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The Canadian Model BIT—A Step in the Right Direction for Canadian Investment in Africa?

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In the past two years, Canada has signed BITs with nine African states: Benin (January 2013), United Republic of Tanzania (May 2013), Cameroon (March 2014), Nigeria (May 2014), Senegal (November 2014), Mali (November 2014), Cote d'Ivoire (November 2014), Burkina Faso (April 2015) and most recently Guinea (May 2015). The first eight of these treaties (the "New Canada-African State BITs") are based on the Canadian Model BIT (which Canada calls the Model Foreign Investment Protection and Promotion Agreement or "FIPA"). The text of the Canada-Guinea BIT is not yet available, but it is likely to follow this same model. While only two have entered into force (Benin in May of 2014 and United Republic of Tanzania in December of 2013), these treaties signal an effort by Canada to increase investment in key African markets. Canada is also engaged in ongoing BIT negotiations with Ghana and Kenya.

Signing BITs with these African states suggests that Canada's foreign investment in Africa will continue to focus on the mining and energy sectors. For example, Canada is the largest foreign investor in Burkina Faso, resulting primarily from the gold mining industry—gold has been Burkina Faso's primary export since 2008. Canada also has identified mining as a key opportunity for Canadian investors in the Cote d'Ivoire, Mali, and Senegal. Ghana and the Cote d'Ivoire both started to produce oil in 2013, so the petroleum industry in those states is ripe for investment from Canadian oil and gas exploration and production companies.

All of the New Canada-African State BITs provide for arbitration in the event of a dispute and contain many of the standard provisions that one would expect in a BIT, including national treatment, fair and equitable treatment, free transfer of capital, and protection against expropriation. However there are three aspects that set these treaties apart.

First, the New Canada-African State BITs contain what have been called "non-lowering of standards" provisions, which provide that a Contracting Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from domestic health, safety, or environmental measures. These clauses contemplate consultation between the two contracting parties to the BIT if one state believes the other has relaxed standards (or has offered to do so).

Second, although not included in its 2004 Model BIT, since 2010 Canada has included a voluntary corporate social responsibility ("CSR") provision in the BITs it signs. With the exception of the Canada-Tanzania BIT, all of the New Canada-African State BITs include this provision. The

provision may not be included in the Canada-Tanzania BIT because negotiations between Tanzania and Canada began in 2008, before Canada started including the CSR provision in BITs. Where included, this CSR provision states that the contracting parties should encourage enterprises to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies. The provision does not identify any particular CSR standards or principles that a country should encourage, thereby leaving it open to states to choose their own CSR standards.

Third, the arbitration provisions of these BITs contemplate a high level of transparency throughout the dispute resolution process. The BITs contain a presumption that all documents submitted to a tribunal will be publicly available, unless the disputing parties agree otherwise. Hearings are open to the public and arbitral awards are to be made publicly available. (The BITs do provide for redaction of submissions and awards and in camera hearings where necessary to protect confidential information.) In addition, all of the New Canada-African State BITs contain a provision that expressly contemplates third party submissions. While a tribunal is not required to accept third party submissions, these BITs give a tribunal the authority to accept submissions from non-parties with a "significant interest" in the arbitration, so long as the submission does not disrupt the proceedings or unfairly prejudice a disputing party.

While not completely new, these three aspects of the New Canada-African State BITs reflect a growing trend to address social and environmental issues in investment treaties. For example, earlier treaties have included aspirational language relating to CSR or non-lowering of standards in their preambles. The preamble to the Cameroon-Turkey BIT states that the parties are "convinced that the objectives [of the BIT] can be achieved without relaxing health, safety and environmental measures . . . as well as internationally recognized labor rights". The preamble to the Nigeria-Austria BIT expresses (i) a commitment "to achieving these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognised labour standards" and (ii) a "belief that responsible corporate behaviour can contribute to mutual confidence between enterprises and host countries".

The New Canada-African State BITs include similar sentiments, but have elevated them to substantive treaty provisions. Nonetheless, some commentators have noted that the non-mandatory wording of these provisions makes them unenforceable. In this regard, all of these BITs exclude the non-lowering of standards provisions from arbitration, and most (with Benin and Burkina Faso being the only exceptions) exclude the CSR provisions as well. However, these provisions may be given effect in other ways beyond traditional enforcement. For example, the Government of Canada offers economic diplomacy services to Canadian companies operating abroad, including the issuance of letters of support, advocacy efforts and opportunities to participate in trade missions. The Canadian government refuses these economic diplomacy services to companies that do not embody CSR best practices.

In addition, although they may not give rise to arbitration claims, in certain circumstances the CSR and non-lowering of standards provisions could give rise to defences by states in investor-state arbitrations. The fact that they are included as substantive provisions in these BITs, rather than being stated simply as aspirational goals in a preamble, means that some tribunals may find a defence based on these provisions more convincing. Where the CSR and non-lowering of standards provisions are relevant, they may also strengthen the arguments of third parties seeking to make submissions to a tribunal regarding the environmental, health or safety impact of an investment.

The fact that these BITs expressly contemplate submissions by third parties may also reflect an increasingly common argument that the public has an interest in foreign investment. In this regard, the Canada-Burkina Faso BIT goes a step further than the other New Canada-African State BITs, identifying the types of third parties expected to make submissions and setting out a procedure for doing so. While this BIT opens the door to amicus briefs and provides helpful guidance, the procedure sets certain limitations, including page limits and a requirement that the submitting third party identify any government, person or entity that has provided financial or other assistance to prepare the amicus brief. The procedure set out in the Canada-Burkina Faso BIT also provides factors for the Tribunal to consider. These largely mirror those in ICSID Rule 37, including the extent to which (i) the submission would assist the Tribunal to dispose of a question of fact or law related to the dispute; (ii) the submission would address a matter within the scope of the dispute and (iii) the amicus curiae has a significant interest in the arbitration. There is one notable addition – the extent to which the arbitration is a matter of public interest, a factor frequently referred to by tribunals arbitrating under the UNCITRAL Rules.

As only two of these new BITs have entered into force, the impact any of these provisions may have remains an open question. Given that the CSR and non-lowering of standards provisions are stated in aspirational language, the impact they could have may be immeasurable. The same is true of the provisions contemplating submissions by third parties in arbitration. The BITs continue to leave the decision to admit amicus briefs to the discretion of tribunals, so it will be difficult to tell the extent to which the inclusion of these provisions actually affects a tribunal's determination.

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