

Canada and India sign investment protection agreement

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Canada and India are building regulatory and treaty co-operation to fuel a growing trading relationship between the two countries.¹ A bilateral investment protection agreement between the countries signed on 16 June 2007 (the "Treaty") is a key element of commitment by the countries to enhance trading incentives for the private sector.² The proposed agreement is now before the governments for ratification.

The investment agreement will enhance security for investments running between India and Canada. This short piece reviews the advantages conferred by the Treaty.

Investment protection agreements

Investment protection agreements are concluded on a government-to-government basis and are designed to shield private sector parties from one contracting state from political risks when investing in the other contracting state. Third party nationals investing through companies in jurisdictional signatories (India and Canada) are also generally protected when investing in the treaty partner country.

The use of investment protection agreements has taken off in the last decade and there are now approximately 2000 such agreements worldwide, with nearly one hundred and fifty countries participating. Emerging market countries in Latin America, Asia and Africa are active participants in such agreements, as they see it as an inexpensive means to mitigate risk and so attract foreign investors.

Available protections

The text of the agreement between India and Canada is not yet public. However, the Canadian Government has announced that the agreement will require each government to:

- > apply its laws pertaining to the admission of investment in an objective and impartial manner;
- > ensure the fair and equitable treatment of investors and provide full protection and security for their investments, in accordance with principles of international law;
- > protect investments from the other partner country against expropriation or nationalisation;

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- > treat foreign investors established in its territory in a non-discriminatory manner;
- > allow the repatriation of profits or proceeds of an investment without restrictions; and
- > ensure that government measures affecting investments will be transparent and implemented with due process.³

Dispute resolution

In default of an investment protection agreement, there is, of course, no effective recourse by a private investor in the event of government failures to provide security and due process for investments. Investment protection agreements facilitate arbitration of disputes by the foreign investor against the host state in a neutral forum.

Arbitrations are organised under the auspices of an international tribunal, typically either the United Nations Commission on International Trade Law (UNCITRAL) or the International Centre for Settlement of Investment Disputes (ICSID). Canada has signed but not yet ratified the ICSID Convention and India has yet to sign the same. Accordingly, any proceedings under the Treaty would proceed under UNCITRAL. Private investors are able to pursue claims directly against the host jurisdiction in the event of breach.

Where compensation is awarded by the tribunal following a successful claim the private investor can enforce against the commercial assets of the defaulting government in more than 160 countries worldwide.⁴

Practical applications

The treaty will stimulate trade between Canada and India by mitigating risk exposures for cross-border investments from one country into the other. Investors from third countries which do not have investment protection treaties with India (such as the US) will find Canada more attractive as a jurisdiction through which to route such investment.

Cross-border investment between Canada and India will now be better supported by assurances for greater political security for investments between the countries. Ratification procedures for the investment protection treaty are underway now in both states.

For further information, please contact your Stikeman Elliott representative or Dee Rajpal (drajpal@stikeman.com) of our India Practice Group.

¹ As at the end of 2006, Canadian foreign direct investment in India was valued at CDN\$327 million, while India's foreign direct investment in Canada reached CDN\$200 million (up almost 50 percent from the previous year).

² See "India and Canada: A New Era of Co-operation", Report to Ministers of the India-Canada CEO Roundtable prepared by the Canadian Council of Chief Executives and Confederation of Indian Industry, 2 September 2008, available at http://www.ceocouncil.ca/publications/pdf/test_4254df32db448d6f6b29a0b01dc066ba/India_Canada_Report_September_2_2008.pdf.

³ "Canada and India Conclude Investment Agreement", Foreign Affairs and International Trade Canada News Release, 16 June 2007.

⁴ Under the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (entered into force 7 June 1959).