

Canada and China Sign Major Investment Agreement

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The *Foreign Investment Promotion and Protection Agreement* (FIPA), that Canada and China signed on September 8, 2012, is designed to enhance two-way investment flows by binding both countries on matters regarding foreign investors and investments in their own jurisdictions. The agreement was to take effect one month after it had been ratified by both countries. Canada is expected to ratify it some time in November.

The Canada-China FIPA is meant to protect Canadian and Chinese investments and investors while stimulating inbound investment in each country. It clarifies the rules that regulate foreign direct investment in each country and includes mandatory arbitration for dispute settlement.

The main aspects of the agreement include: (i) non-discriminatory government treatment for investments made by Canadian investors in China and Chinese investors in Canada, (ii) provisions to protect investors in case of expropriation, and (iii) a defined dispute-settlement mechanism.

Key Distinctions of the Canada-China FIPA

To date, Canada has partnered with 24 other countries to develop FIPAs that are generally similar in form and substance. The Canada-China FIPA would deviate from the standard FIPA model by adopting several standards more common in Chinese bilateral investment treaties. The main distinctions are the following:

1. AGREEMENT LIFESPAN OF 31 YEARS

Unlike other FIPAs with an indefinite term and a termination provision with one year's notice by either party, the Canada-China FIPA would have an initial lifespan of 15 years, with the standard one year notice for termination thereafter. Investments made prior to the termination of

the Canada-China FIPA would be subject to it for an additional 15 year period after the effective termination date. This means it could be enforceable for 31 years post-ratification for an investment made prior to its initial termination. For example, if the FIPA is ratified in 2012 and the investment is made during the last year of its application, being 2028, the FIPA would apply to that investment until 2043.

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

A second key distinction in the Canada-China FIPA is that it does not provide prospective new investments into China with 'national treatment'. In other Canadian FIPAs, investors receive 'national treatment' at the stages of establishment and acquisition, for example, in the Canada-Jordan FIPA. Although the Canada-China FIPA affords 'most-favoured-nation treatment' at the usual establishment and acquisition stages, it excludes 'national treatment' from these stages and limits it to everything post-establishment of an investment, including the expansion, management, conduct, operation and sale or other disposition of investments in its territory. This is more in line with practices found in other Chinese bilateral investment treaties than with those of Canada. The *Investment Canada Act* and its Chinese equivalent would still apply. This would allow both governments to veto investments that are viewed as not providing a net benefit to their country at the establishment and acquisition stages, without providing recourse for the aggrieved prospective investor.

3. DEFAULT DISPUTE RESOLUTION OUT OF PUBLIC VIEW

As in other FIPAs, disputes pertaining to breaches of the agreement are settled through arbitration. In contrast to standard FIPAs, however, the arbitration hearings of the parties under the Canada-China FIPA are by default private, unless the disputing contracting party determines that it would be in the public interest to make all other documents available publicly. For example, an arbitration hearing for a Canadian investor in China claiming damages would be private unless China decided it was in the public interest to make it public. This is a departure from the general Canadian standard in other bilateral investment treaties and is more in sync with Chinese norms.

Exceptions

As in other FIPAs, specified industries are explicitly exempt from the application of the Canada-China FIPA. In particular, measures pertaining to cultural industries (broadly defined to include publishing, film or video recordings, music recordings and radio communications) are excluded. Other exceptions include certain environmental measures, and the protection of essential security interests. Free trade areas, aviation, fisheries or maritime matters are excluded solely from the 'most-favoured-nation treatment'.

Expropriation

The expropriation provisions of the Canada-China FIPA are in line with those in other Canadian FIPAs and prohibit the expropriation of investments or returns of investors other than for a public purpose and against compensation at fair-market value.

Looking Forward

The government of Canada believes that the Canada-China FIPA will promote greater direct investment between the two countries. Canadian and Chinese firms contemplating foreign direct investment in the other country should be aware that conflicts could be resolved by private arbitration should the host country decide public arbitration not being in the public interest. In addition, the government of Canada can anticipate that it may experience several claims by Chinese firms given the increasing number of Chinese inbound investments in Canada. This may result in greater exposure by the Canadian government to potential damages if Chinese investors are wronged by the Canadian government's actions.