Columbia Center on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues
No. 140 February 2, 2015
Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)
Managing Editor: Adrian P. Torres (adrian.p.torres@gmail.com)

The Transatlantic Trade and Investment Partnership, investor-state dispute settlement and China

by
Axel Berger and Lauge N. Skovgaard Poulsen*

The prospect of including investor-state dispute settlement (ISDS) into the Transatlantic Trade and Investment Partnership (TTIP) has produced a polarizing debate in the European Union (EU). Critics have argued that this adjudication mechanism is unnecessary in TTIP as United States (US) investors can expect fair treatment in EU courts and vice versa.

Advocates have countered that the inclusion of ISDS is justified in TTIP. One important argument is the precedential value for future agreements. The standard reference is China: excluding investor-state arbitration from TTIP would make it more difficult to get a comprehensive agreement negotiated with Beijing.

For instance, Karel De Gucht, then European Commissioner for Trade, told the European Parliament in July 2014 that: "I think it will be difficult one day claim that we must avoid ISDS provisions with the US because they are dangerous and then the next day insist to include the same kind of provisions in agreements with others such as China."[1] The *Financial Times* agreed, warning that, unless investment arbitration is included in the agreement, "the TTIP – and investor protection in China – could be at risk."[2]

We disagree with this assessment.

First, China has been signing investment agreements with broad and binding consent to investment arbitration for more than 15 years. And unlike many other developing countries, which are becoming increasingly skeptical of investment arbitration, Beijing remains a strong proponent of the regime to protect the growing stock of Chinese investment abroad. Chinese investments have been regarded with suspicion in recent years by an increasing number of host countries, and investment arbitration is one instrument for Beijing to seek redress for unwanted restrictions. In 2012, a major Chinese insurer, Ping An, filed a large investment treaty claim against Belgium, for instance.

Second, the EU and China have not waited for TTIP to materialize before entering into comprehensive investment negotiations. They recently vowed to accelerate the

pace of negotiations toward a China-EU investment treaty – notably, before knowing the outcome of TTIP.[3] Parallel investment treaty talks between China and the US have been difficult, as Beijing has been hesitant about having investor-state arbitration cover pre-establishment issues. This is partly because of a power struggle between the Ministry of Commerce and the National Development and Reform Commission, where the former is keen on further liberalization while the latter is less so. Yet, this divide is less relevant for talks with Brussels, as Beijing is *not* opposed to ISDS covering traditional post-establishment protections. China should therefore be willing to accept the approach in the recent EU agreement with Canada, for instance, where investment arbitration is limited to the post-establishment phase.

Finally, besides the dynamics within this triangle, it is worth highlighting the China-Australia Free Trade Agreement (ChAFTA) concluded in November 2014. Australia refused to include investment arbitration in its 2005 free trade agreement with the US, but the current Abbott government is considering investment arbitration on a case-by-case basis. And in the agreement with China, investment arbitration is included. As noted in the Australian government's overview of the treaty: "The investment obligations in ChAFTA can be enforced directly by Australian and Chinese investors through an Investor-State Dispute Settlement (ISDS) mechanism".[4]

Beijing was thereby not deterred from including investment arbitration in an agreement with a developed country, which had previously refused to include similar provisions in a treaty with the US. This seems to be the final nail in the coffin for the already implausible argument that China's support of ISDS depends on the nature of investment protection agreements among developed countries.

Just as critics of TTIP should avoid spreading myths of investment arbitration to favor their cause, advocates of a transatlantic investment treaty should be careful not to overstate their case. Based on Beijing's recent approach to investment treaty negotiations, it seems impetuous to use the "China-card" as one of the core arguments for allowing US investors to side-track EU courts.

---

* Axel Berger (axel.berger@die-gdi.de) is a researcher at the German Development Institute/Deutsches Institut für Entwicklungspolitik (DIE) working on China's investment treaty program; Lauge Poulsen (l.poulsen@ucl.ac.uk) is a Lecturer in International Political Economy at University College London.
The authors are grateful to Anna De Luca, Wenhua Shan and Valentina Vadi for their helpful peer reviews. ***Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

[1] Statement by Commissioner Karel De Gucht on TTIP, European Parliament Plenary debate, Strasbourg, July 15, 2014.

[2] "Jean-Claude Juncker plays with future of EU-US trade deal," *Financial Times*, October 23, 2014.

[3] "China, EU vow to speed up investment treaty talks", *Xinhua*, October 16, 2014, available at http://news.xinhuanet.com/english/china/2014-10/16/c_133719673.htm

[4] "China-Australia Free Trade Agreement: key outcomes", available at http://dfat.gov.au/fta/chafta/fact-sheets/key-outcomes.pdf.

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.

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at www.ccsi.columbia.edu.

Most recent Columbia FDI Perspectives

- No. 139, Ralf Krüger and Ilan Strauss, "Africa rising out of itself: The growth of intra-African FDI," January 19, 2015.
- No. 138, Steven Globerman, "Host governments should not treat state-owned enterprises differently than other foreign investors," January 5, 2015.
- No. 137, Dylan G. Rassier, "Locating production and income within MNEs: An alternative approach based on formulary apportionment," December 22, 2014.
- No. 136, Gus Van Harten, "Canada's non-reciprocal BIT with China: Would the US or Europe do the same?" December 8, 2014.
- No. 135, Stephen M. Schwebel, "In defense of bilateral investment treaties," November 24, 2014.

All previous *FDI Perspectives* are available at http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/.