

REGIONAL FOCUS & CONTROVERSIES

Treaty on the Wall, Who is the Fairest One of All: The Canada-China Foreign Investment Promotion and Protection Agreement

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Canada and China's new Foreign Investment Promotion and Protection Agreement ("CC-FIPA") came into force on October 1, 2014. This work discusses some of the main benefits to be gained from building stronger investment relations between Canada-China, as well as a Canadian perspective on the main investment risks that are most likely to impede either country from achieving the full potential in their investment relations. Against this backdrop, this work then examines those provisions in the CC-FIPA that are most central to promoting Canada-China investment benefits, as well as those provisions that are most relevant to protecting against the investment risks in Canada-China relations.

Keywords

CC-FIPA, BITs, Canada-China Relations, FDI, Risks of Investment, Expropriation, Nationalization, SOEs, ICA

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1. Introduction

If one were to pin the new Canada-China Foreign Investment Promotion and Protection Agreement (“CC-FIPA”)¹ to a wall, gaze into its provisions, and utter the words “treaty on the wall, who is the fairest one of all,” what might the CC-FIPA respond? The CC-FIPA’s answer would vary according to the inquirer. The CC-FIPA would likely also want to know in relation to what specific issue the question is being asked. For this and other reasons, such work does not seek to provide an answer as to whether the CC-FIPA’s provisions are fair and balanced. Rather, it seeks to furnish the reader with a proverbial mirror to reflect on. This is first achieved by identifying the main benefits and risks that are unique to Canada-China investment relations, then by framing the CC-FIPA’s provisions around these risks and benefits. In adopting this approach, it becomes apparent that core obligations under the CC-FIPA are mirrored to each party’s respective self-interests. Distortions in the application of its final provisions are inevitable as both parties view them through their own distinctive cultural and historical prisms.

An important obstacle should be borne in mind while reading this work, as well as while reflecting on the CC-FIPA’s provisions, that both sides stand on opposite sides of a social, cultural, religious, political, and linguistic dividing wall that prevents the type of lucid understanding necessary to make a fair and objective assessment as to the fairness of the CC-FIPA’s provisions. Furthermore, while each provision in the CC-FIPA can be compared and evaluated by reference to the treaty experience acquired by each country, the benefits and risks endemic to Canada-China investment relation are unique and unparalleled,² such that the best and most valuable measure of comparison of the CC-FIPA’s ability to promote and protect foreign investments within each country’s territory may be the passage of time.

The primary purpose of this research is to provide a Canadian perspective on some of the main risks perceived in Canada-China foreign direct investment relations and, within this context, to assess how the CC-FIPA, entered into force on October 1, 2014, serves to protect or alleviate some of these issues and risks. This work is composed of four parts including a short Introduction and Conclusion. Part two will provide

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, *available at* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng> (last visited on Oct. 30, 2015).

² Prime Minister of Canada, Canada-China Joint Statement, *available at* <http://pm.gc.ca/eng/news/2009/12/03/canada-china-joint-statement> (last visited on Oct. 15, 2015).