Written Submission on Section A of Working Paper 244[1]

The following are comments on, and suggested language for, certain draft provisions in Section A (draft provisions 1 to 9), as well as draft provisions 11 and 12 (paragraphs 1 to 5 and 7) of Working Paper 244 (A/CN.9/WG.III/WP.244). This submission focuses on provisions we believe to be the most critical and in need of particular attention. It is not, however, meant to be an exhaustive commentary on the provisions in Section A.

While the Secretariat has indicated that the aim is to harmonize these provisions with existing procedural rules, such as the 2022 ICSID Arbitration Rules, and to serve as a supplement to the UNCITRAL Arbitration Rules, we believe that, as a *reform* process, Working Group III (WGIII) has a unique opportunity to pursue more ambitious objectives. Rather than merely harmonizing with established frameworks—which should only serve as benchmarks if they are demonstrably fair and legitimate—WGIII should aim to address the systemic challenges and deficiencies of the current ISDS regime. Meaningful and impactful reforms would have the potential to enhance the credibility and transparency of international investment dispute resolution, while also achieving the overarching goals of the UNCITRAL WGIII reform process.

Below, we present the current language of selected draft provisions, key observations on those provisions, and proposed amendments. Our goal is to enhance the clarity, effectiveness, transparency, and overall impact of specific draft provisions to be included in Section A of Working Paper 244.

Current Draft Provision 1: Evidence

1. Each disputing party shall have the burden of proving the facts relied on to support its claim or defence.

2. [...]
3. [...]
4. [...]

5. Unless otherwise directed by the Tribunal, statements by witnesses, including expert witnesses, shall be presented in writing, and signed by them. The Tribunal may decide which witnesses, including expert witnesses, shall testify before the Tribunal if hearings are held.

[1] Submission prepared by the Columbia Center on Sustainable Investment (CCSI), the International Institute for Environment and Development (IIED), the International Institute for Sustainable Development (IISD), and the South Centre.

6. [...]

7. The Tribunal may, at the request of a disputing party or on its own initiative, exclude from evidence or production any document, exhibits or evidence obtained illegally or based on the following reasons: […]

8. […]

Comments on Draft Provision 1: Evidence

Paragraph 1: The general principle regarding the burden of proof is rooted in the maxim *onus probandi actori incumbit*, meaning "he who asserts must prove." As a general principle of international law applicable to arbitration, this rule places the burden on the Claimant to substantiate its allegations regarding jurisdiction, the merits, and damages with sufficient evidence to establish its claim.

As currently drafted, paragraph 1 risks creating confusion about this fundamental rule that the Claimant bears the burden of proof. The use of the term "defence" lacks clarity, as not every objection, counter-argument, or rebuttal by the Respondent in challenging a Claimant's claim requires independent proof. To avoid ambiguity, we recommend aligning the language with the formulations found in modern treaties and models, which clearly specify that the Claimant has the burden of proving its claims. For example, see Article 32(4) of Canada's 2021 Model FIPA,[2] and Article 9.23(7) of the CPTPP.[3]

Paragraph 5: As currently drafted, paragraph 5 entails a preference for written witness statements in the proceedings. While this approach might help address concerns about procedural economy, it raises concerns—particularly because the text does not differentiate between expert witnesses and other types of witnesses. These concerns are especially relevant in cases where one or both disputing parties seek to put forward witnesses from communities impacted by the investment project. For such witnesses, the reliance on written statements might pose a barrier to effective participation in the proceeding.

[2] Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model, Article 32(4): If an investor of a Party submits a claim to arbitration under Article 27 (Submission of a Claim to Arbitration), … the investor has the burden of proving all elements of its claim, consistent with the general principles of international law applicable to international arbitration.

[3] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Article 9.23(7): For greater certainty, if an investor of a Party submits a claim under this Section, including a claim alleging that a Party breached Article 9.6 (Minimum Standard of Treatment), the investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration.

Paragraph 5 of the current provision (paragraph 5bis in suggested revised provision) also grants the Tribunal considerable discretion both in deciding whether to depart from the default preference for written witness statements and in determining which witnesses may testify at the hearing. This suggests that the Tribunal, rather than the disputing parties, have the authority to make such decisions. We recommend aligning this language with the current UNCITRAL Arbitration Rules,[4] and separating this section from the preceding rule on written witness submissions.

Paragraphs 6bis and 6ter: In addition to the current content of Draft Provision 1, we recommend incorporating two paragraphs from Draft Provision 23 in Working Paper 231 (A/CN.9/WG.III/WP.231) into the Draft Provision on Evidence. These two paragraphs, which outline procedural options already available under existing rules,[5] do not grant any new powers to the Tribunal. However, their inclusion would provide valuable guidance to both the Tribunal and the disputing parties, explicitly affirming certain procedural possibilities and helping to shape expectations regarding the handling of evidence.

Suggested Revised Provision 1: Evidence

1. The claimant shall have the burden of proving all elements of the claim.

2. [...]
3. [...]
4. [...]

5. Unless otherwise directed by the Tribunal, statements by witnesses, including expert witnesses, may be presented in writing, and signed by them.

5bis. At an appropriate stage of the proceedings, any disputing party may request the Tribunal to hold hearings for the oral presentation of evidence by witnesses, including expert witnesses. In the absence of such a request, the Tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

6. [...]

[4] UNCITRAL Arbitration Rules, Article 17(3): 3. If at an appropriate stage of the proceedings any -party so- requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert- witnesses, or for oral - argument. In the absence of such a request, the - arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.
[5] See Dafina Atanasova, Vincent Beyer, and Josef Ostransky, "Compensation and Damages in Investor-State Dispute Settlement: Options for reform" (IISD, September 2024) at page 11, https://www.iisd.org/system/files/2024-09/compensation-damages-isds-reform.pdf.

6bis. 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 relevant issues, such as the assessment or calculation of damages, subject to any terms and conditions agreed with the disputing parties.

6ter. The Tribunal may require that experts appointed by the disputing parties or on its own initiative, if any, 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 opinions in case the experts disagree on facts and legal approaches; and
c. A joint report by those experts.

7. The Tribunal shall, at the request of a disputing party or on its own initiative, exclude from evidence or production any document, exhibits or evidence obtained illegally or any document found to be fraudulent, or based on the following reasons: […]

8. […]

Current Draft Provision 3: Interim/provisional measures

1. The Tribunal may, at the request of a disputing party, grant interim/provisional measures. […]

Comments on Draft Provision 3: Interim/provisional measures

Expanding Draft Provision 3 to include a more comprehensive framework for provisional measures would be a significant step in the reform process. While such measures can be necessary to protect a disputing party or parties, or to preserve access to evidence, they can also unduly interfere with a State's ability to adopt, implement, or enforce legitimate laws and policies. This risk of undue interference with States' regulatory powers is especially significant when provisional measures purport to bar (or recommend against) a State adopting, maintaining, or enforcing laws or policies that are the subject of a Claimant's ISDS case. Such orders (or recommendations) providing for injunctive relief also create tensions with the efforts of many States to limit Tribunals' authority to award pecuniary remedies, such as compensation for harms caused by a treaty breach, and not other remedies.[6]

[6] Treaties frequently also provide that restitution may be provided in the event of an expropriation, but that a State can opt to pay compensation instead of providing restitution.

Modern investment agreements have sought to address these risks and tensions by explicitly restricting the scope of provisional measures. For instance, the CPTPP, USMCA, and Canada's 2021 FIPA Model permit Tribunals to order interim measures to protect Claimants, but explicitly prohibit orders or recommendations that would enjoin the implementation of measures alleged to breach a treaty.[7] Given the strong emphasis by many State delegates in the UNCITRAL WGIII process on safeguarding their right to regulate, and in light of the fact that avoiding undue regulatory chill has been recognized as a "cross-cutting" issue by WGIII, it is important to include language in Draft Provision 3 that similarly restricts the use of provisional measures.

Suggested Revised Provision 3: Interim/provisional measures

1. The Tribunal may, at the request of a disputing party, grant an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in the submission of a claim to arbitration. For the purposes of this paragraph, an order includes a recommendation.

2. Decisions regarding the granting and enforcement of provisional measures should not impede a State's legitimate right to regulate. This includes the State's ability to perform essential functions, such as enacting and enforcing laws or safeguarding public interest objectives, including the protection of life, health, and the environment.

   [...]

[7] See e.g. Article 9.23(9) of the CPTPP: "A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 9.19 (Submission of a Claim to Arbitration). For the purposes of this paragraph, an order includes a recommendation." See also Article 14.D.7.9 of USMCA and Article 39 of Canada's Model FIPA, which use similar formulations.

Current Draft Provision 5: Security for costs

1. At the request of a disputing party, the Tribunal may order any disputing party making a claim [or counterclaim] to provide security for costs.

2. [...]
3. [...]

4. In determining whether to order a disputing party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:

    a. That disputing party's ability to comply with an adverse decision on costs;
    b. That disputing party's willingness to comply with an adverse decision on costs;
    c. The effect that providing security for costs may have on that disputing party's ability to pursue its claim [or counterclaim];
    d. The conduct of the disputing parties; and
    e. The existence of third-party funding to support that disputing party in pursuing its claim or counterclaim].

5. [...]

6. If a disputing party fails to comply with the order to provide security for costs, the Tribunal may order the suspension of the proceeding for a fixed period of time. If the proceeding is suspended for more than [90] days, the Tribunal may, after inviting the disputing parties to express their views, order the termination of the proceeding.

7. [...]
8. [...]

Comments on Draft Provision 5: Security for costs

We suggest deleting the bracketed words "or counterclaim" from the draft provision. Allowing a Tribunal to order security for costs at the request of a disputing party raises distinct considerations when applied to claims and counterclaims. While it is acknowledged that such orders for security for costs might discourage Claimants from pursuing claims, this potential effect is offset by the need to address legitimate concerns, such as the risk of non-payment due to insolvency or asset-stripping.

These specific risks are far less relevant in the context of counterclaims by Respondent States. The rationale for requiring security for costs in the case of counterclaims is therefore weak. At the same

time, the potential consequences—namely, discouraging States from pursuing legitimate counterclaims—are significant, particularly in the light of the wider structural asymmetries of investor-state dispute settlement. By treating claims and counterclaims the same, the language in brackets risks imposing an undue burden on States and undermining their ability to assert counterclaims effectively.

Suggested Revised Provision 5: Security for costs

1. At the request of a respondent, the Tribunal may order a claimant to provide security for costs.

2. [...]
3. [...]

4. In determining whether to order a claimant to provide security for costs, the Tribunal shall consider all relevant circumstances, including:

    a. The claimant's ability to comply with an adverse decision on costs;
    b. The claimant's willingness to comply with an adverse decision on costs;
    c. The effect that providing security for costs may have on the claimant's ability to pursue its claim;
    d. The conduct of the disputing parties; and
    e. The existence of third-party funding to support the claimant in pursuing its claim.

5. [...]

6. If the claimant fails to comply with the order to provide security for costs, the Tribunal may order the suspension of the proceeding for a fixed period of time. If the proceeding is suspended for more than [90] days, the Tribunal may, after inviting the disputing parties to express their views, order the termination of the proceeding.

7. [...]
8. [...]

Draft Provision 9: Allocation of costs

1. [...]
2. [...]

3. Unless otherwise determined by the Tribunal, expenses incurred by a disputing party related to or arising from third-party funding shall not be included in the costs of the proceeding.

4. [...]
5. [...]
6. [...]

Comments on Draft Provision 9: Allocation of costs

We support the inclusion of a clear rule stating that costs related to or arising from third-party funding (TPF) should not be included in the costs of the proceeding. However, given the broad definition of "TPF" in the current text, we believe the rule set forth in Draft Provision 9(3) may require refinement in specific cases. For instance, when the TPF is provided by a donor for philanthropic or non-profit purposes—and not in exchange for a share of the award or any other rights in the claim or the Claimant's assets—the application of the general rule may warrant reconsideration.

To address this, we suggest edits to clarify the general principle of non-recovery of such costs. In addition, we recommend including supplementary language, perhaps in a footnote or commentary, to outline the types of exceptional circumstances under which a departure from that general rule could be justified.

Suggested Revised Provision 9: Allocation of costs

1. [...]
2. [...]

3. Expenses incurred by a disputing party related to or arising from third-party funding, including expenses paid by the funder to support a disputing party's claim, shall not be included in the costs of the proceeding.

4. [...]

5. [...]
6. [...]

Current Draft Provision 12: Third-party funding

1. […]

2. A disputing party in receipt of third-party funding shall disclose to the Tribunal and the other disputing party the following information:
    a. The name and address of the third-party funder; and
    b. The name and address of the beneficial owner of the third-party funder and any natural or legal person with decision-making authority for or on behalf of the third-party funder in relation to the proceeding.

3. […]
4. […]

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

6. […]
7. […]
8. […]

Comments on Draft Provision 12: Third-party funding

While we understand that the Secretariat is not currently seeking comments on Draft Provision 12(6), we note the close connection between the procedural and disclosure regulations for TPF and its broader regulation under paragraph 6. Accordingly, we will provide additional comments on TPF at a later stage.

That said, we wish to emphasize that disclosures related to TPF should not be limited to the disputing parties and the Tribunal but should also be made publicly accessible. To reflect this point, we have suggested edits to the text to ensure greater transparency in line with this recommendation.

Suggested Revised Provision 12: Third-party funding

1. […]

2. A disputing party in receipt of third-party funding shall disclose the following information to the Tribunal, the other disputing party, and the public:
    a. The name and address of the third-party funder; and
    b. The name and address of the beneficial owner of the third-party funder and any natural or legal person with decision-making authority for or on behalf of the third-party funder in relation to the proceeding.

3. […]
4. […]

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

6. […]
7. […]
8. […]