WRITTEN COMMENTS OF CANADA ON DRAFT PROVISIONS 1-9, 11 AND 12 OF THE DRAFT PROVISIONS ON PROCEDURAL AND CROSS-CUTTING ISSUES IN A/CN.9/WG.III/WP.244

Canada thanks the Secretariat for its work on procedural and cross-cutting issues relating to the investor-state dispute settlement reform and provides the following comments and suggestions on draft provisions 1 to 9 in Section A and draft provisions 11 and 12 in Section B of A/CN.9/WG.III/WP.244. Canada provides its comments on these provisions based on the understanding that the proposal is for these provisions to be incorporated in the arbitral rules and not as treaty provisions.

These comments build on Canada's previous comments on procedural and cross-cutting issues and are provided without prejudice to Canada's final position on the issues addressed below or on whether such provisions are necessary.

Section A. Provisions to supplement the applicable procedural rules

Draft Provision 1: Evidence

Canada suggests that the first sentence in paragraph 3 be drafted in a permissive manner to reference the ability of tribunals to establish a procedure for document requests/production. This could be added as a last sentence to paragraph 2. Paragraph 3 could then focus on considerations for rejecting specific document requests. With respect to the circumstances listed in paragraph 3, Canada seeks clarification as to the rationale for specifically referring to an objection "by the other party" in subparagraph (d), whereas ICSID Rule 37(d) refers more broadly to "the basis of the objection". In view of the broad language providing for the consideration of "all relevant circumstances" in this paragraph, Canada does not consider the additional language in paragraph 7 to be necessary.

Canada is of the view that paragraph 4 may not be necessary as the principle that each disputing party has the burden of proving the facts relied on to support its claim or defence is already captured by paragraph 1. Moreover, this could raise questions as to whether the Tribunal can draw adverse inferences if a party refuses to produce documents or if it would be limited to deciding the issues based on the evidence before it.

Canada suggests that the second sentence in paragraph 5 be aligned more closely with the language in ICSID Rule 38(2), which provides more broadly for any disputing party or the Tribunal to call a witness for examination at a hearing.

The Working Group may also wish to consider whether paragraph 8 is necessary given that it is already captured by the general scope of the Tribunal's authority to "conduct the arbitration in such manner as it considers appropriate". Should this language be included to align with ICSID Rule 40, Canada also suggests to include the additional language in ICSID Rule 40(2) and (3) to circumscribe the scope of the Tribunal's authority.

Draft Provision 2: Bifurcation

With regard to paragraph 1, Canada notes that "a plea that the Tribunal does not have jurisdiction", is only one of the types of issues or questions that could be addressed in a separate phase of the proceeding. While the provision uses the term "including" before the reference, it should be made clear that bifurcation is not limited to a phase to address jurisdiction but can also include bifurcation on the merits and damages.

Draft Provision 3: Interim/provisional measures

Canada is of the view that similar to ICSID Rule 47, it may be useful to include an illustrative list of possible types of provisional measures or considerations for granting such measures in a draft provision on interim/provisional measures. Canada notes that in its practice, the scope of such interim measures is limited and that a tribunal cannot enjoin the application of the measure alleged to constitute a breach (see e.g., Model FIPA Article 39 (Interim Measures of Protection)).[1]

Draft Provision 4: Manifest lack of legal merit/early dismissal

Draft Provision 4 largely appears to be aligned with ICSID Rule 41. On the question of including a specific reference to costs in paragraph 6, Canada notes that this may not be necessary in view of the more detailed provisions in Draft Provision 9 (Allocation of Costs). As noted below, based on our understanding that Draft Provision 9 to applies generally to any "costs of the proceeding", it may not be necessary to include provisions on allocation of costs in Draft Provision 4.

Draft Provision 5: Security for costs

Canada supports the consideration of the existence of third-party funding in the tribunal determination as to whether one of the circumstances in 4(a) to 4(c) exists (for example it may be relevant to the disputing party's ability to comply with an adverse decision on costs) and not as an element in and of itself. Canada would suggest adjusting the drafting the provision more in line with the ICSID Rules.

Draft Provision 6: Suspension of the proceeding

No comment.

Draft Provision 7: Termination of the proceeding

No comment.

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[1] **Article 39: Interim Measures of Protection**

1. A Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal shall not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 27 (Submission of a Claim to Arbitration). For the purposes of this paragraph, an order includes a recommendation.

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Additional Draft Provision on Discontinuance

The Working Group may wish to consider the inclusion of draft language to provide for a default rule concerning the discontinuance of the proceedings, if one or more of the disputing parties fails to act within fixed period of time (see e.g., Article 57 of ICSID Rules, Model FIPA Article 29 (Discontinuance)).[2]

Draft Provision 8: Period of time for making the award

For simplicity, Canada suggests replacing the language in paragraphs 1 and 2 with language similar to ICSID Article 58(1) (i.e., "The Tribunal shall ensure the proceeding is carried out in a timely and efficient manner and make the final decision as soon as possible, and in any event, no later than [..]").[3] Notably, the time periods stipulated in other draft provisions (see e.g., Draft Provision 4 (Manifest lack of legal merit/early dismissal)) should be taken into account in setting out an appropriate time period for an award.

Draft Provision 9: Allocation of costs

Canada interprets this draft provision to apply generally to any "costs of the proceeding" and as such, considers it unnecessary to specifically refer to costs arising from a request by a disputing party that a claim is manifestly without legal merit pursuant to Draft Provision 4.

Section B. Provisions building on existing procedural rules and investment agreements including on the submission of a claim

Draft Provision 11: Consolidation and coordination of proceedings

Canada has no comments on the proposed consent-based provision on consolidation (i.e., it only provides for consolidation where the disputing parties agree) but notes that in its own practice, Canada usually provides for the ability of tribunals to order consolidation in certain circumstances.[4] Such additional provisions on consolidation could be considered in the context of model treaty clauses.

Paragraph 4 contains new language, which provides that this provision is without prejudice to the right of a disputing party to seek consolidation or coordination under the Agreement. Canada questions why such language is necessary; it should be understood that all the draft provisions

[2] **Article 29: Discontinuance**

If the claimant fails to take a step in the proceeding within 180 days of the submission of a claim to arbitration under Article 27 (Submission of a Claim to Arbitration), or such other time period as agreed to by the disputing parties, the claimant is deemed to have withdrawn its claim and to have discontinued the proceeding. The Tribunal, if constituted, shall, at the request of the respondent Party, and after notice to the disputing parties, in an order take note of the discontinuance. After the order has been rendered the authority of the Tribunal shall cease.

[3] For example, see Canada's Model FIPA Article 40(4).

[4] For example, see Model FIPA Article 34 (Consolidation).

under consideration apply in addition to, or absent other procedures in the underlying instrument of consent.

Draft Provision 12 (paragraphs 1-5, 7): Third-party funding

Generally, Canada supports the inclusion of paragraphs 1-5 of the draft provision. With regard to paragraph 3, Canada is of the view that it is not necessary to list the information that the Tribunal may require to disclose. Instead, Canada suggests that the approach in ICSID Rule 14(4), according to which the "Tribunal may order disclosure of further information", may be more appropriate. Depending on the circumstances, requiring full disclosure of the funding arrangements may be prejudicial and not be necessary to establish conflicts of interest or security for costs.

Canada has several questions regarding paragraph 6 and 8 and therefore reserves its comments pending further discussion by the Working Group. At this time, Canada notes that if the purpose of paragraph 7 is to list potential sanctions for the non-compliance with the third-party funding disclosure requirements, additional guidance as to circumstances and relevant factors for consideration in determining when certain sanctions are appropriate may be necessary. Suspension and termination of proceedings may not be appropriate in all circumstances.