United Nations
Commission on International Trade Law

Remaining provisions on procedural and cross-cutting issues

ROYAUME DU MAROC
MINISTERE DE LA JUSTICE

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Procedural rules and cross-cutting issues

- 22 Draft Provisions
- A/CN.9/WG.III/WP.253 and A/CN.9/WG.III/WP.262

Working Group III – 53rd session, January 2026 (NYC)

Decided that the draft provisions on conduct of proceedings (DPs 1–9, 11 and 12) will be presented as

A/CN.9/1246

Supplementary provisions on the conduct of proceedings to resolve international investment disputes

Remaining draft provisions (DPs) on procedural and cross-cutting issues:

- DP10: Counterclaim
- DP11bis: Consolidation
- DP12bis: Regulation of third-party funding
- DP13: Amicable settlement
- DP14: Local remedies
- DP15: Waiver of rights to initiate adjudicatory dispute resolution proceeding
- DP16: Limitation period
- DP17: Denial of benefits
- DP18: Shareholder claims on its own behalf
- DP18bis: Shareholder claims on behalf of the enterprise
- DP19: Right to regulate
- DP20: Assessment of damages and compensation
- DP21: Joint interpretation
- DP22: Submission by a non-disputing Treaty Party

Remaining draft provisions (DPs) on procedural and cross-cutting issues:

- **DP10: Counterclaim / Demande reconventionnelle**
- DP11bis: Consolidation
- **DP12bis: Regulation of third-party funding / Réglementation du financement par des tiers**
- DP13: Amicable settlement
- **DP14: Local remedies / Recours internes**
- DP15: Waiver of rights to initiate adjudicatory dispute resolution proceeding
- DP16: Limitation period
- DP17: Denial of benefits
- DP18: Shareholder claims on its own behalf
- DP18bis: Shareholder claims on behalf of the enterprise
- **DP19: Right to regulate / Droit de réglementer**
- **DP20: Assessment of damages and compensation / Évaluation des réparations et de l'indemnisation**
- DP21: Joint interpretation
- DP22: Submission by a non-disputing Treaty Party

DP12*bis:* Regulation of third-party funding / Réglementation du financement par des tiers

- At the outset concerns were expressed that third-party funding, including:
  - Conflicts of interest and disclosure;
  - Third-party control and influence;
  - Confidentiality and legal privilege;
  - Costs and security for costs; and
  - Impact on frivolous claims

  (See WP.157, see also A/CN.9/935, para. 89-91; A/CN.9/970, paras. 17-25).

- It was also said that third-party funding could be a useful tool to ensure access to justice, particularly for small- and medium-sized enterprises (A/CN.9/935, para. 91).

DP12*bis:* Regulation of third-party funding / Réglementation du financement par des tiers

- Various ways were suggested to address concerns relating to third-party funding, including through regulation, by:
    - introducing mechanisms to ensure a level of transparency including through disclosures (which could also assist in ensuring the impartiality of the arbitrators),
    - imposing sanctions for failure to disclose, and
    - providing rules on third-party funders and on when they could provide funding (A/CN.9/970, para. 20).

- Third-party funding issues were linked to solutions developed to address other concerns: e.g. frivolous claims could be addressed through early dismissal mechanisms regardless of whether a third-party funder was involved.

- The Working Group concluded that it was desirable that reforms be developed by UNCITRAL in order to address concerns related to the definition, and to the use or regulation of third-party funding in ISDS (A/CN.9/970, para. 25).

DP12*bis:* Regulation of third-party funding / Réglementation du financement par des tiers

- Need to incorporate or otherwise address aspects of *SPXI: Third-party funding* in DP12*bis*

- Draft SPXI provides that: “Third-party funding” means the direct or indirect provision of any funds to a disputing party by a non-party for the pursuit or defence of a proceeding, either through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.

DP12*bis:* Regulation of third-party funding

1. The Tribunal may limit third-party funding:

(a) When the expected return to the third-party funder exceeds [a reasonable amount] [** per cent of the amount to be awarded];

(b) When the number of cases funded by the third-party funder against the respondent exceeds [a reasonable number] [a number to be specified];

(c) When the third-party funder has direct or indirect control or influence over the management of the claim or the proceeding, including by taking decisions to terminate, settle or otherwise resolve the dispute or the selection of the legal representative of the funded party;

(d) When the third-party funder is able to terminate the funding arrangement without prior notice; or

(e) […].

2. When determining whether to limit third-party funding, the Tribunal shall assess all relevant circumstances of the case, including the reasons for the funded party to seek third-party funding and the impact its determination could have on the proceeding.

3. When the Tribunal determines to limit third-party funding, the funded party shall terminate the funding agreement and return any funding received.

4. If a disputing party receives or retains funding which the Tribunal has limited pursuant to paragraph 1 or does not comply with paragraph 3, the Tribunal may take the measures listed in [SPXI, para. 7: order security for costs; take the failure into account when allocating costs; and suspending the proceeding and, if suspended for more than 90 days, ordering the termination of the proceeding].

(WP.253)

DP14: Local remedies / Recours internes

- Under customary international law, exhaustion of local remedies is a prerequisite for the exercise of diplomatic protection.

- “Local remedies” means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury (ILC ADP, art. 14(2)).

- The rule ensures that “the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system” (*Interhandel*, Preliminary Objections, at p. 27).

- *However*, the local remedies rule is generally not applicable in the context of investment treaties which provide investors with direct access to international courts or tribunals.

DP14: Local remedies / Recours internes

- Criticisms in media were noted, including on:
  - the use of arbitration as opposed to domestic adjudicatory systems to resolve investment disputes;
  - party-appointment; and
  - the asymmetry of ISDS which was available only to foreign investors (A/CN.9/.935, para. 94).

- International NGOs highlighted concerns about the impacts of ISDS and regulatory chill on a range of issues: environmental protection; labour rights; transparency; democracy and the role of the domestic courts; accountability of the investors; and impacts on non-parties and access to justice. (A/CN.9/935, para. 97).

- It was agreed that requiring investors to exhaust local remedies before bringing their claims to investment arbitration was a tool to be considered in reforming ISDS rather than a concern to be addressed (A/CN.9/970, para. 30).

DP14: Local remedies / Recours internes

1. Prior to submitting a claim to the Tribunal, a party may initiate a proceeding before a court or other competent authority of a Contracting Party (local adjudicatory dispute resolution proceeding), where and as available.

2. Where a party initiates a local adjudicatory dispute resolution proceeding, the limitation period in Draft Provision 16 shall be suspended:

(a) Until the party obtains a final decision of the court of last resort of that Contracting Party; or

(b) For 36 months, if no such final decision is reached within that period.

(WP.253)

DP19: Right to regulate / Droit de réglementer

- The regulatory chill effect of ISDS was mentioned as an aspect that warranted consideration by the Working Group.

- It was said that ISDS or the mere threat of using ISDS had resulted in regulatory chill and discouraged States from undertaking measures aimed to regulate economic activities and to protect economic, social and environmental rights.

- The inherent asymmetric nature of the ISDS system, costs associated with the ISDS proceedings and high amount of damages awarded by tribunals were mentioned as some of the elements that could undermine the States' ability to regulate.

- It was noted that States were in the process of reforming their investment agreements to preserve their sovereign right to regulate (A/CN.9/970, para. 36).

DP19: Right to regulate / Droit de réglementer

- It was generally agreed that the States' right to regulate was a principle of sovereignty in customary international law.
- On the one hand, in light of threat of regulatory chill, there was support for developing DP19 further and broadening to include measures relating to economic, fiscal and monetary policies, the environment, climate and ecosystem, consumer protection, subsidies, personal data and privacy, as well as cultural diversity.

- On the other hand, it was said that DP19 should be deleted:
  - as it related to the substantive protection standards and obligations of States in the Agreement and were not necessarily found in the section addressing ISDS;
  - work was taking place in other fora; and
  - inclusion of DP19 could result in depriving investors of the protection provided under the Agreement and essentially foreclose claims, which might disincentivize investment, contrary to the primary objective of investment agreements (A/CN.9/1196/Add.1, paras. 100-103).

DP19: Right to regulate / Droit de réglementer

- Three formulations of DP19 were initially considered.

- Generally, it was suggested that the formulations should be more balanced with the appropriate safeguards, for example, requiring measures by States to not be applied in a manner inconsistent with the Agreement.

- After discussion, while acknowledging that there was no agreement in the Working Group on whether DP19 should be included as a reform element, the secretariat was requested to prepare a revised draft of the latter two formulations (A/CN.9/1196/Add.1, paras. 104-107).

DP19: Right to regulate / Droit de réglementer

Alternative A

When assessing the alleged breach by a Contracting Party of its obligation under the Agreement, the Tribunal shall take into account the high level of deference that international law generally extends to a State's inherent right to set its legislative and regulatory priorities and to regulate to protect legitimate policy objectives, such as public health, public safety, human rights, the environment[, essential security interests, consumers, personal data and privacy, the climate and ecosystems, the integrity of financial and monetary systems and cultural diversity].

Alternative B

No claim may be submitted under this Agreement if the measure alleged to constitute a breach of the Agreement is non-discriminatory and adopted by the Contracting Party in good faith to protect legitimate policy objectives, such as public health, public safety, human rights, the environment[, essential security interests, consumers, personal data and privacy, the climate and ecosystems, the integrity of financial and monetary systems and cultural diversity].

(WP.262)

DP10: Counterclaim / Demande reconventionnelle

- The Working Group considered proposals with respect to whether obligations of investors warranted further consideration (for example, in relation to human rights, the environment as well as to corporate social responsibility).

- It was noted that that aspect was closely related to the question of allowing counterclaims by States as well as claims by third parties against investors.

- In that context, the general understanding was that any work by the Working Group would not foreclose consideration of the possibility that claims might be brought against an investor where there was a legal basis for doing so (A/CN.9/970, paras. 34-35).

DP10: Counterclaim / Demande reconventionnelle

- It was stated that counterclaims:
  - could enhance procedural efficiency and avoid multiple proceedings; and
  - could address the asymmetry between respondent States and claimants.

- However, concerns were raised that allowing for counterclaims:
  - could potentially lead to delays and additional costs, including a risk of parallel proceedings; and
  - there was a lack of clarity regarding the source and scope of investors' obligations that could be the basis for counterclaims.

DP10: Counterclaim / Demande reconventionnelle

1. Where a claim is submitted for resolution, the respondent may make a counterclaim:

   (a) Arising directly out of the subject matter of the claim or in direct connection with the factual or legal basis of the claim; and

   (b) That the claimant has failed to comply with its legal obligations to the respondent, including under any legally binding instrument to which the respondent is a party.

2. The submission of a claim by the claimant constitutes its consent to the submission of any counterclaim by the respondent in accordance with paragraph 1.

3. A counterclaim shall be made no later than in the statement of defence, unless the Tribunal considers that the delay in the submission of the counterclaim was justified under the circumstances.

(WP.253 and A/CN.9/1239, paras. 39-51)

DP20: Assessment of damages and compensation / Évaluation des réparations et de l'indemnisation

- It was said that ISDS or the mere threat of using ISDS had resulted in regulatory chill and discouraged States from undertaking measures aimed to regulate economic activities and to protect economic, social and environmental rights.

- The inherent asymmetric nature of the ISDS system, costs associated with the ISDS proceedings **and the high amount of damages awarded by tribunals** were mentioned as some of the elements that could undermine the States' ability to regulate (A/CN.9/970, para. 36).

- The determination of damages by arbitral tribunals was another aspect that was raised as warranting consideration by the Working Group. It was generally felt that **concerns about incorrect calculation of damages by tribunals** could be linked to other concerns, for example, concerns about incorrect decisions by arbitral tribunals (A/CN.9/970, para. 38).

DP20: Assessment of damages and compensation / Évaluation des réparations et de l'indemnisation

- **Remedies (para. 1)**
  - Tribunal may award monetary damages or restitution of property

- **Interest (para. 2)**
  - Pre-award and post-award interest may be granted at a reasonable rate

- **Assessment criteria (para. 3)**
  - Damages must arise directly from a breach of the Agreement
  - Tribunal considers: Contributory fault of claimant; failure to mitigate damages; repeal/modification of the measure; other compensation received

DP20: Assessment of damages and compensation / Évaluation des réparations et de l'indemnisation

1. The Tribunal may award, separately or in combination, only:

(a) Monetary damages and any interest in accordance with paragraph 2; and

(b) Restitution of property, in which case the decision shall provide that the respondent may pay monetary damages and any interest in accordance with paragraph 2, in lieu of restitution.

2. The Tribunal may award pre-award interest and post-award interest at a reasonable risk-free rate.

3. In assessing or calculating monetary damages, the Tribunal shall only reflect loss or damage directly caused by the breach of the Agreement. The Tribunal shall consider among others and as relevant:

(a) Contributory fault of the claimant, whether deliberate or negligent;

(b) Failure by the claimant to make all reasonable efforts to mitigate loss or damage;

(c) Repeal or modification of the measure alleged to constitute a breach of the Agreement; and

(d) Any other compensation received by, or awarded to, the claimant with regard to the same breach.

(WP.262)

DP20: Assessment of damages and compensation / Évaluation des réparations et de l'indemnisation

- **Assessment (para. 4)**
  - Satisfactory evidence, not speculative
  - [Tribunal may consider future cash flows only if profitability is proven]
  - [Optional: Damages may be capped at total investment expenditures.]

- **Punitive damages (para. 5)**
  - Not allowed

DP20: Assessment of damages and compensation / Évaluation des réparations et de l'indemnisation

4. The Tribunal shall only award monetary damages that are established on the basis of satisfactory evidence and that are not inherently speculative. [The Tribunal may award monetary damages on the basis of expected future cash flows only insofar as they are based on a case-by-case, fact-based inquiry that takes into consideration, among other factors, whether the investment has been in operation in the territory of the respondent Contracting Party for a sufficient period of time to establish a performance record of profitability.][The Tribunal shall not award monetary damages exceeding the total expenditures (adjusted for inflation) incurred by the claimant in making its investment.]

5. The Tribunal shall not award punitive damages.

(WP.262)

DP20: Assessment of damages and compensation / Évaluation des réparations et de l'indemnisation

- **Use of experts (paras. 6-7)**
  - The Tribunal may appoint one or more experts to report to it in writing on issues related to the assessment or calculation of damages
  - The Tribunal may require that experts appointed by the parties, if any, work on the basis of a harmonized, clearly defined set of instructions based on similar assumptions.

DP20: Assessment of damages and compensation / Évaluation des réparations et de l'indemnisation

[6. The Tribunal may, at the request of a disputing party or on its own initiative, appoint one or more experts to report to it in writing on issues related to the assessment or calculation of damages, subject to any terms and conditions agreed with the disputing parties.]

[7. The Tribunal may require that experts appointed by the parties, if any, on issues related to the assessment or calculation of damages work on the basis of a harmonized, clearly defined set of instructions based on similar assumptions. The Tribunal may also require:

(a) A joint statement by the experts to explain any difference in their opinions;

(b) Alternative calculations in case the experts disagree on facts and legal approaches; and

(c) A joint report by those experts.]

(WP.262)

? Procedural rules and cross-cutting issues: questions and next steps

- ✓ How should the remaining **treaty-DPs** be presented? As model treaty provisions? As a protocol to the MIIR or in the MIIR itself as core provisions?
- ✓ If presented as individual provisions, would States have full flexibility **to choose** the DPs of their choice?
- ✓ Should **alternatives** be developed for States to choose from?
- ✓ If States agree to modify their treaties, should the **disputing parties be able to opt out** or should they be mandatory?
- ✓ If the underlying Agreement has similar provisions, should there be a **conflict provisions** to address these interactions?

The next draft of the DPs (WP.267) will be available, as an advance copy, at the end of July.

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Thank you for your attention!

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