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The Canada-China Investment Treaty – Lessons for a U.S.-China BIT?

by James J. Saulino*

I. Introduction

On September 9, 2012, Canada and China signed a new investment agreement, known in Canada as a Foreign Investment Promotion and Protection Agreement ("FIPA"), and elsewhere as a Bilateral Investment Treaty ("BIT"). The Canada-China FIPA is the result of nearly two decades of effort. It contains, in one form or another, all of the key substantive protections common to most other BITs—national treatment, most favored nation treatment ("MFN"), fair and equitable treatment, compensation for expropriation, and full protection and security. It also includes an investor-state dispute settlement mechanism that is broadly similar to the kind found in other investment treaties.

Canada based its negotiations on its Model FIPA, which was last publicly updated in 2004. And indeed, the agreement resembles Canada's 2004 Model FIPA in many ways. However, it also contains some key deviations from Canada's model text. These deviations suggest where some of the "hot spots" were in the negotiation and indicate where key concessions may have been made.

The following is an analysis of some of the key provisions where the Canada-China FIPA diverges from the approach taken in Canada's Model FIPA. In particular, this article focuses on five subjects: (1) National Treatment, (2) Performance Requirements, (3) Existing Non-Conforming Measures, (4) Transparency of Regulations, and (5) Transparency of Arbitral Proceedings.

For each subject, the article compares Canada's model text to that of the Canada-China FIPA and assesses both the possible motivation for and effects of the apparent compromises that were made. In addition, the article compares each of these to the corresponding provisions in the 2012 U.S. Model BIT in order to draw out any potential lessons and better understand how each area might be handled in a potential U.S.-China BIT.

II. National Treatment

As noted above, the Canada-China FIPA contains the usual substantive protections of a BIT, including the requirement to provide "national treatment." At Article 6.1, the Canada-China FIPA states:

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> Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favourable 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.

Likewise, the 2004 Canada Model FIPA states at Article 3.1:

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

As is apparent, the list of investment-related activities that are protected are the same, with two notable absences in the Canada-China agreement: protection for "establishment" and "acquisition."

Interestingly, the MFN clause of the Canada-China FIPA does protect establishment and acquisition, in addition to the other investment related activities listed above. In this way, the MFN clause of the Canada-China FIPA is almost exactly identical to the MFN clause in the Canada Model FIPA. Thus, at Article 4.1, the Canada Model FIPA states:

> Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the **establishment, acquisition**, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

And at Article 5.1, the Canada-China FIPA states:

> Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Contracting Party with respect to the **establishment, acquisition**, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

Thus, it is only with respect to the national treatment clause that the Canada-China Agreement excludes protection for "establishment" and "acquisition."[1] Given that this is a deviation from

[1] To eliminate any doubt, the Canada-China FIPA reiterates this distinction between the scope of the national treatment clause and the MFN clause in Article 1.2, where it defines an "investor" as

(continued…)

Canada's model national treatment clause, it is reasonable to assume that the change was requested (and bargained for) by China. The question is: why?

Generally speaking, the practical impact of an MFN clause on a host government's freedom to pursue national policy is less far-reaching than that of a national treatment clause, because the MFN clause only prohibits discrimination *among foreigners* rather than between nationals and foreigners. The national treatment clause, in this way, strikes closer to home, prohibiting a government from extending preferences to its own national investors that it may not wish to extend generally.[2]

Thus, the effect of excluding "establishment" and "acquisition" from the list of activities protected by the national treatment clause is to allow China to administer preferences for its own nationals who are seeking to establish or acquire an investment, or, analogously, to impose barriers for foreign investors who are seeking to establish or acquire an investment.[3] Such preferences for domestic industry can be used, for example, to pursue a national industrial policy. Under the text as negotiated, all that is required is for the host government to be evenhanded between national investors and foreign investors who already have established investments in their territories (and even this obligation is limited by the "Existing Non-Conforming Measures" exception, discussed below). With these activities excepted, China is free to administer or enact measures that have the effect of championing home-grown industries or insulating them from foreign competitors.[4]

(continued…)

any natural person or enterprise that "seeks to make, is making or has made a covered investment," but then adds in a footnote that "the elements 'seeks to make' and 'is making' in the definition of an investor are only applicable with respect to Article 5 [MFN]." This also forecloses the possibility that an investor could make a claim based on a violation of fair and equitable treatment in the pre-establishment phase of the investment.

[2] *See* MOST-FAVOURED-NATION TREATMENT: A SEQUEL, UNCTAD Series on International Investment Agreements II, United Nations (2010), p. 102 ("Worth noting is that NT [National Treatment] is much more central than MFN treatment for purposes of liberalizing the entry regime of the host State, given that most barriers of entry are measures inconsistent with NT and only a few with MFN treatment.")

[3] Notably, Canada would be prohibited from doing the same by virtue of the commitments it has already made in other investment treaties. This is because Canada has already extended its national treatment clauses in other investment treaties to cover pre-establishment activities. *See, e.g.*, NAFTA Art. 1102; Canada-Jordan FIPA, Art. 3. Since the MFN clause in the Canada-China FIPA covers pre-establishment protections, a Chinese investor would be able to invoke the more favorable national treatment clauses to which Canada has committed with these other treaty partners, thereby gaining the right to national treatment in the pre-establishment phase in Canada.

[4] 2012 National Trade Estimate Report on Foreign Trade Barriers, Office of the U.S. Trade Representative, p. 89 ("[T]here is growing concern that other steps China has taken continue to

(continued…)

These pre-establishment protections are considered by many foreign firms to be crucial to ensuring market access, and thus the decision not to include them was a significant one in the Canada-China FIPA.[5] Indeed, an October 2012 report by the U.S. Chamber of Commerce noted three characteristics of China's inbound foreign investment approval process that give rise to concerns among foreign investors: "(i) industrial policies explicitly designed to foster domestic industries and national champions; (ii) relatively opaque inbound FDI approval processes explicitly mandated to help China achieve its industrial policy goals; and (iii) administrative and judicial review processes that generally do not provide meaningful recourse for unsuccessful investment applicants."[6] Each of these would be impacted by a national treatment clause that covered "establishment" and "acquisition."

These issues are therefore likely to be important in negotiations over a U.S-China BIT. The U.S. China Business Council indicated in its February 2012 "statement of priorities" that among the most important elements of a future U.S.-China BIT would be "national treatment provisions that apply to new and existing investments."[7]

The U.S. Model BIT takes precisely the same approach as the Canada Model FIPA, requiring protection for the full range of investment related activities—establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments—in both its national treatment and MFN clauses. Thus, while one cannot predict the outcome of a U.S.-China BIT negotiation as to this specific issue, it seems certain that these pre-establishment protections have been and will continue to be a key topic of negotiation between those two countries as well.

III. Performance Requirements

(continued…)

discriminate against or otherwise disadvantage foreign investors. These restrictions are often accompanied by other problematic industrial policies, such as the increased use of subsidies and the development of China-specific standards. Many of these developments appear to represent protectionist tools created by industrial planners to shield inefficient or monopolistic enterprises, particularly those in which the Chinese government has an ownership interest, from competition.")

[5] *Market Access is Key Area in U.S. China BIT Talks, But Outcome Uncertain*, Inside U.S. Trade, October 19, 2012.

[6] *China's Approval Process for Inbound Foreign Direct Investment: Impact on Market Access, National Treatment, and Transparency*, U.S. Chamber of Commerce, p. 76, available at: http://www.uschamber.com/sites/default/files/international/asia/china/files/1210_Chinainbound_inside.pdf.

[7] *U.S.-China Business Council Board of Directors Statement of Priorities in the U.S.-China Commercial Relationship*, U.S.-China Business Council, February 10, 2012, available at: https://www.uschina.org/public/documents/2012/02/board_priorities.pdf

A second area of interest in the Canada-China FIPA concerns performance requirements—measures which have the effect of discriminating against foreign investors or otherwise distorting the competitive playing field in a manner that burdens foreign investment. By requiring a foreign investor to, for example, observe "domestic content" requirements for the products it produces, or to purchase goods or services from local vendors, a host government can significantly impact a foreign investor's ability to implement its preferred method of production in its territory.

Performance requirements come in two general types: those that are imposed on an investor as a condition for investing *at all*, and those that are imposed on an investor only as a condition for *receiving a benefit* (such as a tax break). Performance requirements in the latter category are generally considered less problematic because, while they can be burdensome for foreign investors, they do not relate to the basic question of whether the investor can do business in a country. Indeed, these kinds of measures are often used by host governments when conditioning investment incentives offered to potential new foreign investors.

The Canada Model FIPA contains a provision at Article 7 that prohibits the imposition of certain performance requirements in each category. With respect to the first category—requirements imposed as a precondition for investing, Article 7.1 states:

> Neither Party may **impose or enforce any of the following requirements**, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or a non-Party in its territory: (a) to export a given level or percentage of goods; (b) to achieve a given level or percentage of domestic content; (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory; (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings; (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority, to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or (g) to supply exclusively from the territory of the Party the goods it produces or the services it provides to a specific regional market or to the world market.

With respect to the second category—requirements imposed as a precondition for receiving a benefit, Article 7.3 states:

> Neither Party may **condition the receipt or continued receipt of an advantage**, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements: (a) to achieve a given level or percentage of domestic content; (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory; (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

Thus, the list of prohibited performance requirements is much shorter in the second category, reflecting a judgment that host states must be allowed some measure of flexibility when they seek to impose conditions on the benefits they offer to investors. [8]

The Canada-China FIPA takes a very different approach from that of the Canada Model FIPA. The agreement skips the specific and lengthy enumeration of the performance requirements that are prohibited in each category in favor of a two-sentence commitment at Article 9:

> The Contracting Parties reaffirm their obligations under the WTO Agreement on Trade-Related Investment Measures (TRIMs), as amended from time to time. Article 2 and the Annex of the TRIMs are incorporated into and made part of this Agreement.

In turn, the Annex of the TRIMs Agreement, which is incorporated by reference in the above provision, lists some, but not all, of the Canada Model FIPA's performance requirements as "illustrative" examples of measures that would be objectionable.[9] These include measures that require an enterprise to purchase products of domestic origin (similar to the protection provided in the Canada Model FIPA at Articles 7.1(c) and 7.3(b)); measures that require an enterprise's use of imported products be limited by the amount of products that it exports (similar to the protection provided in the Canada Model FIPA at Articles 7.1(d) and 7.3(c)); and measures that restrict an enterprise's imports by restricting its access to foreign exchange, (similar to the protection provided in the Canada Model FIPA at Articles 7.1(d) and 7.3(d)).

[8] For good measure, Article 7.4 of the Canada Model FIPA seeks to preserve even more host state flexibility in conditioning investment incentives by stating: "Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory."

[9] Agreement on Trade-Related Investment Measures (TRIMs) Annex.

One notable absence from the TRIMs "illustrative list" is technology transfer requirements, which are prohibited as a requirement for investment under the Canada Model FIPA at Article 7.1(f). This provision, also found in the U.S. Model BIT, prohibits a government from imposing a requirement "to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory…."[10] While China's protocol of accession to the WTO does reference technology transfers, this commitment is not specifically incorporated by the text of Article 9 of the Canada-China FIPA.

Thus, the approach taken in the Canada-China FIPA is somewhat less robust in terms of prohibiting either government from imposing specific performance requirements than that taken by the Canada Model FIPA. This should probably be viewed as a significant concession by Canada from its preferred text, but not a total concession, for two reasons.

First, it is significant because of what is missing. Laws regarding "technology transfers," for example, can be highly problematic from the standpoint of a foreign investor seeking to protect its proprietary technology. Following its accession to the WTO, China has eliminated many of its formal requirements for technology transfers, but laws that "encourage" such transfers still remain. According to a report by the Office of the U.S. Trade Representative, "U.S. companies remain concerned that this 'encouragement' in practice can amount to a 'requirement,' particularly in light of the high degree of discretion provided to Chinese government officials when reviewing investment applications."[11] In this regard, the FIPA offers no additional protection for investors, since technology transfer requirements are not specifically enumerated as being prohibited.

However, what remains is still valuable. The incorporation by reference of Canada's and China's pre-existing TRIMs commitments into the investment treaty is more than merely a symbolic statement. In effect, it creates a private right of action on behalf of an investor for a government's violations of its TRIMs commitments. This is something that the TRIMs itself does not do—instead leaving it to an aggrieved investor to lobby his or her home government to bring an action in the WTO against the offending government. Thus, the Canada-China FIPA text at Article 9 simply borrows the specific formulation of the performance requirements from the TRIMs text, but links it up to the investor-state dispute settlement mechanism embodied in the investment treaty.

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[10] U.S. Model BIT, Art. 8(f); *see also* Canada Model FIPA, Art. 7(f), prohibiting any requirement "to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority, to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement…"

[11] *2012 National Trade Estimate Report on Foreign Trade Barriers*, Office of the U.S. Trade Representative, p. 89.

With respect to the U.S., its model BIT takes much the same approach as the Canadian model text, but goes even further, with a longer list of prohibited performance requirements.[12] Thus, it is likely that the U.S. and China will face a similarly challenging negotiation over these provisions. The solution in the Canada-China FIPA offers one potential way forward, but may not ultimately prove to be acceptable to either party in the U.S.-China context.

IV. Existing Non-Conforming Measures

A third deviation from the Canada Model FIPA in the text of the Canada-China FIPA concerns how existing non-conforming measures are treated. This is perhaps the most significant departure from the model text, for it affects the overall scope and impact of the Canada-China treaty in a major way.

The Canada Model FIPA, like the U.S. Model BIT, allows that substantive commitments made in the investment treaty will not apply to certain existing non-conforming measures, with these specific exceptions set out on the basis of a "negative list." Thus, the Canada Model FIPA and the U.S. Model BIT both provide that the articles dealing with national treatment, most favored nation treatment, appointments to senior management and boards of directors, and performance requirements will not apply to "any existing non-conforming measure that is maintained" at the national level of government, so long as those non-conforming measures are specifically listed by the host government in an annex to the agreement.

In this way, the Canadian and U.S. models allow a country to maintain existing non-conforming measures by making exceptions for them, but at the same time limit the scope of the exceptions by requiring each party to specifically enumerate the non-conforming measures that it wishes to exempt from the reach of the treaty (and, most importantly, by encouraging an extensive negotiation aimed at narrowing the exceptions as much as possible). If a government has measures in place that do not conform with the obligations it is undertaking with respect to national treatment, most favored nation treatment, and the others, then it is required to bargain for the right to list them as exceptions or else expected to reform such measures to bring them into compliance. The specific language the Canada Model FIPA uses to accomplish this is at Article 9.1:

[12] Indeed, Article 8 ("Performance Requirements") was expanded in the 2012 revision to the U.S. Model BIT to include a prohibition on conduct by a State that accords a preference based on the use of domestic technology. *See* U.S. Model BIT, Art. 8(h).

> Articles 3 [National Treatment], 4 [MFN], 6 [Senior Management] and 7 [Performance Requirements] shall not apply to:
>
> (a) any existing non-conforming measure that is maintained by
>
> (i) a Party at the national level, as set out in its Schedule to Annex I, or
>
> (ii) a sub-national government;
>
> (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a);
>
> (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 3, 4, 6 and 7.

The Canada-China FIPA uses similar language in its provision on existing non-conforming measures, but with a very different effect. Thus, the Canada-China FIPA states at Article 8.2(a)(i):

> Articles 5 [MFN], 6 [National Treatment] and 7 [Senior Management] do not apply to…any existing non-conforming measures maintained within the territory of a Contracting Party;

What the Canada-China FIPA has done, therefore, is provide for similar exceptions—to the requirement for most favored nation treatment, national treatment, and senior management and boards of directors appointments—without simultaneously limiting the scope of the exceptions using a "negative list." Thus, the exceptions are expansive and almost totally non-transparent.

The effect is that any existing measures which China now has in place that discriminate against foreign investors (violating national treatment), or that discriminate among foreign investors (violating most favored nation treatment) may stay in place and will not be prohibited. China (and Canada) are only committed via this treaty to refrain from instituting *new* measures that violate the national treatment and most-favored nation treatment principles.[13]

As noted above and in Appendix A, the U.S. Model BIT takes an almost identical approach to existing non-conforming measures as in the Canada Model FIPA. Given that the compromise

[13] While the scope of the exception for existing non-conforming measures is wide, it still does not cover expropriation (Article 10) or fair and equitable treatment (Article 4). Thus, existing measures of China or Canada that violate these could be actionable under the Canada-China FIPA.

reached in the Canada-China FIPA has such broad effects on the remainder of the treaty, it seems fair to assume that this issue will likely be a flashpoint in U.S.-China BIT negotiations.

V. Transparency of Regulations

A fourth area of interest in the Canada-China FIPA text is in transparency requirements for new regulatory actions by the host government. The Canada Model FIPA deals with such transparency requirements at Art. 19 as follows:

> 1. Each Party shall, to the extent possible, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them.
>
> 2. To the extent possible, **each Party shall: (a) publish in advance any such measure that it proposes to adopt; and (b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.**
>
> 3. Upon request by a Party, information shall be exchanged on the measures of the other Party that may have an impact on covered investments.

The Canada Model FIPA also specifically provides in a footnote to this Article that "No investor may have recourse to dispute settlement under Section C for any matter arising under this Article."

By contrast, the Canada-China FIPA states the following in its equivalent provision at Art. 17:

1. Each Contracting Party shall, with a view to promoting the understanding of its laws and policies that pertain to or affect a covered investment: (a) make such laws and policies public and readily accessible; (b) if requested, provide copies of specified laws and policies to the other Contracting Party; and (c) if requested, consult with the other Contracting Party with a view to explaining specified laws and policies.

2. Each Contracting Party shall ensure that its laws, regulations and policies pertaining to the conditions of admission of investments, including procedures for application and registration, criteria used for assessment and approval, timelines for processing an application and rendering a decision, and review or appeal procedures of a decision, are administered in a manner that enables investors of the other Contracting Party to become acquainted with them.

3. Each Contracting Party **is encouraged to**:

(a) publish in advance any measure that it proposes to adopt; and

(b) provide interested persons and the other Contracting Party a reasonable opportunity to comment on the proposed measure.

As highlighted above, the divergence here lies in the obligation of a host government to provide advance notice and comment before instituting a new regulation. The Canada Model FIPA states that each party "shall" publish measures in advance and provide interested persons and the other treaty partner an opportunity to comment on such measures. This obligation is limited only by the language "to the extent possible" and by the fact that violations are not redressable individually by an investor in the forum of an investor-state arbitration.

In contrast, the regulatory notice and comment requirement is somewhat less robust in the Canada-China FIPA, stating only that each government "is encouraged to" publish measures in advance and provide an opportunity for comment. This "encouragement" is also exempted from the investor-state dispute settlement mechanism in the treaty.[14]

The U.S. Model BIT goes much further than even the Canada Model FIPA in its regulatory transparency requirements. In addition to the same requirement that "to the extent possible" each party shall provide advance notice and comment for regulations, at Article 11 the U.S. Model BIT goes on to specify the form in which proposed regulations respecting any matter covered by the treaty are to be published (in a single official journal, not less than 60 days before public comments are due, and including an explanation of purpose and rationale).[15] It also requires that administrative proceedings regarding particular investments be noticed to investors,

[14] *See* Canada-China FIPA Art. 20.1 (excluding Article 17 from the scope of the dispute settlement mechanism).

[15] U.S. Model BIT, Art. 11.3 and 11.4.

that the investors be afforded an opportunity to present facts and arguments prior to final administrative action, and that there be a review and appeal process.[16] Finally, Article 11 requires that each party must allow investors of the other party the opportunity to participate in the development of standards and technical regulations set by central government bodies.[17]

In addition, the U.S. Model BIT requires at Article 10 that each country shall promptly publish all laws, regulations, procedures, administrative rulings of general application, and adjudicatory decisions respecting any matter covered by the treaty.

However, only part of the U.S. transparency obligations are individually actionable by an investor via the investor-state dispute settlement mechanism. Article 24, which lays out the requirements for submission to arbitration, allows claims only for breaches of Articles 3 through 10 of that treaty. Thus, a government's failure to adhere to the detailed notice and comment procedures outlined in Article 11 are not breaches that are individually actionable.

Nevertheless, the emphasis in the U.S. model treaty on transparency with respect to regulations, including the detailed recitation of prohibitions and obligations in Article 11, indicate that this is an area of priority for the U.S. in a negotiation with China. Accordingly, it may be that a different kind of compromise must be reached on this issue between the U.S. and China, since Canada and China started from positions that were, relatively speaking, much closer to one another.

VI. Transparency of Arbitral Proceedings

A fifth area of divergence between the Canada Model FIPA and the Canada-China FIPA is in the requirements for transparency of arbitral proceedings under the investor-state dispute settlement mechanism. In particular, the Canada Model FIPA (as well as the U.S. Model BIT) provides for much broader transparency for arbitral hearings than does the Canada-China FIPA.

The Canada Model FIPA states at Article 38:

> 1. Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera…
>
> …3. All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information.
>
> 4. Notwithstanding paragraph 3, any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information.

[16] U.S. Model BIT, Art. 11.6 and 11.7.

[17] U.S. Model BIT, Art. 11.8.

The Canada-China FIPA provides an alternative set of rules regarding transparency of proceedings, which in some cases flip the default presumptions in the opposite direction. Thus at Article 28, the treaty states:

> 1. Any Tribunal award under this Part shall be publicly available, subject to the redaction of confidential information. Where a disputing Contracting Party determines that it is in the public interest to do so and notifies the Tribunal of that determination, all other documents submitted to, or issued by, the Tribunal shall also be publicly available, subject to the redaction of confidential information.
>
> 2. Where, after consulting with a disputing investor, a disputing Contracting Party determines that it is in the public interest to do so and notifies the Tribunal of that determination, hearings held under this Part shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera.

The formulation of the transparency rule in the Canada-China FIPA therefore requires only that arbitral awards are public by default. Whether arbitral hearings and documents submitted to the Tribunal are public is a determination ultimately left to the state that is party to the investor state dispute. The treaty does not grant the disputing investor or the Tribunal a similar decisionmaking authority on these issues. By contrast, in the Canada Model FIPA's formulation, hearings and documents are public by default, not by decision of the state that is party to the dispute.

Since this is a derogation from the Canada model text, it is again reasonable to assume that this change came at the request of China, which apparently wants to maintain its discretion to control whether hearings and documents are public. This is a significant concession from the ideal of transparency embodied in the Canada Model FIPA.

The U.S. Model BIT takes a similar approach to transparency of proceedings as the Canadian Model FIPA. It requires that all documents associated with the arbitration—including the notice of arbitration, the memorials, any minutes or transcripts, and any awards or decisions—be made public unless determined by a party to be protected confidential information.[18] It also requires that hearings be conducted in the open subject to the protection of confidential information, rather than leaving the decision of having open proceedings to the state that is the party to the dispute.

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[18] U.S. Model BIT, Art. 29. This is also subject to Art. 19 ("Disclosure of Information") which states: "Nothing in this Treaty shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private."

Thus, here again, the U.S. and China will need to reach an accord regarding transparency of arbitral proceedings, for there appear to be differences suggested by examining the Canada Model FIPA, the U.S. Model BIT, and the Canada-China FIPA. Whether the U.S. and China will reach a similar solution to the one found in the Canada-China FIPA remains to be seen.

VII. Lessons for the Future

The discussion above has elucidated some of the key differences between the Canada-China FIPA and the Canada Model FIPA. While the areas identified are notable departures from the approach taken by the Canada model text, the Canada-China FIPA still represents a significant agreement for both countries. However, its significance should be viewed in light of the factors that may weigh against its practical effectiveness.

As noted above, the largely unlimited exception for existing non-conforming measures in Article 8.2 of the Canada-China FIPA means that only new actions by either Canada or China will be legally actionable under the treaty. This has the potential to substantially limit the scope of actionable complaints that an investor might have.

More broadly, with respect to China, foreign investors are probably less likely to bring an arbitration than they would be elsewhere given the apprehension by some about potential retaliation by the Chinese government.[19] As the U.S. Ambassador to the WTO stated in a speech in November 2011: "China's trading partners have heard from their enterprises on too many occasions that Chinese regulatory authorities threaten to withhold necessary approvals or take other retaliatory actions against foreign enterprises if they speak out against problematic Chinese policies…"[20] Indeed, with respect to a binding investor-state dispute settlement mechanism, some have predicted that such a provision "could be of limited usefulness because many U.S. companies will hesitate to take such a confrontational approach with China for fear of retaliation against their business interests."[21] Along the same lines, a European Commission survey of EU firms found that they considered an investor-state dispute settlement mechanism was not crucial

[19] To the extent that an aggrieved investor chooses to withdraw entirely from China before instituting a treaty arbitration, there would be no possibility for retaliation. Thus, concerns regarding retaliation are of particular relevance in the context of larger investors who have multiple or long-term interests at stake in China.

[20] Remarks by U.S. Ambassador to the WTO Michael Punke on the China Transitional Review of the Protocol of Accession to the WTO Agreement, November 30, 2011, *available at*: http://www.ustr.gov/about-us/press-office/press-releases/2011/november/remarks-united-states-ambassador-world-trade-orga

[21] *Market Access is Key Area in U.S. China BIT Talks, But Outcome Uncertain*, Inside U.S. Trade, October 19, 2012.

to a BIT with China since "resorting to investment arbitration against China was felt to be a last resort only given the fear of retaliation by China."[22]

While concerns about retaliation may have a chilling effect on investors seeking to exercise and protect their rights under the treaty, by no means does this indicate that the agreement will be "toothless." The Canada-China FIPA can be used as a reference point in a negotiation between a business and the government, even if the dispute does not ever come before an international tribunal. It is, in effect, a public commitment by China and Canada that can anchor each country's behavior, preventing either from straying too far from what is written and agreed. A written pre-commitment such as this offers some measure of negotiating leverage for an aggrieved investor, to the extent that the investor would want to attempt negotiation.

So it is with a U.S.-China BIT, once one is concluded. While we cannot know the ultimate compromises that negotiators might make on any of the five areas discussed in this article, having a completed agreement between the U.S. and China will itself have great value in terms of promoting market access and providing assurances to foreign investors.

Given that the Canada Model FIPA and the U.S. Model BIT take broadly similar approaches in these and other areas, the compromises that were reached between Canada and China in the course of completing negotiations on their treaty offer a potential roadmap for U.S. and Chinese negotiators in completing theirs.

[22] *EU Firms Downplay Investor-State Arbitration in China BIT for Fear of Retaliation*, Inside U.S.-China Trade, December 14, 2011.

Appendix A

Comparison of Selected Provisions

National Treatment – "Establishment" and "Acquisition"

Canada Model FIPA

Art. 3.1 "Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the **establishment, acquisition,** expansion, management, conduct, operation and sale or other disposition of investments in its territory."

Canada-China FIPA

Art. 6.1 "Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favourable 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."

U.S. Model BIT

Art. 3.1 "Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."

Performance Requirements

Canada Model FIPA

Art. 7.1 "Neither Party may **impose or enforce any of the following requirements**, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or a non-Party in its territory: (a) to export a given level or percentage of goods; (b) to achieve a given level or percentage of domestic content; (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory; (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings; (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority, to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or (g) to supply exclusively from the territory of the Party the goods it produces or the services it provides to a specific regional market or to the world market."

Art. 7.3 "Neither Party may **condition the receipt or continued receipt of an advantage**, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements: (a) to achieve a given level or percentage of domestic content; (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory; (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings."

Canada-China FIPA

Art. 9 “The Contracting Parties reaffirm their obligations under the WTO Agreement on Trade-Related Investment Measures (TRIMs), as amended from time to time. Article 2 and the Annex of the TRIMs are incorporated into and made part of this Agreement.”

U.S. Model BIT

Art. 8.1 “Neither Party may, **in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment** of an investor of a Party or of a non-Party in its territory, **impose or enforce any requirement** or enforce any commitment or undertaking: (a) to export a given level or percentage of goods or services; (b) to achieve a given level or percentage of domestic content; (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory; (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings; (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;(g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market; or (h) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of persons of the Party; or (ii) that prevents the purchase or use of, or the according of a preference to, in its territory, particular technology, so as to afford protection on the basis of nationality to its own investors or investments or to technology of the Party or of persons of the Party.”

Existing Non-Conforming Measures

Canada Model FIPA

Art. 9 "1. Articles 3 [National Treatment], 4 [MFN], 6 [Senior Management] and 7 [Performance Requirements] **shall not apply to: (a) any existing non-conforming measure that is maintained by (i) a Party at the national level, as set out in its Schedule to Annex I**, or (ii) a sub-national government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a);

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 3, 4, 6 and 7.

2. Articles 3 [National Treatment], 4 [MFN], 6[Senior Management] and 7 [Performance Requirements] shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its schedule to Annex II….

…5. The provisions of Articles 3 [National Treatment], 4 [MFN] and 6 [Senior Management] of this Agreement shall not apply to: (a) procurement by a Party or state enterprise; (b) subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance;"

Canada-China FIPA

Art. 8 "…2. Articles 5 [MFN], 6 [National Treatment] and 7 [Senior Management] **do not apply to: (a) (i) any existing non-conforming measures maintained within the territory of a Contracting Party**; and (ii) any measure maintained or adopted after the date of entry into force of this Agreement that, at the time of sale or other disposition of a government's equity interests in, or the assets of, an existing state enterprise or an existing governmental entity, prohibits or imposes limitations on the ownership or control of equity interests or assets or imposes nationality requirements relating to senior management or members of the board of directors;

(b) the continuation or prompt renewal of any non-conforming measure referred to in sub-paragraph (a); or (c) an amendment to any non-conforming measure referred to in sub‑paragraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 5 [MFN], 6 [National Treatment] and 7 [Senior Management]…

…5. Articles 5, 6 and 7, do not apply to: (a) procurement by a Contracting Party; (b) subsidies or grants provided by a Contracting Party, including government-supported loans, guarantees and insurance."

U.S. Model BIT

Art. 14 "1. Articles 3 [National Treatment], 4 [MFN], 8 [Performance Requirements], and 9 [Senior Management] **do not apply to: (a) any existing non-conforming measure that is maintained by a Party at: (i) the central level of government, as set out by that Party in its Schedule to Annex I or Annex III**, (ii) a regional level of government, as set out by that Party in its Schedule to Annex I or Annex III, or (iii) a local level of government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 3 [National Treatment], 4 [MFN], 8 [Performance Requirements], or 9 [Senior Management].

2. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II…

…5. Articles 3 [National Treatment], 4 [MFN], and 9 [Senior Management] do not apply to: (a) government procurement; or (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance"

Regulatory Transparency

Canada Model FIPA

Art. 19 "1. Each Party shall, **to the extent possible**, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them.

2. To the extent possible, **each Party shall**: (a) **publish in advance** any such measure that it proposes to adopt; and (b) provide interested persons and the other Party a **reasonable opportunity to comment** on such proposed measures.

3. Upon request by a Party, information shall be exchanged on the measures of the other Party that may have an impact on covered investments."

Canada-China FIPA

Art. 17 "1. Each Contracting Party shall, with a view to promoting the understanding of its laws and policies that pertain to or affect a covered investment: (a) make such laws and policies public and readily accessible; (b) if requested, provide copies of specified laws and policies to the other Contracting Party; and (c) if requested, consult with the other Contracting Party with a view to explaining specified laws and policies.

2. Each Contracting Party shall ensure that its laws, regulations and policies pertaining to the conditions of admission of investments, including procedures for application and registration, criteria used for assessment and approval, timelines for processing an application and rendering a decision, and review or appeal procedures of a decision, are administered in a manner that enables investors of the other Contracting Party to become acquainted with them.

3. **Each Contracting Party is encouraged to**: (a) **publish in advance** any measure that it proposes to adopt; and (b) provide interested persons and the other Contracting Party **a reasonable opportunity to comment** on the proposed measure."

U.S. Model BIT

Art. 10 "1. Each Party shall ensure that its: (a) laws, regulations, procedures, and administrative rulings of general application; and (b) adjudicatory decisions respecting any matter covered by this Treaty are promptly published or otherwise made publicly available.

2. For purposes of this Article, "administrative ruling of general application" means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include: (a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular covered investment or investor of the other Party in a specific case; or (b) a ruling that adjudicates with respect to a particular act or practice."

Art. 11: "1. The Parties agree to consult periodically on ways to improve the transparency practices set out in this Article, Article 10 and Article 29.

2. Publication: To the extent possible, **each Party shall**: (a) **publish in advance** any measure referred to in Article 10(1)(a) that it proposes to adopt; and (b) provide interested persons and the other Party a **reasonable opportunity to comment** on such proposed measures.

3. With respect to proposed regulations of general application of its central level of government respecting any matter covered by this Treaty that are published in accordance with paragraph 2(a), each Party: (a) shall publish the proposed regulations in a single official journal of national circulation and shall encourage their distribution through additional outlets; (b) should in most cases publish the proposed regulations not less than 60 days before the date public comments are due; (c) shall include in the publication an explanation of the purpose of and rationale for the proposed regulations; and (d) shall, at the time it adopts final regulations, address significant, substantive comments received during the comment period and explain substantive revisions that it made to the proposed regulations in its official journal or in a prominent location on a government Internet site..."

U.S. Model BIT (cont'd)

Art. 11: "…6. Administrative Proceedings: With a view to administering in a consistent, impartial, and reasonable manner all measures referred to in Article 10(1)(a), each Party shall ensure that in its administrative proceedings applying such measures to particular covered investments or investors of the other Party in specific cases: (a) wherever possible, covered investments or investors of the other Party that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated, and a general description of any issues in controversy; (b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and (c) its procedures are in accordance with domestic law.

7. Review and Appeal: (a) Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Treaty. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter. (b) Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to: (i) a reasonable opportunity to support or defend their respective positions; and (ii) a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority. (c) Each Party shall ensure, subject to appeal or further review as provided in its domestic law, that such decisions shall be implemented by, and shall govern the practice of, the offices or authorities with respect to the administrative action at issue.

8. Standards-Setting: (a) Each Party shall allow persons of the other Party to participate in the development of standards and technical regulations by its central government bodies. Each Party shall allow persons of the other Party to participate in the development of these measures, and the development of conformity assessment procedures by its central government bodies, on terms no less favorable than those it accords to its own persons."

Transparency of Arbitral Proceedings

Canada Model FIPA

Art. 38 "1. **Hearings** held under this Section **shall be open to the public**. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera.

2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.

3. All **documents** submitted to, or issued by, the Tribunal **shall be publicly available**, unless the disputing parties otherwise agree, subject to the deletion of confidential information…"

Canada-China FIPA

Art. 28 "1. Any Tribunal award under this Part shall be publicly available, subject to the redaction of confidential information. **Where a disputing Contracting Party determines** that it is in the public interest to do so and notifies the Tribunal of that determination, **all other documents** submitted to, or issued by, the Tribunal **shall also be publicly available**, subject to the redaction of confidential information.

2. **Where**, after consulting with a disputing investor, **a disputing Contracting Party determines** that it is in the public interest to do so and notifies the Tribunal of that determination, **hearings** held under this Part **shall be open to the public**. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera…"

U.S. Model BIT

Art. 29 "1. Subject to paragraphs 2 and 4, the respondent **shall**, after receiving the following documents, promptly transmit them to the non-disputing Party and **make** them **available to the public**: (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and **any written submissions** submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [Amicus Submissions] and Article 33 [Consolidation]; (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal.

2. The tribunal **shall conduct hearings open to the public** and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure…"