

CANADA-CHINA INVESTMENT TREATY ENTERS INTO FORCE AFTER 30 MONTH WAIT

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The Canada-China Foreign Investment Promotion and Protection Agreement (known as a “FIPA”) will enter into force on October 1, 2014, some 30 months after the initial announcement of this treaty by Prime Minister Stephen Harper during his February 2012 state visit to China.

The entry into force of the Canada-China FIPA has been delayed by political controversy and a legal challenge by a B.C. First Nation. In the 2013 decision, *Hupacasath First Nation v Canada*, the First Nation band failed to obtain a declaration that Canada must consult them prior to ratifying the FIPA. The Federal Court of Canada determined that the FIPA’s adverse impact on the First Nation’s rights and title was minimal and speculative. The Court found that the FIPA does not address any specific lands or projects and is a broad, national framework similar to the North American Free Trade Agreement. Although the pending appeal from this decision remains to be decided, the Canadian government’s ratification of the FIPA demonstrates that it is confident that this decision will be upheld.

Investment treaty protections and procedure

The Canada-China FIPA protects Canadian investors in China and Chinese investors in Canada. The two host governments are required to observe a number of obligations to investors from the other party, including obligations to:

- pay compensation for direct or indirect expropriation;
- treat foreign investment fairly and equitably and accord it full protection and security in accordance with international law;
- provide due process before courts and tribunals;
- refrain from discriminatory or protectionist conduct;
- apply laws transparently and impartially; and
- allow for repatriation of profits and transfer of capital.

Certain government measures are exempt from the application of the FIPA. These include measures

regulating cultural industries and non-discriminatory environmental measures necessary to protect the health of humans, animals and plants, or necessary for resource conservation. Other exemptions cover government measures to protect the integrity of the financial system and national security interests.

The FIPA allows Canadian investors in China, or Chinese investors in Canada, to enforce their rights through international arbitration rather than through the host government's national court system. The Canada-China FIPA also has a distinctive "cooling off" period when a claim concerns a measure by the Chinese government. A Canadian investor must not only negotiate before arbitration, but also pursue China's administrative reconsideration procedure for at least four months, where available.

All Canada-China FIPA arbitral awards will be public, subject to protection of confidential information. Investors may therefore find their disputes brought into the limelight. The Canadian government has also declared that it will make written submissions public, and, according to the FIPA, either Canada or China may make documents public when they deem it to be in the public interest to do so.

The arbitral awards that resolve investor disputes with host governments are enforceable against host state assets in over 150 countries via two widely ratified treaties known as the *New York Convention* and the *ICSID Convention*. These enforcement provisions create a powerful incentive for states to comply with investment treaty awards.

Future trends and implications for business

The ratification of the Canada-China FIPA provides greater certainty and protection to Canadian investors in China. Meanwhile, Canadian businesses, particularly in the natural resources sector, will also become more attractive for Chinese investors.

China's legal system is gradually becoming more transparent and the Canada-China FIPA will reinforce this trend. Although China has ratified over 100 investment treaties today, China's early treaties limited the rights of investors to bring claims solely for the value of expropriated assets and did not include any transparency provisions. The Canada-China FIPA, by contrast, has much broader protections and greater transparency.

The effects of China's broader investment protections remain to be tested. In 2011, the first investment treaty claim against China was registered by a Malaysian investor at the International Centre for the Settlement of Investment Disputes (ICSID). That case has since settled on confidential terms and no other investment disputes involving China are public. Canadian investors may become the first to successfully resort to the greater international remedies that China is now willing to afford to certain foreign investors.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.