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Protecting your Hong Kong Investments

Every government has the right to expropriate land, buildings, and personal property in its territory. From time to time every government does so, such as when a government takes land on which to build roads or other public works. Still, some governments seem to expropriate more often than others.

There is another kind of expropriation called "creeping expropriation". As the national political landscape changes, a government may impose more and more regulations on foreign firms, restricting the industries in which foreigners can invest, preventing profits from being remitted abroad, or imposing other regulatory restraints making it practically impossible to continue operations.

Conservative by nature, foreign investors frequently seek assurances that their investment interests will be protected, but find little comfort in national laws that are easily amended, revoked, or disregarded. Often thrifty by nature, foreign investors would prefer not to buy insurance to protect against these risks. What to do?

A tool of international law called a protection of investment agreement (PIA), may give foreign investors the security they crave. A PIA is an agreement between two states that provides for the reciprocal protection of investments from one state on the other's soil. PIAs are usually concluded between less developed, former communist states and developed countries, in order to foster investment in the former by the latter. So, it may surprise some readers to learn that Hong Kong, which is neither formerly communist nor a lesser developed country, is negotiating a series of PIAs.

To appreciate the significance of this you must know a bit about a typical PIA. A PIA must define the persons who are protected under the agreement; these are generally individual residents of each state and companies incorporated in each state. Investments which are protected under the PIA are defined very broadly to include all kinds of property, debts, and rights (such as patents, trademarks, etc.). A PIA will include a promise by each state not to discriminate against investments from the opposite state. It will also include a promise by each state to treat investments from the other state no less favourably than it treats investments from its own nationals. A third promise, which is often included, is to treat investments from the other state on terms no less favourable than those accorded investments from any other country. These promises, made as they are by one state to another, are of much more value than simple national declarations of principle which may be made by the state in its law or otherwise to foreign investors themselves.

Enough of principles; conservative foreign investors still want to know what compensation they will receive in the event of expropriation or creeping expropriation in the other state. This is where a PIA is so important as it will set out the principles by which compensation is payable. Rather than having to rely on vague or changeable national standards, the foreign investor can now rely on the PIA's international standard which typically provides for prompt, adequate, and effective compensation. In the event of expropriation, foreign investors are assured they will receive timely and fair compensation that is freely convertible into the currency of choice. Of course, having rights is one thing, but

enforcing them is quite another. A PIA allows investors to enforce their rights in the national courts of the state concerned and also in an international body such as the U.N.

The Joint Liaison Group has approved a model PIA for use by Hong Kong in negotiating PIAs with other countries. As at the end of 1993, Hong Kong had initialed a PIA with Canada, and had concluded PIAs with the Netherlands, Australia, and Sweden. At the same time PIAs were being negotiated with the U.S., Singapore, Japan, and New Zealand. Unfortunately, the Canadian government has not yet given its blessing to the PIA, so it is not in force. It seems that the Canadian government is concerned that the PIA, as it currently stands, would be incompatible with the North American Free Trade Agreement (NAFTA) in some respects. A spokesperson for the Canadian government has said that one of its priorities over the next six months is to re-negotiate those items with Hong Kong and fine-tune the PIA so that it conforms with NAFTA in all respects.

We at The Canadian Chamber are obviously keen to see the PIA concluded, because it can only enhance investor confidence at this critical time in Hong Kong's history. On behalf of our members we have written to the Canadian government urging them to sign and implement the agreement as soon as possible. Let's hope that negotiations will be held soon, that they will successfully produce a PIA, and that we will be able to give Canadians another reason for investing in this vital region of the world. ♦

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