Canada-China Foreign Investor Promotion and Protection Agreement

General Analysis by the Ontario Economic Development Society

Authors: Jordan Dedier, Joshua B. Hummel

Date of Publication: September 30 2014

Publication No. 1.

Topic: Implications of International Investment Law

ABSTRACT

The China-Canada Foreign-Investor Promotion and Protection Agreement (FIPA) was signed in September of 2012 and recently ratified by the Federal Government. The FIPA will come into effect on October 1st, 2014. The purpose of this paper is to summarize what a FIPA is, as well as Canada and China's terms between each other in the agreement. Next, to understand the degree of control the agreement gives each contracting state over the other, and finally the risk assumed by each as result of the terms of the agreement. Finally, the paper will critique prominent criticisms that this controversial FIPA has received since its ratification became public knowledge. By addressing these matters, the corollary that should come to light is that the Agreement is mutually beneficial to both countries and their respective investors.

Part I – What is a FIPA?

The formal definition adopted by Foreign Affairs, Trade and Development Canada of a FIPA is:

"A bilateral agreement aimed at protecting and promoting foreign investment through legally-binding rights and obligations. FIPAs accomplish their objectives by setting out the respective rights and obligations of the countries that are signatories to the treaty with respect to the treatment of foreign investment."[1]

A FIPA is, therefore, an extension of the rules and obligations set-out by the Agreement of Trade-Related Investment Measures (TRIMS Agreement) under the laws of the World Trade Organization (WTO).[2] FIPAs, like the TRIMS Agreement, seek to regulate the consequences on investors as a result of state behaviour, as well as the treatment by states on investments as they cross their borders. FIPAs are meant to provide reciprocal benefits to both "contracting parties" (the countries involved in the agreement) and facilitate a more secure international investment climate.

Part II – Important Terms of Canada and China's Agreement

International investment law is still a nascent area that is parallel to its much more developed spouse international trade law. The latter is the domain of the WTO and is one of the few legally binding forms of international law currently in existence. Countries must ratify the various treaties that the Organization is composed of to gain membership and are subject to trade-related sanctions for non-compliance.[3] The greater the convergence of the world economy, the more dependent each is on maintaining mutual compliance to avoid economic collapse.[4]

While the Canada-China FIPA is written in the context of obliging TRIMS[5]—such that certain terms are near-black-letter replicas of the Agreement *per se*—regulation of the agreement's terms, in the event of a dispute, are set-out by the United Nations Commission on International Trade Law's (UNCITRAL) arbitration rules, which FIPA requires to be the governing law.[6] The forum these disputes are settled in is the World Bank's International Centre for Settlement of Investment Disputes (ICSID),[7] the treaty for which both Canada and China

[1] Foreign Affairs, Trade and Development Canada, *Foreign Investment Promotion and Protection (FIPAs)*. (2013). Online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng>.
[2] *Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*, C 2012, Article 9, Performance Requirements.
[3] Uruguay Round Agreement, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Annex 2, BISD 353, Article 3(1). Online: <http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#23_1>.
[4] Peter Van den Bossche &Werne Zdouc, *The Law and Policy of the World Trade Organization*, 3rd Ed (New York: Cambridge University Press, 2013) at 21.
[5] *Supra* note 2.
[6] *Supra* at note 2 Article 22.
[7] *Ibid.*

have ratified. Prior to arbitration though, the FIPA requires that there is consultation to minimize the potential risk of losses should either lose the dispute.[8] If the dispute cannot be mitigated and must be arbitrated, the FIPA requires that both countries each choose an arbitrator (that is qualified), or allow the President of the International Court of Justice (currently Peter Tomka of Slovakia).[9] A third arbitrator is then chosen by a third-party who has diplomatic relations with Canada and China but is not a party to either the FIPA or the dispute.[10] Neither Canada nor China can legally bind themselves to a guarantee that the impugned investors will be indemnified for their losses, regardless of the perceived outcome.[11] It should be noted that Canada and China have chosen ICSID rather than the WTO's own dispute settlement body or the International Chamber of Commerce Court of Arbitration. Canada and China have reduced the burden on private investors to file claims on their own through ICSID by subrogating the task rather than inserting a clause to decide a claim though a TRIMS panel which would require Canada and China to take on the responsibility independent of whether they had subrogated the responsibility or not.[12]

International law regarding National Treatment and the Most-Favoured Nation regulations apply to the Canada-China FIPA the same as they do under the rules of the WTO. Under the FIPA's Most-Favoured Nation clause Canada and China must treat each other's investors in the same manner as they would their own under their irrespective laws during the time that an investment has been made.[13] This shields both parties from the potential of either country's authorities on investment denying access to their markets on the basis of measures enacted specifically to prevent a particular party (or group or class of parties) access. Furthermore, under the FIPA's National Treatment clause, Canada and China cannot enact measures within their country after an investment has been made to nullify the purpose and effect of having made that investment.[14] For example, a measure which completely nullifies an investment is considered in-direct expropriation, because it indirectly confiscates the purpose and effect of having a degree of ownership and control over a matter.[15] The difference between the effect of the Most-Favoured Nation and National Treatment clause is whether the investment has *ex ante* or *ex post* crossed through a country's borders.

Some exceptions exist for the purposes of "cultural industries", environment, health, and competition. The Canada-China FIPA explicates that the Agreement does not apply to "cultural industries", which are defined as enterprises engaged in:

"(a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but does not include the sole activity of printing or typesetting any of the foregoing;

(b) the production, distribution, sale or exhibition of film or video recordings;

(c) the production, distribution, sale or exhibition of audio or video music recordings;

(d) the publication, distribution, sale or exhibition of music in print or machine readable form; or

(e) radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services."[16]

Furthermore, measures can be enacted through the FIPA to prevent environmental damage, and maintain human, animal, and plant health, as well as to protect natural resources.[17]

[8] *Ibid* at Article 15.
[9] *Ibid*.
[10] *Ibid*.
[11] *Ibid* at Article 13.
[12] As a result of the fact that only states and customs territories can become WTO members, either must represent their country's affected third-parties. See Article XII:1 of the *WTO Agreement* on membership and applicable restrictions in relation to joining.
[13] *Supra* at note 2 Article 5.
[14] *Ibid* at Article 6.
[15] UNCTAD, *Series on International Investment Agreements II*, (New York & Geneva: UN, 2012) at 7 – 12. Online: <http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf>.
[16] *Supra* at note 2 Article 33.1.

Lastly, criminal and civil anti-trust/competition laws in Canada apply so that Chinese investors cannot dominate Canadian financial markets and industry (as stated in Articles 33.6 b and c).[18] The Investment Canada Act provides that the country only approves of investment that results in a net-benefit for Canada[19], and the Act also provides that investments that may be a risk to Canada's national security have the potential to be blocked and investigated, with potential consequences to follow.[20] The safety nets ensure that Canada responsibly allows Chinese investors to engage with Canadian markets.

All of these matters are reciprocal—and so Canadians can expect that the Chinese be obligated to follow the same rules under the FIPA. Perhaps the most assuring part of the FIPA is that China cannot directly or indirectly expropriate from Canadian investors.[21] Expropriation has been the basis for many problematic trade and investment negotiations, especially since China is centrally planned and has a history of expropriation in non-protected instances of investment.

Criticisms

The Foreign Investment Promotion and Protection Agreement has been highly criticised by Gus Van Harten, Professor of Law at Osgood hall. Harten criticises the Agreement's *de facto* lack of reciprocity for what he claims is Canada's lesser access to Chinese markets compared to China's far-reaching access into Canadian markets. Harten supports his criticism with the fact that "the treaty does not allow market access except under the existing legal framework of each country".[22] He finds this concerning because "[Canada's] existing legal framework is more open and less opaque than [China's]".[23] Putting forward that China could utilize its own 'cloudy legal framework' to its advantage in this FIPA however, is an unfounded criticism. Article 17 of FIPA, for example, deals specifically with Transparency of Laws Regulations and Policies.[24] Each Contracting Party shall, with a view to promoting the understanding of its laws and policies that pertain to or affect a covered investment:

- (a) make such laws and policies public and readily accessible;
- (b) if requested, provide copies of specified laws and policies to the other Contracting Party; and
- (c) if requested, consult with the other Contracting Party with a view to explaining specified laws and policies.[25]

Furthermore, details on transparency requirements are listed in two additional sub-clauses of section 17.[26] If these clauses were insufficient to ensure China could not exploit its potentially messy legal framework to gain an advantage in the FIPA, "Canada's new FIPA Model also links in its Article 5 the obligations regarding 'fair and equitable treatment' and 'full protection and security' to the minimum standard".[27] This minimum standard is defined

[17] *Ibid* at Article 33.2.
[18] *Ibid* at Article 33.6 b and c.
[19] *Investment Canada Act*, RS C 1985, c. 28 (1st Supp.) s.16(1). Online: <https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#p3.5>.
[20] *Ibid* at Part IV.1.
[21] *Supra* at note 2 Article 10.1.
[22] Van Harten, Gus. "Listen To Gus Van Harten On The China-Canada Investment Treaty." *CBC*. CBC, October 27 2012. Web. 15 September 2014. <http://www.cbc.ca/player/News/Politics/Audio/ID/2297312742/>
[23] *Ibid*.
[24] Canada. Canada, Department of Foreign Affairs, Trade and Development. *Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*. N.p. n.p. 23 August 2013. Web. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng>.
[25] Supra note 24.
[26] *Ibid*.
[27] Houde, Marie-France. "Modern Features in Recent OECD Bilateral Investment Treaties." *International Investment Perspectives*. ISBN 92-64-02689-4. 2006. Pg 160. <http://www.oecd.org/industry/inv/internationalinvestmentagreements/40072428.pdf>

as a "a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which states, *regardless of their domestic legislation and practices*, must respect when dealing with foreign nationals and their property".[28] Essentially, the minimum standard ensures that countries cannot escape international norms and appropriate practices on the legal technicalities, or there lack of, in complex international treaty agreements.

Harten has a fair concern in regard to the unorthodox dispute resolution mechanism used in this FIPA. Foremost, it is namely unorthodox because "lawsuits can proceed behind closed doors. This shift to secrecy reverses a long-standing policy of the Canadian government".[29] Additionally, Canada's losing history in international trade disputes is concerning. Exemplary of this is where "Canadian investors have sued other countries, usually the U.S., 16 times and lost every case".[30] Similarly, in investor-state arbitration Canada has "lost about half of the decided cases against the government, all by U.S. companies under NAFTA".[31] The secrecy of the dispute resolution mechanism as well as the history of reoccurring losses of Canadians suing internationally should be a serious concern to Canadian investors intending to invest through this FIPA.[32]

The Council of Canadians Acting For Social Justice highlight their concern that the Agreement would allow "China-based corporations… to directly challenge local, provincial and federal policies that interfere with their 'right' to make a profit from energy, mining or other controversial projects".[33] This concern is real insofar as Chinese companies would be able to challenge environmental regulations, for example, if they've invested in a pipeline that those laws would prohibit. Similarly however, Canadian companies will receive this reciprocal 'right' to challenge Chinese laws.[34]

It seems most likely that this FIPA will not have a negative impact on Canada despite the controversy surrounding its ratification. A second economic and human rights analysis of this FIPA may be published in the months to come after more data is made available. Ultimately, the agreement will go into effect tomorrow, October 1st 2014, and only time will reveal its true implications.

[28] OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing. <http://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf>
[29] Van Harten, Gus. "Canada-China investment deal allows for confidential lawsuits against Canada." *The Star*. 29 September 2012. <http://www.thestar.com/opinion/editorialopinion/2012/09/29/canadachina_investment_deal_allows_for_confidential_lawsuits_against_canada.html>
[31] *Ibid*.
[32] *Ibid*.
[33] *Canadians*. The Council of Canadians. N.d. Web. Accessed on 15 September 2014. <http://www.canadians.org/fipa-info>
[34] *Ibid*.