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Canada Ratifies the ICSID Convention: Enhancing Legal Rights and Protections for Canadian Investments Abroad

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Introduction

If the effectiveness of any dispute-settlement process is to be measured by the existence of impartial and well-defined rules, finality of the outcome and enforceability of the decision, Canada’s ratification on November 1, 2013, of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and its coming into effect on December 1, 2013, should be widely recognized as a watershed event for Canadian businesses investing overseas.

It has taken Canada almost 50 years to become a member of the ICSID Convention, and the recent ratification now makes Canada (as the 150th country) one of the last to do so. Very few countries in the world have not joined the ICSID Convention. Countries that have chosen not to do so include Cuba, Iran, North Korea and Russia. Others such as Bolivia, Ecuador and Venezuela, which became members several years ago, have since decided to denounce their membership on the basis that the ICSID rules restrict their national sovereignty to deal as they wish with foreign investors.

The long delay in Canada’s ratification is not due to any material reservation relating to the merits of ICSID membership, but rather can be attributed to Canada’s federalist constitutional framework. Since the enforcement procedures for international arbitration awards rendered under the ICSID Convention must be implemented into law by provincial and territorial governments, unanimity between the federal government, on the one hand, and provincial and territorial governments, on the other hand, was required, before ratification could take place. This proved to be elusive for many years, with Alberta and Québec, in particular, withholding their consent, and latterly Québec being the remaining holdout.

The ICSID Convention

The 1965 ICSID Convention was established by the World Bank to facilitate investor-state arbitrations. It created for the first time an institutional framework and arbitration rules to resolve disputes between foreign investors and states by allowing foreign investors to launch arbitration proceedings directly against the host state in which they had made their investments. In doing so, it effectively rendered it unnecessary for foreign investors to petition their home country’s government to engage in diplomatic
protection and force resolution under public international law to secure redress for harmful measures taken by the host state against their investment.

During the first 30 years of the ICSID Convention, very few investment disputes were brought for resolution under it. This has since changed to a remarkable degree and, as of 1995, the number of cases being brought under the ICSID Convention has been rapidly increasing each year; just last year a record number of 50 investment disputes were filed with ICSID.

The growth in the number of cases is attributable to the use of ICSID arbitration clauses in investment contracts for dispute resolution, and due to the ever-increasing number of bilateral investment treaties that provide for resolution of disputes under the aegis of the ICSID Convention. For more information read Osler Update “Canada Revitalizes Program of Bilateral Trade and Investment Initiatives” (Spring 2007).

While most of Canada’s foreign investment promotion and protection agreements (also known as bilateral investment treaties) already provide for the possibility of resort to ICSID (as does Chapter 11 of NAFTA), until Canada ratified the ICSID Convention, Canadian investors contemplating launching an investor-state arbitration were prevented from seeking the benefits of the ICSID Convention and its dispute resolution rules (instead they had to resort to the ICSID Additional Facility Rules or the UNCITRAL Rules, and had to rely on the 1958 New York Convention for enforcing awards).

Advantages of Arbitration under ICSID

There are several advantages to conducting investment dispute arbitrations under the ICSID Convention:

- The arbitral awards issued under the ICSID Convention are binding and enforceable. All member states must enforce an ICSID award as if it were a final judgment of its national courts.
- ICSID awards can only be challenged under the Convention’s annulment procedure, which is a very limited review mechanism. National courts are not permitted to further review or set aside an ICSID award.
- It provides institutional support to the parties, including lists of possible arbitrators, screening and registering arbitration requests, assisting in the constitution of arbitral tribunals and the conduct of proceedings.
- Consent to ICSID arbitration cannot be unilaterally withdrawn by signatory states, and the investor can initiate the arbitration process so long as the host state of the investment is an ICSID member.
- Mechanisms for avoiding frustration of proceedings are provided. For example, Art. 38 provides for the appointment of an arbitrator by the ICSID in case a party fails to do so, and Art. 45 assures that lack of cooperation by any party will not prevent the continuation of the proceedings.
- Arbitration under ICSID is arguably less expensive because of the administrative support provided by the ICSID institution.

Finality and Enforceability

The fact that as of the end of 2012, approximately 60% of the 514 known investor-state treaty-based disputes were brought under this Convention bears witness to its considerable advantages over alternative processes.

The ICSID Convention is also more often than not used for resolving investment disputes arising out of investment contracts entered into by foreign investors with host states. For more information, read Osler Update, “Critical Elements for a Successful Global Investment Strategy: Advance Planning, Socially
Responsible Behaviour, and Heeding Local and Community Interests.”

Furthermore, the ICSID Convention’s dispute resolution process is invoked by foreign investors in a wide variety of economic sectors that are dependent on stable foreign government economic policies and regulatory processes, including mining, oil and gas, electric power and other energy, banking and financial services, insurance, engineering and construction, broadcasting and communications, transportation, water delivery, sanitation and flood protection, agriculture, fishery and forestry, and tourism.

Among the above-enumerated advantages of using the ICSID Convention, its greatest advantages may likely be that it provides an institutional framework for the administration of international arbitrations (rather than the parties having to rely on an ad hoc process established by the chosen arbitrators), and that it leads to a much higher degree of finality and enforceability for the arbitration awards rendered.

The finality of the awards is achieved by requiring national courts of ICSID member countries to recognize them as final and binding on the issues disputed by the parties. This renders the awards immune from re-examination by any court or in any subsequent proceeding, except under the limited review process contemplated by the ICSID Convention.

Therefore, awards issued by tribunals constituted under the ICSID Convention cannot be vacated by national courts, unlike international commercial arbitration awards and investment-treaty-based arbitration awards issued by tribunals constituted under arbitration rules designed principally for commercial disputes and which can be judicially reviewed by national courts in the jurisdiction chosen by the parties as the “seat of arbitration” (albeit, on certain very limited grounds such as public policy or for grave procedural errors in the conduct of the arbitration). Instead, the national courts are bound by statutes incorporating the provisions of the Convention into local law to immediately enforce the awards as if they were final judgments of the particular country’s courts. This immediate recognition of the award is accompanied by the court’s assisting the successful party by having the assets of the losing party (including a country) attached if the monetary amount of the award is not paid.

The limited review process contemplated by the ICSID Convention is strictly prescribed and limited to interpretation, revision and annulment, and is done without the involvement of any national courts. Although the remedies for interpretation and revision can be considered by the same ICSID tribunal that issued the award, the annulment process – the most drastic of the procedures for review – requires the formation of a new ICSID tribunal to consider the prior issued award.

The annulment process is designed not to re-examine the merits of the award, but only to safeguard the integrity of the ICSID arbitration process. Therefore, a tribunal constituted to consider whether an award should be annulled can do so on extremely limited grounds, such as that the original tribunal was not properly constituted, the tribunal manifestly exceeded its powers, corruption by a tribunal member, serious departure from the fundamental procedural requirements or that the award failed to state the reasons on which it was based. As a result, only a handful of ICSID awards have been annulled in part or in whole.

Conclusion

Canada has been negotiating investment agreements with other countries vigorously over the last few years, especially following the implementation of the investment chapter within NAFTA. These investment agreements – known as Foreign Investment Promotion and Protection Agreements (FIPAs) –
are bilateral investment treaties designed to promote and protect Canadian investments abroad. They create the substantive legal rights and protections for Canadian investors in foreign countries, while also providing reciprocal rights for foreign investors investing in Canada. Generally, this means that Canadian investors investing in a foreign country that has signed a FIPA are accorded certain standards of treatment, including that they are to be treated by the host state no less favourably than domestic investors (known as national treatment) and foreign investors from other countries (most-favoured-nation treatment); they will not have their investments expropriated without adequate compensation; and they will not be subject to treatment lower than the international minimum standards.

Currently 24 Canadian FIPAs are in force. Canada has concluded negotiations with other countries for 13 other FIPAs that will come into effect as soon as they are signed and ratified, and continues to negotiate with additional countries to conclude 12 new FIPAs. Canada also provides for investment protection in many of its free trade agreements such as NAFTA and the recently concluded CETA (Comprehensive Economic and Trade Agreement, between Canada and the European Union). See the November 2013 Osler Corporate Review for more information.

With the ratification of the ICSID Convention, Canada has added another level of protection for Canadian businesses investing overseas by ensuring that successful international arbitration awards are treated as final and are effectively enforced against unsuccessful host countries. The enforcement proceedings can take place in any of the currently 150 member countries of the ICSID Convention.

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