

Intelligence MEMOS



From: Lawrence Herman
To: Canadians Concerned About Trade
Date: September 1, 2020
Re: **HUAWEI AND THE CANADA-CHINA AGREEMENT**

Is Ottawa prevented from excluding Huawei from Canada's 5G system because of the 2014 Canada-China investment protection [treaty](#)?

Would excluding Huawei on national security grounds give the company grounds for claiming compensation under that agreement? China's ambassador to Canada has said so.

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

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 decide how they choose to define "national security." Rejecting Huawei – or any Chinese investment – on grounds of national security is within Canada's sovereign right.

Those sovereign rights can be restricted or moderated by rules of customary international law. For example, there are 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, formally Foreign Investment Promotion and Protection Agreement, or FIPPA, come into play.

The FIPPA contains a series of binding obligations regarding the manner in which investors and investments from each country are to be treated. Where obligations are breached, Article 15 allows each country recourse to arbitration by a three-member panel. The panel decision 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 "fair and equitable treatment" for Chinese investors. At the same time, it makes clear that those obligations do not go beyond international law [standards](#).

In the Huawei case, any national security decision would have to be demonstrably in breach of this minimum international law standard. There is a huge array of arbitration case law, with varying degrees of concreteness. However, in *Apotex v United States*, a 2014 NAFTA investment arbitration panel said "a high threshold of severity and gravity" is required to conclude there has been a breach. 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 two fundamental non-discrimination rules in the FIPPA regarding treatment of foreign investors and their investments. Article 5 mandates most-favoured-nation (MFN) treatment – full equality of treatment with investors from other countries. Article 6 provides for national treatment, meaning treatment on a par with the treatment accorded home country investors.

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

There is also the question of a claim by Huawei itself under Article 20, Part C. of the FIPPA, based on allegations of breaches 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 a national security exception, using fairly standard wording found in other international agreements. Article 33 provides that nothing in the agreement shall be construed as limiting a state "from taking any actions that it considers necessary for the protection of its essential security interests" in time of war or other emergency.

The question here is whether these Article 33 exceptions provide full cover for Canada, given the terms "in time of war or other emergency." However, while Huawei might argue any ban was not imposed in the context of an "emergency," the self-defining words – "that it considers necessary" – could be used to defeat such a claim.

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 *Investment Canada Act* decisions.

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. It may well happen, given the increasing likelihood of Canada banning Huawei from 5G deployment. 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.

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