Comments on Working Paper A/CN.9/WG.III/WP.248

The following comments on provisions 21 and 22 of Working Paper A/CN.9/WG.III/WP.248 (Working Paper 248) are submitted jointly by the Republic of Chile, the Republic of Colombia, the Dominican Republic, the United Mexican States, the Republic of Panama, and the Republic of Paraguay. These comments are made without prejudice to each country's ability to submit additional comments or adjust its position as the negotiations progress.

Provision 21: Joint Interpretation

We consider that the provision on joint interpretation should focus exclusively on the authority of the parties to a treaty to issue joint interpretations that are binding on the tribunal.

In this regard, we are of the view that a tribunal should not be allowed to request a joint interpretation, as suggested in paragraphs 3 and 4 of Working Paper 248. The adoption of a joint interpretation is an exclusive prerogative of the treaty parties and should remain entirely at their discretion.

On the other hand, although we do not consider paragraph 2 to be necessary, we are open to its inclusion if other delegations so prefer.

Therefore, we would support the text currently set out in paragraphs 1 and 5, with some modifications, as follows:

1. ***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. ***A joint interpretation issued pursuant to paragraphs 1 shall be binding on tribunals established in accordance with the Agreement. Tribunals shall ensure that their decisions and awards are consistent with the joint interpretation.***

We do not consider it necessary to include the bracketed text in paragraph 1, but we are flexible on this matter.

Finally, we support classifying this provision as a treaty provision, consistent with those categorized under Section B.

Provision 22: Submission by a non-disputing Treaty Party

Given that Article 5 of the UNCITRAL Rules on Transparency already establishes a rule on this matter, we consider that, for reasons of legal coherence, it would not be advisable to propose a different rule as a supplement to the UNCITRAL Arbitration Rules. In this regard, we propose two optional and complementary mechanisms that could be implemented through the Multilateral Instrument:

1. Allow the UNCITRAL Arbitration Rules provided for in older investment treaties to be replaced by the UNCITRAL Arbitration Rules in force at the time the investor-State dispute is submitted to arbitration.

2. Include the UNCITRAL Rules on Transparency in the Multilateral Instrument through an optional protocol, with the aim of extending their application to investment treaties concluded before April 1, 2014.

Additionally, we believe that the right of a treaty party that is not a disputing party to participate in an investor-State dispute settlement proceeding, specifically regarding the interpretation of the treaty, should be established as a treaty provision. This would ensure its applicability in all disputes, regardless of the arbitration rules applying to the dispute.

Accordingly, we propose the following text and its classification under Section B (treaty provision) for consideration by Working Group III:

> ***"A treaty party that is not a disputing party may make oral and written submissions to the tribunal regarding the interpretation of the treaty applicable to the dispute."***