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Canada and India Conclude Investment Treaty: Negotiations With China Continue

On June 16, the Hon. David Emerson, Minister of International Trade, announced the conclusion of negotiations on a Foreign Investment Protection and Promotion Agreement ("FIPA") with India. The Agreement reflects the government's growing recognition of the importance of emerging markets such as India and China for Canada's international trade and investment.

Minister Emerson observed that the Indian market offers tremendous opportunities for Canadian investors. Last year, merchandise exports grew by 55 percent and two way foreign direct investment increased by more than 17 percent. By providing a stable environment for investors, the Minister explained, the Agreement will further stimulate trade and investment flows.

What Is a FIPA?

The Canada-India FIPA is the latest addition to a worldwide network of over 2,500 bilateral investment treaties. Similar provisions exist in free trade agreements such as NAFTA, CAFTA and the Energy Charter Treaty. While there are important differences between treaties, they generally contain a basic set of protections for foreign investment that require host governments to:

- pay compensation for direct or indirect expropriation;
- treat foreign investment fairly and equitably by respecting legitimate expectations and providing due process before courts and tribunals;
- apply their laws in a transparent and impartial manner;
- refrain from discriminatory or protectionist conduct; and
- allow for repatriation of profits and transfer of capital.

Unlike most international treaties, investment agreements have strong dispute settlement mechanisms. Foreign investors can enforce their rights under such a treaty through international arbitration without lobbying their own governments to advance their claim. A growing number of international tribunals have rendered large damage awards to foreign investors whose rights were violated. These awards are enforceable against host state assets in over 140 countries – leading host governments to take meritorious claims seriously.

Canada's Broader International Investment Agenda

Canada currently has 22 FIPAs in force – far less than most other capital-exporting countries. In 2004, the government began to address the lack of protections for Canadian international businesses by adopting a Model FIPA to use in negotiations with potential treaty partners. In November 2006, Canada and Peru signed a FIPA based on this model. Negotiations with China and Jordan are now well underway. Exploratory discussions have been held with Indonesia, Vietnam and Kuwait.

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Given the growing importance of the Chinese market, concluding a FIPA with China is one of the government's top priorities. However, negotiations have dragged on due to significant differences between Canada's Model FIPA and the standard Chinese approach. Most of these differences relate to dispute settlement provisions rather than substantive protections. Canada is seeking fewer preconditions and greater transparency for dispute settlement than China typically allows in its treaties.

In December 2006, Canada also signed the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (known as the "ICSID Convention"). The ICSID Convention does not create substantive protections for foreign investors, but does offer a convenient procedural mechanism for the resolution of investment disputes and the enforcement of arbitral awards. Until December, Canada was the only developed economy not to be a signatory of ICSID. Over 140 countries have ratified this Convention.

Canadian Investors Beware: Entry Into Force Takes Time

The recent spate of international investment initiatives will be welcome by Canadian businesses that face the political and legal risks of doing business in emerging markets. However, Canadian businesses cannot yet rely on these instruments. Neither the recently concluded FIPAs nor the ICSID Convention have yet entered into force with respect to Canadian investors. Entry into force requires ratification by the Canadian Parliament.

In the interim, Canadian businesses may mitigate some of the risks of doing business in emerging markets through careful investment planning and contract drafting. Canadian investors should consider international arbitration clauses, stabilization agreements, political risk insurance and channeling investment through vehicles established under the laws of third countries with effective investment treaties.

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