HUAWEI AND THE CANADA-CHINA INVESTMENT AGREEMENT

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There is a good question as to whether the federal government is prevented from excluding Huawei from Canada's 5G system because of provisions in the 2014 Canada-China investment protection treaty[1]. Is there a risk that excluding Huawei on national security grounds could give the company grounds for claiming compensation from Canada under that agreement? China's ambassador to Canada has said so.[2]

The agreement contains a range of obligations on Canada regarding treatment of Chinese investors and their investments, giving those investors the right to invoke binding arbitration against Canada for infringing these obligations.[3]

Leaving the agreement aside for a moment, international law gives all countries ("States" in legal parlance) sovereign rights to regulate foreign investments as they see fit. This includes the right to impose restrictions for national security reasons. And it is up to host States to

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[1] *Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*, in force 1 October 2014 (Global Affairs Canada website. https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng).

[2] "Banning Huawei from Canada's 5G networks could be costly for taxpayers", CBC News, 17 February 2019.

[3] There is no doubt that, even without being allowed into the 5G system Huawei would have standing as an investor under the broad definition of the term.

decide how they chose to define "national security" and under what circumstances they consider this interest to be at risk.[4] If there was a sound basis for Canada rejecting Huawei – or any Chinese investment - on grounds of national security, it would be within Canada's sovereign right to do so.

Those sovereign rights can be restricted or moderated by rules of customary international law. For example, there are customary international law norms regarding the treatment of aliens, respect for human rights and other aspects that seek to limit or constrain sovereign action. And there are treaties and conventions that do this explicitly. That is where the terms of the Canada-China investment treaty (or FIPPA) come into play.[5]

The FIPPA contains a series of binding obligations regarding the manner in which investors and investments from each country are to be treated in the host country. Where those obligations are breached, Article 15 allows both Canada and China to have recourse to arbitration by means of a panel of three arbitrators. The decision of the panel is binding and, if not implemented by the losing side, the successful party has a right to full compensation.

The obligations in Article 4 of the treaty include that of "fair and equitable treatment" (FET) to be accorded Chinese investors. Article 4 makes it clear that those obligations do not go beyond international law standards:

> *1. Each Contracting Party shall accord to covered investments fair and equitable treatment and full protection and security, in accordance with international law.*

[4] *The Protection of National Security in IIAs* (UNCTAD, Geneva 2009), p. 3.
[5] "FIPPA" stands for Foreign Investment Promotion and Protection Agreement. Other countries use different terminology. For example, these are called Bilateral Investment Treaties or "BITs" in US parlance.

> *2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the international law minimum standard of treatment of aliens as evidenced by general State practice accepted as law.*[6]

This means that for there to be a Canadian risk of a legal dispute, any national security decision respecting Huawei would have to be demonstrably in breach of this minimum international law standard. In terms of case law, there is a huge array of arbitration decisions, some varying in degrees of concreteness. However, in *Apotex v United States,* a 2014 NAFTA investment arbitration, the panel said that "a high threshold of severity and gravity" is required in order to conclude that the host state has breached any of the requirements contained within the FET standard.[7]

Given the widely-accepted right of States to apply measures respecting their own security interests, it is difficult to see how Canada could be held to account for offending this minimum international law standard.

Together with these minimum standards, there are non-discrimination rules in the FIPPA requiring Canada to accord Chinese investors and their investments national treatment and most-favoured nation (MFN) treatment. With respect to MFN treatment, Article 5 states,

> *2. Each Contracting Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of investors of a non-Contracting Party with respect to the establishment,*

[6] There is a vast amount of literature on the minimum standard of treatment concept and the meaning of FET, spawning literally thousands of pages of academic analysis over many years. See as but one example, "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Paper 2004/3, September 2004.

[7] ICSID Case No. ARB(AF)/12/1).

> *acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.*

Article 6 provides for national treatment, meaning treatment on a par with the treatment accorded home country – i.e., domestic – investors.

Those obligations are to ensure Chinese investors and investments are not discriminated against in a wide range of matters vis-à-vis Canadian investors or other foreign investors in the same competitive orbit. That means these obligations only apply where the Chinese investment is in "like circumstances" to the domestic or foreign investment it is being compared to. It is hard to see how Huawei could be said to be an investor "in like circumstances" to other Canadian or foreign investors.

Article 8 provides that the non-discrimination provisions in Articles 5 and 6 do not apply to any non-conforming measure maintained by China or Canada in respect of investments. This broad exclusion could, arguably, cover any kind of national security decision banning Huawei's entry into Canada's 5G networks, that was not otherwise in conformity with these non-discrimination provisions.

Apart from government-to-government, or State-to-State, aspects, there is the question of a claim by Huawei itself under Article 20, Part C. of the FIPA, based on allegations of beaches by Canada of the obligations just described, alleging that the company's Canadian investment has been irreparably harmed by breaches of the treaty by Canada.

Even where these obligations might apply, there is another override - a national security exception to these obligations, using fairly standard wording found in other international agreements, principally the World Trade Organization Agreement as well as the CUSMA. Article 33 of the FIPA provides that nothing in the Agreement shall be construed,

> *(b) to prevent a Contracting Party from taking any actions that it considers necessary for the protection of its essential security interests . . .*
> *(ii) in time of war or other emergency in international relations,*

The question here is whether these Article 33 exceptions provide full cover for Canada, given the terms "in time of war or other emergency in international relations,"[8] It is unfortunate – perhaps with the benefit of hindsight – that the FIPPA negotiators didn't employ broader terminology by not simply replicating the GATT/WTO essential security wording. However, while there might be arguments that banning Huawei was not done in the context of an "emergency" in international relations, the self-defining words in the chapeau ("that it considers necessary") could be used to defeat a Huawei arbitration claim if one were launched.

More important, Article 34 of the FIPPA says that neither Article 15 (on State-to-State disputes) nor Part C (on investor-State claims) apply to the "decisions" set out in Annex D.34 of the agreement. Annex D.34 is entitled "Exclusions" and lists,

> *1. A decision by Canada following a review under the Investment Canada Act, an Act respecting investment in Canada, with respect to whether or not to:*
> *(a) initially approve an investment that is subject to review; or*
> *(b) permit an investment that is subject to national security review;*
> *shall not be subject to the dispute settlement provisions under Article 15 and Part C of this Agreement.*[9]

[8] That is the same cover, incidentally, that Donald Trump has been using in issuing national security tariffs under section 232 of the 1962 *Trade Expansion Act*.

[9] The endnotes to the Agreement states that the concept of "initially approve an investment" in paragraph 1 means all decisions made with respect to whether or not to permit an investment under the *Investment Canada Act*.

None of these overrides foreclose an arbitration case being initiated by the Chinese government or by the company. They would have the advantage of invoking an actual investment treaty with Canada, one of the few China has with other countries.[10] This could mean either the Chinese government or Huawei would use the rare opportunity of challenging national security measures applied by a Western democracy. It may well happen, given the increasing likelihood of Canada banning Huawei from 5G deployment in this country. We'll have to wait and see.

In the meantime, the provisions outlined above would seem to provide a firm basis for Canada turning back any such action without too much difficulty.

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[10] The only other treaty China has with a developed country containing investment provisions is with Australia. China has investment treaties with only s handful of other countries in the developing world. UNCTAD-Investment Policy Hub (https://investmentpolicy.unctad.org/country-navigator/45/china).