

**Submission to Global Affairs Canada: Consultations on a Possible
Canada-China Free Trade Agreement**

By the *Trade Justice Network*

June 2, 2017

A great deal of secrecy has surrounded Canada's previously negotiated trade agreements, including the Canada-China Foreign Investment Promotion and Protection Agreement (FIPA) and the Trans Pacific Partnership (TPP) (Brown 2014; Van Harten 2015; Geist 2014; McDermott & Manna 2016). Such a lack of transparency is not acceptable to Canadians. We commend the current federal government for accepting submissions on the possible Canada-China Free Trade Agreement (FTA) prior to negotiations. We urge the government to take into strong consideration the interests of Canadians and to continue to engage in genuine, meaningful consultation with Canadians throughout the negotiating process should Canada decide to pursue a FTA with China. We would also call on the Canadian negotiators to ensure that the negotiation process be kept open, transparent and inclusive to all Canadians and Indigenous peoples.

Given that the Canadian government remains in the exploratory stage of a FTA with China, and due to the many unknown factors, this submission will highlight some of our main concerns at this time around the negotiation of a FTA with China. These concerns include the impact on our trade relationship, enhanced rights of investors, environmental impacts and China's poor record on labour and human rights.

In its recent launch of the preliminary public consultation process, the Government of Canada (GoC) claimed that "today's modern, interconnected economy requires a more *inclusive and progressive* approach to international trade that reflects the views and priorities of Canadians" (GoC 2017a, emphasis added). Both Prime Minister Justin Trudeau and International Trade Minister François-Philippe Champagne have repeatedly touted the Canada-EU Comprehensive Economic and Trade Agreement (CETA) as the new benchmark of "progressive" free trade (Trudeau 2017; GoC 2017b). If the government aims to stay true to its commitment to supposedly progressive trade, a Canada-China FTA must ensure that human rights, labour rights, Indigenous sovereignty and environmental sustainability are protected (and prioritized) rather than jeopardized by enhanced investor rights.

The Canada-China Trade Relationship

Canada's economy has traditionally been characterized by exports of lower value-added natural and mineral resource processing. In contrast, East Asian economies have concentrated on manufactured, higher value-added exports (Poon 2006). This structure contributed to Canada's "chronic trade imbalances" with Japan, South Korea and China. In Canada's trade with China in particular, imports from China tripled between 2000 and 2005, where they reached \$30 billion (Poon 2006).

Canada continues to have a significant trade deficit with China. If we look at Canada's merchandise trade with China, Canada had a \$44 billion trade deficit in 2016. Canadian exports totaled \$20 billion, while imports from China were triple the amount of exports at \$64 billion (Asia Pacific Foundation of Canada 2017). Statistics Canada, however, recently expanded its reporting to indicate Canada-China trade in terms of balance of payments (BoP), rather than strictly the movement of merchandise. On the basis of BoP, in 2016 Canada imported over \$37 billion in Chinese imports, while its exports to China valued \$22 billion; therefore, Canada had a trade deficit of approximately \$15 billion (Statistics Canada 2017). No matter which way we measure the Canada-China trade relationship, it is evident that Canada has a significant deficit. Furthermore, it is possible that "incoming foreign investment flows could act to counter-balance

the balance of payments (BoP), but these would likely work to further entrench Canada as a provider of raw materials and lower-value added production unless provided the adequate incentives and restrictions” (Poon 2006, 9). Although increased Canada-China investment flows could help to lessen our trade deficit, it would not address Canada’s position of dependency in the trade relationship.

Furthermore, increased North-South trade, particularly with China, has contributed to downward pressure on wages and the loss of manufacturing jobs. Since 2000, Canada has lost 547,000 manufacturing jobs and real wages have increased at a lower rate than productivity, rising by only 6.8% from 2000 to 2016 (less than 0.5% per year) (Jackson 2017). Although the negative impacts of this trade relationship should be offset by rising wages and expanding markets in low-wage countries—and China and other developing countries have seen some rise in wages and standard of living—the share of wages in national income has decreased since 2000 in both developed and developing countries as a result of technological change, global trade and the decline of unions (IMF 2017). Workers’ share of wages has decreased particularly for middle-skill jobs in advanced economy industries (subject to global competition) and the sectors in developing countries that participate in global value chains. This has contributed to the rise in inequality in most countries (Ibid.). Jackson (2017) notes that “when it comes to a Canada-China FTA, our economic relationship needs to be re-balanced rather than simply reinforced.”

Enhanced Rights of Investors and Corporations

In a possible FTA with China, Canada must not continue to give enhanced protections to investors and corporations at the expense of Canadian workers, citizens and the environment, as was done in the Canada-China Foreign Investment Promotion and Protection Agreement (FIPA) as well as CETA and the TPP. Many insights (and precautionary lessons) can be gleaned from the FIPA with China. The agreement was signed in 2012, effective as of September 2014 and will be in effect until 2045.

In his newest book, Gus Van Harten, Osgoode law professor and an expert on investment treaties, outlines the ways in which FIPA is lopsided. It disproportionately benefits Chinese investors by granting them enclave legal status in Canada and by extending the right of market access to Chinese investors, while not giving the same to Canadian investors. This requires Canada to open its economy and resources to Chinese corporations, but allows China’s economy to remain closed if it so chooses (Van Harten 2015).

Despite Stephen Harper’s promise that the FIPA “ensures non-discriminatory treatment in terms of national firms in the application of the law,” the FIPA allows China to keep in place its existing laws and practices that discriminate against foreign investors over domestic companies (Van Harten 2015). While countries’ “discriminatory” measures are preserved in other investment treaties (e.g. subsidies), “the China FIPA goes much further than most deals by exempting *all* existing discriminatory measures, at all levels of government” (Van Harten 2015). This sets a worrisome precedent for trade and investment with China.

Van Harten describes the model of (and motivation for) Chinese development that is evident in the structure of the FIPA:

“For China, the FIPA fits a strategy. The strategy is to buy into other countries’ resources and extract as much value from them as possible. It is to maximize profits and wages for

Chinese companies and workers from the extraction of resources abroad. It is to transfer raw materials to China for processing and to capture foreign technology in order to fuel China's factory of the world. It is to use a strong economy at home to nurture globally competitive companies, and to open up the home economy only after those companies are ready to dominate markets abroad" (Van Harten 2015).

This leaves Canada's economy in a more dependent position, and less likely to benefit from such an agreement. A FTA with China must not give Chinese investors and corporations preferential treatment or disproportionate access to the Canadian economy.

It is also worth noting that Chinese investors are in a unique position compared to those in Canada. Due to their access to low-cost financing from the Chinese state, Chinese investors "can buy a lot of things that others in Canada cannot" (Van Harten 2015). In their book on China's economic expansion in Asia, Africa and Latin America, Cardenal and Araujo (2013) note that China "uses its astonishing financial clout to serve the country's national strategic objectives." Chinese companies have begun investing enormous amounts in other countries (\$460 billion between 2005-12) in order to maintain a minimum 8% growth rate to ensure social stability. Chinese development banks provide nearly limitless funds to firms. These funds "represent an incalculable advantage in an era otherwise dominated by empty coffers and dwindling cash flow" (Cardenal & Araujo 2013). This places Canadian investors at a significant disadvantage.

Chinese companies' access to funds allows them to invest in foreign firms, secure long-term supply contracts and develop natural resources projects. As a result, this "gives 'China, Inc.'—the triumvirate formed by the party-state, the banks, and the state-owned companies—the ammunition needed to blow their competitors out of the water" (Ibid.). The authors also show how Chinese investments abroad have had detrimental impacts on the local labour and environment, which will be elaborated on in subsequent sections. The precautionary example provided by the FIPA of precisely the model to avoid, as well as the position of Chinese investors and the impacts of their investments, raise serious concerns that the Canadian government must consider in the possible negotiations of a Canada-China FTA.

Investor-State Dispute Settlement

It has become the norm for trade and investment treaties to include provisions that allow investors to challenge government laws, policies and regulations. The FIPA with China, for example, enables Chinese investors to challenge Canadian laws through international arbitration, which is shown to be skewed towards foreign investors, and thus pressures decision-makers (Van Harten 2015).

Similar investor protections have appeared in the investment chapters of large trade agreements such as the North American Free Trade Agreement (NAFTA), CETA and the TPP. NAFTA and the TPP contain the investor-state dispute settlement (ISDS) mechanism and CETA established a nearly identical Investor Court System (ICS). ISDS reinforces and protects corporate rights to the extent that corporations are able to effectively sue governments before tribunals of private arbitrators—separate from the domestic court systems—for alleged expropriation, discriminatory treatment or loss of potential profits (TPP Chapter 9; CETA Chapter 33; NAFTA Chapter 11). However, ISDS goes beyond "protecting" investors, as "the

obligation to compensate investors for losses of expected profits can and has been applied even where rules are nondiscriminatory and profits are made from causing public harm.” (Stiglitz & Hersh 2015). In essence, ISDS gives foreign investors and multi-national corporations the ability to challenge government decisions and regulations that have been developed in the public interest.

Canada is the most sued country under NAFTA Chapter 11 (Global Affairs Canada 2017), yet it agreed to the expansion of investor rights in agreements such as the TPP and CETA. Although CETA takes some steps to update the ISDS process through its ICS, the protection of investor rights remains largely unchanged and ICS does not adequately address the problematic elements of ISDS (Van Harten 2016a; PowerShift e.V. and Canadian Centre for Policy Alternatives 2016).

As noted above, the Canada-China FIPA contains a similar mechanism that allows Chinese investors to challenge Canadian laws. It is worth noting that it appears likely that the value of Chinese assets in Canada will grow faster than Canada’s in China. Chinese investment in Canada increased from CDN\$334 million per year (between 2001-2005) to CDN\$10.7 billion per year (between 2008-2012) (Ibid.). The inclusion of ISDS is dangerous and unacceptable, especially given the rate at which Chinese investment in Canada is growing.

It is worth noting that in the last month, Ecuador terminated 16 bilateral investment treaties, including one with Canada, based on the recommendation of the Ecuadorian Citizens’ Commission Comprehensive Audit of Investment Protection Treaties and of the International Arbitration System on Investments (CAITISA) report. One of the Commission’s key recommendations was to exclude the ISDS mechanisms from any future treaty (Transnational Institute 2017). This demonstrates that it is possible to reject ISDS in pursuit of fairer trade relationships.

Canada must end its continued support of expanding investor rights at the expense of human and labour rights, environmental sustainability, indigenous sovereignty, governments’ right to regulate and democracy. Such investor protections certainly do not resemble the making of a “progressive” trade agreement. If Canada pursues a FTA with China, we call on the federal government and negotiators to stand up against ISDS and for Canadian sovereignty and democracy.

Labour Rights

In the pursuit of a possible FTA, Canada cannot neglect China’s deplorable record of labour and human rights abuses. The labour rights violations and poor working conditions faced by workers in China are well documented (CLW 2016a; CLW 2014). These injustices must be taken into strong consideration during possible negotiations.

China Labor Watch (CLW) is a non-profit organization that conducts factory assessments of labour conditions, provides training (community, activist, collective bargaining), and runs a worker hotline. Through its investigations and correspondence with workers, CLW has found severe violations in occupational safety. These include long work hours (e.g. 15 hour shifts), low wages (e.g. 1.54 USD per hour), lack of safety training, and a lack of worker representation (CLW 2016). Migrant workers in particular experience low wages, wage arrears, no labour contract, overtime work and high injury rates (Chan 2012). In the labour-intensive

export sector, there are reports of toxic poisoning of migrant workers, as well as fatal mining accidents, factory fires, high incidents of workplace injuries (Chan et al. 2014).

These poor working conditions contribute to health problems. This includes chronic injuries, such as the musculoskeletal disorders common in the auto industry, though these are less apparent to the public eye. Factors contributing to such injuries include long work hours, speed of assembly lines, poorly set-up workstations, and physical and psychological pressure from management. Furthermore, workers may suffer wage deductions or loss of bonuses for taking sick leave (Chan et al. 2014).

It is a lack of enforcement and worker representation that contributes to poor working conditions and labour rights in China. Chinese governments and China's unions have failed to enforce labour laws and protect worker rights (Chan 2012). Chan et al. (2014), and others (e.g. Morantz 2013; Walters 2004), have shown how strong unions and worker representation helps to maintain and improve the workplace safety. The weaker labour movement in China has contributed to the low priority given to occupational health and safety.

In contrast to the history of the labour movement in Western countries, China developed labour institutions before organized labour mobilization, rather than the reverse. As a result, Chinese labour activism has been unorganized and segmented. This is also supported by the state, as “the Chinese state has successfully undermined workers’ ability to organize and act collectively by enforcing a *bifurcated strategy*, a strategy that restricts workers’ collective rights (i.e. the rights to organize and strike) on the one hand, and confers on them individual rights regarding wages, contracts, benefits and working conditions on the other” (Chen 2016). Furthermore, trade unions in China often represent the employer/management rather than workers (Chan et al. 2014). In the 1990s, labour activists tried to organize independent unions that would not fall under the All-China Federation of Trade Unions (ACTFU), the official trade union, but they were banned (Chan 2012).

Finally, China has a policy towards forced labour. It is sanctioned for individuals in prisons/detention and for purposes of “re-education.” The existence of a forced labour system has been criticized by the international community. Critics have also highlighted the poor labour conditions (including sleep and food deprivation, heavy workloads, unclean work environments and torture) and that many export products made through forced labour (Jiang 2014a).

Many of these structures of (and attitudes towards) labour in China are fundamentally at odds with the rights we value and uphold in Canada. As a trading partner with China, Canada has a responsibility to speak out against labour rights violations. Furthermore, the proposed FTA could be used as a tool to promote fairer labour standards and pressure the Chinese government to uphold workers’ rights. Similarly to the ways in which investor rights are enforceable through NAFTA or the FIPA, Canada’s proposed FTA with China could outline binding, enforceable commitments to uphold labour rights.

It is worth noting that previously negotiated FTAs, such as CETA, contain labour chapters; however, the provisions are not binding. For example, CETA does take some positive steps in theory by upholding parties’ commitments to the International Labour Organization (ILO) Conventions (Article 23.3.4). It also includes a non-derogation clause that prevents parties from weakening labour laws or standards in order to facilitate trade or investment (Article 23.4). However, none of CETA’s labour provisions are enforceable, thus rendering them meaningless.

The non-binding compliance mechanism relies on cooperation and dialogue through a process of consultations and advice from an expert panel (Article 23.9-10). This stands in stark contrast to the enforceability of investor rights. Not only do non-binding labour provisions show little promise of improving labour rights or standards in either region, but may even put them at risk.

If Canada is to pursue a FTA with China, it must address the injustices and labour conditions faced by workers in China. Any such FTA must include *binding* and *enforceable* provisions on labour rights.

Human Rights

As is the case with labour rights, China's human rights abuses are well documented. China is a member of the UN and has ratified many international human rights treaties; however, China has hesitated to implement international standards and objected to international pressure to comply (Jiang 2014b). It is for this reason that China is often described as "one of the worst human rights violators in the world today" (Peerenboom 2005). This will be an area of particular concern for Canadians in a potential FTA.

The Chinese state has curtailed many fundamental human rights, including freedom of expression, assembly, association and religion. While there have been some positive developments in recent years, the conditions under President Xi Jinping remain troubling. Between July and September of 2015, approximately 280 human rights lawyers and activists were detained and interrogated (Human Rights Watch 2016). Human rights lawyers are also subject to physical violence (e.g. by court officials).

The government has also shut down or detained several nongovernmental organizations (NGOs) and arrested or imprisoned many activists. Activists defending human rights have faced detention, prosecutions, forced disappearance and torture by authorities. President Xi's anti-corruption campaign is characterized by prosecutions that violate the right to fair trial (HRW 2016). Freedom of expression is restricted through censorship (e.g. the censorship of politically unacceptable information through the Internet) and punishment.

The Chinese Communist Party (CCP) has publicly stated its commitment to gender equality; however, "its lack of respect for human rights means that women continue to face systemic discrimination on issues ranging from employment to sexual harassment" (HRW 2016). Homosexuality was decriminalized in China in 1997 and removed from the official list of mental illness in 2001. There still remains no legal recognition of same-sex partnership and no law to protect against the discrimination of people on the basis of gender identity or sexual orientation (HRW 2016). It is clear that China's stance on human rights severely violates what Canadians value as fundamental rights deserved by all.

It is worth noting that the Harper government compromised human rights in its FIPA (Van Harten 2015). This is a disappointing and devastating outcome, especially given that Canada is locked into this agreement until 2045. This certainly does not reflect a "progressive and inclusive approach to international trade" (GoC 2017a). A similar compromise in a potential FTA with China will not be acceptable to Canadians. Canada must not condone the Chinese government's treatment of its people by entering into a trade agreement without acknowledging human rights. Canada must stand up for fundamental human rights, including workers rights, women's rights, and freedom of expression, religion, association and assembly.

The Environment

Finally, the environment is an area of crucial importance in a possible FTA with China. The Canadian government must consider China's record on environmental degradation. Furthermore, an agreement must include genuine and enforceable environmental protections for Canada to stay true to its environmental sustainability and climate change commitments.

Foremost, we must be cautioned by the environmental impact of previous or existing Chinese projects overseas. The China Development Bank (CDB) finances many overseas natural resource and infrastructure projects, and thus some of its projects have had negative impacts on the environment and local communities. The Shwe oil and gas pipeline project in Burma, for example, led to environmental degradation (deforestation, river dredging and chemical pollution) as well as land confiscation, loss of livelihood, increased militarization, and lack of economic development (Friends of the Earth 2012). Such impacts were devastating to the local community, as they would be to Canadian communities.

China National Petroleum Corporation has also invested in the Canadian tar sands. In February 2010, a subsidiary of CNPC's PetroChina International bought a 60% share in two tar sands projects with Canada's Athabasca Oil Sands Corp (USD 1.7 billion). The tar sands have contributed to devastatingly harmful effects on the health and culture of indigenous people in the region, forest depletion, water scarcity and pollution, and increased greenhouse gas emissions (i.e. exacerbation of climate change) (Friends of the Earth 2012).

It is worth noting that in recent years the China Banking Regulatory Commission (CBRC) developed a new policy, the Green Credit Policy, which requires Chinese banks to ensure that their projects are in compliance with environmental laws before the receive funding. In February 2012, the CBRC issued a new Directive to the Green Credit Policy, which "instructs Chinese banks to adhere to international environmental and social financing standards in overseas transactions" (Friends of the Earth 2012). However, an assessment of the implementation of China's Green Credit guidelines conducted by Friends of the Earth (2014) found that Chinese-financed projects are not fully implementing the guidelines. These projects are continuing to jeopardize the livelihoods and well-being of local and Indigenous communities. For example, indigenous communities in Ecuador have tried to stop a Chinese owned copper mine as it threatens one of the most biodiverse regions in the world (Friends of the Earth 2014). Such a record of environmental degradation, negative local economic impacts and threats to indigenous sovereignty—and the blatant disregard for environmental standards—should sound alarm bells for Canada. The Canadian government must ensure that any Chinese projects in Canada follow Canadian regulations around the environment and Indigenous sovereignty.

It should be noted that the previous Conservative government did not adequately consider the environmental impacts of Chinese investment in Canada. The Harper government's environmental assessment of the China FIPA found no possibility of environmental impacts of new Chinese investment in Canada. The assessment, carried out by trade officials, stated: "As new flows of investment from China into Canada (or Canada into China) cannot be directly attributed to the presence of a FIPA, there can be no causal relationship found between the implementation of such a treaty and environmental impacts in Canada." Not only does this contradict the government's messaging that the FIPA would lead to more investment, but it

disregards the potential environmental impact of increased investment in Canada, which we have seen with previous Chinese projects. Furthermore, “the government ignored how the FIPA’s new rights for Chinese investors can be used to pressure governments against enforcing or tightening Canadian environmental laws” (Van Harten 2015). It would be irresponsible for Canada to pursue a FTA with China without conducting an independent and comprehensive environmental assessment.

Here, it is important to stress that the Canadian government must take into consideration the ways in which FTAs themselves can pose a threat to environmental protection and sustainability. Although some agreements include chapters pertaining to the environment—such as Chapter 22 (Trade and Sustainable Development) and Chapter 24 (Trade and the Environment) in CETA and the TPP’s environment chapter (Chapter 20)—the provisions are not *binding*. For example, the CETA texts notes that parties “should” promote or encourage particular environmental practices, such as the use of “voluntary” schemes around sustainable production and best practices of corporate social responsibility (Chapter 23, Article 3.2). While CETA may encourage environmentally sustainable practices, these commitments are “largely aspirational and lack any effective enforcement mechanism” (Nadarajah 2014, 110).

As with labour rights, the non-binding nature of environmental provisions stand in stark contrast to investor rights. In fact, the investment provisions in these trade agreements pose a serious threat to the ability of governments to develop and enforce environmental regulations. The investor-state dispute settlement (ISDS) mechanism in NAFTA and the TPP, and the nearly identical Investor Court System (ICS) in CETA, pose a serious threat to the environment. Environmental laws, regulations and protection measures are not immune from these mechanisms. In fact, most ISDS cases tend to be about environmental protection, health and natural resources (Van Harten 2016b, 2-3). In effect, ISDS is a tool with which foreign investors and multi-national corporations can challenge—and ultimately cause the overturning of—laws, regulations and policies that have been developed in the public interest, including environmental protection.

This erosion of governments’ sovereignty and right to regulate, particularly around protecting the public interest, comes at a time when addressing climate change is of utmost importance. Not only does ISDS restrict the maintenance and implementation of existing environmental laws, regulations and policies, but it threatens to prevent the development of *new* ones. Such investor protection provisions, therefore, will undermine Canada’s ability to meet its climate commitments. Therefore, a FTA with China must include comprehensive and *enforceable* environmental protection provisions if Canada is to meet its environmental sustainability and climate change commitments. Environmental protections are also inextricably linked to the protection of Indigenous sovereignty and self-governance in Canada. The Canadian government must honour a nation-to-nation relationship with indigenous peoples by ensuring that Indigenous communities retain the right to make decisions around natural resource development on their lands without the threat of being challenges by foreign investors.

Concluding Remarks

We urge the Canadian government to account for these concerns in its consideration of a FTA with China. Such an agreement has the potential to significantly impact Canadian democracy,

sovereignty, public health, labour and human rights, and the environment. We call on the federal government to be open and transparent in its potential negotiations and to engage in genuine, meaningful consultation with Canadians. Finally, we call on the Canadian government to stand by its commitment to adopt a “progressive and inclusive” approach to trade. A progressive trade agreement with China would address human rights abuses, contain enforceable provisions around labour rights and environmental protection, and limit the expanse of investor rights while democracy and Canadian governments’ right to regulate are limited.

The Trade Justice Network is a network comprised of environmental, civil society, student, indigenous, cultural, farming, labour and social justice organizations that aims to raise awareness about free trade agreements and their implications. We seek to highlight the need for a more sustainable, equitable and socially just international trade regime.

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