

Kick-off Remarks

Mrs. Shamali Gupta
Deputy Director, Investment Trade Policy
Global Affairs Canada

International Investment Agreements (IIAs) have evolved over time. Pre-1989, IIAs were characterized by the degree of protection that international law should offer to foreign investors, which caused an imbalance where bilateral investment treaties (BITs) were seen to favour developed countries. From 1989 to present day, there has been a growing recognition of the value of facilitating foreign investment among countries, which resulted in a substantial increase in the number of BITs being concluded. Over this same time period, bilateral investment agreements also evolved into regional, plurilateral or multilateral agreements – through which investment liberalization was also pursued intensively. Through all these changes however, the core principles of investment agreements remained: establishing a secure and stable environment for investors and investments.

For Canada, our earlier investment model evolved based primarily on our experience with the 1994 North America Free Trade Agreement (NAFTA) investment chapter. However, with the recent conclusion of milestone free trade agreements such as the Canada-EU Comprehensive Economic and Trade Agreement (CETA), this has established a new inclusive direction for Canadian IIA policy.

For example, Canada has made efforts to consolidate our IIA network in the EU. Canada had concluded several older generation investment treaties with countries that are now EU member states in the 1990 and 2000s. However, with the entry into force of CETA, these treaties will be replaced by the modernized CETA investment text.

CETA innovations include reaffirming and explicitly re-stating the *governments' right to regulate*. This includes for environmental regulation, the promotion of safety, public health or any other public policy objectives. CETA also reflects significant *improvements and reforms to the ISDS process*, such as:

- Introducing mediation as an alternative dispute settlement procedures;
- Including a permanent first-instance Tribunal whose members are precluded from acting as counsel, expert or witness in any other international investment dispute.
- Establishing a permanent Appellate Tribunal to review decisions that are contested by either the investor or the respondent state
- Ensuring that a mechanism of joint treaty interpretation is established by the States; and
- Creating an arbitrator code of conduct to address criticism of ethics, fairness and impartiality of arbitrators.

CETA innovations also help to *foster responsible investment* through clarifying that investments made through fraudulent or illegal means would be denied access to ISDS in the treaty. In addition, the incorporation of specific international standards, such as the OECD Guidelines for Multinational Enterprises, also help to re-affirm the partners' commitments to these standards and encourage their wider use.

Although CETA signaled a turning point for Canada's investment trade policy, Canada had already been pursuing certain practices prior to this time. For example, since 2001 Canada has been pursuing joint interpretation of treaty provisions to clarify the content of a treaty and to narrow the scope of

interpretive discretion of tribunals. The most recent example includes work through the Joint Commission of our free trade agreement with Colombia, which adopted a joint interpretative declaration in 2017 that reaffirms the parties' right to regulate and clarifies the treaty provisions on "like circumstances", full protection and security, and minimum standard of treatment. Canada is committed to using these provisions to avoid and correct any misinterpretation by tribunals.

Other reform action includes Canada's engagement at the multilateral level. For example, Canada has been actively involved in the work of UNCITRAL's Working Group III. The working group, which is chaired by a member of the Canadian delegation, is considering possible reform of the ISDS mechanism used in international investment agreements, including the possibility of creating a new Multilateral Investment Court.

Recently, Canada has also been actively engaged in the Structured Discussion on Investment Facilitation for Development at the WTO. Canada fully supports the work towards developing a multilateral framework on investment facilitation for development. A multilateral framework, which improves transparency and streamlines administrative procedures, will benefit investors and will help countries attract badly needed private capital.

Finally when looking ahead at ongoing and future reform efforts, Canada believes it is important to respond to concerns that have been raised by our citizens and stakeholders with respect to international investment agreements. For example, Canada is currently in the process of reviewing and modernizing our model investment treaty. A key part of this review has been the public consultation process. This process, which was conducted over a six month period, was designed to better understand how and what changes should be reflected in a new inclusive investment treaty model for Canada. The results of these consultations, along with Canada's recent treaty experience will help guide the development of Canada's model investment treaty going forward.

It is Canada's goal to ensure that all segments of society can take advantage of the opportunities that flow from trade and investment.