Kluwer Arbitration Blog

Release of the New Canadian FIPA Model: Reflections on International Investment and ISDS at a Crossroads

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On May 13, 2021, after several years of public consultations, Global Affairs Canada released a new Foreign Investment Promotion and Protection Agreement Model ("2021 Model"). The prior iteration of the FIPA Model was broadly understood to have been influenced by Canada's experience under the NAFTA regime. Similarly, the 2021 Model benefits from Canada's continued trade and investment experience, recent trends in investment treaty law, and the latest debates on the future of investor-State dispute settlement ("ISDS"). This post provides an overview of the 2021 Model and highlights how it reflects emerging policy objectives, clarifies certain standards of protection, and promotes alternative routes for resolving investment disputes. This post also draws comparisons between the 2021 Model and the recent Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP," which entered into force for most of its parties on December 30, 2018), Canada-U.S.-Mexico Agreement ("CUSMA," also known as USMCA or T-MEC, which entered into force on July 1, 2020), and Comprehensive Economic and Trade Agreement ("CETA," which is currently pending ratification by all members of the European Union).

The 2021 FIPA Model and Evolving Policy Objectives

While older investment and trade treaties focused primarily on achieving economic prosperity, "new" generation treaties tend to provide comprehensive frameworks that reflect national (and international) agendas for promoting sustainable development, corporate social responsibility, and human rights. The 2021 Model reflects the Canadian approach to these goals.

The Right to Regulate, Ensuring Responsible Business Conduct, and Protecting Human Rights

In recent years, a State's right to regulate in the interests of its population, notwithstanding the protections granted to foreign investments, has become a core and enduring topic. Canada has faced this issue several times in NAFTA arbitrations. Therefore, the 2021 Model, in addition to stating this overarching objective in its

Preamble, also reaffirms the Parties' right to regulate to achieve legitimate policy objectives concerning health, the environment, climate change, gender equality, rights of Indigenous peoples and cultural diversity (Art. 3).[1)] Although Canada has reiterated its commitment to the Paris Climate Agreement in the CETA Joint Committee Recommendation, the reference to regulation in response to climate change in the 2021 Model seems like an innovative inclusion.

The 2021 Model expands on the idea of "responsible business conduct" ("RBC") (Art. 16), which requires investors to comply with laws and regulations on human rights, gender equality, environmental protection and labour. It also encourages investors to voluntarily incorporate into their business practices the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights, as well as other internationally recognized standards, guidelines and principles concerning labour, environment, gender equality, human rights, community relations and anti-corruption. Investors are likewise invited to engage in meaningful dialogue with local (including Indigenous) communities. Global Affairs Canada is not new in supporting internationally responsible business conduct. Notably, the government already maintains the Canadian Ombudsperson for Responsible Enterprise (CORE), which offers guidance and dispute resolution services, consistent with international standards, for Canadian companies operating abroad.

Protecting Indigenous Peoples' Rights

The desire and need to ensure Indigenous peoples' rights and participation in the 2021 Model are hardly surprising, considering that rights of Indigenous peoples enjoy constitutional protection. Although the Crown need not consult Indigenous peoples before entering into free trade agreements when the impact of such agreements on their rights is speculative (as determined in *Hupacasath First Nation v. Canada*), it does have the duty to consult them whenever: "(1) the Crown has knowledge, actual or constructive, of potential aboriginal claims or rights; (2) the Crown proposes conduct or a decision; and (3) that conduct or decision may have an adverse impact on the Aboriginal claims or rights" (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, para. 51). Therefore, as previously discussed on the Blog, Indigenous peoples' rights are intrinsic to Canada's international treaty-making practice. As such, in CPTPP (Annex II), CUSMA, and CETA (Annex II-C-1), Canada reserved the right to adopt or maintain measures denying foreign investors and their investments rights or preferences provided to Indigenous peoples.

The approach in the 2021 Model is consistent with these recent trends and guarantees Canada's right to adopt or maintain "a measure necessary to fulfill Aboriginal or treaty rights as recognized and affirmed by section 35 of the Constitution Act, 1982" (Art. 22). Additionally, the 2021 Model requires Parties to ensure transparency of their laws, regulations, procedures and administrative rulings regarding Indigenous peoples' rights (Art. 15), as well as the investors' compliance with them (Art. 16). Neither Party may offer to or actually relax, waive or otherwise derogate from Indigenous peoples' rights in order to encourage investments in its territory (Art. 4). "Public purpose," in the context of expropriation, may have a different meaning for Indigenous peoples (Art. 9, fn. 3). Finally, ISDS tribunals are empowered to appoint experts to report on rights of Indigenous peoples, either upon request or on their own

initiative, unless the disputing parties do not consent (Art. 38).

Evolving Substantive Protections for Foreign Investors

Whereas obligations to provide National Treatment ("NT," Art. 5) and Most Favored Nation treatment ("MFN," Art. 6) have been maintained, the 2021 Model clarifies that "a difference in treatment accorded to an investor or covered investment and a non-Party's investors or investments of a non-Party's investors does not, in and of itself, establish discrimination based on nationality" (Art. 6(5)). Moreover, MFN does not to apply to procedures for the resolution of investment disputes (Art. 6(6)).

Similar to the earlier FIPA Model, the Minimum Standard of Treatment ("MST", Art. 8) presupposes treatment in accordance with customary international law. However, unlike the previous model, it no longer refers to Fair and Equitable Treatment ("FET"). Rather, possible violations of MST are clearly enumerated and include, among others, denial of justice and failure to provide full protection and security ("FPS"). The 2021 Model clarifies that the FPS standard, which has for years divided tribunals, concerns only the physical security of an investor and their investment (fn. 2), which is similar to the approach taken in CETA (Art. 8.10(5)). Interestingly, CUSMA (Art. 14.6(2)(b)) and CPTPP (Art. 9.6(2)(b)) do not expressly limit the standard to physical security but require each Party to provide "the level of police protection under customary international law" (an approach similar to that of the 2012 US Model BIT).

In sync with the overarching narrative of the 2021 Model, the provision on expropriation (Art. 9) states that a non-discriminatory measure which is "adopted or maintained in good faith to protect legitimate public welfare objectives" will not constitute indirect expropriation, even if it has an effect equivalent to expropriation. Furthermore, expropriation will only occur if it concerns "a covered investment that is a tangible or intangible property right under the domestic law of the Party in which the investment is made." Finally, the new Model also brings some clarity to the issue of compensation. (Art. 9(5)).

The 2021 FIPA Model and ISDS Reform

As already discussed, in recent years Canada has been actively negotiating and bringing into force new treaties, each carrying its own approach to ISDS. The 2021 Model takes into account innovative approaches to ISDS as a whole, and also the latest best practices.

An Overall Commitment to ISDS and Dispute Resolution

Canada's withdrawal from ISDS in CUSMA has raised a few brows, as it means that ISDS claims can no longer be asserted by Canadian investors, nor against Canada (except, for a limited time, with respect to "legacy investments" under the pre-existing NAFTA regime). CETA, on the other hand, reflects a shared European Union and

Canadian decision to "pursue [] the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes" (Art. 8.29).

Canada's divergent approaches to ISDS in these recent treaties can perhaps be reconciled through the 2021 Model's approach, which commits Canada to ISDS in principle, but only alongside and in addition to other methods of dispute resolution.

The 2021 Model envisages mandatory steps that must be completed before a claim is submitted to arbitration. This includes a requirement for investors to seek to resolve the dispute through consultations within certain time periods calculated based on their knowledge of the claim or the withdrawal from domestic proceedings (Art. 25). Should consultations fail, once 180 days since the other Party received a request for consultations have elapsed, an investor may bring a claim under the ICSID Convention, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or any other rules on agreement of the disputing parties (Art. 27). Failing to do so within one year of the delivery of the request for consultations will result in the request for consultations being considered withdrawn (Art. 25(7)). Once a claim is submitted, an investor must continue being proactive; if no steps are taken within 180 days of the submission of a claim to arbitration (or other deadline, as agreed), an investor is deemed to have withdrawn its claim and discontinued the proceedings (Art. 29).

However, if an investor opts for mediation at any point in time, and parties agree to have recourse to mediation, the time limits concerning consultations and all timelines pursuant to an arbitration agreement are suspended, which should allow the parties to engage in serious discussions (or so it is hoped) (Art. 26).

The Potential for an Appellate Mechanism

Alongside arbitration, the 2021 FIPA requires Parties to consider other ISDS mechanisms, "consisting of a first instance investment tribunal or an appellate mechanism," should such mechanisms be "developed under other institutional arrangements and [are] open to the Parties for acceptance." A similar instruction exists in CPTPP (Art. 9.23(11)).

For now, the only appellate mechanism that may be considered is that developed under CETA (though it is unknown if the Appellate Tribunal created under CETA would be "open [] for acceptance" by parties under a different future investment treaty emanating out of the 2021 Model). The CETA Appellate Tribunal (once operative) is empowered under rules adopted earlier this year to hear appeals of awards rendered under Chapter 8, Section F of CETA. Appeals are to be brought within 90 days of the award's issuance and are based on the following grounds: errors in the application or interpretation of applicable law, manifest errors in the appreciation of the facts, and annulment grounds of the ICSID Convention.

An Interest in Transparency, Legitimacy, and Speed

The 2021 Model responds to the latest debates in ISDS reform, including concerns about transparency, legitimacy, and the costs and length of arbitral proceedings.

In an effort toward transparency, it expressly requires a claimant benefiting from a

third-party funding arrangement to disclose to the respondent Party and to the Tribunal the name and address of the third-party funder early in the arbitration, with an ongoing obligation to disclose any change in such circumstances (Art. 42).

With respect to diversity, the 2021 Model includes detailed provisions on the arbitrators who may conduct ISDS proceedings (Art. 30). Notably, "disputing parties are encouraged to consider greater diversity in arbitrator appointments, including through the appointment of women." Relatedly, readers may recall that last year the CETA arbitrator roster failed to reflect diversity goals, that failure was acknowledged, and improvement efforts are apparently underway. As such, the 2021 Model rebalances the "solution" to the diversity challenge and puts the onus on parties and their counsel to select (or at least consider) diverse candidates.

Moreover, all arbitrators are expected to abide by an Arbitrator Code of Conduct for Dispute Settlement that accompanies the 2021 Model. It expressly seeks to be "interpreted in a manner consistent with other internationally recognized standards or guidelines regarding direct or indirect conflicts of interest," including IBA Guidelines on Conflicts of Interest in International Arbitration (Code of Conduct, Art. 3). It is designed to clarify the disclosure requirements, ensure proper performance of duties by arbitrators, and at all times, confirm the impartiality and independence of sitting arbitrators. A further interesting element is the obligation of former arbitrators to not "create the appearance that the arbitrator was biased in carrying out his or her duties or would benefit from the decision, order or award" that was rendered.

Finally, in a bid to react to the chorus of concerns about the costs and length of arbitral proceedings, an expedited arbitration section outlines alternate methods (Section F). In particular, parties may consent to expedited arbitration before a sole arbitrator where the damages claimed do not exceed CAD$ 10 million (Arts. 47 and 49) or coordinate mediation to resolve the dispute (Art. 48).

Concluding Remarks

Canada is currently holding exploratory discussions and negotiations with a number of countries, such as China, Ghana, India, Philippines, Thailand, Turkey, to name a few, and is set to commence negotiations on a new Canada-United Kingdom free trade agreement before April 2022 (as per Art. IV(1) of the Canada-UK Trade Continuity Agreement). As the 2021 Model is an example of modern treaty-draftsmanship that encapsulates the needs of investors, all the while addressing concerns raised by host States and civil society in recent years, it is likely to inform Canada's position in these and other treaties on the horizon.

**** The views expressed herein are those of the author and do not necessarily reflect the views of Woods LLP or its partners.***

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References

↑1 The "Summary of Main Changes" posted on Global Affairs Canada's website mentions that "tobacco control measures are automatically excluded from dispute resolution and, therefore, cannot be challenged by investors under ISDS or State-to-State dispute settlement." This exclusion is likely elaborated in Annex III ("Exclusions from Dispute Settlement"), but the text of this Annex has not yet been made available.

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