Canada*

I. Introduction

Canada has taken a very active role in negotiating several new free trade agreements and bilateral investment treaties in 2007. This article will discuss the negotiations, review new developments in foreign investment law, and analyze a new Canadian Supreme Court decision that confirmed the automatic incorporation of international law into Canadian law.

II. Canadian Free Trade Agreements

Canadian trade policy has shifted significantly in the second year of Stephen Harper's administration. Previously, Canada signed bilateral free trade agreements (FTAs) only with Chile, Costa Rica, Israel, and the United States.[1] In 2007, however, Canada concluded negotiations with the European Free Trade Association (EFTA);[2] it launched new FTA negotiations with the Dominican Republic, Caribbean Community and Common Market (CARICOM),[3] Colombia, and Peru; it renewed negotiations with Singapore, Republic of Korea, and four Central American countries;[4] and it is exploring a potential FTA with Jordan. In total, Canada currently is pursuing free trade agreements with twenty-nine countries.

The reason for the flurry of FTAs is that Canada worries that it is falling behind the United States.[5] Also, the impasse in the World Trade Organization's (WTO) Doha round

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1. The FTA with the United States was superseded by the North American Free Trade Agreement (NAFTA), which also includes Mexico. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605(1993) [herinafter NAFTA]; Free Trade Agreement, U.S.-Can., Dec. 22, 1987-Jan.2, 1988, 27 I.L.M. 281 (1988).

2. Members of EFTA include Iceland, Norway, Switzerland, and Liechtenstein. European Free Trade Association—EFTA, http://www.efta.int (last visited Feb. 18, 2008).

3. Members of CARICOM include fifteen Caribbean states. Caribbean Community (CARICOM) Secretariat, CARICOM Member States (2008), http:/www.caricom.org (follow Community hyperlink) (last visited Feb. 18, 2008).

4. El Salvador, Guatemala, Honduras, and Nicaragua.

5. Foreign Affairs and International Trade Canada, Economic Analysis of Prospective Free Trade Agreement(s) Between Canda and the Countries of the Andean Community, 3-4 (June 2007), http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/andean-andin/FTA-ALE-and.aspx.

of multilateral negotiations has created incentives for countries to instead pursue their interests on the bilateral and regional level.

A. Colombia and Peru Style FTAs

Negotiations with Colombia and Peru are good examples of Canada's new FTA policy. The Colombia and Peru FTAs are expected to be broad in scope (i.e., covering goods, services, and investment) and are modeled after the recently signed U. S. FTAs with these countries.[6] The U.S. agreements eliminate all industrial tariffs within ten years and most agricultural tariffs within seventeen years. Canada likely will aim for similar market access for its products.

The United States achieved better treatment for its service providers in Colombia and Peru than under the General Agreement on Trade in Services (GATS). For example, GATS applies only to those services that WTO members have explicitly listed in their schedule of commitments, while the U. S. FTAs with Colombia and Peru apply to all services except those explicitly excluded. Canada will aim to match these service benefits in its FTA negotiations.

Canada will also seek an investment chapter in the Colombia FTA that is similar to NAFTA Chapter 11 and comparable to the United States-Peru FTA.[7] Similar to a bilateral investment treaty, an investment chapter would protect foreign investments made by a national or enterprise of a FTA member country that has made or is seeking to make a foreign investment in another FTA member country. NAFTA Chapter 11, for example, permits an aggrieved investor or its foreign subsidiary to initiate an arbitration claim against a NAFTA government by alleging that the government breached certain principles of customary international law, effectively, non-discrimination, due process of law, and expropriation.[8] Canada likewise is considering an investment chapter for the Peru agreement, although the investment provisions likely will not be substantial because Canada already has a separate bilateral investment treaty with Peru.

B. EFTA Agreement and Impact of Doha Round Impasse

Canada's newly negotiated agreement with EFTA is notable because it is not based on Canada's regional interests,[9] and it is Canada's first transatlantic FTA. These policy objectives perhaps explain the different level of market access obtained in the EFTA agreement and what Canada seeks to achieve in negotiations with other countries, such as Colombia or Peru. The EFTA agreement is limited in scope, covering primarily trade in goods, and it is not expected to include substantial new obligations on services, investment, or intellectual property. The EFTA agreement is also between developed coun-

6. *Id*. at 14.

7. The agreements have not yet been ratified by the U.S. Congress. The Peru agreement passed the House on November 8, 2007. The Library of Congress, Summary, http://thomas.loc.gov/cgi-binbdquery/z?d110:H.R.3688: (detailing the timeline of H.R. 3688, which took effect Dec. 14, 2007) (last visited Feb. 18, 2008).

8. *See* NAFTA, *supra* note 1, at ch. 11.

9. The United States also does not have a FTA with CARICOM, but the details of Canada's negotiations with CARICOM are sparse.

tries, which generally have low tariffs on industrial goods. Thus, the agreement is unlikely to achieve significant market access for Canadian products.

The agreement may, however, impact agricultural trade. The parties signed separate bilateral agricultural agreements with EFTA members and Canada purportedly achieved significant market access for Canadian agricultural exports. Canada, however, is not a substantial exporter of agricultural products to EFTA.[10] Moreover, the bilateral agriculture agreements are not comprehensive, eliminating and reducing tariffs only on certain agricultural products.[11]

The EFTA agreement, however, must be seen in context of the Doha round. The Doha negotiating round was expected to produce substantial liberalization in agriculture trade that would benefit major agricultural exporters like Canada. Thus far, the WTO members have deadlocked on their agriculture commitments, stalling the negotiations and creating incentives for states to instead pursue their agricultural interests on a bilateral and regional basis. The primary benefits of the EFTA agreement appear to be in the agriculture sector. Although the benefits of the agreement may not be substantial, it may serve as a model for future agreements that are not comprehensive like U.S. FTAs but which may achieve substantial market access in agriculture.

C. WTO Developments

The signing of the 2006 Softwood Lumber Agreement between the United States and Canada concluded the WTO disputes over softwood lumber. Nonetheless, Canada has been involved in several other significant disputes in the WTO, most notably over U. S. agricultural subsidies.

1. *U. S. Agricultural Subsidies*

On November 9, 2007, Canada requested a WTO dispute settlement panel to review U. S. agricultural subsidies.[12] Brazil filed a similar request on the same day.[13] Canada and Brazil allege that the United States has provided subsidies in excess of its commitments under the WTO Agriculture Agreement (AA). The two cases, which are likely to be consolidated into a single proceeding, come on the heels of a WTO panel and Appellate Body decision that concluded that U.S. subsidies to the cotton industry violated the AA and the Agreement on Subsidies and Countervailing Measures (SCM).[14]

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10. The Canadian Ministry of Agri-Good reports that in 2006 Canada exported $76 million to EFTA countries in agri-food products. *See* Press Release, Agriculture and Agri-Food Canada, Canadian Agriculture to Benefit from Trade Deal with European Free Trade Association, June 15, 2007, *available at* http://www.agr.gc.ca/cb/index_e.php?s=n&s2=2—7&page=n70615a. In comparison, Canada's agri-food worldwide exports for 2006 were $27.6 billion, and $1.8 billion to the E.U. Statistics Canada, compiled by Agriculture and Agri-Food Canada.

11. *See* Press Release, *supra* note 10.

12. *See* Request for the Establishment of a Panel by Canada, *United States—Subsidies and Other Domestic Support for Corn and Other Agricultural Products*, WT/DS357/12 (Nov. 9, 2007).

13. *See* Request for the Establishment of a Panel by Brazil, *United States—Domestic Support and Export Credit Guarantees for Agricultural Products*, WT/DS365/13 (Nov. 9, 2007) (Brazil dropped its initial claim on export credit guarantees and now it is substantially the same as Canada's claim).

14. Panel Report, *United States—Subsidies on Upland Cotton*, WT/DS267/R (Sept. 8, 2004).

As part of its WTO commitments, the United States agreed to limit the amount of subsidies having a direct effect on agricultural markets to $19.1 billion annually, not counting exempt subsidies such as those qualifying as green box subsidies.[15] The *Upland Cotton* case challenged the United States' classification of its subsidy programs. The WTO panel and appellate body found that certain subsidy programs that the United States notified to the WTO as permissible green box subsidies did not fully meet the green box criteria. Although the *Upland Cotton* case did not rule directly on the specific subsidy programs, it opened up those subsidy programs to challenge in other cases. The new Canadian and Brazilian claims aim to affirmatively establish that certain U.S. subsidies do not meet the green box criteria and, thus, that the United States exceeded its $19.1 billion cap on trade-distortive subsidies.

The timing of the Canadian subsidies case is important since the U.S. Congress is expected to renew the Farm Bill, which sets the level of domestic support to the U.S. agricultural industry for the years 2008-2013.[16] The Canadian and Brazilian cases likely are timed to add pressure on Congress to insert amendments into the Farm Bill that will address the alleged subsidies. Further, the Doha Round has stalled partly because states could not agree on the amount of cuts in domestic support to the agricultural programs. Major agricultural exporters like Canada and Brazil may be trying to achieve through the WTO dispute settlement system what they could not achieve in the Doha Round negotiations—substantial cuts in agricultural subsidies, particularly by the United States.

If Canada and Brazil are successful in their WTO challenge, the United States will face difficult choices. The Farm Bill may have to be amended to bring the subsidy programs into compliance, or the United States may have to make further concessions in the Doha Round. Otherwise, Canada and Brazil could seek authorization to retaliate against the United States by suspending concessions or obligations they gave to the United States under the WTO agreements. Other WTO members may also file new cases against the U.S. agricultural subsidies, which would add more pressure on the United States to amend its farm programs.

2. *Canadian Retaliatory Measures in EC—Hormones Dispute*

A WTO panel is expected to issue a report to the parties in *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*. In 1998, a WTO Appellate Body found that the European Community's (EC) ban on the importation of meat and meat products reated with certain growth hormones from Canada and the United States violated the Sanitary and Phytosanitary Agreement (SPS) because the ban was not based on a risk assessment.[17] When the EC failed to comply with the WTO ruling, Canada and the United States were authorized by the WTO's Dispute Settlement Body (DSB) to impose

15. Green box subsidies are permissible because they do not distort trade or effect production, or they have minimal effect on trade or production; examples include subsidies for agricultural research, pest and disease control, and infrastructural services. *See* Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World trade Orgnaization, Annex 1A, Multilateral Agreement on Trade in Goods, *available at* http://www.wto.org (last visited Feb. 18, 2008) [hereinafter Agriculture Agreement].

16. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002). The current 2002 Farm Bill is set to expire in 2007.

17. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, (Jan. 16, 1998) (adopted Feb. 13, 1998).

retaliatory measures against imports of products from EC states.[18] Canada subsequently applied a 100 percent *ad valorem* rate of duty on certain EC products.[19]

In 2003, the EC adopted new legislation purportedly amending the measure that the WTO appellate body concluded to be inconsistent with the SPS Agreement.[20] The new law left the import ban in place, but the EC notified DSB that the ban now was consistent with the WTO appellate body decision in *Beef Hormones* because the new law was based on a risk assessment.[21] Canada and the United States, however, refused to remove their retaliatory duties and argued that the EC's new law did not implement the WTO rulings in *Beef Hormones*, but simply relabeled its earlier ban, and that there continued to be no scientific basis for the ban.[22] The EC subsequently brought this challenge against the Canadian retaliatory measure.

The EC claim is novel because it challenges Canadian and United States' retaliatory measures imposed with the DSB's authorization to remedy a WTO violation by the EC. Under Article 22.8 of DSU, the retaliatory measures must be temporary and applied only until the inconsistent measure is removed.[23] But the parameters of this rule are unclear, as no panel has interpreted the provision. Canada and the United States argue that the EC's import ban has not been removed. The EC argues the measure was removed when it adopted the new law, and a WTO panel must determine whether the new law is consistent with the *Beef Hormones* rulings in order for Canada and the United States to continue applying retaliatory duties. The WTO panel could shed light on how the removal of a WTO inconsistency is determined under Article 22.8 of DSU.

III. 2007 Developments in Canadian Bilateral Investment Treaties and Dispute Resolution

In 1989, there were less than 400 bilateral investment treaties (BITs) in force worldwide.[24] By the end of 2006, that number increased to over 2,500.[25] During 2007, Canada pursued and, in some cases, finalized BITs with a number of countries around the world. Also of significance to Canadian investors, is Canada's long-awaited signing of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the "ICSID Convention").

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18. *See* Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, *Beef Hormones*, WT/DS48/ARB (July 12, 1999).

19. *See* European Union Surtax Order, P.C. 1999-1323. 28 Jul. 1999, Canada Gazette Part II, Vol. 133, No. 17, SOR/99-317.

20. Council Directive 2003/74/EC, 2003 O.J. (L 262).

21. *See* Communication from the European Communities, *Beef Hormones*, WT/DS48/20 (Oct. 28, 2003).

22. Minutes of Meeting held on Nov. 7, 2003, paras. 30-31, WT/DSB/M/157 (Dec. 18, 2003).

23. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22.8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uroguay Round, 33 I.L.M. 1125 (1994) *available at* http://www.wto.org [hereinafter DSU].

24. Development Implications of International Investment Agreements, IIA Monitor No. 2 (2007), UNCTAD/WEB/ITE/IIA/2007, *available at* http://www.unctad.org/en/docs/webiteiia20072_en.pdf.

25. *Id.*

A. BIT Negotiations Concluded in 2007

Following last year's BIT with Peru (BITs are also referred to in Canada as Foreign Investment Protection and Promotion Agreements or FIPAs), Canada concluded BITs with India and Jordan in 2007. The Canada-Peru BIT also entered into force on June 20, 2007.

On June 16, 2007, Canada's Minister of International Trade, David Emerson, announced that Canada had concluded negotiations on a BIT with India following a meeting in Toronto with his Indian counterpart, Kamal Nath, India's Minister of Commerce and Industry.[26] Shortly thereafter, on July 13, 2007, following a meeting in Ottawa with Jordan's King Abdullah, Prime Minister Harper announced the Jordan-Canada BIT.[27] The final texts of these BITs are still being finalized. As was the case with Canada's BIT with Peru, the BITs with India and Jordan are also based on the 2004 Model and are expected be similar to the Peruvian BIT.

B. BIT Negotiations with China

Canada is currently negotiating a BIT with China, to be concluded in early 2008. As was the case with Canada's most recent BITs, Canada continues to negotiate on the basis of its 2004 Model FIPA, which contains a comprehensive set of procedural rights and obligations intended to ensure the effectiveness of the investor-state dispute settlement mechanism. Canada's twenty-two other BITs currently in force that were not negotiated on the 2004 Model FIPA are also generally more detailed and contain more substantive obligations and procedural requirements than the approximately 100 Chinese BITs currently in existence.

Given the divergence in both substantive and procedural obligations among Canada and China's BITs, several key issues have arisen in the context of the negotiations. These include the following: (1) a pre-arbitration administrative review process; (2) consequences of commencing domestic court proceedings; (3) standing; (4) enforceability of awards; (5) transparency; and (6) governing law.

C. Administrative Review Process

China's recent BIT with Germany provides that before an investor can bring a claim against China to investor-state arbitration, it must first submit the claim to an administrative review process. If the matter has not been resolved to the satisfaction of the investor within three months, the investor can then proceed to investor-state arbitration. It is argued that the administrative review mechanism allows the relevant Chinese officials to become aware of the problem and attempt to resolve it prior to commencing investor-state proceedings under the BIT.

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26. Hon. David L. Emerson, Minister of Int'l Trade, Address to the Indo-Canada Chamber of Commerce (June 16, 2007), *available at* http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication_id=385229&Language=E&docnumber=2007/26.

27. Press Release, Prime Minister's Office, Prime Minister Harper Concludes Successful Meetings with King Abdullah II of Jordan (July 13, 2007), *available at* http://www.pm.gc.ca/eng/media.asp?category=1&id=1752.

D. Fork in the Road

Canada's 2004 Model FIPA requires that an investor waive its right to initiate or continue domestic proceedings with respect to the measure of the host government that is alleged to be a violation or breach of the FIPA or BIT. The commencement of domestic proceedings does not preclude a BIT claim as long as the investor discontinues or completes the domestic process within the time limitations under the BIT. Many other BITs require that the investor must choose between domestic proceedings and international arbitration, a so-called "fork in the road" process. Once domestic proceedings have been commenced, the investor is precluded from bringing a claim under the BIT. Negotiators are considering whether such a "fork in the road" process in the Chinese BIT would unduly restrict access to BIT arbitrations and the substantive protections afforded by the BIT.

E. Standing

Canada's 2004 Model FIPA permits an investor to bring a claim on its own behalf and/or on behalf of an enterprise it owns or controls for damages resulting from a violation of the BIT. Where a claim is brought on behalf of an enterprise, the award is payable directly to the enterprise. Many other BITs, including China's existing BITs, contain a more general provision regarding dispute settlement and an investor's right to bring a claim for damages for breach of the BIT. The distinction between damages to the investor and damages to the enterprise it owns or controls is more relevant where the investor owns or controls the enterprise but is not the sole shareholder.

In light of the corporate structures of enterprises and joint ventures doing business in China, negotiators are considering whether there will be an appreciable difference between damages to the investor and damages to the enterprise and whether a general provision would afford investors adequate protection.

F. Enforceability of awards

Under Canada's 2004 Model FIPA, the parties have an obligation to provide for the enforcement of awards in their territory. In order to ensure that the 1958 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "New York Convention") can be invoked to enforce awards resulting from claims brought under Canada's BITs, it is usually stipulated that the requirement of the New York Convention for consent in writing is met and that a claim under the BIT is deemed to arise out of a commercial relationship or transaction, i.e., a commercial dispute, for purposes of the New York Convention.

Generally, China does not include such specific enforceability of awards provisions in its BITs. Negotiators are considering whether the BIT, consistent with Canada's current BITs and 2004 Model FIPA, must include a provision deeming the dispute commercial in order to ensure an enforceable arbitral award in China and other jurisdictions.

G. Transparency

Canada's 2004 Model FIPA contains several transparency provisions that permit public access to documents, open hearings, and publication of the award. Most other existing BITs, including Chinese BITs, do not include such provisions.

H. Governing Law

Canada's 2004 Model FIPA includes a governing law provision that indicates the arbitral tribunal shall decide the dispute in accordance with the BIT and applicable rules of international law. Some BITs do not contain any such provisions. Investors should consider the implications of removing this type of provision from the BIT or the implications of adding a reference to domestic law in the governing law provision.

I. Future BIT Negotiations

Canada and Kuwait held their inaugural round of BIT negotiations from September 10-12, 2007, in Ottawa, Canada. Exploratory discussions are well underway with Indonesia and Vietnam. Canada has targeted a number of other countries as future BIT partners, which include: the Dominican Republic, Hong Kong, Pakistan, Uzbekistan, Mongolia, Jordan, Paraguay, Morocco, and the United Arab Emirates. Certain African countries have also been identified by Canadian officials as priorities, including Libya, Madagascar, Tanzania, and Algeria.

J. Canada's Signing of the ICSID Convention

On March 30, 2007, then Minister of Foreign Affairs, Peter MacKay, introduced the Settlement of International Investment Disputes Act in the House of Commons.[28] This followed Canada's signing of the ICSID Convention[29] on December 15, 2006. The bill is now at the committee stage in the legislative process and currently before the Standing Committee on Foreign Affairs and International Development. It will then pass back to the House of Commons for a third reading before being considered by the Senate and ultimately receiving Royal Assent, after which it becomes law and will enter into force on a day to be fixed by order of the Governor in Council.

The bill, which will ensure that ICSID arbitration awards are recognized and enforced in Canada, must be adopted prior to ratification of the ICSID Convention. Because of Canada's federal structure, the provinces must also adopt legislation to support the ICSID Convention. To date, Ontario, British Columbia, Newfoundland and Labrador, Nunavut, and Saskatchewan have passed such legislation.

Canada's signing of the ICSID Convention will be of particular interest to investors in Canada, the United States, and other countries with which Canada has negotiated BITs due to the private investor-state mechanisms that enable investors to sue host govern-

28. *Canada Moves Closer to ICSID Convention*, 62 Disp. Resol. J. 12 (2007).

29. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (1966), *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

ments who fail to comply with their investment obligations and thereby cause damage or loss to foreign investors. Under the investment dispute settlement provisions of Canada's FTAs (including NAFTA's Chapter 11) and Canada's BITs, disputes between Canadian investors and a host government may be resolved through arbitration under the ICSID Convention, the Additional Facility Rules of ICSID, or the ad-hoc UNCITRAL Rules. Canada, however, must be a Party to the ICSID Convention before a dispute brought by a Canadian investor can proceed under the ICSID Convention. The signing of the ICSID Convention has therefore been long-awaited as Canadian investors have, until now, been precluded from choosing arbitration under the auspices of the ICSID Convention.

IV. Controversy Over Foreign Investment

The issue of foreign investment review continued to generate controversy in Canada during 2007. The source for this controversy was the ongoing acquisition by non-Canadian investors of domestic companies, many of them icons of corporate Canada.

Leading Canadian companies that were acquired by foreign investors in 2007, or were the targets of pending foreign takeover bids, included: Alcan; Algoma Steel; Cognus Inc.; Prime West Energy Trust; Stelco; and Abitibi Consolidated, Inc. When added to the tally of foreign-acquired companies in 2006 (e.g., Falconbridge, Inco, Hudson's Bay, and Dofasco), it is no wonder that Fortune Magazine has described the last two years as constituting the biggest foreign invasion of Canada since the War of 1812.[30]

A. Concerns About the ICA

The unabated string of foreign acquisitions in 2007 led to a growing chorus for federal government intervention and specifically a re-appraisal of the effectiveness of the Investment Canada Act (ICA).[31] There was even a suggestion by some politicians that all transaction reviews under ICA should be suspended until this assessment of the legislation could be completed.

B. Establishment of Review Panel

The federal government did not agree to suspend the ICA's application. In July 2007, however, it followed through on a commitment made in 2006 and announced the establishment of a special panel (the "Panel") to review the effectiveness of Canada's foreign investment laws and their impact on Canadian domestic and international competitive-

30. *See* Erik Heinrich, *Canada's Largest Companies Feel Squeeze of the Buyout Boom*, Fortune, Sep. 14, 2007, *available* at http://money.cnn.com/2007/09/12/news/international/100259540.fortune/.

31. Investment Canada Act, R.S.C, c.28 (1st Supp) (1985). The ICA establishes a renew/notification process that applies to all acquisitions by non-Canadians of Canadian businesses. *Id*. at § 36; Heinrich, *supra* note 30.

ness.[32] These laws include not only the ICA, but also various statutes imposing sector-specific limitations on foreign ownership.[33]

The Panel, which consists of a mix of business and legal representatives, formally launched its consultation process with the release of a discussion paper entitled *Sharpening Canada's Competitive Edge* (the "Consultation Paper").[34] According to the Consultation Paper, the Panel proposes to explore two broad themes: how best to encourage international investment by Canadians and how best to position Canada to be a world-leading location for talent, capital, and innovation.

Within these two broad themes, the Panel intends to focus on four areas of inquiry, two of which deal with foreign investment in Canada: (1) the effectiveness of Canada's investment policies, and (2) promoting Canada as a destination for talent, capital and innovation. The Panel will also review Canada's competition policies and consider how to promote Canadian direct investment abroad.

The Consultation Paper sets out a series of questions for each of the Panel's four focus areas. The responses to these questions are to form the backbone of the Panel's recommendations to the Minister of Industry, which are due by June 30, 2008.

Some of the key questions relating to foreign investment review include:[35]

- How important is domestic control and ownership of Canadian business activities to Canada's economic prospects and ability to create jobs and opportunity for Canadians?
- How important are company headquarters to Canada's economic prospects and ability to create jobs and opportunity for Canadians? How important are global divisional head offices? What factors influence their location?
- What, if any, changes to the investment review process would enhance Canada's competitiveness and improve Canadians' understanding of the benefits of [foreign direct investment]? Should the "net benefit" test [under the ICA] be adapted to reflect the new competitive environment? If so, how?
- What changes, if any, are required to Canada's sectoral investment regimes to minimize or eliminate negative effects on Canada's competitiveness?
- Does Canada's approach to mergers strike the right balance between consumers' interest in vigorous competition and the creation of an environment from which Canadian firms can grow to become global competitors?
- What mix of policy changes would be required to make Canada the preferred point of entry to, and location in, the North American market for the high-value activities of non-North American business entities?

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32. Press Release, Industry Canada, Canada's New Government Creates Competition Policy Review Panel (July 12, 2007), *available at* http://www.ic.gc.ca.

33. *Id.* These sectors include the telecommunications industry (Telecommunications Act); broadcasting industry (Broadcasting Act); airline industry (Canada Transportation Act); and financial services (Bank Act/Insurance Act/Loan & Trust Companies Act).

34. Competition Policy Review Panel, Consultation Paper, *Sharpening Canada's Competitive Edge* (Oct. 30, 2007), *available at* http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/vwapj/sharpening_e.pdf/$FILE/sharpening_e.pdf.

35. *Id.*

C. National Security and State-Owned Enterprises

In a related move, Canada's Minister of Industry announced that the federal government would be dealing directly with two specific foreign investment issues rather than leaving them to the Panel to consider: the need for specific guidelines on take-overs by foreign state-owned enterprises (SOEs) and the "creation of an explicit national security test" for the ICA.[36]

According to the Minister, the government recognizes these issues raise legitimate concerns that ought to be dealt with more immediately than the Panel's schedule would allow. The government will try to release any draft guidelines or amendments prior to year end. In an effort to reassure foreign investors, at least to some degree, the Minister also said that the government will not use any new rules to target specific countries or as a cover for blatant protectionism; and any new rules will not have retroactive application to pre-existing transaction proposals.

V. Automatic Incorporation of International Law into Canadian Law

Conventional academic and judicial wisdom in Canada has long held that international customary law is part of the Canadian common law. Thus, rules of customary international law may be identified and applied with the same force and effect as a common law rule, subject to a clear conflict with the expressed will of Parliament, in which case the latter prevails. This view is derived from early judicial recognition of the law of nations in English common law and Canadian courts have acted consistently with the premise,[37] but an unambiguous affirmation of the status of customary international law in this regard was lacking until the Supreme Court of Canada's decision in *R. v. Hape*.[38] In making its ruling, the Court left intact, without discussion, the generally understood companion principle that treaties ratified or acceded to by Canada are neither self-executing nor have any independent status in Canadian domestic law, absent legislative implementation by Parliament and/or, as necessary, by provincial legislatures, in accordance with the federal division of powers under the Constitution Act of 1867.[39]

Hape addressed the criminal prosecution in Canada of an alleged money launderer. The international overlay to a Canadian criminal trial arose when defense counsel pleaded protective provisions of the Canadian Charter of Rights and Freedoms, primarily directed to the exclusion of documentary evidence obtained by Canadian federal police investigators in the Turks and Caicos with the cooperation of local police authorities. International customary law came into play on the question of whether the Charter should apply at all to Canadian police conduct outside Canada in the territory of a foreign sovereign. De-

36. Honorable Jim Prentice, Speaking Points for an Address to the Vancouver Board of Trade (Oct. 9, 2007), *available at* http://www.ic.gc.ca.

37. *See, e.g.*, Heathfield v. Chilton (1767), 4 Burr. 2015, 98 E.R. 50, cited with approval in Saint John v. Fraser-Brace Overseas Corp. [1958] S.C.R. 263, at 268-269.

38. R. v. Hape, [2007] SCC 26 (Can.).

39. This is the well-known rule from Ontario (A.G.) v. Canada (A.G.) (Labour Conventions) [1937] A.C. 325 (P.C.), requiring the "transformation" of the international obligation into domestic legislation. *See* H. Scott Fairley, *External Affairs in the Constitution of Canada*, in Selected Papers in International Law: Contribution of the Canadian Council on International Law, 1972-1997, 79 (Y. Le Bouthillier et al eds., 1999).

parting from previous jurisprudence on point,[40] a majority of the Supreme Court in an opinion authored by Justice LeBel[41] found that the Charter could not be applied extraterritorially, on the basis that the provisions in Charter section 32(1) could not be interpreted to go that far and remain consistent with international law.[42] Prior to formulating his analytical approach and applying it to the facts of the case, Justice LeBel both confirmed and clarified previous judicial thinking on the role and status of international law as a matter of Canadian domestic law. Further discussion of Justice LeBel's decision is set forth below.

Justice Bastarache (joined by Justices Abella and Rothstein) and Justice Binnie each wrote separate opinions, concurring in the result that the conviction should be affirmed. The separate concurrences neither disputed the general propositions of the majority on the status of international law in Canadian law nor took issue with the majority's treatment of the related doctrine of comity and the statutory presumption of legislative conformity with international law. The Court split on issues of Charter analysis, methodology, and application to the specific circumstances of Canadian police conduct abroad and the appropriate consequences that should attach thereto in the context of a domestic criminal trial. In short, the two concurring opinions characterized all of those issues as being essentially matters of Canadian police conduct that did not engage or interfere with a foreign sovereign, such that international law had to be invoked for a proper resolution of the case.[43] This comment does not address any of those issues dividing the Supreme Court Justices.

A. Automatic Incorporation of Customary Law into Canadian Common Law

The principal clarification provided by the Court is its affirmation of the "adoptionist" theory that customary international law is part of the law of Canada. After noting leading English authority on point[44] and previous Canadian decisions supporting that view,[45] the Court recognized its failure to make the affirmation clearer in prior caselaw. Justice LeBel's decision fills that absence:

> Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may

40. *See* R. v. Cook, [1998] 2 S.C.R. 597 (Can.).
41. Justice LeBel was joined by Chief Justice McLachlin and Justices Fish, Deschamps and Charron. *Hape*, *supra* note 38.
42. *Id.* ¶ 93.
43. *See id.*
44. *Id.* ¶ 36.
45. *Id.* ¶ 37.

> violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.[46]

This affirmation by the Court provides the cornerstone for a long overdue comprehensive discussion of the relationship between international law and domestic law as interpreted and applied in Canada. Justice LeBel specifically details international authority recognizing the sovereign equality of states as a governing principle of customary law, together with the co-relative duties of non-intervention in the territory of and respect for the territorial sovereignty of foreign states.[47] Taken together, Justice LeBel affirms that these norms "cannot be regarded as anything less than firmly established rules of customary international law"[48]. Therefore, his majority opinion concludes:

> Every principle of customary international law is binding on all states unless superseded by another custom or by a rule set out in an international treaty. As a result, the principles of non-intervention and territorial sovereignty may be adopted into the common law of Canada in the absence of conflicting legislation. These principles must also be drawn upon in determining the scope of extraterritorial application of the Charter.[49]

The balance of the Court's general discussion of the treatment of international law under domestic law addresses the companion principle of comity between nations outside the context of binding legal rules, and the well-known, and here further invigorated, judicial presumption of statutory conformity with international law. Unlike the status of customary law in Canadian law, which had heretofore lacked the unambiguous judicial imprimatur of Canada's highest court, neither of these two established judicial tools were in any doubt. But the Court's elaboration of both is nonetheless significant.

B. Extraterritorial Jurisdiction in International Law and Parliament's Ability to Legislate Extraterritorially

The majority's analysis of the principal international law bases for asserting prescriptive or adjudicative jurisdiction—territoriality, nationality, and universality—is useful[50] but needs no further elaboration here. It is important to note, however, that the Court's care in its treatment of and the weight it gives to the limited mandate international law accords to extraterritorial acts is consistent with Canadian practice more generally in taking serious exception to the extraterritorial acts of other states, even to the extent of enacting blocking legislation to preclude judicial recognition and enforcement by Canadian courts of acts of other states so designated by Parliament.[51] There is no question that the extraterritorial zeal of other members of the international community, most notably that of the

46. *Id.* ¶ 39.
47. *Id.* ¶¶ 40-46.
48. *Id.* ¶ 46.
49. *Id.*
50. *See id.* ¶¶ 57-65.
51. *See, e.g.*, Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29.

United States,[52] has been and remains a perennial area of sensitivity for Canadian governments and legislators.

The Court makes clear that Parliament has the constitutional authority to legislate extraterritorially and has clearly done so on several occasions.[53] Nothing is said, however, on the perhaps still controversial subject of whether a provincial legislature could do the same thing.[54] At the end of the day, the LeBel majority concludes, with the aid of a contextual international law background, that the language of the Charter does not clearly provide for extraterritorial application and that, absent express clarity on point, applicable customary international law incorporated into Canadian common law, considerations of comity, and the presumption of conformity with international law all militated against any such interpretation of Charter section 32(1).

C. Concluding Comments and Prospects

Judicial awareness of the law of nations as part of the law of Canada will be a welcome development for some lawyers but also a problematic one for many. The sources of international law[55] are not a particularly familiar feature on the typical landscape understood by most practitioners. In Canada, international law may be less obscure for some criminal lawyers than their counterparts in civil and commercial litigation; however, the *Hape* precedent should resonate for all litigators, whatever their principal stripe.

Hape may encourage in Canada the possibility of more U.S.-style civil litigation fueled by alleged violations of international law. It has been suggested, for example, by way of objection to the assumption of "universal" jurisdiction by a U.S. federal court over a Canadian company under the Alien Tort Claims Act[56]—there based exclusively on alleged violations of international human rights law—that any such action properly belonged, if at all, in a Canadian court exercising appropriate *in personam* jurisdiction over the defendant.[57] While Canada lacks any comparable statutory authorization for civil causes of action under the law of nations,[58] *Hape* suggests that Canadian common law incorporating international customary law would give Canadian courts adequate subject-matter jurisdiction to entertain similar cases.

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52. See Fairley, *supra* note 39; H. Scott Fairley & John Currie, *Projecting Beyond the Boundaries: A Canadian Perspective on the Double-Edged Sword of Extraterritorial Acts*, in Trilateral Perspectives on International Legal Issues 119 (Michael K. Young & Yuji Iwasawa eds., 1996).

53. *Hape*, *supra* note 38, ¶ 66.

54. This issue had not been definitively resolved, but the balance of contemporary opinion suggests that provincial and federal powers to legislate contrary to international law are essentially symmetrical. *See* discussion in Gibran van Ert, *Using International Law in Canadian Courts* (Alphen aan Rijn: Kluwer Law International, 2002), pp. 58-65., *but see*, G.V. La Forest, *May the Provinces Legislate in Violation of International Law*, 39 Can. B. Rev. 78 (1961).

55. The most convenient authoritative summary of the basic categories for the "sources" of international law is found in the *Statute of the International Court of Justice* Art. 38(1), *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

56. Alien Tort Claims Act, 28 U.S.C. §1350 [hereinafter ATCA].

57. *See* Presbyterian Church of Sudan et al v. Talisman Energy Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

58. ATCA, *supra* note 56.

Canadian courts do take judicial notice of international law, just as they do of Canadian statute and common law.[59] As such, submissions of international law are to be distinguished from the typical approach of Canadian courts with respect to foreign law, which must be proved essentially as fact evidence, typically through expert affidavits.[60]

The *Hape* decision unambiguously affirms the appropriateness and importance of the international dimension to understanding the contextual will of the legislature and to fleshing out principles of common law independent of statutory enactments. The new recognition it has been accorded also holds promise, as suggested above, for broadening the scope of available argument in relation to governmental and private action in civil as well as criminal cases. Thus, *Hape* may have rendered the Canadian legal environment more hospitable to foreign litigants seeking to invoke international legal standards. In any event, *Hape* will remain important for its statements of general principle engaging the interpretation of Canadian law as a whole.

59. *See*, *e.g.*, The Ship North v. The King [1906] 37 S.C.R. 385 (Can.); *Jose Pereira E. Hijos S.A. v. Canada* (A. G.), [1997] 2 F.C. 84 (T.D.) (Can.); *Pan American World Airways Inc. v. The Queen* (1979), 96 D.L.R. (3d) 267 (F.C.T.D.) (Can.).

60. *See* JANET WALKER, CASTEL & WALKER: CANADIAN CONFLICT OF LAWS (6th ed. 2007) (looseleaf).