



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. 176 June 20, 2016

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Daniel Allman (daniel.allman@columbia.edu)

Protecting public welfare regulation through joint treaty party control: a ChAFTA innovation

by

Anthea Roberts and Richard Braddock*

If countries wish to protect legitimate and non-discriminatory public welfare regulation from investor-state claims, what options do they have? This *Perspective* highlights an innovative feature in the recent China-Australia Free Trade Agreement (ChAFTA) that goes well beyond existing safeguards for protecting the regulatory autonomy of states by providing a mechanism for joint treaty party control. In doing so, ChAFTA evidences a new and controversial step in efforts to recalibrate interpretive authority between arbitral tribunals and the treaty parties acting collectively.

Newer-style investment treaties often seek to protect countries' regulatory autonomy by reaffirming the importance of public welfare regulation in the preamble, refining and clarifying core investment protections, and sometimes including general exceptions clauses. These approaches are useful but have limits. Preambular provisions are non-binding. Substantive clauses are binding, but states may not wish to allow arbitral tribunals to second-guess the permissibility of sensitive public welfare measures. Even if respondent states ultimately prevail, they are likely to expend considerable resources in time and money in defending claims.

Faced with these concerns, China and Australia broke new ground in ChAFTA by including a mechanism that protects public welfare measures through joint treaty party control. ChAFTA provides that "Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim" by an investor.¹ If an investor challenges a regulatory measure, the respondent state is permitted to issue a "public welfare notice" specifying why it believes that the measure falls within this exception. The arbitration proceedings are then suspended and a 90-day consultation period with the other treaty party is triggered.²

If the treaty parties agree that the challenged measure fits within the scope of the carve-out, the decision is binding on any investor-state tribunal, and any decision or award issued by such a tribunal must be consistent with that decision.³ Because the mechanism is triggered at an early stage of the process—the respondent state has 30 days to issue a notice after receiving a request for consultations from an investor—it may prevent an investor-state tribunal from being established at all. If the treaty parties are not able to agree on whether or not the measure falls within the carve-out during the 90-day consultation period, the matter falls to the investor-state tribunal to determine. The tribunal is not permitted to draw any adverse inference from the non-issuance of a public welfare notice by the respondent or from the absence of any decision between the treaty parties as to whether the measure falls within the scope of the exception.⁴

This ChAFTA mechanism represents a new step in a broader trend of states seeking to recalibrate the balance between investor protection and state sovereignty, and between the interpretive power of arbitral tribunals and treaty parties. Recent treaties evidence a rise in provisions that permit the treaty parties to provide an *interpretation* of the treaty that is binding on arbitral tribunals. The ChAFTA mechanism takes that a step further by allowing the treaty parties to reach an agreement on the *application* of their treaty that is binding on arbitral tribunals. This is consistent with the approach taken in some recent treaties with respect to joint treaty party control over matters relating to taxation and financial services, but the ChAFTA provision is considerably broader in scope.⁵

By requiring a joint decision of the treaty parties, ChAFTA limits the ability of respondent states to abuse the mechanism, which would be a more significant risk if the clause were self-judging. However, some will object to the measure as repoliticizing investor-state disputes by leaving investors at the mercy of joint decisions of the treaty parties. The clause does not include references to the public welfare measures being necessary or proportionate. Time constraints mean that a joint agreement is only likely to be reached in relatively clear-cut cases. There is also a question of how the mechanism would work between unequal treaty parties: there is a risk that a stronger party might lean on a weaker party to reach an agreement that was not warranted; or a stronger party might ignore attempts by a weaker party to reach an agreement that was justified.

Ultimately, whether the ChAFTA mechanism works well in practice will depend on how home states internalize their dual interests as capital exporters (who are interested in protecting their investors' rights) and capital importers (who are interested in protecting legitimate regulatory autonomy). If they get this balance right, the mechanism could provide an innovative modality for states wishing to protect legitimate and non-discriminatory public welfare measures through joint treaty control. If they get the balance wrong, however, the clause will engender controversy due to over-use or remain in obscurity due to under-use.

* Anthea Roberts (Anthea.Roberts@anu.edu.au) is Associate Professor at the RegNet School of Regulation and Global Governance, ANU; Richard Braddock (richard.braddock@lexbridgelawyers.com) is a Partner at Lexbridge Lawyers. The authors are grateful to Lise Johnson, Stephan Schill and two anonymous

reviewers for their helpful peer reviews. **The views expressed by the authors of this *Perspective* do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

¹ ChAFTA, Article 9.11.4.

² Article 9.11.5-9.11.6.

³ Article 9.18.3.

⁴ Article 9.11.8.

⁵ *E.g.*, U.S. Model BIT, Articles 20, 21; Canada-China FIPA, Articles 20(2), 33(3).

The material in this Perspective may be reprinted if accompanied by the following acknowledgment: “Anthea Roberts and Richard Braddock, ‘Protecting public welfare regulation through joint treaty party control: a ChAFTA innovation,’ Columbia FDI Perspectives, No. 176, June 20, 2016. Reprinted with permission from the Columbia Center on Sustainable Investment (www.ccsi.columbia.edu).” A copy should kindly be sent to the Columbia Center on Sustainable Investment at ccsi@law.columbia.edu.

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Daniel Allman, daniel.allman@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 <http://www.ccsi.columbia.edu>.

Most recent Columbia FDI Perspectives

- No. 175, Umirdinov Alisher, “The case for an advisory center on international investment law,” June 6, 2016.
- No. 174, Qianwen Zhang, “China’s ‘new normal’ in international investment agreements,” May 23, 2016.
- No. 173, Gabriel Bottini, “Using investor-state dispute settlement to enforce investor obligations,” May 9, 2016.
- No. 172, Maria Borga, “Not all foreign direct investment is foreign: the extent of round-tripping,” April 25, 2016.
- No. 171, Delphine Nougayrède, “Untangling the effects of special purpose entities on FDI,” April 11, 2016.

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