

Briefing Note

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention)¹

What is the ICSID Convention?

- It is a 1965 international convention that established an autonomous international arbitration institution as part of the World Bank.
- The primary purpose of ICSID is to provide facilities for resolving investment disputes between international investors and states in which investments are made.
- 147 states have ratified the Convention, and an additional 10 – including Canada – have signed but not yet ratified it.
- Canada is the only G-8 state and one of only three OECD states that has not ratified the Convention.

What is the status of Canada's ratification of the ICSID Convention?

- Canada signed the ICSID Convention in December 2006 and passed federal implementing legislation in March 2008 – but so far the Federal Government has not proclaimed the implementing legislation into force.
- Four provinces – British Columbia, Newfoundland and Labrador, Ontario and Saskatchewan – and two of three territories – Northwest Territories and Nunavut – have passed implementing legislation.

What is holding Canada back?

- The reason for the delay seems to be Canada's federal structure. Canada's constitution allocates treaty-making authority to the Federal Government. However, provincial and territorial concurrence is sought when a treaty deals with a subject matter wholly or partly within their jurisdiction.
- ICSID relates, in part, to an area of provincial and territorial jurisdiction. The federal government appears to want all provinces and territories to pass

¹ This note has been adapted from a Kluwer Arbitration Blog posting by Barry Leon and Andrew McDougall of Perley-Robertson, Hill & McDougall LLP, August 24, 2010, online: http://kluwarbitrationblog.com/blog/2010/08/24/why-has-canada-not-ratified-the-icsid-convention/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+KluwerArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29

implementing legislation before it proclaims its legislation and ratifies the Convention.

- Whatever the reasons for the delay, the merits of ICSID do not appear to be the problem. When ratification legislation was being considered in the House of Commons, Members of Parliament generally agreed that ratification is in Canada's interest.

Why should provincial and territorial governments care about ICSID?

- The benefits of ICSID membership to provincial and territorial economies and to Canadian companies, large and small, could be significant.
- The provinces and territories have vast natural resources such as in oil and gas, power and forestry.
- They also have head offices for companies active around the world in these sectors plus others such as aerospace, technology and engineering.
- Ratification of ICSID would enhance Canada's image abroad as an investment-friendly country. Conversely, Canada's failure to ratify has the opposite effect on its reputation.
- The availability of binding ICSID arbitration increases foreign investor confidence in Canada, making it an attractive location for foreign investment by reducing the risk to incoming investors.
- The majority of countries in which Canada's companies invest most frequently are ICSID members. If Canada ratified the ICSID Convention, Canadian companies would have reduced risk in their foreign investment activities. This would be beneficial to Canada.

What does the private sector say about the need for Canada to ratify ICSID?

- The Canadian Chamber of Commerce has called for Canada to ratify ICSID.
- The Canadian Bar Association has called for Canada to ratify ICSID.
- ICC Canada, the Canadian National Committee of the International Chamber of Commerce's International Court of Arbitration, has called for Canada to ratify ICSID.