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Summary of the ninth intersessional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of Chile

This note reproduces a submission from the Government of Chile containing the summary of the ninth intersessional meeting on investor-State dispute settlement (ISDS) reform held from 5 to 7 November 2025 in Santiago. The summary was submitted to the secretariat on 31 December 2025 in English and Spanish and is reproduced as an annex to this note.

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Annex

Introduction

1. The ninth intersessional meeting of Working Group III on investor-State dispute settlement (ISDS) reform (the "Meeting") was held from 5 to 7 November 2025 in Santiago. The Meeting focused on procedural and cross-cutting issues, with particular attention to draft provisions (DPs) 12, 18, 19, and 20, as set out in document A/CN.9/WG.III/WP.253, along with the annotations thereto contained in document A/CN.9/WG.III/WP.254. The Meeting was organized in two parts: (i) expert panel discussions, which enabled in-depth consideration of the relevant DPs, and provided technical input and comparative perspectives drawing on treaty practice, arbitral experience and academic analysis and (ii) roundtable sessions among Working Group III delegates to discuss the drafting of those provisions in light of the panel discussions. The roundtable sessions were designed to allow delegates to reflect on specific drafting options, identify areas of convergence and divergence, and exchange views on issues requiring further consideration by the Working Group.

2. The Meeting was jointly organized by the Undersecretariat for International Economic Affairs of Chile and the UNCITRAL Secretariat. The Meeting, which was held both in-person and online, was attended by participants from 26 States, with more than 85 participants attending in person, including delegates of Working Group III. Participants also included representatives of international organizations, academia and the private sector. Simultaneous interpretation in Spanish, French and English was provided during the Meeting.

Opening remarks

3. The opening remarks were delivered by Mr. Alberto van Klaveren, Minister of Foreign Affairs of Chile, followed by Ms. Claudia Sanhueza, Undersecretary for International Economic Affairs of Chile, Ms. Anna Joubin-Bret, Secretary of UNCITRAL and Mr. Shane Spelliscy, Chair of UNCITRAL Working Group III.

4. A keynote speech was delivered by Professor Philippe Sands KC, who drew on his experience as counsel, arbitrator and academic in international law and investment arbitration.

5. Professor Sands reflected on the historical foundations and original objectives of ISDS, recalling his early involvement in the field beginning in the mid-1980s. He referred to the initial understanding of ISDS as a rules-based mechanism grounded in the rule of law, designed to provide legal certainty and predictability for investors, particularly in States perceived at the time as higher-risk jurisdictions.

6. Against that historical background, Professor Sands described a personal evolution from initial confidence in ISDS to a growing sense of "discomfort". He explained that this discomfort was grounded in concerns about legitimacy, stressing that no legal regime could endure in the absence of broad societal acceptance. He situated these concerns within a wider set of systemic developments affecting multilateral governance, referring to the weakening of the multilateral trading system, the removal of ISDS from the successor to NAFTA, and the effective collapse of the Energy Charter Treaty. In the latter case, he noted that difficulties associated with ISDS, particularly in politically sensitive contexts, had played a central role in undermining confidence in the treaty, illustrating how perceived legitimacy deficits could translate into the erosion of entire legal regimes.

7. Professor Sands identified several features of contemporary ISDS practice that, in his view, had contributed to legitimacy concerns. He highlighted in particular the sharp escalation of costs and legal fees over time, noting that many present-day cases were not materially more complex than earlier disputes, yet now routinely involved significantly higher expenditures. He expressed a concern that ISDS was increasingly

perceived as operating on a commercial basis and warned that this evolution has distorted incentives within the system.

8. In this regard, he criticized what he described as a culture of excessive deference by arbitrators to party autonomy. Drawing on his experience as an arbitrator, he observed that such deference often resulted in overly long pleadings, extended hearings and procedural practices, which would not be accepted in judicial settings, thereby contributing to inefficiency and rising costs.

9. Professor Sands also addressed the increasing role of third-party funding. While recognizing that third-party funding might be necessary in certain cases to ensure access to justice, he cautioned against its use as a speculative investment tool. He noted that funding arrangements could contribute to cost inflation and undermine confidence in the system, particularly where funders were insulated from adverse cost consequences.

10. Turning to procedural reform, he emphasized the importance of more active case management by tribunals, including greater discipline with respect to pleadings, hearings and procedural timelines. He suggested that stronger procedural discipline could be encouraged through mechanisms allowing for review or appeal, which, in his view, could contribute to greater care and consistency in decision-making.

11. In concluding, Professor Sands underscored that a central challenge for ISDS was striking an appropriate balance between State's ability to regulate in the public interest and the legitimate interests of investors under international law. He stressed the importance of the applicable law in assessing how that balance was achieved and encouraged the pursuit of reforms aimed at addressing legitimacy concerns and ensuring the long-term viability of the system.

Panel I: Damages & Compensation I – Draft Provision 20

12. Panel I was moderated by Mr. Andrés Jana (Chair of UNCITRAL Working Group II and Partner at Jana & Gil Dispute Resolution). The panel featured Ms. Ana María Daza-Clark (Senior Lecturer, University of Edinburgh and Steering Committee Member, Academic Forum); Mr. Jason File (Director of Legal Affairs and General Counsel, United States Council for International Business); Ms. Pamela Hernández (Director, General Counsel for International Trade, Mexico); Ms. Sylvie Tabet (General Counsel, Trade Law Bureau, Canada); and Mr. Josef Ostřanský (Senior Policy Advisor, International Institute for Sustainable Development).

13. The discussion focused on paragraphs 1 to 3 of DP 20 as well as the Draft guidelines on the calculation of damages and compensation (the "Guidelines") in document A/CN.9/WG.III/WP.255. Panellists examined whether the DP appropriately balanced the objectives of full reparation, legal certainty and the preservation of regulatory and policy space for States. As a broader framing issue, panellists also discussed whether it was necessary or desirable to expressly restate principles of customary international law within DP 20, given that such principles would in any event be applicable to the assessment of damages.

Context and objectives of Draft Provision 20

14. Panellists generally agreed that DP 20 was intended to codify and clarify existing standards governing the quantification of damages, without creating new substantive obligations. At the same time, it was acknowledged that views differed as to how those standards should be explicitly reflected in the DP. Some panellists observed that the principle of full reparation was well established in public international law and widely accepted in investment arbitration. From this perspective, omitting an explicit reference to full reparation was viewed by some panellists as conceptually incomplete, especially given that the principle itself was not contested.

15. Panellists also emphasized that DP 20 should be read as a whole, together with other paragraphs addressing causation, valuation, interest and adjustments. They

stressed that paragraph 1 was framed from the perspective of the tribunal's powers and did not, in itself, dictate the outcome of any specific damages assessment. From that perspective, concerns that the reference to full reparation could lead to the award of excessive amounts were said to be misplaced, as the remaining paragraphs of DP 20 provided the necessary structure and constraints.

16. Other panellists nevertheless cautioned that an unqualified reference to full reparation could be interpreted as mandating de facto restitution or maximum compensation in all cases. They emphasized the need to ensure that paragraph 1 did not undermine States' regulatory space or unduly constrain tribunals' ability to tailor remedies to the circumstances of each case.

17. Panellists further agreed that the central challenge was not the principle of full reparation itself, but rather determining which damages were compensable and the appropriate methodologies for quantifying them.

Types of remedies

18. The panel noted that compensation constituted the primary remedy in ISDS. Some panellists considered that restitution was realistically confined to certain categories of disputes, particularly expropriation, and pointed to treaty practice explicitly linking restitution to that context. It was also noted that restitution could interfere with the sovereign powers of the respondent State and could raise enforcement challenges. From this perspective, DP 20 was seen as broadly consistent with existing practice. Other panellists emphasized that restitution should not be categorically excluded and that DP20 should preserve flexibility in that regard.

19. Particular attention was paid to the use of the disjunctive "or" in paragraph 1. Some panellists agreed that, in practice, there could be cases where a combination of restitution and compensation was appropriate, for example where restitution addressed part of the harm, while compensation addressed residual losses.

20. Reference was made to the Guidelines, which suggested that remedies need not be strictly binary. Panellists considered that this supported the possibility of combined remedies, where justified.

Interest and the notion of "reasonable rate"

21. Turning to paragraph 2, panellists first addressed the inclusion of interest as a component of compensation. There was general agreement that a provision on compensation should address interest explicitly, given its potentially significant impact on the overall quantum of damages. Panellists emphasized that the primary function of interest was to achieve full reparation by accounting for the time value of money. It was widely agreed that interest should not be conceived as a tool to induce or incentivize compliance by States, nor as a punitive element, but rather as an integral component of compensation aimed at restoring the injured party to the position it would have been in, absent the breach.

22. The panel discussed whether DP 20 should provide more detailed guidance on the applicable interest rate, the compounding of interest, and the accrual period. As currently drafted, paragraph 2 was understood to allow tribunals discretion to award simple or compound interest, as appropriate. Some panellists considered that further specificity could be useful, while others expressed the view that detailed guidance would be better placed in the Guidelines rather than in the DP.

23. The notion of a "reasonable rate" of interest generated discussion. Some panellists supported the use of language, such as "commercially reasonable rate," as reflected in certain treaties, viewing it as more closely aligned with commercial reality. Others cautioned that such language could indirectly favour the systematic use of compound interest and risk contributing to excessive interest awards.

Causation

24. Panellists discussed the chapeau of paragraph 3 ("loss or damage incurred by reason of, or arising out of, a breach of the Agreement") and its reference to causation. For some, the language was unproblematic, reflecting treaty practice and preserving the requirement that investors establish both legal and factual causation, with the burden of proof resting on the claimant.

25. Suggestions were made that greater emphasis could be placed on the requirement that damages be non-speculative. However, others noted that speculative harm would already fail the causation test and, in any event, was addressed more explicitly in paragraph 4. There was general agreement that causation remained a complex and underdeveloped area, and that further elaboration would be more appropriate in the Guidelines.

26. Some panellists nevertheless considered the language to be overly broad and insufficiently precise, advocating for a stricter formulation such as "directly caused by." Others cautioned that overly rigid language could unduly limit tribunals' ability to assess causation in complex factual scenarios, particularly in cases involving multiple contributing factors or regulatory measures adopted over time.

Contributory fault, mitigation, and related adjustments

27. The treatment of contributory fault and failure to mitigate damages also featured prominently in the discussion of paragraph 3. Panellists referred to paragraph 41 of the Guidelines, which introduced a two-factor test requiring "wilful or negligent" conduct of the investor that "materially contributed to the damage." These criteria were viewed as helpful in disciplining the assessment of investor conduct and distinguishing contributory fault from mere business risk. Several panellists considered that this level of detail was better addressed in the Guidelines.

28. With respect to mitigation, there was broad agreement that paragraph 3 contained sufficient guidance, and that any further elaboration should be confined to the Guidelines. Panellists cautioned against imposing unrealistic mitigation obligations, particularly in politically sensitive or unstable contexts.

29. A recurrent issue identified was whether an investor's failure to pursue available domestic remedies should be considered as a failure to mitigate damages. Panellists noted the complex interaction between mitigation, domestic proceedings, limitation periods, and the ability of investors to pursue international claims after exhausting or foregoing domestic remedies. Several panellists suggested that additional discussion of this issue could be useful.

30. The panel also discussed the relevance of corrective action taken by the State. Some panellists expressed scepticism as to the practical scope of such actions once a breach had occurred and compensation was being calculated, suggesting that further clarification would be beneficial.

31. On subparagraph (d) of paragraph 3, panellists noted that while the prevention of double recovery could not be addressed solely through DP 20, the provision appropriately directed the tribunals' attention to this issue. Reference was made to arbitral practice where tribunals have considered parallel proceedings, including commercial arbitration or concurrent ISDS cases, when assessing compensation.

32. The panel further discussed the non-exhaustive nature of the list of adjustment factors. While DP 20 included the language "among others," the Guidelines included additional considerations, such as macroeconomic conditions and the fiscal capacity of the respondent State. Some panellists questioned whether certain factors, such as the legality of the investment, were more appropriately addressed at the jurisdictional stage rather than as part of the damages assessment.

33. There was general agreement that any expansion of such factors should be in the Guidelines rather than in the DP. However, it was proposed to incorporate equitable considerations to address situations where an investment was governed by

contract, and where damages awarded under international law could result in compensation exceeding what would have been available under the applicable domestic contract law. Other panellists did not consider such equitable considerations to fall within the same category as the determination of full reparation. They suggested that concerns about overcompensation could be addressed through mechanisms relating to the performance or execution of awards, rather than through the quantum determination itself.

34. In concluding, panellists reflected on the role of project risk and country risk in damages assessment. It was noted that while such risks were often emphasized by investors at the time of investment, their assessment could shift at the damage calculation stage, particularly in relation to valuation methodologies such as discounted cash flow (DCF). Several panellists welcomed further clarification in the Guidelines to discipline these incentives and avoid overcompensation.

35. Finally, it was observed that framing these issues in terms of avoiding overcompensation, rather than introducing broad and potentially polarizing equitable standards, could offer a more neutral and workable approach for tribunals when applying DP 20.

Panel II: Damages & Compensation II – Draft Provision 20

36. Panel II was moderated by Mr. Martin Doe (Deputy Secretary-General of the Permanent Court of Arbitration). The panel brought together experts from diverse backgrounds, including Ms. Dafina Atanasova (Economic Affairs Officer, UNCTAD); Mr. Simon Batifort (Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP); Mr. Jonathan Bonnitcha (Associate Professor, University of New South Wales); Ms. Ivette Esis (Associate Professor, Universidad Finis Terrae) and Mr. Israel Libata (First Secretary, Permanent Mission of the Democratic Republic of the Congo to the United Nations).

37. The discussion continued the examination of DP 20, focusing on paragraphs 4 and 5. Panellists addressed the evidentiary threshold applicable to monetary claims, the use of valuation methods, particularly in relation to lost profits, the possible introduction of caps on damages and the prohibition of punitive damages.

Evidentiary standards and concerns about inflated claims

38. The panel opened with a discussion of the first sentence of paragraph 4, which provided that monetary damages should be established on the basis of “satisfactory evidence” and should not be “inherently speculative.” It was observed that inflated claims, disconnected from reality, had become a recurring challenge in practice, often anchored in aggressive or optimistic expert valuations, with material consequences for the cost and duration of proceedings.

39. Some panellists expressed concern that the “satisfactory evidence” threshold could be insufficient to meaningfully deter speculative claims, particularly in cases involving projections of future profits. They suggested that clearer articulation of heightened evidentiary standards could be warranted. Reference was made to procedural mechanisms that could reinforce discipline, including structured cost consequences and more robust scrutiny of expert evidence.

40. In this regard, panellists referred to DP 9(2)(e), which allowed tribunals to allocate costs, inter alia, by reference to the amount of monetary damages claimed in proportion to the amount ultimately awarded. While this approach was viewed as conceptually sound, some panellists suggested that it could be strengthened or clarified, for example, by introducing a rule whereby claimants could bear a greater share, or even the entirety, of costs if the damages awarded fell below a defined percentage of the amount claimed.

41. Other panellists highlighted recent treaty practice that incorporated contextual factors into the assessment of damages, including the origin and nature of the investment, the balance between public and private interests, and profits already

realized by the investor. These factors were viewed as contributing to a more fact-based evaluation and reducing reliance on hypothetical or abstract assumptions.

42. It was suggested that DP 20 could be complemented by a non-exhaustive list of additional considerations, similar to those found in paragraph 3, specifically tailored to issues of quantification. Some panellists suggested that such an approach could also inspire the development of sanctions or corrective mechanisms beyond cost allocation, aimed at discouraging inflated or unmeritorious claims.

Customary international law and standards of proof

43. The panel discussed the interaction between DP 20 and customary international law, noting that international jurisprudence supported a differentiated approach to standards of proof. In particular, claims for future profits were seen as requiring especially rigorous evidence, whereas other categories of loss might, in certain circumstances, be assessed with greater reliance on equitable considerations.

44. Panellists observed that treaty language referring to "reasonable certainty" was increasingly used to guide tribunals and could provide a clearer benchmark than "satisfactory evidence." Such language was viewed as more closely aligned with customary international law and as promoting coherence between treaty-based standards and established jurisprudence.

45. The requirement that damages should not be "inherently speculative" was regarded as particularly significant in the context of valuation. Panellists noted that this requirement related less to issues of causation and more to the assumptions underpinning damages claims, especially in cases involving future lost profits. It was said that in such cases, claims were often based on business plans or hypothetical projections, which might lack independent factual substantiation.

Use of discounted cash flow (DCF) and other valuation methods

46. The discussion then turned to the second sentence of paragraph 4, which addressed the use of the DCF methodology. Panellists generally agreed that while DCF could be appropriate in certain circumstances, its application to non-operational or unproven investments carried a high risk of speculative outcomes.

47. Panellists emphasized that tribunals should be required to justify their choice of valuation method through careful analysis of factors such as operational history, market conditions, discount rates and the evidentiary foundations of expert reports. Transparency in the evaluation of expert evidence was identified as essential to ensuring rigor and credibility in damages assessment. A suggestion was made that the use of tribunal-appointed experts could contribute to greater impartiality.

48. Reference was made to treaty developments that prioritize observable market data, such as comparable transactions involving similar investments, over income-based valuation methods where preconditions for DCF were not met.

49. Panellists also recalled established guidance, including the World Bank Guidelines on the Treatment of Foreign Direct Investment (1992) and the International Law Commission's Articles on State Responsibility (2001), which cautioned against the use of DCF in the absence of a proven track record of profitability. It was noted that arbitral practice had long been largely consistent with this position, although more recent decisions have departed from it, sometimes resulting in highly speculative valuations.

50. One panellist argued that these developments underscored the need for a clearer, possibly bright-line rule reaffirming that DCF should not be used absent a demonstrated history of profitability. It was suggested that such a rule could be framed as an outright prohibition in order to reduce uncertainty and repetitive litigation on this issue.

51. More generally, panellists emphasized that claims for future lost profits warranted heightened scrutiny and should be grounded on verifiable evidence and

reasonable certainty. Treaty models that limit or exclude compensation for future profits in specific circumstances, particularly where investments lacked operational history, were cited as potential reference points for States seeking to manage exposure to speculative claims.

Caps on damages and proportionality considerations

52. The panellist then addressed the two bracketed sentences in paragraph 4. The second sentence concerned the award of damages based on expected future cash flows following a case-by-case, fact-based inquiry, while the third sentence would cap damages at the total expenditures incurred by the claimant, adjusted for inflation.

53. Panellists discussed whether these two formulations should be understood as alternative options or as potentially complementary mechanisms. One view was that both sentences could operate together, as they serve distinct but related functions. The second sentence was seen as addressing the evidentiary basis required under international law to justify awards for future losses, while the third sentence was understood as performing a broader function of ensuring correspondence between the amount invested and the amount awarded.

54. It was proposed that both sentences could be retained, with the third sentence redrafted to clarify that damages should not exceed the amount invested plus a reasonable rate of return calculated on the basis of that expenditure. This approach was presented by the panellists as a potential “landing zone” capable of reconciling divergent views.

55. Panellists noted that several States had expressed interest in adopting caps or proportionality-based limitations to reduce unpredictability and to ensure that awards remain connected to actual economic contributions. At the same time, caution was expressed to avoid inadvertently transforming sunk costs into a minimum entitlement. Panellists emphasized that investment treaties were not a guarantee of capital recovery, and that losses resulting from commercially unsuccessful investments should not automatically give rise to compensation.

56. Divergent views were expressed regarding the relationship between caps and existing treaty standards for compensation, particularly in the context of expropriation. Some participants argued that treaties already contained specific compensation standards that departed from customary international law as a default rule, and that introducing caps should not be seen as conceptually problematic. Others cautioned that tribunals had sometimes used valuation techniques to sidestep legal questions, treating damages as a purely factual exercise.

57. Treaty practice was cited to illustrate a range of approaches, such as the India-UAE BIT (2024) and India-Uzbekistan BIT (2024), which excluded future profits and certain categories of assets from compensation, or capped damages at the actual loss suffered. These examples were characterized as evidence of increasing diversification in State practice.

58. Some panellists suggested that proportionality considerations could help situate compensation within a broader analytical framework that took into account the nature of the breach, the conduct of the parties, and the economic reality of the investment.

Prohibition of punitive damages

59. Paragraph 5 of DP 20, which prohibited punitive damages, was generally regarded as reflecting established practice. Panellists nevertheless discussed how this prohibition interacted with related concepts, including moral or exemplary damages, and whether additional clarification might be necessary to ensure coherence.

60. Questions were raised as to how the prohibition of punitive damages might affect interest as corrective, punitive, or compliance-inducing in nature. Some panellists noted that greater clarity could be useful to delineate the boundaries between compensatory and non-compensatory elements of awards.

61. While excluding punitive damages, some panellists observed that mechanisms for addressing egregious conduct, subject to appropriate safeguards, warranted further reflection, particularly in light of evolving institutional and treaty frameworks.

Panel III: Right to Regulate – Draft Provision 19

62. The Panel III was moderated by Mr. Ricardo Vásquez (Partner, Vásquez Urra Abogados, Chile). The panel featured distinguished speakers, including Mr. Thiago Chaves (Attorney, Office of the Attorney General, Brazil); Mr. Santiago Díaz Cedel (Expert Advisor, National Agency for the Legal Defense of the State, Colombia); Ms. Yiwei Lu (State Counsel, Attorney-General's Chambers, Singapore); and Ms. Silvina Gonzalez Napolitano (Legal Expert, Secretariat for International Economic Negotiations, Argentina).

63. The discussion focused on DP 19 concerning the right of States to regulate, with particular attention to the two alternative formulations contained in the draft. Panellists examined the objectives, legal effects, and practical implications of each alternative, as well as their interaction with existing treaty standards and arbitral practice. It was recalled that the provision sought to respond to long-standing concerns regarding the balance between investment protection and States' regulatory autonomy, an issue that had featured prominently throughout the work of UNCITRAL Working Group III, and had been identified by a number of delegations as a source of perceived regulatory chill.

64. With respect to Alternative A, panellists discussed its function as an interpretative provision aimed at guiding tribunals in their assessment of regulatory measures adopted for legitimate public policy objectives. In particular, Alternative A was understood as directing tribunals to accord a high level of deference to such measures, while preserving the application of the substantive obligations contained in the treaty. This approach was discussed against the background of concerns expressed by some States that tribunals had, in practice, engaged in overly intrusive review of domestic regulatory choices, by reassessing policy trade-offs or second-guessing regulatory judgments. At the same time, panellists noted that Alternative A would not preclude claims where a measure was alleged to be inconsistent with applicable treaty standards.

65. Some panellists questioned whether Alternative A would add substantive legal content beyond current investment protection standards. It was observed that arbitral tribunals routinely applied standards such as the minimum standard of treatment and indirect expropriation with a degree of restraint, and that findings of breach generally required serious shortcomings, such as manifest arbitrariness, discrimination, or denial of justice. From this perspective, some panellists queried whether an express reference to a "high level of deference" would meaningfully clarify tribunal reasoning, or whether it might introduce additional complexity by raising questions as to the precise scope and legal consequences of such deference, including its potential impact on standards of review and the allocation of the burden of proof.

66. At the same time, other panellists considered that expressly articulating deference in treaty text could serve an important signalling function. In particular, it was suggested that such language could be relevant for older treaties containing broadly framed standards, where interpretative guidance might be limited. From this viewpoint, codifying deference could assist tribunals in framing their analysis and narrowing interpretative discretion, even if similar considerations were already reflected in parts of arbitral jurisprudence. Panellists emphasized that the value of Alternative A might therefore lie less in altering substantive outcomes and more in shaping interpretative methodology.

67. The discussion then turned to Alternative B, which was characterized by some panellists as a more far-reaching option. By excluding certain regulatory measures from the scope of ISDS where such measures pursued specified public policy objectives, Alternative B was viewed by some panellists as offering stronger protection against regulatory chill and greater certainty for States. Comparisons were

drawn with general exceptions clauses in trade agreements and with recent model investment treaties that incorporated carve-outs for particular policy areas, such as taxation and financial services. In this context, Alternative B was seen as reflecting a more categorical approach to safeguarding regulatory space.

68. At the same time, reservations were expressed regarding the practical effect of Alternative B. Panellists noted that arbitral experience with exception clauses suggested that tribunals often retained a role in assessing whether the conditions for invoking such clauses were satisfied. As a result, disputes might not be eliminated but rather shifted to jurisdictional or admissibility phases of the proceedings. It was therefore observed that, while Alternative B might change the framing of disputes, it would not necessarily prevent tribunals entirely from evaluating regulatory measures.

69. Particular attention was given to the qualifying language common to both alternatives, which conditioned the right to regulate on measures being applied "in a manner consistent with the Agreement." Panellists expressed concern that this formulation could limit the operative effect of DP 19, given that States typically invoked the right to regulate precisely in circumstances where a breach of treaty obligations was alleged. It was noted that similar language in existing treaties had, in some instances, allowed tribunals to prioritize substantive obligations over regulatory considerations, thereby reducing the practical impact of right-to-regulate clauses.

70. The panel also discussed the list of legitimate public policy objectives referenced in DP 19. Some panellists cautioned against overly exhaustive or closed lists, observing that public policy priorities evolve over time and that treaty language should retain sufficient flexibility to accommodate such evolution. Illustrations were given of areas such as environmental protection, public health and data regulation, which have gained increasing importance in recent years. An approach combining illustrative lists with open-ended language was discussed as a possible means of balancing legal certainty with adaptability.

71. Beyond substantive drafting considerations, panellists observed that the right to regulate may also have implications on the conduct of ISDS proceedings. It was noted that regulatory measures could affect not only the substantive assessment of investor claims but also procedural aspects of arbitration. By way of illustration, reference was made to the COVID-19 pandemic, during which public health measures restricted travel and in-person hearings, thereby directly affecting arbitral proceedings. This example was used to underscore that the exercise of regulatory powers might intersect with procedural dimensions of dispute settlement, and that the right to regulate should not be viewed solely through the substantive law lens.

72. In concluding, panellists agreed that further refinement of DP 19 would be required, particularly with respect to its qualifying language and its interaction with existing treaty obligations. It was emphasized that any right-to-regulate provision should be assessed as part of a broader ISDS reform package, including procedural reforms, with a view to ensuring clarity, coherence, and predictability for both States and investors.

Panel IV: Shareholder Claims – Draft Provision 18

73. Panel IV was moderated by Ms. Lise Johnson (Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP, UK). The panel included Mr. David Bigge (Chief of Investment Arbitration, Department of State, U.S.A.); Mr. David Gaukrodger (Senior Legal Adviser, Investment Division, Organisation for Economic Co-operation and Development); Mr. Juan Pablo Gómez (Independent Consultant, Professor, Universidad de Los Andes, Colombia); and Mr. Rodrigo Monardes (Head of International Affairs, Ministry of Finance, Chile).

74. The panel examined DP 18 in detail, focusing on its structure, internal logic and underlying policy rationale, as well as on the different ways in which shareholder claims and reflective loss had been addressed in existing international investment agreements. The panel also considered the extent to which the provision reflected, or

departed from, approaches rooted in domestic corporate law, customary international law and arbitral practice.

75. According to some panellists, approaches to shareholder claims could vary depending on the public policy perspective adopted by each State. Nevertheless, there was general agreement that DP 18 addressed an important aspect of ISDS by clarifying the treatment of claims brought by shareholders, where the economic loss was borne by the enterprise. Several panellists underscored that, from a procedural perspective, the claimant in a derivative claim remained the shareholder, even where the claim was brought on behalf of the enterprise.

76. In this context, it was observed that, in arbitral practice, awards were often rendered in favour of the claimant as a procedural matter, while the treaty or the tribunal might determine the ultimate allocation of monetary damages or restitution. Some panellists suggested that an express reference in treaty text to an award being rendered "in favour of the enterprise" could be unnecessary and potentially confusing, particularly where the objective was to ensure that compensation remained at the level of the enterprise in accordance with general principles of corporate law.

77. The discussion also referred to existing treaty practice, which avoided expressly identifying the beneficiary of the award in cases involving shareholder claims. Instead, such agreements tended to regulate the conditions under which derivative claims might be brought, leaving the allocation of restitution or monetary damages to the application of the treaty, the applicable law or determinations by the tribunal. Under this approach, monetary damages or restitution were understood to accrue to the enterprise, while procedural rules maintained the shareholder as claimant for purposes of standing and res judicata.

78. Paragraph 1 of DP 18, which reaffirmed the general rule excluding shareholder claims for reflective loss, was considered as reflecting well-established principles of domestic corporate law and customary international law. Panellists noted that codifying this rule at the treaty level could reduce legal uncertainty, avoid fragmented or duplicative proceedings, and limit excessive litigation costs. Illustrative examples were cited to demonstrate that, in the absence of a clear rule, multiple shareholders or related entities could bring parallel claims arising from the same alleged injury to the enterprise.

79. It was stated that paragraphs 2 to 4 introduced a limited exception to the general prohibition on reflective loss claims, allowing shareholders to bring claims on behalf of the enterprise under strictly defined circumstances and that these provisions subjected derivative claims to requirements relating to ownership, control and waiver. In general, panellists considered that ownership and control requirements constituted important safeguards to ensure that only shareholders with a significant relationship to the enterprise could initiate such claims, thereby reducing the risk of opportunistic litigation. The discussion highlighted potential ambiguities regarding the concept of control, including whether it should be confined to voting rights or extend to other forms of effective influence, as well as the need to consider situations involving minority shareholders exercising effective control.

80. Panellists also examined the interaction between paragraph 5 and provisions relating to restitution and damages, in particular DP 20. Concerns were expressed that references to restitution, if not carefully aligned, could be interpreted as limiting the State's ability to comply with its obligations through monetary compensation in lieu of restitution. In this regard, it was noted that treaty practice generally preserved the State's option to pay monetary compensation, while clarifying the valuation consequences of that choice.

81. In considering paragraph 5, it was observed that, in derivative claims, the shareholder acts as claimant from a procedural standpoint, while the provision sought to direct any form of reparation to the enterprise. Panellists discussed different drafting techniques to reflect this approach, including formulations providing that restitution and monetary damages, including any applicable interest, be paid to the

enterprise, thereby avoiding characterizing the award as being rendered “in favour of the shareholder”.

82. Paragraph 5 was discussed as an integral component of the overall framework of DP 18. Panellists emphasized that the provision sought to align shareholder actions with the rights and interests of the enterprise, while reinforcing procedural clarity. Several panellists observed that consistent drafting across paragraphs 2 to 5 was essential to avoid disputes over interpretation and to ensure coherence with related provisions on remedies and admissibility.

83. Panellists reflected on the broader policy rationale underpinning DP 18. Codifying rules on reflective loss and derivative claims was viewed as a means of clarifying treaty standards, reducing the multiplicity of claims and improving predictability in ISDS. Several panellists expressed a preference for explicit treaty language over relying on implied rules or customary international law, noting that the latter has led to divergent tribunal interpretations. At the same time, it was acknowledged that provisions on ownership, control and waiver should retain a degree of flexibility in order to remain workable across different factual scenarios.

84. In conclusion, broad support was expressed for further refining paragraph 5 and related provisions by drawing on consolidated treaty practice and ensuring coherence with other provisions on remedies. Panellists emphasized that DP 18 should focus on defining eligibility and the conditions applicable to shareholder claims, thereby contributing to greater predictability and procedural coherence, while safeguarding both State interests and the legitimate rights of enterprises and investors.

Panel V: Third-Party Funding – Draft Provision 12 & 12*bis*

85. Panel V examined DP 12 and 12*bis*. The panel was moderated by Ms. Ladan Mehranvar (Senior Legal Researcher, Columbia Center on Sustainable Investment). The discussion brought together institutional, market, and State perspectives. Panellists included Ms. Ella Rosenberg (Legal Counsel, International Centre for Settlement of Investment Disputes); Ms. Juliana Giorgi (General Counsel for Latin America, Loopa Finance); Ms. Inés Guzmán (Deputy State Attorney, International Arbitration Department, Spain); and Ms. Margie-Lys Jaime (Head, Office of Investment Arbitration, Panama).

86. It was recalled that DP 12 and 12*bis* were originally developed as a single provision and were later separated in order to distinguish disclosure obligations from possible regulation of third-party funding (TPF). Panellists noted that this structural decision was intended to allow progress on disclosure, while preserving space for continued discussion on more contested regulatory issues.

87. The discussion revisited long-standing concerns regarding the increasing role of TPF in ISDS, particularly in a system perceived by high costs, lengthy proceedings, and structural asymmetries of resources. Panellists observed that the growing presence of TPF had raised concerns regarding distorted incentives, including the pursuit of weak or speculative claims, the inflation of damages and the increased procedural burden placed on respondent States, especially those with limited institutional capacity.

88. Beyond conflicts of interest, panellists focused on practical challenges associated with funded claims, with particular emphasis on the difficulties in recovery of costs. Examples were cited of cases in which tribunals awarded costs to respondent States, but enforcement proved ineffective because the claimant entity had no assets and the funder was not bound by the award. Panellists referred to instances in which States spent extended periods pursuing cost recovery through domestic courts with limited success, thereby weakening the deterrent effect of cost-shifting. Requests for security for costs were discussed in this context, including cases where such requests had been denied despite the existence of TPF, due to high thresholds and restrictive approaches adopted by tribunals.

89. The panel also addressed the impact of TPF on the quantum of claims. While comprehensive empirical data remained limited, experience shared during the discussion suggested that funded cases often involved very high amount of claims. In several examples cited, tribunals ultimately awarded only a small fraction of the amounts claimed. These outcomes were discussed as illustrating how funding structures and return expectations could encourage inflated claims, increasing costs and procedural complexity without corresponding substantive outcomes. In this context, the exclusion of funders' returns from recoverable costs was viewed as an important safeguard to avoid transferring the financial consequences of private commercial arrangements to respondent States.

90. Concerns were further raised regarding the role of TPF in facilitating multiple claims arising from a single measure. Panellists discussed examples of coordinated or portfolio funding strategies supporting parallel claims against the same State following regulatory reforms, including in sectors such as energy and public utilities. Such clustering of cases was seen as amplifying litigation exposure, complicating settlement efforts and placing sustained pressure on public resources. These practices were also noted to raise questions regarding the relationship between treaty consent and the identity of the ultimate beneficiaries of the arbitral awards.

91. At the same time, panellists acknowledged that TPF might serve legitimate purposes. It was noted that ISDS proceedings involved substantial upfront costs, long timelines and enforcement risks, which might prevent otherwise viable claims from being pursued. In this context, TPF was recognized as a mechanism that could facilitate access to justice, particularly for small and medium-sized investors or claimants experiencing temporary financial constraints. The challenge for reform was therefore framed as managing systemic risks associated with funding, without undermining legitimate access to dispute settlement.

92. Against this background, the panel examined existing disclosure frameworks, including arbitral rules requiring disclosure of the existence of TPF and the identity of the funder. These requirements were recognized as an important step in preventing undisclosed conflicts of interest, particularly where arbitrators may have professional or financial links to funders. At the same time, panellists noted that disclosure limited to identity alone did not address broader concerns relating to funder control, strategic influence, exposure to adverse costs or the overall dynamics of funded claims, potentially limiting the ability of tribunals and parties to assess funding-related risks.

93. DP 12 was described as reflecting a restrained approach resulting from extensive consultations and compromise among delegations holding divergent views. Transparency and conflict-prevention were identified as its core objectives, while broader regulatory questions were left to DP 12*bis* or to the exercise of tribunal discretion. Panellists noted that tribunals could, under existing procedural powers, order additional disclosure where necessary, although the effectiveness of such powers would depend on consistent and proactive use.

94. Divergent views were also expressed. Some panellists observed that disclosure obligations should remain narrow. It was noted that arbitral practice had not demonstrated that non-disclosure of funding arrangements has, as such, undermined arbitrator independence or impartiality. From this perspective, disclosure of the existence of funding and the identity of the funder was viewed as sufficient, while broader disclosure of funding terms was considered unnecessary and potentially detrimental.

95. In this context, concerns were raised that broader disclosure could reveal proprietary methodologies, risk-assessment models and commercially sensitive information, thereby affecting funders' competitive position. It was also noted that disclosure of funding terms could interfere with legal privilege and litigation strategy. These considerations were cited in support of a measured approach to transparency, in the absence of evidence that disclosure beyond identity was required to safeguard arbitrator independence.

96. The panel further discussed the consequences of non-disclosure of TPF. Examples were cited in which funding arrangements were disclosed at a late stage of the proceedings, resulting in challenges to arbitrators and the suspension of procedural calendars. In some cases, arbitrators were replaced mid-proceeding, leading to additional delays and costs for both parties. More generally, concerns were raised regarding the potential for annulment or setting aside of awards due to undisclosed conflicts, undermining legal certainty and confidence in the system. These experiences were cited as underscoring the importance of early and accurate disclosure as a preventive measure.

97. At the same time, caution was expressed regarding sanctions for non-compliance. Measures such as dismissal of claims or automatic adverse cost orders were viewed as potentially disproportionate and more likely to penalize claimants than funders. Panellists emphasized the need for proportionate and discretionary responses focused on curing procedural defects and addressing bad faith where demonstrated, rather than punitive approaches that could impair due process. The interaction between TPF and security for costs was further examined. Panellists discussed cases in which tribunals granted security after considering funding arrangements that insulated claimants from adverse cost exposure, as well as cases in which similar requests were rejected. These examples illustrated ongoing inconsistencies in practice. While existing procedural tools were seen as capable of addressing certain risks, concerns remained regarding predictability and coherence.

98. Turning to DP 12*bis*, the panel examined proposals to regulate or limit TPF beyond disclosure. It was observed that TPF was increasingly used as a commercial investment strategy, rather than primarily as a mechanism to support financially constrained claimants. This evolution was linked to concerns regarding inflated claims, reduced incentives to settle and increased exposure arising from coordinated or portfolio funding of multiple claims.

99. DP 12*bis* was discussed as granting tribunals the discretion to limit TPF in defined circumstances, including excessive funder control or the concentration of claims against a single State or regulatory measure. While these criteria were viewed as addressing genuine risks, panellists raised concerns regarding vague concepts, such as a “reasonable number” of funded claims. Suggestions included focusing on proportional exposure rather than numerical thresholds. Similar challenges were identified in relation to potential limits on funder returns, particularly given the difficulty of assessing proportionality prior to an award.

100. Finally, the discussion highlighted persistent data and transparency gaps. The absence of system-wide information on TPF was seen as limiting the ability to assess its impact on claims, damages, settlement behaviour and respondent States. Broader disclosure was discussed as a means of supporting evidence-based reform, while recognizing the need to protect confidential and commercially sensitive information.

Panel VI: Implementation of the Draft Provisions on Procedural & Cross-Cutting Issues in the Multilateral Instrument on ISDS Reform

101. Panel VI was moderated by Mr. Jae Sung Lee (Secretary of Working Group III). The panel included Ms. Nora Bellec (Legal Officer, DG TRADE, European Union); Ms. Mariana Pinto Schmidt (Legal Advisor, Investment, Services and Digital Economy Department, Undersecretariat for International Economic Affairs, Chile); Ms. Binish Suleman (Attorney Adviser, Department of State, U.S.A.); Mr. Sun Zhao (Director, Investment Law Division, Department of Treaty and Law, Ministry of Commerce, China). The panel focused on practical and legal questions relating to the implementation of the DPs within the framework of the multilateral instrument on ISDS reform (MIIR).

102. The discussion addressed how the DPs could be implemented in practice, with particular attention to questions of legal form and their interaction with existing procedural frameworks. Panellists reflected on how different implementation

approaches might seek to balance effectiveness, flexibility and legal certainty, taking into account the diversity of treaty practice and arbitral rules applicable to ISDS.

103. A recurring theme was the distinction between DPs of a predominantly procedural character and those that affected jurisdiction, admissibility, or the scope of consent. Some panellists observed that certain DPs, such as those relating to transparency obligations, cost allocation, or procedural conduct, could be implemented through procedural or arbitration rules. In this regard, reform through the UNCITRAL Arbitration Rules (UARs) was viewed as a constructive and incremental approach, offering adaptability, administrative efficiency, and a degree of procedural convergence without necessarily requiring immediate treaty amendment.

104. Other panellists cautioned, however, that reliance on procedural rules alone might not be sufficient to achieve systemic reform. It was noted that ISDS was conducted under a variety of arbitral rules, and that reforms implemented exclusively through the UARs would not automatically extend to disputes governed by other procedural frameworks. From this perspective, treaty-based implementation through the MIIR was seen as an important mechanism to ensure broader applicability and to avoid fragmentation based on the choice of arbitral rules.

105. The panel also discussed whether the DPs should be implemented as a comprehensive package or as provisions that States could adopt individually. While several panellists recognized the value of a comprehensive approach in promoting coherence and predictability, it was also observed that securing agreement across all issues simultaneously could present practical challenges. In this context, mechanisms allowing for opt-in or opt-out were discussed as possible tools to facilitate participation and accommodate different policy preferences and levels of readiness.

106. At the same time, concerns were expressed that extensive optionality could undermine the objectives of consistency and harmonization. Panellists noted that if States were to make divergent choices across provisions, the resulting framework could remain fragmented, potentially perpetuating some of the structural challenges that the reform process sought to address. The discussion reflected differing assessments regarding how much flexibility could be accommodated without compromising legal certainty and predictability.

107. Some panellists observed that the DPs had received varying degrees of convergence. In particular, limitation periods and joint interpretation mechanisms were mentioned as areas in which a lower level of controversy had been identified, and which could offer practical improvements compared to existing approaches. At the same time, it was noted that other DPs were of a more sensitive or context-dependent nature, and that their broader application might require further consideration at later stages of the reform process.

108. The limits of bilateral renegotiation of treaties as a reform strategy were also discussed. Some panellists noted that revising the existing stock of treaties through bilateral processes could be resource-intensive and time-consuming, particularly in light of the large number of first-generation treaties still in force and the practical and political challenges associated with bilateral renegotiation of treaties. From this perspective, the MIIR was described as a pragmatic means of advancing reform within a more manageable timeframe. Other views, however, emphasized the continued relevance of bilateral renegotiation, noting that it could allow States to retain greater control over the content, sequencing and scope of reforms, tailor treaty modifications to specific bilateral relationships and policy contexts, and preserve the consensual nature of treaty-making.

109. At the same time, panellists recognized that a multilateral approach might introduce its own complexities. Mechanisms involving notifications, reservations, listings, or differentiated levels of commitment were noted to raise questions regarding legal clarity and domestic implementation. These considerations were described as particularly relevant for domestic approval processes, which often

required a clear understanding of the legal effects and obligations arising from the instrument.

110. Attention was also given to the interaction between treaty-based provisions and procedural rules. While there was general agreement that treaty obligations should prevail in the event of inconsistency, panellists highlighted the need for careful drafting to manage overlaps with existing treaty provisions and arbitral rules. It was observed that some older treaties might already contain procedural clauses, and that the relationship between those clauses and new DPs would need to be addressed to avoid uncertainty.

111. Institutional aspects of the reform process were also discussed. Panellists emphasized the importance of coordination with other reform initiatives, while underscoring that States should remain at the centre of the decision-making. Concerns were expressed regarding the capacity of delegations to engage simultaneously in multiple processes, as well as the risk that dispersing reform discussions across different fora could dilute focus and coherence.

112. In concluding, the panellists emphasized that implementation of the DPs was closely linked to broader policy considerations. While there was shared recognition of the need to modernize existing ISDS arrangements, views continued to differ on the appropriate balance between procedural and treaty-based reform, the degree of flexibility to be afforded to States, and the most effective pathway to achieving durable and meaningful outcomes. The discussion underscored the importance of designing the MIIR in a manner that accommodated these differing perspectives while remaining capable of delivering practical improvements to the functioning of the system.

Roundtable Discussions

113. The roundtable discussions, moderated by Mr. Shane Spelliscy and Ms. Natalie Morris-Sharma (Rapporteur, UNCITRAL Working Group III), enabled Working Group delegates to consider the DPs discussed during the panels. The roundtable focused on refining drafting choices, identifying areas requiring clarification, and considering whether alternative formulations could better reflect the range of views expressed. Where appropriate, delegations considered whether the exchanges could support the presentation of the Chair's proposal to the Working Group at its January session (see document A/CN.9/WG.III/WP.262).

Draft Provision 12 and Draft Provision 12 bis: Third Party Funding

114. DPs 12 and 12*bis* were discussed with particular emphasis on the separation between disclosure obligations and regulation of TPF.

115. With respect to DP 12, delegations considered the scope and timing of disclosure obligations. Some delegations suggested that the provision could clarify that disclosure should cover the existence of TPF, the identity of the funder, and the nature of the funding arrangement, including any agreement relating to the allocation of proceeds. It was suggested that disclosure be required "at the time of submission of the claim or as soon as the funding arrangement is concluded," with a continuing obligation to disclose material changes.

116. Other delegations expressed reservations regarding overly detailed disclosure requirements, noting the potential risk of duplication with existing arbitral rules. In this context, some delegations suggested clarifying language to indicate that the DP would apply without prejudice to applicable rules addressing the disclosure of TPF.

117. Turning to DP 12*bis*, delegations expressed differing views on whether and how the provision should address regulatory consequences associated with TPF. Some delegations suggested that the provision could refer to the tribunal's authority to consider the existence of TPF when deciding procedural matters, such as security for costs, without prescribing mandatory outcomes.

118. Regarding DP 12*bis*, drafting options discussed included providing that "the existence of TPF may be taken into account when deciding on security for costs," without creating a presumption. Other proposals focused on limiting regulation to situations where a funder exercised "decisive or controlling influence." Suggestions were also made to replace references to a "reasonable number" of funded claims with language addressing "concentration of claims" or "cumulative exposure," while preserving access to ISDS.

Draft Provision 18: Shareholder Claims and Reflective Loss

119. DP 18 was examined with a focus on its structure and consistency with treaty practice on shareholder claims and reflective loss. Particular attention was given to paragraph 5.

120. Several delegations questioned whether the provision should refer to an award made "in favour of the shareholder." Some delegations suggested alternative drafting that would avoid this formulation by focusing instead on the submission of a derivative claim. By reference to existing treaty practice, the following was suggested: "Where a claim is submitted to arbitration on behalf of an enterprise, any award of restitution shall provide that restitution be made to the enterprise, and any award of monetary damages shall provide that such damages be paid to the enterprise."

121. It was suggested that this approach could address conceptual concerns while aligning the provision with formulations used in modern investment agreements. Some delegations further suggested deleting references to an award being made "in favour of the shareholder" to avoid confusion as to the identity of the beneficiary.

122. Delegations also discussed situations involving the total expropriation of an enterprise. It was noted that some delegations considered such cases to involve direct injury to the shareholder rather than reflective loss, and therefore would fall outside the scope of derivative claims. In this context, some delegations emphasized the importance of preserving the distinction between direct and derivative claims in the drafting of the DP.

123. Concerns were raised regarding references to restitution of property to the enterprise without explicit recognition of the State's option to pay compensation in lieu of restitution. Some delegations suggested that paragraph 5 could clarify this point by cross-referencing DP 20 or by adding language indicating that restitution would be "subject to the tribunal's authority to award monetary compensation where restitution is not appropriate."

124. Delegations emphasized that further refinement was required to ensure that the provision clearly reflected its intended scope, avoided unintended limitations on lawful expropriation accompanied by compensation, and remained coherent with related DPs.

Draft Provision 19: Right to Regulate

125. Discussions on DP 19 focused on whether the provision should operate as guidance to tribunals or as a carve-out, and whether its consideration fell within the mandate of the Working Group. Delegations discussed how DP 19 might affect tribunal reasoning without modifying substantive treaty obligations.

126. Several delegations expressed concerns regarding references to a "high level of deference" accorded to States. Some questioned whether such a standard was sufficiently grounded in international law or clearly defined, while others supported the concept as a means of preventing tribunals from second-guessing regulatory decisions, particularly in technically complex areas.

127. Some delegations suggested alternative language that would reaffirm the State's right to regulate without referring to a "high level of deference." Examples included: "The Parties reaffirm the right of each Party to regulate within its territory to achieve

legitimate public policy objectives," or "The tribunal shall recognize that a Party retains the right to regulate to pursue legitimate public policy objectives."

128. Other delegations supported retaining the reference to deference but suggested clarifying its scope. It was proposed that deference could be linked to specific regulatory contexts, such as public health or environmental protection, or framed as respect for governmental judgment rather than as a general standard applicable to all regulatory measures.

129. Delegations also discussed whether the provision should include a non-exhaustive list of legitimate public policy objectives. Some suggested language indicating that such objectives could include, inter alia, public health, public safety, environmental protection, human rights, and sustainable development, while others preferred broader language such as "legitimate public policy objectives," without enumeration.

130. Concerns were raised that the formulation should not unduly limit review or affect the balance of rights and obligations under the underlying treaty. Several delegations emphasized that any drafting should make clear that recognition of the right to regulate did not preclude tribunals from assessing the consistency of challenged measures with applicable treaty obligations.

Draft Provision 20: Assessment of Damages and Compensation

131. Delegations discussed DP 20 with a focus on the relationship between restitution and monetary compensation, and how these remedies should be reflected. Several delegations emphasized the importance of clearly preserving the State's option to provide monetary compensation in lieu of restitution, noting that restitution might not always be feasible or appropriate in practice.

132. In this context, some delegations underlined that DP 20 should avoid any implication that restitution would constitute a mandatory or preferred remedy. It was noted that greater clarity could help ensure that it reflects established approaches under international law, whereby restitution and compensation operate as alternative forms of reparation.

133. Some delegations suggested that the DP could explicitly clarify the relationship between restitution and compensation by requiring tribunals to specify the alternative of monetary compensation representing the fair market value of the investment, , where restitution was ordered but not ultimately be carried out.

134. Suggested language included: "Where restitution is awarded, the tribunal shall provide that the respondent may elect to pay monetary compensation in lieu of restitution." It was noted that this could assist in avoiding uncertainty in the implementation of awards.

135. Delegations also discussed the need to avoid double recovery, particularly in cases involving shareholder claims or overlapping proceedings. It was suggested that DP 20 could require tribunals to take into account prior awards, settlements or compensation received in relation to the same harm or loss when determining damages.

136. In this regard, some delegations noted that the risk of double recovery was closely linked to situations where claims might be brought in relation to the same underlying measures, and that clarity in DP 20 could contribute to addressing this concern.

137. Further discussion addressed the relationship between DP 20 and DP 18. Some delegations emphasized that, in cases involving derivative claims, the allocation of damages or restitution should be aligned with the general principles governing compensation set out in DP 20, in order to ensure coherence across the DPs.

138. Overall, the roundtable discussions highlighted broad agreement on the need for greater clarity and internal consistency in the DP 20. Some delegations also noted that

DP 20 could serve to provide general guidance to tribunals on the relationship between restitution and compensation and on the avoidance of double recovery, while preserving tribunal discretion and without establishing exhaustive or prescriptive rules. At the same time, delegations recognized that further work would be required to reconcile differing views on the appropriate level of guidance to tribunals.

Closing Remarks

139. The closing remarks were delivered by Ms. Marcela Otero (Director-General of Multilateral Economic Affairs, Undersecretariat for International Economic Affairs, Chile) and Ms. Anna Joubin-Bret (Secretary of UNCITRAL).