

A CONCLUDED CANADA-CHINA FIPA AND ITS IMPLICATIONS FOR CANADIAN BUSINESSES

Justin Carter

Over the past half century, the bilateral investment treaty (BIT) has become one of the most common legal vehicles employed by countries to develop stronger trade and investment relationships amongst themselves. BITs outline two fundamental sets of provisions. Substantive provisions cover obligations that host-governments must uphold to investors from the co-signatory, such as national treatment, most-favoured nation treatment, and standards surrounding expropriation. Complementing these provisions are procedural standards, which govern the rules surrounding the dispute process between disputant investors making claims against host-governments. Collectively, these two core sets of provisions provide a legal framework for private parties and governments to refer to when understanding the legal particularities of bilateral investment between home and host countries.

Canada, which calls its BITs foreign investment promotion and protection agreements (FIPAs), has so far entered into twenty-four BITs, mostly with developing countries. In 1994, Canada and China began negotiating a FIPA; negotiations remain ongoing. The implications of a successfully concluded Canada-China FIPA are clear. Once concluded, this agreement would arguably be Canada's most important FIPA, although such an asser-

“The recent enthusiastic disposition exhibited by the Conservative government to reach a conclusion to the agreement can be explained by economic drivers as much as by symbolic drivers. It is important for the federal government, as well as provincial governments, to be seen as taking a spirited approach in their dealings with China.”

tion is not based on recent indicators of Canadian investment in China. As of the end of 2010, the total stock of Canadian FDI in China amounted to only CDN \$4.8 billion, a little more than a third of the total stock of Canadian FDI in Hungary — a country with which Canada already has a FIPA.¹ Instead, the importance of a Canada-China FIPA resides in growth prospects for both Canadian investment in China as well as Chinese investment in Canada. While Chinese FDI in Canada has also remained relatively negligible until recently, direct investment inflows have increased dramatically since 2008 with total stock at the end of 2010 totalling CDN \$14.06 billion.²

Original negotiations of the Canada-China FIPA were put on hold until after China's accession to the World Trade Organization (WTO), having resumed in 2004. Since 2004, twelve rounds of negotiations have taken place, with the last round taking place in Beijing in January 2010. While negotiations have indeed been protracted, recent comments made by Canadian trade Minister Ed Fast indicate that the Canada-China FIPA is close to conclusion, and will likely be signed sometime in mid-2012.³

So why has it taken so long to reach an agreement? Research conducted by the author in 2010 exposed some key differences in preferences between the Canadian and Chinese sides. First, Canada's FIPAs use a pre-establishment model, which grant protections to not only already admitted investment, but also those seeking admission. These standards apply to both national treatment and most-favoured nation protections. In contrast, China does not include any pre-establishment language in its BITs. The second cause of likely disharmony between the two sides' preferences are issues surrounding transparency regarding non-conforming measures. In all its most recent FIPAs, Canada outlines all the relevant statutes and regulations that might affect admission or treatment of investment. China has not taken the same approach with its BIT program, instead consistently opting for blanket clauses that give it the right to regulate investment subject to all its laws and regulations. Finally, and probably the most complicated set of differences between the two sides pertains to preferences surrounding procedural provisions. Canada has taken a very aggressive approach on dispute resolution and procedure in its FIPAs, notably surrounding public access and allowances for *amici* in the arbitration process. The procedural provisions of China's investment treaties are patently broad, and do not afford the

same level of transparency as Canada's FIPAs.

The recent enthusiastic disposition exhibited by the Conservative government to reach a conclusion to the agreement can be explained by economic drivers as much as symbolic drivers. It is important for the federal government, as well as provincial governments, to be seen as taking a spirited approach in their dealings with China. With global economic conditions continuing to be rife with uncertainty, the Chinese market is viewed as an important hedge against any turmoil that might generated in the United States or Europe. With New Zealand having entered into a free-trade agreement (FTA) with China in 2008, and Australia close to agreement on an



FTA (not to mention the over thirty European countries that are party to an investment treaty with China), it is important for the federal government to not be viewed as though it is dilatory on the China file. The symbolic nature of the agreement is accentuated by Minister Fast's recent comments stating that the agreement "will send a clear message to businesses that both countries are open for business and are open for investment."⁴

The question of whether or not the conclusion of a Sino-Canadian investment agreement will actually increase bilateral investment between Canada and China is difficult to answer. So the argument goes that by creating an investment framework that is defined by clear and enforceable rules reduces risks for investors, the attractiveness of investing in the other jurisdiction increases substantially. Lower risks mean lower contingent costs when examining the feasibility of the investment. However, conclusions reached from empirical research in this area is mixed, and is generally limited to examining developing countries that enter into BITs with developed countries.⁵

With all the benefits attached with a concluded agreement, Canadian firms must realize that a Canada-China FIPA will not alleviate many of the regulatory headaches or perceived unfair decisions that are sometimes carried out by the Chinese government against foreign companies. It should also be remembered that the BIT, while being a treaty between two countries, is in practice a contract between investors and their host government. Accordingly, the Canada-China FIPA will offer no protections against commercial malfeasance, such as IP theft.

However, for Canadian businesses already operating in China, the FIPA will add a layer of protection currently unavailable to them, bringing investment disputes between Canadian companies and the Chinese government into the realm of international law, and away from Chinese courts. Canadian companies will for the first

time have access to international fora to adjudicate disputes against the Chinese government should they arise; although it should be remembered that not once has a claim been brought against China in international fora pursuant to any of its bilateral investment treaties.

The Canada-China FIPA will also create a more predictable regulatory climate for Canadian companies operating in China. After the FIPA is signed, China will be obligated to not adopt any measures that create a more restrictive operating environment for Canadian companies, subject to the agreement's public interest clause and non-conforming measures. The agreement will also give Canadian companies protections surrounding onerous performance requirements (such as local purchase requirements), which has been a common concern for foreign companies invested in China.

Footnotes

- <1> See Foreign Affairs and International Trade Canada, *Canadian Direct Investment Abroad (Stocks)*, <http://www.international.gc.ca/economist-economiste/assets/pdfs/FDI_stocks-Outward_by_Country-ENG.pdf>
- <2> See Foreign Affairs and International Trade Canada, *Foreign Direct Investment (Stocks) in Canada*, <http://www.international.gc.ca/economist-economiste/assets/pdfs/FDI_stocks-Inward_by_Country-ENG.pdf>
- <3> See CBC News, *China-Canada Investment Deal in the Works*, Oct 13, 2011, <<http://www.cbc.ca/news/politics/story/2011/10/13/pol-china-investment-agreement.html>>
- <4> Ibid.
- <5> For empirical studies on the efficacy of BITs in promoting investment, see Jeswald W. Salacuse and Nicholas P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" (2005) 46 Harv. Int'l L.J. 67; and Eric Neumayer and Laura Spess, "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries" (2005) 22 World Development 1567.

For further reading, see Justin Carter, "The Protracted Bargain: Negotiating the Canada- China FIPA" (2009) Canadian Yearbook of International Law.

Justin Carter is program manager with China Links. For questions or queries regarding this article, please email the author at carterj@exchange.ubc.ca.