



CONLIN BEDARD
LLP

BARRISTERS & SOLICITORS

Client Update

October 1, 2014

Client Update: Canada-China foreign investment protection agreement comes into force

On October 1, 2014, the Canada-China Foreign Investment Promotion and Protection Agreement¹ (“CC-FIPA” or “Agreement”) came into force. The goal of this FIPA is to provide clear rules for investors and protections against discriminatory or arbitrary treatment. Like other FIPAs, this Agreement provides investors with recourse to investor-state arbitration where the investors are of the view that the CC-FIPA has been breached and they have sustained damage or loss as a result. This summary focuses primarily on the CC-FIPA’s investor state-dispute settlement mechanism.

We note at the outset that the CC-FIPA does not alter Canada’s and China’s (the “Parties”) rules with respect to the establishment of investments. This differs from some other Canadian investment protection regimes, such as chapter 11 of the *North American Free Trade Agreement*. As a result, Canada has preserved its right to block certain new investments by China pursuant to the *Investment Canada Act*.

The CC-FIPA sets out specific requirements governing how claims are brought, when they are brought and what can be claimed. Claims can be

submitted by an investor for a breach of various provisions, including a failure of the Party to provide most-favoured-nation treatment or national treatment, the imposition of performance requirements and the expropriation of investments or returns without compensation. Note that a claim can also be based on the actions of a provincial government. There are, however, certain violations of the FIPA that cannot be advanced through the arbitration mechanism, including where a Party fails to allow certain key employees to enter and work temporarily or where a Party has failed to ensure that its laws and policies are transparent. The CC-FIPA also contains restrictions based on the nature of the claim. For example, the CC-FIPA does not apply to taxation measures except with respect to expropriation obligations, and the Agreement does not protect investments in financial institutions except with respect to expropriation or restrictions on the transfer of capital. The CC-FIPA also contains other rules specific to claims related to financial institutions.

There are certain preconditions that must be met before submitting a claim to arbitration under the CC-FIPA. These requirements include waiting at least six months following the event giving rise to the claim before submitting a claim to arbitration; delivering written notice of intent to submit a claim at least four months before actually submitting it; and submitting a claim no more than three years after the investor first discovered the breach and the loss or damage connected to it. Each Party has also established specific requirements of their own. If the claim is against China, the investor must apply for administrative reconsideration and then wait four months before submitting a claim. If the claim is

¹ Full name: *Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*



against Canada, the submission of the claim must include a waiver of the right to proceed before other administrative tribunals and courts, except in relation to injunctive, declaratory or other extraordinary relief.

Once the preconditions for submission of a claim are met, the claim will be submitted under the ICSID Convention. Arbitral panels will consist of three arbitrators – one appointed by each party and the presiding arbitrator appointed by agreement of the Parties.

The CC-FIPA provides for interim measures of protection, such as measures to preserve evidence or an investor's property. However, the CC-FIPA grants the Tribunal the power only to "recommend" interim measures, rather than the power to "order" such measures that is contained in Canada's model FIPA and NAFTA Chapter 11. This weakened authority could put investors in a difficult position with respect to the preservation of their rights, pending the outcome of the arbitration.

Investors should also be aware of the CC-FIPA's public access provisions. Under the CC-FIPA, only Tribunal awards are required to be public. However, the Party in the dispute can make all documents submitted to or issued by the Tribunal public if it determines unilaterally that this is in the public interest (subject to the redaction of confidential information). Investors who bring a claim should be cognizant of the fact that they lack control over how public their dispute may become.

Finally, awards issued pursuant to the FIPA are binding and enforceable in the territory of each Party. These awards, pursuant to the ICSID Convention, will

also be enforceable in any ICSID member state, subject only to annulment by an ICSID Committee on very limited grounds. However, enforcement of an award under the ICSID convention cannot be sought until 120 days after the award has been rendered or once revision or annulment proceedings have been completed. If the investor seeks to enforce the award in a non-ICSID state, it may still enjoy streamlined enforceability if that state is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the "New York Convention").

The CC-FIPA could significantly decrease the risk of Canadian companies investing in China. Further, the content and application of this agreement should be of interest to United States ("US") companies, as the US is currently negotiating a bilateral investment treaty ("BIT") with China. The US Government has announced that both sides are working towards agreement on core issues by the end of 2014, with "negative list" discussions beginning in 2015. The BIT is slated to include all sectors and stages of investment, but it is not yet clear whether it will provide for investor-state dispute resolution.

We would be happy to provide a more fulsome analysis of how the CC-FIPA affects your business in particular. Should you have any questions, please contact Ben Bedard or Paul Conlin.

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