

INFRASTRUCTURE AND ENERGY BULLETIN

Investing in India: A Boost for Canadian Investors

It is widely acknowledged that India has an acute need for better transportation infrastructure (including roads, ports and airports) as well as better power and telecommunications infrastructure. For transport infrastructure alone, the Indian government has publicly estimated that investment of approximately US\$320 billion will be needed by 2012. This represents a significant opportunity for foreign infrastructure investors, whether investing alone or in partnership with private Indian entities or state-run entities such as India Infrastructure Finance Company.

In making investments in Indian infrastructure, Canadian investors have found that even though Canada and India share a similar legal system based on English common law, there are differences that have created uncertainty for some investors. As well, Canadian investors have sometimes needed to be prepared to operate on a “non-level” playing field regarding government procurement processes, conflicting legal and administrative decisions at the federal and state levels of Indian government and “sovereign immunity” issues in enforcing remedies against Indian governments or their agencies. For most Canadian investors, including infrastructure and other funds, these risks could only be overcome by negotiating hard-won agreements, buying expensive political risk insurance or putting in place intermediary investment structures through offshore jurisdictions that have bilateral treaties with India.

In June 2007, however, Canada and India announced that they have concluded negotiations on a Foreign Investment Protection and Promotion Agreement (FIPA) as a major step to foster investment. Both countries have also indicated that further discussions that may lead to a future free trade agreement are continuing.

The Canada–India FIPA, which is expected to be signed later this year, will be based on the model that Canada developed for this purpose in 2003 and used in connection with the Canada–Peru FIPA signed in 2006. In particular, it is expected to provide for a high standard of protection for Canadians investing in infrastructure in India, and to incorporate several key principles:

- protection against expropriation or nationalization without compensation, with compensation based on fair market value;
- assurance of legal treatment that is non-discriminatory (i.e., no different from the legal treatment for nationals) and that meets a minimum standard in accordance with principles of international law;
- protection against restraints or restrictions on the transfer of funds, including repatriation;
- transparency and due process of measures affecting investment; and

- a state-of-the-art framework for dispute resolution offering access to investor-state arbitration under the International Convention on the Settlement of International Disputes and the Arbitration Rules of the United Nations Convention on International Trade Law.

Once enacted, the Canada–India FIPA will provide significant protection to Canadians investing in India, and in circumstances in which the use of offshore vehicles will not be necessary to achieve tax efficiency, thus removing the need for complex and often costly offshore intermediary structuring.

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