

November 23 2018

Vernon MacKay, Director
Investment Trade Policy Division
Global Affairs Canada

Re: Foreign Investment Promotion and Protection Agreement Consultation

Dear Vernon:

The Canadian Chamber of Commerce and Canadian Services Coalition welcomes the opportunity to comment on the Government of Canada's consultations with respect to Foreign Investment Promotion and Protection Agreements (FIPAs). The Canadian Chamber of Commerce is Canada's largest industry association, representing over 200,000 businesses across the country. The Canadian Services Coalition, housed within the Chamber, is Canada's only pan-sectoral services association focused on services trade issues, and raising awareness of the importance of services to the Canadian economy. Although the specifics of this consultation pertain to FIPAs, we would like to use this opportunity to offer views about investor-state provisions more widely.

General Approach to FIPAs

Canada's FIPAs, including investor-state dispute settlement, help to provide important predictability for Canadian companies' outbound investment. The reality is that Canadian companies often operate in jurisdictions with weak and compromised legal institutions. Consequently, Canadian companies operating in jurisdictions where recourse exists to use investor-state dispute settlement know that there is a deterrent effect to countries enacting arbitrary, discriminatory, or expropriatory measures, as well as a means to receive financial compensation when a government violates its treaty obligations. For certain sectors, particularly extractives where there is a significant upfront investment before any products are produced or processed, these agreements are crucial. Additionally, these agreements help bolster the competitiveness of Canadian companies by ensuring our companies are not disadvantaged when they undertake business activities abroad.

Therefore, any changes to Canada's approach to FIPAs and/or investor-state provisions must be done on a 'do no harm' basis.

While it is crucial to have investor-state dispute settlement mechanisms, the Chamber recognizes the importance of ensuring governments have the continued ability to regulate in the public interest, as long as it is done in a non-discriminatory, non-arbitrary, and transparent manner. The best way to both reduce the legal risk to governments and provide maximum predictability to businesses that rely on FIPA protections, is to continue to clarify the substantive obligations in Canada's FIPAs, such as most favoured nation, minimum standard of treatment, and indirect expropriation.

Investment Court System

As part of Canada's approach to investment protection, it is important to note the Investment Court System created under the Comprehensive Economic and Trade Agreement (CETA) with the European Union.

While the drive for greater transparency and clearer codes of ethics for tribunal members is a proper aspiration, we do have concerns about the creation of a standing court. One area is the cost of administering the Investment Court System since tribunal members will be paid a monthly retainer as noted in Article 8.27.12. Given the



investor-state mechanism is likely to be sparingly used, a standing roster, rather than ad hoc tribunals, means that the public purse will be paying potentially significant amounts of money for adjudicators to simply be on standby. Furthermore, taken to its logical extension, replacing ad hoc dispute panels with Investment Court Systems in Canada's FIPAs and trade agreements would mean further compounding these costs.

Additionally, we are concerned that the roster approach will deter well-qualified individuals given the restrictions arbitrators will face on their ability to have a private practice.

Given the above – as well as the uncertainty when European Union Member States will ratify the agreement and the ambiguity created by the ongoing European Court of Justice referral - the government should not replicate the Investment Court System until after the CETA is ratified, and both the Court as well as appellate mechanism can be evaluated. Instead, the government should continue to conclude agreements which use the ad hoc panel approach for the time being.

Progressive Trade Agenda

We note the importance the government has placed on using FIPAs and investor-state provisions in the context of advancing the Progressive Trade Agenda. However, as noted above, FIPAs should remain focused foremost on protecting outbound Canadian investment.

On the issue of SMEs specifically, we note the government's desire to make investment protection provisions more accessible. However, we do not think the government's trade diversification work with SMEs should focus on raising awareness of ISDS. Our SMEs are not undertaking outbound investment flows that make them likely to take advantage of ISDS provisions. Additionally, the costs of using these provisions would be prohibitive for SMEs. The Trade Commissioner Service should instead focus its support for SMEs on programs to facilitate increased exports.

With respect to responsible business conduct, we acknowledge the importance of Canadian companies adhering to high standards for how they conduct themselves abroad. Companies neglecting their commitments not only reflects negatively on themselves, but also the wider Canadian business brand. However, with the fundamental principle of FIPAs and investor-state provisions being the protection of outbound Canadian investment, the government should not use these agreements as a forum for creating new responsible business conduct obligations. The government has the National Contact Point, Canadian Ombudsperson for Responsible Enterprise (CORE), OECD Guidelines on Multinational Enterprises, and domestic legislation. Creating new rules will make compliance for Canadian companies more complex, especially at a time when the government is still operationalizing the CORE. Rather, the government should continue to use best endeavours language to encourage the adoption of multilaterally agreed principles. Similarly, the government should use its negotiations with countries to encourage greater adoption of OECD anti-corruption principles in developing countries to help enhance Canadian competitiveness.

We look forward to continuing to engage with Global Affairs Canada on these issues. Should you have questions please do not hesitate to contact Mark Agnew (magnew@chamber.ca 613-238-4000 ext 2230).