

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).

an overview of Canada-China relations. It seeks to highlight the main benefits to be gained by each party from stronger Canada-China bilateral investment relations. With non-discriminatory treatment between domestic and foreign investors as the overarching theme of bilateral investment treaties, it identifies some of the main risks and issues within Canada-China relations that are most likely to be injurious to stronger Canada-China investment relations.³ Part three will then analyze more important and substantive provisions of the CC-FIPA, and how they fit around the benefits and risks that are unique to Canada-China bilateral investment relations.

2. Canada-China Bilateral Investment Relations

A. Canada-China Relations: Overview

1. Diplomatic Relations

Canada established official diplomatic relations with China as early as 1970 following a visit to the People's Republic of China by former Canadian Prime Minister Pierre Elliott Trudeau.⁴ Resident diplomatic missions between both countries were established in 1971.⁵ Since around 45 years of diplomatic relations, both countries have become increasingly cognizant of the distinct cultural viewpoints that animate their relations, as well as the importance of respecting each other's core interests and major concerns.⁶ Despite these varying cultural views, the complimentary in each other's economies has also lead to progressive financial regulatory reform aimed at opening up each other's economies.⁷

As recently demonstrated by recent major Chinese direct investments in Canada,⁸ Canada's stable energy supplies (notably in Albert's oil sands) are of critical value to the growing energy demands of China's vast, expanding markets, which also present invaluable investment opportunities for Canadian investors. A selective

³ See generally P. BATTERSBY, *THE UNLAWFUL SOCIETY: GLOBAL CRIME AND SECURITY IN A COMPLEX WORLD* (2014).

⁴ Government of Canada, China, Canada-China Diplomatic Relations, available at <http://www.cdi.org/program/issue/document.cfm?DocumentID=4222&IssueID=76&StartRow=1&ListRows=10&appendURL=&Orderby=DateLastUpdated&ProgramID=68&issueID=76> (last visited on Oct. 15, 2015).

⁵ *Id.*

⁶ *Id.*

⁷ *Supra* note 2.

⁸ E. Rocha, *CNOOC Completes Contentious \$15.1-billion acquisition of Nexen*, FIN. POST, Feb. 25, 2013, available at <http://business.financialpost.com/news/energy/cnooc-completes-contentious-15-1-billion-acquisition-of-nexen> (last visited on Oct. 15, 2015).

overview of each country's respective economies serves to better illustrate some of the complementary that exists between both economies.

2. *Economic Relations*

Canada's Energy Sector

Canada's national economy and high standard of living has historically been driven by its natural resources sector. In 2014, the natural resources sector accounted for approximately 20 percent of Canada's nominal GDP and was responsible for the creation of 1.8 million jobs. The energy sector contributed to approximately 10 percent, and 300,000 jobs, 30,000 of which were held by Canada's aboriginal population.⁹ It also contributes to various educational programs for younger students in the form of scholarships.¹⁰ On average, the natural resource sector has contributed CAD 26 billion per year to the Canadian economy over the past five years.¹¹ Seven hundred billion dollars in investment are projected towards major resource projects, CAD 569 (81.29 percent) of which will be invested towards the energy sector.¹² Further investments could also help fuel the development of new clean technologies that would increase Canada's energy production capacity. The most current available data indicates that Canada ranks 5th on the production capacity scale (4383 barrels per day), with China ranking 4th (4572).¹³ Whereas China ranks as having the 14th largest proven oil reserve with 24 billion barrels, Canada ranks 4th with 173 billion barrels (approximately 167.81, or 97 percent of which are in Alberta's oil sands).¹⁴ China ranked second in terms of total petroleum consumption with 10480 thousand barrels per day, with Canada ranking 8th with 2431 barrels per day.¹⁵ Owing to the important gap between its production and consumption, China has developed a high level (56.6percent) of dependence on foreign oil supplies.¹⁶

⁹ Natural Resources Canada, Facts and Figures on the Natural Resources Sector, available at <http://www.nrcan.gc.ca/publications/key-facts/16013> (last visited on Oct. 15, 2015).

¹⁰ See, e.g., Nexen, 2015 Oil Sands Scholarship Brochure, available at https://www.google.ca/url?sa=t&rct=j&q=&e&src=s&source=web&cd=3&ved=0CDIQFjACahUKEwiu2svcnNzIAhVDIB4KHSfLCWM&url=http%3A%2F%2Fwww.nexencnooltd.com%2F~%2Fmedia%2FFiles%2FCommunity%2FNexen-OilSandsScholarshipBrochure.ashx&usg=AFQjCNFyez9gbi_y5kMJ8amvxqKmuAAQ&bvm=bv.105841590,d.dmo (last visited on Oct. 15, 2015).

¹¹ *Supra* note 9.

¹² *Id.*

¹³ Energy Information Administration, International Energy Data and Analysis, available at <http://www.eia.gov/beta/international/?fips=ch> (last visited on Oct. 15, 2015).

¹⁴ Government of Canada, China, Energy, available at http://www.canadainternational.gc.ca/china-chine/bilateral_relations_bilaterales/Energy.aspx?lang=eng (Last visited on Oct. 15, 2015).

¹⁵ *Supra* note 9.

¹⁶ Chenyuan Fu, *China's Prospective Strategy in Employing Investor-State Dispute Resolution Mechanism for the Best Interest of Its Outward Oil Investment*, 2 PKU TRANSNAT'L L. REV. 266-320 (2014), available at <http://stl.pku.edu.cn/>

China's Internal Markets

China has progressed from an isolated autocratic socialist system with tight controls over the society, to a more liberalized, market-oriented system that seeks to promote economic development, as well as a higher standard of living for her population.¹⁷ This gradual liberalization and opening up, which was accelerated following China's accession to the WTO, has improved the investment environment in China.¹⁸ The size of its markets, estimated at 1,367,485,388 potential customers, and its low labor production cost, estimated at approximately USD 1.74 per hour in the manufacturing sector,¹⁹ has made China a particularly attractive market for foreign direct investment ("FDI"). China ranked as the 2nd largest recipient of FDI in the world, with an FDI inflow of USD 124 billion, and ranked as the most attractive economy for multinational companies.²⁰ The two major forms of FDI are Wholly Foreign-owned Enterprises (895.89 x 100) and Equity Joint Ventures (237.72).²¹ Its largest sources of FDI are from Hong Kong (USD 73 billion), Singapore (USD 7.2 billion), and Japan (USD 7 billion).²² China also ranked as the most attractive economies for multinational companies.²³ The largest concentrations of FDI was in the science and high-tech driven province of Guangdong (USD 57037 x 2000),²⁴ a coastal province in South East China that borders Hong Kong,²⁵ followed by Jiangsu (USD 89519 x 2000), and Shanghai (USD 55545 x 2000).²⁶ On a national level, the main destination sectors of FDI are manufacturing (4555498) real estate (2879807), wholesale and retail trades (1151099), and leasing and business services (1036158).²⁷ Canadians have expressed a particular interest in China's transportation,

wp-content/uploads/2014/05/7Fu-Chenyuan_Chinas-Prospective-Strategy.pdf (last visited on Oct. 30, 2015).

¹⁷ CIA, *The World Fact Book*, available at <https://www.cia.gov/library/publications/the-world-factbook/docs/notesanddefs.html?fieldkey=2002&term=Population%20growth%20rate> (last visited on Oct. 15, 2015).

¹⁸ CHUNLAI CHEN, *FOREIGN DIRECT INVESTMENT IN CHINA: LOCATION DETERMINANTS, INVESTOR DIFFERENCES AND ECONOMIC IMPACTS* (2011).

¹⁹ US Department of Labor Bureau of Labor Statistics, *International Comparisons of Hourly Compensation Costs in Manufacturing, 2012*, available at <https://www.bls.gov/fls/ichcc.htm> (last visited on Oct. 15, 2015).

²⁰ By comparison, Canada ranked 7th in the world, with an FDI inflow of 62 billion US dollars. See Santander Trade Portal, *China, Foreign Investment*, available at <https://en.santandertrade.com/establish-overseas/china/foreign-investment> (last visited on Oct. 15, 2015).

²¹ NATIONAL BUREAU OF STATISTICS OF CHINA, *CHINA STATISTICAL YEARBOOK*, available at <http://www.stats.gov.cn/tjsj/ndsj/2014/indexeh.htm> (last visited on Oct. 15, 2015).

²² *Supra* note 19.

²³ *Id.*

²⁴ *Supra* note 20.

²⁵ *Id.*

²⁶ *Supra* note 18, at 134.

²⁷ Numbers are in USD 10,000. *Supra* note 19.

biotechnology, education, finance, IT, manufacturing, and natural resource sectors.²⁸

B. Canadian Perspective of Risks Factors to Foreign Direct Investments in China

Despite the complementarity and opportunities that exists between Canada's rich energy sector, and China's vast and expanding internal markets, the most recent national opinion poll on Canadian views on Asian investment indicates that Canadians "continue to oppose foreign direct investment from China while welcoming inflows from other countries such as Japan, South Korea and India [...]"²⁹ When asked "if a foreign company wanted to make an investment in Canada, would you favor or oppose the investment if the company were from [...]," 78 percent of Canadians indicated they would be 'in favor' of the investment if the company were from Japan, compared to 77 percent relative if the company was from the US, and 67 percent if the company was from South Korea. Conversely, 49 percent of Canadians indicated they would oppose the investment if the company was from China.³⁰ The loss of control over Canadian natural resources to state-owned Enterprises, particularly in oil-rich Alberta, is a significant concern relative to inbound Chinese direct investments. Relative to Canadian direct investment in China, and directly related to the structure of Chinese State-owned enterprises, corruption and bribery are also frequently cited as a major concerns, and likely deterrents, to the differential treatment that Canadian investors might receive while abroad.³¹ These two factors are discussed immediately below.

1. Corruption and Bribery in China

Bribery, an unspoken rule in the Chinese business environment,³² and corruption in

²⁸ Foreign Affairs, Trade and Development Canada, Canada-China Foreign Investment Promotion and Protection Agreement (FIPA) Negotiations – Came Into Force, Oct. 1, 2014, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-chine.aspx?lang=eng> (last visited on Oct. 15, 2015).

²⁹ I. Marlow, *Canadians Oppose and Overestimate Chinese Investment, Polls Shows*, GLOBE AND MAIL, June 2, 2015, available at <http://www.theglobeandmail.com/report-on-business/international-business/canadians-oppose-and-overestimate-chinese-investment-poll-shows/article24734711/> (last visited on Oct. 15, 2015).

³⁰ Asia Pacific Foundation of Canada, 2015 National Opinion Poll: Canadian Views on Asian Investment, available at <https://www.asiapacific.ca/surveys/national-opinion-polls/2015-national-opinion-poll-canadian-views-asian-investment> (last visited on Oct. 15, 2015).

³¹ L. Dawson, *Potash and BlackBerries: Should Canada Treat All Foreign Investment the Same*, A MACDONALD-LAURIER INSTITUTE PUBLICATION, June, 2012, available at <http://www.macdonaldlaurier.ca/files/pdf/Should-Canada-Treat-All-FDI-The-Same-Commentary-June-2012.pdf> (last visited on Oct. 15, 2015).

³² R. Levick, *New Data: Bribery is Often 'An Unspoken Rule in China'*, FORBES, Jan. 21, 2015, available at <http://www.forbes.com/sites/richardlevick/2015/01/21/new-data-bribery-is-often-an-unspoken-rule-in-china> (last visited on Oct. 15,

China are critical risks for Canadians to invest in China.³³ *E.g.*, China's transportation sector, that of interest to Canadian investors, has been identified as "one of the most vulnerable areas encroached by corruption."³⁴ In discussing the bidding process in China, one author explains:

Aiming at huge profits, many private entrepreneurs would approach their officials by sending *bribes, gifts*, or other interests to compete for these projects. Very often, bidding becomes a procedure of performance, whereas the real winner is already determined by under the table deals.³⁵

Bribery was also recently illustrated in Guangdong province, where some 50 scientific and technological provincial and city officials were placed under investigation on suspicion of accepting bribes in Guangdong.³⁶ As discussed earlier, the science and high-tech driven province of Guangdong is the largest recipient of FDI in China.³⁷ While Canadians have expressed an interest in R&D intensive areas such as biotechnology, engineering, life sciences, and information technology, misgivings by Canadians in relation to the power of Chinese government officials to examine and approve projects provides little reassurance to Canadian direct investments in these areas.

2015).

³³ Some of the more pointed risks related to corruption are outlined by the Canadian Trade Commissioner. See Canadian Trade Commissioner, *Doing Business in China – The Dangers of Engaging in Corrupt Practices*, available at <http://www.tradecommissioner.gc.ca/eng/document.jsp?did=153381>. See also *China's Bribery Culture Poses Risks for Multinationals*, BLOOMBERG, Nov. 21, 2013, available at <http://www.bloomberg.com/news/articles/2013-11-21/china-s-bribery-culture-poses-risks-for-multinationals>; *China's Communist Part axes top general for taking bribers*, CNN, July 31, 2015, available at <http://www.cnn.com/2015/07/31/china/china-military-guo-boxiong-corruption>; *Former Chinese State Oil Boss Convicted of Corruption*, ABC NEWS, available at <http://abcnews.go.com/International/wireStory/chinese-state-oil-boss-convicted-corruption-34414859>; *China Corruption: Life Term for Ex-Security Chief Zhou*, BBC NEWS, June 11, 2015, available at <http://www.bbc.com/news/world-asia-china-33095453>; *Chinese Official Who Ran Oil Giant Admits Bribe taking, Court Reports*, N.Y. TIMES, Apr. 14, 2015, available at http://www.nytimes.com/2015/04/14/world/asia/jiang-jiemin-bribery-trial-china.html?_r=0; *Former Top UN Official Accused in Chinese Bribery Investigation*, ABC NEWS, Oct. 6, 2015, available at <http://abcnews.go.com/International/top-official-accused-chinese-bribery-investigation/story?id=34282162>; *How to Bribe a Chinese Official*, THE ATLANTIC, June 8, 2013 available at <http://www.theatlantic.com/china/archive/2013/07/how-to-bribe-a-chinese-official/277581/> (all last visited on Oct. 15, 2015). See also *supra* note 31, at 8.

³⁴ JIANGNAN ZHU, OFFICIALS' PROMOTION LIKELIHOOD AND REGIONAL VARIATION OF CORRUPTION IN CHINA (2008). See also *supra* note 18, at 134.

³⁵ Zhu, *id.* at 315-6. [Emphasis added]

³⁶ In commenting on the incident, Dean of the School of Life Sciences at Tsinghua University, and Dean of the School of Life Sciences at Peking University, stated "to obtain major grants in China, it is an open secret that doing good research is not as important as schmoozing with powerful bureaucrats and their favorite experts."

³⁷ *Supra* note 21.

2. Chinese State Capitalism

State-Owned Enterprises

Chinese state controlled capitalism are also a central concern in Canada-China investment relations.³⁸ The socialist aspects of China's state controlled capitalism are most visible in its Central-State-Owned enterprises and local-state-owned enterprises ("SOEs").³⁹ The central or local governments appoint SOEs chairpersons. At least, half of appointed board members in SOEs are said to be ministers incumbent of the Chinese central government.⁴⁰ Owing to national security reasons, Chinese SOEs retain control over key sectors, including the natural resource sector.⁴¹ From the perspective of Canadian direct investment in China, wholly foreign-owned enterprises are not an option in relation to key sectors of the Chinese economy, such as the high-tech and natural resources sectors. The only option available would be a Sino-Canadian joint enterprise, where the risk for State influence is arguably higher. From the perspective of Chinese Direct Investment in Canada, major concerns are the "loss of control" over Canadian natural resources to SOEs controlled by the Chinese government, as well as the ability for the Canadian government to effectively manage environmental issues surrounding these activities.

Expropriation and Nationalization

Even in relation to wholly foreign-owned state enterprises doing business outside key sectors of the Chinese economy, the risk of expropriation or nationalization is ever present in China.⁴² Aside from a provision in the 1982 Chinese Constitution, which states that foreign investments "shall be protected by the law of PRC," Article 2 of the Constitution expressly provides for the right of the State to "nationalize, expropriate or transfer ownership of foreign properties, in which case *appropriate compensation* should be paid..."⁴³ Article 5 of the Wholly Foreign-owned Enterprise Law of PRC ("WFEL") states: "... under *special circumstances*, where necessary for the public interest, a wholly foreign-owned enterprise may be expropriated in

³⁸ J. Smart, *Dancing with the Dragon: Canadian Investment in China and Chinese Investment in Canada*, SPP RESEARCH PAPERS, Sep. 2012, available at <http://www.policyschool.ucalgary.ca/sites/default/files/research/dancing-dragon-smart.pdf> (last visited on Oct. 15, 2015).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ The largest and most important SOEs are China National Petroleum Corporation ("CNPC") China Petrochemical Corporation ("SINOPEC"), and China National Offshore Oil Corporation ("CNOOC"). *Supra* note 16, at 11.

⁴² *Supra* note 19. For details on expropriation in China in the context of bilateral investment treaties, see Shen Wei, *Expropriation in Transition: Evolving Chinese Investment Treaty Practices in Local and Global Contexts*, LEIDEN J. INT'L L. 28 (2015).

⁴³ SHOUHUANG LI, THE LEGAL ENVIRONMENT AND RISKS FOR FOREIGN INVESTMENTS IN CHINA 110 (2007).

accordance with legal procedures, and appropriate compensation paid.”⁴⁴ The same wording that initially appeared in Article 2 of the 1979 version of the Sino-foreign Equity Joint Venture Law of PRC was omitted from the revised 1988 version of the law.⁴⁵ Without a clear legal framework specifying the meaning and implications of terms such as ‘special circumstances’ or ‘appropriate compensation,’ the perceived risk of expropriation or nationalization remains high.⁴⁶

3. Canada-China Foreign Investment Promotion and Protection Agreement

A. Overview

As discussed above, the main benefits to be gained from Canada-China relations are different. Canada can: (a) access to Chinese direct investment to expand its production capacity, and grow its economy; and (b) gain access to China’s expanding internal markets. Meanwhile, China can secure a reliable source of energy to meet the growing energy demands of her expanding internal markets.

From a Canadian perspective, the main investment risks and concerns are: (1) loosing control over Canadian natural resources to Chinese SOEs; (2) the risk of bribery and corruption in China; and (3) the risk of expropriation of Canadian investments. Generally, the most relevant obligation under the CC-FIPA is the most-favoured nation (“MFN”) treatment which means that foreign investors should be treated no less favorably than domestic (national treatment) or third party investors within the territory. With respect to (1), the most relevant provisions are those pertaining to investment screening mechanisms referenced in the schedule of the CC-FIPA. With respect to (2) and (3), the most important measure of protection are the CC-FIPA’s provisions that deal with expropriation, as well as enforcement mechanisms provided in part C of the CC-FIPA. Each of these mechanisms is explained below, with a brief commentary on how they fit with the context of Canada-China relations.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ It should be noted that expropriation of private property in Canada, such as farm land, is not uncommon in Canada. See generally the Canada Expropriation Act (R.S.C., 1985, c. E-21).

1. Definitions

Article 1 of the CC-FIPA contains a typically broad definition of ‘investment’ and ‘investor.’ Unlike the NAFTA and the Canada’s model BIT, Article 1(h)(i) expressly includes “concessions to search for and extract oil and other natural resources.”⁴⁷ This reflects China’s interest in Canada’s natural resources, and Canada’s interest in Chinese capital to fuel its energy sector. Another deviation from the NAFTA and Canada’s model BIT is the extended protection provided to business property in Article 1(j) through the terms “and related property rights.”⁴⁸ This broadened coverage afforded to business property rights narrows concerns that foreign investors might receive less than what they would otherwise be entitled to in the event of expropriation. Also, the definition of ‘investor’ contained in Article 1(a) of the CC-FIPA includes a reference to a person that “seeks to make, is making, or has made a *covered investment*.” Pursuant to Article 1(4), a ‘covered investment’ is what is “*admitted in accordance with national laws and regulations*.” [Emphasis added] It signifies that both parties retain some measure of control in admitting foreign investments within their territory. The investment selection mechanisms are discussed in more detail below.

2. National Treatment and Most-Favoured-Nation Treatment

General Principle

At the heart of any international bilateral investment treaty is a concern to ensure that foreign investors are treated no less favorably than other investors in that same host State. It is a mechanism to open domestic markets to foreign investors. As a practical illustration of the workings of this concept, the NAFTA Tribunal ordered payment of USD 6.5 million to an American investor in Canada after the Canadian government implemented a prejudicial ban on chemical exports that only favored Canadian investors.⁴⁹ Protection against discriminatory measures (*de jure*), or the discriminatory effects of non-discriminatory measures (*de facto*), is commonly achieved on two levels: in relation to domestic investors (national treatment obligation); and in relation to third party foreign investors (MFN treatment obligation). Both principles can be further applied to two separate phases of the investment process: pre-establishment phase (establishment and acquisition of an investment); and post-establishment phase (expansion, management, conduct,

⁴⁷ CC-FIPA art. 1.1(h)(i).

⁴⁸ *Id.* art. 1.1(j).

⁴⁹ *S.D. Myers v. Government of Canada*, UNCITRAL, Oct. 21, 2002, available at <http://www.italaw.com/cases/documents/977> (last visited on Nov. 15, 2015).

operation and sale or other disposition of investments). These mechanisms moderate market access to foreign investors. As is common in all international bilateral investment treaties, these two vital concepts of international investment law are found in Articles 5 (MFN obligation) and 6 (national treatment obligation) of the CC-FIPA, with a few noteworthy exceptions.

Exceptions

Unlike MFN treatment, national treatment under the CC-FIPA does not apply to the pre-establishment phase of foreign direct investments. This is first apparent in a footnote to the definition of ‘investor’ in Article 1(2), which states that the elements “seeks to make” and ‘is making,’ as opposed to ‘has made,’ are only applicable to Article 5. More to the point, unlike Article 5, Article 6 specifically excludes the terms ‘establishment’ and ‘acquisition’ from its provision. Article 6 lays down:

Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favorable than that it accords, *in like circumstances*, to its own investors with respect to the *expansion, management, conduct, operation and sale or other disposition* of investments in its territory.⁵⁰

Post-establishment national treatment is also excluded from the notion of ‘expansion’ in sectors that are subject to a prior approval process.⁵¹

Conversely, MFN treatment in Article 5 extends to the pre-establishment and post-establishment phases.⁵² It requires both parties to provide treatment that is no less favorable than that provided to a third party State under “any bilateral or multilateral international agreement in force prior to January 1, 1994.” This would exclude the NAFTA, which entered into force on January 1, 1994.⁵³ MFN treatment does not encompass the dispute resolution mechanisms in other international investment treaties or trade agreements.⁵⁴ Finally, national treatment (post-establishment) and MFN treatment (pre-establishment and post-establishment) do not apply to any existing non-conforming measures maintained within a party’s territory.⁵⁵

⁵⁰ CC-FIPA arts. 5 & 6(1). [Emphasis added]

⁵¹ *Id.* art. 6(4).

⁵² *Id.* art. 5.

⁵³ *Id.* art. 8(b).

⁵⁴ *Id.* art. 5(3).

⁵⁵ *Id.* art. 8.2(a)(i).

Commentary

Ensuring that foreign investors are treated no less favorably than domestic or third party investors is critical to promoting bilateral investment relations, the exclusion of national-treatment from the pre-establishment phase under Article 6 of the CC-FIPA undermines, to some degree, Canada's justification for concluding an investment treaty with China, i.e., gaining access to China's vast, expanding markets.⁵⁶ Conversely, China is indirectly granted pre-establishment national treatment through MFN treatment. This potentially signifies increased access to Chinese investments in Canada's natural resources sector. Yet, pre-establishment national treatment also remains possible for Canada under the MFN treatment in Article 5. This could occur through a US-China or EU-China BIT. Obtaining pre-establishment national-treatment to Canadian investors would seem important in light of the additional risk of bribery and corruption in the pre-establishment phase of investments in China.⁵⁷ In any event, the most recent amendments to China's Catalogue for the Guidance of Foreign Investment Industries contains a list counting 349 'encouraged' industry sectors. It is compared to a reduced list of 38 'restricted' and 36 'prohibited' industry sectors which indicates that the trend is towards greater openness, transparency, and liberalization towards FDI.⁵⁸ Finally, the carve-out for existing non-conforming measures found in Article 8.2(a)(i) is a realistic and necessary provision in light of each country's unique historical trajectory. It should also be noted that even the clearest and most conforming of measures can be applied in a discriminatory way. If anything, a complex web of clear and precise rules can be applied more easily, diligently, predictably, precisely and cautiously to foreign investors than otherwise non-conforming measures.

3. *Investment Screening Mechanisms*

General Principles

Canada's energy sector and China's vast expanding internal markets are somewhat protected through investment screening mechanisms referenced in Annex D.34 of the CC-FIPA. In relation to China direct Investment, Canada retains its capacity to review and approve proposed investments under the Investment Canada

⁵⁶ Accessing China's vast markets was a driving force behind the CC-FIPA.

⁵⁷ The Canadian Trade Commissioner Service, *Doing Business in China – The Dangers of Engaging in Corruption Practices*, available at <http://www.tradecommissioner.gc.ca/eng/document.jsp?did=153381&cid=512&oid=32> (last visited on Oct. 15, 2015).

⁵⁸ Public Information Services, *Invest in China, Catalogue for the Guidance of Foreign Investment Industries*, available at http://www.fdi.gov.cn/1800000121_39_4830_0_7.html (last visited on Oct. 15, 2015).

Act (“ICA”), including through national security reviews.⁵⁹ Meanwhile, China retains the capacity to review a proposed Canadian investment through its “laws, regulations and rules relating to the regulation of foreign investment.”⁶⁰ Although the terminology employed relative to China’s screening mechanism is arguably more vague and opaque than that employed relative to Canada, the investment screening mechanism under ICA is arguably itself opaque, non-transparent, and lacking specificity in language.⁶¹ In either case, decisions as to whether or not to approve a proposed inbound investment are excluded from the CC-FIPA’s dispute settlement provisions.⁶² For Canada, the CC-FIPA further specifies that *all* decisions made under the ICA are excluded from the dispute settlement provisions.⁶³

The Investment Canada Act

Concerns of Chinese SOEs accessing, acquiring and controlling Canadian assets, or of ‘loosing control’ over Canada’s natural resources to Chinese State-owned enterprises, particularly in the Canadian oil sands,⁶⁴ are alleviated to some degree by the review mechanisms in ICA. It seek to ensure that a foreign investment that triggers the applicable review threshold (CAD 600 million in enterprise value)⁶⁵ is of ‘net benefit’ to Canada. In applying the ‘net benefit’ test, special provisions apply to SOEs, a term broadly defined as including *entities* that are “*controlled or influenced, directly or indirectly, by a government or government agency.*”⁶⁶ The definition of SOE goes even further to include an *individual* “acting under the direction of a government or agency,” or “acting under the influence, directly or indirectly” of such a government or agency.⁶⁷ In addition to the usual “net benefit test,” SOEs falling above the lowed review threshold (CAD 369 million in asset value) must satisfy the Canadian government of other factors, such as the investment’s commercial orientation, freedom from political influence, sound corporate governance and transparency, and positive contributions to the productivity and industrial efficiency

⁵⁹ CC-FIPA Annex D.34(1)(a)(b).

⁶⁰ *Id.* D.34(2)(a)(b).

⁶¹ *Supra* note 31, at 6.

⁶² CC-FIPA Annex D.34(1).

⁶³ *Id.* n.12. [Emphasis added]

⁶⁴ Industry Canada, Investment Canada Act, Statement Regarding Investment by Foreign State-Owned Enterprises, available at <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81147.html> (last visited on Oct. 15, 2015).

⁶⁵ For details on current applicable review thresholds under ICA, see Industry Canada, Investment Canada Act: Thresholds, available at https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00050.html (last visited on Oct. 15, 2015).

⁶⁶ ICA (R.S.C., 1985, c. 28 (1st Supp.)), § 3 (Definition of Stated-owned Enterprise) [Emphasis added]

⁶⁷ *Id.* [Emphasis added]

of the Canadian business.⁶⁸

National Security Reviews

Access or loss of control over Canada's natural resources, or any other important Canadian asset to SOEs is further alleviated by the national security review screening mechanism contained in Part IV.1 (Investments Injurious to National Security) of ICA.⁶⁹ The national security review mechanism has been used on several occasions, more recently as a means to block a CAD 30-million investment (clearly below the CAD 369 threshold under the 'net benefit' test of ICA) by a Canadian subsidiary of Beijing-based Beida Jade Bird Group, a company controlled by China's Peking University, located just two kilometers away from the Canadian space agency.⁷⁰ Canada's national security review mechanism is aligned with the investment review process found under the US,⁷¹ which has also been used to block questionable Chinese investments.⁷² China has also its own national security review mechanism. The Canadian national security review mechanism is triggered when there are "reasonable grounds to believe that an investment by a non-Canadian could be *injurious to national security*,"⁷³ regardless of any applicable monetary review threshold under the 'net benefit' test under ICA, and regardless of whether or not control in a Canadian business is acquired. The word 'injurious' and the concept of 'national security' are deliberately left undefined. The national security review mechanism does not specify whether it applies to a specific sector, or type of investment.

Commentary

Concerns over "loss of control" of Canada's natural resources, especially in relation

⁶⁸ *Id.*

⁶⁹ ICA pt. IV.1. (Investments Injurious to National Security)

⁷⁰ Considering stories of rampant stories of corruption at Peking University, one cannot help but question how far corrupt practices in China extend beyond national and cultural barriers. See J. Gray, *Ottawa's National Security' Review a Warning to Foreign Investors*, GLOBE AND MAIL, July 1, 2015, available at <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/ottawas-national-security-review-a-warning-to-foreign-investors/article25219593> (last visited on Oct. 15, 2015).

⁷¹ In addition to China, other countries such as the UK, Japan and Germany have also implemented a national security review investment screening mechanism. See Competition Review Panel, Archived 7 – Competitiveness Agenda: the Legal Foundations, available at <http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/00059.html> (last visited on Oct. 15, 2015).

⁷² J. Pace, *Obama Blocks Chinese Purchase of U.S. Wind Farms*, Sept. 28, 2012, available at http://www.washingtonpost.com/business/economy/obama-blocks-chinese-purchase-of-us-wind-farms/2012/09/28/e1cd8246-09bd-11e2-a10c-fa5a255a9258_story.html (last visited on Oct. 15, 2015).

⁷³ *Supra* note 69. [Emphasis added]

to Chinese SOEs, is alleviated to some degree not only by the broad scope of discretion allowed under the ICA's net benefit' test, but also by the even broader national security review mechanism found in ICA. While such terms as "laws, regulations, and rules relating to the regulation of foreign investment" employed in Annex D.34 (2) of CC-FIPPA relative to China provides no certainty to Canadian investors as to the specific investment mechanisms to be used to screen Canadian Direct Investments, the language and concepts to screen foreign investments under ICA offer no greater certainty to Chinese investors. In that sense, it would also be said that Canada's natural resource sector is as open to foreign investments as Canada is willing to open it to Chinese direct investment, or as open as Chinese markets are willing to be open to Canadians. This is especially true for Canada considering that *all* decisions made under ICA are exempt from investor dispute settlement provisions. [Emphasis added] While national security reviews remain an integral part of the foreign investment screening mechanism under ICA, ensuring minimum degree of clarity and certainty could help improve foreign investor confidence towards Canada.

4. Expropriation

General Principles

The *Ping An Life Insurance Co. of China, et al. v. Kingdom of Belgium*⁷⁴ case is an illustrative case of the risk posed by expropriation in relation to FDI. In this case, China's second largest life insurer had invested in Fortis Bank, which collapsed in 2008-2009, and was subsequently bailed out and taken over by the Belgium government. The USD 2 billion dollar private arbitration claim subsequently brought by *Ping An* against the Belgium government was dismissed because Belgium's financial restructuring measures allegedly amounted to expropriation and violated the China-Belgium BIT.⁷⁵ In *Metalclad Corp. v. United Mexican States*,⁷⁶ the NAFTA tribunal decided that the property on which Metalclad's waste disposal facility was located was converted into an ecological reserve, taking all private use rights away from Metalclad. Expropriation occurred due to Metalclad's refusal to pay bribes to government officials.⁷⁷ Metalclad received an award for CAD 16.7 million.

⁷⁴ *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium* (ICSID Case No. ARB/12/29), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5912_En&caseId=C2463 (last visited on Oct. 15, 2015).

⁷⁵ *Id.*

⁷⁶ *Metalclad Corp. v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), available at <https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB%28AF%29/97/1> (last visited on Oct. 15, 2015).

⁷⁷ Rasha Bhojwani, *Detering Global Bribery: Where Public and Private Enforcement Collide*, 112 COLUMBIA L. REV. 66

Due Process

Like most BITs, Article 10 of the CC-FIPA contains measures that help alleviate concerns surrounding nationalization or expropriation. Article 10 provides in part that foreign investments “shall not be expropriated, nationalized or subjected to measures having an effect equivalent to expropriation or nationalization [...] except for a public purpose, under domestic due procedures of law, in a non-discriminatory manner and against compensation.”⁷⁸ As one author rightly points out, the terms “domestic due procedures of law” is tilted in favor of national laws, and arguably offers less protection than the terms “due process of law,” as laid down in the Canadian model BIT, which would allow more room to rely on principles of customary international law concerning expropriation.⁷⁹ The fact that the CC-FIPA limits the application of customary international law may be due to China’s unique historical trajectory and limited participation in shaping customary international law.

Definition of Indirect Expropriation

A critical issue in international investment law involves differentiating legitimate public interest regulations from disguised regulations aimed at expropriation. This issue is attributable to the absence of a clear definition of indirect expropriation.⁸⁰ Article 10 of the CC-FIPA covers indirect expropriation through the words: “effect equivalent to expropriation or nationalization.” Annex B.10 of the CC-FIPA goes further by clarifying the notion of *indirect* expropriation by specifying that expropriation can occur “without formal transfer of title or outright seizure.”⁸¹ Annex B.10 of the CC-FIPA takes into account the ‘economic impact’ as well as the extent to which a measure “interferes with reasonable, investment-backed expectations.”⁸² These economic considerations are qualified and balanced by the following terms: “the sole fact that a measure or series of measures [...] has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred.”⁸³ These last terms ensure a balanced, legalistic determination of indirect expropriation over a broader discretionary approach

(2012), available at http://columbialawreview.org/wp-content/uploads/2012/07/112-1_Bhojwani_R.pdf (last visited on Oct. 15, 2015).

⁷⁸ CC-FIPA art. 10. [Emphasis added]

⁷⁹ Wei, *supra* note 42, at 590.

⁸⁰ *Id.* at 582.

⁸¹ CC-FIPA Annex B.10(1). [Emphasis added]

⁸² *Id.* B.10.

⁸³ *Id.* B.10(2)(a).

focused solely on economic factors.⁸⁴ As a final important qualifier, Annex B.10 (3) states that a measure aimed at protecting the legitimate public objective, such as the environment, does not constitute indirect expropriation.⁸⁵

Commentary

The broad concept of expropriation, including the definition of indirect expropriation contained in Annex 10.B of the CC-FIPPA, is as sophisticated a notion of expropriation as can be found in international investment agreements. With the exception of the word ‘domestic’ added to the concept of ‘due process,’ the provision on expropriation in Article 10 of the CC-FIPPA follows the provision contained in Canada’s model BIT.⁸⁶ The strength of the provision on expropriation should relieve at least some concerns surrounding the risk of expropriation in China. Compensation according to the fair market value of the investment, either before the expropriation or before the public is informed of the expropriation, combined with an expanded notion of business property contained in the definition of ‘investment’ laid down in CC-FIPA Article 1(j), ensures a fair measure of compensation.⁸⁷ While concerns surrounding the Canadian government’s ability to regulate on environmental matters go beyond the scope of this work, according to Annex B.10 (3), the Canadian government retains its ability to pass legitimate, non-discriminatory measures for protecting the environment.⁸⁸

5. Investor State Dispute Arbitration

General Principles

Under Part C of the CC-FIPPA, an investor may submit a claim to arbitration under the ICSID Convention, the Additional Facility Rules of ICSID, or the UNCIRAL Arbitration Rules.⁸⁹ In addition to party specific requirements under Article 21(2) and Annex C.21 of the CC-FIPA, a claimant must meet certain condition precedents in Article 21, which include an obligation to first attempt to settle a dispute through informal consultation.⁹⁰ Parties also have an obligation not to file a claim earlier than

⁸⁴ Wei, *supra* note 42, at 585.

⁸⁵ CC-FIPA Annex B.10(3).

⁸⁶ Canada’s model BIT, Annex B.13(1), available at <http://www.italaw.com/documents/Canadian2004-FIPPA-model-en.pdf> (last visited on Oct. 15, 2015).

⁸⁷ CC-FIPA art. 10.

⁸⁸ *Id.*

⁸⁹ *Id.* art. 22(1).

⁹⁰ *Id.* art. 21(1).

six (6) months after the events giving rise to the claim,⁹¹ and no later than three (3) years after knowledge of the alleged breach and knowledge that the loss or damages have been incurred as a result of the breach.⁹² Finally, Article 28 provides for public access to hearings and documents, subject to a necessary carve out in relation to confidential business information.⁹³ Public access to arbitration requirements and hearings is subject to a determination by the respondent State for the public interest. While this represents a departure away from the transparency found in Canada's model BIT and the NAFTA, it also represents a departure towards transparency in China's treaty practice.⁹⁴

Commentary

Rights and obligations under the CC-FIPA are only as great as the measures available to enforce them. Differences in language and culture can act as an important impediment to obtaining just and appropriate remedies from domestic courts, especially in hostile business environments where the rule of law is upheld to varying standards,⁹⁵ or where corruption (even at the highest level of the judiciary) constitutes a real risk.⁹⁶ In that sense, the dispute settlement provisions of the CC-FIPA are unarguably an invaluable measure of protection to foreign investors under the CC-FIPA. With the notable exception of decisions as to whether or not to admit a foreign investment within a party's territory, which further emphasizes the control each country preserves over accepting foreign investments within its territory, a breach of any obligations under the CC-FIPA, most notably those on which discussions in this work have focused on (national treatment, MFN treatment, expropriation), opens up recourse to the dispute settlement provisions in Part C of the CC-FIPA, described by some commentators as a "huge boon for investors."⁹⁷ The large monetary awards obtained through investor dispute settlement mechanisms

⁹¹ *Id.* art. 21(2)(b).

⁹² *Id.* art. 21(2)(f).

⁹³ *Id.* art. 28.

⁹⁴ See generally *supra* note 16, at 45. See also C. Walsh & M. Woods, *The Canada-China Foreign Investment Protection and Promotion Act*, Tradeready.ca, available at <http://www.tradeready.ca/the-canada-china-foreign-investment-protection-and-promotion-act> (last visited on Oct. 15).

⁹⁵ The Rule of Law Index developed by the World Justice Program ranks Canada 14 globally, compared to China's ranking of 71. In terms of regulatory enforcement, Canada ranks 13, and China 66. See World Justice Program, Rule of Law around the World, available at <http://worldjusticeproject.org/rule-law-around-world> (last visited Oct. 15, 2015).

⁹⁶ See, e.g., L. Hilgers, *A Chinese Supreme Court Justice Falls from Grace*, available at <http://foreignpolicy.com/2015/07/28/china-supreme-court-corruption-crackdown> (last visited on Oct. 15, 2015).

⁹⁷ See, e.g., M. Kronby, M. Barutciski & J. I. Goldman, *The Promise (and Limitations) of the New Canada-China Investment Treaty*, available at https://bennettjones.com/Publications/Updates/The_Promise_%28and_Limitations%29_of_the_New_Canada-China_Investment_Treaty (last visited Oct. 15, 2015).

also serve the important function of deterring parties from breaching their treaty obligations.

4. Conclusion

Owing to China's historical trajectory and regime, Canada-China foreign direct investment relations give rise to risks and concerns that are unique. At the same time, not least because of the complementarity that exists between both economies, significant benefits can be gained from building and maintaining strong Canada-China bilateral investment relations. This is so generally in relation to Canada's natural resource sector, and specifically Alberta's oil sands, where attracting Chinese direct investments could lead to the development of new clean technologies necessary to help Canada expand her energy production capacity, and fuel her own economy. By the same token, China is in need of reliable foreign sources of energy to meet increasing energy demands of her vast internal markets, which also present invaluable investment opportunities for Canadians. Unlocking these mutual economic benefits invariably means addressing risks and concerns in Canada-China relations. From a Canadian viewpoint, the main concerns are: losing control over Canada's natural resources to Chinese SOEs; the risk posed by corruption and bribery in China; and the risk of expropriation of Canadian investments in China.

The final provisions in the CC-FIPA reflect each party's self-interest in their investment relations. With perhaps the single exception of the risk of corruption and bribery in China, a risk which can hardly be addressed within an international investment agreement, the core provisions of the CC-FIPA alleviate some of the more important concerns identified in Canada-China investment relations. The national treatment (post-establishment) and MFN treatment (pre-establishment and post-establishment) are a first necessary step. The obligations should be viewed as a long-term investment considering the trend in China towards further liberalization and openness. The carve out for existing non-conforming measures is insignificant if otherwise conforming measures are used in a discriminatory manner. Circumscribing the language of the 'net benefit' test and clarifying the scope of national security reviews under ICA would help promote investments. The special requirements that apply to SOEs, especially for investment targeted at natural resources, alleviate concerns expressed over losing control of Canadian natural resources to Chinese SOEs. Combined with broad definitions of investor and

investments, and expansive notions of private property rights, provisions on direct and indirect expropriation are as strong and sophisticated as can be found in today's bilateral investment treaties. While investor dispute settlement mechanisms are likely to provide the strongest measure of protection and reassurance to foreign investors, it is in the best interest of both parties to ensure they uphold their obligations under the CC-FIPA, and to ensure that foreign investors receive treatment that is no less favorably, in law or fact, than that accorded to other investors within their territory. Despite the CC-FIPA, the risk of corruption and bribery in China remains a high concern for Canadian investors wishing to invest in China.