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Possible reform of investor-State dispute settlement (ISDS)

Appellate mechanism and enforcement issues

Communication by Canada

The Government of Canada herein provides a response to the Secretariat's request for comments on the Secretariat's draft working paper on an Appellate mechanism and enforcement issues.

II. Functioning of an appellate mechanism

A. Main elements

1. Scope and standard of review

a. Scope of review

(i) Errors of law and fact

Canada Comment No. 1:

Canada considers that to best achieve the reform objectives, the scope of appeal should extend to all errors in the interpretation or application of the law. It should not be limited to certain errors of law. Limiting the appeal to errors of law only with respect to certain provisions risks having unintended consequences and opening the door to unnecessary debate about the scope of appeal. While it is true that the systemic effect and importance of coherence/predictability is particularly acute with respect to substantive provisions that are most frequently found in investment treaties, it is also important with respect to the interpretation of the applicable law more generally, which includes all provisions of investment treaties. Canada considers that there would be value in extending the scope of the appellate review to certain errors of facts and mixed errors of facts and law, subject to the

discussion below regarding the application of a higher standard of review to such errors.

Separate considerations apply to whether to extend the possibility of appeal to contract-based investment disputes and to disputes that arise from domestic law; it may not be necessary to include such disputes in the scope of the appellate mechanism; or it may be appropriate to limit the scope of disputes subject to appeal to certain types of contract-based investment disputes (e.g., where the dispute concerns a breach of a substantive treaty obligation or consent to arbitration is provided for in the treaty).

On the issue of whether a manifest error in the appreciation of the facts can constitute an error of law; and whether a question of interpretation or application of domestic law falls in the category of error of law or error of fact (A/CN.9/1004/Add.1, paras. 27 and 53), Canada is of the view that: (1) it may be preferable to have separate grounds of appeal for manifest errors in the appreciation of the facts and for errors of law; and (2) except in cases where the domestic law would be the applicable law, an error on the interpretation or application of domestic law would generally not constitute an error of law.

(ii) Grounds in the existing annulment or setting aside procedures

Canada Comment No. 2:

In order to avoid multiplication of proceedings and in the interest of efficiency, Canada considers that it would be more practical to have the appellate tribunal also address the grounds of set aside or annulment and that this should exclude subsequent annulment and set aside proceedings, to the extent possible. For example, with respect to the existence of an investment, an arbitral tribunal may make several errors which could amount to errors of law, fact, mixed law and facts and go to the tribunal's jurisdiction/constitute a manifest excess of powers. It would be more efficient to address the errors in one proceeding. The Working Group may want to further consider the extent to which the grounds in existing annulment or setting aside procedures would already be covered by the reference to errors of law/facts or whether their specific inclusion is necessary. For example, CETA Article 8.28.2 provides: 2. The Appellate Tribunal may uphold, modify or reverse the Tribunal's award based on: (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).

Further reflection is necessary as to how best to streamline the appeals and set aside or annulment processes. One possibility is that to the extent certain grounds of set aside or annulment are incorporated into the appeal provisions, the state Party would waive its right to annulment and set aside and its consent to arbitration would be conditioned on a waiver from the investor of such rights. This could potentially be addressed in the treaty establishing the appellate mechanism. In order to be effective, it may be necessary to consider implications for the choice of the place of arbitration to ensure that it is in a jurisdiction that recognizes such waivers.

b. Standard of review

Canada Comment No. 3:

On balance, Canada considers that a *de novo* standard should apply to consideration of errors of law and a manifest error standard should apply to errors of facts. It would

not be practical or desirable to allow for a full review of the tribunal's appreciation of the facts i.e. its factual conclusions drawn from the evidence. Such factual findings call for a higher deference as the tribunal is better placed to assess the evidence presented by the disputing parties. The standard that would apply to questions of application of the law to the facts and mixed questions of law and facts may depend on the specific question at issue. In many legal systems, the review standard applicable to specific situations has been developed by the domestic courts over many years and there are often no clear cut answers. It may therefore be difficult for this Working Group to set out a clear standard that would apply to each situation. Nevertheless, further analysis and discussion of different situations would be helpful in deciding how best to articulate the standard of review.

c. Illustration from existing appellate mechanisms

2. Appealable decisions

a. Decisions on challenge and on interim measures

Canada Comment No. 4:

For the reasons set out in the Secretariat paper, on balance, Canada agrees that it may be preferable to limit appeals to the final award. Allowing appeals of decisions regarding arbitrator challenges and interim measures, could lead to a multiplication of proceedings. To the extent that certain issues regarding the arbitrators' independence and impartiality or the interim measures affect the final award they may however be relevant to a ground of appeal in relation to the final award.

b. Decisions on jurisdiction

Canada Comment No. 5:

As the Secretariat notes, in most cases (although certainly not all) there are some efficiency advantages to limiting appeals to the final award. Canada sees some merit to this. It would not preclude an appeal of a decision on jurisdiction if it falls within the scope of appeal, but rather, affect its timing. In cases where a decision on jurisdiction disposes of the matter entirely, the decision would be a final award and subject to appeal. In cases where the decision on jurisdiction disposes of a dispute in part and leads to the consideration of other matters, such as merits and damages, such a decision may need to be considered by the parties (and by the appellate tribunal) in light of the final award. In some cases, the parties may decide not to proceed to an appeal of certain issues in light of the final outcome. Limiting the appeal to the final award would also ensure that the appellate tribunal has the full record before it. We also note that the concerns related to limiting appeals to final awards (including the and the possibility of additional procedures because of incomplete records) may be addressed by providing the appellate tribunal with remand authority. While it may not always be possible or practical with ad hoc investment tribunals, remand would be more effective if the first tier tribunal is a standing tribunal.

Canada is cognizant of the fact that waiting for a final award to correct an error of jurisdiction may in some cases lead to unnecessary costs related to consideration of merits and damages. On the other hand, dilatory appeals could add to the costs and duration of the proceedings. As the Secretariat paper notes, it is possible that some of these concerns could be addressed, for example by requiring the posting of security for appeal. If appeals of jurisdictional decisions are allowed, consideration

would have to be given to whether appeal is extended to decisions on admissibility issues which are often addressed together with jurisdictional issues.

3. Effect of appeal

a. Temporary suspension of first-tier tribunal decisions

Final decisions by the first-tier tribunal

Canada Comment No. 6:

Canada notes that this could be addressed by "deeming" an arbitral award to be final for the purpose of enforcement only after the time period for the appeal is exhausted or the appeal proceedings are concluded. See for example CETA 8.28.9 and 8.41.

Non-final (interim) decisions of the first-tier tribunal

Canada Comment No. 7:

If appeal is allowed for interim decisions or for other decisions apart from the final award, the effect of an appeal on those decisions needs to be addressed.

b. Affirm, reverse, modify or annul the decisions

Canada Comment No. 8:

The scope of the appellate tribunal's authority should include the ability to affirm, reverse or modify the decision and to render a final decision by applying its legal findings and conclusions based on the facts before it. In doing so, the appellate tribunal should also be required to specify precisely how it has modified or reversed the relevant findings and conclusions of the Tribunal. Guidance could be provided to the appellate tribunal regarding its authority to apply its own legal findings and conclusions to such facts and render a final award, and where not possible, to issue a decision referring the matter back to the Tribunal to render an award in accordance with the findings and conclusions of the Appellate Tribunal. Beyond that, the scope of the appellate tribunal's authority should be considered in light of the scope of the appeal (i.e. if grounds for annulment under ICSID and grounds for set aside are included) and the appropriate remedy for due process violations.

c. Remand authority

Canada Comment No. 9:

Where possible, Canada considers that the appellate tribunal should complete the analysis but remand to the original tribunal should be allowed where necessary to resolve the dispute. In those cases, the appellate tribunal's determinations on the law would be binding on the first tier tribunal who would be charged with identifying the necessary factual basis and applying the appellate tribunal's guidance to resolve the dispute. The decision on remand should be subject to further appeal in exceptional cases only, including the failure to adhere to the appellate tribunal's instructions, but limited to circumstances not present at the time of the first appeal to avoid abuse. Remand works best where a standing first instance tribunal is also established.

Otherwise, first-tier tribunals could remain constituted until after the appeal deadline, where there is no appeal, or otherwise after appeal proceedings are completed. In the case of an appeal based on procedural irregularity, a new arbitral tribunal should be constituted to consider the unresolved factual or legal issues. We recognize the higher cost and duration of proceedings stemming from this approach, but note the Secretariat's comments on the need to strike a balance between addressing cost and duration issues and the need to instill consistency and confidence in the system.

5. Timelines

Canada Comment No. 10:

Canada agrees that a provision imposing timelines for the appeal process as well as provisions to manage the cost and duration of the appeals process would be desirable.

B. Enforcement

1. Under the New York Convention

Canada Comment No. 11: Canada shares the view that awards subject to an appellate mechanism could be enforceable under the New York Convention. Nevertheless, the development of draft provisions deeming the applicability of the New York Convention and the obligations with respect to enforcement would be helpful in guiding domestic courts and the disputing parties, as well as promote greater consistency and predictability. We are open to development of enforcement provisions as between the contracting states, in the context of the treaty establishing the appellate mechanism, or more generally, in a multilateral instrument for ISDS reform, which would permit non-participating States to opt into the enforcement mechanism for the appellate mechanism.

2. Under the ICSID Convention

Canada Comment No. 12: Canada is prepared to consider either the possibility of an amendment or an *inter se* modification to the ICSID Convention to address the enforcement of awards subject to an appellate mechanism. While an amendment to the ICSID Convention would ensure that such awards are enforceable amongst all ICSID Member States, such a modification would require unanimous consent. In our view, an *inter se* modification of the ICSID Convention would be a viable alternative to addressing the issue of enforcement amongst contracting states to the appellate mechanism. We look forward to reviewing ICSID's detailed paper exploring different options for amending or modifying the ICSID Convention.

C. Consolidated draft provision on appellate mechanism and enforcement

1. General comments

***Canada Comment No. 13*:** In order to achieve the reform objectives, the decision of the appellate tribunal should be binding on the first instance tribunal in that dispute. More generally, first instance tribunals should have due regard to decisions of the appellate tribunal (with appropriate consideration given to whether the appellate tribunal decisions are relevant to the interpretation of the treaty at issue). A formal system of stare decisis may be difficult to apply in a system that involves different treaties.

2. Draft provisions

a. Appellate procedure

Preliminary draft provision regarding an appellate mechanism:

Article X – Appellate [Mechanism][Rules][Court]
[Scope and standard of review]

"1. *A disputing party may appeal a decision on the grounds that the decision by the first-tier [arbitral][ISDS] tribunal is based upon:*

(a) Option 1: [*An error of law that is material and prejudicial*] - Option 2: [*Errors in the application or interpretation of [applicable law][the following standards: (to be listed - for instance: expropriation, fair and equitable treatment and non-discrimination)*];

***Canada Comment No. 14*:** Canada's preference is for the language in Option 2. A general standard of prejudice for errors of law does not appear to be necessary. Depending on the scope of the appeal, there could however be a requirement to show that the error is material and prejudicial, for example if the appeal relates to the treatment of certain specific evidence/witnesses or the admission or inferences to be drawn from documents. This would allow tribunals to determine what is prejudicial and material on a case-by-case basis.

[(b) Option 1: [*Determinations of fact that are clearly erroneous*] – Option 2: [*Manifest errors in the appreciation of facts [, including the appreciation of relevant domestic law and the assessment of damages,]*]; and

Canada Comment No. 15: As noted in comments above, appreciation of the facts in light of the evidence would be best reviewed under a "manifest error" standard. To the extent pure questions of fact are reviewable i.e. determinations of facts, a high standard of review should apply to the factual determinations of the first tier tribunal. The "clearly erroneous" and "manifest error" standards (or "palpable and overriding error" in Canadian law) appear to be different ways of expressing a similar higher threshold that gives a high level of deference to the first level tribunal.

[(c) *An error in the application of the law to the facts of a case*.]]

Canada Comment No. 15: As noted in comments above, an error in the interpretation of the applicable law and its application to the facts could be reviewed under the same standard. In Canada's view, this issue could be addressed by the draft language in Option 2 of subparagraph (a).

2. Option 1: [*A disputing party may also appeal on any of the five grounds for annulment of an award as set out in Article 52 of the ICSID Convention and on the grounds under Article V[(1)] of the New York Convention to the extent they are not covered under paragraph (1) (a) and (b) above.*] Option 2: [*Grounds to be fully enumerated instead of referring to the provisions of relevant provisions, for the sake of clarity*][1]

3. The [appellate [body][court][tribunal]] may also undertake a review of errors of law or fact in exceptional circumstances, to the extent they are not covered under paragraph (1) (a) and (b) above.

[1] Paragraph (2) of the draft provision aims to avoid a three-step process under which subsequent ICSID proceedings or litigation before domestic courts could take place after the appeal proceedings. It should be completed with provisions ensuring that it would not be possible for the parties to undertake such procedures. An alternative to a reference to the provisions of the ICSID and New York Conventions would be to spell out the grounds. In that regard, it should be noted that reference is made to article V(1) of the New York Convention only, which leaves room for intervention by domestic courts on the grounds of arbitrability and public policy.

Canada Comment No. 16: As noted in Canada's comments on the grounds of appeal, avoiding a three tier process is desirable but further analysis is required regarding the extent to which it can be avoided and the interaction between the grounds of appeal set out in paragraph 1 and those of Article 52 of the ICSID Convention and article V of the New York Convention. The rationale for paragraph 3 is not apparent and, while it may have some value, it risks creating uncertainty regarding the scope of the appeal.

[Appealable decisions]

4. *Decisions by the first-tier tribunal settling a dispute between an investor and a State or State-owned entity [that arises under an investment treaty][2] are subject to appeal under the [appellate [body][court][tribunal]] [Rules on Appeal].*

Canada Comment No. 17: See Canada's comments above regarding appealable decisions. On balance it may be preferable to limit appealable decisions to the "final award" by the first tier tribunal. While the main concerns are with respect to disputes arising under investment treaties, Canada is open to considering including other types of investment disputes, such as State-to-State disputes, which may involve similar issues of treaty interpretation and where there is a desire for consistency and coherence.

5. *[Decisions by the first-tier tribunals on their own jurisdiction are also subject to appeal. If the first-tier tribunal rules as a preliminary question that it has jurisdiction, any party may request the appellate [body][court][tribunal] to decide the matter; while such a request is pending, the first-tier tribunal may continue the proceedings and make [an award][a decision]].*

***Canada Comment No. 18*:** As set out above, allowing such appeals during the arbitration may lead to increased appeals or result in fewer tribunals deciding issues of jurisdiction as a preliminary matter.

[…]

[Timelines]

11. As a general rule, the appeal proceedings shall not exceed [--] days from the date a party to the dispute formally notifies its decision to appeal to the date the appellate [body][court][tribunal] issues its decision. When the appellate [body][court][tribunal] considers that it cannot issue its decision in time, it shall inform the disputing parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its decision. In no case should the proceedings exceed [--] days.

[2] In relation to the bracketed text, the Working Group may wish to consider how an appellate mechanism might work outside the context of treaty-based ISDS, such as where the basis for jurisdiction were a foreign investment law or an investment contract (A/CN.9/1004/Add.1, para. 56).

Canada Comment No. 19: Canada supports the introduction strict timelines and provisions to manage the cost and duration of the appeals process (see e.g., Article 3(5) of the CETA Draft Decision on the Functioning of the Appellate Tribunal).

12. The appellate tribunal may request the appellant to provide security for the costs of appeal and for any amount awarded against it in the provisional decision of the first-tier tribunal."

***Canada Comment No. 20*:** In order to deter unnecessary appeals and address concerns relating to increased cost and duration, the Working Group could consider imposing default requirement for the appealing party to post security for costs and or other security as necessary (see e.g., Article 3(6) of the Draft Decision of the CETA Joint Committee on the functioning of the Appellate Tribunal).

b. Enforcement

1. The Working Group indicated that the enforcement mechanism provided for in article 54 of the ICSID Convention, as well as language in recent bilateral and multilateral investment treaties could provide useful models (A/CN.9/1004/Add.1, para. 64). They read as follows:

Article 54 ICSID Convention:

"(1) *Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.*

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."

Canada Comment No. 21: As an alternative to amending the ICSID Convention, the Working Group could explore the option of an *inter se* modification of the ICSID Convention as between members of an appellate mechanism. For example, the terms and conditions of the *inter se* modification could be addressed through an express provision in the multilateral instrument.

2. Provision under recent investment treaties reads as follows:

"Article xx - Enforcement of Awards*:*

1. An award issued pursuant to this Section shall not be enforceable until it has become final pursuant to Article xx [article dealing with final awards after appeal]. A final award issued pursuant to this Section shall be binding between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy.

2. A Party shall recognise an award issued pursuant to this Section as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party.

3. Execution of the award shall be governed by the laws concerning the execution of judgments in force where such execution is sought. 4. For the purposes of Article 1 of the New York Convention, final awards issued pursuant to this Section are arbitral awards relating to claims that are considered to arise out of a commercial relationship or transaction.

5. For greater certainty and subject to paragraph 1, if a claim has been submitted to dispute settlement pursuant to Article 6(2)(a) (Submission of a claim), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the ICSID Convention."

Article xx [consent] : "*The consent pursuant to paragraphs 1 and 3 requires that the disputing parties refrain from: (a) Enforcing an award issued pursuant to this Section before such award has become final pursuant to Article 30 (Final Award); and (b) Seeking to appeal, review, set aside, annul, revise or initiate any other similar procedure before an international or domestic court or tribunal, as regards an award pursuant to this Section."*

Canada Comment No. 22: As noted above, the Working Group may wish to further explore options for recognition and enforcement of awards that are subject to an appellate mechanism in the context of the New York Convention.

III. Options for establishing an appellate mechanism

3. Possible models

c. Permanent plurilateral or multilateral appellate body

Canada Comment No. 23:

A permanent plurilateral or multilateral appellate body, linked to a permanent tribunal would best achieve the desired objectives of consistency and predictability identified by the Working Group. However, Canada remains open to exploring other reform options, such as the development of a stand-alone appellate mechanism.