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Canada Ratifies ICSID and Alberta Introduces the Necessary Implementing Legislation

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Matters commented on: Canada's ratification of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the Washington or ICSID Convention) and Bill 40: Settlement of International Investment Disputes Act

On November 1, 2013 Canada deposited its instrument of ratification of the Washington Convention with the secretariat for the International Centre for the Settlement of Investment Disputes (ICSID). The Convention will enter into force for Canada on December 1, 2013. The ICSID Convention, as its name implies, is designed to provide for dispute settlement (binding arbitration or conciliation) of investment disputes between states and investors from other states. The Centre may take jurisdiction over any such dispute by the written consent of both parties. That consent may be given in a specific case or it may be given generally. General consent is frequently given by the terms of a bilateral investment treaty such as the recent agreement that Canada has concluded with China. Article 22 of that agreement (which has yet to enter into force) provides as follows:

> 1. A disputing investor who meets the conditions precedent provided for in Article 21 may submit the claim to arbitration under:
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> (a) the ICSID Convention, provided that both Contracting Parties are parties to that Convention;
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> (b) the Additional Facility Rules of ICSID, provided that one Contracting Party, but not both, is a party to the ICSID Convention; or
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> (c) the UNCITRAL Arbitration Rules, as supplemented or modified by the rules set out in this Agreement or adopted by the Contracting Parties.

Article 23 provides the evidence of consent:

> Each Contracting Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement. Failure to meet any of the conditions precedent provided for in Article 21 shall nullify that consent.

It will be observed that Article 22 permits the claimant to choose from amongst three arbitral fora and so it becomes important to understand the implications of that choice. The ICSID Additional Facility Rules are simply a set of rules that allows the Centre to serve as the

secretariat for the arbitration. In such a case the arbitration is not governed by all the terms of the ICSID Convention.

The principal implication of choosing ICSID as the arbitral forum is that the resulting award under an ICSID Arbitration will be shielded from any judicial supervision by a Canadian court. This follows from Article 53 of the Convention which provides as follows:

> (1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

That provision however is not self-implementing. Accordingly all jurisdictions in Canada will need to give legal effect to that clause. Most jurisdictions have done so including:

- Canada: *Settlement of International Disputes Act*, SC 2008, c.8, s7 (not yet in force).
- Nunavut, *Settlement of International Disputes Act*, SNU 2006, c.13
- Saskatchewan, *Settlement of International Disputes Act*, SS 2006, c S-47.2
- Ontario, *Settlement of International Disputes Act*, SO 1999, c 12, Sch D
- Newfoundland and Labrador, *Settlement of International Disputes Act*, SNL 2006, c S-13.3
- Northwest Territories, *Settlement of International Disputes Act*, SNWT 2009, c 15
- British Columbia, *Settlement of International Disputes Act*, SBC 2006, c 16

Bill 40: *Settlement of International Investment Disputes Act* was introduced in the Alberta Legislature on November 4 with debate on the Bill being adjourned the next day. In introducing this Bill, Mr. Sohail Quadri, the MLA for Edmonton-Mill Woods indicated that "[m]oving forward with the implementation of the ICSID convention is a positive step to create certainty for investments both in Alberta and abroad…" No doubt this statement speaks to the fact that implementation of the ICSID Convention will provide investors with direct access to a form of dispute settlement which empowers them to seek remedies outside of the courts of a host state. Still, there may be some remaining uncertainty about the finality of awards rendered pursuant to the ICSID Convention. While there can be no domestic judicial supervision of an ICSID arbitration, the ICSID Convention does offer its own corrective. This is the so-called annulment procedure under Article 52 of the Convention, which provides that:

> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
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> (a) that the Tribunal was not properly constituted;
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> (b) that the Tribunal has manifestly exceeded its powers;
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> (c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.

Awards rendered under the UNCITRAL Rules or the ICSID Additional Facility Rules are not immune from judicial supervision. Which judicial supervision rules apply will depend upon the "seat" of the arbitration. The seat is not typically determined by where the arbitration actually occurs but by the express choice of the parties to the arbitration, or, failing agreement, by the decision of the arbitrators. The choice of place was, for example, contentious in *Murphy v Canada*, ICSID Case No. ARB(AF)/07/4. The matter was dealt with in the Award as follows:

> 15. The parties were unable to reach an agreement on the place of arbitration at the first session (Articles 19 and 20 of the Arbitration (Additional Facility) Rules, Article 1130 of the NAFTA). The Claimants proposed Washington, D.C., USA, while the Respondent proposed St. John's (Newfoundland and Labrador) or Ottawa (Ontario), Canada. If a place in Canada were to be selected, the Claimants proposed Toronto (Ontario). The parties made oral submissions on this issue at the first session and filed further written submissions following certain questions from the Tribunal….
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> 18. On October 7, 2009, the Tribunal issued Procedural Order No. 1, designating Toronto as the place of arbitration. In reaching its decision, the Tribunal took into account a range of factors, including the neutrality of the courts, Article 22 of the UNCITRAL Notes, the proximity of evidence and the ability to obtain evidence, and various arbitration statutes. As the Claimants had requested that the Ontario Superior Court of Justice have exclusive jurisdiction if Toronto were selected, the Tribunal invited the parties to comment on the request. The parties subsequently agreed that the Ontario Superior Court of Justice would be the exclusive court of the place of arbitration in which any and all applications concerning the arbitration would be filed. On November 5, 2009, the Tribunal issued Procedural Order No. 2 confirming the parties' agreement.

Where an arbitration occurs under the UNCITRAL or Additional Facility Rules neither party will have access to the Article 52 annulment procedure.

There is much room to discuss the relative merits of these two review systems (i.e. domestic judicial supervision vs. the expert annulment procedure) and the relative "intrusiveness" or deference (i.e. the grounds and standard of review). The matter is not straightforward. For example, while Article 52 seems to allow for annulment only on very exceptional grounds, paragraph (e) has in some cases provided an opportunity for very searching analysis at a high level of expertise of the quality of the reasoning of arbitral panel: see for example *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/08 (Annulment Proceeding); *Enron Corporation Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3 (Annulment Proceeding); *Patrick Mitchell v Democratic Republic of Congo*, ICSID Case No. ARB/99/7 (Decision on the Application for Annulment of the Award). By contrast, there is no equivalent ground of review in any Canadian statute providing for the judicial supervision of international commercial (or investor/state) arbitral awards. As a matter of practice therefore Canadian judicial review procedures of investor state arbitral awards may show a higher standard of deference than that exhibited by ICSID Annulment Panels.

Consider as an example the Award in *Murphy v Canada* rendered under the ICSID Additional Facility Rules. One of us has written at length and critically of that Award and has suggested, in effect, that the reasoning is not supportable: see post here. The seat of the arbitration for that Award was, as we have seen, Toronto. We think that Canada would have had a much better chance of obtaining annulment under Article 52 than it would in obtaining judicial review under the terms of Ontario's *International Commercial Arbitration Act*, RSO 1990, c.I.9, which implements the UNCITRAL Model Law on International Commercial Arbitration.

The narrow grounds for setting aside arbitral awards under the Model Law are found in Article 34 which provides that an arbitral award may be set aside if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

To date, Ontario courts have heard 3 of the 5 applications for review of NAFTA Chapter 11 arbitral awards: *Mexico v Karpa*, 2005 CanLII 249 (ONCA); *Bayview Irrigation District #11 v Mexico*, 2008 CanLII 22120 (ONSC); *Mexico v Cargill*, 2010 ONSC 4656; 2011 ONCA 622.

Karpa (aka Feldman) involved an arbitration conducted under the ICSID additional facility rules. Ottawa (at para 1) was named as the place of arbitration although the hearing took place in Washington DC. In that case, applying factors developed by the Supreme Court of Canada (i.e. the existence of a privative clause, the expertise of the tribunal, the purpose of the jurisdiction-

conferring act, and the nature of the problem submitted for review) as well as ideas of international comity, the court concluded (at para 43) that "the applicable standard of review in this case is at the high end of the spectrum of judicial deference." The Court in *Bayview* took a similar view (see esp. paras 13 and 60 - 62).

Cargill was another ICSID additional facility case in which the seat of arbitration was designated as Toronto although the case was heard in Washington (at para 9). While the Court acknowledged (at para 35) the general approach of deference to consensual international arbitral awards it applied a correctness standard to the threshold issue of determining whether the matter was properly before the arbitral panel (at paras 36 – 42) while again acknowledging that a reviewing court should be loath to characterize an issue as jurisdictional (at paras 45 – 48) and emphasizing that it had no jurisdiction to review on the merits. In the end the Court concluded that the tribunal had not erred in assuming jurisdiction.

Aside from the first case in which a Canadian court was asked to review a case brought under the ICSID additional facility rules (*Mexico v Metalclad Corp*, 2001 BCSC 664; additional reasons 2001 BCSC 1529) the three cases discussed above are representative of the general trend in Canadian court practice to find that there is no basis of review under any of the heads included in the Model Law. Given this history, it seems that arbitral awards rendered outside of the ICSID Convention remain final and binding on the parties in any such dispute. The available corrective under the ICSID Convention provides a review of arbitral awards on grounds exhaustively listed in Article 52. However Article 52(e), which specifies that ICSID arbitral awards may be annulled in cases where a tribunal fail[s] to state the reasons on which the award is based, has been used as a means by which to question and at times overturn the decisions reached by expert ICSID arbitral panels. It is entirely possible therefore that awards obtained as a result of arbitrations under the ICSID Convention may be more subject to successful challenge than investor-state arbitral awards obtained outside of the ICSID Convention and reviewed by Canadian Courts.