Israel's Comments on Draft Provisions on Procedural and Cross-cutting Issues[1]

(A/CN.9/WG.III/WP.231, A/CN.9/WG.III/WP.232)

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Israel commends the work of the UNCITRAL Working Group III in preparing the draft provisions on procedural and cross-cutting issues, as part of its work regarding possible reform of Investor-State dispute settlement (ISDS). As the Israeli delegation will not be able to join in presence at the Working Group III session, it is grateful for the opportunity to provide its written comments. The comments are set forth below.

However, before offering specific comments on the draft provisions, Israel would like to raise two general comments regarding the draft provisions:

Firstly, as expressed in the past, for example in our joint submission of March and October 2019 with the governments of Japan, Chile, Mexico and Peru (A/CN.9/WG.III/WP.182), Israel favors an approach whereby Working Group members retain maximum flexibility to develop a specially tailored menu of relevant solutions, rather than pursuing a one-size-fits-all framework. Despite the fact that the Working Group has identified a broad list of concerns regarding procedural and cross-cutting issues, this does not entail that all States necessarily face all of these concerns or would prefer adhering to the same provisions. Therefore, Israel believes these provisions should not be an attempt to create an Investment Treaty model but rather, Member States should be able to adopt the provisions individually, in combination or in their entirety, based on their own specific needs and interests.

Secondly, it seems that some of the provisions in Working Papers 231 published by Working Group III on the 26th of July, 2023 lie outside of the scope of Investor-State Dispute Settlement. For example, Draft Provision 4 - State to State dispute settlement, Draft Provision 9 - Denial of Benefits or Draft Provision 12 - Right to Regulate. The reference to the State-to-State dispute settlement is recurrent in different draft provisions, such as draft provision 5, 6, 7, 8, 9, 10 and 15, among others. In our view, considering that the mandate of the Working Group relates to Investor-State dispute

[1] Israel's comments in this document are without prejudice to the position that Israel may take in light of the discussions in Working Group III.

settlement mechanisms, such an inclusion is not appropriate. We therefore welcome the annotations made in Working Paper 232, especially paragraphs 7 and 33.

1. Draft Provision 3 – Dispute Resolution Proceedings

As stated above, Israel's approach is that the draft provisions do not constitute a model treaty, but rather recommended "model provisions" which Parties are free to include in future treaties. Therefore, we suggest removing this placeholder, which would be more relevant for a model treaty. As such, we commend the comment made in paragraph 7 of the annotations regarding the relevance of this provision to ISDS proceedings.

2. Draft provision 4: State-to-State dispute settlement

As previously stated in our general comments, Draft provision 4 on State-to-State dispute settlement appears to fall outside of the scope of the mandate of the Group. Therefore, Israel supports removing the draft provision from the document.

3. Draft provision 5: Period for amicable settlement

Draft provision 5 requires disputing parties to seek amicable settlement through negotiation and consultation or through mediation for a certain period of time before a claim is submitted to an adjudicatory process. We welcome encouraging the parties to make use of such means. Israel's view is that the cooling-off period should be 6 months, as suggested in paragraph 11 of the annotations.

4. Draft provision 6: Recourse to local remedies

Draft provision 6 requires an investor to seek recourse to local remedies in the host State for a certain period of time prior to submitting a claim under any other dispute resolution proceeding. Israel, in accord with many other States, supports the recourse to local remedies through a no-U turn provision in its treaties, and does not support the obligation to exhaust local remedies. The no-U turn provision allows, rather than obliges, the investor to recourse to local remedies before turning to arbitration. As the

obligation to recourse to local remedies is not widely accepted, we believe this draft provision should be removed from this document. At the very least, the provision should be rephrased in order to simply encourage disputing parties to settle their dispute via local remedies, as suggested in comment 14.

5. Draft provision 7: Waiver of rights to initiate dispute resolution proceeding

Israel suggests adding "subject matter of the claim" after "with respect to". Subject matter is wider than the measure alleged to constitute a breach of the Agreement and this would ensure that an investor will not initiate or continue another dispute resolution proceeding on the same subject matter but regarding a different measure of the State.

Furthermore, it is questionable whether it is appropriate to request the waiver of an investor when it is a State-to-State dispute settlement. Therefore, we suggest removing the reference to draft provision 4.

It would read*: No claim may be submitted for resolution pursuant to Draft Provisions 3 ~~or 4~~, unless the investor waives its right to initiate or continue any other dispute resolution proceeding with respect* ***to the subject matter of its claim or to any*** ***~~to the~~*** *measure alleged to constitute a breach of the Agreement.*

6. Draft provision 8: Limitation period

Israel's view is that the limitation period should be 3 years since the investor first acquired, or should have first acquired, knowledge of the measure alleged to constitute a breach of the Agreement and knowledge that is has incurred loss or damage. Furthermore, in our view, the limitation period is not relevant for State-to-State dispute settlement and we suggest removing the reference to draft provision 4.

7. Draft provision 9: Denial of benefits

As stated above in our general comments, Israel supports removing the Denial of benefits provision from the draft provisions since it is not directly related to the dispute settlement mechanism.

8. Draft provision 11: Counterclaim

Israel welcomes in principle Draft provision 11 allowing the respondent to make a counterclaim arising directly out of the subject matter of the claim, in connection with the factual and legal basis of the claim, or in case of the claimant breaching his obligations under the Agreement. Israel supports the inclusion of a rule preventing an arbitral tribunal from dismissing such counterclaims on grounds of lack of consent by the claimant. However, Israel suggests further discussions of the Working Group on Paragraph 1(c) and the reference to "domestic law, an investment contract or any other instrument binding on the claimant".

9. Draft provision 12: Right to regulate

Israel does not support the inclusion of the Right to Regulate provision. Firstly, Israel is concerned that paragraph 1 falls outside of the scope of Working Group III's current mandate regarding Investor-State Dispute Settlement. Additionally, Israel does not support paragraph 3 as it cuts too broad a carve-out from the scope of protection offered under ISDS.

We could consider retaining Paragraph 2, but would suggest removing the part of the sentence that reads: "*that international law accords to Contracting Parties with regard to the development and implementation of domestic policies*".

The draft provision would read: "*When assessing the alleged breach by a Contracting Party of its obligation under the Agreement, the Tribunal shall give a high level of deference to[~~that international law accords to Contracting Parties with regard to the development and implementation of domestic policies,~~] the right to regulate in the public interest and the right to adopt, maintain and enforce measures sensitive to the protection of public health, public safety or the environment, the promotion and protection of cultural diversity, or […]*".

10. Draft provision 13: Evidence

Israel is not convinced that the provision in its current form adds to the existing rule on evidence found in Article 27 of the UNCITRAL Arbitration Rules. For example, the current provision does not deal with the issue of "fishing expeditions". Therefore, Israel suggests considering expanding article 13(4) regarding the admissibility and the assessment of the evidence on the basis of Article 9 of the IBA Rules on the Taking of Evidence in International Arbitration.

11. Draft provision 14: Bifurcation

Israel has no comment on the text, and supports including a provision for bifurcation.

12. Draft provision 15: Consolidation of proceedings

Israel supports including a provision on consolidation of proceedings as it could reduce the time and the cost required to handle multiple parallel proceedings.

13. Draft provision 16: Interim/provisional measures

Article 26 of the UNCITRAL Arbitration Rules already provides the appropriate process for requesting and granting interim measures. Therefore, Israel's view is that an inclusion of such a provision in this document may not necessarily be needed.

14. Draft provision 19: Early dismissal

Israel welcomes the draft provision on early dismissal. Israel's view is that a disputing party should make the request no later than 60 days after the constitution of the tribunal, and that the Tribunal should render its decision within 60 days after the last submission by the disputing parties.

15. Draft provision 20: Security for costs

Israel welcomes the provision on security for costs.

16. Draft provision 21: Third-party funding (TPF)

Israel, in line with many other delegations, views the use of TPF as a useful tool for access to justice, especially for individual investors, small and medium enterprises. We therefore welcome the draft provision reflecting a permissive approach regarding the use of TPF, in conjunction with the appropriate disclosure obligations and the possibility of suspending and terminating the proceedings. However, we support minimizing, as much as possible, any other use of TPF for reasons other than those legitimate purposes for which it was envisioned (such as aiding access to justice for SMEs). We therefore suggest amending the definition of third-party funding to include the notion that funding may be either for profit or non-profit.

In accordance with the definition of TPF included in Rule 14 of the ICSID Arbitration Rules, "funds for the pursuit of defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding", we suggest adding to paragraph 1: "through a donation, grant or" before "in the return for remuneration dependent on the outcome of the proceeding". Thus, the amended paragraph would read:

"Third-party funding" means the provision of any direct or indirect funding to a disputing party by a natural or legal person who is not a party to the proceeding but enters into an agreement to provide, or otherwise provides, funding ("third -party funder") for a proceeding initiated pursuant to Draft Provisions 3 or 4, ***through a donation, grant or*** *in return for remuneration dependent on the outcome of the proceeding.*

17. Draft provision 23: Assessment of damages and compensation

Israel would like to remove draft provision 23(3)(f). In our view the Tribunal should consider the contributory fault of the claimant, provided in draft provision 23(3)(a), which may already include non-compliance with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

Furthermore, we would appreciate clarification regarding the interaction between provision 23(4) "The Tribunal may award monetary damages on the basis of expected future cash flows…" and provision 23(8) "The Tribunal shall not award monetary damages exceeding the total expenditures (adjusted for inflation) incurred by the

claimant in making its investment", seeing as such provisions might, in specific cases, overlap and contradict each other.