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**In This Issue**



## CCIL Office - Change of Address

Please make note of our new co-ordinates:

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www.ccil-ccdi.ca

## Request for Nominations for the John E. Re Medal

*Awarded by the Canadian Council on International Law in recognition of a outstanding contribution to the cause of international law and internation organizations*

The CCIL bestows from time to time a gold medal to commemorate the life an of John E. Read, who was a distinguished member of the International Court o Justice. Such awards are granted to Canadians who have made a distinguishec contribution to international law and organizations and to non-Canadians who made an outstanding contribution to international law and organizations in the of special interest to Canada. A committee will be established to consider nominations for the John E. Read Award. The Award Ceremony will take place, nomination is successful, at the 2009 Annual CCIL Conference.

Please forward your nomination, with supporting documentation, to the CCIL C by June 30, 2009. 275 Bay Street, Ottawa, ON K1R 5Z5, email: info@ccil-ccd

## Mises en candidature pour la m?daille John Read

*Attribu?e par le Conseil canadien de droit international pour contribution exceptionnelle en droit international et aupr?s d'organisations internationales*

Le Conseil canadien de droit international (CCDI) attribue de temps ? autre un daille d'or comm?morant la vie et l'?uvre de John E. Read, un ancien membre rite de la Cour internationale de justice. Cet honneur vient reconna?tre le m?r

droit international et l'engagement remarquable aupr?s d'organisations internationales de Canadiens et de Canadiennes ou de personnes d'ailleurs qui fait une contribution notoire dans des domaines d'int?r?t pour le Canada. Un c sera cr?? pour ?tudier les candidatures re?ues pour le prix. Si le comit? retien de celles-ci, la m?daille sera remise lors du congr?s annuel 2009 du CCDI.

Pri?re d'envoyer vos mises en candidature ainsi que les pi?ces ? l'appui au bur CCDI pour le 30 juin 2009, 275, rue Bay, Ottawa ON K1R 5Z5 - courriel : info( ccdi.ca.

## Death of Alan J. Beesley

Friends and former colleagues will be saddened to learn of the death of J. Alar Beesley, in Victoria on Thursday, January 22, 2009, at the age of 81. Born in Smithers B.C. on August 17, 1927, he had a long and distinguished career in t Canadian foreign service including serving as Canada's High Commissioner to Australia, Papua New Guinea, the Solomon Islands and Vanuatu 1977-1980, Ca Ambassador to Austria, the IAEA and UNIDO 1973-1976, Canada's first Ambas for Disarmament 1980-1982, Ambassador to the United Nations in Geneva and Disarmament Conference and GATT 1983-1987 and Assistant Under-Secretary Legal Advisor to External Affairs from 1972-1973. He served as Ambassador fo Marine Conservation and Special Environmental Advisor to Canada's Foreign M 1989-1991. From 1967-1983 as Ambassador to the Law of the Sea Conference Canadian Head of Delegation, and Chair of the Conference Drafting Committee Ambassador Beesley was instrumental in shaping the Law of the Sea Conventic Alan Beesley attended the Stockholm Conference on the Environment in 1972 throughout his career was deeply committed to protecting the Environment an disarmament. In 1987 he took a years' sabbatical as a visiting professor at the University of British Columbia Law School. Prior to joining the Foreign Service, practiced law at Crease and Company in Victoria. He studied law at the Univers British Colombia receiving his LLB with the class of 1950. Over the years he re many medals and honours including the Order of Canada Medal in 1984 for his extensive work on the Law of the Sea and the Environment; the Prime Minister Outstanding Public Service Award in 1983, the Admiral's Medal for Contributior Canadian Maritime Affairs 1993 and the Medal of Honour, United Nations Asso of Canada 1995. He served as a member of the International Law Commission 1986-1991 and received an Honorary Doctor of Environmental Studies from th University of Waterloo, and an Honorary Doctor of Laws from DalhousieUnivers

"Alan Beesley was a brilliant negotiator, international lawyer and diplomat. His gifts and abilities in all three disciplines combined to make him one of the truly outstanding Canadian foreign service officers of any generation. He led the Ca delegation to the Third United Nations Law of the Sea Conference with an unparalleled boldness and imagination that placed him at the very centre of th negotiations and effectively secured by far the greater part of Canada's major objectives in this forum. Perhaps his most notable attribute was his extraordin intuition, amounting almost to extra-sensory perception, which allowed him to the drift of the negotiations at a given moment and influence their course decis Together with his remarkable understanding of the aspirations of the developir countries, this enabled Canada to punch well above its weight multilaterally. H left an enduring legacy in which the Department of Foreign Affairs and all Cana can take great pride. God rest him."

Leonard Legault, Ottawa, ON, Canada

"Alan was an extraordinary individual who made major and forward-looking contributions to the international law of the sea and the environment and who promoted Canadian interests with enthusiasm. It was my good fortune to have opportunity to work, and at times to spar, with him."

Prof. Bernard H. Oxman, Richard A. Hausler Professor of Law, University of Mia School of Law

"Alan Beesley was a consummate diplomat, gifted negotiator and esteemed colleague. A favourite anecdote comes from an UNCLOS Committee meeting, w we were debating Passage Through International Straits well past midnight. Th French Delegate had the floor and was droning on and on to the very sleepy

Committee Members, stressing that international straits were of great importa France as French shipping used the Straits of Gibraltar to move products from Atlantic to the Med. Alan wrote a note and sent it via a UN Guard to the Frenc Delegate at the podium, who after reading it promptly concluded his remarks i hurried, somewhat nervous manner. He never discovered who sent the note; did it say? "Why the heck don't you French simply send the stuff by rail?"."

Lorne S Clark, Princeton, NJ, USA

President Philippe Kirsch of the ICC was saddened by news of the death of Ala Beesley, with whom he first worked when he joined the Canadian Department External Affairs in 1972. They also worked together on several later occasions, notably in the context of the International Conference on the Law of the Sea, i Caracas and New York. President Kirsch considered Mr. Beesley an outstanding negotiator and clear-minded lawyer, from whom he learned valuable skills use his entire professional life.

## Canada's Influence on International Law

The CCIL announces a new section of its website devoted to the influence tha Canada has had on public international law. (http://www.ccil-ccdi.ca/index.php option=com_content&task=section&id=17&Itemid=146)

Through its people, governments and events, Canada has shaped public intern law. In an effort to pay tribute to our organisation's co-founder, Ronald St. Joh Macdonald, we are collecting information demonstrating the effect that Canada had on the content and development of international law.

At our 2007 annual conference, Craig Scott described Ronald Macdonald as "fie proud as a Canadian and idealistically committed to making cosmopolitanism a reality". It is in this spirit that we welcome contributions to the CCIL Website a encourage you to read the contributions already made.

## A Closer Look at Canada's Imminent Accession to the I Convention

J. Anthony VanDuzer and Anthony Daimsis*

### Introduction

On Thursday March 13, 2008, Bill C-9, An Act to implement the Convention on Settlement of Investment Disputes between States and Nationals of Other Sta (the ICSID Convention) received Royal Assent. British Columbia, Newfoundlan Labrador, Nunavut, Ontario and Saskatchewan have already adopted legislatio would implement the ICSID Convention[1] on the day on which it enters into f for Canada. When Canada finally does accede to the Convention it will join 14 states that became parties before it.

Those who support Canada's accession cite many benefits, including that:

1. It would provide additional protection to Canadian investors abroad by allowing them to provide for recourse to arbitration using ICSID arbitra in their contracts with foreign states;
2. Canadian investors abroad and foreign investors in Canada could bring investment claims under ICSID arbitral rules where permitted in Canada foreign investment protection agreements (FIPAs) and free trade agree (FTAs), like NAFTA;[2] and
3. ICSID membership would contribute to reinforcing Canada's image as a investment friendly country.[3]

Because of these benefits joining ICSID has been on the federal government's agenda for many years but accession has been delayed due to the resistance some provinces. Despite long standing discussions regarding whether Canada become an ICSID party, however, there has been relatively little debate in Car regarding the distinctive features of the ICSID process and what subjecting Ca to ICSID arbitration would mean in practice.

This note examines an issue seldom discussed by those advocating Canadian accession to ICSID: the limited possibilities for review of ICSID awards. An av

issued by an ICSID tribunal in favour of a foreign investor against Canada can challenged before domestic courts unlike other arbitral awards. All ICSID part states are obliged to ensure that their courts simply enforce an ICSID award a was an order of the court. There are no grounds upon which enforcement ma refused. ICSID awards can be challenged in an annulment proceeding before tribunal internally appointed by ICSID but only on very narrow grounds. Most significantly, unlike domestic courts reviewing other investor-state arbitration awards, ICSID tribunals cannot take public policy concerns into account.

This reduction in the scope for challenging awards could have significant implic for Canada, because such challenges are common in investor-state arbitration. cases under NAFTA Chapter 11 to date, states have challenged 3 of the 4 awa made against them.[4] Each of these challenges, including one by Canada, re part, on public policy grounds.[5] This note examines the possible consequenc the more limited review of investor-state awards that is permitted in relation t arbitrations under the ICSID Convention rules.

**The current process for challenging investor-state arbitration awards**

Canada provides for investor-state arbitration in most of its FIPAs and FTAs. T scheme under Chapter 11 of the NAFTA is typical. Under Chapter 11, an Amer Mexican investor may make a claim for compensation against Canada for losse suffered as a result of a Canadian measure that breached Canada's obligations Chapter 11.[6] Until Canada joins ICSID, investor-state arbitrations under Ch 11 may be held only under the arbitration rules of the United Nations Commiss International Trade Law (UNCITRAL)[7] or, in some circumstances, the ICSID Additional Facility Rules.[8] The Additional Facility rules are only available wh either the investor's state or the state complained against is party to the ICSI Convention. At the moment, the United States is the only NAFTA party that ha joined ICSID. As a result, in arbitral claims against Canada, the Additional Fac rules can be only used when the investor is American. The choice of rules is up the investor. An award against Canada in an arbitration under either of these may be challenged in the domestic courts in the place of arbitration.[9]

The law of the place in which the award is made will determine the standards applied by the court hearing the challenge. In practice NAFTA arbitrations ha been held either at a location within the country complained against or in one other NAFTA states. So, a challenge to an award against Canada would be m the court of the North American jurisdiction in which the arbitration took place.

Canada, Mexico and several US states, as well as more than 50 other countrie adopted the UNCITRAL Model Law on International Commercial Arbitration (Mo Law), which governs challenges to arbitration awards.[10] The grounds for re arbitration awards under the Model Law and most other arbitration laws are lir reflecting one of the basic goals of arbitration which is to produce a final awar the same reason, Canadian courts have interpreted the scope of these ground narrowly.[11] The approach taken by Canadian courts in investor-state cases mirrored the approach taken in international commercial arbitrations between p parties.[12]

Under the Model Law a party may seek to set aside an award on a variety of g relating to whether the arbitration met basic standards for due process. As we award may be set aside if the tribunal exceeded its jurisdiction. Similar groun be relied on in ICSID annulment procedures. Under the Model Law, however, may also be set aside if they are contrary to the public policy of the jurisdictio which the application to set aside the award is brought.[13] This public policy is not available in arbitrations under the arbitration rules of the ICSID Convention.[14] While the public policy ground is rarely invoked in private commercial arbitration, it has been raised in all three judicial reviews of NAFTA investor-state arbitrations, though without success. In these cases, the courts said that in order to be contrary to public policy an award must "offend our lo principles of fairness in a fundamental way."[15] While this suggests a very hi standard, the Federal Court of Canada in the only NAFTA challenge brought by Canada suggested a broader scope for review, including an enquiry into the m the decision. In SD Myers, the court said that it would be contrary to public p enforce awards that exceeded the tribunal's jurisdiction, and that awards that patently unreasonable were beyond the jurisdiction of the tribunal.[16]

The law regarding the scope of review under the public policy ground is not ye settled and public policy is likely to vary from one jurisdiction to the next. The broader review based on public policy considerations contemplated in SD Myer

not be applied in courts outside of Canada. As well, if Canadian courts were t
SD Myers to set aside awards liberally, it is possible that arbitrators would dec
to hold arbitrations in Canada with a view to avoiding Canadian judicial review
Nevertheless, public policy may provide an important ground for challenging a
against Canada and other states, at least in some cases.

**Where ICSID and the current framework differ**

One effect of joining the ICSID Convention is that, a foreign investor from a c
with which Canada has a FIPA or an FTA that provides for investor-state arbitr
will be able to choose to have its claim arbitrated under the arbitration rules c
ICSID Convention. Where the investor does so, Canada will have no recourse
domestic courts to challenge any eventual award against it and will not be abl
seek review of such an award on public policy grounds. Under the ICSID annul
procedures, the only grounds on which annulment may be granted are where t
tribunal: (i) was not properly constituted, (ii) has manifestly exceeded its pow
(iii) was corrupt, (iv) seriously departed from a fundamental rule of procedure,
failed to state the reasons on which its award was based.[17]

To initiate an annulment proceeding, Canada must request the Chairman of th
Administrative Council of ICSID to appoint an ad hoc committee to review awa
Members of the committee cannot have sat on the original panel, must be of a
different nationality from that of the original arbitrators and more significantly
may be a national of either state affected by the dispute or have been designa
the Panel of ICSID Arbitrators by those states.[18] In the interest of neutrality
members of any ad hoc committees have no ties with interested states. As w
unlike domestic judges, they have no experience with public interest considera
nor any mandate to take such considerations into account.

Joining the ICSID Convention could lead to the following scenario for Canada.
investor makes a claim against Canada under NAFTA Chapter 11 alleging that
Canadian measure intended to achieve some important policy objective, like th
protection of the environment, is contrary to Canada's obligations under Chapt
and has caused a loss to the investor. The investor chooses to arbitrate unde
arbitration rules of the ICSID Convention. If the arbitral tribunal made an awar
against Canada, Canada could not seek to have the award set aside in a dome
court at the place of arbitration and could not argue that the award was contra
public policy, either because it offends local principles of fairness in the place o
arbitration or, if the application was being heard in Canada, because the award
patently unreasonable, applying the test in SD Myers. Under ICSID, the annul
committee could consider whether the tribunal had "manifestly exceeded" its
jurisdiction in the award, but this is a higher standard than a simple excess of
jurisdiction which is all that is required to set aside an award in a domestic juc
review under the Model Law.

**Conclusions**

Even though Canada appears to be on the verge of its long anticipated accessi
the ICSID Convention, there has been relatively little discussion of the technica
implications of joining ICSID. Canadian accession to ICSID may have some m
positive benefits from the perspective of Canadian investors because it gives th
access to an arbitration process that is well known and specifically adapted for
investor-state arbitration. It may also enhance international perceptions of Ca
as a welcoming place to invest in a small way. There are, however, a number
distinctive features of the ICSID process which may have an impact on Canada

In this short piece we have only addressed one of these features. Once Canad
joins ICSID, foreign investors in Canada may be encouraged to choose the ICS
Rules with a view to avoiding the prospect of costly and time consuming judici
review proceedings and narrowing the scope for Canada to seek to set aside a
award against it. Where they do, accession will have the effect of subjecting C
to a process that is not safeguarded by judicial review, whether in Canadian o
foreign courts, and which does not provide the backstop protection of a review
ensures that awards against Canada are not contrary to public policy. Compar
the current situation, such a limited review will curtail Canada's ability to chall
investor-state awards against it, even those that are manifestly wrong or abho
to public policy, though the real effect of the different review standard in ICSID
arbitrations is hard to predict.

Of course, Canada's accession to ICSID will also mean that Canadians investin

abroad will benefit from being able to avoid judicial review and review on publ
policy grounds of awards ordering foreign states to compensate them by choos
ICSID arbitration. But the cases brought against Canada under NAFTA to date
make clear that Canada must also consider the impact of ICSID accession on i
exposure to investor-state claims.

*Common Law Section, Faculty of Law, University of Ottawa. Both are Membe
the faculty's International Law Group and teach a course on international comr
arbitration.

[1] The ICSID Convention (Convention on the Settlement of Investment Dispu
between States and Nationals of Other States, done at Washington, 18 March
575 U.N.T.S. 159, reprinted in 4 I.L.M. 532 (1965) [ICSID Convention].

[2] Done December 17, 1992, reprinted in (1993) 32 I.L.M. 605 [NAFTA].

[3] As presented during the second reading in the House of Commons of Bill C
Mr. Ted Menzies, Parliamentary Secretary to the Minister of International Trade
the Minister of International Cooperation, CPC; available at
<http://www2.parl.gc.ca/HousePublications/Publication.aspx?
Mode=1&Parl=39&Ses=1&Language=E&DocId=2945948&File=0#Int-2081960>

[4] United Mexican States v. Karpa (2005), 74 O.R. (3d) 180 (C.A.)[Feldman
Review]; Canada v. S.D. Myers, [2004] FC 38 (CanLii) (TD)[Myers Review]; M
v. Metalclad Corporation, (2001) B.C.J. No. 950, supplementary reasons (2001
No. 2268 (S.C.)(notices of abandonment of appeal filed by both parties Octobe
2001). No judicial review was sought by Canada of the decision in Pope & Talb
Interim Award (June 26, 2000)(available at
<http://www.naftaclaiims.com/Disputes/Canada/Pope/PopeInterimMeritsAward
In one case, a losing investor has applied to court in Mexico to vacate the awa
International Thunderbird Gaming Corporation v.Mexico, Award, January 26, 2
available at
<http://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Awar

[5] Myers Review, ibid.

[6] NAFTA, supra note 2, Arts. 1116, 1117.

[7] UN General Assembly, 31st Session, Supplement 17 at 46, Chapter V, Sect
Arbitration Rules of the United Nations Commission on International Trade Law
approved by the UN General Assembly on 15 December 1976, UN Doc. A/31/1
1976, reprinted in UN, UNCITRAL Arbitration Rules (New York: United Nations,
1977)[UNCITRAL Rules].

[8] NAFTA, supra note 2, Art. 1120. The ICSID Additional Facility for the
Administration of Conciliation, Arbitration and Fact-Finding Proceedings was cre
by the Administrative Council of ICSID on 27 September 1978. ICSID, ICSID
Additional Facility Rules for the Administration of Conciliation, Arbitration, and
Finding Proceedings, [1979] Doc.ICSID/11. Schedule C to the Additional Facili
out the Arbitration (Additional Facility) Rules [Additional Facility Rules].

[9] In any court proceeding to enforce an award, the law of the jurisdiction in
enforcement is sought will govern the proceeding. In Canada, Mexico, and in
United States, the grounds that may be relied to refuse enforcement are esser
the same as the grounds for setting aside an award.

[10] E.g., Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.), Schedul
34. An example of provincial legislation is the International Commercial Arbitr
Act, R.S.O. 1990, c. I.9[ICCAA].

[11] E.g., Quintette Coal Limited v. Nippon Steel Corporation, (1990), 50 B.C.L
(2d) 207 (C.A.), leave to appeal to the Supreme Court of Canada refused (199
B.C.L.R. (2d) xxvii; Schreter v. Gasmac Inc. (1992), 7 O. R. (3d) 608 (Gen. Di
additional reasons (1992), 89 D. L. R. (4th) 380.

[12] C.f. Myers Review, supra note 4.

[13] Article 34(2)(b)(ii) of the Model Law states that an arbitral award may be
aside if "the award is in conflict with the public policy of this State." Under fed
legislation, the "State" is Canada and so the test is whether it would be contra
the public policy of Canada. Under the Ontario act, public policy is adjudged ag
Ontario's public policy. See section 1(6) ICAA, supra note 10. A court applying
Model Law may also refuse recognition and enforcement of the award on the b
that recognition and enforcement would be contrary to public policy (Article
36(1)(b)(ii)).

[14] As well, under the Model Law an award may be set aside if the award dea
a subject matter not capable of arbitration in the jurisdiction in which the arbit
was held. This ground cannot be relied on in ICSID annulment proceedings eit

[15] Feldman Review, supra note 4, at 196.

[16] Myers Review, supra note 4. The court defined patently unreasonable de
as exhibiting "such as a complete disregard of the law so that the decision
constitutes an abuse of authority amounting to a flagrant injustice" at para. 55

[17] ICSID Convention, supra note 1, Article 52(1).

[18] ICSID Convention, ibid., Article 52(3). See Lucy Reed, Jan Paulsson, and
Blackaby, Guide to ICSID Arbitration (The Hague: Kluwer Law International, 2(

at 96 - 110.
[19] Six new notices of intent relating to claims against Canada were filed in 2 alone (see Department of Foreign Affairs and International Trade web site, ava at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/di diff/gov.aspx?lang=en>.

## Announcing the publication of:

The Oxford Handbook of International Trade Law
(edited by Daniel Bethlehem, Donald McRae, Rodney Neufeld, Isabelle Van Da

This comprehensive handbook provides commentary and critique on a wide ra questions relating to the discipline of international trade law and its intersectio states and other facets of the international system. It also examines the econ and institutional context of the world trading system as well as its wider frame

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