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Comments from the European Union and its Member States

The European Union and its Member States refer to paragraph 68 of the report of Working Group III on the work of its 49th session (A/CN.9/1194) as well as communication from the UNCITRAL Secretariat dated 21 October 2024, where delegations from Working Group III are invited to provide written comments on Section A of Working Paper A/CN.9/WG.III/WP.244, as well as draft provision 11 (consolidation of claims) and part of draft provision 12 (third-party funding but only paragraphs 1 to 5 and 7) which will be included into Section A.

The European Union and its Member States therefore submit the below comments on the relevant provisions falling under Section A. This should not be read as an agreement on the rest of the provisions of Working Paper A/CN.9/WG.III/WP.244. This is without prejudice to the position that the European Union and its Member States may take in light of the discussions in Working Group III, including on the form of those provisions. In this regard, it is the understanding of the European Union and its Member States that draft provisions in Section A would be drafted to supplement the UNCITRAL Arbitration Rules. The European Union and its Member States are of the view that those draft provisions should also be part of procedural rules to a standing mechanism and could also be retrofitted into treaties.

United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
Forty-ninth session
Vienna, 23–27 September 2024

Possible reform of investor-State dispute settlement (ISDS)

Draft provisions on procedural and cross-cutting issues

Note by the Secretariat

Contents

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II. Draft provisions on procedural and cross-cutting issues

A. Provisions to supplement the applicable procedural rules

Draft Provision 1: Evidence

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

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

3. The Tribunal may reject any request, unless made by all disputing parties, to establish a procedure whereby each party can request another party to produce documents. In considering such requests for production of documents, the Tribunal shall consider all relevant circumstances, including:

(a) The scope and timeliness of the request;

(b) The admissibility, relevance, materiality and weight of the documents requested;

(c) The burden of production; and

(d) The basis of any objection by the other party.

4. If a disputing party, duly invited by the 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 Tribunal may make the award on the evidence before it.

5. Unless otherwise directed by the Tribunal, statements by witnesses, including expert witnesses, shall be presented in writing, and signed by them. The Tribunal may decide which witnesses, including expert witnesses, shall testify before the Tribunal if hearings are held.

6. The Tribunal shall determine the admissibility, relevance, materiality and weight of evidence offered.

7. The Tribunal may, at the request of a disputing party or on its own initiative, exclude from evidence or production any document, exhibits or evidence obtained illegally or based on the following reasons: […]

8 The Tribunal may order a visit to any place connected with the dispute, at the request of a disputing party or on its own initiative and may conduct inquiries there as appropriate.

Comments from the European Union and its Member States:

The European Union and its Member States would like to formulate the following comments on paragraph 3:

- The first sentence of paragraph 3 grants the Tribunal discretionary power to reject a request for a document production **procedure**, unless the request is made by all disputing parties. The Annotations (paragraph 4, footnote 3) mention that this language comes from UNCITRAL Rules for Expedited Arbitration where, for costs and time efficiency, such procedure could be avoided.

  The question is whether, in an "ordinary" arbitration or dispute, this discretionary power is justified. The European Union and its Member States believe that a procedure for document production can be burdensome and heavy on a respondent's resources, and a balance should be found between this concern and the utility of document production for litigating a case, including for a State or

REIO. The current wording, while trying to address such concerns, may give too much arbitrary power to the Tribunal since it is unclear if the listed grounds in the rest of the paragraph are to guide the Tribunal in its decision or for a separate stage (see below).

- The second sentence of paragraph 3 lists the circumstances to be considered when assessing requests for document production. However, it is unclear whether these grounds are for the Tribunal when assessing a request to establish a procedure for document production, or, once such procedure is established, if the grounds are for the Tribunal when assessing individual request for producing specific documents (the latter one may seem far reaching).
- In any event, Draft provision 1 seems to be missing the possibility for the Tribunal to decide on a dispute arising out of a party's objection to the other party's request for production of documents, once such procedure is established, as provided in ICSID Arbitration Rule 37. The Annotations (paragraph 4, footnote 4) indicate that the second sentence and listed circumstances in paragraph 3 follow ICSID Rule 37, but paragraph 3 concerns a different situation or at least creates confusion as to which situation is concerned (as explained above). The European Union and its Member States would like to request the addition of a paragraph reproducing Rule 37.

In addition, with regard to paragraph 7, the European Union and its Member States suggest taking into account, as a ground for exclusion, information protected or classified for national security purposes (e.g. IBA Rule Article 9(2), or similar provisions found to limit transparency of the proceedings, e.g. UNCITRAL Transparency Rules, Article 7(2)).

The European Union and its Member States think that this provision should be acceptable depending on the clarifications requested above being resolved and the outcome of the negotiations, this draft provision could also be part of procedural rules to a standing mechanism.

Draft Provision 2: Bifurcation

1. A disputing party may request that an issue, including a plea that the Tribunal does not have jurisdiction, be addressed in a separate phase of the proceeding ("request for bifurcation").

2. The request for bifurcation shall be made as soon as possible and shall state the issue to be bifurcated. The 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 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 Tribunal shall decide on the request for bifurcation within [30] days after the last submission on the request and shall fix any period of time necessary for the further conduct of the proceeding.

5. If the Tribunal orders bifurcation, it shall suspend the proceeding with respect to any issues to be addressed at a later phase, unless the disputing parties agree otherwise.

6. The Tribunal may at any time on its own initiative decide whether an issue should be addressed in a separate phase of the proceeding.

Comments from the European Union and its Member States:

The European Union and its Member States have the following comments:

- In paragraph 1, the word "objection" should replace "plea", as a more appropriate word in the investment law terminology. Furthermore, it is suggested to make clear that draft provision 2 is also relevant for requests to bifurcate liability and damages. To this end, the relevant part of paragraph 1 could be redrafted as follows: *"... including ~~a plea~~* ***an objection*** *that the Tribunal does not have jurisdiction* ***or the assessment of damages****, ...".*
- In paragraph 3, it is suggested to add a reference to the objective of procedural economy, which is the overall rationale for bifurcation. To this end, the relevant part of paragraph 3 could be redrafted as follows: *"the Tribunal shall consider all relevant circumstances* ***serving procedural economy****, including..."*
- In paragraph 5, the words "unless the disputing parties agree otherwise" should be removed. It is unclear why such possibility should be allowed, as the purpose of an order to bifurcate is to deal with different issues separately, with some of them being addressed first. Not suspending the proceeding with respect to issues to be addressed at a later phase would nullify the benefits of the bifurcation.
- In paragraph 6, the previous version of that provision included the following language at the beginning of the paragraph "After consultation with the disputing parties". Such language should be reintroduced in paragraph 6, considering the impact on the proceeding that such discretionary power given to the Tribunal would have.

The European Union and its Member States would also be in favour of developing draft provision 2 to incorporate some elements of Rule 44 of the ICSID Rules with regard to request for bifurcation relating to a preliminary objection, in particular paragraph 1 of Rule 44 providing for a procedural calendar.

The European Union and its Member States think that this provision should be acceptable and depending on the outcome of the negotiations, this draft provision could also be part of procedural rules to a standing mechanism.

Draft Provision 3: Interim/provisional measures

1. The Tribunal may, at the request of a disputing party, grant interim/provisional measures.

[…]

Comments from the European Union and its Member States:

The EU approach clarifies that the tribunal can only order interim measures of protection for the purpose of preserving the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective. The Tribunal can, for example, order evidence to be preserved (e.g. to avoid that documents be destroyed).

However, it cannot seize the property of a party to secure satisfaction of the award (e.g. it cannot order that accounts be blocked) nor prevent the respondent from applying the measures that are subject to the dispute. The EU approach is more restrictive than for instance Article 26 of UNCITRAL Arbitration Rules and Rule 47 of ICSID Arbitration Rules, which allow as an interim measure an order to restore the status quo and does not have a clear prohibition of the seizure of assets.

The EU approach however leaves discretion to the Tribunal and does not provide for circumstances to be taken into account by the Tribunal in deciding to order interim measures.

The European Union and its Member States think that this provision, depending on the outcome of the negotiations, could also be part of procedural rules to a standing mechanism.

Please find below language according to the EU approach. In the European Union and its Member States' view, this language should be included:

"1. The Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party.

2. The Tribunal shall not order the seizure of assets nor prevent the application of the treatment alleged to breach the provisions referred to in [the claim under consideration]. For the purposes of this [Article], an order includes a recommendation."

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

1. A disputing 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 Tribunal and no later than [45] days after its constitution. The 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 Tribunal. The objection shall specify the grounds on which it is based and contain a statement of the relevant facts, laws and arguments. The Tribunal shall fix the period of time within which submissions on the objection shall be made by the disputing parties.

4. The Tribunal shall decide on the objection within [60] days after the last submission on the objection.

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

6. If the Tribunal makes an award in accordance with paragraph 5, the Tribunal shall award the prevailing party its reasonable costs, unless the Tribunal determines that there are exceptional circumstances justifying a different allocation of costs.

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

Comments from the European Union and its Member States:

In EU agreements, there are two provisions relating to early dismissal of unfounded claims that complement each other: one for "claims manifestly without legal merit" and one for "claims unfounded as a matter of law". Taken together, they constitute a double layer of protection for respondents. Both allow for the expeditious dismissal of unfounded or abusive claims: a first objection against manifestly unfounded claims (higher threshold), which can be raised at the very beginning of a case, and a second defence against legally unfounded claims, which can be raised also at a later stage. The EU approach only considers requests made by the respondent.

With regards to claims manifestly without legal merit, the EU approaches provides for the situation where the respondent only learns about the facts on which the objection is based at a later stage. In that situation, the respondent can raise the objection within 30 days from that moment (even if it is more than 30 days after the constitution of the division).

Paragraph 2 of draft provision 19 only includes the possibility to make the request no later than [45] days after the constitution of the Tribunal, without expressly including the situation where the respondent learns about the facts at a later stage. Rather, paragraph 2 provides that "*The Tribunal may admit a later request if it considers the delay justified*" which leaves significant discretion to the Tribunal. In addition to this

language, we would add the specific circumstance where the respondent or disputing party only learn about the facts on which the objection is based at a later stage.

Furthermore, while the EU approach includes a short timeframe of 30 days to make an objection, the European Union and its Member States would be open to consider a longer timeframe of 60 days.

Also, in the EU approach the Tribunal shall issue its decision within a limited period of time (no later than 120 days after the objection was submitted) to fulfil the purpose of early dismissal and avoid significant disruption to the proceeding.

The position of the European Union and its Member States is that further work is relevant on this draft provision and, depending on the outcome of the negotiations, could also be part of procedural rules to a standing mechanism.

Please find below language according to the EU approach. In the European Union and its Member States' view, this language should be included:

"Claims Manifestly without Legal Merit

1. The respondent may, no later than 30 days after the constitution of [the Tribunal], and in any case before the first meeting of [the Tribunal], or 30 days after the respondent became aware of the facts on which the objection is based, submit an objection that a claim is manifestly without legal merit.

2. The respondent shall specify as precisely as possible the basis for the objection.

3. The Tribunal, after giving the disputing parties an opportunity to present their observations on the objection, shall, at the first meeting of [the Tribunal] or promptly thereafter, issue a decision or provisional award on the objection, stating the grounds therefor. If the objection is received after the first meeting of [the Tribunal], the Tribunal shall issue such decision or provisional award as soon as possible, and no later than 120 days after the objection was submitted. In doing so, the Tribunal shall assume the alleged facts to be true, and may also consider any relevant facts not in dispute.

4. This Article and any decision of the Tribunal shall be without prejudice to the right of a disputing party to object, pursuant to [Article on Claims Unfounded as a Matter of Law] or in the course of the proceedings, to the legal merits of a claim, and shall be without prejudice to the Tribunal's authority to address other objections as a preliminary question.

Claims Unfounded as a Matter of law

1. Without prejudice to the Tribunal's authority to address other objections as a preliminary question or to a respondent's right to raise any such objections at any appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted pursuant to [relevant article] is not a claim for which an award in favour of the claimant may be issued under [this Section], even if the facts alleged were assumed to be true. The Tribunal may also consider any relevant facts not in dispute.

2. An objection pursuant to paragraph 1 shall be submitted to the Tribunal as soon as possible after the [the Tribunal] is constituted, and in no event later than the date the Tribunal determines for the respondent to submit its counter-memorial or statement of defence. An objection shall not be submitted pursuant to paragraph 1 as long as proceedings pursuant to [Article on Claims Manifestly without Legal Merit] are pending, unless the Tribunal grants leave to submit an objection pursuant to this Article, after having taken due account of the circumstances of the case.

3. On receipt of an objection pursuant to paragraph 1, and unless it considers the objection manifestly unfounded, the Tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or provisional award on the objection, stating the grounds therefor."

Draft Provision 5: Security for costs

1. At the request of a disputing party, the Tribunal may order any disputing 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 Tribunal shall fix the period of time within which submissions on the request shall be made by the disputing parties.

3. The Tribunal shall decide on the request within [30] days after the last submission on the request.

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

(a) That disputing party's ability to comply with an adverse decision on costs;

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

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

(d) The conduct of the disputing parties; and

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

5. The 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 disputing party fails to comply with the order to provide security for costs, the Tribunal may order the suspension of the proceeding for a fixed period of time. If the proceeding is suspended for more than [90] days, the Tribunal may, after inviting the disputing 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 Tribunal ordered security for costs.

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

Comments from the European Union and its Member States:

The European Union and its Member States have the following comments:

- With regard to paragraph 1 of draft provision 5 and paragraph 18 of the Annotations, it does not seem relevant, for policy reasons, to include the possibility for a respondent State making a counterclaim to be ordered security for costs.
- With regard to paragraph 4(e), it could be linked to information that the Tribunal may request under draft provision 12. Indeed, if the Tribunal does not yet have the information specified in draft provision 12, it would seem necessary that the Tribunal requests that the disputing party disclose it for the purposes of paragraph (4)(e). Also, the approach in Rule 53(4) of the ISCID Arbitration Rules, where third-party funding can be considered as evidence in relation to the circumstances listed under current paragraph 4, seems more appropriate.

The European Union and its Member States think that this provision could be acceptable and, depending on the outcome of the negotiations, this draft provision could also be part of procedural rules to a standing mechanism.

Draft Provision 6: Suspension of the proceeding

1. The Tribunal shall order the suspension of the proceeding when requested jointly by the disputing parties.

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

3. In its order of suspension, the 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 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 disputing parties to express their views. The Tribunal shall extend the period of suspension prior to its expiry by agreement of the disputing parties.

Comments from the European Union and its Member States:

The European Union and its Member States think that this provision could be acceptable and, depending on the outcome of the negotiations, this draft provision could also be part of procedural rules to a standing mechanism.

Draft Provision 7: Termination of the proceeding

1. The Tribunal shall order the termination of the proceeding when requested jointly by the disputing parties.

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

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

Comments from the European Union and its Member States:

The European Union and its Member States suggest to clarify the conditions under which the proceedings could be terminated. For instance, it could be possible to order termination in case the continuation is impossible (and not simply “unnecessary”). Furthermore, the objection raised by a party to the dispute against termination should be justifiable and demonstrate that continuance is not impossible.

The European Union and its Member States think that this provision could be acceptable and, depending on the outcome of the negotiations, this draft provision could also be part of procedural rules to a standing mechanism.

Draft Provision 8: Period of time for making the award

1. The Tribunal shall make the award as soon as possible.

2. Unless otherwise agreed by the disputing parties, the Tribunal shall make the award within [period of time] after the date of the constitution of the Tribunal.

3. The Tribunal may, in exceptional circumstances and after inviting the disputing parties to express their views, extend the period of time established in accordance with paragraph 2 and indicate a period of time within which it shall make the award.

Comments from the European Union and its Member States:

The EU approach considers a specific timeframe from the date of submission of the claim. The European Union and its Member States would be in favour of mentioning a specific timeframe such as 18 months to contribute to a quick and efficient procedure. We could also consider 6 months from the date of the last submission.

In addition, the European Union and its Member States would suggest to delete paragraph 3 and to simply provide for a specific timeframe within which the Tribunal shall make the award. While the reality may be that a Tribunal would need an

extension to make the award (and this possibility could be provided in the procedural order with agreement of the disputing parties), providing for this possibility already in the arbitration rules would remove the pressure on the Tribunal to be diligent.

The European Union and its Member States think that this provision could be acceptable and, depending on the outcome of the negotiations, this draft provision could also be part of procedural rules to a standing mechanism.

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 Tribunal may allocate the costs between the disputing 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;

(b) The conduct of the disputing 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 Tribunal;

(c) The complexity of the issues;

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

(e) The existence of third-party funding; and

(f) The amount of monetary damages/compensation claimed by the claimant in proportion to the amount awarded by the Tribunal.

3. Unless otherwise determined by the Tribunal, expenses incurred by a disputing party related to or arising from third-party funding shall not be included in the costs of the proceeding.

4. Paragraphs 1 to 3 apply to any costs arising from a request by a disputing party that a claim is manifestly without legal merit pursuant to Draft Provision 4.

5. The Tribunal may, at the request of a disputing party or on its own initiative, make an interim decision on costs at any time.

6. The Tribunal shall ensure that all decisions on costs are reasoned and form part of the award.

Comments from the European Union and its Member States:

The European Union and its Member States agree with the principle of the losing party paying the costs. However, paragraph 2 should set a higher standard for allocation, and ensure that the winning party only bears expenses in exceptional circumstances. The word "exceptionally" should appear between "may" and "allocate" as follows:

*"2. However, the Tribunal may **exceptionally** allocate the costs between the disputing parties, if it determines the allocation to be reasonable taking into account all relevant circumstances of the case, including:"*

Also, with regard to paragraph 35 of the Annotations and the possibility to subject decisions on costs to appeal, the European Union and its Member States believe that this question should be left to the discussions on the draft statute of a standing mechanism. With regard to paragraph 36 of the Annotations, it would appear relevant to incorporate Rule 51 of the ICSID Arbitration Rules (on statement of, and submission on, costs) into this draft provision.

The European Union and its Member States think that this provision could be acceptable and, depending on the outcome of the negotiations, this draft provision could also be part of procedural rules to a standing mechanism.

Draft Provision 11: Consolidation and coordination of proceedings

1. Where two or more claims have been submitted separately, the disputing parties may agree to consolidate or coordinate the relevant proceedings.

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

3. The disputing parties shall provide the proposed terms for the conduct of the consolidated or coordinated proceedings to the Tribunals.

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

Comments from the European Union and its Member States:

The ability to consolidate and coordinate proceedings is a useful tool in reducing the number of claims, saving time and resources and ensuring consistency. However, it should also be kept in mind that one of the advantages of a standing mechanism is precisely the ability to manage similar cases (which is more difficult in the ad hoc system) and to join them. Therefore, whilst this rule is certainly useful it must be understood that a standing mechanism may itself need to develop more specific provisions.

On consolidation, the EU approach is different and more detailed than draft provision 11. It defines under which conditions consolidation of claims is possible and what the procedural rules are. One of the main differences in our approach is that only the respondent can ask for consolidation, and it must be in relation to claims raising the same issue of law or fact and arising out of the same circumstances. Consolidation is only possible for claims under the same agreement, but as said a standing mechanism could develop more specific provisions providing for consolidation of claims across different agreements.

The European Union and its Member States suggest that the EU approach's text be used for the purpose of supplementing the UNCITRAL Arbitration Rules, but that more specific rules would be developed by a standing mechanism for example to allow consolidation over disputes across different agreements:

"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."

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 that is not a party to the proceeding but enters into an agreement to provide, or otherwise provides, funding ("third-party funder") for a proceeding 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 Tribunal and the other disputing party the following information:

(a) The name and address of the third-party funder; and

(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.

3. In addition, the Tribunal may require the funded party to disclose:

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

(b) Whether the third-party funder agrees to cover any adverse cost award;

(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; and

(e) Any other information deemed necessary by the Tribunal.

4. The disputing party shall disclose the information listed in paragraph 2 when submitting its statement of claim, or if the funding agreement is entered into after the submission of the statement of claim, immediately thereafter. The disputing party shall disclose the information required by the Tribunal in accordance with paragraph 3 as promptly as possible.

5. If there is any new information or any change in the information disclosed in accordance with paragraphs 2 and 3, the disputing party shall disclose such information to the Tribunal and the other disputing party as promptly as possible.

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

(a) When the expected return to the third-party funder exceeds a reasonable amount;

(b) When the number of cases that the third-party funder funds against the respondent Contracting Party with regard to the same measure exceeds a reasonable number; or

(c) […].

7. If the disputing party fails to comply with the disclosure obligations in paragraphs 2 to 5, the 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.

8. If the disputing parties receive funding which is not permissible under paragraph 6, the Tribunal may take the measures listed in paragraph 7 and in addition order the disputing party to terminate the funding agreement and to return any funding.

Comments from the European Union and its Member States on paragraphs 1 to 5 and 7:

At first, it is important to note that third party funding may, in certain circumstances and where properly regulated, have a positive impact as it would favour claims with merits and would help small investors having access to ISDS.

Nevertheless, third-party funding is an important concern for the European Union and its Member States and is also closely linked to other aspects of the reform, in particular the adopted Codes of conduct for arbitrators and judges. Indeed, one of the main concerns with third party funding relate to conflict of interests or the possibility to influence arbitrators, which is addressed through disclosure and transparency, as addressed by paragraphs 1 to 5 and 7. A failure to comply with the disclosure

obligation would include the situation where a disputing party had provided false information or concealed information with regard to third-party funding.

The European Union and its Member States have the following comments:

- The lists of information currently displayed under paragraph 3 should be included under paragraph 2 as information to be mandatorily disclosed to the Tribunal and the other disputing party.
    - Paragraph 3(a) which refers to "*information regarding the funding agreement and the terms thereof*" should be detailed so as to explicitly specify the key terms of a funding agreements that should be disclosed, such as the rate of return, but also the aspects that are currently covered by 3(b) and (c).
    - In addition, it should be added the disclosure of a proof of the capacity of the third-party funder to finance all stages of the proceeding, including, therefore, the payment of costs of the respondent where ordered.
    - It should also be added the disclosure of other cases against the same respondent(s) that are funded by the same third-party funder and/or related entities.
- On paragraph 5, the reference to "as promptly as possible" should be better clarified, either by providing "within a period specified by the Tribunal" or by providing a specific timeframe directly in the text, such as 30 days.

The position of the European Union and its Member States is that further work is relevant on the question of third-party funding which, depending on the outcome of the discussions, could also be in the rules of procedure of a standing mechanism.

The European Union and its Member States do not take a position, in this submission, on the questions of regulation of third-party funding, specifically the elements on this in paragraphs 6 and 8 of the current draft article. Further reflection on these issues is required and is ongoing.