The Definition of Investment and its Development: for the Reference of the Future BIT between China and Canada

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Résumé

Cet article porte sur la notion d'investissement et son développement à l'échelle internationale. Il discute plus particulièrement de la nécessité d'assurer la protection des investisseurs par les traités bilatéraux et des mesures limitées prises par la Chine jusqu'à présent à ce sujet.

Abstract

This article deals with the notion of investment and its development at the international level. It discusses more particularly the question of the necessity to protect investors by bilateral investment treaties and of the limited measures taken by China until now on this subject.

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Attracting foreign direct investment (FDI) and carrying out overseas investment and cooperation are an important part of China's opening up, a basic national policy. This two-way investment promotion policy, which is called "bringing in" and "going out" by Chinese, is China's response to economic globalization and its effort to take part in the international division of labor. According to UNCTAD's World Investment Report 2011, China's foreign direct investment (FDI) inflows ranked second in the world in 2010 and China has also recently become the world's fifth largest investor. These figures speak for themselves[1]. However, China's legal system for overseas investment and management services is still in its initial stage. We can learn from Canada because of its high level of investment liberalization in both attracting foreign investment and encouraging overseas investment. China and Canada issued a joint statement on 3 December 2009 when Canadian Prime Minister Stephen Harper visited Beijing. Both sides undertook to expedite negotiations of a China-Canada Foreign Investment Promotion and Protection Agreement and to provide a predictable and stable legal framework to increase investors' confidence.

As an important part of the international investment legal framework, bilateral investment treaties ("BITs") refer to the treaties that are entered into by two countries to encourage and protect inbound investments to the host country. The purposes of BITs are to promote the economic growth of the host country and to facilitate international private equity activities. Yet today's IIA International Investment Agreements regime offers protection to only two-thirds of the global FDI stock and covers only one-fifth of possible bilateral investment relationships. To provide full coverage, a further 14,100 bilateral treaties would be required[2].

China has bilateral investment agreements with 130 countries, including Austria, the Belgium-Luxembourg Economic Union, France, Germany, Italy, Japan, South Korea, Spain, Thailand and the United Kingdom. China's bilateral investment agreements usually cover definitions of Investment and Investor, expropriation, arbitration, most-favored-nation

[1] "Outflows from the largest FDI sources – Hong Kong (China) and China – increased by more than $10 billion each, reaching historical highs of $76 billion and $68 billion, respectively." United Nations Conference on Trade and Development [UNCTAD], *World Investment Report 2011*, Chapter I, p. 7.

[2] United Nations Conference on Trade and Development [UNCTAD], *World Investment Report 2011*, Overview, p. 12.

treatment, and repatriation of investment proceeds. In their model BITs, the United States and Canada share the same requirement for capital liberalization which differs greatly from those provisions in BITs entered into between China and other countries. So China's negotiations with the United States and Canada on BITs have been unsuccessful till now. Currently, China has 14 FTA partners comprising of 31 economies, among which 8 agreements have been signed. Most of these FTAs include provisions for investments. The definitions of "investment" under current BITs and FTAs are the outcome of the game of interests among parties.

I. Direct Investment and Indirect Investment

A. International Organizations' Definitions of "Direct Investment": Common Reference Criteria for Many Countries

The authoritative definitions of "direct investment" mainly come from the *Balance of Payments and International Investment Position Manual* (BPM6), published by the International Monetary Fund (IMF), and the *Standard Definition of Foreign Direct Investment* by the Organisation for Economic Co-operation and Development (OECD). These definitions are primarily used in international institutions' annual reports about global FDI flow, including both FDI inflow and outflow. They are also the reference criteria for most countries' FDI statistics.

1. IMF's Definition of "Direct Investment"

The BPM6 defines "direct investment" as "a category of cross-border investment associated with a resident in one economy having control or a significant degree of influence on the management of an enterprise that is resident in another economy"[3].

[3] International Monetary Fund [IMF], *Balance of Payments and International Investment Position Manual*, 6th ed., IMF, 2008, par. 6.8.

2. OECD's Definition of "Foreign Direct Investment"

According to the *Benchmark Definition of Foreign Direct Investment*[4], foreign direct investment materializes when a resident enterprise direct investor finds a lasting interest via a direct investment enterprise which is located in another economy. The lasting interest means a long-term relationship between a direct investor and a direct investment enterprise. In addition, this relationship has important influence on the management of the enterprise. Owning directly or indirectly 10% or more of the voting power of a direct investment enterprise can be regarded as having the above relationship. OECD doesn't allow any qualification of the 10% threshold and suggests its members to execute it strictly in order to keep the consistency of different countries' statistic data[5].

3. WTO's Definition of "Direct Investment"

The Secretariat of the World Trade Organization (WTO) published a report on trade and foreign direct investment in 1996. According to it, foreign direct investment is a situation in which an investor, which is residing in his parent country, owns assets in another country, the host country, and aims to manage these assets. The difference in management can distinguish foreign direct investment from portfolio investment which mainly focuses on foreign stocks, bonds and other financial instruments.

The report listed three main types of foreign direct investment: a) equity capital; b) reinvested earnings; c) other capital (i.e., short or long-term borrowing and lending of funds between the MNC and the affiliate.)

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4 The OECD first launched the *Benchmark Definition of Foreign Direct Investment*, which was used to define foreign direct investment, in 1983. It went through four modifications in 1990, 1992, 1996 and 2008. The third chapter of the 2008 version regulates in detail the definitions of foreign direct investment, foreign investment enterprise, foreign direct investor, etc.

5 Organisation for Economic Co-operation and Development [OECD], *Benchmark Definition of Foreign Direct Investment*, 4th ed., Paris, OECD, 2008, para. 117. Some consider that, in certain cases, 10% voting right cannot ensure the investor to have its say in the enterprise; on the other hand, in other cases, the investor can have effective *locus standi* in the enterprise even though the percentage of voting right is less than 10%.

This categorization is similar to the investment types provided by the 2008 Statistical Bulletin of China's Outward Foreign Direct Investment[6].

4. UNCTAD's Analysis of "Investment"

Based on its analysis to the scope and definitions of international investment agreements, UNCTAD comes to the conclusion that "while the broad and open-ended asset-based definition has remained wide-spread in BITs focusing on investment protection, newer agreements have used techniques for narrowing the scope of the definition". UNCTAD also thinks that arbitral practice "has further highlighted the importance of a proviso that a treaty should apply only to those investments that are made in accordance with host State law"[7].

B. Traditional Boundary Between International Direct and Indirect Investment

1. Definition of International Indirect Investment

International indirect investment is also called foreign indirect investment. It refers to economic activities in which investors increase the value of invested capital through purchase of foreign stocks or other securities or through provision of loans. To be more specific, the investors do not get involved nor have any effective say in the operation and management of the invested enterprises but only invest with particular stocks and securities that can provide income.

2. International Indirect Investment in the Broad Sense

According to the sixth edition of the IMF's *Balance of Payments and International Investment Position Manual*, five functional categories of investment are distinguished in the international accounts: direct invest-

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6 See WTO News: Press Releases, Press/57, October 9, 1996, "Trade and foreign direct investment", New Report by the WTO, available at: <http://www.wto.org/english/news_e/pres96_e/pr057_e.htm>.

7 Scope and Definition: United Nations Conference on Trade and Development [UNCTAD], *Series on Issues in International Investment Agreements II*, 2011p. xi-xii.

ment; portfolio investment; financial derivatives (other than reserves) and employee stock options; other investment; and reserve assets[8].

Investment other than direct investment is usually referred to as indirect investment. International indirect investment focuses on the amount of interests and the stability of earnings of the investment while international direct investment puts more emphasis on the right to control, own and manage the foreign assets of the enterprise and the right to get surplus value.

II. Forms of Contributions in Foreign Direct Investment

A. OECD's Explicit Exclusion of Financial Derivatives from the Forms of Contribution in Direct Investment

According to OECD Benchmark Definition of Foreign Direct Investment (4th Edition), the main financial instrument components of FDI are *equity* and *debt instruments.* Equity includes common and preferred shares (exclusive of nonparticipating preference shares which should be included under debt), reserves, capital contributions and reinvestment of earnings. All cross-border positions and transactions in equity between FDI-related enterprises are included in FDI. Dividends, distributed branch earnings, reinvested earnings and undistributed branch earnings are components of FDI income on equity.

Debt instruments include marketable securities such as bonds, debentures, commercial paper, promissory notes, nonparticipating preference shares and other tradable non-equity securities as well as loans, deposits, trade credit and other accounts payable/ receivable. All cross-border positions and transactions related to these instruments, between enterprises covered by an FDI relationship other than between related financial intermediaries are included in FDI. The interest returns on the above instruments are included in FDI income on debt. Positions and transactions in financial derivatives between entities in a direct investment relationship should be excluded from direct investment[9].

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8 IMF, *supra*, note 3, para. 6.1.

9 OECD, *supra*, note 5, para.152-154.

Specifically, financial instruments related to FDI include: (i) equity equity in branches, all shares in subsidiaries and associates, and other contributions of an equity nature; (ii) deposits: savings deposits, term deposits, transferable and nontransferable deposits in local or foreign currencies; (iii) *debt securities*: nonparticipating preferred shares, bonds, debentures, commercial paper, promissory notes and other non-equity securities; (iv) loans: all loans and advances (except accounts receivable/payable which are treated as a separate category of financial assets), financial leases and repurchase agreements; (v) trade credit (receivables and payables) between FDI related enterprises, which represents short-term credit in the ordinary course of business by suppliers/buyers of goods and services; (vi) other accounts receivable/payable includes advances and deferred payments in respect of exchange of non-produced assets.

B. The Growing Importance of Non-equity Modes (NEMs) of International Production

Traditionally, international direct investment is limited to equity modes while non-equity modes represent the development of a new form of investment. For equity modes, a parent company owns shares with voting rights of a foreign subsidiary therefore the parent company can control its activities. Equity modes can further be divided into two categories: owning all the shares and owning part of the shares. If a parent company owns all the shares, that is, it owns 100% of the subsidiary's equity such a subsidiary is called a wholly-owned subsidiary. Branches established by early transnational companies in foreign countries were basically like this. Owning part of the shares is the case in a joint venture. Based on the constituent legal forms, joint ventures can be divided into equity joint ventures and contractual joint ventures.

International production, today, is no longer exclusively about FDI on the one hand and trade on the other. Non-equity modes (NEMs) of international production are of growing importance[10]. NEMs include contract manufacturing, services outsourcing, contract farming, franchising, licensing, management contracts and other types of contractual relationships through which TNCs coordinate activities in their global value

[10] OECD, *supra*, note 5, Box 4.1 "Financial instruments related to foreign direct investment", p. 62.

chains (GVCs) and influence the management of host-country firms without owning an equity stake in those firms[11].

For Non-Equity Modes, international investors acquire to some extent the actual control of an enterprise in the host state by establishing some business connections with it so as to realize the operational objectives of their own companies. Non-Equity Modes is a newly appeared investment strategy coming along with the nationalizations and the withdrawal of foreign investment in developing countries in the 1970s and has been developing with the diversification of the forms of investment.

NEMs may be more appropriate than FDI in sensitive situations. The advantages of NEMs for TNCs are: (1) the relatively low upfront capital expenditures required and the limited working capital needed for operation; (2) reduced risk exposure; (3) flexibility in adapting to changes in the business cycle and in demand; and (4) as a basis for externalizing non-core activities that can often be carried out at lower cost by other operators[12].

Contracting parties of many early bilateral investment treaties held that intangible properties of foreigners were the result of legislations of their home states and were not properties protected by international law. Therefore, protection to intellectual property right, i.e., intangible property such as patent, copyright and know-how, was preconditioned on the recognition of host states. With the development of international investment, more and more contracting parties of bilateral investment treaties begin to regard intangible property as the focus of investment protection. Moreover, many new forms of foreign investment contracts involve transfer of intangible property. For example, the subject matters in license agreements, management contracts and consultation contracts all include intangible property. Concession agreements, the main form of foreign investment with the mineral and resources department, also relate to contractual rights of intangible property. Therefore, in bilateral investment agreements, foreign investment protection not only covers tangible property but also intangible property brought into the invested enterprises.

[11] UNCTAD, *supra*, note 2, p. 15.
[12] *Id.*, p. 18.

Actually, most foreign investment behaviors contain the connotation of direct investment and the skills as well as characteristics of indirect investment due to the highly developed capital market. This tendency of combining international direct and indirect investment together challenges the standard of the traditional definition of “Direct Investment”. The reason is that it puts restrictions on the implementation of each country’s investment promotion policies and measures and goes against the investors and their investment interest protection provided by the parent country to the investors.

III. Definitions of “Investment” Under Current BITs and FTAs

A. The Interpretation of “Asset-based” and “Enterprise-based” Definition Models

Nowadays, bilateral investment treaties and international investment agreements define “investment” by detailing its ways of expression rather than using expressions like “direct investment” and “indirect investment”. For example, besides the abstract description, more and more asset-based definitions give a list of the forms of the contributions of investment. On the other hand, the foothold of the enterprise-based definition of investment is no longer limited to the enterprise-related ownership, control or the operation rights, but includes all kinds of activities related to an enterprise directly or indirectly. However, it goes without doubt that no agreement is exactly the same, since all the BITs, RITs and FTAs are the results of the concession of interests among different countries.

1. The “Asset-based” Definition Model: Two Approaches

Under the first definition approach, “investment” refers to “every kind of property or assets”, followed by a list of the kinds of assets contributed, for example, movable, immovable property and other property: shares and bonds; intellectual property; franchise right etc. Since the term “investment” has the meaning of kinds of property and property rights, whose range is quite extensive, it will be too simple to directly categorize the investment into direct and indirect. Therefore, a lot of countries are likely to define the forms of the assets that are contributed, which is quite clear and straightforward. Also note that investments are usually limited to assets that are legally approved or formally registered under the law of the host country.

The other approach defines "investment" as "kinds of assets", followed by a list of the assets that are formed into, including (1) enterprise; (2) the shares, stock, and other forms of equity participation in an enterprise; (3) bonds, debentures, other debt instruments; (4) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (5) claims to money; (6) intellectual property rights; (7) concessions; and (8) any other tangible or intangible, movable or immovable property, and related property rights. This approach is the result of investment liberalization. It is also the model adopted by modern developed countries in their bilateral investment treaties.

The distinction between assets that are contributed and assets that are formed into comes from different perspectives: whether the assets are seen from the perspective of the investment country/area or from the host country/destination.

2. The "Enterprise-based" Definition Model and its Evolution

Investments are usually defined as "enterprises", i.e., investments related to the ownership or control of an enterprise, e.g. a newly-built enterprise, or the purchasing of the equity of an existing enterprise. Traditionally, investment has been defined as "direct investment". This strict approach is advocated by developing countries who are trying to restrict the scope of "investment" to the invested enterprise, but fails to be accepted by most developed countries.

In recent years, the "enterprise-based" definition has been modified and the scope of its definition is expanding, becoming more and more similar to the second approach of the asset-based model: there is no general description to investment but only a direct list of the forms of the assets that has been formed into, i.e., the checklist of tangible and intangible property. The most typical case is Article 1139 of the NAFTA, the 2003 Canada FIPA[13], and the Mexico Model BIT. This model can also be

[13] "Agreement Between Canada and – for the Promotion and Protection of Investments", available at:

deemed as the modern version of the "enterprise-based" definition model, and some Chinese scholars call it a "closed-list".

3. The Features of the U.S. Model

The 2004 model BIT of the US combined these two modes mentioned above together.

It includes the general concept of "investment" that can be contributed and the list of the assets that are formed into. The list imitates the one in article 1139 of NAFTA, only its restrictive conditions are removed. Meanwhile, derivative financial products, a pure indirect investment, are also added into the forms of "assets" in the U.S. Model. Some Chinese scholars called such definition a "circle definition".

B. The Practices of BITs Between China and Foreign Countries

1. A General Description of "Investment" and a List of the "Property or Assets that are Contributed", i.e., the Forms of Assets in the Investment Country

The definition of "investment" under the China-Germany BIT belongs to the first approach of the asset-based definition, which also represents the mainstream in BITs concluded in recent years. But its scope is too narrow[14]. Such definition can also be seen in the BITs with Netherland, Finland, and South Korea.

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf>.

14 Article 1 of the *Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments* says as follows:
The term "investment" means every kind of asset invested directly or indirectly by investors of one Contracting Party in the territory of the other Contracting Party, and in particular, though not exclusively, includes:
(a) movable and immovable property and other property rights such as mortgages and pledges;
(b) shares, debentures, stock and any other kind of interest in companies;
(c) claims to money or to any other performance having an economic value associated with an investment;

2. A List of the "Assets that are Formed into" Without a General Description of "Investment", i.e., the Forms of Investment in the Host Country

The definition of investment in the Canada model is almost the same as that in NAFTA but the latter does not exclude a loan to or debt security issued by a financial institution[15]. The definition of "investment" under NAFTA is the modern enterprise-based definition. The scope of "investment that are formed into" covered by NAFTA not only includes an enterprise, equity and bonds, but also incorporates real estate property, tangible or intangible property (including Intellectual property), and the interests arising from the enterprise's revenues, profits or dissolved property, etc.[16].

(d) intellectual property rights, in particular copyrights, patents and industrial designs, trade-marks, trade-names, technical processes, trade and business secrets, know-how and good-will; and
(e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources;
any change in the form in which assets are invested does not affect their character as investments;

15 Article 1 Definitions of 2004-FIPA- model: investment means: …(V) (i) notwithstanding subparagraph (III) and (IV) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located, and
(ii) a loan granted by or debt security owned by a financial institution, other than a loan to or debt security of a financial institution referred to in (i), is not an investment;
for greater certainty:
(iii) a loan to, or debt security issued by, a Party or a state enterprise thereof is not an investment; and
(iv) a loan granted by or debt security owned by a cross-border financial service provider, other than a loan to or debt security issued by a financial institution, is an investment if such loan or debt security meets the criteria for investments set out elsewhere in this Article;

16 In accordance with Article 1139 of *NAFTA*, investment means:
(a) an enterprise;
(b) an equity security of an enterprise;
(c) a debt security of an enterprise
(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the debt security is at least three years,
but does not include a debt security, regardless of original maturity, of a state enterprise;

3. Both a General Description and a List of the "Assets that are Formed Into"

The definition is apparently based on the blueprint of the Mexico Model BIT. However, the definition of investment in the Mexico Model BIT is almost the same as that in NAFTA. The difference is that the definition of "investment" in China-Mexico BIT has a general description as well as a restriction on investment: only investment approved by the contractual party is under the protection. In other words, investment approved by the host country shall enjoy the specific protection of the bilateral investment protection mechanism while investment that is not approved of may only resort to general principles of general international law.

In accordance with Article 1 of the Agreement between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Invest-

(d) a loan to an enterprise
(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the loan is at least three years,
but does not include a loan, regardless of original maturity, to a state enterprise;
(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;
but investment does not mean,
(i) claims to money that arise solely from
(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or
(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or
(j) any other claims to money,
that do not involve the kinds of interests set out in subparagraphs (a) through (h);
investment

ment, "investment" means the assets owned or controlled by investors of a Contracting Party and acquired in accordance with the laws and regulations of the other Contracting Party. This is then followed by a list of the forms of "assets that are formed into", which basically conforms to the checklist of Article 1139 of NAFTA but explicitly excludes the claims to money[17]. The definition in China-Mexico BIT is also the most expansive among all the BITs that China has concluded until the present.

17 *Agreement between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments*: "investment" means the assets owned or controlled by investors of a Contracting Party and acquired in accordance with the laws and regulations of the other Contracting Party, listed below:
(a) an enterprise;
(b) an equity security of an enterprise;
(c) a debt security of an enterprise
(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the debt security is at least three years,
but does not include a debt security, regardless of original maturity, of a Contracting Party or of a State enterprise;
(d) a loan to an enterprise
(i) where the enterprise is an affiliate of the investor, or
(ii) where the original maturity of the loan is at least three years,
but does not include a loan, regardless of original maturity, to a Contracting Party or to a State enterprise;
(e) an interest in an enterprise that entitles the owner to share an income or profits of the enterprise;
(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d) above;
(g) real estate or other property, tangible or intangible, acquired or used for business purposes; and
(h) interests arising from the commitment of capital or other resources in the territory of a Contracting Party to economic activity in such territory, such as under
(i) contracts involving the presence of an investor's property in the territory of the other Contracting Party, including turnkey or construction contracts, or concessions, or
(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;
but investment does not mean,
(i) claims to money that arise solely from
(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Contracting Party to an enterprise in the territory of the other Contracting Party, or

4. A General Description with Limitations and a List of the Forms of the Extended "Assets that are Contributed"

The definition of "investment" given in the investment agreement between China and ASEAN belongs to the first approach of asset-based definition model. The definition, although similar to the one in the BIT between China and Mexico, puts some limitations on the description. It also lists the forms of the assets that are contributed, alike the BIT between China and Germany, making each item more specific, certain and more expansive on the general[18].

5. The Broadest Definition of Investment

The definition of "investment" under the 2004 Model BIT of the US combines the second approach of the asset-based model and the modern version of the enterprise-based model, making it quite different from any traditional model. Besides requiring the assets to be investment-natured and a general description to the forms of assets, there is almost no other limitation to the assets that are formed into. In particular, it also incorpor-

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d) above, or
(j) any other claims to money,
that do not involve the kinds of interests set out in subparagraphs (a) through (h) above;

18 "Investment" means every kind of asset invested by the investors of a Party in accordance with the relevant laws, regulations and policies 1 of another Party in the territory of the latter including, but not limited to, the following:
(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
(ii) shares, stocks and debentures of juridical persons or interests in the property of such juridical persons;
(iii) intellectual property rights, including rights with respect to copyrights, patents and utility models, industrial designs, trademarks and service marks, geographical indications, layout designs of integrated circuits, trade names, trade secrets, technical processes, know-how and goodwill;
(iv) business concessions conferred by law, or under contract, including concessions to search for, cultivate, extract, or exploit natural resources; and
(v) claims to money or to any performance having financial value.
It also supplement that, returns that are invested should be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments.

ates futures, options, and other derivatives which are purely assets of indirect investment.

In accordance with the U.S. 2004 Model BIT, "investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Its forms of investment are the broadest among all existing BITs and may be: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

IV. Definitions of "Investment" Different from those in Chinese Legislation

Currently, China's relevant authorities confine "foreign investment/ overseas investment" to "foreign direct investment". In addition, the definition given by them narrows the scope of investment and contains too many restrictions. On the other hand, it's too abstract and cannot integrate with the different expressions of investment discussed earlier. These limitations are related to the functions of the relevant authorities.

A. The MoC`s Scope of Definition: the Narrowest

The *Measures for the Administration of Foreign Investment* put forward by the MoC claim that "overseas investment" refers to "acts conducted by enterprises established under Chinese law (hereinafter "enterprises") such as setting up or acquiring abroad the ownership, control or other operation rights of an nonfinancial enterprise through establishment or merger and acquisition"[19].

[19] Article 2 of the *Measures for the Administration of Overseas Investment*: Overseas Investment in these Measures refers to acts conducted by enterprises established under

The reason roots in that MoC is only granted administration authority on enterprises, both in attracting foreign investment and in supervising investment aboard.

B. The SAFE's Definition: Broader than the MoC's

Provisions in the *Foreign Exchange Administration for Overseas Direct Investment of Domestic Institutions* by the State Administration of Foreign Exchange (SAFE) stipulates that "overseas direct investment" shall mean the acts of domestic institutions to establish enterprises or obtain the ownership, control rights, operation and management rights or other rights and interests of existing enterprises or projects outside China through establishment (of sole proprietorship enterprises or equity/cooperative joint ventures), merger and acquisition, and equity participation upon verification and approval by the departments in charge of overseas direct investment[20]. Obviously, as to the administration of the foreign investors' use of foreign exchange, the SAFE accepts both DRC's verification to projects and the MoC's approval of enterprises contracts.

C. The DRC's Definition: the Most Concrete

The *Temporary Administration Measures for the Verification and Approval of Overseas Investment Project* provides that "overseas investment" refers to investment abroad conducted by various types of investment entities or the overseas enterprises or organizations in which they hold a controlling share, including new establishment merger and acquisition equity participation capital increase and re-investment; "overseas investment projects" refers to the activities by which an investment entity obtains overseas ownership operation and management rights or other relevant rights through the injection of assets and rights such as currency negotiable securities physical objects intellectual property rights or technology equity or claims or through the provision of security."[21] This defin-

Chinese law (hereinafter "enterprises") such as setting up or acquiring the ownership, control or other operation rights of an nonfinancial enterprise through establishment or merge and acquisition abroad.

20 Article 2 of the *Foreign Exchange Administration for Overseas Direct Investment of Domestic Institutions*.

21 Article 2 of the *Temporary Administration Measures for the Verification and Approval of Overseas Investment Project* provides: "These Procedures shall apply to the verification and approval of investment including new establishment merger and acquisition

ition is comparatively detailed mainly because the DRC had great power during the project approval process.

D. The Definition in the 2008 Statistical Bulletin of China's Outward Foreign Direct Investment: the Closest to the Standard of International Organizations.

Jointly published by the MoC, the SAFE and the State Statistics Bureau, the 2008 Bulletin takes the IMF criteria into consideration but narrows the scope of the "foreign direct investment" to refer to acts by Chinese enterprises and groups ("the domestic investors") to invest in foreign countries and regions as well as Hong Kong, Macau and Chinese Taiwan with the core purpose of controlling the operation rights of foreign enterprises via cash, realty and intangible assets. The nature of overseas/foreign direct investment is mainly reflected in the goal of an economy to invest in another economy so as to achieve its long-term interest. In this Bulletin, "direct investment enterprise" means foreign enterprises whose 10% or more shares or voting right (for corporate enterprise), and other equivalent rights are directly owned or controlled by the (Chinese) investor. Foreign enterprises can be divided into subsidiaries[22], affiliated companies[23] and branches[24] according to the different methods of establishment.

equity participation capital increase and re-investment projects conducted overseas by various types of legal persons Investment Entities in the People's Republic of China and the overseas enterprises or organizations in which they hold a controlling share." Article 3 provides: "For the purposes of these Procedures the term 'overseas investment projects' shall refer to the activities by which an Investment Entity obtains overseas ownership operation and management rights or other relevant rights through the injection of assets and rights such as currency negotiable securities physical objects intellectual property rights or technology equity or claims or through the provision of security."

22 In 2008 Statistical Bulletin of China's Outward Foreign Direct Investment, a subsidiary refers to an organization in which 50% or more voting right for shareholders or members of the foreign enterprise are controlled by the domestic investors who also have the power to administer, manage and supervise the nomination and recall of the key members of the enterprise.

23 *Id.* "Affiliated company" refers to organizations in which the domestic investors own 10% to 50% voting right of the shareholders or members of the foreign enterprises.

24 *Id.* "Branch" refers an oversea non-Corporate enterprise owned by domestic investors. The oversea standing bodies, offices or representative offices of domestic investors are regarded as "Branches".

Obviously out of the need for statistics, the classification adopts the general international practice.

The definition of "amount of foreign direct investment"[25] in the Bulletin borrows from the classification for direct investment by WTO and includes equity investment[26], profit reinvestment[27] and other investments related to debt trading between enterprises[28]. But, the Bulletin limits foreign direct investment by the banking industry to equity investment and other investments (i.e., the long-term claims on their oversea branches owned by domestic banks).

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To conclude, no uniform pattern has been adopted in the practices of BITs among countries, even though a model agreement of a certain country can be made references to. This shows that every country has its own national conditions and situations, and the two sides should take positions, attitudes, and many other factors into account. Therefore, instead of blindly following the most advanced model, each country should base its BIT on its own national situations.

The BIT between China and Canada should base on the BIT between China and Mexico. It should both incorporate the restrictions into the general description and list the forms of assets that are acceptable. In accordance with the practice of BITs and foreign investment activities of

25 *Id*. "Amount of foreign direct investment" refers to investment contributed directly into foreign enterprises by domestic investors during the reported period, including equity investment, profit reinvestment and other investment related to inter-company debt trading. But, the Bulletin limits foreign direct investment by the banking industry to equity investment and other investments, the latter means the long-term claims on the oversea branches owned by domestic banks.

26 *Id*. "Equity investment" refers to the equity capital owed by domestic investors in their overseas branches or the stock they have in their foreign subsidiaries and affiliated companies.

27 *Id*. "Profit reinvestment" is part of the profit of a foreign subsidiary or affiliated company which has not been divided but should belong to a domestic investor, and the profit that has not been transferred to the domestic investor by overseas branches.

28 *Id*. "Other investment" refers to activities such as debt trading between a domestic investor and its oversea subsidiary, affiliated company and branch, including the loans between domestic investors and its oversea subsidiary, affiliated company and branch.

different countries, the approach to define directly the forms of the assets that the investment may take in the host country or destination will expand the control of the host country and enhance the protection to investors. This is the international trend. Considering China's current situation, it is not realistic to fully adopt the Canada model.