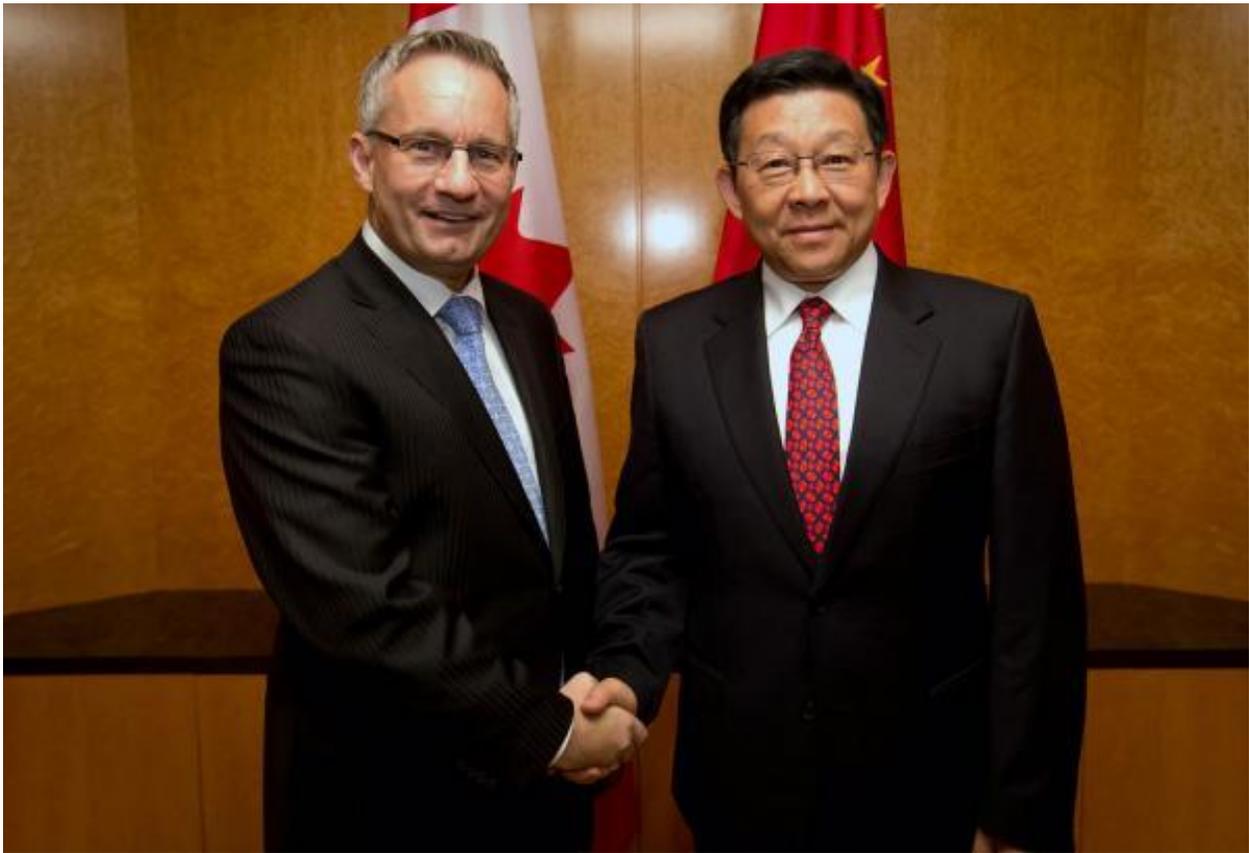


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The Canada-China investment treaty sleight of hand

Canadians and Canada's negotiating partners, beware: Canada's new investment treaty ends a newer approach, and could tie your hands.



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Trade Minister Ed Fast with Chinese Commerce Minister Chen Deming in Vancouver in September 2012.

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Since 2005, Canada has prided itself on selling an advanced model of investment treaty to developing countries—one that, it has argued, protects their regulatory space while still protecting investors.

Indeed, at a UN-sponsored meeting in 2009, Canada carefully explained how its new model both protected investors and protected governments regulatory and policy space.

The Canada-China Investment Treaty ends this model, and Canada's negotiating partners should beware, as should Canadians.

On Jan. 1, 1994, the North American Free Trade Agreement came into force. Its language was of its time, and it has spawned some 33 international arbitrations against Canada. And this number continues to grow, including one initiated last month over Quebec's decision to suspend natural gas fracking pending further environmental study, and a further case now being threatened by big pharma if patent litigation does not go its way.

Canada has similar investment treaties with 25 other nations; an additional 20 will be ratified or negotiated in the coming years. Canada has not had a claim against it under these other treaties—but Canadian companies have initiated significant claims against developing countries, including for over \$1 billion.

Arbitrators determine the outcome of claims by looking at the scope of the rights the treaties give to foreign investors. With awards in investor-state arbitrations now reaching over \$2 billion, the language in these treaties matters. The higher the level of investor protection, the higher the risk that new laws or regulations will be found to breach the treaty, requiring compensation to be paid by governments.

In response to the initial arbitrations against Canada, the US, and Mexico under NAFTA, Canada adopted a new model treaty in 2004 that updated this language. The revised language restricted the scope of investor rights, without eliminating them—and reduced the risk of Canada having to pay foreign investors when such measures are adopted.

To protect these changes in investor protections, post-2004 treaties also include a technical legal device called a forward-looking most-favoured nation provision. This means that an investor can use higher levels of investor rights provided under another treaty, but only if that other treaty was concluded after their nation's initial treaty with Canada. An investor arbitrating a claim under treaty A can use stronger rights given to another investor under treaty B, but only if that treaty was concluded later.

Allowing an investor to use an older treaty with broader investor rights under the provision would undo the risk-reduction strategy by also making the old language available to investors.

The Canada-China treaty puts an end to this approach. Article 8(1) contains the MFN provision. It states that the provision does not apply to "treatment accorded under any bilateral or multilateral international agreement in force prior to 1 January 1994." This means it does apply to all investment agreements concluded after. So, the MFN provision is now backward-looking instead of forward-looking.

Between 1994 and 2004, Canada concluded investment treaties with Barbados, Egypt, Costa Rica, and Ecuador, among others, that contain the older versions of the investor rights that were discarded by the 2004 model text.

As a result, Chinese investors using the arbitration provisions to sue Canada will have a claim to use this older language—the same language that even our current government did not use in treaties it negotiated between 2004 and 2011 because of the risk it created for all Canadian governments.

This should concern Canadians concerned with issues such as the environmental conditions on oil sands development.

With Canada now negotiating an EU investment agreement, these higher standards of investor protection and higher risks to legitimate government measures are being brought back into the negotiation. EU investors and governments will clearly demand the same deal as provided to the Chinese.

Why the Canadian government has done this is unknown. To secure higher rights for Canadian investors abroad by using this new MFN clause? To create a precedent for negotiations with African countries? To put a brake on future environmental regulation in Canada, especially in relation to the northern pipeline and China's newly-acquired tar sands interests? No one knows.

But African governments should beware. Canada is aggressively seeking to negotiate investment treaties in Africa, especially in mining countries, apparently even tying development assistance to signing such an agreement in many cases. The government advertises its treaties as containing well-balanced new standards. But this sleight of hand in the MFN provision undoes that for African countries too, almost all of which have old-model treaties as well.

If Canada demands this same MFN provision of countries such as Mali or Benin or Pakistan or other governments it is negotiating with, Canada will be tying their hands to provisions that limit their ability to adopt badly-needed new regulatory measures to protect the environment, worker safety, human health, etc.

African governments should beware of this sleight of hand. Like a magician, Canada can now sell new-style treaties and make them disappear all at the same time.

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