

Comments on the categorization and prioritization of procedural rules and cross-cutting issues from Working Paper A/CN.9/WG.III/WP.231:

This presentation on the categorization and prioritization of procedural rules and cross-cutting issues from Working Paper A/CN.9/WG.III/WP.231 ("Working Paper 231") is jointly made by the Federative Republic of Brazil, the Republic of Chile, the Republic of Colombia, the Republic of Costa Rica, the Republic of Panama, and the United Mexican States. The following comments are made without prejudice to the specific positions that each country may maintain regarding the various proposed provisions discussed in the working document.

During the Seventh Intersessional Meeting of UNCITRAL Working Group III, held on March 7-8, 2024, in Brussels, Belgium, UNCITRAL Secretariat presented a classification of the proposed provisions in Working Paper 231 into the following categories:

- **Category A:** Those seeking harmonization with existing procedural rules (including the 2022 ICSID Arbitration Rules) and which could supplement UNCITRAL Arbitration Rules: provisions 13 (evidence), 14 (bifurcation), 16 (interim/provisional measures), 19 (early dismissal), 20 (security for costs), 22 (suspension and termination of the proceeding), 24 (period of time for making the final decision), and 25 (allocation of costs).
- **Category B:** Those based on existing procedural rules and provisions found in recent investment treaties, which could be drafted as treaty provisions for adoption by States: provisions 11 (counterclaim), 15 (consolidation of proceedings), and 21 (third-party funding), as well as the incorporation of UNCITRAL's Code of Conduct and UNCITRAL's Rules on Transparency in Treaty-based Investor-State Arbitration; and
- **Category C:** Those not found in procedural rules, addressing so-called cross-cutting issues: provisions 7 (waiver of rights to initiate dispute resolution proceeding), 8 (limitation period), 9 (denial of benefits), 10 (shareholder claims), 12 (right to regulate), 23 (Assessment of damages and compensation).

In response to the Chair of Working Group III's inquiry regarding the way forward to address the proposal for categorization and prioritization of procedural rules and cross-cutting issues in Working Document 231, we offer the following comments:

Category A:

- Form: While we consider it unnecessary to define at this moment the form these provisions might take, we generally support the proposal that they could take the form of a supplement or annex to the UNCITRAL Arbitration Rules for investment arbitration.
- Prioritization: Given the previous work carried out by several participating delegations in Working Group III during the ICSID Arbitration Rules reform process (2022), we consider that provisions in this category should require less debate time in the Working Group than those in other categories. Consequently, we suggest that Working Group III not use its resources to extensively discuss these provisions during its sessions.

We recommend conducting parallel work alongside discussions in Working Group III sessions, similar to the work done regarding the "toolkit for the prevention and mitigation of international investment disputes". To this end, we propose making progress in between sessions through the submission of written comments.

Category B:

- Form: While we believe some of these provisions could take the form of a supplement or annex to the UNCITRAL Arbitration Rules for investment arbitration, some provisions could also take the form of treaty language to be included in the Multilateral Instrument on ISDS Reform (MIIR) and thereby modify existing treaties. In some cases, we consider that a provision could be considered for adoption in both formats. For example, the provision on third-party funding could be included in an annex to the UNCITRAL Arbitration Rules for investment arbitration, as well as in the MIIR to modify previous treaties, thus raising the standard in those international investment disputes where the UNCITRAL arbitration rules are not used.
- Prioritization: We acknowledge that not all provisions within this category represent the same level of impact on ISDS reform, and we suggest they be considered individually, requiring more discussion from the Working Group.

Category C:

- Form: We propose that these provisions be incorporated as treaty articles in the MIIR to reform previous treaties. This would represent a significant contribution to the reform process, allowing modification of existing treaties and specifically addressing critical concerns expressed by several Working Group delegations regarding the lack of consistency, coherence, and predictability in tribunal decisions, as well as the costs and duration of ISDS proceedings.
- Prioritization: These provisions should be prioritized in discussion, along with some that may be identified in Category B. We believe Working Group III resources should focus on the most complex issues, especially those in Category C, which require deeper and more exhaustive debate. Unlike reforms contemplated in Category A, which have already been extensively discussed during the ICSID Arbitration Rules reform process 2022, provisions in Categories B and C address fundamental issues that need detailed and thorough attention to ensure an effective and substantial ISDS reform.

Additionally, we suggest incorporating the following provisions into the discussion of Working Group III:

- **Binding joint interpretations by treaty Parties of treaty provisions.** See TIPAT/CPTPP, USMCA/TMEC/CUSMA, Chile-EU AFA, Panama-US FTA, Panama-Canada FTA.
- **Non-disputing treaty Party submissions on treaty interpretation.** See TIPAT/CPTPP, USMCA/TMEC/CUSMA, Chile-EU AFA, Panama-US FTA, Panama-Canada FTA.