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United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
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Possible reform of investor-State dispute settlement (ISDS)

Draft provisions on procedural and cross-cutting issues

Note by the Secretariat

Contents

I. Introduction

1. At its forty-ninth session in September 2024, fiftieth session in January 2025 and fifty-first session (second part) in April 2025, the Working Group considered the draft provisions on procedural and cross-cutting issues, as contained in documents A/CN.9/WG.III/WP.244 [1] [and A/CN.9/WG.III/WP.248]. Annotations to the draft provisions were found in documents A/CN.9/WG.III/WP.245 [and A/CN.9/WG.III/WP.248].

2. At the fiftieth session in January 2025, views were expressed that procedural rules reform was a crucial pillar of the ISDS reform that could address the concerns identified by the Working Group. The need to update and modernize the procedural rules governing ISDS proceedings was stressed, including the means for States to implement the reforms by retrofitting their old-generation investment agreements. In that context, it was observed that the Working Group should take into account the interests of States, in particular those of developing and least developed countries, as well as investors and should develop comprehensive reforms (A/CN.9/1195, para. 17).

Deliberations of the Working Group

3. At its forty-ninth session, the Working Group considered draft provisions 10, 12, 13 and 20 (A/CN.9/1194, paras. 71–104). At its fiftieth session, the Working Group considered draft provisions 1 to 4 (A/CN.9/1195, paras. 23-69).[2] At its fifty-first session (second part), the Working Group considered draft provisions [14 to 19, 21 and 22] (A/CN.9/1196/Add.1, paras. ** -- **).

4. Regarding draft provisions 5–9, 11, 12 (paragraph 1–5, and 7) in document A/CN.9/WG.III/WP.244 and draft provisions 21 and 22 in document A/CN.9/WG.III/WP.248, delegations were invited to submit written comments by 7 March 2025. With regard to those draft provisions, the chair, the rapporteur and the secretariat was requested to prepare a revised text based on the comments received (A/CN.9/1195, para. 125).[3]

Possible form of the draft provisions

5. The Working Group had considered the form of the draft provisions in documents A/CN.9/WG.III/WP.244 [and A/CN.9/WG.III/WP.248].

6. At the forty-ninth session, the Working Group agreed that the draft provisions in sections B and C in document A/CN.9/WG.III/WP.244 could be considered collectively as treaty provisions for use by parties (A/CN.9/1194, para. 69).

7. [At the fifty-first session, the Working Group agreed that draft provisions 21 and 22 …].

8. With respect to draft provisions 1 to 9, 11 and 12 (paragraphs 1 to 5 and 7), it was noted that they could be drafted to supplement the UNCITRAL Arbitration Rules (UARs) and that their final form would be discussed at a later stage (A/CN.9/1194, para. 68). At its fiftieth session, the Working Group decided as a first step to review those provisions as rules to supplement the UARs and as a second step, to consider how to transform them into treaty provisions or make them applicable to existing

[1] The provisions in document A/CN.9/WG.III/WP.244 were prepared based on the deliberations of the Working Group during its forty-sixth session in October 2023 (A/CN.9/1160, paras. 86-124) and forty-seventh session in January 2024 (A/CN.9/1161, paras. 113-116), which were based on documents A/CN.9/WG.III/WP.231 and A/CN.9/WG.III/WP.232. The provisions also reflected the comments received from delegations (available below the documents for the forty-seventh session (https://uncitral.un.org/en/working_groups/3/investor-state) as well as those received during seventh inter-sessional meeting in March 2024 (A/CN.9/WG.III/WP.242, paras. 60-65).

[2] The Working Group considered those provisions based on the written comments received prior to that session. The comments are available on the Working Group III web page below the documents for the fiftieth session (https://uncitral.un.org/en/working_groups/3/investor-state).

[3] The comments are available on the Working Group III web page below the documents for the fiftieth and fifty-first sessions (https://uncitral.un.org/en/working_groups/3/investor-state).

investment agreements and to arbitrations under other arbitration rules through the multilateral instrument on ISDS reform (A/CN.9/1195, para. 22). It was further agreed that how those draft provisions could become applicable to procedures in a standing mechanism would be discussed at a third stage. As a drafting point, it was agreed that if the draft provisions contained language identical to the UARs, they should be retained to the extent that the Working Group did not wish to deviate from that approach.

9. At the same session, it was suggested that the Working Group should seek to prepare an entire set of procedural rules for ISDS, considering the potential impact that supplementary ISDS rules could have on the UARs, and the difficulties faced in drafting those rules at the current session. It was said that piecemeal amendments or supplements to the UARs might have a negative impact on the overall application of the UARs and reduce their attractiveness as a whole, and that such an approach could risk the integrity and coherence of the UARs. It was generally felt that this could be considered further after the revised set of draft provisions were prepared (A/CN.9/1195, para. 127).

10. The approach taken by the Working Group was that the draft provisions would be prepared in different forms, some to supplement the UARs and some as treaty provisions, leaving the possibility to reconsider their form at a later stage. It should, however, be noted that the draft provisions to supplement the UARs (Draft Provisions 1 to 9, 11 and 12), which is being aligned with the 2022 ICSID Arbitration Rules (ICSID Rules), would only address arbitral proceedings under UNCITRAL and ICSID. However, they would not be applicable to arbitral proceeding in other fora, which feature as options in about a third of the international investment treaties and approach taken by developing countries to promote regional dispute resolution facilities. This might result in claimants circumventing the desired reforms by choosing institutional rules that do not reflect the proposed changes.

11. Noting the concerns expressed at the forty-ninth session in January 2025 and considering that the Working Group was not able to present those draft provisions for adoption by the Commission in 2025, the Working Group may wish to consider the final form of these draft provisions including how they would interact with other applicable procedural rules including the UARs. It is suggested that the Working Group reconsiders its approach and review Draft Provisions 1 to 9, 11 and 12 as treaty provisions to ensure that they would apply to proceedings regardless of the applicable procedural rules. The Working Group may wish to also consider how the draft provisions are to be formulated as a protocol of a multilateral instrument on ISDS reform (MIIR).

12. As a second step, those provisions could be transformed into rules to supplement the UARs, which would then be aligned with the treaty provisions. As those draft provisions have been prepared in line with the UARs, consolidating them into the UARs would not require much work. This could be possible future work of Working Group II (Dispute Resolution) to update the UARs and to ensure consistency.

Introduction to chapter II

13. Accordingly, chapter II of this Note presents the revised draft provisions on procedural and cross-cutting issues.

14. For ease of reference, the numbering of the provisions in documents A/CN.9/WG.III/WP.244 and A/CN.9/WG.III/WP.248 have been retained to the extent possible.

15. Section A currently contains procedural rules for investment arbitration. Therefore, reference is made to an “arbitral tribunal.” To the extent possible, they follow the language in the UARs, unless the Working Group has decided to deviate from that approach (A/CN.9/1195, para. 23).

16. Section B contains provisions to be included in international investment agreements. These draft provisions need to be read in the context of the applicable

international investment agreement (referred to in the draft provisions as the "Agreement"). The draft provisions do not address who can submit a claim and the types of dispute resolution proceedings that can be chosen, which are left to the underlying investment agreement. For example, references to "investor", "investment", "claim" and "dispute" should be understood in the context of the respective agreement and as defined therein. The phrase "Contracting Party" in the draft provisions refers to the parties to the Agreement and "disputing parties" refers generally to an investor raising a claim under the Agreement and a respondent Contracting Party. Similarly, the term "Tribunal" in the draft provisions refer to the adjudicatory body provided for in the Agreement to resolve the disputes, including an arbitral tribunal.

II. Draft provisions on procedural and cross-cutting issues

A. Provisions on procedural issues

Draft provisions 1 to 4 were considered by the Working Group in January 2025.

Draft Provision 1: Evidence[4]

1. Each disputing party shall have the burden of proving the facts relied on to support its claim or defence.[5]

2. At any time during the proceeding, the arbitral tribunal may require the disputing parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.[6]

3. If requested by a disputing party, the arbitral tribunal may, after consulting with the disputing parties and if it deems appropriate, establish a procedure whereby each party can request another party to produce documents. In establishing the procedure, the arbitral tribunal shall consult with the disputing parties and consider the benefits and burdens of document production in the circumstances of the particular case.

4. In deciding a dispute arising out of a party's objection to the other party's request for the production of documents, the arbitral tribunal shall consider all relevant circumstances, including: (a) the scope and timeliness of the request; (b) the relevance and materiality of the documents requested; (c) the burden of production; and (d) the basis of any objection."

5. If a disputing party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.[7]

6. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party.[8] Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, shall be presented in writing, and signed by them.[9]

7. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of evidence offered.[10]

8. The arbitral tribunal shall, at the request of a disputing party or on its own initiative, exclude document, exhibits or other evidence:

[4] See A/CN.9/1195, paras. 23-43.
[5] See UARs 27(1).
[6] See UARs 27(3).
[7] See UARs 30(3).
[8] See UARs 27(2), first sentence.
[9] Modification of the UARs 27(2), second sentence.
[10] See UARs 27(4).

(a) Which were obtained contrary to the law of the State where they were collected;

(b) Which were falsified or fabricated or are found to be fraudulent; or

(c) The use of which as evidence is prohibited under the applicable domestic law or privileges.

9. The arbitral tribunal may order a visit to any place connected with the dispute, on its own initiative or at the request of a party, if it deems the visit necessary, and may conduct inquiries there as appropriate. The order shall define the scope of the visit and the subject of any inquiry, the procedure to be followed, the applicable time limits and other relevant terms. The parties shall have the right to participate in any visit or inquiry.

Note to the Working Group

17. Draft Provision 1 addresses the taking of evidence.

18. Paragraph 1 affirms that each disputing party has the burden of proving the elements of its claim (or counterclaim) or defence,[11] and the subsequent paragraphs clarify the discretion of the arbitral tribunal in the taking of evidence and its evaluation.

19. Paragraph 2 allows the arbitral tribunal to require the disputing parties to produce evidence.[12] Given the substantial amount of evidence typically provided by the disputing parties in investment disputes, it also allows the arbitral tribunal to define the evidence to be produced and set the necessary time frames.

20. Paragraphs 3 and 4 grant the arbitral tribunal discretionary power to reject a request for a document production procedure unless the request is made by all disputing parties.[13] To address concerns that document production can be burdensome, delay proceedings and possibly be misused by parties, the paragraph sets forth a clear procedure and lists the circumstances to be considered when assessing requests for document production.[14] This ensures that the arbitral tribunal carefully evaluates the necessity and impact of document requests, maintaining a fair and efficient process.

21. Paragraph 5 addresses the consequence of late submissions of evidence.[15] For the sake of efficiency, paragraph 6 establishes the default rule that witness statements are to be presented in written form and signed by the witnesses, as the Working Group agreed that the default rule should be written witness statements to enhance procedural efficiency and to align the language with ICSID Rules 38(1) (A/CN.9/1195, para. 28).

22. Paragraph 7 affirms the discretionary power of the arbitral tribunal to determine the admissibility, relevance, materiality and weight of evidence[16] and paragraph 8 lists specific instances where the arbitral tribunal would have to exclude from evidence certain documents. Lastly, paragraph 9 stipulates the authority of the Tribunal to order site visits and to conduct on-site inquiries.[17]

23. Draft provision 1 does not address experts appointed by the arbitral tribunal as this is addressed in UARs article 29 (A/CN.9/1195, para. 31).

[11] See UARs 27(1), ICSID Rules 36(2). The IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules”) also reflect this principle by describing that the parties must submit all available documents to which they will rely on.
[12] See UARs 27(3), ICSID Rules 36(3).
[13] See UNCITRAL Expedited Arbitration Rules, article 15(1).
[14] See ICSID Rules 37.
[15] See UARs 30(3).
[16] See UARs 27(4), ICSID Rules 36(1), IBA Rules 9(1).
[17] See ICSID Rules 40.

Draft Provision 2: Bifurcation[18]

1. A party may request that an issue, including the assessment of damages or a plea that the arbitral tribunal does not have jurisdiction, be addressed in a separate phase of the proceeding ("request for bifurcation"). A request for bifurcation [in accordance with paragraph 1] does not prejudice any right that a party may have to raise any other objections on the jurisdiction of the arbitral tribunal pursuant to [article 23 of the UNCITRAL Arbitration Rules].

2. The request for bifurcation shall be made as soon as possible and shall state the issue to be bifurcated. The arbitral tribunal shall fix the period of time within which submissions on the request for bifurcation shall be made by the disputing parties.

3. When determining whether to bifurcate, the arbitral tribunal shall consider all relevant circumstances, including whether:

(a) Bifurcation would materially reduce the time and cost of the proceeding;

(b) Determination of the issues to be bifurcated would dispose of all or a substantial portion of the claim; and

(c) The issues to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.

4. The arbitral tribunal shall decide on the request for bifurcation within thirty (30) days after the last submission on the request. The arbitral tribunal may decide to accept the request in full or in part, or to reject it. The arbitral tribunal shall state the reasons upon which the decision is based, unless the parties have agreed that no reasons are to be given, and shall fix any period of time necessary for the further conduct of the proceeding.

5. If the arbitral tribunal orders bifurcation, it shall suspend the proceeding with respect to any issues to be addressed at a later phase, unless the parties agree otherwise. When a request for bifurcation is made, [which includes a plea that the arbitral tribunal does not have jurisdiction], the arbitral tribunal shall suspend the proceeding on the merits until the arbitral tribunal makes a decision on the request for bifurcation, unless the parties agree otherwise.

6. The arbitral tribunal may, [after inviting the parties to express their views /after consultation with the parties], decide whether an issue should be addressed in a separate phase of the proceeding.

Note to the Working Group

24. Draft Provision 2 has been aligned with ICSID Rules 42. It should be read in conjunction with UARs 23, which addresses pleas on the jurisdiction of the arbitral tribunal (including time frames).

25. Bifurcation refers to the separation of the proceeding into different phases addressing distinct issues. In complex cases, bifurcation may allow the dispute parties and the arbitral tribunal to focus on the merits of the case first to save cost and time, and possibly settle on the damages or other issues. Furthermore, a request for bifurcation does not affect or limit any other rights a party might have, including raising other objections regarding the tribunal's jurisdiction at a later stage (A/CN.9/1195, para. 46).

26. Paragraphs 1 and 6 provide that bifurcation may take place at the request of a disputing party or upon the initiative of the arbitral tribunal. Paragraph 1 clarifies that a plea that the arbitral tribunal does not have jurisdiction[19] may be the subject of bifurcation.

[18] See A/CN.9/1195, paras. 44-55.

[19] UARs article 23(2) provide that a plea that the Tribunal does not have jurisdiction needs to be made no later than in the statement of defence.

27. The first sentence of paragraph 2 requires a disputing party to request bifurcation as soon as possible, stating the reasons. The second sentence requires the arbitral tribunal to set a time period for the parties to make submissions on the request.

28. Paragraph 3 provides a non-exhaustive list of circumstances to be considered by the arbitral tribunal when deciding on bifurcation.[20] The key consideration is whether bifurcation would enhance procedural efficiency and reduce the overall time and cost of the proceeding.

29. Paragraph 4 specifies a time period of 30 days for the arbitral tribunal to decide on bifurcation. The arbitral tribunal might grant, partially grant or reject the request, but the decision should be reasoned. This aligns with UARs article 34(3).

30. In case of bifurcation, the proceeding on the remaining issues shall be suspended (paragraph 5). The suspension ensures that jurisdictional issues are resolved before proceeding further, unless both parties agree otherwise.

31. Paragraph 6 grants the arbitral tribunal the discretion to bifurcate the proceeding on its own initiative, but only after consulting with the parties. The phrase "after consultation with the parties" is bracketed because a rule akin to ICSID Rules 27(3) (which provides a general rule requiring the tribunal to consult the parties before making an order or decision on its own initiative) could be incorporated into the Draft Provisions (A/CN.9/1195, para. 55).

Draft Provision 3: Interim/provisional measures[21]

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself; or

(c) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (c), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

[20] See ICSID Rules, Rule 42(4).
[21] See A/CN.9/1195, paras. 56–62.

7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceeding.

9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

10. The arbitral tribunal shall not grant interim measures:

(a) Which attaches or enjoins the application of the measure alleged to constitute a breach referred to in the claim; or

(b) [Which impedes a State's right to regulate in the public interest, including in order to protect life, health and environment.]

Note to the Working Group

32. Interim measures aim to preserve the parties' rights, both substantive and procedural, pending the final decision of the arbitral tribunal on the merits of the claim. The Working Group generally agreed that article 26 should provide the basis for these provisions (A/CN.9/1195, para. 56) and paragraphs 1 to 10 reflect the language of that article.

33. Paragraph 1 confirms that the arbitral tribunal should not have the authority to grant interim measures on its own initiative (A/CN.9/1195, para. 62).

34. Paragraph 10 limits the arbitral tribunal's discretionary power in granting interim measures. Subparagraph (b) is placed in square brackets as it was considered difficult for the arbitral to make the necessary assessment given the interim character of these measures (A/CN.9/1195, para. 61). The Working Group may wish to consider subparagraph (b) also in the context of Draft Provision 19.

Draft Provision 4: Manifest lack of legal merit/early dismissal[22]

1. A party may object that a claim is manifestly without legal merit.

2. A disputing party shall make the objection as soon as possible after the constitution of the arbitral tribunal and no later than 60 days after its constitution. The arbitral tribunal may admit a later objection if it considers the delay justified.

3. The objection may relate to the substance of the claim or the jurisdiction of the arbitral tribunal. The objection shall specify the grounds on which it is based and contain a statement of the relevant facts, laws and arguments. The arbitral tribunal shall fix the period of time within which submissions on the objection shall be made by the parties.

4. The arbitral tribunal shall decide on the objection within 60 days after the last submission on the objection.

5. If the arbitral tribunal decides that all claims are manifestly without legal merit, it shall make an award to that effect. Otherwise, the arbitral tribunal shall make a decision on the objection and fix any period of time for the further conduct of the proceeding.

6. A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of the disputing party to raise a plea that the arbitral tribunal

[22] See A/CN.9/1195, paras. 63–69.

does not have jurisdiction or to argue subsequently in the proceeding that the claim is without legal merit.

Note to the Working Group

35. Allowing for early dismissal of frivolous and manifestly unfounded claims is an important tool to prevent the abuse of the ISDS system and to guarantee effective access to justice for other claims. An early dismissal procedure allows manifestly unmeritorious claims to be dismissed early in the process before they unnecessarily consume the parties' resources.

36. Draft Provision 4 is aligned with Rule 41 of the ICSID Rules, which allows a disputing party to object that a claim is manifestly without legal merit. Paragraph 1 provides that a party may raise an objection upon which the tribunal may dismiss the claim. The arbitral tribunal should not dismiss a claim on its own initiative (include reference).

37. Paragraphs 2 to 5 outline the procedure to be followed by the parties as well as the Tribunal, indicating the time frames and noting that the request for early dismissal may relate to both jurisdiction and merits.

38. Paragraph 6 clarifies that even if a disputing party did not prevail in the procedure, it may argue later in the proceeding that the Tribunal lacks jurisdiction or that the claim lacks legal merit.

39. The rule for allocating costs arising from the procedure can be found in Draft Provision 9(4).

According to the request by the Working Group, Draft Provisions 5 to 12 (excluding Draft Provision 10) will be revised by the chair, rapporteur and the secretariat based on written comments.

Draft Provision 5: Security for costs

1. The arbitral tribunal may, at the request of a party, order any party making a claim [or counterclaim] to provide security for costs.

2. The request shall include a statement of the relevant circumstances and the supporting documents. The arbitral tribunal shall fix the period of time within which submissions on the request shall be made by the parties.

3. The arbitral tribunal shall decide on the request within 30 days after the last submission on the request.

4. In determining whether to order a party to provide security for costs, the arbitral tribunal shall consider all relevant circumstances, including:

(a) That party's [ability] [financial capacity] to comply with an adverse decision on costs;

[(b) That party's willingness to comply with an adverse decision on costs;]

[(c) The effect that providing security for costs may have on that party's ability to pursue its claim [or counterclaim]];

(d) The conduct of the parties; and

[(e) The existence of third-party funding to support that party in pursuing its claim [or counterclaim]].

5. The arbitral tribunal shall specify any relevant terms in an order to provide security for costs and fix a period of time for compliance with that order.

6. If a party fails to comply with the order to provide security for costs, the arbitral tribunal [may] [shall] order the suspension of the proceeding for a fixed period of time. If the proceeding is suspended for more than [90] days, the arbitral tribunal [may][shall], after inviting the parties to express their views, order the termination of the proceeding.

7. A disputing party shall promptly disclose any material change in the circumstances upon which the arbitral tribunal ordered security for costs.

8. The arbitral tribunal may at any time modify or terminate its order to provide security for costs, at the request of a party [or on its own initiative].

Note to the Working Group

40. Security for costs could protect a respondent State against a claimant's inability or unwillingness to pay costs and further discourage frivolous claims. Draft Provision 5 is aligned with Rule 53 of the ICSID Rules.

41. Paragraph 1 specifies that an order for security for costs may be made at the request of a disputing party. The Working Group may wish to consider whether only claimants should be ordered security for costs, or if a respondent State making a counterclaim may also be ordered security for costs. *Written comments diverged - some expressed that security for costs should be ordered only to claimant investors. As a drafting point, it was suggested that reference be made to the "claimant" in the Draft Provision instead of "a party."*

42. Paragraph 2 addresses how a disputing party should request the arbitral tribunal and paragraph 3 how the arbitral tribunal should proceed, indicating also the time frame (30 days) within which the tribunal should decide on such request.

43. Paragraph 4 provides a non-exhaustive list of circumstances for the tribunal to consider. *Based on written comments consider (i) replacing the word "ability" with "financial capacity" in subparagraph (a) and (ii) whether to retain subparagraphs (b), (c) and (e). See ICSID Rules 53(4) providing that the existence of third-party funding could be considered as evidence in assessing whether other circumstances exist, such as a party's ability to comply with an adverse costs decision—rather than as a standalone factor.*

44. Paragraph 5 requires the arbitral tribunal to specify the terms of the security to be provided and to indicate a time frame within which the order should be complied with. Paragraph 6 deals with possible non-compliance by the disputing party, which may result in the suspension or the termination of the proceeding (see Draft Provisions 6 and 7). *Written comments suggest that the tribunal should have no discretion in imposing sanctions for non-compliance, and that a State may have strategic reasons for choosing not to comply with the order (particularly if a respondent State is ordered security for costs for its counterclaim).*

45. Paragraph 7 requires the parties to disclose any material change in the circumstances that led the arbitral tribunal to order security for costs and paragraph 8 gives discretion to the tribunal to modify or terminate the order to provide security for costs. *Written comments suggest that this should occur only at the request of a party, and not on the tribunal's own initiative.*

Draft Provision 6: Suspension of the proceeding

1. The arbitral tribunal shall order the suspension of the proceeding when requested jointly by the parties.

2. The arbitral tribunal may, at the request of a party or on its own initiative, order the suspension of the proceeding [after inviting the parties to express their views].

3. In its order of suspension, the arbitral tribunal shall specify the period of suspension and any relevant terms of the suspension. Time frames set out in the rules applicable to the proceeding shall be extended by the period of time for which the proceeding is suspended.

4. The arbitral tribunal may, at the request of a disputing party or on its own initiative, extend the period of suspension prior to its expiry, after inviting the parties to express their views. The arbitral tribunal shall extend the period of suspension prior to its expiry by agreement of the parties.

Note to the Working Group

46. One way to ensure procedural efficiency is to suspend or stay the proceeding under certain circumstances. Draft Provision 6, which is aligned with Rule 54 of the ICSID Rules, clarifies when the arbitral tribunal may suspend the proceeding.[23]

47. Paragraph 1 provides that the arbitral tribunal should suspend the proceeding at the joint request of the parties, for example, if they want to engage in mediation (see UNCITRAL Model Provisions on Mediation for International Investment Disputes, Provision 3(2)).

48. Paragraph 2 grants discretion to the arbitral tribunal to suspend the proceeding at the request of a disputing party or on its own initiative, but only after obtaining the views of the parties. *Written comments note the ambiguity about obtaining the views of the parties, which may need to be handled more generally as part of the obligation of the arbitral tribunal to consult the parties (see para. 31 above).*

49. When ordering suspension, the arbitral tribunal shall specify the period of suspension (which may be extended) and any other terms. During the suspension, other time frames in the applicable rules are stalled, resulting in their extension (paragraph 3).

Draft Provision 7: Termination of the proceeding

1. The arbitral tribunal shall order the termination of the proceeding when requested jointly by the parties.

2. If a party requests the termination of the proceeding, the arbitral tribunal shall fix a period of time within which the other party may object to the termination.

3. If no objection is made within the fixed period of time, the other party shall be deemed to have agreed to the termination, and the arbitral tribunal shall order the termination of the proceeding. If an objection is made within the fixed period of time, the proceeding shall continue.

[4. If the parties agree on a settlement of the dispute before the award is rendered, the arbitral tribunal:

(a) shall issue an order taking note of the termination of the proceeding, if the parties so request; or

(b) may record the settlement in the form of an award, if the parties file the complete and signed text of their settlement and request that the tribunal embody such settlement in an award.

5. Following the submission of a claim to arbitration, if the parties fail to take any steps in the proceeding for more than 150 days, or such period as they may agree with the approval of the tribunal, the tribunal shall notify the parties that they shall be deemed to have discontinued the proceeding if the parties fail to take steps within 30 days after the notice is received. If the parties fail to take any action within that period, the tribunal shall record the termination in an order. If a tribunal has not yet been constituted, the appointing authority shall assume these responsibilities.]

Note to the Working Group

50. Another way to ensure procedural efficiency is to terminate the proceeding under certain circumstances. Draft Provision 7 is aligned with ICSID Rules 55(1) and 56(1) on the discontinuance of the proceeding using the term “termination” as used in the UARs.[24] It does not address the situation where the parties have agreed on a

[23] Article 43(4) of the UNCITRAL Arbitration Rules also provides for the suspension of the proceeding, but its application is limited to circumstances when the deposit of costs is not paid in whole or in part.

[24] The UARs mention termination of proceedings in different situations, such as when deposit for

settlement, as that is addressed by UARs 36(1). ICSID Rules 57 ("Discontinuance for failure of parties to act") is not reflected as this issue is addressed by UARs 30. *Written comments indicate a preference for closer alignment with the ICSID Rules with more detailed provisions, including the inclusion of new paragraphs 4 and 5 based on ICSID Rules 55(2) and 57 (to be further considered in conjunction with UARs 30 and 36(1)).*

51. Paragraph 1 requires the arbitral tribunal to order the termination of the proceeding when parties jointly make the request. Paragraphs 2 and 3 address a situation where a disputing party unilaterally requests termination of the proceeding. If there is no objection within the fixed time limit, it is deemed to construe consent by the other party to the termination. If the other disputing party objects, the proceeding shall continue. *Written comments suggest considering the potential misuse of paragraph 1 and possible discretion to be given to the tribunal.*

Draft Provision 8: Period of time for making the award

1. [Unless otherwise agreed by the parties,] the arbitral tribunal shall make the award as soon as possible, and in any event no later than:

(a) 60 days after the later of the constitution of the arbitral tribunal constitution or the last submission, if the award is made in accordance with Draft Provision 4(5);

(b) 180 days after the last submission, if the award is made in accordance with Draft Provision 2 and article 23 of the UNCITRAL Arbitration Rules; or

(c) [6 months] [240 days] [18 months] after the last submission in all other cases.

2. A statement of costs and submission on the allocation of costs filed pursuant to Draft Provision 9 shall not be considered a submission for the purposes of paragraph 1.

[3. The arbitral tribunal may, in exceptional circumstances and after inviting the parties to express their views, extend the period of time established in accordance with paragraph 1 and indicate a period of time within which it shall make the award.]

Note to the Working Group

52. Draft Provision 8 addresses the concerns expressed with regard to the duration of ISDS proceeding. It imposes a time frame within which the arbitral tribunal should make the award. *Based on written comments, it has been aligned more closely with Rule 58 of the ICSID Rules with detailed time frames, which commence either after the constitution of the arbitral tribunal or the last submission by the parties. The time frames in paragraph 1 will need to be reviewed taking into account the different time frames in the Draft Provisions (for example, Draft Provisions 2 and 4) and UARs 23. Meaning of "last submission" in the context of ad hoc arbitration.*

53. Paragraph 2 is based on ICSID Rules 58(2).

54. Paragraph 3 allows the tribunal to extend the deadline in exceptional circumstances after consulting the parties, which could ensure the enforceability of the award even if the deadlines were not met.[25] *Written comments suggest a possible deletion of paragraph 3, which may, however, limit the flexibility. The consequences of non-compliance with the suggested time frame need to be considered.*

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costs of arbitration is unpaid (Article 43(3)), and when the claimant fails to communicate its statement of claim, without showing sufficient cause, within a fixed period of time (Article 30(1)). UARs 36 addresses termination generally, when parties agree on the settlement of the dispute, or when the continuation of the arbitral proceedings becomes unnecessary or impossible.

[25] This extension mechanism is inspired by article 16 of the UNCITRAL Expedited Arbitration Rules, which sets a six-month period from the tribunal's constitution and provides a detailed procedure for extensions in exceptional cases.

Draft Provision 9: Allocation of costs

1. The costs of the proceeding shall in principle be borne by the unsuccessful disputing party.

2. However, the arbitral tribunal may [exceptionally] allocate the costs between the parties, if it determines the allocation to be reasonable taking into account all relevant circumstances of the case, including:

(a) The outcome of the proceeding or any parts thereof [taking into account which claims were upheld and dismissed at the jurisdiction, merits and quantum stages];

(b) The conduct of the parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner in accordance with the applicable rules and complied with the orders and decisions of the arbitral tribunal;

(c) The complexity of the issues;

(d) The reasonableness of the costs claimed by the parties;

(e) [The existence of third-party funding] [a failure by a party to comply with its disclosure obligations in Draft Provision 12]; and

(f) The amount of monetary damages claimed by the claimant in proportion to the amount awarded by the arbitral tribunal,

[(g) The proportionality of the costs of the parties].

3. The arbitral tribunal shall request that each party file a statement of its costs and a written submission on the allocation of costs before allocating the costs between the parties.

[4. When allocating costs between the parties and when examining their reasonableness, the arbitral tribunal shall consider the differences or gaps between the expenses and costs submitted by each party.]

5. [Unless otherwise determined by the arbitral tribunal,] expenses incurred by a disputing party related to or arising from third-party funding [, including expenses paid by the funder to support a party's claim] shall not be included in the costs of the proceeding.

6. [Paragraphs 1 to 5 apply to any costs arising from an objection by a party that a claim is manifestly without legal merit in accordance with Draft Provision 4.] [If the arbitral makes an award pursuant to Draft Provision 4, the arbitral tribunal shall award the prevailing party its reasonable costs, unless there are exceptional circumstances justifying a different allocation of costs.]

7. The arbitral tribunal may, at the request of a party or on its own initiative, make an interim decision on costs at any time.

8. The arbitral tribunal shall ensure that all decisions on costs are reasoned and form part of the award.

Note to the Working Group

55. Based on UARs 42, Draft Provision 9 is aligned with Rule 52 of the ICSID Rules 52. UARs 40 defines the meaning and scope of "costs".

56. Paragraph 1 provides the default rule that the unsuccessful disputing party should bear the costs of the proceeding, in whole or in part ("costs follow the event" principle).[26] The Working Group may wish to confirm this rule noting that under the ICSID Convention Article 61(2), there is no such presumption. – whether the term "exceptionally" should be added in paragraph 2.

[26] See UARs 42(1), first sentence.

57. Following Rule 52(1) of the ICSID Rules, paragraph 2 lists factors to be taken into account in reasonably allocating the costs between the parties (illustrative and non-exhaustive list).[27] *Written comments suggest considering whether subparagraph (a) should be further elaborated, whether subparagraph (e) should refer instead non-compliance of the parties with regard to third-party funding disclosure obligations in Draft Provision 12 (also noting that ICSID Rule 52 does not explicitly mention TPF, while tribunals retain the discretion to consider all relevant circumstance), whether subparagraph (f) should also apply to respondents' exaggerated defences or objections, and whether to add subparagraph (g) to the list (see also paragraph 4).*

58. Paragraph 3 follows Rule 51 of the ISCID Rules introduces a safeguard requiring the arbitral tribunal request each party to submit a statement of its costs and a written submission on the allocation of costs before the tribunal makes any decisions on cost allocation. *Written comments express doubts about requiring parties to submit an estimate of costs to be incurred by them at the outset or early stages of the proceeding.*

59. Paragraph 4 is based on a written submission – might be better placed in paragraph 2.

60. Paragraph 5 reflects the view that costs related to third-party funding should not be allocated and be recoverable (A/CN.9/1004, para. 93). *Written comments indicate that the arbitral tribunal should not have the discretion to provide otherwise or to provide the criteria for determining "otherwise". Questions are posed on how those costs can be distinguished from other costs that are recoverable and whether additional clarification should be provided.*

61. Paragraph 6 reflects the agreement of the Working Group that the allocation of costs arising from the procedure in Draft Provision 4 should be addressed in Draft Provision 9 (A/CN.9/1195, para. 69). *However, written comments indicate that there is no need to include paragraph 7 as it reiterates the principles outlined in the previous paragraphs – and to consider further whether a specific rule on cost allocation for claims manifestly without merit is necessary, and whether the Draft Provision should be aligned closer to ICSID Rules 52(2).*

62. Paragraph 7 allows the Tribunal to make an interim decision on costs before the final award, either upon a request of a disputing party or on its own initiative. *Written comments suggest considering whether specific guidelines should be developed on the requirements and criteria for such interim cost decisions.*

63. Paragraph 8 requires that decisions on costs are reasoned and eventually form part of the final award.

Draft Provision 11: Consolidation and coordination of arbitral proceedings

1. Where two or more claims have been submitted separately, the parties may agree to consolidate or coordinate the relevant arbitral proceedings [involving the same State].

2. Consolidation shall join all aspects of the proceedings sought to be consolidated and result in a single award. Coordination aligns specific procedural aspects of the proceedings, but they remain separate and result in separate awards.

3. [The parties shall provide the proposed terms for the conduct of the consolidated or coordinated proceedings to the arbitral tribunals.] [The parties shall jointly provide the administering institution, or the tribunals where there is no administrating

[27] See also UNCITRAL Notes on Organizing Arbitral Proceedings, para. 48, which provides: "In allocating costs, the arbitral tribunal may also consider certain conduct of the parties. Conduct so considered might include a party's: (a) failure to comply with procedural orders of the arbitral tribunal; or (b) procedural requests (for example, document requests, procedural applications and cross-examination requests), that are unreasonable, to the extent that such conduct actually had a direct impact on the costs of the arbitration and/or is determined by the arbitral tribunal to have unnecessarily delayed or obstructed the arbitral proceedings."

institution, with the proposed terms for the conduct of the consolidated or coordinated proceedings and consult with the administering institution or the arbitral tribunals to ensure that the proposed terms are capable of being implemented.]

[4. Where there is an administering institution, after the consultation referred to in paragraph (3), the administering institution shall communicate the proposed terms agreed by the parties to the arbitral tribunals. Such arbitral tribunals shall make any order or decision required to implement these terms.]

[5. Where there is no administering institution, after the consultation referred to in paragraph (3), the arbitral tribunals shall implement the proposed terms as agreed by the parties and shall make any order or decision as required to implement these terms.]

6. This provision shall be without prejudice to the right of a party to seek consolidation or coordination under the Agreement.

Note to the Working Group – see also Draft Provision 11 bis

64. Draft Provision 11 has been aligned with Rule 46 of the ICSID Rules on consolidation or coordination of arbitrations. Consolidation refers to the combining of multiple proceedings involving the same State, which had been commenced separately, into a single proceeding (see Additional Facility Arbitration Rule 56) and resulting in one award. Coordination refers to the alignment of specific procedural aspects of proceedings, which had been commenced separately, remain separate and will result in separate awards.

65. Consolidation and coordination can streamline the handling of multiple or parallel proceedings, reducing the burden on the parties. It may also prevent inconsistent decisions by Tribunals on the same measures or issues. While it would be ideal to consolidate or coordinate proceedings that have an issue of law or fact in common or that arise out of the same events or circumstances, Draft Provision 11 relies on the parties' consent for consolidation or coordination. This is because the type of proceedings envisaged under the Agreement may be quite different (including the applicable arbitration rules) and as there may not be an administering institution or authority to facilitate consolidation or coordination of such proceedings. – Clarification required on whether "all aspects" of the proceedings must be consolidated, or whether "all aspects … sought to be consolidated" must be consolidated. It is unclear whether "all aspects" of the proceedings must be consolidated or only those aspects "sought to be consolidated."

66. When determining whether to consolidate or coordinate, the parties should take into account all relevant circumstances, including whether: (i) the proceedings pertain to the same or similar issues of fact or law; (ii) those issues arise out of the same event; and (iii) consolidation or coordination would promote fair and efficient resolution of claims and ensure consistent decisions. – Written comment – whether paragraph 1 should be limited to when two or more claims involve the same responding State adapting from Rule 46(2) of the ICSID Rules, clarify the meaning of "relevant' proceedings (for example, where fundamental facts or legal relationships are identical or similar, or cases involving a counterclaim) and whether explicitly specify a time frame within which consolidation and coordination are permissible during the proceedings.

67. Paragraph 3 provides that the parties should agree upon the proposed terms of the consolidated proceeding. For example, this may indicate which of the Tribunals would be tasked with the consolidated proceeding (or how it should be composed) as well as any applicable rules and a procedural schedule. The terms should also address the termination of the proceeding that is to be consolidated. *Written comments suggest considering how to address situations where the arbitral tribunal is yet to be constituted.*

68. *Based on written comments - Drawing from ICSID Rule 46(4) and (5), consider whether paragraphs 3 to 5 provide sufficient clarity on how consolidated or coordinated proceedings will be conducted, regardless of the presence of an*

administering institution. The ICSID Rules address the procedural steps for consolidating or coordinating proceedings, and the Draft Provision aims to reflect similar process, but with adjustments to accommodate both scenarios — where an administering institution is present and where it is not.

69. Paragraph 6 confirms that a party may seek consolidation or coordination of the proceedings under the applicable procedural rule, if available. Such a procedure may differ considerably, particularly in terms of the party entitled to seek consolidation or coordination as well as the procedure itself.[28] *Written comments question whether paragraph 6 is necessary.*

Draft Provision 12: Third-party funding

1. "Third-party funding" means the provision of any direct or indirect funding to a [disputing] party by a [natural or legal person][third party] that is not a [disputing] party to the proceeding but enters into an agreement to provide, or otherwise provides, [total or partial] funding ("third-party funder") for a proceeding, [including a firm that represents a party], either through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.

2. A [disputing] party in receipt of third-party funding shall disclose to the arbitral tribunal, the other [disputing] party [and the public], the following information:

(a) The name and address of the third-party funder [and in case it is a legal entity, the name(s) of the person(s) who own or control that legal entity];

(b) The name and address of the beneficial owner of the third-party funder and any natural or legal person with decision-making authority for or on behalf of the third-party funder in relation to the proceeding;

[(c) Information regarding the funding agreement and the terms thereof;]

[(d) Whether the third-party funder agrees to cover any adverse decision on costs];

[(e) Any right of the third-party funder to control or influence the management of the claim or the proceeding or to terminate the funding agreement];

[(f) Any agreement between the third-party funder and the legal representative of the disputing party];

[(g) Any changes in relation to third-party funding which must also be reported to the court and the other litigating party immediately];

[(h) Any relationship that may exist between the third-party funder or its ultimate beneficiary and any of the arbitrators constituting the arbitral tribunal];

[(i) The interest that the third-party funder may have in the outcome of the proceeding]

[(j) The capacity of the third-party funder to finance all stages of the proceeding, including any adverse decisions on costs]

[(k) Other claims funded by the third-party funder and/or related entities against the same respondent]

[3. The representatives of a party acting as third-party funders in accordance with paragraph 1 shall disclose it mutatis mutandis as provided in paragraph 2.]

4. In addition, the arbitral tribunal may require the funded party to disclose information as deemed necessary [regarding the funding agreement and the third-party funder] [subject to applicable law], for example:

[(a) Information regarding the funding agreement and the terms thereof;

[28] See CPTPP, Article 9.28 and EU-Singapore IPA, Article 3.24.

(b) Whether the third-party funder agrees to cover any adverse decision on costs;

(c) Any right of the third-party funder to control or influence the management of the claim or the proceeding or to terminate the funding agreement;

(d) Any agreement between the third-party funder and the legal representative of the disputing party].

5. The funded party shall disclose the information listed in paragraph 2 [as soon as possible] [when communicating the notice of arbitration or the response to the notice of arbitration, or if the funding agreement is entered into afterwards, immediately thereafter]. The funded party shall disclose the information required by the arbitral tribunal in accordance with paragraph 4 as promptly as possible and within the period of time specified by the arbitral tribunal.

6. If there is any new information or any change in the information disclosed in accordance with paragraphs 2 and 3, the party shall disclose such information to the arbitral tribunal, the other party [and the public] as promptly as possible.

7. If a party fails to comply with the disclosure obligations in paragraphs 2 to 6, the arbitral tribunal may:

[(a) Suspend or terminate the proceeding in accordance with Draft Provisions 6 or 7];

(b) Order security for costs in accordance with Draft Provision 5; or

(c) Take this fact into account when allocating costs in accordance with Draft Provision 9.

Note to the Working Group – see also Draft Provision 12 bis

70. Disclosure of third-party funding serves to prevent conflicts of interest and enhances transparency. As such, a number of recent investment agreements and arbitration rules include rules on disclosure of third-party funding.[29] Furthermore, in order to comply with article 11(2)(a)(iv) of the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution and article 9(3)(a)(iv) of the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution, it would be necessary for an arbitrator or a judge to have information about any third-party funder to assess possible conflicts of interest.

71. Draft Provision 12 adopts a permissive approach to third-party funding requiring parties to disclose the existence of third-party funding and relevant information, while limiting third-party funding in limited circumstances.

72. The Working Group agreed that disclosure requirements for third-party funding would be developed as a separate provision under Section A (see A/CN.9/1194, para. 92). Accordingly, it outlines the obligations for parties to disclose information about third-party funding to the arbitral tribunal and the other parties, promoting transparency and preventing undue influence in the proceeding.

73. Paragraph 1 provides a broad definition of third-party funding to ensure adequate disclosure, which would allow for the identification of any conflict of interest.

74. *Based on the written comments, redrafting would need to consider*

75. *Regarding paragraph 1,*

- *if formulated as a treaty provision, the word "disputing" would appear in front of the word "party" to distinguish it from Treaty parties;*

[29] See ICSID Rules 14; ICC Arbitration Rules, Article 11(7). In addition, the Modernization Agreement includes a new provision requiring both disputing parties to disclose information on a third party financing its litigation costs.

- *Whether to elaborate that a "firm representing a party" could be included as a third-party funder;*
- *Whether to replace the words "natural or legal person" with "third party" to ensure that entities without legal personality are covered by the definition – however, this would be a circular definition;*
- *Whether to clarify that funding may be "total or partial" and whether the consequences would be different;*
- *To distinguish non-profit funding and for-profit funding and whether the treatment should be different;*
- *Whether "funding" should be understood to be limited to "financial support" or could be broader to include "non-financial support".*

76. *Regarding paragraph 2,*

- *Whether the disclosure should be made to the public (see also paragraph 6) and how;*
- *Whether in subparagraph (a), the rule should specify instances where the third-party funder is a legal entity;*
- *Whether the information to be disclosed under paragraph 2 should be expanded to those under subparagraphs (c) to (f) (which were previously listed under paragraph 4) – making them mandatory (this may need to be discussed in conjunction with paragraph 4);*
- *Whether the disclosure of the full terms of the funding agreement should not be required;*
- *Whether the information to be disclosed under paragraph 2 should be further expanded to those under subparagraph (g) to (k) – taking into account whether all of the information would be available to the funded party;*
- *In relation to subparagraph (c), whether to specify the key terms of the funding agreement that is subject to disclosure such as rate of return*.

77. Paragraph 3 reflects the suggestion that a representative of a funded party, which falls under the definition of a third-party funder in accordance with paragraph 1, should have the same disclosure obligation as the funded party – this broadens the obligation to certain third-party funders, and would need to clarify whether the obligation falls on both the party and the representative and the consequences of non-disclosure by the representative

78. *Based on written comments regarding paragraph 4, consider*

- *Whether to simply state the rule that the arbitral tribunal may require disclosure of additional information;*
- *Whether to limit it to information regarding the funding agreement and the third-party funder (Rule 14(4) of the ICSID Rules);*
- *Whether to indicate that disclosure of additional information would be subject to applicable law – may need to clarify whether this only applies to additional information and not the information in paragraph 2 and what the applicable law would be;*
- *Whether to provide an illustrative list of information that may be requested by the arbitral tribunal (in conjunction with paragraph 2 – whether they should be the subject of mandatory disclosure);*
- *Whether the specific terms of the funding agreement should not be the subject of disclosure;*

– *If the funding agreement provides that the third-party funder agrees to cover any adverse decisions on costs, whether this would remove the need to order security for costs.*

79. Regarding paragraph 5, *written comments prefer an early disclosure by the funded party prior to the statement of claim. In this regard, paragraph 5 should also address disclosure by respondents.*

80. Paragraphs 7 sets out the measures that can be taken by the arbitral tribunal when a disputing party fails to comply with the disclosure obligations or when the disputing parties receives funding which is not permissible.[30]

81. *Based on written comments regarding paragraph 7, consider*

– *Whether suspension and termination of the proceeding (subparagraph (a)) is an appropriate measure to counter non-compliance (and that it should be limited to exceptional cases) while another view is that subparagraph (a) should be the sole measure available as subparagraphs (b) and (c) do not necessarily achieve the objective required;*

– *Whether additional guidance on the circumstances of failures and relevant factors should be provided in paragraph 7;*

– *Regarding subparagraph (b), whether the existence of third-party funding should be the basis of ordering security for costs or limited only to the non-compliance with the disclosure obligation;*

82. The Working Group may also wish to note that the ICSID Rules do not contain any sanctions for non-compliance, but this may be taken into account by the arbitral tribunal in allocating cost in accordance with ICSID Rules 52(1)(b).

B. Provisions for inclusion in international investment agreements

Draft Provisions 10, 12 *bis*, 13 were considered by the Working Group in September 2024. Draft Provision 11 *bis* was included based on written submissions.

Draft Provision 10: Counterclaim[31]

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 [close] connection with the factual or legal basis of the claim; and

(b) That the claimant has failed to comply with its obligations under the Agreement, domestic law, any relevant investment contract or any other instrument binding on the claimant.

2. The submission of a claim by the claimant [constitutes] [is deemed to constitute] its consent to any submission of a 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.

4. The respondent may not make a counterclaim, which it had initiated in a proceeding before any court, administrative tribunal, or other dispute settlement

[30] See Indonesia-Australia Comprehensive Economic Partnership Agreement (CEPA) (2019), Article 14.32(3); EU-Vietnam IPA, Article 3.37(3); CIETAC International Investment Arbitration Rules (2017), Article 27(3); Argentina-Chile FTA, Article 8.27(2).

[31] See A/CN.9/1194, paras. 71-81, see also A/CN.9/WG.III/WP.245, paras. 37-40.

procedure. When making a counterclaim, the respondent shall [provide a statement waiving] [waive] its right to initiate or continue any proceedings before any court, administrative tribunal, or other dispute settlement procedure regarding the same claim.

Note to the Working Group

83. Draft Provision 10 reproduces the text suggested at September 2024 session (A/CN.9/1194, para. 80).

84. Paragraph 1 provides the conditions to be met for a respondent to bring a counterclaim. The Working Group may wish to confirm that the conditions in subparagraphs (a) and (b) are cumulative ("and"). Subparagraph (b) does not list nor specify such obligations of investors but rather indicate the instruments where they may be found. The Working Group may wish to consider: (i) whether to include the word "close" in subparagraph (a); and (ii) whether to include "any other instrument binding on the claimant" in subparagraph (b), which is intentionally broad to cover instruments that may be developed in the future.

85. To avoid Tribunals dismissing counterclaims on grounds of a lack of consent by the claimant, paragraph 2 ensures that the submission of a claim by the claimant constitutes its consent to the respondent's right to submit a counterclaim. The Working Group may wish to consider whether the consent in paragraph 2 should be "deemed".

86. Paragraph 3 addresses the timing of counterclaims to ensure that counterclaims do not result in delays.

87. Paragraph 4 reflects the suggestion that a rule requiring the respondent to waive its right to initiate any adjudicatory dispute resolution proceeding regarding the same claim as the counterclaim should be included (A/CN.9/1194, paras. 81). It ensures that once a counterclaim is submitted, the respondent cannot pursue the same claim in another forum, thereby avoiding multiple proceedings and potential conflicting decisions. The Working Group may wish to consider the appropriate formulation.

Draft Provision 11 *bis*: Consolidation and coordination of proceedings

Suggested language based on CPTPP Article 9.28, see also USMCA Article 14.D.12

1. If two or more claims have been submitted separately to arbitration under the Agreement and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

2. A disputing party that seeks a consolidation order under this Draft Provision shall deliver, in writing, a request [to the Secretary-General] and to all the disputing parties sought to be covered by the order and shall specify in the request: (a) the names and addresses of all the disputing parties sought to be covered by the order; (b) the nature of the order sought; and (c) the grounds on which the order is sought.

3. Unless [the Secretary-General] finds within a period of 30 days after the date of receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Draft Provision.

4. Unless all the disputing parties sought to be covered by the order agree otherwise, a tribunal established under this Draft Provision shall comprise three arbitrators: (a) one arbitrator appointed by agreement of the claimants; (b) one arbitrator appointed by the respondent; and (c) the presiding arbitrator appointed by the [Secretary-General], provided that the presiding arbitrator is not a national of the respondent or of a Party of any claimant.

5. If, within a period of 60 days after the date when the [Secretary-General] receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the [Secretary General], on

request of any disputing party sought to be covered by the order, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

6. If a tribunal established under this Draft Provision is satisfied that two or more claims that have been submitted to arbitration under Article 9.19.1 (Submission of a Claim to Arbitration) have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order: (a) assume jurisdiction over, and hear and determine together, all or part of the claims; (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or (c) instruct a tribunal previously established under Article 9.22 (Selection of Arbitrators) to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that: (i) that tribunal, on request of a claimant that was not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and (ii) that tribunal shall decide whether a prior hearing shall be repeated. If a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 9.19.1 (Submission of a Claim to Arbitration) and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph

7. The request shall specify: (a) the name and address of the claimant; (b) the nature of the order sought; and (c) the grounds on which the order is sought. The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 9.22 (Selection of Arbitrators) shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On the application of a disputing party, a tribunal established under this Draft Provision, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 9.22 (Selection of Arbitrators) be stayed, unless the latter tribunal has already adjourned its proceeding.

Suggested language for consolidation in the context of a standing mechanism

“1. If two or more claims submitted pursuant to Article 6 have a question of law or fact in common and arise out of the same events or circumstances, the respondent may deliver to each claimant a request to agree on the consolidated consideration of all those claims or part of them (hereinafter referred to as "consolidation request"). The consolidation request shall stipulate:

(a) the names and addresses of the disputing parties to the claims sought to be consolidated;

(b) the scope of the consolidation order sought; and

(c) the grounds for the consolidation order sought.

2. The respondent shall at the same time submit a copy of the consolidation request to the President of the Tribunal.

3. If all the disputing parties to the claims sought to be consolidated agree on the consolidation order sought, they shall submit a joint consolidation request to the President of the Tribunal within 30 days after the delivery of the consolidation request referred to in paragraph 1. The President of the Tribunal shall, after receipt of such joint consolidation request, constitute a new division (the “consolidating division”) of the Tribunal pursuant to Article 9. The consolidating division shall, by order,

assume jurisdiction over all or part of the claims subject to the joint consolidation request.

4. If the disputing parties to the claims sought to be consolidated have not reached an agreement on consolidation within 30 days after the delivery of the consolidation request referred to in paragraph 1, the respondent shall inform the President of the Tribunal and may ask the issuance of a consolidation order on the consolidation request referred to in paragraphs 1 and 2. In that case, the President of the Tribunal shall constitute a consolidating division of the Tribunal pursuant to Article 9. The consolidating division shall, by order, assume jurisdiction over all or part of the claims subject to the consolidation request if, after considering the views of the disputing parties, it decides that to do so would best serve the interests of fair and efficient resolution of the claims, including the interests of consistency of awards.

5. The dispute settlement rules applicable to the proceedings pursuant to this Article are determined as follows:

(a) if all the claims sought to be consolidated have been submitted to dispute settlement under the same rules referred to in Article 6(2), those rules shall apply.

(b) if the claims sought to be consolidated have not been submitted to dispute settlement under the same rules referred to in Article 6(2), the UNCITRAL Arbitration Rules shall apply, unless the claimants inform the Tribunal within 30 days after the delivery of the consolidation request referred to in paragraph 1 that they have agreed on another set of dispute settlement rules available pursuant to Article 6(2).

6. Divisions of the Tribunal constituted pursuant to Article 9 shall cede jurisdiction in relation to the claims, or parts thereof, over which the consolidating division has assumed jurisdiction, and the proceedings of such divisions shall be suspended. The award of the consolidating division in relation to the parts of the claims over which it has assumed jurisdiction shall be binding on the divisions which have jurisdiction over the remainder of the claims, from the date the award becomes final pursuant to Article 30 (final award).

7. If a claim submitted pursuant to Article 6, or part thereof, is subject to consolidation pursuant to this Article, the claimant may, within 30 days after the issuance of the consolidation order, withdraw that claim, or the part thereof, and such claim or part thereof may not be resubmitted under Article 6.

8. At the request of the respondent, the consolidating division of the Tribunal, on the same basis and with the same effect as paragraphs 3 and 6 above, may decide whether it shall have jurisdiction over all or part of a claim falling within the scope of paragraph 1 above, which is submitted after the initiation of the consolidation proceedings.

9. At the request of one of the claimants, the consolidating division of the Tribunal 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."

Note to the Working Group

88. Many recent investment agreements[32] provide for consolidation.

89. *Written comments indicate a wish to develop a treaty provision which would make it possible to consolidate or coordinate proceedings under different rules or different institution – see, however, comment from ICSID which stated that*

[32] Republic of South Korea-New Zealand FTA (2015), Article 10.29; CETA (2016), Article 8.43; Argentina-Chile FTA (2017), Article 8.31; Argentina-Japan BIT (2018), Article 28; CPTPP, Article 9.28.

"consolidation under the ICSID Rules is only available for two or more ICSID Convention cases or two or more Additional Facility cases, not for proceedings administered under other rules or by other institutions. Coordination could be used for proceedings under different procedural rules or administered by different institutions. Pursuant to Administrative and Financial Regulation (AFR 22), "[t]he Secretariat of the Centre is the only body authorized to administer proceedings conducted under the [ICSID] Convention." The same applies under the Additional Facility Rules (AFR 11). Consequently, if one of the cases that was being coordinated was an ICSID Convention or an Additional Facility case, the coordinated cases would need to be administered by the ICSID Secretariat."

Draft Provision 12 *bis*: Regulation of third-party funding[33]

1. The Tribunal may limit third-party funding in the following circumstances:

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

(b) When the number of cases that the third-party funder funds against the respondent Contracting Party 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 decisions to terminate, settle or otherwise resolve the dispute or decisions on 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. In determining whether to limit third-party funding pursuant to paragraph 1, the Tribunal shall assess the overall circumstances of the case, including the reason(s) for the funded party to seek funding and the impact such a 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 the 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 [Draft Provision 12, paragraph 7].

Note to the Working Group

90. In light of the divergence in views, Draft Provision 12 *bis* is prepared for States that wish to regulate third-party funding beyond mere disclosure, based on concerns about potential problems caused by third-party funding (A/CN.9/1194, para. 86). In other words, it is an optional provision for consideration by the Working Group. The application of Draft Provision 12 *bis* relies on Draft Provision 12, which includes the definition of third-party funding, disclosure requirements and measures to be taken in non-compliance. This is because it would not be possible to regulate third-party funding without appropriate disclosure by the parties.

91. Paragraph 1 gives the discretion to the Tribunal to regulate third-party funding by limiting certain types of funding or funding under certain circumstances. It lists

[33] See A/CN.9/1194, paras. 82-93; A/CN.9/1124, paras. 125–143, see also A/CN.9/WG.III/WP.245, paras. 48-49, A/CN.9/WG.III/WP.219.

types or circumstances that are particularly problematic and abusive but also aims to ensure the limitations do not result in the elimination of meritorious claims.

92. Subparagraph (a) includes instances where the award or the eventual return is to be provided entirely to the third-party funder. A situation where the funded party concealed information or provided false information is not separately listed in paragraph 1, as this is addressed in Draft Provision 12.

93. The Working Group may wish to consider how to formulate the subparagraphs taking into account the fact that the Tribunal would be responsible for administering the determination process. For example, the Tribunal would likely need to obtain additional information in order to make the assessment under each subparagraph. Furthermore, the determination should not result in undue delays and costs. In that context, the Working Group may wish to consider whether the entire process should be detailed in the provision to ensure due process (for example, indicating who can request the limitation, whether the funded party or the third-party funder would be given the opportunity to express their views).

94. The Working Group may wish to also consider whether the list should have a catch-all subparagraph, which would give discretion to the Tribunal to limit "any third-party funding which it finds to be abusive". Alternative, it could be formulated as an open-ended list for States to include other types or circumstances that they wish to regulate.

95. Paragraph 2 obliges the Tribunal to take into account the overall circumstances of the case and the funding as it makes the decision to limit third-party funding. Paragraph 3 obliges the funded party to terminate the funding agreement and return any funding received, where the Tribunal decides to limit funding pursuant to paragraph 1.

96. Paragraphs 4 sets out the measures that can be taken by the Tribunal when a disputing party fails to comply with its determination to limit third-party funding, which are identical to the measures that can be taken when the disputing party does not comply with the disclosure requirement (suspension, termination, security for cost or the fact to be taken into account in allocating costs). The Working Group may wish to consider whether these measures are sufficient or to include other measures (for example, early dismissal of the claim in accordance with Draft Provision 4).

97. *Based on written comments, consider whether Draft Provision 12 needs to be replicated under Draft Provision 12 bis.*

98. *Written comments received after the September 2024 session are as follows: Draft provision 12 bis should be deleted. Regulation of third-party funding should be limited to addressing transparency and disclosure, notably to ensure potential conflicts of interest are avoided or to assess whether security for costs must be provided. Going further might interfere with legitimate contractual relationships. Proposed Draft Provision 12 bis goes beyond current practice. Furthermore, it provides a lot of discretion to the arbitral tribunal and the circumstances can be difficult to assess. For example, it can be questionable what a "reasonable amount" in subparagraphs (a) and what a "reasonable number" of cases in subparagraph (b) would be. It was questioned why the Tribunal should intervene and change the investor's decision on the payment of the third-party funder, which may be based on the investor's own risk assessment.*

Draft Provision 13: Amicable settlement[34]

[34] See A/CN.9/1194, paras. 94-98, A/CN.9/1160, paras. 116–117, see also A/CN.9/WG.III/WP.245, paras. 50-53, A/CN.9/WG.III/WP.231.

1. The parties should seek to settle their dispute amicably through consultation, negotiation, mediation or any other means.

2. A party may invite the other party to engage in means of amicable settlement referred to in paragraph 1. The other party should make all reasonable efforts to accept such invitation.

3. Unless otherwise provided in the Agreement, no claim may be submitted to the Tribunal for resolution until 6 months have elapsed from the date of receipt of the invitation in paragraph 2.

Note to the Working Group

99. Draft Provision 13 reflects the deliberations of the Working Group during its forty-ninth session and reproduces the text suggested at that session for future consideration (A/CN.9/1194, para. 98). Reference was also made to the UNCITRAL Model Provisions on Mediation for International Investment Disputes.

100. Paragraph 1 aims to promote the use of amicable settlement and paragraph 2 emphasizes its voluntary nature. Amicable settlement is encouraged but not imposed on the parties. There is no duty on the parties to engage in such proceedings or to effectively reach amicable settlement during the period indicated in paragraph 3. And parties are free to withdraw from the process at any time.

101. While the phrase "unless otherwise provided in the Agreement" in paragraph 3 aims to address conflicts that may arise with provisions in the underlying Agreement, it risks the interpretation that the cooling-off period cannot be introduced if the Agreement does not contain such a provision. The Working Group may wish to clarify the meaning of "otherwise", for example, that it refers to a different time period provided in the Agreement. The Working Group may also with to consider whether the disputing parties should be able to determine a different time period and whether the conduct of the parties in engaging in amicable settlement should be taken into account by the tribunal in allocating costs (Draft Provision 9).

Draft Provisions 14 to 19 are subject to deliberations of the Working Group in April 2025.

Draft Provision 14: Local remedies

Prior to submitting a claim to the Tribunal, a party shall consider initiating recourse before a court or competent authority of a Contracting Party, where available.

Draft Provision 15: Waiver of rights to initiate dispute resolution proceeding

1. No claim may be submitted to the Tribunal unless the investor waives its right to initiate or continue any other adjudicatory dispute resolution proceeding with respect to the same subject matter or the measure alleged to constitute a breach of the Agreement.

2. When submitting a claim to the Tribunal, the investor shall provide:

(a) A statement that it will not initiate any such adjudicatory dispute resolution proceeding; and

(b) A statement that it has withdrawn from or discontinued such adjudicatory dispute resolution proceeding, if applicable.

3. Paragraphs 1 and 2 shall not apply to proceedings where the investor seeks interim/provisional measures.

Draft Provision 16: Limitation period

No claim may be submitted for resolution if [3] years have elapsed since the investor first acquired, or should have first acquired, knowledge of the alleged breach of the Agreement and knowledge that it has incurred loss or damage.

Draft Provision 17: Denial of benefits

1. A Contracting Party may deny the benefits of the Agreement to an investor of the other Contracting Party that is an enterprise of that Contracting Party and to investments of that investor if the enterprise is owned or controlled by a person of a non-Contracting Party and:

(a) The enterprise has no substantial business activities in the territory of any Contracting Party other than the denying Contracting Party; or

(b) The denying Contracting Party adopts or maintains measures with respect to the non-Contracting Party or a person of the non-Contracting Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of the Agreement were accorded to the enterprise or to its investments.

2. A Contracting Party may deny the benefits of the Agreement to an investor of the other Contracting Party and to investments of that investor if:

(a) The investor receives third-party funding in a manner inconsistent with Draft Provision 12;

(b) The investment was made in violation of the denying Contracting Party's laws and regulations;

(c) The investment involved or was made by way of corruption, fraud, or deceitful conduct; or

(d) The claim would constitute a misuse of the Agreement and its objectives.

Draft Provision 18: Shareholder claims

1. A shareholder may submit a claim on its own behalf only for direct loss or damage incurred as the result of a breach of the Agreement, which means that the alleged loss or damage is separate and distinct from any alleged loss or damage to the enterprise in which the shareholder holds shares. Direct loss or damage does not include diminution in the value of the shareholding or in the distribution of dividends to the shareholder as a result of loss or damage incurred by the enterprise. The loss of an opportunity to conduct business activities carried out or expected to be carried out by the enterprise also does not constitute direct loss or damage.

2. A shareholder may submit a claim against a Contracting Party on behalf of an enterprise of that Contracting Party, which the shareholder owns or controls, only in the following circumstances:

(a) All assets of that enterprise are directly and wholly expropriated by that Contracting Party; or

(b) The enterprise sought remedy in that Contracting Party to redress its loss or damage but has been subject to treatment akin to a denial of justice under customary international law.

3. When submitting a claim, the shareholder shall provide:

(a) Evidence of its alleged ownership or control of the enterprise;

(b) A statement that the enterprise and itself will not initiate any other adjudicatory dispute resolution proceeding with respect to the same subject matter or the measure alleged to constitute a breach of the Agreement; and

(c) A statement that the enterprise and itself has withdrawn from or discontinued such adjudicatory dispute resolution proceeding, if applicable.

4. When the Tribunal makes an award in favour of the shareholder in a proceeding pursuant to paragraph 2, the Tribunal shall award monetary damages and any applicable interest or restitutions of property to the enterprise. The award shall provide that it is made without prejudice to any right that any person may have under

the applicable law in the respondent Contracting Party with respect to the relief provided therein.

Draft Provision 19: Right to regulate

Nothing in the Agreement shall be construed as preventing the Contracting Parties from exercising their right to regulate and to adopt, maintain and enforce any measure that they consider appropriate to ensure that investments are made in a manner sensitive to the protection of public health, public safety, human rights, essentials security interests or the environment, the promotion and protection of cultural diversity, or [...].

When assessing the alleged breach by a Contracting Party of its obligation under the Agreement, the Tribunal shall give a high level of deference that international law accords to Contracting Parties with regard to [the development of domestic policies as well as implementation of international commitments (including compliance with the Paris Agreement or any principle or commitment contained in articles 3 and 4 of the United Nations Framework Convention on Climate Change),] the right to regulate and the right to adopt, maintain and enforce measures sensitive to the protection of public health, public safety, human rights, essential security interests or the environment, the promotion and protection of cultural diversity, or [...].

No claim may be submitted if the measure alleged to constitute a breach of the Agreement was adopted by the Contracting State to protect public health, public safety, human rights, essential security interests or the environment, to promote and protect cultural diversity, or […].

Draft Provision 20 was considered by the Working Group in September 2024. An informal draft of the guidelines on damages will be presented during a side event during the April 2025 session.

Draft Provision 20: Assessment of damages and compensation[35]

1. The Tribunal may award:

(a) Monetary damages and any applicable interest; or

(b) Restitution of property, in which case the decision 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.

2. The Tribunal may award [simple] pre-award and post-award interest at a reasonable rate.

3. In assessing or calculating monetary damages, the Tribunal shall only reflect loss or damage incurred by reason of, or arising out of, a breach of the Agreement. The Tribunal shall also consider among others and as applicable:

(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.

[35] See A/CN.9/1194, paras. 99-104, A/CN.9/1160, paras. 99–115. See also A/CN.9/WG.III/WP.245, paras. 72-78, A/CN.9/WG.III/WP.231, A/CN.9/WG.III/WP.232, paras. 72-76.

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.

[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) Joint report by those experts.]

Note to the Working Group

102. During the forty-ninth session of the Working Group, diverging views were expressed with regard to Draft Provision 20 in document A/CN.9/WG.III/WP.244. That provision had been prepared based on the discussions during the forty-sixth session in October 2023, which had been based on Draft Provision 23 in document A/CN.9/WG.III/WP.231.

103. Support was expressed for Draft Provision 20 as a compromise reflecting the deliberations in the Working Group and also accurately reflecting the internationally recognized principle of full reparation (A/CN.9/1194, paras. 100 and 102). On the other hand, views were expressed that Draft Provision 23 in document A/CN.9/WG.III/WP.231 should form the basis of the Working Group's deliberations. Accordingly, the revised Draft Provision 20 incorporates certain elements that were found therein. It also reflects points raised during the forty-ninth session (A/CN.9/1194, para. 101).

104. The Working Group may wish to also note that the secretariat is preparing an initial draft of the guidelines on the assessment of damages and compensation for presentation during the second part of the fifty-first session.

105. Paragraph 1 provides that the Tribunal may award monetary damages or restitution of property as possible remedies. In the case of expropriation where the Tribunal orders restitution of property, subparagraph 1(a) requires the Tribunal to allow the respondent to pay monetary damages in lieu of restitution, which shall represent the fair market value of the property at the time of the expropriation. The respondent State would have the option to choose between restitution of the property and paying monetary damages. Considering that paragraph 2 addresses the interest that may be awarded, the Working Group may wish to consider whether to retain the words "and any applicable interest" in subparagraph 1(a).

106. Paragraph 2 allows the Tribunal to award interests, which may be pre-award as well as post-award, possibly at different rates. Such interest should be set at a reasonable rate as determined by the Tribunal. The Working Group may wish to consider whether the Tribunal should be limited to awarding "simple" interests only,

particularly for the pre-award damages. The Working Group may also wish to consider whether the Tribunal should be required to consult the disputing parties in determining the interest rate or its determination would be subject to the agreement of the disputing parties.

107. Paragraph 3 addresses causality and reflects the understanding of the Working Group that damages should be limited to those directly caused by the breach and not by the entirety of the measure which led to the breach. For example, State's action or failure to take action which may be inconsistent with the expectations of the claimant shall not constitute a basis for damages. Paragraph 3 further provides a non-exhaustive list of circumstances for the Tribunal to consider when assessing damages. Subparagraph (b) notes the failure of the claimant to make all reasonable efforts, rather than focusing on whether such efforts mitigated the loss or damage. Subparagraph (d) addresses the possible double recovery by the claimant arising from compensations with regard to the same breach but not, for example, insurance payments received for the loss. The Working Group may wish to consider whether the claimant's non-compliance with obligations under domestic laws would be considered "contributory fault" under subparagraph (a), as such non-compliance is already a basis for counterclaims under Draft Provision 10(1)(b).

108. The phrase "among others" in the chapeau of paragraph 3 allows the Tribunal to consider other relevant factors. The Working Group may wish to consider whether the paragraph should list the following as other factors to be considered in achieving an equitable and acceptable outcome: the economic situation of the respondent State, project risk and country risk-assessments at the time the investment was made, corruption in the making of the investment, whether the investment was fully realized, and the potential crippling effect of the award on the respondent State and its people.

109. Paragraph 4 provides that monetary damages shall be awarded on the basis of satisfactory evidence and shall not be speculative. The Working Group may wish to further consider whether paragraph 4 should prohibit the use of certain calculation methods, such as discounted cash flow, or limit them to instances where there was a proven track of profitability. The Working Group may wish to further consider whether the Tribunal should be prohibited from awarding monetary damages exceeding the total expenditures (adjusted for inflation) incurred by the claimant in making its investment (sunk costs) and from awarding monetary damages in excess of the amount claimed. These may be better addressed in the guidelines to be prepared.

110. Paragraph 5 prohibits punitive damages.

111. Paragraphs 6 and 7 address the involvement of experts appointed by the Tribunal or the disputing parties in the assessment of damages. However, the Working Group may wish to note that the use of experts would generally be provided for in the applicable procedural rules (A/CN.9/1160, para. 110) and could be further elaborated in the guidelines.

112. The Working Group may wish to note that Draft Provision 9(2)(f) allows the Tribunal to take into account the amount of damages sought by the claimant in proportion to the amount awarded when allocating costs. This addresses the concerns expressed about excessive damages being claimed.

Draft Provisions 21 to 22 are subject to the deliberations of the Working Group in April 2025, time permitting. The following reflects the written comments received so far.

Draft Provision 21: Joint interpretation

1. [To the extent not otherwise addressed in the Agreement, the] Parties to the Agreement may issue an interpretation jointly agreed by the Parties with regard to [any provision of] the Agreement (the "joint interpretation"), including through a body established for such a purpose under the Agreement.

2. Upon a request by a Party to the Agreement to issue a joint interpretation, the other Party or Parties to the Agreement [shall][should] give due consideration to that request.

3. [The Tribunal may, at the request of a disputing party or on its own initiative, [seek][request] a joint interpretation of any provision of the Agreement that is the subject of the dispute.]

4. A joint interpretation pursuant to paragraph 3 shall be issued within 90 days from the date the Tribunal seeks the joint interpretation, unless the Parties to the Agreement [agree otherwise] [jointly request an extension of the period]. [Upon a request by a Party to the Agreement, the Tribunal shall consider extending the time period]. If the joint interpretation is not issued within the time period, the Tribunal shall decide the issue. [The Tribunal shall not draw any inference from the absence of a joint interpretation or of any response from the Parties to the Agreement with regard to its seeking joint interpretation in accordance with paragraph 2.]

5. A joint interpretation issued pursuant to paragraphs 1 and 3 shall be binding on Tribunals [established in accordance with the Agreement] [that are seized of a dispute under the relevant Agreement]. Tribunals shall ensure that their decisions and awards are consistent with the joint interpretation.

6. [Parties to the Agreement may decide that a joint interpretation shall have binding effect from a specific date].

Note to the Working Group

113. Draft Provision 21 aims to clarify the meaning of joint interpretations as well as the means for issuing joint interpretations and to give binding effect to them.

114. Joint interpretation provisions in international treaties allow treaty parties to issue authoritative interpretations of the provisions in the treaties, clarifying the meaning of specific terms and the underlying intentions. Article 31(3) of the Vienna Convention on the Law of Treaties (Vienna Convention) addresses joint interpretations[36] providing that subsequent agreements between Parties regarding the interpretation of a treaty or the application of its provisions shall be taken into account.

115. However, a joint interpretation may not be inherently binding on Tribunals as the Vienna Convention does not expressly provide such an effect. Tribunals generally retain the discretion to consider the interpretation alongside other relevant factors, such as the text of the treaty, its context, and the object and purpose of the treaty. Giving binding effect to joint interpretations could therefore contribute to greater consistency and predictability and allow treaty parties to exercise control over the interpretation of their respective international investment agreements.

116. Some investment agreements take an institutional approach to joint interpretations by establishing joint commissions or committees responsible for addressing matters that might affect the operation of the treaty and for issuing

[36] Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties."

interpretive statements.[37] Some agreements also provide that interpretations by such bodies must be followed by tribunals.[38] Even if such a body is not provided for in the investment agreement, treaty parties could issue joint interpretations ad hoc, for example, through consultations, exchanges of notes, or diplomatic correspondence.

117. Paragraph 1 affirms that Parties to the Agreement or a body established under that Agreement for such purpose have the authority to issue a joint interpretation at any time and in any form.

118. *Based on written comments, consider:*

- *Whether to develop the Draft Provision as a procedural rule or as a treaty provision;*
- *Whether to include the square bracketed language addressing the relationship of the Draft Provision with the existing provisions in the Agreement – this may need to be considered more broadly (whether the square bracketed language should apply to the entirety of the Draft Provisions (for example, paragraph 5) and not be limited to paragraph 1);*
- *In the context of multilateral investment agreements, whether non-signatories should be allowed to participate in the joint interpretation to reach a common interpretation of the protection standards in those agreements;*
- *Whether to clarify that the joint interpretation may be issued not only for the provisions of the Agreement but also with regard to the preamble and annexes*.

119. Paragraph 2 encourages the Parties to the Agreement to cooperate in the issuance of the joint interpretation, particularly when one of the Parties makes such a request. *Based on written comments, consider:*

- *Whether to use "should" instead of "shall" as encouraging Parties and not creating any binding obligation;*
- *Whether the Draft Provision should further provide for circumstances where the other party refuses to issue a joint interpretation, where there lacks consensus on the contents of the joint interpretation or where there is no agreement within the 90-day time period – to balance the sovereign right of States on their participation.*

[37] For example, Article 165 of the Japan-Mexico Free Trade Agreement (2004) states that the Joint Committee is composed of representatives of the Governments of the Parties and sets forth its functions. Article 26.1 of the Comprehensive Economic and Trade Agreement (CETA) provides that the Parties establish the CETA Joint Committee comprising representatives of the European Union and representatives of Canada. The Joint Committee shall be co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees. The Agreement between the United States of America, Mexico, and Canada (USMCA) (2018) establishes the Free Trade Commission under Article 30.1 composed of government representatives of each Party at the level of Ministers or their designees. The functions of the Free Trade Commission are listed in Article 30.2.

[38] For example, Article 40(2) of the ASEAN Comprehensive Investment Agreement states that any interpretation of the agreement jointly agreed upon by the parties shall be binding on any tribunal established under the agreement. Article 14.D.9(2) of USMCA (2018) provides that a decision of the Commission on the interpretation of a provision of the agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision. Article 8.31(3) of CETA (2016) provides that an interpretation adopted by the Joint Committee shall be binding on a tribunal and that the Joint Committee may decide that an interpretation shall have binding effect from a specific date.

120. Paragraph 3 allows a Tribunal to seek a joint interpretation either at its own initiative or upon the request by a disputing party.[39] *Based on written comments, consider:*

- *Whether the Tribunal should be obliged to seek a joint interpretation upon the request of a disputing party as well as the broader implications of granting tribunals this authority, including the risk of undermining their discretion, potential perceptions of prejudgment, and complications if no joint interpretation is issued;*
- *Whether the Tribunal should be given the right to seek joint interpretation (which might lead to deletion of paragraphs 3 and 4) – possible implications, delays, perceived prejudgment or prejudice, the consequences of no joint interpretation on the case itself and the arguments to be made by the disputing parties;*
- *Whether to replace the term "seek" with "request" – this was intentional to distinguish the request by a disputing party to the Tribunal;*
- *The underlying assumption of paragraph 3 is that the Tribunal would be making the request to all Parties of the Agreement and not only the Party involved in the dispute. This is stipulated in paragraph 1;*
- *Whether to clarify that the Tribunal should seek/ request joint interpretation from all Parties of the Agreement.*

121. When a Tribunal seeks a joint interpretation pursuant to paragraph 4, the Parties to the Agreement or the body established under the Agreement for that purpose are requested to issue a joint interpretation within 90 days. *Written comments generally favor a possible extension of the time period. In that context, consider:*

- *Whether the Parties themselves can agree or whether the request of extension should be made to the Tribunal (note that in the context of a BIT, one of the Treaty Parties would not be party to the dispute);*
- *Whether the request should be made by the Parties jointly or could be made by one of the Parties;*
- *Whether the Tribunal should have the discretion to extend the time period;*
- *Whether the number of extensions should be limited to one-time and whether there should be a maximum period (a possible cap of no more than 180 days);*
- *Whether the 90-day time period should begin from when all Parties to the Agreement received the communication from the Tribunal and not when the Tribunal sought the joint interpretation;*
- *Whether to include a rule that the Tribunal shall not draw any negative inferences from the fact that the Parties did not issue a joint interpretation (similar to that found in Draft Provision 22(3).*

122. Paragraph 5 addresses the binding effect of joint interpretations on Tribunals established in accordance with the Agreement. This includes the Tribunal that sought the joint interpretation pursuant to paragraph 3 as well as other Tribunals that are interpreting the provisions, which are the subject of the joint interpretation. While paragraph 5 ensures that a joint interpretation is binding on all pending and future disputes, the temporal scope of the binding effect might need to be clarified, particularly with regard to Tribunals established prior to the issuance of the joint interpretation (for example, whether a joint interpretation issued after an award is rendered should not have any binding effect and thus should not impact a subsequent

[39] Article 40 (3) of The ASEAN Comprehensive Investment Agreement (ACIA) 2012; Article 30 (2) of Canada - China BIT 2012; Article 30 (2) of Canada - China BIT 2012; Article 24 (3) of Belarus - India BIT 2018.

set aside/annulment procedure). This question may require further analysis in the context of an appellate mechanism, including whether a joint interpretation issued after the first-tier award should have a binding effect on the appellate tribunal and whether joint interpretations could be used to rectify any errors made by the appellate tribunal.

123. *With regard to paragraph 5, consider*

- *Whether to use the second square-bracketed text to cover first-instance and appeals tribunals of a standing mechanism and tribunals seized of a dispute but whose jurisdiction is contested.*

124. *With regard to paragraph 6, consider*

- *Whether the Parties to the Agreement or the body established under the Agreement could specify the date upon which the joint interpretation should have binding effect;*
- *Whether to include an additional sentence clarifying that the Parties to the Agreement may be able to set a date upon which the interpretation shall take effect (which would allow them to decide whether the interpretation should have an effect on pending proceedings). Views against have also been expressed.*

Draft Provision 22: Submission by a non-disputing Treaty Party

1. The Tribunal shall allow a Party to the Agreement that is not a party to the dispute ("non-disputing Treaty Party") to make a submission on the interpretation of the Agreement at issue in the dispute [if requested by that Party]. The Tribunal may, after consultation with the disputing parties, invite a non-disputing Treaty Party to make [such a submission] [a submission on the interpretation of the Agreement at issue in the dispute].

2. The Tribunal, after consultation with the disputing parties, [may][shall] allow submissions on further matters within the scope of the dispute from a non-disputing Treaty Party. In determining [whether to allow such submissions] [[the scope and form of such submission], the Tribunal shall take into consideration, among others:

(a) whether the non-disputing Treaty Party has a significant interest in the proceeding;

(b) the extent to which the submission would assist the Tribunal in the determination of a [factual or] legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties, and

[(c) the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection].

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 provide the non-disputing Treaty Party with relevant documents filed in the proceeding, unless either party objects.]

5. The Tribunal shall ensure that a submission by a non-disputing Treaty Party does not disrupt or unduly burden the proceeding, or unfairly prejudice any disputing party.

6. The Tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Treaty Party. [The observations shall be submitted together with the written submissions of the Parties to the extent possible.]

Note to the *Working Group*

125. Draft Provision 22 is based on article 5 of the Transparency Rules and Rule 68 of the ICSID Arbitration Rules. It provides the framework for submissions by a Party

to the Agreement that is not a party to the dispute (referred to as "non-disputing Treaty Party"). Such provisions are found in investment agreements and arbitration rules, as non-disputing Treaty Party submissions can help Tribunals understand the broader context and intended meaning of the treaty provisions.

126. *In this regard, consider*

- *Aligning the text more closely with the Transparency Rules;*
- *Whether to develop the Draft Provision as a procedural rule or as a treaty provision.*

127. Paragraph 1 provides that the Tribunal shall permit submissions by non-disputing Treaty Parties and may further invite them to make such submissions on the interpretation of the Agreement at issue in the dispute. In other words, it obliges the Tribunal to accept such submissions by non-disputing Treaty Parties when made. It also obliges the Tribunal to consult the disputing parties before inviting for such submissions. *Based on the written comments, consider*

- *Whether the phrase "subject to paragraph 4" found in article 5(1) of the Transparency Rules should be retained in paragraph 1 as a condition for allowing non-disputing Treaty Party submissions (views against the inclusion have also been expressed); Whether to add the square bracketed language in the first sentence, which may be obvious from the words "shall allow" as it is permissive in response to such a request;*
- *Whether to spell out the meaning of such a submission in the second sentence;*
- *Whether to further specify the scope of submission and the effect that such submission should have on the Tribunal (only to inform its interpretation and no binding effect);*
- *Whether to further elaborate on the form (oral or written) of the submission and to set a time frame for the submission (both paragraphs 1 and 2).*

128. The submissions referred to in paragraph 2 are different in scope as they deal with submissions on "further matters within the scope of the dispute" from a non-disputing Treaty Party. This is based on article 5 of the Transparency Rules which conflates non-disputing Treaty Party submissions on treaty interpretation and those on other matters. The Working Group may wish to consider whether such submissions, which do not relate to the interpretation of the Agreement, should be addressed in Draft Provision 22.

129. Paragraph 2 gives guidance to the Tribunal on whether to allow submission on further matters within the scope of the dispute by listing several relevant factors to consider, based on article 5(2) of the Transparency Rules, which makes reference to article 4(3)). *Based on the written comments, consider*

- *Whether the formulation in paragraph 2 should follow paragraph 1 requiring the Tribunal to allow submissions and in that context, the second sentence to refer to the "scope and form of the submissions" rather than whether such submission can be made;*
- *Whether to delete the reference to "factual" issues in subparagraph 2(b);*
- *Whether subparagraph (c) should be a paragraph on its own;*
- *To ensure transparency and neutrality of the submission, whether to require the non-disputing Treaty Party to disclose any links with the claimant and whether the disputing parties can submit observation (already in paragraph 6) on the relevance and legitimacy of the interventions.*

130. Paragraph 3 clarifies that the Tribunal should not make any assumption or draw conclusions based on the absence of or failure by non-disputing Treaty Parties to provide submissions.

131. *Based on written comments with regard to paragraph 4, consider*

- *Whether to include paragraph 4 allowing non-disputing Treaty Party to have access to the relevant documents of the case (also in line with ICISD Rule 68(3)) in order to decide whether to file or not a submission on its own initiative or at the invitation of a Tribunal;*
- *Whether a disputing Treaty Party may object to such an arrangement.*

132. The first sentence of paragraph 5 obliges the Tribunal to ensure that non-disputing Treaty Party submissions do not disrupt or unduly burden the proceeding or unfairly prejudice any disputing party. For example, when inviting a non-disputing Treaty Party to make a submission pursuant to paragraph 1, the Tribunal may consider imposing conditions on the submission, including the format, length, scope or publication of the submission, and the time period to make the submission.[40]

133. Paragraph 6, based on Rule 68(4) of the ICSID Arbitration Rules, allows disputing parties to make observations on the non-disputing Treaty Party submission. *Based on written comments, consider whether to add language that the observations of the Treaty Parties should be in written form.*

New Draft Provision 23: Applicable law

1. When rendering its decision, the Tribunal shall apply this Agreement as interpreted in accordance with customary rules of interpretation of public international law as codified in the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.

2. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.

Note to the Working Group

134. *Based on written comments, consider whether an additional provision on the applicable law should be included – "Many investment treaties, including EU agreements, include such provisions to ensure that Tribunals apply the Agreement in line with customary international law and the Vienna Convention on the Law of Treaties. This addition would provide clarity on treaty interpretation and the role of domestic law, and it could also inform discussions on applicable law in the context of a standing mechanism."*

[40] See ICSID Rules, Rule 68(2), second sentence.