

E-Bulletin

Canada's Ratification of ICSID: Late to the Party But Greater Protection Now Available to Canadian Foreign Investment Abroad

The signature by Canada and the European Union of a comprehensive free-trade agreement on October 18, 2013 is an important development with many significant and far-reaching economic consequences for Canada. However the announcement of this agreement has largely overshadowed another important announcement made by the Canadian Minister of International Trade on November 1, 2013 on the ratification by Canada of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also known as the "ICSID Convention". The Canadian Government signed the Convention on December 15, 2006 and passed the necessary domestic implementing legislation on March 13, 2008. The Convention will enter into force for Canada on December 1, 2013, 30 days after its ratification. Owing to the recalcitrance of certain Canadian provinces, notably Alberta and Québec, to implement a federal treaty which dealt with certain matters within provincial competence, the Federal Government was not able to secure the full assent of all provinces in order to sign the treaty until this year. Canada has been the last of the G8 countries to ratify the ICSID Convention and one of the few remaining members of the OECD not to have done so (Mexico being another notable hold-out). There are 149 other countries which have now ratified the ICSID Convention.

At first blush, many in the mining industry might be inclined to dismiss ICSID as simply another international agreement of little relevance to the day-to-day business of mineral exploration and development. They should think again. The Canadian Government's ratification of the treaty will bring a significant and long overdue improvement to the security of mining investments outside Canada and particularly in the developing world. Simply put, the ICSID Convention provides greater access to effective international arbitration through both a framework of rules and an international structure for the settlement of investment disputes between a foreign government and a private investor. It has become a preferred choice for investors seeking to enforce their rights against foreign governments for a number of reasons, including the relative immunity from domestic court challenge of arbitral awards by ICSID tribunals and the limitation of annulment reviews of any arbitration award to a committee of ICSID itself, rather than an outside court.

In the event of a dispute between a host government for mining investment and a mining company, international arbitration has long been available to Canadian investors under so-called *ad hoc* arbitration procedures which are usually provided for in agreements between a host country government and a foreign mining company prior to implementation of a project. However, problems have not infrequently arisen in cases where a host government resists engaging in dispute arbitration with a foreign investor. There has on occasion been interference in arbitration awards by foreign courts, often at the instigation of national governments. The ICSID Convention provides for a specialized investment dispute resolution mechanism backed up by a competent Secretariat operating under the aegis of the World Bank, making it much more difficult for host governments to resist participation in legitimate arbitration. Moreover, the Secretariat's facilities are available to administer investor-state arbitrations that are not covered by the ICSID Convention and the ICSID Convention provides a framework for the enforcement of arbitral awards once an investment arbitration is concluded between an investor and a foreign host government. It accordingly represents an important additional instrument for protecting mining investments in foreign countries.

This is particularly so because of Canada's relatively thin network of bilateral investment protection treaties with foreign governments (currently 27 bilateral investment protection agreements signed, including the recent one with China). In the absence of a comprehensive network of investment protection treaties between Canada and other foreign governments, it is all the more critical that Canada-based mining companies seeking long-term protection for their investments in foreign jurisdictions should have the important option of proceeding to investor state arbitration under ICSID rules and administration. In that connection, companies contemplating new investments should ensure that contractual arrangements with foreign governments, whether they take the form of concession agreements, production sharing or simple mining license arrangements, refer in the case of future disputes, to the option of submitting the dispute to ICSID arbitration. Canada's ratification of the ICSID Convention on November 1, 2013 will now make ICSID resolution of disputes with foreign governments a clear option for Canadian companies seeking to protect their mining investments abroad.

Sills Egsgard LLP is a Toronto-based law firm specializing in international trade and investment and related regulatory compliance issues.

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