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Possible reform of investor-State dispute settlement (ISDS)

Draft provisions on procedural and cross-cutting issues

Note by the Secretariat

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I. Introduction

1. At its forty-ninth session in September 2024, fiftieth session in January 2025 and fifty-first session (second part) in April 2025, the Working Group considered the draft provisions on procedural and cross-cutting issues (referred to as "DPs") in A/CN.9/WG.III/WP.244 and annotations thereto in A/CN.9/WG.III/WP.245. At its forty-ninth session, the Working Group agreed that additional DPs on non-disputing Treaty Party submissions and joint interpretation would be developed (A/CN.9/1196/Add.1, para. 67), which were presented at the fiftieth session as DP 21 and 22 in A/CN.9/WG.III/WP.248.

2. At its forty-ninth session in September 2024, the Working Group considered DP 10, 12 (paragraphs 6 and 8), 13 and 20.[1] At its fiftieth session in January 2025, the Working Group considered DP 1–4.[2] At the fifty-first session in April 2025, the Working Group considered DP 14–19.[3]

3. At the first part of the fiftieth session in January 2025, delegations were invited to submit comments on DP 5–9, 11, 12 (paragraphs 1 to 5 and 7), 21 and 22.[4] At that session, it was agreed that the Chair, the Rapporteur and the secretariat would prepare a revised version of those provisions based on the comments received for the Working Group's consideration at the current session.[5] The Working Group agreed that DP 21 and 22 could also be subject to deliberations, time permitting.

4. At the second part of the fifty-first session, the Working Group agreed to reflect on the appropriate form of the draft provisions and the means of their implementation, including how they should interact with underlying investment agreements (see chapter III).[6]

5. Chapter II presents the revised draft provisions, prepared to allow adjustments once the Working Group determines their form. For ease of reference, the original numbering from documents A/CN.9/WG.III/WP.244 and A/CN.9/WG.III/WP.248 is retained. This Note is accompanied by document A/CN.9/WG.III/WP.254 containing the annotations.

6. To the extent possible, the DPs have been prepared to align with the UNCITRAL Arbitration Rules (UARs) as well as the 2022 ICSID Arbitration Rules (ICSID Rules).[7] Some DPs may need to be read in the context of the applicable international investment agreement (the "Agreement"). The DPs do not address who can submit a claim and the types of dispute resolution proceedings available, which are left to the Agreement. Terms such as "investor", "investment", "claim" and "dispute" should be understood in the context of the respective Agreement. The term "Contracting Party" refers to the parties to the Agreement, and "disputing parties" and "parties" refer to those involved in the arbitration or other dispute resolution proceedings. Similarly, the term "Tribunal" refers to the arbitral tribunal or other adjudicatory body provided for in the Agreement, and the term "proceeding" refers to dispute resolution proceedings before such bodies. These terms will need to be adjusted depending on the form of the DPs.

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[1] A/CN.9/1194, paras. 57–104.
[2] A/CN.9/1195, paras. 23–69.
[3] A/CN.9/1196/Add.1, paras. 67–109.
[4] See comments from delegations available at https://uncitral.un.org/en/working_groups/3/investor-state. See also the compilation of comments on A/CN.9/WG.III/WP.244 available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_244_-_1_april.pdf and the compilation of comments on A/CN.9/WG.III/WP.248 available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_of_comments_on_wp.248.pdf.
[5] A/CN.9/1195, para. 125 and A/CN.9/1196/Add.1, para. 108.
[6] A/CN.9/1196/Add.1, para. 109.
[7] UARs available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf. ICSID Rules available at https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf.

II. Draft provisions on procedural and cross-cutting issues

Draft Provision 1: Evidence[8]

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. At the request of a disputing party, the Tribunal may establish a procedure whereby each party can request another party to produce documents. In establishing the procedure, the Tribunal shall consult the disputing parties and consider the benefits and burdens of document production in the circumstances of the particular case.

4. In deciding a dispute arising out of a party's objection to the other party's request for production of documents, the Tribunal shall consider all relevant circumstances, including:

(a) The scope and timeliness of the request;

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

(c) The burden of production; and

(d) The basis of any objection.

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. Witnesses, including expert witnesses, who are presented by the disputing parties to testify to the Tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the proceeding or in any way related to a disputing party. Unless otherwise directed by the Tribunal, statements by witnesses, including expert witnesses, shall be presented in writing and signed by them.

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

8. The Tribunal shall, at the request of a disputing party or on its own initiative, exclude documents, exhibits or other evidence:

(a) Which were obtained contrary to the law of the State where they were collected;

(b) Which were falsified or fabricated or are found to be fraudulent; or

(c) The use of which as evidence is prohibited under the applicable domestic law or privileges.

9. The Tribunal may, at the request of a disputing party or on its own initiative, order a visit to any place connected with the dispute, if it deems the visit necessary, and may conduct inquiries there as appropriate. The order shall define the scope of the visit and the subject of any inquiry, the procedure to be followed, the applicable time limits and other relevant terms. The disputing parties shall have the right to participate in any visit or inquiry.

[8] A/CN.9/1195, paras. 23–43.

Draft Provision 2: Bifurcation[9]

1. A disputing party may request that an issue, including a plea that the Tribunal does not have jurisdiction or the assessment of damages, be addressed in a separate phase of the proceeding ("request for bifurcation"). A request for bifurcation does not prejudice any right that a disputing party may have to raise any other objections on the jurisdiction of the Tribunal pursuant to article 23 of the UNCITRAL Arbitration Rules [or the relevant provision in the applicable rules].

2. A 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 a request for bifurcation is made along with a plea that the Tribunal does not have jurisdiction, the proceeding on the merits shall be suspended until the Tribunal determines whether to bifurcate, unless the disputing parties agree otherwise.

4. 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.

5. The Tribunal shall decide on the request for bifurcation within 30 days after the last submission on the request. The Tribunal may decide to accept the request in full or in part, or to reject it. The Tribunal shall state the reasons upon which the decision is based, unless the disputing parties have agreed that no reasons are to be given. The Tribunal shall fix any period of time necessary for the further conduct of the proceeding.

6. 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, on its own initiative and after consulting the disputing parties, decide whether an issue should be addressed in a separate phase of the proceeding.

Draft Provision 3: Interim measures[10]

1. The Tribunal may, at the request of a disputing party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the Tribunal orders a disputing party, for example and without limitation, to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the process itself; or

(c) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The disputing party requesting an interim measure under paragraphs 2 (a) to (b) shall satisfy the Tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is

[9] A/CN.9/1195, paras. 44–55.
[10] A/CN.9/1195, paras. 56–62.

likely to result to the disputing party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the Tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2(c), the requirements in paragraphs 3(a) and (b) shall apply only to the extent the Tribunal considers appropriate.

5. The Tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any disputing party or, in exceptional circumstances and upon prior notice to the disputing parties, on the Tribunal's own initiative.

6. The Tribunal may require the disputing party requesting an interim measure to provide appropriate security in connection with the measure.

7. The Tribunal may require any disputing party to promptly disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The disputing party requesting an interim measure may be liable for any costs and damages caused by the measure to any disputing 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 proceeding.

9. A request for interim measures addressed by any disputing party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

10. The Tribunal shall not grant an interim measure:

(a) Which attaches or enjoins the application of the measure alleged to constitute a breach referred to in the claim; or

(b) [Which impedes a State's right to regulate in the public interest, including in order to protect life, health or environment.]

Draft Provision 4: Manifest lack of legal merit[11]

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 60 days thereafter. 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 to 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 for submissions on the objection.

4. The Tribunal shall decide on the objection within 60 days after 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. 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.

[11] A/CN.9/1195, paras. 63–69.

Draft Provision 5: Security for costs

1. The Tribunal may, at the request of a disputing party, order any party making a claim to provide security for costs.

2. The request shall include a statement of the relevant circumstances and supporting documents. The Tribunal shall fix the period of time for submissions on the request.

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 party's ability to comply with an adverse decision on costs;

(b) That party's willingness to comply with an adverse decision on costs;

(c) The effect that providing security for costs may have on that party's ability to pursue its claim;

(d) The conduct of the parties; and

(e) In relation to subparagraphs (a) to (d), the existence of third-party funding.

5. The Tribunal shall specify any relevant terms in an order to provide security for costs and fix the 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 suspend the proceeding with respect to that party's claim for a fixed period of time. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting the disputing parties, order the termination of the proceeding with respect to that claim.

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

8. At the request of a disputing party, the Tribunal may at any time modify or terminate its order to provide security for costs.

Draft Provision 6: Suspension of the proceeding

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

2. The Tribunal may, at the request of a disputing party or on its own initiative, order the suspension of the proceeding after consulting the disputing parties.

3. In its order for suspension of the proceeding, the Tribunal shall specify the period of suspension and any relevant terms of the suspension. Time frames set out in the applicable rules shall be extended by the period of time for which the proceeding is suspended.

4. The Tribunal shall extend the period of suspension prior to its expiry when requested jointly by the disputing parties. The Tribunal may, at the request of a disputing party or on its own initiative, extend the period of suspension prior to its expiry, after consulting the disputing parties.

Draft Provision 7: Termination of the proceeding

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 a 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 issue an order for the termination of the proceeding. If an objection is made within the fixed period of time, the proceeding shall continue.

4. Following the submission of a claim, if the disputing parties fail to take any steps in the proceeding for more than 150 consecutive days [or any such period as they may agree with the approval of the Tribunal], the Tribunal shall notify the disputing parties of the time elapsed since the last step taken in the proceeding. If the disputing parties fail to take a step within 30 days after that notice, they shall be deemed to have agreed to the termination and the Tribunal shall issue an order for the termination of the proceeding. If any of the disputing parties takes a step within 30 days after that notice, the proceeding shall continue. If the Tribunal has not yet been constituted, the appointing authority shall assume these responsibilities.

5. If, before the award is made, the disputing parties agree on a settlement of the dispute, the Tribunal shall either issue an order for the termination of the proceeding or, if requested by the disputing parties and accepted by the Tribunal, record the settlement in the form of an award on agreed terms. The Tribunal is not obliged to give reasons for such an award.

6. If, before the award is made, the continuation of the proceeding becomes unnecessary or impossible for any reason not mentioned in paragraph 5, the Tribunal shall inform the disputing parties of its intention to issue an order for the termination of the proceeding. The Tribunal shall have the power to issue such an order unless there are remaining matters that may need to be decided and the Tribunal considers it appropriate to do so.

Draft Provision 8: Period of time for making the award

1. Unless otherwise agreed by the disputing parties, the Tribunal shall make the award as soon as possible, and in any event no later than:

(a) 60 days after the last submission, if the award is made in accordance with Draft Provision 4, paragraph 5;

(b) 180 days after the last submission, if the award is made in accordance with Draft Provision 2 [and article 23 of the UNCITRAL Arbitration Rules or the relevant provision in the applicable rules] [along with a plea that the Tribunal does not have jurisdiction]; or

(c) 240 days after the last submission in all other cases.

2. A statement of costs and submission on the allocation of costs pursuant to Draft Provision 9, paragraph 4 shall not be considered a submission for the purposes of paragraph 1.

3. [In exceptional circumstances,] the Tribunal may, [after advising the disputing parties of the special circumstances justifying the delay and] after consulting the disputing parties, extend the period of time in paragraph 1 and indicate a period of time within which it shall make the award.

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;

(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, including the difference between the costs claimed by each party; and

(e) The amount of monetary damages claimed by a disputing party in proportion to the amount awarded by the Tribunal.

3. If the Tribunal makes an award pursuant to Draft Provision 4, paragraph 5, the costs of the proceeding shall be borne by the unsuccessful party, unless there are exceptional circumstances justifying an allocation of costs between the disputing parties.

4. The Tribunal shall request that each disputing party file a statement of its costs and a written submission on the allocation of costs before allocating the costs between the disputing parties.

5. Expenses incurred by a disputing party related to or arising from third-party funding shall not be included in the costs of the proceeding.

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

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

Draft Provision 10: Counterclaim[12]

1. Where a claim is submitted for resolution, the respondent may make a counterclaim:

(a) Arising directly out of the subject matter of the claim or in [close] connection with the factual or legal basis of the claim; and

(b) 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.

2. The submission of a claim by the claimant constitutes its consent to the submission of any counterclaim by the respondent in accordance with paragraph 1.

3. A counterclaim shall be made no later than in the statement of defence, unless the Tribunal considers that the delay in the submission of the counterclaim was justified under the circumstances.

4. The respondent may not make a counterclaim, which it had initiated in another adjudicatory dispute resolution proceeding. When making a counterclaim, the respondent shall provide a statement that it will not initiate or continue any adjudicatory dispute resolution proceeding regarding the same claim.

Draft Provision 11: Consolidation and coordination of arbitrations

1. Parties to two or more pending arbitrations may agree to consolidate or coordinate those arbitrations.

2. Consolidation joins all aspects of the arbitrations sought to be consolidated and results in one award. To be consolidated, the arbitrations shall involve the same respondent(s).

[12] A/CN.9/1194, paras. 71–81.

3. Coordination aligns specific procedural aspects of two or more pending arbitrations, but the arbitrations remain separate proceedings and result in separate awards.

4. The parties referred to in paragraph 1 shall jointly provide the proposed terms for the conduct of the consolidated or coordinated arbitrations to the tribunals constituted in the arbitration. They shall also consult with those tribunals to ensure that the proposed terms are capable of being implemented. Such tribunals shall make any order or decision required to implement the terms as agreed by the parties.

Draft Provision 11 bis: Consolidation

1. If two or more claims have been submitted separately to arbitration under this Agreement and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 to 10.

2. A disputing party that seeks a consolidation order shall make a request to the [Secretary-General of ICSID] [appointing authority] and to all the disputing parties sought to be covered by the order, and shall specify in the request:

(a) the names and addresses of all the disputing parties sought to be covered by the order;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

3. Unless the [[Secretary-General of ICSID] [appointing authority] finds, within a period of 30 days after the date of receiving the request under paragraph 2, that the request is manifestly unfounded, a Tribunal shall be established under this Draft Provision.

4. Unless all the disputing parties sought to be covered by the order agree otherwise, a Tribunal established under this Draft Provision shall comprise three arbitrators:

(a) one arbitrator appointed by agreement of the claimants;

(b) one arbitrator appointed by the respondent; and

(c) the presiding arbitrator appointed by the [Secretary-General of ICSID] [appointing authority], provided that the presiding arbitrator is not a national of the respondent or of a Party of any claimant.

5. If, within a period of 60 days after the date when the [Secretary-General of ICSID] [appointing authority] receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the [Secretary-General of ICSID] [appointing authority], on request of any disputing party sought to be covered by the order, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

6. If a Tribunal established under this Draft Provision is satisfied that two or more claims that have been submitted to arbitration under this Agreement have a question of law or fact in common, and arise out of the same events or circumstances, the Tribunal may, in the interest of fair and efficient resolution of the claims, and after consulting the disputing parties, by order:

(a) Assume jurisdiction over, and hear and determine together, all or part of the claims;

(b) Assume jurisdiction over, and hear and determine, one or more of the claims, the determination of which it believes would assist in the resolution of the others; or

(c) Instruct a tribunal previously established under this Agreement to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that:

(i) that tribunal, on request of a claimant that was not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and

(ii) that tribunal shall decide whether a prior hearing shall be repeated.

7. If a Tribunal has been established under this Draft Provision, a claimant that has submitted a claim to arbitration under this Agreement and that has not been named in a request made under paragraph 2 may make a written request to the Tribunal that it be included in any order made under paragraph 6. The request shall specify:

(a) the name and address of the claimant;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the [Secretary-General of ICSID] [appointing authority].

8. A Tribunal established under this Draft Provision shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by the [relevant part of the Agreement, including the Draft Provision itself].

9. A tribunal previously established under this Agreement shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established or instructed under this Draft Provision has assumed jurisdiction.

10. At the request of a disputing party, a Tribunal established under this Draft Provision, pending its decision under paragraph 6, may order that the proceedings of a tribunal previously established under this Agreement be suspended, unless that tribunal has already adjourned its proceedings.

Draft Provision 12: Third-party funding[13]

1. "Third-party funding" means the direct or indirect provision of any funds to a disputing party by a non-party for the pursuit or defence of a proceeding, 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 or that has entered into an arrangement to receive third-party funding (the "funded party") shall disclose to the Tribunal and other disputing party the following information:

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

(b) The name and address of the beneficial owner(s) of the third-party funder and any person(s) with decision-making authority for or on behalf of the third-party funder in relation to the proceeding;

(c) Whether the third-party funder agrees to cover any adverse decision on costs;

(d) 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; and

(e) The remuneration of the third-party funder dependent on the outcome of the proceeding.

[13] A/CN.9/1194, paras. 82–93; A/CN.9/1124, paras. 125–143.

3. The Tribunal may require the funded party to disclose:

(a) Further information regarding the funding agreement, including its terms;

(b) Any agreement between the legal representative of the funded party and the third-party funder;

(c) Other claims funded by the third-party funder or its related entities against the respondent; and

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

4. The funded party shall disclose the information listed in paragraph 2 when communicating the notice of arbitration or the response to the notice of arbitration, or, if the funding arrangement is entered into afterwards, immediately thereafter. The funded party shall disclose the information required by the Tribunal in accordance with paragraph 3 as promptly as possible and within the period of time specified by the Tribunal.

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

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

(a) Order security for costs in accordance with Draft Provision 5, paragraphs 5 to 8;

(b) Take this fact into account when allocating costs in accordance with Draft Provision 9; or

(c) Suspend or terminate the proceeding in accordance with Draft Provisions 6 or 7.

Draft Provision 12 bis: Regulation of third-party funding[14]

1. The Tribunal may limit third-party funding:

(a) When the expected return to the third-party funder exceeds [a reasonable amount] [** per cent of the amount to be awarded];

(b) When the number of cases funded by the third-party funder against the respondent exceeds [a reasonable number] [a number to be specified];

(c) When the third-party funder has direct or indirect control or influence over the management of the claim or the proceeding, including by taking decisions to terminate, settle or otherwise resolve the dispute or the selection of the legal representative of the funded party;

(d) When the third-party funder is able to terminate the funding arrangement without prior notice; or

(e) […].

2. When determining whether to limit third-party funding, the Tribunal shall assess all relevant circumstances of the case, including the reasons for the funded party to seek third-party funding and the impact its determination could have on the proceeding.

3. When the Tribunal determines to limit third-party funding, the funded party shall terminate the funding agreement and return any funding received.

4. If a disputing party receives or retains funding which the Tribunal has limited pursuant to paragraph 1 or does not comply with paragraph 3, the Tribunal may take the measures listed in Draft Provision 12, paragraph 6.

[14] A/CN.9/1194, paras. 82–93; A/CN.9/1124, paras. 125–143.

Draft Provision 13: Amicable settlement[15]

1. Disputing parties should seek to settle their dispute amicably through consultation, negotiation, mediation or any other mutually agreed means.

2. A party may invite the other party to engage in means of amicable settlement referred to in paragraph 1. The other party should make all reasonable efforts to accept such invitation.

3. Unless otherwise provided in the Agreement, no claim may be submitted to the Tribunal for resolution until 6 months have elapsed from the date of receipt of the invitation in paragraph 2.

4. When the disputing parties agree to engage in means of amicable settlement referred to in paragraph 1, the limitation period in Draft Provision 16, paragraph 1, shall be suspended for the duration of the amicable settlement.

Draft Provision 14: Local remedies[16]

1. Prior to submitting a claim to the Tribunal, a party may initiate a proceeding before a court or other competent authority of a Contracting Party (local adjudicatory dispute resolution proceeding), where and as available.

2. Where a party initiates a local adjudicatory dispute resolution proceeding, the limitation period in Draft Provision 16 shall be suspended:

(a) Until the party obtains a final decision of the court of last resort of that Contracting Party; or

(b) For 36 months, if no such final decision is reached within that period.

Draft Provision 15: Waiver of rights to initiate adjudicatory dispute resolution proceeding[17]

1. No claim may be submitted to the Tribunal unless the disputing party waives its right to initiate or continue any other adjudicatory dispute resolution proceeding with respect to the same subject matter, including the measure alleged to constitute a breach of the Agreement.

2. When submitting a claim to the Tribunal, the claimant shall provide a written statement that:

(a) It will not initiate any such adjudicatory dispute resolution proceeding; and

(b) It has withdrawn from or discontinued any such adjudicatory dispute resolution proceeding.

3. If the claim is submitted on behalf a locally established enterprise that the investor owns or controls directly or indirectly [in accordance with Draft Provision 18], the claimant shall also provide a written statement of that enterprise in accordance with paragraph 2.

[4. For greater certainty, paragraphs 1 and 2 also apply to:

(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 that the investor owns or controls directly or indirectly, all persons who, directly or indirectly, have an ownership interest in or are controlled by

[15] A/CN.9/1196/Add.1, para. 89; A/CN.9/1194, paras. 94–98; A/CN.9/1160, paras. 116–117.
[16] A/CN.9/1196/Add.1, paras. 69–77 and A/CN.9/1160, paras. 120–124.
[17] A/CN.9/1196/Add.1, paras. 78–85.

the locally established enterprise, and claim to have suffered the same loss or damage as the locally established enterprise.]

5. Paragraphs 1 to 4 shall not apply to a proceeding where the claimant seeks interim measures.

Draft Provision 16: Limitation period[18]

1. No claim may be submitted to the Tribunal if [period to be determined from 3 to 5 years] years have elapsed since the investor first acquired, or should have first acquired, knowledge of the alleged breach of the Agreement and knowledge that it has incurred loss or damage, which allegedly arose from the breach.

2. The period of time in paragraph 1 may be extended or suspended by agreement of the disputing parties.

3. The period of time in paragraph 1 shall be suspended:

(a) For the duration of the period of time during which the disputing parties engage in amicable settlement in accordance with Draft Provision 13;

(b) For the duration of the period of time in Draft Provision 14, paragraph 2, where a disputing party initiates a local adjudicatory dispute resolution proceeding.

Draft Provision 17: Denial of benefits[19]

1. A Contracting Party may deny the benefits of this Agreement to an investor of another Contracting Party that is an enterprise of that Contracting Party and to investments of that investor, if the enterprise:

(a) is owned or controlled by a person of a non-Contracting Party or of the denying Contracting Party; and

(b) has no substantial business activities in the territory of [any Contracting Party other than the denying Contracting Party] [that other Contracting Party].

2. A Contracting Party may deny the benefits of this Agreement to an investor of another Contracting Party that is an enterprise of that Contracting Party and to investments of that investors if:

(a) persons of a non-Contracting Party own or control the enterprise; and

(b) the denying Contracting Party adopts or maintains measures with respect to that non-Contracting Party, or a person of that non-Contracting Party, that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of the Agreement were accorded to the enterprise or to its investments.

[3. A Contracting Party may also deny the benefits of the Agreement to an investor of the other Contracting Party and to investments of that investor if:

(a) The investor receives third-party funding limited by the Tribunal in accordance with Draft Provision 12 bis;

(b) The investment was made in serious violation of the denying Contracting Party's laws and regulations; or

(c) The investment involved or was made through corruption, fraud, or deceitful conduct.]

4. A Contracting Party may deny the benefits in accordance with paragraphs 1 to 3 at any time, including after a claim has been submitted to the Tribunal. The denying Contracting Party shall act as promptly as possible upon becoming aware of any claim. The denial shall affect only the investor submitting the claim and its investments and shall apply retroactively to the time of the investment.

[18] A/CN.9/1196/Add.1, paras. 86–91.
[19] Ibid., paras. 92–95.

Draft Provision 18: Shareholder claims[20]

1. A shareholder may submit a claim on its own behalf only for direct loss or damage incurred as the result of a breach of the Agreement. For greater certainty, this means that the alleged loss or damage is separate and distinct from any alleged loss or damage to the enterprise in which the shareholder holds shares. Direct loss or damage does not include diminution in the value of the shareholding; any reduction in the distribution of dividends to the shareholder as a result of loss or damage incurred by the enterprise; or the loss of an opportunity to conduct business activities carried out or expected to be carried out by the enterprise, where such loss or damage arises from harm to the enterprise itself.

2. A shareholder may submit a claim against a Contracting Party on behalf of an enterprise of that Contracting Party, which the shareholder owns or controls directly or indirectly, only in the following circumstances:

(a) All assets of that enterprise are directly and wholly expropriated by that Contracting Party; or

(b) The 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.

3. When submitting a claim, the shareholder shall provide evidence of its alleged ownership or control of the enterprise.

[4. When submitting a claim under paragraph 2, the shareholder shall also provide a written statement that:

(a) The enterprise and itself will not initiate any other adjudicatory dispute resolution proceeding with respect to the same subject matter, including the measure alleged to constitute a breach of the Agreement; and

(b) The enterprise and itself have withdrawn from or discontinued any such adjudicatory dispute resolution proceeding.]

5. When the Tribunal makes an award in favour of the shareholder in a proceeding pursuant to paragraph 2, the Tribunal shall award monetary damages and any applicable interest or restitutions of property to the enterprise. The award shall provide that it is made without prejudice to any right that any person may have under the applicable law of the respondent Contracting Party with respect to the relief provided therein.

Draft Provision 19: Right to regulate[21]

Alternative A

When assessing the alleged breach by a Contracting Party of its obligation under the Agreement, the Tribunal shall give a high level of deference that international law accords to Contracting Parties with regard to the development of domestic policies as well as implementation of international commitments, the right to regulate and the right to adopt, maintain and enforce measures necessary to protect public health, public safety, human rights, the environment, [essential security interest, consumers, personal data and privacy, the climate and ecosystems, the integrity of financial and monetary systems, cultural diversity], provided that such measures are applied in a manner consistent with the provisions of this Agreement.

Alternative B

No claim may be submitted under this Agreement if the measure alleged to constitute a breach of the Agreement was adopted by the Contracting Party to protect public health, public safety, human rights, the environment, [essential security

[20] A/CN.9/1196/Add.1, paras. 96–99; A/CN.9/1044, paras. 41–56.
[21] A/CN.9/1196/Add.1, paras. 100–107.

interest, consumers, personal data and privacy, the climate and ecosystems, the integrity of financial and monetary systems, cultural diversity], provided that such measures were applied in a manner consistent with the provisions of this Agreement.

Draft Provision 20: Assessment of damages and compensation[22]

1. The Tribunal may award:

(a) Monetary damages; or

(b) Restitution of property, in which case the decision shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation or impending expropriation became known (whichever is earlier) in lieu of restitution.

2. The Tribunal may award pre-award interest and post-award interest at a reasonable rate.

3. In assessing or calculating monetary damages, the Tribunal shall only reflect loss or damage incurred by reason of, or arising out of, a breach of the Agreement. The Tribunal shall consider among others and as relevant:

(a) Contributory fault of the claimant, whether deliberate or negligent;

(b) Failure by the claimant to make all reasonable efforts to mitigate loss or damage;

(c) Repeal or modification of the measure alleged to constitute a breach of the Agreement; and

(d) Any other compensation received by, or awarded to, the claimant with regard to the same breach.

4. The Tribunal shall only award monetary damages that are established on the basis of satisfactory evidence and that are not inherently speculative. [The Tribunal may award monetary damages on the basis of expected future cash flows only insofar as they are based on a case-by-case, fact-based inquiry that takes into consideration, among other factors, whether the investment has been in operation in the territory of the respondent Contracting Party for a sufficient period of time to establish a performance record of profitability.][The Tribunal shall not award monetary damages exceeding the total expenditures (adjusted for inflation) incurred by the claimant in making its investment.]

5. The Tribunal shall not award punitive damages.

[6. 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 issues related to the assessment or calculation of damages, subject to any terms and conditions agreed with the disputing parties.]

[7. The Tribunal may require that experts appointed by the parties, if any, on issues related to the assessment or calculation of damages 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 calculations in case the experts disagree on facts and legal approaches; and

(c) Joint report by those experts.]

[22] A/CN.9/1194, paras. 99–104; A/CN.9/1160, paras. 99–115; A/CN.9/1124, para. 103; A/CN.9/1044, para. 78; A/CN.9/970, paras. 36–37; A/CN.9/935, paras. 36 and 97; A/CN.9/964, para. 111.

Draft Provision 21: Joint interpretation

1. The Parties to the Agreement may issue an interpretation jointly agreed by the Parties with regard to any provision of the Agreement ("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 give due consideration to that request.

3. A joint interpretation shall be binding on Tribunals that are seized of a dispute under the Agreement. Tribunals shall ensure that their decisions and awards are consistent with the joint interpretation. Tribunals shall not draw any inference from the absence of any joint interpretation.

4. The Parties to the Agreement may decide that a joint interpretation shall have binding effect from a specific date.

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

1. The Tribunal shall, subject to paragraph 5, allow, or, may, after consulting the disputing parties, invite, submissions on issues of treaty interpretation from a non-disputing Party to the Agreement ("non-disputing Treaty Party").

2. The Tribunal, after consulting the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Treaty Party. In determining whether to allow such submissions, the Tribunal shall take into consideration, among other factors it determines to be relevant:

(a) Whether the non-disputing Treaty Party has a significant interest in the proceeding;

(b) The extent to which the submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; and

(c) For greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.

3. The Tribunal shall provide the non-disputing Treaty Party with relevant documents filed in the proceeding, unless a disputing party objects.

4. The Tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.

5. The Tribunal shall ensure that a submission by a non-disputing Treaty Party does not disrupt or unduly burden the proceeding, or unfairly prejudice any disputing party.

6. The Tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Treaty Party.

III. Further issues for consideration

1. At its fifty-first session, the Working Group agreed to reflect on the appropriate form of the draft provisions and their means of implementation, including their interaction with underlying investment agreements.[23] Accordingly, the Working Group may wish to consider the following issues.

Form of the DPs

2. At the forty-ninth session, the Working Group agreed that the DPs in former sections B and C in document A/CN.9/WG.III/WP.244 could be considered

[23] A/CN.9/1196/Add.1, para. 109.

collectively as treaty provisions for use by parties.[24] With respect to DPs 1 to 9, 11 and 12 (paragraphs 1 to 5 and 7), it was noted that they could be drafted to supplement the UARs and that their final form would be discussed at a later stage.[25]

3. At its fiftieth session, the Working Group endorsed a phased approach: (i) as a first step, to review DPs 1 to 9 as rules to supplement the UARs; (ii) consider how to transform them into treaty provisions or make them applicable to existing investment agreements and to arbitrations under other arbitration rules through the multilateral instrument on ISDS reform (MIIR); and (iii) examine how they could become applicable to procedures in a standing mechanism. As a drafting point, it was agreed that if the DPs contained language identical to the UARs, they should be retained to the extent that the Working Group did not wish to deviate from that approach.[26]

4. At the same session, it was suggested that the Working Group should seek to prepare an entire set of procedural rules for ISDS, considering the potential impact that supplementary ISDS rules could have on the UARs, and the difficulties faced in drafting those rules at that session. It was said that piecemeal amendments or supplements to the UARs might have a negative impact on the overall application of the UARs and reduce their attractiveness as a whole, and that such an approach could risk the integrity and coherence of the UARs. It was generally felt that this could be considered further after the revised set of DPs were prepared.[27]

5. Given that DPs to supplement the UARs could not be presented to the Commission in 2025, the Working Group may wish to revisit their final form and consider their interaction with other applicable procedural frameworks, including the UARs. The current approach in this Note accommodates the DPs in different formats, some as UARs supplements, others as treaty provisions, leaving open the possibility to reconsider their form later. It should, however, be noted that the application of the DPs to supplement the UARs would be limited to arbitral proceedings under the UARs. They would not automatically apply to arbitrations under other institutional rules, which are used in approximately one-third of international investment treaties, many of which are supported by developing countries seeking to enhance regional dispute resolution mechanisms. This divergence may create risks of circumvention, as claimants could opt for procedures that do not reflect the intended reforms.

Binding nature and flexibility

6. The Working Group may wish to assess whether the DPs should be presented as a set of provisions or as individual provisions. Even when finalized as a set of provisions, flexibility could be provided to States to opt in or opt out of specific provisions (via reservations, declarations, or interpretive statements). While a unified approach could promote coherence and predictability, a modular structure might encourage broader participation by accommodating policy preferences.

7. The Working Group may also wish to consider whether to incorporate flexibility within each provision by offering options or alternative formulations. While this approach would provide for maximum flexibility, it could lead to further fragmentation and make it difficult to assess compatibility across different treaty regimes. If such an approach is taken, it may be preferable to adopt the DPs as model provisions instead.

Development of additional provisions

8. The Working Group may wish to consider suggestions to develop additional provisions, such as a provision on applicable law to help ensure consistent

[24] A/CN.9/1194, para. 69.
[25] Ibid., para. 68.
[26] A/CN.9/1195, para. 22.
[27] Ibid., para. 127.

interpretation of treaty obligations and clarify the tribunal's approach to domestic law.[28]

Interaction with other applicable instruments

9. The Working Group may wish to consider how the DPs would interact with other applicable instruments. The Working Group may wish to clarify their intended relationship with existing procedural frameworks, specifically whether they should: (i) override conflicting treaty commitments; (ii) apply by default where treaties are silent; or (iii) complement existing treaty provisions by filling gaps without creating conflict (see Article 2(2) of the Code of Conduct for Arbitrators in International Investment Dispute Resolution). The choice among these alternatives will have implications for legal certainty, the interpretative coherence of treaty regimes, as well as the drafting of the DPs.

Post-adoption flexibility

10. The Working Group may wish to consider to how the DPs, once adopted, could subsequently be amended or modified to reflect developments or changes in practice.

Party autonomy

11. The Working Group may wish to reflect on the degree to which disputing parties should be allowed to derogate from or modify the application of the DPs by mutual agreement. The Working Group may wish to determine which DPs, if any, should be mandatory to uphold procedural integrity or safeguard public interest. Additionally, mechanisms for derogation should be carefully considered to ensure legal certainty while preserving flexibility.

[28] See written comments submitted by the European Union and its Member States available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_eu_and_ms_wp.248.pdf.