

The Government of Canada's Comments on the Proposed Revisions to the ICSID Arbitration Rules

Proposed Amended Rule

Canada's Comments

Chapter I

General Provisions

Rule 1

Application of Rules

(1) These Rules shall apply to any arbitration proceeding conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Convention") in accordance with Article 44 of the Convention.

(2) The official languages of the Centre are English, French and Spanish. The texts of these Rules are equally authentic in each official language.

(3) These Rules may be cited as the "Arbitration Rules" of the Centre.

No comments.

Chapter II

Conduct of the Proceeding

Rule 2

Meaning of Party and Party Representation

(1) For the purposes of these Rules, "party" may include, where the context so admits:

No comments.

<p>(a) all parties acting as claimants or as respondents; and</p> <p>(b) an authorized representative of a party.</p> <p>(2) Each party may be represented or assisted by agents, counsel or advocates (“representative(s)”), whose names and proof of authority to act shall be notified by that party to the Secretariat.</p>	
<p style="text-align: center;">Rule 3</p> <p style="text-align: center;">Method of Filing</p> <p>(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.</p> <p>(2) Supporting documents, including witness statements, expert reports, exhibits and legal authorities, shall be filed together with the written submissions to which they relate, within the time limit fixed to file such written submissions.</p> <p>(3) An extract of a supporting document may be filed if the omission of the text does not render the extract misleading. The Tribunal may require a fuller extract or a complete version of the document.</p>	<p>1) The Rule in paragraph 1 establishes a default of electronic submission, but allows the Tribunal to order otherwise. In the explanations in the Working Paper, it is suggested that this can only be so ordered for good cause. However that phrase is missing, and not implied in the Rule. Canada suggests that the language be changed to say “...or the Tribunal, for good cause, orders otherwise.”</p> <p>2) In paragraph 1, the language of “shall be introduced” is used, and in the Working Paper it is suggested that this is different than being admitted into the record. Canada questions whether this distinction is clear enough. Canada suggests consideration be given to rephrasing as below (with the additional modification proposed above): “Written submissions, observations, supporting documents and communications shall be filed electronically with the Secretariat, unless the parties otherwise agree or the Tribunal, for good cause, orders otherwise. The Secretariat shall acknowledge receipt and distribute them in accordance with Rule 4.”</p> <p>3) In paragraph 2, reference is made to the need to file supporting documents with the “written submissions” to which they relate. A written submission is defined in the ICSID Rules later on. In Canada’s experience, supporting documents can accompany other types of communications to the Tribunal as well. Hence, Canada suggests that we broaden the reference in paragraph 2 to be, in both instances, “written submissions, observations, and communications”.</p>

	<p>4) In paragraph 3, only the Tribunal is empowered to require a fuller extract or complete version of a document. In the Working Paper, it suggests that the other party may also request it, but that is not clear from the Rule. Canada suggests that this be broadened such that if only an extract is provided, the other party also has the right to require the production of a fuller extract or the complete version. Canada suggests that the last sentence, thus, be changed to say “The other disputing party or the Tribunal...”.</p>
<p style="text-align: center;">Rule 4</p> <p style="text-align: center;">Routing of Written Communications</p> <p>(1) The Secretariat shall be the official channel of written communications among the parties, the Tribunal, and the Chairman of the Administrative Council (“Chairman”), except that:</p> <ul style="list-style-type: none">(a) the parties may communicate directly with each other, provided that the Secretariat is copied on all communications to be introduced into the proceeding;(b) the members of the Tribunal shall communicate directly with each other; and(c) a party may communicate directly with the Tribunal if requested to do so by the Tribunal, provided that the other party and the Secretariat are copied on the communications. <p>(2) The Secretariat shall acknowledge receipt of all communications filed by a party and, subject to paragraph (1)(a) and (c), distribute them to the other party and the Tribunal.</p>	<p>1) Canada suggests that Rule 4(1)(a), as drafted, may create some confusion as to whether parties must always copy the Secretariat on their bilateral communications even if they have not decided whether such communications need to be filed in the proceeding (i.e., the parties may wish to communicate between themselves and only later determine to submit such communications into the proceeding). Canada suggests that (a) be clarified to allow parties to communicate directly without having to involve the Secretariat by striking out the language after the comma in (a). In Canada’s view, Rule 3 on Method of Filing is sufficiently clear on how the parties must submit a communication to the Tribunal if they wish to do so.</p>

Rule 5

Procedural Languages, Translation and Interpretation

- (1) The parties may agree to use one or two procedural languages in the proceeding. The parties shall consult with the Tribunal and the Secretariat regarding the use of a language that is not an official language of the Centre.
- (2) If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.
- (3) Written submissions, observations, supporting documents and communications shall be filed in a procedural language. In a proceeding with two procedural languages, the Tribunal may require a party to file any document in both procedural languages.
- (4) A document in a language other than a procedural language shall be accompanied by a translation into a procedural language. In a proceeding with two procedural languages, the Tribunal may require a party to translate any document into both procedural languages. Translation of only the relevant part of a document is sufficient, provided that the Tribunal may require a fuller or a complete translation. If the translation is disputed, the Tribunal may require a certified translation.
- (5) Any written communication from the Tribunal or the Secretariat shall be in a procedural language. In a proceeding with two procedural languages, the Tribunal and, where applicable the Secretary-General, shall render orders, decisions, and the Award in both procedural languages, unless the parties agree otherwise.
- (6) Any oral communication shall be in a procedural language. In a proceeding with two procedural languages, the Tribunal may require interpretation into the other procedural language. The recordings and transcripts of a hearing shall be kept in the procedural language(s) used at the hearing.
- (7) The testimony of a witness or an expert in a language other than a procedural language shall be interpreted into the procedural language(s) used at the hearing.

1) In paragraphs 3, 4 and 6, the proposal is that the Tribunal “may require” translation into both procedural languages. The Working Paper suggests that a party could also make the request, but that is not clear from the Rule. Canada suggests that the Rules state in each case that “the other disputing party or the Tribunal may require...”

<p style="text-align: center;">Rule 6</p> <p style="text-align: center;">Correction of Errors and Deficiencies</p> <p>(1) A party may correct an accidental error in any 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.</p> <p>(2) The Secretariat may request that a party correct any deficiency in a filing, at the party’s own cost.</p>	<p>1) In paragraph 2, the Rule states that the Secretariat may request that a party correct a deficiency. In the Working Paper, at paragraph 170, the suggestion is that the Secretariat may correct the deficiency. Canada supports the wording of the Rule here, but requests clarification in light of the language in the Working Paper.</p>
<p style="text-align: center;">Rule 7</p> <p style="text-align: center;">Calculation of Time Limits</p> <p>(1) Any time limit expressed as a period of time shall be calculated from the day after the date:</p> <p style="margin-left: 20px;">(a) of the relevant notice;</p> <p style="margin-left: 20px;">(b) on which the Tribunal announces the period; or</p> <p style="margin-left: 20px;">(c) on which the procedural step starting the period is taken.</p> <p>(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 the relevant step is taken or the relevant document is received by the Secretariat on the subsequent business day.</p>	<p>1) Canada suggests that clarification be given to the concept of the “day after the date.” In particular, the day after a date can vary depending on the location of a party. For example, an investor in Japan may file a notice on Friday, December 28, 2018 at 9am in Japan. However, that will be Thursday, December 27 in Washington, D.C. In such circumstances, it will be unclear whether the time limit should be calculated from December 29 or from December 28. Canada suggests that consideration be given to specifying the relevant place for the calculation of the date in paragraph 1.</p>
<p style="text-align: center;">Rule 8</p> <p style="text-align: center;">Time Limits Specified by the Convention and these Rules or Fixed by the Secretary-General</p> <p>(1) The parties may agree to extend a time limit fixed by the Secretary-General or specified by the Convention or these Rules if such time limit is not mandatory under the Convention.</p> <p>(2) Any step taken by the parties after expiry of a time limit fixed by the Secretary-General or specified by the Convention or</p>	<p>1) Canada is uncertain of the reference to the powers of the Tribunal in paragraph 2 of this Rule, particularly in light of paragraph 175 of the Working Paper, which provides that “Because these time limits are not fixed by the Tribunal, they cannot be extended by the Tribunal.” In these circumstances, Canada asks for clarification as to how the Tribunal could be empowered to find the existence of special circumstances justifying the delay, when the Tribunal does not have the power to extend the time limits in the</p>

<p>these Rules shall be disregarded, unless the Secretary-General or the Tribunal, as applicable, concludes that there are special circumstances justifying the delay.</p> <p>(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.</p>	<p>first place, according to the Working Paper.</p> <p>2) Canada notes that paragraphs 2 and 3 both use the concept of special circumstances, however, the Working Paper does not give any guidance as to what constitutes such special circumstances. Canada suggests that consideration be given to providing guidance as to what constitutes special circumstances in some form prior to the implementation of these new Rules.</p>
<p style="text-align: center;">Rule 9</p> <p style="text-align: center;">Time Limits Fixed by the Tribunal</p> <p>(1) The Tribunal shall fix time limits for completion of each step in the proceeding, other than time limits specified by the Convention or these Rule.</p> <p>(2) The Tribunal may extend a time limit it fixed upon reasoned application by a party made prior to the expiry of the time limit. The Tribunal may delegate this power to its President.</p> <p>(3) The Tribunal shall disregard any step taken after expiry of a time limit it fixed unless it concludes that there are special circumstances justifying the delay.</p>	<p>1) As written, these Rules suggest that an agreement by the parties to extend the time limit for a particular procedural step can be disregarded by the Tribunal. In Canada’s view, this is inappropriate, and it actually seems to run counter to Rule 12(3) which binds the Tribunal to follow the agreement of the parties on procedural matters. If both parties wish to extend a time limit, it should not be possible for the tribunal to disregard that agreement under any circumstances. Allowing the Tribunal to do so may force the parties into procedural steps that, for whatever reason, they both prefer to delay. In addition, Canada sees no reason why there should be different rules depending on where the original time limit comes from. Canada suggests that a first sentence be added to paragraph 2 that says “The parties may agree to extend a time limit fixed by the Tribunal.” The second sentence could then begin “Absent an agreement of the parties...”</p> <p>2)) Canada notes that paragraph 3 uses the concept of special circumstances, however, the Working Paper does not give any guidance as to what constitutes such special circumstances. Canada suggests that consideration be given to providing guidance as to what constitutes special circumstances in some form prior to the implementation of these new Rules.</p>

<p style="text-align: center;">Rule 10</p> <p style="text-align: center;">Waiver</p> <p>Subject to Article 45 of the Convention, if a party knows or should have known that an applicable Rule, agreement of the parties, or any order or decision of the Tribunal or the Secretary-General has not been complied with, and does not promptly object, then that party shall be deemed to have waived its right to object to that non-compliance.</p>	<p>No comments</p>
<p style="text-align: center;">Rule 11</p> <p style="text-align: center;">General Duties</p> <p>(1) The Tribunal shall treat the parties equally and provide each party with a reasonable opportunity to present its case.</p> <p>(2) The Tribunal shall consult with the parties prior to making an order or decision authorized by these Rules to be made by a Tribunal on its own initiative.</p> <p>(3) The Tribunal and the parties shall conduct the proceeding in an expeditious and cost-effective manner.</p> <p>(4) The parties shall cooperate in implementing the Tribunal's orders and decisions.</p>	<p>1) In paragraph 4, the proposed Rule establishes an obligation to cooperate. The Working Paper suggests that this refers to an obligation to cooperate with the Tribunal, but in Canada's view, the proposed Rule reads more like an obligation to cooperate between the parties. This Rule would not make sense in many circumstances where there is no cooperation required, but rather simply compliance by one of the parties. Canada suggests that paragraph 4 be rewritten to say "The parties shall implement the Tribunal's orders and decisions in good faith."</p>
<p style="text-align: center;">Rule 12</p> <p style="text-align: center;">Orders, Decisions and Agreements</p> <p>(1) The Tribunal shall make the orders and decisions required for the conduct of the proceeding.</p> <p>(2) Orders and decisions may be taken by any appropriate means of communication and may be signed by the President on behalf of the Tribunal, unless the parties agree otherwise.</p> <p>(3) The Tribunal shall apply any agreement of the parties on procedural matters to the extent that it conforms with the Convention and the Administrative and Financial Regulations.</p>	<p>No comments</p>

<p style="text-align: center;">Rule 13</p> <p style="text-align: center;">Written Submissions and Observations</p> <p>(1) The parties shall file the following written submissions, with any supporting documents, within the time limits fixed by the Tribunal:</p> <ul style="list-style-type: none"> (a) a memorial by the requesting party, subject to paragraph (2); (b) a counter-memorial by the other party; and, if the parties so agree or the Tribunal finds it necessary: (c) a reply by the requesting party; and (d) a rejoinder by the other party. <p>(2) The requesting party may elect to have the Request for arbitration considered as the memorial</p> <p>(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 responding to the previous written submission.</p> <p>(4) The Tribunal shall grant leave to file unscheduled written submissions, observations or supporting documents upon a timely and reasoned application and only if these are necessary in view of all relevant circumstances.</p>	<p>1) Paragraph 4 of this proposed Rule provides that the Tribunal “shall grant leave” to file unscheduled submissions. Canada suggests that “shall” be changed to “may” to reflect the conditionality of the next part of the sentence.</p> <p>2) Paragraph 4 requires a “timely and reasoned application” however it does not offer specificity on when such application must be submitted, and nor does it address whether that application should include the additional unscheduled submission. In Canada’s view, it can be prejudicial for the application to make an unscheduled submission to be accompanied with the actual submission. For example, Canada has had experience where a sur-reply is appended to an application to file a sur-reply, creating the obvious difficulty that the actual sur-reply was put before the Tribunal before permission was granted to file it – making it seem like such permission was perfunctory. Canada suggests that paragraph 4 be redrafted to say “The Tribunal may grant leave to file unscheduled written submissions, observations or supporting documents only if a timely and reasoned application for permission to file such submissions, observations or supporting documents is made in advance, and only if the Tribunal finds that the submissions, observations or supporting documents are necessary in view of all relevant circumstances.”</p>
<p style="text-align: center;">Rule 14</p> <p style="text-align: center;">Case Management Conference</p> <p>With a view to expediting the proceeding, the Tribunal may convene a case management conference with the parties at any time to:</p> <ul style="list-style-type: none"> (a) identify uncontested facts; 	<p>1) In the chapeau, the language is permissive in that it grants the Tribunal the power to convene a case management conference, but does not make it mandatory. In Canada’s view, case management conferences are useful, and Tribunal’s should be required to have them. Hence, Canada suggests that in the chapeau, the “may” be changed to a “shall”. Further, in the chapeau, the singular is used – “a case management conference”, whereas Canada believes that multiple case management conferences may be necessary. Canada also suggests that there could be other items useful to discuss at a</p>

<p>(b) narrow the issues in dispute; and</p> <p>(c) address any other procedural or substantive issue related to the resolution of the dispute.</p>	<p>case management conference in addition to the items in the list. As such, Canada suggests language to make it clear that the list is not exhaustive. Finally, Canada suggests that it is important to clarify that case management conferences are distinct from the First Session to be held by the Tribunal. Hence, Canada suggests redrafting the chapeau to say “With a view to expediting the proceeding, in addition to the First Session, the Tribunal shall convene one or more case management conferences with the parties, at such times as it deems appropriate, in order to, among other things.”</p>
<p style="text-align: center;">Rule 15</p> <p style="text-align: center;">Hearings</p> <p>(1) There shall be one or more hearings before the Tribunal, unless the parties agree otherwise.</p> <p>(2) The President of the Tribunal shall determine the date, time and method of holding hearings, after consulting with the other members of the Tribunal and the parties.</p> <p>(3) If a hearing is to be held in person, it may be held at any place agreed to by the parties after consulting with the Tribunal and the Secretariat. If the parties do not agree on the place of a hearing, it shall be held at the seat of the Centre pursuant to Article 62 of the Convention.</p> <p>(4) Any member of the Tribunal may put questions to the parties and ask for explanations at any time during a hearing.</p>	<p>No comments</p>

<p style="text-align: center;">Rule 16</p> <p style="text-align: center;">Deliberations</p> <p>(1) The deliberations of the Tribunal shall take place in private and remain confidential.</p> <p>(2) The Tribunal may deliberate at any place it considers convenient.</p> <p>(3) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.</p> <p>(4) The Tribunal shall deliberate on any matter for decision immediately after the last written or oral submission on that matter.</p>	<p>1) In paragraph 2, there is a reference to the Tribunal deliberating at any “place”. Canada suggests that the word place denotes a physical location where all the members of the Tribunal must be located. As noted in the Working Paper, it is possible for deliberations to occur via other means as well. Canada suggests that this paragraph be amended to say “The Tribunal may deliberate at any place or by any method it considers convenient.”</p>
<p style="text-align: center;">Rule 17</p> <p style="text-align: center;">Quorum</p> <p>The participation of a majority of the members of the Tribunal shall be required at the first session, hearings and deliberations, by any appropriate means of communication, unless the parties agree otherwise.</p>	<p>No comments</p>
<p style="text-align: center;">Rule 18</p> <p style="text-align: center;">Decisions Taken by Majority Vote</p> <p>The Tribunal shall take decisions by a majority of the votes of all its members. Abstention shall count as a negative vote.</p>	<p>No comments</p>
<p style="text-align: center;">Rule 19</p> <p style="text-align: center;">Payment of Advances and Costs of the Proceeding</p> <p>(1) The Tribunal shall determine the portion of the advances payable by each party in accordance with Administrative and</p>	<p>1) In paragraph 2, Canada suggests that it is not clear that the costs of the proceedings must be reasonable and hence Canada suggests that it be amended to read: “The costs of the proceeding are all reasonable costs....”</p>

<p>Financial Regulation 14(5) to defray the costs of the Tribunal and the Centre in connection with the proceeding.</p> <p>(2) The costs of the proceeding are all costs incurred by the parties in connection with the proceeding, including:</p> <ul style="list-style-type: none"> (a) the legal fees and expenses of the parties; (b) the fees and expenses of the members of the Tribunal; and (c) the administrative charges and direct costs of the Centre. <p>(3) The Tribunal shall request that each party file a statement of costs before allocating the costs of the proceeding between the parties.</p> <p>(4) In determining and allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including:</p> <ul style="list-style-type: none"> (a) the outcome of any part of the proceeding or overall; (b) the parties' conduct during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner; (c) the complexity of the issues; and (d) the reasonableness of the costs claimed. <p>(5) The Tribunal may at any time make interim decisions on the costs of any part of a proceeding.</p> <p>(6) The Tribunal shall ensure that all decisions on costs are reasoned and form part of the Award</p>	<p>2) In paragraph 3, Canada suggests that it be made clear that the tribunal is to determine the reasonableness of the costs (as opposed to the current approach which somewhat implies this step in paragraph 4. Canada suggests paragraph 3 be reworded to say "The Tribunal shall request that each party file a statement of costs, and shall determine the reasonableness of the claimed costs before allocating the costs of the proceeding between the parties."</p> <p>3) In paragraph 4, a single Rule is created for decisions with respect to all cost allocations. Canada suggests that a different Rule should be created for instances where a case is dismissed for manifest lack of legal merit under Rule 35. In particular, where a case is dismissed for manifest lack of legal merit, the Rule should be clear that the investor will be responsible for all of the costs of the proceeding. A finding under Rule 35 is essentially a finding that the case is legally frivolous, and in order to create a sufficient disincentive for bringing such frivolous cases, it is necessary, in Canada's view, to have a hard Rule on costs when the case is dismissed under Rule 35. Canada suggest the creation of a new paragraph 3<i>bis</i> which would read "Where a claim is dismissed under Rule 35, all costs of the proceeding shall be allocated to the claimant."</p> <p>4) In light of changes to paragraphs 2 and 3, Canada would suggest that paragraph 4 be modified to read "In allocating the costs of proceedings not dismissed under Rule 35..."</p> <p>5) In paragraph 4(a), the Tribunal is directed to consider the "outcome of any part of the proceeding or overall." In Canada's experience, much cost is often incurred because investors and respondents adopt what might be colloquially called a "kitchen-sink" approach – i.e. an approach where they make every possible argument, or challenge every possible measure. This can have serious cost implications. For example, in Canada's experience,</p>
---	--

investors almost always make a claim for lost profits, even when there is no basis in law for such a claim. However, such a claim requires the retention of often expensive damages experts, and also requires considerable time and attention be paid to this evidence by the Tribunal. Where such a claim is made, but is unsuccessful, there is still the possibility that some other theory of damages might succeed. Canada suggests that Tribunal's be directed to specifically consider these possible circumstances in cost awards to deter the undesirable inflation of unnecessary costs. As such, Canada suggests that paragraph 4(a) be redrafted to say "the outcome on specific claims or arguments, of any part of the proceeding, or overall".

Chapter III

Constitution of the Tribunal

Rule 20

General Provisions Regarding the Constitution of the Tribunal

- (1) The parties shall constitute a Tribunal without delay after registration of the Request for arbitration.
- (2) The majority of the arbitrators on a Tribunal shall be nationals of States other than the State party to the dispute and the State whose national is a party to the dispute, unless the Sole Arbitrator or each individual member of the Tribunal is appointed by agreement of the parties.
- (3) A party may not appoint an arbitrator who is a national of the State party to the dispute or the State whose national is a party to the dispute without agreement of the other party.
- (4) A person previously involved in the resolution of the parties' dispute as a judge, mediator, conciliator or in a similar capacity may be appointed as an arbitrator only by agreement of the parties.

1) Canada understands the desire to avoid unnecessary delay, but questions the advisability of forcing the parties to constitute a Tribunal quickly after the registration of a request. Canada favours the use of alternative means to resolve disputes where possible. However, in Canada's experience, once a Tribunal is constituted, it tends to formalize the dispute process and make it more difficult to find a negotiated resolution. As a result, Canada suggests deleting paragraph 1, or maintaining the language from existing ICSID Rule 1(1) ("with all possible dispatch"), which is more permissive.

<p style="text-align: center;">Rule 21</p> <p style="text-align: center;">Disclosure of Third-party Funding</p> <p>(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:</p> <p style="padding-left: 40px;">(a) through a donation or grant; or</p> <p style="padding-left: 40px;">(b) in return for a premium or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.</p> <p>(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.</p> <p>(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.</p>	<p>1) In paragraph 1, it is not clear to Canada how the provision will apply to federal states such as Canada where other levels of government may contribute to the costs of defending a measure adopted by that level of government. Such sub-national governments may not be considered to be “parties” to the ICSID arbitration. To avoid such ambiguity, Canada suggests that the first sentence be amended to say “...by a natural or juridical person that is not a party, or a constituent subdivision or agency of a party, to the dispute...”</p> <p>2) Canada believes that the reference to funding being given to a law firm is unduly restrictive as a party may be represented not be a law firm, but by a sole practitioner etc. Hence, we suggest that the reference to law firm be amended to read “or a law firm, counsel, or other advisor representing that party.”</p> <p>3) Canada believes that it is not clear whether the list in (a) and (b) are the only means through which third party funding is provided. If it is not meant to be limitative, we suggest that this be made clearer by, for example, revising the lead-in sentence to (a) and (b) to read “Such funds or material support may be provided by any means, including but not limited to:”. If it is meant to be limitative, then Canada questions whether (b) is drafted sufficiently widely. For example, as drafted it could be read to exclude loans that are not contingent on outcome. However, if the concerns with respect to third-party funding include potential conflicts of interest and lack of ability to pay a cost award, the fact of a traditional financing, and who offered that financing, seem just as relevant. In order to avoid this, (b) could be redrafted so it is split into a (b) and (c), with (b) being “in return for a premium” and (c) being “in exchange for remuneration or reimbursement...”</p>

<p style="text-align: center;">Rule 22</p> <p style="text-align: center;">Method of Constituting the Tribunal</p> <p>(1) The number of arbitrators and the method of their appointment must be determined before the Secretary-General can act on any appointment proposed by a party.</p> <p>(2) The parties shall endeavor to agree on any uneven number of arbitrators and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 60 days after the date of registration, the Tribunal shall be constituted in accordance with Article 37(2)(b) of the Convention.</p>	No comments
<p style="text-align: center;">Rule 23</p> <p style="text-align: center;">Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention</p> <p>If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention, each party shall appoint an arbitrator and the parties shall jointly appoint the President of the Tribunal.</p>	No comments
<p style="text-align: center;">Rule 24</p> <p style="text-align: center;">Assistance of the Secretary-General with Appointment</p> <p>The parties may jointly request that the Secretary-General assist with the appointment of a President of the Tribunal or a Sole Arbitrator.</p>	No comments
<p style="text-align: center;">Rule 25</p> <p style="text-align: center;">Appointment of Arbitrators by the Chairman of the Administrative Council in Accordance with Article 38 of the Convention</p> <p>(1) If the Tribunal has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request that the Chairman appoint the arbitrator(s) who have not yet been appointed pursuant to</p>	No comments

<p>Article 38 of the Convention.</p> <p>(2) The Chairman shall appoint the President of the Tribunal after appointing any members who have not yet been appointed.</p> <p>(3) The Chairman shall consult with the parties as far as possible before appointing an arbitrator and shall use best efforts to appoint any arbitrator(s) within 30 days after receipt of the request to appoint.</p>	
<p style="text-align: center;">Rule 26</p> <p style="text-align: center;">Acceptance of Appointment</p> <p>(1) A party appointing an arbitrator shall notify the Secretariat of the appointment and provide the appointee's name, nationality(ies) and contact information.</p> <p>(2) The Secretariat shall request an acceptance from the appointee upon receipt of the notice referred to in paragraph (1). The Secretariat shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).</p> <p>(3) Within 20 days after the receipt of the request for acceptance of an appointment, an appointee shall:</p> <ul style="list-style-type: none"> (a) accept the appointment; and (b) provide a signed declaration in the form published by the Centre, addressing matters including the arbitrator's independence, impartiality, availability and commitment to maintain the confidentiality of the proceedings. <p>(4) The Secretariat shall notify the parties of the acceptance of appointment by each arbitrator and provide their signed declaration.</p> <p>(5) The Secretariat shall notify the parties if an arbitrator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as arbitrator in accordance with the method followed for the previous appointment.</p> <p>(6) Each arbitrator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).</p>	<p>No comments</p>

<p style="text-align: center;">Rule 27</p> <p style="text-align: center;">Replacement of Arbitrators Prior to Constitution of the Tribunal</p> <p>(1) At any time before the Tribunal is constituted:</p> <ul style="list-style-type: none">(a) an arbitrator may withdraw an acceptance;(b) a party may replace an arbitrator whom it appointed; or(c) the parties may agree to replace any arbitrator. <p>(2) A replacement arbitrator shall be appointed as soon as possible, in accordance with the method by which the withdrawing or replaced arbitrator was appointed.</p>	<p>No comments</p>
<p style="text-align: center;">Rule 28</p> <p style="text-align: center;">Constitution of the Tribunal</p> <p>(1) The Tribunal shall be deemed to be constituted on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointments.</p> <p>(2) As soon as the Tribunal is constituted, the Secretary-General shall transmit the Request for arbitration, the supporting documents, the notice of registration and communications with the parties to each member.</p>	<p>No comments</p>

Chapter IV

Disqualification of Arbitrators and Vacancies

Rule 29

Proposal for Disqualification of Arbitrators

(1) A party may propose the disqualification of one or more arbitrators (“proposal”) pursuant to Article 57 of the Convention.

(2) The following procedure shall apply:

(a) any proposal shall be filed after the constitution of the Tribunal and within 20 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 grounds on which it is based and including a statement of the relevant facts, law and arguments, with any supporting documents;

(c) the other party shall file its response and supporting documents within seven days after receipt of the written submission;

(d) the arbitrator to whom the proposal relates may file a statement limited to factual information relevant to the proposal. This statement shall be filed within five days after receipt of the written submissions referred to in paragraph (2)(c); and

(e) the parties may file final written submissions on the proposal within seven days after expiry of the time limit referred to in paragraph (2)(d).

1) With respect to paragraph 3, Canada does not believe that eliminating the automatic suspension of the proceedings is the most efficient way to proceed. Canada recognizes that doing so may save some time, but is concerned that it could affect the perceived legitimacy of the tribunal in the period in question. Canada understands the concern that sometimes challenges to arbitrators are used a strategic tool to delay proceedings. However, Canada believes that the better approach would be to reverse the presumption and provide instead that “The proceeding shall be suspended while the proposal is pending unless the parties agree to continue the proceedings, in whole or in part. If the parties agree to continue the proceedings while the proposal is pending, and 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.”

<p>(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.</p>	
<p style="text-align: center;">Rule 30</p> <p style="text-align: center;">Decision on the Proposal for Disqualification</p> <p>(1) The decision on a proposal shall be taken by the arbitrators not subject to the proposal or by the Chairman in accordance with Article 58 of the Convention.</p> <p>(2) For the purposes of Article 58 of the Convention:</p> <p style="padding-left: 40px;">(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;</p> <p style="padding-left: 40px;">(b) if a subsequent proposal is filed while the decision on a prior proposal is pending, both proposals shall be decided by the Chairman as if they were a proposal to disqualify a majority of the Tribunal.</p> <p>(3) The decision on any proposal shall be made within 30 days after the later of the expiry of the time limit referred to in Rule 29(2)(e) or the notice in Rule 30(2)(a).</p>	<p>No comments</p>
<p style="text-align: center;">Rule 31</p> <p style="text-align: center;">Incapacity or Failure to Perform Duties</p> <p>If an arbitrator becomes incapacitated or fails to perform the duties required of an arbitrator, the procedure in Rules 29 and 30 shall apply.</p>	<p>No comments</p>

<p style="text-align: center;">Rule 32</p> <p style="text-align: center;">Resignation</p> <p>(1) An arbitrator may resign by notifying the Secretary-General and the other members of the Tribunal and providing reasons for the resignation.</p> <p>(2) If the arbitrator was appointed by a party, the other members of the Tribunal shall promptly notify the Secretary-General whether they consent to the arbitrator’s resignation for the purposes of Rule 33(3)(a).</p>	<p>No comments</p>
<p style="text-align: center;">Rule 33</p> <p style="text-align: center;">Vacancy on the Tribunal</p> <p>(1) The Secretary-General shall notify the parties of any vacancy on the Tribunal.</p> <p>(2) The proceeding shall be suspended from the date of notice of the vacancy until the vacancy is filled.</p> <p>(3) A vacancy on the Tribunal shall be filled by the method used to make the original appointment, except that the Chairman shall fill the following vacancies from the Panel of Arbitrators:</p> <p style="padding-left: 40px;">(a) a vacancy caused by the resignation of a party-appointed arbitrator without the consent of the other members of the Tribunal; or</p> <p style="padding-left: 40px;">(b) a vacancy that has not been filled within 45 days after the notice of vacancy.</p> <p>(4) Once a vacancy has been filled and the Tribunal has been reconstituted, the proceeding shall continue from the point it had reached at the time the vacancy was notified. A newly appointed arbitrator may require that any portion of a hearing be recommenced if necessary to decide a pending matter.</p>	<p>1) The last sentence of paragraph 4 gives a newly appointed arbitrator the right to require that certain portions of a hearing be recommenced, and it introduces a “necessity” test. Canada suggests that as drafted it is unclear who is to decide whether recommencing the hearing is necessary to decide a pending matter. If the intent is to put the decision solely in the hands of the newly appointed arbitrator, Canada suggests that the sentence be amended to say “A newly appointed arbitrator may require that any portion of a hearing be recommenced if such newly appointed arbitrator believes it necessary to decide a pending matter.”</p>

Chapter V

Initial Procedures

Rule 34

First Session

(1) Subject to paragraph (2), the Tribunal shall hold a first session with the parties to address the procedure, including the matters listed in paragraph (4).

(2) The first session shall be held within 60 days after the Tribunal's constitution or such other period as the parties may agree. If the President of the Tribunal determines that it is not possible to convene the parties and the other members within this period, the first session shall be held solely among the Tribunal members after consulting with the parties in writing on the matters listed in paragraph (4).

(3) The first session may be held in person or remotely, by any means that the Tribunal deems appropriate. The agenda, method and date of the first session shall be determined by the President of the Tribunal after consulting with the other members and the parties.

(4) Before the first session, the Tribunal shall circulate an agenda to the parties and invite their views on procedural matters, including:

- (a) the applicable arbitration Rules;
- (b) the number of members required to constitute a quorum of the Tribunal;
- (c) the division of advances payable pursuant to the Administrative and Financial Regulation 14(5);
- (d) the procedural language(s), translation and interpretation;
- (e) the method of filing and routing of written communications;
- (f) the number, type and format of written submissions;

No comments

<p>(g) the place of hearings;</p> <p>(h) the scope, timing and procedure for requests for production of documents between the parties, if any;</p> <p>(i) the procedural calendar, including written submissions, hearings, the Tribunal’s orders, decisions and the Award;</p> <p>(j) the manner of keeping the recordings and transcripts of hearings;</p> <p>(k) the publication of documents and recordings; and</p> <p>(l) the protection of confidential information.</p> <p>(5) The Tribunal shall issue an order recording the parties’ agreements and any Tribunal decisions on the procedure within 15 days after the later of the first session or the last written submission on procedural matters addressed at the first session.</p>	
<p style="text-align: center;">Rule 35</p> <p style="text-align: center;">Manifest Lack of Legal Merit</p> <p>(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.</p> <p>(2) The following procedure shall apply:</p> <p style="padding-left: 40px;">(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;</p> <p style="padding-left: 40px;">(b) the Tribunal shall fix time limits for written or oral submissions, as required, on the objection;</p> <p style="padding-left: 40px;">(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</p>	<p>No comments</p>

<p>(d) the Tribunal shall issue its decision on the objection within 60 days after the latest of:</p> <ul style="list-style-type: none"> (i) the constitution of the Tribunal; (ii) the last written submission on the objection; or (iii) the last oral submission on the objection. <p>(3) The decision of the Tribunal shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 36 or to argue subsequently in the proceeding that a claim is without legal merit.</p> <p>(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.</p>	
<p style="text-align: center;">Rule 36</p> <p style="text-align: center;">Preliminary Objections</p> <p>(1) A party may file a preliminary objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal.</p> <p>(2) The following procedure shall apply:</p> <ul style="list-style-type: none"> (a) a preliminary objection shall be made as soon as possible. Unless the facts on which the objection is based are unknown to the party at the relevant time, the objection shall be made no later than: <ul style="list-style-type: none"> (i) the date to file the counter-memorial if the objection relates to the main claim; or (ii) the date to file the next written submission after an ancillary claim is raised, if the objection relates to the ancillary claim; (b) the party shall file a written submission, specifying the grounds on which the preliminary objection is based and including a statement of relevant facts, law and arguments, with any supporting documents; and 	<p>(1) In paragraph 3, the Tribunal is given the power to decide to address a preliminary objection in a separate phase, as well as the permissive power to suspend the proceedings on the merits. In Canada’s view, if there is a preliminary objection that a dispute or ancillary claim is not within the jurisdiction of the Centre or competence of the Tribunal, then the proceedings on the merits should be stayed as matter of principle , if the Tribunal decides to hear that objection as a separate phase. Accordingly, Canada suggests that in the last phrase of paragraph (3), the language be changed to “it shall suspend the proceeding on the merits.”</p> <p>2) In paragraph 4, the presumption is that even when a preliminary objection is filed, the party making the objection is required to file its counter-memorial. In Canada’s view, this process could lead to a significant waste of time and money for States who may be forced to file expensive expert reports and extensive other submissions when it is totally unnecessary because there is no jurisdiction or competence to hear the claim. Canada’s view is that the presumption should be the reverse. Canada understands the desire to achieve shorter arbitration, but this must be balanced</p>

<p>(c) the Tribunal shall fix time limits for written or oral submissions, as required, on the preliminary objection.</p> <p>(3) The Tribunal may address a preliminary objection in a separate phase of the proceeding pursuant to Rule 37 or join the objection to the merits. If the Tribunal decides to address the preliminary objection in a separate phase, it may suspend the proceeding on the merits.</p> <p>(4) If a party files a preliminary objection it shall also file its counter-memorial on the merits, or file its next written submission after an ancillary claim is raised if the objection relates to the ancillary claim, unless the Tribunal has ordered otherwise.</p> <p>(5) The Tribunal may at any time on its own initiative consider whether a claim is within the jurisdiction of the Centre or within its own competence.</p> <p>(6) The Tribunal shall issue its decision on the preliminary objection within 180 days after the last written or oral submission on the objection.</p> <p>(7) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within its competence, 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.</p>	<p>against the need to ensure that costs are not wasted on ultimately unnecessary filings. Accordingly, Canada suggests paragraph 4 read “If a party files a preliminary objection, the proceedings shall be suspended until the Tribunal decides whether to hear the preliminary objection in a separate phase pursuant to paragraph 3, unless the Tribunal orders otherwise.”</p> <p>3) Canada suggests that Rule 36(6) make clear that the specified time limit only applies where the tribunal has decided to hear the preliminary objection as a separate phase under Rule 37. If the preliminary objection is joined to the rest of the merits of the dispute, then the deadline for a decision in Rule 59(1)(c) should apply. In Canada’s view, it would be odd to have the Tribunal rule on questions of preliminary objections prior to the rest of the award in a non-bifurcated proceeding. Hence, Canada suggests that paragraph 6 be reworded to begin “Where the preliminary objection is heard in a separate phase of the proceedings pursuant to Rule 37, the Tribunal shall...”</p>
<p style="text-align: center;">Rule 37</p> <p style="text-align: center;">Bifurcation</p> <p>(1) A party may request that a question be addressed in a separate phase of the proceeding (“request for bifurcation”).</p> <p>(2) The following procedure shall apply:</p> <p style="padding-left: 40px;">(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;</p>	<p>1) Canada questions whether the deadline specified in paragraph 2(a) is sufficient for States to be able to understand and fully consider the Memorial and to make a decision, as a government, on whether to seek bifurcation. Such a decision may require several levels of approval, and requiring it to be made in 30 days may make obtaining such approvals difficult. Canada suggests that the time period be extended to 60 days in paragraph 2(a). Canada further suggests that paragraph 2(a) make clear the deadlines, if any, for requests for bifurcation not related to either preliminary objections or ancillary claims. For example, if a party is seeking the bifurcation of a proceeding between damages and merits, it is unclear when it must file its request for bifurcation under the current wording of 2(a).</p>

<p>(b) the request for bifurcation shall specify the questions to be bifurcated;</p> <p>(c) the Tribunal shall fix time limits for written or oral submissions, as required, on the request for bifurcation; and</p> <p>(d) the Tribunal shall issue its decision on a request for bifurcation within 30 days after the last written or oral submission on the request.</p> <p>(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.</p> <p>(4) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether bifurcation would materially reduce the time and cost of the proceeding.</p>	<p>2) The timing in paragraph 2(a) evidences the concerns Canada has with the lack of a suspension of the proceedings in Rule 36 because it would seem that in no circumstance will a decision on a request for bifurcation made after receipt of the Memorial be decided prior to the Counter-Memorial having to be filed. In Canada’s experience, the Counter-Memorial is typically the most costly written submission, and it should not have to be filed unless necessary.</p> <p>3) In paragraph 4, only a single relevant factor is specified that might influence whether a tribunal should grant a request for bifurcation; however, in the Working Paper, in paragraph 393, several considerations are listed. Canada suggests that if any considerations are to be listed, then all relevant considerations should be listed. In addition to the factors mentioned in paragraph 393 of the Working Paper, Canada also suggest that the Tribunal be required to bifurcate proceedings if the parties have so agreed.</p>
<p style="text-align: center;">Rule 38</p> <p style="text-align: center;">Consolidation or Coordination on Consent of Parties</p> <p>(1) Parties to two or more pending arbitrations administered by the Centre may agree to consolidate or coordinate these arbitrations.</p> <p>(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.</p> <p>(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.</p>	<p>1) With respect to paragraph 3 of this proposed Rule, Canada does not think that it is appropriate for the Secretary-General to be the one judging if the requested consolidation or coordination would promote a fair and efficient resolution of claims. This is a decision for the parties to make, with the advice (rather than the approval) of the Secretary-General. Hence, Canada suggests that this paragraph be reworded to say “The Secretary-General shall take all necessary administrative steps to implement the agreement of the parties, and shall work with the parties to ensure that the consolidation or coordination requested will promote a fair and efficient resolution of all or any claims asserted in the arbitrations.”</p>

Rule 38BIS

Consolidation by Order

- (1) A party may request full or partial consolidation of two or more arbitrations (“the individual arbitrations”) pending under the ICSID Convention Arbitration Rules.
- (2) The individual arbitrations proposed for consolidation shall:
- (a) arise out of the same circumstances;
 - (b) have a question of law or fact in common; and
 - (c) if consolidated, promote a fair and efficient resolution of all or any of the claims asserted in the individual arbitrations.
- (3) A party requesting consolidation shall file a written request with the Secretary-General specifying:
- (a) the arbitrations proposed for consolidation;
 - (b) the grounds for consolidation;
 - (c) the relevant facts and evidence relied on, attaching supporting documents;
 - (d) observations on why consolidation is warranted; and
 - (e) the terms of consolidation sought in the order.
- (4) The Secretary-General shall transmit the request for consolidation referred to in paragraph (1) to all parties named in the request and invite them to:
- (a) submit their observations on the request with any supporting documents within 45 days after the date of receipt of the request; and
 - (b) indicate whether a hearing is requested or whether they consent to the order being made on the basis of the

1) Canada supports a provision on mandatory consolidation, as proposed in Rule 38BIS.

2) With respect to paragraph 7, Canada suggests that it would be wasteful for an individual arbitration to proceed, only if it is to be later consolidated and that at the very least, the decision cannot be left to the original tribunal, which may be reluctant to stay its proceedings. Hence, Canada suggests that the paragraph be reworded to say “Pending the order on consolidation, each arbitration sought to be consolidated shall be suspended by the Tribunal established for that individual arbitration, or suspended by the Secretary-General if no Tribunal has been constituted for the individual arbitration.” Or, “Pending the order on consolidation, each arbitration sought to be consolidated may be suspended by the Consolidating Arbitrator.”

written submissions filed.

(5) The Secretary-General shall also transmit a copy of the request for consolidation to all arbitrators appointed in the individual arbitrations.

(6) The request for consolidation shall be decided by a single Consolidating Arbitrator who shall:

(a) be selected by the Secretary-General from the ICSID Panel of Arbitrators, after consulting as far as possible with the parties named in the request for consolidation;

(b) not have the nationality of any of the parties to the individual arbitrations;

(c) not be appointed in any of the individual arbitrations;

(d) be appointed as soon as possible, and no later than 60 days after the Secretary-General receives the request for consolidation referred to in paragraph (3); and

(e) set a date for a hearing on the request for consolidation, if required, to take place no later than 30 days after the Consolidating Arbitrator accepts the appointment.

(7) Pending the order on consolidation, each arbitration sought to be consolidated may be suspended by the Tribunal established for that individual arbitration, or suspended by the Secretary-General if no Tribunal has been constituted for the individual arbitration.

(8) The Consolidating Arbitrator may order consolidation of the individual arbitrations in full or in part, or may reject the request for consolidation. The Consolidating Arbitrator shall give brief reasons for the order within 45 days after the last written or oral submissions.

(9) If the Consolidating Arbitrator orders consolidation in full, the Tribunals constituted to hear the individual arbitrations shall be deemed discontinued pursuant to AR 53. If the Consolidating Arbitrator orders consolidation in part, the Tribunals constituted to hear the individual arbitrations shall continue only with respect to those parts that were not consolidated.

(10) If the Consolidating Arbitrator orders consolidation in full or in part, a Tribunal shall be constituted to hear and decide the Consolidated Arbitration.

<p>(11) The Tribunal for the Consolidated Arbitration shall consist of three members, with one selected by the claimants jointly, one selected by the respondents jointly, and the Presiding arbitrator selected by agreement of the claimants and the respondent.</p> <p>If the Tribunal for the Consolidated Arbitration has not been constituted within 45 days after dispatch of the order on consolidation, the Chairman shall appoint the arbitrators not yet appointed in accordance with the procedure in AR 25.</p> <p>(12) The Tribunal for the Consolidated Arbitration may consider requests by other parties to join the Consolidated Arbitration. In so doing, the Tribunal shall consider the stage of the proceedings, the costs incurred to date by the existing parties, and whether the criteria referred to in paragraph (2) are met.</p>	
<p>Chapter VI</p> <p>Evidence</p>	
<p>Rule 39</p> <p>Evidence: General Principle</p> <p>The Tribunal shall determine the admissibility and probative value of the evidence adduced.</p>	<p>1) Canada suggests that a paragraph be added to this Rule that makes clear that the Claimant has the burden of proving all of the elements of its claims, as required by general principles of international law.</p>
<p>Rule 40</p> <p>Tribunal Order to Produce Documents or Other Evidence</p> <p>(1) The Tribunal shall decide any dispute arising out of a party’s request for production of documents or other evidence. In doing so, it shall consider all relevant circumstances including the scope and timeliness of the request, the relevance of the documents and evidence requested, the time and burden of production and any objections raised by the other party.</p> <p>(2) The Tribunal may at any time on its own initiative order a party to produce documents or other evidence.</p>	<p>1) Canada shares the concerns noted in the comments in the Working Paper that document production has become too extensive, too burdensome and too costly. Canada believes that further guidance needs to be provided to Tribunals on how to manage document production, and particularly their right to refuse document production requests. Canada suggests that an initial step in these Rules might be to expressly introduce the idea of the power of the tribunal in this regard in the second sentence by having it read “In deciding whether to grant, deny, limit or otherwise modify a party’s request for production of documents or other evidence, the Tribunal shall consider....” Consideration should also be given to including more substantive criteria (e.g.,</p>

	<p>“the relevance and materiality of the documents and evidence requested and the potential impact on the outcome of the dispute”) in order to emphasize the concern for avoiding costly and burdensome document discovery.</p>
<p style="text-align: center;">Rule 41</p> <p style="text-align: center;">Witnesses and Experts</p> <p>(1) A party intending to rely on evidence given by a witness shall file a written statement by that witness. The statement shall identify the witness, contain the evidence of the witness and be signed and dated.</p> <p>(2) A witness who has filed a written statement may be called for examination at a hearing.</p> <p>(3) The Tribunal shall determine the manner in which the examination is conducted.</p> <p>(4) A witness shall be examined before the Tribunal, by the parties, and under the control of the President. Any member of the Tribunal may put questions to the witness.</p> <p>(5) A witness shall be examined in person unless the Tribunal determines that another means of examination is appropriate in the circumstances.</p> <p>(6) Paragraphs (1)-(5) shall apply, with necessary modifications, to evidence given by an expert.</p> <p>(7) Each witness shall make the following declaration before giving evidence: “I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth.”</p> <p>(8) Each expert shall make the following declaration before giving evidence: “I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief.”</p>	<p>No comments</p>

<p style="text-align: center;">Rule 42</p> <p style="text-align: center;">Tribunal-Appointed Experts</p> <p>(1) The Tribunal may appoint one or more independent experts to report to it on specific matters.</p> <p>(2) The Tribunal shall consult with the parties on the appointment of an expert, including on the terms of reference of the expert.</p> <p>(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.</p> <p>(4) The parties shall have the right to make written or oral submissions on the report of the Tribunal-appointed expert.</p> <p>(5) Rule 41(1)-(5) and (8) shall apply, with necessary modifications, to the Tribunal appointed Expert.</p>	<p>1) Canada is concerned that this Rule, as it is broadly drafted, could be used by Tribunal's in a way that eliminates the fact that a party bears the burden of proving its own positions. In Canada's view, where a party has failed to meet its burden of proof, it is inappropriate for the Tribunal to itself appoint an expert who can, in a fashion, assist the failing party. As such, any such appointment should be limited to ensure that the tribunal is not overstepping its role.</p> <p>2) Further, the appointment of an independent expert by the Tribunal will increase the cost of a dispute, and thus it should be subject to the joint control of the parties. Specifically, if both parties disapprove of such appointment it should not be permitted. In addition, the work should be subject to the terms and conditions imposed by the disputing parties, rather than simply adopted in consultation with them.</p> <p>3) In light of the above, we suggest that paragraph 1 be rewritten to say "Unless the disputing parties agree otherwise, the Tribunal may appoint one or more independent experts to report to it on a specific issue raised by a disputing party in a submission."</p> <p>4) We also suggest that paragraph 2 be rewritten to say "The Tribunal shall consult with the parties on the appointment of an expert, and shall ensure that any expert respects any terms and conditions on which the disputing parties may agree."</p>
<p style="text-align: center;">Rule 43</p> <p style="text-align: center;">Visits and Inquiries</p> <p>(1) The Tribunal may order a visit to any place connected with the dispute, on its own initiative or upon a party's request, if it</p>	<p>No comments</p>

<p>deems the visit necessary, and may conduct inquiries there as appropriate.</p> <p>(2) The order shall define the scope of the visit and the subject of any inquiry, the procedure to be followed, the applicable time limits and other terms.</p> <p>(3) The parties shall have the right to participate in any visit or inquiry.</p>	
--	--

Chapter VII

Publication, Access to Proceedings and Non-Disputing Party Submissions

<p style="text-align: center;">Rule 44</p> <p style="text-align: center;">Publication of Awards and Decisions on Annulment</p> <p>(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.</p> <p>(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.</p> <p>(3) Absent consent of the parties referred to in paragraphs (1) or (2), the Centre shall publish excerpts of the legal reasoning in such documents (“excerpts”). The following procedure shall apply to publication of excerpts:</p> <ul style="list-style-type: none"> (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 paragraph (1); (b) the parties may send comments on the proposed excerpts to the Centre within 30 days after their receipt; and (c) the Centre shall publish excerpts within 30 days after receipt of the parties’ comments on the proposed excerpts, if any. 	<p>1) Canada urges the Member States of ICSID to reconsider Article 48(5) of the ICSID Convention to require publication of Awards etc., rather than leaving this up to the discretion of the investor and respondent in a particular case.</p> <p>2) This Rule should include a provision on redactions, similar to that in Rule 45.</p>
---	---

<p style="text-align: center;">Rule 45</p> <p style="text-align: center;">Publication of Orders and Decisions</p> <p>(1) The Centre shall publish orders and decisions within 60 days after their issuance, with any redactions agreed to by the parties and jointly notified to the Centre within the 60-day period.</p> <p>(2) If either party notifies the Centre within the 60-day period referred to in paragraph (1) that the parties disagree on the redactions, the Centre shall refer the order or decision to the Tribunal to determine any redactions, and shall publish the order or decision with the redactions approved by the Tribunal.</p>	<p>No comments</p>
<p style="text-align: center;">Rule 46</p> <p style="text-align: center;">Publication of Documents Filed by a Party</p> <p>Upon request of a party, the Centre shall publish any written submissions, observations or other documents which that party filed in the proceeding, with redactions agreed to by the parties.</p>	<p>1) In Canada’s opinion, this proposed Rule does not adequately address the public’s interest in transparency and would leave ICSID’s Rules out of step with modern practice, as reflected in the UNCITRAL Rules on Transparency in Investor-State Arbitration. Canada has for nearly two decades included provisions requiring that submissions in investor-State arbitrations be made public. Canada strongly believes that allowing an investor the right to decide to keep its submissions confidential, over the objection of a State, would be contrary to the public interest and would lead to continued criticism of the entire mechanism. Moreover, there is more that can be done because nothing in the Convention prohibits the publication of documents filed by a party without their consent. Hence, Canada strongly urges this provision to be rewritten along the lines of Rule 45 – mandating the publishing of these documents with a provision on redactions.</p>
<p style="text-align: center;">Rule 47</p> <p style="text-align: center;">Observation of Hearings</p> <p>(1) The Tribunal shall allow persons in addition to the parties, their representatives, witnesses and experts during their</p>	<p>1) In Canada’s opinion, this proposed Rule does not adequately address the public’s interest in transparency and would leave ICSID’s Rules out of step with modern practice, as reflected in the UNCITRAL Rules on Transparency in Investor-State Arbitration. Canada strongly believes that allowing an investor the right to decide to close the hearings would be contrary to the public</p>

<p>testimony, and persons assisting the Tribunal to observe hearings, unless either party objects.</p> <p>(2) The Tribunal shall establish procedures to prevent the disclosure of confidential information to persons observing the hearings.</p> <p>(3) The Centre shall publish recordings and transcripts of hearings, unless either party objects.</p>	<p>interest and would lead to continued criticism of the entire mechanism. Moreover, there is more that can be done because nothing in the Convention prohibits public hearings. Canada submits that the Rule should be to mandate that hearings be public, subject to limited closure as necessary to protect confidential information.</p>
<p style="text-align: center;">Rule 48</p> <p style="text-align: center;">Submission of Non-disputing Parties</p> <p>(1) Any person or entity that is not a disputing party (“non-disputing party”) may apply for permission to file a written submission in the proceeding.</p> <p>(2) In determining whether to permit a non-disputing party submission, the Tribunal shall consider all relevant circumstances, including:</p> <ul style="list-style-type: none"> (a) whether the submission would address a matter within the scope of the dispute; (b) how the submission would assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (c) whether the non-disputing party has a significant interest in the proceeding; (d) the identity, activities, organization and ownership of the non-disputing party, including any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party; and (e) whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission. <p>(3) The parties shall have the right to make observations on whether a non-disputing party should be permitted to file a</p>	<p>1) Canada believes that there can be significant value to the participation of non-disputing parties in the arbitration process. Moreover, where a request to participate is denied, reasons should be given. Hence, Canada suggests that in the chapeau paragraph 4, it being that “If the Tribunal decides that a non-disputing party will not be permitted to file a written submission, it shall provide the reasons for such decision. If the Tribunal decides that a non-disputing party will be permitted to file a written submission, it shall ensure that....”</p> <p>2) With respect to paragraph 4(c), Canada’s experience is that the participation of third parties has not led to significant increases in the costs of arbitration, that calculating exactly what the increased costs are would be difficult. Further, Canada believes that the Rules should not seek to deter the participation of interested groups by imposing upon them a financial burden. Hence, Canada suggests the deletion of this subparagraph. At the very least, it should be made clear that it would only be in very exceptional circumstances that the Tribunal would order the payment of costs attributable to the non-disputing party’s participation</p>

<p>written submission in the proceeding and on the conditions for filing such a submission, if any.</p> <p>(4) The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to:</p> <ul style="list-style-type: none"> (a) the format, length or scope of the submission; (b) the date of filing; and (c) the payment of funds to defray the increased costs of the proceeding attributable to the non-disputing party's participation. <p>(5) The Tribunal may provide the non-disputing party with access to relevant documents filed in the proceeding, unless either party objects.</p> <p>(6) If the Tribunal permits a non-disputing party to file a written submission, the parties shall have the right to make observations on the submission.</p>	
<p style="text-align: center;">Rule 49</p> <p style="text-align: center;">Participation of Non-disputing Treaty Party</p> <p>(1) The Tribunal shall permit a Party to a treaty that is not a party to the dispute (“nondisputing Treaty Party”) to make a written submission on the application or interpretation of a treaty at issue in the dispute.</p> <p>(2) A Tribunal may allow a non-disputing Treaty Party to make a written submission on any other matter within the scope of the dispute, in accordance with the procedure in Rule 48.</p> <p>(3) The parties shall have the right to make observations on the submission of the non-disputing Treaty Party.</p>	<p>1) With respect to 49(1), Canada suggests that the absolute right of the non-disputing treaty party to participate via a written submission should be limited to issues of the interpretation of the treaty at issue. This is consistent with Canada’s treaty practice, as well as the UNCITRAL Rules on Transparency. Thus, Canada suggests deletion of the words “application or” from paragraph 1.</p> <p>2) Canada suggests that the requirement in paragraph 49(2) for the Tribunal to consider the procedure in Rule 48 in the case of a non-disputing treaty party submission may be awkward, particularly with respect to 48(2)(d) and (e), which do not seem appropriate to apply to States. Hence, Canada suggests that Rule 49(2) be reworded to say “A Tribunal may allow a non-disputing Treaty Party to make a written submission on any other matter within the scope of the dispute, in accordance with the procedures in Rule 48 that the Tribunal deems relevant to the application.”</p>

	<p>3) Canada also suggests that consideration be given here to making clear that the non-disputing Treaty Party's have a right to access relevant documents filed in the proceeding so as to allow them to fully consider all relevant information in making their submissions. In this regard, Canada suggests that if such documents have not been made public, it be made clear that the the non-disputing Treaty Party also have the obligation to keep them confidential.</p>
<p>Chapter VIII Special Procedures</p>	
<p style="text-align: center;">Rule 50 Provisional Measures</p> <p>(1) A party may at any time request that the Tribunal recommend provisional measures to preserve that party's rights, including measures to:</p> <ul style="list-style-type: none"> (a) prevent action that is likely to cause: <ul style="list-style-type: none"> (i) current or imminent harm to the other party; or (ii) prejudice to the arbitral process; (b) maintain or restore the status quo pending determination of the dispute; and (c) preserve evidence that may be relevant to the resolution of the dispute. <p>(2) The following procedure shall apply:</p> <ul style="list-style-type: none"> (a) the request shall specify the rights to be preserved, the measures requested, and the circumstances that require such measures; 	<p>1) Canada suggests that it is necessary for the Rules to reflect that each State has a right to regulate, and in fact, an obligation to continue to regulate in certain areas even when an investment dispute is ongoing. Any order for provisional measures should respect the sovereignty of the State in this regard. In this regard, Canada suggests that a third sentence be added to paragraph 3, stating that "In recommending the provisional measures it determines are urgent and necessary, the Tribunal shall give due deference to the right of a State to regulate within its territory to achieve legitimate policy objectives."</p>

<p>(b) the Tribunal shall fix time limits for written or oral submissions, as required, on the request;</p> <p>(c) if a party requests provisional measures 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</p> <p>(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:</p> <ul style="list-style-type: none"> (i) the constitution of the Tribunal; (ii) the last written submission on the request; or (iii) the last oral submission on the request. <p>(3) In deciding whether to recommend provisional measures, the Tribunal shall consider all relevant circumstances. The Tribunal shall only recommend provisional measures if it determines that they are urgent and necessary.</p> <p>(4) The Tribunal may recommend provisional measures on its own initiative. The Tribunal may also recommend provisional measures different from those requested by a party.</p> <p>(5) A party must promptly disclose any material change in the circumstances upon which the Tribunal recommended provisional measures.</p> <p>(6) The Tribunal may at any time modify or revoke the provisional measures, on its own initiative or upon a party's request.</p> <p>(7) A party may request any judicial or other authority to order provisional measures if such recourse is available in the instrument recording the parties' consent to arbitration.</p>	
<p style="text-align: center;">Rule 51</p> <p style="text-align: center;">Security for Costs</p> <p>(1) A party may request that the Tribunal order the other party to provide security for the costs of the proceeding and determine the appropriate terms for provision of the security.</p>	<p>1) Canada believes that it would be useful for the Rules to expressly give to a Tribunal the authority to award security for costs, rather than leaving it as implied under the current approach. Paragraph 1 could thus be revised to say "On the request of the other party, or on its own initiative, the Tribunal may order a party to provide security for the costs of the proceeding, and determine the appropriate terms for the provision of the security."</p>

<p>(2) The following procedure shall apply:</p> <ul style="list-style-type: none"> (a) the request shall specify the circumstances that require security for costs; (b) the Tribunal shall fix time limits for written or 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: <ul style="list-style-type: none"> (i) the constitution of the Tribunal; (ii) the last written submission on the request; or (iii) the last oral submission on the request. <p>(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider the party's ability to comply with an adverse decision on costs and any other relevant circumstances.</p> <p>(4) If a party fails to comply with an order for 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.</p> <p>(5) A party must promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.</p> <p>(6) The Tribunal may at any time modify or revoke its order for security for costs, on its own initiative or upon a party's request.</p>	<p>2) Canada believes that the current standards developed by Tribunals for when security for costs will be required are inappropriate and far too burdensome. These standards should be changed and the proposals for amendment should avoid any suggestion that they are codifying or accepting such standards. In Canada's view, security for costs should be awarded where there are reasonable grounds to believe that a disputing party will not be able to comply with an adverse costs award. Further, while Canada agrees that the existence of third party funding is not determinative, it is a relevant factor and Canada would support a reference to it here. Hence, Canada suggests that paragraph 3 be rewritten to say "In determining whether to order a party to provide security for costs, the Tribunal shall consider whether there are reasonable grounds to believe that a party will not be able to comply with an adverse decision on costs and any other relevant circumstances, including the whether the party has received third party funding and the terms thereof."</p>
<p style="text-align: center;">Rule 52</p> <p style="text-align: center;">Ancillary Claims</p>	<p>No comments</p>

<p>(1) Unless the parties agree otherwise, a party may file an incidental or additional claim or a counter-claim (“ancillary claim”) arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and the jurisdiction of the Centre.</p> <p>(2) An incidental or additional claim shall be presented no later than the date to file the reply, and a counter-claim shall be presented no later than the date to file the counter-memorial, unless the Tribunal decides otherwise.</p>	
<p style="text-align: center;">Rule 53</p> <p style="text-align: center;">Default</p> <p>(1) A party is in default if it fails to appear or present its case, or indicates that it will not appear or present its case.</p> <p>(2) If a party is in default at any stage of the proceeding, the other party may request that the Tribunal address the questions submitted to it and render an Award.</p> <p>(3) Upon receipt of the request referred to in paragraph (2), the Tribunal shall notify the defaulting party of the request and grant a grace period to cure the default, unless it is satisfied that the defaulting party does not intend to appear or present its case. The grace period shall not exceed 60 days without the consent of the other party.</p> <p>(4) If the default relates to a first session or hearing, the Tribunal may set the grace period as follows:</p> <ul style="list-style-type: none">(a) reschedule the first session or hearing to a date within 60 days after the original date;(b) proceed with the first session or hearing in the absence of the defaulting party and fix a time limit for the defaulting party to file a written submission within 60 days after the first session or hearing; or(c) cancel the hearing and fix a time limit for the parties to file written submissions within 60 days after the original date of the first session or hearing. <p>(5) If the default relates to another scheduled procedural step, the Tribunal may set the grace period to cure the default by fixing a new time limit for the defaulting party to complete that step within 60 days after the date of the notice of default referred to in paragraph (3).</p>	<p>No comments</p>

<p>(6) A party's default shall not be deemed an admission of the assertions made by the other party.</p> <p>(7) The Tribunal may invite the party appearing to file observations, produce evidence or make oral submissions.</p> <p>(8) If the defaulting party fails to act within the grace period or if no such period is granted, the Tribunal shall examine the jurisdiction of the Centre and its own competence before deciding the questions submitted to it and rendering an Award.</p>	
--	--

Chapter IX

Suspension and Discontinuance

<p style="text-align: center;">Rule 54</p> <p style="text-align: center;">Suspension</p> <p>(1) Except as otherwise provided in the Administrative and Financial Regulations or these Rules, the Tribunal may suspend the proceeding on:</p> <ul style="list-style-type: none"> (a) agreement of the parties; (b) request of a party; or (c) its own initiative. <p>(2) The Tribunal shall give the parties the opportunity to make observations before ordering the suspension of the proceeding pursuant to paragraph (1)(b) or (c).</p> <p>(3) In its order recording the suspension of the proceeding the Tribunal shall specify:</p> <ul style="list-style-type: none"> (a) the period of the suspension; (b) any appropriate conditions; and (c) a modified procedural calendar to take effect on resumption of the proceeding. 	<p>1) In Canada's view, where both parties have agreed to suspend the proceedings, the Tribunal should not have the discretion to act to the contrary. Hence, Canada suggests that paragraph 1 be restructured such that the Tribunal "shall" suspend the proceedings on agreement of the parties, and that it "may" suspend on the request of a party or its own initiative.</p>
---	---

<p>(4) The Tribunal may extend the period of the suspension prior to its expiry, on its own initiative or upon a party's request.</p> <p>(5) The Secretary-General shall suspend the proceedings pursuant to paragraph (1)(a) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal. The parties shall inform the Secretary-General of the period of the suspension and any conditions agreed to by the parties.</p>	
<p style="text-align: center;">Rule 55</p> <p style="text-align: center;">Settlement and Discontinuance</p> <p>(1) If the parties notify the Tribunal that they have agreed to discontinue the proceeding, the Tribunal shall issue an order taking note of the discontinuance.</p> <p>(2) If the parties agree on a settlement of the dispute before the Award is rendered, the Tribunal:</p> <p style="padding-left: 40px;">(a) shall issue an order taking note of the discontinuance of the proceeding, if the parties so request; or</p> <p style="padding-left: 40px;">(b) may record the settlement in the form of an Award, if the parties file the complete and signed text of their settlement and request that the Tribunal embody such settlement in an Award.</p> <p>(3) The Secretary-General shall issue the order referred to in paragraphs (1) and (2)(a) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.</p>	<p>No comments</p>
<p style="text-align: center;">Rule 56</p> <p style="text-align: center;">Discontinuance at Request of a Party</p> <p>(1) If a party requests the discontinuance of the proceeding, the Tribunal shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.</p> <p>(2) The Secretary-General shall fix the time limit and issue the order referred to in paragraph (1) if the Tribunal has not yet</p>	<p>No comments</p>

<p>been constituted or if there is a vacancy on the Tribunal.</p>	
<p style="text-align: center;">Rule 57</p> <p style="text-align: center;">Discontinuance for Failure of Parties to Act</p> <p>(1) If the parties fail to take any steps in the proceeding for more than 150 days, the Tribunal shall notify them of the time elapsed since the last step taken in the proceeding.</p> <p>(2) If the parties fail to take a step within 30 days after the notice referred to in paragraph (1), they shall be deemed to have discontinued the proceeding and the Tribunal may issue an order taking note of the discontinuance.</p> <p>(3) If either party takes a step within 30 days after the notice referred to in paragraph (1), the proceeding shall continue.</p> <p>(4) The Secretary-General shall issue the notice and the order referred to in paragraphs (1) and (2) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.</p>	<p>No comments</p>
<p style="text-align: center;">Rule 58</p> <p style="text-align: center;">Discontinuance for Failure to Pay</p> <p>If the parties fail to make payments to defray the costs of the proceeding as required by Administrative and Financial Regulation 14, the proceeding may be discontinued pursuant to that Regulation.</p>	<p>No comments</p>

<p>Chapter X</p> <p>The Award</p>	
<p style="text-align: center;">Rule 59</p> <p style="text-align: center;">Timing of the Award</p> <p>(1) The Tribunal shall render the Award as soon as possible and in any event no later than:</p> <ul style="list-style-type: none"> (a) 60 days after the last written or oral submission if the Award is rendered pursuant to Rule 35(4); (b) 180 days after the last written or oral submission if the Award is rendered pursuant to Rule 36(7); or (c) 240 days after the last written or oral submission on all other matters. <p>(2) A statement of costs filed in accordance with Rule 19(3) shall not be considered a submission for the purposes of calculating the time limits referred to in paragraph (1).</p>	<p>1) This paragraph provides deadlines for the issuance of the Award. However, it does not cover cases where proceedings have been bifurcated. Canada has had the experience that decisions on certain aspects of a dispute (i.e. jurisdiction or merits) can sometimes take an excessive amount of time. Canada suggests that consideration be given applying similar deadlines to decisions in bifurcated proceedings, rather than just to the Award.</p>
<p style="text-align: center;">Rule 60</p> <p style="text-align: center;">Contents of the Award</p> <p>(1) The Award shall be in writing and shall contain:</p> <ul style="list-style-type: none"> (a) a precise designation of each party; (b) the names of the representatives of the parties; (c) a statement that the Tribunal was established under the Convention, and a description of the method of its 	<p>No comments</p>

<p>constitution;</p> <p>(d) the name of each member of the Tribunal and the appointing authority of each;</p> <p>(e) the dates and place(s) of the first session and the hearings;</p> <p>(f) a brief summary of the proceeding;</p> <p>(g) a statement of the relevant facts as found by the Tribunal;</p> <p>(h) a brief summary of the submissions of the parties, including the relief sought;</p> <p>(i) the decision of the Tribunal on every question submitted to it, and the reasons on which the Award is based; and</p> <p>(j) a statement of the costs of the proceeding, including the fees and expenses of each member of the Tribunal, and a reasoned decision regarding the allocation of the costs of the proceeding.</p> <p>(2) The Award shall be signed by the members of the Tribunal who voted for it. It may be signed by electronic means if the parties agree.</p> <p>(3) Any member of the Tribunal may attach an individual opinion or a statement of dissent to the Award before the Award is rendered.</p>	
<p style="text-align: center;">Rule 61</p> <p style="text-align: center;">Rendering of the Award</p> <p>(1) Once the Award has been signed by the members of the Tribunal who voted for it, the Secretary-General shall promptly:</p> <p>(a) dispatch a certified copy of the Award to each party, together with any individual opinion and statement of dissent, indicating the date of dispatch on the Award; and</p> <p>(b) deposit the Award in the archives of the Centre, together with any individual opinion and statement of dissent.</p>	<p>No comments</p>

<p>(2) The Award shall be deemed to have been rendered on the date of dispatch.</p> <p>(3) The Secretary-General shall provide additional certified copies of the Award to a party upon request.</p>	
<p style="text-align: center;">Rule 62</p> <p style="text-align: center;">Supplementary Decision and Rectification</p> <p>(1) A Tribunal may rectify any clerical, arithmetical or similar error in the Award on its own initiative within 30 days after rendering the Award.</p> <p>(2) A party requesting a supplementary decision on, or the rectification of, an Award pursuant to Article 49(2) of the Convention shall file the request with the Secretary-General within 45 days after the Award was rendered and pay the lodging fee published in the schedule of fees.</p> <p>(3) The request referred to in paragraph (2) shall:</p> <ul style="list-style-type: none"> (a) identify the Award to which it relates; (b) be signed by each requesting party or its representative and be dated; and (c) specify: <ul style="list-style-type: none"> (i) with respect to a request for a supplementary decision, any question which the Tribunal omitted to decide in the Award; and (ii) with respect to a request for rectification, any clerical, arithmetical or similar error in the Award. <p>(4) Upon receipt of the request and the lodging fee, the Secretary-General shall promptly:</p> <ul style="list-style-type: none"> (a) transmit the request to the other party; (b) register the request, or refuse registration if the request is not made within the time limit referred to in paragraph (2); and 	<p>1) In paragraph 3, there are a number of procedural requirements for a request for a supplementary decision. However, Canada notes that in Rule 63, there are additional procedural requirements for an application for interpretation, revision and annulment (particularly R.63 subparagraphs b and d). Canada suggests that the additional requirements in Rule 63 also be included in Rule 62.</p>

<p>(c) notify the parties of the registration or refusal to register.</p> <p>(5) As soon as the request is registered, the Secretariat shall transmit the request and the notice of registration to each member of the Tribunal.</p> <p>(6) The President of the Tribunal shall determine the procedure to consider the request, after consulting with the other members of the Tribunal and the parties.</p> <p>(7) Rules 60-61 shall apply to any decision of the Tribunal pursuant to this Rule.</p> <p>(8) The Tribunal shall issue the supplementary decision or rectification within 60 days after the last written or oral submission on the request.</p> <p>(9) The date of dispatch of the supplementary decision or rectification shall be the relevant date for the purposes of calculating the time limits specified in Articles 51(2) and 52(2) of the Convention.</p> <p>(10) A supplementary decision or rectification under this Rule shall become part of the Award and shall be reflected on all certified copies of the Award.</p>	
<p>Chapter XI</p> <p>Interpretation, Revision and Annulment of the Award</p>	
<p style="text-align: center;">Rule 63</p> <p style="text-align: center;">The Application</p> <p>(1) A party applying for interpretation, revision or annulment of an Award shall file the application with the Secretary-General, together with any supporting documents and pay the lodging fee published in the schedule of fees.</p> <p>(2) The application shall:</p> <p style="padding-left: 40px;">(a) identify the Award to which it relates;</p>	<p>No comments</p>

(b) be in a procedural language used in the original proceeding;

(c) be signed by each applicant or its representative and be dated;

(d) attach proof of any representative's authority to act; and

(e) include the contents and be filed within the time limits referred to in paragraphs (3)-(5).

(3) An application for interpretation made pursuant to Article 50(1) of the Convention may be filed at any time after the dispatch of the Award and shall specify the points in dispute concerning the meaning or scope of the Award.

(4) An application for revision made pursuant to Article 51(1) of the Convention shall be filed within 90 days after the discovery of a fact of such a nature as decisively to affect the Award, and in any event within three years after the Award (or any supplementary decision on or rectification of the Award) was rendered. The application shall specify:

(a) the change sought in the Award;

(b) the newly discovered fact that decisively affects the Award; and

(c) evidence that when the Award was rendered that fact was unknown to the Tribunal and to the applicant, and that the applicant's ignorance of that fact was not due to negligence.

(5) An application for annulment made pursuant to Article 52(1) of the Convention shall:

(a) be filed within 120 days after the date on which the Award (or any supplementary decision on or rectification of the Award) was rendered if the application is based on any of the grounds in Article 52(1)(a), (b), (d) or (e) of the Convention; or

(b) be filed within 120 days after the discovery of corruption on the part of a member of the Tribunal and in any event within three years after the date on which the Award (or any supplementary decision on or rectification of the Award) was rendered, if the application is based on Article 52(1)(c) of the Convention; and

(c) specify the grounds on which it is based, limited to the grounds in Article 52(1)(a)-(e) of the Convention, and the reasons in support of each ground.

<p>(6) Upon receiving an application and the lodging fee, the Secretary-General shall promptly:</p> <ul style="list-style-type: none"> (a) transmit the application and the supporting documents to the other party; (b) register the application, or refuse registration if the application is not made within the relevant time limits referred to in paragraphs (3) or (4); and (c) notify the parties of the registration or refusal to register. <p>(7) The last date for filing an application under this Rule shall be determined in accordance with Rule 7. A complete application and evidence of payment of the lodging fee must be filed by such date.</p> <p>(8) An applicant may withdraw from its application before it has been registered by filing a written notice of withdrawal with the Secretary-General. The Secretariat shall promptly notify the parties of the withdrawal, unless the application has not yet been transmitted to the other party pursuant to paragraph (5)(a).</p>	
<p style="text-align: center;">Rule 64</p> <p style="text-align: center;">Interpretation or Revision: Reconstitution of the Tribunal</p> <p>(1) As soon as an application for the interpretation or revision of an Award is registered, the Secretary-General shall:</p> <ul style="list-style-type: none"> (a) transmit the notice of registration, the application and any supporting documents to each member of the original Tribunal; and (b) request each member of the Tribunal to inform the Secretary-General within 10 days whether that member can take part in the consideration of the application. <p>(2) If all members of the Tribunal can take part in the consideration of the application, the Secretary-General shall notify the Tribunal and the parties of the reconstitution of the Tribunal.</p> <p>(3) If the Tribunal cannot be reconstituted in accordance with paragraph (2), the Secretary-General shall invite the parties to constitute a new Tribunal without delay. The new Tribunal shall have the same number of arbitrators and be appointed by the same method as the original Tribunal.</p>	<p>No comments</p>

<p style="text-align: center;">Rule 65</p> <p style="text-align: center;">Annulment: Appointment of <i>ad hoc</i> Committee</p> <p>(1) As soon as an application for annulment of an Award is registered, the Chairman shall appoint an <i>ad hoc</i> Committee in accordance with Article 52(3) of the Convention.</p> <p>(2) Each member of the Committee shall provide a signed declaration in accordance with Rule 26.</p> <p>(3) The Committee shall be deemed to be constituted on the date the Secretary-General notifies the parties that all members have accepted their appointment.</p>	<p>No comments</p>
<p style="text-align: center;">Rule 66</p> <p style="text-align: center;">Procedure Applicable to Interpretation, Revision and Annulment</p> <p>(1) Except as provided below, the provisions of these Rules shall apply, with necessary modifications, to any procedure relating to the interpretation, revision or annulment of an Award and to the decision of the Tribunal or Committee.</p> <p>(2) The procedural agreements and orders on matters addressed at the first session of the original Tribunal shall apply to a proceeding under this Rule, with necessary modifications, unless the parties agree or the Tribunal or Committee orders otherwise.</p> <p>(3) In addition to the application, the written procedure shall consist of one round of written submissions, unless the parties agree or the Tribunal or Committee orders otherwise.</p> <p>(4) A hearing shall be held upon the request of either party, or if ordered by the Tribunal or Committee.</p> <p>(5) The Tribunal or Committee shall issue its decision within 120 days after the last written or oral submission on the application.</p>	<p>No comments</p>

Rule 67

Stay of Enforcement of the Award

- (1) A party to an interpretation, revision or annulment proceeding may request a stay of enforcement of all or part of the Award at any time before the final decision on the application.
- (2) If the stay is requested in the application for revision or annulment of an Award, enforcement shall be stayed provisionally by the Secretary-General until the Tribunal or Committee decides on the request.
- (3) The following procedure shall apply:
- (a) the request shall specify the circumstances that require the stay;
 - (b) the Tribunal or Committee shall fix time limits for written or oral submissions, as required, on the request;
 - (c) if a party files the request before the constitution of the Tribunal or Committee, the Secretary-General shall fix time limits for written submissions on the request, so that the Tribunal or Committee may consider the request promptly upon its constitution; and
 - (d) the Tribunal or Committee shall issue its decision on the request within 30 days after the latest of:
 - (i) the constitution of the Tribunal or Committee;
 - (ii) the last written submission on the request; or
 - (iii) the last oral submission on the request.
- (4) If a Tribunal or Committee decides to stay enforcement of the Award, it may impose conditions for the stay, or for lifting the stay, in view of all relevant circumstances.
- (5) A party must promptly disclose to the Tribunal or Committee any change in the circumstances upon which the enforcement was stayed.
- (6) The Tribunal or Committee may at any time modify or terminate a stay of enforcement, on its own initiative or upon a

No comments

<p>party's request.</p> <p>(7) A stay of enforcement shall terminate on the date of dispatch of the decision on the application for interpretation, revision or annulment, or on the date of discontinuance of the proceeding.</p>	
<p style="text-align: center;">Rule 68</p> <p style="text-align: center;">Resubmission of Dispute after an Annulment</p> <p>(1) If a Committee annuls all or part of an Award, either party may file with the Secretary-General a request to resubmit the dispute to a new Tribunal, together with any supporting documents and pay the lodging fee published in the schedule of fees. The request shall:</p> <ul style="list-style-type: none">(a) identify the Award to which it relates;(b) be in a procedural language used in the original proceeding;(c) be signed by each requesting party or its representative and be dated;(d) attach proof of any representative's authority to act; and(e) specify which aspect(s) of the dispute is resubmitted to the new Tribunal. <p>(2) Upon receiving a request for resubmission and the lodging fee, the Secretary- General shall promptly:</p> <ul style="list-style-type: none">(a) transmit the request and the supporting documents to the other party;(b) register the request;(c) notify the parties of the registration; and(d) invite the parties to constitute a new Tribunal without delay, which shall have the same number of arbitrators,	<p>No comments</p>

and be appointed by the same method as the original Tribunal.

(3) If the original Award was annulled in part, the new Tribunal shall only reconsider that part of the dispute pertaining to the annulled portion of the Award.

(4) Except as otherwise provided in paragraphs (1)-(3), these Rules shall apply to the resubmission proceeding.

(5) The procedural agreements and orders on matters addressed at the first session of the original Tribunal shall apply to the resubmission proceeding, with necessary modifications, unless the parties agree or the new Tribunal orders otherwise.

Chapter XII

Expedited Arbitration

Rule 69

Consent of Parties to Expedited Arbitration

(1) The parties to an arbitration conducted under the ICSID Convention may consent to expedite the arbitration in accordance with this Chapter (“expedited arbitration”) by following the procedure in paragraph (2).

(2) The parties shall jointly notify the Secretariat in writing of their consent to an expedited arbitration in accordance with this Chapter. Such notice must be received within 20 days after the date of registration of the Request for arbitration.

(3) Chapters I-XI of the Arbitration Rules shall apply to an expedited arbitration except that:

(a) Rules 8(1), 22, 23, 25, 35, 37, 38, 42, and 43 do not apply in an expedited arbitration pursuant to this Chapter; and

(b) Rules 26, 30, 34, 36, 40, 53, 59, 62 and 66, as modified by Rules 70-78, apply in an expedited arbitration pursuant to this Chapter.

1) Canada believes that there must be an option for the parties or for the tribunal to determine at some point that expedited arbitration is no longer feasible, and that they can then opt out and return to regular arbitration. Canada feels this is important to preserve the flexibility of the parties and the tribunal to respond to potentially changing circumstances.

<p style="text-align: center;">Rule 70</p> <p style="text-align: center;">Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration</p> <p>(1) The Tribunal in an expedited arbitration shall consist of a Sole Arbitrator appointed pursuant to Rule 71 or a three-member Tribunal appointed pursuant to Rule 72.</p> <p>(2) The parties shall jointly notify the Secretariat in writing of their election of a Sole Arbitrator or a three-member Tribunal within 30 days after the date of registration of the Request for arbitration.</p> <p>(3) If the parties do not notify the Secretariat of their election within the time limit referred to in paragraph (2), the Tribunal shall consist of a Sole Arbitrator to be appointed in accordance with Rule 71.</p> <p>(4) An appointment under Rules 71-72 shall be deemed an appointment in accordance with a method agreed by the parties pursuant to Article 37(2)(a) of the Convention.</p>	No comments
<p style="text-align: center;">Rule 71</p> <p style="text-align: center;">Appointment of Sole Arbitrator for Expedited Arbitration</p> <p>(1) A Sole Arbitrator in an expedited arbitration shall be appointed in accordance with the following procedure:</p> <p style="padding-left: 40px;">(a) The parties shall jointly advise the Secretary-General in writing of their agreement on a Sole Arbitrator and shall provide the appointee's name, nationality(ies) and contact information within 20 days after the notice referred to in Rule 70(2); and</p> <p style="padding-left: 40px;">(b) The Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73;</p> <p>(2) The Secretary-General shall appoint the Sole Arbitrator if:</p>	No comments

<p>(a) the parties do not agree on the Sole Arbitrator within the time limit referred to in paragraph (1)(a);</p> <p>(b) the parties notify the Secretary-General that they are unable to agree on the Sole Arbitrator;</p> <p>(c) the appointee does not accept the appointment within the time limit referred to in Rule 73; or</p> <p>(d) the appointee declines the appointment.</p> <p>(3) The following procedure shall apply to an appointment by the Secretary-General of the Sole Arbitrator pursuant to paragraph (2):</p> <p>(a) the Secretary-General shall transmit a list of five candidates for appointment as Sole Arbitrator to the parties within 10 days after the relevant event referred to in paragraph (2);</p> <p>(b) each party may strike one name from the list, and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;</p> <p>(c) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them;</p> <p>(d) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73; and</p> <p>(e) if the selected candidate does not accept the appointment, the Secretary-General shall select the next highest-ranked candidate.</p>	
<p style="text-align: center;">Rule 72</p> <p style="text-align: center;">Appointment of Three-Member Tribunal for Expedited Arbitration</p> <p>(1) A three-member Tribunal shall be appointed in accordance with the following procedure:</p> <p>(a) each party shall appoint an arbitrator (“co-arbitrators”) within 20 days after the notice referred to in Rule 70(2) and shall notify the Secretary-General of the appointees’ names, nationalities and contact information within such</p>	<p>No comments</p>

time;

(b) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73;

(c) the parties shall jointly appoint the President of the Tribunal within 20 days after the receipt of acceptance of both appointments made pursuant to paragraph (1)(a) and shall notify the Secretary-General of the appointee's name, nationality(ies) and contact information within such time; and

(d) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73.

(2) The Secretary-General shall appoint the arbitrators not yet appointed if:

(a) an appointment is not made within the time limits referred to in paragraph (1)(a) or (c);

(b) the parties notify the Secretary-General that they are unable to agree on the President of the Tribunal;

(c) an appointee does not accept the appointment within the time limit referred to in Rule 73; or

(d) an appointee declines the appointment.

(3) The following procedure shall apply to the appointment by the Secretary-General of any arbitrators not yet appointed pursuant to paragraphs (1) and (2):

(a) the Secretary-General shall first appoint the co-arbitrator(s) not yet appointed, after consulting as far as possible with the parties. The Secretary-General shall use best efforts to make the co-arbitrator appointment(s) within 15 days after the relevant event in paragraph (2);

(b) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73;

(c) as soon as both co-arbitrators have accepted their appointment, or within 10 days after the relevant event referred to in paragraph (2), the Secretary-General shall transmit a list of five candidates for appointment as President of the Tribunal to the parties;

<p>(d) each party may strike one name from the list, and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;</p> <p>(e) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them;</p> <p>(f) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73; and</p> <p>(g) if the selected candidate does not accept the appointment, the Secretary-General shall select the next highest-ranked candidate.</p>	
<p style="text-align: center;">Rule 73</p> <p style="text-align: center;">Acceptance of Appointment in Expedited Arbitration</p> <p>An arbitrator appointed in an expedited arbitration shall accept the appointment and provide a declaration pursuant to Rule 26(3) within 10 days after receipt of the request for acceptance.</p>	<p>No comments</p>
<p style="text-align: center;">Rule 74</p> <p style="text-align: center;">First Session in Expedited Arbitration</p> <p>(1) The Tribunal shall hold a first session pursuant to Rule 34 within 30 days after the constitution of the Tribunal.</p> <p>(2) The first session shall be held by telephone or electronic means of communication unless both parties and the Tribunal agree it shall be held in person.</p>	<p>No comments</p>

Rule 75

The Procedural Schedule in Expedited Arbitration

(1) The following schedule for written submissions and the hearing shall apply in the expedited arbitration:

(a) the requesting party shall file a memorial within 60 days after the first session, unless the Request for arbitration is to be considered the memorial pursuant to Rule 13(2);

(b) the other party shall file a counter-memorial within 60 days after the date of filing the memorial, or within 60 days after the first session if the requesting party has elected to use the Request for arbitration as its memorial pursuant to Rule 13(2);

(c) the memorial and counter-memorial referred to in paragraph (1)(a) and (b) shall be no longer than 200 pages in length;

(d) the requesting party shall file a reply within 40 days after the date of filing of the counter-memorial;

(e) the other party shall file a rejoinder within 40 days after the date of filing of the reply;

(f) the reply and rejoinder referred to in paragraph (1)(d) and (e) shall be no longer than 100 pages in length;

(g) the hearing shall be held within 60 days after the last written submission is filed;

(h) the parties shall file statements of costs within 10 days after the last day of the hearing referred to in paragraph (1)(g); and

(i) the Tribunal shall render the Award as soon as possible, and in any event no later than 120 days after the hearing referred to in paragraph (1)(g).

(2) Any preliminary objection, counter-claim, incidental or additional claim shall be joined to the main schedule referred to in paragraph (1). The Tribunal shall adjust the schedule if a party raises any such matter, taking into account the expedited nature of the process.

(3) The Tribunal may extend the time limits in paragraph (1)(a) and (b) by up to 30 days if any party requests that the Tribunal

1) With respect to paragraph 3, Canada questions whether the timelines contained in this Rule are feasible if document production is to be allowed. Canada suggests that paragraph 3 be amended to include a first sentence that says "At the request of a party the Tribunal may grant limited requests for specifically identifiable documents that the requesting Party knows, or has good cause to believe exist."

<p>determine a dispute arising from requests to produce documents or other evidence pursuant to Rule 40(1). The Tribunal shall decide such applications based on written submissions and without an in-person hearing.</p> <p>(4) Any schedule for submissions other than those referred to in paragraphs (1)-(3) shall run in parallel with the main schedule in paragraph (1), unless the Tribunal determines that there are exceptional circumstances that justify the suspension of the main schedule. In fixing time limits for such submissions, the Tribunal shall take into account the expedited nature of the process.</p>	
<p style="text-align: center;">Rule 76</p> <p style="text-align: center;">Default during Expedited Arbitration</p> <p>A Tribunal may grant a party in default a grace period not to exceed 30 days pursuant to Rule 53.</p>	<p>No comments</p>
<p style="text-align: center;">Rule 77</p> <p style="text-align: center;">The Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration</p> <p>(1) A Tribunal may rectify any clerical, arithmetical or similar error in the Award on its own initiative within 15 days after rendering the Award.</p> <p>(2) The Tribunal shall issue a supplementary decision or rectification pursuant to Rule 62 within 30 days after the last written or oral submission on the request.</p>	<p>No comments</p>
<p style="text-align: center;">Rule 78</p> <p style="text-align: center;">The Procedural Schedule for an Application for Interpretation, Revision or Annulment of an Award Rendered in Expedited Arbitration</p> <p>(1) A Tribunal may rectify any clerical, arithmetical or similar error in the Award on its own initiative within 15 days after rendering the Award.</p>	<p>1) Canada notes that paragraph 1 of this proposed Rule appears to be a typo in that it repeats paragraph 1 of Rule 77. The paragraph belongs in Rule 77 not Rule 78.</p>

<p>(2) The following schedule for written submissions and the hearing shall apply to the procedure relating to an interpretation, revision or annulment of an Award rendered in an expedited arbitration:</p> <ul style="list-style-type: none"> (a) the applicant shall file a memorial on interpretation, revision or annulment within 30 days after the first session; (b) the other party shall file a counter-memorial on interpretation, revision or annulment within 30 days after the memorial; (c) a hearing shall be held within 45 days after the date for filing the counter-memorial; (d) the parties shall file statements of costs within 5 days after the last day of the hearing referred to in paragraph (2)(c); and (e) the Tribunal or Committee shall render the decision on interpretation, revision or annulment as soon as possible, and in any event no later than 60 days after the hearing referred to in paragraph (2)(c). <p>(3) Any schedule for submissions other than those referred to in paragraph (2) shall run in parallel with the main schedule, unless the Tribunal or Committee determines that there are exceptional circumstances that justify the suspension of the main schedule. In fixing time limits for such submissions, the Tribunal or Committee shall take into account the expedited nature of the process.</p>	
<p style="text-align: center;">Rule 79</p> <p style="text-align: center;">Resubmission of a Dispute after an Annulment in Expedited Arbitration</p> <p>The consent of the parties given pursuant to Rule 69 shall not apply to resubmission of the dispute.</p>	<p>No comments</p>

Comments of the Government of Canada on the Proposed Mediation Rules	
Proposed Rule	Canada's Comments
<p>Chapter I</p> <p>General Provisions</p>	
<p>Rule 1</p> <p>Application of Rules</p> <p>(1) These Rules shall apply to any mediation proceeding conducted under the Additional Facility Rules, except to the extent the parties agree otherwise and subject to paragraph (2).</p> <p>(2) If any of these Rules, or any aspect of the parties' agreement to modify the application of these Rules, conflicts with a provision of law from which the parties cannot derogate, that provision shall prevail.</p> <p>(3) The applicable (Additional Facility) Mediation Rules are those in force on the date of filing of the request for mediation.</p> <p>(4) The official languages of the Centre are English, French and Spanish. The texts of these Rules are equally authentic in each official language.</p> <p>(5) These Rules may be cited as the "(Additional Facility) Mediation Rules" of the Centre.</p>	<p>In light of the possibility that certain treaties may contain provisions on mediation that introduce supplemental elements or provisions that differ from the ICSID Mediation Rules, Canada believes that proposed Rule 1(2) should make clear that the applicable treaty mediation rules will prevail. For example, CETA Article 8.20(4) contains a 60 day period in which the disputing parties should seek to resolve the dispute. Canada's understanding of Rules 1(1) and (2) is that the 60-day time period from CETA Article 8.20(4) forms part of the disputing parties' agreement to mediate. If ICSID or Member States have a different understanding, proposed Rule 1 should be clarified.</p>
<p>Rule 2</p> <p>Meaning of Party and Party Representation</p> <p>For the purposes of these Rules, "party" may include, where the context so admits, all parties to the mediation and an authorized representative of a party.</p>	<p>No comments.</p>

<p>Each party may be represented or assisted by agents, counsel or advocates (“representative(s)”), whose names and proof of authority to act shall be notified by that party to the Secretariat.</p>	
<p style="text-align: center;">Chapter II Institution of the Mediation</p>	
<p style="text-align: center;">Rule 3</p> <p style="text-align: center;">Institution of Mediation Based on Prior Party Agreement</p> <p>(1) If the parties have agreed in writing to refer the dispute to mediation under the (Additional Facility) Mediation Rules, any party wishing to institute a mediation proceeding shall file a request for mediation together with the required supporting documents (“Request”) with the Secretary-General and pay the lodging fee published in the schedule of fees.</p> <p>(2) The Request may be filed by one or more requesting parties, or filed jointly by the parties to the dispute.</p> <p>(3) The Request shall:</p> <ul style="list-style-type: none">(a) be in English, French or Spanish;(b) identify each party to the proceeding and its nationality and provide their contact information (including electronic mail address, street address and telephone number);(c) be signed by each requesting party or its representative and be dated;(d) attach proof of each representative’s authority to act;(e) be filed electronically, unless the Secretary-General authorizes the filing of the Request in an alternative format;	<p>No comments.</p>

<p>(f) if the requesting party is a juridical person, state that it has obtained all necessary authorizations to file the Request, and attach the authorizations;</p> <p>(g) with regard to Article 2(1)(c) of the Additional Facility Rules, indicate that the mediation is between a State or an REIO on the one hand and a national of another State on the other hand, describe the investment to which the mediation pertains, and include a brief statement of the issues in dispute;</p> <p>(h) contain any provisions agreed to by the parties regarding the appointment and qualifications of the mediator and any procedural proposals or agreements reached between the parties; and</p> <p>(i) attach a copy of the agreement of the parties to refer the dispute to mediation under the (Additional Facility) Mediation Rules.</p> <p>(4) Upon receipt of the Request, the Secretary-General shall:</p> <p>(a) promptly acknowledge receipt of the Request to the requesting party; and</p> <p>(b) transmit the Request to the other party upon receipt of the lodging fee.</p> <p>(5) The Secretary-General shall act as the official channel of written communications between the parties.</p>	
<p style="text-align: center;">Rule 4</p> <p style="text-align: center;">Institution of Mediation Absent a Prior Party Agreement</p> <p>(1) If the parties have no prior agreement to refer the dispute to mediation under the (Additional Facility) Mediation Rules, any party wishing to institute a mediation proceeding shall file a Request with the Secretary-General, pay the lodging fee published in the schedule of fees and make an offer to mediate to the other party in accordance with paragraphs (2)-(5).</p> <p>(2) The Request shall:</p>	<p>As written, it is not clear that proposed Rule 4(5) contemplates the possibility that the party receiving the request for mediation might not explicitly accept or reject an offer to mediate but instead make a counter-offer to mediate subject to certain conditions or mediate different issues. In such circumstances, the Secretary-General may find herself conveying counter-proposals and negotiating positions on the proposed agreement to mediate. Canada suggests a new provision be added to this rule that puts the onus on the parties to decide whether such conditions are acceptable or not: "If the other party informs the Secretary-General that it accepts the offer to mediate subject to certain conditions, the Secretary-General shall acknowledge receipt of such communication and transmit it to the requesting party and inform the parties that if no agreement on the offer to mediate is reached between the parties within 30 days, no further action will be taken on the Request."</p>

<p>(a) comply with the requirements in Rule 3(3)(a)-(i);</p> <p>(b) include an offer to refer the dispute to mediation under these Rules; and</p> <p>(c) request that the Secretary-General invite the other party to accept the offer to mediate referred to in paragraph (b).</p> <p>(3) Upon receipt of the Request, the Secretary-General shall:</p> <p>(a) promptly acknowledge receipt of the Request to the requesting party;</p> <p>(b) transmit the Request to the other party upon receipt of the lodging fee; and</p> <p>(c) invite the other party to inform the Secretary-General within 30 days of transmittal of the Request pursuant to paragraph (3)(b) whether it accepts the offer to mediate referred to in paragraph (2)(b).</p> <p>(4) If the other party informs the Secretary-General that it accepts the offer to mediate referred to in paragraph (2)(b), the Secretary-General shall acknowledge receipt and transmit the acceptance of the offer to mediate to the requesting party.</p> <p>(5) If the other party fails to accept or rejects the offer to mediate referred to in paragraph (2)(b) within the 30-day period referred to in paragraph (3)(c), the Secretary-General shall acknowledge receipt and transmit any communication received to the requesting party and inform the parties that no further action will be taken on the Request.</p>	
<p style="text-align: center;">Rule 5</p> <p style="text-align: center;">Registration of the Request</p> <p>(1) Upon receipt of:</p> <p>(a) the lodging fee; and</p>	<p>No comments.</p>

<p>(b) a Request pursuant to Rule 3; or</p> <p>(c) a Request and an agreement to mediate pursuant to Rule 4; the Secretary-General shall register the Request if it appears, on the basis of the information provided, that the Request is not manifestly outside the scope of Article 2(1) of the Additional Facility Rules.</p> <p>(2) The Secretary-General shall notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.</p> <p>(3) The notice of registration of the Request shall:</p> <p>(d) record that the Request is registered and indicate the date of registration;</p> <p>(e) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Centre; and</p> <p>(f) invite the parties to appoint the mediator without delay.</p>	
<p style="text-align: center;">Rule 6</p> <p style="text-align: center;">Qualifications of the Mediator</p> <p>(1) The mediator shall be impartial and independent of the parties.</p> <p>(2) The parties may agree that the mediator shall have particular qualifications or expertise relevant to the subject-matter of the Request.</p>	<p>No comments.</p>
<p style="text-align: center;">Rule 7</p> <p style="text-align: center;">Number of Mediators and Method of Appointment</p> <p>(1) There shall be one mediator or two co-mediators. Each mediator shall be appointed by</p>	<p>No comments.</p>

agreement of the parties. All references to “mediator” in these Rules shall include co-mediators, where the context so admits.

(2) If the parties do not advise the Secretary-General of an agreement on the number of mediators within 30 days after the date of registration, there shall be one mediator appointed by agreement of the parties.

(3) The parties may jointly request that the Secretary-General assist with the appointment of a mediator at any time.

(4) If the parties are unable to appoint the mediator within 60 days after the date of registration, either party may request that the Secretary-General appoint the mediator not yet appointed. The Secretary-General shall consult with the parties as far as possible on the qualifications, expertise, nationality and availability of the mediator and shall use best efforts to appoint any mediator within 30 days after receipt of the request to appoint.

(5) If no step is taken by the parties to appoint the mediator pursuant to this Rule within 120 days after the date of registration, or such other period as the parties may agree, the Secretary-General shall inform the parties that the mediation cannot proceed.

(6) If the parties notify the Secretary-General prior to the appointment of a mediator that they have agreed to terminate the mediation, the Secretary-General shall notify the parties that the mediation cannot proceed.

Rule 8

Acceptance of Appointment

(1) The parties shall notify the Secretariat of the appointment and provide the name, and contact information of the appointee.

(2) The Secretariat shall request an acceptance from the appointee as soon as the appointee is selected.

Canada believes that proposed Rule 8(7) is appropriate for the context of mediation as opposed to the stricter conflict of interest rules for arbitrators that may apply under certain treaties in the context of investor-state arbitration. If, however, a treaty contains stricter conditions on mediators than what is contemplated under proposed Rule 8(7), Canada understands those conditions would apply. Otherwise, Canada has no comments on proposed Rule 8.

<p>(3) An appointee shall accept the appointment and provide a signed declaration in the form published by the Centre within 20 days after the receipt of the request for acceptance.</p> <p>(4) The Secretariat shall notify the parties of the acceptance of appointment by the mediator and provide the signed declaration.</p> <p>(5) The Secretariat shall notify the parties if a mediator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed in accordance with the method followed for the previous appointment.</p> <p>(6) The mediator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3).</p> <p>(7) Unless the parties and the mediator agree otherwise, the mediator may not act as arbitrator, counsel, expert, witness, judge or in any other capacity in any other proceeding relating to the dispute that is the subject of the mediation.</p>	
<p style="text-align: center;">Rule 9</p> <p style="text-align: center;">Notice of Acceptance</p> <p>As soon as the mediator has, or both co-mediators have, accepted the appointment(s), the Secretary-General shall notify the parties of such acceptance (“notice of acceptance”) and transmit the Request, any supporting documents, and the notice of registration to each mediator.</p>	<p>No comments.</p>
<p style="text-align: center;">Rule 10</p> <p style="text-align: center;">Resignation and Replacement of Mediator</p> <p>(1) A mediator may resign by notifying the Secretary-General and the parties.</p>	<p>No comments.</p>

<p>(2) A mediator shall resign:</p> <ul style="list-style-type: none">(a) on the joint request of the parties; or(b) if the mediator becomes incapacitated or is unable to perform the duties required of a mediator. <p>(3) Following the resignation of a mediator, a new mediator shall be appointed by the same method used to make the original appointment, except that the SecretaryGeneral shall fill any vacancy that has not been filled within 45 days after the notice of the vacancy, or such other period as agreed by the parties.</p> <p>(4) Following the resignation of a co-mediator, the parties may agree to continue the mediation with the remaining co-mediator acting as a sole mediator. The parties shall notify the Secretary-General of such agreement within 45 days after the notice of the vacancy or such other period as agreed by the parties pursuant to paragraph (2).</p>	
<p style="text-align: center;">Rule 11</p> <p style="text-align: center;">Role and Duties of the Mediator</p> <p>(1) The mediator shall assist the parties in reaching a mutually acceptable resolution of all or part of the dispute.</p> <p>(2) The mediator shall treat the parties equally and provide each party with a reasonable opportunity to participate in the proceeding.</p>	<p>No comments.</p>

<p style="text-align: center;">Rule 12</p> <p style="text-align: center;">Duties of the Parties</p> <p>(1) The parties shall cooperate with the mediator and with one another and shall conduct the mediation in good faith.</p> <p>(2) The parties shall provide all relevant explanations, documents or other information requested by the mediator.</p>	<p>Canada notes that paragraph 1376 of the Explanatory Notes emphasizes that the parties are bound to comply with any request for documents by the mediator, which suggests a mandatory obligation. Canada questions whether such a mandatory obligation is appropriate in the context of a mediation. For example, if a mediator requests a document(s) that a disputing party considers to be highly sensitive or prejudicial, a disputing party should not be required to produce it in the same way it would have to in the context of an arbitration.</p> <p>Given the different nature of the mediation process as compared to arbitration, Canada suggests proposed Rule 12(2) be modified to emphasize its voluntary nature: “The parties should endeavour to provide all relevant explanations, documents and other information reasonably requested by the mediator.” This proposed rule will not prevent a mediator from making a determination that a party has not cooperated with the mediator under proposed Rule 17(1)(d), if appropriate.</p>
<p style="text-align: center;">Rule 13</p> <p style="text-align: center;">First Session</p> <p>(1) Each party shall file a brief, initial written statement describing the issues in dispute and its views on these issues and on the procedure to be followed. Such statement shall be filed simultaneously with the Secretariat 15 days after the date of the notice of acceptance, or such other period as the mediator may determine, but in any event before the first session. The Secretary-General shall transmit the initial statements to the mediator and the other party.</p> <p>(2) The mediator shall hold a first session with the parties within 30 days after the date of the notice of acceptance or such other period as the parties may agree.</p> <p>(3) At the first session, the mediator shall determine the protocol for the mediation (“Protocol”) after consulting with the parties on procedural matters, including:</p> <p style="padding-left: 40px;">(a) the procedure for the conduct of the mediation, such as the procedural languages, method of communication, place of meetings, the next steps in the proceeding, confidentiality arrangements, participation of other persons in the mediation and any</p>	<p>No comments.</p>

<p>other procedural and administrative matters;</p> <p>(b) any agreement between the parties not to initiate or pursue other proceedings in respect of the dispute during the mediation;</p> <p>(c) any agreement between the parties concerning the application of prescription or limitation periods; and</p> <p>(d) any other relevant matters.</p> <p>(4) At the first session or within any other period as the mediator may determine, each party shall:</p> <p>(a) identify a representative who is authorized to settle the dispute on its behalf; and</p> <p>(b) describe the process that would be followed to implement a settlement.</p>	
<p style="text-align: center;">Rule 14</p> <p style="text-align: center;">Conduct of the Mediation</p> <p>(1) The mediator shall conduct the mediation in accordance with the Protocol and shall take into account the views of the parties and the circumstances of the dispute.</p> <p>(2) The mediator shall conduct the mediation in an expeditious and cost-effective manner.</p> <p>(3) The mediator may meet and communicate with the parties jointly or separately. Such communications may be in person or in writing, and by any appropriate means of communication.</p> <p>(4) The mediator may request that the parties provide additional information or written statements.</p> <p>(5) If requested by the parties, the mediator may make oral or written recommendations for</p>	<p>No comments.</p>

<p>the resolution of all or part of the dispute.</p> <p>(6) The mediator may obtain expert advice with the agreement of the parties.</p>	
<p style="text-align: center;">Rule 15</p> <p style="text-align: center;">Payment of Advances and Costs of the Proceeding</p> <p>Unless the parties agree otherwise, each party shall:</p> <p>(a) pay one half of the advances payable in accordance with (Additional Facility) Administrative and Financial Regulation 7(5);</p> <p>(b) pay one half of the fees and expenses of the mediator, as well as the administrative fee for the use of the facilities of the Centre, in accordance with (Additional Facility) Administrative and Financial Regulation 7(5); and</p> <p>(c) bear any other expenses it incurs in connection with the proceeding</p>	<p>No comments.</p>
<p style="text-align: center;">Rule 16</p> <p style="text-align: center;">Confidentiality of the Mediation and Use of Information in Other Proceedings</p> <p>(1) Unless the parties agree otherwise, all matters relating to the mediation other than the information to be published by the Centre pursuant to (Additional Facility) Administrative and Financial Regulation 4, shall remain confidential, except to the extent that disclosure may be required by law or for purposes of implementation and enforcement.</p> <p>(2) The parties may consent to the publication by the Centre of documents generated in connection with the mediation.</p> <p>(3) The parties shall not make any use of information or documents obtained in the mediation,</p>	<p>For the sake of clarity, Canada suggests several minor modifications for proposed Rule 16(3): “The parties shall not make any use of information or documents obtained in the mediation, and shall not rely on <u>or refer to</u> any positions taken, admissions made, or views expressed by the other party or the mediator during the mediation in <u>any</u> other proceedings.”</p>

and shall not rely on any positions taken, admissions made, or views expressed by the other party or the mediator during the mediation in other proceedings.

Rule 17

Notice of Termination of the Mediation

(1) The mediation shall be terminated upon:

- (a) the signing of a settlement agreement by the parties;
- (b) a notice of withdrawal by any party, unless the remaining parties agree to continue the mediation;
- (c) a determination by the mediator that there is no likelihood of resolution through this mediation; or
- (d) a determination by the mediator that a party failed to participate in the mediation or cooperate with the mediator.

(2) The mediator shall take note of the termination in writing. The notice of termination shall contain a brief summary of the proceeding and the reason for termination of the mediation pursuant to paragraph (1). The notice shall be signed by the mediator.

(3) The Secretary-General shall promptly dispatch a certified copy of the notice of termination to each party, indicating the date of dispatch; and deposit the notice in the archives of the Centre. The Secretary-General shall provide additional certified copies of the notice to a party upon request.

No comments.