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ASA's Comments to the Draft Provisions on Procedural and Cross-Cutting Issues

General Comment

The Swiss Arbitration Association (ASA) Task Force on Investor-State Dispute Settlement[1] offers the following comments and suggestions on the draft provisions on procedural and cross-cutting issues, distributed on 26 July 2023 (A/CN.9/WG.III/WP.231) and revised on 8 July 2024 (A/CN.9/WG.III/WP.244).

As a general remark, we note that the purpose(s) or policy choice(s) that underlie each draft provision have not always been clearly stated. This makes it somewhat challenging to determine the best way to achieve said purposes or policy choices. Furthermore, the ultimate form of the draft provisions (a treaty, procedural rules, or a guiding note for arbitrators) is crucial for designing the draft provisions. While the ASA Task Force has noted the proposed classification of the draft provisions into three categories (see WP.244, para. 2), it wishes to draw the attention to the fact that including certain provision in treaties will make it challenging to modify them at a subsequent stage. Furthermore, the inclusion of detailed procedural rules in treaties could conflict with existing procedural rules, such as those recently amended in the ICSID Rules, which entails the risk of a fragmented regulation and application of procedural rules.

The ASA Task Force respectfully suggests that answering these broader questions regarding purpose and form of the draft provisions would benefit the discussion on the specific formulation of those provisions. With this caveat in mind, the ASA Task Force nevertheless offers comments on some draft provisions that, from the Task Force's point of view, would appear to benefit from further discussion and consideration among all stakeholders.

Draft Provision 5 – Security for Costs

States may wish to consider whether the existence of third-party funding (4(e), currently in square brackets) should be listed as an independent circumstance that the tribunal shall consider in addition to those circumstances set forth in 4(a) to 4(d)

[1] The ASA Task Force that prepared these comments comprised Diana Akikol, Dolores Bentolila, Bernhard Berger, Anya George, Christine Kaddous, Yoshimi Ohara, and Michele Potestà (chair).

in determining an application for security for costs particularly in comparison with Rule 53(3)(4) of ICSID Arbitration Rules (2022).

While 4(a) to 4(c) are circumstances that may directly support requests for security for costs, 4(e) seems to be of a somewhat different nature. Indeed, item 4(e) is a fact that the tribunal may take into account in assessing whether the circumstances set forth in 4(a) to 4(c) exist. Parties requesting security for costs have argued that the existence of third-party funding is indication of impecuniosity of claimants which should be considered among the circumstances that warrant orders for provision of security for costs. However, some investment treaty tribunals have concluded that impecuniosity and the existence of third-party funding alone are not sufficient circumstances to grant security for costs orders.[2] Moreover, parties may also procure third party funding to create additional cashflow not because they lack funds. Hence, unlike item 4(a) to 4(c), the existence of third-party funding in and of itself may not either directly support or deny requests for security for costs. If so, States may wish to consider whether to remove 4(e) or adopt the approach taken by the ICSID Arbitration Rules. Rule 53(3) of the ICSID Arbitration Rules lists circumstances that correspond to 4(a) to 4(d) as examples of circumstances that the tribunal shall consider in determining whether to order to provide security for costs. Under the ICSID Rules, the existence of third-party funding is treated as one of the pieces of evidence that the tribunal shall consider "in relation to" the circumstances that correspond to 4(a) to 4(d), namely, *inter alia*, the party's ability and willingness to comply with an adverse costs order. This allows a Tribunal operating under the ICSID Arbitration Rules to consider not merely whether a party has obtained third-party funding, but whether such specific third-party funding arrangement supports the existence of circumstances set forth in 4(a) to 4(c), which is consistent with published ICSID and non-ICSID decisions.

Draft Provision 10 – Counterclaim

Consent to Arbitration

The first and foremost principle for hearing counterclaims in investor-State arbitration is consent. A counterclaim can only be heard by an arbitral tribunal if the tribunal has jurisdiction over it. Therefore, draft provision 10 should be consistent with the dispute resolution clause, which defines the jurisdiction of the arbitral tribunal. Additionally, draft provision 10 could benefit from clearer language regarding the existence of the State's consent to settle counterclaims through arbitration, including terms such as "*the Contracting States hereby consent to submit to arbitration the following counterclaims...*"

[2] ICSID Working Paper #1, paras. 265, 266. Martina Polasek; Celeste E. Salinas Quero "Chapter 21: Security for Costs: Overview of ICSID Case Law" Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy, (Kluwer)

Conditions for Making Counterclaims

As a preliminary remark, it could be clarified whether the conditions in 10(1) (a) to (c) are alternative or cumulative. In our view, the conditions for making counterclaims should be cumulative. If they are alternative, any counterclaim based on domestic law or a contract that is not even remotely related to the dispute would be admissible. This would not be in line with the standards applied by most international courts and tribunals, which require a connection between the counterclaim and the dispute for the admissibility of a counterclaim.

Furthermore, the conditions for making counterclaims in draft provision 10, items (a) and (b), seem to address the same condition. However, item (a) is broader as it does not define the legal test for determining the connection between the claim and the counterclaim. Item (b), on the other hand, refers to the legal test that has been applied by some arbitral tribunals which includes (i) a factual connection and (ii) a legal connection. We note that the requirement of a legal connection could prevent the admissibility of counterclaims based on domestic law or on the contract where the claims are based on an investment treaty. Investment treaty tribunals have typically interpreted "legal connectedness" to exclude counterclaims based on domestic law (*Saluka Investments BV v. Czech Republic*; *Sergei Paushok v. Mongolia*; *Urbaser v. Argentine Republic*). If the consensus is to permit counterclaims based on domestic law in arbitrations based on investment treaty claims, it may be advisable to require only a factual connection with the claim, rather than also a legal connection.

As regards, condition (c), we note that the scope of domestic law counterclaims might be very broad. Some arbitral tribunals have ruled that investment arbitrators lack jurisdiction to adjudicate public law claims (such as tax law or administrative fines). It would be beneficial for States and other stakeholders to debate whether jurisdiction to assess counterclaims encompasses decisions on public law claims or is limited to civil law/tort claims. Moreover, the formulation "[t]hat the claimant has failed to comply with its obligations" might be interpreted to suggest that the respondent may only request declaratory relief (as opposed to other types of relief, e.g. monetary relief). Unless this limitation as to the types of relief for counterclaims is intentional, we would suggest to reformulate condition (c) accordingly.

Parallel Proceedings

If counterclaims based on domestic law or the contract are admissible in investment treaty arbitration, the risk of parallel proceedings arises, as domestic courts will also have jurisdiction to hear the domestic law or contract counterclaim. The requirement of a waiver of the State's counterclaims before domestic courts as a condition precedent to making counterclaims in investment arbitration might prevent parallel proceedings, double recovery and conflicting decisions.

Draft Provision 12 – Third-party funding

Delegates of WG III may wish to consider what purpose and/or policy goals draft provision 12 seeks to achieve. Is the aim mainly to regulate third-party funding in the context of disclosure and arbitrator independence? Or is the aim to provide for market regulation in the field of third-party funding more generally?

In the first case, draft provision 12 could be limited to the first five paragraphs. Indeed, paragraphs 1 to 5 mainly deal with issues pertaining to third-party funding in relation to arbitrator independence. While more detailed than Rule 14 of the 2022 ICSID Arbitration Rules, they seem to reflect current practice regarding disclosure. However, in this context, delegates of WG III should keep in mind that disclosure of third-party funding to prevent possible conflicts of arbitrators should occur at the stage prior to the constitution of the arbitral tribunal. To this end, it appears too late if, under paragraph 4, the information listed in paragraph 2 is only to be disclosed "when the statement of claim is due".

In the second case, delegates of WG III may wish to seriously think through the effects of the apparent "market regulation" of third-party funding aimed at in paragraphs 6 to 8. What is the policy purpose behind those paragraphs 6 to 8? Is it to limit (or disincentivize) third-party funding in general? If so, is this a desired objective from the perspective of encouragement of foreign investment and potentially access to justice?

More specifically, delegates of WG III should consider the following issues in the context of paragraphs 6 to 8: What is the legal (or contractual) basis for the arbitral tribunal to exercise jurisdiction over the third-party funding agreement and the third-party funder to, e.g., order the disputing party to terminate the funding agreement and return the funding received (cf. para. 8)? Can these provisions be given any effect at all under the third-party funding agreement, bearing in mind that the third-party funder is not a party to the arbitration proceedings and the funding agreement will usually have its own jurisdiction or arbitration clause?

In respect of paragraph 7, delegates may wish to consider whether termination of suspension of proceedings should only be ordered as a second step, after security for costs is ordered and the investor fails to comply with the security for cost order.

A further question that delegates of WG III may wish to consider in relation to draft provision 12 is where a provision on third-party funding should go. Instead of serving as a model clause for States to incorporate in their IIAs (as the inclusion of draft provision 12 within Section B of WP. 244 would suggest), delegates of WG III may wish to consider recommending a provision on third-party funding to serve as a guideline for inclusion in arbitration rules.

Draft Provision 16 – Limitation Period

The interaction between the limitation period set forth in draft provision 16 and (i) the amicable settlement provision (draft provision 13), as well as (ii) the local remedies provision (draft provision 14) could prove problematic.

If an invitation to engage in amicable settlement pursuant to draft provision 13(2) does interrupt the limitation period (which is currently unclear based on the wording of draft provision 16), the question arises of when the limitation period starts to run again, i.e. when the amicable settlement process is deemed to have failed.

If such an invitation does not interrupt the limitation period, the investor might break off amicable settlement early to initiate arbitration (in order to avoid time bar issues).

There could be a similar negative effect in relation to local remedies and negotiations or discussions that are not within the framework of draft provision 13: the investor may feel pressured into breaking off those processes prematurely to initiate arbitration within the limitation period.

The Task Force thus suggests to coordinate more precisely the interaction between the proposed limitation period and the relevant pre-arbitration steps or options contemplated in the other draft provisions.

Finally, the negative effects highlighted above could potentially be mitigated by a longer limitation period (i.e. of at least 5 years) which would allow sufficient time for alternative remedies to be exhausted before resorting to arbitration.

Draft Provision 18 – Shareholder Claims

While the exclusion of shareholder claims for recovery of reflective loss or damage could be beneficial to prevent the risk of multiple arbitrations, conflicting decisions and double recovery, it could also significantly restrict the remedies available to investors. Most foreign direct investments are channeled through locally established companies in the host State (often upon request by the host State), meaning that many investments protected under investment treaties are shares in such locally incorporated entities.

States may therefore wish to consider the proposed limitation of shareholder claims in connection with the broader issue of standing under the investment treaty, i.e. the definition of investor. Standing determines whether a local company (in which a foreign investor holds shares) can access international arbitration as an investor under the investment treaty. If the local company lacks standing under the investment treaty, the shareholder's ability to seek remedies for indirect losses (such as diminution in share value) caused by State measures directed at the local

company may become critical, as the local company might lack an effective remedy. Conversely, if the local company has standing under the investment treaty, such as under USCMA, Article 14.D.3, 1.b, the investor could indirectly access treaty protection through the local company's claim, and the question of the shareholder's own standing might become redundant (at least for majority shareholders). In our view, addressing the issue of reflective loss together with investor standing is crucial for achieving a fair balance of protection for all parties involved, adequately protecting the investors, and ensuring access to meaningful remedies in international investment arbitration.

While draft provisions 18.2 and 18.3 allow the (direct or indirect) shareholder of the company to seek recovery on behalf of the company in circumstances where the company itself is, or may be, unable to obtain justice, it limits the possibility of such shareholder claims to two precise scenarios. States may wish to consider whether this proposed wording might be overly restrictive, as in practice there may be other situations where a shareholder's claim on behalf of the company could be justified, e.g. if the company ceases to exist or is unable to act due to measures directed against it (e.g. in case of bankruptcy proceedings or detention of its directors). It may therefore be preferable to opt for a non-exhaustive definition or list of circumstances in which a shareholder may submit a claim on behalf of the company, such us where the local company ceases to exist or is somehow unable to claim.

Draft Provision 20 – Damages

Paragraph 1(a): Available Remedies

The limitation of available remedies to compensation and restitution of property would unduly restrict the arbitral tribunal from ordering other important remedies such as satisfaction, juridical restitution and specific performance. These remedies can be crucial in certain circumstances. For example, they may be advisable in cases involving the confirmation of the validity of a commercial arbitration agreement or an arbitral award unlawfully invalidated by local courts (see, e.g., *ATA v. Jordan*), the withdrawal of targeted administrative orders, or specific performance of contractual obligations of ongoing contracts. Moreover, such remedies can provide full reparation to investors while preserving the investment and maintaining the relationship between the investor and the host State, thereby fulfilling the purpose of IIAs in fostering and promoting investments (see, e.g., *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID, Case No. ARB(AF)/11/23, Award of 8 April 2013, para. 570).

Although non-pecuniary remedies are not enforceable under the ICSID Convention, arbitral tribunals still retain the power to order them (Schreuer, "Alternative Remedies in Investment Arbitration" (2016) 3:1 J Damages in Int'l Arb at 1, 17-18, citing History of the Convention, Vol. I, pp. 246, 248, Vol. II, pp. 344,

346, 347, 425, 990, 903, 991, 1019, 1026, 1029). Furthermore, non-enforceable non-pecuniary remedies can also prove effective, as the majority of arbitral awards are voluntarily complied with by host States.

Therefore, we believe it is advisable to allow for the full range of remedies available under public international law. Any such remedies should, of course, be subject to the limitations of impossibility and disproportionate burden, which would exclude remedies that infringe upon state sovereignty, impact third parties, or are excessively difficult for the State to implement.

Draft provision 20.3: Considerations for Assessing or Calculating Damages

Draft provision 20.3 outlines various considerations the tribunal shall consider in assessing or calculating damages in investment arbitration. We understand that the list is illustrative ("among others"), which we respectfully share as the list currently does not cover other important considerations. Some considerations currently not listed include the following:

- Events beyond State control, such as market forces, currency fluctuations, or business risks. Many common law jurisdictions like the United States and civil law systems like France exclude liability for damages caused by independent third parties or uncontrollable events (see, e.g., The Restatement (Second) of Torts, Section 440, Cour de cassation, Chambre civile, 28 février 2001, pourvoi n° 98-18.026);

- Double recovery obtained by the local company and the shareholder. Draft provision 20.3(d) addresses monetary damages received *by the claimant* but does not contemplate damages received by related entities, such as local companies or intermediate shareholder companies. Precedents from investment arbitration cases where both the shareholder and the subsidiary obtained compensation, such as *Plama Consortium Limited v. Bulgaria* and *Devas v. India*, underscore the importance of preventing double recovery and ensuring fair distribution of compensation among affected parties in case of shareholder claims.

Draft provision 20.4: Expected Future Cash Flows

We generally agree with draft provision 20.4 as it seeks to crystalize investment treaty case law regarding the admissibility of expected future cash flows. However, we suggest to replace "inherently speculative" with "speculative", as the adverb "inherently" adds nothing and rather creates possible uncertainties.