

## Arbitration- Canada

### National Ratification of ICSID Convention Imminent

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#### Background Ratification

An important tool for the resolution of international investor-state disputes will soon be available to Canadians who invest abroad and foreigners who invest in Canada. More than 40 years after the advent of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), the process of its ratification in Canada is at last underway. This update outlines the importance of the ICSID Convention and considers the implications of its ratification for Canada.

#### Background

The ICSID Convention came into force in 1966 through the World Bank's sponsorship. It sought to remove a major impediment to foreign investment in developing countries - namely, fears as to the lack of an effective mechanism to resolve disputes between signatory states and their foreign investors. Rather than leaving investors to rely on diplomatic efforts or local courts in the host state, the ICSID Convention established neutral *ad hoc* arbitration tribunals to resolve international investment disputes. Such tribunals were designed to avert fears of discriminatory adjudication in the local courts and deliver awards that could be enforced as easily as other international arbitral awards. The sole mechanism for challenging a final ICSID award is the self-contained review regime established by the ICSID Convention. As a result, awards under the ICSID Convention cannot be challenged in national courts, unlike many other forms of investor-state arbitration. For this reason, ICSID awards are also not subject to the various grounds on which national courts can decline to recognize and enforce international commercial arbitration awards under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration.

In the past 40 years the ICSID Convention has become a cornerstone of international investor protection. After a slow start in the 1970s and 1980s, the ICSID Convention came into its own in the 1990s with the proliferation of bilateral investment treaties that required disputes to be resolved under the ICSID Convention. More than 2,000 such treaties are now in place and, as of December 2006, more than 143 states have ratified the ICSID Convention and become members of the International Centre for Settlement of Investment Disputes. Notably, Canada has remained on the sidelines - the only G8 country to do so. This delay is usually attributed to Canada's federal system of government: Canadian ratification of the ICSID Convention would require its implementation not only by the federal Parliament, but also by each of the provincial and territorial legislatures - effectively establishing 14 vetoes over Canadian ratification of the ICSID Convention.

Therefore, Canada has been outside the ICSID Convention framework for decades. During that period, the only aspect of ICSID's operations in which Canada has been able to participate is the

ICSID Additional Facility, which was established by the World Bank in 1978 to extend the availability of ICSID arbitration to certain types of international investment dispute with states that are not ICSID members. For example, as Canada and Mexico are not ICSID members, disputes under the North American Free Trade Agreement have been ineligible for resolution under the ICSID Convention but have been eligible for resolution under the Additional Facility. Although many of the principles that guide arbitration under the Additional Facility are similar to those under the ICSID Convention, one key distinction remains: the ICSID Convention's self-contained provisions on recognition and enforcement of ICSID awards do not apply to Additional Facility awards. As a consequence, Additional Facility awards are as vulnerable to challenge in the courts as any other international commercial arbitration award.

## Ratification

Over the past 20 years, the government of Canada has been actively promoting Canadian ratification of the ICSID Convention. With most of the provinces and territories now expressing support in principle for the implementation of the ICSID Convention in Canada, these efforts seem to have paid off. The Uniform Law Conference of Canada (ULCC) sought to facilitate implementation by drafting model legislation for adoption by the federal Parliament and each of the provincial and territorial legislatures. The ULCC's model Settlement of International Investment Disputes Act is short (just 15 clauses) and aims to implement the ICSID Convention provisions concerning the jurisdiction and powers of the provincial superior courts to recognize and enforce ICSID awards (Clause 3). Under Clause 6 ICSID awards may be registered in the provincial superior court and thereafter will be enforceable as a judgment of that court. Under Clause 8 an ICSID award is final and binding "and is not subject to appeal, review, setting aside or any other remedy except as provided in the ICSID Convention". If a provincial, federal or territorial government in Canada consents to resolve disputes with foreign investors under the ICSID Convention, Clause 5 allows for variation as to whether the resulting ICSID award will bind crown corporations, crown agents and other similar entities. Under Clause 13 the statute comes into force on royal assent; therefore, the legislation in each Canadian province and territory as well as at federal level may be coordinated to come into force simultaneously.

To date, five Canadian jurisdictions have enacted legislation implementing the ICSID Convention based on the ULCC's model statute (Ontario, British Columbia, Newfoundland and Labrador, Saskatchewan, and Nunavut). The provincial statutes have followed the ULCC model statute template with only minor variations. Ratification now awaits the enactment of implementation legislation in Alberta, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Yukon and the Northwest Territories, and by the federal Parliament. Despite the length of that list, the federal government is apparently optimistic that each of these governments will do its part: at a ceremony held on December 15 2006, the Canadian ambassador to the United States attended the World Bank headquarters in Washington DC to sign the ICSID Convention on Canada's behalf. Once Canadian ratification of the ICSID Convention is complete, for the first time international investor-state disputes involving Canadians or their federal, provincial and territorial governments will have direct access to the many advantages of dispute resolution under the ICSID Convention.

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