COMMENTS FROM THE SWISS CONFEDERATION TO THE DRAFT PROVISIONS IN SECTION A (DRAFT PROVISIONS 1 TO 9), DRAFT PROVISION 11 AND DRAFT PROVISION 12 OF THE DOCUMENT "A/CN.9/WG.III/WP.244: DRAFT PROVISIONS ON PROCEDURAL AND CROSS-CUTTING ISSUES"

The Swiss Confederation has reviewed the working papers of the Secretariat "A/CN.9/WG.III/WP.244: Draft provisions on procedural and cross-cutting issues" and "A/CN.9/WG.III/WP.245: Annotations to draft provisions on procedural and cross-cutting issues", and is pleased to submit the present comments.

DRAFT PROVISION 1: EVIDENCE

2. For the sake of clarity, Switzerland proposes that paragraph 2 refer to "documents, witnesses, and other evidence" instead of "documents, exhibits or other evidence", even though it is aware that Article 17 of the UNCITRAL Rules refers to "documents, exhibits or other evidence". Switzerland makes this suggestion as exhibits and documents appear synonymous. Alternatively, the formulation found in ICSID Rule 36(3), whereby "[t]he Tribunal may call upon a party to produce documents or other evidence (…)", could also be adopted.

3. The proposed limitations to document production contained in paragraph 3 appear justified in light of the fact that document production has on some occasions gone too far in practice. Regarding the second sentence of paragraph 3 (starting with "In considering …"), it is not sufficiently clear whether the circumstances enumerated in the paragraph should be considered when deciding to *establish* a procedure for document production pursuant to the first sentence or when *ruling on specific document production requests* in the event such document production phase has been allowed.

4. In Switzerland's view, the meaning of paragraph 4 is not clear. If a party ordered to do so fails to produce evidence, then in practice the tribunal will decide on the evidence in the record or, depending on the circumstances, will draw adverse inferences, i.e. it will assume that the facts supposed to be proven by the evidence not provided are not established. It is unclear whether the current draft tries to exclude adverse inferences. Moreover, even if the failure to produce evidence is excused, the tribunal must rule on the evidence before it, which the present wording appears to exclude. It is more likely to draw an adverse inference if there is no excuse for the failure. In other words, this paragraph requires some further work.

   Our comment above (para. 2) on exhibits and documents would equally apply here.

7. Regarding para. 7, Switzerland is of the view that it would be useful to list the reasons for exclusion from evidence or production that have been recognized in arbitral practice, and at a minimum those enumerated in Article 9(2) of the IBA Rules on the Taking of Evidence.

   In paragraph 7, our comment above (para. 2) on exhibits and documents would equally apply here.

DRAFT PROVISION 2: BIFURCATION

The equivalent ICSID Rule on Bifurcation (Rule 42) refers to “question” instead of “issue”, and to “dispute” instead of “claim”. The wording could be amended accordingly.

DRAFT PROVISION 3: INTERIM/PROVISIONAL MEASURES

It seems to Switzerland that it is not a priority for the Working Group to work on a provision on interim measures, as applicable arbitration rules already entail very detailed rules.

DRAFT PROVISION 4: MANIFEST LACK OF LEGAL MERIT/EARLY DISMISSAL

Switzerland considers the possibility to foresee an early dismissal as very important. Switzerland welcomes that this draft provision is aligned with Rule 41 of the ICSID Arbitration Rules.

DRAFT PROVISION 5: SECURITY FOR COSTS

1. With respect to paragraph 1, Switzerland welcomes the current draft stating that both disputing parties, i.e. the claimant and the respondent State making a counterclaim may be ordered to provide security for costs. This is in line with ICSID Rule 53. This is based on the assumption that in a proceeding the same rights and obligations should apply to all disputing parties (equal treatment).

3. We agree with the period of time of 30 days as suggested in paragraph 3.

4. In paragraph 4, Switzerland supports to list the existence of third-party funding as one of the circumstances to be considered by the Tribunal. In comparison, it is not foreseen in ICSID Rule 53, which mention instead third-party funding in the context of the evidence which may be adduced in relation to the listed circumstances (see ICSID Rule 53(4)). According to Switzerland’s understanding, the specific listing of the existence of third-party funding in paragraph 4 may give even more emphasis to the third-party funding circumstance.

DRAFT PROVISION 8: PERIOD OF TIME FOR MAKING THE AWARD

Switzerland considers that the right balance between the disputing parties’ legitimate desire for speed, on the one side, and the quality of awards, on the other, should be maintained, keeping in mind that investment treaty disputes may be complex and often raise public interest issues, the weighing of which may require careful deliberation and accurate drafting. In that vein, Switzerland has the following observations:

2. In paragraph 2, it would make more sense to provide a timeframe after the last substantive submission (i.e. to the exclusion of cost submissions) as it is foreseen in Rule 58 of ICSID Arbitration Rules than after the date of the constitution of the Tribunal. To base the timeframe on the date of the constitution of the Tribunal would not take

into account the fact that the length of proceedings depends very much on the specific proceedings (complexity, number of submissions, etc.). The timeframe should be both reasonable and realistic, keeping in mind the various concerns expressed above. In this connection, Switzerland also notes that the ICSID Rules provide a "best efforts" rule regarding time limits applicable to the Tribunal (see Rule 12(1): "The Tribunal shall use best efforts to meet time limits to render orders, decisions and the Award").

DRAFT PROVISION 9: ALLOCATION OF COSTS

1. Switzerland agrees with providing a default rule in paragraph 1 according to which costs follow the event, while leaving the possibility to allocate costs differently under the circumstances (same rule as in Rule 42(1) of the UNCITRAL Arbitration Rules).

2. In paragraph 2, lit. (e), we wonder if the mere existence of third-party funding is sufficient as a factor for the allocation of costs. According to Provision 12(7)(c), only the fact that the disputing party fails to comply with disclosure obligations will be taken into account in cost allocation.

   Regarding paragraph 2, lit. (f), Switzerland is of the view that such rule is one-sided, i.e. it only takes into account inflated claims by claimants, without covering similar situations for respondents (i.e. exaggerated defenses or objections by the respondents on the amounts claimed).

With regard to the question raised in paragraph 36 of the Annotations to the draft provisions on procedural and cross-cutting issues (cf. the Working Group may wish to also consider whether Rule 51 of the ICSID Rules on statement of, and submission on, costs should be incorporated in Draft Provision 9 and whether the disputing parties should be required to submit an estimate of costs to be incurred by them at the outset of the proceeding), from a practical point, it seems to us to be very difficult if not impossible for disputing to submit an estimate of costs to be incurred by them at the outset of the proceeding.

DRAFT PROVISION 11: CONSOLIDATION AND COORDINATION OF PROCEEDINGS

On the principle, Switzerland agrees with this draft provision opting for "voluntary" consolidation (all disputing parties in the separate proceedings must agree).

However, it is a very short provision that provides only limited guidance to tribunals. At present, consolidation is not possible when the proceedings to be consolidated are brought under different institutional rules. It would therefore be worthwhile <u>to address cross-institutional consolidation</u>.

Specifically, the requirements, procedure and consequences of consolidation could also be described.

3. According to paragraph 3 the disputing parties "shall provide the proposed terms for the conduct of the consolidated or coordinating proceedings to the Tribunals". It is unclear how the process would work in practice if the Tribunals have not yet been established. These cases may need to be clarified.

DRAFT PROVISION 12: THIRD-PARTY-FUNDING

3. Switzerland notes that paragraph 3 goes beyond ICSID Rule 14(4), which simply states that tribunal "may order disclosure of further information".

   Regarding lit. (b), Switzerland is concerned that such disclosure may have unintended consequences, i.e. suggest that if the funding agreement provides that the third-party funder has agreed to cover any adverse cost award, then there may be no need to order security for costs, which would be undesirable. For this reason, this provision may require clarification.

4. In paragraph 4, it seems late to disclose information with the "statement of claim". First, while it is true that in the vast majority of cases it is the claimant who relies on third-party funding, as noted above in some cases respondents have relied on third-party funding as well. However, it is not contemplated when respondents should disclose the information.

   In the ICSID context, the moment of disclosure is at the time of registration or as soon as funding agreement concluded (Rule 14(2) ICSID Arbitration Rule). While registration is not transposable here, it seems to Switzerland that disclosure should occur "in the first submission in the arbitration" (a notice of arbitration, an answer, etc.).

6. Proposed paragraph 6 goes beyond current practice. Furthermore, it provides a lot of discretion to the arbitral tribunal and the circumstances can be difficult to assess. For example, it can be questionable what a "reasonable amount" in lit. (a) and what a "reasonable number" of cases in lit. (b) are. With respect to lit. (a), Switzerland also wonders why the Tribunal should intervene and change the investor's decision on the payment of the third-party funder, which may be based on the investor's own risk assessment.

With regard to paragraphs 6 to 8, Switzerland would like to emphasize that, as it was said during the discussion on the matter at the 49th session of the Working Group, it is of the view that regulation of third-party funding should be limited to addressing transparency and disclosure, notably to ensure potential conflicts of interest are avoided or to assess whether security for costs must be provided. Going further might interfere with legitimate contractual relationships. E.g., in paragraph 7, a far-reaching measure according to which the tribunal could order the termination of an agreement and the return of any funding is foreseen. It is in Switzerland's view doubtful that the tribunal would have jurisdiction to order termination of the funding agreement (which is governed by its own applicable law and subject to its own dispute resolution clause). Furthermore, there are unclarities, e.g., with regard to paragraph 7, lit. (b): under this paragraph, it is the failure to comply with the disclosure obligations that triggers a security for costs order. Under Draft Provision 5, the very existence of third-party funding is considered as a circumstance warranting security for costs. This creates confusion and room for arguments as to when granting security for costs is warranted.