Compilation of comments received on the draft provisions on procedural and cross-cutting issues (A/CN.9/WG.III/WP.248)

General comments

Singapore

Pursuant to paragraph 125 of A/CN.9/1195, Singapore provides our written comments on Draft Provisions 21 and 22 set out in Working Paper 248. Singapore reserves the right to submit additional comments or to adjust our positions in the future.

Viet Nam

Viet Nam takes 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 Papers numbered A/CN.9/WGIII/WP.244 and A/CN.9/WGIII/WP.248, Viet Nam raises below its comments on specific draft provisions. The views expressed herewith do not represent the priority of Viet Nam, its position on the final form of provisions, or its intention to exclude any provision. Viet Nam also reserves the right to submit additional comments on those provisions.

Algeria

Lors de la 51ème session du 17 au 19 février 2025, les délégations ont été invitées à soumettre sur les projets de dispositions 21 et 22 du document A/CN.9/WG.III/WP.248, au plus tard le 7 mars 2025. Ces contributions permettront au Secrétariat de la CNUDCI d'élaborer une version révisée du texte, en vue de son examen par le Groupe de travail lors de sa 52ème session à l'automne 2025.

La présente soumission répond à cet appel. L'Algérie ne manquera pas de soumettre des commentaires supplémentaires ou d'exprimer une position spécifique sur ces projets de dispositions lors des discussions futures qui se dérouleront au sein du groupe de travail III

USA

The United States thanks the Secretariat for its work on draft provisions 21 and 22 as set out in WP 248 (referred to jointly as the "Draft Provisions") and submits the following comments to those provisions. These comments are preliminary, offered on a technical basis, and subject to further development based on discussions within the Working Group. The United States has not included as part of this submission any additional comments on draft provisions 5-9, 11, or 12(1)-(5) and (7), but maintains the comments it previously submitted regarding those provisions.

European Union and its Member States

The European Union and its Member States refer to paragraph 125 of the report of Working Group III on the work of its 50th session (A/CN.9/1195) as well as communication from the UNCITRAL Secretariat dated 6 February 2025, where delegations are invited to provide written comments on draft provisions 21 and 22 in document A/CN.9/WG.III/WP.248. The European Union and its Member States therefore submit the below comments on draft provisions 21 and 22 and suggest an additional draft provision on "applicable law". 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.

Draft Provision 21: Joint Interpretation

Singapore

On paragraph 4 of the draft provision and paragraph 11 of Working Paper 248, regarding the timeline for issuance of a joint interpretation, Singapore considers that a joint interpretation should be issued expeditiously within the timeframe provided for, and should be issued as early on in the arbitral proceedings as possible. This provides certainty to the investor-claimant and the tribunal, and prevents abortive work. Singapore considers that a 90-day period in paragraph 4 seems appropriate. That said, issuing a joint interpretation within 90 days may be challenging in some instances, especially where there are multiple Parties to the Agreement. Thus, Singapore proposes allowing for a one-off extension of the period, on agreement of Parties without need for leave from the tribunal. This creates flexibility to cater to situations where the issue for joint interpretation is complex. Nevertheless, there should be certainty as to the maximum duration the tribunal should wait for the issuance of a joint interpretation. This certainty can be provided for by imposing a cap on the period of extension. Singapore suggests that the period of extension be capped at 90 days. This would strike an appropriate balance between certainty and the need to give Parties adequate time to issue a joint interpretation.

On paragraph 5 of the draft provision and paragraph 12 of Working Paper 248, regarding the temporal scope of the binding effect of a joint interpretation, Singapore considers that where an arbitral award has not been rendered, the tribunal is bound by the joint interpretation that is issued within the timeline stipulated in the draft provision. As a default position, a joint interpretation should not have retrospective effect – it should not affect arbitral awards rendered prior to the issuance of the joint interpretation. Where a joint interpretation is issued after an arbitral award is rendered, it should also not affect subsequent proceedings related to that award, including setting aside, annulment or appeal proceedings. This is so that the joint interpretation exercise does not risk providing a backdoor appeal mechanism.

On paragraph 13 of Working Paper 248, Singapore considers that Parties to the Agreement should be given the option of specifying the temporal scope of the joint interpretation. In this regard, Singapore proposes the inclusion of the following sentence in paragraph 5: "**Parties to the Agreement may decide that a joint interpretation shall have binding effect from a specific date**." It should, however, be clearly understood that paragraph 5 is without prejudice to what has been otherwise agreed in existing international investment agreements.

Argentina

Comentarios:

Sugerimos incluir una referencia similar a la que existe en la disposición 22 sobre el efecto que tiene el hecho de que los Estados no acepten la invitación a que los Estados busquen alcanzar una interpretación conjunta.

Modificaciones sugeridas (en negrita):

"3. El tribunal podrá, a instancia de una parte litigante o por iniciativa propia, solicitar una interpretación conjunta de cualquier disposición del acuerdo que sea objeto de la controversia. ***El tribunal no hará ninguna inferencia de la falta de observaciones o de respuesta ante una invitación que se formule de conformidad con los párrafos 1 o 2."***

Viet Nam

Viet Nam welcomes efforts to address the issue of joint interpretation in ISDS. Viet Nam anticipates this provision to aid in clarifying the views of contracting states on each provision of the underlying agreement, which may contain general terms open to varying interpretations by different arbitral tribunals.
Considering that the speed of issuing a joint interpretation will depend on the internal procedures of each Party to the Agreement, Viet Nam proposes the following drafting suggestions for draft provision 21(4):

"4. A joint interpretation pursuant to paragraph 3 shall be issued within 90 days from the date the Tribunal seeks the joint interpretation. ***Upon a request by a Party to the Agreement, the Tribunal shall consider extending this time period.*** *If the joint interpretation is not issued within the time period, the Tribunal shall decide the issue."*

In addition, when drafting this provision, in the context of multilateral agreements, Vietnam proposes that consideration be given to allowing the participation of both Parties to the Agreement and non-signatories, which would result in common interpretations of the protection standards in investment treaties among those parties.

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

Algeria

Commentaires et recommandations :

1. Champ d'application de l'interprétation conjointe (complément au paragraphe 1) :

L'Algérie recommande d'introduire un nouveau paragraphe en complément du paragraphe 1 afin de préciser de manière explicite les éléments pouvant faire l'objet d'une interprétation conjointe au titre de la disposition 21. Cette interprétation ne devrait pas se limiter aux seules dispositions de l'accord, mais également couvrir son préambule, ses annexes et son contexte (***i.*** Tout accord ayant rapport au traité et qui est intervenu entre toutes les parties à l'occasion de la conclusion du traité et ***ii.*** Tout instrument établi par une ou plusieurs parties à l'occasion de la conclusion du traité et accepté par les autres parties en tant qu'instrument ayant rapport au traité), conformément à l'article 31(2) de la Convention de Vienne sur le droit des traités.

L'intégration explicite de ces éléments renforcerait la cohérence interprétative et garantirait une lecture fidèle aux intentions des parties et aux engagements souscrits, tout en assurant une approche conforme aux principes du droit international en matière d'interprétation des traités.

2. Clarification de la procédure (paragraphe 2) :

Le libellé actuel du paragraphe 2 prévoit que l'autre partie à l'accord doit « prendre dûment en considération » une demande d'interprétation conjointe, sans préciser les conséquences ***(i)*** d'un refus ou ***(ii)*** d'une absence de consensus sur l'interprétation demandée. Cette absence de cadre procédural peut entraîner une impasse juridique et nuire à la prévisibilité du processus d'interprétation.

Afin de remédier à ces lacunes, l'Algérie recommande d'apporter des précisions quant à la procédure à suivre par la partie sollicitant une interprétation conjointe, ainsi qu'aux modalités de résolution en cas de désaccord entre les parties. Pour ce second cas de figure, une solution pourrait consister à prévoir l'intervention d'un organe indépendant, tel qu'un comité d'experts ou une commission instituée par l'accord, qui serait chargé d'examiner la demande et, le cas échéant, de proposer une interprétation objective.

3. Gestion des divergences d'interprétation entre les parties (paragraphe 3) :

Une recommandation analogue à celle formulée pour le second cas de figure du paragraphe 2 s'applique au paragraphe 3. En l'état, le texte proposé ne précise pas la procédure à suivre en cas de désaccord entre les parties sur l'interprétation conjointe d'une disposition demandée par le tribunal. Une clarification s'impose afin de déterminer si, en l'absence de consensus, le tribunal est habilité à statuer de manière autonome sur la question, comme le prévoit le paragraphe 4 lorsque l'interprétation conjointe n'est pas émise dans le délai de 90 jours.

L'Algérie estime que l'ajout d'une disposition spécifique à cette situation permettrait d'éliminer toute ambiguïté et d'assurer une meilleure prévisibilité du processus d'interprétation.

4. Point de départ du délai de 90 jours (paragraphe 4) :

Le texte proposé prévoit que l'interprétation conjointe demandée par le tribunal doit être rendue dans un délai de 90 jours à compter de la date de sa demande. Toutefois, afin de garantir une application plus efficace et d'éviter toute contestation liée au calcul du délai, l'Algérie recommande que ce délai commence à courir à partir de la date de réception effective de la demande par les parties concernées. Cette précision permettrait de mieux prendre en compte les délais de notification et de prévenir d'éventuelles contestations procédurales.

5. Effet contraignant des interprétations conjointes, rôle des tribunaux et application dans le temps (paragraphe 5) :

5.1. L'Algérie recommande de limiter l'effet contraignant des interprétations conjointes qu'à celles adoptées conformément au paragraphe 1, c'est-à-dire celles résultant d'un consensus entre les parties à l'accord.

Une distinction claire doit être faite entre ces interprétations officielles résultant d'un consensus entre les parties à l'accord (prévues au paragraphe 1) et les sentences et jugements rendus par les tribunaux en l'absence d'une interprétation conjointe dans le délai imparti (prévus au paragraphe 3).

Ainsi, une interprétation rendue par défaut par un tribunal statuant sur un différend particulier ne devrait ni s'imposer aux litiges futurs ni prévaloir sur la volonté exprimée par les parties signataires de l'accord.

Cette limitation permettrait d'éviter que les tribunaux ne créent indirectement des règles nouvelles qui pourraient compromettre la souveraineté des États parties et la stabilité de l'interprétation de l'accord.

5.2. Concernant la portée temporelle de l'effet contraignant des interprétations conjointes, l'Algérie estime qu'il ne devrait s'appliquer qu'aux affaires en cours et futures. Un effet rétroactif n'est pas envisageable, car il pourrait remettre en cause des sentences déjà rendues et exécutées, entraînant une insécurité juridique. Cela serait particulièrement problématique dans le cadre du Mécanisme d'appel ou d'une procédure d'annulation ultérieure, risquant de déstabiliser l'ensemble du système. Ainsi, une interprétation conjointe adoptée après une sentence de premier degré ne devrait pas s'imposer au tribunal d'appel.

Switzerland

Switzerland is supportive of a provision regarding joint interpretations by state parties to an international investment agreement.

Paragraphs 1 and 2: Switzerland agrees with the principle that Parties to an agreement may issue an interpretation jointly agreed by the Parties regarding any provision of the Agreement.

Paragraph 3: In Switzerland's view, the possibility to request a joint interpretation from the Parties should not be given to the tribunal. There is a risk that this could place the tribunals in a constant dilemma as to whether or not to request a joint interpretation and undermine their discretion. There is also a risk that if a tribunal requests a joint interpretation on one specific provision of the Agreement and not on others which may also be in contention between the disputing parties, it may be perceived to prejudge the case. In addition, if no joint interpretation is issued on a provision on which the tribunal has requested such joint interpretation (because, for instance, the Parties are unable to agree on a given interpretation), this may trigger arguments in the proceeding as to the significance of such lack of agreement between the Parties. In this regard, Switzerland notes that draft provision 21 does not contain any language similar to the one contained in draft provision 22, paragraph 3 (i.e., that no inference should be drawn from the absence of any joint interpretation). For these reasons, Switzerland is of the view that the possibility for tribunals to request joint interpretations from the Parties should not be provided.

Paragraph 4: Following Switzerland's view regarding paragraph 3, paragraph 4 should be deleted.

Paragraph 5: Following Switzerland's view regarding paragraphs 3 and 4, paragraph 5 should be amended accordingly. Switzerland supports the statement stipulating that a joint interpretation shall be binding on tribunals.

As raised in paragraphs 12 and 13 of the annotations to the draft provision, an important consideration concerning joint interpretations is the date of entry into force. For Switzerland, joint interpretations shall not be retroactively binding on tribunals. If this were the case, it would mean that these interpretations could be applied to ongoing cases, which would mean interference with pending proceedings. In other words, Parties to treaties would have an influence on the handling of disputes and participate in the ISDS mechanism. This would be contradictory to the principles of legal certainty, stability and predictability of legal rules. *A fortiori*, any effect of joint interpretations over concluded cases should also be excluded. For these reasons, Switzerland is of the view that draft provision 21 should be supplemented to specify that the effect of joint interpretations should only be prospective.

USA

The United States generally supports the inclusion of a joint interpretation provision in international investment agreements ("IIA"), in keeping with current U.S. practice. Within the context of this Working Group's reform efforts, the United States supports including a joint interpretation provision as one of the cross-cutting and procedural provisions, rather than as part of, for example, the multilateral instrument on ISDS reform ("MIIR"), as the application of the joint interpretation provision is limited to interpretation of investment agreements. The United States supports the categorization of draft provision 21 as a Section B provision, since it would build on existing provisions in recent IIAs and would require agreement between at least two treaty parties, and is therefore best situated as a treaty provision that could complement existing investment agreements. The categorization of joint provision 21 into Section B is also proper given the omission of a joint interpretation provision from the procedural rules set out in either the UARs or the ICSID Arbitration Rules.

The United States proposes the following line edits to draft provision 21:

1. **[To the extent not otherwise addressed in the Agreement, the]** Parties to the Agreement may issue an interpretation jointly agreed by the Parties with regard to any provision of the Agreement (the "joint interpretation"), including through a body established for such a purpose under the Agreement.
2. Upon a request by a Party to the Agreement to issue a joint interpretation, the other Party or Parties to the Agreement ~~shall~~ **should** give due consideration to that request.
~~**3. The Tribunal may, at the request of a disputing party or on its own initiative, seek a joint interpretation of any provision of the Agreement that is the subject of the dispute.**~~
~~**4. A joint interpretation pursuant to paragraph 3 shall be issued within 90 days from the date the Tribunal seeks the joint interpretation. If the joint interpretation is not issued within the time period, the Tribunal shall decide the issue.**~~

5. A joint interpretation issued pursuant to paragraph~~s~~ 1 ~~**and 3**~~ shall be binding on Tribunals established in accordance with the Agreement. Tribunals shall ensure that their decisions and awards are consistent with the joint interpretation.

The United States supports adding bracketed language to paragraph 1 to clarify that the joint interpretation provision in WP 248 would be subject to existing provisions in the underlying IIA. As noted in paragraph 5 of WP 244, the Working Group needs to further consider how draft provision 21 and any other potential Section B provisions may best be incorporated into and implemented as part of existing IIAs. Depending on the outcome of those negotiations, it is possible that the bracketed language proposed by the United States for paragraph 1 will ultimately not be necessary. But in the meantime, and pending the outcome of those discussions, the bracketed language makes clear the U.S. view that draft provision 21 should not be read to replace or otherwise change existing joint interpretation mechanisms in IIAs, including IIA provisions that provide for binding interpretations through a standing commission or other treaty body.

With respect to paragraph 2, the United States proposes deleting "shall," which connotes a binding and enforceable obligation, with "should." This edit tracks the commentary at paragraph 9, which states that the purpose of paragraph 2 is to "encourage[] the Parties to the Agreement to cooperate in the issuance of the joint interpretation, particularly when one of the Parties makes such a request."

The United States proposes deleting paragraphs 3 and 4 and would similarly oppose any provision (as suggested in paragraph 10 of WP 248) that would require a tribunal to seek a joint interpretation if requested by a disputing party. Unlike non-disputing treaty Party submissions, joint interpretations require consultations between the two treaty States. Joint interpretations may therefore be difficult to conclude within the timeframe of specific disputes, particularly in the context of multilateral treaties. The mechanism established in paragraphs 3 and 4 is therefore unlikely to result in a joint interpretation that would be useful to a tribunal during the timeframe suggested. Plus, if a tribunal has the power to request an interpretation, there is a risk that respondent States will be prejudiced if, due solely to the complexities of interstate negotiation, they are unable to arrive at the requested interpretation (particularly within 90 days).

In response to paragraph 13 of WP 248, a joint interpretation by its very nature reflects the authentic intentions of the Parties to the Agreement *ab initio*. The United States therefore would oppose specifying the date upon which the joint interpretation would have binding effect and would instead take the view that any joint interpretation issued under this draft provision would legitimately reflect the Parties' original intent in negotiating the interpreted provision.

European Union and its Member States

The European Union and its Member States wish to recall that they have submitted a paper on the draft multilateral instrument (A/CN.9/WG.III/WP.246) suggesting to create a mechanism for joint interpretation within the multilateral instrument.[1] As that submission made clear, it is imperative that such a mechanism be available at a minimum as regards the standing mechanism, irrespective of whether such a provision appears in the underlying agreement. Hence, the European Union and its Member States have suggested the inclusion of a joint interpretation mechanism in the multilateral instrument as giving the greatest possible scope for application. This proposed mechanism for joint interpretation is inspired by draft provision 21. The text included in the multilateral instrument should be adjusted as a function of the outcome of the discussion of the text here. Nevertheless, and in so far as draft provision 21 in WP.248 is considered as a treaty provision to be retrofitted into existing treaties, the European Union and its Member States suggest the following edits to the text:

1. Parties to the Agreement may issue an interpretation jointly agreed by the Parties with regard to any provision of the Agreement (the "joint interpretation"), including through a body established for such a purpose under the Agreement. **The Parties may decide that an interpretation shall have binding effect from a specific date.**

→ On paragraph 1, it is suggested to add the possibility for the treaty Parties to set a specific date from which an interpretation shall have binding effect, in order to leave the choice to the treaty Parties to decide whether to apply an interpretation to pending proceedings or not.

2. Upon a request by a Party to the Agreement to issue a joint interpretation, the other Party or Parties to the Agreement shall give due consideration to that request.

[1] See paper submitted by the European Union and its Member States, available at https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/2025.02.14_submission_mi_joint_interpretatio n.pdf

3. The Tribunal may, at the request of a disputing party or on its own initiative, ~~**seek**~~ **request** a joint interpretation of any provision of the Agreement that is the subject of the dispute. **It shall address such a request to both of the Parties to the Agreement pursuant to which the dispute is lodged**.

→ On paragraph 3, it is suggested to replace "seek" by "request" as a more appropriate term, and to clarify that when the Tribunal requests a joint interpretation, it shall address such request to both of the Parties to the treaty pursuant to which the dispute is taking place, and not only to the Party to the treaty involved in the dispute.

4. A joint interpretation pursuant to paragraph 3 shall be issued within 90 days from the date the Tribunal seeks the joint interpretation, **unless the Parties to the Agreement concerned jointly request an extension of that period**. If the joint interpretation is not issued within the time period, the Tribunal shall decide the issue.

→ On paragraph 4, it is suggested to provide flexibility on the timing to issue a joint interpretation, as 90 days may be too short depending on the internal processes of a State or REIO. Therefore, the Parties to the treaty should have the power to jointly request an extension to issue such a joint interpretation.

5. A joint interpretation issued pursuant to paragraphs 1 and 3 shall be binding on **the** Tribunals **that are seized of a dispute under the relevant** ~~**established in accordance with the**~~ Agreement. Tribunals shall ensure that their decisions and awards are consistent with the joint interpretation.

→ On paragraph 5, it is suggested to clarify that the joint interpretation is binding on "Tribunals that are seized of a dispute under the relevant Agreement" to more clearly cover: (i) a first-instance and appeals Tribunals as currently discussed in the draft statute of a standing mechanism (A/CN.9/WG.III/WP.240) and (ii) a Tribunal seized of a dispute but whose jurisdiction is contested. It could indeed be debated whether such Tribunals are established "in accordance with the Agreement". The replacement phrase covers all possible situations.

Draft Provision 22: Submission by a non-disputing Treaty Party

Singapore

On paragraph 15 of Working Paper 248, regarding whether paragraph 1 of the draft provision should be subject to paragraph 4, Singapore considers that the current version of draft provision is appropriate, because it can be read harmoniously with both Rule 68 of the ICSID Arbitration Rules (for arbitrations governed by the ICSID Arbitration Rules), as well as Article 5 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (for arbitrations governed by the UNCITRAL Rules on Transparency).

Argentina

Comentarios:

Respecto del párrafo 2, sugerimos que el Tribunal se encuentre obligado a permitir a la Parte No Contendiente presentar sus observaciones, tal como lo permite la Regla 68 de las Reglas CIADI 2022.

En todo caso, las partes discutirán y el Tribunal decidirá sobre la extensión y alcance de dicha presentación.

Con relación al párrafo 2(b), se sugiere eliminar la frase "*de hecho*", ya que el alcance de la disposición solo refiere a la interpretación del Tratado.

Sobre el párrafo 5, consideramos que, en aras de la economía procesal, los comentarios sobre las observaciones de las Partes No Contendientes, en la medida de lo posible, deberían ser presentados junto con los escritos de las Partes, tal como fueron previstos en los calendarios procesales pertinentes. Si ello no fuese posible, podrían formularse de forma separada.

Modificaciones sugeridas (en negrita):

"*…2. El tribunal, tras celebrar consultas con las partes litigantes,* ***permitirá*** *que una parte en el tratado que no sea litigante presente observaciones sobre otras cuestiones comprendidas en la controversia. A la hora de decidir* ***el alcance y la forma de*** *tales observaciones, el tribunal tendrá en cuenta, entre otras cosas:*

(…)
*5. El tribunal se asegurará de que las partes litigantes tengan una oportunidad razonable de presentar comentarios sobre cualquier observación que realice una parte en el tratado que no sea litigante****. En la medida de lo posible, los comentarios se presentarán junto con los escritos a presentarse por las Partes*****."**

Viet Nam

Vietnam appreciates the efforts to address the issue of submission of a non-disputing Treaty Party in ISDS, as it allows for the proactive affirmation of that Party's position on the relevant provisions of the underlying agreement, which aids the Tribunal's understanding and consistency in decision-making.

To enhance efficiency of regulating submissions by a non-disputing Treaty Party in ISDS, Viet Nam proposes the following drafting suggestions for draft provision 22(1):

"*1. The Tribunal shall allow a Party to the Agreement that is not a party to the dispute ("non-disputing Treaty Party") to make a submission on the interpretation of the Agreement at issue in the dispute* ***if requested by that Party****.*

2. *The Tribunal may, after consultation with the disputing parties, invite a non-disputing Treaty Party to make* ~~***such***~~ *a submission* ***on the interpretation of the Agreement at issue in the dispute****.*

3. *The Tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Treaty Party…*"

Viet Nam also suggests including the regulation on submission of a non-disputing Treaty Party as a procedural rule provision and, subsequently, developing to include this regulation as a treaty provision to ensure the efficiency of regulating submission of a non-disputing Treaty Party in ISDS.

Algeria

Commentaires et recommandations :

Paragraphes 1 et 2 :

1. Clarification de la portée juridique des observations :

L'Algérie recommande de compléter les paragraphes 1 et 2 afin de préciser la portée juridique des observations formulées par une Partie au traité non-partie au litige. Il conviendrait d'indiquer expressément si ces observations ont un effet contraignant sur le tribunal ou si elles ont pour seule vocation d'éclairer son interprétation.

Dans un souci de sécurité juridique et de cohérence avec la nature consultative de ces observations, il est recommandé d'opter pour la seconde approche. En effet, accorder un caractère contraignant à ces observations risquerait de modifier l'équilibre procédural entre les parties au litige et d'altérer le rôle souverain du tribunal dans l'appréciation des faits et du droit applicable. En revanche, reconnaître leur valeur purement informative garantirait que le tribunal puisse en tenir compte tout en conservant sa pleine liberté d'appréciation.

Ainsi, une clarification en ce sens renforcerait la prévisibilité du processus et préserverait l'autonomie du tribunal dans la conduite de la procédure.

2. Encadrement des modalités d'intervention :

L'Algérie suggère l'ajout d'une nouvelle disposition complémentaire aux paragraphes 1 et 2 précisant les modalités de soumission des observations par une Partie au traité non-partie au litige. Ce complément viserait à :

(i) Déterminer si ces observations doivent être présentées sous forme écrite, orale ou les deux ;

(ii) Fixer un délai raisonnable pour leur soumission afin d'éviter tout retard injustifié dans la procédure.

Paragraphe 2 : Garantir la neutralité de l'intervention de la Partie au traité non-partie au litige

L'Algérie recommande l'ajout d'une disposition complémentaire afin d'assurer la transparence et la neutralité de l'intervention de la Partie au traité non-partie au litige prévue dans ce paragraphe (observations sur d'autres questions s'inscrivant dans le cadre du litige), qui devrait prévoir :

(i) L'obligation pour cette Partie au traité non-partie au litige de déclarer tout lien, direct ou indirect, avec l'investisseur partie au différend, en vue de prévenir d'éventuels conflits d'intérêts et de garantir l'objectivité des observations soumises ;

(ii) La possibilité pour les parties au litige de présenter des observations sur la pertinence et la légitimité de l'intervention de la Partie au traité non-partie au litige et ce, en vue de permettre au tribunal d'évaluer si cette intervention est conforme aux exigences d'équité procédurale et aux principes fondamentaux du règlement des différends.

Switzerland

In general, Switzerland supports a provision regarding submissions by a non-disputing Treaty Party. However, the language of draft provision 22 should follow as closely as possible Article 5 of the UNCITRAL Transparency Rules. Otherwise, we risk reopening issues that were already debated during the negotiations on the Transparency Rules. Furthermore, if draft provision 22 and Article 5 of the UNCITRAL Transparency Rules end up being different, the risk of confusion and contradiction may arise.

With regard to the question raised in paragraph 15 of the annotations on whether the phrase "subject to paragraph 4" found in article 5(1) of the Transparency Rules should be retained in paragraph 1 as a condition for allowing non-disputing Treaty Party submissions, Switzerland sees no reason to eliminate the «subject to paragraph 4» language.

Regarding the question raised in paragraph 16 of the annotations on whether submissions on "further matters within the scope of the dispute" should be allowed, Switzerland is of the opinion that this possibility should be provided for, in alignment with Article 5 of the Transparency Rules.

Concerning the list of factors that a tribunal shall take into account when allowing such submissions by a non-disputing Treaty Party, Switzerland agrees that it is useful to have an illustrative, non-exhaustive list of considerations to enable the tribunal to take into account various relevant circumstances. Regarding the consideration set out in lit. (c), Switzerland wonders to what extent this should be included in the list as a consideration or whether it is rather a principle that should be incorporated as a paragraph.

Switzerland has no observation to make regarding paragraphs 3 to 5 of draft provision 22, which correspond to paragraphs 3 to 5 of Article 5 of the UNCITRAL Transparency Rules.

USA

This draft provision reflects an amalgamation of ICSID Arbitration Rule 68 (Participation of Non-Disputing Treaty Party) and Article 5 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Transparency Rules"). The United States does not have specific line edits to draft provision 22 but does support

adding a paragraph to that provision based on ICSID Rule 68(3) to require the tribunal to provide the non-disputing Treaty Party with relevant documents filed in the proceeding, unless either party objects.

Structurally, the U.S. view is that draft provision 22 would be better categorized as one of the Section A provisions, rather than as a Section B treaty provision to modify or supplement existing IIAs, and that it should be reframed as a supplement to the UAR's procedural rules in order to bring those rules more in line with the more contemporaneous ICSID Rule 68.

Finally, as to paragraph 15 of the commentary to WP 248, the United States does not see the necessity of including a cross-reference to paragraph 4 in paragraph 1.

European Union and its Member States

Draft provision 22 is in line with the similar provision from the UNCITRAL Transparency Rules (Article 5) and the 2022 ICSID Arbitration Rules (Rule 68). Accordingly, the Working Group should avoid reopening its substance and should instead focus on targeted adjustments. In this regard, the European Union and its Member States would support the addition of a new paragraph 3bis allowing the non-disputing Treaty Party to have access to the relevant documents of the case in order to decide whether to file or not a submission on its own initiative or at the invitation of a Tribunal. Furthermore, since this provision is already present in the UNCITRAL Transparency Rules, it can already be retrofitted by a State joining the Mauritius Convention. The European Union and its Member Stares are concerned that permitting retrofitting of one aspect of the Transparency Rules may undermine the attractiveness of the Mauritius Convention. Nevertheless, the European Union and its Member States would not object to the retrofitting of draft provision 22 into existing treaties if there is strong support in the Working Group. The European Union and its Member States could also support the inclusion of this draft provision in Section A of WP.244, as a supplement to the UNCITRAL Arbitration Rules. This draft provision shall also be included in the rules of procedure of a standing mechanism, which should in any event include a full set of transparency provisions as in the UNCITRAL Transparency Rules.

3bis. The Tribunal shall provide the non-disputing Treaty Party with relevant documents filed in the proceeding, unless otherwise publicly available pursuant to applicable rules on the publication of documents.

Additional draft provision 23: Applicable law

The European Union and its Member States would like to suggest the addition of a new draft provision on applicable law. Many investment treaties contain a clause on the applicable law, as is the case for EU agreements. It would be a useful addition to the provisions that could be retrofitted into existing treaties where they do not have rules on applicable law or very limited rules. It should also be given consideration in the context of the discussions on applicable law with regard to the statute of a standing mechanism.

The following language is suggested as an additional provision:

1. When rendering its decision, the Tribunal shall apply this Agreement as interpreted in accordance with customary rules of interpretation of public international law as codified in the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.

2. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.