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International Institute for Sustainable Development

COMMENTARY

Reply to Public Consultation on Canada's International Investment Agreements (FIPAs)

IISD Investment for Sustainable Development Program
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Other Comments Concerning Canada's FIPAs

What in your view are the advantages and disadvantages of FIPAs?

There is no empirical evidence showing the advantages of foreign investment promotion and protection agreements (FIPAs) to Canada or any of its partner states. On the other hand, investment treaties with investment protection provisions commonly found in FIPAs have been widely criticized for creating asymmetry of rights and obligations in favour of foreign investors, resulting in regulatory chill and erosion of policy space for host states, and causing detriment to other stakeholders, such as local communities and domestic investors.

Canada should ensure that independent cost-benefit analyses of existing FIPAs and investment chapters are carried out, considering the views and interests of all Canadian stakeholders and Canada's commitment to achieving the Sustainable Development Goals (SDGs).

Canada should also ensure that independent and broad cost-benefit analyses and impact assessments are conducted prior to the negotiation of any FIPA or other investment instruments. These analyses must cover environmental (including climate change), social (including gender) and human rights risks of such treaties in Canada and abroad, with impact mitigation measures included in the treaties and enforced with the assistance of periodic reassessment.[1]

Overall, the narrow focus on investment protection and investment liberalization currently predominant in the FIPAs should be reassessed in light of the SDGs.[2] The model FIPA should be adapted accordingly, and barriers to achieving the SDGs in the current model should be removed. At the same time, Canada should develop new elements, such as providing incentives for investment for sustainable development.

[1] International Institute for Sustainable Development (IISD). (2018). *Developing a progressive agenda for reform of international investment law: Canadian perspectives*. Report of the expert meeting held in Ottawa, Canada, June 13, 2018. Retrieved from https://www.iisd.org/library/developing-progressive-agenda-reform-international-investment-law-canadian-perspectives

[2] Bernasconi-Osterwalder, N. (2018). *A progressive investment agenda for Canada: Going beyond nice words*. Retrieved from https://www.iisd.org/library/progressive-investment-agenda-canada-going-beyond-nice-words

Are there other mechanisms that could robustly protect Canadian investor interests abroad against, for example, unfair or discriminatory treatment by other governments and uncompensated expropriation?

There is no conclusive evidence that investment protection treaties effectively "protect" investors abroad in a way that reduces risks. Studies have shown that investment protection treaties do not facilitate access to finance or risk insurance.[3] Alternative solutions could better protect the investor against risks, without having the negative consequences of regulatory chill, high litigation costs and uncertainty about outcomes.

One option is to provide political risk insurance to Canadian investors operating abroad, for example, through Export Development Canada (EDC) and the World Bank Group's Multilateral Investment Guarantee Agency (MIGA).

Canada could also seek international cooperation with host states of Canadian investors, aiming at improving governance in host countries to help minimize risks.

Canada could also consider fostering mechanisms for the prevention and the amicable resolution of investment-related disputes, including multistakeholder conciliation and mediation. These processes should be independent from formal dispute settlement processes between investors and states and between states. The Compliance Advisor Ombudsman (CAO), an independent recourse mechanism for the International Finance Corporation (IFC) and MIGA, could serve as a mediation–compliance model to hear complaints from investors (as well as from communities).[4]

As investors abroad, companies should resort to the domestic legal systems of the states where the investment is taking place; in certain cases, Canada could espouse their diplomatic protection claims against host states.

Finally, contract-based arbitration will generally be much more effective and balanced than general treaty protections. Contract-based arbitration carries its own risk and is only as fair as the underlying contract, but it applies to a specific project and is therefore more precise and predictable.

Importantly, the mandate of Global Affairs Canada is to "improve and maintain market access for Canadian businesses," and to provide "advice and services to help Canadian businesses succeed abroad," not to shift all business and regulatory risk to the host state, especially developing country states that need the regulatory space to improve their legal structures and implementation to advance the SDGs. Canada should ensure that Canadian investors enhance corporate governance practices and conduct proper due diligence prior to commencing their operations abroad, which could significantly decrease their exposure to various political, legal and regulatory risks.

Investor–State Dispute Settlement

How can traditional investor–state dispute settlement (ISDS) mechanisms in Canada's FIPAs be made more transparent and fairer?

This question is based on the premise that traditional ISDS mechanisms included in Canada's FIPAs lack transparency and fairness, but limits the discussion on reform to a discussion around the ISDS model. By limiting the question to a mere improvement of traditional ISDS mechanisms, the consultation fails to provide an opportunity to collect valuable input toward reform of international investment governance (including investment-related dispute prevention and resolution) in the best interest of Canadians and other stakeholders. The consultation should not be limited to fixing traditional ISDS mechanisms. Rather, it should address a range of public concerns that have led to pressure for reform of investment-related dispute settlement.

[3] Poulsen, L. (2010). The importance of BITs for foreign direct investment and political risk insurance: Revisiting the evidence. In *Yearbook on International Investment Law and Policy 2009-2010* (pp. 539–574). Oxford University Press. Retrieved from http://discovery.ucl.ac.uk/1471858/1/Poulsen_bits%20pri%20yearbook.pdf

[4] IISD. (2017, July). *Investment-related dispute settlement: Lessons from international accountability mechanisms*. Results of an expert meeting held in Washington, D.C., April 11, 2017. Retrieved from https://www.iisd.org/library/investment-related-dispute-settlement-lessons-international-accountability-mechanisms

The efficacy and value of any mechanism is dependent on the substantive law governing the dispute. In order for investment-related disputes to be resolved fairly, the underlying rights and obligations must be balanced. Not only governments, but investors too, should be held accountable for their behaviour. This should be reflected in the design of any dispute settlement process. Moreover, investments can have important impacts on local communities. Any dispute settlement process involving third-party interests must therefore allow for meaningful participation of third parties with full standing where appropriate.

Further, we recognize the importance of national courts and the principle of exhaustion of local remedies in international law. We are of the view that no public international law disputes, including international investment law, should be brought to the international level without first going through the judicial and administrative processes available at the domestic level.

As mentioned above, a better approach would be to focus on dispute prevention and accountability. The CAO mentioned above includes both a mediation and a compliance function. This independent recourse mechanism could hear investment-related complaints from investors and communities.

Corporate Social Responsibility

How can Canada's FIPAs best advance and strengthen the notion of responsible business conduct?

For investment to advance sustainable development, it first needs to be responsible. If it is not, it will work against sustainable development and hinder the achievement of the SDGs. Investors must, at a minimum, comply with the laws of their home and host states, refrain from engaging in corruption or fraud, pay taxes, abide by international labour standards, conduct environmental impact assessments and respect human rights. These responsibilities must be made clear in the agreement. Reference to Organisation for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises can also be useful. It must be clear that compliance with the Guidelines is expected from investors. To strengthen corporate social responsibility and responsible business conduct, language must go beyond hortatory.[5]

Importantly, investor obligations should be coupled with accountability mechanisms allowing affected individuals and communities to bring complaints against investors for non-compliance, as described above. The mechanism could be managed in coordination with the OECD national contact points, but would need to be independent from these. This could help tackle labour and human rights issues in global supply chains and put responsibilities onto transnational corporations where implementation and compliance monitoring through the host state is weak. FIPAs could set up rosters of professional mediators and panellists who would investigate compliance with these guidelines and standards.

If investment protection and related dispute settlement is retained, FIPAs should make clear that investors do not only have rights but also obligations. In case of non-compliance, investors should not be able to access ISDS. Canada should also consider including an ISDS carve-out to prohibit access by carbon-intensive and other investors whose activities hinder the achievement of the SDGs.[6]

[5] IISD. (2018, April). *Integrating investor obligations and corporate accountability provisions in trade and investment agreements*. Report of the expert meeting held in Versoix, Switzerland, January 11–12, 2018. Retrieved from https://www.iisd.org/library/integrating-investor-obligations-and-corporate-accountability-provisions-trade

6 Van Harten, G. (2015, September 20). An ISDS carve-out to support action on climate change. *Osgoode Legal Studies Research Paper No. 38/2015*. Retrieved from https://ssrn.com/abstract=2663504

Public Interest Regulation

How can Canada's FIPAs ensure the right outcomes on social policies, such as environment and health?

If investment protection provisions and ISDS are retained, potential negative effects on environmental and social policies will remain. The most problematic provision in this respect is the minimum standard of treatment and "fair and equitable treatment" provision. Even as revised in Canada–European Union Comprehensive Economic and Trade Agreement (CETA), the provision still allows challenges to legitimate environmental and social policies and regulations. Environmental and other carve-outs can be added, but, if ISDS is possible, there is no guarantee that these will be circumvented, with no opportunity for rectification. The aim of international investment law should shift away from investment protection to investment for sustainable development. This would require Canada to actively engage in international cooperation with partner states to promote policies for the achievement of the SDGs.

Women's Economic Empowerment

How can Canada's FIPAs best advance gender equality and women's economic empowerment?

Canada's FIPAs must ensure that the investments of Canadian businesses abroad and those of foreign investors in Canada support gender equality and women's empowerment. On the one hand, they must acknowledge the gender impacts of foreign investment and gender differences in development needs, opportunities and capacities; on the other, they must enhance women's access to and control over resources, as well as women's participation and influence in decision-making processes.

To achieve these goals, Canada's FIPAs could require that investors:[7]

- Develop and adopt an explicit gender strategy for the empowerment of women within the company and externally through suppliers, customers and business partners along the value chain.
- Entrench explicit gender commitments in contracts with host government, customers and suppliers.
- Monitor gender impacts on an ongoing basis.
- Adapt business models and plans as required to be more inclusive and gender-sensitive, and report on progress on an annual basis.
- Promote equal employment opportunities, and develop practices that support women's participation (for instance by providing childcare support, or flexible working hours).
- Carefully examine the gender division of labour and include provisions that provide, and improve, women's labour market opportunities. In addition to equal pay for equal work—including between seasonal and permanent employees—investors should pay attention to the quality (decency) of working conditions for women, such as creating a safe, healthy and respectful working environment.
- Develop policies to facilitate women's access to financial resources and services and to markets.
- Establish a dedicated Gender Committee to raise awareness of women's rights, identify violations and provide a forum for grievances.
- Partner with civil society organizations and women's organizations with a view to supporting women's economic empowerment in the communities where the business operates.

[7] Sexsmith, K. (2017). *Promoting gender equality in foreign agricultural investments: Lessons from voluntary sustainability standards*. Winnipeg: International Institute for Sustainable Development. Retrieved from https://www.iisd.org/sites/default/files/publications/promoting-gender-equality-foreign-agricultural-investments.pdf

- Ensure female participation in community consultations (equal to men, if possible), community liaison committees, internal staff committees, farmers' groups and other stakeholder groups with which the investor engages.
- Identify and seek to redress specific impediments to gender equality in local and national environments, such as illiteracy, unequal access to land titles or finance.
- Include gender-sensitive elements in community development agreements and social development programs.
- Ensure participation of women in local employee training programs; do not assume the knowledge is passed from participant men to non-participant women.

Canada's FIPAs could also commit home and host states to:

- Prioritize inclusive and gender-sensitive outcomes in investment and development strategies.
- Consider the likely gender impact of investments as part of the process of screening prospective investors. Request a gender statement from investors, which should include an explanation of how the project will generate opportunities for women.
- Work with investors and independent researchers to devise a gender impact assessment study, or a broader social impact assessment that includes particular attention to gender equality.
- Gather gender-disaggregated data before, during and after the implementation of the investment project. Include both independent researchers and women in the design, implementation and analysis of the research. This data can be used to monitor and enforce gender-equal outcomes from the project.
- Enshrine commitments for positive gender outcomes in contracts with investors.
- Monitor gender impacts of investments on an ongoing basis and hold investors accountable for adherence to gender commitments made.
- Consider developing model indicators based on lessons learned from voluntary sustainability standards initiatives.
- Identify and seek to address gender inequalities embedded in and reproduced by legal systems.
- Develop non-discriminatory dispute resolution procedures, for example by involving women in the development and implementation of judicial alternatives to customary mechanisms if they so choose.

Small and Medium-Sized Enterprises

How can Canada's FIPAs promote the interests of Canadian small and medium-sized enterprises (SMEs)?

The trend in Canadian FIPAs and investment chapters, influenced by the original North American Free Trade Agreement (NAFTA) (and maintained in the new United States–Mexico–Canada Agreement [USMCA]), is to prohibit performance requirements. These requirements are demands by governments for such things as technology transfer, training of local workers or local purchasing, in return for the right to invest, or for some preferential treatment of the investment (for example, tax preferences).

From a sustainable development perspective, performance requirements that are well designed and applied can be effective tools to maximize the economic, environmental and social benefits of foreign investment in the host state.[8] In particular, Canada as a host state could use performance requirements to promote the interests of Canadian SMEs—for example, by requiring foreign investors in Canada to purchase local goods from Canadian SMEs.

[8] UN Environment; Environment and Trade Hub, IISD. (2017). A sustainability toolkit for trade negotiators: Trade and investment as vehicles for achieving the 2030 Sustainable Development Agenda. *Performance requirements prohibitions*. Retrieved from https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-4-safeguarding-policy-space/5-4-3-performance-requirement-prohibitions/#jump

Accordingly, it would be important for Canada to retain the possibility of using performance requirements when circumstances so warrant, rather than prohibiting them under FIPAs and investment chapters.

One option is to not go beyond the performance requirements prohibitions already existing under the World Trade Organization (WTO) Agreement on Trade-Related Investment Measures (TRIMs), which prohibit only trade-related local content requirements and requirements linked to export performance. This can be done through a simple re-affirmation of WTO commitments, or by simply not dealing with performance requirements in the FIPAs or investment chapters.

If performance requirements are prohibited, there are options for limiting the effects of the prohibition:

- Explicitly state that certain types of performance requirements will be permitted
- Specify a list of sectors in which performance requirements may be used or may not be used
- Include a specific exception to performance requirement prohibitions
- Grandfather existing performance requirements
- Carve out non-mandatory performance requirements
- Place performance requirement obligations outside the coverage of investor–state dispute settlement (ISDS), if included.

Another option would be to include a provision explicitly stating that the use of performance requirements is permitted when circumstances warrant it, thus recognizing the potential importance of performance requirements for sustainable development. For example, the provision could explicitly allow state parties to support the development of local entrepreneurs, SMEs in particular.

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