcoming article in the *Canadian Yearbook of International Law*. The author thanks David Gantz, James Saulino and Wenhua Shan for their helpful peer reviews. **The views expressed by the author of this *Perspective* do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

¹ Armand de Mestral, "The Canada-China BIT 2012: Perspectives and implications," *Columbia FDI Perspectives*, No. 129, September 2, 2014.

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For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Adrian Torres, adrian.p.torres@gmail.com or adrian.torres@law.columbia.edu.

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