

**BILL C-9: SETTLEMENT OF INTERNATIONAL
INVESTMENT DISPUTES ACT**

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LEGISLATIVE HISTORY OF BILL C-9

HOUSE OF COMMONS

Bill Stage	Date
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First Reading: 29 October 2007
Second Reading: 29 October 2007
Committee Report: 28 November 2007
Report Stage:
Third Reading:

SENATE

Bill Stage	Date
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First Reading:
Second Reading:
Committee Report:
Report Stage:
Third Reading:

Royal Assent:

Statutes of Canada

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print**.

Legislative history by Michel Bédard

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INVESTMENT DISPUTES ACT *

BACKGROUND

On 29 October 2007, the Minister of Foreign Affairs introduced in the House of Commons Bill C-9, An Act to implement the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention). Bill C-9 was previously introduced in the 1st Session of the 39th Parliament as Bill C-53. Pursuant to a motion adopted by the House on 25 October 2007, Bill C-9 was deemed to have been read a second time and referred to the Standing Committee on Foreign Affairs and International Development.

The ICSID Convention,⁽¹⁾ which provides a mechanism to settle international investment disputes, came into force on 14 October 1966. As of 9 May 2007, it had been signed by 156 countries, of which 144 have proceeded to ratification.⁽²⁾ Canada became the most recent signatory to the Convention on 15 December 2006.

The ICSID Convention establishes the International Centre for Settlement of Investment Disputes. Located in Washington D.C., the ICSID has close links to the World Bank. Its purpose is “to provide facilities for conciliation and arbitration of investment disputes,” in accordance with the provisions of the Convention, between contracting states (that is, states that

* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

- (1) The World Bank Group, International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules*, <http://worldbank.org/icsid/basicdoc/basicdoc.htm>.
- (2) The World Bank Group, International Centre for Settlement of Investment Disputes, “List of Contracting States and other Signatories of the Convention,” 9 May 2007, <http://www.worldbank.org/icsid/constate/c-states-en.htm>.

are parties to the Convention) and nationals of other contracting states.⁽³⁾ Pursuant to Article 25 of the Convention, the jurisdiction of ICSID extends to “any legal dispute arising directly out of an investment” between a contracting state and a national of another contracting state, with the written consent of the parties to the dispute. In other words, the Convention provides for a mechanism through which ICSID member countries and foreign investors in those countries can settle disputes relating to investments made by such investors.

One of the important features of the Convention is that it provides for the recognition and enforcement of arbitral awards issued by ICSID tribunals. Awards issued by ICSID tribunals are binding on states that are parties to the Convention, and such states must enforce the pecuniary obligations imposed by ICSID tribunals as if they were contained in a final judgment of their domestic courts.⁽⁴⁾

The increase in cross-border investments arising from globalization has also led to an increase in the number and complexity of investment disputes between foreign investors and host governments. Foreign investors generally prefer to use a well-recognized international dispute mechanism as opposed to domestic legal systems. Ratification of the ICSID Convention by Canada will enable Canadian investors in other ICSID member countries to take advantage of its dispute settlement process, on fulfilment of certain conditions. Similarly, foreign investors in Canada can also take advantage of the ICSID mechanisms.⁽⁵⁾

Several of Canada’s trading partners, such as the United States, the United Kingdom, China, Japan, Germany, France and Chile, have already ratified the Convention. However, some of our trading partners, such as Brazil, India and Mexico, are not signatories.⁽⁶⁾

(3) *ICSID Convention*, art. 1.

(4) *ICSID Convention*, art. 54.

(5) Even though Canada has not yet ratified the ICSID Convention, it currently makes use of the ICSID Additional Facility Rules, which have been adopted by the ICSID Administrative Council. These rules authorize the ICSID Secretariat to administer certain proceedings between states and nationals of other states that fall outside the scope of the ICSID Convention.

(6) It is interesting to note that the North American Free Trade Agreement (NAFTA) establishes a mechanism whereby investors of one NAFTA party can directly make claims against the government of another NAFTA party through an arbitration process in certain circumstances. NAFTA outlines certain general procedures regarding the arbitration but stipulates that such arbitration must be conducted in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of other States, Additional Facility Rules of ICSID, or the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

DESCRIPTION AND ANALYSIS

Bill C-9 may be cited as the *Settlement of International Investment Disputes Act* (clause 1).

The bill comes into force on a date fixed by the Governor in Council (clause 12), even though the provisions of the bill apply to arbitral awards, conciliation proceedings and arbitration agreements made under the Convention before or after its coming into force (clause 4).

A provincial superior court has the jurisdiction to recognize and enforce an award made by an ICSID tribunal. On application, such a court must recognize and enforce an award as if it were the final judgment of that court (clause 8). An award made by an ICSID tribunal is not subject to any remedy except as set out in the Convention (clause 7).

Clause 9 provides for the exclusion of local remedies for matters arbitrated under ICSID. Unless an arbitration agreement made under the Convention stipulates otherwise, a court or administrative tribunal in Canada cannot order interim measures for the protection or preservation of a party's interests before or during an ICSID arbitration proceeding. Similarly, a court or tribunal in Canada cannot make a determination on a matter that is covered by the agreement.

A view expressed by a party, a statement, an admission or an offer of settlement made by a party in an ICSID conciliation proceeding cannot be used in any other proceedings, including those before a court, tribunal or arbitrator, unless agreed to by the parties. Similarly, a report on the recommendations made by a conciliation commission established under the Convention cannot be used in any other proceedings (clause 10).

Under the ICSID Convention every contracting party can designate four persons to both the Panel of Conciliators and the Panel of Arbitrators.⁽⁷⁾ Clause 11 of the bill provides that the Governor in Council may designate persons to the panel of conciliators and the panel of arbitrators.

In the event of an inconsistency, the provisions of the Act or Convention will prevail over the United Nations Foreign Arbitral Awards Convention and its implementing legislation⁽⁸⁾ as well as the *Commercial Arbitration Act* (clause 3).⁽⁹⁾

(7) *ICSID Convention*, art. 13.

(8) *United Nations Foreign Arbitral Awards Convention Act*, R.S.C. 1985, c. 16 (2nd Supp.). This Convention is a widely recognized instrument of international arbitration and requires domestic courts to give effect to arbitration agreements when the matter before it is covered by such an agreement. Parties to this Convention must also recognize and enforce awards made in other States, subject to certain exceptions.

(9) R.S.C. 1985, c. 17 (2nd Supp.). This Act gives the force of law to the Commercial Arbitration Code, which is based on the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985.

Clause 5 of the bill states that ICSID has the capacity of a natural person. This provision recognizes certain privileges and immunities provided to ICSID under the Convention, such as the exemption of ICSID and its assets, property and income from taxation and customs duties. Clause 5 also grants certain privileges and immunities to the chair and members of the Administrative Council and to other persons such as counsel and witnesses. The provisions of the bill are binding on the federal Crown (clause 6).

COMMENTARY

Like its predecessor bill, Bill C-9 has not received much media attention. At the time of introduction of Bill C-53, the Minister of Foreign Affairs stated: “By implementing this Convention, which has been adopted by 143 other countries, the Government is taking the necessary steps to provide Canadian investors with an additional tool to settle investment disputes efficiently.”⁽¹⁰⁾ The Minister of International Trade also noted that: “The ICSID Convention will contribute to Canada’s prosperity by providing additional protection to Canadian investors and reinforcing Canada’s investment-friendly image abroad.”⁽¹¹⁾ In the House of Commons, the bill received support from both the Liberal Party and the Bloc Québécois.⁽¹²⁾

Prior to ratification of the ICSID Convention, implementing legislation must be enacted in Canada. Both federal and provincial/territorial legislation are needed to implement the Convention. British Columbia, Newfoundland and Labrador, Nunavut, Ontario and Saskatchewan have already adopted implementing legislation. The federal government has stated that it “will continue to seek provincial and territorial support prior to ratification.”⁽¹³⁾

(10) Foreign Affairs and International Trade Canada, “Minister MacKay introduces bill to protect Canadian investment abroad,” News release, Ottawa, 30 March 2007, http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication_id=385012&language=E&docnumber=51.

(11) Ibid.

(12) *Debates*, House of Commons, 15 May 2007, <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Mode=1&Parl=39&Ses=1&Language=E&DocId=2945948&File=0#Int-2081960>.

(13) News release, 30 March 2007.