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This newsletter is designed to highlight new issues of importance in international trade and business related law. We hope you will find it interesting and welcome your comments.

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CANADA AND CHINA SIGN MAJOR INVESTMENT AGREEMENT

Patrick Gervais and Nailah Gordon-Decicieo

The *Foreign Investment Promotion and Protection Agreement* (FIPA), that Canada and China signed on September 8, 2012, is designed to enhance two-way investment flows by binding both countries on matters regarding foreign investors and investments in their own jurisdictions. The agreement was to take effect one month after it had been ratified by both countries. Canada is expected to ratify it some time in November

The Canada-China FIPA is meant to protect Canadian and Chinese investments and investors while stimulating inbound investment in each country. It clarifies the rules that regulate foreign direct investment in each country and includes mandatory arbitration for dispute settlement.

The main aspects of the agreement include: (i) non-discriminatory government treatment for investments made by Canadian investors in China and Chinese investors in Canada, (ii) provisions to protect investors in case of expropriation, and (iii) a defined dispute-settlement mechanism.

Key Distinctions of the Canada-China FIPA

To date, Canada has partnered with 24 other countries to develop FIPAs that are generally similar in form and substance. The Canada-China FIPA would deviate from the standard FIPA model by adopting several standards more common in Chinese bilateral investment treaties. The main distinctions are the following:

1. Agreement Lifespan of 31 Years

Unlike other FIPAs with an indefinite term and a termination provision with one year's notice by either party, the Canada-China FIPA would have an initial lifespan of 15 years, with the standard one year notice for termination thereafter. Investments made prior to the termination of the Canada-China FIPA would be subject to it for an additional 15 year period after the effective termination date. This means it could be enforceable for 31 years post-ratification for an investment made prior to its initial termination. For example, if the FIPA is ratified in 2012 and the investment is made during the last year of its application, being 2028, the FIPA would apply to that investment until 2043.

2. No 'National Treatment' at the Establishment and Acquisition Stage

A second key distinction in the Canada-China FIPA is that it does not provide prospective new investments into China with 'national treatment'. In other Canadian FIPAs, investors receive 'national treatment' at the stages of establishment and acquisition, for example, in the Canada-Jordan FIPA. Although the Canada-China FIPA affords 'most-favoured-nation treatment' at the usual establishment and acquisition stages, it excludes 'national treatment' from these stages and limits it to everything post-establishment of an investment, including the expansion, management, conduct, operation and

"Anti-corruption compliance is now considered a priority issue for many Canadian companies, especially those doing business in vulnerable industries such as mining, oil and gas, infrastructure, and health care."

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sale or other disposition of investments in its territory. This is more in line with practices found in other Chinese bilateral investment treaties than with those of Canada. The *Investment Canada Act* and its Chinese equivalent would still apply. This would allow both governments to veto investments that are viewed as not providing a net benefit to their country at the establishment and acquisition stages, without providing recourse for the aggrieved prospective investor.

3. Default Dispute Resolution Out of Public View

As in other FIPAs, disputes pertaining to breaches of the agreement are settled through arbitration. In contrast to standard FIPAs, however, the arbitration hearings of the parties under the Canada-China FIPA are by default private, unless the disputing contracting party determines that it would be in the public interest to make all other documents available publicly. For example, an arbitration hearing for a Canadian investor in China claiming damages would be private unless China decided it was in the public interest to make it public. This is a departure from the general Canadian standard in other bilateral investment treaties and is more in sync with Chinese norms.

Exceptions

As in other FIPAs, specified industries are explicitly exempt from the application of the Canada-China FIPA. In particular, measures pertaining to cultural industries (broadly defined to include publishing, film or video recordings, music recordings and radio communications) are excluded. Other exceptions include certain environmental measures, and the protection of essential security interests. Free trade areas, aviation, fisheries or maritime matters are excluded solely from the 'most-favoured-nation treatment'.

Expropriation

The expropriation provisions of the Canada-China FIPA are in line with those in other Canadian FIPAs and prohibit the expropriation of investments or returns of investors other than for a public purpose and against compensation at fair-market value.

Looking Forward

The government of Canada believes that the Canada-China FIPA will promote greater direct investment between the two countries. Canadian and Chinese firms contemplating foreign direct investment in the other country should be aware that conflicts could be resolved by private arbitration should the host country decide public arbitration not being in the public interest. In addition, the government of Canada can anticipate that it may experience several claims by Chinese firms given the increasing number of Chinese inbound investments in Canada. This may result in greater exposure by the Canadian government to potential damages if Chinese investors are wronged by the Canadian government's actions. ■

THE APPLICATION OF UNITED STATES ANTI-CORRUPTION LAWS TO CANADIAN COMPANIES

Henry J. Chang

Introduction

Anti-corruption compliance is now considered a priority issue for many Canadian companies, especially those doing business in vulnerable industries such as mining, oil and gas, infrastructure, and health care. However, Canadian companies tend to focus exclusively on compliance under the *Corruption of Foreign Public Officials Act*[1] ("CFPOA"), Canada's anti-corruption law. While CFPOA com-

[1] S.C. 1998, c. 34.

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pliance is crucial, some Canadian companies must also comply with the much stricter Foreign Corrupt Practices Act of 1977[2] (the "FCPA"), the equivalent anti-corruption statute in the United States.

Canadian Companies Subject to the FCPA

There are several instances in which Canadian companies may be directly liable under the FCPA or where, due to their relationship with U.S. entities, they may be contractually required to comply with the FCPA. These instances are described in greater detail below.

Canadian Subsidiaries of United States Companies

The FCPA does not specifically address foreign subsidiaries of U.S. companies and there has been no definitive decision concluding that foreign subsidiaries acting entirely on their own outside the jurisdiction of the United States are subject to the FCPA. However, the U.S. Department of Justice's *Lay Person's Guide to FCPA*[3] confirms that U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, as can U.S. citizens or residents who were employed by or acting on behalf of such foreign-incorporated subsidiaries. Therefore, Canadian subsidiaries of U.S. companies may be required to comply with the FCPA, at the insistence of their U.S. parent companies.

United States Subsidiaries of Canadian Companies

The FCPA applies to all "domestic concerns." A "domestic concern" is defined as any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, *or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.*[4] Clearly, any legal entity organized under United States law, such as the U.S. subsidiary of a Canadian company, will be subject to the FCPA.

Issuers of Securities in the United States

Companies (either U.S. or foreign) that are considered issuers of securities in the United States will be subject to the FCPA. An "issuer" is defined as a corporation, which has issued securities that have been registered in the United States or that is required to file periodic reports with the U.S. Securities and Exchange Commission.[5] Therefore, a Canadian company that trades its stocks, bonds, or American Depository receipts on a U.S. securities exchange will be considered an issuer and will be subject to the FCPA.

Canadian Companies Acting in Furtherance of a Corrupt Payment in the United States

A foreign company, whether or not it is an "issuer," is subject to the FCPA if it causes, directly or indirectly (through a director, employee, agent, or stockholder), an act in furtherance of a corrupt payment to take place within the territory of the United States.[6] Therefore, a Canadian company that would not otherwise be subject to the FCPA may be prosecuted if any act taken in furtherance of the illegal bribe took place in United States territory.

Canadian Companies Doing Business with U.S. Companies

Although Canadian companies (and individuals) doing business with U.S. companies are not automatically subject to the FCPA, the contracts that they sign with U.S. companies will often contain terms and conditions that impose a contractual obligation to comply with the FCPA. This is because it

[2] 15 U.S.C. §§78dd-1, et seq.
[3] http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.
[4] 15 U.S.C. §78dd-2(h)(1).
[5] 15 U.S.C. §78dd-1(a).
[6] 15 U.S.C. §78dd-3(a).

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is unlawful for an entity subject to the FCPA to:

a) Authorize a third party to make an improper payment to a foreign official; or

b) Make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official.[7]

According to the FCPA, a person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if:

a) Such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

b) Such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.[8]

When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.[9] The *Lay Person's Guide to FCPA*[10] characterizes this knowledge element as including "conscious disregard and deliberate ignorance."

In order to avoid being held liable for corrupt third party payments, U.S. companies must exercise due diligence and take all necessary precautions to ensure that they have formed business relationships with reputable and qualified third parties that are acting in compliance with the FCPA. It is therefore typical for U.S. companies to include representations and warranties in their agreements, confirming third party compliance with the FCPA. Such agreements may also contain an obligation to provide annual certifications to the U.S. company, confirming its understanding of and compliance with the FCPA.

Ensuring Compliance with the FCPA

Any Canadian company that is required to comply with the FCPA (either by law or by contract) should consult with a lawyer who is familiar with both United States and Canadian anti-corruption laws. ■

[7] 15 U.S.C. §78dd-1(a); 15 U.S.C. §78dd-2(a);15 U.S.C. §78dd-3(a).
[8] 15 U.S.C. §78dd-1(f)(2); 15 U.S.C. §78dd-2(h)(3); 15 U.S.C. §78dd-3(f)(3).
[9] Id.
[10] http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

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