

Investment Promotion and Protection in the Canada–UK Trade Relationship

SSHRC-ESRC Knowledge Synthesis Grants
Understanding the future of Canada – UK trade relationships

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Introduction

International Investment Agreements (BITs and Investment Chapters of FTAs)

- Strong Canada-UK investment relationship
- Investment flows in 2016
 - C\$ 97.9 billion from Canada to the UK
 - C\$ 41.8 billion from the UK to Canada
- Investment flows in 2017
 - C\$ 102.3 billion from Canada to the UK
 - C\$ 47.4 billion from the UK to Canada
- Investment agreements are intended to promote and protect foreign investment

Period of Uncertainty Regarding Investment Law

- Controversy surrounding international investment law generally, and investor-state dispute settlement in particular.
- Calls for reforms of international investment law, and investor-state arbitration
- No international investment treaties signed by the UK post-Lisbon Treaty (one signed earlier, and finalized after)
- Unclear position of Canada regarding investor-state dispute settlement
 - In CETA – investment court system, with placeholder for a multilateral investment court
 - In CP-TPP – traditional investor-state dispute settlement
 - In CUSMA – no ISDS with either the United States or Mexico (although Mexico covered by CP-TPP)

Objectives and Methodology

- Report directed at policy-makers and treaty-drafters
- Method: report based on theory and (treaty) practice:
 - Provisions from investment treaties and model IIAs (UNCTAD searchable database of 2,572 treaties)
 - 34 reports from intergovernmental organizations (OECD, UNCTAD, UNCITRAL)
 - 146 peer-reviewed publications published since 2008

Three Focal Points for Reform of IIAs

1. Dispute Settlement
2. Limitations on substantive obligations undertaken by states
 - Fair and equitable treatment
 - Limitations on regulatory expropriation claims
3. Imposition of obligations on foreign investors

Theme 1

Dispute Settlement Possibilities

Dispute Settlement Possibilities 1/2

- Alterations to existing investor-state dispute settlement mechanisms
 - Provisions addressing arbitrators' independence and impartiality
 - Provisions addressing treaty shopping and abuse of process
 - Provisions on transparency

Dispute Settlement Possibilities 2/2

- Alternatives to existing investor-state dispute settlement mechanisms
 - Institutionalization
 - Treaty-specific “courts” – the investment “court” system found in CETA and other EU agreements with Singapore, Vietnam, and Mexico
 - A multilateral investment court (MIC) – proposed by the European Commission
 - Alternative dispute resolution (ADR)
 - Ombudsman/dispute prevention policies
 - Mediation/conciliation
 - State-state dispute settlement only
 - Hybrid Mechanisms
 - Joint committee + ombudsment + state-state dispute settlement

Theme 2

Breadth of Investment Protection

Fair and Equitable Treatment

Fair and Equitable Treatment

- A “non-relational”, “non-contingent” or “absolute” standard of protection;
- Unclear standard frequently invoked in investment disputes;
- Interpreted by Investment Tribunals as extending, for example, to non-discrimination, transparency, protection against bad faith and threats, due process and the protection of investors’ legitimate expectations;
- A key issue focuses on the link with the international minimum standard of treatment under customary international law.

FET in Numbers

- 2,441 IAs provide for FET
 - 1,988 IAs provide for unqualified FET
 - 453 IAs provide for qualified FET
 - reference to international law or principles of international law
 - reference to customary international law
 - reference to the customary international law minimum standard of treatment
 - list of elements of FET (exhaustive or indicative)

Examples of FET Provisions (1/4)

- Example of an unqualified FET provision:

“Each Contracting Party shall in its Area accord to investments of investors of the other Contracting Party fair and equitable treatment as well as full protection and security” (Japan – Kazakhstan BIT, 2014, art 5(1)) .

- Example of a qualified FET provision by reference to international law or principles of international law:

“Each Contracting Party shall in its Area accord to investments of investors of the other Contracting Party treatment in accordance with international law, including fair and equitable treatment and full protection and security” (Japan – Oman BIT, 2015, art 5(1)).

- Example of a qualified FET provision by reference to customary international law and to the customary international law minimum standard of treatment:

“Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security” (Canada – Mongolia BIT, 2016, art 6(1)).

Examples of FET Provisions (2/4)

- Example of a qualified FET provision by reference to a list of elements:

“No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through:

 - (i) Denial of justice in any judicial or administrative proceedings; or
 - (ii) Fundamental breach of due process; or
 - (iii) Targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or
 - (iv) Manifestly abusive treatment, such as coercion, duress and harassment” (India Model BIT, 2015, art 3.1).

Examples of FET Provisions (3/4)

- Example of a qualified FET provision by reference to a list of elements explicitly mentioning “legitimate expectations” and limiting the scope of the standard of protection:

“ [...] (3) The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.

(4) When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated. [...]

(6) For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article.

(7) For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, a Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1” (CETA, 2016, art 8.10).

Examples of FET Provisions (4/4)

- Example of a qualified FET provision by reference to a list of elements explicitly mentioning “legitimate expectations” and limiting the scope of the standard of protection:

“[...] (3) The Contracting Parties shall, upon request of a Contracting Party, review the content of the obligation to provide fair and equitable treatment and may complement this list through a **joint interpretative declaration within the meaning of Article 31, paragraph 3, sub a, of the Vienna Convention on the Law of Treaties.**

(4) When applying paragraph 2 of this Article, a Tribunal may take into account whether a Contracting Party made a specific representation to an investor to induce an investment that created a **legitimate expectation**, and upon which the investor relied in deciding to make or maintain that investment, but that the Contracting Party subsequently frustrated.

(5) When a Contracting Party **has entered into a written commitment** with investors of the other Contracting Party regarding a specific investment, that Contracting Party shall not, either itself or through an entity exercising governmental authority, breach the said commitment through the exercise of governmental authority in a way that causes loss or damage to the investor or its investment” (The Netherlands Model BIT, 2018, art 9).

The Protection Against Unlawful Expropriation

Expropriation

- Expropriation by host states is allowed only if the taking of the property is:
 - justified by a public purpose;
 - is not tainted by discrimination;
 - is done in accordance with due process; and,
 - is accompanied by the payment of compensation.
- **Direct expropriation:** physical takings and outright nationalization;
- **Indirect expropriation:** measures that have effects equivalent to a direct expropriation.

Indirect Expropriation in Numbers

- 2,489 IIAs explicitly refer to **indirect** expropriation;
- 97 IIAs include a carve-out for general regulatory measures;
- 87 IIAs include a carve-out for compulsory licenses which are consistent with the TRIPs Agreement.

Examples of Expropriation Provisions (1/4)

- Example of an expropriation provision without any mention of **indirect** expropriation:

“Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized or subjected to any other measures of dispossession (hereinafter referred to as “expropriation”), except for a public purpose, in accordance with due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation” (Morocco – Rwanda BIT, 2016, art 4(1)).

- Example of an expropriation provision with a definition of **indirect** expropriation:

“For the purpose of this Agreement, a) Indirect expropriation results from a series of measures of a Party having an equivalent effect of direct expropriation without formal transfer of title or outright seizure. b) The determination of whether a measure or series of measures of a Party constitute indirect expropriation requires a case-to-case, fact-based inquiry into various factors including, but not limited to the scope of the measures or series of measures and their interference with the reasonable and distinguishable concerning the investment” (Morocco – Nigeria BIT, 2016, art 8(2)).

Examples of Expropriation Provisions (2/4)

- Example of a detailed expropriation provision:

“1. Neither Contracting Party shall nationalize or take any other measures depriving, directly or indirectly, the investors of the other Contracting Party of their investments, unless the following conditions are complied with:

- a) the measure is taken in the public interest;
- b) the measure is taken under due process of law;
- c) the measure is taken in a non-discriminatory manner; and
- d) the measure is taken against prompt, adequate and effective compensation.

2. **Direct expropriation occurs when** an investment is nationalised or otherwise directly taken through formal transfer of title or outright seizure.

3. **Indirect expropriation occurs** if a measure or a series of measures of a Contracting Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure...”

Examples of Expropriation Provisions (3/4)

“... 4. The determination of whether a measure or a series of measures by a Contracting Party, in a specific factual situation, constitutes an indirect expropriation **requires a case-by-case, fact-based inquiry that considers, amongst other factors:**

- a) the economic impact of the measure or series of measures, although the sole fact that a measure or a series of measures of a Contracting Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
- b) the duration of the measure or series of measures by a Contracting Party; and
- c) the character of the measure or series of measures, notably their object and context.

5. The **compensation** referred to in paragraph 1 of this Article shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. For greater certainty, this Agreement creates no other method for evaluation of the compensation. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value...”

Examples of Expropriation Provisions (4/4)

“... 6. **In addition** to paragraph 5 of this Article, the compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment and shall, in order to be effective for the investor, be paid and made transferable, without delay, to the State designated by the investor and in the currency of the State of which the investor is a national or in any freely convertible currency accepted by the investor.

7. The affected investor shall have the right, under the law of the expropriating Contracting Party, to a prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Contracting Party, in accordance with the principles set out in this Article.

8. Except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Contracting Party that are designed and applied in good faith to protect legitimate public interests, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity, do not constitute indirect expropriations.

9. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, to the extent that such issuance is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreements” (The Netherlands Model BIT, 2018, art 12).

Thème 3

Les obligations imposées au investisseurs

Préambule

- « DE RÉAFFIRMER l'importance de promouvoir la **responsabilité sociale des entreprises**, l'identité et la diversité culturelles, la protection et la conservation de l'environnement, l'égalité des sexes, les droits des Autochtones, les droits dans le domaine du travail, le commerce inclusif, le développement durable et le savoir traditionnel, ainsi que l'importance de préserver leur droit de réglementer dans l'intérêt public » (PTPGP, 2018, préambule).
- « ACKNOWLEDGING the importance of good corporate governance and **corporate social responsibility** for sustainable development, and affirming their aim to encourage enterprises to observe internationally recognised guidelines and principles in this respect, such as the **OECD Guidelines for Multinational Enterprises**, the **OECD Principles of Corporate Governance** and the **UN Global Compact** » (ALE Bosnie-Herzégovine – AELE, 2013, préambule).

Responsabilité sociale des entreprises (1/2)

- « **Chacune des Parties encourage** les entreprises exerçant leurs activités sur son territoire ou relevant de sa compétence à intégrer, **sur une base volontaire**, dans leurs pratiques et politiques internes des normes internationalement reconnues en matière de responsabilité sociale des entreprises, telles que les déclarations de principe auxquelles les Parties ont adhéré et qui portent sur des questions comme le travail, l'environnement, les droits de la personne, les relations avec la collectivité ou la lutte contre la corruption » (TBI Canada – Côte d'Ivoire, 2014, art 15(2)).

Responsabilité sociale des entreprises (2/2)

- « The Contracting Parties reaffirm the importance of each **Contracting Party** to **encourage** investors operating within its territory or subject to its jurisdiction to **voluntarily incorporate** into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the **OECD Guidelines for Multinational Enterprises**, the **United Nations Guiding Principles on Business and Human Rights**, and the **Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business** » (The Netherlands Model BIT, 2018, art 7(2)).

Obligations directes (1/2)

- « **1. Investors or the investment shall comply with environmental assessment screening and assessment processes** applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question. **2. Investors or the investment shall conduct a social impact assessment** of the potential investment. The Parties shall adopt standards for this purpose at the meeting of the Joint Committee. **3. Investors, their investment and host state authorities shall apply the precautionary principle** to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigation or alternative approaches of the precautionary principle by investors and investments shall be described in the environmental impact assessment they undertake » (TBI Maroc – Nigeria, 2016, art 14).

Obligations directes (2/2)

- « The Contracting Parties acknowledge that **investors and their investments shall comply** with the laws of the host Contracting Party with respect to the management and operation of an investment » (TBI Argentine – Qatar, 2016, art 11).
- « 1. **Investors shall not exploit or use local natural resources** to the detriment of the rights and interests of the host State. 2. **Investors shall respect rights of local populations**, and avoid land grabbing practices vis-à-vis local communities » (Draft Pan-African Investment Code, 2016, art 21).

Impacts négatifs des investissements (1/2)

- « If the Contracting Party in whose territory the investment is made, suffers from a loss, destruction or damages with regard to its public health or life or the environment, including natural resources by the investor of the other Contracting Party, then **the First contracting Party shall be accorded adequate and effective compensation** as per its laws and regulations, and if necessary as per international law, by the investor of the other Contracting Party » (TBI Bangladesh – Danemark, 2009, art 2(2)).
- « Without prejudice to national administrative or criminal law procedures, a Tribunal may, in deciding on the **amount of compensation**, take into account **non-compliance by the investor** with its commitments under the UN Guiding Principles on Businesses and Human Rights, and the OECD Guidelines for Multinational Enterprises » (The Netherlands Model BIT, 2018, art 23).

Impacts négatifs des investissements (2/2)

- « The concept of ‘in like circumstances’ requires an overall examination, on a case-by-case basis, of all the circumstances of an investment, including notably: (a) its effects on **third persons and the local community**; (b) its effects on the local, regional or national **environment**, the **health** of the populations or on the **global commons**; (c) the sector in which the investor is active; (d) the aim of the measure in question; (e) the regulatory process generally applied in relation to a measure in question; and (f) other factors directly relating to the investment or investor in relation to the measure in question » (ECOWAS Community Rules on Investment, 2008, art 5(4)).

Refus d'accorder des avantages

- « Il est entendu qu'un investisseur ne peut déposer une plainte en vertu de la présente section si l'investissement a été effectué à la suite **de déclarations frauduleuses, de dissimulation, de corruption ou d'une conduite équivalent à un abus de procédure** » (AECG, 2016, art 8.18(3)).
- «Nothing in this Agreement shall require any Party to protect investments made with capital or assets of **illicit origin** or investments in the establishment or operation of which **illegal acts** have been demonstrated to occur and for which national legislation provides asset forfeiture » (Brazil Model CFIA, 2015, art 15(2)).

Thank you

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