

Comments by the Republic of Chile regarding Provision 1 (Scope of Application) of the Draft Expedited Arbitration Provisions

The Republic of Chile appreciates the work of the Secretariat and the Chairman of the Working Group in the elaboration of Document A/CN.9/WG.II/WP.216, on the Draft Expedited Arbitration Provisions (“EAPs”) for the settlement of commercial disputes.

Echoing the concerns raised by the distinguished delegation of Vietnam during the last day of the informal consultations held between the 24th and the 26th of February, 2021, regarding the application of the Expedited Arbitration Provisions to Investor-State Dispute Settlement (“ISDS”), the Republic of Chile wishes to express its position regarding the need for the explanatory note on Provision 1 (Scope of Application) to expressly state that the drafting process of the Provisions did not take into consideration the singularities and characteristics of investment arbitration, given that the objective and rationale of the discussions was in line with the suitability and application of the EAPs to commercial arbitration.

While Provision 1 requires agreement of the parties for the application of EAPs to a particular dispute, Document A/CN.9/WG.II/WP.214 refers to the possibility for the Working Group to “confirm that the suitability of the EAPs for investment arbitration is a question to be determined by the disputing parties”. In this regard, this delegation considers that in order for the EAPs to be applicable to ISDS proceedings, the explanatory notes should reflect 1) the need to expressly incorporate a clause in the respective investment treaty that provides the possibility to apply the EAPs for the settlement of disputes between investors and States and, additionally, 2) the requirement for the consentment of the State for the application of the EAPs with respect to the specific dispute submitted to arbitration. Introducing both clarifications in the explanatory notes will serve as a safeguard from the risks highlighted in paragraph 21 of Document A/CN.9/1010 related to inadvertently being subject to expedited arbitration, specially considering the implications of investor-State disputes in sensitive affairs, such as public policy matters. Thus, the explanatory notes would reflect the position of certain delegations regarding the unsuitability of these provisions to regulate investor-State arbitration proceedings.

Accordingly, the Republic of Chile agrees with the proposed addition suggested by the distinguished delegation of Singapore in relation to the application of the UNCITRAL Rules on Transparency in Investor-State Arbitration under a Treaty to expedited arbitration, and proposes that, in case that such addition is included to the explanatory note of Provision 1, the following text be included in the previous paragraph:

2) The parties should take into consideration that in the elaboration of these Provisions the particularities of investment arbitration were not taken into account, and therefore their suitability for this type of proceedings was not subject to analysis in the Working Group. Notwithstanding, to the extent that the Parties to an international investment instrument expressly incorporate the option that the settlement of disputes between an investor of a Party and the other Party to such instrument may be subject to the Expedited Arbitration Provisions, such rules may only be applied to the extent that the State consents to their application in writing after the receipt of the request for arbitration.