

**UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE
LAW (UNCITRAL) Working Group III: Investor-State Dispute
Settlement Reform**

Draft provisions on procedural and cross-cutting issues

Note by the Secretariat

Comments from the Republic of Colombia

I. General comments

1. Colombia thanks the Secretariat for preparing these draft provisions on procedural and cross-cutting issues prepared by the UNCITRAL Secretariat; and submits its comments to such draft.
2. For Colombia, the draft provisions on procedural and cross-cutting issues is of vital importance, and it is expected to achieve a binding legal instrument, as has been expressed in the working group.
3. Colombia reserves its right to modify, withdraw or make further comments or state a specific position on this and any other issues during discussions taking place within the Working Group III on a possible Investor-State dispute settlement (ISDS) reform.

II. Specific comments

Draft provision 1 Consultation and negotiation

4. Colombia asserts that the language of this provision aligns with the generic wording commonly found in clauses of this nature. To enhance its clarity and applicability, Colombia proposes an additional clause stipulating that when consultations pertain to administrative acts by state entities, the claimant must have previously exhausted the administrative remedies mandated by the domestic law of the Host

State. The suggested addition is as follows: "In the case of requests for consultations related to administrative acts, the request must be preceded, at least, by the exhaustion of the administrative remedies as required by the Host State's domestic law."

Draft provision 5 Period for amicable settlement

5. Colombia agrees with the wording of this provision and proposes the period for the amicable settlement period to be of six months.

Draft provision 6 Recourse to local remedies and Draft provision 7 Waiver of rights to initiate dispute resolution proceeding

6. The delegation posits that, upon joint interpretation, provisions 6 and 7 may potentially give rise to contradictions. Provision 6 mandates the utilization of national courts and the acquisition of a judgment as a prerequisite for initiating an arbitration proceeding. However, provision 7 establishes that, if a dispute resolution process has been initiated, the concerned party must relinquish its right to commence or perpetuate any alternative dispute resolution process concerning the measure presumed to constitute a breach of the agreement.
7. To address this concern, Colombia proposes a compromise by suggesting the consolidation of the two provisions. The proposed provision should explicitly state that, where appropriate, administrative remedies must be exhausted before initiating a dispute. It is recommended to specify that the investor can recourse to local courts. In the case of opting for investment arbitration, the investor is obliged to waive the right to initiate or continue any alternative dispute resolution process related to the alleged measure constituting breach of the agreement. The main objective of this proposal is to prevent the parties from becoming entangled in multiple and simultaneous proceedings.

Draft provision 8: Limitation period

8. With respect to the duration specified in DP 8, Colombia considers that a three-year timeframe is appropriate.

Draft provision 9: Denial of benefits

9. Colombia concurs with the formulation of the clause and submits a proposal for the incorporation of the following stipulations:

10. "It should be established through judicial or administrative proceedings, either by an International Court or a judicial or administrative authority of the Parties, and proven that the investor has directly or indirectly:

- Committed serious violations of human rights.
- Sponsored individuals or organizations convicted of serious violations of human rights or violations of International Humanitarian Law, or sponsored terrorist organizations included in international lists.
- Caused environmental damage."

11. Moreover, specifically with regards to literal 2 C which refers to the denial of benefits when the investment was made by way of corruption, fraud or deceitful conduct, Colombia suggests for this wording to refer to corruption, fraud or deceitful conduct not only for the making of the investment, but also during the execution of the investment. The wording with the proposed modification would read as follows: "The investment was made by way of, or involved, corruption, fraud, or deceitful conduct;"

12. Furthermore, we propose the inclusion of a provision stipulating that "the benefits conferred by this Agreement shall be rendered unavailable to an investor of a Party if the principal motive behind acquiring the nationality of that Party was to attain advantages under this Agreement that would otherwise be inaccessible to said investor."

13. Also, it is important to specify when benefits under the Agreement will be denied and the conditions for exercising the right to deny benefits to make it effective, including, for example, a temporal limit. The following wording is suggested: "Benefits may be denied at any time, even after any claim has been initiated under the dispute resolution mechanism."
14. The proposed wording aligns with discussions on the project of an internationally legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.
15. Additionally, for Colombia, it is relevant to include a provision regarding the denial of benefits under the agreement if citizenship is acquired with the primary purpose of obtaining benefits under the Agreement. This is aimed at preventing abuse of rights by those investors who adopt a particular nationality solely to access the protections of the agreement and thus resort to dispute resolution mechanisms.

Draft provision 10: Shareholder claims

16. Colombia agrees with the wording of this draft provision, with the limitation to the types of claims a shareholder may submit against a Host State, which only allows shareholders to claim direct breach or damage and not any sort of loss or damage caused solely to the enterprise.
17. Colombia acknowledges its concurrence with the stipulation presented in the first and second paragraphs. Concerning the third paragraph, it is our considered position that the inclusion of this clarification is unnecessary, as it is inherently implicit within the expropriation provisions delineated in the relevant treaties.

Draft provision 11: Counterclaim

18. Colombia agrees with the proposed wording, however regarding literal 1 C, it is important to specify more clearly what obligations the plaintiff could fail to fulfill under the agreement.

19. Concerning numeral 2, this wording could hinder counterclaims for states if misinterpreted or not applied by arbitral tribunals; therefore, it is proposed to stipulate that the defendant's consent to counterclaims shall be either presumed upon the submission of the investor's claim or incorporated in the text of the claimant's written submission.

Draft provision 12: Right to regulate

20. Colombia agrees with the proposed wording, however from numerals 1 to 3, when referring to the matters considered as of public interest, Colombia suggests including human rights, as well as essential security interests, and maintaining an open and non-exhaustive list. It is proposed to include the phrase "such as..." to convey this openness.
