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Why has Canada Not Ratified the ICSID Convention?

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A significant majority of countries in the world have demonstrated that they see benefits in being a member of ICSID by ratifying the ICSID Convention (Convention on the Settlement of Investment Disputes Between States and Nationals of Other States). 144 states have ratified the treaty, and an additional 11 – including Canada – have signed but not yet ratified it.

Lawyers and many business people involved in the world of international trade and investment are well aware of the benefits of ICSID. Whatever operational shortcomings that ICSID has had – or may still be in the process of fixing – few would question that ICSID is the leading institution for investor-state disputes.

Many have asked why Canada has not yet ratified the ICSID Convention. It has been 45 years since the Convention came into existence and over three and a half years since Canada signed in December 2006. Canada is a G-8 and G-20 country and a country that stands to benefit more than many others from ICSID. The Secretary General of ICSID is a Canadian.

Yet, Canada remains the only G-8 state and one of only three OECD states that has not ratified the Convention.

Canada's economy needs and benefits significantly from incoming investment, and Canadian companies are significant international investors. It seems obvious that ratification of ICSID would enhance Canada's image abroad as an investment-friendly country and foster Canada's economic prosperity. Conversely, it seems obvious that Canada's failure to ratify has the opposite reputational effect.

The availability of binding ICSID arbitration would increase investor confidence in Canada, making it an even more attractive location for foreign investment by reducing the risk, and therefore the cost, to the incoming investor. This would benefit Canada's economy.

Even more significantly, Canadian companies would have reduced risk, and therefore reduced cost, in their foreign investment activities, in which they are engaging with increasing frequency and vigor. This too would be beneficial to Canada. The majority of countries in which Canada's companies invest most frequently and most heavily are ICSID members (notably excluding Mexico, India and Brazil).

One need not search hard for examples of Canadian companies that might have been able to utilize ICSID to their advantage. An example is the highly publicized, recent complaints made by First

Quantum Minerals, a Canadian mining company, against the Democratic Republic of the Congo. When Canada's Prime Minister raised these complaints at the recent G-20 Summit in Toronto, one might have thought that the gap in Canada's investor protection caused by Canada's failure to ratify the ICSID Convention would have been highlighted, leading Canadian businesses to urge ratification and governments in Canada to spring into action and take the necessary steps to ratify. However, two months after the Toronto Summit that still does not appear to be happening.

What is holding Canada back, and what will it take to achieve ratification of the ICSID Convention? We cannot justify the delay, but we can try to explain it.

In a nutshell, the reason for the delay seems to be Canada's particular federalist structure. As in all federal states, powers are allocated by Canada's constitution between its federal government, and its 10 provinces and three territories. Canada's constitution, like in most if not all federal states, allocates treaty-making authority to the federal level. However, when the subject matter of a treaty is in a field in which Canada's provinces and territories have authority, the provinces and territories may have a say.

Generally speaking, whether constitutionally or by practice, provincial and territorial concurrence is sought when the subject matter of a treaty is a subject matter wholly or partly within their jurisdiction. ICSID relates to one or more areas of provincial and territorial jurisdiction, so it has been generally assumed that provincial and territorial implementing legislation is needed or at least desirable.

Canada's federal government signed the ICSID Convention in December 2006 and passed implementing legislation in March 2008. The implementing legislation has not yet been brought into force, our understanding being that this has been awaiting provincial and territorial implementing legislation. So far, only four of 10 provinces (British Columbia, Newfoundland and Labrador, Ontario and Saskatchewan) and two of three territories (Nunavut and Northwest Territories) have passed implementing legislation.

Of the provinces and territory remaining, Alberta and Québec are most notable. The benefits of ICSID membership to these provinces' economies and companies would appear to be significant because of the nature of their economies and the international involvement of their companies. These provinces have vast natural resources such as in oil and gas, power and forestry. They also have companies active around the world in these sectors plus others such as aerospace and engineering.

It is suspected by some that implementing legislation is being used as a bargaining chip in federal-provincial negotiations on other issues. Another possibility is that putting forward ratification legislation on an international treaty such as ICSID in the face of crowded legislative agendas is not a priority. And a reality may be that treaty ratification is not a vote-getting issue.

Whatever the reasons for the lack of implementing legislation, it appears that concern about the merits of ICSID has never been, and is not now, the problem. When ratification legislation was being considered in Canada's federal House of Commons, Members of Parliament generally agreed that ratification is in Canada's interest. Indeed, in the many years since ICSID came into existence, Canada's federal government has been trying at least intermittently to get its provincial counterparts to commit to act, and since signing the treaty, to actually act.

There is some indication that Canada's federal government may move ahead with ratification of

ICSID without waiting for the remaining provinces and territory. This is consistent with comments made during parliamentary debates and hearings when the federal implementing legislation was being considered. Citing provisions of ICSID as authority, parliamentarians and officials stated that Canada could designate provinces and territories that so wish to be a part of ICSID as "constituent subdivisions" under the Convention. Provinces and territories that have not passed implementing legislation could be designated if and when they do so. Article 70 of the ICSID Convention would allow Canada to identify by written notice the provinces and territories to which the treaty would not apply.

For example, then Senior General Counsel and Director General of Canada's Trade Law Bureau, Meg Kinnear, now Secretary General of ICSID, testified before the Parliamentary Committee considering the federal implementing legislation:

What the federal government has said to all the provinces is that if you want to be what's called "designated" as a constituent subdivision, just tell us and we will do that. … So we have said that this is up to you, and if at any time later you decide that you would like to be designated, just tell the federal government. There is no problem with that, but it's totally up to the province to decide when they would like to do that. (November 22, 2007, Hansard, 39th Parliament, 2nd Session)

This approach is not without dissent. Some opposition members in the federal Parliament countered that the "constituent subdivision" approach would violate Canada's constitutional division of powers and would constitute "wrongful arrogation" of the federal government's control over international relations.

Another point raised was whether Canada, by ratifying without implementing legislation in all provinces and territories, would be violating its treaty obligations under the Vienna Convention on the Law of Treaties. Article 26 of that treaty states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith", while Article 27 states that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". The counter-argument to this point appears to be that the ICSID Convention itself has created the "constituent subdivision" approach so that ratification relying on it is not a violation of any treaty obligation.

Lastly, moving forward with ratification without full provincial and territorial concurrency could be seen as deviating from Canadian treaty implementation practice and might have political implications. Few would disagree that unanimous provincial and territorial ratification is preferable in Canada's federal state environment. Also, partial applicability of ICSID in Canada could complicate investment transactions and distort economic relations among different provinces and territories.

In any case, in the absence of unanimity after an unduly prolonged time and considerable effort, the alternative of utilizing the "constituent subdivisions" approach appears to many to be the best achievable option in the interests of the Canadian economy and Canadian businesses that invest internationally.

For those who have scratched their heads in disbelief wondering why Canada has not ratified the ICSID Convention, we hope that this provides an explanation.

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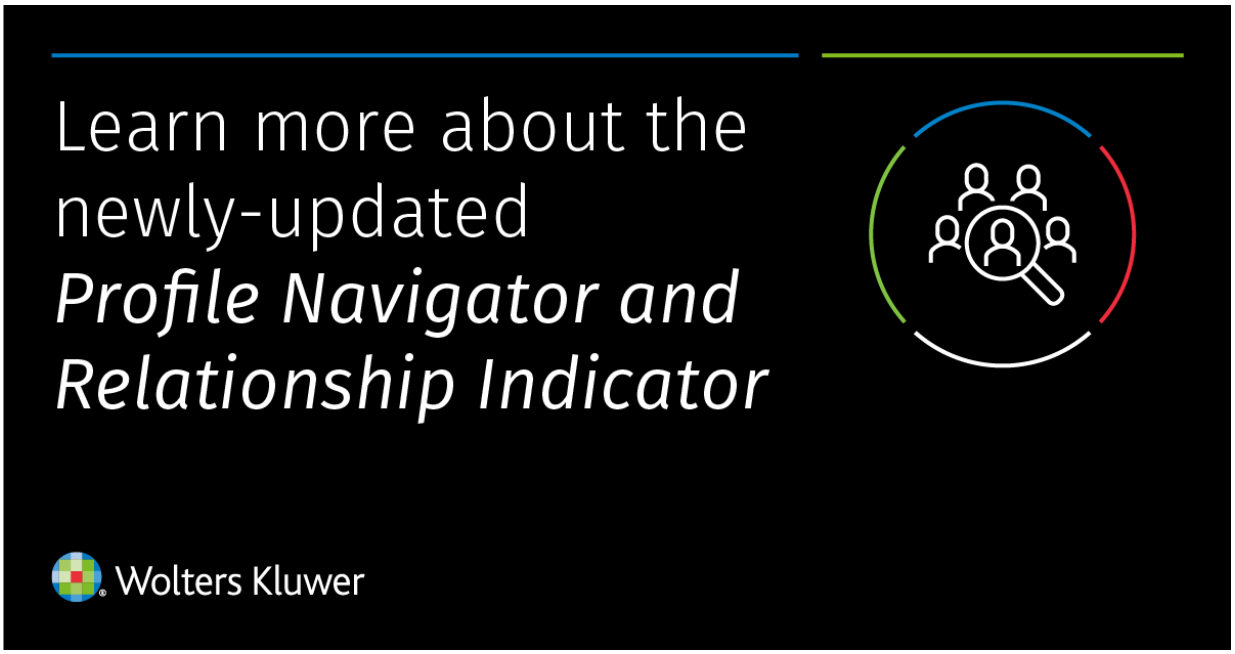

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