

Investor-to-State Dispute Settlement text after discussions on 15 November 2013

NB: (1) square bracketed blue text indicates EU draft text not provisionally agreed by Canada; (2) square bracketed red text indicates Canadian draft text not provisionally agreed by the EU; and (3) square bracketed black text indicates text provisionally agreed but subject to further examination. Shaded text is being worked on in separate documents.

Article x-1: [Purpose] CAN

1. Without prejudice to the rights and obligations of the Parties under Chapter [XY](Dispute Settlement), this Section establishes a mechanism for the settlement of disputes between a claimant and a respondent concerning an alleged breach of an obligation under [Section 3 or Section 4 of this Chapter] where the claimant claims to have suffered loss or damage as a result of the alleged breach.

[Canada Note: Given that the Investment Chapter already contains a Scope of Application article, perhaps we should rename this article. We suggest "Purpose".]

[Note: the expression "under Sections 3 or 4 of this Chapter" shall be modified throughout the text in order to account for the fact that ISDS only covers post-establishment]

[Note: Parties need to decide on the issue of a Party as an investor]

EU [Article x-3: Definitions

The definitions contained in [chapter on investment protection] apply to this chapter.]

[Canada Note: Canada proposes to delete the text in square brackets and merge the entire article with the section 1 (definitions) of the consolidated investment chapter. We have also re-ordered alphabetically and, for consistency, bolding the terms rather than using quotations and adding semi-colons at the end of each definition.]

[EU Note: possibly ok provided there is no overlap in terms]

[attachment] means the seizure of the property of a disputing party to secure or ensure the satisfaction of an award]

[claimant] means an investor or, where applicable, a locally established company that has taken any of the steps referred to in Section 6];

[Note: the EU wishes to review the expression "any of the steps referred to"]

confidential information means confidential business information [and information that is privileged or otherwise protected from disclosure under the law of a Party];

[EU Note: not necessary in light of Annex]

[Note: Canada agrees in principle; will verify and confirm]

[disputing party] means either the claimant or the respondent;]

[disputing parties] means both the claimant and the respondent;]

[enjoin] means an order to prohibit or restrain an action]

ICSID means the International Centre for Settlement of Investment Disputes established by the ICSID Convention;

ICSID Additional Facility Rules means the Rules Governing the Additional Facility for the Administration

of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes [, in effect on the date of the submission of a claim to arbitration;]

ICSID Convention means the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, [in effect on the date of the submission of a claim to arbitration];

EU [For the purposes of this section,] “**locally established [company]**” means CAN [an company that is a juridical person]/ EU [juridical person] which has the nationality of the respondent and which is owned or controlled, CAN [directly or indirectly,] by an investor of the other Party EU [and which engages in substantive business operations in the territory of the Respondent at the time the treatment being complained of is afforded and at the time of submission of the claim [pursuant to Article x], Such entity shall for the purposes of this [section], be deemed to be an investor of the other Party, and shall, for the purposes of Article 25(2)(b) of the ICSID Convention, be treated as a “national of another Contracting State”.]

[Canada Note: CAN is prepared to use the term “locally established company” in return for EU’s flexibility elsewhere]

[Note: For the purposes of this definition, the term “territory” refers to operations in any Member State of the European Union. Note to EU: Perhaps this could be a footnote to the definition.]

EU [(y) A **juridical person** is:

- (i) owned by natural or juridical persons of the other Party if more than 50 per cent of the equity interest in it is beneficially owned by natural or juridical persons of that Party;
- (ii) controlled by natural or juridical persons of the other Party if such natural or juridical persons have the power to name a majority of its directors or otherwise to legally direct its actions.]

[Canada Note: At the Rules table it was decided not to do define ownership and control. Indeed, the definition of investment’s chapeau uses our preferred “directly or indirectly” in respect of ownership and control. Furthermore, CAN considers a specific definition of ownership and control for a juridical person to be unnecessary.]

New York Convention means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, [in effect on the date of the submission of a claim to arbitration];

non-disputing Party means the Party to the Agreement which is not the respondent;

[respondent means either Canada or, in the case of the European Union, either the respondent as determined-pursuant to Article x- (Notice Requesting a Determination) or, where such determination has yet to be made, the alleged respondent identified by the claimant for purposes of mediation or in the request for consultation;]

[Note: the EU wishes to reflect on possible adjustments to this definition]

Tribunal means an arbitration tribunal established under Article x- (Submission of a Claim to Arbitration) or x- (Consolidation);

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law, in effect on the date of the submission of a claim to arbitration.

Article x-4: Consultations

1. Any dispute should as far as possible be settled amicably. Such a settlement may be agreed at any time, including after the arbitration has been commenced. Unless the disputing parties agree to a

longer period, consultations shall be held within 60 days of the submission of the request for consultations under paragraph 2. The place of consultation shall be Ottawa where the consultations concern treatment afforded/measures adopted by Canada or Brussels where the consultations concern treatment afforded/measures adopted by the European Union or a Member State unless the [disputing parties] agree otherwise.

2. A claimant of a Party alleging a breach of the provisions of [Section 3 (Non-discriminatory Treatment) or Section 4 (Investment Protection) of this chapter] shall submit a request for consultations to the other Party. The claimant shall provide:

[Note: Parties agree that the ISDS section applies only "post-establishment": adjustments to be made in formulation. Perhaps we should address in the purpose/scope provision]

- (a) a request for consultation containing the following information:

- i. the name and address of the claimant. Where there is more than one claimant, the name and address of each claimant shall be provided,
- ii. the provisions of [Section 3 or of Section 4 of this chapter] alleged to have been breached,
- iii. the legal and the factual basis for the claim, including the [measures/treatment] at issue, and,
- iv. the relief sought and the estimated amount of damages claimed; and

- (b) evidence establishing that it is an investor of the other Party.

3. A request for consultations must be submitted within the later of:

- (a) 3 years after the date on which the claimant first acquired, or should have acquired, knowledge of the [treatment/measure] alleged to be inconsistent with [Section 3 or Section 4 of this chapter] and that the claimant has incurred loss or damage thereby; or
- (b) if local remedies are pursued, two years after the date of exhaustion or cessation of the pursuit of local remedies, and, in any event, no later than 15 years after the date on which the claimant first acquired, or should have acquired, knowledge of the [treatment/measure] alleged to be inconsistent with [Section 3 or Section 4 of this chapter] and that the claimant has incurred loss or damage thereby.

4. EU [The time periods in paragraphs 3 and 4 shall not render claims inadmissible where the claimant can demonstrate that the failure to request consultations or submit a claim to arbitration is due to the claimants' inability to act as a result of actions taken by the respondent, provided that the claimant acts as soon as reasonably possible after it is able to act.]

[Canada Note: EU has acknowledged that this is not directed at Canada. As such we would propose that it be removed. We have not adjusted paragraph numbers to avoid confusion.]

5. In the event that the request for consultations concerns an alleged breach of [Section 3 or Section 4 of this chapter] by the European Union, or a Member State of the European Union, it shall be sent to the European Union.

[Note: Canada to propose text to account for financial services chapter and any other chapters that might pertain to ISDS]

6. In the event that the claimant has not submitted a claim to arbitration pursuant to Article x- (Submission of a claim to arbitration) within 18 months of submitting the request for consultations, the

claimant shall be deemed to have withdrawn from proceedings under this Section in respect of the alleged breach of [Section 3 or Section 4 of this chapter] and to have waived its rights to bring a claim. This period may be extended by agreement between the [disputing parties].

Article x-5: Mediation

1. The disputing parties may at any time agree to have recourse to mediation.

[Note: This article will be reviewed in light of final definition of disputing party.]

2. Recourse to mediation is voluntary and without prejudice to the legal position or rights of either disputing party under this chapter and shall be governed by the rules agreed to by the disputing parties including, if available, the rules established by the Services and Investment Committee pursuant to Article x-26(5)(d).

3. The mediator is appointed by agreement of the disputing parties. Such appointment may include appointing a mediator from the roster established pursuant to Article x-10 (Constitution of the Tribunal) or requesting the Secretary General of ICSID to appoint a mediator from the list of chairpersons established pursuant to Article x-10 (Constitution of the Tribunal).

4. Disputing parties shall endeavour to reach a mutually agreed solution within 60 days from the appointment of the mediator.

5. If the disputing parties agree to have recourse to mediation, Articles 2(3) and 2(6) shall not apply from the date on which the disputing parties agreed to have recourse to mediation to the date on which either disputing party decides to terminate the mediation, by way of a letter to the mediator and the other disputing party.

[Article x-6: Notice Requesting a Determination

1. If the dispute cannot be settled within [3] months of the submission of the request for consultations, the request concerns an alleged breach of the agreement by the European Union and the claimant intends to initiate arbitration proceedings, pursuant to Article x- (Submission of a claim to arbitration) the claimant shall deliver a notice requesting a determination of the respondent. Such notice shall be sent to the European Union.

2. Where the dispute concerns [treatment] afforded by an institution of the European Union, the European Union will act as respondent. Where the dispute concerns [treatment] afforded by a Member State of the European Union, the Member State shall act as respondent unless [the EU informs the claimant within 2 months from the date of submission of the notice pursuant to paragraph 1 that a determination has been made that the EU shall act as respondent.] The claimant may submit a notice of arbitration pursuant to Article x- (Submission of a claim to arbitration) on the basis of such determination.

3. Where either the European Union or the Member State acts as respondent, neither the European Union, nor the Member State concerned may assert the inadmissibility of the claim or otherwise assert that the claim is unfounded on the ground that the proper respondent should be the European Union rather than the Member State or vice versa.

4. Nothing in this Agreement or the applicable arbitration rules shall prevent the exchange of all

information relating to a dispute between the European Union and a Member State or vice versa.

5. Consultations between the claimant and the European Union and the Member State concerned may continue subsequent to the submission of the **notice of intent** referred to in this paragraph.]

[Note: Insert the following text into Article x (on applicable law): The tribunal shall be bound by the determination made pursuant to article x- (Notice requesting a determination)]

[Article x-7 : Procedural and Other Requirements to Submit a Claim to Arbitration

1. A claimant may submit a claim to arbitration under Article x (Submission of a Claim to Arbitration) only if the claimant:
 - a) delivers to the respondent, with the submission of a claim to arbitration, its consent to arbitration in accordance with the procedures set out in this Chapter;
 - b) allows at least 6 months to elapse from the submission of the request for consultations and, where applicable, at least 3 months to elapse from the submission of the notice requesting a determination;
 - c) fulfils the requirements of the notice requesting a determination and request for consultations including Article x-4(2) whose requirements shall be met in a manner that does not materially affect the ability of the respondent to effectively engage in consultations or to prepare its defence;
 - d) identifies the same measures in its claim to arbitration as those identified in its request for consultations;
 - e) provides an attestation, where it has initiated a claim or proceeding, seeking compensation or damages before a tribunal or court under domestic law or pursuant to international dispute settlement proceedings with respect to any measure alleged to constitute a breach referred to in its claim to arbitration, that:
 - i. a final award, judgment or decision has been made; or
 - ii. it has withdrawn any such claim or proceeding before a final award, judgment or decision has been made;The attestation shall contain, as applicable, proof that a final award, judgment or decision has been made or proof of the withdrawal of any such claim or proceeding; and
 - f) provides a waiver of its right to initiate any claim or proceeding seeking compensation or damages before a tribunal or court under domestic law or pursuant to international dispute settlement proceedings with respect to any measure alleged to constitute a breach referred to in its claim to arbitration.
2. Where the submission of a claim to arbitration is for loss or damage to a locally established company or to an interest in a locally established company, both the investor and the locally established company shall provide an attestation pursuant to subparagraph 1(e) and a waiver pursuant to subparagraph 1(f).
3. The requirements of paragraphs 1(e), (f) and 2 do not apply in respect of a locally established company where the respondent or the investor's host State has deprived an investor of control of the locally established company, or has otherwise prevented the locally established company from fulfilling

the requirements in subparagraph 1(e), (f) or 2.

4. The waiver provided by the claimant pursuant to subparagraph 1(f) shall cease to apply:
- i. where the claim is rejected on the basis of a failure to meet the requirements of paragraphs 1 or 2 or on any other procedural or jurisdictional grounds;
 - ii. where a claim is dismissed pursuant to Article x (Claim manifestly without legal merit) or Article x (Claims Unfounded as a Matter of Law); or
 - iii. where a claim is withdrawn, in conformity with applicable arbitration rules, within 12 months of the constitution of the tribunal.
5. Upon the request of the respondent and subject to paragraph 3, the Tribunal shall decline jurisdiction where the claimant fails to fulfil any of the requirements of paragraphs 1 and 2.]

Article x-8 : Submission of a Claim to Arbitration

1. [If a dispute has not been resolved through consultations, a claim against a respondent may be submitted to arbitration under this section by:
- a) an investor of the other Party on its own behalf, under any of the arbitration rules specified in paragraph 2;
 - b) a locally established [company], on its own behalf, under the arbitration rules specified in subparagraph 2(a), or
 - c) an investor of the other Party, on behalf of a locally established [company], under the arbitration rules specified in subparagraphs 2(b), 2(c) and 2(d).]
2. Subject to paragraph 1, a claim may be submitted under the following arbitration rules:
- a) the ICSID Convention CAN [, for which a locally established company shall, for the purposes of Article 25(2)(b) of the Convention, be treated as a “national of another Contracting State”];
 - b) the ICSID Additional Facility Rules where the conditions for proceedings pursuant to paragraph (a) do not apply;
 - c) the UNCITRAL Arbitration Rules; or
 - d) any other arbitration rules proposed by the claimant after agreement by the disputing parties. EU [The respondent shall be deemed to have accepted the rules proposed by the claimant unless it objects, in writing, within [30 days] of the submission of the dispute, in which case.] CAN [The respondent shall reply to the claimant’s request within 20 days of receipt.] If the disputing parties have not agreed on such arbitration rules within 30 days, the claimant may submit a claim under one of the dispute settlement mechanisms provided for in subparagraphs (a), (b) or (c).
- [Canada Note: CAN has attempted to address EU’s interest in requiring a respondent to provide an “active” response to the claimant’s proposal under subparagraph (d). This is intended as an alternative to the “deeming” provision.]*
3. The claimant may, when submitting its claim, propose that a sole arbitrator should hear the case. The respondent shall give sympathetic consideration to such a request [, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are

relatively low.]

[Canada Note: Canada is prepared to agree EU's proposal in paragraph 3 if EU is able to demonstrate flexibility elsewhere.]

[3 bis. When submitting a claim to arbitration pursuant to this Article, a claimant must provide/deliver with the submission of a claim to arbitration:

- a) written consent to arbitration is delivered to the respondent; and
- b) an attestation and waiver in accordance with Article x- (Procedural and Other Requirements to Submit a Claim to Arbitration).]EU

[Canada Note: Canada proposes to cover 3 bis in Article x – Conditions Precedent,]

[4. If a determination pursuant to Article x (Notice Requesting a Determination) identifies a different respondent from that identified in a request for consultations pursuant to Article x (Request for Consultations):

- a) an investor, who owns or controls a locally established company which has submitted the Request for Consultations shall not be prevented from submitting a claim to arbitration under subparagraphs 1(a) or 1(c); and
- b) a locally established company that is owned or controlled by an investor which has submitted the request for consultations shall not be prevented from submitting a claim to arbitration under subparagraph 1(b).]CAN.

[4. The fact that a claimant that is a locally established company has submitted a request for consultations pursuant to Article X (Request for Consultations) and has submitted the notice requesting a determination pursuant to Article X (Notice Requesting a Determination) and that ~~shall not render~~ a claim pursuant to paragraphs 3 (b), (c) or (d) is subsequently filed by a claimant of the other Party, as defined in [substantive rules section] on behalf of the locally established company shall not render such claim inadmissible.]EU

[Canada Note: EU to confirm it is able to accept CAN's proposal for paragraph 4 in which case EU proposal would be removed]

5. The arbitration is governed by the arbitration rules applicable under paragraph 2 that are in effect on the date that the claim or claims are submitted to arbitration under this section, [subject to the specific rules set out in this section or pursuant to this chapter.]EU [subject to the specific rules set out in this section and supplemented by rules adopted pursuant to article 26(5)(c)]CAN.

[Canada Note: CAN would withdraw its proposal for "except to the extent modified in this section" and accept EU's proposal for "subject to the specific rules set out in this section"(but not "or pursuant to this chapter"), if EU were to accept "and supplemented by rules adopted pursuant to Article 26(5)(c).]

6. A claim is submitted to arbitration under this chapter when:

- (a) the request for arbitration under Article 36(1) of the ICSID Convention is received by the Secretary-General of ICSID;
- (b) the request for arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretariat of ICSID;
- (c) the notice of arbitration under Article 3 of the UNCITRAL Arbitration Rules is received by the respondent; or

(d) the request or notice of arbitration pursuant to other arbitration rules is received by the respondent [in accordance with subparagraph 2(d)] CAN.

7. Each Party shall notify the other Party of the place of delivery of notices and other documents by the claimants bringing a claim. Each Party shall ensure this information is made publicly available.

[Canada Note: CAN is prepared to accept EU's proposal in respect of paragraph 7.]

[Article x-9: Consent to Arbitration

1. Canada and the European Union [and Member States] consent to the submission of a claim to arbitration in accordance with the procedures set out under this Agreement.

[Note: EU working on drafting for bracketed text]

2. The consent under paragraph 1 and the submission of a claim to arbitration under this chapter shall satisfy the requirements of:

(a) Article 25 of the ICSID Convention and Chapter II (Institution of Proceedings) of the ICSID Additional Facility Rules for written consent of the disputing parties; and,

(b) Article II of the New York Convention for an agreement in writing.]

Article x-10: Constitution of the Tribunal

1. By derogation from the applicable rules for the constitution of the tribunal and unless the disputing parties have agreed to appoint a sole arbitrator, the Tribunal shall comprise three arbitrators. One arbitrator shall be appointed by each of the disputing parties and the third, who will be the presiding arbitrator, shall be appointed by agreement of the disputing parties. If the disputing parties agree to appoint a sole arbitrator, the disputing parties shall seek to agree on the sole arbitrator.

[Note: parties to verify whether the expression "By derogation from the applicable rules..." is necessary]

2. If a Tribunal has not been constituted within 90 days from the date that a claim is submitted to arbitration, or where the disputing parties have agreed to appoint a sole arbitrator and have failed to do so within 90 days from the date the respondent agreed to submit the dispute to a sole arbitrator, a disputing party may request the Secretary-General of ICSID to appoint the arbitrator or arbitrators not yet appointed. The Secretary General of ICSID shall appoint the remaining arbitrators from the list established pursuant to paragraph 3. In the event that such list has not been established on the date a claim is submitted to arbitration, the Secretary-General of ICSID shall make the appointment at his or her own discretion taking into consideration nominations made by either Party and, to the extent practicable, in consultation with the disputing parties. The Secretary-General of ICSID may not appoint as presiding arbitrator a national of a Party, such as a national of any Member State where a Member State is a disputing party, unless all disputing parties agree otherwise.

3. No later than two years after the entry into [application/force] of the Agreement, the Committee on Services and Investment shall establish, and thereafter maintain, a list of individuals who are willing and able to serve as arbitrators and who meet the qualifications set out in paragraph 5. The Committee on Services and Investment shall ensure that the list includes at least [15/20] individuals.

[Note: parties to reflect on number of arbitrators and Canada to reflect on whether the arbitrators shall be named on the basis of a consensus]

4. For the purposes of the list established in paragraph 3, each Party shall propose at least [seven/ten] individuals to serve as arbitrators. The Parties shall [also] select at least [five] individuals [from their list

of proposed arbitrators] who are not nationals of either Party to act as presiding arbitrator. In case one party wishes to appoint more than seven individuals, the other Party may propose the same number of additional arbitrators and the Parties may agree to increase the number of chairpersons accordingly.

[Note: Canada to attempt at drafting something in the Committee article]

5. Arbitrators appointed pursuant to this section shall have expertise or experience in public international law, in particular international investment law. It is desirable that they have expertise or experience in international trade law, and the resolution of disputes arising under international investment or international trade agreements.

6. [For a period of at least twelve months prior to the constitution of the tribunal until six months after the publication of the final award,] arbitrators shall be independent of, and not be [affiliated] with or [take instructions] from any disputing party the government of a Party with regard to trade and investment matters. Arbitrators shall not take instructions from any organisation, government or disputing party with regard to matters related to the dispute. Arbitrators shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to article x-26 [Committee on Services and Investment]. Arbitrators who serve on the list established pursuant to paragraph 4 shall not, for that reason alone, be deemed to be affiliated with the government of a Party.

Article x-11: Agreement to the Appointment of Arbitrators

1. For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on a ground other than nationality:

- (a) the respondent agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules; and
- (b) a claimant referred to in sub-paragraphs 1(a) and 1(b) of Article x- (Submission of a Claim to Arbitration) may submit a claim to arbitration or continue a claim under the ICSID Convention or, as the case may be, the ICSID Additional Facility Rules only if the claimant agrees in writing to the appointment of each member of the Tribunal.
- (c) CAN [an investor referred to in sub-paragraph 1(c) of Article x- (Submission of a Claim to Arbitration) may submit a claim to arbitration or continue a claim under the ICSID Additional Facility Rules only if the investor and the locally established company agree in writing to the appointment of each member of the Tribunal.]

[Note: Sub-paragraphs b) and c) have been modified to reflect the hybrid approach on Standing reflected in Submission of a Claim article]

[Note: Parties to look at incorporating or cross-referencing the substantive content of Article x-7(3)]

Article x-12. Applicable Law and Rules of Interpretation

[1. A Tribunal established under this chapter shall determine whether the EU [treatment] CAN [measure] in question is inconsistent with [Section 3 or Section 4 of this chapter].]

[Move to article 1 on scope]

1. In making its determination under paragraph X, the tribunal shall apply [Section 3 and Section 4 of this chapter] interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules

and principles of international law applicable between the Parties.

EU [It shall in addition take into account generally and internationally accepted principles of public or administrative law.]

[3. Where serious concerns arise as regards matters of interpretation, [the Committee for the Settlement of Investor-State Disputes] [the Commission] [may adopt decisions interpreting a provision of [Section 3 or Section 4 of this chapter]].

Any such interpretation shall be binding on a Tribunal established under this chapter EU [where the treatment on which the claim is based occurred after the date on which the interpretation was adopted by the Committee].

Article x-13: Place of Arbitration

The disputing parties may agree on the place of arbitration under the arbitration rules applicable pursuant to Article x- (Submission of a Claim to Arbitration) or, where applicable, Article x- (Consolidation), provided it is in the territory of a party to the New York Convention. If the disputing parties fail to agree on the place of arbitration, the Tribunal shall determine the place in accordance with the applicable arbitration rules, provided that the place shall be in the territory of either Party or of a third state that is a party to the New York Convention.

[Note for scrub: notion of "EU territory" to be addressed]

Article x-14: Claims Manifestly Without Legal Merit

1. The respondent may, either no later than 30 days after the constitution of a tribunal pursuant to Article x- (Constitution of Tribunal) and in any event before the first session of the Tribunal, EU [or 30 days after the respondent became aware of the facts on which the objection is based,] file an objection that a claim is manifestly without legal merit.

2. The respondent shall specify as precisely as possible the basis for the objection.

3. The Tribunal, after giving the disputing parties an opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, issue a decision or award on the objection, stating the grounds therefor. In doing so, the Tribunal shall assume the alleged facts to be true, and may also consider any relevant facts not in dispute.

4. This procedure and any decision of the Tribunal shall be without prejudice to the right of a respondent to object, pursuant to article x-15 (Claims unfounded as a Matter law Law) or in the course of the proceeding, to the legal merits of a claim and without prejudice to a Tribunal's authority to address other objections as a preliminary question.

[Canada Note: The phrase "or 30 days after the respondent became aware of the facts on which the objection is based" does not work with paragraph 3 in that it is envisaged that a decision will be rendered only at or shortly after the first procedural meeting. In addition, since the Parties have agreed to include the companion Article x-15, it appears to be unnecessary. As such, we propose to remove it.]

[Note: EU to consider redrafting at paragraph 3 : "at its first session or promptly thereafter"]

Article x-15: Claims Unfounded as a Matter of Law

1. Without prejudice to a tribunal's authority to address other objections as a preliminary question or to a respondent's right to raise any such objections at any appropriate time, the Tribunal shall address

and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted under this section is not a claim for which an award in favour of the claimant may be made under Article (Submission of a Claim to Arbitration), even if the facts alleged were assumed to be true. The Tribunal may also consider any relevant facts not in dispute.

2. An objection under paragraph 1 shall be submitted to the Tribunal as soon as possible after the Tribunal is constituted, and in no event later than the date the Tribunal fixes for the respondent to submit its counter-memorial or statement of defence or, in the case of an amendment to the notice of arbitration, the date the Tribunal fixes for the respondent to submit its response to the amendment. An objection may not be submitted under paragraph 1 as long as proceedings under Article x-14 (Claim manifestly without legal merit) are pending, unless the Tribunal grants leave to file an objection under this article, after having taken due account of the circumstances of the case.

[Canada Note: we propose to remove "statement of defence" in paragraph 2 since it is specific to the UNCITRAL rules, while counter-memorial would apply to any of the arbitration rules available.]

[Note: EU to verify the relevance of having the expression "or statement of defence"]

3. On receipt of an objection under paragraph 1, EU [and unless it considers the objection manifestly unfounded,] the Tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

[Canada Note: we propose to remove "and unless it [i.e. the tribunal] considers the objection manifestly unfounded". If the goal is dissuade frivolous objections by respondents, Canada would be willing to consider inserting a specific costs provision similar to Article 28(6) of the 2012 US Model BIT which states: "When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment."]

[Note: the EU wishes for the Tribunal to have a say; the EU to further consult internally concerning the expression in brackets]

Article x-16: Interim Measures of Protection

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 may not order [attachment] nor may it [enjoin] the application of the [measure] alleged to constitute a breach referred to in Article x- (Submission of a Claim to Arbitration). For the purposes of this paragraph, an order includes a recommendation.

Article x-17: Discontinuance

If, following the submission of a claim to arbitration under this section, the claimant fails to take any steps in the proceeding during six consecutive months or such periods as the disputing parties may agree, the claimant shall be deemed to have withdrawn its claim and to have discontinued the proceedings. The Tribunal, or if no tribunal has been established, the Secretary General of ICSID shall, at the request of the respondent, and after notice to the disputing parties, in an order take note of the discontinuance. After such an order has been rendered the authority of the tribunal shall lapse.

CAN [Article x-18:]

[Canada Note: Canada to provide with an Article x-18 concerning, inter alia, exchanges of documents between various levels of government]

Article x-19: The non-disputing Party to the Agreement

1. [Subject to Article 5 (Exceptions to Transparency) of Annex [Title], the respondent shall, within 30 days after receiving the following documents, deliver them to the non-disputing Party: a request for consultations, a claim referred to in Article x- (Submission of a Claim to Arbitration) and any other documents that are appended to such documents. On request, the non-disputing Party is entitled to receive, from the respondent:

- a) pleadings, memorials and briefs submitted to the tribunal by a disputing party;
- b) [any written submissions submitted pursuant to Article x-25 (Consolidation),] Article 3 (Submission by a third person) of the annex [and Article x-19 Submission of a Non-disputing Party];
- c) minutes or transcripts of hearings of the tribunal, where available; and
- d) orders, awards and decisions of the tribunal.

Unless publicly available, the non-disputing Party is entitled to receive copy of all or part of the evidence that has been tendered to the Tribunal, at its cost. The Party receiving such information shall treat the information as if it were a respondent.]

[Note: Drafting to be further worked upon]

2. The Tribunal shall accept or, after consultation with the disputing parties, may invite, oral or written submissions from the non-disputing Party regarding the interpretation of the Agreement. The non-disputing Party has the right to attend a hearing held under this Section.

[Note: Parties to consider if there is a need to address modalities]

3. The tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.

4. The tribunal shall also ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the non-disputing Party to the Agreement.

Article x-20: Final Award

1. Where a Tribunal makes a final award against the respondent finding a breach of the provisions of [Section 3 or Section 4 of this chapter], the Tribunal may award, EU [in a manner sufficient to compensate the loss suffered by the investor,] separately or in combination, only:

- a) monetary damages and any applicable interest;
- b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation, or impending expropriation became known, whichever is earlier and any applicable interest in lieu of restitution, determined in a manner consistent with Article x-11 (Expropriation).

[Note: subject to final check of the expropriation article]

2. [Subject to paragraph 5], where a claim is made under paragraph 1(c) of Article x- (Submission of a Claim to Arbitration):
- an award of monetary damages and any applicable interest shall provide that the sum be paid to the locally established [company];
 - an award of restitution of property shall provide that restitution be made to the locally established [company]; and
 - CAN [the award shall provide that it is made without prejudice to a right that a person may have in monetary damages or property awarded pursuant to paragraphs 1(a) or (b) under a Party's domestic law.]**

[Note: Canada to determine whether reference to paragraph 5 on costs is sufficiently clear]

3. Monetary damages shall not be greater than the loss suffered by the claimant as a result of the breach of the relevant provisions of [Section 3 or Section 4 of this chapter], reduced by any prior damages or compensation already provided. For the calculation of monetary damages, the Tribunal shall [, at the request of the respondent or on its own initiative,] also reduce the damages to take into account any restitution of property or repeal or modification of the measure found to be inconsistent with [section 3 or 4 of this chapter].

[Note: EU to check on text in square brackets "at the request of the..."]

4. A Tribunal may not award punitive damages.
5. A tribunal shall order that the costs of arbitration be borne by the unsuccessful disputing party. In exceptional circumstances, a tribunal may apportion costs between the disputing parties if it determines that apportionment is reasonable [appropriate] [in the circumstance of the case]. Other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the tribunal determines that such apportionment is unreasonable in the circumstances of the case. [Where only some of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful claims.] ◀[alt]▶ [Where a claimant is partially successful on the merits, the costs shall be adjusted, proportionately, to the number or extent measures in breach of the obligations under this chapter.]

[Canada Note: In paragraph 5, so as to avoid using "reasonable" in the first and second sentence, we have proposed "appropriate". In the last sentence we have re-drafted to avoid the use of the term "claim" to avoid confusion in the manner that we have witnessed in the consolidation article.]

[Note: both parties to consider alternate language in square brackets (at bottom of paragraph 5)]

Article x-21:- Indemnification or Other Compensation

A respondent shall not assert, and a tribunal shall not accept a defence, counterclaim, right of setoff, or similar assertion that a claimant has received, or will receive, indemnification or other compensation pursuant to an insurance or guarantee contract in respect of all or part of the compensation sought in a dispute initiated pursuant to this section.

Article x-22: Fees and Expenses of the Arbitrators

The fees and expenses of the arbitrators pursuant to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention in force on the date of initiation of the arbitration shall apply.

Article x-23: Enforcement of Awards

1. An award issued by a Tribunal pursuant to this Section shall be binding between the disputing parties and in respect of that particular case.

[Note: EU to verify how this works with respect to the consolidation Article]

2. Subject to paragraph 3 and the applicable review procedure for an [interim award], a disputing party shall recognize and comply with an award without [~~undue~~] delay.

[Note: parties to examine alternate language such as: "any award other than the final award"]

[Note: parties respectively to look into how a Party is to organise in terms of budget when an award against it requires payment of damages]

3. A disputing party may not seek enforcement of a final award until:

(a) in the case of a final award made under the ICSID Convention:

- i. 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or
- ii. enforcement of the award has been stayed and revision or annulment proceedings have been completed; and

(b) in the case of a final award under the ICSID Additional Facility Rules the UNCITRAL Arbitration Rules, or any other rules applicable pursuant to Article x- 8(2)(d) (Submission of a Claim to Arbitration):

- i. 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or
- ii. enforcement of the award has been stayed and a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

4. [Execution of the award shall be governed by the laws concerning the execution of judgments in force where such execution is sought.]

4 bis. [Each Party shall enforce the pecuniary obligations imposed by that award within its territory as if it were a final judgment of a court in that Party.]

[Note: Canada proposes to delete paragraph 4bis]

5. A claim that is submitted to arbitration under this chapter shall be deemed to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.

Article x-24: Role of the Parties to the Agreement

1. No Party shall bring an international claim, in respect of a dispute submitted pursuant to Article x- (Submission of a Claim to Arbitration), unless the other Party has failed to abide by and comply with the award rendered in such dispute. This shall not exclude the possibility of dispute settlement under the Dispute Settlement Chapter in respect of a measure of general application even if that measure is alleged to have violated the agreement as regards a specific investment in respect of which a dispute has been initiated pursuant to Article x- (Submission of a Claim to Arbitration) and is without prejudice to Article x- (The non-disputing Party to the Agreement).

2. Paragraph 1 does not preclude informal exchanges for the sole purpose of facilitating a settlement of the dispute.

Article x-25: Consolidation

1. When two or more claims that have been submitted separately to arbitration under Article x- (Submission of a Claim to Arbitration) have a question of law or fact in common **CAN [and arise out of the same events or circumstances]**, a disputing party may seek the establishment of a separate

Tribunal and request that such Tribunal issue a consolidation order in accordance with:

- a) the agreement of all of the disputing parties sought to be covered by the order; or
- b) the terms of paragraphs 2 through 12.

[Canada Note: Canada maintains its proposal to include the phrase “and arise out of the same events or circumstances” because it is possible that a question of law could arise out of entirely different circumstances or events (e.g. two unrelated cases). We would not want to capture such circumstances, so view this limitation to be necessary. Otherwise, the scope for consolidation would be broader than our intent.

2. The disputing party seeking a consolidation order shall first deliver a request to the disputing parties that would seek to be covered by this order. This request shall specify:

- a) the names and addresses of the disputing parties sought to be covered by the order;
- b) EU [the claims in respect of which the consolidation order is sought] CAN [nature] EU[scope] of the order sought; and
- c) the grounds for the order sought.

The disputing parties shall endeavour to agree on the consolidation order, the applicable arbitration rules and the composition of the tribunal.

[Canada Note: Canada maintains its proposal for “nature” as we view the term “scope” to be ambiguous. “Scope” could be synonymous with “nature” of the order sought, as in the objective of the disputing party seeking consolidation. On the other hand, it could pertain to one or more of the disputing investors are to be covered by the order. As such, “nature” is the more precise of the terms. The alternative EU proposal is more problematic, in our view, since it is not clear whether the intent here is to refer to a claim in the sense of specific allegation in a Claim, e.g. national treatment or whether it refers to more than one submission of a claim to arbitration.]

3. Where the disputing parties which have been notified pursuant to paragraph 2 have not reached agreement on consolidation within 30 days of the request, a disputing party may make a request for a consolidation order under this Article and shall deliver it, in writing, to the Secretary-General of ICSID and to all the disputing parties sought to be covered by the order. Such request shall specify:

- a) the names and addresses of the disputing parties sought to be covered by the order;
- b) EU [the claims in respect of which the consolidation order is sought] CAN [nature] EU[scope] of the order sought; and
- c) the grounds for the order sought.]

When the disputing parties have agreed on consolidation of the claims they shall submit a joint request pursuant to this paragraph.

[Canada Note: Please see comment above in respect of paragraph 2 which applies to sub-paragraph 3(b)]

4. A Tribunal established under this Article shall conduct its proceedings in the following manner:

- a) when all of the claims for which a consolidation order is sought have been submitted to arbitration under the same arbitration rules pursuant to article x-[8] (Submission of a Claim to Arbitration), the Tribunal shall proceed under the same arbitration rules;
- b) when the claims for which a consolidation order is sought have not been submitted to arbitration under the same arbitration rules:

- i. the investors may collectively agree on the arbitration rules pursuant to paragraph 1 of Article x-[8] (Submission of a Claim to Arbitration) which shall apply to the consolidation proceedings; or
- ii. if the investors cannot agree on the arbitration rules within 30 days of the Secretary of General of ICSID receiving the request for consolidation, the UNCITRAL Arbitration Rules shall apply to the consolidation proceedings.

5. A Tribunal established under this Article shall comprise three arbitrators: one arbitrator appointed by the respondent, one arbitrator appointed by agreement of the investors, and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties. The presiding arbitrator may not be a national of a Party, such as a national of any Member State where a Member State is a disputing party, unless all disputing parties agree otherwise.

If, within 45 days after the Secretary General of ICSID receives a request for consolidation, the respondent or the investors fail to appoint an arbitrator, the Secretary-General of ICSID, at the request of a disputing party, shall appoint the arbitrator or arbitrators not yet appointed from the list referred to in paragraph 4 of Article x-10 (Constitution of the Tribunal). In the event that such list has not been established, the Secretary General shall appoint the arbitrator or arbitrators in accordance with paragraph 3 of Article x-10 (Constitution of the Tribunal).

If, within 60 days after the Secretary General of ICSID receives a request for consolidation, the disputing parties have not agreed to a presiding arbitrator, the Secretary-General of ICSID shall appoint the presiding arbitrator from the list referred to in paragraph 4 of Article x-10 (Constitution of the Tribunal). In the event that such list has not been established, the Secretary General shall appoint the presiding arbitrator in accordance with paragraph 3 of Article x-10 (Constitution of the Tribunal). The presiding arbitrator may not be a national of a Party, such as a national of any Member State where a Member State is a disputing party, unless all disputing parties agree otherwise.

6. If, after hearing the disputing parties, a Tribunal established under this Article is satisfied that claims submitted to arbitration under Article x- (Submission of a Claim to Arbitration) have a question of law or fact in common [and arise out of the same events or circumstances], and consolidation would best serve the interests of fair and efficient resolution of the claims including the interest of consistency of arbitral awards, the tribunal may, by order:
- a) assume jurisdiction over, and hear and determine together, all or part of the claims; or
 - b) ~~(CAN [assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in resolving the other claims.]~~

[Note: language to be included to cover situation where the parties have agreed on consolidation]

7. Where a Tribunal has been established under this Article, and has assumed jurisdiction pursuant to paragraph 6 an investor that has submitted a claim to arbitration under Article x- (Submission of a Claim to Arbitration) and that has not been made subject to a consolidation order pursuant to paragraph 6 may make a written request to the Tribunal that it be included in such order provided that the request complies with the requirements set out in paragraph 2.

The Tribunal shall grant such order where it is satisfied that the conditions of paragraph 6 are met and that granting such a request would not unduly burden or unfairly prejudice the disputing parties or unduly disrupt the proceedings. Before a Tribunal issues such an order, it shall consult with the

disputing parties.

8. On application of a disputing party, a Tribunal established under this Article, pending its decision under paragraph 5, may order that the proceedings of a Tribunal established under Article x- (Submission of a Claim to Arbitration) which is hearing claims in respect of which request for consolidation has been made be stayed unless the latter Tribunal has already adjourned its proceedings.
9. A Tribunal established under Article x- (Submission of a Claim to Arbitration) shall cede jurisdiction in relation to the claims, or parts thereof, over which a tribunal established under this Article has assumed jurisdiction. The proceedings of such tribunals shall be stayed or adjourned, as appropriate, in respect of those claims or parts thereof over which the tribunal has assumed jurisdiction.
10. The award of the Tribunal established under this Article in relation to those claims over which it has assumed jurisdiction, in whole or in part, shall become binding on the tribunals established under Article x- as regards those claims once the conditions of Article 23(3) have been fulfilled.
11. A claimant may withdraw the claim or the part thereof subject to consolidation from arbitration under this Article and such claim or part thereof may not be resubmitted to arbitration under Article x- (Submission of a Claim to Arbitration). If it does so no later than 15 days after receipt of notice of consolidation, its earlier submission of the claim to that arbitration shall not prevent the claimant's recourse to dispute settlement other than under this Chapter.
12. At the request of one of the claimant, the Tribunal established under this Article may take such measures as it sees fit in order to preserve the confidentiality of protected information of that claimant vis-à-vis other claimants. Such measures may include the submission of redacted versions of documents containing protected information to the other claimants or arrangements to hold parts of the hearing in private.

Article x-26: Committee

1. The Committee on Services and Investment shall provide a forum for the Parties to consult on issues related to this Section, including:
 - a) difficulties which may arise in the implementation of this chapter;
 - b) possible improvements of this chapter, in particular in the light of experience and developments in other international fora; and,
 - c) whether, and if so, under what conditions, an appellate mechanism could be created under the Agreement to review, on points of law, awards rendered by a tribunal under this Section, or whether awards rendered under this section could be subject to such an appellate mechanism developed pursuant to other institutional arrangements. Such consultations shall take into account the following issues, among others:
 - i. the nature and composition of an appellate mechanism;
 - ii. the applicable scope and standard of review;
 - iii. transparency of proceedings of an appellate mechanism;
 - iv. the effect of decisions by an appellate mechanism;
 - v. the relationship of review by an appellate mechanism to the arbitration rules that may be selected under Article x- (Submission of a Claim to Arbitration); and
 - vi. the relationship of review by an appellate mechanism to domestic laws and international law on the enforcement of arbitral awards.

[Note: the intention is that these issues will be discussed by the Committee when the parties agree to]

2. The Committee shall, on agreement of the Parties, and after completion of the respective legal requirements and procedures of the Parties, decide to:
- a) establish and maintain the list of arbitrators pursuant to Article x- 10(4)(Constitution of the Tribunal);
 - b) adopt a code of conduct for arbitrators to be applied in disputes arising out of this chapter, which may replace or supplement the rules in application, and that may address topics including:
 - i. disclosure obligations;
 - ii. the independence and impartiality of arbitrators; and
 - iii. confidentiality.

The Parties shall make best efforts to ensure that the decisions referred to in (a) and (b) are adopted no later than the entry into [application/force] of the Agreement, and in any event no later than two years after the entry into [application/force] of the Agreement.

[Note: agreed in principle that the time periods run from provisional application, if any. Drafting to be checked in the light of the general and final provisions of CETA]

3. The Committee may, on agreement of the Parties, and after completion of the respective legal requirements and procedures of the Parties, decide to:
- a) recommend the adoption of interpretations of the agreement pursuant to Article x-12(3) (Applicable Law and Rules of Interpretation);
[Note: articulation with institutional provisions to be reviewed]
 - b) ~~replace the provisions in Annex I [TITLE] by the UNCITRAL Rules on Transparency in treaty-based investor State arbitration or other available rules on transparency. Such decision may, if necessary, set out conditions for the application of such rules.]~~
[Note: necessity of this provision to be reviewed in light of UNCITRAL discussions.]
 - b) adopt and amend rules supplementing the applicable arbitration rules, and amend the applicable rules on Transparency. These rules are binding on the members of a Tribunal established under this Section; and,
[Canada Note: Canada introduced the above grammatical change post October 2nd session. EU approval is required before accepting tracked changes.]
 - c) adopt rules for mediation for use by disputing parties as referred to in Article x-5 (Mediation).

CAN [Article x-27: Exclusion

The dispute settlement provisions of this Section and of Chapter x (Dispute Settlement) do not apply to the matters referred to in Annex II (Exclusions from Dispute Settlement).]

[ANNEX I – Rules on public access to document, hearings and the possibility of non-disputing Parties and third persons to make submissions

Article 1. Publication of information at the commencement of arbitral proceedings

[1 bis. Once the request for consultations, [EU notice], or claim to arbitration has been received by the respondent, the disputing parties shall promptly communicate to the repository referred to under Article

6 a copy of such document. Upon the receipt of such document from either party, the repository shall then promptly make available to the public information regarding the name of the claimant, the provisions of the agreement alleged to be breached, the economic sector involved, the [measure] [treatment] alleged to be in breach of the agreement, and the amount of damages claimed.]

1. Once the notice of intent to submit a claim to arbitration pursuant to Article 4 of the [ISDS Section] has been received by the respondent, the disputing parties shall promptly communicate to the repository referred to under Article 6 a copy of the notice of arbitration. Upon its receipt of the notice of arbitration from either party, the repository shall then promptly make available to the public information regarding the name of the disputing parties, the economic sector involved, and the agreement under which the claim is being made.

Article 2. Publication of documents

1. [Subject to the exceptions set out in article 5], the following documents shall be made available to the public: the request for consultations, [EU notice], the submission of claim to arbitration; the response to the submission of claim to arbitration; the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party, [the agreement to mediate], a table listing all exhibits to the aforesaid documents and to expert reports and witnesses statements, if such table has been prepared for the proceedings, but not the exhibits themselves, which must be requested separately under paragraph 3; any written submissions by the non-disputing Party to the treaty and by third persons; transcripts of hearings, where available; and awards, orders and decisions of the arbitral tribunal.

2 [Subject to the exceptions set out in Article 5,] witness statements and expert reports, exclusive of the exhibits thereto which must be requested separately under paragraph 3, shall be made available to the public upon request by any person.

3. [Subject to the exceptions set out in Article 5,] the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified site.

4. The documents to be made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under Article 6 as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential or protected information prescribed under Article 5. The documents made available pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under Article 6 as they become available and, if applicable, in a redacted form in accordance with Article 5. The repository shall make the documents available in a timely manner, in the form and in the language in which it receives them.

5. A person, who is not a disputing party, granted access to documents under paragraphs 2 or 3, shall bear any administrative costs of such access (such as photocopying or shipping documents).

Article 3. Submission by a third person

1. After consultation with the disputing parties, the arbitral tribunal may, allow a person or entity that is not a disputing party ("third person(s)") to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any such page limits as may be set by the arbitral tribunal:

- a) describe the third person, including, where relevant, its membership and legal status (e.g. trade association or other non-governmental organisation), its general objectives, the nature of its activities, and any parent organisation (including any organisation that directly or indirectly controls the third person);
- b) disclose any connection, direct or indirect, with any disputing party;
- c) provide information on any government, person or organisation that has provided to the third party (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the request, such as, for instance, funding around 20% of its overall operations annually;
- d) describe the nature of the interest that the third person has in the arbitration; and,
- e) identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.
- f) Where a non-disputing Party wishes to file a submission on issues of fact under this article, it shall comply with subparagraphs (d) and (e) and the other paragraphs of this article.**

3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration among other things (a) whether the third person has a significant interest in the arbitral proceedings; and (b) the extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

4. The submission filed by the third person shall: (a) be dated and signed by the person filing the submission; (b) be concise, and in no case longer than as authorised by the arbitral tribunal; (c) set out a precise statement of the third person's position on issues; and (d) only address matters within the scope of the dispute.

5. The arbitral tribunal shall ensure that such submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

6. The arbitral tribunal shall ensure that the disputing parties are given an opportunity to present their observations on the submission by the third person.

Article 4. Hearings

1. Subject to paragraphs 2 and 3, hearings shall be public.

2. Where there is a need to protect information or the integrity of the arbitral process pursuant to Article 5, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.

3. The arbitral tribunal may make logistical arrangements to facilitate the public's right of access to hearings (including where appropriate by organising attendance through video links or such other means as it deems appropriate).

Article 5. Exceptions to transparency

1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to paragraphs 3 and 4, shall not be made available to the public or to non-disputing Parties to the treaty pursuant to articles 1 to 4

2. Confidential or protected information consists of:

(a) Confidential business information;

(b) Information which is protected against being made available to the public under the Agreement;

(c) Information which is protected against being made available to the public, in the case of the information of the respondent, under the law of the respondent, and in the case of other information, under any law or rules determined to be applicable to the disclosure of such information by the arbitral tribunal.

[Note: parties to check essential security confidentiality provision, etc.]

3. The arbitral tribunal, in consultations with the parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate (a) time limits in which a party, non-disputing party, or third person shall give notice that it seeks protection for such information in a document (b) procedures for the prompt designation and redaction of the particular confidential or protected information in such documents, and (c) procedures for holding hearings in private to the extent provided by Article 4, paragraph 2. Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultations with the parties.

4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

Integrity of the arbitral process

5. Information shall not be made available to the public pursuant to articles 1 to 4 where the information, if made available to the public, would jeopardise the integrity of the arbitral process as determined pursuant to paragraph 6 below.

6. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardise the integrity of the arbitral process (a) because it could hamper the collection or production of evidence, or (b) because it could lead to the intimidation of witnesses, lawyers acting for disputing parties, or members of the arbitral tribunal, or (c) in comparably exceptional circumstances.

Article 6. Repository of published information

The Secretary General of ICSID shall act as repository and shall make available to the public information pursuant to this Annex.

Article 7

Where these rules provide for the arbitral tribunal to exercise discretion, the arbitral tribunal shall exercise that discretion, taking into account the need to balance (a) the public interest in transparency in treaty-based investor-State arbitration and of the particular arbitral proceedings and (b) the disputing

parties' interest in a fair and efficient resolution of their dispute.]

CAN [ANNEX II - Exclusions from Dispute Settlement

A decision by Canada following a review under the *Investment Canada Act*, with respect to whether or not to permit an investment that is subject to review, is not subject to the dispute settlement provisions under Sections 6 (Investor-to-State Dispute Settlement) of this chapter, or to chapter x (Dispute Settlement) of this Agreement.]