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# Possible reform of investor-State dispute settlement (ISDS)

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

## Note by the Secretariat

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# I. Introduction

1. This Note contains annotations to the draft provisions on procedural and cross-cutting issues in document A/CN.9/WG.III/WP.244 to assist the Working Group in understanding how the draft provisions would operate and how they relate to each other.

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

## A. Provisions to supplement the applicable procedural rules

### Draft Provision 1: Evidence

2. Draft Provision 1 addresses the taking of evidence. Paragraph 1 affirms that each disputing party has the burden of proving the elements of its claim (or counterclaim) or defence,[1] and the subsequent paragraphs clarify the discretion of the Tribunal in the taking of evidence and its evaluation.

3. Paragraph 2 allows the Tribunal to require the disputing parties to produce evidence.[2] Given the substantial amount of evidence typically provided by the disputing parties in investment disputes, it also allows the Tribunal to define the evidence to be produced and set the necessary time frames.

4. The first sentence of paragraph 3 grants the Tribunal discretionary power to reject a request for a document production procedure, unless the request is made by all disputing parties.[3] The second sentence lists the circumstances to be considered when assessing requests for document production.[4]

5. Paragraph 4 addresses the consequence of late submissions of evidence.[5] For the sake of efficiency, paragraph 5 provides the default rule that statements by witnesses are to be presented in written form signed by them.[6] A written witness statement may eliminate the need to hear a witness particularly if facts are undisputed.[7] The paragraph also clarifies that the Tribunal has the authority to choose the witnesses to testify at a hearing.[8]

6. Paragraph 6 affirms the discretionary power of the Tribunal to determine the admissibility, relevance, materiality and weight of evidence offered[9] and paragraph 7 addresses the power to exclude certain evidence.[10] The Working Group may wish to identify other reasons for excluding evidence. Lastly, paragraph 8 stipulates the authority of the Tribunal to order site visits and to conduct inquiries on site.[11]

7. Draft Provision 1 does not address experts appointed by the Tribunal as this is addressed in Article 29 of the UNCITRAL Arbitration Rules. The Working Group may wish to consider incorporating aspects of Rules 38 and 39 of the ICSID Rules on witnesses and experts.

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[1] See UNCITRAL Arbitration Rules, Article 27(1), ICSID Rules, Rule 36(2). The IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") also reflect this principle by describing that the parties must submit all available documents to which they will rely on.
[2] See UNCITRAL Arbitration Rules, Article 27(3), ICSID Rules, Rule 36(3).
[3] See UNCITRAL Expedited Arbitration Rules, Article 15(1).
[4] See ICSID Rules, Rule 37.
[5] See UNCITRAL Arbitration Rules, Article 30(3).
[6] See UNCITRAL Expedited Arbitration Rules, Article 15(2).
[7] See UNCITRAL Notes on Organizing Arbitral Proceedings, para. 88.
[8] See UNCITRAL Expedited Arbitration Rules, Article 15(3).
[9] See UNCITRAL Arbitration Rules, Article 27(4), ICSID Rules, Rule 36(1), IBA Rules Article 9(1).
[10] See IBA Rules, Article 9(2) and (3).
[11] See ICSID Rules, Rule 40.

**Draft Provision 2: Bifurcation**

8. Draft Provision 2 is aligned with Rule 42 of the ICSID Rules. Bifurcation refers to the separation of the proceeding into different phases addressing distinct issues. For example, jurisdictional issues may be considered separately from the merits of the case, or liability issues may be separated from the assessment of damages. In complex cases, bifurcation may allow the dispute parties and the Tribunal to focus on the merits of the case first to save cost and time, and perhaps settle on the damages or other discrete issues.

9. Paragraphs 1 and 6 provide that bifurcation may take place at the request of a disputing party or upon the initiative of the Tribunal. Paragraph 1 clarifies that a plea that the Tribunal does not have jurisdiction[12] may also be the subject of bifurcation.

10. The first sentence of paragraph 2 requires a disputing party to make a request for bifurcation as soon as possible stating the reasons. The second sentence requires the Tribunal to fix the time period within which the disputing parties make submissions on the request for bifurcation.

11. Paragraph 3 provides a non-exhaustive list of circumstances to be considered by the Tribunal when deciding whether to bifurcate.[13] Most importantly, the Tribunal should take into account whether bifurcation would enhance the procedural efficiency and reduce the overall time and cost of the proceeding. Paragraph 4 specifies a time period within which the Tribunal has to determine whether to bifurcate (for example, 30 days). In case of bifurcation, the proceeding shall be suspended with regard to those issues to be determined at a later phase (paragraph 5).

12. Rule 44 of the ICSID Rules addresses bifurcation requests with preliminary objections, which is addressed in Rule 43. Those Rules have not been reproduced in Draft Provision 2 in light of Article 23 of the UNCITRAL Arbitration Rules.[14] The Working Group may wish to consider whether Draft Provision 2 should be developed further to address a plea being made in accordance with Article 23 along with a request for bifurcation.

**Draft Provision 3: Interim/provisional measures**

13. Interim or provisional measures aim to preserve the disputing parties' rights, both substantive and procedural, pending the final decision of the Tribunal on the merits of the claim. Examples of such measures are provided for in Article 26 of the UNCITRAL Arbitration Rules and Rule 47 of the ICSID Rules, which also outline the process for requesting and granting such measures. In general, an interim or provisional measure is granted by the Tribunal upon the request of a disputing party at any stage of the proceedings. The Working Group may wish to consider whether Article 26 of the UNCITRAL Arbitration Rules sufficiently addresses the issues or to prepare a rule more closely aligned with Rule 47 of the ICSID Rules.[15]

**Draft Provision 4: Manifest lack of legal merit/early dismissal**[16]

14. Allowing for early dismissal of frivolous and manifestly unfounded claims is an important tool to prevent the abuse of the ISDS system and to guarantee effective

[12] Article 23(2) of the UNCITRAL Arbitration Rules provides that a plea that the Tribunal does not have jurisdiction needs to be made no later than in the statement of defence.

[13] See ICSID Rules, Rule 42(4).

[14] See ICSID Rules, Rule 42(3)(c).

[15] For example, ICSID Rule 47(1) does not list preservation of assets as an objective of the provisional and Rule 47(4) allows the Tribunal to recommend provisional measures on its own initiative.

[16] The Working Group considered a draft provision on early dismissal in document A/CN.9/WG.III/WP.219 (paras. 11–18) during its forty-third session in September 2022 (A/CN.9/1124, paras. 107–119). The Commission, at its fifty-sixth session in 2023, adopted an additional note to the UNCITRAL Notes on Organizing Arbitral Proceedings on early dismissal and preliminary determination (A/78/17, annex VII).

access to justice for other claims.[17] An early dismissal procedure allows manifestly unmeritorious claims to be dismissed early in the process before they unnecessarily consume the disputing parties' resources.

15. Draft Provision 4 is aligned with Rule 41 of the ICSID Rules, which allows a disputing party to object that a claim is manifestly without legal merit. 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 request for early dismissal may relate to both jurisdiction and merits.

16. Paragraph 6 provides the rule for allocating costs arising from the procedure, that the Tribunal shall determine the amount of reasonable costs to be paid by the unsuccessful party to the prevailing party, unless there are exceptional circumstances justifying otherwise (see also Draft Provision 9(4)).[18] Paragraph 7 clarifies that even if a disputing party did not prevail in the procedure, it may argue later in the proceeding that the Tribunal lacks jurisdiction or that the claim lacks legal merit.

**Draft Provision 5: Security for costs**

17. Security for costs could protect a respondent State against a claimant's inability or unwillingness to pay costs and further discourage frivolous claims. Draft Provision 5 is aligned with Rule 53 of the ICSID Rules.

18. Paragraph 1 specifies that an order for security for costs may be made at the request of a disputing party. The Working Group may wish to consider whether only claimants should be ordered security for costs, or if a respondent State making a counterclaim may also be ordered security for costs.

19. Paragraph 2 addresses how a disputing party should make the request to the Tribunal. Paragraph 3 addresses how the Tribunal should proceed and indicates the time frame within which the Tribunal should decide whether to order security for costs.

20. Paragraph 4 provides a non-exhaustive list of circumstances to be considered by the Tribunal. The Working Group may wish to consider whether the existence of third-party funding should also be included as one of the circumstances and whether such existence would "require" the Tribunal to order security for costs (see Draft Provision 12(7)(b)). Rule 53(4) of the ICSID Rules provides that the existence of third-party funding could be considered as evidence in relation to the circumstances.

21. Paragraph 5 requires the Tribunal to specify the terms of the security to be provided and to indicate a time frame within which the order should be complied with. Paragraph 6 deals with possible non-compliance by the disputing party, which may result in the suspension or the termination of the proceeding (see Draft Provisions 6 and 7).

22. Paragraph 7 requires the disputing parties to disclose any material change in the circumstances that led the Tribunal to order security for costs and paragraph 8 gives discretion to the Tribunal to modify or terminate the order to provide security for costs.

[17] ICSID Rules, Rule 41. In addition, the agreement in principle on the modernization of the Energy Charter Treaty (the "Modernization Agreement") includes a new provision requiring frivolous claims. To ensure efficiency of arbitral proceedings and reduce the costs of litigation, mechanisms are established for (i) dismissal of claims that are manifestly without legal merits as a matter of substance or jurisdiction at the outset of proceedings and (ii) expedited dismissal of claims unfounded as a matter of law on merits. A special provision is envisaged for dismissal of claims submitted as a result of investment restructuring for the sole purpose of submitting a claim under the Treaty.

[18] See ICSID Rules, Rule 52(2).

**Draft Provision 6: Suspension of the proceeding**

23. One way to ensure procedural efficiency is to suspend or stay the proceeding under certain circumstances. Draft Provision 6, which is aligned with Rule 54 of the ICSID Rules, clarifies when the Tribunal may suspend the proceeding.[19]

24. Paragraph 1 provides that the Tribunal should suspend the proceeding at the joint request of the disputing parties. For example, if mediation commences while arbitration is in progress, the parties could jointly notify the Tribunal and request the suspension of the arbitral proceeding (see UNCITRAL Model Provisions on Mediation for International Investment Disputes, Provision 3(2)). Paragraph 2 grants discretion to the Tribunal to suspend the proceeding at the request of a disputing party or on its own initiative, but only after obtaining the views of the disputing parties.

25. When ordering suspension, the Tribunal shall specify the period of suspension (which may be extended) and any other terms. During the suspension, other time frames in the applicable rules are stalled, resulting in their extension (paragraph 3).

**Draft Provision 7: Termination of the proceeding**

26. Another way to ensure procedural efficiency is to terminate the proceeding under certain circumstances. Draft Provision 7 is aligned with Rules 55(1) and 56(1) of the ICSID Rules on the discontinuance of the proceedings using the term "termination" as used in the UNCITRAL Arbitration Rules.[20] It does not address the situation where the disputing parties have agreed on a settlement, as that is addressed by Article 36(1) of the UNCITRAL Arbitration Rules. Rule 57 of the ICSID Rules ("Discontinuance for failure of parties to act") is also not reflected as this issue is addressed by Article 30 of the UNCITRAL Arbitration Rules.

27. Paragraph 1 requires the Tribunal to order the termination of the proceeding when disputing parties jointly make the request. Paragraphs 2 and 3 address a situation where a disputing party unilaterally requests termination of the proceeding. If there is no objection within the fixed time limit, it is deemed to construe consent by the other party to the termination. If the other disputing party objects, the proceeding shall continue.

**Draft Provision 8: Period of time for making the award**

28. Draft Provision 8, modelled after Rule 58 of the ICSID Rules, addresses the concerns expressed with regard to the duration of ISDS proceedings. It imposes a time frame within which the Tribunal should make the award (paragraph 2), further encouraging the Tribunal to conduct the proceedings in a timely and effective manner (paragraph 1).

29. The Working Group may wish to consider whether the Draft Provision should provide concrete time frames as found in Rule 58(1) of the ICSID Rules. Rule 58(1) specifies different time periods (60, 180 or 240 days) depending on the circumstances, which commence either after the constitution of the Tribunal or the last submission by the parties. Article 16 of the UNCITRAL Expedited Arbitration Rules provides for a six-month time period commencing from the date of constitution of the Tribunal and a detailed procedure to extend that period in exceptional circumstances. In summary, the Working Group may wish to consider what would be the appropriate

[19] Article 43(4) of the UNCITRAL Arbitration Rules also provides for the suspension of the proceeding, but its application is limited to circumstances when the deposit of costs is not paid in whole or in part.

[20] The UNCITRAL Arbitration Rules mention termination of proceedings in different situations, such as when deposit for costs of arbitration is unpaid (Article 43(3)), and when the claimant fails to communicate its statement of claim, without showing sufficient cause, within a fixed period of time (Article 30(1)). Article 36 of the UNCITRAL Arbitration Rules addresses termination generally, when parties agree on the settlement of the dispute, or when the continuation of the arbitral proceedings becomes unnecessary or impossible.

time frame, when that time frame should commence as well as the consequences when the time frame is not met by the Tribunal.

**Draft Provision 9: Allocation of costs**

30. Based on Article 42 of the UNCITRAL Arbitration Rules, Draft Provision 9 is aligned with Rule 52 of the ICSID Rules. It does not define the meaning and scope of "costs", which is to be determined by the applicable rules.[21]

31. Paragraph 1 provides the default rule that the unsuccessful disputing party should bear the costs of the proceeding, in whole or in part ("costs follow the event" principle).[22]

32. Following Rule 52(1) of the ICSID Rules, paragraph 2 lists factors to be taken into account in reasonably allocating the costs between the disputing parties.[23] Subparagraph (e) lists the existence of third-party funding as an additional factor (see Draft Provision 12(7)(c)). Subparagraph (f) notes that the proportionality of the compensation sought to that awarded is another factor to consider in allocating costs (see Draft Provision 20 and para. 77 below).

33. Paragraph 3 reflects the view that costs related to third-party funding should not be allocated and be recoverable (A/CN.9/1004, para. 93). However, discretion is provided to the Tribunal to determine otherwise.

34. Paragraph 4 is aligned with Rule 52(2) of the ICSID Rules. It confirms that paragraphs 1 to 3 shall apply with regard to costs of the early dismissal procedure (see Draft Provision 4(6) and para. 16 above). If Draft Provisions 4 and 9 are to be presented jointly, the Working Group may wish to consider placing Draft Provision 4(6) in Draft Provision 9.

35. Paragraph 5 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. Paragraph 6 requires that decisions on costs are reasoned and eventually form part of the final award. The Working Group may wish to consider whether decisions on costs could be subject to appeal (see article 27 of the draft statute of a standing mechanism in A/CN.9/WG.III/WP.239).

36. The Working Group may wish to also consider whether Rule 51 of the ICSID Rules on statement of, and submission on, costs should be incorporated in Draft Provision 9 and whether the disputing parties should be required to submit an estimate of costs to be incurred by them at the outset of the proceeding.

[21] See UNCITRAL Arbitration Rules, Article 40 and ICSID Rules, Rule 50.

[22] See CETA, Article 8.39 (5) and EU-Singapore IPA (2018), Article 3.21(1).

[23] See also UNCITRAL Notes on Organizing Arbitral Proceedings, para. 48, which provides: "In allocating costs, the arbitral tribunal may also consider certain conduct of the parties. Conduct so considered might include a party's: (a) failure to comply with procedural orders of the arbitral tribunal; or (b) procedural requests (for example, document requests, procedural applications and cross-examination requests), that are unreasonable, to the extent that such conduct actually had a direct impact on the costs of the arbitration and/or is determined by the arbitral tribunal to have unnecessarily delayed or obstructed the arbitral proceedings."

## B. Provisions building on existing procedural rules and investment agreements including on the submission of a claim

### Draft Provision 10: Counterclaim[24]

37. Recent investment agreements have included provisions explicitly allowing for counterclaims by respondent States,[25] which could reduce uncertainty on their permissibility, promote fairness and ultimately ensure a balance between the disputing parties in ISDS. Allowing counterclaims to be heard together with the original claim also enhances procedural efficiency and could avoid multiple proceedings in different forums involving the same disputing parties.

38. Applicable procedural rules contemplate the possibility of the respondent raising counterclaims under certain conditions.[26] Paragraph 1 aims to broaden the scope of counterclaims that can be brought by providing a non-cumulative list of circumstances justifying counterclaims, particularly with subparagraph (c) allowing for counterclaims based on the investor's breach of its obligations regardless of any linkage with the claim itself.[27] The subparagraph, however, does not list nor specify such obligations of investors but simply indicate where they might be found. The Working Group may wish to consider whether it wishes to develop a provision based on recent investment agreements that impose certain obligations on investors.[28]

39. Paragraph 2 ensures that counterclaims made by respondents in accordance with paragraph 1 falls within the jurisdiction of the Tribunal (A/CN.9/1044, para. 61). This is because procedural rules typically limit counterclaims to those that fall within the jurisdiction,[29] with arbitral tribunals often dismissing counterclaims on grounds of a lack of consent by the claimant.[30]

40. Paragraph 3 addresses the timing of counterclaims.[31] It requires the respondent to make any counterclaims at the latest in its statement of defence. A counterclaim can be made at a later stage of the proceedings, but only when the Tribunal considers it appropriate under the circumstances. This is to ensure that counterclaims do not result in delays.

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[24] At its thirty-eighth session, the Working Group requested the Secretariat to continue to work on the topic of counterclaims with a focus on the procedural aspect and to prepare options to clarify the conditions under which a counterclaim could be brought (A/CN.9/1044, paras. 61–62).

[25] For example, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Article 9.19(2); Slovakia-Iran BIT (2016), Article 14(3); Argentina-United Arab Emirates BIT (2018), Article 28(4).

[26] UNCITRAL Arbitration Rules, Article 21(3); ICSID Rules, Rules 48; SCC Arbitration Rules, Article 9(1)(iii); and ICC Arbitration Rules, Article 5.

[27] The Working Group may wish to consider whether the conditions in paragraph 1 should be cumulative. See Article 10.30(1) of the EU-Chile Advanced Framework Agreement (2023) which follows a more restrictive approach of counterclaims which reads as follows: "The respondent may submit a counterclaim on the basis of an investor's failure to comply with an international obligation applicable in the territories of both Parties, arising in connection with the factual basis of the claim."

[28] See PAIC, Articles 21–24; Argentina-Qatar BIT (2016), Articles 11 and 12; Morocco-Nigeria BIT (2016), Articles 18 and 24; India Model BIT, Articles 9–12; Common Market for Eastern and Southern Africa (COMESA) Common Investment Area (CCIA) Revised Investment Agreement (2017), Part 4; Southern African Development Community (SADC) Model Bilateral Investment Treaty Template (2012), Part 3; Morocco Model BIT, Articles 18 and 28.

[29] See for example, UNCITRAL Arbitration Rules, Article 21(3), which states, "provided that the arbitral tribunal has jurisdiction over it" and ICSID Rules, Rule 48, which states, "provided that such ancillary claim is within the scope of the consent of the parties and the jurisdiction of the Centre".

[30] For example, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1 (7 December 2011), Award, paras. 859–877; *Oxus Gold plc v. Republic of Uzbekistan* (17 December 2015), Award, paras. 906–959; and *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/15 (22 August 2016), Award, paras. 618–629.

[31] See UNCITRAL Arbitration Rules, Article 21(3) and UNCITRAL Expedited Arbitration Rules, Article 12.

**Draft Provision 11: Consolidation and coordination of proceedings**

41. Draft Provision 11 has been aligned with Rule 46 of the ICSID Rules on consolidation or coordination of arbitrations. Consolidation refers to the combining of multiple proceedings, which had been commenced separately, into a single proceeding. Coordination refers to the alignment of specific procedural aspects of proceedings, which had been commenced separately, remain separate and will result in separate decisions.

42. Consolidation and coordination can streamline the handling of multiple or parallel proceedings, reducing the burden on the disputing parties. It may also prevent inconsistent decisions by Tribunals on the same measures or issues.[32] Many recent investment agreements[33] and arbitration rules[34] provide for consolidation. While it would be ideal to consolidate or coordinate proceedings that have an issue of law or fact in common or that arise out of the same events or circumstances, Draft Provision 11 relies on the disputing parties' consent for consolidation or coordination. This is because the type of proceedings envisaged under the Agreement may be quite different (including the applicable arbitration rules) and as there may not be an administering institution or authority to facilitate consolidation or coordination of such proceedings.

43. When determining whether to consolidate or coordinate, the disputing parties should take into account all relevant circumstances, including whether: (i) the proceedings pertain to the same or similar issues of fact or law; (ii) those issues arise out of the same event; and (iii) consolidation or coordination would promote fair and efficient resolution of claims and ensure consistent decisions.

44. Paragraph 3 provides that the disputing parties should agree upon the proposed terms of the consolidated proceeding. For example, this may indicate which of the Tribunals would be tasked with the consolidated proceeding (or how it should be composed) as well as any applicable rules and a procedural schedule. The terms should also address the termination of the proceeding that is to be consolidated.

45. Paragraph 4 confirms that a disputing party may seek consolidation or coordination of the proceedings under the applicable procedural rule, if available. Such a procedure may differ considerably, particularly in terms of the party entitled to seek consolidation or coordination as well as the procedure itself.[35]

**Draft Provision 12: Third-party funding**[36]

46. Disclosure of third-party funding serves to prevent conflicts of interest and enhance transparency. As such, a number of recent investment agreements and

[32] Hanno Wehland, The Coordination of Multiple Proceedings in Investment Treaty Arbitration, Oxford University Press, 2013, para. 4.10; Jonathan T. Fried, Two Paradigms for the Rule of International Trade Law, Canada-United States Law Journal, 1994, Volume 20, p. 49.

[33] Republic of South Korea-New Zealand FTA (2015), Article 10.29; CETA (2016), Article 8.43; Argentina-Chile FTA (2017), Article 8.31; Argentina-Japan BIT (2018), Article 28; CPTPP, Article 9.28.

[34] See ICSID Rules, Rule 46(2); ICC Arbitration Rules, Article 10; SIAC Rules, Rule 7; LCIA Rules, Article 22.1 (ix).

[35] See CPTPP, Article 9.28 and EU-Singapore IPA, Article 3.24.

[36] The Working Group considered the topic of third-party funding at its thirty-seventh and thirty-eighth sessions held respectively in April and October 2019 and concluded that it would be desirable to address the legal framework pertaining to third-party funding in ISDS. Possible options for reform were discussed and the Secretariat was requested to prepare draft provisions on third-party funding (A/CN.9/970, paras. 17–25; A/CN.9/1004, paras. 80–94 and 97). At its forty-third session in September 2022, the Working Group considered the draft provisions on third-party funding as contained in document A/CN.9/WG.III/WP.219 and heard a proposal on the possible way forward (A/CN.9/1124, paras. 125–143). Draft Provision 12 has been prepared largely based on that proposal.

arbitration rules include rules on disclosure of third-party funding.[37] Furthermore, in order to comply with article 11(2)(a)(iv) of the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution and article 9(3)(a)(iv) of the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution, it would be necessary for an arbitrator or a judge to have information about any third-party funder to assess possible conflicts of interest.

47. Draft Provision 12 adopts a permissive approach to third-party funding requiring disputing parties to disclose the existence of third-party funding and relevant information, while limiting third-party funding in limited circumstances. Paragraph 1 provides a broad definition of third-party funding to ensure adequate disclosure, which would allow for the identification of any conflict of interest.

48. Paragraph 6 empowers the Tribunal to restrict third-party funding in the exceptional circumstances listed therein. The Working Group may wish to consider whether to take this approach and if so, additional circumstances or types of funding to be listed therein (for example, if a disputing party provided false information or concealed information with regard to third-party funding, or if the funding agreement allows the third-party funder to control or influence the management of the claim or the proceeding).

49. Paragraphs 7 and 8 set out the measures that can be taken by the Tribunal when a disputing party fails to comply with the disclosure obligations or when the disputing parties receives funding which is not permissible.[38] If Draft Provision 12 is presented as a standalone text, it would need to incorporate components from other draft provisions.

**Draft Provision 13: Amicable settlement**[39]

50. Draft Provision 13 reflects the understanding that the disputing parties should be encouraged to seek means of amicable settlement before initiating a claim, such as consultation, negotiation, mediation, or any other means. The aim is to promote the use of amicable settlement without making it a precondition for submitting a claim. Accordingly, paragraph 2 introduces a "cooling-off period", where the two parties can engage in amicable settlement, which commences when one of the parties invites the other party to engage in amicable settlement (A/CN.9/1160, para. 116).

51. Considering the divergence in views with regard to whether the "cooling-off period" should be mandatory, paragraph 3 presents two options. One is to encourage the parties to refrain from submitting a claim to the Tribunal during the cooling-off period. Another is to require the passage of the cooling-off period as a condition for raising a claim (see A/CN.9/1160, para. 117).

52. Regardless of the approach chosen, the cooling-off period should be sufficiently long to allow the parties to exchange views on a possible settlement, yet not excessively long, to avoid delaying the final resolution of the dispute, especially when a settlement appears unlikely. Recent investment agreements contain a cooling-off period of 6 months or 180 days.[40]

53. The parties should generally be free to withdraw from consultation, negotiation, mediation and any other means of amicable settlement at any time. As such, Draft

[37] See ICSID Rules, Rule 14; ICC Arbitration Rules, Article 11(7). In addition, the Modernization Agreement includes a new provision requiring both disputing parties to disclose information on a third party financing its litigation costs.

[38] See Indonesia-Australia Comprehensive Economic Partnership Agreement (CEPA) (2019), Article 14.32(3); EU-Vietnam IPA, Article 3.37(3); CIETAC International Investment Arbitration Rules (2017), Article 27(3); Argentina-Chile FTA, Article 8.27(2).

[39] At its forty-sixth session in October 2023, the Working Group considered Draft Provisions 1 and 5 in A/CN.9/WG.III/WP.231, respectively addressing consultation and negotiation, and the period for amicable settlement (A/CN.9/1160, paras. 116–117).

[40] See CETA, Article 8.22 (1)(b); CPTPP, Article 9.19(1); See also USMCA, Article 14.D.3.(2), which provides for a 90-day period to elapse after the submission of a notice of intent before submitting a claim to arbitration.

Provision 13 does not impose a duty on the parties to "engage" in such proceedings or effectively reach amicable settlement during the cooling-off period.

**Draft Provision 14: Local Remedies**

54. Draft Provision 14 reflects the understanding of the Working Group that recourse to local remedies should be encouraged but not be mandatory (A/CN.9/1160, para. 124). States wishing to impose the exhaustion of local remedies would be free to introduce it as a condition for raising a claim (see ICSID Convention, Article 26).[41]

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

55. Draft Provision 15 aims to avoid multiple proceedings by limiting an investor from seeking relief in multiple forums for the same matter or the same breach. Paragraph 1 makes it a condition that the investor waives its rights to initiate or continue proceedings in other forums to submit a claim. The phrase "adjudicatory dispute resolution proceeding" refers to proceedings in domestic courts, arbitral tribunals and international tribunals. The waiver would not apply to (and thus limit) the investor from initiating or continuing non-adjudicatory means of dispute resolution such as consultation or mediation or a proceeding relating to the enforcement of decisions rendered.

56. Paragraph 2 requires the investor to file a statement, together with the claim, confirming that it will not initiate any such adjudicatory dispute resolution proceeding and that is has withdrawn or discontinued such proceedings. The Working Group may wish to consider the consequences of non-compliance with this requirement as well as the submission of false or misleading statements.

57. Paragraph 3 clarifies that the waiver does not apply to proceedings to seek interim or provisional measures.

58. The Working Group may wish to consider alternative approaches, for example, a fork-in-the-road provision, which would require an investor to choose a dispute resolution forum at the very beginning with no recourse to any other forum, or a more prescriptive provision, which would prohibit an investor from initiating or continuing any other type of adjudicatory dispute resolution upon the commencement of such a proceeding.

59. Draft Provision 15 will need to be adjusted for States that wish to require the exhaustion of local remedies as a precondition for submitting a claim.

**Draft Provision 16: Limitation period**

60. Draft Provision 16 establishes a time frame within which an investor needs to raise a claim, similar to the statute of limitation in domestic legal systems.[42] The Working Group may wish to consider the appropriate period of time and when that period should commence. As currently drafted, the period commences when the investor becomes aware, or should have become aware, not only that there was an alleged breach, but also that the investor had incurred loss or damage.

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[41] Rules on exhaustion of local remedies require an investor to exhaust all remedies available within the domestic legal system of the host State before initiating other dispute resolution proceedings (independent of the duration of such proceedings). See for example: China-Côte d'Ivoire BIT (2002), Article 9(3); SADC Investment Protocol (2006), Article 28 (1); Albania-Lithuania BIT (2007), Article 8(2); IISD Model International Agreement on Investment for Sustainable Development, Article 45(b). Alternatively, local-remedies-first clauses require an investor to pursue local remedies for a certain period of time (for example, 30 months) before initiating other dispute resolution proceedings. See for example India-Kyrgyzstan BIT (2019), Article 15(2); India-Belarus BIT (2002), Article 15(2); Italy-Argentina BIT (1990), Article 8(3); Peru-Switzerland BIT (1991), Article 9(3); Uruguay-Italy BIT (1990), Article 9(2); Germany-Chile BIT (1991), Article 10(3)(a).

[42] Recent investment agreements provide for such periods, see for example CPTPP, Article 9.21.1 and USMCA, Article 14.D.5.1.c; See also CETA, Article 8.19(6).

61. The Working Group may wish to consider the possible instances where the limitations period would be suspended, for example, when an invitation to engage in amicable settlement was sent in accordance with Draft Provision 13 or when the investor had initiated proceedings before a local court in accordance with Draft Provision 14.

**Draft Provision 17: Denial of benefits**

62. Draft Provision 17 allows a Contracting Party to deny the protection it had offered in the Agreement to investors or investments that it did not intend to protect.[43] The Contracting Party may deny the "benefits of the Agreement", which may encompass all substantial protection standards in that Agreement. The Working Group may wish to consider whether the scope of the benefits to be denied should be narrower, for instance to procedural benefits.

63. Paragraph 1 is based on similar provisions in recent investment agreements.[44] It allows a State to deny the benefits with regard to investments that are owned or controlled by a person of a non-Contracting State and either have no substantial business activities in the territory of the host State or where the host State adopts or maintains measures against that non-Contracting State prohibiting transactions, which would be violated if the investor was granted benefits under the Agreement. This addresses the concerns regarding the use of so-called "shell" or "mailbox" companies to submit claims under investment agreements and further aims to limit forum shopping.

64. Paragraph 2 extends the scope of the provision to address concerns expressed with regard to the use of third-party funding, unlawful investments, and investments resulting from, or involving, corruption and other illegal actions. It should be considered in conjunction with Draft Provision 10 on counterclaims and Draft Provision 12 on third-party funding. The Working Group may wish to consider how the violation of laws and regulations in subparagraph (b) and corruption, fraud and deceitful act in subparagraph (c) would be established (for example, through a separate legal proceedings) and whether the Tribunal would have the authority to do so. The Working Group may wish to also consider whether concerns regarding shareholder claims currently addressed through Draft Provision 18 could be addressed through this provision.

65. Subparagraph (d) is a catch-all provision aimed at addressing any abuse or misuse of the protection provided by the Agreement, for example, the case of "treaty-shopping" or other similar instances where the motive is to attain the benefits of the Agreement, which would otherwise be inaccessible to the investor.

**Draft Provision 18: Shareholder claims**

66. Draft Provision 18 builds on the joint work with the OECD on reflective loss claims[45] and has been revised to reflect comments by the OECD.[46] It should be noted that whether a shareholder has standing as an investor to raise a claim under the Agreement is left to the Agreement and is not dealt with in the provision.

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[43] For example, investment agreements deny benefits to investors who formally satisfy the requirements of a covered "investor" but do not have a real economic connection with the home State.

[44] See CETA, Article 8.16; CPTPP, Article 9.15; USMCA, Article 14.14; See also UK-Japan CEPA (2020), Article 8.13; Japan-Morocco BIT (2020), Article 20; Mauritius-India CEPA (2021), Article 6.22; Chile-Paraguay FTA (2021), Article 6.11; Israel-Republic of Korea FTA (2021), Article 9.11; Bahrain-Japan BIT (2022), Article 25; New Zealand-United Kingdom FTA (2022), Article 14.17.

[45] The Working Group considered the issue of shareholder claims and reflective loss on the basis of document A/CN.9/WG.III/WP.170 (see the report of the thirty-eighth session in October 2020, A/CN.9/1044, paras. 41–56).

[46] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/oecd_secretariat_dp.10.pdf.

67. Paragraph 1 limits the type of claim that a covered shareholder can bring to "direct" loss or damage claims, thereby excluding claims for reflective loss. Paragraph 2 allows for shareholder derivative actions on behalf of an enterprise 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. Paragraph 3 imposes certain requirements on the shareholder when submitting a claim. Paragraph 4 provides that the result of any derivative action shall be awarded to the enterprise and not the shareholder. In that case, it would be advisable for the decision to provide that it is without prejudice to any right that any person other than the disputing parties (for example, creditors of the enterprise and domestic shareholders) may have under applicable domestic law with respect to the relief provided in the decision.

68. The Working Group may wish to consider whether to further develop the draft provision based on more detailed drafting suggestions provided by the OECD[47] (for example, to separate the draft provision to one addressing direct claims and another reflective loss claims, elaborating on key terms, such as shareholder, enterprise, own and control, for instance, an investor would "own" an enterprise if more than 50 per cent of the equity interests is beneficially owned by the investor, and the investor would "control" the enterprise if it has the power to name a majority of its directors or otherwise to legally direct its actions).

## C. Provisions on cross-cutting issues

### Draft Provision 19: Right to regulate

69. At its forty-third session in September 2022, the Working Group identified the issue of regulatory chill as requiring further work (see A/CN.9/1124, para. 103).[48] Views were expressed that ISDS claims or the mere threat of one had resulted in regulatory chill, discouraging States from taking active measures aimed to implement policy objectives. The inherent asymmetry of the ISDS system, costs associated with the proceedings and high amount of damages awarded by tribunals were mentioned as elements that undermine the States' ability to regulate. At the same time, the need to balance the protection of the States' regulatory space and the protection of foreign investment was highlighted.

70. States have taken various approaches and combinations thereof to address this issue. Some have inserted the notion of the right to regulate in the preamble of investment agreements, while others have excluded certain measures from being the subject of claims or included standalone provisions on the right to regulate and to preserve state police powers.[49] The preamble of the multilateral instrument on ISDS reform in A/CN.9/WG.III/WP.246 contains language pertaining to the right to regulate.

71. Draft Provision 19 outlines some of the possible approaches for consideration by the Working Group as options to be developed. For example, the first paragraph acknowledges the right of States to regulate and take certain measures. The second paragraph requires the Tribunal to give deference to the right of States to regulate whereas the third paragraph carves out certain measures adopted by States from the scope of permissible claims. The Working Group may wish to consider which approach would address the concern most appropriately.

[47] Ibid.

[48] See also A/CN.9/964, para. 111; A/CN.9/935, paras. 36 and 97; A/CN.9/970, paras. 36–37; A/CN.9/1044, para. 78.

[49] CETA, Article 8.9; CPTPP, Article 9.16; USMCA, Article 14.16; Japan-United Kingdom CEPA (2020), Article 16.2; Cameroon-United Kingdom EPA (2021), Article 60; Pacific Alliance-Singapore FTA (2022), Article 8.3; New Zealand-United Kingdom FTA (2022), Article 14.1.

**Draft Provision 20: Assessment of damages and compensation**

72. Draft Provision 20 reflects the discussions of the Working Group at its forty-sixth session in October 2023, during which it considered Draft Provision 23 in A/CN.9/WG.III/WP.231 (A/CN.9/1160, paras. 99–115). As suggested at that session, guidelines for arbitral tribunals on the assessment and calculation of damages and compensation could be prepared following the consideration of this provision.

73. Paragraph 1 provides that the Tribunal may award monetary damages and restitution of property as possible remedies. Subparagraph 1(a) and paragraph 2 allow the Tribunal to award interests, which may be pre-award as well as post-award. Such interest should be set at a reasonable rate as determined by the Tribunal. The provision does not prescribe whether the interest should be simple or compound, which would depend on the circumstances of the case and the underlying legal framework (for instance, compound interests may be prohibited under the applicable law). Subparagraph 1(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.[50] The respondent State would have the option to choose between restitution of the property and paying monetary damages.

74. Paragraph 3 addresses causality and reflects the understanding of the Working Group 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 (A/CN.9/1160, para. 107). It further provides a non-exhaustive list of circumstances for the Tribunal to consider when assessing damages. For example, subparagraph (b) notes the failure of the claimant to make all reasonable efforts, rather than focusing on whether such efforts mitigated the loss or damage. Subparagraph (d) addresses the possible double-recovery by the claimant arising from compensations with regard to the same breach but not, for example, insurance payments received for the loss.

75. The Working Group may wish to consider whether non-compliance by the claimant with its obligations under the Agreement, any domestic law, relevant investment contract or any other instrument binding on the claimant is covered by subparagraph (a) or should be listed as a separate subparagraph. It should also be noted that such non-compliance may form the basis of a counterclaim (see Draft Provision 10(1)(c)).

76. Paragraph 4 provides that monetary damages shall be awarded on the basis of satisfactory evidence and shall not be speculative (see also Draft Provision 1). This addresses the concerns expressed with regard to the speculative nature of the assumptions underlying damages calculation, in particular, concerning the use of methods like the discounted-cash-flow (DCF) approach.[51] The guidelines to be prepared (see para. 72 above) could explain that monetary damages should be awarded on the basis of expected future cash flows only insofar as they are based on a case-by-case, fact-based inquiry that takes into consideration, among other factors, whether the investment has been in operation in the territory of the respondent Contracting Party for a sufficient period of time in order to establish a performance record of profitability. The guidelines could also mention that the total expenditure incurred by the claimant in making its investment, adjusted for inflation, should be considered. Paragraph 4 further prohibits punitive damages (A/CN.9/1160, paras. 111 and 115).

77. The Working Group may wish to note that Draft Provision 9(2)(f) allows the Tribunal to take into account the amount of damages sought by the claimant in

[50] Several regional model agreements and investment agreements provide for “fair and adequate” compensation. For example, South African Development Community (SADC) Model BIT, the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area Agreement (the CCIA) and the Pan-African Investment Code (PAIC).

[51] See A/CN.9/WG.III/WP.220, paras. 29–32.

proportion to the amount awarded when allocating costs. This addresses the concerns expressed about excessive damages being claimed.

78. The Working Group may wish to note that the use of experts in the assessment of damages would be subject to the applicable procedural rules and not addressed in Draft Provision 20. These matters could be further developed in the guidelines.