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Settlement of commercial disputes

Revision of the UNCITRAL Arbitration Rules

Observations by the Government of Canada

Note by the Secretariat*

I. Introduction

1. Working Group II (Arbitration and Conciliation) agreed at its 48th session (New York, 4-8 February 2008) to seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take (A/CN.9/646, para. 69). The Commission is expected to provide such guidance at its forty-first session. In preparation for the discussions of the Commission on that topic, the Government of Canada submitted observations on 13 June 2008. The text of these observations is reproduced as an annex to this note in the form in which it was received by the Secretariat.

* The submission of this document was delayed because it contains comments received on 13 June 2008.

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Annex

The Government of Canada's Position on the Need to Enhance Transparency in Investor-State Arbitration

I. Introduction

1. After receiving the Working Group on Arbitration and Conciliation's (the "Working Group") reports on the work of its forty-fifth and forty-sixth sessions, the Commission noted that "the extent to which the revised UNCITRAL Arbitration Rules should take account of investor-state dispute settlement or administered arbitration remained to be considered by the Working Group at future sessions".[1] Pursuant to this mandate, at its forty-eighth session the Working Group began discussing how to revise the UNCITRAL Arbitration Rules (the "Rules") in order to address issues related to investor-state arbitration. In particular, the Working Group considered the need to enhance transparency in investor-state arbitration under the Rules in light of the public interests often at stake in such dispute settlement. By the termination of the session, it was clear that the majority of States at the Working Group believe that it is important for investor-state arbitration to be open and transparent.

2. In its report, the Working Group stated that it 'seek[s] guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take'.[2]

II. Work to enhance transparency in investor-state arbitration should begin promptly

3. The Working Group is 'expected to complete its work so that the final review and adoption of the revised Rules would take place at the latest at the forty-second session of the Commission, in 2009'.[3] Canada submits that the most appropriate time to revise the Rules to enhance transparency in investor-state arbitration is not 'after completion' of that work, but rather as a part of it. The enhancements necessary to increase transparency in investor-state arbitration are relatively simple and uncomplicated. They can take the form of either the modification of several individual rules, or of a short Annex. Given their simplicity, Canada believes that there is adequate time for the Working Group to address transparency in investor-state arbitration and still complete its work prior to the forty-second session of the Commission.

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[1] U.N. General Assembly, Report of the United Nations Commission on International Trade Law on the work of its fortieth session, U.N. Doc. A/62/17 (Part I), at ¶ 175 (23 July 2007) ("UNCITRAL Fortieth Session Report").

[2] U.N. Commission on International Trade Law, Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session, U.N. Doc. A/CN.9/646, at ¶ 69 (29 February 2008) ("WG II Forty-Eighth Session Report").

[3] UNCITRAL Fortieth Session Report, at ¶ 176.

4. However, if a consensus cannot be reached to include these revisions as part of the Working Group's current work, Canada requests that the Commission give the Working Group a clear and express mandate to develop, immediately after completion of its current work and with the goal of presenting it to the Commission as soon as possible, revisions to enhance transparency in investor-state arbitration. The failure to provide, at a minimum, such a mandate will send a troubling message to the international community.

5. The Rules have gained in popularity and use over the past 30 years partly due to the weight carried in the international community by the imprimatur of the United Nations General Assembly.[4] This is an authority that cannot be used lightly. The failure to send an unequivocal signal that the Commission supports updating the Rules to include provisions allowing for transparency in investor-state arbitration, will be seen by States as effectively supporting holding investor-state arbitrations behind closed doors, away from public participation and scrutiny. The Commission should be loathe to adopt a set of rules that fosters a climate of secrecy and denies public accountability, without at least requiring the Working Group to develop a procedure immediately to open investor-state arbitration to the public.

III. The public interest in investor-state arbitration requires enhanced transparency

6. The Rules were adopted by UNCITRAL and recommended for use by the United Nations General Assembly in 1976, more than 30 years ago. The Rules were specifically drafted for use in commercial arbitration.[5] To this end, in the Resolution recommending the use of the Rules, the General Assembly recognized the 'value of arbitration as a method of settling disputes arising in the context of *international commercial relations*'[6] (emphasis added).

7. In the 30 years since their adoption, the use of the Rules has expanded beyond that originally contemplated by the drafters. In particular, the Rules have become at least the second most frequently used set of rules for investor-state arbitration.[7] This is a use of the Rules that the drafters did not anticipate and is also one of the principal reasons that their revision is necessary.[8]

8. The interests involved in investor-state arbitration are substantially different from those involved in commercial arbitration, particularly when the arbitration is brought pursuant to a treaty. Investment arbitration often implicates the public interest and government policy in ways simply not salient in commercial arbitration. In particular, an investment treaty is a document of public international law, made between sovereign states, and, thus, when a dispute arises under it, the whole international community has a stake in how that dispute is resolved. Such adjudication can serve an important legal education function in so far as it furthers

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[4] Paulsson, J. & Petrochilos, G., *Revision of the UNCITRAL Arbitration Rules*, at ¶ 6 available at http://www.uncitral.org/pdf/english/news/arbrules_report.pdf ("Paulsson/Petrochilos Report").

[5] WG II Forty-Eighth Session Report, at ¶ 58.

[6] U.N. General Assembly, *Arbitration Rules of the United Nations International Commission on Trade Law*, U.N. Doc. A/Res/31/98 (15 December 1976).

[7] WG II Forty-Eighth Session Report, at ¶ 58.

[8] See Paulsson/Petrochilos Report, at ¶¶ 4-6.

the understanding both of investors and States as to how certain provisions are construed and provides guidance for future dealings.

9. Investor-state arbitration also implicates the interests of the citizens and residents of the disputing State. Disputes brought pursuant to investment treaties often involve regulations with public policy implications, such as tax laws, environmental laws, health regulations and natural resources laws. Further, the defence of any claim and the payment of any award will ultimately come from public funds. As Prof. John Ruggie, the Special Representative of the United Nations' Secretary-General on the issue of human rights and transnational corporations and other business enterprises, explains when discussing investor-state arbitration in his recent report to the Human Rights Council, '[w]here human rights and other public interests are concerned, transparency should be a governing principle, without prejudice to legitimate commercial confidentiality'.[9]

IV. Other arbitration rules and investment treaties are already allowing for enhanced transparency

10. The goal of the current work is to update the Rules, to take into account their evolving use over the past 30 years, and to ensure that they withstand scrutiny for the next 30 years. Failing to revise the Rules to enhance the transparency of investor-state arbitration will leave them out of step with modern practice. Indeed, while some commercial arbitration institutions have chosen to maintain a presumption of confidentiality, the practice in investor-state arbitration is moving towards greater transparency and openness.

11. Investor-state arbitration is no longer a field in its infancy. The ICSID Convention entered into force on October 14, 1966, and investment treaties have contained provisions allowing for investor-state dispute settlement for more than 40 years.[10] The number of investment treaties has grown throughout the past four decades, reaching more than 1,500 by 1997 and more than 2,500 by 2007.[11] A review of modern dispute settlement practice evidences the ways in which the field is maturing, particularly with respect to transparency in investor-state arbitration.

12. The ICSID Arbitration Rules have always required the ICSID Secretariat to provide public notice of the existence of an investor-state arbitration being conducted pursuant to ICSID's Arbitration Rules or its Additional Facility Rules.[12]

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[9] Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights: Advance Edited Version*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, U.N. Doc. A/HRC/8/5, at ¶ 37 (7 April 2008) available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A-HRC-8-5.doc.

[10] U.N. Conference on Trade and Development, *Investor-State Dispute Settlement and Impact on Investment Rule Making*, U.N. Doc. UNCTAD/ITE/IIA/2007/3, at 1 (2007) available at http://www.unctad.org/en/docs/iteiia20073_en.pdf.

[11] *Id*. at 3.

[12] International Center for the Settlement of Investment Disputes, *Administrative and Financial Regulations*, Regulation 22 (10 April 2006) available at http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp ('The Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method

They have also always permitted either party to publish the award on its own initiative.[13] In 2006, ICSID modified its rules to allow for greater third-party participation through written submissions,[14] to create a presumption that the Tribunal may permit open oral hearings,[15] and to provide for greater access to the legal reasoning behind awards even when the parties refuse to publish the award themselves.[16] One hundred forty-three States, including the vast majority of the States in the Working Group, are Contracting States under the ICSID Convention. Thus, each one of those States already accepts transparency in investor-state arbitration when the dispute is brought under the ICSID rules.

13. States are also starting to build transparency into new, and sometimes existing, investment treaties, notwithstanding provisions in the UNCITRAL Rules or other rules to the contrary. For example, in 2001 the NAFTA Free Trade Commission ("NAFTA FTC") released binding Notes of Interpretation which affirmed the commitment of the NAFTA governments to the principle of transparency generally and created a presumption of public disclosure and openness.[17] In 2003, the NAFTA FTC issued a statement clarifying the Tribunal's discretion to accept third party submissions.[18] Finally in 2004, the NAFTA FTC again affirmed the NAFTA parties' commitment to transparency and welcomed Mexico's support of open hearings.[19]

14. Similarly, Canada's current Model Foreign Investment Protection and Promotion Agreement provides that arbitral proceedings and submissions are to be open to the public, and that the Tribunal can receive third party submissions.[20] A similar approach has been taken by the United States in its 2004 U.S. Model BIT[21] and its recent Free Trade Area Agreements with Chile, Singapore, Central America-Dominican Republic and Morocco. Further, in May 2007, the 19 eastern and

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of termination of each proceeding.')

[13] International Center for the Settlement of Investment Disputes, *Rules of Procedure for Arbitration Proceedings*, R. 48 (4) (10 April 2006) available at http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp (restricting only the Centre's ability to publish the award without the consent of both parties) ("ICSID Arbitration Rules"); Schreuer, C., *The ICSID Convention: A Commentary*, at 822 (2001) (the ICSID Convention and Arbitration Rules 'do[ ] not enjoin the parties from releasing the award.')

[14] ICSID Arbitration Rules, R. 37.

[15] ICSID Arbitration Rules, at R. 32 (2).

[16] ICSID Arbitration Rules, at R. 48 (4).

[17] NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter Eleven Provisions* (31 July 2001) available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interp.aspx?lang=en.

[18] NAFTA Free Trade Commission, *Statement of the Free Trade Commission on non-disputing party participation* (7 October 2003) available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/pdfs/Nondisputing-en.pdf.

[19] NAFTA Free Trade Commission, *2004 NAFTA Commission Meeting: Joint Statement* (16 July 2004) available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/JS-SanAntonio.aspx?lang=en.

[20] *See e.g.* Canadian Model Foreign Investment Promotion and Protection Agreement, at Art. 38 (2004) available at http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/2004-FIPA-model-en.pdf.

[21] US Model Bilateral Investment Treaty (2004), at Art. 29 available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.

southern African member States of COMESA signed an investment treaty providing for full transparency in investor-state arbitration.[22]

15. While States are beginning to include specific provisions in treaties in order to trump the anti-transparency provisions of the UNCITRAL Rules, this is not a desirable solution if the Commission wishes to ensure the continued relevance of the Rules in investor-state arbitration. Further, renegotiating the thousands of BITs already in existence is impractical. Those treaties often leave the choice of whether to use the ICSID Rules or the UNCITRAL Rules to the investor. In light of the important public interests involved, the Commission should stand against giving investors the power to force investor-state arbitrations to be conducted in secret.

V. Enhancing transparency in the Rules is straightforward

16. Canada believes that creating a presumption of openness and transparency in investor-state arbitration in the Rules can be accomplished either through straightforward modifications of several individual rules, or through the addition of an Annex. The modifications would have a negligible impact on the structure, spirit and drafting style of the Rules and no impact on the Rules with respect to commercial arbitrations pursuant to contracts or between private parties.

17. The proposed additions to the rules should seek to accomplish five objectives: (1) creating public knowledge of the initiation of an investor-state arbitration; (2) allowing third parties to make submissions to the tribunal where such submissions would be helpful and relevant and would not unduly delay, interfere with, or increase the costs of, the proceeding; (3) allowing open hearings; (4) making the decisions and award of the tribunal public; and (5) preserving the existing power of an arbitral tribunal to allow closed proceedings and restrict access to documents, or portions thereof, when necessary to protect confidential business information and/or information that is privileged or otherwise protected from disclosure under the domestic law of the disputing State. That all of these objectives can be achieved together is evidenced by current arbitral practice. Investor-state arbitral tribunals already have substantial experience protecting confidential and privileged information in the context of open and transparent proceedings. For example, NAFTA arbitration panels routinely enter confidentiality orders allowing the parties to redact confidential information prior to the publication of documents and permitting the panel to close otherwise public proceedings when necessary.

18. While the text of the necessary modifications remains to be negotiated within the Working Group, it is worth noting that these modifications need only be modest and very simple. Any concerns that the text of the revisions would somehow lead to jurisdictional challenges, or would create unnecessary complexity due to issues such as umbrella clauses and retroactivity, are not insurmountable and can be addressed and resolved in the Working Group. Further, given the limited scope of the

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[22] Common Market for Eastern and Southern Africa, Investment Agreement for the COMESA Common Investment Area, at Art. 28 (5)-(8) (3 May 2007) available at http://www.comesa.int/investment/regimes/investment_area/Folder.2007-11-06.4315/Multi-language_content.2007-11-07.1023/en. The 19 member states are: Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

necessary revisions, there should be little doubt that the Working Group will be able to efficiently resolve any such issues.

VI. Conclusion

19. The Rules have been successful over the past 30 years, but that is no guarantee of success in the next 30 years. The more the Rules fall out of line with modern practice, the more their importance may be minimized moving forward. The Commission should ensure that this does not happen by giving the Working Group the appropriate instructions.

20. At a minimum, the Working Group should be given a clear mandate to develop the revisions necessary to enhance the transparency of the Rules as applied to investor-state arbitration as a priority matter immediately after completion of its current work. Ultimately, failing to promptly include, at the earliest possible opportunity, provisions allowing for enhanced transparency will give the impression that the United Nations approves of a lack of transparency in investor-state arbitration. Such an effective endorsement of secrecy in investor-state arbitration would be contrary to the fundamental principles of good governance and human rights upon which the United Nations is founded.