Canada, China, and the Anti-BIT

Kluwer Arbitration Blog
April 9, 2015

Catherine H. Gibson

Please refer to this post as: Catherine H. Gibson, 'Canada, China, and the Anti-BIT', Kluwer Arbitration Blog, April 9 2015, http://arbitrationblog.kluwerarbitration.com/2015/04/09/canada-china-and-the-anti-bit/

If the Canada-China BIT is any guide, then the US-China BIT may prove to be profoundly state-friendly. Unlike Canada's 2004 model investment agreement and the investment chapter of the 2014 Canada-European Union Comprehensive Trade and Economic Agreement (CETA), the Canada-China BIT offers only negligible establishment-phase protections and lacks disciplines on state-owned enterprises. With such provisions, the Canada-China BIT (and perhaps the US-China BIT) may prove to be an anti-BIT which, rather than promoting new investment, simply asserts states' ability to regulate existing investments.

Three provisions contribute to the Canada-China BIT's weak establishment-phase protections: (1) a weak performance requirements provision; (2) the exclusion of pre-investment approval from dispute settlement; and (3) the omission of establishment-phase protections from the national treatment clause.

The BIT's performance requirements provision provides only that "[t]he Contracting Parties reaffirm their obligations under the WTO Agreement on Trade-Related Investment Measures (TRIMS)" and incorporates TRIMS Article 2 and the Annex, which relate to national treatment, quantitative restrictions, and domestic content requirements. For Canada, TRIMS appears to be a fall-back position on performance requirements – similar references are in Canada's FTAs with Costa Rica, Thailand, and Venezuela.

The weakness of this performance requirements provision is apparent, however, when compared with Canada's model agreement and CETA. The analogous model agreement provision bars domestic content requirements, export minimums, localization of intellectual property, and similar actions when imposed in connection with the establishment of an investment, as well as when imposed as a condition for the continuance of an investment benefit. CETA's investment chapter includes a performance requirements provision along these lines, and also contains a separate "market access" provision. Like GATS article XVI, CETA's "market access" provision forbids limits on the number of enterprises, operations, or natural persons, or the value of transactions or foreign capital that may be involved in an investment. Thus, Canada's model treaty provides strong performance requirements, while CETA provides double protection at the establishment phase. The strength of these agreements' pre-investment protection contrasts strongly with the sparse coverage offered in the Canada-China BIT.

The BIT also excludes pre-investment approval (or disapproval) from both investor-state and state-to-state dispute settlement. Under Annex D.34, neither dispute-resolution method applies to a state's decision to "initially approve an investment that is subject to review" or "permit an investment that is subject to national security review" under its own laws. This exclusion guarantees states broad latitude to refuse the establishment of investments, and such decisions may be reviewed only within

the respective domestic systems. Neither Canada's model agreement nor CETA contains an analogous provision, and due to both countries' relatively onerous investment approval processes, the inclusion of such a provision in the Canada-China BIT will likely have a substantial impact on investment decisions.

Finally, the Canada-China BIT is weak in establishment-phase protection because it does not provide national treatment protection at that phase. In article 6 of the BIT, national treatment protection applies to the "expansion, management, conduct, operation and sale or other disposition of investments." Canada's model treaty and CETA, by contrast, both apply national treatment protection to all these phases of investment, as well as to the "establishment" and "acquisition" of an investment. The absence of these words in the national treatment provision of the Canada-China BIT significantly limits the protections offered by that clause, and excludes any protection whatsoever at the establishment phase.

This omission of pre-investment protection from the national treatment clause, in combination with the weak performance requirements provision and the exclusion of pre-investment approval from dispute settlement, make it unlikely that the BIT will encourage new investments in either state because pre-investment expenditures would receive no protection.

The BIT also exempts state-owned enterprises (SOEs) from several substantive requirements. Because these entities are generally acknowledged as dominant in the Chinese market, these exemptions – like the lack of pre-investment protection – also render the BIT less likely to encourage new investment.

Article 8 of the BIT exempts SOEs in the process of privatization from most-favored nation (MFN) and national treatment (NT) obligations, as well as from the obligation not to restrict the nationalities of management personnel in investments. This provision – which has no counterpart either in Canada's model agreement or CETA – effectively permits China to exclude foreign investors from participating in the privatization of SOEs. This exclusion is significant because participation in these entities' privatization might otherwise have attracted Canadian investors.

The BIT also omits a provision from the Canadian model agreement which requires SOEs exercising delegated government authority to act in a manner not inconsistent with the agreement. Without this provision, both states have more latitude to engage in discriminatory or other anti-competitive conduct via SOEs without violating the BIT. CETA, by contrast, contains an entire chapter on SOEs, and requires SOEs to act in accordance with "commercial considerations" in purchasing and selling goods, forbids SOEs from treating investments in a discriminatory fashion, and requires SOEs to comply with CETA's competition policy chapter. When contrasted with these CETA and model treaty provisions, the absence of any such disciplines on SOEs in the BIT – particularly given the prominence of SOEs in China's economy – is telling.

It remains to be seen whether the Canada-China BIT's state-friendly terms will affect investment flows. It seems certain, however, that Canadians seeking to invest in China and Chinese seeking to invest in Canada can take little comfort in this treaty. Looking forward, investors seeking protection in the US-China BIT may be wise to temper their expectations. Although China has already agreed to provide establishment-phase protections in its BIT with the US, the novel provisions in the Canada-China BIT demonstrate the myriad of ways in which states can structure BITs to protect their own interests, and make these agreements anti-BITs.