

DOCUMENT “A/CN.9/WG.III/WP.248: ADDITIONAL PROVISIONS ON PROCEDURAL AND CROSS-CUTTING ISSUES”: COMMENTS FROM THE SWISS CONFEDERATION TO DRAFT PROVISION 21 ON JOINT INTERPRETATION AND DRAFT PROVISION 22 ON SUBMISSION BY A NON-DISPUTING TREATY PARTY

The Swiss Confederation has reviewed Working Paper A/CN.9/WG.III/WP.248 containing additional provisions on procedural and cross-cutting issues, and is pleased to submit the following comments.

DRAFT PROVISION 21: JOINT INTERPRETATION

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

1. 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.
3. 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.
4. Paragraph 4: Following Switzerland's view regarding paragraph 3, paragraph 4 should be deleted.
5. 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.

DRAFT PROVISION 22: SUBMISSION BY A NON-DISPUTING TREATY PARTY

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.

1. 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.
2. 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.