United Nations A/CN.9/WG.III/WP.254

General Assembly

Distr.: Limited
30 June 2025

Original: English

United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
Fifty-second session
Vienna, 22–26 September 2025

Possible reform of investor-State dispute settlement (ISDS)

Draft provisions on procedural and cross-cutting issues

Note by the Secretariat

Contents

V.25-08556 (E)

I. Introduction

1. This Note contains annotations to the draft provisions on procedural and cross-cutting issues (referred to as "DPs") in A/CN.9/WG.III/WP.253, to assist the Working Group in understanding how they would operate and how they relate to each other.

II. Annotations to the draft provisions on procedural and cross-cutting issues

Draft Provision 1: Evidence

2. DP1 addresses the taking of evidence. Paragraph 1 replicates 27(1) UARs, while[1] paragraph 2 allows the Tribunal to require the disputing parties to produce evidence,[2] determine the evidence to be produced and set the necessary time frames.

3. Paragraph 3 introduces a document production phase, allowing the Tribunal to establish such a procedure upon a party's request and after consultation with the disputing parties. The Working Group may wish to note that the words "consult" or "consultation" are used throughout (DPs 1, 5, 6, 8, 11 bis, 22) in lieu of the phrase "after inviting the parties to express their view", which is used in the UNCITRAL Arbitration Rules (UARs)[3] to highlight the interactive engagement between Tribunal and parties. The Working Group may wish to also consider whether referring simply to "documents" in paragraphs 3 and 4 is appropriate given the use of "documents, exhibits, and other evidence" elsewhere.

4. Paragraph 3 requires the Tribunal to consider the advantages and disadvantages of document production. Paragraph 4 addresses a different point as it deals with disputes arising out of a party's objection to the other party's request for production of documents after the document production phase is established, outlining the factors the Tribunal should consider in solving such issues.[4]

5. Paragraph 5 addresses the consequence of late submissions.[5] Paragraph 6 covers witnesses, specifying who may testify[6] and reflecting that witness statements should, by default, be submitted in signed written form.[7] Paragraph 7 affirms the discretionary power of the Tribunal to determine the admissibility, relevance, materiality and weight of evidence.[8]

6. Paragraph 8 lists instances where the Tribunal would be required to exclude evidence.[9] While the UARs use the phrase "on its own initiative or upon application of a party", paragraph 8 and other DPs (6, 9 and 20) use "at the request of a disputing party or on its own initiative". Regarding subparagraph (c), the Working Group may wish to consider whether the reference should be limited to applicable "domestic" law.[10]

7. Paragraph 9 stipulates the authority of the Tribunal to order site visits and to conduct on-site inquiries.[11]

---

[1] UNCITRAL Arbitration Rules (UARs) 27(1).
[2] UARs 27(3).
[3] A/CN.9/1195, para. 55 and ICSID Arbitration Rules (ICSID Rules) 27(3).
[4] ICSID Rules 37.
[5] UARs 30(3).
[6] Ibid., 27(2), first sentence.
[7] A/CN.9/1195, para. 28. This is a departure from the second sentence of UARs 27(2) and is aligned with ICSID Rules 38(1) and the UNCITRAL Expedited Arbitration Rules (EARs) 15(2).
[8] UARs 27(4).
[9] A/CN.9/1195, paras. 35 and 40. See also IBA Rules on the Taking of Evidence in International Arbitration, Article 9(2) and (3).
[10] A/CN.9/1195, para. 38.
[11] ICSID Rules 40.

Draft Provision 2: Bifurcation

8. DP2 has been aligned with the ICSID Arbitration Rule (ICSID Rules) 42. The word "issue" is used for consistency with the UARs.

9. Paragraph 1 mentions examples of issues that can be bifurcated (jurisdictional pleas and damages assessment).[12] While a disputing party may request bifurcation, paragraph 7 allows the Tribunal to bifurcate on its own initiative.[13]

10. Paragraph 1 also affirms that a request for bifurcation does not limit the requesting party's ability to raise jurisdictional objections. While reference was made to UARs 23, the Working Group may wish to consider adding the square bracketed text or replacing the sentence with the following to make it more generic: "A request for bifurcation shall be without prejudice to the right of the requesting disputing party to raise a plea that the Tribunal does not have jurisdiction".[14]

11. Paragraph 2 requires a disputing party to request bifurcation as soon as possible[15] and the Tribunal to set a time period for parties to make submissions.[16]

12. Paragraph 3 provides that a request for bifurcation with a jurisdictional plea automatically suspends the proceeding on the merits until the Tribunal decides whether to bifurcate.[17] In contrast and in accordance with paragraph 6, a request for bifurcation without a jurisdictional plea does not suspend the proceeding until the Tribunal orders bifurcation.[18]

13. Paragraph 4 provides a non-exhaustive list of circumstances for the Tribunal to consider when deciding on bifurcation.[19] Paragraph 5 requires the Tribunal to decide within 30 days,[20] fully or partially accept or reject the request with reasons,[21] and fix any period of time necessary for the further conduct of the proceeding.[22]

Draft Provision 3: Interim measures

14. Interim measures aim to preserve the parties' rights pending the final decision of the Tribunal on the merits of the claim. DP3 is based on UARs 26.[23]

15. Paragraph 1 affirms that the Tribunal may grant interim measures upon the request of a disputing party, but not on its own initiative.[24]

16. Paragraph 2 reflects the decision by the Working Group to omit subparagraph (c) of UARs 26(2), which refers to measures to preserve assets out of which a subsequent award may be satisfied.[25] Consequential changes have been made to paragraphs 3 and 4.[26] Paragraphs 5 to 9 are identical to UARs 26(5) to (9).

17. Paragraph 10 limits the Tribunal's power in granting certain types of interim measures.[27] Subparagraph (b) was placed in square brackets for further consideration by the Working Group, including whether a Tribunal would be in a position to make the necessary assessment given the interim character of these measures. In conjunction, the Working Group may wish to consider the phrase "without limitation" in the chapeau of paragraph 2 and also in the context of DP19 (Right to regulate).

---

[12] ICSID Rules 42(1).
[13] ICSID Rules 42(6).
[14] A/CN.9/1195, para. 46.
[15] ICSID Rules 42(3)(a).
[16] ICSID Rules 42(3)(c).
[17] ICSID Rules 44(1)(c) and A/CN.9/1195, paras. 51–52.
[18] ICSID Rules 42(5).
[19] ICSID Rules 42(4).
[20] ICSID Rules 42(3)(d).
[21] UARs 34(3) and A/CN.9/1195, para. 49.
[22] ICSID Rules 42(3)(e).
[23] A/CN.9/1195, para. 56.
[24] UARs 26(1) and A/CN.9/1195, para. 62.
[25] UARs 26(2) and A/CN.9/1195, para. 58.
[26] UARs 26(3) and (4).
[27] A/CN.9/1195, paras. 60–61.

Draft Provision 4: Manifest lack of legal merit

18. DP4 has been aligned with ICSID Rules 41 also reflecting the adjustments made by the Working Group.[28] Prior reference to "early dismissal" in the heading was removed.

19. Paragraph 1 allows a disputing party to object that a claim is manifestly without legal merit[29] and paragraph 4 requires the Tribunal to decide on the objection.[30] However, the Tribunal cannot do so on its own initiative.[31]

20. Paragraphs 2 to 5 outline the procedure to be followed by the disputing parties as well as the Tribunal, indicating the time frames and noting that the objection may relate to both jurisdiction and merits.

21. Paragraph 6 clarifies that a disputing party may still argue later in the proceeding that the Tribunal lacks jurisdiction or that the claim lacks legal merit, even if it did not prevail in the procedure provided for in DP4.

22. The allocation of costs arising from the procedure in DP4 is addressed in DP9(3).

Draft Provision 5: Security for costs

23. DP5 has been aligned with ICSID Rules 53. Security for costs could protect against a party's inability or unwillingness to pay costs and discourage frivolous claims.

24. Paragraph 1 provides that an order for security for costs may be made only at the request of a disputing party, and not on the Tribunal's own initiative. The term "claim" in the DPs includes counterclaims, so a party making a counterclaim may also be ordered security for costs.

25. Paragraphs 2 and 3 address the procedure for the parties to request security for costs and for the Tribunal to decide on the request within a 30-day time frame.[32]

26. Paragraph 4 provides a non-exhaustive list of circumstances for the Tribunal to consider in determining whether to order security for costs.[33] These include the parties' ability and willingness to pay, as well as the potential impact of the order on the party concerned. Subparagraph (e) clarifies that the existence of third-party funding is not a stand-alone factor but should be considered in conjunction with circumstances listed in subparagraphs (a) to (d).[34]

27. Paragraph 5 requires the Tribunal to specify the terms of the security for costs and the time period for compliance.[35] Paragraph 6 addresses sanctions for non-compliance by a party ordered security for costs, which is the suspension of the proceeding with respect to that party's claim and possible termination thereof. Unlike ICSID Rules 53(6), which gives the Tribunal discretion to suspend ("may"), this provision mandates suspension ("shall"). On the other hand, while termination of the proceeding remains at the Tribunal's discretion, it must consider the views of the parties (for example, the other party may wish to continue the proceeding). Overall, this paragraph aims to prevent strategic delays related to security for costs.

28. Paragraph 7 requires the parties to disclose any material change in the circumstances that led the Tribunal to order security for costs. Paragraph 8 allows the

[28] Ibid., paras. 63–69.
[29] ICSID Rules 41(1).
[30] ICSID Rules 41(2)(e).
[31] A/CN.9/1195, paras. 64–65. It had also been pointed out that if evidence substantiating a claim was excluded in accordance with DP1(8), that should result in the claim being dismissed by the Tribunal although not necessarily based on DP4 (A/CN.9/1195, para. 64).
[32] ICSID Rules 53(2).
[33] ICSID Rules 53(3) and (4).
[34] ICSID Rules 53(4).
[35] ICSID Rules 53(5).

Tribunal to modify or terminate the order, but only upon request by a disputing party (see para. 24 above).

Draft Provision 6: Suspension of the proceeding

29. One way to ensure procedural efficiency is to suspend the proceeding under certain circumstances. DP6 has been aligned with ICSID Rules 54.[36]

30. Paragraph 1 requires the Tribunal to suspend the proceeding when jointly requested by the parties (for example, if they wish to engage in mediation[37]).[38] Paragraph 2 grants the Tribunal discretion to suspend the proceeding at the request of a disputing party or on its own initiative, but only after consulting the parties (see also DP11 bis (10)).[39]

31. Paragraph 3 requires the Tribunal, when ordering suspension, to specify its duration and any other relevant terms.[40] During the suspension period, applicable procedural time frames are stalled and extended accordingly. Paragraph 4 addresses the potential extension of the suspension.

Draft Provision 7: Termination of the proceeding

32. Another way to ensure procedural efficiency is to provide for the termination of the proceeding. DP7 has been drafted considering UARs 30(1), 36 and ICSID Rules 55 to 57, using the term "termination" as used in the UARs.

33. Paragraph 1 requires the Tribunal to order the termination of the proceeding when parties have so requested jointly.[41] Paragraphs 2 and 3 address situations where one of the parties requests termination of the proceeding, which may be objected to by other parties.[42] The absence of any objection within the fixed period of time is deemed to constitute consent by the other parties to the termination.

34. Paragraph 4 introduces a procedure to terminate the proceeding due to the failure of the parties to act. It is based largely on ICSID Rules 57 and supplements UARs 30(1)(a), which address where the claimant has failed to communicate its statement of claim. The generic phrase "submission of a claim" is used in paragraph 4, as terminology may differ depending on the applicable rules. The Working Group may wish to consider whether to retain the square-bracketed text in the first sentence. It may also wish to consider whether the DPs should in general contemplate a situation where the Tribunal is yet to be constituted, as reflected in the last sentence of paragraph 4 (for example, DP 10, 12, 15, 17 and 18).

35. Paragraphs 5 and 6 respectively replicate UARs 36(1) and 36(2), with the former addressing termination following a settlement and the latter where continuation of the proceeding becomes unnecessary or impossible due to other reasons. The Working Group may wish to consider whether UARs 36(3) should also be replicated in the DP.

Draft Provision 8: Period of time for making the award

36. DP8 has been aligned with ICSID Rules 58 and imposes detailed time frames within which the Tribunal should make the award.

---

[36] While the UARs do not contain an explicit provision on suspension, tribunals have procedural discretion under UARs 17(1) to suspend the proceeding. UARs 43(4) allows for suspension but its application in limited to circumstances when the deposit of costs is not paid in whole or in part.

[37] UNCITRAL Model Provisions on Mediation for International Investment Disputes, Provision 3(2).

[38] ICSID Rules 54(1).

[39] ICSID Rules 54(2) and (3).

[40] ICSID Rules 54(4).

[41] ICSID Rules 55(1).

[42] ICSID Rules 56.

37. Paragraph 1 establishes three distinct time frames for the Tribunal to render its award, depending on the circumstances.[43] The time frames commence with the last submission by the parties, which assumes that the Tribunal would typically have been constituted prior to that last submission. The Working Group may wish to choose the formulation to be used in subparagraph (b) (see para. 10 above).[44] The time frames in paragraph 1 may be varied by the parties as indicated by the phrase "unless otherwise agreed by the disputing parties". Paragraph 2 clarifies the scope of the term "last submission".[45]

38. Paragraph 3 addresses the possible extension of the time frame by the Tribunal and combines elements found in ICSID Rules 12(2) and the UNCITRAL Expedited Arbitration Rules (EARs) 16(2). The Working Group may wish to consider the appropriate formulation, noting that paragraph 3 would allow the Tribunal to extend the time frame to preserve the enforceability of its award.

Draft Provision 9: Allocation of costs

39. DP9 is based on UARs 42, supplemented by ICSID Rules 52. The Working Group may wish to confirm that "costs" would be defined in accordance with the applicable rules, as is the case in UARs 40(2), with paragraph 5 being the sole exception (see para. 45 below).

40. Paragraph 1 provides the default rule that the unsuccessful disputing party should bear the costs of the proceeding in whole or in part.[46]

41. Paragraph 2 provides a non-exhaustive list of factors to consider when allocating costs between the parties.[47] The word "however" indicates that allocation between the parties is to be done on an exceptional basis. The phrase "any parts thereof" allows the Tribunal to consider decisions taken in different phases of the proceeding. For example, the Tribunal may assess which claims were upheld or dismissed during the jurisdictional, merits, and quantum stages of the proceedings.

42. With regard to the list in paragraph 2, subparagraph (d) clarifies that the difference in costs as claimed by the parties can be considered when assessing the "reasonableness" of such costs. Subparagraph (e) is included to address exaggerated claims. Non-compliance by the parties with regard to the disclosure requirements about third-party funding is not mentioned in paragraph 2, as all issues relating to third-party funding are currently captured in DP12 (see para. 66 below).[48]

43. Paragraph 3 sets out the rule for cost allocation in cases where the Tribunal makes an award in accordance with DP4(5).[49] In such cases, the costs shall be borne by the unsuccessful party, unless there are "exceptional circumstances", which is a higher threshold than paragraph 2.

44. Paragraph 4 requires the Tribunal to request each party to submit a statement of its costs and a written submission on the allocation of costs before allocating costs.[50]

45. Paragraph 5 provides that expenses related to or arising from third-party funding should not be subject to allocation and be recoverable (see also DP 12 and 12 bis).[51]

46. Paragraph 6 allows the Tribunal to make an interim decision on costs before the final award, either upon a request of a disputing party or on its own initiative.[52]

[43] ICSID Rules 58(1).
[44] ICSID Rules 58(1)(b). See also ICSID Rule 44(3)(c) that relates to preliminary objections with a request for bifurcation.
[45] ICSID Rules 58(2).
[46] UARs 42(1), first sentence. There is no such presumption under article 61(2) of the ICSID Convention.
[47] UARs 42(1), second sentence and ICSID Rules 52(1).
[48] DP12(9)(b).
[49] ICSID Rules 52(2) and A/CN.9/1195, para. 69.
[50] ICSID Rules 51.
[51] A/CN.9/1004, para. 93.
[52] ICSID Rules 52(3).

Paragraph 7 requires that decisions on costs are reasoned and eventually form part of the final award.[53]

Draft Provision 10: Counterclaim

47. DP10 reflects the different views expressed at the forty-ninth session and the text presented for further consideration following the deliberations.[54]

48. Paragraph 1 provides the conditions to be met for a respondent to submit a counterclaim. The Working Group may wish to confirm that the conditions in subparagraphs (a) and (b) should be cumulative ("and").[55] Subparagraph (b) does not list nor specify the obligations of investors but instead indicates the instruments where they may be found. The Working Group may wish to consider: (i) whether to include the word "close" in subparagraph (a);[56] (ii) whether to include "domestic law" as a basis for counterclaims in subparagraph (b);[57] and (iii) whether to include a catch-all phrase "any other instrument binding on the claimant" also in subparagraph (b).[58]

49. To avoid Tribunals dismissing counterclaims due to lack of consent by the claimant, paragraph 2 ensures that the submission of a claim by the claimant constitutes its consent to the respondent's right to submit a counterclaim. The Working Group may wish to consider whether the consent should be "deemed" by replacing the word "constitutes" with "is deemed to constitute".[59]

50. Paragraph 3 addresses the time frame for making counterclaims to ensure that counterclaims do not result in delays of proceeding. However, it may be extended beyond the statement of defence, if the Tribunal considers the delay justified.[60]

51. Paragraph 4 requires the respondent to waive its right to initiate any adjudicatory dispute resolution proceeding regarding the same claim.[61] It ensures that, once a counterclaim is submitted, the respondent cannot pursue the same claim in another forum, thereby avoiding parallel proceedings and potential conflicting decisions (particularly if the basis of the counterclaim is non-compliance with domestic law). The phrase "adjudicatory dispute resolution proceeding" in the DP is meant to be broad and refers to any proceeding before a court, administrative tribunal or other competent authority as well as an arbitral tribunal (see DP 14 and 15).[62] It also includes both international and local proceedings (see para. 78 below) but does not include means of amicable settlement nor annulment/set aside/appellate proceedings. The Working Group may wish to consider whether the paragraph needs to be retained in light of DP15 (see para. 81 below).

Draft Provision 11: Consolidation and coordination of arbitral proceedings

52. With regard to consolidation, two options (DPs 11 and 11 bis*)* have been prepared for consideration. DP11 relies exclusively on the parties' agreement to consolidate or coordinate, whereas DP11 bis also allows a party to seek consolidation. The Working Group may wish to consider whether to develop both options (possibly in conjunction with other DPs that address concerns about multiple proceedings, for example, DPs 6, 10, 15 and 18), as well as the principles of *res judicata* and *lis pendens*.[63]

---

[53] ICSID Rules 52(4).
[54] A/CN.9/1194, paras. 71–81.
[55] Ibid., para. 72.
[56] Ibid., para. 73.
[57] Ibid., paras. 74–76.
[58] Ibid., para. 77.
[59] Ibid., para. 78.
[60] UARs 21(3).
[61] A/CN.9/1194, paras. 76 and 81.
[62] A/CN.9/1196/Add.1, paras. 76 and 79.
[63] *Res judicata* ensures that matters which have been finally adjudicated cannot be re-litigated between the same parties, thereby safeguarding the finality of decisions. *Lis pendens* addresses the situation where the same dispute is pending before multiple forums, offering a basis for procedural safeguards to avoid parallel proceedings and the risk of conflicting outcomes.

53. DP11 adapts ICSID Rules 46 to apply to arbitrations not administered by an institution.[64] Unlike other DPs, reference is expressly made to "arbitrations" and "arbitral tribunal", as it is difficult to apply the provision to other dispute resolution proceedings provided for in the Agreement.

54. Paragraph 1 notes that the consent of the parties is the basis of consolidation or coordination. Paragraphs 2 and 3 distinguish between consolidation and coordination, further noting that only arbitrations concerning the same respondent can be consolidated.[65] With regard to paragraph 2, it may be necessary to clarify whether "all" aspects of the arbitrations need to be consolidated or only those aspects specifically "sought to be consolidated" by the parties. In the latter case, aspects not consolidated would continue to be handled by the respective arbitral tribunals.

55. Paragraph 4 assumes that there is no institution to facilitate consolidation or coordination. It requires the parties to jointly propose the terms for the conduct of the consolidated or coordinated arbitrations to the pre-established arbitral tribunals and to consult with them. For example, this may involve determining which tribunal would be tasked with the consolidated proceeding (or how it should be composed) as well as specifying any applicable rules and a procedural schedule. The terms should also address the termination of any proceeding subject to consolidation. The pre-established tribunals are then required to issue orders to implement the agreed terms.

Draft Provision 11 bis: Consolidation

56. DP11 bis provides a mechanism to consolidate multiple claims submitted to arbitration under the Agreement. It has been drafted as a treaty provision based on Article 9.28 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and Article 14.D.12 of the Agreement between the United States of America, the United Mexican States, and Canada (USMCA).

57. Paragraph 1 sets out the conditions for consolidation, which may be based on the agreement of all disputing parties or in accordance with the following paragraphs. The Working Group may wish to confirm that the requirement in DP11(2) – that the arbitrations involve the same respondent(s) – need not be mentioned here (see para. 54 above), considering that the claims arise from the same Agreement.

58. Paragraphs 2 through 5 establish the procedure for seeking consolidation. Both the CPTPP and USMCA foresee the involvement of the Secretary-General of ICSID. The Working Group may wish to consider taking a similar approach or instead refer to the appointing authority designated in the Agreement or agreed to by the disputing parties. However, if the appointing authorities in the arbitrations differ, there may be complications in the application of these paragraphs.

59. Paragraph 6 outlines the powers of Tribunals constituted under the DP. Paragraph 7 allows additional claimants to request inclusion in the consolidated proceedings. Paragraphs 8 to 10 address the procedural framework for the Tribunal (in accordance with the UARs) and its relationship with arbitral tribunals established prior to the consolidation.

Draft Provision 12: Third-party funding

60. With regard to third-party funding, two options (DPs 12 and 12 bis*)* have been prepared based on the deliberations.[66] DP12 adopts a permissive approach to third-party funding, requiring parties to disclose the existence of third-party funding and relevant information, whereas DP12 bis aims to regulate certain types of third-party

[64] A/CN.9/WG.III/WP.245, paras. 41–45.
[65] ICSID Rules 46(2).
[66] A/CN.9/1194, para. 92. See also A/CN.9/WG.III/WP.245, paras. 46–49 and A/CN.9/WG.III/WP.219.

funding. The Working Group may wish to consider whether and how to develop both options.

61. DP12 outlines the obligations of parties to disclose information about third-party funding as well as the consequences of non-compliance. It has been aligned with ICSID Rules 14.

62. Paragraph 1 provides a broad definition of third-party funding to ensure comprehensive disclosure. The phrase “any funds” is intended to capture “financial” support thus excluding in-kind contributions such as pro bono legal services. The word “any” aims to capture arrangements for both full and partial financial support. The word “non-party” is used to capture a wide range of entities that might provide funding, such as the law firm representing a party.

63. Paragraph 2 sets out the primary disclosure obligations of the funded party, defined broadly to include not only a party that has received funding but also one that has entered into an arrangement to receive funding. The funded party shall disclose the relevant information to the Tribunal and other disputing party, while disclosure beyond that, including to the public, is at the Tribunal’s discretion. Regarding the information to be disclosed, paragraph 2 lists those that must be disclosed, whereas paragraph 3 lists those that may be required by the Tribunal. For example, the terms of the funding agreement need to be disclosed only to the extent relevant to the information required in paragraph 2 and when so requested by the Tribunal. Paragraph 3 provides a non-exhaustive list of information that the Tribunal may require to be disclosed. In doing so, the Tribunal should consider the need for and the availability of such information (for example, the funded party may not know of a relationship between the third-party funder or its ultimate beneficiary and any of the arbitrators).

64. Paragraph 4 clarifies that only the funded party has the duty to disclose (so not the third-party funder or the legal representative of a funded party). It also specifies the timing of disclosure – when submitting the “notice of arbitration” or the “response to the notice”, or immediately after the funding arrangement if that occurs later. The timing and the terms (which are based on the UARs) may need to be adapted depending on the applicable rules.

65. Paragraph 5 ensures that any new information or changes to previously disclosed information are promptly communicated to the Tribunal and the other disputing party.

66. Paragraph 6 outlines the consequences of non-compliance with the disclosure obligations, an aspect not addressed in ICSID Rules 14. The Tribunal may order security for costs, consider the non-compliance (rather than the mere existence of third-party funding) when allocating costs (see paras. 42 and 45 above), or suspend or terminate the proceeding. The Working Group may wish to consider whether suspension or termination of the proceeding should be limited to exceptional circumstances.

Draft Provision 12 bis: Regulation of third-party funding

67. DP12 bis has been prepared for States wishing to regulate third-party funding beyond mere disclosure.[67] It shall be read together with DP12, as it would not be possible to regulate third party funding without disclosure thereof.

68. Paragraph 1 gives the discretion to the Tribunal to regulate third-party funding by limiting certain types of funding or funding under specific circumstances. It lists examples of third-party funding identified by the Working Group as being particularly problematic and abusive.[68] It should, however, not result in undermining access to justice or eliminating meritorious claims.[69] A situation where the funded party

[67] A/CN.9/1194, para. 86.
[68] Ibid., para. 88.
[69] Ibid., para. 92.

concealed information or provided false information is not listed, as this is covered in DP12, paragraph 6.[70]

69. Regarding the list in paragraph 1, the Working Group may wish to consider appropriate formulations, including whether there should be a catch-all clause allowing the Tribunal to limit, for example, third-party funding it deems abusive. Alternatively, it could remain an open-ended list for States to include the circumstances they wish to regulate. The Tribunal would be responsible for administering the determination and may need to obtain additional information in order to make the assessment, which should, however, not result in undue delays and costs. In that context, the Working Group may wish to consider whether the entire process should be outlined (for example, indicating who can request the limitation and whether the funded party or the third-party funder would be given the opportunity to express their views).

70. Paragraph 3 provides the consequence when the Tribunal decides to limit third-party funding, requiring the funded party to terminate the funding agreement and return any funding received to the third-party funder. Paragraph 4 sets out additional measures that can be taken by the Tribunal (in accordance with DP12(6)), including when a disputing party fails to terminate the agreement or to return the funding in accordance with paragraph 3. The Working Group may wish to consider the appropriateness of these sanctions.

Draft Provision 13: Amicable settlement

71. DP13 reproduces the text suggested at the forty-ninth session for further consideration.[71]

72. Paragraph 1 aims to promote the use of amicable settlement and provides a non-exhaustive list of possible means. Paragraph 2 highlights the voluntary nature, emphasising that such means are encouraged but not imposed on the parties.

73. Paragraph 3 provides for a six-month "cooling-off" period, which commences upon receipt of the invitation to engage in amicable settlement. The Working Group may wish to consider whether to introduce such a period, during which parties would be prevented from raising claims. The Working Group may also wish to consider whether paragraph 3 might prevent a party from raising a claim in a local adjudicatory dispute resolution proceeding (see DP14 and para. 78 below).

74. The phrase "unless otherwise provided in the Agreement" was included to address potential conflicts with provisions in the underlying Agreement. However, the phrase may need to be clarified, particularly regarding whether it refers to the absence of a cooling-off period or a period other than 6 months. The Working Group may also wish to consider whether the disputing parties should be allowed to waive or jointly vary the period.

75. The Working Group may wish to confirm that the conduct of the parties in engaging in amicable settlement should be considered by the Tribunal when allocating costs in accordance with DP9(2)(b).

76. Paragraph 4 provides that, when parties agree to pursue amicable settlement, the limitation period under DP16 is suspended for the duration of those proceedings (i.e., the limitation period is extended for a period of time until the amicable settlement proceeding is terminated).[72] The Working Group may wish to consider this in conjunction with DP16(3) (see para. 88 below).

[70] Ibid., para. 89.
[71] A/CN.9/1194, para. 98.
[72] A/CN.9/1196/Add.1, para. 89.

Draft Provision 14: Local remedies

77. DP14 reflects the understanding of the Working Group that recourse to local remedies should be encouraged but not made mandatory.[73]

78. Paragraph 1 encourages an investor to, where available, initiate a proceeding before a court or competent authority of the respondent State (referred to as "local adjudicatory dispute resolution proceeding").[74]

79. To further incentivize the use of local remedies, paragraph 2 introduces a mechanism to suspend the limitation period in DP16 during the period where local remedies are pursued (see para. 88 below).[75] The Working Group may wish to consider other options, for example, providing for a longer limitation period or providing that the limitation period commences only after a final decision is obtained through local remedies.[76] However, both could defeat the purpose of introducing the limitation period, as the period might be unduly prolonged.

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

80. DP15 aims to avoid parallel proceedings by limiting a party from seeking relief in multiple forums for the same matter or the same breach. The Working Group may wish to ensure that a balance is struck between the need to limit parallel proceedings (judicial efficiency) and the right of parties to initiate or continue adjudicatory dispute resolution proceedings.[77] The Working Group may wish to consider how DP15 would operate when the Agreement contains a similar provision.[78]

81. Paragraph 1 states the general principle that no claim may be submitted by a party with regard to the same subject matter, unless it waives its rights to initiate any other adjudicatory dispute resolution proceedings (see para. 51 above).[79] The term "claim" in the DPs includes "counterclaims" (see para. 24 above) and therefore the phrase "with respect to the same subject matter" is used.[80] The Working Group may wish to consider whether the paragraph should be narrowed to requiring an "investor/claimant" to waive its right to initiate any proceedings with respect to the same measure alleged to constitute a breach of the Agreement.[81] In that case, there would be merit in retaining DP10(4) as applying to respondents making a counterclaim (see para. 51 above).

82. Paragraph 2 spells out the contents of the statement to be provided to the Tribunal ("waiver") and paragraph 3 clarifies that when a claim is submitted on behalf of a locally established enterprise, that enterprise's waiver would also need to be provided. The Working Group may wish to consider whether paragraph 3 should be limited to instances of DP18 or should be broader. Failure to submit the required waiver would be grounds for the Tribunal to dismiss the case.[82]

---

[73] A/CN.9/1160, para. 124. States wishing to impose the exhaustion of local remedies may require an investor to exhaust all remedies available within the domestic legal system of that State before submitting a claim to an arbitral tribunal (see also ICSID Convention, article 26). Those States may replace the word "may" in paragraph 1 with "shall" to impose such requirement. The Working Group may wish to consider how DP14, in its current form, would operate in States that impose the exhaustion of local remedies (A/CN.9/1196/Add.1, paras. 71 and 72).

[74] A/CN.9/1196/Add.1, para. 70. The DPs use the phrase "adjudicatory dispute resolution proceeding" to refer to proceedings before any court, administrative tribunal or other competent authority (see para. 51 above). It should be understood broadly to also include ombudsperson and local arbitration centres but not amicable settlement (A/CN.9/1196/Add.1, para. 76).

[75] A/CN.9/1196/Add.1, paras. 76–77 (third option).

[76] Ibid.

[77] Ibid., para. 78.

[78] Ibid., para. 84. See also footnote 85.

[79] Ibid., para. 79. A waiver would not prevent a disputing party from seeking appeal of an award or decision nor the enforcement thereof at a later stage. The Working Group may wish to consider whether such a clarification would need to be included in 5.

[80] Ibid., para. 83.

[81] Ibid., para. 84.

[82] Ibid., para. 82.

83. The Working Group may wish to consider whether the scope of DP15 should be broadened to apply to parent companies, shareholders and subsidiaries of the investor or of the locally established enterprise, which claim to have suffered the same loss or damage. Paragraph 4 provides a possible formulation.[83] However, this may be too burdensome and effectively limit the right of an investor to submit claims, as the investor might not be in a position to obtain a waiver from all such entities.

84. Paragraph 5 clarifies that the waiver does not apply to a proceeding regarding interim measures.

Draft Provision 16: Limitation period

85. DP16 establishes a time frame within which an investor needs to submit a claim to the Tribunal. It aims to enhance legal certainty by protecting States from indefinite exposure to claims. The Working Group may wish to consider this provision in conjunction with DPs 13 to 15.

86. As paragraph 1 restricts the claimant from raising a claim to the Tribunal, it does not apply to amicable settlement means nor local adjudicatory proceedings. The limitation period commences when the investor becomes aware, or should have become aware, not only of the alleged breach but also of the alleged loss or damage resulting from that breach.[84] The Working Group may wish to consider the appropriate limitation period, noting that a too short of a period may prompt investors to file precautionary claims.[85] It may also wish to consider how DP16 would interact with provisions in the Agreement that provide a different limitation period or commencement thereof.

87. Paragraph 2 allows the disputing parties to agree to extend or suspend the limitation period.[86] This is to facilitate efforts of amicable settlement and pursuit of local remedies. The Working Group may wish to consider the extent to which disputing parties should be given the flexibility to vary the limitation period.

88. Paragraph 3 lists the circumstances where the limitation period could be suspended (during amicable settlement or local adjudicatory dispute resolution proceeding). It does not, however, include instances where the investor was not able to submit the claim due to actions by the host State or force majeure.[87] The Working Group may wish to consider whether DP13(4) and DP14(2) may be better placed in DP16.

Draft Provision 17: Denial of benefits

89. DP17 allows a Contracting Party to deny the protections offered in the Agreement to investors or investments that it did not intend to protect. Noting that first-generation IIAs do not contain such a provision, support was expressed for developing DP17 as an option for States.[88] The Working Group may wish to consider how DP17 would interact with existing provisions in Agreement.

90. Paragraph 1 has been revised to also address “round-tripping”, where a domestic investor routes an investment through a foreign entity to gain the benefits of the Agreement and brings the investment back into their home country. It also addresses investments that are restructured for the primary purpose of bringing a claim under the Agreement and focuses on “shell companies” and “treaty shopping”. While the second square-bracketed text reflects a suggestion made at the previous session, the Working Group may wish to confirm that the first square-bracketed text provides more clarity.

[83] Ibid., paras. 80–82 and 84. See also Article 11.18(4) of the U.S.-Korea Free Trade Agreement.
[84] A/CN.9/1196/Add.1, paras. 86 and 91.
[85] Ibid., para. 88.
[86] Ibid., paras. 89 and 91.
[87] Ibid., para. 90.
[88] Ibid., para. 92.

91. Paragraph 2 addresses situations where a Contracting Party has adopted or maintain measures against a non-Contracting Party or persons thereof that prohibit transactions with an investor or that would be violated if the investor was granted benefits under the Agreement. The Working Group may wish to clarify that such "measures" are limited to those that are in conformity with and justifiable under the Agreement.[89]

92. Paragraph 3 addresses other instances where the Contracting Party may deny the benefits of the Agreement. Considering the divergence in views,[90] the Working Group may wish to consider whether it should be retained and if so, which subparagraphs. Regarding subparagraph (a), the Working Group may wish to consider whether DP12 bis sufficiently provides the sanctions necessary to regulate third-party funding. Regarding subparagraphs (b) and (c), the Working Group may wish to consider whether unlawful investments or investments resulting from, or involving, corruption and other illegal actions, would be protected under the Agreement to begin with (thus, no benefit to be denied). It may also wish to consider how the violation of laws and corruption could be established and whether the Tribunal would have the authority to do so.

93. Paragraph 4 addresses the process for denying benefits, which States may do so at any time. It confirms that denial of benefits can be invoked without any specific formalities, shall apply only to the dispute at hand, and has retroactive effect to the date of the investment. The Working Group may wish to consider whether the phrase "act as promptly as possible" would include an obligation for the denying Contracting Party to inform the Tribunal.

Draft Provision 18: Shareholder claims[91]

94. A wide range of views were expressed on DP18, including whether it should be further developed.[92] The Working Group may wish to consider this question based on the revised text.

95. Paragraph 1 limits the type of claim that a shareholder can bring to "direct" loss or damage claims. The second and third sentences have been drafted as a "for greater certainty" clause to clarify the meaning of direct loss or damage.

96. Paragraph 2 permits shareholder derivative actions on behalf of an enterprise (reflective loss claims) in limited circumstances. Whether a shareholder "owns or controls" the enterprise would need to be assessed both at the time of the alleged breach and at the time the claim is raised. The Working Group may wish to confirm that paragraph 2 would not preclude minority shareholders from raising such a claim, as it does not require the shareholder to hold a majority or specified portion of the shares.[93] The phrase "own or control" is also used in DPs 12, 15 and 17.

97. The phrase "akin to a denial of justice" refers to manifestly unjust or arbitrary judicial proceedings, undue delay in the administration of justice, failure to provide access to local adjudicatory dispute resolution proceedings, and other serious procedural or substantive irregularities in such proceedings.

98. Paragraphs 3 and 4 impose certain requirements on the shareholder when submitting a claim. Paragraph 4 may not be necessary if DP15 is retained in its current form.

99. Paragraph 5 provides that the result of any reflective loss claim should be awarded to the enterprise, not the shareholder. The Working Group may wish to consider providing further guidance to the Tribunal in making an award, for example,

[89] Ibid., para. 93.
[90] Ibid., para. 94.
[91] A/CN.9/WG.III/WP.245, paras. 66–68. See also A/CN.9/WG.III/WP.170 and comments by OECD, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/oecd_secretariat_dp.10.pdf.
[92] A/CN.9/1196/Add.1, paras. 96–97.
[93] Ibid., para. 98.

to consider the governance structure of the enterprise, the interests of other shareholders and stakeholders, and the applicable domestic law governing the rights and obligations of the enterprise and its shareholders.

Draft Provision 19: Right to regulate[94]

100. The Working Group agreed that the States' right to regulate is a principle of sovereignty under customary international law and noted that States have affirmed or reaffirmed that principle in recent bilateral and regional investment agreements, though in different forms.[95] However, a wide range of views were expressed on DP19, including whether it should be further developed.[96] The Working Group may wish to consider this question based on the revised text.

101. DP19 outlines two alternative approaches for consideration by the Working Group.[97] Alternative A requires Tribunals to give high deference to the right of States to regulate. Alternative B carves out certain measures of States from the scope of claims, similar to other draft provisions imposing limitations on claims. Both impose the condition that the DP shall only apply to the extent that the measures adopted by States are applied in a manner consistent with the objective and provisions of the Agreement. The Working Group may wish to consider the list of policy matters included in both alternatives, which reflect the suggestions made so far.

Draft Provision 20: Assessment of damages and compensation[98]

102. Diverging views were expressed about the previous formulations of DP20 as contained in A/CN.9/WG.III/WP.231 (as DP23) and A/CN.9/WG.III/WP.244. DP20 takes such divergence into account and reflects the points raised during the forty-ninth session.[99]

103. Paragraph 1 provides that the Tribunal may award monetary damages or restitution of property as possible remedies. The word "or" should be understood to mean that the two remedies cannot be awarded in combination as they address different situations. Subparagraph (b) provides that in the case of expropriation where the restitution of property is ordered, the Tribunal shall indicate the compensation to be paid in lieu of restitution, which shall represent the fair market value of the property at the time of the expropriation. The respondent State would have the option to choose between restitution and monetary damages. The reference to "any applicable interest" in the previous drafts has been deleted as paragraph 2 provides that such interests can be awarded.

104. Paragraph 2 allows the Tribunal to award interests, which may be pre-award as well as post-award, possibly at different rates. Such interests should be set at a reasonable rate. The Working Group may wish to consider: (i) whether the Tribunal should be limited to awarding "simple" interests only, particularly for the pre-award damages; and (ii) whether the Tribunal should be required to consult the disputing parties in determining the interest rate or its determination would be subject to the agreement of the disputing parties.

105. Paragraph 3 addresses causality and reflects the understanding that damages should be limited to those "directly" caused by the breach and not by the entirety of the measure which led to the breach. Furthermore, a State's action or failure to act which may be inconsistent with the expectations of the claimant shall not constitute a basis for damages as such.

[94] A/CN.9/WG.III/WP.245, paras. 66–68
[95] A/CN.9/1196/Add.1, para. 100.
[96] Ibid., paras. 101–102.
[97] Ibid., para. 107.
[98] A/CN.9/WG.III/WP.245, paras. 72–78; A/CN.9/WG.III/WP.231; and A/CN.9/WG.III/WP.232, paras. 72–76.
[99] A/CN.9/1194, para. 101–103.

106. Paragraph 3 provides a non-exhaustive list ("among others") of circumstances for the Tribunal to consider when assessing damages. The Working Group may wish to consider whether the claimant's non-compliance with obligations under domestic laws would be considered "contributory fault" under subparagraph (a), as such non-compliance is a basis for counterclaims under DP10(1)(b). The Working Group may wish to consider whether the following factors should be included in the list: the economic situation of the respondent State, project risk and country risk-assessments at the time the investment was made, corruption in the making of the investment (see DP17(3)(c)), whether the investment was fully realized, and the potential crippling effect of the award on the respondent State and its people.

107. Paragraph 4 provides that monetary damages shall be awarded on the basis of satisfactory evidence and shall not be speculative. The Working Group may wish to consider whether: (i) paragraph 4 should prohibit the use of certain calculation methods, such as discounted cash flow, or limit them to instances where there was a proven track of profitability; (ii) the Tribunal should be prohibited from awarding monetary damages exceeding the total expenditures (adjusted for inflation) incurred by the claimant in making its investment (sunk costs). These issues are also addressed in the draft guidelines in A/CN.9/WG.III/WP.255.

108. Paragraph 5 prohibits punitive damages. The Working Group may wish to consider whether the paragraph should also prohibit the Tribunal from awarding damages in excess of the amount claimed.

109. Paragraphs 6 and 7 address the involvement of experts appointed in the assessment of damages. The Working Group may wish to note that the use of experts is generally provided for in the applicable procedural rules.[100]

110. DP9(2)(e) allows the Tribunal to consider the amount of damages sought by the claimant in proportion to the amount awarded when allocating costs.

Draft Provision 21: Joint interpretation[101]

111. DP21 clarifies the meaning of joint interpretations, the procedures for issuing them, and the means to give them a binding effect. The Working Group may wish to consider the relationship of DP21 with existing provisions in the Agreement.

112. Paragraph 1 affirms that Parties to the Agreement, or a body established under the Agreement for such purpose, have the authority to issue a joint interpretation at any time and in any form. The Working Group may wish to consider whether to include a mechanism where non-Parties to the Agreement may also participate in the process and whether the joint interpretation may relate not only to a provision of the Agreement but also the preamble or its annexes.

113. Paragraph 2 encourages the Parties to the Agreement to cooperate in the issuance of the joint interpretation, particularly when one of the Parties makes such a request. To respect the sovereign right of the Parties, paragraph 2 does not provide for any implication where the other Party does not participate in the joint interpretation or where no agreement is reached. It also excludes the possibility of a Tribunal seeking a joint interpretation, either at the request of a disputing party or on its own initiative, due to the complexity that may arise.

114. Paragraph 3 addresses the binding effect of joint interpretations on Tribunals. As such, Tribunals should ensure that their decisions and awards are consistent with the joint interpretation. This represents a departure from the default approach under the Vienna Convention, where Tribunals retain discretion to weigh interpretive materials. The paragraph also clarifies that Tribunals should not draw negative inferences from the absence of a joint interpretation.

[100] A/CN.9/1160, para. 110.
[101] A/CN.9/WG.III/WP.248, paras. 5–13.

115. The Working Group may wish to confirm that a joint interpretation should bind Tribunals interpreting the relevant provision in the agreement ("seized of a dispute under the Agreement"), regardless of when the Tribunal was established. This question may require further analysis in the context of an appellate mechanism, including whether a joint interpretation issued after the first-tier award should have a binding effect on the appellate tribunal.

116. To tailor for instances where the Parties wish to set the temporal scope of the joint interpretation, paragraph 4 allows them to specify the date from which a joint interpretation would take effect. This aims to provide flexibility and legal certainty, particularly where the joint interpretation is issued after a dispute has arisen.

Draft Provision 22: Submission by a non-disputing Treaty Party[102]

117. DP22 has been aligned closely with article 5 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Transparency Rules) while reflecting ICSID Rules 68(3). It provides a framework for submissions by a Party to the Agreement that is not a party to the dispute (referred to as the "non-disputing Treaty Party").

118. Paragraph 1 provides that the Tribunal shall permit submissions by non-disputing Treaty Parties and may further invite them to make such submissions on the interpretation of the Agreement at issue in the dispute.[103] When allowing such submissions, the Tribunal should ensure that the submission does not disrupt or unduly burden the proceeding or unfairly prejudice any disputing party.[104] This is captured in the phrase "subject to paragraph 5". Paragraph 1 further mandates the Tribunal to consult the disputing parties before inviting non-disputing Treaty Parties to make such submissions. The Working Group may wish to confirm that the scope and effect of such submissions and their form and timing need not be detailed in DP22.

119. The submissions referred to in paragraph 2 are different in scope from those in paragraph 1 as they deal with submissions on "further matters within the scope of the dispute".[105] Paragraph 2 adapts the factors referred to in article 4(3) of the Transparency Rules, offering a non-exhaustive list for the Tribunal to consider when allowing such submissions. The Working Group may wish to confirm that the non-disputing Treaty Party need not disclose any links it has with the claimant in this process.

120. Paragraph 3 ensures that the non-disputing Treaty Party would have sufficient context to decide whether to make a submission.[106]

121. Paragraph 4 clarifies that the Tribunal should not make any assumption or draw conclusions based on the absence of or failure by non-disputing Treaty Parties to provide submissions.[107] As per paragraph 6, the disputing parties must be given the opportunity to make observations on any such submissions.[108]

---

[102] Ibid., paras. 14–20.
[103] Transparency Rules 5(1).
[104] Transparency Rules 5(4). For example, the Tribunal may impose conditions on the submission, including with respect to the format, length, scope or publication of the submission, and the period to make the submission (ICSID Rules 68(2), second sentence).
[105] Transparency Rules 5(2).
[106] ICSID Rules 68(3).
[107] Transparency Rules 5(3).
[108] Transparency Rules 5(5) and ICSID Rules 68(4).