Global Affairs Canada | **Affaires mondiales Canada**

Department of Justice | **Ministère de la Justice**

CANADA

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By E-mail

June 10, 2019

Meg Kinnear
1818 H Street, N.W.
MSN C3-300
Washington, D.C. 20433
U.S.A.

Dear Ms. Kinnear:

Re: ICSID WORKING PAPER #2

Canada respectfully submits its comments on the amendments to the ICSID Rules proposed in Working Paper #2. Canada would like to commend the Secretariat on its constructive proposals and looks forward to further meetings and discussions of these proposed amendments.

Canada's comments on the proposed changes to the Arbitration Rules are set out in Appendix A, and its comments to the other proposals in Working Paper #2 are set out below. Canada has provided comments only to those proposals in Working Paper #2 where it has substantive suggestions. Any absence of comment by Canada should not be taken to mean that Canada agrees with the explanations provided by the Secretariat in Working Paper #2.

Administrative and Financial Regulations

Regulation 16

With respect to 16(2)(a), Canada believes that allowing only 30 days for compliance with Tribunal requests for funds is insufficient and recommends that the rule continue to allow 60 days for payments to be made. The reality is that the amount of the deposit required or the particular timing of a request often requires States to seek lengthy internal approvals. While the effect of a default may not be immediate, Canada does not believe that the Rules should be drafted in such a way that the number of instances of default, only if technical and without consequence, increase. This is not an instance where reducing the time to pay a request for funds by thirty days increases the efficiency of the arbitration process. Canada suggests that Regulation 16(2)(a) be changed as follows: "if the amounts requested are not paid in full

within 60 days after the date of the request, the Secretary-General may notify both parties of the default and give them an opportunity to make the required payment;"

Regulation 25(b)

The commentaries indicate that Regulation 25(b) was deleted in order to clarify confusion about what the applicable rules were, particularly in light of the fact, that the transparency of documents is already extensively covered in the existing relevant rules. However, the Working Paper does not delete the paragraph. Canada does not have a preference with Regulation 25(b) either being deleted from these Regulations, or remaining as amended in WP2.

Institution Rules

Rule 2

Canada supports inclusion in this Rule of a requirement for the Request for Arbitration to include an estimate of the damages sought, rather than in Rule 3. Canada notes that such an estimate is not required to register the Request. However, the Request for Arbitration serves other purposes than merely allowing registration of a dispute at the Centre. It also often serves as the official notice of a dispute, and in this regard, it is important for the respondent State to know as early as possible the amount being claimed, as this can significantly affect how the State responds to the claim and how it prepares its defence. Accordingly, Canada suggests current Rule 3(a) be moved into Rule 2(2)(a). Further, in order to accommodate this, Canada suggests that the chapeau of paragraph 2(2) be changed to delete the first eight words. In summary, paragraph 2(2)(a) would read:

(2) The Request shall include:

(a) a description of the investment, a summary of the relevant facts and claims, the request for relief, an indication that there is a legal dispute between the parties arising directly out of the investment, and an estimate of the amount of damages sought, if any;

Additional Facility Rules

Canada notes that with respect to the Additional Facility Rules, many of the comments that Canada has with respect to the relevant Convention Arbitraiton Rules are equally applicable. Therefore, the comments set out in Appendix A should be considered to apply, as appropriate, to the equivalent rule in the Additional Facility Arbitration Rules.

Additional Facility Administrative and Financial Regulations

Regulation 2

Canada notes that the "its" in the last sentence in this Regulation is not clear. Canada suggests that it be made clear whether the "its" refers to the Secretariat, or to the Commission or Tribunal.

Mediation Rules

Rule 12

Canada notes the comment in paragraph 789 of the Working Paper that third-party funding does not raise issues in mediation in the same manner as in arbitration, and thus specific provisions are not needed. Canada believes that similar issues could arise, particularly with respect to conflicts of interest. For example, if an arbitration is ongoing, but the parties decide to pause and try mediation, in order to ensure the independence of the mediator, it will be necessary for him or her to know if there is any relationship between the mediator and the third-party funder. Canada does not see any drawback to requiring such disclosures.

Mediation Administrative Rules and Financial Regulations

Regulation 3

Canada believes that while a mediation process should be confidential, the existence of the mediation should not be. In fact, this is expressly provided for in the Mediation Rules. However, to be effectively public, the information must somehow be made available to the public. Canada thus supports the publication of Registers, as originally envisaged.

Schedule 1

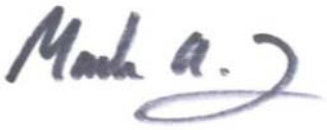
Paragraph 9

Canada understands that the reference to "one class above economy" is meant to refer to business class. However, Canada wonders if this is clear enough in light of the marketing of different types of economy class.

* * *

Canada looks forward to the next meeting of Contracting Parties. Please do not hesitate to contact us in the meantime with respect to any of Canada's comments to Working Paper #2.

Yours truly,



For Shane Spelliscy
Director
Trade Law Bureau

cc. Mark A. Luz, Senior Counsel and Deputy Director, Trade Law Bureau

Appendix A

WORKING PAPER #2 PROPOSED AMENDED ARBITRATION RULES	CANADA'S COMMENTS
Rule ~~3~~ 5 **~~Method of Filing~~ Supporting Documents** ~~(1) Written submissions, observations, supporting documents and communications shall be filed electronically, unless the parties agree or the Tribunal orders otherwise. They shall be introduced into the proceeding by filing them with the Secretariat, which shall acknowledge receipt and distribute them in accordance with Rule 4.~~ (1) ~~(2)~~ Supporting documents, including witness statements, expert reports, exhibits and legal authorities, shall be filed together with the request, written submission~~s~~, observations or communication to which they relate~~, within the time limit fixed to file such written submissions~~. (2) ~~(3)~~ An extract of a supporting document may be filed if the omission of the text does not render the extract misleading. The Tribunal or a party may require a fuller extract or a complete version of the document. (3) If the authenticity of a supporting document is disputed, the Tribunal may order a party to provide a certified copy or to make the original document available for examination.	Canada agrees that an extract of a supporting document may be filed as long as the extract is not misleading in the context of full document. Canada also supports the inclusion of "or a party" in Rule 5(2) because it will allow for a disputing party to request the full document from the other party directly without having to involve the Tribunal.
Rule ~~6~~ 8 **Correction of Errors and Deficiencies** (1) A party may correct an accidental error in a~~ny~~ document ~~written submission, observation, supporting document or communication~~ at any time before the Award is rendered, with agreement of the other party or with leave of the Tribunal. (2) The ~~Secretariat~~ Secretary-General may request that a party correct any deficiency in a filing~~, at the party's own cost~~ or make the required	With respect to paragraph 1, Canada suggests that the rule emphasize that corrections should be made as soon as possible after they are noticed but still before the award is rendered. Canada suggests the following language: "A party may correct an accidental error in a document as soon as possible after the error has been identified, and before the Award is rendered, with the agreement of the other party or with leave of the Tribunal." With respect to paragraph 2, Canada believes that some confusion is introduced in this paragraph by reference to the term "in a filing", which may be interpreted to mean in the document filed. In practice, the document filed is often referred to as "the filing". Canada understands that the point of

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correction.	this paragraph is not to talk about errors in the document filed, but rather about errors in the way a document was filed. Hence, for clarity, Canada suggests that the paragraph be rewritten to say: "The Secretary-General may request that a party correct any deficiency in how a document was filed or make the required correction."
Rule ~~7~~ 9 **Calculation of Time Limits** (1) References to time shall be determined based on the time at the seat of the Centre on the relevant date. (2) ~~(1)~~ Any time limit expressed as a period of time shall be calculated from the day after the date on which: ~~(a) of the relevant notice;~~ (a) ~~(b) on which~~ the Tribunal, or the Secretary-General if applicable, announces the period; or (b) ~~(c) on which~~ the procedural step starting the period is taken. (3) ~~(2)~~ A time limit ~~expires at 11:59 p.m. at the seat of the Centre on the relevant date. Where the end of a time limit falls on a Saturday, Sunday, or a holiday observed by the Secretariat, it~~ shall be satisfied if a procedural ~~the relevant~~ step is taken or ~~the relevant~~ a document is received by the ~~Secretariat~~ Secretary-General on the relevant date, or, if the date falls on a Saturday, Sunday, or a holiday observed by the Secretariat, on the subsequent business day.	Canada suggests that paragraph 3 does not reflect the most appropriate approach to holiday. Although other holiday periods may be relevant (such as holidays at the location of the Secretariat), the most relevant place is the place of the party required to take the procedural step. Canada takes note of the Secretariat's comment that the parties can plan for such dates in advance when doing up the procedural calendar. However, Canada notes that in its experience, it is rare that a procedural order will specify particular dates. Rather the more typical practice, other than for initial pleadings, is for the Procedural Calendar to specify that the next procedural step shall take place a certain period after the completion of the previous one. For example, a Claimant's Memorial may be due 90 days after the Tribunal's final ruling on document production issues. However, when that final order will be made cannot be known with certainty in advance. Hence, in Canada's view, it is more appropriate to have a default rule regarding holidays in the place of the party required to take a procedural step. Hence, Canada suggests that this Rule be redrafted to say: "A time limit shall be satisfied if a procedural step is taken, or a document is received by the Secretary-General, on the relevant date, or if that date falls on a Saturday, Sunday or holiday observed by the party required to take the procedural step, on the subsequent business day."
Rule ~~8~~ 10 **Time Limits ~~Specified by the Convention and these Rules or Fixed by the Secretary-General~~ Applicable to Parties** (1) The Tribunal, or the Secretary-	Canada suggests that a further clarification be made as to the operation of paragraph 4 by making the first sentence and the second sentence separate paragraphs. This will create a non-derogable rule for the provisions with time limits prescribed by the Convention, and then a more flexible rule with respect to other time limits set

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General if applicable, shall fix time limits for the completion of each procedural step in the proceeding, other than time limits prescribed by the Convention or these Rules. (2) ~~(1)~~ The parties may agree to extend a~~ny~~ time limit ~~fixed by the Secretary-General or specified by the Convention or these Rules if such time limit is not mandatory under~~ other than those in Articles 49, 51 and 52 of the Convention. ~~(2) Any step taken by the parties after expiry of a time limit fixed by the Secretary-General or specified by the Convention or these Rules shall be disregarded, unless the Secretary-General or the Tribunal, as applicable, concludes that there are special circumstances justifying the delay.~~ (3) The Tribunal, or the Secretary-General if applicable, may extend any time limit that they fixed, upon a reasoned application by either party made prior to its expiry. The Tribunal may delegate this power to its President. ~~(3) Where these Rules prescribe time limits for orders, decisions and the Award, the Tribunal, or the Chairman, where applicable, shall use best efforts to meet those time limits. If special circumstances arise which prevent the Tribunal from complying with a time limit, it shall advise the parties of the reason for delay and the date when it anticipates the order, decision or Award will be delivered.~~ (4) An application or request filed after the expiry of the time limits in Articles 49, 51 and 52 of the Convention shall be disregarded. A procedural step taken or document received after the expiry of any other time limit shall be disregarded unless: (a) the other party does not object to the late step or filing; or	by the Tribunal. Further, in subparagraph (b) of the second sentence, Canada suggests that if the Tribunal or Secretary-General decides to allow an untimely submission, it should specifically state the reasons that comprise the special circumstances. This could be accomplished by adding "in a reasoned decision" after "concludes". Accordingly, Canada suggests the following changes to the proposed Rule 10(4): (4) An application or request filed after the expiry of the time limits in Articles 49, 51 and 52 of the Convention shall be disregarded. (5) A procedural step taken or document received after the expiry of any other time limit set by the Tribunal shall be disregarded unless: (a) the other party does not object to the late step or filing; or (b) the Tribunal, or the Secretary-General if applicable, concludes in a reasoned decision that there are special circumstances justifying the failure to meet a time limit that they fixed.

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(b) the Tribunal, or the Secretary-General if applicable, concludes that there are special circumstances justifying the failure to meet a time limit that they fixed.	
Rule ~~21~~ 13 **~~Disclosure~~ Notice of Third-party Funding** ~~(1) "Third-party funding" is the provision of funds or other material support for the pursuit or defense of a proceeding, by a natural or juridical person that is not a party to the dispute ("third-party funder"), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. Such funds or material support may be provided:~~ ~~(a) through a donation or grant; or~~ ~~(b) in return for a premium or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.~~ ~~(2) A party shall file a written notice disclosing that it has third-party funding and the name of the third-party funder. Such notice shall be sent to the Secretariat immediately upon registration of the Request for arbitration, or upon concluding a third-party funding arrangement after registration.~~ ~~(3) Each party shall have a continuing obligation to disclose any changes to the information referred to in paragraph (2) occurring after the initial disclosure, including termination of the funding arrangement.~~ (1) For purposes of completing the arbitrator declaration required by Rule 18(3)(b), a party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has	Canada notes the statement of the Secretariat that the primary goal with respect to rules on third-party funding is to avoid conflicts of interest. Canada agrees that this is an important reason for requiring disclosure of third-party funding, but it is not the only reason to require disclosure (for example, it may be relevant for determining whether security for costs is appropriate, or for purposes of award enforcement). Accordingly, Canada suggests that the phrase "For the purposes of completing the arbitrator declaration required by Rule 18(3)(b)" be deleted, because the purpose of the notice is not solely for the arbitrator declaration. Canada does not consider it necessary to elaborate further as to why the disclosure is required – if the disclosure gives rise to conflict of interest or other concerns, the disputing parties and/or arbitrators can elaborate as necessary. Second, Canada also suggests that because the avoidance of conflicts of interest is not the only relevant reason to require disclosure of third-party funding, it is still relevant for parties to disclose whether they have contingency fee arrangements with counsel because it may impact on the claimant's willingness or ability to pay a costs award in the event of an unsuccessful claim. While a contingency fee arrangement with a representative should not give rise to an automatic presumption that security for costs is appropriate, it may be a relevant factor for the Tribunal to consider. Third, as noted in Canada's comments to Working Paper #1, Canada remains concerned about the potential implications the proposed language may have for arrangements between different levels of government in a federal state. A treaty may or may not elaborate on the relationship between different levels of governments, so the proposed rule should be explicit that such other levels of government are not non-parties for the purposes of this provision.

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received funds or equivalent support for the pursuit or defense of the proceeding ("third-party funding"). (2) A non-party referred to in paragraph (1) does not include a representative of a party. (3) A party shall send the notice referred to in paragraph (1) to the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.	Finally, Canada suggests that further consideration be given to imposing specific consequences for the failure to disclose third-party funding. Canada notes the Secretariat's comment that in fact the conduct of the parties can be taken into account in the allocation of costs. However, Canada suggests that without clear direction on the consequences for failing to disclose third-party funding, parties may be incentivized to avoid disclosure. In light of the above, Canada suggests that this provision be written as follows: 1) A party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has received funds or equivalent support for the pursuit or defense of the proceeding ("third-party funding"). 2) A non-party referred to in paragraph (1) does not include a sub-national or any other level of government of a Contracting State. 3) A party shall send the notice referred to in paragraph (1) to the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice. 4) A party which fails to comply with the obligations in this rule shall in principle be responsible for all of the arbitration costs arising from such failure, unless the Tribunal determines that special circumstances exist that justify a different allocation of costs.
Chapter ~~IV~~ III **Disqualification of Arbitrators and Vacancies** **Rule ~~29~~ 21** **Proposal for Disqualification of Arbitrators**	Canada appreciates the reintroduction of the automatic suspension during challenges as this is the best way to ensure the fair treatment of the parties and the efficient conduct of the arbitration. Canada further notes that dilatory challenges are best dealt with in other ways, including having clearer rules on conflicts of interests, promoting a better understanding of the basis for disqualification through the publishing of

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(1) A party may ~~propose the disqualification of~~ file a proposal to disqualify one or more arbitrators ("proposal") ~~pursuant to Article 57 of the Convention.~~ in accordance with the following procedure: ~~(2) The following procedure shall apply:~~ (a) ~~any~~ the proposal shall be filed after the constitution of the Tribunal and within ~~20~~ 21 days after the later of: (i) the constitution of the Tribunal; or (ii) the date on which the party proposing the disqualification first knew or first should have known of the facts on which the proposal is based; (b) ~~the party proposing the disqualification shall file a written submission, specifying~~ the proposal shall include the grounds on which it is based, ~~and including~~ a statement of the relevant facts, law and arguments, ~~with~~ and any supporting documents; (c) the other party shall file its response and supporting documents within ~~seven~~ 21 days after receipt of the ~~written submission~~ proposal; (d) the arbitrator to whom the proposal relates may file a statement limited to factual information relevant to the proposal. ~~This~~ The statement shall be filed within five days after receipt of the ~~written submissions~~ response referred to in paragraph ~~(2)~~(1)(c); and (e) ~~the parties~~ each party may file ~~a~~ final written submissions on the proposal within seven days after	decisions on disqualification, and through the imposition of interim costs awards.

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expiry of the time limit referred to in paragraph ~~(2)~~(1)(d). ~~(3) The proceeding shall continue while the proposal is pending unless it is suspended, in whole or in part, by agreement of the parties. If the proposal results in a disqualification, either party may request that any order or decision issued by the Tribunal while the proposal was pending, be reconsidered by the reconstituted Tribunal.~~ (2) The proceeding shall be suspended until a decision on the proposal has been made, except to the extent that the parties agree to continue the proceeding in whole or in part.	
Rule ~~30~~ 22 **Decision on the Proposal for Disqualification** (1) The decision on a proposal shall be ~~taken~~ made by the arbitrators not subject to the proposal or by the Chair~~man~~ in accordance with Article 58 of the Convention. (2) For the purposes of Article 58 of the Convention: (a) if the arbitrators not subject to a proposal are unable to decide the proposal for any reason, they shall notify the Secretary-General and shall be considered equally divided; (b) if a subsequent proposal is filed while the decision on a prior proposal is pending, both proposals shall be decided by the Chair~~man~~ as if they were a proposal to disqualify a majority of the Tribunal. (3) The ~~decision on~~ arbitrators not subject to the proposal and the Chair	Canada notes the proposals made to provide further clarity with respect to the grounds for disqualification under the Convention. Canada further notes that in paragraph 183 of the Working Paper, the Secretariat has suggested that such grounds cannot be included because they would require an amendment of the Convention. Canada respectfully disagrees that the Convention prohibits further specificity in the Arbitration Rules. Article 57 of the Convention provides "A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14." Article 14 provides, in relevant part, "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment." Thus, it is clear that Article 57 would prevent the Arbitration Rules from prohibiting disqualification on one of these grounds. However, interpreted in line with the Vienna Convention, Article 57 does not prohibit the Arbitration Rules from providing further specificity on what circumstances might be indicative of an ability to "exercise independent judgment" or of a person who is not of "high moral character." Notwithstanding the above, Canada believes it

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shall use best efforts to decide any proposal ~~shall be made~~ within 30 days after the later of the expiry of the time limit referred to in Rule ~~29(2)~~ 21(1)(e) or the notice in ~~Rule 30~~ paragraph (2)(a).	would be more productive to allow for consideration of emerging codes of conduct, as well as the disclosures make by the arbitrator and disputing parties, rather than trying to list all possible factors to be considered. Canada suggests the following language be added to Rule 22: "The decision on a proposal for disqualification shall be reasoned and take into account the disclosures made by the arbitrator and disputing parties, any codes of conduct applicable to the arbitrators and the disputing parties and any other relevant guidelines on conflicts of interest appropriate under the circumstances."
Rule ~~13~~ 29 **Written Submissions ~~and Observations~~** (1) The parties shall file the following written submissions~~, with any supporting documents, within the time limits fixed by the Tribunal~~: (a) a memorial by the requesting party~~, subject to paragraph (2)~~; (b) a counter-memorial by the other party; and,~~ if unless~~ the parties ~~so~~ agree ~~or the Tribunal finds it necessary~~ otherwise: (c) a reply by the requesting party; and (d) a rejoinder by the other party. ~~(2) The requesting party may elect to have the Request for arbitration considered as the memorial.~~ (2) ~~(3)~~ A memorial shall contain a statement of the relevant facts, law and arguments, and the request for relief. A counter-memorial shall contain a statement of the relevant facts, including an admission or denial of facts stated in the memorial, and any necessary additional facts, a statement of law in reply to the memorial, arguments, and the request for relief. A reply and rejoinder shall ~~be limited to~~ respond~~ing~~ to the previous written submission.	In paragraph 216 of the Working Paper, the Secretariat suggests that if the Claimant files its Memorial before the first session, there is a presumption that less time will be needed to file the Counter-Memorial. Canada does not believe that there is any basis for this presumption and suggests that this be corrected in the next version of the Working Paper to ensure that Tribunals do not presume that this statement is accepted as true by the Contracting States. Canada alsothe rule in Rule 29(4) with respect to unscheduled written submissions, and in particular the requirement, for leave to be obtained by the Tribunal before they can be filed. In the last sentence of paragraph 217 of the Working Paper, the Secretariat suggests that this rule makes clear that the leave must be obtained prior to the written submission being filed. Canada agrees with this approach, otherwise the Tribunal has seen the unscheduled written submission, rendering the decision on leave essentially meaningless. However, Canada suggests that this is not clear from the text of the rule as written. Canada suggests an additional sentence at the end of paragraph 4, stating "The application may not include or attach the written submission, observation or supporting documents with respect to which permission to file is being sought."

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(1) A memorial on the merits or a memorial on preliminary objections may be filed at any time before the first session. (2) ~~The Tribunal shall grant leave to file~~ No party may file unscheduled written submissions, observations or supporting documents without leave of the Tribunal, unless the filing of such documents is provided for by the Convention or these Rules. The Tribunal may grant such leave upon a timely and reasoned application ~~and only~~ if it finds such written submissions, observations or supporting documents ~~these~~ are necessary in view of all relevant circumstances.	
Rule ~~14~~ 30 **Case Management Conference~~s~~** With a view to ~~expediting the~~ conducting an effective and expeditious proceeding, the Tribunal ~~may~~ shall convene a one or more case management conference~~s~~ with the parties at any time after the first session to: (a) identify uncontested facts; (b) narrow the issues in dispute; ~~and~~ or (a) address any other procedural or substantive issue related to the resolution of the dispute.	Canada supports the introduction of case management conferences and suggests that specific mention of document production would be a useful addition to this rule in order to ensure that the Tribunal pay close attention to what is often an onerous and expensive process for both disputing parties. Canada suggests adding "manage any requests for the production of documents; or" as a new subsection (c).
Rule ~~40~~ 36 **~~Tribunal Order to Produce Documents or Other Evidence~~** **Disputes Arising from Requests for Documents** ~~(1)~~ The Tribunal shall decide any dispute arising out of a party's objection to the other party's request for production of documents ~~or other evidence~~. In ~~doing so, it~~ deciding the dispute, the Tribunal shall consider:	Canada notes that document production can be one of the most costly and burdensome aspects of current international arbitral practice and may result in parties being compelled to collect, review and produce thousands of documents, only a small portion of which are actually material to the dispute and used as exhibits. The Secretariat should take this opportunity to provide guidance to disputing parties and Tribunals to improve existing document production practice. The Arbitration Rules do not contain an absolute right to document production and Tribunals

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~~all relevant circumstances including~~ (a) the scope and timeliness of the request; (a) the relevance and materiality of the documents and evidence requested; (c) the ~~time and~~ burden of production; ~~and any objections raised by~~ (d) the basis of the ~~other party's~~ objection; and (e) all other relevant circumstances. ~~(2) The Tribunal may at any time on its own initiative order a party to produce documents or other evidence.~~	should be confident in their ability to deny or, if appropriate, modify unreasonable document requests without being accused of denying the requesting party a right to a fair hearing. Accordingly, Rule 36 should not be drafted to suggest that there is an automatic presumption that document production must occur but rather emphasize that a Tribunal should only order production of an appropriately limited and specific request for material and relevant documents. Canada proposes the following language for Rule 36: **Requests to Produce Documents** 1) A party may request that the Tribunal order the other party to produce either a specifically identified document or an appropriately limited category of documents. 2) The party from which the document or documents are requested shall be given an opportunity to provide reasoned objections to the request, including on the grounds that the requested documents are protected from disclosure by applicable privileges and laws. 3) The Tribunal shall grant a disputed request for documents only if the requesting party establishes to the satisfaction of the Tribunal that the request is: a. appropriately specific and limited in scope; b. only for relevant and material documents; c. timely and will not unduly delay or burden the proceedings; and d. not unreasonably burdensome in light of the materiality and likely probative value of the documents sought. 4) The Tribunal shall consider the efficiency and appropriateness of a party's document production requests, and the burden imposed on the other party in objecting to and responding to those requests, when allocating costs of the

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	arbitration, even where the requesting party is ultimately successful.
Rule ~~42~~ 38 **Tribunal-Appointed Experts** (1) The Tribunal may appoint one or more independent experts to report to it on specific matters within the scope of the dispute. (2) The Tribunal shall consult with the parties on the appointment of an expert, including on the terms of reference and fees of the expert. (3) The parties shall provide the Tribunal-appointed expert with any information, document or other evidence that the expert may require. The Tribunal shall decide any dispute regarding the evidence required by the Tribunal-appointed expert. (4) The parties shall have the right to make written ~~or~~ and oral submissions, as required, on the report of the Tribunal-appointed expert. (5) Rule ~~41~~ 37(1)-(5) and (8) shall apply, with necessary modifications, to the Tribunal appointed expert.	Canada remains concerned about the use of tribunal appointed experts, particularly where they are used to provide evidence that was the burden of one of the disputing parties to provide. While tribunal appointed experts should be considered only in rare circumstances, Canada suggests that it is very important for the parties to know as much as possible about any proposed tribunal appointed expert, in order to ensure their full control over the process. Canada notes the comment in paragraph 254 of the Working Paper about qualifications, and the suggestion that these would likely be discussed in the consultations of the parties. However, Canada believes that this should be made explicit in the rule itself, and as such, suggests that paragraph 2 read: "The Tribunal shall consult with the parties on the appointment of an expert, including on the terms of reference, fees, the expert's independence, qualifications, scope of work, and all other relevant information."
Chapter VI **Special Procedures** **Rule ~~35~~ 40** **Manifest Lack of Legal Merit** (1) A party may object that a claim is manifestly without legal merit. The objection may relate to the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal.	The time limit to file an objection that a claim is manifestly without legal merit is currently only 30 days after the constitution of the Tribunal. Canada notes the Secretariat's comment that there is often a period of time between the Request for Arbitration and the constitution of the Tribunal. However, during this period, the Respondent State may only be beginning to organize its defence, and until a Tribunal is actually constitute,d it may not devote sufficient time to determining if a claim is without legal merit. In Canada's experience, there are a number of claims filed which never proceed to the full constitution of a Tribunal, and hence, Respondent

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(2) The following procedure shall apply: (a) a party shall file a written submission no later than 30 days after the constitution of the Tribunal, specifying the grounds on which the objection is based, and including a statement of the relevant facts, law and arguments~~, with any supporting documents~~; (b) the Tribunal shall fix time limits for written ~~or~~ and oral submissions, as required, on the objection; (c) if a party files the objection before constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the objection, so that the Tribunal may consider the objection promptly upon its constitution; and (d) the Tribunal shall issue its decision or render its Award on the objection within 60 days after the latest of: (i) the constitution of the Tribunal; (ii) the last written submission on the objection; or (iii) the last oral submission on the objection. (3) ~~(4)~~ If the Tribunal decides that all claims are manifestly without legal merit, it shall render an Award to that effect. Otherwise, the Tribunal shall issue a decision on the objection and fix any time limit necessary for the further conduct of the proceeding. (4) ~~(3) The~~ A decision ~~of the Tribunal~~ that a claim is not manifestly without legal merit shall be without prejudice to the right of a party to file a preliminary objection pursuant	States are right to be cautious in the expenditure of resources before a Tribunal exists. As a result, Canada suggests that the time limit for filing this objection be 60 days.

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to Rule ~~36~~ 42 or to argue subsequently in the proceeding that a claim is without legal merit.	
Rule ~~37~~ 41 **Bifurcation** (1) A party may request that a question be addressed in a separate phase of the proceeding ("request for bifurcation"). (2) If a request for bifurcation relates to a preliminary objection, Rule 42BIS shall apply. (3) ~~(2)~~ The following procedure shall apply to requests for bifurcation other than a request referred to in paragraph (2): (a) ~~if~~ the request for bifurcation ~~relates to a preliminary objection, a party shall file the request within 30 days after the filing of the memorial on the merits or, if the objection relates to an ancillary claim, within 30 days after the filing of the written submission containing the ancillary claim, unless the facts on which the objection is based are unknown to the party at the relevant time;~~ shall be filed as soon as possible; (b) the request for bifurcation shall ~~specify~~ state the questions to be bifurcated; (c) the Tribunal shall fix time limits for written and ~~or~~ oral submissions, as required, on the request for bifurcation; and (d) the Tribunal shall issue its decision on a request for bifurcation within ~~30~~ 20 days after the last written or oral submission on the request; (e) the Tribunal shall decide whether to suspend any part of the proceeding if it decides to bifurcate; and (f) the Tribunal shall fix any time	In Canada's view, when a request for bifurcation is granted, it should always result in the suspension of any other phase of the proceedings unless the parties agree otherwise or special circumstances exist. This is the logical consequence of a Tribunal deciding that efficiency would be best served by bifurcation: it makes little sense to, for example, bifurcate liability from damages but then require the parties to engage in briefing on quantum before the Tribunal has rendered its decision on liability. Canada suggests rewriting Rule 41(e) as: "the Tribunal shall suspend any other part of the proceeding if it decides to bifurcate, unless the parties agree otherwise, or the Tribunal determines that special circumstances would render such suspension inappropriate."

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limit for the further conduct of the proceeding, as required. (4) In determining whether to bifurcate, the Tribunal shall consider ~~all relevant circumstances, including~~ whether bifurcation ~~would~~ could materially reduce the time and cost of the proceeding and all other relevant circumstances. (5) ~~(3)~~ The Tribunal may at any time on its own initiative decide whether a question is to be addressed in a separate phase of the proceeding.	
Rule 42BIS **Bifurcation of Preliminary Objections** (1) The following procedure shall apply with respect to a request for bifurcation relating to a preliminary objection: (a) unless the parties agree on a different time limit, the request for bifurcation shall be filed within: (i) 30 days after the first session, if the memorial on the merits is filed before the first session; (ii) 30 days after filing the memorial on the merits, if it is filed after the first session; (iii) 30 days after filing the written submission containing the ancillary claim, if the objection relates to an ancillary claim; or (iv) as soon as possible after the facts on which the	In paragraph 1(a), Canada notes that there is a grammar problem in the chapeau in that the "within" cannot be used with (a)(iv). In addition, for similar reasons as Canada's comments on Rule 40, Canada suggests that the time limit for filing a request for bifurcation on a preliminary objection should be 60 days in (a)(i)-(iii). Further, for the same reasons as explained in Canada's comment on Rule 41, if a Tribunal decides to bifurcate a preliminary objection, it should suspend other proceedings. As a result, paragraph 3(a) should instead read: "suspend any other part of the proceeding if it decides to bifurcate, unless the parties agree otherwise, or the Tribunal determines that special circumstances would render such suspension inappropriate."

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preliminary objection is based become known to a party, if those facts were unknown to the party on the relevant dates; (b) the request for bifurcation shall state the preliminary objection to which it relates; (c) the proceeding on the merits shall be suspended pending the Tribunal's consideration of the request for bifurcation, unless the parties agree otherwise; (d) the Tribunal shall fix time limits for written and oral submissions, as required, on the request for bifurcation; and (e) the Tribunal shall issue its decision on a request for bifurcation within 20 days after the last written or oral submission on the request. (2) In determining whether to bifurcate, the Tribunal shall consider whether bifurcation could materially reduce the time and cost of the proceeding and all other relevant circumstances. (3) If the Tribunal decides to address the preliminary objection in a separate phase of the proceeding, it shall: (a) decide whether to suspend any part of the proceeding on the merits; (a) fix time limits for written and oral submissions on the preliminary objection, as required; (b) issue its decision or render its Award on the preliminary objection within 180 days after the last written or oral submission; and	

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(c) fix any time limit necessary for the further conduct of the proceeding if the Tribunal does not render an Award. (4) If the Tribunal decides to join the preliminary objection to the merits, it shall: (a) lift any suspension of the proceeding on the merits in place pursuant to paragraph (1)(c); (b) fix time limits for written and oral submissions on the preliminary objection, as required; (c) modify any time limits for written and oral submissions on the merits, as required; and (d) render its Award within 240 days after the last written or oral submission in the proceeding, in accordance with Rule 57(1)(c).	
Rule ~~38~~ 43 **Consolidation or Coordination ~~on Consent of Parties~~ of Arbitrations** (1) Parties to two or more pending arbitrations administered by the Centre may agree to consolidate or coordinate these arbitrations. ~~(2) The parties referred to in paragraph (1) shall provide the Secretary-General with written terms of reference, specifying the terms of consolidation or coordination to which they would consent.~~ (2) To be consolidated under this Rule, the arbitrations shall have been registered in accordance with the Convention and shall involve the same Contracting State (or any constituent subdivision or agency of the Contracting State). Consolidation joins all aspects of the arbitrations	Canada suggests that for readability, paragraph 1 of this rule be rewritten to provide the definition of the relevant terms, rather than have descriptive language as proposed. In particular, Canada suggests paragraph 1 read: "Parties to two or more pending arbitrations administered by the Centre may agree to join all aspects of the arbitrations and receive only a single Award ("consolidation") or align only specific procedural aspects of each pending arbitration while keeping the proceedings separate ("coordination")." With this drafting, the second sentence of paragraph 2 and the entirety of paragraph 3 can be deleted.

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sought to be consolidated and results in a single Award. ~~(3) The Secretary-General shall take all necessary administrative steps to implement the agreement of the parties if the consolidation or coordination requested would promote a fair and efficient resolution of all or any claims asserted in the arbitrations.~~ (3) Coordination aligns specific procedural aspects of each pending arbitration, but the arbitrations remain separate proceedings and result in individual Awards. (4) The parties referred to in paragraph (1) shall jointly provide the Secretary-General with proposed terms of reference for consolidation or coordination and consult with the Secretary-General to ensure that the proposed terms of reference are capable of being implemented. (5) After the consultation referred to in paragraph (4), the Secretary-General shall communicate the agreed terms of reference to the Tribunal(s) constituted in the arbitrations. Such Tribunal(s) shall make any order or decision required to implement the terms of reference.	
Rule ~~19~~ 50 **Decisions on Costs** (1) In ~~determining and~~ allocating the costs of the proceeding, the Tribunal shall consider ~~all relevant circumstances, including~~: (a) the outcome of ~~any part of~~ the proceeding or ~~overall~~ any part of it; (b) the parties' conduct during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner;	Canada notes that in paragraph 341 of the Working Paper , the Secretariat states that the Tribunal is empowered to consider the outcome on specific claims or arguments in the context of the phrase "any part of the proceeding". Canada suggests that Rule 50(1)(a) be rewritten to say "the outcome of the proceeding, as well as the outcome of specific claims, defences and parts of the proceeding." This will empower Tribunals to consider not just the overall outcome of the dispute but the outcome of specific aspects of the dispute (for example, whether damages awarded are reasonably connected to what was claimed; whether certain defences were accepted). Canada further notes the Secretariat's comment at

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(c) the complexity of the issues; ~~and~~ (d) the reasonableness of the costs claimed~~.~~; and (e) all other relevant circumstances. (2) The Tribunal may ~~at any time~~ make interim decisions on the costs of any part of a proceeding at any time. (3) The Tribunal shall ensure that all decisions on costs are reasoned and form part of the Award.	paragraph 342 of Working Paper #2 that mandatory cost shifting in the context of claims dismissed for a manifest lack of legal merit would be contradictory to the Convention. In Canada's view, Article 61(2) of the Convention is fully compatible with the Arbitration Rules providing guidance to the Tribunal in its decision making without making a mandatory rule. Thus, Canada suggests a new paragraph (2) which provides that "When a claim has been dismissed on the grounds of a manifest legal merit, the Respondent shall in principle be entitled to all of its costs, unless the Tribunal decides that special circumstances exist that justify a different allocation of costs."
Rule 51 **Security for Costs** (1) ~~A party may request that~~ Upon request of a party, the Tribunal may order the other any party asserting a claim or counterclaim to provide security for ~~the~~ costs ~~of the proceeding and determine the appropriate terms for provision of the security~~. (2) The following procedure shall apply: (a) the request shall specify the circumstances that require security for costs; (b) the Tribunal shall fix time limits for written ~~or~~ and oral submissions, as required, on the request; (c) if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request~~,~~ so that the Tribunal may consider the request promptly upon its constitution; and (d) the Tribunal shall issue its decision on the request within 30 days after the latest of: (i) the constitution of the Tribunal; (ii) the last written submission on the request; or	Paragraph 3 of Rule 51 establishes certain criteria for the Tribunal to consider in deciding whether to require security for costs. Canada notes and agrees that the mere existence of third-party funding is not necessarily sufficient to require a party to provide security for costs, but Canada does believe that it might be a relevant factor and sees no reason not to list it in Rule 51(3). Merely including it in the list does not suggest that it is determinative in every instance, just that the Tribunal should consider it. Thus, Canada suggests that there be an additional item in Rule 51(3) for "the existence and terms of any third-party funding." Further, Canada notes the comments of the Secretariat in paragraph 364 of the Working Paper on the standard for security for costs. However, in light of the reluctance of to order security for costs by many Tribunals, Canada agrees that the standard of reasonable doubt as to the party's willingness or ability to comply with an adverse costs decision should be included in Rule 51(3), as was previously suggested by several Contracting States.

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(iii) the last oral submission on the request. (3) In determining whether to order a party to provide security for costs, the Tribunal shall consider: (a) ~~the~~ that party's ability to comply with an adverse decision on costs ~~and~~; (b) ~~any other relevant circumstances~~ that party's willingness to comply with an adverse decision on costs; (c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; (d) the conduct of the parties; and (e) all other relevant circumstances. (4) The Tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit for compliance with the order. (5) ~~(4)~~ If a party fails to comply with an order ~~for~~ to provide security for costs, the Tribunal may suspend the proceeding ~~until the security is provided~~. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding. (6) ~~(5)~~ A party ~~must~~ shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs. (7) ~~(6)~~ The Tribunal may at any time modify or revoke its order ~~for~~ on security for costs, on its own initiative or upon a party's request.	

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Chapter ~~X~~ IX **The Award** **Rule ~~59~~ 57** **Timing of the Award** (1) The Tribunal shall render the Award as soon as possible and in any event no later than: (a) 60 days after the last written or oral submission, or the Tribunal constitution, whichever is later, if the Award is rendered pursuant to Rule ~~35(4)~~ 40(3); (b) 180 days after the last written or oral submission if the Award is rendered pursuant to Rule ~~36(7)~~ 42BIS(3)(c); or (c) 240 days after the last written or oral submission on all other matters. (2) A statement of costs and submissions on costs filed in accordance with Rule ~~19(3)~~ 49 shall not be considered a written submission for the purposes of ~~calculating the time limits referred to in~~ paragraph (1).	Canada notes the comments of the Secretariat in paragraph 387 of the Working Paper, but suggests that further consideration be given to some sort of further incentive for arbitrators to meet the 240 day standard. For example, Canada suggests that the Tribunal once the 240 day period expires, the arbitrators cannot make further requests for fees until the award is finalized and ready to be rendered.
Chapter ~~VII~~ X **Publication, Access to Proceedings and Non-Disputing Party Submissions** **Rule ~~44~~ 61** **Publication of Awards and Decisions on Annulment** (1) With consent of the parties, the Centre shall publish every Award, supplementary decision on an Award, rectification, interpretation, and revision of an Award, and decision on annulment. (2) ~~Consent to publish the documents referred to in paragraph (1) shall be deemed to have been given if no party objects in writing to such publication within 60 days after the date of dispatch of the document.~~ The parties may consent to	Canada strongly supports maximizing the transparency of ICSID arbitrations as much as possible. Canada recognizes that it would require an amendment to the Convention in order to allow public disclosure of Awards without the consent of both parties. Canada would support such an amendment, and encourages others States to support such an amendment as well. In the meantime, there are means by which greater transparency can be promoted within the existing ICSID framework. The current practice of publishing only excerpts of the legal reasoning is unsatisfactory – Canada suggests that the presumption should be to disclose as much of the Award as possible and put the onus on the resisting party to justify why redactions are justified. Canada suggests the following language, which should create a greater incentive for parties to work towards greater transparency: (3) Absent consent of the parties referred to

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publication of the full text or a redacted text of the documents referred to in paragraph (1). (3) Absent consent of the parties referred to in paragraphs (1) and (2), the Centre shall publish excerpts of the legal reasoning in such documents ("excerpts"). The following procedure shall apply to publication of excerpts: (a) the Centre shall propose excerpts to the parties within 30 days after receiving notice that a party declines consent to publication of a document referred to in paragraphs (1) and (2), or if the parties have not provided their consent to publication within 90 days after the dispatch of the document; (b) the parties may send comments on the proposed excerpts to the Centre within 30 days after their receipt; and (c) the Centre shall consider the comments on the proposed excerpts, if any, and publish excerpts within 30 days after receipt of ~~the parties'~~ those comments ~~on the proposed excerpts, if any~~.	in paragraphs (1) and (2), the Centre shall publish excerpts of such documents, including from the procedural history, factual background, arguments of the parties and legal reasoning of the Tribunal ("excerpts"). (4) The following procedure shall apply to publication of excerpts: a. The Centre shall propose excerpts to the parties within 30 days after receiving notice that a party declines consent to full publication of a document referred to in paragraphs (1) and (2), or if the parties have not provided their consent to publication within 90 days after the dispatch of the document; b. The parties may send comments on the proposed excerpts to the Centre within 30 days after their receipt, including any substantive and compelling reason why the proposed excerpts should not be publically disclosed; and **c.** the Centre shall consider the comments on the proposed excerpts, if any, and publish excerpts within 30 days after receipt of those comments.
Rule ~~47~~ 64 **Observation of Hearings** (1) The Tribunal shall allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal to observe hearings, unless either party objects. (2) The Tribunal shall establish procedures to prevent the disclosure of confidential information to persons observing the hearings. (3) The Centre shall publish video	Canada believes that ICSID arbitration hearings should be public, except where going in camera for limited periods of time is necessary to protect confidential information. Canada recommends that this rule be redrafted in order to create the presumption of public hearings but give the Tribunal discretion to order the hearing into confidential session when appropriate.

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recordings ~~and~~ or transcripts of those portions of hearings that were available for observation by the public in accordance with paragraph (1), unless either party objects.	