POSSIBLE REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) – UNCITRAL WORKING GROUP III

SUBMISSION OF THE GOVERNMENT OF CANADA ON THE INFORMAL DOCUMENTS PREPARED BY THE SECRETARIAT TO FACILITATE DISCUSSIONS AT THE SIXTH INTERSESSIONAL MEETING OF WORKING GROUP III

(January 2024)

Canada thanks the Secretariat for its extensive work on issues relating to the proposed ISDS standing multilateral mechanism ("SM") and appellate mechanism ("AM"). Below are Canada's preliminary comments on the informal documents prepared by the Secretariat to facilitate the informal discussions at the Sixth Intersessional Meeting of Working Group III, namely the documents titled (1) *Possible Reform of ISDS – UNCITRAL WG III Draft Statute of a Standing Mechanism (Sept. 2023)*; (2) *Possible Reform of ISDS – UNCITRAL WG* III *Draft Provisions on Selection and Appointment (Sept. 2023)*; and (3) *Possible Reform of ISDS – UNCITRAL WG III Draft Provisions on an Appellate Mechanism (Sept. 2023)*.

These comments build on Canada's previous comments on the Secretariat's initial draft documents,[1] and are provided without prejudice to Canada's final position on the issues addressed below, or on these reform options generally.

1. Canada's Comments on *Possible Reform of ISDS – UNCITRAL WG III - Draft statute of a standing mechanism for the resolution of international investment disputes (Sept. 2023)*

Draft article 1 – Establishment and objective

In Draft article 1, Canada is open to considering a broad reference to the term "international investment disputes" ("IIDs"). Given the nature of this provision, it would allow *a priori* certain types of investment disputes to fall within the scope of the standing mechanism. However, we understand that the jurisdiction of the SM would be defined by the instruments listed by the Parties as provided in Draft article 8. Accordingly, it may not be necessary to define the term "international investment disputes" in draft article 1 or footnote 1 given that the specific jurisdiction of the SM would be defined pursuant to draft article 8.

Canada is of the view that it may be useful to also include general provisions in this draft article concerning the initial set up of the Tribunal (i.e., number of levels, location of seat, minimum number of Contracting Parties or financing required to establish the SM, and interaction with current ad hoc ISDS regime). However, these provisions could be subject to modification by the Committee of Parties and more detailed provisions on procedural matters could be developed by

[1] See e.g., Submission of the Government of Canada on the Initial draft on Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters (November 2021); and Communication by Canada on Appellate mechanism and enforcement Issues (undated).

the Committee of Parties at a later date, when there is more information regarding the membership/composition of Contracting Parties, available resources and instruments subject to the jurisdiction of the SM.

Draft article 2 – Structure of the Standing Mechanism

Please see Canada's comments on Draft article 4 relating to the composition of the First Instance Tribunal and Appeal Tribunal.

For efficiency, one Secretariat could be established to serve all levels of the SM.

Draft article 3 – Conference of the Contracting Parties

It is unclear what is intended by referring to the Conference of the Contracting Parties as the "legislative body" of the SM in Draft article 3(1) and Canada's preference would be to avoid this terminology. If regulations established by the Conference of the Contracting Parties are intended to be binding on the First Instance Tribunal and Appellate Tribunal, the Working Group may wish to have this expressly stated in the draft provisions.

The Conference of the Contracting Parties should decide on the rules of procedures that it wishes to establish. In turn, the Tribunal and Appellate Tribunal should be permitted to determine additional rules and regulations (which are not otherwise set out in the rules established by the Conference of the Contracting Parties) that are necessary for their routine functioning. Whether to establish Sub-Committees and the composition of such Sub-Committees is an issue that can be decided by the Conference of the Contracting Parties at a later stage.

Draft article 4 – First Instance Tribunal and Appeal Tribunal

Canada is open to considering different lengths of terms and options for renewal for Tribunal members as there are advantages and disadvantages related to the different approaches. One option would be for Tribunal members to be appointed for six-year terms, renewable once. A President and Vice President could be appointed to each level of the SM (e.g., first instance tribunal and appellate tribunal) on a randomized basis for a four-year non-renewable term. This may help to ensure independence and impartiality, given that the roles and responsibilities of each tier may differ. Appointments of the President and Vice President on a randomized basis could also reduce the risk of politicization of these positions.

Draft article 5 – Secretariat

Considerations regarding the establishment of a Secretariat can vary depending on whether the SM is established under the auspices of an existing international organization and/or with the support of existing institutions such as ICSID or the PCA. As such, it may be useful to consider Draft article 5 in the context of those discussions. Canada could support the establishment of a SM within the UN framework, as well as the use of existing institutions if it is more efficient to do so from a costs and resources perspective.

Additional clarification/commentary regarding the distinction between various responsibilities listed in Draft article 5 may be helpful. In addition to the limitations in Draft article 5(4), the

Working Group may wish to make it clearer that the executive director is responsible for the tasks in Article 5(3) with the support of staff members. Moreover, the Working Group may wish to consider extending the functions of the "Depositary" as referred to in other draft articles (see e.g., Draft Article 8).to the Secretariat.

Draft article 6 – Financing

Canada supports the proposal for the budget of the SM to be supplemented by fees charged to the disputing parties for services rendered by the SM. We also suggest that the term "annual" be deleted from the current language in Draft article 6(2) to allow for the possibility that the Conference of the Contracting Parties decides that Contracting Parties are only required to provide *initial* assessed contributions, as opposed to annual assessed contributions as per the approach of the Advisory Centre on WTO Law We would also be interested in further information on whether and/or how the users' fee-based income structure and approach of using existing institutions to administer disputes potentially impacts the assumptions and estimates in the informal document titled "Financing of a standing mechanism – An outline."

Draft article 7 – Status, privileges and immunities

Canada notes that the language in this draft article will be subject to the determination of how the SM is structured (i.e., as a standalone entity or as part of an existing organization).

Draft article 8 – Instruments subject to the jurisdiction of the Standing Mechanism

Canada is of the view that the jurisdiction of the SM should be expressly limited to international investment treaty disputes, in which the issues concerning the lack of consistency, coherence, predictability and correctness of arbitral awards, arbitrators and their appointment mechanisms, as well as cost and duration are most prevalent. Establishing a circumscribed and well-defined jurisdiction of the SM is also important from a financing and resource perspective. The Working Group could consider leaving it open to the Conference of the Contracting Parties to revisit the issue of jurisdiction after a certain period of time following the establishment of the SM, subject to available funding and other resources.

Draft article 8(2) is unclear as to how a Contracting Party may "declare" the extent to which claims are subject to the jurisdiction of the SM (e.g., appeal only). For transparency, Contracting Parties should be required to include such stipulations in the list of instruments submitted to the Depositary. Furthermore, the list of instruments maintained by the Executive Director (as Annex I of the Statue) should be required to be made publicly available.

In order to ensure consistency and coherence of under particular treaties, the Working Group may wish to give further consideration to expressly limiting the jurisdiction of the SM only to instruments where *all* treaty Parties consent to claims initiated under that instrument being subject to the jurisdiction of the SM. This would avoid the situation where only one treaty Party consents to the jurisdiction of the SM and others do not. Further consideration would also need to be given to the implications of this approach on Draft article 6(5) regarding the consequences of non-payment of contributions to the SM.

Draft article 9 – Jurisdiction of the First Instance Tribunal and the Appeal Tribunal

As per Canada's comments in Draft article 8, Canada is of the view that the SM should have exclusive jurisdiction for all claims initiated in accordance with any instrument subject to its jurisdiction. This may also require an additional provision to amend the written consent provisions in existing treaties to ensure that both disputing parties expressly consent to the jurisdiction of the SM. Our preference is not to include Draft article 9 (2), which extends the jurisdiction of the First Instance Tribunal to claims initiated by a national of a non-Contracting Party. Similarly, we do not support putting the onus on a majority of the Conference of Contracting Parties to object within 30 days of the submission of a claim to prevent an international investment dispute in which the claimant and respondent consent in writing being subject to the jurisdiction of the SM. In addition to resource and financing considerations, expanding the jurisdiction of the SM to include any IID to which the disputing parties consent, could also lead have other institutional implications.

Draft article 10 – Proceedings before the First Instance Tribunal

In Canada's view, the rules of procedure adopted by the Conference of the Contracting Parties ought to prevail. To the extent possible (i.e. in the absence of conflict), these procedures could also be supplemented by the provisions and procedural rules identified by the Contracting Parties in the applicable listed instrument.

Regarding grounds of appeal, Canada is of the view that those set out in the Statute of the SM ought to apply, except to the extent that the Contracting Parties provide for different grounds of appeal in their instrument of ratification or accession/list of instruments or in the applicable listed instrument.

Draft article 11 – Recognition and Enforcement

To the extent that Contracting Parties intend for final awards of the SM to be recognized and enforceable under existing agreements, such as the New York Convention and ICSID Convention, the Statute could contain express provisions confirming this understanding.

2. Canada's Comments on *Possible Reform of ISDS – UNCITRAL WG III Draft provisions on* an appellate mechanism

Draft provision 1 – Scope of appeal

Canada supports an AM that allows for appeals of decisions on jurisdiction as well as those on the merits. However, as per Canada's interventions during the 44th Session, our preference is to exclude interim measures as such decisions are typically case-specific and temporary in nature.

Draft provision 2 – Grounds for appeal

Canada is of the view that errors in the application and interpretation of the law should generally be appealable.

In our view, errors in the "application" of the law (e.g., the manner in which a rule of law is applied to certain evidence), can be distinguished from a "manifest error in the appreciation of the facts" (e.g., errors in actual findings of fact). Therefore, we support the inclusion of the term "application" in Draft provision 2 (1)(a).

As per Canada's comments during the 44th Session, we are of the view that the appeal of errors in the assessment of damages should not be limited to errors in the appreciation of the facts. As such, we question the need to expressly refer to "assessment of damages" as a specific ground for appeal in Draft provision 2(1)(b).

Canada is also of the view that the grounds for appeal listed in Draft provision 2(2) ought to be limited to existing grounds for set aside and annulment such as those as set out in Article 52)(1) of the ICSID Convention. The additional grounds in Draft provision 2(2) are unnecessary as they may overlap with existing grounds for set aside or annulment (for example, subparagraph (a) and (i)). Furthermore, additional grounds based on "international public policy" and "new or newly discovered facts" unduly widen the grounds of appeal and introduce uncertainty, which does not contribute to addressing the Working Group's objectives of addressing issues relating to consistency, predictability, coherence and correctness, and costs and duration of ISDS proceedings.

Draft provision 3 – Time frame for appeal and *Draft Provision 4 – Effect of an appeal on the first-tier proceeding*

As per Canada's comments during the 44th Session, for practical and efficiency reasons, we are of the view that timing of appeals should generally be limited to after a final award is issued by a first-tier tribunal. This has the advantage of ensuring that Appellate Tribunal has the full record before it when considering an appeal and avoiding disruptions and other procedural delays (to hear requests for suspension of proceedings) to the first-tier or appellate proceeding.

Draft provision 5 – Effect of an appeal on the first-tier decision and the relationship with annulment, setting aside and enforcement proceedings

To avoid parallel or third-tier reviews, Canada supports the establishment of a self-contained framework, which includes existing grounds for set aside and annulment as part of the grounds for appeal for the AM. The Working Group may wish to consider the inclusion of a waiver provision preventing disputing parties from seeking to review, set aside, annul, revise or initiate any other similar procedure outside of those provided by AM (see e.g., *Canada-European Union Comprehensive Economic Trade Agreement* ("CETA") Article 8.28(9)(b): " a disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure as regards an award under this Section").

Rather than "suspending" the effect of a first-tier tribunal decision or "staying" recognition and enforcement proceedings, the Working Group may also wish to consider a provision that provides that an award of a first-tier tribunal is not considered "final" and no enforcement may be brought until after the expiry of the period for appeals has elapsed and no appeal has been brought; an appeal has been rejected or withdrawn and after a certain period has elapsed following the issuance of an award by the Appellate Tribunal, where it has not referred the matter back to the Tribunal

(see e.g., CETA Article 8.28(9)(c): "an award rendered pursuant to Article 8.39 shall not be considered final and no action for enforcement of an award may be brought until either: (i) 90 days from the issuance of the award by the Tribunal has elapsed and no appeal has been initiated; (ii) an initiated appeal has been rejected or withdrawn; or (iii) 90 days have elapsed from an award by the Appellate Tribunal and the Appellate Tribunal has not referred the matter back to the Tribunal").

Draft provision 6 – Conduct of the appellate proceedings

In Canada's view, Draft provision 6(3) is unduly restrictive, especially in the case of existing treaties which may not expressly refer to the possibility of treaty Parties issuing joint interpretations or an appellate mechanism. As such, an express treaty provision should not be required for a joint interpretation by the treaty Parties to be binding on the Appellate Tribunal.

Regarding Draft provision 6(4), Canada supports providing the Appellate Tribunal with the authority to order a disputing party to provide security for an appeal on a case-by-case basis. We are of the view that the percentage or amount of security should be left to the discretion of the Appellate Tribunal. However, the Working Group may wish to specify relevant factors or an applicable standard to guide the tribunal in making such determinations.

Draft provision 7 – Decisions by the appellate tribunal

Canada is of the view that the language in Draft provision 7(1) should be broadened to provide the Appellate Tribunal with the authority of to uphold, modify or reverse the "findings" of a first-tier tribunal, as opposed to being limited only to "decisions" as a whole. Furthermore, Draft provision 7(2) should limit remand only in situations where facts in the existing record are insufficient. However, the reference to "facts *established by the first-tier tribunal*" may be too limited to account for manifest errors in the appreciation of the facts or other facts that had not been considered in the application of the law.

As a general rule, the CETA Joint Committee has established a 180-day period for appeal proceedings, with an outer time limit of 270 days (see Article 3(5) of the Decision No 001/2021 of the CETA Joint Committee of January 29, 2021 setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal). In Canada's view similar timelines could potentially be applied to the AM from the date in which an appeal is initiated, if members are to be appointed on a standing basis (as opposed to ad hoc appeals, which may entail longer time periods for the appointment of an Appellate Tribunal).

Draft provision 8 – Recognition and enforcement

See Canada's comments to Draft article 11 in Canada's comments on the Draft statute of a standing mechanism for the resolution of international investment disputes. Additionally, as explained in our comments to Draft provision 5, we support the establishment of a self-contained framework for appeals, which would incorporate existing grounds for set aside and annulment.

3. Canada's Comments on *Possible Reform of ISDS – UNCITRAL WG III Draft Provisions on Selection and appointment of tribunal members of a standing mechanism (Sept. 2023)*

Draft provision 5 – Tribunal Members

While Canada's preference is to include a transitional provision on the number of Tribunal members (which could be decided at a later stage of discussions), we could also support a flexible approach to deciding the number and composition of members, which would allow the Committee of the Parties to make adjustments, depending on other factors such as the composition of the Parties to the SM, resources and financing available. As a starting point, Canada supports the Secretariat's assumption of 15 part-time first-instance tribunal members and seven full-time appeal appellate members in its informal draft paper on "Financing of a standing mechanism – An outline" as a reasonable starting point.

As per Canada's previous interventions, while we consider experience working in or consulting governments to be an asset, it should not be a mandatory qualification. To ensure that the Tribunal reflects the principle of (geographical) diversity, we also believe that the nationality of members should be taken into account in their eligibility for appointment but at this stage, a strict limitation of two members of the same nationality may be too restrictive or impracticable. As such, we would prefer that a more general provision providing that the composition of the tribunal should, in principle, reflect the composition of Contracting Parties, while also allowing for the appointment of non-nationals of Contracting Parties.

Draft provision 5 – Ad hoc Tribunal Members

Canada maintains a preference not to include a provision providing for the appointment of *ad hoc* Tribunal members within the framework of a multilateral standing mechanism. Instead, the appointment of Tribunal members in general ought to be done with consideration of various requirements for expertise in certain areas, such as financial services. Furthermore, there are other ways in which these competencies could be developed, such as through training and development programs or use of tribunal-appointed experts.

Draft provision 6 – Nomination of candidates

Canada's preference is for Option 1, to avoid the need to create a screening and filtering mechanism, which entails additional costs, resources and considerations regarding representation and accountability (see Canada's comments to Draft provision 6). Along the same lines as our comments to Draft provision 4, the Working Group may wish to adopt a flexible approach to stipulating the number of candidates each Contracting Party may nominate for an election, given that this may depend on the number of vacancies. If the SM includes more than one tier of decision making, Contracting Parties' nomination of candidates should also specify which level the candidate is being nominated, though a Contracting Party should not be precluded from nominating the same individual to both levels. Contracting Parties should also have the flexibility to nominate individuals of different nationalities.

Draft provision 7 – Selection panel

As per Canada's previous interventions, our preference is to avoid the creation of a selection panel for the selection and appointment of Tribunal members to a standing mechanism, as this raises additional questions as to the appropriate level of independence, composition, accountability, financing, time and other resources, and procedures for the panel, itself.

Draft provision 8 – Appointment (election)

In the absence of a selection panel, the Secretariat could take on the responsibility of putting forward a list of eligible candidates for each election, based on the nominations of Contracting Parties. Furthermore, if Tribunal members are to be randomly assigned to cases, Contracting Parties should be allowed to vote for each candidate, regardless of the candidate's nationality and regional group.

Draft provision 9 – Terms of office, renewal and removal

As noted in our comments above, Canada is open to the suggestion to provide for different terms of office for Tribunal members of first-instance versus the appellate level, in order to balance the goals of promoting greater diversity, as well as consistency and coherence.

Draft provision 10 – Conditions of services

To allow for a flexible approach to appointment of Tribunal members, Canada suggests that Draft provision 10(2) be drafted to include the possibility for different forms of remuneration (e.g., salary, monthly retainer fee, payment for services, etc.).

Draft provision 11 – Assignment of cases

Canada's preference is for Option 2 (the assignment of members to chambers on a randomized basis). However, rather than imposing a broad prohibition on the appointment of members who are a national of the State party or the State whose national is a party to the dispute, the Working Group may wish to consider stipulating that the pool of members from which the randomized selection is to take place shall be in accordance with any applicable limitations in the underlying instrument of consent or arbitration rules governing the proceeding. This could account for rules on nationality or special qualifications.