

Comments of the Africa Group on the draft Provisions on Procedural and Cross-cutting issues

The Africa Group wish to reiterate the importance of document A/CN.9/WG.III/WP.231. At its 47th session, the Working Group discussed how to advance its work on the referenced document and A/CN.9/WG.III/WP.232.

Following that Session, the draft provisions on procedural and cross-cutting issues have been classified into 3 categories: (i) those that aimed to achieve harmonization with existing procedural rules (including the 2022 ICSID Arbitration Rules) and could form a supplement to the UNCITRAL Arbitration Rules; (ii) those that would build on existing procedural rules and provisions found in recent investment treaties, which could be drafted as treaty provisions for adoption by States; and (iii) those that were not found in procedural rules addressing the so-called cross-cutting issues, and would require negotiations in the Working Group.

The Africa Group note the suggestion made at the Inter-sessional meeting on ISDS reform in Brussels to include the provisions of categories (i) and (ii) in a supplement to the UNCITRAL Arbitration Rules, and to include the provisions of category (iii) in a protocol to the MIIR so that they could be applied to all ISDS proceedings. However, the suggestion made to suspend the discussion on the provisions of category (iii) and prioritize provisions of categories (i) and (ii) is problematic for the Africa Group, many of which had made previous interventions for reform of key issues such as 12 (right to regulate) and 23 (assessment of damages and compensation) among others. The classification of draft provisions recommended at the intersessional meeting cannot be binding nor adopted as the decision of the WGIII. Decisions are to be adopted at formal meetings of the WGIII, where members would discuss the matter and come to a consensus.

While the importance of classification of the issues for efficient consideration by Working Group III is noted, this submission calls for prioritization of the consideration of the issues that fall under category (iii), many of which are not only pressing to the Africa Group but will connote high impact meaningful ISDS reform since most of them are yet to be addressed in any instrument. Given the time constraints for the conclusion of the Working Group's task, more beneficial and impactful reform will be achieved by spending the limited time in addressing critical issues not covered by any existing rules.

Furthermore, the Africa Group have noted that the categorization as presented in A/CN.9/WGIII/WP.242 does not cover some important draft provisions. Prominent among these, are provision 4 (state-to-state dispute settlement) and provision 6 (recourse to local remedies). The delegations view the omission of these provisions as not only narrowing the scope of the reform, but also narrowing the hope for concrete ISDS reform. In that regard, this submission is made to relist and prioritize consideration of these draft provisions as critical ISDS reform elements for the Africa Group.

