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Investing Abroad: Minimize Your Risks by Taking Advantage of International Investment Agreements and International Arbitration

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Does your company have an investment abroad or is it thinking about expanding its operations internationally? International investment agreements (IIAs) offer significant protections to minimize the risks associated with investing abroad – the risks of foreign government actions that impair or destroy the value of your investment.

These risks exist whether the investment is in a remote developing country in Latin America, Asia or Africa, or in a sophisticated developed country such the United States or a country in Western Europe.

If the country (host state) in which you invest breaches its treaty obligations to foreign investors in that country, you may be entitled to financial compensation from an international arbitral tribunal.

International Investment Agreements

International investment agreements (IIAs) are typically signed between two countries and are commonly referred to as bilateral investment treaties (BITs). Canada refers to its BITs as Foreign Investment Promotion and Protection Agreements (FIPAs). As their name implies, FIPAs aim to promote and protect foreign investments by imposing obligations upon the host state with regard to the treatment of investors from its FIPA partner.

FIPAs, and IIAs in general, aim to achieve their goal by ensuring that each treaty partner (including provinces, states and municipalities in that country) does not discriminate against investors from the other treaty partner. These standards of treatment generally consist of "fair and equitable treatment", "national treatment", and "most favoured nation treatment", as well as the prohibition of expropriation without just compensation. An *indirect* expropriation – where the investment itself may not be expropriated but its business is negatively affected by a state measure – can be considered a violation.

Examples of host state actions that have been found in the particular circumstances to be in breach of its IIA obligations include a temporary export ban, denial of a construction permit, denial of an export tax rebate, and imposition of a product-specific tax.

International arbitration

A significant benefit of IIAs is that an investor can directly sue the host state by initiating a claim using international arbitration if the host state has breached its treaty obligations. International arbitration avoids reliance on the courts of the country in which the investment is located. It provides for a neutral forum with neutral independent decision-makers in the form of an international arbitral tribunal.

An international arbitral tribunal will render its decision (called an "award") that, within certain limits, will be final and binding and will be directly enforceable against the host state, both within the state and importantly, in other countries.

Canada and International Investment Agreements
Canada is a party to IIAs with 28 counties. It has concluded 24 FIPAs, and is a party to four Free Trade Agreements (FTAs) that incorporate an IIA, such as Chapter Eleven of the North American Free Trade Agreement (NAFTA) with the United States and Mexico. The majority of Canada's IIAs are with European and Latin American countries. Canada is actively pursuing other agreements, including with the European Union. For a full list of Canada's agreements and negotiations, visit:

http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?view=d.

All of Canada's IIAs provide for recourse to international arbitration.

Other options for recourse to international arbitration
Although Canada may not have an IIA with the host state of your proposed investment, you can still protect your investment. By structuring your investment with investment protection in mind, your investment can still be covered by an IIA.

One way to ensure your investment is covered by an IIA is to establish a subsidiary in a state that has an IIA with the host state of your investment. This strategy should work so long as you can be demonstrate that the subsidiary was not established for the sole purpose of initiating a dispute under an IIA.

Another possibility exists where the host state provides for international arbitration as a form of dispute resolution with foreign investors through its domestic laws. This form of consent to arbitrate with a foreign investor can be found in a state's laws in relation to foreign investment in general or in its laws related to a particular industry.

Conclusion
IIAs provide important remedies to Canadian companies investing abroad if their investment is subject to discriminatory treatment. A significant benefit of IIAs is that they enable a foreign investor to directly sue the host state by initiating a claim using international arbitration if the host state has breached its treaty obligations. Both the coverage of an IIA and the potential recourse to international arbitration help reduce the risks associated with investing abroad and should be important considerations in the risk management of your foreign investments.

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