



THE SCHOOL OF PUBLIC POLICY

MASTER OF PUBLIC POLICY CAPSTONE PROJECT

CANADA'S FIPA WITH CHINA

An analysis of the opposition to the agreement

Submitted by:

Mukesh Khanal

Approved by Supervisor:

Professor Jack Mintz

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EXECUTIVE SUMMARY

On October 1, 2014, Canada brought into force its Foreign Investment Promotion and Protection Agreement (FIPA) with China. Although the FIPA has various trade-related obligations, it is primarily an investment protection agreement aimed at ensuring Canadian investors in China and Chinese investors in Canada are treated the same as any domestic or other foreign investors by the two respective host governments.

There is a near-unanimous consensus among researchers that inward and outward Foreign Direct Investment flows benefit all nations that engage in such activities. Therefore, this FIPA, which supposedly encourages greater Chinese investments in Canada, should be good news. However, the agreement has received a strong opposition since its signing in September 2012.

Critics oppose the agreement for three main reasons. First, they do not believe the agreement is transparent. Disputes can be resolved in secret through FIPA arbitration tribunals, and case details are not proactively made public. Second, critics point to the huge losses Canada has incurred in NAFTA tribunals as evidence that the Investor-State Dispute Settlement provision in the FIPA could result in similar huge losses through settlements, essentially paid by Canadian taxpayers' dollars. Finally, critics argue that Canadian investors in China will not get fair judgments because the FIPA does not allow them to file a lawsuit in Chinese courts while Chinese investors in Canada can approach Canadian courts to resolve their disputes.

In this paper, the author looks into the historical trade and investment relationships between China and Canada to analyze the veracity of the opposition's claims about the FIPA. While the claims have some merit, the issues are not black and white. It is historical knowledge that some flexibility is needed to engage with China. Canadian firms in China often state their investments as strategic, long term, and filled with potential rather than opportunistic, short term, and for quick profitability. It is also noted that since coming out of self-isolation, China has made significant changes in order to modernize its economy. That process still continues.

The author concludes that despite shortcomings, Canada's FIPA with China builds on their historical political and economic relationship. Although the agreement is less-than-ideal, it still provides more protection to Canadian investors in China than was previously available. Finally, it is also in Canada's interest to ensure that China—now the world's largest economy and with the world's largest reserve of foreign currency—continues to see Canada as a bright investment destination. Canada's FIPA with China is an unfinished document. Canada should continue to engage China while evolving and reforming the agreement.



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ACRONYMS

DFATD

Department of Foreign Affairs, Trade and Development

FDI

Foreign Direct Investment

FIPA

Foreign Investment Promotion and Protection Agreement

FTA

Free Trade Agreement

ISDS

Investor-State Dispute Settlement

NAFTA

North American Free Trade Agreement

SOE

State-owned Enterprise

WTO

World Trade Organization

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I. INTRODUCTION

There has been a lot of media coverage of Canada's Foreign Investment Promotion and Protection Agreement (FIPA) with China. The coverage suggests that Canadians are much divided in their opinions on whether the FIPA benefits Canada or not. Supporters of the agreement laud it as a "protection against discriminatory and arbitrary practice and an impartial redress mechanism."¹ The supporters also believe that nationalist forces are attempting to hijack the discussion, and turn the FIPA with China into a political advantage. Therefore, they caution the public to be wary of what the "excitable nationalists" claim the agreement does for Canadians.²

However, voices that oppose the FIPA are louder. As the details of the agreement emerged after its signing in September 2012, it was attacked as a very poor evidence of Canada's negotiation skills.³ It was suggested that Canada's deal with the Chinese regime, which routinely engages in gross human rights violations, meant that Canada had now lost its moral ground in its international standing.⁴

This paper attempts to analyze why a significant opposition has built in Canada against the FIPA with China. Section II of the paper starts with a background explanation of what a FIPA is and what it does. In Section III, the paper looks into the trade and investment relationship between Canada and China. This section recounts the historical relationship between the two countries, and observes and assesses the trade and foreign investment relationship between Canada and China, including recent figures and trends. Section IV of the paper analyzes the literature to determine if trade and foreign direct investments are complements or substitutes of each other. This section also discusses if a country needs both FTA and FIPA, or if any one suffices for promoting economic development. In Section V, the paper puts forth the three main claims of the opposition against the FIPA with China. Section VI compares three different agreements—the FIPA with China, the FIPA with Serbia (the most recent FIPA brought into force by Canada), and the North American Free Trade Agreement (NAFTA)—on topics that have resulted in significant opposition to the FIPA with China. Section VII delves into a detailed analysis of the opposition's three main claims to determine the veracity of those claims. Finally, Section VIII provides the concluding remarks of the author.

¹ Hugh Stephens, "FIPA with China, finally (and about time too)," *The Vancouver Sun*, September 17, 2014, accessed October 11, 2014,

<http://www.vancouversun.com/business/Opinion+FIPA+with+China+finally+about+time/10212324/story.html>.

² Stephen Gordon, "Don't fear the FIPA," *Macleans*, September 17, 2014, accessed October 10, 2014, <http://www.macleans.ca/economy/economicanalysis/dont-fear-the-fipa/>.

³ Diane Francis, "Canada-China trade deal is too one-sided," *Financial Post*, November 2, 2012, accessed October 10, 2014, <http://opinion.financialpost.com/2012/11/02/canada-china-trade-deal-is-too-one-sided/>.

⁴ Terry Glavin, "Have Canadians surrendered all our moral ground for deals with Beijing?" *Ottawa Citizen*, October 8, 2014, accessed October 11, 2014, <http://ottawacitizen.com/opinion/columnists/glavin-have-canadians-surrendered-all-our-moral-ground-for-deals-with-beijing>.

II. BACKGROUND

In the *Wealth of Nations*, Adam Smith states that it is better to buy a good from a country that produces it cheaply by selling that country something which we can produce cheaply.⁵ Smith's claim assumed that the two trading nations would have an absolute advantage in producing the goods they would trade. A country is considered to have absolute advantage in producing a good if it can produce more of the good with the same amount of resources as the other country.

David Ricardo improved on Smith's notion with his theory of comparative advantage. Ricardo contended that countries need a comparative, not an absolute, advantage in any of the goods they produce in order to trade and benefit. A comparative advantage would still allow countries to produce and trade. Instead of accounting for actual monetary costs of production, a comparative advantage is determined by observing the opportunity costs of production—what the producer loses by not producing one good while only producing the other—to determine if the country is better off producing one good or the other.

In his 1817 book, *On the Principles of Political Economy and Taxation*, Ricardo formally illustrated his comparative advantage theory with an example of how England and Portugal could benefit from trading wine and cloth.⁶ Paul Krugman, the Nobel-winning American economist, argues that Ricardo successfully demonstrated to the world that an economy should stick to producing what it is comparatively good at, and trade the surplus with another economy.⁷ That way, in aggregate, both the countries can produce more and consume more.

Ricardo's comparative advantage theory resulted in many countries opening themselves up to international trade. In the meantime, countries have also identified other means of improving their economy and living standards. For example, according to John Whalley, Professor of Economics at the University of Western Ontario, in the last few decades, nations have warmed up to the idea that "reciprocal exchanges of concessions on trade barriers" will improve "market access" that will benefit all the parties involved in the negotiation.⁸ As a result of increased understandings, many nations, including Canada, have become members of multilateral or bilateral agreements that facilitate greater trade relations and greater trade liberalization. As far back as in 1942, Hugh Keenleyside, a Canadian diplomat, mentioned that trade and economics comprised 90 percent of Canada's 'international relations.'⁹ The percentage may have fluctuated over the years, but Keenleyside's sentiments are still true.

⁵ Steve Suranovic, *International Trade: Theory and Policy* (Washington D.C.: Flat World Knowledge, Inc., 2010).

⁶ Ibid.

⁷ Paul Krugman, "Ricardo's Difficult Idea," Massachusetts Institute of Technology, accessed November 17, 2014, <http://web.mit.edu/krugman/www/ricardo.htm>.

⁸ John Whalley, "Why Do Countries Seek Regional Trade Agreements?" in *The Regionalization of the World Economy*, ed. Jeffrey A. Frankel (Chicago: University of Chicago Press, 1998), 71.

⁹ Paul Gecelovsky and Christopher Kukucha, "Much ado about parties," *International Journal* (Winter 2008-09).

Canada has engaged in bilateral or trilateral relationships through two major tools: the Free Trade Agreement (FTA) and the Foreign Investment Promotion and Protection Agreement (FIPA). According to the Department of Foreign Affairs, Trade and Development (DFATD), negotiations for the Canada-US FTA, the first FTA that Canada signed and brought into force, started in 1986, and it was agreed in principle on October 4, 1987.¹⁰ It was one of the first bilateral trade agreements in the world to address liberalization of agriculture, services and investment.¹¹ The agreement benefitted Canada significantly. From its exports to the US accounting 68.6 percent of its total exports in the 1970-79 period, the share increased to 80.8 percent in the 1990-2000 period.¹²

However, more benefit could be had if the entire North America were to become a free-trade zone. Discussions on signing a tri-lateral FTA between the US, Canada and Mexico had started as soon as Mexico joined the General Agreement on Tariffs and Trade in 1986, and started to “reduce trade barriers and comply with international trade standards.”¹³ In a report for the Pardee Center housed at the Boston University, researchers Kevin Gallagher, Enrique Peters, and Timothy Wise recount that the three North American neighbors signed the trilateral agreement in 1992 after rounds of negotiations, resulting in the North American FTA (NAFTA) coming into force in 1994.¹⁴ For Canada-US trade relations, the NAFTA simply superseded the CUSFTA, by default. The new FTA immediately boosted Canada’s trade in the region.¹⁵ Gus Van Harten from the Osgoode Hall Law School claims that in addition to reducing barriers to trade, the NAFTA also encouraged foreign investment protection for creating more jobs, developing the economy, and supporting a shift to the ‘green economy.’¹⁶

The DFATD mentions that when the Canada-US FTA came into force on January 1, 1989, the Organization for Economic Cooperation and Development at that time was busy developing a model for bilateral agreements for economic benefits.¹⁷ The DFATD claims that this new model served as a guide for Canada’s negotiations in the first rounds of FIPAs, later that year.¹⁸ The

¹⁰ “Canada-United States Free Trade Agreement (FTA),” Department of Foreign Affairs, Trade and Development Canada, accessed October 14, 2014, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/us-eu.aspx?lang=eng>.

¹¹ “Chapter One: Objectives and Scope,” The Canada-US Free Trade Agreement, 7.

¹² Gecelovsky and Kukucha, “Much ado about parties,” 30.

¹³ William J. Kehoe, “NAFTA: Concept, Problems, Promise,” in *Marketing: Foundations For A Changing World*, ed. Brian T. Engelland and Denise T. Smart (Evansville, Indiana: Southern Marketing Association, 1995).

¹⁴ Kevin P. Gallagher, Enrique Dussel Peters, and Timothy A. Wise, “Executive Summary,” in *The Future of North American Trade Policy: Lessons from NAFTA*, Pardee Center Task Force Report, ed. Kevin P. Gallagher, Enrique Dussel Peters, and Timothy A. Wise (Boston: Boston University, November 2009).

¹⁵ Barry E. Prentice and Mark Ojah, “NAFTA in the Next Ten Years: Issues and Challenges in Transportation” (paper presented at the NAFTA in the New Millenium Symposium, University of Alberta, May 24-25, 2001).

¹⁶ Gus Van Harten, “Reforming the NAFTA Investment Regime,” in *The Future of North American Trade Policy: Lessons from NAFTA*, Pardee Center Task Force Report, ed. Kevin P. Gallagher, Enrique Dussel Peters, and Timothy A. Wise (Boston: Boston University, November 2009).

¹⁷ “Canada’s Foreign Investment Promotion and Protection Agreements (FIPAs),” Department of Foreign Affairs, Trade and Development Canada, accessed October 11, 2014, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-apie.aspx?lang=eng>.

¹⁸ Ibid.

DFATD views a FIPA as “a bilateral agreement aimed at protecting and promoting foreign investment through legally-binding rights and obligations.”¹⁹ Therefore, while Canada has pursued FTAs for greater market access for its exports, it has engaged in signing FIPAs to promote and protect Canadian investments overseas. Starting with the FIPA with Poland in 1990, and next with Russia in 1991, Canada has 28 different FIPAs in force so far. It has signed three more, which are yet to come into force. It is involved in negotiations on 11 more.²⁰

The most recent FIPA, the one with China, was ratified in September 2014 and it came into force on October 1, 2014. It brought Canada and China into legally binding obligations on a variety of trade-related issues, including “national treatment (post-establishment), most-favored-nation treatment (pre- and post-establishment, minimum standard of treatment, transparency, performance requirements, transfers and expropriation.”²¹ Despite these trade-related obligations, the FIPA is mainly an investment protection agreement that ensures Canadian investors in China and Chinese investors in Canada are treated the same as “domestic investors or other foreign investors.”²²

III. CANADA-CHINA TRADE AND INVESTMENT RELATIONSHIP

HISTORICAL RELATIONSHIP

Canada and China have a special political and economic relationship. Canada was instrumental in bringing China into the United Nations as a founding member.²³ When the communists gained control of China in 1949, and formed the modern People’s Republic of China, they started developing closer economic and political ties with the Soviet Union.²⁴ However, those in the US were unhappy with that development, and the US government imposed many trade controls and restrictions on China. America’s six European allies—the United Kingdom, Italy, France, the Netherlands, Luxemburg, and Belgium—supported the implementation of those controls and restrictions.²⁵ The policy continued during the Cold War. Although Canada’s trade

¹⁹ “Foreign Investment Promotion and Protection (FIPAs),” Department of Foreign Affairs, Trade and Development Canada, accessed October 11, 2014, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng>.

²⁰ Ibid.

²¹ “Canada-China Foreign Investment Promotion and Protection Agreement (FIPA) Negotiations,” Department of Foreign Affairs, Trade and Development Canada, accessed October 11, 2014, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-chine.aspx?lang=eng>.

²² “Canada’s Foreign Investment Promotion and Protection Agreements (FIPAs).”

²³ Samuel P. S. Ho and Ralph W. Huenemann, *Canada’s Trade with China: Patterns and Prospects* (Quebec: Canadian Economic Policy Committee, June 1972), 3.

²⁴ M. W. Luke Chan, “Management Education in the People’s Republic of China,” in *Canada-China Business Linkages: Growth and Sustainability* (Vancouver: Canadian Federation of Deans of Management and Administrative Studies, December 1994), 76.

²⁵ Ho and Huenemann, *Canada’s Trade with China*, 19.

with China was affected due to the policy of the US and its six European allies, Canada was never a part of that group.²⁶

Embracing communism and becoming close to the Soviet Union caused difficulties for China in renewing international relations with the rest of the world. However, in 1964, France became the first western nation to recognize the People's Republic of China.²⁷ Canada was the second when it established diplomatic relations with China in 1970.²⁸ When China emerged out of political and economic isolation in the 1960s, it had a very low level of economic development. It was still under heavy restrictions from the US and its European allies. During that period, Canada became one of the first western countries to renew economic relations and trade with China. The renewal of this relationship started with China buying \$60 million worth of wheat from Canada in 1960, and paying for it in cash.²⁹

Despite low volume of trade between the two countries in the early 1960s, renewed trade relations with Canada helped China take its first steps towards reintegrating with the world economy. The Chinese displayed gratitude by increasing China's wheat imports from Canada each year after. By mid-1962, China had bought \$422 million worth of wheat and barley from Canada.³⁰ By the end of the 1960s China made much progress in domestic grain production. In 1971, it announced that its domestic grain production exceeded domestic demand, and an Australian wheat delegation sent to China to sell Australian wheat returned home empty-handed.³¹ However, China bought over three million metric tons of wheat that year from Canada. China was honoring its promise to consider "Canada first" as its source of wheat.³² In the first decade of this renewed trading relationship, Canada sold goods worth \$8.67 to China for every dollar worth of goods it bought from China between 1961 and 1970.³³

TRADE

In a 2014 research, Su Fen and Ehsan Latif reported that until the end of the 1990s, food and live animals comprised around 37 percent of Canada's export to China.³⁴ In the meantime, China was becoming a global manufacturing powerhouse, and had started importing resources to grow its manufacturing industry. As a result, by 2012, over half of Canada's exports to China was non-fuel crude materials to support China's manufacturing industry.³⁵ However, Canada's imports composition from China has remained the same for the last several decades. It has

²⁶ Ibid, 21.

²⁷ Ibid, 3.

²⁸ Ibid, 1.

²⁹ Ibid, 16.

³⁰ Pitman B. Potter, "Trade and Human Rights Practices in China: Prospects for Canadian Influence," *Foreign Policy Dialogue Series* (November 2003): 3.

³¹ Ho and Huenemann, *Canada's Trade with China*, 33.

³² Ibid.

³³ Ibid, 11.

³⁴ Su Fen and Ehsan Latif, "Bilateral trade between China and Canada: trends, patterns, and comparisons," in *Asian-Pacific Economic Literature* 28 (November 2014): 79.

³⁵ Ibid.

been dominated by manufactured goods and machinery and equipment.³⁶ Fen and Latif found that China and Canada have increased their trade significantly in the last several decades, and the countries possess comparative advantage in different products and services.³⁷ The suggestion is that trade between the two countries has not been maximized to its potential.

Figure 1: Canada’s trade with China (billions of Canadian dollars)³⁸

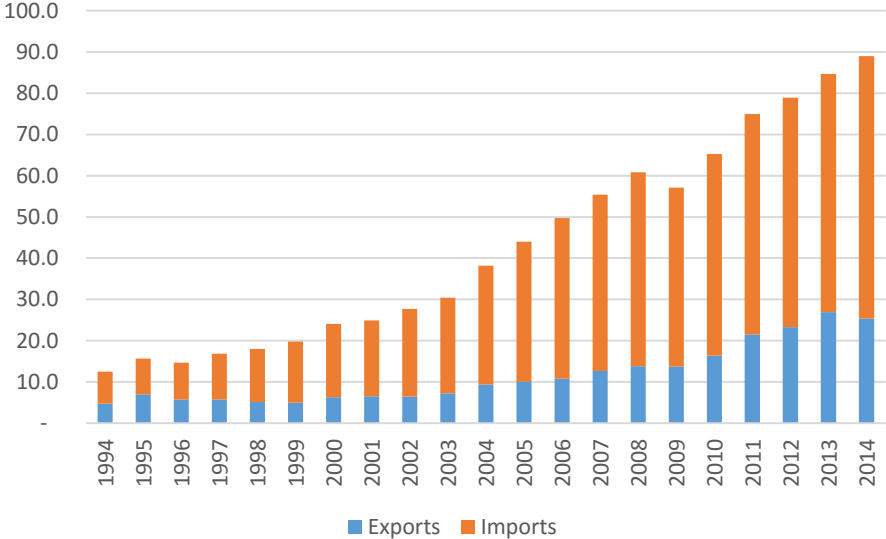
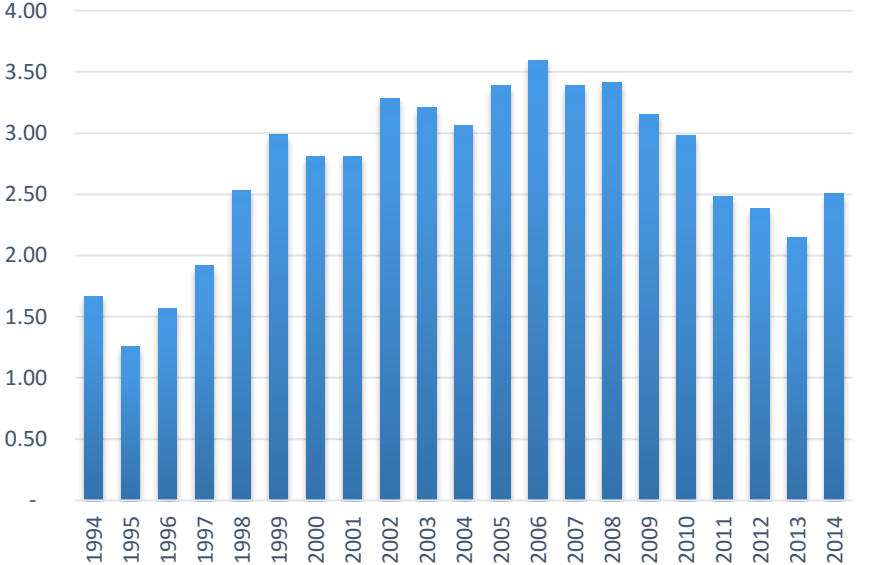


Figure 2: Canada’s imports to exports ratio with China³⁹



³⁶ Ibid.

³⁷ Ibid, 81.

³⁸ Industry Canada, *Trade Data Online (TDO)*, Accessed July 4, 2015, <https://www.ic.gc.ca/eic/site/tdo-dcd.nsf/eng/home>.

³⁹ Ibid.

Figure 3: Canada's trade balance with China (billions of Canadian dollars)⁴⁰

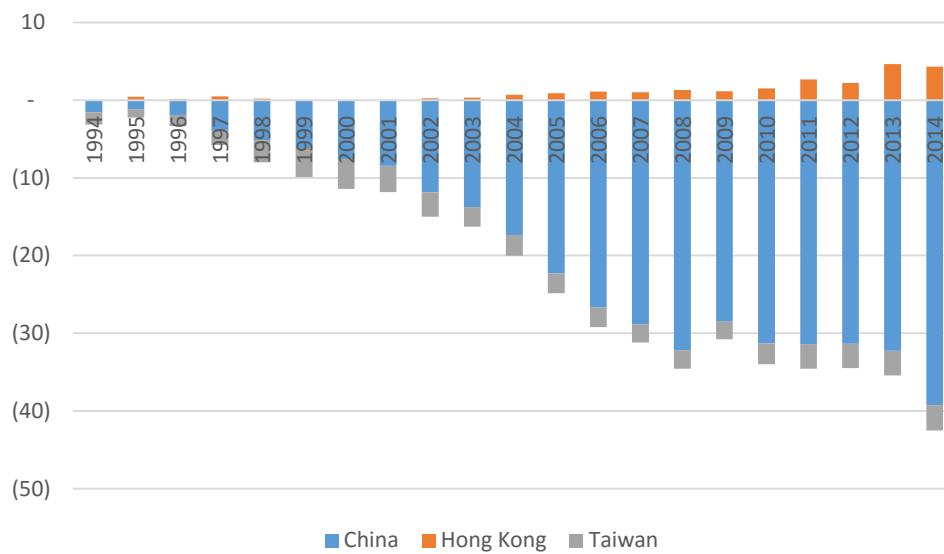


Figure 1 shows the last two decades of Canada's trade with China, including Hong Kong and Taiwan. While the two-way trade was worth slightly over \$10 billion in 1994, it grew almost nine-fold in the last twenty years, reaching almost \$90 billion in 2014. The figures also clearly show that Canadian exports to China grew slowly over the years while imports from China grew at a much faster rate. As a result, Canada has always had a trade deficit with China in the last twenty years. Canada's imports to exports ratio with China, shown in Figure 2, during the last two decades has mostly stayed above 2.0, suggesting that Canada's imports from China were worth twice as much as its exports to China during that period. The best performance from Canadian standpoint was in 1995 when the ratio was 1.25, and the worst performance was in 2006 when the ratio climbed to over 3.5. However, since 2006, the import to export ratio has gradually fallen, and was 205 in 2014. Figure 3 shows that Canada's negative trade balance with China has been rapidly increasing over the years, and exceeded \$40 billion in net trade deficit.

FOREIGN DIRECT INVESTMENT

Unlike Canada, China does not have a long history of engaging in Foreign Direct Investment (FDI)—outward and inward. China started allowing foreign firms to invest in China beginning 1993, and became the third largest recipient of global FDI by 2003.⁴¹ At the same time, China also became a major investor in businesses outside China. From US\$2.5 billion in 2002, China's outward FDI grew to US\$85 billion in 2012.⁴² In the last two decades, it went from allowing seven Chinese firms to invest overseas in 1994 to allowing 6,474 in 2013, as seen in Figure 4. However, only a small fraction of such firms—less than 10 percent in 2013—are actually Chinese State Owned Enterprises, as shown in Figure 5.

⁴⁰ Ibid.

⁴¹ Dilip K. Das, "China's Outbound Foreign Direct Investment: Sources of Growth and Transformation," *Research Center for Chinese Politics and Business, Indiana University*, Working Paper No. 35 (2014): 2.

⁴² Ibid, 3.

Figure 4: Number of Chinese firms allowed to invest overseas⁴³

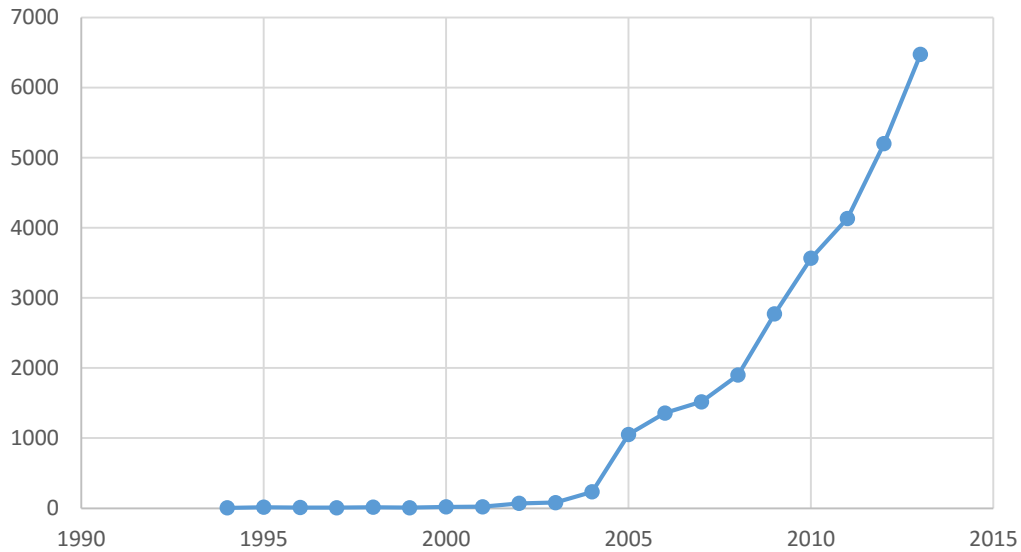
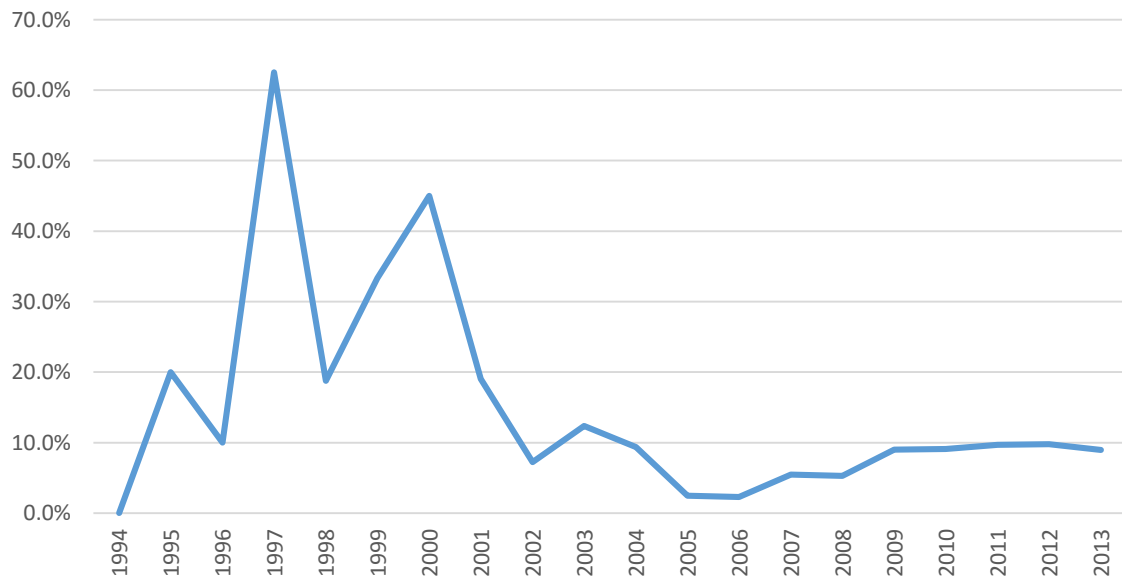


Figure 5: Chinese state-owned enterprise investors as a percentage of total Chinese firms investing overseas⁴⁴



⁴³ Tomoo Marukawa, "Destination Country by Year," in *China's Outward Foreign Direct Investment Data*, ed. Tomoo Marukawa, Asei Ito, and Yongqi Zhang (Tokyo: Institute of Social Science, March 2014): 156.

⁴⁴ Ibid.

Figure 6: Number of Chinese investments attracted by overseas industries between 1970 and 2013⁴⁵

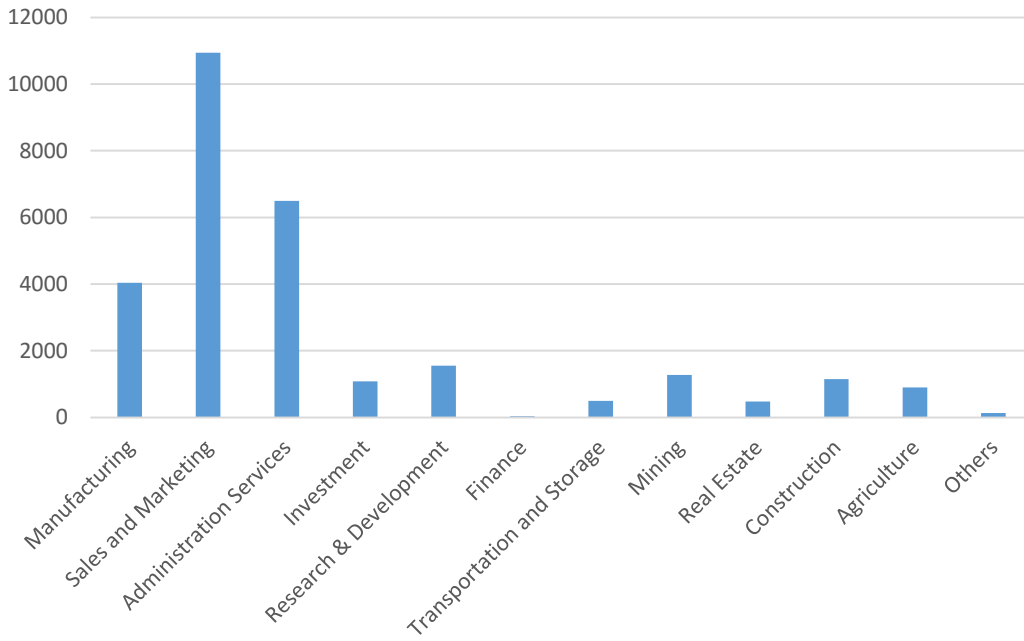
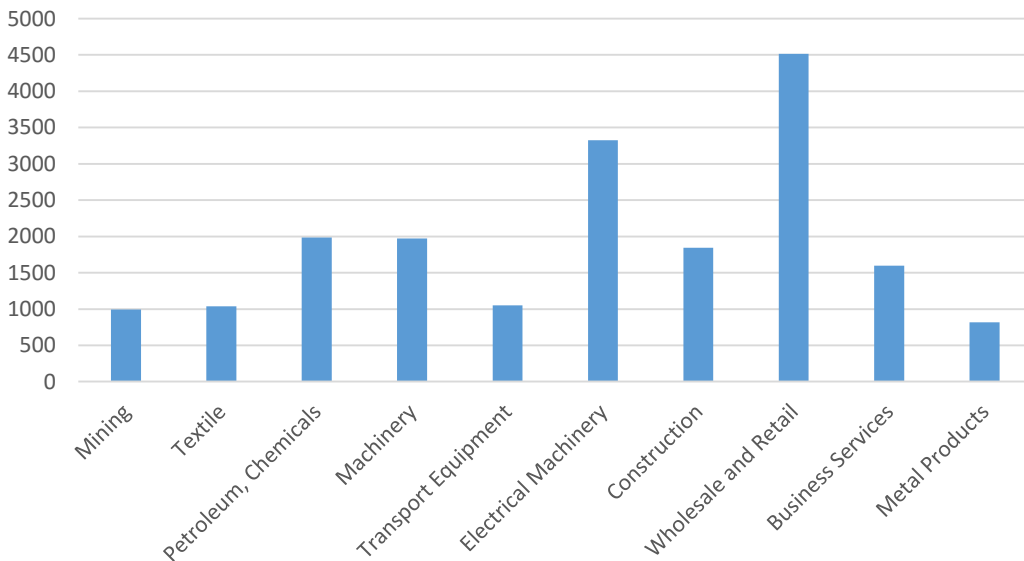


Figure 7: Number of Chinese firms from various industries that made overseas investments between 1970 and 2013⁴⁶



From 1970 until the end of 2013, China allowed a cumulative total of 28,542 Chinese firms to invest overseas. As figure 6 shows, majority of the Chinese investments overseas occurred in three main sectors overseas: sales and marketing, administrative services, and manufacturing. However, figure 6 does not show the size of those investments. Although the number of firms

⁴⁵ Ibid, 118.

⁴⁶ Ibid, 120.

in R&D and Mining sectors appear small, it is widely known that major Chinese investors overseas in these sectors are the state-owned enterprises, which are “active resource seekers” and make huge investments overseas.⁴⁷ The source-industry data in figure 7 shows firms in which industries in China have been more active in investing overseas since 1970. Over 4,500 Chinese firms in wholesale and retail have made overseas investments in that period, followed by machinery and equipment, petro-chemical, construction, and business processing firms.

Between 1970 and 2013, Hong Kong attracted the most number of investments from China, more than twice as much as the second in the list—the US. Canada ranked 13th with 495 Chinese investments in that period. However, these statistics may not reflect the true number of investments.

Many Chinese companies have subsidiaries in Hong Kong. This subsidiary culture started as a way to expand Chinese exports when much of the world cut off soft loans to China following the Tiananmen incident.⁴⁸ As Hong Kong established itself as the “middleman,” and as China’s exports increased, “economies of scale and economies of agglomeration in trading activity” provided a distinct advantage which made it difficult for other nearby trading hubs “such as Singapore or Shanghai to compete with Hong Kong.”⁴⁹ Because “traders tend to agglomerate in a city ... once a city acquires a comparative advantage in trade, the advantage feeds upon itself, and more trading firms will come to the city, making it even more efficient in trade.”⁵⁰ This certainly was the case with Hong Kong, which continues to be the ‘middleman’ for many Chinese firms. It helped that Hong Kong also had “a good knowledge of English, familiarity with modern business practices, the ability to work in different cultural and legal environments, and proficiency with complex contractual forms,” which most Chinese firms lack even today.⁵¹ Hong Kong’s status as a major financial hub could be tapped to quench the growing Chinese economy’s thirst for capital.⁵²

Therefore, many major Chinese foreign investments flow to final destinations through Hong Kong. For example, when China’s largest oil refiner, Sinopec, invested \$5.2 billion in 2011 in the Brazilian firm Galp Energia, the money was not invested directly by Sinopec China, but through Sinopec International Exploration and Development Corporation, a subsidiary of Sinopec in Hong Kong.⁵³ However, the Chinese official statistics did not report this as China’s outward FDI to Brazil, but as Chinese outward FDI to Hong Kong. Therefore, some of those investment

⁴⁷ Dilip K. Das, “China’s Outbound Foreign Direct Investment,” 10.

⁴⁸ Yung-wing Sung, “Economic Integration of Hong Kong and Guangdong in the 1990s,” in *The Hong Kong reader: passage to Chinese sovereignty*, ed. Ming K. Chan and Gerard A. Postiglione (New York: M. E. Sharpe, Inc., 1996), 201.

⁴⁹ Ibid.

⁵⁰ Ibid, 201-202.

⁵¹ Ibid, 202.

⁵² Flora Xiao Huang and Horace Yeung, *Chinese Companies and the Hong Kong Stock Market* (New York: Routledge, 2014), 92.

⁵³ Lihuan Zhou and Denise Leung, “China’s Overseas Investments, Explained in 10 Graphics,” *World Resources Institute*, January 28, 2015, Accessed July 8, 2015, <http://www.wri.org/blog/2015/01/china%E2%80%99s-overseas-investments-explained-10-graphics#fn:3>.

numbers reported for Hong Kong, as shown in Table 1, may be investments taking place in a third destination.

Table 1: China’s most popular outward FDI destinations between 1970 and 2013⁵⁴

Destination	# of investments
Hong Kong	7954
USA	3049
Russia	1152
Japan	835
Vietnam	812
Australia	685
UAE	677
Germany	676
Singapore	627
Korea	617

While both Canada and China attract FDI, they are not in competition for the same kind of FDIs. In a 2012 research report for the Conference Board of Canada, Michael Grant found that China attracts FDIs largely into labor-intensive sectors such as the “outsourced manufacturing” sector while Canada attracts FDIs in “sectors that serve Chinese demand, namely resources.”⁵⁵ A 2010 survey by the China Council for the Promotion of International Trade found that the three main drivers for Chinese investments in Canada were: making use of the Chinese government’s ‘Going Global’ policy incentives, acquiring technology or managerial expertise, and acquiring brands.⁵⁶ Grant also claims that Chinese investors have “special interests in resource development” while Canada has “a national interest in resource development and market diversification.”⁵⁷ Wendy Dobson mentions that the recent flow of Chinese FDI into Canada highlights this perfect match-up of Chinese demand of resources and Canadian need of resource development.⁵⁸ She mentions that most of Chinese investments and acquisitions in Canada have been in natural-resource sectors. Therefore, China’s outward FDI flow in resources complements Canada’s need for inward FDI flow into resource developments.

The flow of FDI between Canada and China have increased in both directions over the years, as shown in Figure 8. However, Chinese FDI into Canada increased at a much faster rate in the last two decades. The flow of Chinese FDI into Canada was below \$5 billion in 2007, but increased rapidly and exceeded \$25 billion in 2014, a more than five-fold increase in eight years. In the same period, Canadian FDI flowing into China increased from \$6.7 billion to \$13.1 billion, an

⁵⁴ Tomoo Marukawa, “Destination Country by Year,” 132-155.

⁵⁵ Michael Grant, “Fear the Dragon? Chinese Foreign Direct Investment in Canada,” *The Conference Board of Canada*, Report (June 2012): 11.

⁵⁶ Ibid, 15

⁵⁷ Ibid.

⁵⁸ Wendy Dobson, “China’s State-Owned Enterprises and Canada’s FDI Policy,” *The School of Public Policy Research Paper Series 7* (10) (March 2014): 15.

almost two-fold increase. A comparison of the FDI flows, as seen in Figure 9, shows that Chinese FDI into Canada in 2014 was almost twice the value of Canadian FDI into China.

Figure 8: Canadian FDI flow from and into China (billions of Canadian dollars)⁵⁹

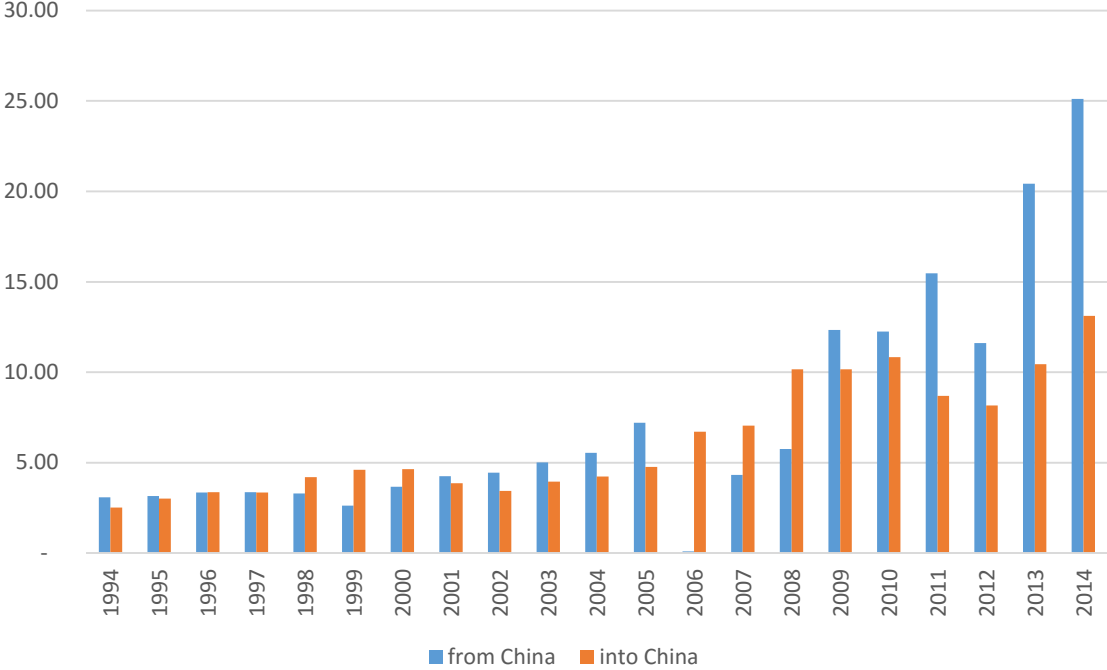
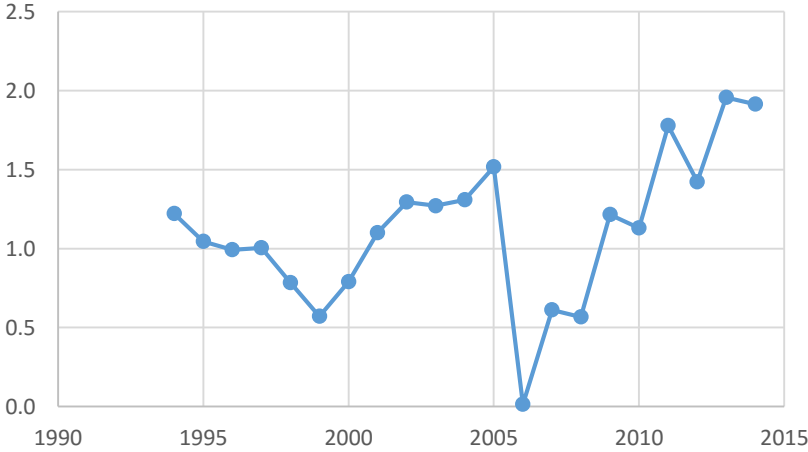


Figure 9: Ratio of Canada’s inward FDI from China to outward FDI into China⁶⁰



⁵⁹ Statistics Canada, CANSIM Table 376-0051 - International investment position, Canadian direct investment abroad and foreign direct investment in Canada, accessed July 3, 2015.

⁶⁰ Ibid.

THE CHINESE ARE COMING

There is a near-unanimous consensus among researchers that both inward and outward FDI flows are beneficial (*see Section IV for a detailed discussion*), the political economy of the FDIs means there is significant opposition to certain FDIs, especially those coming from China. In 2013, Araujo Rodrigues and Juan Cardenal reported in *The New York Times* that China was buying up the world.⁶¹ In 2015, a survey of 206 Germans by the *SKEMA Business School* in France found that only eight percent of the respondents strongly favored the takeover of a German company by a Chinese firm, while the same figure was 10 percent for a takeover by an American firm and 15 percent if the firm was French.⁶² Dominique Jolly, professor at the *SKEMA Business School*, believes that the French fear of the Chinese investments in French wine industry is an overreaction, especially because the Chinese only own 50 of the “over 7,000 chateaux in Bordeaux alone.”⁶³ Essentially, when considering how many wine producers are there in France, the Chinese ownership of French wine companies is very insignificant.

In a 2014 paper for the *School of Public Policy*, Wendy Dobson suggests that the fear of Chinese State Owned Enterprises (SOEs) is unwarranted. Dobson argues that Chinese SOEs may be “huge oligopolies or monopolies in the home market” in China, but are very inexperienced with “market-based international business practices and global rules of the road.”⁶⁴ However, Chinese investments and acquisitions, especially by Chinese SOEs, still face significant scrutiny and opposition in Canada, just like in Europe. As a result, some acquisition bids by Chinese SOEs have failed amidst intense scrutiny.⁶⁵

In a March 2011 paper, Y. Beth Riley, from Bennett Jones LLP’s Antitrust and Competition practice group, claimed that the *Investment Canada Act* is “complex, adds a regulatory burden ... and increases the time and cost of investing in Canada, thus creating the perception of a regulatory and political environment that discourages foreign investment” coming into Canada.⁶⁶ Changes by the Canadian government to the Act could have resulted in decreased Chinese SOE interests in “Canadian oil and gas investments.”⁶⁷ However, in a *School of Public Policy* blog post, Duanjie Chen assessed the situation in 2013 and disagreed with those who

⁶¹ Araujo Heriberto Rodrigues and Juan Pablo Cardenal, “China’s Economic Empire,” *The New York Times*, June 1, 2013.

⁶² Dominique Jolly, “How scary is it to be acquired by Chinese companies?” *Paris Tech Review*, April 10, 2015, accessed July 11, 2015, <http://sptreview.org/en/2015/04/10/chinese-companies-fdi/>.

⁶³ *Ibid.*

⁶⁴ Dobson, “China’s State-Owned Enterprises and Canada’s FDI Policy,” 11.

⁶⁵ *Ibid.*, 15.

⁶⁶ Y. Beth Riley, “Foreign Direct Investment Restrictions in Canada,” *Bennett Jones LLP*, paper presented at the American Bar Association’s Spring Meeting in Washington D.C., accessed July 11, 2015, <http://www.bennettjones.com/uploadedFiles/Publications/Articles/IAB%20-%20paper%20-%20final.pdf>.

⁶⁷ Jesse Snyder, “After a decade of Canadian investment, China is pulling back. What now?” *Alberta Oil Magazine*, June 23, 2015, accessed July 11, 2015, <http://www.albertaoilmagazine.com/2015/06/china-pulls-back-on-canadian-investment/>.

claimed that Canada's new rules had scared foreign investors away.⁶⁸ Chen argued that such claims were not supported by the data. He found that FDI inflow into Canada's energy and mining industry in "the first half of 2013 was \$6.5 billion ... exceeding the half-year average of \$6.2 billion for the period of 2007-2012."⁶⁹

Most governments have a national security review process for vetting international investments. Dobson claims that countries like the US and Australia have much more transparent processes to allowing international investments, unlike Canada.⁷⁰ For example, "Australia provides a transparent list of the factors it takes into account" to foreign investors, "provides a transparent public explanation," and "the onus is on the Australian government to explain why it will not allow" a particular investment into Australia.⁷¹ On the other hand, Dobson argues that Canada's process is vague and uncertain, "subjective, opaque and interventionist," and puts the onus on foreign investors to explain why their investments in Canada should be allowed.⁷² Finally, Dobson cautions that while the FIPA with China "provides investors ... more assurances about the future safety of their assets ... Canada needs a simpler, more transparent policy framework ... guided by the principle of mutual learning" to encourage more future Chinese investments into Canada.⁷³

Gordon Houlden, Director of the China Institute at University of Alberta, mentions that Canada can manage without Chinese investments in Canada. However, Houlden states that as a "country of consumers," Canadian prosperity depends on how well it is able to persuade the Chinese into investing some of the US\$4 trillion in reserves that they have.⁷⁴ For comparison, the total combined international currency reserves of the next six largest reserve-holding countries is US\$3.7 trillion.⁷⁵ Therefore, the question is not whether the Chinese are coming to invest in Canada. The question is how willing Canada is to welcoming them.

IV. TRADE VERSUS FDI: THE DEBATE

Trade and FDI could have different relationships under different contexts. Business can choose to export their goods and services to the final market, or engage in FDIs to set-up production facilities in the final market itself. Such FDIs have advantages such as reduced costs of production (depending on host market's labor and capital costs), reduced transportation costs, and an intimate knowledge of the local market. However, as discussed here and elsewhere in

⁶⁸ Duanjie Chen, "Did Canada's New Rules Scare Away Investors," *The School of Public Policy* blog post, November 22, 2013, accessed July 10, 2015, <http://policyschool.ucalgary.ca/?q=content/did-canada's-new-rules-scare-away-investors>.

⁶⁹ Ibid.

⁷⁰ Dobson, "China's State-Owned Enterprises and Canada's FDI Policy," 20.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid, 22.

⁷⁴ Gordon Houlden, "Opening the doors to Chinese investment," *OpenCanada.org*, July 8, 2015, accessed July 10, 2015, <http://opencanada.org/features/engaging-china/>.

⁷⁵ Ibid.

this paper, FDIs are often substitutes for trade (or 'free trade'), undertaken to overcome tariff and non-tariff trade barriers. This results in increased production in the host country at the expense of lower production in the home country (the FDI source).

FDI could be a complement to trade if it results in increased production in both the host and the home countries. If Chinese FDI into Canada, and Canadian FDI into China are complements to China-Canada trade, they should result in shared gains. However, it may be difficult to conclude that this is the case.

COMPLEMENTS OR SUBSTITUTES?

When the Chinese economy liberalized in the late 1970s, China ranked 32nd in international trade and had very little inward FDI flow.⁷⁶ However, by 2000, China had approved over 364,345 foreign firms that wanted to invest in China, and that process resulted in almost US\$677 billion in inward FDI to China in 2000.⁷⁷ In 2000, China also ranked ninth in international trade with over US\$474 billion in trade volume.⁷⁸

In a 2001 research, Xiaming Liu, Chengang Wang, and Yingqi Wei studied the trade and FDI characteristics of 19 home countries and regions. They concluded that "reductions of impediments to international trade and investment ... lead to more trade-creating activities than to increases in marketing-seeking FDI, which will supplant trade."⁷⁹ Focusing especially on China, Liu et al. argued that "complementary trade can result from FDI, if there exist relatively large differences in resource endowments between the home country and China."⁸⁰

The Going Global strategy that China unveiled in October 2000 was aimed at making China more visible and competitive in international business.⁸¹ A Chinese government circular in October 2004 encouraged FDI outflows in R&D centers that could help Chinese firms acquire "internationally advanced technologies, managerial skills, and professionals."⁸² China's outward FDI forays follow the "imitation to innovation"⁸³ philosophy that helped the post-Second World War Japan grow from a decent economy to the second largest in the world, and Korea from an

⁷⁶ Xiaming Liu, Chengang Wang, and Yingqi Wei, "Causal links between foreign direct investment and trade in China," *China Economic Review* 12 (2001): 191.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid, 200.

⁸⁰ Ibid, 198.

⁸¹ Ping Deng, "Investing for strategic resources and its rationale: The case of outward FDI from Chinese companies," *Business Horizons* 50 (2007): 72.

⁸² Ibid.

⁸³ Jian Cheng Guan, Chiu Kam Mok, Richard C.M. Yam, K.S. Chin, and Kit Fai Pun, "Technology transfer and innovation performance: Evidence from Chinese firms," *Technological Forecasting & Social Change* 73 (2006): 676.

agrarian economy to an industrialized one,⁸⁴ by acquiring technologies from advanced economies, using them well, and improving them.⁸⁵

Table 2: Top 5 sectors in Canada by inward FDI flow (billions of Canadian dollars)⁸⁶

	2010	2011	2012	2013	2014
Manufacturing	176.8	173.0	186.5	204.5	215.7
Mining and oil and gas extraction	112.0	118.2	116.9	141.2	152.1
Management of companies and enterprise	117.9	117.3	112.0	119.3	125.6
Finance and insurance	78.1	79.3	84.6	87.4	90.5
Wholesale trade	39.6	42.8	55.0	57.0	59.7

In a 2007 research, Ping Deng argued that Chinese FDI outflow was driven by Chinese firms' "needs to access complementary resources, notably ... knowledge, in order to upgrade their own capabilities" that will make them more competitive in international business.⁸⁷ In a 2009 paper, Mary Teagarden and Dong Hong Cai argue that Chinese FDI inflow into advanced economies are used to pursue mergers and acquisitions as a means "to secure market access, new technologies, natural and human resources ... to build market share and mindshare."⁸⁸ In his 2014 working paper, Indiana University's Dilip Das claims that Chinese outward FDI focus on "expansion of markets ... acquiring industrial raw materials and resources, particularly energy for industrial development, and ... acquiring much-needed technological assets and managerial know-how" that Chinese firms willing to expand overseas lacked.⁸⁹

Therefore, many studies and research suggest that Chinese outward FDI flow aims to fulfill Chinese needs for natural resources and technical expertise. For example, China has limited oil and natural gas resources, and a lack of company and enterprise management expertise. That difference in resource endowments, be it availability of natural resource or human resource expertise, could have resulted in high outward Chinese FDI into Canada.

For Canada, both trade (imports and exports) and FDI flow (outward and inward) in the last two decades show an ever increasing trend. Figure 10 shows that there was a sudden drop in Canada's trade between 2008 and 2009, the result of the worldwide financial crisis that especially affected Canada's largest trading partners. During that same period, as seen in figure 11, Canada's outward FDI fell slightly. However, inward FDI flow into Canada has continued to increase every single year. A remarkable event occurred in 1997 when FDI flow into Canada

⁸⁴ L. Kim, *Imitattion to Innovation: The Dynamics of Korea's Technological Learning* (Boston: Harvard Business School Press, 1997).

⁸⁵ F. Narin and J. D. Frame, "The growth of Japanese science and technology," *Science* 245 (1989): 600-605.

⁸⁶ Statistics Canada, *CANSIM Table 376-0052 - International investment position, Canadian direct investment abroad and foreign direct investment in Canada*, Accessed July 6, 2015.

⁸⁷ Deng, "Investing for strategic resources," 74.

⁸⁸ Mary B. Teagarden and Dong Hong Cai, "Learning from Dragons who are Learning from Us: Developmental Lessons from China's Global Companies," *Organizational Dynamics* 38 (2009): 79.

⁸⁹ Das, "China's Outbound Foreign Direct Investment," 7.

exceeded the outward flow of investments from Canada for the first time. It has stayed that way since.

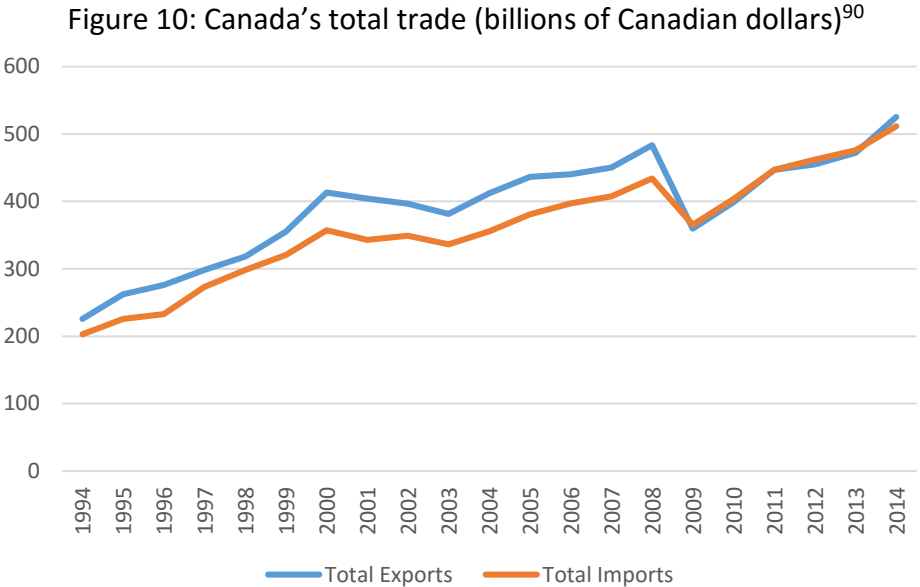
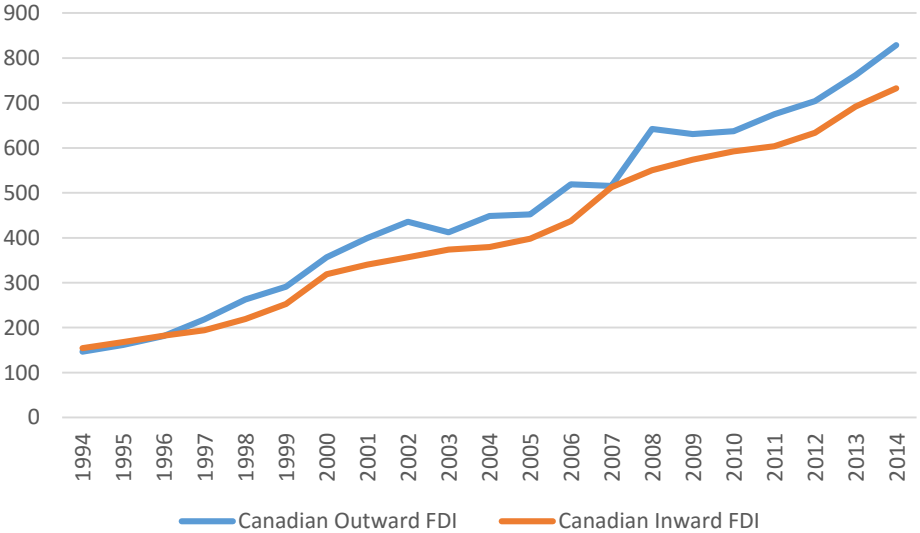


Figure 11: Canadian outward and inward FDI flow (billions of Canadian dollars)⁹¹



It is reasonable to conclude from figure 10 and 11 that the two-way flow of FDI and trade have both been increasing for Canada, and the FDI does not appear to be substituting trade. Had that been the case, the data should have shown one growing rapidly while the other slowing down. A quick correlation test, shown in Table 3, shows that percentage change in Canada’s two-way trade is not correlated with outward or inward FDI. Even when only percentage change in

⁹⁰ Industry Canada, *Trade Data Online (TDO)*.
⁹¹ Statistics Canada, *CANSIM Table 376-0051*.

Canada’s total exports is considered, a correlation with Canada’s outward or inward FDI can be ruled out. That is, there is no statistical evidence to suggest that Canada’s two-way trade and two-way FDI flows are correlated. A negative correlation between FDI flow and trade would have shown that they are substitutes of one another.

Table 3: Correlation coefficients (on figures from 1995 to 2014)

trade and outward FDI	0.4859	exports and outward FDI	0.4459
trade and inward FDI	0.2736	exports and inward FDI	0.3010
trade and two-way FDI	0.4740	exports and two-way FDI	0.4589

Source: Author’s calculations from Industry Canada’s *TDO* and Statistics Canada’s CANSIM 376-0051 data

In a 2007 *e-brief* for the *C.D. Howe Institute*, Jack Mintz and Andrey Tarasov suggested that investment overseas by Canadian firms provide “greater opportunities to expand business operations in international markets; greater market share for Canadian products; and better access to resources, technologies, know-how, and financing.”⁹² That is, Canadian firms that invest overseas become better at understanding and exploiting the world market, resulting in more exports opportunities. Mintz and Tarasov suggested that FDI inflows into Canada from overseas are equally important for Canada. The “threat of takeover by foreign competitors” forces Canadian firms to “perform better or be replaced by stronger leadership.”⁹³ Also, foreign takeover of Canadian firms could result in greater access to international markets and technologies. A 2004 research by Guillemette and Mintz found that most foreign takeovers of Canadian firms result in higher efficiency and productivity in those firms.⁹⁴ That, in turn, makes the firms more competitive in the international market.

However, in a 2013 paper, Vijay Jog and Jack Mintz caution that FDI decisions are not always taken with substitution or complementarity theories in mind.⁹⁵ In fact, they could be a simple financial decision to reap greater rewards by exploiting a policy loophole. For example, Jog and Mintz argue that Chinese investors in Canada enjoy an unlevel playing field that favors them. While Canadian registered plans face a 30 percent equity cap in owning a company, Chinese state-owned enterprises do not face such limits while buying up Canadian firms.

⁹² Jack Mintz and Andrey Tarasov, “Canada Is Missing Out On Global Capital Market Integration,” *C.D. Howe Institute e-brief* 48 (August 21, 2007), accessed May 26, 2015, http://www.cdhowe.org/pdf/ebrief_48.pdf.

⁹³ *Ibid.*

⁹⁴ Yvan Guillemette and Jack Mintz, “A Capital Story—Exploding Myths around Foreign Direct Investment in Canada,” *C.D. Howe Institute Commentary* 201 (2004).

⁹⁵ Vijay Jog, and Jack Mintz, “Sovereign Wealth and Pension Funds Controlling Canadian Businesses: Tax-policy Implications,” *The School of Public Policy SPP Research Papers* 6 (5) (February 2013).

FIPA OR FTA?

The US and China are Canada's largest trade partners. In 2014, Canada had a \$50 billion positive trade balance with the US, while it had \$15 billion negative trade balance with China.⁹⁶ However, those numbers do not reflect the true extent of the trade with those countries. In 2014, Canada's exports to the US were worth \$400 billion; exports to China were worth only \$20.6 billion. Similarly, imports from the US were worth \$350 billion; imports from China were worth only \$35.5 billion. The figures suggest that Canada-China trading relationship has not been exploited to its fullest potential.

Trade is a function of economic growth, and economic growth needs capital investments. Contrary to popular belief, prosperity alone does not create more investments.⁹⁷ Canada is already prosperous, but it has a small population and is "a country of consumers, not a country of savers."⁹⁸ Canadian household saving rate at the end of 2014 was only 3.6 percent, a five-year low.⁹⁹ Also, Canadian households have been dipping into their saving to finance their consumption.¹⁰⁰ Therefore, Canada cannot generate sufficient capital of its own to fuel further economic growth. That means, it has to attract investments from outside. Ignoring China, the largest source of foreign investment today, will make it difficult for Canada "to maintain the prosperity levels most Canadians are accustomed to."¹⁰¹ As a result, Canada's FIPA with China, as a means to attract more Chinese investments into Canada, is a positive step.

It has been argued that FDI decisions in the past were often taken in response to trade barriers imposed by countries. "The inflow of foreign direct investments effectively reduces the need for imports," so trade barriers such as export or import quotas would no longer be binding as a result of FDI inflow into countries that had such barriers up.¹⁰² For example, when criticisms in the US rose against Japanese automakers—blaming them for hurting American auto industry with their cheaper products—the Japanese automakers imposed a voluntary export quota to the US market to please the US automakers. While the action was taken to benefit US automakers, it did the opposite. The "import restriction led to a large inflow of foreign investment from Japan, which had the effect of lowering prices in the United States, thereby

⁹⁶ Statistics Canada, *CANSIM Table 228-0069 – Merchandise imports, exports and trade balance, customs and balance of payments basis for all countries, by seasonal adjustment and principal trading partners*, accessed August 10, 2015.

⁹⁷ Robert E. Lipsey, Robert C. Feenstra, Carl H. Hahn, and George N. Hatsopoulos, "The Role of Foreign Direct Investment in International Capital Flows," in *International Capital Flows*, ed. Martin Feldstein (Chicago: University of Chicago Press, January 1999), 321.

⁹⁸ Houlden, "Opening the doors to Chinese investment."

⁹⁹ Tavia Grant, "Household saving rate nears five-year low as financial risks increase," *The Globe and Mail*, March 3, 2015, accessed August 23, 2015, <http://www.theglobeandmail.com/report-on-business/economy/household-saving-rate-nears-five-year-low-as-financial-risks-increase/article23274104/>.

¹⁰⁰ *Ibid.*

¹⁰¹ Houlden, "Opening the doors to Chinese investment."

¹⁰² Robert C. Feenstra, "Facts and Fallacies about Foreign Direct Investment," in *International Capital Flows*, ed. Martin Feldstein (Chicago: University of Chicago Press, January 1999), 344.

offsetting the initial cost of the trade restriction.”¹⁰³ There are several similar examples, especially in Latin America where the countries had many trade restriction policies such as import substitutions.

In 1999, Robert Feenstra argued that foreign firms’ FDIs in the US often aimed at taking advantage of market imperfections resulting due to their own home countries’ anti-trade policies.¹⁰⁴ Their acquisition of US assets would allow them to gain a “preferential access” to its own home market and “earn higher profits there from acquiring U.S. firm than could the American firm itself.”¹⁰⁵ This could be true of Canadian FDI narrative, too. Among other things, this kind of possibility leads to foreign firms paying a premium to acquire Canadian firms.

Two important points emerge from such experiences.

First, foreign investments often occur in situations and industries where governments restrict free trade. This has been observed in the past when FDI inflow into many US industries were “influenced by the threat of protection in various industries.”¹⁰⁶ The suggestion is: had trade been fair and open, the FDIs would not have been necessary.

Second, no matter what the reasons for increased FDI inflows, they benefit the host country in multiple ways. This was definitely the case in the US-Japan auto dispute. Increased FDI flows into the US by Japanese automakers benefitted the American auto consumers by *lowering the prices* of automobiles in the US. This was in addition to the *wage increases* and *technology transfer*—benefits that generally occur in host countries as a result of increased FDI inflow.¹⁰⁷ Blonigen and Feenstra’s 1997 research on FDI inflows into the US, and Barrel and Pain’s 1999 research on FDI inflows into Europe, showed that increased FDI inflows reduced the likelihood of imposing antidumping duties.¹⁰⁸

Although a general consensus on the issue is difficult to establish, it is evident that there are many who suggest increasing FDI endeavors are a result of poor trade relationships between parties. In its promotion of FIPAs, the DFATD states that “by investing abroad, companies can gain access to overseas markets, reduce input costs, secure access to key resources, acquire new technologies and provide better support to foreign customers.”¹⁰⁹ However, those benefits are clear outcomes of a good trading relationship. Perhaps, that is why Canada has only FTAs with countries with whom it enjoys those benefits through trading relationships. Canada appears to sign FIPAs with countries with whom it does not expect such friendly reciprocities.

¹⁰³ Ibid.

¹⁰⁴ Ibid, 347.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid, 345.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid, 346.

¹⁰⁹ “Canada’s Foreign Investment Promotion and Protection Agreements (FIPAs).”

V. OPPOSITION CLAIMS AGAINST THE FIPA WITH CHINA

David Mulroney, former Ambassador to China, claims that the Chinese rediscovered Canada during the first decade of the twenty-first century as “an investment opportunity, an education provider, a vacation destination and a place to shop for property as a hedge against possible unwelcome developments back home.”¹¹⁰ At the same time, China’s opening up provided opportunities for Canadian investors interested in investing in China. In 1994, to protect Canadian investments in China, the Canadian government started negotiating a FIPA with China. Among the world’s trading nations, the World Trade Organization (WTO) was the forum for “trade negotiations” and handling “trade disputes.”¹¹¹ If the negotiating nations were both members, the WTO would ensure smooth implementation of a negotiated agreement. However, Canada could not negotiate a meaningful FIPA with China because China was not a member of the WTO at that time. Canada resumed its negotiations after China became a member of the WTO in September 2004. Canada and China finally concluded their FIPA negotiations on February 8, 2012.¹¹²

The FIPA with China was signed on September 8, 2012 by Ed Fast, the Canadian Minister for International Trade, and Chen Deming, the Chinese Minister of Commerce. However, Canada failed to ratify the FIPA to bring it into force for a number of reasons. Since signing the agreement, China was accused of engaging in cyber-spying against many countries, including Canada. For example, in the summer of 2014, the Canadian government blamed China of hacking into Canadian government’s computers.¹¹³ In retaliation to the hacking accusations, China arrested a Canadian couple living in China and charged them with stealing military secrets.¹¹⁴ Wide coverage of that arrest drew a public outcry in Canada. Canadians were also concerned about “doing business with a non-democratic regime” with poor records on human rights.¹¹⁵ Also, because the large Chinese investors in Canada were the Chinese state-owned enterprises, the FIPA appeared to favor China more than Canada.¹¹⁶ Reasons such as those resulted in Canada failing to ratify the agreement for two years after its signing.

There appear to be three main reasons for the opposition to the FIPA with China.

First, the Canadian government is accused of signing an agreement that is not transparent. In the House of Commons’ debate on the FIPA with China, the National Democratic Party’s trade critic and Member of Parliament Don Davies argued that the FIPA with China allowed “no public access, no public disclosure, no transparency and no accountability” of dispute settlement

¹¹⁰ Mulroney, *Middle power, middle kingdom*, 23.

¹¹¹ “What we do,” World Trade Organization, accessed November 21, 2014,

http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm.

¹¹² “Negotiations.”

¹¹³ Steven Chase, “Canada ratifies controversial investor deal with China,” *The Globe and Mail*, September 12, 2014, accessed October 12, 2014, <http://www.theglobeandmail.com/news/politics/canada-ratifies-controversial-investor-deal-with-china/article20582845/>.

¹¹⁴ *Ibid.*

¹¹⁵ Stephens, “FIPA with China, finally (and about time too).”

¹¹⁶ Chase, “Canada ratifies.”

through arbitration panels.¹¹⁷ The provisions allow for a dispute between a Chinese firm and the Canadian government to be resolved “in secret” through arbitrary tribunals and with “no limits on damages awarded” by a panel of three arbitrators.¹¹⁸ The provisions also allow for the details of the arbitration sessions and results to be “kept secret at the discretion of the sued party.”¹¹⁹

If these claims about the Investor-State Dispute Settlement (ISDS) provisions are true, the case results can be kept secret, Canadian public would not know whether or how much of those cases resulted in any losses to Canada, and whether the losses were in the thousands or in the millions of dollars. If the precedent is anything to go by, it is doubtful that the Canadian government will be any more forthcoming in disclosing FIPA arbitration results and settlements than it has been on similar cases in the past.¹²⁰ For example, Canada lost the *Mobil/Murphy Oil v Canada* case in 2012 in a NAFTA tribunal and ended up paying compensation to the company, but the compensation details have not been made public.¹²¹

It is very unlikely that either the Canadian government or the Chinese firms in Canada would make any FIPA arbitration case’s compensation details public. If Canada loses an arbitration case against a Chinese firm, the Canadian government would not make the details public for fear of a public outcry, especially if the compensation is huge. The Chinese firm would never make the results public for fear of negative publicity in Canada. Therefore, both the suing and the sued parties have no incentive to let the Canadian public know the arbitration results.

The PM’s office had promoted the FIPA as a strategy to protect Canadian investments in China. However, that strategy has been questioned. Figure 8 shows that Canadian investment in China was \$10.83 billion in 2010 and \$13.12 billion in 2014, representing a growth of 21 percent in the last five years. However, in the same period, Chinese investment in Canada has more than doubled, from \$12.24 billion in 2010 to \$25.11 billion in 2014. The figures suggest that Chinese direct investments in Canada are almost twice as large as Canadian direct investments in China. That is, Chinese firms in Canada stand to benefit more from the FIPA than Canadian firms in China. Therefore, the Canadian government is accused of getting into an agreement that is “inevitably skewed in China’s favor.”¹²²

¹¹⁷ “Hansard-235,” First session of the 41st Parliament, April 18, 2013, accessed November 22, 2014, <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6087364>.

¹¹⁸ Diane Francis, “Canada-China trade deal is too one-sided.”

¹¹⁹ Patrick Brown, “FIPA agreement with China: What’s really in it for Canada?” *CBC News*, September 19, 2014, accessed October 10, 2014, <http://www.cbc.ca/news/canada/fipa-agreement-with-china-what-s-really-in-it-for-canada-1.2770159>.

¹²⁰ Gus Van Harten, “Taking apart Tories’ party line on China-Canada treaty,” *The Tyee*, November 5, 2012, accessed October 13, 2014, <http://thetyee.ca/Opinion/2012/11/05/Van-Harten-FIPA/>.

¹²¹ *Ibid.* For case details see: *Mobil/Murphy Oil v Canada*, accessed November 8, 2014, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/mobil.aspx?lang=eng>.

¹²² Jenny Uechi, “Harper OKs potentially unconstitutional China-Canada FIPA deal, coming into force October 1,” *The Vancouver Observer*, September 12, 2014, accessed October 12, 2014,

While promoting the FIPA, Trade Minister Ed Fast had stated that the FIPA would increase Chinese investments in Canada and “create jobs and economic opportunities for Canadians in every region of the country.”¹²³ However, that claim has been questioned. Gus Van Harten claims that “China has more discriminatory laws and practices than Canada” and the FIPA simply “freezes an unlevel playing field in China and a relatively level one in Canada.”¹²⁴ There are suggestions that the FIPA does not reduce the tariffs on Canadian exports to China.¹²⁵ On the contrary, it allows for “existing restrictions” in China and Canada “to stay in place.”¹²⁶ Therefore, the opposition claim that the FIPA might not create more jobs and economic opportunities for Canadians in Canada.

Second, foreign investors’ ability to sue Canada based on the ISDS provisions are well documented under the NAFTA. When the NAFTA was being designed, Canada and the US agreed to have ISDS provisions in the agreement as a way to ensure that American and Canadian investments in Mexico were protected from the risky business and political environments in Mexico. However, this provision was exploited by American investors in Canada to sue Canada “dozens of times” while only one Canadian investor had ever sued Mexico by 2012.¹²⁷ The Canadian government is still fighting cases in the NAFTA arbitral tribunals that could result in huge losses if Canada loses. For example, on June 30, 2014, Canada filed its Statement of Defense to a lawsuit filed by Eli Lilly and Company on September 12, 2013 in a NAFTA tribunal.¹²⁸ If Canada loses the case, it may end up paying up to US\$500 million in compensation (the maximum claimed) to the American pharmaceutical company.

Third, it is unclear if Canadian firms in China will be able to get fair judgments if they sue the Chinese government. The FIPA is clear that Canadian firms in China cannot approach Chinese courts for dispute settlement. Annex C.21 of the FIPA suggests that Canadian firms in China have to first “make use of the domestic administrative reconsideration procedure.”¹²⁹ If they are not satisfied with the resolutions from that procedure, they can submit claims to arbitration. The FIPA does not mention if Canadian firms in China can register a case in the Chinese courts. That is a disadvantage to the Canadian firms in China because there is no guarantee that the reconsideration procedure will be unbiased because it is not a judicial body.

However, the FIPA allows Chinese firms in Canada to approach the Canadian justice system first. Therefore, Annex C.21 clearly gives Chinese firms in Canada an upper-hand in comparison

<http://www.vancouverobserver.com/news/harper-oks-potentially-unconstitutional-china-canada-fipa-deal-coming-force-october-1>.

¹²³ Uechi, “Harper OKs.”

¹²⁴ Van Harten, “Taking apart Tories’ party line.”

¹²⁵ Uechi, “Harper OKs.”

¹²⁶ Patrick Brown, “FIPA agreement with China: What’s really in it for Canada?”

¹²⁷ Van Harten, “Taking apart Tories’ party line.”

¹²⁸ “Government of Canada’s Statement of Defense” in the *Eli Lilly and Company v. Government of Canada* case, accessed December 2, 2014, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/eli.aspx?lang=eng>.

¹²⁹ *Ibid.*

to Canadian firms in China. The judicial system in Canada, a democratic country, is more likely to be fair to Chinese firms operating in Canada. The same cannot be said about the administrative reconsideration procedure which is composed of Chinese government bureaucrats.

Europeans are also worried about the ISDS provision in the Comprehensive Economic and Trade Agreement, their upcoming FTA with Canada. Germany has expressed concerns over the provision, which it believes will allow Canadian firms to challenge European countries' domestic rules in independent tribunals.¹³⁰ Europeans are concerned that the provision will "permit corporations to overturn domestic laws."¹³¹ Europeans have hinted at excluding the ISDS provision from their upcoming Transatlantic Trade and Investment Partnership with the US.¹³² However, Canadian analysts fear that the provision in the FTA with Europe, along with Canada caving on pharmaceutical rights, may hurt Canada more. It would empower European pharmaceutical companies with "more investor-friendly grounds for challenging decisions made by the Canadian courts."¹³³

VI. COMPARISON WITH OTHER FIPAs AND NAFTA

As mentioned earlier, there are a few major issues on which a significant opposition has built around Canada's FIPA with China. This raises the question: are these issues very particular to only the FIPA with China, or are they present in other FIPAs and FTAs, too? This section compares the FIPA with China with the latest FIPA that Canada has brought into force—the FIPA with Serbia, which came into force on April 27, 2015—on the issues most commonly raised by the opposition. However, most FIPAs that Canada has signed has been with small economies, the exception being China. Therefore, a further comparison is made with the NAFTA, which has the United States as a member, as an agreement that is comparable to the FIPA with China. What follows below is the analysis of the relevant articles and provisions from those agreements. The actual language of the articles and provisions from those agreements are available in the Annex.

¹³⁰ Gordon Isfeld, "CETA a done deal, EU members cannot 'opt out,' German ambassador says," *Financial Post*, October 1, 2014, accessed October 14, 2014, <http://business.financialpost.com/2014/10/01/ceta-a-done-deal-eu-members-cannot-opt-out-german-ambassador-says/>.

¹³¹ Thomas Walkom, "CETA a much-announced trade pact of dubious value," *The Toronto Star*, September 30, 2014, accessed October 11, 2014, http://www.thestar.com/news/canada/2014/09/30/ceta_a_muchannounced_trade_pact_of_dubious_value_walkom.html.

¹³² Bill Curry, "Controversial part of Canada-EU trade deal may be left out of U.S. talks," *The Globe and Mail*, September 29, 2014, accessed October 15, 2014, <http://www.theglobeandmail.com/news/politics/controversial-part-of-canada-eu-trade-deal-may-be-left-out-of-us-talks/article20829136/>.

¹³³ Scott Sinclair, "Intellectual Property Rights," in *Making Sense of the CETA*, ed. Scott Sinclair, Stuart Trew and Hadrian Mertins-Kirkwood (Canadian Center for Policy Alternatives, September 2014), 57.

REASONS FOR LAWSUITS

Article 7 in the FIPA with Serbia and Article 11 in the FIPA with China—both titled *Compensation for Losses*—and Article 1110 in the NAFTA, titled *Expropriation and Compensation*, mention the reasons based on which an investor can sue the host country.

Under the NAFTA, the host country can be sued if it enacts a policy or law that leads to nationalization or expropriation of foreign investors' investment in the host country. This is also true for both the FIPAs with China and Serbia. Under the FIPA with Serbia, additional reasons for lawsuits are armed conflict, civil strife, or state of emergency, including natural disasters, in the host country. Under the FIPA with China, Chinese firms in Canada can sue the Canadian government for restitution, indemnification, compensation or other settlement if war, a state of national emergency, insurrection, riot or other similar events result in losses to the firms.

Therefore, in theory, Article 11 could be seen as too encouraging for Chinese firms in Canada to sue the Canadian government. It is noteworthy that while the NAFTA only focuses on expropriation and policies/laws against foreign investment, the FIPAs include reasons such as war, insurrection, civil strife, and national disasters. In particular, inclusion of “other similar events” in the FIPA with China is worrisome because it could be interpreted very broadly.

DISPUTE SETTLEMENT PROCESS

Article 15 and Annex C.21 in the FIPA with China, Article 22 in the FIPA with Serbia, and Article 1116, 1117 and 1121 deal with the dispute settlement process between foreign investors and the host countries.

All three agreements state that a foreign investor cannot make a claim against the host country if three years have already passed since incurring any damages or losses. The foreign investors are first encouraged to approach diplomatic channels to resolve their disputes. If they fail to resolve the dispute for six months since it arises, they can sue the host country.

The NAFTA states that if an investor approaches arbitration with claims for compensation, the investor has to waive the right to pursue the case in any other tribunal or the court of law in any of the NAFTA signatory countries. It is unclear if this means the arbitration decision is final and that the investor cannot file cases in the courts thereafter, or if it simply means the investor cannot have an ongoing case for the same complaint in a court while it also undergoes arbitration in a NAFTA tribunal. The FIPA with China mentions that foreign investors may not undergo arbitration if they have an ongoing case against the host country for the same dispute. They have to withdraw the case from the courts if they wish to pursue arbitration. The FIPA with Serbia does not have these clear mentions.

The FIPA with China significantly differs from the other two agreements in the language of the party-specific requirements in Annex C.21. The language is clear that a Canadian investor in China has to first approach the Chinese government's administrative reconsideration procedure

in case of any dispute. If that bureaucratic procedure cannot resolve the dispute satisfactorily within four months, the Canadian investor can then submit a claim for arbitration. Because Canada does not have such a bureaucratic procedure set-up, a Chinese investor in Canada can directly submit a case for arbitration if diplomatic consultations fail to resolve the dispute within six months.

The agreements are clear that arbitration results are binding to all parties, which suggests that the parties cannot approach other arbitration avenues or the courts post-arbitration. It is also clear that investors have to withdraw their cases from the courts if they wish to pursue arbitration. However, it is not clear if the investors can still approach arbitration if they are unsatisfied with the outcomes from the host country's courts, where they may have registered a case and got a verdict already.

SELECTION OF ARBITRATORS

Article 15 in the FIPA with China, Article 26 and 38 in the FIPA with Serbia, and Article 1123 in the NAFTA mention the selection of arbitrators.

Both the NAFTA and the FIPA with China mention that the arbitration panel has three arbitrators—one each selected by the two disputing parties, and the third arbitrator is selected jointly by the two parties by agreement. This third arbitrator will also be the Chairperson of the arbitration panel. However, the NAFTA does not clearly mention if the third arbitrator can or cannot be a national of the two contracting parties. On the other hand, the FIPA with China is clear in that this third arbitrator should be a national of a third country that has diplomatic relations with both the contracting parties. The FIPA with China also mentions that if the two contracting parties fail to pick the third mediator, the President of the International Court of Justice will be invited to pick the third mediator, still fulfilling the criteria that the third mediator is not a national of either of the contracting party.

The FIPA with Serbia suggests that the arbitration panel has three arbitrators or more, if the disputing parties agree. Each party chooses an arbitrator, and the third arbitrators is chosen jointly by the two disputing parties to be the Chairperson of the panel. It is not clearly stated if the third arbitrator has to be a national of a third country. However, unlike the NAFTA and the FIPA with China, the FIPA with Serbia mentions that the arbitrators should have expertise or experience in public international law, international trade or international investment rules. This kind of clear statement of qualification of arbitrators is not present in the other two agreements.

PUBLICATION OF AWARD AND CASE DETAILS

Article 28 in the FIPA with China, Article 31 in the FIPA with Serbia, and Annex 1137.4 in the NAFTA mention the publication of case details.

The NAFTA is clear that in the case of Canada, either Canada or a disputing investor can make the arbitration award details public if it chooses to do so. Both the FIPA with Serbia and the FIPA with China state that details of a tribunal's award should be publicly available, with redactions of confidential information. Other case details and documents in the FIPAs are made publicly available only if a disputing party determines it to be in the public interest and notifies the tribunal. Otherwise, other details and documents are kept secret. The FIPAs also mention that even if a tribunal designates some information as confidential, if a party has access to information laws, such laws can be invoked to make information public.

VII. ANALYSIS OF THE OPPOSITION CLAIMS

Public support for Chinese investments in Canada is lacking among Canadians. A national poll conducted in 2015 by the Asia Pacific Foundation of Canada showed that Canadians are more supportive of foreign investments coming from Japan, the US, and Europe than that coming from China.¹³⁴ As a result, there is significant opposition to the FIPA with China. A closer look, as discussed earlier, shows that there are three main reasons for this opposition: a lack of transparency, potential for Canada to lose millions to Chinese firms through arbitration tribunals, and lack of faith in the FIPA provisions for fair judgments.

TRANSPARENCY

Access to public documents and information is one of the fundamental rights of a private citizen. Most democratic countries enshrine this right into law through the Right to Information Act or a similar legislation. The *Access to Information Act 1985* extends this right to Canadian citizens and permanent residents. Section 2 of the Act states that “the head of a government institution shall ... respond to the request accurately and completely and ... provide timely access to the record in the format requested.”¹³⁵

However, governments may refuse to disclose information in certain instances. Sections 13 through 29 of the *Access to Information Act* mention various scenarios under which the request for information could be denied by the government. For example, it can be denied if the information was obtained in confidence from a foreign state, an international organization of states, another province, a municipal or regional government or an aboriginal government. It can be denied if the disclosed information could hurt Canada's federal-provincial affairs or hurt Canada's “conduct of international affairs ... defense ... prevention or suppression of subversive or hostile activities.”¹³⁶ Information that potentially interferes with Canadian law enforcement and investigations can be denied. Information that could be used to commit a crime or could threaten individual safety can be denied. Disclosure of confidential “trade secrets or financial, commercial, scientific or technical information” or trade and investment advice obtained in

¹³⁴ Houlden, “Opening the doors to Chinese investment.”

¹³⁵ *Access to Information Act RSC 1985 c A-1*, accessed on December 1, 2014, <http://canlii.ca/t/52bss>.

¹³⁶ *Ibid.*

confidence from a third party can be denied. “Personal information as defined in section 3 of the *Privacy Act*” cannot be disclosed.¹³⁷ However, none of these sections remotely suggest that case and compensation details from the FIPA or FTA arbitral tribunals should be kept secret.

All of Canada’s FIPAs state that tribunal award details should be publicly available. However, the FIPAs allow for other case details and documents to be kept secret. Other case details and documents can be made public only if either party feels it is in the public interest. However, Gus Van Harten argues that this option encourages more secrecy than transparency.¹³⁸ An argument could be made that proactive disclosure of all details and documents in which the Canadian government is the sued party would uphold the *Access to Information Act* and make the Canadian government more accountable to its public.

The NAFTA reforms on July 31, 2001 reinterpreted the agreement to allow “any party to a dispute to disclose the outcome without universal consent of all the parties.”¹³⁹ Similar reforms in the FIPA with China would allow the countries to improve their proactive disclosure practice. It is possible that a proactive disclosure by Canada in a high-profile case could bring a reciprocal disclosure by the Chinese government. However, that would be a positive outcome. Such disclosures would make the Chinese government more accountable to its public, too. Therefore, a reform of the FIPA with China to promote mutual disclosures would be a win-win situation for the Canadian government. A case could be made that the Canadian government would be making China more accountable to its public while making itself more accountable to Canadians.

The DFATD states that it has been working towards improving “proactive disclosure of information so that Canadians are better able to hold Parliament, the government and public-sector officials accountable.”¹⁴⁰ The DFATD publishes each of the completed *Access to Information Act* requests online every month for everyone to see.¹⁴¹ In a paper on investment arbitration, researchers from the Princeton University’s Department of Politics argue that keeping the case details of arbitrations secret feeds the general perception that the arbitrators and the arbitration process hide behind poor conduct and decisions, and are not accountable.¹⁴² If that is true, lack of public disclosure of FIPA arbitration case details goes against the attempts of the Canadian government to become more transparent and accountable.

¹³⁷ Ibid.

¹³⁸ Gus Van Harten, “Breaking Down the Harm to Canada Done by Treaty with China,” *The Tyee*, September 15, 2014, accessed December 4, 2014, <http://thetyee.ca/Opinion/2014/09/15/China-Investment-Treaty-Breakdown/>.

¹³⁹ Emilie Hafner-Burton, Zachary Steinert-Threlkeld, and David Victor, “Secrecy in International Investment Arbitration,” Department of Politics, Princeton University, October 29, 2014, accessed December 5, 2014, <https://www.princeton.edu/politics/about/file-repository/public/SecrecyInInvestmentArbitration.pdf>.

¹⁴⁰ “Transparency,” Department of Foreign Affairs, Trade and Development Canada, accessed December 10, 2014, <http://www.international.gc.ca/departement-ministere/transparence-transparence/index.aspx?lang=eng>.

¹⁴¹ “Completed Access to Information Requests,” Department of Foreign Affairs, Trade and Development Canada, accessed December 10, 2014, <http://www.international.gc.ca/departement-ministere/atip-aiprp/reports-rapports/index.aspx?lang=eng>.

¹⁴² Hafner-Burton et. al., “Secrecy in International Investment Arbitration,” 12.

Given that any compensation made by Canada to Chinese firms is the Canadian public's money, it is fair for Canadians to demand access to case details and documents in FIPA arbitration cases. Also, an across-the-board implementation of the Canadian government's policy of proactive disclosure of information for greater transparency and accountability would produce better results. Proactive public disclosures of FIPA-related case details and documents should be a part of the push for that greater accountability and transparency. While Canada is unable to ensure that the Chinese government makes proactive disclosures to its own public, the Canadian government has the ability to do so in cases where it is the sued party.

COMPENSATION

Article 11 of the FIPA states that if Chinese firms in Canada suffer losses due to "war, state of national emergency, insurrection, riot or other similar events," they can sue the Canadian government for compensations. War and insurrection are well-understood concepts. War is an armed combat or conflict within a country or between different countries. An insurrection is a violent rebellion by the people against their own government. However, a riot or a national emergency needs to be defined clearly.

Section 3 of the *Emergencies Act* of 1985 defines a "national emergency" in Canada as "an urgent or critical" temporary situation that can endanger the lives, health or safety of Canadians and on a scale in which a province does not have sufficient capacity or authority to handle it.¹⁴³ A national emergency could also be a critical or urgent temporary situation that threatens the "sovereignty, security and territorial integrity of Canada" but no existing Canadian law can handle the situation effectively.¹⁴⁴

The United Kingdom's *Riot Act* of 1714 defined a riot as a group of twelve or more people disturbing the peace.¹⁴⁵ Members of such groups would be judged felons and awarded the death penalty if they did not disperse within an hour. Canada incorporated these provisions into its *Criminal Code* with some modifications. Section 63 of the *Criminal Code 1985* defines a riot as an unlawful gathering of three or more people disturbing the peace.¹⁴⁶ The members of the group could be imprisoned for two to ten years, depending on their level of involvement in the riot.

There have been no wars or insurrections inside Canada in recent years. It is unlikely that they will occur anytime soon. However, national emergencies are not as rare. In the last decade, there have been many national emergencies in Canada, and the Canadian Parliament has held discussions on preparing for them.¹⁴⁷ Floods have ravaged Manitoba; Ontario has been affected

¹⁴³ *Emergencies Act RSC 1985 c 22 (4th Supp)*, accessed December 1, 2014, <http://canlii.ca/t/hxzt>.

¹⁴⁴ *Ibid*.

¹⁴⁵ *The Riot Act 1714*, accessed December 1, 2014, <http://www.gutenberg.org/dirs/etext05/rtact10h.htm>.

¹⁴⁶ *Criminal Code RSC 1985 c C-46*, accessed December 1, 2014, <http://canlii.ca/t/52brq>.

¹⁴⁷ *37th Parliament of Canada Volume 1*, March 2004, accessed December 1, 2014, <http://www.parl.gc.ca/content/sen/committee/373/defe/rep/rep03vol1-e.htm>.

with ice storms, power blackout, and SARS epidemic; Quebec has suffered from ice storms; forest fires have devastated the forests in British Columbia; Alberta suffered during the Mad Cow crisis; and hurricanes have affected the Maritimes.¹⁴⁸ It cannot be ruled out that national emergencies will not occur in the future.

Riot as an excuse to sue the Canadian government is problematic. Would four colleagues working in a Chinese firm in Canada, dissatisfied with their workplace treatment and demonstrating outside their office building while disturbing the traffic flow in an adjacent street, be seen as rioting? Would a demonstration by the workers' union against its employer qualify as an event similar to a riot? However, demonstrations by workers against their employers is a fundamental right that workers in Canada enjoy. Also, who defines whether such an event is a riot or not? The FIPA is not clear on that.

Similarly, a devastating flood in the Red River in Manitoba would be a national emergency. Would losses to a Chinese firm in Manitoba due to the flood allow the firm to sue the Canadian government for compensations? Under the current FIPA language, such acts of God could be used by a Chinese firm to sue the Canadian government. That is unfair to the Canadian government, which may have no role in causing a national emergency. It would be especially unfair to the Canadian public which pays the bill if Canada loses the case.

Second, the Investor-State Dispute Settlement (ISDS) provision may not be the best solution to resolving investment disputes.¹⁴⁹ Removing the ISDS clauses from all FTAs and FIPAs would ensure that Canada would not suffer huge losses in settlements in arbitration tribunals. But, once ISDS is removed, there would be no mechanism in the FIPA to address disputes. That is not an ideal situation for Canada, either. Canada could pursue ISDS in some FTAs and FIPAs and not others.

However, such inconsistent policies do not help Canada. The Australian case provides a good example why. Australia did not pursue ISDS in its FTA with the US in 2004, New Zealand in 2011, Malaysia in 2012, and Japan in 2014.¹⁵⁰ But, the ISDS is present in its FTAs with China and Korea.¹⁵¹ If the countries that are signatories in a bilateral agreement with no ISDS provision are also signatories in a multi-lateral agreement such as the Trans-Pacific Partnership, which will have an ISDS provision, firms would ignore the bilateral agreement and file cases under the multi-lateral agreement that has the ISDS provision.

Unlike popular perception, the ISDS provisions could be insufficient for the sort of protection that foreign firms seek in China. In 2012, Japan and China escalated a nationalistic row over a

¹⁴⁸ Ibid.

¹⁴⁹ Rohan Pearce, "Inquiry rejects ban on ISDS clauses in free trade agreements," *Bilaterals.org*, August 29, 2014, accessed December 5, 2014, <http://www.bilaterals.org/?inquiry-rejects-ban-on-isds>.

¹⁵⁰ Luke Nottage, "Why no investor-state arbitration in the Australia-Japan FTA?" *East Asia Forum*, April 9, 2014, accessed December 5, 2014, <http://www.eastasiaforum.org/2014/04/09/why-no-investor-state-arbitration-in-the-australia-japan-fta/>.

¹⁵¹ Ibid.

few uninhabited islands in the East China Sea. The *BBC* explains that both countries claim the islands because they are “close to important shipping lanes, offer rich fishing grounds and lie near potential oil and gas reserves.”¹⁵² During the row, Chinese mobs trashed and burned Japanese-owned businesses in China, resulting in \$100 million worth of losses, but “Japan’s FIPA with China ... was of little use during the riots, or in their aftermath.”¹⁵³ The Japanese businesses had to file cases in the Chinese courts, instead.

Ambassador David Mulroney has plenty of examples of a local Chinese partner of a foreign firm working in China stealing the foreign firm’s intellectual property. In addition to stealing, the local Chinese firm, then, sues the foreign firm in the Chinese courts for “having the temerity to continue using the technology he (the foreign partner) developed in the first place.”¹⁵⁴ Chinese government also looks the other way to Chinese employees in foreign firms in China taking “valuable production secrets to the local competition or even siphoning money from the joint venture to build a competing factory down the road.”¹⁵⁵ Victory for foreign firms that sue Chinese employees or partners is very rare. One such rarity occurred in July 2014 when Canada’s IMAX sued one of its employees for taking the company’s technology to China and setting up a rival company with the support of the Chinese government.¹⁵⁶ IMAX won \$7 million in compensations.¹⁵⁷

If such past experiences are any indication, it is not certain that ISDS provisions would help Canadian firms in China when the provisions are most needed. If the provisions are unhelpful when they are most necessary, Canada is better-off having no ISDS provision at all. However, the FIPA is already ratified and into force. An amendment can only be made if both Canada and China agree.

The US has a much more litigious culture than China, and American firms are responsible for the majority of arbitration cases filed against Canada under NAFTA’s Chapter 11 provision. However, in absolute numbers, there have been only 22 cases filed against Canada through the ISDS provisions in various FTAs and FIPAs that Canada has signed.¹⁵⁸ Therefore, it could be premature to assume that Chinese firms will sue Canada dry by exploiting the ISDS provision. If Canada’s experience with ISDS under NAFTA is any indication, the ISDS provision under the FIPA with China should not be a serious concern for Canada.

¹⁵² “How uninhabited islands soured China-Japan ties,” *BBC*, November 9, 2014, accessed December 10, 2014, <http://www.bbc.com/news/world-asia-pacific-11341139>.

¹⁵³ Michael Den Tandt, “The little glitch ignored by FIPA enthusiasts is that China doesn’t follow rules,” *National Post*, November 16, 2012, accessed December 10, 2014, <http://fullcomment.nationalpost.com/2012/11/16/michael-den-tandt-the-little-glitch-ignored-by-fipa-enthusiasts-is-that-china-doesnt-follow-rules/>.

¹⁵⁴ Mulroney, *Middle power, middle kingdom*, 47.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ Kyla Tienhaara, “A Risky Business” (presentation at the Senate Foreign Affairs, Defence and Trade Legislation Committee, The Australian Senate, August 6, 2014).

It could, as well, be the case that more Canadian firms in China will end up suing the Chinese government through the arbitral tribunals. Canada provisioned ISDS in most of its FIPAs and FTAs as a tool to protect Canadian investors overseas. It is only courteous to extend the same benefit to firms from another country operating in Canada. If Canada is still worried about possible huge losses to Chinese firms through arbitration tribunals, there are three possible policy responses it can pursue:

- Amend Article 11 of the FIPA
- Remove the ISDS provision altogether from Article 11
- Keep Article 11 of the FIPA as it is

While the ISDS provision in the FIPA may not be of any assistance to the Canadian firms in China—as in the case of Japanese firms in China—when they are needed the most, the option of removing the ISDS provision from Article 11 of the FIPA altogether may not be an ideal solution. Removing the provision would leave investors from both countries with no mechanism to settle disputes. Also, Canada has ISDS provisions built into all of its other FIPAs. To remove the provision from the FIPA with China would make the agreement inconsistent with Canada’s other FIPAs it has in force with other nations. Also, any changes to the FIPA can be made only if both Canada and China agree to make the changes, or only at the time of renewal of the agreement, which is in 2029. Therefore, removing the ISDS provisions altogether from the FIPA is possible if both Canada and China agree. Otherwise, Canada will have to wait until 2029, when it can refuse to renew the agreement until the provisions are removed.

Amending Article 11 of the FIPA would address the concerns that unclear definitions in the FIPA may hurt Canada. An amendment to the agreement to clarify what constitutes a ‘riot’ or to remove ‘national emergency’ as a possible cause for FIPA arbitration lawsuits would minimize the possible losses for Canada. Gus Van Harten studies international trade law, and is one of the most vocal critic of the FIPA with China, with several publications on the issue. In an email to the author on July 6, 2015, Van Harten stated that amendments are possible if both China and Canada agree to make them.¹⁵⁹ However, Van Harten considers it “highly unlikely China would agree to any changes because the terms currently favor China.”¹⁶⁰

The third option would be to keep the FIPA as it is. The FIPA took effect on October 1, 2014. It is too soon to know how much damage the ISDS provision in the FIPA could inflict on Canada. A similar provision in dozens of other FTAs and FIPAs that Canada has signed has resulted in a total of around two-dozen cases against Canada, mostly by American firms. If that is an indicator, the FIPA with China may not result in too many arbitration cases against Canada. If the damage is huge in the coming years, Canada could push for an amendment to limit the damage. However, until then, Canada would be better served if it ensured reciprocity and consistency between all its FIPAs. This would maintain Canada’s reputation in implementing such contracts in the future. In *Thinking Strategically: The Competitive Edge in Business, Politics,*

¹⁵⁹ Gus Van Harten, email message to author, July 6, 2015.

¹⁶⁰ Ibid.

and *Everyday Life*, economists Avinash Dixit and Barry Nalebuff explain that establishing consistency and reputation “serves as a commitment.”¹⁶¹ It makes Canada more credible.

FAIR JUDGMENT

Article 11 does not define what events qualify as “other similar events” that could be a cause for lawsuits against Canada. It is possible that Chinese firms in Canada could exploit this lack of clarity because what falls under “other similar events” is up for interpretation. If the case is registered in a Canadian court, the court would interpret the provision. If the case is registered in an arbitral tribunal, the three-member panel would make the interpretation.

Article 15 of the FIPA, titled *Disputes between the Contracting Parties*, mentions that if “diplomatic channels” fail to resolve a dispute “within six months,” the disputing parties can submit the case to “an ad hoc arbitral tribunal.”¹⁶² On the selection of the three arbitrators in the tribunal, subsection 3 of Article 15 states:

“Such tribunal shall be comprised of three arbitrators ... each Contracting Party shall appoint one arbitrator. Those two arbitrators shall jointly select a third arbitrator, who shall be a national of a third State which has diplomatic relations with both Contracting Parties. The third arbitrator shall be appointed by the two Contracting Parties as Chairman of the arbitral tribunal ...”¹⁶³

If the two arbitrators fail to select the third arbitrator, subsection 4 of Article 15 suggests that “either Contracting Party may ... invite the President of the International Court of Justice” to appoint the third arbitrator.¹⁶⁴ The individual selected by the President of the International Court of Justice still has to pass the nationality criteria outlined under subsection 3.

Few would doubt the competency of a Canadian court to interpret the FIPA provisions. However, issues of fairness could arise if the case is registered for arbitration because arbitrators are chosen and paid by the disputing parties, and may or may not have legal background and experience.¹⁶⁵ Also, an arbitrator in one case could be a legal counsel for a claimant in another case, resulting in conflict-of-interest issues.¹⁶⁶ That could raise questions on an arbitrator’s ability to make independent and fair judgment.

¹⁶¹ Avinash K. Dixit and Barry J. Nalebuff, *Thinking Strategically: The Competitive Edge in Business, Politics, and Everyday Life* (New York: W. W. Norton & Company, 1991), 145.

¹⁶² “Agreement between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments.”

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Kyla Tienhaara, “China free trade: is there a devil in the detail?” *The Drum*, November 16, 2014, accessed December 5, 2014, <http://www.abc.net.au/news/2014-11-17/tienhaara-will-there-be-a-devil-in-the-detail-of-the-china-fta/5896534>.

¹⁶⁶ Ibid.

The FIPA also has different dispute settlement provisions for Canadian firms and Chinese firms. Chinese firms in Canada are not forced to first approach one particular mechanism before approaching another. They are free to approach either a Canadian court or a FIPA tribunal. On the other hand, Canadian firms in China should first approach the administrative reconsideration procedure, a bureaucratic set-up created by the Chinese government, for dispute settlement. If unsatisfied with the procedure's decision, the firms can approach a FIPA tribunal. They are not allowed to approach a tribunal directly in the first place, which is a luxury Chinese firms in Canada have. This presents the Chinese firms in Canada with a clear advantage over Canadian firms in China. Also, the Canadian courts are more likely to be independent of any influence from the Canadian government, and more likely to be unbiased against the Chinese firms. The same cannot be said about the Chinese bureaucratic administration procedure.

Gus Van Harten claims that the unclear language of the FIPA means a Chinese investor in Canada "could bring a claim under the FIPA after, before, or alongside a Canadian court case."¹⁶⁷ Canadian courts are considered a part of 'Canada,' and the FIPA's unclear language allows a Chinese investor to challenge a Canadian court's decision by claiming "by way of process or substance, arguing e.g. that the investor was denied 'fair and equitable treatment'."¹⁶⁸ However, the FIPA clearly states that a Chinese investor in Canada can only approach arbitration under FIPA after withdrawing an ongoing case in a Canadian court. Also, the FIPA clearly states that the arbitration results are binding, which means the Chinese investor cannot bring a claim in a Canadian court after the arbitration. The FIPA, however, is unclear on whether the investor can bring a claim to arbitration after a Canadian court has decided on the claim.

The FIPA binds both nations equally. Therefore, it should treat investors from both the nations equally, too. However, different dispute settlement provisions for Chinese investors in Canada and Canadian investors in China could be interpreted as unequal treatment. Especially, in the case of Canada, Van Harten argues that "the FIPA undermines the Canadian judicial system because ... judicial decisions are no longer final."¹⁶⁹ Van Harten argues that since the FIPA is an agreement, if both Canada and China agree, they can change the FIPA provisions to ensure they do not override the home state's justice system.¹⁷⁰

VIII. CONCLUSION

It is historical knowledge that some flexibility is needed to engage with China. A 1972 research by Samuel Ho and Ralph Huenemann found that Canadian analysts understood that Canadian businesses that invested and operated in China would have to be "flexible enough" to deal with

¹⁶⁷ Gus Van Harten, email message to author, July 6, 2015.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

Chinese institutions such as the “state-run trading companies.”¹⁷¹ A 1994 research by Paul Guild and Amy Tang found that Canadian firms operating in China experienced “more barriers and inhibitors than facilitators to collaboration with Chinese firms.”¹⁷² Guild and Tang identified political differences and tensions between Canada and China as the most inhibiting factors for Canadian firms’ collaboration with local Chinese businesses and growth in China.¹⁷³ They also found that despite the setbacks, the Canadian firms expressed their desire to keep operating in China for “strategic long term potential” rather than for “opportunistic short term profitability.”¹⁷⁴ Canadian analysts in 1972 had suggested that Canada would have to continue clarifying and modifying trade-related rules with China, every now and then.¹⁷⁵ In 2015, forty-three years later, it is still a useful suggestion.

China has made significant efforts to modernize itself since it came out of self-isolation in the 1960s. In 1994, the Chinese government made a list of possible institutional changes that needed to be made in order to modernize its economy.¹⁷⁶ One of the changes was to relax government control over the state-owned enterprises. Reforms were undertaken to make such enterprises “independent ... involved in fair and free competition and be responsible for profits and losses.”¹⁷⁷ After joining the World Trade Organization in 2002, the government promoted its “going global” strategy to “sustain the economic reform process and to promote global industry champions.”¹⁷⁸

Despite shortcomings, the FIPA builds on Canada’s historical political and economic relationship with China. It is possible that the Canadian government was fully aware of the shortcomings in the FIPA’s design and language. After all, it is common knowledge to Canadian analysts that Chinese courts are “unpredictable ... time-consuming and expensive.”¹⁷⁹ Even Chinese businesses believe that “courts in China are not the preferred method of dispute resolution.”¹⁸⁰ Therefore, they prefer “arbitration or conciliation provisions in their joint venture agreements.”¹⁸¹ Such historical knowledge and context could have guided the Canadian government’s decision to pursue arbitration for dispute resolution.

¹⁷¹ Ho and Huenemann, *Canada’s Trade with China*, 49.

¹⁷² Paul Guild and Amy Tang, “Collaborative Networking between Chinese and Canadian Companies,” in *Canada-China Business Linkages: Growth and Sustainability* (Vancouver: Canadian Federation of Deans of Management and Administrative Studies, December 1994), 135.

¹⁷³ *Ibid.*, 138.

¹⁷⁴ *Ibid.*, 140.

¹⁷⁵ *Ibid.*

¹⁷⁶ Cecil R. Dipchand, “China’s Socialist Market Economy: Implications for Future Financial Market Reforms,” in *Canada-China Business Linkages: Growth and Sustainability* (Vancouver: Canadian Federation of Deans of Management and Administrative Studies, December 1994), 105.

¹⁷⁷ *Ibid.*

¹⁷⁸ Yin-Wong Cheung and Xingwang Qian, “Empirics of China’s Outward Direct Investment,” *Pacific Economic Review* 14:3 (2009), 314.

¹⁷⁹ William Rosenfeld and Martin Day, “Investing in China: A Legal Perspective,” in *Canada-China Business Linkages: Growth and Sustainability* (Vancouver: Canadian Federation of Deans of Management and Administrative Studies, December 1994), 215.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

China has grown in stature as an international investor due to its economic might and foreign reserves. Earlier discussions in this paper suggest that China is expected to continue increasing its outward FDI. Incoming FDIs have had a very positive impact on the Canadian economy over the years. Foreign investments coming into Canada stimulate Canadian economic growth, “foreign controlled firms have higher productivity levels and pay higher wages than domestic firms ... spur innovation by spending more on research and development than domestic firms” and FDI coming into Canada “contributes to domestic job growth ... and ... increases capital formation in Canada.”¹⁸² With that knowledge, it is in Canada’s interest to ensure that China, with the world’s largest reserve for foreign currency and the world’s largest economy, continues to see Canada as a bright investment destination.

Opponents to the FIPA could be those Canadians who fear that China would use its economic might to bully Canada in the FIPA relationship. Among the countries with whom Canada has FIPAs in force, only China has an economy larger than Canada’s. In 2013, China ranked second in the world with US\$9.24 trillion in Gross Domestic Product while Canada ranked 11th with US\$1.82 trillion.¹⁸³ In October 2014, *The Economist* reported that China had become the largest economy in the world, surpassing the United States.¹⁸⁴

Foreign takeovers has been “central to the development of Canada’s energy industry.”¹⁸⁵ Most such takeovers were by private entities. However, the growing fear of Chinese investments in Canada is a product of Chinese state-owned enterprises as the main investors. But, Ambassador David Mulroney argues that it should not matter whether the investor is a foreign multinational or a Chinese state-owned enterprise as long as the “investors operate in accordance with Canadian law and all of the regulations.”¹⁸⁶ He argues that the Chinese state-owned enterprises that invest in Canada are also under immense pressure back home. Because the state-owned enterprises “are by definition playing with nation’s cash,” if “foreign investments go sour, they run the risk of being criticized for having been duped by slick foreigners.”¹⁸⁷ So, the fear exists on both ends.

Foreign experiences also teach Chinese state-owned firms valuable lessons and make them better. After the failed bid by Minmetals, a Chinese state-owned enterprise, to buy Noranda, Canada’s largest mining firm, Chinese state-owned enterprises started to learn more about how things worked in Canada. As a result, by 2009, major Chinese oil firms had “begun to avail themselves of good guidance in the form of Canadian banks, law firms, accountants and

¹⁸² Simone Collins, “Recent Decisions under the Investment Canada Act: Is Canada Changing its Stance on Foreign Direct Investment?” *Northwestern Journal of International Law and Business* 32:1 (2011), 149. Page 142-164.

¹⁸³ “GDP (Current US\$),” *World Development Indicators*, accessed October 12, 2014, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?order=wbapi_data_value_2013+wbapi_data_value+wbapi_data_value-last&sort=desc.

¹⁸⁴ “China’s back,” *The Economist*, October 11, 2014, accessed December 12, 2014, <http://www.economist.com/news/finance-and-economics/21623758-chinas-back>.

¹⁸⁵ Mulroney, *Middle power, middle kingdom*, 73.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*, 68.

communication advisors.”¹⁸⁸ Therefore, when CNOOC bought Nexen in 2012 for \$15 billion, CNOOC’s proposal “talked about using Calgary as a base for managing Canadian and wider regional operations, and listing shares in the Toronto Stock Exchange.”¹⁸⁹ China’s state-owned enterprises have also started to move away from acquiring production and resources, and have started to place “a greater emphasis on efficiency and return on capital.”¹⁹⁰

China will continue to rise, and Chinese state-owned enterprises will continue to be major players in international investments and acquisitions. Ambassador Mulroney argues that Canadians should not think they “dodged a bullet by shutting the door to any new acquisitions” by Chinese firms after the “one-off approval of CNOOC’s takeover of Nexen.”¹⁹¹ Instead, Canadians should recognize that they may have actually shot themselves in the foot while many of Canada’s allies such as “Australia, the UK and Germany” see Chinese investments “as an increasingly important source of growth.”¹⁹²

Given China’s rise as the largest economy in the world, and the historical relationship that Canada has had with China, it is better for Canada to have policies that promote and encourage more Chinese investments into Canada. Ambassador Mulroney argues that although Canada’s FIPA with China is a less-than-ideal agreement, it still provides “more protection to Canadian investors than they currently enjoy. Among other things ... it offers protection against arbitrary acts, such as expropriation by host governments” which is always a threat to Canadian investments in China.”¹⁹³ Canada’s dealings with China is “an unfinished process ... continuing to evolve, and reforms appear to be accelerating.”¹⁹⁴ Instead of fearing the Chinese state-owned enterprises and shutting them out of investing in Canada, Canadians should trust “our transparent, rules-based business environment, and our feisty and well-informed democracy ... self-confidence in our regulations” to protect Canadian interests.¹⁹⁵

¹⁸⁸ Ibid, 71.

¹⁸⁹ Ibid.

¹⁹⁰ Snyder, “After a decade of Canadian investment.”

¹⁹¹ Mulroney, *Middle power, middle kingdom*, 77.

¹⁹² Ibid.

¹⁹³ Ibid, 81.

¹⁹⁴ Ibid, 82.

¹⁹⁵ Ibid, 82-83.

REFERENCES

- 37th Parliament of Canada Volume 1*, March 2004. Accessed December 1, 2014.
<http://www.parl.gc.ca/content/sen/committee/373/defe/rep/rep03vol1-e.htm>.
- Access to Information Act RSC 1985 c A-1*. Accessed December 1, 2014. <http://canlii.ca/t/52bss>.
- Brown, Patrick. "FIPA agreement with China: What's really in it for Canada?" *CBC News*, September 19, 2014. Accessed October 10, 2014. <http://www.cbc.ca/news/canada/fipa-agreement-with-china-what-s-really-in-it-for-canada-1.2770159>.
- Chan, M. W. Luke. "Management Education in the People's Republic of China." In *Canada-China Business Linkages: Growth and Sustainability* (Vancouver: Canadian Federation of Deans of Management and Administrative Studies, December 1994), 76.
- Chase, Steven. "Canada ratifies controversial investor deal with China." *The Globe and Mail*, September 12, 2014. Accessed October 12, 2014.
<http://www.theglobeandmail.com/news/politics/canada-ratifies-controversial-investor-deal-with-china/article20582845/>.
- Chen, Duanjie. "Did Canada's New Rules Scare Away Investors." *The School of Public Policy* blog post. November 22, 2013. Accessed July 10, 2015.
<http://policyschool.ucalgary.ca/?q=content/did-canada's-new-rules-scare-away-investors>.
- Cheung, Yin-Wong, and Xingwang Qian. "Empirics of China's Outward Direct Investment." *Pacific Economic Review* 14:3 (2009).
- "China's back." *The Economist*. October 11, 2014. Accessed December 12, 2014.
<http://www.economist.com/news/finance-and-economics/21623758-chinas-back>.
- Collins, Simone. "Recent Decisions under the Investment Canada Act: Is Canada Changing its Stance on Foreign Direct Investment?" *Northwestern Journal of International Law and Business* 32:1 (2011): 142-164.
- Criminal Code RSC 1985 c C-46*. Accessed December 1, 2014. <http://canlii.ca/t/52brq>.
- Curry, Bill. "Controversial part of Canada-EU trade deal may be left out of U.S. talks." *The Globe and Mail*, September 29, 2014. Accessed October 15, 2014.
<http://www.theglobeandmail.com/news/politics/controversial-part-of-canada-eu-trade-deal-may-be-left-out-of-us-talks/article20829136/>.
- Das, Dilip K. "China's Outbound Foreign Direct Investment: Sources of Growth and Transformation." *Research Center for Chinese Politics and Business, Indiana University*. Working Paper No. 35 (2014).

Deng, Ping. "Investing for strategic resources and its rationale: The case of outward FDI from Chinese companies." *Business Horizons* 50 (2007).

Department of Foreign Affairs, Trade and Development Canada. "Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments." Accessed November 8, 2014. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng>.

_____. "Canada-China Foreign Investment Promotion and Protection Agreement (FIPA) Negotiations." Accessed October 11, 2014. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-chine.aspx?lang=eng>.

_____. "Canada's Foreign Investment Promotion and Protection Agreements (FIPAs)." Accessed October 11, 2014. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-apie.aspx?lang=eng>.

_____. "Canada-United States Free Trade Agreement (FTA)." Accessed October 14, 2014. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/us-eu.aspx?lang=eng>.

_____. "Completed Access to Information Requests." Accessed December 10, 2014. <http://www.international.gc.ca/department-ministere/atip-airprp/reports-rapports/index.aspx?lang=eng>.

_____. "Foreign Investment Promotion and Protection (FIPAs)." Accessed October 11, 2014. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng>.

_____. "Transparency." Accessed December 10, 2014. <http://www.international.gc.ca/department-ministere/transparency-transparence/index.aspx?lang=eng>.

Dipchand, Cecil R. "China's Socialist Market Economy: Implications for Future Financial Market Reforms." In *Canada-China Business Linkages: Growth and Sustainability* (Vancouver: Canadian Federation of Deans of Management and Administrative Studies, December 1994).

Dixit, Avinash K., and Barry J. Nalebuff. *Thinking Strategically: The Competitive Edge in Business, Politics, and Everyday life*. New York: W. W. Norton & Company, 1991.

Dobson, Wendy. "China's State-Owned Enterprises and Canada's FDI Policy." *The School of Public Policy Research Paper Series 7*: 10 (March 2014).

- Eli Lilly and Company v. Government of Canada*. Accessed December 2, 2014.
<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/eli.aspx?lang=eng>.
- Emergencies Act RSC 1985 c 22 (4th Supp)*. Accessed December 1, 2014. <http://canlii.ca/t/hxzt>.
- Feenstra, Robert C. "Facts and Fallacies about Foreign Direct Investment." In *International Capital Flows*, edited by Martin Feldstein, 331-350. Chicago: University of Chicago Press, January 1999.
- Fen, Su, and Ehsan Latif. "Bilateral trade between China and Canada: trends, patterns, and comparisons." In *Asian-Pacific Economic Literature* 28 (November 2014): 79.
- First session of the 41st Parliament, April 18, 2013. Accessed November 22, 2014.
<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6087364>.
- Francis, Diane. "Canada-China trade deal is too one-sided." *Financial Post*, November 2, 2012. Accessed October 10, 2014. <http://opinion.financialpost.com/2012/11/02/canada-china-trade-deal-is-too-one-sided/>.
- Gallagher, Kevin P., Enrique Dussel Peters, and Timothy A. Wise. "Executive Summary." In *The Future of North American Trade Policy: Lessons from NAFTA*, edited by Kevin P. Gallagher, Enrique Dussel Peters, and Timothy A. Wise, 1-9. Boston: Boston University, November 2009.
- "GDP (Current US\$)." *World Development Indicators*. Accessed October 12, 2014.
http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?order=wbapi_data_value_2013+wbapi_data_value+wbapi_data_value-last&sort=desc.
- Gecelovsky, Paul, and Christopher Kukucha. "Much ado about parties." *International Journal* (Winter 2008-09): 29-45.
- Glavin, Terry. "Have Canadians surrendered all our moral ground for deals with Beijing?" *Ottawa Citizen*, October 8, 2014. Accessed October 11, 2014.
<http://ottawacitizen.com/opinion/columnists/glavin-have-canadians-surrendered-all-our-moral-ground-for-deals-with-beijing>.
- Gordon, Stephen. "Don't fear the FIPA." *Macleans's*, September 17, 2014. Accessed October 10, 2014. <http://www.macleans.ca/economy/economicanalysis/dont-fear-the-fipa/>.
- Grant, Michael. "Fear the Dragon? Chinese Foreign Direct Investment in Canada." *The Conference Board of Canada Report* (June 2012).

- Grant, Tavia. "Household saving rate nears five-year low as financial risks increase." *The Globe and Mail*, March 3, 2015. Accessed August 23, 2015.
<http://www.theglobeandmail.com/report-on-business/economy/household-saving-rate-nears-five-year-low-as-financial-risks-increase/article23274104/>.
- Guan, Jian Cheng, Chiu Kam Mok, Richard C.M. Yam, K.S. Chin, and Kit Fai Pun. "Technology transfer and innovation performance: Evidence from Chinese firms." *Technological Forecasting & Social Change* 73 (2006): 666-678.
- Guild, Paul, and Amy Tang. "Collaborative Networking between Chinese and Canadian Companies." In *Canada-China Business Linkages: Growth and Sustainability* (Vancouver: Canadian Federation of Deans of Management and Administrative Studies, December 1994).
- Guillemette, Yvan, and Jack Mintz, "A Capital Story—Exploding Myths around Foreign Direct Investment in Canada." *C.D. Howe Institute Commentary* 201 (2004).
- Hafner-Burton, Emilie, Zachary Steinert-Threlkeld, and David Victor. "Secrecy in International Investment Arbitration." Department of Politics, Princeton University. October 29, 2014. Accessed December 5, 2014. <https://www.princeton.edu/politics/about/file-repository/public/SecrecyInInvestmentArbitration.pdf>.
- Ho, Samuel P. S., and Ralph W. Huenemann. *Canada's Trade with China: Patterns and Prospects* (Quebec: Canadian Economic Policy Committee, June 1972).
- Houlden, Gordon. "Opening the doors to Chinese investment." *OpenCanada.org*, July 8, 2015. Accessed July 10, 2015. <http://opencanada.org/features/engaging-china/>.
- "How uninhabited islands soured China-Japan ties." *BBC*, November 9, 2014. Accessed December 10, 2014. <http://www.bbc.com/news/world-asia-pacific-11341139>.
- Huang, Flora Xiao, and Horace Yeung. *Chinese Companies and the Hong Kong Stock Market* (New York: Routledge, 2014).
- Industry Canada. *Trade Data Online (TDO)*. Accessed July 4, 2015.
<https://www.ic.gc.ca/eic/site/tdo-dcd.nsf/eng/home>
- Isfeld, Gordon. "Canada, EU leaders sign CETA pact despite German concerns." *Financial Post*, September 26, 2014. Accessed October 12, 2014.
<http://business.financialpost.com/2014/09/26/stephen-harper-eu-leaders-meet-amid-ceta-cloud/>.

- Jog, Vijay, and Jack Mintz. "Sovereign Wealth and Pension Funds Controlling Canadian Businesses: Tax-policy Implications." *The School of Public Policy SPP Research Papers* 6 (5) (February 2013).
- Jolly, Dominique. "How scary is it to be acquired by Chinese companies?" *Paris Tech Review*, April 10, 2015. Accessed July 11, 2015. <http://sptreview.org/en/2015/04/10/chinese-companies-fdi/>.
- Kehoe, William J. "NAFTA: Concept, Problems, Promise." In *Marketing: Foundations For A Changing World*, edited by Brian T. Engelland and Denise T. Smart, 363-367. Evansville, Indiana: Southern Marketing Association, 1995.
- Kim, L. *Imitattion to Innovation: The Dynamics of Korea's Technological Learning* (Boston: Harvard Business School Press, 1997).
- Krugman, Paul. "Ricardo's Difficult Idea," Massachusetts Institute of Technology. Accessed November 17, 2014. <http://web.mit.edu/krugman/www/ricardo.htm>.
- Lipsey, Robert E., Robert C. Feenstra, Carl H. Hahn, and George N. Hatsopoulos. "The Role of Foreign Direct Investment in International Capital Flows." In *International Capital Flows*, edited by Martin Feldstein, 307-330. Chicago: University of Chicago Press, January 1999.
- Liu, Xiaming, Chengang Wang, and Yingqi Wei. "Causal links between foreign direct investment and trade in China." *China Economic Review* 12 (2001): 190-202.
- Lone Pine Resources Inc v. Government of Canada*. Accessed December 10, 2014. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/lone.aspx?lang=eng>.
- Marukawa, Tomoo. "Destination Country by Year." In *China's Outward Foreign Direct Investment Data*, edited by Tomoo Marukawa, Asei Ito, and Yongqi Zhang. Tokyo: Institute of Social Science, March 2014.
- Mintz, Jack, and Andrey Tarasov. "Canada Is Missing Out On Global Capital Market Integration." *C.D. Howe Institute e-brief* 48 (August 21, 2007). Accessed May 26, 2015. http://www.cdhowe.org/pdf/ebrief_48.pdf.
- Mobil/Murphy Oil v Canada*. Accessed November 8, 2014. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/mobil.aspx?lang=eng>.
- Mulrone, David. *Middle power, middle kingdom: What Canadians need to know about China in the 21st century* (Toronto: Allen Lane, 2015).

- Narin, F., and J. D. Frame. "The growth of Japanese science and technology." *Science* 245 (1989): 600-605.
- Nottage, Luke. "Why no investor-state arbitration in the Australia-Japan FTA?" *East Asia Forum*, April 9, 2014. Accessed December 5, 2014. <http://www.eastasiaforum.org/2014/04/09/why-no-investor-state-arbitration-in-the-australia-japan-fta/>.
- Pearce, Rohan. "Inquiry rejects ban on ISDS clauses in free trade agreements." *Bilaterals.org*, August 29, 2014. Accessed December 5, 2014. <http://www.bilaterals.org/?inquiry-rejects-ban-on-isds>.
- Potter, Pitman B. "Trade and Human Rights Practices in China: Prospects for Canadian Influence." *Foreign Policy Dialogue Series* (November 2003): 3.
- Prentice, Barry E., and Mark Ojah. "NAFTA in the Next Ten Years: Issues and Challenges in Transportation." Paper presented at the NAFTA in the New Millenium Symposium, University of Alberta, May 24-25, 2001.
- Riley, Y. Beth. "Foreign Direct Investment Restrictions in Canada." *Bennett Jones LLP*. Paper presented at the American Bar Association's Spring Meeting in Washington D.C. Accessed July 11, 2015. <http://www.bennettjones.com/uploadedFiles/Publications/Articles/IAB%20-%20paper%20-%20final.pdf>.
- Rodrigues, Araujo Heriberto, and Juan Pablo Cardenal. "China's Economic Empire." *The New York Times*, June 1, 2013.
- Rosenfeld, William, and Martin Day. "Investing in China: A Legal Perspective." In *Canada-China Business Linkages: Growth and Sustainability* (Vancouver: Canadian Federation of Deans of Management and Administrative Studies, December 1994).
- Sinclair, Scott. "Intellectual Property Rights." In *Making Sense of the CETA*, ed. Scott Sinclair, Stuart Trew and Hadrian Mertins-Kirkwood (Canadian Center for Policy Alternatives, September 2014).
- Snyder, Jesse. "After a decade of Canadian investment, China is pulling back. What now?" *Alberta Oil Magazine*, June 23, 2015. Accessed July 11, 2015. <http://www.albertaoilmagazine.com/2015/06/china-pulls-back-on-canadian-investment/>.
- Statistics Canada. *CANSIM Table 228-0069 – Merchandise imports, exports and trade balance, customs and balance of payments basis for all countries, by seasonal adjustment and principal trading partners*. Accessed August 10, 2015.

_____. *CANSIM Table 376-0051 - International investment position, Canadian direct investment abroad and foreign direct investment in Canada*. Accessed July 3, 2015.

_____. *CANSIM Table 376-0052 - International investment position, Canadian direct investment abroad and foreign direct investment in Canada*. Accessed July 6, 2015.

Stephens, Hugh. "FIPA with China, finally (and about time too)." *The Vancouver Sun*, September 17, 2014. Accessed October 11, 2014.
<http://www.vancouversun.com/business/Opinion+FIPA+with+China+finally+about+time/10212324/story.html>.

Sung, Yung-wing. "Economic Integration of Hong Kong and Guangdong in the 1990s." In *The Hong Kong reader: passage to Chinese sovereignty*, edited by Ming K. Chan and Gerard A. Postiglione, 182-208. New York: M. E. Sharpe, Inc., 1996.

Suranovic, Steve. *International Trade: Theory and Policy* (Washington D.C.: Flat World Knowledge, Inc., 2010).

Tandt, Michael Den. "The little glitch ignored by FIPA enthusiasts is that China doesn't follow rules." *National Post*, November 16, 2012. Accessed December 10, 2014.
<http://fullcomment.nationalpost.com/2012/11/16/michael-den-tandt-the-little-glitch-ignored-by-fipa-enthusiasts-is-that-china-doesnt-follow-rules/>.

Teagarden, Mary B., and Dong Hong Cai. "Learning from Dragons who are Learning from Us: Developmental Lessons from China's Global Companies." *Organizational Dynamics* 38 (2009): 73-81

The Canada-US Free Trade Agreement. "Chapter One: Objectives and Scope."

The Riot Act 1714. Accessed December 1, 2014.
<http://www.gutenberg.org/dirs/etext05/rtact10h.htm>.

Tienhaara, Kyla. "A Risky Business." Presentation at the Senate Foreign Affairs, Defence and Trade Legislation Committee, The Australian Senate, August 6, 2014.

_____. "China free trade: is there a devil in the detail?" *The Drum*, November 16, 2014. Accessed December 5, 2014. <http://www.abc.net.au/news/2014-11-17/tienhaara-will-there-be-a-devil-in-the-detail-of-the-china-fta/5896534>.

Uechi, Jenny. "Harper OKs potentially unconstitutional China-Canada FIPA deal, coming into force October 1." *The Vancouver Observer*, September 12, 2014. Accessed October 12, 2014. <http://www.vancouverobserver.com/news/harper-oks-potentially-unconstitutional-china-canada-fipa-deal-coming-force-october-1>.

Van Harten, Gus. "Breaking Down the Harm to Canada Done by Treaty with China." *The Tyee*, September 15, 2014. Accessed December 4, 2014.
<http://thetyee.ca/Opinion/2014/09/15/China-Investment-Treaty-Breakdown/>.

_____. "Reforming the NAFTA Investment Regime." In *The Future of North American Trade Policy: Lessons from NAFTA*, edited by Kevin P. Gallagher, Enrique Dussel Peters, and Timothy A. Wise, 43-52. Boston: Boston University, November 2009.

_____. "Taking apart Tories' party line on China-Canada treaty." *The Tyee*, November 5, 2012. Accessed October 13, 2014. <http://thetyee.ca/Opinion/2012/11/05/Van-Harten-FIPA/>.

Walkom, Thomas. "CETA a much-announced trade pact of dubious value." *The Toronto Star*, September 30, 2014. Accessed October 11, 2014.
http://www.thestar.com/news/canada/2014/09/30/ceta_a_muchannounced_trade_pact_of_dubious_value_walkom.html.

Whalley, John. "Why Do Countries Seek Regional Trade Agreements?" In *The Regionalization of the World Economy*, edited by Jeffrey A. Frankel, 66. Chicago: University of Chicago Press, 1998.

World Trade Organization. "What we do." Accessed November 21, 2014.
http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm.

Zhou, Lihuan, and Denise Leung. "China's Overseas Investments, Explained in 10 Graphics." *World Resources Institute*, January 28, 2015. Accessed July 8, 2015.
<http://www.wri.org/blog/2015/01/china%E2%80%99s-overseas-investments-explained-10-graphics#fn:3>.

ANNEX

Reasons for Lawsuits	
FIPA WITH CHINA	<p>Article 11: Compensation for Losses</p> <p>Investors of one Contracting Party who suffer losses in respect of covered investments owing to war, a state of national emergency, insurrection, riot or other similar events, shall be accorded treatment by the other Contracting Party, in respect of restitution, indemnification, compensation or other settlement, no less favorable than it accords in like circumstances, to its own investors or to investors of any third State.</p>
FIPA WITH SERBIA	<p>Article 7: Compensation for Losses</p> <p>Notwithstanding Article 17(5)(b), each Party shall accord to an investor of the other Party, and to a covered investment, non-discriminatory treatment with respect to measures it adopts or maintains relating to compensation for losses incurred by investments in its territory as a result of armed conflict, civil strife, or state of emergency, including as a result of a natural disaster.</p> <p>Where Article 17(5)(b) states: an amendment to the TRIPS Agreement in force for both Parties;</p>
NAFTA	<p>Article 1110: Expropriation and Compensation</p> <p>1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation")</p>
Dispute Settlement Process	
FIPA WITH CHINA	<p>Article 15: Disputes between the Contracting Parties</p> <p>1. Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled by consultation through diplomatic channels.</p> <p>2. If a dispute cannot thus be settled within six months, it shall, upon the request of either Contracting Party, be submitted to an ad hoc arbitral tribunal.</p> <p>6. The arbitral tribunal shall reach its decision by a majority of votes. The arbitral tribunal shall, upon the request of either Contracting Party, explain the reasons for its decision. Unless otherwise agreed, the arbitral tribunal shall make best efforts to render its decision within six months of the appointment of the Chairman in accordance with paragraphs 3 and 4 of this Article.</p>

7. Each Contracting Party shall bear the cost of its appointed arbitrator and of its representation in the arbitral proceedings. The relevant costs of the Chairman and the arbitral tribunal shall be borne in equal parts by the Contracting Parties.

8. The decision of the arbitral tribunal shall be final and binding on both Contracting Parties. The Contracting Parties shall, if necessary, within 60 days of the decision of an arbitral tribunal, meet and decide on the manner in which to resolve their dispute. That decision shall normally implement the decision of the arbitral tribunal. If the Contracting Parties fail to reach a decision, the Contracting Party bringing the dispute shall be entitled to receive compensation of equivalent value to the arbitral tribunal's award.

Annex C.21: Conditions Precedent to Submission of a Claim to Arbitration: Party-Specific Requirements

Where the claim concerns a measure of China:

1. Upon receipt of the Notice of Intent or at any time prior, China shall require that an investor make use of the domestic administrative reconsideration procedure. If the investor considers that the dispute still exists four months after the investor has applied for the administrative reconsideration, or where no such remedies are available, the investor may submit its claim to arbitration.

2. An investor who has initiated proceedings before any court of China with respect to the measure of China alleged to be a breach of an obligation under Part B may only submit a claim to arbitration under Article 20 if the investor has withdrawn the case from the national court before judgment has been made on the dispute. This requirement does not apply to the domestic administrative reconsideration procedure referred to in paragraph 1.

Where the claim concerns a measure of Canada:

3. The investor and, where the claim is for loss or damage to an interest in an enterprise of Canada that is a juridical person that the investor owns or controls directly or indirectly, the enterprise shall waive their right to initiate or continue before any administrative tribunal or court under the law of any Contracting Party, or other dispute settlement procedures, any proceedings with respect to the measure of Canada that is alleged to be a breach referred to in Article 20, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of Canada.

	<p>4. The waiver required under paragraph 3 shall be delivered to Canada and shall be included in the submission of a claim to arbitration. A waiver from the enterprise shall not be required if Canada has deprived a disputing investor of control of an enterprise.</p>
<p>FIPA WITH SERBIA</p>	<p>Article 22: Conditions Precedent to Submission of a Claim to Arbitration</p> <p>1. The disputing parties shall hold consultations and attempt to settle a claim amicably before an investor may submit a claim to arbitration. Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the notice of intent to submit a claim to arbitration under subparagraph 2(c). The place of consultation shall be the capital of the respondent Party, unless the disputing parties otherwise agree.</p> <p>2. An investor may submit a claim to arbitration under Article 21 only if:</p> <p>(b) at least six months have elapsed since the events giving rise to the claim;</p> <p>(e) in the case of a claim submitted under Article 21(1):</p> <p>(i) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby,</p> <p>(f) in the case of a claim submitted under Article 21(2):</p> <p>(i) not more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage thereby,</p>
<p>NAFTA</p>	<p>Article 1116: Claim by an Investor of a Party on Its Own Behalf</p> <p>2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.</p> <p>Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise</p> <p>2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.</p> <p>Article 1121: Conditions Precedent to Submission of a Claim of Arbitration</p>

	<p>1. A disputing investor may submit a claim under Article 1116 to arbitration only if:</p> <p>(a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and</p> <p>(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.</p>
Selection of Arbitrators	
FIPA WITH CHINA	<p>Article 15: Disputes between the Contracting Parties</p> <p>3. Such tribunal shall be comprised of three arbitrators. Within two months from the date on which either Contracting Party receives the written notice requesting arbitration from the other Contracting Party, each Contracting Party shall appoint one arbitrator. Those two arbitrators shall jointly select a third arbitrator, who shall be a national of a third State which has diplomatic relations with both Contracting Parties. The third arbitrator shall be appointed by the two Contracting Parties as Chairman of the arbitral tribunal within two months from the date of appointment of the other two arbitrators.</p> <p>4. If within the periods specified in paragraph 3 of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to appoint any arbitrator who has or have not yet been appointed. If the President is a national of either Contracting Party or is otherwise prevented from discharging this function, the next most senior member of the International Court of Justice who is not a national of either Contracting Party shall be invited to make the necessary appointments.</p>
FIPA WITH SERBIA	<p>Article 26: Arbitrators</p> <p>1. Except in respect of a Tribunal established under Article 28, and unless the disputing parties agree otherwise, the Tribunal shall be composed of three arbitrators. One arbitrator shall be appointed by each of the disputing parties and the third, who will be the presiding arbitrator, shall be appointed by agreement of the disputing parties.</p>

	<p>Article 38: Disputes between the Parties</p> <p>5. Arbitrators shall have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements. They shall be independent of, and not be affiliated with or take instructions from a Party.</p>
NAFTA	<p>Article 1123: Number of Arbitrators and Method of Appointment</p> <p>Except in respect of a Tribunal established under Article 1126, and unless the disputing parties otherwise agree, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.</p>
Publication of award/case details	
FIPA WITH CHINA	<p>Article 28: Public Access to Hearings and Documents</p> <p>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.</p> <p>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 <i>in camera</i>.</p> <p>4. The Contracting Parties may share with officials of their respective federal and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.</p> <p>5. To the extent that a Tribunal’s confidentiality order designates information as confidential and a Contracting Party’s law on access to information requires public access to that information, the Contracting Party’s law on access to information shall prevail. However, a Contracting Party should endeavor to apply its law on access to information so as to protect information designated confidential by the Tribunal.</p>

<p>FIPA WITH SERBIA</p>	<p>Article 31: Public Access to Hearings and Documents</p> <p>1. A Tribunal award under this Section shall be publicly available, subject to the redaction of confidential information. All other documents submitted to, or issued by, the Tribunal shall be publicly available unless the disputing parties otherwise agree, subject to the redaction of confidential information.</p> <p>2. Hearings held under this Section shall be open to the public. The Tribunal may hold portions of hearings <i>in camera</i> to the extent necessary to ensure the protection of confidential information.</p> <p>4. The Parties may share with officials of their respective national and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Section, but they shall ensure that those persons protect the confidential information in those documents.</p> <p>5. If a Tribunal’s order designates information as confidential and a Party’s law on access to information requires public access to that information, the Party’s law on access to information prevails. However, the Party should try to apply its law on access to information so as to protect information that the Tribunal’s order has designated as confidential.</p>
<p>NAFTA</p>	<p>Annex 1137.4: Publication of an Award</p> <p>Canada Where Canada is the disputing Party, either Canada or a disputing investor that is a party to the arbitration may make an award public.</p> <p>Mexico Where Mexico is the disputing Party, the applicable arbitration rules apply to the publication of an award.</p> <p>United States Where the United States is the disputing Party, either the United States or a disputing investor that is a party to the arbitration may make an award public.</p>