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United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
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Vienna, 9–13 October 2023

Possible reform of investor-State dispute settlement (ISDS)

Draft provisions on procedural and cross-cutting issues

Note by the Secretariat

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I. Introduction

1. The Working Group had a preliminary discussion on procedural reform of investor-State dispute settlement (ISDS) at its thirty-sixth session in 2018 based on documents A/CN.9/WG.III/WP.149 and A/CN.9/WG.III/WP.153 (see A/CN.9/964, paras. 124–134), at its thirty-ninth session in October 2020 based on documents A/CN.9/WG.III/WP.192 and A/CN.9/WG.III/WP.193 (see A/CN.9/1044, paras. 41–89) and at the fourth intersessional meeting in September 2021 (see A/CN.9/WG.III/WP.214).

2. At its forty-third session in September 2022, the Working Group considered draft provisions on procedural reform on the basis of document A/CN.9/WG.III/WP.219, which addressed the procedural issues that the Working Group had identified during the first phase of its mandate. The Working Group also considered so-called "cross-cutting" issues (see A/CN.9/1124, paras. 89–104) and identified additional issues as requiring further work. Reference was made to the annex in an earlier submission by States (A/CN.9/WG.III/WP.182). The Secretariat was requested to prepare draft provisions on the identified issues taking into account recent treaty practice, the recently amended Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) as well as studies conducted by other organizations with a view of consolidating them into a suite of draft provisions (A/CN.9/1124, paras. 103 and 104).

3. Accordingly, this Note provides for a set of provisions addressing procedural and cross-cutting issues (referred to as the "Draft Provisions"). The Draft Provisions have been prepared for inclusion in existing and future international investment agreements ("IIAs") and follow the structure of chapters or sections in recently concluded IIAs addressing the resolution of investment disputes between investors and States. Accordingly, the Draft Provisions need to be read in the context of the IIA that they would be incorporated into (referred to in the Draft Provisions as the "Agreement"), including the substantive protection standards. The Draft Provisions may also be incorporated into investment contracts between a foreign investor and a State or a regional economic integration organization (REIO) and into domestic legislation governing foreign investments to the extent applicable and with the necessary adjustments.

4. References to "investor", "investment", "claim" and "dispute" in the Draft Provisions should be understood in the context of the respective Agreement and as defined therein. "Contracting Party" in the Draft Provisions refers to the Parties to the Agreement (which may be a State or a REIO) and "disputing parties" generally refers to an investor raising a claim under the Agreement and a respondent Contracting Party. The type of proceedings through which the investor could raise its claim, including any applicable rules, would be provided in the Agreement. However, as reference need to be made to such a provision in the Agreement and as the Draft Provisions have been prepared to apply generally to all such forums of dispute settlement (including a standing mechanism or an appellate mechanism), Draft Provision 3 is a placeholder to refer to whatever dispute resolution mechanism is provided under the Agreement. Similarly, the term "Tribunal" in the Draft Provisions refers to an adjudicatory body provided for in the Agreement to resolve investment disputes.

5. Where relevant, the Draft Provisions refer to other reform elements being developed or already developed by the Working Group/Commission (for example, the Code of Conduct for Arbitrators in International Investment Dispute Resolution, the Code of Conduct for Judges in International Investment Dispute Resolution, the Model Provisions on Mediation for International Investment Disputes, the Rules on Transparency in Treaty-based Investor-State Arbitration) and include a provision as a placeholder to illustrate the relationship with the Draft Provisions. The Working Group may wish to consider the general structure of the Draft Provisions and assess whether there are elements to be taken out or further added.

Comments from the European Union and its Member States:

The European Union (EU) and its Member States thank the Secretariat for the preparation of this working paper on procedural and cross-cutting issues and for the opportunity to provide written comments ahead of the next deliberations of Working Group III on this important element of the reform.

The aim of the comments below is threefold:

The first objective is to signal, for each individual draft provision, if further work is in our view necessary or not, considering, among other factors, the procedural scope of the mandate of Working Group III and its current workload. Account should also be taken of already existing procedural rules in order to avoid merely replicating such rules and of other ongoing reform processes, notably the work programme on the future of investment treaties of the OECD, where substantive issues are addressed.

The second objective is to indicate, for such draft provisions where further work is considered necessary, what should be their final destination, *i.e.* the form that could eventually take those provisions.

In this regard, four options were mentioned during the 46th session of the Working Group (A/CN.9/1160, para. 92-95): (i) model clauses for future IIA negotiations, (ii) provisions to be retrofitted in existing IIAs through a multilateral instrument, (iii) supplementary rules to the UNCITRAL Arbitration Rules (UARs) or (iv) rules of procedure of a standing mechanism.

The EU and its Member States are of the view that using these draft provisions as mere model clauses for future negotiations of IIAs would not be achieving the objective of a meaningful reform of the current ISDS regime. Considering that we should generally avoid scattering the results of our work in too many distinct instruments and destinations, we should concentrate on reforms that can deliver significant improvements. We would not prioritise the development of supplementary rules to the current UNCITRAL Arbitration Rules.

The EU and its Member States are of the view that priority should accordingly be given to the drafting of provisions (i) to be retrofitted in existing IIAs through a specific protocol of a multilateral instrument and/or (ii) to be included in the statute or in procedural rules of the standing mechanism, which may also be established via a specific (but distinct) protocol to a multilateral instrument.

It is the view of the EU and its Member States that it is difficult to prejudge at this stage what should be the final destination of those draft provisions, which would need to be decided in light of their substance and of the outcome of the discussions on a multilateral instrument.

The third objective is to provide guidance and support to the Secretariat, including, where possible and relevant, with drafting suggestions, for the preparation of a revised working paper.

In this regard, the EU and its Member States would support, where deemed necessary, the possibility to offer in some instances, especially in relation to those draft provisions where it may be difficult to reach consensus, several options on which States would have the possibility to express individual choices.

Finally, as a general comment, we note that the term “Agreement” is used in various instances in the working paper, but it is the position of the EU and its Member States that a more neutral term should be used to cover treaties and other relevant instruments.

II. Draft provisions on procedural and cross-cutting issues

A. Submission of a claim – conditions and limitations

Draft provision 1: Consultation and negotiation

1. A dispute between a Contracting Party and an investor of the other Contracting Party (the "disputing parties") shall be settled as far as possible amicably through consultation or negotiation.

2. The disputing parties may agree to engage in consultation or negotiation at any time, including after the commencement of any other dispute resolution proceeding pursuant to Draft Provision 3.

3. A party may invite the other party in writing to engage in consultation or negotiation, which shall contain at least the following information:

(a) The name and contact details of the inviting party and its legal representative and, if the invitation is made by a legal person, the place of its incorporation;

(b) Government agencies and entities that have been involved in the matters giving rise to the invitation;

(c) A description of the basis of the dispute sufficient to identify the matters giving rise to the invitation; and

(d) A description of any prior steps taken to resolve the dispute, including information on any pending claim.

4. The other party should make all reasonable efforts to accept or reject the invitation in writing within 30 days of receipt of the invitation. If the inviting party does not receive an acceptance within 60 days of receipt of the invitation, that party may elect to treat it as a rejection of the invitation.

Comments from the European Union and its Member States:

The EU and its Member States note the conclusions of the Working Group at its 46th session with regard to draft provision 1 (A/CN.9/1160, para 116): "*Considering that a number of IIAs already included provisions on amicable settlement, it was generally felt that there was not much merit in the Working Group developing a text similar to draft provision 1. It was, however, suggested that claimants should be required to seek (or, at least, initiate) amicable settlement prior to raising a claim and that draft provision 5, which provided for such a "cooling-off period", deserved further work to incorporate that preliminary step*."

However, the EU and its Member States wish to explain the EU approach to amicable settlement, in particular regarding consultations, as it is directly linked to the "cooling-off period".

The EU approach makes a difference between negotiation and consultation. Negotiation relates to amicable resolution, while consultation follows a failure to amicably settle the dispute through negotiation (or mediation). Negotiation and mediation are always available and not mandatory, while consultation is mandatory to continue the proceeding and is also submitted to statute of limitation. Draft provision 1 on the other hand includes both consultation and negotiation indistinctly as part of the amicable resolution of the dispute.

For an example of "cooling-off period" based on the EU approach, see draft provision 5 below.

Draft provision 2: Mediation

[UNCITRAL Model Provisions on Mediation for International Investment Disputes[1]]

Draft provision 3: Dispute resolution proceedings

[A placeholder to refer to the dispute resolution means provided in the Agreement.]

Draft provision 4: State-to-State dispute settlement

1. A Contracting Party may submit, on behalf of an investor of that Contracting Party, a claim against another Contracting Party in accordance with the dispute settlement provisions in the Agreement or the UNCITRAL Arbitration Rules.

2. The Contracting Party may request the Tribunal established in accordance with paragraph 1 to determine that:

(a) A measure by another Contracting Party constitutes a breach of the Agreement; and

(b) The measure resulted in loss or damage to the investor and in that case, the amount of compensation for such loss or damage.

3. The Tribunal may allow the investor or its representative to file a written submission in accordance with article 4 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration or otherwise participate in the proceeding as a third person.

4. The Contracting Party may request the Tribunal to order the payment of any compensation directly to the investor and the payment of costs to whoever has assumed them.

Comments from the European Union and its Member States:

The EU and its Member States note the conclusions of the Working Group at its 46th session, where it was decided to not develop a provision of State-to-State dispute settlement as it was felt that this was a policy choice to be left to individual States (A/CN.9/1160, para 119). We agree with this conclusion, but this is notwithstanding the EU and its Member States' position that a statute for a standing mechanism should include State-to-State disputes. We are accordingly providing our view on this draft provision below.

It seems that the recently concluded IIAs refer to in footnote 5 of the Annotations (A/CN.9/WG.III/WP.232), only include SSDS to the exclusion of ISDS with a process akin to diplomatic protection.

The SSDS provisions often found in IIAs indeed concern interpretation and application of the relevant agreements. SSDS in EU-Agreements are based on WTO Dispute settlement (going beyond interpretation and application, allowing a Contracting Party to request the removal of a measure allegedly breaching the Agreement). However, these provisions exist in parallel with ISDS provisions and do not permit the use of diplomatic protection. These SSDS provisions pursue a different purpose than draft provision 4.

For instance, EU-level agreements include both an SSDS provision and ISDS, and in general explicitly deny the possibility for a State party to bring an international claim or to give diplomatic protection in relation to a dispute submitted by an investor under the agreement (EU-Singapore Art. 3.23 and Art. 3.58 EU-Vietnam with a wording similar as Art. 27 of the ICSID Convention; Art 10.51 EU-Chile; CETA Art 8.42).

Therefore, it is not clear whether draft provision 4 would exist in parallel with ISDS provisions or not. If such provision exists in parallel with ISDS, it raises the issue of coordination between the two if launched in parallel. In any event, it also questions

[1] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 17* (A/78/17), annex 1.

whether a tribunal would have to apply requirements under customary international law for diplomatic protection.

Draft provision 5: Period for amicable settlement

No claim may be submitted for resolution pursuant to Draft Provisions 3 or 4 unless [period of time] have elapsed from (i) an invitation to engage in consultation or negotiation under Draft Provision 1 or (ii) an invitation to engage in mediation under Draft Provision 2, whichever was made earlier.

Comments from the European Union and its Member States:

The EU approach does not include time periods for amicable settlement (negotiation and mediation) since it is not a mandatory step and is always available.

However, the EU approach includes time periods with regard to consultations, since it is the first mandatory step before submitting a claim. It provides that six months must have lapsed after the submission of the request for consultations. This ensure that the respondent has sufficient time to prepare its defence.

The EU and its Member States note the conclusions of the Working Group at its 46th session requesting the Secretariat "to prepare a draft provision on a "cooling-off" period including an option that would make such a period mandatory, taking into account modern treaty practice." (A/CN.9/1160, para 117). In that view, we suggest the following drafting:

"*If the dispute cannot be settled within six months of the submission of the request for consultations, the claimant may submit a claim to the Tribunal established pursuant to [relevant provision].*"

The position of the EU and its Member States is that further work is relevant on this clause, which could appear in a protocol to a multilateral instrument with the view to retrofit in existing treaties and in the statute/rules of procedure of a standing mechanism.

Draft provision 6: Recourse to local remedies

No claim may be submitted for resolution pursuant to Draft Provisions 3 or 4 unless:

(a) the investor had first initiated a dispute resolution proceeding before a court or competent authority of a Contracting Party with respect to the measure alleged to constitute a breach of the Agreement; and

(b) the investor obtained a final decision from a court of last resort of that Contracting Party or [period of time] have elapsed from the date the proceeding in subparagraph (a) was initiated.

Comments from the European Union and its Member States:

The EU and its Member States disagree with draft provision 6 and the mandatory recourse and exhaustion of local remedies, as the EU agreements follow a different approach to local remedies.

The EU approach does not see a requirement for investors to exhaust domestic remedies as necessarily the most efficient approach. Instead, recourse to domestic proceedings is encouraged through the different time limitations related to the consultation phase, where an investor benefits from a longer statute of limitation if it first goes to domestic proceedings. This incentivises the investor to first seek relief before domestic courts, which are usually also less expensive. In addition, the EU approach follows a No U-turn approach, explained in draft provision 7 below, where an investor cannot return to domestic courts once it brings a dispute under the agreement. Therefore, it encourages the investors to first seek remedies before domestic courts before submitting a claim under the Investment Court System in the EU Agreements.

Therefore, the EU approach is very different from the one provided in draft provision 6. The EU and its Member States note the conclusions of WGIII at its 46th session and the guidelines given to the Secretariat to provide options for encouraging recourse to local remedies without necessarily requiring them and to do so in conjunction with other requirements for raising claims. Therefore, the EU and its Member States suggest the following drafting, which encourages investors to have recourse to local remedies without necessarily requiring them through the benefit of a longer statute of limitation if it first goes to domestic courts. This should be read in conjunction with the No U-turn approach commented in draft provision 7 below.:

"[The request for consultations][The claim] shall be submitted:

(a) within three years after the date on which the claimant or, as applicable, the locally established enterprise, first acquired or should have first acquired, knowledge of the treatment as alleged to breach the provisions referred to in [the claim under consideration] and of the loss or damage alleged to have been incurred thereby; or

(b) within two years after the date on which the claimant or, as applicable, the locally established enterprise, ceases to pursue proceedings before a tribunal or court under the law of a Party, and, in any event no later than 10 years after the date on which the claimant or, as applicable, the locally established enterprise, first acquired or should have first acquired, knowledge of the treatment alleged to breach the provisions referred to in [the claim under consideration] and of the loss or damage alleged to have been incurred thereby.

The time periods shall not render a claim inadmissible if the claimant can demonstrate that the failure to request consultations or to submit a claim is due to the claimant's inability to act as a result of actions taken by the other Party, provided that the claimant acts as soon as reasonably possible after it is able to act."

The scope *ratione personae* of the rule would also deserve further clarification in order to specify whether upstream affiliates and local subsidiaries would be covered by the notion of "investor" within the meaning of draft provision 6. An example is given in the draft proposal made under draft provision 7 below.

In addition, in relation to the interaction between international dispute resolution mechanism and national court, the EU and its Member States would suggest to consider a general requirement on States to ensure the availability and efficiency of domestic courts and a reminder (as done in the preamble of the Washington Convention) that while disputes between States and foreign investors would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases.

The position of the EU and its Member States is that further work is relevant on this clause, which could appear in a protocol to a multilateral instrument with the view to retrofit in existing treaties and potentially, depending on the outcome of the discussions, in the statute/rules of procedure of a standing mechanism.

Draft provision 7: Waiver of rights to initiate dispute resolution proceeding

No claim may be submitted for resolution pursuant to Draft Provisions 3 or 4, unless the investor waives its right to initiate or continue any other dispute resolution proceeding with respect to the measure alleged to constitute a breach of the Agreement.

Comments from the European Union and its Member States:

The EU approach excludes parallel claims. This prohibition relates not only to parallel proceedings before domestic courts, but also covers parallel domestic arbitration procedures and international courts or arbitral tribunals. The only exception is interim injunctive or declaratory relief before domestic courts or tribunals, where there is no risk of double compensation.

With regard to domestic proceedings, following our comment to draft provision 6 above, the EU approach does not provide a fork-in-the-road clause but instead follows

a “no U-turn” approach: once an investor initiates dispute settlement under the agreement, it cannot return to domestic courts. In other words, an investor can first go to domestic courts (whether or not until the exhaustion of domestic remedies) and then still submit a claim for dispute settlement (consecutive but not parallel proceedings). However, the investor cannot first launch a dispute before an international tribunal and then go back to domestic courts.

In addition, as provided in our drafting proposal, the EU approach includes a paragraph (3 below) ensuring that the mechanism preventing parallel claims will not be thwarted by different claims brought by different but related entities. Therefore, the claimant includes, for the purpose of the provision on parallel claims, not only the investor but also, where applicable, the locally established enterprise. This is related to the definition of claimant in the agreement which, in EU agreements, includes claims on behalf of a locally established enterprise which will have to comply with the declaration and waiver requirements. The notion of claimant also includes all person who, directly or indirectly, have an ownership interest in or are controlled by the locally established enterprise or investor and claim to have suffered the same loss or damages as the investor or locally established enterprise.

The requirements of paragraphs 1 and 2(a) thus also extend to e.g. daughter/mother companies. However, for practical reasons, this is not the case for the waiver requirement under paragraph 2(b). Indeed, it would in certain cases of large groups of companies be an excessive burden to collect a waiver from all the related companies in a particular case. The difference with paragraph 2(a) is that this provision refers to proceedings that are already ongoing and therefore usually known to the claimant, so that it is less difficult to collect the necessary evidence.

The position of the EU and its Member States is that further work is relevant on this clause, which could appear in a protocol to a multilateral instrument with the view to retrofit in existing treaties and potentially, depending on the outcome of the discussions, in the statute/rules of procedure of a standing mechanism.

See below a drafting proposal based on the EU approach:

“ 1. The Tribunal shall dismiss a claim by a claimant who has submitted a claim to the Tribunal or to any domestic or international court or tribunal concerning the same treatment as that alleged to breach the provisions referred to in [the claim under consideration] unless the claimant withdraws such pending claim.

This paragraph does not apply if the claimant submits a claim to a court or tribunal seeking interim injunctive or declaratory relief.

2. Together with the submission of a claim the claimant shall provide:

(a) evidence that it has withdrawn any pending proceedings before any domestic or international court or tribunal under domestic or international law concerning the same treatment as that alleged to breach the provisions referred to in [the claim under consideration]; and

(b) a declaration that it will not initiate any proceedings before any domestic or international court or tribunal under domestic or international law concerning the same treatment as that alleged to breach the provisions referred to in [the claim under consideration].

3. For the purposes of this Article, the term "claimant" includes the investor and, if applicable, the locally established enterprise. In addition, for the purposes of paragraphs 1 and 2(a), the term "claimant" also includes:

(a) if the claim is submitted by an investor acting on its own behalf, all persons who, directly or indirectly, have an ownership interest in or are controlled by the investor and claim to have suffered the same loss or damage as the claimant; or

(b) if the claim is submitted by an investor acting on behalf of a locally established enterprise, all persons who, directly or indirectly, have an ownership interest in or are controlled by the locally established enterprise, and claim to have suffered the

same loss or damage as the locally established enterprise. (Footnote: For greater certainty, the same loss or damage referred to in this paragraph means loss or damage flowing from the same treatment which the person seeks to recover in the same capacity as the claimant. For example, if the claimant sues as a shareholder, this provision would cover a related person also pursuing recovery as a shareholder.)"

Draft provision 8: Limitation period

No claim may be submitted for resolution pursuant to Draft Provisions 3 or 4, if [period of time] have elapsed since the investor first acquired, or should have first acquired, knowledge of the measure alleged to constitute a breach of the Agreement and knowledge that it has incurred loss or damage.

Comments from the European Union and its Member States:

The EU approach addresses limitation period together with the request for consultation as provided under draft provision 6.

The general rule is that a request must be submitted within three years after the date on which the investor first acquired, or should have acquired, knowledge of the breach of the agreement and of its loss or damage. The objective of this time-limit is to provide legal certainty for all parties, by ensuring that an investor needs to act within a given period of time. The relevant moment when the investor acquired or should have acquired knowledge of the breach depends on the facts of the case.

Where domestic remedies are pursued, a request for consultations may be submitted later than the afore-mentioned three years, in order to give enough time for domestic court proceedings and to avoid forcing the investor to stop those domestic proceedings after three years so as not to be time-barred for the international claim. However, once domestic proceedings are exhausted or terminated, investors must act within two years if they still want to request consultations, and in any event no later than 10 years after they acquired or should have acquired knowledge of the alleged breach. The 10 years introduce thus an absolute time-limit: if domestic proceedings take longer, the investor will lose its right to turn to dispute settlement, unless he terminates the domestic proceedings and lodges the claim before expiry of the 10 years.

Finally, even if the time-periods have not been respected, a claimant can still submit a claim if the non-respect of the time-limits is due to the claimant's inability to act as a result of the actions taken by the respondent. This would normally only occur in exceptional circumstances, for example, where the claimant is imprisoned or denied their civil rights by the respondent and therefore not in a position to submit its claim. In such cases, the claimant has to act as soon as reasonably possible after it is again able to act.

The position of the EU and its Member States is that further work is relevant on this clause, which could appear in a protocol to a multilateral instrument with the view to retrofit in existing treaties and potentially, depending on the outcome of the discussions, in the statute/rules of procedure of a standing mechanism.

The draft proposal is reproduced here for simplicity:

"[The request for consultations][The claim] shall be submitted:

(a) within three years after the date on which the claimant or, as applicable, the locally established enterprise, first acquired or should have first acquired, knowledge of the treatment alleged to breach the provisions referred to in [the claim under consideration] and of the loss or damage alleged to have been incurred thereby; or

(b) within two years after the date on which the claimant or, as applicable, the locally established enterprise, ceases to pursue proceedings before a tribunal or court under the law of a Party, and, in any event no later than 10 years after the date on which the claimant or, as applicable, the locally established enterprise, first acquired or should have first acquired, knowledge of the treatment alleged to breach the

provisions referred to in [the claim under consideration] and of the loss or damage alleged to have been incurred thereby.

The time periods shall not render a claim inadmissible if the claimant can demonstrate that the failure to request consultations or to submit a claim is due to the claimant's inability to act as a result of actions taken by the other Party, provided that the claimant acts as soon as reasonably possible after it is able to act."

Draft provision 9: Denial of benefits

1. A Contracting Party may deny the benefits of the Agreement to an investor of the other Contracting Party that is an enterprise of that Contracting Party and to investments of that investor if the enterprise is owned or controlled by a person of a non-Contracting Party and:

(a) Has no substantial business activities in the territory of any Contracting Party other than the denying Contracting Party; or

(b) The denying Contracting Party adopts or maintains measures with respect to the non-Contracting Party or a person of the non-Contracting Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of the Agreement were accorded to the enterprise or to its investments.

2. A Contracting Party may deny the benefits of the Agreement to an investor of the other Contracting Party and to investments of that investor if:

(a) The investor receives third-party funding in a manner inconsistent with Draft Provision 21;

(b) The investment was made in violation of the denying Contracting Party's laws and regulations or national or international principles of good faith;

(c) The investment was made by way of corruption, fraud, or deceitful conduct; or

(d) Permitting a claim to be submitted pursuant to Draft Provisions 3 or 4 would constitute a misuse of the Agreement and its objectives.

Comments from the European Union and its Member States:

While the first paragraph of the denial of benefits clause in draft provision 9 is similar to language usually found in IIAs, paragraph 2 is significantly departs from the treaty practice and is more far-reaching.

The EU approach to denial of benefits is more restricted and would allow a Party to deny the benefits of the agreement in circumstances where it has adopted measures related to the maintenance of international peace and security, including the protection of human rights, when such measures either require the prohibition of transactions with investors or covered investments of the other Party or to avoid the circumvention of such measures (e.g. EU Global Human Rights Sanction Regime (see Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, enabling the freezing of funds and economic resources). Such measures could be adopted regardless of whether the investor (enterprise of the other Contracting Party) is ultimately owned/controlled by a person of a non-Contracting Party, or not. This is because it is of no relevance whether an enterprise of a non-Contracting Party owns or control the investor, as such measures may be equally adopted vis a vis investors of the other Party.

Regarding paragraph 1(a), EU agreements deal with the issue of shell companies by requiring in the definition of "investor of a Party" that the juridical person has substantive business operations. As such, the matter is dealt with at the jurisdictional stage and it allows the burden of proof to remain on the claimant, which is not the case under the denial of benefits clause.

Regarding paragraph 1(b), the risk of allowing a party to deny the benefits of the agreement on the basis of any measures that the denying Contracting Party adopts is

that this may legitimise, in certain cases, measures that would otherwise would not be justified under the exceptions of the treaty. In contrast, the narrow approach undern the EU agreements provides that such measures are limited to sanctions relating to international peace and security, including human rights.

Paragraph 2 raises issues in several ways:

- On subparagraph (a), the relevance of third party funding for denial of benefits is unclear, since it is almost impossible to know before the dispute starts what is the situation of the claimant with possible third party funding. We do not believe that third party funding should be regulated in this way.
- On subparagraphs (b) and (c), they relate to the substance and not to the procedure. Concerning subparagraph (b) in particular, and as far as domestic laws are concerned, the making of an investment in accordance with domestic laws is a requirement that should be present for an investment to be "covered" under the EU agreements. Therefore, it becomes a jurisdictional question. Moreover, the reference to a "national or international principles of good faith" raises interpretation issues, and compliance with "international principles of good faith" seems to scrutinize the intents which significantly lowers the threshold for denial of benefits. Concerning subparagraph (c), EU agreements deems it as a ground for inadmissibility.
- On subparagraph (d), it is understood as including the issue of "treaty shopping" which is addressed in EU agreements under "anti-circumvention" provisions and serves as a ground for the tribunal to decline jurisdiction.

The EU approach to denial of benefits also contains useful procedural elements clarifying when and how the denial of benefits clause may be triggered.

The EU and its Member States provide below a "Denial of benefits" clause based on the EU approach:

"A Party may deny the benefits of this Agreement to an investor of the other Party or to a covered investment, if the denying Party adopts, implements, maintains or enforces measures related to the maintenance of international peace and security, including the protection of human rights, which:

a. prohibit transactions with investors of the other Party or their covered investments, or

b. would be violated or circumvented, if the benefits of this Agreement were accorded to investors of the other Party or their covered investments, including where the measures prohibit transactions with a natural or juridical person who owns or controls either of them.

For greater certainty, a Party may deny such benefits pursuant to this Article without any prior publicity or other additional formality related to its intention to exercise the right conferred by this Article."

The EU and its Member States are not convinced that further work is necessary on a denial of benefits clause in itself, nor that such clause should be part of a protocol to a multilateral instrument. At the same time, certain issues included in draft provision 9 are of great importance to the EU and its Member States, for instance the issue of shell companies. As explained, we have addressed this in EU agreements as a jurisdictional requirement rather than addressing this issue through a denial of benefits clause. As a general matter, the EU and its Member States support further disciplines to avoid the use of investment agreements by shell companies. This issue should be further discussed in the Working Group or other fora.

Draft provision 10: Shareholder claims

1. A shareholder may submit a claim pursuant to Draft Provision 3 on its own behalf only for direct loss or damage incurred as the result of a breach of the Agreement, which means that the alleged loss or damage is separate and distinct from

any alleged loss or damage to the enterprise in which the shareholder holds shares. Direct loss or damage does not include diminution in the value of the shareholding or in the distribution of dividends to the shareholder as a result of loss or damage incurred by the enterprise.

2. A shareholder may submit a claim to a Contracting Party pursuant to Draft Provision 3 on behalf of an enterprise of that Contracting Party, which the shareholder owns or controls, only in the following circumstances:

(a) All assets of that enterprise is directly and wholly expropriated by that Contracting Party; or

(b) The enterprise sought remedy in that Contracting Party to redress its loss or damage but has been subject to treatment akin to a denial of justice under customary international law.

3. When the Tribunal makes a final decision in favour of the shareholder in a proceeding pursuant to paragraph 2, the Tribunal shall award monetary damages and any applicable interest or restitutions of property to the enterprise.

Comments from the European Union and its Member States:

EU agreements do not address directly the situation of shareholders in a detailed and specific provision. Shareholders claims are included first and foremost in the definition of "claimant" in the agreement which includes an investor submitting a claim acting either (i) on its own behalf or (ii) on behalf of a locally established enterprise which it owns or controls. EU agreements do not name "shareholders" but instead include them in the category of investors allowed to make a claim.

The EU and its Member States wish to recall that the underlying policy rationale behind the reflective loss principle in those domestic legal systems where it exists is that shareholders should not be able to recover for reflective loss, where the company has a right to claim against the same wrongdoer. Unless a shareholder can show that it has suffered a separate and distinct loss from that experienced by the company, it should not be able to bring a claim on its own behalf on the basis of reflective loss.

While the EU treaty practice does not contain language which explicitly addresses this issue, we believe that properly understood EU treaties containing the "on-behalf of approach" would prevent such claims. Therefore, we support the policy concern, and would not exclude exploring a formulation that reflects this concern but that would require on an assessment of the other procedural rules that may be agreed i.e. provisions on using an "on behalf of approach".

Draft provision 11: Counterclaim

1. When a claim is submitted for resolution pursuant to Draft Provisions 3 or 4, the respondent may make a counterclaim:

(a) Arising directly out of the subject matter of the claim;

(b) In connection with the factual and legal basis of the claim; or

(c) That the claimant has breached its obligations under the Agreement, domestic law, an investment contract or any other instrument binding on the claimant.

2. For the avoidance of doubt, the consent of the respondent to the submission of a claim by the claimant is subject to the condition that the claimant consents to any submission of a counterclaim referred to in paragraph 1.

Comments from the EU and its Member States:

Counterclaims have been allowed only in one EU agreement and about the failure of the investor to comply with international obligations applicable in the territories of both Parties and arising in connection with the factual basis of the claim. See Article 10.30 of EU-Chile AFA:

"1. The respondent may submit a counterclaim on the basis of an investor's failure to comply with an international obligation applicable in the territories of both Parties, arising in connection with the factual basis of the claim.

2. The counterclaim shall be submitted no later than in the Respondent's counter-memorial or statement of defence, or at a later stage in the proceedings if the Tribunal decides that the delay was justified under the circumstances.

3. For greater certainty, claimant's consent to the procedures under this Section includes the submission of counterclaims by the respondent."

If counterclaims were to be allowed, it is the view of the EU and its Member States that paragraph 1 of draft provision 11 should be more limited and the conditions listed should be cumulative in accordance with international law. We do not wish to include domestic law in paragraph 1(c), as a State can always hold the investor liable under domestic law before its domestic courts. The home State should agree to the scope of possible counterclaims while a reference to domestic law leaves open the potentiality of counterclaims be expanded just by the host State. Accordingly, paragraph 1 would read as follows:

"1. When a claim is submitted for resolution pursuant to Draft Provisions 3 or 4, the respondent may ~~make~~ ***submit*** *a counterclaim:*

(a) Arising directly out of the subject matter of the claim;

(b) In connection with the factual and legal basis of the claim; ***and***

(c) That the claimant has breached its obligations under the Agreement ~~domestic law, an investment contract~~ or international obligations applicable in the territory of each party and binding on claimants."

Furthermore, it should be noted that allowing counterclaims is linked to the scope of the consent given by the respondent in the agreement and the scope of jurisdiction. As such, paragraph 2 cannot be read in isolation from the scope of the consent to bring disputes under the relevant agreement.

Note that the EU and its Member States consider that the standing mechanism should have jurisdiction by which it can hear counterclaims or other forms of claims, provided they are permitted under the underlying instrument that is subject to the jurisdiction of the standing mechanism.

The position of the EU and its Member States is that further work is relevant on this clause, which could appear in a protocol to a multilateral instrument with the view to retrofit in existing treaties and potentially, depending on the outcome of the discussions, in the statute/rules of procedure of a standing mechanism.

Draft provision 12: Right to regulate

1. Nothing in the Agreement shall be construed as preventing the Contracting Parties from exercising their right to regulate in the public interest and to adopt, maintain and enforce any measure that they consider appropriate to ensure that investments are made in a manner sensitive to the protection of public health, public safety or the environment, the promotion and protection of cultural diversity, or [...].

2. When assessing the alleged breach by a Contracting Party of its obligation under the Agreement, the Tribunal shall give a high level of deference that international law accords to Contracting Parties with regard to the development and implementation of domestic policies, the right to regulate in the public interest and the right to adopt, maintain and enforce measures sensitive to the protection of public health, public safety or the environment, the promotion and protection of cultural diversity, or [...].

3. No claim may be submitted for resolution pursuant to Draft Provisions 3 or 4, if the measure alleged to constitute a breach of the Agreement was adopted by the Contracting State to protect public health, public safety or the environment (including compliance with the Paris Agreement or any principle or commitment contained in

articles 3 and 4 of the United Nations Framework Convention on Climate Change), the promotion and protection of cultural diversity, or […].

Comments from the European Union and its Member States:

As a general comment, the EU and its Member States agree on the importance of recognition of the "right to regulate". However, we see this issue as relating to substantial clauses which go beyond the scope of the mandate of Working Group III and its task to reforming ISDS in particular through a standing mechanism, which would in our view largely solve the problems that are sought to be addressed here.

This is because the substantive provisions in investment agreements can be interpreted in a manner consistent with a State's right to regulate and many treaties, in particular more recent treaties including the EU treaties, explicitly confirm the right to regulate of the State. However, the perceived impact of the current system of ISDS on the right to regulate is in our view largely driven by the lack of certainty, predictability and absence of appeal mechanism inherent in an *ad hoc* system, which means that States (and investors) cannot in advance determine with a reasonable likelihood the outcome of a potential dispute and hence States are put under pressure to curtail otherwise legitimate regulatory activities.

The position of the EU and its Member States is accordingly that the most effective means to address this issue is the reform strand on the creation of a permanent mechanism and an appeal mechanism rather than on further clauses reaffirming States' right to regulate. Those mechanisms would better ensure greater predictability for disputing parties and all stakeholders, because over time the decisions of those mechanisms would clarify the scope of the right to regulate and its articulation with other substantive provisions contained in the treaties.

Therefore, further work on this specific clause is not necessary. The EU and its Member States note that the ongoing workstream on the future of investment treaties at the OECD is discussing the right to regulate in terms of possible substantive provisions.

B. Conduct of the proceedings

Draft provision 13: 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. The Tribunal may decide which documents, exhibits or other evidence the disputing parties should produce within such a period of time as the Tribunal shall determine.

3. 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.

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

5. The Tribunal may reject any request, unless made by all disputing parties, to establish a procedure whereby each disputing party can request another party to produce documents.

6. 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 final decision on the evidence before it.

Comments from the European Union and its Member States:

The EU and its Member States think that this provision is going in the right direction.

could be part of procedural rules to a standing mechanism. The possibility to retrofit such a provision in existing IIAs is not a priority issue because this could be addressed through the update of dispute settlement rules.

Draft provision 14: Bifurcation

1. A disputing party may request that an issue 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.

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 [period of time] after the last submission on the request and shall fix any time period 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. After consultation with the disputing parties, the Tribunal may at any time and 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 EU and its Member States think that this provision is going in the right direction and could be part of procedural rules to a standing mechanism. The possibility to retrofit such a provision in existing IIAs is not a priority issue because this could be addressed through the update of dispute settlement rules.

Draft provision 15: Consolidation of proceedings

1. When two or more claims have been submitted separately pursuant to Draft Provisions 3 or 4, the disputing parties may agree to consolidate the relevant proceedings.

2. Consolidation shall join all aspects of the proceedings sought to be consolidated and result in a single decision.

3. The disputing parties shall provide the proposed terms for the conduct of the consolidated proceedings.

Comments from the European Union and its Member States:

The ability to consolidate claims is a useful tool in reducing the number of claims, saving time and resources and ensuring consistency. The EU approach on consolidation is different and more detailed that draft provision 15. 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.

The EU and its Member States think that, while a provision on consolidation could be useful in the rules for a standing mechanism, it would need to be further elaborated to fit in a standing mechanism. The possibility to retrofit such a provision in existing IIAs is not a priority issue because this could be addressed through the update of dispute settlement rules.

Draft provision 16: Interim/provisional measures

1. A disputing party may at any time request the Tribunal to 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 position of the EU and its Member States is that further work is relevant on this clause, which could appear in a protocol to a multilateral instrument with the view to retrofit in existing treaties and in the statute/procedural rules for a standing mechanism.

Please find below language according to the EU approach:

"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 17: Code of Conduct

Adjudicators appointed to resolve a claim pursuant to Draft Provisions 3 or 4 shall be bound by the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution or the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution, whichever is appropriate.

Comments from the European Union and its Member States:

We support the implementation of the Code of conduct for arbitrators through IIAs providing for *ad hoc* arbitration and the inclusion of the Code of conduct for judges in the procedural rules of a standing mechanism.

The position of the EU and its Member States is that this clause could appear in a protocol to a multilateral instrument with the view to retrofit in existing treaties and in the statute/procedural rules for a standing mechanism.

Draft provision 18: Transparency

The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall apply to the proceedings initiated pursuant to Draft Provisions 3 or 4, regardless of whether the proceeding is an investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors concluded on or after 1 April 2014.

Comments from the European Union and its Member States:

The EU policy is to provide for transparency in investment dispute settlement. The EU considers that transparency is important, not only as a general policy objective of the EU, but also to promote accountability (international investment dispute awards will be open to public scrutiny) and to counter the criticism (related to traditional ISDS) that decisions are taken by "secretive tribunals". Furthermore, transparency contributes to consistency in international investment law, by making a body of law widely available and encouraging tribunals to develop a consistent approach to common questions of interpretation.

To pursue that end, the UNCITRAL Transparency rules are incorporated directly into our agreements. In addition, we aim to go beyond the UNCITRAL Transparency Rules by providing that documents not covered by these rules shall also be made publicly available, and the possibility of public hearings.

The EU and its Member States support the application of UNCITRAL Transparency Rules to dispute proceedings under the standing mechanism. Therefore, this should be fitted into the statute/procedural rules of a standing mechanism. As the Mauritius convention already provide for retrofitting, the EU and its Member States do not see it necessary to have this draft provision retrofitted.

Draft provision 19: Early dismissal

1. The Tribunal, at the request of a disputing party or on its own initiative, may decide that a claim submitted pursuant to Draft Provisions 3 or 4, a counterclaim submitted pursuant to Draft Provision 11, or parts thereof are manifestly without legal merit.

2. A disputing party shall make the request referred to in paragraph 1 as soon as possible after the constitution of the Tribunal but no later than [period of time (for example, 45 days)] after its constitution. The Tribunal may admit a later request if it considers the delay justified.

3. The request may relate to the jurisdiction of the Tribunal or the substance of the claim or counterclaim. The request shall specify the grounds on which it is based and contain a statement of the relevant facts, laws and arguments.

4. After inviting the disputing parties to express their views within a fixed period of time, the Tribunal shall make its decision within [period of time (for example, 60 days)] after the last submission by the disputing parties.

5. If the Tribunal decides that all claims are manifestly without legal merit, it shall render a decision to that effect. Otherwise, the Tribunal shall issue a decision on the request and fix any time frames for the further conduct of the proceeding. 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.

6. A decision by the Tribunal that a claim is not manifestly without legal merit shall be without prejudice to the right of the disputing party to argue subsequently in the proceeding that the Tribunal lacks jurisdiction or that the claim or counterclaim 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 X 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.

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 EU and its Member States is that further work is relevant on this clause, which could appear in a protocol to a multilateral instrument with the view to retrofit in existing treaties and in the statute/rules of procedure of a standing mechanism.

Please find below language according to the EU approach:

"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 20: 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. A disputing party shall make the request referred to in paragraph 1 by specifying the relevant circumstances that justify the security for costs and include supporting documents.

3. After inviting the disputing parties to express their views within a fixed period of time, the Tribunal shall make a decision whether to order security for costs within [period of time (for example, 30 days)] after the last submission by the disputing parties.

4. When determining whether to order a disputing party to provide security for costs, the Tribunal shall consider all relevant circumstances of the case, 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 existence of third-party funding to support that disputing party in pursuing its claim or counterclaim; and

(e) The conduct of the disputing parties.

5. When ordering security for costs, the Tribunal shall specify the terms and fix a period of time for compliance with the order.

6. If a disputing party fails to comply with the order to provide security for costs, the Tribunal may suspend the proceeding for a fixed period of time, after which it may order the termination of the proceeding in accordance with Draft Provision 22.

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 the request of a disputing party or on its own initiative, modify or terminate its order to provide security for costs.

Comments from the European Union and its Member States:

The EU and its Member States think that this provision is going in the right direction. A preliminary comment concerns paragraph 4(d) which could be linked to information that the tribunal may request under draft provision 21(3). Indeed, if the tribunal does

not yet have the information specified in draft provision 21(3), it would seem necessary that the tribunal requests that the disputing party disclose it for the purposes of draft provision 20(4)(d).

The position of the EU and its Member States is that this clause could potentially, depending on the outcome of the discussions, appear in the statute/rules of procedure of a standing mechanism.

Draft provision 21: 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 who is not a party to the proceeding but enters into an agreement to provide, or otherwise provides, funding ("third-party funder") for a proceeding initiated pursuant to Draft Provisions 3 or 4 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 disputing 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 paragraph 2 to 5, the Tribunal may:

(a) Suspend or terminate the proceeding in accordance with Draft Provision 22;

(b) Order security for costs in accordance with Draft Provision 20; or

(c) Take this fact into account when allocating costs in accordance with Draft Provision 25.

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 received.

Comments from the European Union and its Member States:

Third-party funding is an important concern for the Working Group and is also closely linked to other aspects of the reform, in particular the adopted Code of conduct for arbitrators and judges. The European and its Member States' main concern with third party funding relate to conflict of interests with arbitrators, which is addressed through disclosure and transparency.

It is important to note that third party funding may have a positive impact as it would favour claims with merits and would help small investors having access to ISDS. In our view, the important situation to regulate is the case of failure to comply with the disclosure obligations in paragraphs 2 to 5, as provided in paragraph 7. A failure to comply with the disclosing obligation would include the situation where a disputing party had provided false information or concealed information with regard to third-party funding. The possibility to limit third-party funding, outside a situation a failure to comply with disclosure obligations, such as the "exceptional circumstances" listed in paragraph 6 of draft provision 21, would need further thought and be better substantiated to ensure that it does not run contrary to the objective of facilitating access to ISDS for small players.

The position of the EU and its Member States is that further work is relevant on this provision, which could appear in a protocol to a multilateral instrument with the view to retrofit in existing treaties and could be included in the statute/procedural rules for a standing mechanism.

Draft provision 22: Suspension and termination of the proceeding

1. The Tribunal shall suspend or terminate the proceeding when requested jointly by the disputing parties.

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

3. When ordering suspension, the Tribunal shall specify the period of suspension and any 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 was suspended.

4. The Tribunal may extend the period of suspension, after inviting the disputing parties to express their views.

5. The Tribunal may terminate the proceeding at the request of a disputing party, unless the other disputing party objects thereto in writing within a period of time fixed by the Tribunal.

6. If the disputing parties fail to take any steps in the proceeding for more than [period of time], the Tribunal shall notify them of the time elapsed since the last step taken and fix a period of time to take any necessary steps.

7. If either of the disputing parties takes the necessary step within the period of time referred to in paragraph 6, the proceeding shall continue. If the disputing parties fail to take the necessary step within that period of time, the Tribunal shall issue an order of termination if it finds that the continuation of the proceeding has become unnecessary.

Comments from the European Union and its Member States:

The conditions under which the proceedings could be terminated would deserve further clarifications. Current draft provision 22 foresees that the proceedings are terminated if continuation is deemed unnecessary. We may propose that termination could also be ordered in case the continuation is impossible. Furthermore, the objection raised by a party to the dispute against termination should be justifiable.

The position of the EU and its Member States is that further work is relevant on this provision, which could appear in a protocol to a multilateral instrument with the view to retrofit in existing treaties and could be included in the statute/procedural rules for a standing mechanism.

C. Decisions by the Tribunal

Draft provision 23: Assessment of damages and compensation

1. When the Tribunal makes a final decision, it may only award:

(a) Monetary damages and any applicable interest; or

(b) Restitution of property, in which case the decision shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation or impending expropriation became known, whichever is earlier, and any applicable interest in lieu of restitution.

2. The Tribunal may award simple pre-award and post-award interest at a reasonable rate.

3. In assessing or calculating monetary damages, the Tribunal shall only reflect loss or damage incurred by reason of, or arising out of, a breach of the Agreement. The Tribunal shall consider, as applicable:

(a) Contributory fault of the claimant, whether deliberate or negligent;

(b) Failure by the disputing parties to mitigate loss or damage;

(c) Prior monetary damages received by the claimant for the same loss or damage;

(d) Restitution of property;

(e) Repeal or modification of the measure alleged to constitute a breach of the Agreement; and

(f) Any non-compliance by the claimant with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

4. The Tribunal shall only award monetary damages that are established in accordance with Draft Provision 13 on the basis of satisfactory evidence and that are not inherently speculative. The Tribunal may award monetary damages on the basis of expected future cash flows only insofar as they are based on a case-by-case, fact-based inquiry that takes into consideration, among other factors, whether the investment has been in operation in the territory of the respondent Contracting Party for a sufficient period of time to establish a performance record of profitability.

5. The Tribunal may, at the request of a disputing party or on its own initiative, appoint one or more experts to report to it in writing on issues related to the assessment or calculation of damages, subject to any terms and conditions agreed with the disputing parties.

6. The Tribunal may require that experts appointed by the parties, if any, on issues related to the assessment or calculation of damages work on the basis of a harmonized, clearly defined set of instructions based on similar assumptions. The Tribunal may also require:

(a) A joint statement by the experts to explain any difference in their opinions;

(b) Alternative calculations in case the experts disagree on facts and legal approaches; and

(c) Joint report by those experts.

7. The Tribunal shall not award punitive damages.

8. The Tribunal shall not award monetary damages exceeding the total expenditures (adjusted for inflation) incurred by the claimant in making its investment.

9. If the amount of monetary damages claimed by the claimant significantly exceeds the amount awarded by the Tribunal, the Tribunal may take this fact into account when allocating costs in accordance with Draft Provision 25.

Comments from the European Union and its Member States:

The EU and its Member States note the conclusions of the Working Group at its 46th session with regard to draft provision 23 (A/CN.9/1160, paras 114-115):

"*After discussion, the Secretariat was requested to further develop a draft treaty provision that could address the gaps in existing IIAs by revising draft provision 23, and prepare guidelines for arbitral tribunals on the assessment and calculation of damages and compensation*.

The Secretariat was further requested to revise draft provision 23 to be consistent with the general principle of full reparation and clarify that: (i) a tribunal could award monetary damages and/or restitution of property; (ii) a tribunal could award reasonable interest; (iii) causation between the breach and the damage would be required; (iv) in assessing damages, a number of elements, including contributory fault, duty of mitigation efforts and avoidance of double recovery, needed to be taken into account; (v) damages should be based on clear rules on burden of proof requiring satisfactory evidence; and (vi) punitive damages should not be awarded. The Secretariat was further requested to consider placing the paragraphs on the use of experts and allocation of cost in the draft provisions on the conduct of the proceedings. It was suggested that the guidelines could further elaborate on, for example, calculation methods, means to avoid speculative damages, rules on causation as well as interest to be awarded."

The EU approach, just as most IIAs, contains little guidance on the issue of damages. The question of compensation is typically regulated in the article on expropriation which follows the formulation found in most investment agreements: fair market value based on internationally recognized principles and norms. The reference to "internationally recognised principles and norms" is intended to limit tribunals' discretion by creating an obligation not to resort to untested or unpopular theories or to apply certain methods on scenarios that would not normally warrant such methods.

EU agreements, as most other investment treaties, do not provide guidance on the calculation of damages when other treaty standards (e.g. FET) are violated. Certain limitations on the amounts to be awarded can be found in the procedural part of our agreements, which typically provide that "monetary damages shall not be greater than the loss suffered by the claimant", which in our view provides for an outer limit and does not rule out the application of any valuation method.

Therefore, the EU and its Member States see merits in revising draft provision 23 to provide for a list of relevant considerations that tribunals should take into account when assessing damages and compensation. While we concur with the conclusions of the Working Group, the EU and its Member States provide below the list of our comments to draft provision 23:

- As a general comment, the EU and its Member States recognise the importance of the issue and the need to provide further guidance to assess damages. It is necessary to have a framework in place that steers tribunals when assessing damages, allowing for the necessary flexibility to adjust depending on the specificities of a given case. Such framework should consist of rules, which set out a prescribed action, but also of

guidelines. As there is a great degree of subjectivity in such assessment, this could not be easily captured by a rule. This is because a value is less an actual fact than the expression of an opinion based on the set of facts before the expert and the tribunal. Guidelines could also help reduce the significant reliance of tribunals on accounting experts.

It is important that the principles to apply do not derogate from public international law principles. Also, concerns raised by damages are connected to the existing dispute settlement procedures which impact the outcome of cases. These concerns are recurring in a system without a permanent mechanism developing consistency and without the possibility of an appeal. Structural reforms to establish an appellate mechanism and two-tier standing mechanism would address some of these concerns.

- On paragraph (1): under the EU agreements, a Tribunal may award, separately or in combination, monetary damages and restitution of property. We would thus propose to replace 'or' at the end of (a) with 'and'. For instance, in a case of a claim that involves both expropriation and a violation of some other standard, it is possible that an award which provides only for restitution of the property is not sufficient.

- On paragraph (2): we consider that "Reasonable" interest entails a great degree of subjectivity which on its own is not sufficiently clear to steer a tribunal. Moreover, we consider that limiting interest to simple interest in all cases does not reflect neither the economic reality nor the regulation of the matter in domestic legislations. In this regard, the topic may warrant further research. Additionally, we consider that it would be more appropriate to develop guidelines that guide tribunals on the choice of the suitable interest rate at a given moment (including cases where a compound interest may be more suitable).

- On paragraph (3): while certain factors, such as mitigation of damages and contributory fault are largely regarded by tribunals as principles of international law and can be traced in domestic tort/delictual law of many legal systems, others are more debatable. For instance, under (c), it is necessary to clarify what the prior monetary damages are to ensure that these do not capture insurance monies. Element (e) risks to read that a repeal or modification of the measure alleged to constitute a breach of the agreement could be considered to cure the situation of an aggrieved investor who may have suffered financial losses. It should be recalled that in many investment treaties the nature of the remedies is specified and may prohibit the tribunal to order the repeal or modification of the national measure. Finally, element (f) relates to the question of investors obligations and counterclaims and cannot be properly addressed in a self-standing manner in the damages section.

- On paragraph 4: the attempt to clarify the parameters for the calculation of future cash flows is welcomed, although we note a contradiction between paragraph 4 which allows monetary damages based on future cash flows and paragraph 8 which prohibits monetary damages exceeding the total expenditures incurred by the claimant in making its investment. We believe that the matter can be better addressed in guidelines which will identify in which situations awarding future cash flows is appropriate or not.

- On paragraph 8: As noted above, there seems to be a conflict between paragraph 4 and 8. Again we would consider the regulation of calculation methods to move to guidelines. Sunk costs are more appropriate in situations where there is no track record and/or the investment has not been operational.

- On paragraph 9: We believe it is necessary to distinguish between situations where an investor inflates a claim in bad faith and fails to substantiate such claim from situations where an investor genuinely provides for an assessment of damages that, upon a tribunal's consideration, falls short of the latter's assessment. The former is already captured by the rules on the allocation of costs. The latter, in our view, does not constitute a sanctionable conduct.

- Moreover, we suggest to emphasise the requirement of causality (e.g. "*The Tribunal shall not award monetary damages and applicable interests greater than the loss directly caused to the claimant by the wrongful act of the respondent*").

- We also suggest to conduct further analysis on (i) the regulation of moral damages and non-pecuniary remedies such as specific performance and (ii) the use of satisfaction (including for monetary compensation) within the meaning of article 37(1) of the ILC's draft ARSIWA.

The position of the EU and its Member States is that further work is relevant on this provision, which could appear in a protocol to a multilateral instrument with the view to retrofit in existing treaties and could potentially, depending on the outcome of the discussions, be included in the statute/procedural rules for a standing mechanism.

Draft provision 24: Period of time for making the final decision

1. The Tribunal shall ensure the proceeding is carried out in a timely and efficient manner and make the final decision as soon as possible.

2. Unless otherwise agreed by the disputing parties, the Tribunal shall make the final decision within [period of time] after the last submission by the disputing parties or a hearing, whichever is later.

3. The Tribunal may, 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 final decision.

Comments from the European Union and its Member States:

The EU approach provides that "*The Tribunal shall issue a provisional award within 18 months* ***after the date of submission of the claim***." The reference to "provisional" is due to the two-tier Investment Court System, where the First Instance Tribunal renders a provisional award that becomes final either if no appeal is launched or after the appeal proceedings is terminated. The EU and its Member States are flexible on the time-limit and while 18 months is the preferred option to contribute to a quick and efficient procedure, 24 months could be acceptable too. We could consider 6 months after the date of the last submission.

The position of the EU and its Member States is that further work is relevant on this provision, which could appear in a protocol to a multilateral instrument with the view to retrofit in existing IIAs and could be included in the statute/procedural rules for a standing mechanism.

Draft provision 25: 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 disclosure by the disputing parties on the existence of third-party funding in accordance with Draft Provision 21; and

(f) The amount of monetary damages 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 19.

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

6. The Tribunal shall ensure that its decision on costs is reasoned and form part of the final decision.

Comments from the European Union and its Member States:

The EU 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:

The position of the EU and its Member States is that further work is relevant on this provision, which could appear in a protocol to a multilateral instrument with the view to retrofit in existing IIAs and could be included in the statute/procedural rules for a standing mechanism.