

# Investment Promotion and Protection in the Canada–UK Trade Relationship

## About the project

A new international investment agreement (IIA) between Canada and the United Kingdom (UK) constitutes a crucial opportunity to include innovative provisions and to explore new possibilities to construct a more legitimate investment regime. This knowledge synthesis project provides a comprehensive review of the range of opportunities that currently exist in order to support evidence-based decision-making when any such agreement is negotiated. What are the provisions that can be included in an investment agreement between the two states to address controversial issues and support the reform of the international investment regime?

This project addresses three specific themes:

- dispute settlement possibilities;
- the breadth of investment protection; and
- obligations imposed on foreign investors.

Each theme focuses on a broad collection of data and exposes an overview of provisions to be considered by negotiators. The project focused on three forms of knowledge:

- innovative provisions from previous treaty practice by relying upon 2,572 IIAs and 75 model agreements;
- 34 reports published by intergovernmental organizations between 2008 and 2018; and
- 146 peer reviewed publications.

The findings will allow policy-makers to undertake the negotiation process with a clear sense of the various provisions available to address the most controversial issues of international investment law. Specifically, with respect to dispute settlement possibilities, the breadth of investment protection and obligations imposed on foreign investors.

## Key findings

- **Dispute settlement possibilities:** The mechanism allowing private investors to submit investment claims to international arbitration has come under increasing public scrutiny, with several actors criticizing its lack of legitimacy. Certain policy-makers and negotiators have responded to these criticisms in various ways. Six different approaches have been included in IIAs and model agreements:
  - a reformed investor-state dispute settlement mechanism;
  - a return to diplomatic protection and state-to-state arbitration;
  - a reliance on domestic courts;
  - alternative dispute resolution mechanisms;
  - hybrid approaches; and
  - an investment court system.
- **Breadth of investment protection:** Addressing the indeterminacy in the substantive protections offered to investors can also be achieved by clarifying the standards of protection that are traditionally included in IIAs. An enhanced level of precision is especially visible with respect to the fair and equitable treatment (FET) and expropriation obligations. Various options have been used by states to qualify FET provisions, including:
  - specifying and delimiting the elements included within its ambit;
  - limiting definition of indirect expropriation; or
  - various forms of presumptive carve-outs, including for general regulatory measures.
- **Obligations imposed on foreign investors:** With a view to countering the generally asymmetric nature of IIAs, some states have chosen

to address foreign investors' responsibilities in their treaties. Some agreements refer generally to these responsibilities in the preamble or in provisions referring to corporate social responsibility. More constraining provisions impose a sanction on investors in the event they want to avail themselves of the protection of the treaty by calling for explicit consideration of the investment's negative impact or by denying substantive protection for investments made through corruption or other fraudulent means. A few treaties impose direct obligations on foreign investors. ■

### Policy implications

- Policy-makers and negotiators should engage with these themes and controversial issues and explicitly address them in an investment agreement between Canada and the UK. While IIAs are often concluded by minimally modifying an existing model treaty, the shifting landscape regarding the regulation of investment opens up a wide range of possibilities. It also calls for creative innovations that can contribute to the development of a more legitimate regime. Policy-makers and negotiators cannot simply avoid these controversial issues anymore.
- To identify specific provisions, policy-makers and negotiators should rely on recent provisions that have already been included in IIAs and model agreements elaborated by other states. Using the practice of states as a starting point implies that even the most innovative options are not unprecedented. Such an approach can contribute to the reform of international investment law in a way that builds upon the existing strengths of the regime. ■

### FURTHER INFORMATION

Read the full report

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