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Canada and China Foreign Investment Promotion and Protection Agreement in Force October 1, 2014

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Canada ratified the Foreign Investment Promotion and Protection Agreement with China[1] (FIPA) on September 12, 2014, almost two years to the day following its signature. FIPA will come into force on October 1, 2014, creating new standards for investments between China and Canada. FIPA aims to stimulate trade between the two countries by protecting investors in each market, China now being Canada's second largest commercial partner.

The key aspects of the FIPA include (i) non-discriminatory government treatment for investments made by Canadian investors in China and vice-versa, (ii) a defined dispute resolution mechanism, and (iii) protection measures for damages suffered by investors in each respective market.

Key Distinctions of the Canada-China FIPA

The Canada-China FIPA differs from the other two dozen similar Canadian agreements in the following ways:

1. INITIAL 15 YEAR TERM

Unlike other FIPAs with an indefinite term and a one year termination notice by either party, the Canada-China FIPA has an initial term of 15 years, with the usual one year termination notice thereafter. Investments made prior to FIPA's termination will be subject to FIPA rules for an additional 15 year period after its effective termination date. For example, an investment made in 2028 prior to FIPA's earliest termination in 2029 would still be subject to the terms of the agreement for 15 years thereafter, meaning 2043.

2. NO 'NATIONAL TREATMENT' AT THE ESTABLISHMENT AND ACQUISITION STAGE

A second key distinction of FIPA is its lack of 'national treatment' protection at the prospective stage. 'National treatment' protection allows foreign firms the same treatment as national firms. Generally, in other Canadian bilateral treaties, investors receive 'national treatment' at the establishment and acquisition stages. Instead of 'national treatment' at the establishment and acquisition stages, FIPA allows the lower threshold of 'most-favoured-nation treatment' at these stages. National treatment protection only kicks in after the investment is made and excludes everything prior to the close of the transaction. This is in line with other Chinese bilateral investment treaties but not with most Canadian treaties. The *Investment Canada Act* and its Chinese equivalent still apply, allowing both governments to veto investments at the establishment and acquisition stages when they do not meet the net benefit test in the target country.

3. BY DEFAULT PRIVATE DISPUTE RESOLUTION

Dispute resolution of FIPA is by default by way of private arbitration. In contrast with other Canadian treaties, the arbitration is private unless the host government determines that it would be in the public interest to make the dispute resolution public. For example, an arbitration hearing relating to a dispute by a Canadian company in China claiming damages under FIPA would be private unless the Chinese government requested it be made public.

4. EXEMPTED INDUSTRIES

Certain industries are explicitly exempt from the application of FIPA. For investments in China, many of the excluded industries mirror the industries prohibited to foreign investors under the *Catalogue of Prohibited Foreign Investment Industries* issued by the Ministry of Commerce of the People's Republic of China. Cultural and media industries are excluded, as well as certain environmental industries, security related industries, and a broad catch-all for industries related to the protection of essential security interests.

5. EXPROPRIATION

Expropriation provisions in FIPA mirror similar Canadian treaties and prohibit the expropriation of investments or returns of investors, other than for a public purpose and in exchange of compensation at fair-market value. The mechanism for determining fair market value is specified in FIPA.

Moving Forward

Proponents of FIPA believe that it will help increase direct investment between the two countries because of the greater certainty it allows investors from both countries. As trade between both countries continues to grow, greater expertise will be needed in the field of dispute resolution for Canadian investors operating in China as well as in the field of dispute resolution between Chinese investors and the Canadian government.

[1] *Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*. Please follow this link for the full text of FIPA: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng.