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Perspectives on topical foreign direct investment issues

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The new Canadian Model investment treaty: A quiet evolution

by

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A late bloomer in the international investment law regime, Canada signed its first Foreign Investment Promotion and Protection Agreement (FIPA) in 1989 with the Soviet Union. The first generation of FIPAs was soon replaced by a second one, modeled on the far more comprehensive Chapter 11 of NAFTA. Canada then reviewed its foreign investment policy, to strike a better balance between investors' protection and host countries' right to regulate for legitimate public policy objectives. This resulted in the [2004 Model FIPA](#), launching a third generation of agreements, and responding to many shortcomings revealed in arbitral cases. The new [2021 Model FIPA](#) published by Canada is the latest iteration of this incremental process, purporting to achieve a new progressive agenda and integrating provisions already found in the investment chapters of its latest trade agreements. It offers few substantive or procedural innovations and mostly reflects those already found in the [Comprehensive and Progressive Trans-Pacific Partnership \(CPTPP\)](#), the [EU-Canada Comprehensive Economic and the Trade Agreement \(CETA\)](#) or the [Canada-United States-Mexico Agreement \(CUSMA\)](#).

The 2021 Model FIPA keeps the usual investor-state dispute-settlement (ISDS) arbitration regime instead of embracing the investment court system introduced by CETA. The most noteworthy addition is the expedited arbitration procedure, for claims not exceeding \$CDN 10 million. It aims to facilitate access to ISDS for individuals and small and medium-size enterprises. This new procedure, together with the [2022 amended ICSID arbitration rules](#), is a first concrete step to address this issue. Regrettably, access to this expedited arbitration requires the *ad hoc* consent of the host country instead of being available at the choice of investors. More detailed provisions on consultations condition access to ISDS and enhance dispute prevention, while optional mediation remains open during all the proceedings. Preliminary rulings on objections to jurisdiction are now compulsory, while third-party funding must be disclosed, improving ISDS transparency and legitimacy. A new code of conduct responds to concerns regarding certain practices of arbitrators, prohibiting notably acting simultaneously as an arbitrator and as a counsel in different cases. It does not refer to the [draft code](#) currently discussed by ICSID and UNCITRAL, raising the possibility of future conflicting standards. The adoption of authoritative interpretation of the treaty by state parties is now curiously restricted

to “serious concerns” concerning matters of interpretation, although this power was not problematic and has [only been used once with NAFTA](#).

In addition to provisions already found in recent treaty practice to protect the right to regulate of the host country, the 2021 Model FIPA includes some innovations that are worth mentioning. The minimum standard of treatment clause combines the NAFTA approach of circumscribing it to international customary law, with that of CETA detailing fair and equitable treatment in an exhaustive list. This may raise the question of whether this codification leaves out existing or emerging aspects of the custom. Denial of benefits is now automatic for corporate investors not having substantial business activities in their home country. It takes a robust stance against treaty shopping, since this condition is now included in the definition of “enterprise of a Party” (like CETA), instead of being actionable at the will of the host country. However, no specific criteria are given to assess those activities. General exceptions inspired by Article XX of GATT 1994, on non-trade issues, are completely left out, as in CPTPP. While these exceptions have been a distinctive feature of the Canadian approach since the 1994 Canada-Ukraine FIPA, they were never applied in an actual case. Their abandonment should not have serious consequences for the right to regulate.

Finally, the 2021 Model FIPA laudably introduces a new section on investment promotion and facilitation. However, it misses the opportunity to address this emerging concern effectively, failing to reflect the [WTO negotiations on investment facilitation](#). Surprisingly, the clauses on non-derogation to health or environmental measures, key personnel, transparency, and responsible business conduct (RBC) are all misplaced in the section on investment protection instead of in this new section. This odd structure is evidenced by the fact that none of those clauses are subjected to ISDS. Apart from a new reaffirmation of the duty to comply with the domestic laws of the host country, and to encourage dialogue with native peoples and local communities, the RBC clause remains aspirational and rather uninspired. In contrast, the [Netherlands 2019 Model BIT](#) addresses the important issue of jurisdiction of domestic courts for extraterritorial activities of corporations.

The new Canadian model investment treaty marks a quiet evolution, integrating useful innovations found in latest treaty practice, but proposing few original solutions. Future model treaties should deal with investment facilitation in one coherent section, together with international cooperation and technical assistance, reflecting the objective to prevent disputes. Acceptance by domestic courts of extraterritorial civil jurisdiction should be facilitated, by affirming for instance that it does not offend international comity between contracting states. Access to ISDS should be explicitly prevented in case investors breach domestic law when establishing their investments. Until a multilateral investment court or appellate review is established, the adoption of authoritative interpretation by state parties should be facilitated, as this could enhance the legitimacy of ISDS.

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