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Settlement Reform)  
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## **Possible reform of Investor-State dispute settlement (ISDS)**

### **Submission from the Governments of Chile, Israel, Japan, Mexico and Peru**

#### **Note by the Secretariat**

This note reproduces a submission received on 30 September 2019 from the Governments of Chile, Israel, Japan, Mexico and Peru in preparation for the thirty-eighth session of the Working Group. The submission is reproduced as an annex to this Note in the form in which it was received.

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## Annex

### Proposal for the Development of A “Suite” Approach to ISDS Reform

At its thirty-seventh Session, Working Group III agreed on a three-step process for carrying out the third stage of its mandate – the development of possible reform options for investor-State dispute settlement (ISDS).<sup>1</sup> For the first step, delegations were invited to submit additional reform proposals to the UNCITRAL Secretariat for consideration at the Working Group’s thirty-seventh session. The following proposal elaborates on the “suite” approach outlined in document [A/CN.9/WG.III/WP.163](#), which emphasized the importance of providing a solution that allowed for “maximum flexibility to develop a menu of relevant solutions, which may vary in form, and that Member States can choose to adopt, based on their specific needs and interests, including those of developing countries.”<sup>2</sup> As further noted in document [A/CN.9/WG.III/WP.163](#), flexibility of approaches is necessary given the different needs of different countries:

*“Despite the fact that the Working Group has identified a broad list of concerns, this does not mean that all States necessarily face all of these concerns. Therefore, maximum flexibility to develop a menu of relevant solutions should be a premise in order to allow States to choose and adopt the best solution based on their specific needs and interests. This approach would also allow States to internalize, adopt and ensure the effectiveness at its national level for any kind of solution through different ways rather than through a rigid approach that could hinder or impede the States to adopt the solutions into its national level.”<sup>3</sup>*

A key feature of the “suite” approach is that reform tools can be pursued independently from one another without regard to how they are ultimately configured,<sup>4</sup> to optimally address the concerns the Working Group has identified. As Annex I demonstrates, one country may have ultimately different approaches to investor-State dispute settlement but may share a common understanding of the types of procedural provisions that can help address some of the concerns identified to date by the Working Group.<sup>5</sup>

Some of these provisions have already been incorporated in international agreements and applied and interpreted by arbitral tribunals. For purposes of illustration, it is useful to consider specific examples of how a few of these provisions have been used in recent disputes:

- **Dismissal of Frivolous Claims:** Provisions permitting early dismissal of frivolous claims have given tribunals clear authority to dismiss claims that lack legal merit at a preliminary stage in arbitral proceedings, thus avoiding unnecessary cost and duration.<sup>6</sup>

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<sup>1</sup> See Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its 37<sup>th</sup> session, A/CN.9/970.

<sup>2</sup> *Submission of Chile, Israel, and Japan*, document A/CN.9/WG.III/WP.163, at p. 4.

<sup>3</sup> *Id.* at pp. 3-4, n.6. The importance of maintaining a flexible approach has been underscored by several proposals presented to date before the Working Group, including proposals by Colombia (*see* A/CN.9/WG.III/WP.173, at para. 5), Costa Rica, (*see* A/CN.9/WG.III/WP.164, at para. 5, and A/CN.9/WG.III/WP.178, at para. 8), and Korea (*see* A/CN.9/WG.III/WP.179, at p. 2).

<sup>4</sup> Thailand’s submission, for example, refers to a “building blocks” approach, according to which any reform solution “should be adaptable enough to combine with other work in the future.” *See* submission of Thailand, A/CN.9/WG.III/WP.162, at para. 10.

<sup>5</sup> Note that many other modern agreements share these types of provisions as well; the chart included in the Annex is meant only to illustrate that there is commonality among different approaches but is not meant to suggest that these agreements are the only ones that can serve as a basis for assessing commonality.

<sup>6</sup> Tribunals have interpreted expedited review provisions as “clearly intended to avoid the time and cost of a trial and not to replicate it.” *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent’s Preliminary Objections

- **Use of Non-Disputing Party Submissions on Treaty Interpretation:** Non-disputing Party submissions by States under their IIAs provide a practical mechanism to seek to ensure that the interpretation of their IIAs by ISDS tribunals reflects correctly the intention of the party when negotiating the IIA. Some tribunals have affirmed the role such submissions may play in forming “subsequent practice”<sup>7</sup> and others have expressly relied on non-disputing Party submissions in interpreting IIA provisions.<sup>8</sup>
- **Limitations on standing for reflective loss:** For IIAs that allow for submission of a dispute on behalf of the investment company, provisions that limit claims by shareholders for direct losses only or for indirect losses to subsidiaries that they own or control have successfully limited opportunities for multiple inconsistent decisions and unnecessary and duplicative proceedings, such as promoting the correctness of decisions with respect to the allocation of damages.<sup>9</sup>
- **Limitations on Treaty Shopping:** Availability of “denial of benefits” provisions or minimum business activity thresholds can be powerful tools to prevent treaty shopping by investors that have only “shell” companies as their basis for an investment under the relevant treaty.<sup>10</sup>
- **Waiver provisions:** Provisions requiring claimants to waive their right to continue or initiate claims in other forums have limited parallel claims under a variety of existing IIAs, helping to ensure that claims are brought in the proper forum, while also avoiding

Under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, para. 112; see also *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, para. 97 (holding that Article 10.20.4 of the US-Panama TPA “is designed to enable a tribunal to dismiss at an early stage claims that are demonstrably doomed to failure, thereby saving time and costs.”). By contrast, under earlier agreements without expedited review provisions tribunals lacked authority to rule on preliminary objections that, for example, the claims should be dismissed for “lack of legal merit.” See, e.g., *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Partial Award, 7 August 2002, paras. 109, 126. The tribunal ultimately dismissed all of claimant’s claims for lack of jurisdiction, after three years of pleading on jurisdiction and merits. See *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part VI, 3 August 2005. See also, e.g., ICSID Arbitration Rule 41(5); Mexico-EU Art. 2.7 (Section: Resolution of Investment Disputes), CPTPP Art. 9.29(4).

<sup>7</sup> See, e.g., *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, paras. 158, 160 (noting the positions of the three NAFTA parties on that agreement’s statute of limitations and acknowledging that in accordance with Article 31(3)(b) of the Vienna Convention on the Law of Treaties, such subsequent practice is entitled to “considerable weight”); *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 379 (“the consistent practice of the NAFTA Parties in their submissions before Chapter Eleven tribunals in making a clear distinction between the application of Article 1116 and Article 1117 can be taken into account in interpreting the provisions of NAFTA. Thus, the NAFTA Parties’ subsequent practice militates in favour of adopting the Respondent’s position on this issue[.]”).

<sup>8</sup> See, e.g., *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, para. 302 (citing to the second U.S. non-disputing Party submission in interpreting the meaning of “substantial business activities” in the denial of benefits provision in the investment chapter of the U.S.-Panama TPA); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent’s Objections to Jurisdiction, 1 June 2012, para. 4.85 (citing to and agreeing with the rationale provided in non-disputing Party submissions by the United States and Costa Rica with respect to the timing of invocation of the denial of benefits provision in the CAFTA-DR’s investment chapter). See also, e.g., CPTPP Art. 9.25(2).

<sup>9</sup> See, e.g., *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019 (limiting investor’s damages to direct losses and precluding indirect losses to its subsidiary).

<sup>10</sup> See, e.g., *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, para. 4.92 (dismissing claimant’s CAFTA-DR claims for lack of jurisdiction based on El Salvador’s denial of benefits under Chapter 10 of that agreement). See also, e.g., CPTPP Art. 9.15(1)-(2); Israel-Japan BIT, Article 1(e)(ii) (definition of “enterprise of a Contracting Party”).

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inconsistent decisions about a State's compliance with its substantive obligations, unnecessary and duplicative costs and duration of proceedings.<sup>11</sup>

Other solutions common to modern treaty practice, such as the development of ethical codes for arbitrators,<sup>12</sup> are relatively recent but nonetheless can help shape work on arbitrator conduct and qualifications.<sup>13</sup> There are many other examples of provisions that have already been developed and incorporated into the existing treaty practice of many States, and such innovations can guide the further work of the Working Group on numerous other areas of concern.

Existing provisions in modern treaties, however, are not the only inspiration for future drafting of possible solutions. The drafting could also take into account the work of relevant international organizations, such as the International Centre for the Settlement of Investment Disputes (ICSID), the Organization for Economic Co-operation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD).<sup>14</sup> As an example, the latest Proposal for Amendment of the ICSID Rules and Regulations, incorporates provisions addressing some of the questions raised within Working Group III.<sup>15</sup>

Once developed by the Working Group as possible reform options, such provisions, and any other reform tools developed, could be adopted by the Commission for possible use by States in multiple ways. As an example, States could incorporate one or more of the proposed provisions into future agreements that they negotiate, taking into account their own political and policy concerns and interests. Another alternative would be for these modernized provisions to be incorporated, either in their entirety or in the combination preferred by States, into pre-existing, so-called "first generation" agreements that lack some or all of these types of procedural innovations. Incorporation could occur, among other approaches, through a treaty amendment process similar to that used in the UN Convention on Transparency in Treaty-based Investor-State Arbitration ("the Mauritius Convention")<sup>16</sup>

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<sup>11</sup> Tribunals have interpreted breaches of the waiver requirement to avoid prejudice to the State, such as proceedings instituted to gain negotiating advantages or to burden the State with multiple proceedings, in parallel or sequentially. *See, e.g., Renco Group v. Peru*, UNCITRAL, Partial Award, 15 July 2016, para. 87. *See also Waste Management, Inc. v. United Mexican States*, ICSID Case ARB(AF)/98/2, Award, 2 June 2000, paras. 27, 31 (dismissing NAFTA claim based on deficient, conditional waiver of the claimant, observing that the parallel domestic and NAFTA proceedings could not "continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages. This is precisely what NAFTA Article 1121 seeks to avoid."). Some tribunals have also rejected overly strict interpretations of the formal waiver requirement. *See, e.g., International Thunderbird Gaming v. Mexico*, Award, UNCITRAL *Ad hoc*, 26 January 2006, paras. 117-118. *See also, e.g., Israel - Japan BIT* (2017) Art. 24.8(b).

<sup>12</sup> *See, e.g., CPTPP* Art. 9.22(6).

<sup>13</sup> *See A/CN.9/WG.III/WP.163*, Annex II (citing code of conduct as an example of a common concern ripe for reform solutions).

<sup>14</sup> We note that the need to effectively incorporate into the discussions of the Working Group the analysis of other organizations and the outcome of the ICSID Rules Amendment Process had already been highlighted by other proposals (*see* Thailand submission in A/CN.9/WG.III/WP.162, at para. 9, and Costa Rica's submission in A/CN.9/WG.III/WP.164 at paras. 11-12). We further support Costa Rica's proposal of continuing an opening and inclusive process that would take into account the input from civil society, the Academic Forum and the Practitioner's Group (*see* Costa Rica's submission in A/CN.9/WG.III/WP.164 at para. 15).

<sup>15</sup> Such topics that present overlap include the need for disclosure of third-party funders to deal with arbitrators' potential conflicts of interest, the importance of providing tribunals the appropriate authority to grant security for costs, incorporating provisions for the submission of Non-Disputing Treaty Parties and setting forth particular time frames for the issuance of decisions and awards, as well as a proposal for new mediation rules for investor-state arbitration, and enhance rules for conciliation, among others. Additionally, ICSID and UNICTRAL are already collaborating on developing rules for a code of conduct that could be applied in both forums.

<sup>16</sup> Pursuant to this process, States that ratify the Mauritius Convention thereby apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to arbitrations thereafter arising under whichever of their own prior treaties they may designate for such amendment when they adopt the Convention. Additional provisions could be adopted in similar fashion.

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or through the mechanism used in the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, the so-called “Multilateral Instrument” or MLI, of the OECD for addressing tax avoidance issues.<sup>17</sup>

Because many of the concerns identified by the Working Group have arisen out of first-generation agreements that lack these subsequent innovations, an approach that would allow for the incorporation of these provisions into existing treaties that lack them could be a valuable tool to address some of the concerns identified to date. In implementing this proposal, States need not adopt a “one-size-fits all” approach, and can also draw upon existing and already interpreted provisions, without requiring that all reforms be accepted before any such reform can be implemented. Thus, each State would retain the flexibility to tailor the solution to its policy needs and preferences, in the context of its varied pre-existing agreements and bilateral relationships.

A list of topics that have been identified as potential options to address particular concerns is described below. The list is organized by the broad categories of concerns identified previously by the Working Group and reflected in the useful UNCITRAL Secretariat Note (see A/CN.9/WG.III/WP.149). In some cases, a particular topic might address more than one concern. For completeness, such topics are listed in multiple places as appropriate.

To be clear, the list described below is not intended to be exhaustive, nor to contain any and all relevant modern provisions that could assist in reforming the current ISDS system. It would be open to the Working Group to decide on a list of topics during the course of its discussions on this proposal; the following list merely serves as a starting point for identifying potential areas of commonality where work could begin on specific reform solutions. We note that some of the tools included in this list have also been incorporated in other proposals, thus showing that there are an important number of commonalities that should be explored as a way forward in the reform process.<sup>18</sup>

The undersigned delegations wish to emphasize that the submission of this proposal is without prejudice to assessing, considering and adopting proposals submitted by other Member States within the framework of the Working Group, or solutions that result from the discussions throughout the reform process.

### ***Description of Key Types of Procedural Provisions in Existing IIAs***

#### **Concerns pertaining to arbitrators and decision-makers**

- *Code of conduct or incorporation of existing ethics rules:* These types of provisions are designed to set out rules for determining the independence and impartiality of arbitrators.

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<sup>17</sup> See Submission from the Government of Colombia, A/CN.9/WG.III/WP.173, where Colombia emphasized the importance of “implementing with flexibility and progressivity the measures that address the concerns already identified by the Working Group.” According to OECD data, the MLI already covers more than 85 jurisdictions. Moreover, as underscored in Proposal 173, unlike the Mauritius Convention, the MLI does not need to be opted-into integrally, but rather allows for progressivity and can be done provision by provision. Colombia’s proposal also made express reference to Working Paper 163 (see paras. 19 to 23), thus confirming the compatibility of the suite approach and the MLI proposal. Notwithstanding the fact that the MLI can be a useful tool, consideration should be given to the inherent differences between IIAs and Tax Treaties. See also, Ecuador’s submission in A/CN.9/WG.III/WP.175, at paras. 27-32, proposing the adoption of a multilateral treaty, and referring to both the Mauritius Convention and the MLI approach as potential avenues for procedural reform.

<sup>18</sup> See, e.g., Annex I to Costa Rica’s submission in A/CN.9/WG.III/WP.164 and Annex II to Costa Rica’s submission in A/CN.9/WG.III/WP.178 (including an “indicative list of solutions by category of concerns” and referring to many of the provisions listed below, including joint interpretations, non-disputing Treaty party-submissions, mechanisms to address concurrent proceedings and limit claims within the same corporate structure, code of conduct for arbitrators and improvement and control of the challenge system); Turkey’s submission in A/CN.9/WG.III/WP.174, at pp. 2-3; Morocco’s submission in A/CN.9/WG.III/WP.161, at para. 9.

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Some include qualification criteria for decision-makers, while others establish rules for double-hatting.

- *Rules limiting/prohibiting double-hatting*: These types of provisions vary, but are designed to set out the circumstances in which an arbitrator may not serve as counsel in another arbitration or when a counsel may not serve as an arbitrator. Some provisions set out time periods following service as an arbitrator or counsel during which the person may not serve in the other capacity; some prohibit any arbitrator or counsel from serving in the other capacity concurrently.
- *Rules setting forth a common standard for disqualification/challenge of arbitrators*: These types of provisions may assist in ensuring that arbitrators be required to step aside when their independence or impartiality is appropriately questioned by one of the disputing parties.
- *Special expertise requirements for arbitrators for certain claims*: These types of provisions are designed to require that anyone appointed to be an arbitrator in a particular dispute have the specialized expertise related to the subject matter of the dispute. These provisions tend to be applied to disputes involving highly regulated industries, such as financial services, but are not limited to such industries.
- *Designation of independent appointing authority (i.e., to appoint tribunal chair)*: These types of provisions are designed to facilitate appointment of arbitrators when there is no agreement between the parties or one disputing party is unable to make a selection or prefers an impartial authority to make appointments for a particular dispute. While these may be less relevant for institutional arbitration, these types of provisions may be of great use when investors initiate an *ad hoc* arbitration.
- *Disclosure of third-party funding*: These types of provisions are designed to require a disputing party to identify a third party-funder to avoid unidentified potential conflicts of interest, and to identify possible issues related to the availability of security for costs.<sup>19</sup>

#### Concerns pertaining to cost and duration

- *Encouragement of mediation, conciliation and other mechanisms to prevent investment arbitration*: These types of provisions are designed to encourage disputing parties to seek a mutually beneficial resolution to their dispute before pursuing arbitration, thus avoiding the costs and time associated with arbitration.<sup>20</sup>
- *Dismissal of frivolous claims*: These types of provisions are designed to deter unmeritorious claims and avoid the cost and duration associated with a full oral and written briefing of a claim that may be unfounded in law or fact at an early stage in the arbitral proceeding.
- *Expedited consideration of preliminary objections*: These types of provisions are designed to clarify that a decision-maker, upon request of a disputing party, has the authority to isolate and resolve a claim – especially one that may dispose of the whole dispute – at an early stage of the proceedings, avoiding costs associated with a merits phase.

<sup>19</sup> See Note by the Secretariat, A/CN.9/WG.III/WP.172, Third-Party Funding – Possible Solutions, para. 27 (noting that the disclosure requirements may cover the existence of third-party funding and the identity of the funder, including the identity of the ultimate funder).

<sup>20</sup> Other States, such as Brazil have emphasized the importance of dispute prevention, as a potential tool to attract and retain investments, but also to resolve investors' grievances swiftly. See Submission from the Government of Brazil, A/CN.9/WG.III/WP.171. While not necessarily adhering to a Cooperation and Facilitation Agreement Model as the one outlined by Brazil, we encourage the Working Group to give proper thought to the types of mechanisms that could effectively and efficiently avoid the proliferation of international investment arbitrations. In this regard, Thailand's principle of "prevention rather than litigation", Korea's focus on "prevention of disputes rather than 'post-dispute regulation'", South Africa's mentions of Dispute Prevention Policies and Alternative Dispute Resolution, and China's observations regarding the use of alternative dispute resolution measures and pre-arbitration consultation procedures in order to avoid having disputes escalate to arbitration proceedings, should be considered. See Thailand's Working Paper 162, at para. 11; Korea's submission in A/CN.9/WG.III/WP.179, at p. 5; South Africa's submission in A/CN.9/WG.III/WP.176, at p. 7, paras. 104 and 109, and China's submission in A/CN.9/WG.III/WP.177, at p.5.

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- *Establishing limitation periods for bringing claims pursuant to treaty*: These types of provisions are designed to prevent claimants from bringing so-called “stale” claims and preventing parties from having to carry out extensive review of older documents and to locate individuals no longer involved in a matter, thus lowering costs associated with bringing and defending a claim.
  - *Waiver of claims by parent/subsidiary under a different treaty once claims are submitted*: These types of provisions are designed to lower costs by avoiding multiple proceedings to resolve the same dispute by both a claimant-investor and its controlling entity or subsidiary.
  - *Voluntary consolidation of similar claims brought under same treaty by different parties*: These types of provisions are designed to avoid duplication of costs when similar claims are pursued by different claimants against the same host State.
  - *Limited standing to claim for reflective loss*: These types of provisions are designed to ensure that for IIAs that allow for submission of a dispute on behalf of the investment company, only investors that own or control a locally incorporated investment company may claim for the losses of the company, that is, preventing shareholders, especially minority shareholders, from claiming for indirect losses. These provisions aim to avoid double recovery and a multiplicity of claims arising out of the same events.
  - *Guidelines for production of documents in order to avoid so-called “fishing expeditions”*: These types of provisions are designed to place reasonable limits, including page limits, on the extent of document production that a disputing party can seek, thus reducing costs associated with document requests and avoiding the delays that unnecessary document production may cause (e.g., *IBA Rules on the Taking of Evidence in International Arbitration*).
  - *Requirement to hold arbitration in a New York Convention state unless parties agree otherwise*: By ensuring that an award is enforceable pursuant to a high international standard, these provisions help avoid the uncertainty, costs and delays associated with enforcing awards in cases not brought under the ICSID Convention, when the choice of seat is much broader.
  - *Requirement for tribunals and parties to act in a cost-effective and expeditious manner*: These types of provisions are designed to encourage decision-makers to manage cases effectively and efficiently, avoiding unnecessary costs and delays for the disputing parties.
  - *Regulation of tribunal authority to order interim measures*: These types of provisions are designed to regulate the tribunal's authority to order interim measures – at times determining that a tribunal may not require a host State to refrain from any particular regulatory action, while establishing the tribunal's authority to order disputing parties to preserve evidence or to protect the tribunal's jurisdiction.
  - *Express permission for tribunal to award costs and attorneys' fees*: These types of provisions are designed to deter a party from making a frivolous or unmeritorious argument, and to reimburse/compensate the prevailing party for its costs incurred during the conduct of proceedings.
  - *Automatic discontinuance of abandoned claims*: These types of provisions are designed to avoid a host State having to continue to allocate resources to monitoring a claim that the claimant is no longer pursuing.
  - *Requirement that claimants name arbitrator when submitting a claim*: These types of provisions are designed to avoid delays and additional costs in the selection and constitution of a tribunal.
  - *Deadlines for the appointment of other arbitrators, including provisions encouraging parties to appoint the chair*: These types of provisions are designed to avoid delays and additional costs in the constitution of a tribunal. While these may be less relevant for institutional arbitration, these types of provisions may be of great use when investors initiate an *ad hoc* arbitration.

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Concerns related to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals

- *Waiver of ability to continue pending claims or initiate new claims once claims are submitted to arbitration (i.e., “no U-turn”)*: These types of provisions are designed to prevent parallel or concurrent proceedings on the same substantive treaty obligation being adjudicated at the same time in different forums, while in some cases allowing a disputing party to first seek redress in a host State’s domestic courts.
- *Waiver of claims by parent/subsidiary under a different treaty once claims are submitted*: These types of provisions are designed to prevent different entities owned or controlled by a claimant, or entities that own or control the claimant, from bringing multiple claims, under different treaties, for the same challenge to a host State’s actions.
- *Voluntary consolidation of similar claims brought under same treaty by different parties*: These types of provisions are designed to allow disputing parties to have cases that are based on the same treaty obligation and the same facts or circumstances heard by a single panel. In addition to reducing costs and duration of proceedings, these provisions can avoid certain scenarios where different arbitral panels reach different conclusions when considering similar claims brought by different claimants.
- *special expertise requirements for arbitrators for certain claims (e.g., financial services)*: These types of provisions are designed to ensure that arbitrators are able to decide a matter appropriately and thus coherently and consistently, where special expertise is warranted, such as in highly regulated industries with public policy implications.
- *Non-disputing treaty Party submissions on treaty interpretation*: These types of provisions are designed to establish a mechanism to enable a non-disputing treaty Party submission, to inform decision makers of its views as to the interpretations of the provisions of the treaty at issue in the dispute.
- *Other third-party submissions (not limited to issues of treaty interpretation)*: These types of provisions are designed to allow tribunals, subject to several criteria, to receive information about areas of special expertise, factual knowledge, or other relevant concerns that other third parties affected by the dispute may have.
- *Binding joint interpretations by treaty Parties of treaty provisions*: These types of provisions are designed to allow the States Party to a treaty to clarify the interpretation of a particular provision and require tribunals to apply or consider that interpretation in any cases involving that provision.
- *Tribunal-appointed experts*: These types of provisions allow tribunals, subject to certain criteria, to seek expertise on critical factual matters to further their understanding of the facts presented to them by the disputing Parties and thus facilitate their decision-making in areas where special expertise is warranted.
- *Publication of pleadings, awards, and other case documents related to treaty interpretation*: These types of provisions allow parties to future disputes to understand and be aware of the arguments previously made by disputing parties, as well as the decision and reasoning of prior decision-makers under the same treaty. Subject to certain criteria and exceptions (for example for confidential information), these provisions thus may promote consistency and correctness because they demonstrate how States that are party to a treaty interpret a particular provision.
- *Limited standing to claim for reflective loss*: These types of provisions are designed to ensure that for IIAs that allow for submission of a dispute on behalf of the investment company, only investors that own or control a locally incorporated investment company may claim for the losses of the company. That is, to the extent that shareholders, especially minority shareholders, bring claims for indirect losses, any award would go to the investor and not to the shareholder. These provisions aim to avoid inconsistent decision-making by multiple decision-makers in connection with the same events.
- *Limitations on “treaty shopping”*: These types of provisions seek to prevent nationals of third States from benefiting from the treaty through, for example, the use of shell companies. Such provisions can be effective in preventing improper treaty shopping.



Annex (Note: the following selected treaties are for illustrative purposes only; various existing IIAs which address the relevant concerns can be used as a basis for drafting reform options.)

REFORM MEASURE	CPTPP	EU-MEX FTA	USMCA
<i>Concerns pertaining to arbitrators and decision-makers</i>			
code of conduct/ethics rules	X	X	X
rules limiting/prohibiting double-hatting		X	X
special expertise requirements for arbitrators for certain claims (e.g., financial services)	X	X	X
treaty-specific rules for arbitrator challenges		X	
independent appointing authority (i.e., to appoint tribunal chair)	X		X
disclosure of third-party funding		X	
<i>Concerns pertaining to cost and duration</i>			
encouragement of mediation, conciliation, etc. to avoid formal disputes	X	X	X
dismissal of frivolous claims	X	X	X
expedited consideration of preliminary objections	X	X	X
Limitations periods/ statute of limitations for bringing claims	X	X	X
waiver of claims by parent/subsidiary under a different treaty once claims are submitted	X (sub)	X (sub)	X
voluntary consolidation of similar claims brought under same treaty by different parties	X	X	X
requirement to hold arbitration in a NY Convention state unless parties agree otherwise	X		X
requirement for tribunals and parties to endeavor to act in a cost-effective and expeditious manner			X
regulations on tribunal authority to order interim measures	X	X	X
express permission for tribunal to award costs and attorneys' fees	X	X	X
discontinuance of abandoned claims		X	X
requirement that claimants name arbitrator when submitting a claim	X		X
deadlines for the appointment of other arbitrators, including the chair	X		X
<i>Concerns related to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals</i>			
waiver of pending or new claims in other dispute settlement forums once claims are submitted to arbitration	X	X	X
waiver of claims by parent/subsidiary under a different treaty once claims are submitted	X (sub)	X (sub)	X
voluntary consolidation of similar claims brought under same treaty by different parties	X	X	X
special expertise requirements for arbitrators for certain claims (e.g., financial services)	X	X	X
non-disputing Party submissions on treaty interpretation	X	X	X
other third-party submissions (not limited to issues of treaty interpretation)	X	X	X
binding joint interpretations by treaty Parties of treaty provisions	X	X	X
tribunal-appointed experts	X	X	X
publication of pleadings, awards, and other case documents related to treaty interpretation	X	X	X
limitations on "treaty shopping"	X	X	X