Possible Reform of Investor-State Dispute Settlement (ISDS)

Initial draft on Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters

Submission of the Government of Canada

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Canada is grateful to the Secretariat for its further work on issues surrounding the selection and appointment of ISDS tribunal members in the context of a standing multilateral mechanism (also referred to below, as a "multilateral investment tribunal", "MIT" or the "Tribunal"). Below are Canada's preliminary comments on the draft provisions covering the selection and appointment of ISDS Tribunal members as well as interrelated topics on establishment and functioning of a standing multilateral mechanism. These comments are provided without prejudice to Canada's final position on the Working Group's development of this reform option.

FRAMEWORK: ESTABLISHMENT, JURISDICTION AND GOVERNANCE

Draft provision 1 – Establishment of the Tribunal

The statement that the Tribunal functions on a "permanent basis" may require further clarification or may not be necessary. Similar provisions do not appear in the texts establishing other international courts, such as the Statute of the International Court of Justice.

Draft Provision 2 – Jurisdiction

Specific issues concerning the scope of the Tribunal's jurisdiction should be addressed in the instruments establishing the consent to the jurisdiction of the Tribunal (i.e. the underlying treaties and/or agreement). In this regard, the current language of this provision appears broad enough to include counterclaims, if allowed by underlying treaty. Similarly, rather than setting out a "default rule" to determine which dispute settlement regime applies, such matters could be addressed in the underlying treaties.

As noted in paragraph 10 of the commentary, "the parties consent" may refer either to the State parties or to the disputing parties. Canada's view is that the jurisdiction of the Tribunal is dependent on disputing parties' consent to arbitration. To avoid confusion, we suggest that this clarification be made in the text of the provision.

Going forward, further reflection should be given to how the MIT is implemented in investment treaties. Consent to the jurisdiction of the Tribunal in future investment treaties is a matter that can be negotiated between the parties to those agreements and addressed in the text they conclude. In this regard, the Working Group could consider developing a model provision on consent to the jurisdiction of the MIT for States that wish to incorporate it in their future treaties. With regard to existing treaties, Canada also supports the development of an efficient and flexible mechanism to allow States who wish to do so to consent to the jurisdiction of the Tribunal for existing treaties, similar to the *Mauritius Convention.*

Draft Provision 3 – Governance Structure

In principle, Canada supports the proposal for a governance structure composed of a committee of the Contracting States (referred to below as the "Committee of the Parties" or "Committee") that could provide general oversight, but not interfere with the decision making function of the Tribunal. Along these lines,

we suggest that the word "ensure" in the last sentence of paragraph 1 be replaced with "address matters concerning" to broaden the general description of the Committee's responsibilities and provide for greater flexibility, beyond simply "ensuring" the functioning of the Tribunal. Additionally, it may also helpful for the Working Group to consider providing further guidance on the role of the Committee of Parties. For example, depending on the scope of the instrument establishing the MIT, the Committee's role may extend to other matters beyond a first instance tribunal, and to other issues such as an appellate tribunal, advisory centre and secretariat.

Additional guidance on the governance structure and relationship between the Committee and the Tribunal should be considered. For example, further clarity on the distinction between the "rules of procedure" established by the Committee in paragraph 2 and the Tribunal's determination of "relevant rules for carrying out its functions" in paragraph 3 would be useful.

Depending on the role of the Committee of the Parties and the scope of the instrument establishing the MIT (i.e., potential inclusion of an appellate level, advisory centre and secretariat), it may be appropriate to have separate sections or chapters pertaining to the role and functioning of the Committee and the Tribunal. The section on the Committee could address further matters such as the composition of the Committee (e.g., President, Secretary, etc.) and the Committee's procedures for referring, deciding and adopting/implementing procedures for various matters. Should the MIT be developed with an "open architecture" that would allow Contracting States with the flexibility to determine which elements they would like to sign onto, consideration will need to be given to how the roles and responsibilities of Contracting States within the Committee may vary.

SELECTIVE REPRESENTATION AND NUMBER OF TRIBUNAL MEMBERS

Draft Provision 4 – Number of tribunal members and adjustments

Issues concerning the number of Tribunal members will depend on various factors, such as the number and composition of Contracting States to the MIT, caseload of the Tribunal, costs, and resources available. At this stage, the Working Group may wish to simply include transitional provisions on these topics, with further reflection given to the appropriate timing and methodology for deciding such issues at a later stage, mindful of the need to achieve greater diversity in ISDS adjudicators.

In general, Canada is of the view that Tribunal members should be appointed on a full-time basis, in order to reduce the number of required members, costs/resource requirements and likelihood of conflict of interests arising, and to increase independence and efficiency. However, this approach will need to be balanced alongside other considerations, such as the number and caseload of Tribunal members, as well as resource and cost implications.

Paragraph 1 sets out the general principles underlying the composition of the Tribunal. As noted in the commentary, the qualifications for "highest judicial office" may vary from country to country. Further it is unclear why candidates for the Tribunal should only include those who qualify for these limited these positions and how those qualifications necessarily are relevant or translate to the international investment and trade law context. While qualifications for judicial appointment are a relevant consideration, they may not necessarily be a determinative factor for appointment to a multilateral investment tribunal. Accordingly, Canada suggests adding "jurists of recognized competence" to the list of qualifications in paragraph 1, for greater flexibility and inclusion. In addition to the individual qualifications of the Tribunal members, it may be useful to include a requirement that the Tribunal shall be composed of members reflecting the principles of diversity and gender equality.

In paragraph 2, Canada supports Draft Option 1, variant 3, with a combination of Option 2 to allow a

proposal to be made by the presidency acting on behalf of the Tribunal or the Committee of the Parties. This would be consistent with an oversight role for the Committee.[1] A minimum two-thirds decision of the Committee also prevents Contracting States from "vetoing" decisions relating to the appointment of Tribunal members.

Regarding the relevant factors for consideration in amending the number of Tribunal members, Canada is of the view that considerations relating to the caseload of the Tribunal could include the number, type, and complexity of claims, as well as the stages of each case. While an increase or decrease of Contracting States to the MIT does not necessarily increase the number of cases submitted to the Tribunal, greater representation of Tribunal members in accordance with the membership of the Contracting States may be required. Furthermore, consideration should be given to overall cost implications of amending the size of the Tribunal (similar to the *Canada – European Union Comprehensive Economic and Trade Agreement* ("CETA"), it may be necessary to increase the number of tribunal members in multiples to ensure proper functioning of the Tribunal).

Limitations on the number of tribunal members from a particular nationality will potentially help to promote greater diversity and representation. This approach is reflected in some of Canada's investment treaties, which include requirements with respect to the diversity of nationality of the Tribunal. For example, in CETA, the division of the Tribunal hearing a case must consist of one national of a Member State of the EU, one national of Canada, and one national of a third country (CETA, Article 8.27.6). However, a strict rule preventing any two members from being nationals of the same State may not be appropriate, depending on the number of and composition of the Contracting States to the MIT. Furthermore, the election of two or more nationals of the same State may be unavoidable if Contracting States are permitted to nominate non-nationals.

Draft Provision 5 – Ad hoc tribunal members

Canada is generally of the view that Tribunal members of a standing multilateral mechanism should be randomly assigned to cases. Such an approach helps to further the objectives of arbitrator diversity, independence and impartiality. As noted in the commentary, the system of *ad hoc* judges (allowing the appointment of a judge of the respondent State's nationality) may not be appropriate in the investor-State dispute settlement context, and could potentially complicate other matters concerning functioning of the Tribunal and have other cost and efficiency implications.

If Tribunal members are randomly assigned to cases, issues relating to the nationality will need to be further clarified. For example, issues concerning whether Tribunal members can have the same nationality as a disputing party and the relationship between the instrument establishing the MIT and other applicable arbitral rules that provide rules on the nationality of arbitrators (e.g., ICSID) will need to be addressed.

NOMINATION, SELECTION AND APPOINTMENT OF CANDIDATES

Draft Provision 6 – Nomination of Candidates

Option 1:

As noted in Canada's Comments on Draft Provision 4, it may be more appropriate to determine the number of candidates that each Contracting State may nominate at a later stage, given that the appropriate number of candidates depends on various factors, including the size of the Tribunal, number of vacancies, and

[1] For example, pursuant to CETA Article 8.27.3, the decision to increase or decrease the Tribunal is determined by the Joint Committee, as opposed to the Tribunal.

number and composition of Contracting States to the MIT.

As a starting point, Canada supports the proposal in paragraph 1 that Contracting States should have the flexibility to nominate non-nationals, especially if Tribunal members are to be randomly assigned to cases. However, rather than requiring "equal" representation of genders (which may be not be possible if members are to be elected), Canada suggests that the selection of Tribunal members be conducted with a view to the principles of diversity and gender equality. This would allow Contracting States the flexibility to take into account other factors such as geographical and legal diversity.

In paragraph 2, Canada supports the inclusion of a provision to encourage Contracting States to adopt an open, inclusive and transparent process for nominating candidates, with a view to the overall principles of diversity and gender equality. However, this language should be flexible given that the internal processes of States can differ widely.

Option 2:

Canada is of the view that it would be more appropriate for an open call for candidates to take place at the Contracting State level. While the open call process proposed in Option 2 could potentially be more inclusive, as noted in paragraph 32 of the commentary, there would be a need for an additional screening and filtering mechanism by a separate body and for further review and approval of candidates by the Committee of the Parties, which would entail additional costs and resources.

Draft Provision 7 – Selection Panel

While the creation of a selection panel or consultative committee could potentially promote greater inclusiveness and representation of diverse views of different stakeholders in the ISDS system (e.g., investors, civil society groups, professional organizations), it raises serious questions as to the appropriate composition and accountability of such groups. As such, it may be preferable to ensure the quality and representativeness of the adjudicators by encouraging open, transparent and inclusive nomination processes at the Contracting State level.

Draft Provision 8 – Appointment (election)

Further reflection is required on the appropriate methodology for classifying Tribunal members into regional groups. For example, as an alternative to the United Nations Regional Groups proposed in paragraph 1, a methodology could be developed to ensure that the regional representation of Tribunal members reflects the membership of the Contracting States and/or caseload of the MIT. Similarly, depending on the composition of the Contracting States to the MIT, it may be more appropriate for the Tribunal to reflect the diversity of legal systems, geographical distribution of the Contracting States, as opposed to the world.

As noted in previous comments, Canada is of the view that it may be preferable for Contracting States to be responsible for nominating candidates for the Tribunal and Appellate Tribunal, as opposed to a selection panel or committee. Moreover, consideration should be given to allowing all Contracting States the opportunity to vote for each candidate, regardless of their nationality. This is based on the understanding that any Tribunal member will have the opportunity to be selected/randomly assigned to each case. Limiting a Contracting States' votes to their regional group also impacts considerations such as diversity and inclusion.

Regarding the selection of a President, an alternative approach could be for the President of the Tribunal/Appellate Tribunal to be drawn by lot (see e.g,, CETA Article 8.27.8 and 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, Article 2.2). This method avoids politicization of the process or potential conflicts amongst members. Additionally, consideration could also be given to appointing a Vice-President in the event the President is not available or is conflicted.

TERMS OF OFFICE

Draft Provision 9 – Terms of office, renewal and removal

Further consideration should be given to whether the duration of the terms of the Tribunal members of first and second instance should differ. For example, in CETA, Tribunal Members are appointed for a five-year term, renewable once (CETA Article 8.27.5). In contrast, Appellate Tribunal Members are appointed for a nine-year non-renewable term (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, Article 2.3).

During the informal consultations, a suggestion of "junior" observers of the Tribunal was discussed. However, this could potentially increase costs, as well as impact on the election of future members. For example, would a future member be required to serve first as a junior observer, prior to becoming a member? What would be the rules on double-hatting/conflicts of interests/confidentiality of "junior" observers?

Canada agrees that the expiry of the terms of the members should be staggered and determined by draw of lots. Depending on the size and composition of the Tribunal, random lots should be selected from different regional/representative groups.

On the issue of resignation, removal and replacement, Canada agrees that a Tribunal member should be free to resign from his or her position at any time and that the threshold for removing a member should otherwise be high. Further clarification as to what constitutes "substantial misconduct or failure to perform his or her duties" could be provided. in the form of guidelines or interpretations to the Code of Conduct. Moreover, a process for reviewing contested challenges of a member conducted by an independent person/body should be established (see e.g., CETA Article 8.30).

CONDITIONS OF SERVICE

Draft Provision 10 – Conditions of services

The availability of members to perform their duties is more important than their availability at all times on short notice, which may not always be necessary or reasonable. Canada suggests alternative language similar to CETA Article 8.27.11: "The Members of the Tribunal shall ensure that they are available and able to perform the functions set out under this Agreement."

ASSIGNMENT OF CASES

Draft Provision 11 – the assignment of cases

Canada supports Option 2, wherein disputes are assigned to the chambers of the Tribunal on a randomized basis. As stated above, Canada is of the view that the Committee of Parties should be responsible for assigning members to the tribunal of first instance and appellate level.

The President of the Tribunal should be responsible for assigning members to different disputes, ensuring

all members have an equal opportunity to participate. This should be done on a randomized basis and in accordance with the Rules of Procedures to be adopted by the Committee of the Parties, taking into account specific requirements in the agreement/contract establishing the disputing parties' consent t the jurisdiction of the Tribunal (e.g., nationality restrictions, language requirements, other required qualifications of adjudicators etc.).

Given that considerations of diversity and representation will be taken into account at the earlier stage of appointment to the Tribunal, unless otherwise required by the Rules of Procedures to be adopted by the Committee of the Parties or the underlying treaty for the dispute, it may not be practical to take into account such considerations in the assignment of each case.

MEANS OF ESTABLISHMENT

In determining of whether the MIT should be created under the auspices of an existing international organization or as a separate, independent international organisation, relevant considerations include potential cost and resource implications and the composition of the Contracting States to the Tribunal. Whether or not the MIT should host an advisory centre depends on similar considerations concerning the impact that this will have on costs and resources, as well as on the role and function of the advisory centre.

PROCEDURAL QUESTIONS

Canada agrees that the process for modification of detailed procedural rules should be simplified.

APPLICABLE LAW AND TREATY INTERPRETATION

There should be a clear distinction between the role of the Tribunal and the Contracting States to the MIT. While Tribunal decisions, in particular those of the Appellate Tribunal, may provide guidance on the interpretation of certain provisions of the treaties or legal standards, Canada is of the view that binding joint interpretative statements, should only be issued by Contracting States or the Committee of Parties.