Compilation of comments received on the draft provisions on procedural and cross-cutting issues (A/CN.9/WG.III/WP.244)

General comments

Singapore

Singapore reaffirms the points previously made in:

(a) its interventions at UNCITRAL Working Group III's ("WG III") 46th session in October 2023;

(b) its interventions at WG III's 47th session in January 2024; and

(c) its written comments submitted pursuant to paragraph 30 of A/CN.9/1160,

which were in response to Working Paper 231, insofar as they continue to relate to the draft provisions presented in Working Paper 244.

Singapore also restates its interventions at WG III's 49th session in September 2024 on Working Paper 244.

Singapore understands that the Draft Provisions in Section A of Working Paper 244 are categorised as such, being in the nature of harmonisation with existing rules, and that the final categorisation of the Draft Provisions in Working Paper 244 should be ultimately guided by the content of the provisions as they develop. On the Draft Provisions that are in the nature of harmonisation, Singapore's overarching position is to consider aligning the content of the Draft Provisions as far as possible with various developments in this field, including the ICSID Arbitration Rules 2022 ("ICSID Rules").

European Union and its Member States

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

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

Canada

Canada thanks the Secretariat for its work on procedural and cross-cutting issues relating to the investor-state dispute settlement reform and provides the following comments and suggestions on draft provisions 1 to 9 in Section A and draft provisions 11 and 12 in Section B of A/CN.9/WG.III/WP.244. Canada provides its comments on these provisions based on the understanding that the proposal is for these provisions to be incorporated in the arbitral rules and not as treaty provisions.

These comments build on Canada's previous comments on procedural and cross-cutting issues and are provided without prejudice to Canada's final position on the issues addressed below or on whether such provisions are necessary.

Australia

The Commonwealth of Australia ('Australia') expresses its gratitude to the Secretariat for presenting the Draft Procedural Rules and Cross Cutting Issues (WP.244). Australia provides the following comments on these rules, with a particular focus on their harmonization with other investor-state arbitration rules. Australia reserves its position as to whether it considers such provisions would be best incorporated into the UNCITRAL Rules or

included as part of an instrument associated with the MIIR, and as to whether Australia would ultimately support either proposal.

ICSID

The Secretariat of the International Centre for Settlement of Investment Disputes (ICSID) appreciates the opportunity to submit observations (below and in Annex A) on the Draft Provisions on Procedure in the Report of Working Group III on the work of its 49th Session (A/CN.9/1194) and on the categorization presented in Report A/CN.9/WG.III/WP.244. These observations are based on ICSID's extensive experience with investor-State dispute settlement (ISDS) and its comprehensive procedural reforms adopted in the ICSID Arbitration Rules of July 2022 ("2022 ICSID Rules").

As a preliminary point, ICSID recommends that all Draft Provisions included by Working Group III in Category A, together with certain provisions from Category B (Counterclaim, Consolidation and Coordination, and Third-Party Funding), be consolidated into a cohesive set of procedural rules in Category A. This approach would mitigate the risk of fragmentation of procedural rules applicable in ISDS cases.

Further, ICSID recommends that the draft provisions in Category A and certain provisions in Category B (Counterclaim, Consolidation and Coordination, and Third-Party Funding) be adopted as a supplement to the UNCITRAL Arbitration Rules for investor-State arbitration rather than as treaty provisions, for the following reasons (see also ICSID's submission to UNCITRAL Working Group III of January 16, 2024):

1. There is no necessity to update the 2022 ICSID Rules. The 2022 ICSID Rules were recently revised to include provisions addressing matters discussed in UNCITRAL Working Group III. These Rules reflect extensive amendments that garnered wide consensus among States. The 2022 ICSID Rules have been well received by users and are functioning effectively.

2. While the 2022 ICSID Rules do not require further amendments, the UNCITRAL Arbitration Rules need to be updated to (a) incorporate provisions being discussed in Working Group III, and (b) align them with the 2022 ICSID Rules. This would lead to greater harmonization and consistency of procedural rules used in ISDS.

3. A supplement to the UNCITRAL Arbitration Rules could be tailored to update and enhance the provisions and language in the UNCITRAL Arbitration Rules. As a supplement to the UNCITRAL Arbitration Rules, these provisions would not need to be adjusted to account for ICSID-specific language and the considerations of the ICSID Convention. Each set of rules is a cohesive whole, and provisions need to integrate seamlessly.

4. A supplement to the UNCITRAL Arbitration Rules would prevent the fragmentation of the rules used in ICSID proceedings, depending on a State's opt-in to similarly worded or different provisions in a treaty, as such treaty provisions would purport to override individual ICSID rules.

5. A supplement to the UNCITRAL Arbitration Rules would avoid complexities in determining which provisions apply to specific cases, depending on the disputing parties' nationalities or other factors yet to be determined.

6. Adopting a supplement to the UNCITRAL Arbitration Rules would ensure that future updates to the Rules would be less burdensome than if those rules had been adopted in the form of treaty provisions. Rules need modernization and amendment over time, as demonstrated by the processes to amend the ICSID and UNCITRAL Arbitration Rules, and a flexible amendment process is preferable to facilitate changes.

7. A supplement to the UNCITRAL Arbitration Rules could be adopted independently and in advance of a multilateral instrument on investor-State dispute settlement reform ("MIIR"). This supplement could subsequently be implemented through a protocol to a MIIR, similar to the UNCITRAL Transparency Rules.

ICSID remains available to address any questions on these submissions or to provide further information to Working Group III.

USA

The United States submits the following comments on draft provisions 1-9, 11, and 12(1)-(5), (7) (referred to collectively as the "Draft Provisions"), as set out in WP 244 and WP 245. These comments are preliminary, offered on a technical basis, and subject to further development based on discussions within the Working Group. The comments, which respond to the request for comments made during the 49th session of Working Group III, focus on the suitability of the Draft Provisions for inclusion in a set of supplemental rules to the UNCITRAL Arbitration Rules (UAR), for use in investor-state dispute settlement (ISDS) proceedings. In particular, the comments note whether a draft rule is already reflected in the UAR, or whether it tracks the revised ICSID Arbitration Rules (2022). In our view, it would be useful to develop a set of procedural arbitration rules that bring the UAR in line with the revised 2022 ICSID Arbitration Rules so that both sets of rules reflect common procedures for the conduct of arbitration between foreign investors and host States. These rules, like the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, would be specifically designed for use in ISDS proceedings as a

supplement to the UAR; they are not intended to replace the UAR and do not address all applicable UAR rules. There may also be rules in the UNCITRAL Expedited Arbitration Rules (EAR) that could usefully be applied in the ISDS context, regardless of whether the proceeding is expedited or not. The Draft Provisions would not be intended for use in international commercial disputes, and we would support language clarifying that if appropriate. Any adaptation of these provisions for use in international commercial arbitration would be more appropriately considered by Working Group II, given its mandate to address that topic.

Overall, we thank the Secretariat for its work on these improved Draft Provisions, which are largely consistent with the revised 2022 ICSID Arbitration Rules. They will serve as a solid basis for achieving consensus on this element of the Working Group's reform agenda and submission to the Commission during its 2025 session.

Brazil, Chile, Colombia, Dominican Republic, Ecuador, Mexico and Panama

The following comments on Working Paper A/CN.9/WG.III/WP.244 concerning the Draft Provisions on Procedural and Cross-Cutting Issues ("Working Paper 244") are submitted jointly by the Federative Republic of Brazil, the Republic of Chile, the Republic of Colombia, the Dominican Republic, the Republic of Ecuador, the United Mexican States, and the Republic of Panama.

This document aims to provide written comments on the draft provisions in Section A (provisions 1 to 9), provision 11, and provision 12 (paragraphs 1 to 5 and 7) of Working Paper 244, as outlined in paragraph 68 of the Working Group's report on its 49th session (Vienna, 23–27 September 2024).

These comments seek to align the provisions with the 2022 ICSID Arbitration Rules while incorporating best practices derived from recent investment treaties and the IBA Rules on the Taking of Evidence in International Arbitration.

This is a translation of the original Spanish version, which is the official text. It has been provided to facilitate understanding for non-Spanish speakers and broaden accessibility. Each country reserves the right to submit additional comments or adjust its positions in the future.

CCSI, IIED, IISD and South Centre

The following are comments on, and suggested language for, certain draft provisions in Section A (draft provisions 1 to 9), as well as draft provisions 11 and 12 (paragraphs 1 to 5 and 7) of Working Paper 244 (A/CN.9/WG.III/WP.244). This submission focuses on provisions we believe to be the most critical and in need of particular attention. It is not, however, meant to be an exhaustive commentary on the provisions in Section A.

While the Secretariat has indicated that the aim is to harmonize these provisions with existing procedural rules, such as the 2022 ICSID Arbitration Rules, and to serve as a supplement to the UNCITRAL Arbitration Rules, we believe that, as a *reform* process, Working Group III (WGIII) has a unique opportunity to pursue more ambitious objectives. Rather than merely harmonizing with established frameworks—which should only serve as benchmarks if they are demonstrably fair and legitimate—WGIII should aim to address the systemic challenges and deficiencies of the current ISDS regime. Meaningful and impactful reforms would have the potential to enhance the credibility and transparency of international investment dispute resolution, while also achieving the overarching goals of the UNCITRAL WGIII reform process.

Below, we present the current language of selected draft provisions, key observations on those provisions, and proposed amendments. Our goal is to enhance the clarity, effectiveness, transparency, and overall impact of specific draft provisions to be included in Section A of Working Paper 244.

Viet Nam

Viet Nam take this opportunity to commend the ongoing investor-State dispute settlement (ISDS) reform process at Working Group III and its sincere gratitude towards the Secretariat for their work.

In consideration of the Working Paper numbered A/CN.9/WGIII/WP.244, Viet Nam raises below its comments on specific draft provisions. The views expressed herewith do not represent the priority of Viet Nam, the position of Viet Nam on the final form of provisions, or the intention of Viet Nam to exclude any provision. Viet Nam also reserves the right to submit additional comments on the above-mentioned issue.

Draft Provision 1: Evidence

Singapore

Singapore suggests that the Draft Provision should be aligned as far as possible with the rules on evidence in the ICSID Rules and the UNCITRAL Arbitration Rules.

On paragraph 2, Singapore notes that it does not set out the threshold for when the tribunal may call upon a disputing party to produce further evidence. Singapore suggests adapting from Rule 36(3) of the ICSID Rules, to adjust paragraph 2 as follows:

> "At any time during the proceeding, the Tribunal may require the disputing parties to produce documents, exhibits or other evidence, **if it deems it necessary**".

On paragraph 3, Singapore suggests splitting the first sentence from the rest of paragraph 3, as it addresses a different issue. The first sentence concerns the possibility of establishing a procedure for document production, while the rest of the paragraph concerns the assessment of requests for document production and it can thus be a separate paragraph.

On paragraph 4, Singapore considers that this paragraph need not be confined to the "final decision", but may include a decision on jurisdiction or a partial merits award. Singapore suggests adapting from Rule 30(3) of the UNCITRAL Arbitration Rules, which reads "the arbitral tribunal may make the award on the evidence before it."

On paragraph 5, Singapore suggests also considering a further sentence akin to Rule 38(3) of the ICSID Rules, which states that "The Tribunal shall determine the manner in which the examination is conducted."

On paragraph 8, Singapore considers that it would be useful to add a sentence to paragraph 8, stating that "The parties shall have the right to participate in any visit or inquiry." This would be akin to Rule 40 of the ICSID Rules.

European Union and its Member States

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

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

The question is whether, in an "ordinary" arbitration or dispute, this discretionary power is justified. The European Union and its Member States believe that a procedure for document production can be burdensome and heavy on a respondent's resources, and a balance should be found between this concern and the utility of document production for litigating a case, including for a State or REIO. The current wording, while trying to address such concerns, may give too much arbitrary power to the Tribunal since it is unclear if the listed grounds in the rest of the paragraph are to guide the Tribunal in its decision or for a separate stage (see below).

The second sentence of paragraph 3 lists the circumstances to be considered when assessing requests for document production. However, it is unclear whether these grounds are for the Tribunal when assessing a request to establish a procedure for document production, or, once such procedure is established, if the grounds are for the Tribunal when assessing individual request for producing specific documents (the latter one may seem far reaching).

In any event, Draft provision 1 seems to be missing the possibility for the Tribunal to decide on a dispute arising out of a party's objection to the other party's request for production of documents, once such procedure is established, as provided in ICSID Arbitration Rule 37. The Annotations (paragraph 4, footnote 4) indicate that the second sentence and listed circumstances in paragraph 3 follow ICSID Rule 37, but paragraph 3 concerns a different situation or at least creates confusion as to which situation is concerned (as explained above). The European Union and its Member States would like to request the addition of a paragraph reproducing Rule 37.

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

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

Part 2

The European Union and its Member States refer to paragraph 126 of the report of Working Group III on the work of its 50th session (A/CN.9/1195), where delegations are invited to provide written comments on draft provisions 14* to 19 in document A/CN.9/WG.III/WP.244. The European Union and its Member States therefore submit the below comments on draft provisions 14 to 19. This is without prejudice to the position that the European Union and its Member States may take in light of the discussions in Working Group III.

Canada

Canada suggests that the first sentence in paragraph 3 be drafted in a permissive manner to reference the ability of tribunals to establish a procedure for document requests/production. This could be added as a last sentence to paragraph 2. Paragraph 3 could then focus on considerations for rejecting specific document requests. With respect to the circumstances listed in paragraph 3, Canada seeks clarification as to the rationale for specifically referring to an objection "by the other party" in subparagraph (d), whereas ICSID Rule 37(d) refers more broadly to "the basis of the objection". In view of the broad language providing for the consideration of "all relevant circumstances" in this paragraph, Canada does not consider the additional language in paragraph 7 to be necessary.

Canada is of the view that paragraph 4 may not be necessary as the principle that each disputing party has the burden of proving the facts relied on to support its claim or defence is already captured by paragraph 1. Moreover, this could raise questions as to whether the Tribunal can draw adverse inferences if a party refuses to produce documents or if it would be limited to deciding the issues based on the evidence before it.

Canada suggests that the second sentence in paragraph 5 be aligned more closely with the language in ICSID Rule 38(2), which provides more broadly for any disputing party or the Tribunal to call a witness for examination at a hearing.

The Working Group may also wish to consider whether paragraph 8 is necessary given that it is already captured by the general scope of the Tribunal's authority to "conduct the arbitration in such manner as it considers appropriate". Should this language be included to align with ICSID Rule 40, Canada also suggests to include the additional language in ICSID Rule 40(2) and (3) to circumscribe the scope of the Tribunal's authority.

Switzerland

Paragraph 2. For the sake of clarity, Switzerland proposes that paragraph 2 refer to "documents, witnesses, and other evidence" instead of "documents, exhibits or other evidence", even though it is aware that Article 17 of the UNCITRAL Rules refers to "documents, exhibits or other evidence". Switzerland makes this suggestion as exhibits and documents appear synonymous. Alternatively, the formulation found in ICSID Rule 36(3), whereby "[t]he Tribunal may call upon a party to produce documents or other evidence (…)", could also be adopted.

Paragraph 3. The proposed limitations to document production contained in paragraph 3 appear justified in light of the fact that document production has on some occasions gone too far in practice. Regarding the second sentence of paragraph 3 (starting with "In considering …"), it is not sufficiently clear whether the circumstances enumerated in the paragraph should be considered when deciding to establish a procedure for document production pursuant to the first sentence or when ruling on specific document production requests in the event such document production phase has been allowed.

Paragraph 4. In Switzerland's view, the meaning of paragraph 4 is not clear. If a party ordered to do so fails to produce evidence, then in practice the tribunal will decide on the evidence in the record or, depending on the circumstances, will draw adverse inferences, i.e. it will assume that the facts supposed to be proven by the evidence not provided are not established. It is unclear whether the current draft tries to exclude adverse inferences. Moreover, even if the failure to produce evidence is excused, the tribunal must rule on the evidence before it, which the present wording appears to exclude. It is more likely to draw an adverse inference if there is no excuse for the failure. In other words, this paragraph requires some further work.

Our comment above (para. 2) on exhibits and documents would equally apply here.

Paragraph 7. Regarding para. 7, Switzerland is of the view that it would be useful to list the reasons for exclusion from evidence or production that have been recognized in arbitral practice, and at a minimum those enumerated in Article 9(2) of the IBA Rules on the Taking of Evidence.

In paragraph 7, our comment above (para. 2) on exhibits and documents would equally apply here.

Australia

Paragraphs 1, 2, and 6, and the first sentence of paragraph 5, reflect Article 27 of the UNCITRAL Rules 2021. The first sentence of paragraph 3 and the last sentence of paragraph 5 incorporate language from Article 15 of the UNCITRAL Expedited Arbitration Rules 2021. Paragraph 4 is drawn from Rule 30(3) of the ICSID Rules. Paragraph 7 appears to be drawn from the chapeau of Article 9(2) of the IBA Rules of the Taking of Evidence in

International Arbitration, although the reasons listed in Article 9(2), and elaborated on in Article 9(4), are not reflected in Draft Provision 1. Paragraph 8 appears to be a variation of Article 43(b) of the ICSID Convention.

Australia queries the intention behind this amalgamation of provisions. In particular, Australia queries the reason for incorporating provisions associated with expedited proceedings in Article 15 of the UNCITRAL Expedited Arbitration Rules 2021. While additional discretionary powers may be appropriate for a Tribunal in expedited contexts, Australia queries the appropriateness of their application in standard arbitration settings. Moreover, to the extent this provision was to be incorporated into the UNCITRAL Rules, Australia further queries what the status of sentence one of Article 27(2) of the current rules would be, as it is not reproduced in Draft Provision 1.

Argentina

Argentina considers that, as stated in draft provision 1, the burden of proving the facts on which the memorial or the counter memorial are based should be borne by each party in a dispute, and that the tribunal should have the power to issue an award on the basis of the evidence available. However, we also consider it necessary for the provision to specify that the tribunal has the power to apply a "negative inference" or "adverse inference" in cases where there is a lack of evidence and there is no justification for the failure in providing the requested evidence, the justification is insufficient or the failure to present evidence is directly related to what is being alleged. This inference may lead to a dismissal of the claim made by the party that could not prove its claim or to releasing the opposing party from the burden of proving the unproven claim.

Rule 34(3) of the 2006 ICSID Arbitration Rules allowed tribunals to "take formal notice" of a party's failure to produce evidence, which could give rise to an adverse inference. The tribunal in the ICSID case OPIC Karinum Corporation v. Venezuela applied the negative inference when Respondent's explanations for the failure to produce documents were found "less than fully persuasive." The tribunal in NAFTA Feldman v. Mexico Case applied the negative inference because the Respondent had failed to produce evidence directly related to its claim and because the Respondent never explained why that evidence was not produced.

Regarding paragraph 2 of provision 1, Argentina would like to know whether the tribunal can request evidence even after the proceedings are closed.

In the case of paragraph 5, we would consider it appropriate that this should be without prejudice of the will of the parties, that is, the will of each party to wish to call a witness or expert offered by the other party to testify.

Given the aforementioned comments, we would suggest some modifications of the text of Draft Provision 1.

Suggested modifications for Draft Provision 1 (Highlighted in bold):

Draft Provision 1: Evidence

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

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

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

(a) The scope and timeliness of the request;

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

(c) The burden of production; and

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

4. If a disputing party, duly invited by the Tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the Tribunal may make the award on the evidence before it, without prejudice to the possibility. ***The Tribunal shall take formal note of the failure of a party to produce documents, exhibits or other evidence it was invited to submit, and of any reasons given for such failure, and may make negative inferences against the party that does not cooperate.***

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

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

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

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

USA

Much of this provision replicates UAR Articles 27 and 30(3), is not necessary for a separate set of required rules for ISDS proceedings, and can be omitted from the Draft Provisions. The exception is paragraph 3, which sets out a rule for addressing disputes over document production requests. It could be useful to include a slightly modified version of paragraph 3 as a standalone provision, similar to ICSID Arbitration Rule 37. We would suggest modifying paragraph 3 to include the second sentence of EAR 15(1) following the first sentence of paragraph 3, deleting "such" from what is currently the second sentence of paragraph 3, and adding cross-references to UAR Articles 27 and 30(3). Paragraph 5 is currently discussed in the UNCITRAL Notes on Organizing Arbitral Proceedings (2016) at para. 88.

Brazil, Chile, Colombia, Dominican Republic, Ecuador, Mexico and Panama

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

2. **For greater clarity, each disputing party submitting a claim has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration and customary international law.**

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

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

(a) The scope and timeliness of the request;
(b) **The relevance for the dispute** ~~**admissibility, relevance,**~~ **and the** materiality **to its outcome** ~~**a weight of the documents requested**~~**;**
(c) The burden of production; and
(d) The basis of any objection by the other party.

5. If a disputing party, duly invited by the Tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the Tribunal may make the award on the evidence before it.

6. Unless otherwise directed by the Tribunal, statements by witnesses, including expert witnesses, shall be presented in writing, and signed by them. **Within the period of time set by the tribunal, each disputing party shall inform the tribunal and the other parties of the witnesses whose appearance it requests, including its own witnesses or experts.** The Tribunal may decide which witnesses, including expert witnesses, shall testify before the Tribunal if hearings are held.

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

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

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

Comments

1. The modifications to paragraph 1 aim to harmonize the provision with Rule 36 on evidence in the 2022 ICSID Arbitration Rules. We also consider that limiting the provision to claims and responses only excludes other procedural actions, such as requests for provisional measures, to which these rules are also applicable. This comment is intended for the Spanish version.

2. The new proposal for paragraph 2 seeks to adjust the standard of the burden of proof to the standard of effective proof.
3. The proposals to the previous paragraph 3, now paragraph 4, aim to harmonize the provision with Rule 37 concerning differences related to document production requests in the 2022 ICSID Arbitration Rules, and to align the text with Article 9 of the IBA Rules on the Taking of Evidence in International Arbitration.
4. The modification to the previous paragraph 4, now paragraph 5, seeks to improve the wording, aligning it with Article 30 of the UNCITRAL Arbitration Rules.
5. The proposed changes in the new paragraph 6 seek to ensure that the tribunal consults with the disputing parties before deciding on the witnesses and experts who will testify at a hearing.
6. The proposed changes in new paragraph 7 (of the Spanish version) aim to improve the Spanish translation of the text.

In the new paragraph 9, we propose removing "or based on the following reasons".

CCSI, IIED, IISD and South Centre

Paragraph 1: The general principle regarding the burden of proof is rooted in the maxim *onus probandi actori incumbit*, meaning "he who asserts must prove." As a general principle of international law applicable to arbitration, this rule places the burden on the Claimant to substantiate its allegations regarding jurisdiction, the merits, and damages with sufficient evidence to establish its claim.

As currently drafted, paragraph 1 risks creating confusion about this fundamental rule that the Claimant bears the burden of proof. The use of the term "defence" lacks clarity, as not every objection, counter-argument, or rebuttal by the Respondent in challenging a Claimant's claim requires independent proof. To avoid ambiguity, we recommend aligning the language with the formulations found in modern treaties and models, which clearly specify that the Claimant has the burden of proving its claims. For example, see Article 32(4) of Canada's 2021 Model FIPA, and Article 9.23(7) of the CPTPP.

> Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model, Article 32(4): If an investor of a Party submits a claim to arbitration under Article 27 (Submission of a Claim to Arbitration), … the investor has the burden of proving all elements of its claim, consistent with the general principles of international law applicable to international arbitration.
>
> Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Article 9.23(7): For greater certainty, if an investor of a Party submits a claim under this Section, including a claim alleging that a Party breached Article 9.6 (Minimum Standard of Treatment), the investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration.

Paragraph 5: As currently drafted, paragraph 5 entails a preference for written witness statements in the proceedings. While this approach might help address concerns about procedural economy, it raises concerns—particularly because the text does not differentiate between expert witnesses and other types of witnesses. These concerns are especially relevant in cases where one or both disputing parties seek to put forward witnesses from communities impacted by the investment project. For such witnesses, the reliance on written statements might pose a barrier to effective participation in the proceeding.

Paragraph 5 of the current provision (paragraph 5bis in suggested revised provision) also grants the Tribunal considerable discretion both in deciding whether to depart from the default preference for written witness statements and in determining which witnesses may testify at the hearing. This suggests that the Tribunal, rather than the disputing parties, have the authority to make such decisions. We recommend aligning this language with the current UNCITRAL Arbitration Rules and separating this section from the preceding rule on written witness submissions.

UNCITRAL Arbitration Rules, Article 17(3): 3. If at an appropriate stage of the proceedings any -party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral - argument. In the absence of such a request, the - arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

Paragraphs 6bis and 6ter: In addition to the current content of Draft Provision 1, we recommend incorporating two paragraphs from Draft Provision 23 in Working Paper 231 (A/CN.9/WG.III/WP.231) into the Draft Provision on Evidence. These two paragraphs, which outline procedural options already available under existing rules (See Dafina Atanasova, Vincent Beyer, and Josef Ostransky, "Compensation and Damages in Investor-State Dispute Settlement: Options for reform" (IISD, September 2024) at page 11, compensation-damages-isds-reform.pdf.), do not grant any new powers to the Tribunal. However, their inclusion would provide valuable guidance to both the Tribunal and the disputing parties, explicitly affirming certain procedural possibilities and helping to shape expectations regarding the handling of evidence.

Suggested Revised Provision 1: Evidence

1. **The claimant** shall have the burden of proving **all elements of the claim**.

2. [...]
3. [...]
4. [...]

5. Unless otherwise directed by the Tribunal, statements by witnesses, including expert witnesses, **may** be presented in writing, and signed by them.

5bis. At an appropriate stage of the proceedings, any disputing party may request the Tribunal to hold hearings for the oral presentation of evidence by witnesses, including expert witnesses. In the absence of such a request, the Tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

6. [...]

6bis. 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 relevant issues, such as the assessment or calculation of damages, subject to any terms and conditions agreed with the disputing parties.

6ter. The Tribunal may require that experts appointed by the disputing parties or on its own initiative, if any, 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 opinions in case the experts disagree on facts and legal approaches; and
c. A joint report by those experts.

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

8. […]

Viet Nam

First, Viet Nam welcomes efforts to address the issue of evidence in ISDS, particularly paragraph 7 on the power of the Tribunal to exclude exhibits or evidence "*obtained illegally*". However, it does not address the problems arising from ISDS practices, namely illegal taking of evidence, falsification, or fabrication of evidence. In our practice, we have faced a number of cases where Claimants submit evidence which were illegaly taken, or even fabricated or falsified and the Tribunals have not addressed such issues in a proper way. Therefore, Viet Nam proposes to further clarify situations where such evidence shall be excluded at the draft paragraph 7 as followed:

"7. The Tribunal may, at the request of a disputing party or on its own initiative, exclude from evidence or production any document, exhibits or evidence ***~~obtained illegally or~~*** *based on the following reasons:*
(a) Documents, exhibits or evidence obtained illegally.
For greater clarity, documents, exhibits or evidence "obtained illegally" are those obtained against the law of the State in which they were collected;
(b) Documents, exhibits or evidence with clear signs of falsification and fabrication;
(c) […]"

Second, considering the importance of regulating evidence in ISDS, Viet Nam suggests the following matters be taken into consideration when drafting this provision:

- Failure to provide evidences proving amount of damages shall be an important ground for the Tribunal to dismiss such claim of damages;
- The use and production of falsified and fabricated documents shall be considered as an act against public order and grounds for dismissing claims by the Arbitral Tribunal or by the domestic court of the seat of arbitration.

Third, Viet Nam suggests including the regulation on evidence as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure the efficiency of regulating evidence in ISDS.

Algeria

Bien que la disposition du paragraphe 3 puisse limiter les demandes abusives, l´Algérie considère qu'elle reste incomplète, car elle ne traite pas suffisamment certains aspects essentiels de la preuve. Notamment, elle ne prévoit pas de mécanismes dissuasifs ou de sanctions pour les demandes de preuve excessives ou abusives. Or, notre pratique montre que de nombreux investisseurs inondent l'État de ce type de demandes dans le seul but d'allonger

les délais ou d'alourdir les coûts, ce qui engendre des charges disproportionnées et exerce une pression accrue sur les ressources publiques.

Pour dissuader ces tactiques dilatoires, il est recommandé d'ajouter un paragraphe complémentaire au paragraphe 3, permettant expressément au tribunal de prendre des mesures visant à limiter les requêtes non pertinentes ou excessives. Ces mesures pourraient inclure l'utilisation de « modèles de production de documents », l'imposition de régimes de coûts liés aux demandes de preuve, ou l'adoption d'ordonnances procédurales prévoyant des sanctions adaptées.

Bien que plusieurs tribunaux aient déjà adopté ce type de mécanismes pour encadrer la production de preuves et prévenir les demandes abusives, leur codification explicite obligerait les tribunaux à les appliquer systématiquement. Cela permettrait de rétablir l'équilibre en protégeant l'État défendeur, souvent victime de tactiques dilatoires, tout en optimisant les ressources de toutes les parties et en garantissant le droit à une procédure complète et équitable.

Concernant le paragraphe 7, l´Algérie soutient que le tribunal doit obligatoirement exclure de l´administration de la preuve ou de la production tout document, pièce factuelle ou élément de preuve obtenus illégalement lorsque la partie contestante en fait la demande. Dans les autres cas, le tribunal devrait disposer d´un pouvoir discrétionnaire pour décider de leur exclusion ou de leur admission, en fonction des circonstances.

State not wishing to be identified

With respect to paragraph 2, if this paragraph intends to impose restrictions on the submission of evidence after a certain period, XXX is of the view that the submission of additional evidence should be allowed in exceptional circumstances, such as when the discovery of new evidence significantly impacts the award.

With regard to paragraph 3, XXX reserves its position in requiring the tribunal to consider not only the relevance and materiality but also the admissibility and weight of the documents requested at the stage of considering requests for production of documents.

Regarding paragraph 8, XXX observes that the tribunal may order a visit to any place connected with the dispute and may conduct inquiries there as set forth in Article 43 of the ICSID Convention and Rule 40 of the ICSID Arbitration Rules 2022 ("ICSID Rules").

With respect to the Secretariat's note on whether to consider incorporating aspects of the ICSID Rules on witnesses and experts, namely, Rule 38 (Witnesses and Experts) and 39 (Tribunal-Appointed Experts), XXX's position varies by clause. First, XXX holds the view that Rule 38 of the ICSID Rules, which reflects the current practice in investment arbitration, can be included in the Draft Provisions. However, XXX calls for further review and consideration over the inclusion of Rule 39 of the ICSID Rules in the Draft Provisions for the following reasons:

XXX agrees in principle that the use of tribunal-appointed experts can be beneficial in cases where the Tribunal requires a neutral third-party opinion on specific, important issues. However, either party may challenge the expertise and impartiality of the tribunal-appointed expert during the selection and designation process and even after the appointment, which may result in significant procedural delays. It is also likely that the Tribunal gives more credence to the opinions of tribunal-appointed experts than those of party-appointed experts, which could potentially defeat the purpose of the parties' use of experts. Moreover, the cost of the tribunal-appointed expert is likely to form part of the arbitrator's fees, which in turn would drive up arbitration costs. This may result in an unpredictable increase in total costs of ISDS proceedings.

Draft Provision 2: Bifurcation

Singapore

Singapore notes that Draft Provision 2 is aligned with Rule 42 of the ICSID Rules.

European Union and its Member States

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

In paragraph 1, the word "objection" should replace "plea", as a more appropriate word in the investment law terminology. Furthermore, it is suggested to make clear that draft provision 2 is also relevant for requests to bifurcate liability and damages. To this end, the relevant part of paragraph 1 could be redrafted as follows: *"... including ~~a plea~~* ***an objection*** *that the Tribunal does not have jurisdiction* ***or the assessment of damages****, ...".*

In paragraph 3, it is suggested to add a reference to the objective of procedural economy, which is the overall rationale for bifurcation. To this end, the relevant part of paragraph 3 could be redrafted as follows: *"the Tribunal shall consider all relevant circumstances* ***serving procedural economy****, including…"*

In paragraph 5, the words "unless the disputing parties agree otherwise" should be removed. It is unclear why such possibility should be allowed, as the purpose of an order to bifurcate is to deal with different issues separately, with some of them being addressed first. Not suspending the proceeding with respect to issues to be addressed at a later phase would nullify the benefits of the bifurcation.

In paragraph 6, the previous version of that provision included the following language at the beginning of the paragraph "After consultation with the disputing parties". Such language should be reintroduced in paragraph 6, considering the impact on the proceeding that such discretionary power given to the Tribunal would have.

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

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

Canada

With regard to paragraph 1, Canada notes that "a plea that the Tribunal does not have jurisdiction", is only one of the types of issues or questions that could be addressed in a separate phase of the proceeding. While the provision uses the term "including" before the reference, it should be made clear that bifurcation is not limited to a phase to address jurisdiction but can also include bifurcation on the merits and damages.

Switzerland

The equivalent ICSID Rule on Bifurcation (Rule 42) refers to "question" instead of "issue", and to "dispute" instead of "claim". The wording could be amended accordingly.

Australia

Australia sees merit in Draft Provision 2. However, while Draft Provision 2 is substantively similar to Rule 42 of the ICSID Rules, it does not contain distinct treatment of bifurcation requests accompanying preliminary objections as per Rule 44 of the ICSID Rules. Australia queries the intention behind not specifying the procedure in relation to such bifurcation requests. Australia acknowledges that paragraph 1 differs from ICSID Rules 42(1) by specifying that the issues for which bifurcation can be sought include 'a plea that the Tribunal does not have jurisdiction', making it unambiguous that preliminary objections concerning jurisdiction can be bifurcated. Australia supports this clarification.

ICSID

AR 42, 43, and 44
AF AR 52, 53, and 54
The 2022 ICSID Arbitration Rules (the "2022 Rules") distinguish between requests for bifurcation of preliminary objections (AR 44), and all other requests for bifurcation (AR 42) for example on quantum. By contrast, Draft Provision 2 proposes only one rule on bifurcation that does not specifically address requests for bifurcation of preliminary objections.

The vast majority of requests for bifurcation under the ICSID Arbitration Rules (2006 and 2022) pertain to preliminary objections. Under AR 44(1), (bifurcation with preliminary objections), unless the parties agree otherwise, the request for bifurcation must be filed within 45 days after the filing of the Memorial on the Merits.

This default time limit was added under the 2022 Rules to accelerate proceedings and enhance efficiency. It does not appear in AR 42, which is applicable to all other requests for bifurcation.

An analysis of the requests for bifurcation under AR 44(1) shows that in at least half of the cases, parties have agreed on a deadline for the submission of a request for bifurcation of preliminary objections other than the 45-day default (from 35-60 days) and are including such a deadline in their procedural calendars.

In light of the above, the Working Group may wish to consider distinguishing between requests for bifurcation of preliminary objections and all other requests for bifurcation and adding a default deadline for a request for bifurcation of preliminary objections.

Paragraph 64 of the Report of Working Group III on the work of its 49th Session (A/CN.9/1194) states that "it was suggested that section B could include […] the presumption of bifurcation of jurisdictional issues."

ICSID case law shows that many tribunals have stated that there is no presumption for or against bifurcation. The ICSID Rules provide guidance with regard to the circumstances that tribunals should consider when deciding whether to bifurcate proceedings.

Bifurcation of preliminary objections does not always lead to a reduction of time and costs. The research of the ICSID Secretariat as part of the process which led to the adoption of the 2022 Rules showed that where jurisdiction was upheld in bifurcated proceedings and an award on the merits followed, the proceedings were over 550 days longer than the general average. Where the bifurcated proceeding led to an award declining jurisdiction, it was almost 600 days shorter than the average. (ICSID Working Paper No. 1, p. 902).

In order to avoid fragmentation, and because it is a procedural provision, Draft Provision 2 in its entirety could be kept in Category A.

Argentina

Argentina believes it would be useful if some kind of addition to this provision could be made for the scenario in which a litigating party that requested the bifurcation of the procedures makes a reservation to raise a preliminary objection together with the merits of the dispute. There have been cases in which arbitration tribunals have used this type of reservations of rights to impose a reinforced standard for the analysis of the degree of relevance of the preliminary objections in respect of which the bifurcation was requested.

We understand that, if an instance were generated for the resolution of jurisdictional objections of law or for objections that can be dealt with in a short period of time, this would allow for savings in time and would contribute to the efficiency of the procedures.

Argentina agrees with the importance of clarifying in the provision the type of circumstances that the tribunal should consider when deciding whether or not to bifurcate a proceeding, as is the case with Rule 44 of the 2022 ICSID Arbitration Rules.

It is common to see tribunals decide that bifurcating involves more time than not bifurcating, which is self-evident, and does not necessarily mean that bifurcations should not be admitted. The emphasis should be, we believe, on ensuring that such delays are not disproportionate. We propose changes in the text in order to make that clear.

We also suggest that it be clarified that the tribunal may order bifurcation only with respect to some grounds.

Suggested modifications for Draft Provision 2 (Highlighted in bold):

Draft Provision 2: Bifurcation

1. A disputing party may request that an issue, including a plea that the Tribunal does not have jurisdiction, be addressed in a separate phase of the proceeding ("request for bifurcation"). ***Such a request does not affect the right of such party to present other preliminary objections, at the latest at the time of filing the counter-memorial.***

2. The request for bifurcation shall be made as soon as possible and shall state the issue to be bifurcated. The Tribunal shall fix the period of time within which submissions on the request for bifurcation shall be made by the disputing parties.

3. When determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) Bifurcation ***would materially reduce does not entail a disproportioned extension of*** *the time and cost of the proceeding,* ***taking into account that whenever there is a bifurcation and preliminary exceptions are rejected, the time and cost of the proceeding will be higher than if there had been no bifurcation.***

(b) Determination of the issues to be bifurcated would dispose of all or a substantial portion of the claim; and

(c) The issues to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.

4. The Tribunal shall decide on the request for bifurcation within [30] days after the last submission on the request and shall fix any period of time necessary for the further conduct of the proceeding.

5. If the Tribunal orders bifurcation, it shall suspend the proceeding with respect to any issues to be addressed at a later phase, unless the disputing parties agree otherwise. ***The tribunal may order bifurcation only with respect to some of the preliminary objections.***

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

USA

This draft provision reflects ICSID Arbitration Rule 42 (Bifurcation). Given that there are instances where bifurcation may be useful, for example to efficiently dismiss claims that do not meet jurisdictional conditions required under international investment agreements (IIAs), we support including Draft Provision 2 in order to provide clarity on the criteria relevant to a decision on bifurcation. Thirty days reflects an appropriate amount of time for the tribunal to decide on such a request.

Brazil, Chile, Colombia, Dominican Republic, Ecuador, Mexico and Panama

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

2. The request for bifurcation shall be made as soon as possible and shall state the issue to be bifurcated. The Tribunal shall fix the period of time within which submissions on the request for bifurcation shall be made by the disputing parties.

3. When determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) Bifurcation would materially reduce the time and cost of the proceeding;
(b) Determination of the issues to be bifurcated would dispose of all or a substantial portion of the claim; and
(c) The issues to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.

4. The Tribunal shall decide on the request for bifurcation within [30] days after the last submission on the request and shall fix any period of time necessary for the further conduct of the proceeding.

5. **The tribunal's decision to reject the request for bifurcation, particularly when it concerns an objection to the tribunal's jurisdiction, must be based on a thorough analysis of the arguments presented by the disputing party requesting bifurcation and the facts on which those arguments are based.**

6. **Upon receiving the request for bifurcation, the tribunal** ~~**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,

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

Comments:

1. The modifications to paragraphs 1 and 2 in the Spanish version aim to improve the wording in Spanish, in line with Rule 42 of the 2022 ICSID Arbitration Rules.
2. The proposal for the new paragraph 5 aims to ensure that the tribunal does not deny a request for bifurcation without providing proper justification.
3. The proposal for the new paragraph 6 aims to suspend the arbitral proceedings as soon as the request for bifurcation is received.

State not wishing to be identified

Article 23 of the UNCITRAL Arbitration Rules ("UNCITRAL Rules") provides that pleas regarding the tribunal's jurisdiction may be addressed either as a preliminary question or in an award on the merits. However, the

UNCITRAL Rules does not include a provision for bifurcation requests related to preliminary objections, which is covered by Rule 44 of the ICSID Rules. Therefore, regarding the Secretariat's Note on whether Draft Provision 2 should be further developed to address a plea being made in accordance with Article 23 of the UNCITRAL Rules along with a request for bifurcation, XXX is in favor of amending the current draft to bring it in line with the ICSID Rules. It seems to be more common in practice that the disputing parties seek bifurcation at the jurisdictional stage. Additionally, XXX suggests considering the inclusion of a specific time frame for bifurcation related to preliminary objections, as outlined in Rule 44 of the ICSID Rules.

Draft Provision 3: Interim/provisional measures

Singapore

Singapore suggests adapting from Rule 47 of the ICSID Rules.

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 those documents be destroyed).

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

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

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

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

> *"1. The Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party.*
>
> *2. The Tribunal shall not order the seizure of assets nor prevent the application of the treatment alleged to breach the provisions referred to in [the claim under consideration]. For the purposes of this [Article], an order includes a recommendation."*

Canada

Canada is of the view that similar to ICSID Rule 47, it may be useful to include an illustrative list of possible types of provisional measures or considerations for granting such measures in a draft provision on interim/provisional measures. Canada notes that in its practice, the scope of such interim measures is limited and that a tribunal cannot enjoin the application of the measure alleged to constitute a breach (see e.g., Model FIPA Article 39 (Interim Measures of Protection)).

> *Article 39: Interim Measures of Protection*
>
> *1. A 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 or to protect the Tribunal's jurisdiction. A Tribunal shall not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 27 (Submission of a Claim to Arbitration). For the purposes of this paragraph, an order includes a recommendation.*

Switzerland

It seems to Switzerland that it is not a priority for the Working Group to work on a provision on interim measures, as applicable arbitration rules already entail very detailed rules.

ICSID

ICSID Convention Art. 47
AR 47
AF AR 57

Working Group III was invited to consider whether Draft Provision 3 should be more aligned with AR 47 or whether Article 26 of the UNCITRAL Arbitration Rules sufficiently addresses the issues related to interim/provisional measures.

The main differences between Article 26 and AR 47 are:

AR 47(1) mirrors Article 26(2) of the UNCITRAL Arbitration Rules on the possible type of measures, except that preserving assets is not in the non-exhaustive list under AR 47. The notion of preserving assets was understood to appear to cater more broadly to commercial arbitration than to investor-state arbitration.

AR 47(3) does not contain any standard such as "irreparable harm," or a "risk thereof," or "harm not adequately reparable by an award of damages" (Article 26(3)(a)) of the UNCITRAL Arbitration Rules), as these notions have not been uniformly adopted in investment cases and may not be suitable in every circumstance. It does, however, specify that the tribunal must consider all the circumstances and imposes the requirements of urgency and necessity, which have uniformly been required in cases to date. Article 26(3)(a) of the UNCITRAL Arbitration Rules contains a standard that is suitable both for commercial and investment arbitration and that can be interpreted consistently in both types of arbitration.

Finally, paragraph 64 of the Report of Working Group III on the work of its 49th Session (A/CN.9/1194) states that "it was suggested that section B could include draft provisions on interim/provisional measures […]."

A new free-standing provision in Category B as a treaty provision could lead to further fragmentation of the matter.

USA

UAR 26 already provides for interim measures, so this provision is not strictly needed for a supplemental set of rules for ISDS. It may be worth considering, however, whether additional limitations on granting interim measures may be appropriate in ISDS. For example, in modern U.S. IIA practice, interim measures are allowed only to preserve evidence, to preserve the rights of a disputing party, or to protect the tribunal's jurisdiction, but not to enjoin a challenged measure. A recent example is USMCA Art. 14.D.7(9).

Brazil, Chile, Colombia, Dominican Republic, Ecuador, Mexico and Panama

~~**1. The Tribunal may, at the request of a disputing party, grant interim/provisional measures.**~~
~~**[…]**~~

1. A disputing party may at any time request that the tribunal recommend provisional measures to preserve that disputing party's right or to ensure the full exercise of the tribunal's jurisdiction, including measures to:

(a) prevent actions that are likely to cause current or imminent harm to that party or prejudice to the arbitral process;
(b) maintain or restore the *status quo* pending determination of the dispute; or
(c) preserve evidence in the possession or control of a disputing party that may be relevant to the resolution of the dispute.

2. The tribunal shall not order the attachment or enjoin the application of a measure alleged to constitute a breach of the treaty, including its suspension.

3. A request for provisional measures must specify the rights to be safeguarded, the measures sought, and the circumstances requiring their adoption. The disputing party requesting the provisional measures bears the burden of proving the facts alleged in support of its request to a reasonable degree. The tribunal shall establish a time limit for submissions on such request.

4. When deciding on provisional measures, the tribunal shall consider all relevant circumstances, including:

(a) whether the measures are urgent, proportional, and necessary;
(b) whether there is a right at risk of being affected;
(c) the tribunal's *prima facie* jurisdiction to order the provisional measure; and
(d) the effect such measures may have on each of the disputing parties.

5. The tribunal may modify, suspend, or terminate the provisional measures at any time, either on its own initiative or at the request of a disputing party. The tribunal may also recommend provisional measures different from those requested by a disputing party.

6. A party shall promptly disclose any material changes in the circumstances on the basis of which the provisional measure was granted.

7. The tribunal may require the party requesting a provisional measure to provide appropriate security in connection with the measure. In such a case, the measure shall not be granted unless the security is first provided.

8. The party requesting a provisional measure shall be liable for any costs and damages caused by the provisional measure to any party if the tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The tribunal may award such costs and damages at any point during the proceedings.

9. Decisions on the granting of provisional measures and their compliance shall not prevent the exercise of the legitimate right to regulate of the respondent State, including its ability to perform functions such as the enforcement and application of laws or the protection of public interest objectives such as life, health, and the environment.

Comments

1. The proposal for paragraph 1 aims to align the text with Rule 47(1) of the 2022 ICSID Arbitration Rules.
2. The proposals in paragraphs 2 and 3 aims to align with the practice of our countries concerning provisional measures in recent investment treaties. Furthermore, we suggest incorporating a provision on the burden of proof for the requesting party, as this would prevent the acceptance of facts that are invoked as the basis for the request without even being *prima facie* demonstrated.
3. Paragraph 4 seeks to reflect the standards that are commonly used in practice by tribunals when examining requests for provisional measures. Some of these requirements are reflected both in Rule 47 of the 2022 ICSID Arbitration Rules and in paragraph 3 of Article 26 of the UNCITRAL Arbitration Rules.
4. The proposal in paragraph 5 aims to harmonize with Rule 47(4) of the 2022 ICSID Arbitration Rules and Article 26(5) of the UNCITRAL Arbitration Rules.
5. Paragraphs 6 and 7 are proposed in line with Article 26 of the UNCITRAL Arbitration Rules.
6. The proposal in paragraph 9 suggests that these rules should reflect that each State has the right to regulate and the obligation to continue regulating in certain areas even when an investment dispute is ongoing. Any order for provisional measures must respect the sovereignty of the State in this regard.

CCSI, IIED, IISD and South Centre

Expanding Draft Provision 3 to include a more comprehensive framework for provisional measures would be a significant step in the reform process. While such measures can be necessary to protect a disputing party or parties, or to preserve access to evidence, they can also unduly interfere with a State's ability to adopt, implement, or enforce legitimate laws and policies. This risk of undue interference with States' regulatory powers is especially significant when provisional measures purport to bar (or recommend against) a State adopting, maintaining, or enforcing laws or policies that are the subject of a Claimant's ISDS case. Such orders (or recommendations) providing for injunctive relief also create tensions with the efforts of many States to limit Tribunals' authority to award pecuniary remedies, such as compensation for harms caused by a treaty breach, and not other remedies.[1]

Modern investment agreements have sought to address these risks and tensions by explicitly restricting the scope of provisional measures. For instance, the CPTPP, USMCA, and Canada's 2021 FIPA Model permit Tribunals to order interim measures to protect Claimants, but explicitly prohibit orders or recommendations that would enjoin the implementation of measures alleged to breach a treaty.[2] Given the strong emphasis by many State delegates in the UNCITRAL WGIII process on safeguarding their right to regulate, and in light of the fact that avoiding undue regulatory chill has been recognized as a "cross-cutting" issue by WGIII, it is important to include language in Draft Provision 3 that similarly restricts the use of provisional measures.

Suggested Revised Provision 3: Interim/provisional measures

1. The Tribunal may, at the request of a disputing party, grant **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 or to protect the Tribunal's jurisdiction. A**

[1] Treaties frequently also provide that restitution may be provided in the event of an expropriation, but that a State can opt to pay compensation instead of providing restitution.

[2] See e.g. Article 9.23(9) of the CPTPP: "A 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 or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 9.19 (Submission of a Claim to Arbitration). For the purposes of this paragraph, an order includes a recommendation." See also Article 14.D.7.9 of USMCA and Article 39 of Canada's Model FIPA, which use similar formulations.

Tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in the submission of a claim to arbitration. For the purposes of this paragraph, an order includes a recommendation.

2. **Decisions regarding the granting and enforcement of provisional measures should not impede a State's legitimate right to regulate. This includes the State's ability to perform essential functions, such as enacting and enforcing laws or safeguarding public interest objectives, including the protection of life, health, and the environment.**

[...]

State not wishing to be identified

The Secretariat wishes to discuss whether Article 26 (Interim Measures) of the current UNCITRAL Rules sufficiently addresses the issues or to prepare a rule more closely aligned with Rule 47 of the ICSID Rules. XXX considers that, as the existing rules (both UNCITRAL and ICSID Rules) provide specific requirements, procedures, etc. for requests for interim and conservatory measures, there is little need to provide additional detail in this Draft Provision 3 for the purpose of minimizing conflicts between the rules. In terms of future refinements to the draft, however, it is advisable that the following could be added:

Since there is a degree of complementarity between Rule 47 of the ICSID Rules and Article 26 of the UNCITRAL Rules, XXX proposes to amend Provision 2 of the current draft by introducing some elements that are present in Rule 47 of the ICSID Rules. For instance, in consideration of the urgency of the provisional measures and the need to render an award expeditiously, XXX considers that it would be preferable to introduce the rules on time limits for provisional measures stipulated in Rule 47(2) (b) to (d) of the ICSID Rules into the Draft Provisions.

With respect to paragraph 2(c) of Article 26 of 2013 UNCITRAL Rules, which provides for preserving assets as one of the purposes of provisional measures, XXX takes note that this purpose of preserving assets is excluded from Rule 47 of ICSID Rules. As the ICSID Rules on provisional measures reflect the characteristics of the ISDS procedure, XXX is of the view that bringing the Draft Provisions in line with the existing structure and conditions of the ICSID Rules is a more suitable approach.

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

Singapore

Singapore strongly supports the inclusion of an early dismissal mechanism, which we believe can promote the savings of time and costs.

Singapore thanks the Secretariat for addressing two concerns that Singapore raised at WG III's 43rd session in September 2022, namely that it would be inappropriate for the tribunal to dismiss claims at its own initiative, and that this provision should not apply to counterclaims. Singapore notes that Draft Provision 4 is generally aligned with Rule 41 of the ICSID Rules.

European Union and its Member States

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

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

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

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

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

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

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

> *"Claims Manifestly without Legal Merit*
>
> *1. The respondent may, no later than 30 days after the constitution of [the Tribunal], and in any case before the first meeting of [the Tribunal], or 30 days after the respondent became aware of the facts on which the objection is based, submit an objection that a claim is manifestly without legal merit.*
>
> *2. The respondent shall specify as precisely as possible the basis for the objection.*
>
> *3. The Tribunal, after giving the disputing parties an opportunity to present their observations on the objection, shall, at the first meeting of [the Tribunal] or promptly thereafter, issue a decision or provisional award on the objection, stating the grounds therefor. If the objection is received after the first meeting of [the Tribunal], the Tribunal shall issue such decision or provisional award as soon as possible, and no later than 120 days after the objection was submitted. In doing so, the Tribunal shall assume the alleged facts to be true, and may also consider any relevant facts not in dispute.*
>
> *4. This Article and any decision of the Tribunal shall be without prejudice to the right of a disputing party to object, pursuant to [Article on Claims Unfounded as a Matter of Law] or in the course of the proceedings, to the legal merits of a claim, and shall be without prejudice to the Tribunal's authority to address other objections as a preliminary question.*
>
> *Claims Unfounded as a Matter of law*

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

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

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

Canada

Draft Provision 4 largely appears to be aligned with ICSID Rule 41. On the question of including a specific reference to costs in paragraph 6, Canada notes that this may not be necessary in view of the more detailed provisions in Draft Provision 9 (Allocation of Costs). As noted below, based on our understanding that Draft Provision 9 to applies generally to any "costs of the proceeding", it may not be necessary to include provisions on allocation of costs in Draft Provision 4.

Switzerland

Switzerland considers the possibility to foresee an early dismissal as very important. Switzerland welcomes that this draft provision is aligned with Rule 41 of the ICSID Arbitration Rules.

Australia

Australia sees merit in Draft Provision 4. Draft Provision 4 is substantively similar to Rule 41 of the ICSID Rules. Australia notes, however, that unlike Rule 41 of the ICSID Rules, Draft Provision 4 grants tribunals discretion to accept objections that a claim is manifestly without legal merit (MWLM) if submitted more than 45 days after the constitution of the Tribunal, as per sentence two of paragraph (2) above.

Australia further notes that the proposed Draft Provision 4 does not provide a procedure for MWLM objections prior to the composition of the tribunal. We agree with this approach in the context of ad hoc arbitration governed by the UNCITRAL Rules, noting that the relevant Agreement could provide such a right if desired by the State parties.

Australia considers that costs in paragraph (6) could be better dealt with in the proposed provision concerning costs (presently Draft Provision 9).

ICSID

AR 41
AF AR 51

Draft Provision 4 largely aligns with AR 41(1) except that Draft Provision 4(2) adds that the tribunal may admit a later objection [i.e., an objection made after the 45-day deadline] if it considers that the delay is justified. This exception does not exist under the 2022 Rules because the purpose of the rule was to allow claims that manifestly lack legal merit to be dismissed early in the process before they unnecessarily consume the parties' resources, and because the 45-day deadline was considered sufficient time to file such an objection. In practice, the average time to reach the stage of tribunal constitution is approximately 5-6 months. The party wishing to object to a claim on these grounds thus has sufficient time to prepare the submission.

Paragraph 64 of the Report of Working Group III on the work of its 49th Session (A/CN.9/1194) states that "it was suggested that section B could include draft provisions on […] early dismissal [and] frivolous claims […]," in particular "[…] a provision in Section B that addresse[s] the standard for the preliminary dismissal of a claim for which there was no legal basis for rendering an award." (para 62).

ICSID tribunals have applied a high standard for determining whether a claim manifestly lacks legal merit under AR41(1). Tribunals have required the moving party to establish its objection clearly and obviously, with relative ease and dispatch (see ICSID's Experience with Objections that a Claim Manifestly Lacks Legal Merit; data as of 10 March 2021; posted under the 74th Session of Working Group II).

Working Group III may wish to consider keeping Draft Provision 4, in its entirety, in Category A. Dividing it into a general provision and a further provision/s to be included in Category B as a treaty provision addressing the legal standard would lead to uncertainty, possible inconsistencies in the application of the rule, and to further fragmentation.

Argentina

Draft provision 4, paragraph 2, reads: "*A disputing party shall make the objection as soon as possible after the constitution of the Tribunal and no later than [45] days after its constitution. The Tribunal may admit a later objection if it considers the delay justified*". We were wondering what would happen if the time established to respond to the claim was longer than 45 days. In those cases, would it be justified for a party to present an objection for manifest lack of legal merit *after* those 45 days?

USA

This draft provision reflects ICSID Arbitration Rule 41 (Manifest Lack of Legal Merit) and Rule 52(2). Currently, there is no separate provision for early dismissal under the UAR, although the UNCITRAL Notes on Organizing Arbitral Proceedings, Note 21 at para. 147–54, confirm that a tribunal, under UAR Article 17, has the authority to dismiss claims as a preliminary matter when appropriate. Nevertheless, in the ISDS context, a rule setting out a specific procedure could provide greater clarity and predictability for the dismissal of meritless or frivolous claims. We note that ICSID Arbitration Rule 44 provides an additional accelerated procedure for bifurcation and preliminary objections, which could be a useful addition to the UAR for ISDS proceedings.

We are not certain that, in the ISDS context, it is appropriate to require that costs be awarded to the prevailing party absent exceptional circumstances, as set out in paragraph 6, although we recognize that ICSID Arbitration Rule 52(2) includes a similar presumption, as does UAR Article 42 ("shall" award costs to prevailing party unless not appropriate). We note that in modern U.S. IIA practice, the most recent example of which is USMCA Article 14.D.7(6), the tribunal has the discretion to award costs and is required to consider whether the claim or an objection thereto was frivolous.

Brazil, Chile, Colombia, Dominican Republic, Ecuador, Mexico and Panama

1. A disputing party may object that a claim is manifestly without legal merit.

2. A disputing party shall make the objection as soon as possible after the constitution of the Tribunal and no later than [45] days after its constitution. The Tribunal may admit a later objection if it considers the delay justified.

3. The objection may relate to the substance of the claim or the jurisdiction of the Tribunal. The objection shall specify the grounds on which it is based and contain a statement of the relevant facts, laws and arguments. The Tribunal shall fix the period of time within which submissions on the objection shall be made by the disputing parties.

4. The Tribunal shall decide on the objection within [60] days after **the later of the constitution of the tribunal or** the last submission on the objection.

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

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

7. A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of the disputing party to raise a plea that the Tribunal does not have jurisdiction or to argue subsequently in the proceeding that the claim is without legal merit.

Comments:

The proposed amendments to paragraph 4 aim to harmonize the text with Rule 41(2)(e) of the 2022 ICSID Arbitration Rules.

Viet Nam

Considering that this issue is always raised by States, to realistically ensure the rights of disputing parties, Viet Nam proposes the following drafting suggestions for paragraph 2:

"*2. A disputing party shall make the objection as soon as possible after the constitution of the Tribunal and no later than **60** days after its constitution. The Tribunal may admit a later objection if it considers the delay justified.*"

In addition, Viet Nam suggests including the regulation on manifest lack of legal merit/early dismissal as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure its enforceability.

Algeria

L'Algérie soutient ce projet de disposition, qui constitue un moyen efficace pour les parties de contester rapidement les réclamations infondées ou abusives dès le début de la procédure, contribuant ainsi à préserver leurs ressources avant que celles-ci ne soient gaspillées inutilement.

Cependant, il est proposé de renforcer ce mécanisme de filtrage précoce dans son paragraphe 2 pour inclure spécifiquement les situations où la partie contestante n'a pris connaissance des faits sur lesquels repose l'objection qu'après l'expiration du délai de 45 jours. Dans ce cas, il serait judicieux que ce délai commence à courir à partir de la date de découverte des faits en question, afin de garantir une plus grande équité procédurale et permettre aux parties de défendre adéquatement leurs intérêts.

State not wishing to be identified

XXX is of the view that the content of the Draft Provision 4 can be aligned with that of ICSID Rules, namely, Rule 41 (Manifest Lack of Legal Merit). XXX agrees that a disputing party may object that a claim is manifestly without legal merit no later than 45 days after constitution of the tribunal, and that the tribunal shall decide on the objection within a certain period after the last submission on the objection. However, the tribunal should be allowed to extend the time period upon a showing of extraordinary cause.

Regarding paragraph 6, XXX agrees with the draft allowing the tribunal to award the prevailing party its reasonable costs, as provided in Rule 52 of the ICSID Rules.

Draft Provision 5: Security for costs

Singapore

Singapore strongly supports a rule on security for costs, as this mechanism is important in deterring frivolous or unmeritorious claims. We think that this procedural rule would go a long way in reforming ISDS.

Addressing the Secretariat's question in paragraph 18 of Working Paper 245, on applying this Draft Provision to counterclaims, Singapore considers that a respondent State making a counterclaim may also be ordered to furnish security for costs. There is no principled reason to differentiate the application of this Draft Provision between claims and counterclaims. Singapore suggests adapting from Rule 53 of the ICSID Rules on security for costs, which is applicable to "any party asserting a claim or counterclaim".

On paragraph 4(e) of the Draft Provision, Singapore's view is that the existence of third party funding should not be a relevant factor in and of itself when determining whether to order security for costs. A disputing party may obtain third-party funding for a multitude of reasons, and the existence of third-party funding is not in itself a sign that the disputing party will not be able to satisfy a decision on costs. We thus propose to delete paragraph 4(e) which is currently in square brackets. Singapore suggests adapting from Rule 53(4) of the ICSID Rules, which was agreed upon only after undergoing an immense amount of debate, to address third party funding in the following manner in Draft Provision 5: "The Tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (4), including the existence of third-party funding."

European Union and its Member States

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

With regard to paragraph 1 of draft provision 5 and paragraph 18 of the Annotations, it does not seem relevant, for policy reasons, to include the possibility for a respondent State making a counterclaim to be ordered security for costs.

With regard to paragraph 4(e), it could be linked to information that the Tribunal may request under draft provision 12. Indeed, if the Tribunal does not yet have the information specified in draft provision 12, it would seem necessary that the Tribunal requests that the disputing party disclose it for the purposes of paragraph (4)(e). Also, the approach in Rule 53(4) of the ISCID Arbitration Rules, where third-party funding can be considered as evidence in relation to the circumstances listed under current paragraph 4, seems more appropriate.

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

Canada

Canada supports the consideration of the existence of third-party funding in the tribunal determination as to whether one of the circumstances in 4(a) to 4(c) exists (for example it may be relevant to the disputing party's ability to comply with an adverse decision on costs) and not as an element in and of itself. Canada would suggest adjusting the drafting the provision more in line with the ICSID Rules.

Switzerland

Paragraph 1. With respect to paragraph 1, Switzerland welcomes the current draft stating that both disputing parties, i.e. the claimant and the respondent State making a counterclaim may be ordered to provide security for costs. This is in line with ICSID Rule 53. This is based on the assumption that in a proceeding the same rights and obligations should apply to all disputing parties (equal treatment).

Paragraph 3. We agree with the period of time of 30 days as suggested in paragraph 3.

Paragraph 4. In paragraph 4, Switzerland supports to list the existence of third-party funding as one of the circumstances to be considered by the Tribunal. In comparison, it is not foreseen in ICSID Rule 53, which mention instead third-party funding in the context of the evidence which may be adduced in relation to the listed circumstances (see ICSID Rule 53(4)). According to Switzerland's understanding, the specific listing of the existence of third-party funding in paragraph 4 may give even more emphasis to the third-party funding circumstance.

Australia

Australia sees merit in Draft Provision 5. Security for costs can protect a respondent State against a claimant's inability or unwillingness to pay costs, and discourage frivolous claims. We would consider it appropriate to extend this provision to counterclaims, akin to ICSID Rule 53(1). We support the inclusion of a Tribunal considering the existence of third-party funding to support a disputing party in pursuing its claim or counterclaim, as currently drafted in Draft Provision 5(4)(e).

ICSID

AR 53
AF AR 63

Draft Provision 5 seems to be largely modelled after AR 53, save for that in Draft Provision 5, third party funding is a circumstance in and of itself to order Security for Costs. In AR 53, the existence of third-party funding comes in as evidence adduced in relation to the circumstances tribunals should consider when determining whether to order a party to provide security for costs.

The existence of third-party funding is typically considered as part of the evidence to show that a party is impecunious and unable or unwilling to comply with an adverse decision on costs. It is not sufficient by itself to justify granting security for costs but may be considered as evidence of a circumstance listed in paragraph 53(3).

Argentina

Argentina considers it is very important to state that one of the circumstances that the tribunal must consider when ordering a disputing party to provide security for costs is whether there is third-party financing (paragraph (e) of paragraph 4), as is the case with Rule 53 (4) of the 2022 ICSID Arbitration Rules.

We also believe that this provision should be aimed at requiring security for costs from the private party in the dispute. We shall bear in mind that, in case of States, it may take more or less time to collect the costs, but a State will almost certainly not disappear –at least not without leaving a successor State–, which makes it unnecessary to request security for costs in the case of States.

Comentarios:

Argentina considera sumamente relevante que se establezca que una de las circunstancias que el tribunal debe analizar a la hora de ordenar a una parte litigante que preste garantía de pago de las costas es si existe financiación por terceros (inciso (e) del párrafo 4), al igual que sucede con la Regla 53 (4) de las Reglas de Arbitraje del CIADI de 2022.

Consideramos relevante tener presente que las garantías de pago de las costas suelen tener lugar ante reclamos que tienen una cierta probabilidad de ser rechazados en la etapa jurisdiccional; en efecto, la garantía de pago de las costas busca evitar que reclamantes con reclamos sin fundamento puedan aventurarse en procesos contra los Estados sin consecuencia alguna.

Entendemos que esta disposición debería estar dirigida a requerir garantías de pago de costas a la parte privada en una controversia. Consideramos que se debe tener en cuenta que, en el caso de los Estados, podrá llevar más o menos tiempo cobrar los costos, pero un Estado casi con seguridad no va a desaparecer –al menos no sin dejar un Estado sucesor–, lo que torna innecesario requerir garantías de pago de costas en el caso de los Estados.

En función de lo expuesto no creemos que haya que incluir la expresión "*o una reconvención*" en el párrafo 1 del proyecto de disposición 5.

También tenemos dudas sobre cómo se evaluaría el requisito sobre la voluntad para cumplir con el pago de las costas de parte del demandante ("*la voluntad que tenga la parte litigante de cumplir una decisión de condena en costas;*"). La preocupación es que se entienda que este requisito está cumplido con una declaración del demandante.

USA

This draft provision reflects ICSID Arbitration Rule 53 (Security for Costs), including taking into account third-party funding (TPF) as a factor. Currently, there is no separate provision for security for costs in the UAR. In particular, we support the bracketed language in para. 4(e) to make TPF a required factor in security for costs and a regular part of claimant's disclosures. We question whether it is necessary to terminate the proceeding if a host State fails to provide security for costs (para. 6), as it may create an incentive not to comply with such an order, and note that the provision as drafted does not clearly apply symmetrically to both claimants and respondents.

Brazil, Chile, Colombia, Dominican Republic, Ecuador, Mexico and Panama

1. At the request of a disputing party, the Tribunal may order any disputing party making a claim ~~[or counterclaim]~~ to provide security for costs.

2. The request shall include a statement of the relevant circumstances and the supporting documents. The Tribunal shall fix the period of time within which submissions on the request shall be made by the disputing parties.

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

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

(a) That disputing party's **financial capacity** ~~**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];**~~
(b) ~~**(d)**~~ The conduct of the disputing parties; and
(c) ~~**[(e)**~~ The existence of third-party funding to support that disputing party in pursuing its claim ~~**or counterclaim**~~ **and its willingness to cover the costs of the proceedings~~]~~.**

5. The Tribunal shall specify any relevant terms in an order to provide security for costs and fix a period of time for compliance with that order.

6. If a disputing party fails to comply with the order to provide security for costs, the Tribunal **shall** ~~**may**~~ order the suspension of the proceeding for a fixed period of time. If the proceeding is suspended for more than [90] days, the Tribunal **shall** ~~**may, after inviting the disputing parties to express their views,**~~ order the termination of the proceeding.

7. A disputing party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

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

Comments:

1. In paragraphs 1 and 5, we propose removing "counterclaims".
2. We propose removing subparagraphs b) and c) in paragraph 4, as they refer to conducts that cannot be objectively assessed and may be raised as absolute defenses by the requested party. The decision to grant or deny the security for costs should be based on objective facts. Additionally, we propose adding the current item (e) in brackets as item (c) to the list.
3. The proposed amendment in paragraph 6 aims to eliminate the tribunal's discretion regarding the application of procedural sanctions in the event of non-compliance with the order to provide security for costs.
4. In paragraph 8, we propose removing "or on its own initiative". We believe that any change to the decision regarding the security for costs should only occur at the request of the interested party, and such request should be properly justified.

CCSI, IIED, IISD and South Centre

We suggest deleting the bracketed words "or counterclaim" from the draft provision. Allowing a Tribunal to order security for costs at the request of a disputing party raises distinct considerations when applied to claims and counterclaims. While it is acknowledged that such orders for security for costs might discourage Claimants from pursuing claims, this potential effect is offset by the need to address legitimate concerns, such as the risk of non-payment due to insolvency or asset-stripping.

These specific risks are far less relevant in the context of counterclaims by Respondent States. The rationale for requiring security for costs in the case of counterclaims is therefore weak. At the same time, the potential consequences—namely, discouraging States from pursuing legitimate counterclaims—are significant, particularly in the light of the wider structural asymmetries of investor-state dispute settlement. By treating claims and counterclaims the same, the language in brackets risks imposing an undue burden on States and undermining their ability to assert counterclaims effectively.

Suggested Revised Provision 5: Security for costs

1. At the request of a **respondent**, the Tribunal may order a **claimant** to provide security for costs.

2. [...]
3. [...]

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

a. **The claimant's** ability to comply with an adverse decision on costs;
b. **The claimant's** willingness to comply with an adverse decision on costs;
c. The effect that providing security for costs may have on **the claimant's** ability to pursue its claim;
d. The conduct of the disputing parties; and
e. The existence of third-party funding to support **the claimant** in pursuing its claim.

5. [...]

6. If **the claimant** fails to comply with the order to provide security for costs, the Tribunal may order the suspension of the proceeding for a fixed period of time. If the proceeding is suspended for more than [90] days, the Tribunal may, after inviting the disputing parties to express their views, order the termination of the proceeding.
7. [...]
8. [...]

Viet Nam

To realistically address the issue of costs, Viet Nam proposes considering the following matters when drafting this provision:

- Only the State can request security for costs since the failure to pay costs under an arbitration award often comes from the investor.
- The security for costs is mandatory in cases with third-party funding.

In addition, Viet Nam suggests including the regulation on security for costs as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure its enforceability.

Algeria

L'Algérie soutient ce projet de disposition qui vise à dissuader les réclamations infondées ou abusives, tout en offrant à l'État défendeur un outil efficace pour limiter les risques financiers liés à l'impossibilité de recouvrer ses dépens en cas de victoire, particulièrement lorsque la partie adverse est financièrement instable. Cette disposition constitue une avancée notable dans la réforme des mécanismes de règlement des différends entre investisseurs et États, en rétablissant un certain équilibre entre les parties au différend.

Toutefois, il est vivement recommandé de :

- Limiter l'application de cette mesure aux investisseurs, en excluant expressément son imposition à l'État défendeur lorsqu'il présente une demande reconventionnelle. L'exigence de garantie repose principalement sur le risque d'insolvabilité ou de non-recouvrement des frais accordés par le tribunal, un risque inexistant pour les États. Contrairement aux investisseurs privés, les États bénéficient d'une solvabilité durable et d'une continuité institutionnelle, rendant cette obligation non seulement inutile mais aussi disproportionnée ;
- Rendre expressément cette garantie obligatoire en présence d'un financement divulgué par des tiers, car ce type de financement témoigne souvent d'une situation d'insolvabilité ou de vulnérabilité financière de la partie demanderesse. Une telle obligation est pleinement justifiée pour protéger les intérêts financiers de l'État défendeur et garantir que les frais adjugés pourront être recouvrés en cas de victoire.

State not wishing to be identified

The Secretariat explains that the security for costs provision may protect the respondent State against frivolous claims and the claimant's inability to pay costs.

With respect to paragraph 1, XXX reserves its position in including counterclaim and is of the view that only claimants should be ordered security for costs given the low probability of situations where arbitration costs are not recovered by a respondent State making a counterclaim.

Regarding paragraph 3, XXX agrees that the tribunal shall decide on security for costs within 30 days after the last submission on the request to ensure expedited proceedings, as stipulated in the ICSID Rules.

With respect to paragraph 4, XXX is in principle of the view that the existence of third-party funding itself does not necessarily mean that an order for security for costs must be made. Third-party funding, however, is generally more likely to be provided to the claimant rather than the respondent State, and where there is third-party funding, the continuation of funding by the funder can have a significant impact on the whole progress of the case. In this regard, XXX would like to retain paragraph 4(e) in its current form and to require tribunals to consider the existence of third-party funding as one of the circumstances.

Regarding paragraphs 6, in order to ensure the efficiency of the proceedings, XXX agrees that the tribunal may suspend and terminate proceedings if a disputing party fails to comply with the order to provide security for costs, as stipulated in the ICSID Rules.

Draft Provision 6: Suspension of the proceeding

Singapore

As a general comment, Singapore's view is that it is useful to split the provisions on suspension and termination into two separate provisions, and notes with appreciation that this is now reflecting in Draft Provisions 6 and 7 respectively.

On paragraph 4, Singapore supports the addition of the last sentence. If the disputing parties agree on the extension of suspension, then the Tribunal must give effect to the extension.

Comments from the European Union and its Member States

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

USA

This draft provision reflects ICSID Arbitration Rule 54 (Suspension of the Proceeding). Currently, there is no separate provision for suspension in the UAR, and we believe that it is appropriate to add such a supplemental rule for ISDS.

State not wishing to be identified

Given that the Draft Provision appears to set forth regulations concerning the suspension and termination of proceedings in a manner analogous to ICSID Rules 54 through 56, XXX concurs, in principle, with the underlying intent of these provisions.

It is stipulated in paragraph 1 that the tribunal shall order the suspension of the proceeding upon the joint request of the disputing parties. XXX agrees in principle with this Draft Provision, as it is important that the tribunal respects and incorporates the explicit agreement expressed by both disputing parties.

With respect to paragraph 2, XXX also agrees in principle with the approach of allowing the tribunal to order the suspension of the proceeding either upon the request of one of the parties or on its own initiative. However, further review is needed as the current wording of paragraph 2 is ambiguous in certain aspects, such as:

(a) whether providing an opportunity for the disputing parties to express their views is a mandatory requirement,

(b) the manner and format of such expressions (e.g., whether the Tribunal or the parties are required to formally request or provide written expressions of views), and

(c) how to handle situations where a party does not express its views despite being given the opportunity to do so.

Argentina

Comentarios:

Sin perjuicio de las objeciones que los Estados puedan formular en cuanto a la falta de jurisdicción del tribunal o la inadmisibilidad de los reclamos, consideramos apropiado que el tribunal se encuentre facultado a suspender el procedimiento en caso de que exista otro fuero paralelo que se encuentre tratando una cuestión relevante para la determinación del caso.

Creemos que modificar la Disposición 6 en ese sentido mejoraría la eficiencia y eficacia en la resolución de disputas al permitir a los tribunales suspender el procedimiento y así: (i) evitar que continúe cuando otros foros puedan ofrecer una resolución más pronta o económica de la disputa; (ii) evitar planteos de revisión de laudos u otras resoluciones debido a decisiones posteriores en otros foros que modifiquen las bases sobre las cuales se emitió el laudo u otra resolución; (iii) evitar que los reclamos de los inversores sean declarados prematuros si ellos se relacionan con resoluciones pendientes en otros fueros, lo que eventualmente llevaría a nuevos procedimientos arbitrales una vez que se tornen firmes dichas resoluciones en otros fueros, y (iv) evitar que los Estados y los inversores se enfrenten a litigios en múltiples foros sobre una misma cuestión, multiplicando expendios para ambas partes.

La práctica de los tribunales arbitrales de inversión sugiere que está inclusión mejoraría la eficiencia y eficacia en la resolución de disputas inversor-Estado. En ese sentido, el tribunal de *SPP c. Egipto* estableció que "[w]*hen the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, in the interest of international judicial order, either of the tribunals may. [sic] in its discretion and as a matter of comity, decide to stay the exercise of its*

jurisdiction pending a decision by the other tribunal.".[3] En el mismo sentido, el tribunal de *SGS c. Filipinas*, concluyó que "[…] *justice would be best served if the* [t]*ribunal were to stay the present proceedings pending determination of the amount payable, either by agreement between the parties or by the Philippine courts in accordance with* [a]*rticle 12 of the CISS Agreement*." [4]

Modificaciones sugeridas al texto del proyecto de Disposición 6 (en negrita):

"*...El tribunal podrá, a instancia de una parte litigante o por iniciativa propia, ordenar la suspensión del proceso tras invitar a las partes litigantes a expresar su opinión.* ***El tribunal tendrá especialmente en cuenta la existencia de procesos paralelos al decidir si suspende el proceso***."

[3] *Southern Pacific Properties (Middle East) Limited c. República Árabe de Egipto*, Caso CIADI Nº ARB/84/3, Decisión sobre Objeciones Preliminares a la Jurisdicción del 27 de noviembre de 1985, ¶ 84.
[4] *SGS Société Générale de Surveillance S.A. c. República de Filipinas*, Caso CIADI Nº ARB/02/6, Decisión del Tribunal sobre Objeciones a la Jurisdicción del 29 de enero de 2004, ¶ 175.

Draft Provision 7: Termination of the proceeding

Singapore

Singapore suggests adapting from Rules 55 to 57 of the ICSID Rules.

European Union and its Member States

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

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

Canada

Additional Draft Provision on Discontinuance

The Working Group may wish to consider the inclusion of draft language to provide for a default rule concerning the discontinuance of the proceedings, if one or more of the disputing parties fails to act within fixed period of time (see e.g., Article 57 of ICSID Rules, Model FIPA Article 29 (Discontinuance)).

> **Article 29: Discontinuance**
>
> If the claimant fails to take a step in the proceeding within 180 days of the submission of a claim to arbitration under Article 27 (Submission of a Claim to Arbitration), or such other time period as agreed to by the disputing parties, the claimant is deemed to have withdrawn its claim and to have discontinued the proceeding. The Tribunal, if constituted, shall, at the request of the respondent Party, and after notice to the disputing parties, in an order take note of the discontinuance. After the order has been rendered the authority of the Tribunal shall cease.

- For example, see Canada's Model FIPA Article 40(4).
- For example, see Model FIPA Article 34 (Consolidation).

USA

This draft provision reflects ICSID Arbitration Rules 55(1) and 56(1), which usefully supplement the provisions under the UAR allowing termination of the proceedings when the disputing parties have reached a settlement (UAR 36(1)) or when one of the disputing parties defaults (UAR 30) by providing additional detail on grounds and procedure. This clarity on termination could be useful for ISDS proceedings, by allowing for dismissal of a case where appropriate, for example due to a failure to prosecute a claim or other undue delays.

In terms of drafting, given that UAR Article 36 addresses settlement, it may be useful to include a cross-reference for clarity.

Brazil, Chile, Colombia, Dominican Republic, Ecuador, Mexico and Panama

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

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

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

4. If the disputing parties agree on a settlement of the dispute before the award is rendered, the tribunal:

(a) shall issue an order taking note of the discontinuation of the proceeding, if the parties so request; or

(b) may record the settlement in the form of an award, if the parties file the complete and signed text of their settlement and request that the tribunal embody such settlement in an award.

5. Following the submission of a claim to arbitration, if the disputing parties fail to take any steps in the proceedings for more than 150 days, or such period as they may agree with the approval of the tribunal, the tribunal shall notify the disputing parties that they shall be deemed to have discontinued the proceedings if the disputing parties fail to take steps within 30 days after the notice is received. If the parties fail to take

any action within that period, the tribunal shall record the termination in an order. If a tribunal has not yet been constituted, the appointing authority shall assume these responsibilities.

Comments:

1. The proposal for the new paragraph 4 addresses the situation in which the disputing parties decide to settle before the award is issued. This provision aligns with the content of Rule 55 of the 2022 ICSID Arbitration Rules and Article 36 of the UNCITRAL Arbitration Rules.

2. The proposal for paragraph 5 aims to prevent a State from having to bear the uncertainty, and the financial and administrative costs caused by potential claims that remain open indefinitely, without any movement from the investor for longer than is reasonable. In many cases, the State receives arbitration notifications from investors who have no intention of initiating an arbitral proceeding, yet the claims are kept active to pursue various interests against the State that are not necessarily related to the alleged claim.

State not wishing to be identified

XXX, in principle, agrees with the Draft Provision, as it distinguishes between suspension and termination, aligning with the structure of the ICSID Rules (54 through 56) and, in the case of termination, sets forth provisions similar to Rule 55(1) and Rule 56(1) of the ICSID Rules.

Nonetheless, with respect to paragraph 1, if the order for termination of proceedings is stipulated as a mandatory requirement, as in the current Draft Provision, there exists a risk of potential misuse, leading to automatic termination even in cases where continuing the proceedings may be warranted from a due process perspective. Accordingly, it is necessary to consider revising the wording.

Furthermore, with respect to paragraph 2, XXX agrees in principle with the approach of allowing the termination of proceedings upon the request of one party or on the tribunal's own initiative. However, XXX calls for more caution in making decisions about whether to terminate proceedings based solely on the application of one party. Certain issues, such as the opportunity for parties to express their views and the format of such expressions (e.g., whether the Tribunal or the parties must request or express views in writing), warrant further examination. XXX further emphasizes the need to specify whether the Tribunal has the authority to decide on costs issues following the termination of proceedings.

Concerning paragraph 3, XXX agrees with the revised provision stipulating that if no objection is expressed within a specified period, this shall be deemed consent, enabling the tribunal to terminate the proceedings, as it clearly outlines how to proceed in cases of non-expression of intent.

Argentina

Entendemos que el lenguaje de la disposición debería incluir supuestos de terminación como consecuencia de la inacción de las partes, tal como lo establece la Regla 57 de las Reglas de Arbitraje del CIADI de 2022 o como se comprende en el supuesto de falta de presentación del escrito de demanda, en el Artículo 30(a) del Reglamento de la Corte Permanente de Arbitraje de 2012. También consideramos que debería contener el supuesto de terminación del procedimiento por innecesaridad o imposibilidad de continuar con el procedimiento, tal como lo establece el Artículo 36(2) del Reglamento de la CNUDMI de 2021.

Modificaciones sugeridas al texto del proyecto de Disposición 7 (en negrita):

Sugerimos agregar un inciso 4 que rece:

"***4. Si la demandante no presenta sus escritos dentro del plazo fijado para ello, el tribunal notificará a las partes dejando constancia de esta situación y fijando un plazo de 30 días para que las partes se expidan. Si no se realiza ninguna actuación dentro del plazo fijado por el tribunal, se considerará que el procedimiento se ha descontinuado y el tribunal emitirá una resolución al respecto. Si alguna de las partes actúa dentro de dicho plazo, el procedimiento continuará. Si el tribunal aún no está constituido o existen vacancias en el mismo, la institución arbitral u organismo pertinente emitirá la notificación y resolución correspondientes***."

Draft Provision 8: Period of time for making the award

Singapore

On paragraph 2, Singapore's view is that counting the period of time from the date of the constitution of the Tribunal may cause some difficulties, because things that happen in the process of the arbitration may be outside the tribunal's control. In this regard, Singapore suggests adapting from the tailored approach in Rule 58 of the ICSID Rules, which specifies different timelines, calculated either from the constitution of the tribunal or from the last submission, for different kinds of award.

Singapore further invites the Secretariat to consider making it clear that the period of time specified in this Draft Provision is subject to any other periods of time set out in other Draft Provisions catering to specific circumstances. This would prevent any confusion as to which period of time is applicable. We note, for example, Draft Provision 4, which provides a time period for an award on an objection that a claim is manifestly without legal merit.

European Union and its Member States

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

In addition, the European Union and its Member States would suggest to delete paragraph 3 and to simply provide for a specific timeframe within which the Tribunal shall make the award. While the reality may be that a Tribunal would need an extension to make the award (and this possibility could be provided in the procedural order with agreement of the disputing parties), providing for this possibility already in the arbitration rules would remove the pressure on the Tribunal to be diligent.

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

Canada

For simplicity, Canada suggests replacing the language in paragraphs 1 and 2 with language similar to ICSID Article 58(1) (i.e., "The Tribunal shall ensure the proceeding is carried out in a timely and efficient manner and make the final decision as soon as possible, and in any event, no later than [..]").[5] Notably, the time periods stipulated in other draft provisions (see e.g., Draft Provision 4 (Manifest lack of legal merit/early dismissal)) should be taken into account in setting out an appropriate time period for an award.

Switzerland

Switzerland considers that the right balance between the disputing parties' legitimate desire for speed, on the one side, and the quality of awards, on the other, should be maintained, keeping in mind that investment treaty disputes may be complex and often raise public interest issues, the weighing of which may require careful deliberation and accurate drafting. In that vein, Switzerland has the following observations:

Paragraph 2. In paragraph 2, it would make more sense to provide a timeframe after the last substantive submission (i.e. to the exclusion of cost submissions) as it is foreseen in Rule 58 of ICSID Arbitration Rules than after the date of the constitution of the Tribunal. To base the timeframe on the date of the constitution of the Tribunal would not take into account the fact that the length of proceedings depends very much on the specific proceedings (complexity, number of submissions, etc.). The timeframe should be both reasonable and realistic, keeping in mind the various concerns expressed above. In this connection, Switzerland also notes that the ICSID Rules provide a "best efforts" rule regarding time limits applicable to the Tribunal (see Rule 12(1): "The Tribunal shall use best efforts to meet time limits to render orders, decisions and the Award").

Australia

Australia notes that paragraph 2 indicates that the relevant time period for making an award shall run from the date of the constitution of the tribunal. We note that the ordinary period for the tribunal to make an award under Rule 58(1)(c) of the ICSID Rules is '240 days after the last submission in all other cases'. We consider it is appropriate to align Draft Provision 8 with the ICSID rules in this respect, so that the period commences after the date of the last submissions rather than the date of constitution of the tribunal. This is because the time necessary for the proceedings may differ significantly based on the number and complexity of the claims. A period running from the date of constitution of the tribunal would be available for State parties to implement through their underlying Agreements, if desired.

[5] For example, see Canada's Model FIPA Article 40(4).

We note also that Rule 58(1) of the ICSID Rules makes specific provision for time periods for awards concerning an objection that a claim is manifestly without legal merit, as well as for preliminary objections addressed on a bifurcated basis. Australia considers that alternative time periods should be explicitly incorporated into Draft Provision 8, such as that presently contained in Draft Provision 4(4) or as may be developed in Draft Provision 3.

ICSID

AR 58
AF AR 69

Draft Provision 8 currently does not contain any deadlines. Working Group III may wish to consider the time limits adopted under the 2022 ICSID Rules which are:

- Decision or Award on Manifest Lack of Legal Merit: Within **60 days** after the later of the constitution of the Tribunal or the last submission on the objection (AR 58(1)(a))
- Decision or Award on Jurisdiction: Within **180 days** after the last submission (AR 58(1)(b))
- Award on the Merits: Within **240 days** after the last submission (AR 58(1)(c)).

USA

This draft provision reflects ICSID Arbitration Rule 58 (Timing of the Award). Currently, there is no separate provision for setting the time for making the award in the UAR, and such a rule could be an appropriate addition as a supplemental rule for ISDS proceedings to address concerns about the duration of such proceedings. However, in keeping with ICSID Arbitration Rule 58(1)(c), the time period for an award (para. 2) should be measured from the date of final written or oral submissions, whichever are later, rather than from the date of constitution of the Tribunal, as variations in the duration of time between the date of constitution of the Tribunal and the final written or oral submissions are more likely to be driven by the parties or by the complexity of the case, rather than by Tribunal delay. As for the appropriate duration of time between the final written submissions or hearing (whichever is later) and the award, the United States proposes a maximum of 240 days, in keeping with ICSID Arbitration Rule 58(1)(c).

Brazil, Chile, Colombia, Dominican Republic, Ecuador, Mexico and Panama

~~**1. The Tribunal shall make the award as soon as possible.**~~
~~**2. Unless otherwise agreed by the disputing parties, the Tribunal shall make the award within [period of time] after the date of the constitution of the Tribunal.**~~
~~**3. The Tribunal may, in exceptional circumstances and after inviting the disputing parties to express their views, extend the period of time established in accordance with paragraph 2 and indicate a period of time within which it shall make the award.**~~

1. The tribunal shall render the award as soon as possible and, in any event, no later than:

(a) 60 days after the later of the tribunal constitution or the last submission, if the award is rendered under Rule [Manifest Lack of Legal Merit];
(b) 180 days after the last submission, if the award is rendered under [a preliminary objection with bifurcation]; or
(c) 240 days after the last submission in all other cases.

2. A statement on costs and a submission on costs shall not be considered a submission for the purposes of paragraph 1.

Comments:

We propose adapting the text to align with Rule 58 of the 2022 ICSID Arbitration Rules, which sets different time limits depending on the stage of the proceedings.

Algeria

L'Algérie considère qu'un délai de 24 mois maximum pour le rendu de la sentence, à compter de la constitution du Tribunal, constitue un délai approprié. Ce délai permet (i) de garantir l'efficacité du mécanisme de règlement des différends entre investisseurs et États, tout en offrant un temps suffisant pour une analyse approfondie des questions complexes et (ii) d'éviter les retards excessifs qui pourraient augmenter les coûts et compromettre la prévisibilité de la procédure.

Pour les différends complexes, le paragraphe 3 garantit la flexibilité nécessaire en reconnaissant que la complexité des affaires peut justifier un délai prolongé, afin d'assurer une analyse approfondie et rendre une sentence équitable et bien fondée.

State not wishing to be identified

The revised provision is modelled after Rule 58 of the ICSID Rules, with a focus on addressing significant issues, such as extensive delays and prolonged cases that take substantial time and costs. XXX supports the intent of this provision to enhance efficiency in terms of both time and costs, ensuring expedited proceedings. XXX agrees with setting a concrete time frame for making the award.

With respect to Paragraph 1, XXX agrees with the provision requiring the Tribunal to render the award as promptly as possible.

Concerning Paragraphs 2–3, XXX supports setting a specific timeframe, even if only declaratively, to promote expedited proceedings. However, further discussion is necessary regarding:

(a) whether the timeframe stipulated by the ICSID Rules is reasonable,

(b) the starting point for calculating the period, and

(c) the consequences of failing to adhere to the established timeframe.

Draft Provision 9: Allocation of costs

Singapore

Singapore can go along with Draft Provision 9.

European Union and its Member States

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

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

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

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

Canada

Canada interprets this draft provision to apply generally to any "costs of the proceeding" and as such, considers it unnecessary to specifically refer to costs arising from a request by a disputing party that a claim is manifestly without legal merit pursuant to Draft Provision 4.

Switzerland

Paragraph 1. Switzerland agrees with providing a default rule in paragraph 1 according to which costs follow the event, while leaving the possibility to allocate costs differently under the circumstances (same rule as in Rule 42(1) of the UNCITRAL Arbitration Rules).

Paragraph 2. In paragraph 2, lit. (e), we wonder if the mere existence of third-party funding is sufficient as a factor for the allocation of costs. According to Provision 12(7)(c), only the fact that the disputing party fails to comply with disclosure obligations will be taken into account in cost allocation.

Regarding paragraph 2, lit. (f), Switzerland is of the view that such rule is one-sided, i.e. it only takes into account inflated claims by claimants, without covering similar situations for respondents (i.e. exaggerated defenses or objections by the respondents on the amounts claimed).

With regard to the question raised in paragraph 36 of the Annotations to the draft provisions on procedural and cross-cutting issues (cf. the Working Group may wish to also consider whether Rule 51 of the ICSID Rules on statement of, and submission on, costs should be incorporated in Draft Provision 9 and whether the disputing parties should be required to submit an estimate of costs to be incurred by them at the outset of the proceeding), from a practical point, it seems to us to be very difficult if not impossible for disputing to submit an estimate of costs to be incurred by them at the outset of the proceeding.

Australia

This provision is an amalgamation of the current UNCITRAL rules Article 42 and ICSID Rule 52, although the list of considerations in paragraph 2 has been expanded. Australia supports the starting principle that costs follow the event, as set out in paragraph 1 of this provision.

ICSID

ICSID Convention Art. 61
AR 51 and 52
AF AR 61 and 62

Under Article 61(2) of the ICSID Convention, tribunals have the discretion to allocate costs and there is no presumption that costs will follow the event. The allocation of costs under the ICSID Rules is thus different from current provision Article 42 of the UNCITRAL Arbitration Rules and Draft Provision 9.

AR 51 does not include a presumption that the unsuccessful party bears the costs (as is the case in the UNICITRAL Rules and in Draft Provision 9 (except where there is an award rendered pursuant to AR 41(3) (MLLM)).

AR 51(2) sought to provide tribunals with guidance as to how to allocate costs by introducing factors used in practice by ICSID tribunals.

Draft Provision 9 explicitly includes the existence of third-party funding as one of the circumstances that a tribunal considers when determining the allocation of costs. AR 52 does not specifically mention third-party funding as a consideration for cost allocation. Nevertheless, tribunals retain the discretion to consider all relevant circumstances, including third-party funding, when making their decisions on cost allocation.

Finally, Working Group III may also wish to consider whether AR 51 on statements of, and submissions on, costs should be incorporated in Draft Provision 9.

Argentina

Argentina considers that it would be useful to state in this provision that, when allocating costs between the parties and when examining their reasonableness, the tribunal should consider the differences or gaps between the expenses and costs submitted by each party in order to avoid the overestimation of expenses or the inclusion of superfluous expenses. Regarding this point, we believe it is relevant to share our concern about what we perceive as disproportionate increases in the cost of expert reports.

Suggested modifications for Draft Provision 9 (Highlighted in bold):

Draft Provision 9: Allocation of costs

1. The costs of the proceeding shall in principle be borne by the unsuccessful disputing party.

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

(a) The outcome of the proceeding or any parts thereof, ***taking into account which claims were upheld and dismissed at the jurisdiction, merits and quantum stages;***

(b) The conduct of the disputing parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner in accordance with the applicable rules and complied with the orders and decisions of the Tribunal;

(c) The complexity of the issues;

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

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

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

g) the proportional relation between the costs of the parties.

2bis. When allocating costs between the parties and when examining their reasonableness, the tribunal shall consider the differences or gaps between the expenses and costs submitted by each party.

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

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

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

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

USA

Although the proposed rule follows UAR Article 42, which presumes the losing party should pay costs, we prefer in the ISDS context the approach followed in ICSID Rule 52 (Decisions on Costs), which sets out an illustrative list of criteria that an arbitral tribunal should consider when issuing an award on costs, among other considerations relevant to a cost award decision. Taking away the presumption that the loser pays does not mean that costs will not be awarded to the prevailing party; it simply means that arbitral tribunals should assess all of the factors relevant to a cost award, including but not limited to the outcome of the dispute. This approach applies equally to claimants and respondents and avoids discouraging claimants with meritorious claims. A specific rule for frivolous or meritless claims is a more targeted solution to the concern about these types of claims.

With respect to the annotation at para. 32 of WP 245, the United States agrees that paras. 2(e) and (f) are useful additions and are not in conflict with ICSID Rule 52(1), which provides an illustrative and non-exhaustive list of relevant factors.

Regarding para. 3 in Draft Provision 9, further discussion or additional input is needed regarding what "expenses [are] incurred by a disputing party related to or arising from third-party funding," and how those costs are distinguishable from other costs that are recoverable.

Brazil, Chile, Colombia, Dominican Republic, Ecuador, Mexico and Panama

1. The costs of the proceeding shall in principle be borne by the unsuccessful disputing party.
2. However, the Tribunal may allocate the costs between the disputing parties, if it determines the allocation to be reasonable taking into account all relevant circumstances of the case, including:
(a) The outcome of the proceeding or any parts thereof;
(b) The conduct of the disputing parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner in accordance with the applicable rules and complied with the orders and decisions of the Tribunal;
(c) The complexity of the issues;
(d) The reasonableness of the costs claimed by the disputing parties;
(e) The existence of third-party funding; and
(f) The amount of monetary damages/compensation claimed by the claimant in proportion to the amount awarded by the Tribunal.
3. ~~**Unless otherwise determined by the Tribunal, e**~~**Expenses** incurred by a disputing party related to or arising from third-party funding shall not be included in the costs of the proceeding.
4. Paragraphs 1 to 3 apply to any costs arising from a request by a disputing party that a claim is manifestly without legal merit pursuant to Draft Provision 4.
5. The Tribunal may, at the request of a disputing party or on its own initiative, make an interim decision on costs at any time.
6. The Tribunal shall ensure that all decisions on costs are reasoned and form part of the award.

Comments:

In paragraph 3, we propose removing the phrase "Unless the tribunal decides otherwise." We do not consider it appropriate for the party that is not benefiting from third-party funding to be required to bear the costs of the third-party funder of the other disputing party. Third-party funding costs should be settled between the funder and the funded party. Moreover, the tribunal should not decide on costs arising from a contract with a third party that is not part of the arbitral proceedings, as this falls outside its jurisdiction.

CCSI, IIED, IISD and South Centre

We support the inclusion of a clear rule stating that costs related to or arising from third-party funding (TPF) should not be included in the costs of the proceeding. However, given the broad definition of "TPF" in the current text, we believe the rule set forth in Draft Provision 9(3) may require refinement in specific cases. For instance, when the TPF is provided by a donor for philanthropic or non-profit purposes—and not in exchange for a share of the award or any other rights in the claim or the Claimant's assets—the application of the general rule may warrant reconsideration.

To address this, we suggest edits to clarify the general principle of non-recovery of such costs. In addition, we recommend including supplementary language, perhaps in a footnote or commentary, to outline the types of exceptional circumstances under which a departure from that general rule could be justified.

Suggested Revised Provision 9: Allocation of costs

1. [...]
2. [...]

3. **Expenses incurred** by a disputing party related to or arising from third-party funding, **including expenses paid by the funder to support a disputing party's claim,** shall not be included in the costs of the proceeding.

4. [...]
5. [...]
6. [...]

Algeria

Afin de renforcer la transparence, la prévisibilité et le contrôle des coûts de la procédure, et de permettre aux parties de mieux anticiper et gérer leurs dépenses, l'Algérie propose l'ajout d'un paragraphe obligeant les parties et le tribunal à soumettre, dès le début de la procédure, un budget prévisionnel détaillé des coûts. Ce budget, accessible

à toutes les parties, devrait inclure les frais d'arbitrage (honoraires des membres du tribunal, frais administratifs), les frais juridiques (avocats, experts, consultants) et les frais logistiques (traductions, déplacements, frais de témoins). Cette mesure vise à garantir une gestion plus rigoureuse des ressources, particulièrement pour les États où les finances publiques sont limitées.

State not wishing to be identified

With respect to paragraph 1, XXX agrees with the general principle that the unsuccessful disputing party should bear the costs. Furthermore, XXX, in principle, agrees with paragraph 2, which sets forth factors the tribunal may consider when allocating costs. In particular, as set out in subparagraphs 2(e) and 2(f), XXX is of the view that the tribunal should consider the existence of third-party funding and the amount of monetary damages claimed by the claimant in proportion to the amount awarded by the tribunal, in order to align with third-party funding disclosure obligations and address concerns about the excessive damages being claimed.

Nonetheless, with respect to paragraph 3, while XXX agrees with the Draft Provision that excludes expenses related to third-party funding from the costs of the proceeding, it appears necessary to expressly state the criteria for exceptions by adding specific details to the phrase "Unless otherwise determined by the Tribunal."

With respect to paragraph 5, which stipulates that the tribunal may issue an interim decision on costs at the request of a disputing party or on its own initiative, XXX recommends establishing specific guidelines on the requirements and criteria for the aforementioned interim cost decisions.

Additionally, with respect to paragraph 6, considering that the cost decision forms part of the final award, XXX agrees with the revision of the wording from "final decision" to "award" to clarify the intent of the provision.

Moreover, for the sake of procedural clarity, XXX agrees with the need for a cost submission provision similar to Rule 51 of ICSID Rules. However, regarding the proposal to submit cost estimates early in the proceedings, XXX believes that the practical benefit of such a requirement is limited, considering that costs differ greatly depending on changes in preconditions or procedural delays. Additionally, the estimation process may incur unnecessary costs. These factors should be carefully considered in deciding whether to mandate early cost estimates.

Argentina

Comentarios:

Argentina considera que sería de utilidad establecer en esta disposición que, al momento de distribuir las costas entre partes y al examinar la razonabilidad de éstas, el tribunal debería considerar las diferencias o brechas entre los gastos y costas presentados por cada parte a fin de evitar la sobredimensión de los gastos o la inclusión de gastos superfluos. Respecto a este punto, nos parece prudente compartir nuestra preocupación sobre lo que percibimos como aumentos desproporcionados en el costo de los informes de expertos.

Modificaciones sugeridas al texto del proyecto de Disposición 9 (en negrita):

Disposición 9: Asignación de las costas

1. Las costas del proceso correrán en principio a cargo de la parte litigante que haya resultado vencida.

2. Sin embargo, el tribunal podrá distribuir las costas entre las partes litigantes si determina que esa distribución es razonable, teniendo en cuenta todas las circunstancias pertinentes del caso, entre ellas las siguientes:

*a) el resultado del proceso o de cualquiera de sus partes**, teniendo en cuenta que reclamos fueron estimados y desestimados en etapa de jurisdicción, fondo y quantum**;*

b) la conducta de las partes litigantes durante el proceso y, entre otras cosas, en qué medida han actuado de manera expedita y eficaz en función de los costos de conformidad con el reglamento aplicable y en cumplimiento de las órdenes y decisiones del tribunal;

c) la complejidad de las cuestiones;

d) la razonabilidad de las costas reclamadas por las partes litigantes;

*e) la existencia de financiación por terceros**; y***

*f) el monto de la indemnización pecuniaria/compensación reclamada por el demandante en relación con el monto concedido por el tribunal**; y***

g) la relación de proporción entre los costos de las partes.

2bis. A momento de distribuir las costas entre partes y al examinar la razonabilidad de éstas, el tribunal considerará las diferencias o brechas entre los gastos y costas presentados por cada parte.

3. A menos que el tribunal determine lo contrario, los gastos en que incurra una parte litigante que estén relacionados con la financiación por terceros o deriven de ella no se incluirán en las costas del proceso.

4. Los párrafos 1 a 3 se aplicarán a las costas que deriven de la solicitud de una parte litigante para que se determine que una demanda carece manifiestamente de fundamento jurídico de conformidad con la disposición 4.

5. El tribunal podrá, a instancia de una parte litigante o por iniciativa propia, dictar en cualquier momento una decisión provisional sobre las costas.

6. El tribunal velará por que todas las decisiones sobre costas estén motivadas y formen parte del laudo.

Draft Provision 10: Counterclaim

Saudi Arabia

We are of the that draft provision is challenging in the following respects:

First, we note as a general observation that counterclaims are not consistent with the Model BITs. While Draft Provision 10(2) does state that the submission of a counterclaim is subject to the Claimant's consent, it remains the case that Draft Provision 10 has at least a norm-setting effect, in so far as it suggests what could or should be acceptable. More importantly perhaps, it is not entirely clear, based on the draft provision language, whether the submission of a claim to arbitration by the investor could be interpreted as amounting to tacit or implied consent. In other words, it is not entirely clear whether the consent requirement, even though it is set forth in 10(2), can in fact be relatively easily met and so would not in fact necessarily constitute an important hurdle for the submission of counterclaims. Accordingly, it would be preferable to reject Draft Provision 10 in its entirety. We note however in this regard that tribunals increasingly allow counterclaims under their case management powers if the counterclaims also relate to the "investment dispute", so the express inclusion of counterclaims might not be the sole determining factor (i.e., even if not expressly referenced in the underlying instrument, the possibility that tribunals would allow counterclaims cannot be ruled out).

Second, and more realistically perhaps, we recommend at a minimum striking two of the three subparagraphs provided within Draft Provision 10(1), which set forth the bases upon which a Respondent may submit a counterclaim. In particular, we recommend keeping 10(1)(a) ("Arising directly out of the subject matter of the claim") while striking both 10(1)(b) ("In connection with the factual and legal basis of the claim") and 10(1)(c) ("That the claimant has failed to comply with its obligations under the Agreement, domestic law, any relevant investment contract or any other instrument binding on the claimant."). Our concern with the bases provided in 10(1)(b) and 10(1)(c) is that they risk considerably broadening the scope of counterclaims that a Respondent may bring. Further, it also grants international tribunals and foreign arbitrators power to interpret and apply domestic laws and regulations, which may raise sovereignty and domestic policy concerns.

ICSID

ICSID Convention Art. 46
AR 48
AF AR 58

Working Group III may wish to consider moving this provision to Category A as it is a procedural provision covered by most rules.

Under Article 46 of the ICSID Convention and AR 48, "unless the parties agree otherwise, a party may file […] a counterclaim […] arising directly out of the subject-matter of the dispute" provided that it is "within the scope of the consent of the parties and the jurisdiction of the Centre."

The scope of Draft Provision 10 is broader than Article 46 and AR 48 because it also encompasses counterclaims that have a "[close] connection with the factual or legal basis of the claim".

The scope of counterclaims is even broader under ICSID Additional Facility Arbitration Rule 58(1) which captures incidental or additional claims and counterclaims provided that they are "within the scope of the arbitration agreement of the parties." Such wording could also be considered by the Working Group as it would encompass Draft provisions 10(1)(a) and potentially (b).

Finally, if draft Provision 10 were to be considered in Category B, a treaty could extend the scope of the counterclaims under the ICSID Convention since the language "unless the parties agree otherwise" is used in the ICSID Convention.

State not wishing to be identified

Regarding paragraph 1, the term "relevant proceedings" as a criterion for consolidation and coordination is ambiguous and requires further clarification. For instance, it is worth considering specifying examples of "relevant proceedings," such as cases where fundamental facts or legal relationships are identical or similar, or cases involving a counterclaim that has been filed.

Additionally, XXX believes that paragraph 1 should clearly specify the final point at which consolidation and coordination are permissible.

Draft Provision 11: Consolidation and coordination of proceedings

Singapore

As a general comment, Singapore considers that insofar as the consolidation being contemplated is taking place only for proceedings under the same arbitration rules, such as when they are all ICSID cases or they are all non-ICSID cases, this Draft Provision should fall under Section A of Working Paper 244.

Singapore suggests having a consolidation and coordination provision that seeks to consolidate proceedings that may be taken under different rules or different institutions. In that regard, such a Draft Provision would have to fall under Section B of Working Paper 244, as such a provision would necessarily have to be in a treaty, rather than in the procedural rules of a particular institution. In relation to such a Draft Provision, Singapore invites the Secretariat to consider who the consolidating authority ought to be in such cases. The consolidation and coordination process must be fair and transparent in such cross-institutional cases.[6] Singapore further invites the Secretariat to consider including a discretionary power to order consolidation of two or more related proceedings upon application of a disputing party, ie, where not all the disputing parties have consented to the consolidation. Article 9.28 of the CPTPP and Article 3.24 of the EU-Singapore IPA may serve as examples of provisions relating to the consolidation of proceedings in such circumstances.

On paragraph 1, Singapore suggests stating that the consolidation or coordination of proceedings may be agreed to by the disputing parties only where the two or more claims involve the same responding State, adapting from Rule 46(2) of the ICSID Rules.

On paragraph 3, Singapore proposes adjustments based on Rules 46(4) and (5) of the ICSID Rules, as follows:

> 3. The disputing parties shall **jointly** provide **the administering institution, or the tribunals where there is no administrating institution, with** the proposed terms for the conduct of the consolidated proceedings and **consult with the administering institution or the tribunals to ensure that the proposed terms are capable of being implemented.**
>
> **4. Where there is an administering institution, after the consultation referred to in paragraph (3), the administering institution shall communicate the proposed terms agreed by the parties to the tribunals. Such tribunals shall make any order or decision required to implement these terms.**
>
> **5. Where there is no administering institution, after the consultation referred to in paragraph (3), the tribunals shall implement the proposed terms as agreed by the disputing parties and shall make any order or decision as required to implement these terms.**

European Union and its Member States

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

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

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

> *"1. If two or more claims submitted pursuant to Article 6 have a question of law or fact in common and arise out of the same events or circumstances, the respondent may deliver to each claimant a request to agree on the consolidated consideration of all those claims or part of them (hereinafter referred to as "consolidation request"). The consolidation request shall stipulate:*
>
> *(a) the names and addresses of the disputing parties to the claims sought to be consolidated;*

[6] The Secretariat may wish to refer to "Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol", prepared by Singapore International Arbitration Centre, which contains helpful thinking on the issue.

(b) the scope of the consolidation order sought; and

(c) the grounds for the consolidation order sought.

2. The respondent shall at the same time submit a copy of the consolidation request to the President of the Tribunal.

3. If all the disputing parties to the claims sought to be consolidated agree on the consolidation order sought, they shall submit a joint consolidation request to the President of the Tribunal within 30 days after the delivery of the consolidation request referred to in paragraph 1. The President of the Tribunal shall, after receipt of such joint consolidation request, constitute a new division (the "consolidating division") of the Tribunal pursuant to Article 9. The consolidating division shall, by order, assume jurisdiction over all or part of the claims subject to the joint consolidation request.

4. If the disputing parties to the claims sought to be consolidated have not reached an agreement on consolidation within 30 days after the delivery of the consolidation request referred to in paragraph 1, the respondent shall inform the President of the Tribunal and may ask the issuance of a consolidation order on the consolidation request referred to in paragraphs 1 and 2. In that case, the President of the Tribunal shall constitute a consolidating division of the Tribunal pursuant to Article 9. The consolidating division shall, by order, assume jurisdiction over all or part of the claims subject to the consolidation request if, after considering the views of the disputing parties, it decides that to do so would best serve the interests of fair and efficient resolution of the claims, including the interests of consistency of awards.

5. The dispute settlement rules applicable to the proceedings pursuant to this Article are determined as follows:

(a) if all the claims sought to be consolidated have been submitted to dispute settlement under the same rules referred to in Article 6(2), those rules shall apply.

(b) if the claims sought to be consolidated have not been submitted to dispute settlement under the same rules referred to in Article 6(2), the UNCITRAL Arbitration Rules shall apply, unless the claimants inform the Tribunal within 30 days after the delivery of the consolidation request referred to in paragraph 1 that they have agreed on another set of dispute settlement rules available pursuant to Article 6(2).

6. Divisions of the Tribunal constituted pursuant to Article 9 shall cede jurisdiction in relation to the claims, or parts thereof, over which the consolidating division has assumed jurisdiction and the proceedings of such divisions shall be suspended. The award of the consolidating division in relation to the parts of the claims over which it has assumed jurisdiction shall be binding on the divisions which have jurisdiction over the remainder of the claims, from the date the award becomes final pursuant to Article 30 (final award).

7. If a claim submitted pursuant to Article 6, or part thereof, is subject to consolidation pursuant to this Article, the claimant may, within 30 days after the issuance of the consolidation order, withdraw that claim, or the part thereof, and such claim or part thereof may not be resubmitted under Article 6.

8. At the request of the respondent, the consolidating division of the Tribunal, on the same basis and with the same effect as paragraphs 3 and 6 above, may decide whether it shall have jurisdiction over all or part of a claim falling within the scope of paragraph 1 above, which is submitted after the initiation of the consolidation proceedings.

9. At the request of one of the claimants, the consolidating division of the Tribunal may take such measures as it sees fit in order to preserve the confidentiality of protected information of that claimant vis-à-vis other claimants. Such measures may include the submission of redacted versions of documents containing protected information to the other claimants or arrangements to hold parts of the hearing in private."

Canada

Canada has no comments on the proposed consent-based provision on consolidation (i.e., it only provides for consolidation where the disputing parties agree) but notes that in its own practice, Canada usually provides for the ability of tribunals to order consolidation in certain circumstances. Such additional provisions on consolidation could be considered in the context of model treaty clauses.

Paragraph 4 contains new language, which provides that this provision is without prejudice to the right of a disputing party to seek consolidation or coordination under the Agreement. Canada questions why such language is necessary; it should be understood that all the draft provisions under consideration apply in addition to, or absent other procedures in the underlying instrument of consent.

Switzerland

On the principle, Switzerland agrees with this draft provision opting for "voluntary" consolidation (all disputing parties in the separate proceedings must agree).

However, it is a very short provision that provides only limited guidance to tribunals. At present, consolidation is not possible when the proceedings to be consolidated are brought under different institutional rules. It would therefore be worthwhile to address cross-institutional consolidation.

Specifically, the requirements, procedure and consequences of consolidation could also be described.

3. According to paragraph 3 the disputing parties "shall provide the proposed terms for the conduct of the consolidated or coordinating proceedings to the Tribunals". It is unclear how the process would work in practice if the Tribunals have not yet been established. These cases may need to be clarified.

Australia

Paragraphs 1-3 above are substantively similar to Rule 46 of the ICSID Rules. Australia overall sees merit in Draft Provision 11, however Australia queries two points concerning paragraph 2.

Firstly, Australia queries the language in sentence one of paragraph 2 that consolidation "shall join all aspects of the proceedings sought to be consolidated and result in a single decision". While this reflects the language in ICSID Rule 46(1), we consider it ambiguous as to whether "all aspects" of the proceedings must be consolidated, or whether "all aspects … sought to be consolidated" must be consolidated. We request clarification on the intention of this paragraph.

Secondly, and related to Australia's first query, Australia queries the formulation in paragraph 2 sentence one that consolidation shall 'result in a single decision'.

The UNICTRAL Rules distinguish between 'awards or other decision[s]', although both shall be made by a majority of arbitrators (UNCITRAL Rules, Article 33(1) and subject to Article 33(2)). A tribunal operating under these rules may make separate awards on different issues at different times, and these are final and binding on those issues (UNCITRAL Rules, Article 34(1)). The term 'decision' is not otherwise clarified. This differs to the ICSID Rules, under which an award is a decision made by a majority of votes of a tribunal's members which deals with every question submitted to the tribunal (ICSID Rules, Rule 46(2)). The ICSID Rules further provide that a tribunal shall make the orders and decisions required for the conduct of the proceeding (ICSID Rules, Rule 27(1)).

We query whether 'single decision' is intended to refer to only an 'award' or also 'other decision[s]' (as per Article 33(1)); that is, is it envisaged that consolidation could result in a decision which is not an award? We note that the relevant annotations to this provision do not explain the choice of the word 'decision' in place of 'award'.

Australia raises the same question in relation to the use of 'separate decisions' in sentence two of paragraph 2.

Additionally, Australia notes that paragraph 4 is not reflected in Rule 46 of the ICSID Rules.

If Draft Provision 11 is to be included in the UNCITRAL Rules, we suggest removing paragraph 4 so that it is left up to each underlying Agreement to specify the relationship between any consolidation and coordination provisions in that Agreement with the UNCITRAL rules.

ICSID

AR 46
AF AR 56

ICSID welcomes the Working Group's suggestion to move Draft Provision 11 from Category B to Category A.

AR 46 contains provisions on the consolidation or coordination of two or more arbitrations. Consolidation is for two or more cases registered under the Convention which involve the same State. A similar rule is contained in Additional Facility Arbitration Rule 56. Consolidation will result in one award. Coordination, by contrast, aligns procedural aspects of one or more arbitrations (possibly under different procedural rules) and results in separate awards.

Paragraph 61 of the Report of Working Group III on the work of its 49th Session (A/CN.9/1194) suggests that "elements of draft provision 11 on voluntary consolidation could be placed in section A, while a provision addressing the consolidation and coordination of proceedings under different procedural rules or administered by different institutions could be considered in section B"

Consolidation under the ICSID Rules is only available for two or more ICSID Convention cases or two or more AF cases, not for proceedings administered under other rules or by other institutions. Coordination could be used for proceedings under different procedural rules or administered by different institutions.

Pursuant to Administrative and Financial Regulation (AFR) 22, "[t]he Secretariat of the Centre is the only body authorized to administer proceedings conducted under the [ICSID] Convention." The same applies under the Additional Facility AFR 11. Consequently, if one of the cases that was being coordinated was an ICSID Convention or an Additional Facility case, the coordinated cases would need to be administered by the ICSID Secretariat.

USA

This draft provision reflects ICSID Arbitration Rule 46 for voluntary consolidation by agreement of the disputing parties and would be appropriate to include in a supplemental set of rules for ISDS proceedings under the UARs. It also appropriately preserves the disputing parties' ability to use alternative consolidation provisions that may be included in the underlying IIA.

Should the Working Group wish to make consolidation a requirement in certain circumstances, such a provision would be better developed as a treaty provision. We note that under U.S. modern practice, most recently in USMCA Article 14.D.12, arbitral tribunals are authorized to resolve questions of consolidation or coordination.

Viet Nam

In drafting this provision, Viet Nam suggests taking reference to Article 56 of ICSID Additional Facility Rules to address more specific consolidation scenarios in arbitral cases.

In addition, Viet Nam suggests including the regulation on consolidation and coordination of proceedings as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure its enforceability.

Draft Provision 12: Third-party funding

Singapore

Singapore can go along with paragraphs 1, 2, 4, 5 and 7.

On paragraph 3, Singapore considers that it is not necessary to specify circumstances in which the tribunal may order further information, in order not to prejudge the situations in which the tribunal may order further information. Specifically, Singapore does not agree that specific terms of the funding agreement should be disclosed as a matter of course, as this could lead to a regulatory chill on third-party funding. Singapore proposes to simply state that all further information is subject to the requirement that the Tribunal deems such information necessary, as is the approach adopted in the ICSID Rules.

For completeness, Singapore reiterates its interventions at WG III's 49th session in September 2024 on paragraphs 6 and 8 of Draft Provision 12. Singapore is strongly of the view that paragraphs 6 and 8 are inappropriate and should be deleted.

European Union and its Member States on paragraphs 1 to 5 and 7

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

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

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

The lists of information currently displayed under paragraph 3 should be included under paragraph 2 as information to be mandatorily disclosed to the Tribunal and the other disputing party.

- Paragraph 3(a) which refers to "*information regarding the funding agreement and the terms thereof*" should be detailed so as to explicitly specify the key terms of a funding agreements that should be disclosed, such as the rate of return, but also the aspects that are currently covered by 3(b) and (c).
- In addition, it should be added the disclosure of a proof of the capacity of the third-party funder to finance all stages of the proceeding, including, therefore, the payment of costs of the respondent where ordered.
- It should also be added the disclosure of other cases against the same respondent(s) that are funded by the same third-party funder and/or related entities.

On paragraph 5, the reference to "as promptly as possible" should be better clarified, either by providing "within a period specified by the Tribunal" or by providing a specific timeframe directly in the text, such as 30 days.

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

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

Canada

Generally, Canada supports the inclusion of paragraphs 1-5 of the draft provision. With regard to paragraph 3, Canada is of the view that it is not necessary to list the information that the Tribunal may require to disclose. Instead, Canada suggests that the approach in ICSID Rule 14(4), according to which the "Tribunal may order disclosure of further information", may be more appropriate. Depending on the circumstances, requiring full disclosure of the funding arrangements may be prejudicial and not be necessary to establish conflicts of interest or security for costs.

Canada has several questions regarding paragraph 6 and 8 and therefore reserves its comments pending further discussion by the Working Group. At this time, Canada notes that if the purpose of paragraph 7 is to list potential sanctions for the non-compliance with the third-party funding disclosure requirements, additional guidance as to circumstances and relevant factors for consideration in determining when certain sanctions are appropriate may be necessary. Suspension and termination of proceedings may not be appropriate in all circumstances.

Switzerland

Switzerland notes that paragraph 3 goes beyond ICSID Rule 14(4), which simply states that tribunal "may order disclosure of further information".

Regarding lit. (b), Switzerland is concerned that such disclosure may have unintended consequences, i.e. suggest that if the funding agreement provides that the third-party funder has agreed to cover any adverse cost award, then there may be no need to order security for costs, which would be undesirable. For this reason, this provision may require clarification.

Paragraph 4. In paragraph 4, it seems late to disclose information with the "statement of claim". First, while it is true that in the vast majority of cases it is the claimant who relies on third-party funding, as noted above in some cases respondents have relied on third-party funding as well. However, it is not contemplated when respondents should disclose the information.

In the ICSID context, the moment of disclosure is at the time of registration or as soon as funding agreement concluded (Rule 14(2) ICSID Arbitration Rule). While registration is not transposable here, it seems to Switzerland that disclosure should occur "in the first submission in the arbitration" (a notice of arbitration, an answer, etc.).

Paragraph 6. Proposed paragraph 6 goes beyond current practice. Furthermore, it provides a lot of discretion to the arbitral tribunal and the circumstances can be difficult to assess. For example, it can be questionable what a "reasonable amount" in lit. (a) and what a "reasonable number" of cases in lit. (b) are. With respect to lit. (a), Switzerland also wonders why the Tribunal should intervene and change the investor's decision on the payment of the third-party funder, which may be based on the investor's own risk assessment.

With regard to paragraphs 6 to 8, Switzerland would like to emphasize that, as it was said during the discussion on the matter at the 49th session of the Working Group, it is of the view that regulation of third-party funding should be limited to addressing transparency and disclosure, notably to ensure potential conflicts of interest are avoided or to assess whether security for costs must be provided. Going further might interfere with legitimate contractual relationships. E.g., in paragraph 7, a far-reaching measure according to which the tribunal could order the termination of an agreement and the return of any funding is foreseen. It is in Switzerland's view doubtful that the tribunal would have jurisdiction to order termination of the funding agreement (which is governed by its own applicable law and subject to its own dispute resolution clause). Furthermore, there are unclarities, e.g., with regard to paragraph 7, lit. (b): under this paragraph, it is the failure to comply with the disclosure obligations that triggers a security for costs order. Under Draft Provision 5, the very existence of third-party funding is considered as a circumstance warranting security for costs. This creates confusion and room for arguments as to when granting security for costs is warranted.

Australia

Australia sees merit in this provision and the disclosure of third-party funding in principle as a way of preventing conflict of interests, as well as enhancing transparency in the dispute process.

Australia proposes the following minor amendments to Draft Provision 12 paragraph (1), by inserting the word 'disputing' as a qualifier to provide clarity and ensuring that treaty parties are captured within the provision as drafted:

"Third-party funding" means the provision of any direct or indirect funding to a disputing party by a natural or legal person that is not a disputing party in the proceeding but enters into an agreement to provide, or otherwise provides, funding ("third -party funder") for a proceeding either through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.

ICSID

AR 14
AF AR 23

ICSID welcomes the suggestion to move Draft Provision 12 from Category B to Category A.

Paragraph 46 of A/CN.9/WGIII/WP.245 states that "[d]isclosure of third-party funding serves to prevent conflicts of interest and enhance transparency".

AR 14 was developed to prevent conflicts of interest. To this end, in AR 14, the timing for the disclosure of third-party funding is upon registration of the Request for Arbitration, or immediately upon securing third party funding if that happens later in the proceeding.

Draft Provision 12(4) only requires disclosure "when submitting the statement of claim". The Working Group may wish to consider whether requiring parties to disclose the existence of third-party funding earlier in the proceeding,

for example at the stage of the Notice of Arbitration or thereafter, could further transparency and the prevention of conflicts of interest.

Draft Provision 12.7 includes sanctions if the disputing party fails to comply with disclosure obligations, including suspension or termination of the proceeding, ordering security for costs, or considering non-compliance when allocating costs.

Because AR 14 was developed to prevent conflicts of interest, there is no sanction in Rule 14 for failure to comply with disclosure obligations. Nevertheless, when tribunals allocate costs, they must consider a number of factors, including (AR 52(1)(b)) "the conduct of the parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner and complied with these Rules and the orders and decisions of the Tribunal." Consequently, failing to disclose third-party funding, in violation of AR 14, is considered by a tribunal in allocating costs and no specific provision needs to be added to that effect.

Argentina

On its Forty-ninth session, held in Vienna between 23 September and 27 September 2024, UNCITRAL Working Group III agreed that, with regard to the draft provisions in section A (draft provisions 1 to 9), draft provision 11 and draft provisions 12 (paragraphs 1 to 5 and 7), delegations could submit written comments.

Concerning provision 12, while our position is that no third-party funding should be allowed, we agree with the general wording of the provision regarding third-party funding, although we believe that the provision should make it clearer that if there is third-party funding, this should be disclosed as soon as possible and not at a particular procedural stage. In fact, it should be disclosed at the start of the process and there should be an ongoing verification of the contributor.

Noting that in some cases the financing comes from the firm representing the plaintiff, we consider it important to make it clear that it is necessary to know whether it is the plaintiff who is financing the arbitration with his own funds or through third parties. Knowing this information is relevant, for example, in discussions on security for costs.

In the case of paragraph 2(a), we suggest that in case the third-party providing financing is a legal entity, the notification should include the names of the persons and entities that own and control that legal entity, as is the case under Rule 14 of the 2022 ICSID Arbitration Rules.

Regarding (b) of paragraph 6, we would like to clarify how the amount received by the third party will be estimated to be reasonable or proportionate.

Suggested modifications for Draft Provision 12 (Highlighted in bold):

Draft Provision 12: Third-party funding

*1. "Third-party funding" means the provision of any direct or indirect funding to a disputing party by a natural or legal person that is not a party to the proceeding but enters into an agreement to provide, or otherwise provides, funding ("third –party funder") for a proceeding**, including the firm that represents the claimant,** either through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.*

2. A disputing party in receipt of third-party funding shall disclose to the Tribunal and the other disputing party the following information:

*(a) The name and address of the third-party funder **and, in case it is a legal entity, the name(s) of the person(s) who own or control that legal entity;** 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.

Any changes in relation to third-party funding must be reported to the court and the other litigating party immediately.

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

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

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

(c) Any right of the third-party funder to control or influence the management of the claim or the proceeding or to terminate the funding agreement;

(d) Any agreement between the third-party funder and the legal representative of the disputing party; and

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

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

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

(...)

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

(a) Suspend or terminate the proceeding in accordance with Draft Provisions 6 or 7;

(b) Order security for costs in accordance with Draft Provision 5; or

(c) Take this fact into account when allocating costs in accordance with Draft Provision 9.

USA

Paragraphs 1-5 of this draft provision reflect ICSID Arbitration Rule 14. There is no comparable provision in the UARs and a supplemental rule for ISDS proceedings would be welcome. We have two additional observations. First, the inclusion of the disclosure of the beneficial owner of a third-party funder is a welcome clarification. Second, a "subject to applicable law" caveat should be added to paragraph 3 to clarify that it does not displace any existing limits on disclosure required under applicable laws on privilege.

On paragraph 7, subparagraphs (b) and (c) are consistent with ICSID Arbitration Rules 52 and 53(4), and would be appropriate to include as a supplemental rule for ISDS proceedings under the UARs. We note that subparagraph (a) is not included in the ICSID Arbitration Rules but, given that it is discretionary, could be a useful incentive to promote disclosure. However, its use should be limited to exceptional circumstances and we would welcome a discussion of whether there are any unintended consequences of such a provision.

Brazil, Chile, Colombia, Dominican Republic, Ecuador, Mexico and Panama

1. "Third-party funding" means the provision of any direct or indirect funding to a disputing party by a ~~**natural or legal person**~~ **third party** that is not a party to the proceeding but enters into an agreement to provide, or otherwise provides**, total or partial** funding ("third -party funder") for a proceeding either through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.
2. The representatives of a party acting as third-party funders in accordance with paragraph 1 shall disclose it *mutatis mutandis* as provided in paragraph 3.
3. 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.
(c) Any relationship that may exist between the third-party funder or its ultimate beneficiary and any of the arbitrators constituting the tribunal;
(d) Whether the third-party funder agrees to cover any adverse cost award;
(e) The interest that the third-party funder may have in the outcome of the proceedings; and
(f) 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.

4. In addition, the Tribunal may require the funded party to disclose **at any stage of the proceedings**:
(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;**~~
(b) ~~**(d)**~~ Any agreement between the third-party funder and the legal representative of the disputing party; and
(c) ~~**(e)**~~ Any other information deemed necessary by the Tribunal.
5. The disputing party shall disclose the information listed in paragraph **3 as soon as possible after signing the third-party funding agreement.** ~~**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.**~~
6. 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.

[7. 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) […].]
8. If the disputing party fails to comply with the disclosure obligations in **paragraphs 3 to 6** ~~**2 to 5**~~, the Tribunal may:
(a) Suspend or terminate the proceeding in accordance with Draft Provisions 6 or 7;
(b) Order security for costs in accordance with Draft Provision 5; or
(c) Take this fact into account when allocating costs in accordance with Draft Provision 9.
9. If the disputing parties receive funding which is not permissible under paragraph **7**, the Tribunal may take the measures listed in paragraph **8** and in addition order the disputing party to terminate the funding agreement and to return any funding.

Comments:

1. In paragraph 1, we propose using the term "third party" to replace “natural or legal person” as we believe that otherwise, the scope of the concept might be restricted and fail to encompass other funding entities without legal personality. Additionally, we propose language to clarify that the funding may be “total” or “partial”.
2. We propose a new paragraph 2 to cover cases where the representatives of a party act as third-party funders.
3. In the current paragraph 3, formerly paragraph 2, we propose including some of the situations listed in the current paragraph 4 to make disclosure mandatory.
4. In the current paragraph 5, formerly paragraph 4, we propose that the third-party funding agreement should be disclosed at the earliest opportunity, as several months may pass between the initial arbitral action and the filing of the claim without the State being aware of the agreement, creating a disadvantage and inefficiency in the transparency rules.

CCSI, IIED, IISD and South Centre

While we understand that the Secretariat is not currently seeking comments on Draft Provision 12(6), we note the close connection between the procedural and disclosure regulations for TPF and its broader regulation under paragraph 6. Accordingly, we will provide additional comments on TPF at a later stage.

That said, we wish to emphasize that disclosures related to TPF should not be limited to the disputing parties and the Tribunal but should also be made publicly accessible. To reflect this point, we have suggested edits to the text to ensure greater transparency in line with this recommendation.

> ***Suggested Revised Provision 12: Third-party funding***
>
> *1. […]*
>
> *2. A disputing party in receipt of third-party funding shall disclose* ***the following information*** *to the Tribunal, the other disputing party,* ***and the public:***
> *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. […]*
> *4. […]*
>
> *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, the other disputing party****, and the public*** *as promptly as possible.*
>
> *6. […]*
> *7. […]*
> *8. […]*

Algeria

L’Algérie propose la suppression des points b) et c) du projet de la disposition pour concentrer les conséquences du non-respect des obligations de divulgation sur des mesures plus strictes et efficaces. Cette proposition s’inscrit dans une approche visant à renforcer la répression des financements occultes, conformément aux principes de transparence et d’intégrité procédurale.

En effet, le point a), qui permet de suspendre ou de clore la procédure en cas de non-conformité, constitue une mesure dissuasive forte et adaptée. En donnant au tribunal le pouvoir d'interrompre ou de mettre fin à une procédure entachée de financements occultes ou de manquements aux obligations de divulgation, cette disposition garantit une réponse immédiate et proportionnée.

Les points b) et c), en revanche, introduisent des sanctions moins directes qui pourraient diluer l'impact dissuasif de la disposition, en permettant à la partie contestante de poursuivre la procédure malgré des manquements graves.

State not wishing to be identified

XXX supports a broad definition of third-party funding in paragraph 1, as XXX believes that third-party funding should be subject to comprehensive regulations. XXX agrees with the current draft's inclusion of "donation" in the definition of third-party funding, expressly encompassing non-profit funding purposes. XXX further recommends considering differentiation in the regulatory scope and disclosure requirements based on whether funding is for profit or non-profit purposes. Furthermore, XXX believes that third-party funding regulations should cover not only financial but also non-financial support.

Regarding paragraph 3, which stipulates the information that the tribunal may additionally request for disclosure, XXX holds the position that all information available for tribunal use should be disclosed to the maximum extent possible. Accordingly, XXX considers the current wording of the Draft Provision appropriate, as it allows the tribunal to request disclosure as deemed necessary.

With respect to paragraphs 4 and 5, XXX holds the position that it is advisable to stipulate disclosure of information in the early stages of proceedings, as third-party funding agreements may sometimes be concluded before the statement of claim is submitted. Furthermore, XXX holds that the disputing party who fails to comply with the disclosure obligation regarding third-party funding should be subject to appropriate sanctions, as outlined in subparagraphs (a) through (c) of paragraph 7. Consequently, XXX is able to express its support for paragraph 7.

Viet Nam

Draft provision 12: Third-party funding *(paragraphs 1 - 5, and 7)*

Considering the importance of attaining transparency in cases involving third-party funding, Viet Nam proposes that consideration be given to ensuring the provision does not prevent the non-funded party from requesting the Tribunal to order additional disclosure from the funded party, if deemed necessary.

Viet Nam also suggests including the regulation on third-party funding as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure the efficiency of regulating third-party funding in ISDS.

Draft Provision 14: Local remedies

Viet Nam

To realistically prevent the potential risk of a disputing party bypassing domestic dispute resolution mechanisms before seeking intervention from international mechanisms, Viet Nam proposes the following drafting suggestions for draft provision 14:

"Prior to submitting a claim to the Tribunal, a party shall ~~***consider initiating***~~ ***initiate*** *recourse before a court or competent authority of a Contracting Party, where available."*

Viet Nam also suggests including the regulation on local remedies as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure the efficiency of regulating local remedies in ISDS.

European Union and its Member States

The position of the European Union and its Member States is that, as currently redrafted, the regulatory effect of this draft provision is limited and its added value questionable. It is worth considering whether it is necessary to include such provision in this paper.

Nevertheless, if the Working Group decides to keep it, this draft provision could appear in a protocol to a multilateral instrument with the view to retrofit in existing treaties and could also, depending on the outcome of the discussions, be in the rules of procedure of a standing mechanism.

Draft Provision 15: Waiver of rights to initiate dispute resolution proceeding

Viet Nam

Viet Nam welcomes efforts to address the issue of waiver of rights to initiate dispute resolution proceeding in ISDS, as it prevents claimants from simultaneously initiating claims under multiple international investment agreements. In practice, there have been cases where the claimants have submitted a waiver of the right to initiate dispute resolution proceeding under one agreement, yet later filed claims under multiple agreements simultaneously, and the Tribunal did not dismiss or terminate any of those cases. Therefore, when drafting this provision, Viet Nam proposes that consideration be given to establishing that failure to comply with the waiver commitment shall serve as the basis for the Tribunal to dismiss the case on the grounds that the right has been waived.

Viet Nam also suggests including the regulation on waiver of rights to initiate dispute resolution proceeding as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure the efficiency of regulating waiver of rights to initiate dispute resolution proceeding in ISDS.

European Union and its Member States

The position of the European Union and its Member States is that further work is relevant on this draft provision, which could appear in a protocol to a multilateral instrument with the view to retrofit in existing treaties and could also, depending on the outcome of the negotiations, be in the rules of procedure of a standing mechanism.

The revised version of the “waiver of rights” provision is going in the right direction, in particular the addition of paragraph 3 on interim and provisional measures.

The EU approach also 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.

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 16 – Limitation period

European Union and its Member States

The position of the European Union and its Member States is that further work is relevant on this draft provision, which could appear in a protocol to a multilateral instrument with the view to retrofit in existing treaties and could also, depending on the outcome of the negotiations, be in the rules of procedure of a standing mechanism.

Draft provision 16 is going in the right direction in terms of posing a general rule for limitation periods, but the wording could be slightly adjusted for instance to refer to "*knowledge of the* ***treatment alleged to breach the Agreement and of the loss or damage alleged to have been incurred thereby****".*

Also, according to the EU approach, it is not the claim that should be submitted within 3 years but the request for consultations.

Furthermore, in the EU approach, 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 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 17: Denial of benefits

Saudi Arabia

The draft provision goes much further than commonly adopted denial of benefits provisions in other BITs, such as by denying benefits in the event third-party funding is received in a manner inconsistent with the draft provisions, which is controversial. We also note below, in case helpful, two further revisions to Draft Provision 17 that could make it more acceptable from an investor's perspective:

- First, we recommend narrowing the scope of 17(2)(c) which currently provides the following as a basis for denying an investment treaty's benefits: "The investment involved or was made by way of corruption, fraud, or deceitful conduct". While it is standard and consistent with the KSA Model BIT to deny benefits if the investment was established or acquired illegally (and this condition is often also reflected in the very definition of a qualifying "investment"), the term "involved" in the draft provision is ambiguous and could potentially be interpreted to imply that any illegality in the performance of the investment would also render the treaty's protections inapplicable. Such an interpretation would considerably broaden the scope of the treaty's exclusions. We therefore propose that the following revision be made to Draft Provision 17(2)(c): "The investment involved or was made by way of corruption, fraud, or deceitful conduct".

- Second, we recommend replacing the language in 17(2)(d) with language that is more precise and less open to interpretation. The current draft provision states that "[t]he claim would constitute a misuse of the Agreement and its objectives". This language leaves too much latitude for Respondents to argue, and Tribunals to find, that a given claim should be excluded because it amounts to a "misuse" of the "Agreement and its objectives". Adopting instead the following, more specific, language found in the Netherlands Model BIT would be preferable over more broadly worded abuse of process language: "The Tribunal shall decline jurisdiction if an investor has changed its corporate structure with a main purpose to gain the protection of this Agreement at a point in time where a dispute had arisen or was foreseeable."]

European Union and its Member States

The European Union and its Member States are not convinced that further work is necessary on a denial of benefits clause, nor that such clause should be part of a protocol to a multilateral instrument. At the same time, certain issues included in draft provision 17 are of great importance to the European Union and its Member States, for instance the issue of shell companies, or the issues covered by paragraph 2(b) and (c). As explained below, the EU approach treat these issues through jurisdictional requirements rather than through a denial of benefits clause. As a general matter, the European Union 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.

While the first paragraph of the denial of benefits clause in draft provision 17 is similar to language usually found in IIAs, paragraph 2 significantly departs from the treaty practice and is more far-reaching.

The EU approach to denial of benefits takes a narrower approach and would allow a Party to deny the benefits of the agreement only 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.

Paragraph 1 is unnecessarily centred only around enterprises. The benefits of the agreement should be also deniable to natural persons, however the current drafting in the chapeau '*[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 paragraph 1(b) does not cover such situation.

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. The ultimate ownership as such is of no relevance so long as a certain company has substantive business operations in a Contracting party.

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 under 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. 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.

- 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 European Union 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."

Draft Provision 18: Shareholder claims

Saudi Arabia

The draft provision is problematic in the following respects, particularly when considered jointly, as further discussed below:

- First, draft provision 18(1) limits the type of claims that a covered shareholder can bring to "direct" loss or damage claims (i.e., to claims where the shares themselves were seized or otherwise directly interfered with). The implication is that claims for reflective loss (i.e., claims for the depreciation in the shares' value owing to harm caused to the local subsidiary—e.g., seizure of the local subsidiary's own assets) are excluded.
- Second, draft provision 18(2) allows derivate claims (i.e., claims brought on behalf of the locally incorporated subsidiary by the parent company) only in one of the following two limited circumstances: "All assets of that enterprise are directly and wholly expropriated by that Contracting Party" (18(2)(a)) or "[t]he 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" (18(2)(b)).
- By way of background, we note that while the exclusion of reflective loss is fairly common in domestic legal systems, the exclusion of reflective loss in international investment treaties could be problematic. This is because the locally incorporated subsidiary may be barred at the jurisdictional stage, based on its nationality, from advancing international investment claims—thus making the reflective loss theory potentially key for the recovery of damages. We therefore recommend resisting the exclusion of reflective loss by rejecting Draft Provision 18(1) in its entirety.
- Further, if it is not possible to reject Draft Provision 18(1) in its entirety, we recommend at least both:

  - Ensuring that the final version of the Draft Provisions expressly includes both direct and indirect investments within the definition of the term "investment". This could facilitate the parent company's ability to bring claims for harm caused to assets owned by the locally incorporated subsidiary, since such assets could be considered part of the parent company's (indirect) investment; and

  - Ensuring that the final version of the Draft Provisions do not contain the restrictions on derivative claims set forth in 18(2)(a) and 18(2)(b). Indeed, if reflective loss claims are excluded then, at a minimum, the parent company should be able to freely bring claims on behalf of its locally incorporated subsidiary (even if any damages awarded pursuant to a derivative claim would ordinarily go to the local subsidiary, not the parent company). The conditions laid down in 18(2)(a) and 18(2)(b) are far too narrow as (i) expropriation claims (referenced in 18(2)(a)) require full evisceration of value (unlike for instance Fair and Equitable Treatment claims) and (ii) denial of justice claims (referenced in 18(2)(b)) carry a high threshold and can be difficult to prove. Accordingly, the conditions in 18(2)(a) and 18(2)(b) significantly limit the ability of parent companies to bring derivative claims, whereas the unhindered ability to bring such claims can be quite important from an investor's perspective if reflective loss claims are excluded.

Viet Nam

Considering that commitments against denial of justice are commonly regulated in international investment agreements, Viet Nam proposes that sub-paragraph 2(b) be deleted from this provision.

Viet Nam also suggests including the regulation on shareholder claims as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure the efficiency of regulating shareholder claims in ISDS.

European Union and its Member States

The European Union and its Member States support the policy concern and would not exclude exploring a formulation of draft provision 18 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". As explained below, the EU treaty practice does not contain language which explicitly addresses the issue of shareholders claims, but properly understood EU treaties containing the "on-behalf of approach" would prevent derivative claims.

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 European Union 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.

Furthermore, the rationale for providing limitations to the submission of derivative claims (i.e. claims on behalf of the enterprise) under paragraph 2 is unclear and would deserve further explanation. It questions how this provision would be reconciled with IIAs which do not limit the ability of a shareholder to bring a claim on behalf of an enterprise to specific situations.

Draft Provision 19: Right to regulate

European Union and its Member States

As a general comment, the European Union and its Member States agree on the importance of recognition of the "right to regulate". EU agreements contain an explicit reaffirmation of it. 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.

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 European Union 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, the European Union and its Member States does not believe that further work on this clause is necessary within Working Group III, and 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.

Nevertheless, if the Working Group wished to continue working on this provision, the European Union and its Member States have the following substantial comments:

The EU approach includes a reaffirmation of the Parties' right to regulate within their territories to achieve legitimate policy objectives and corollaries of such right, along the lines of paragraph 1. However, the right to regulate under paragraph 1 is articulated in the form of an exception. From a practical viewpoint, it means that a certain measure would be found in violation of the agreement and then it would have to be determined whether it is justifiable under paragraph 1. As such, the burden of proof falls on the state to prove that its acts are compliant with the right to regulate. But the EU approach considers that the right to regulate is inherent to the State (hence why it is a reaffirmation), not conferred by the treaty as the drafting of draft provision 19 suggests, and that any acts falling within its sphere do not constitute violation of the treaty. Under the EU approach, the burden is on the investor to prove that a certain act goes beyond the right to regulate, thus it is in violation of the treaty.

Paragraphs 2 and 3 represent a novelty compared to the provisions on the right to regulate that are usually found in IIAs:

- Paragraph 2: The European Union and its Member States assume that a tribunal, in particular in a reformed ISDS system, would not second guess policy decision of a Contracting party for all the reasons enumerated in paragraph 2. The reference to a "high level of deference" raises concerns because a tribunal should also respect and apply the applicable agreement. In addition, the reference to specific climate change agreements may raise policy issues.

- Paragraph 3: The carve out from any dispute settlement mechanisms in paragraph 3 is far-reaching. In light of what is overwhelmingly the case in IIAs and the WTO, such considerations are better served through the presence of exceptions which ensure that arbitrary or disproportionate measures or measures constituting disguised protectionism or discrimination are avoided. Rather than a complete carve-out the EU approach prefers to ensure State's policy space through the presence of exceptions and a reaffirmation of the State's right to regulate.

Draft Provision 20: Assessment of damages and compensation

Saudi Arabia

Expanded Justification for Replacing “Interest” with “Rate of Return” Compliance with Domestic Legislation; In our jurisdictions where the term interest is not legally applicable, using rate of return ensures that the provision aligns with national laws. This compliance reduces the risk of enforcement challenges or disputes over legal terminology. Furthermore, the term rate of return reflects the true economic loss more comprehensively by accounting for the opportunity cost associated with the investment. Unlike simple interest, which may apply a fixed rate without considering market fluctuations, a rate of return can incorporate factors like inflation, investment risks, and expected gains, providing a more accurate measure of compensation.

Interest often implies specific financial or contractual obligations that may vary significantly between jurisdictions. In contrast, rate of return provides a neutral and adaptable concept that can be tailored to the circumstances of the dispute, including the type of investment, industry standards, and prevailing economic conditions. Also, we are of the view that Investors are likely to favor a rate of return approach, as it provides predictability in compensation based on the expected profitability of their investment rather than relying on statutory interest rates, which might be arbitrary or subject to legal caps. This predictability encourages investment by providing assurance of fair treatment under the Agreement.