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Possible reform of investor-State dispute settlement (ISDS)

Draft provisions on procedural and cross-cutting issues

Note by the Secretariat

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I. Introduction

1. The Working Group had a preliminary discussion on procedural reform of investor-State dispute settlement (ISDS) at its thirty-sixth session in 2018 based on documents A/CN.9/WG.III/WP.149 and A/CN.9/WG.III/WP.153 (see A/CN.9/964, paras. 124–134), at its thirty-ninth session in October 2020 based on documents A/CN.9/WG.III/WP.192 and A/CN.9/WG.III/WP.193 (see A/CN.9/1044, paras. 41–89) and at the fourth intersessional meeting in September 2021 (see A/CN.9/WG.III/WP.214).

2. At its forty-third session in September 2022, the Working Group considered draft provisions on procedural reform on the basis of document A/CN.9/WG.III/WP.219, which addressed the procedural issues that the Working Group had identified during the first phase of its mandate. The Working Group also considered so-called "cross-cutting" issues (see A/CN.9/1124, paras. 89–104) and identified additional issues as requiring further work. Reference was made to the annex in an earlier submission by States (A/CN.9/WG.III/WP.182). The Secretariat was requested to prepare draft provisions on the identified issues taking into account recent treaty practice, the recently amended Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) as well as studies conducted by other organizations with a view of consolidating them into a suite of draft provisions (A/CN.9/1124, paras. 103 and 104).

3. Accordingly, this Note provides for a set of provisions addressing procedural and cross-cutting issues (referred to as the "Draft Provisions"). The Draft Provisions have been prepared for inclusion in existing and future international investment agreements ("IIAs") and follow the structure of chapters or sections in recently concluded IIAs addressing the resolution of investment disputes between investors and States. Accordingly, the Draft Provisions need to be read in the context of the IIA that they would be incorporated into (referred to in the Draft Provisions as the "Agreement"), including the substantive protection standards. The Draft Provisions may also be incorporated into investment contracts between a foreign investor and a State or a regional economic integration organization (REIO) and into domestic legislation governing foreign investments to the extent applicable and with the necessary adjustments.

4. References to "investor", "investment", "claim" and "dispute" in the Draft Provisions should be understood in the context of the respective Agreement and as defined therein. "Contracting Party" in the Draft Provisions refers to the Parties to the Agreement (which may be a State or a REIO) and "disputing parties" generally refers to an investor raising a claim under the Agreement and a respondent Contracting Party. The type of proceedings through which the investor could raise its claim, including any applicable rules, would be provided in the Agreement. However, as reference need to be made to such a provision in the Agreement and as the Draft Provisions have been prepared to apply generally to all such forums of dispute settlement (including a standing mechanism or an appellate mechanism), Draft Provision 3 is a placeholder to refer to whatever dispute resolution mechanism is provided under the Agreement. Similarly, the term "Tribunal" in the Draft Provisions refers to an adjudicatory body provided for in the Agreement to resolve investment disputes.

5. Where relevant, the Draft Provisions refer to other reform elements being developed or already developed by the Working Group/Commission (for example, the Code of Conduct for Arbitrators in International Investment Dispute Resolution, the Code of Conduct for Judges in International Investment Dispute Resolution, the Model Provisions on Mediation for International Investment Disputes, the Rules on Transparency in Treaty-based Investor-State Arbitration) and include a provision as a placeholder to illustrate the relationship with the Draft Provisions. The Working Group may wish to consider the general structure of the Draft Provisions and assess whether there are elements to be taken out or further added.

II. Draft provisions on procedural and cross-cutting issues

A. Submission of a claim – conditions and limitations

Draft provision 1: Consultation and negotiation

1. A dispute between a Contracting Party and an investor of the other Contracting Party (the "disputing parties") shall be settled as far as possible amicably through consultation or negotiation.

2. The disputing parties may agree to engage in consultation or negotiation at any time, including after the commencement of any other dispute resolution proceeding pursuant to Draft Provision 3.

3. A party may invite the other party in writing to engage in consultation or negotiation, which shall contain at least the following information:

(a) The name and contact details of the inviting party and its legal representative and, if the invitation is made by a legal person, the place of its incorporation;

(b) Government agencies and entities that have been involved in the matters giving rise to the invitation;

(c) A description of the basis of the dispute sufficient to identify the matters giving rise to the invitation; and

(d) A description of any prior steps taken to resolve the dispute, including information on any pending claim.

4. The other party should make all reasonable efforts to accept or reject the invitation in writing within 30 days of receipt of the invitation. If the inviting party does not receive an acceptance within 60 days of receipt of the invitation, that party may elect to treat it as a rejection of the invitation.

Draft provision 2: Mediation

[UNCITRAL Model Provisions on Mediation for International Investment Disputes[1]]

Draft provision 3: Dispute resolution proceedings

[A placeholder to refer to the dispute resolution means provided in the Agreement.]

Draft provision 4: State-to-State dispute settlement

1. A Contracting Party may submit, on behalf of an investor of that Contracting Party, a claim against another Contracting Party in accordance with the dispute settlement provisions in the Agreement or the UNCITRAL Arbitration Rules.

2. The Contracting Party may request the Tribunal established in accordance with paragraph 1 to determine that:

(a) A measure by another Contracting Party constitutes a breach of the Agreement; and

(b) The measure resulted in loss or damage to the investor and in that case, the amount of compensation for such loss or damage.

3. The Tribunal may allow the investor or its representative to file a written submission in accordance with article 4 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration or otherwise participate in the proceeding as a third person.

[1] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 17* (A/78/17), annex 1.

4. The Contracting Party may request the Tribunal to order the payment of any compensation directly to the investor and the payment of costs to whoever has assumed them.

Draft provision 5: Period for amicable settlement

No claim may be submitted for resolution pursuant to Draft Provisions 3 or 4 unless [period of time] have elapsed from (i) an invitation to engage in consultation or negotiation under Draft Provision 1 or (ii) an invitation to engage in mediation under Draft Provision 2, whichever was made earlier.

Draft provision 6: Recourse to local remedies

No claim may be submitted for resolution pursuant to Draft Provisions 3 or 4 unless:

(a) the investor had first initiated a dispute resolution proceeding before a court or competent authority of a Contracting Party with respect to the measure alleged to constitute a breach of the Agreement; and

(b) the investor obtained a final decision from a court of last resort of that Contracting Party or [period of time] have elapsed from the date the proceeding in subparagraph (a) was initiated.

Draft provision 7: Waiver of rights to initiate dispute resolution proceeding

No claim may be submitted for resolution pursuant to Draft Provisions 3 or 4, unless the investor waives its right to initiate or continue any other dispute resolution proceeding with respect to the measure alleged to constitute a breach of the Agreement.

Draft provision 8: Limitation period

No claim may be submitted for resolution pursuant to Draft Provisions 3 or 4, if [period of time] have elapsed since the investor first acquired, or should have first acquired, knowledge of the measure alleged to constitute a breach of the Agreement and knowledge that it has incurred loss or damage.

Draft provision 9: Denial of benefits

1. A Contracting Party may deny the benefits of the Agreement to an investor of the other Contracting Party that is an enterprise of that Contracting Party and to investments of that investor if the enterprise is owned or controlled by a person of a non-Contracting Party and:

(a) Has no substantial business activities in the territory of any Contracting Party other than the denying Contracting Party; or

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

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

(a) The investor receives third-party funding in a manner inconsistent with Draft Provision 21;

(b) The investment was made in violation of the denying Contracting Party's laws and regulations or national or international principles of good faith;

(c) The investment was made by way of corruption, fraud, or deceitful conduct; or

(d) Permitting a claim to be submitted pursuant to Draft Provisions 3 or 4 would constitute a misuse of the Agreement and its objectives.

Draft provision 10: Shareholder claims

1. A shareholder may submit a claim pursuant to Draft Provision 3 on its own behalf only for direct loss or damage incurred as the result of a breach of the Agreement, which means that the alleged loss or damage is separate and distinct from any alleged loss or damage to the enterprise in which the shareholder holds shares. Direct loss or damage does not include diminution in the value of the shareholding or in the distribution of dividends to the shareholder as a result of loss or damage incurred by the enterprise.

2. A shareholder may submit a claim to a Contracting Party pursuant to Draft Provision 3 on behalf of an enterprise of that Contracting Party, which the shareholder owns or controls, only in the following circumstances:

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

(b) The enterprise sought remedy in that Contracting Party to redress its loss or damage but has been subject to treatment akin to a denial of justice under customary international law.

3. When the Tribunal makes a final decision in favour of the shareholder in a proceeding pursuant to paragraph 2, the Tribunal shall award monetary damages and any applicable interest or restitutions of property to the enterprise.

Draft provision 11: Counterclaim

1. When a claim is submitted for resolution pursuant to Draft Provisions 3 or 4, the respondent may make a counterclaim:

(a) Arising directly out of the subject matter of the claim;

(b) In connection with the factual and legal basis of the claim; or

(c) That the claimant has breached its obligations under the Agreement, domestic law, an investment contract or any other instrument binding on the claimant.

2. For the avoidance of doubt, the consent of the respondent to the submission of a claim by the claimant is subject to the condition that the claimant consents to any submission of a counterclaim referred to in paragraph 1.

Draft provision 12: Right to regulate

1. Nothing in the Agreement shall be construed as preventing the Contracting Parties from exercising their right to regulate in the public interest and to adopt, maintain and enforce any measure that they consider appropriate to ensure that investments are made in a manner sensitive to the protection of public health, public safety or the environment, the promotion and protection of cultural diversity, or [...].

2. When assessing the alleged breach by a Contracting Party of its obligation under the Agreement, the Tribunal shall give a high level of deference that international law accords to Contracting Parties with regard to the development and implementation of domestic policies, the right to regulate in the public interest and the right to adopt, maintain and enforce measures sensitive to the protection of public health, public safety or the environment, the promotion and protection of cultural diversity, or [...].

3. No claim may be submitted for resolution pursuant to Draft Provisions 3 or 4, if the measure alleged to constitute a breach of the Agreement was adopted by the Contracting State to protect public health, public safety or the environment (including compliance with the Paris Agreement or any principle or commitment contained in articles 3 and 4 of the United Nations Framework Convention on Climate Change), the promotion and protection of cultural diversity, or […].

B. Conduct of the proceedings

Draft provision 13: Evidence

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

2. At any time during the proceeding, the Tribunal may require the disputing parties to produce documents, exhibits or other evidence. The Tribunal may decide which documents, exhibits or other evidence the disputing parties should produce within such a period of time as the Tribunal shall determine.

3. 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.

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

5. The Tribunal may reject any request, unless made by all disputing parties, to establish a procedure whereby each disputing party can request another party to produce documents.

6. If a disputing party, duly invited by the Tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the Tribunal may make the final decision on the evidence before it.

Draft provision 14: Bifurcation

1. A disputing party may request that an issue be addressed in a separate phase of the proceeding ("request for bifurcation").

2. The request for bifurcation shall be made as soon as possible and shall state the issue to be bifurcated.

3. When determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) Bifurcation would materially reduce the time and cost of the proceeding;

(b) Determination of the issues to be bifurcated would dispose of all or a substantial portion of the claim; and

(c) The issues to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.

4. The Tribunal shall decide on the request for bifurcation within [period of time] after the last submission on the request and shall fix any time period necessary for the further conduct of the proceeding.

5. If the Tribunal orders bifurcation, it shall suspend the proceeding with respect to any issues to be addressed at a later phase, unless the disputing parties agree otherwise.

6. After consultation with the disputing parties, the Tribunal may at any time and on its own initiative decide whether an issue should be addressed in a separate phase of the proceeding.

Draft provision 15: Consolidation of proceedings

1. When two or more claims have been submitted separately pursuant to Draft Provisions 3 or 4, the disputing parties may agree to consolidate the relevant proceedings.

2. Consolidation shall join all aspects of the proceedings sought to be consolidated and result in a single decision.

3. The disputing parties shall provide the proposed terms for the conduct of the consolidated proceedings.

Draft provision 16: Interim/provisional measures

1. A disputing party may at any time request the Tribunal to grant interim/provisional measures.

[…]

Draft provision 17: Code of Conduct

Adjudicators appointed to resolve a claim pursuant to Draft Provisions 3 or 4 shall be bound by the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution or the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution, whichever is appropriate.

Draft provision 18: Transparency

The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall apply to the proceedings initiated pursuant to Draft Provisions 3 or 4, regardless of whether the proceeding is an investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors concluded on or after 1 April 2014.

Draft provision 19: Early dismissal

1. The Tribunal, at the request of a disputing party or on its own initiative, may decide that a claim submitted pursuant to Draft Provisions 3 or 4, a counterclaim submitted pursuant to Draft Provision 11, or parts thereof are manifestly without legal merit.

2. A disputing party shall make the request referred to in paragraph 1 as soon as possible after the constitution of the Tribunal but no later than [period of time (for example, 45 days)] after its constitution. The Tribunal may admit a later request if it considers the delay justified.

3. The request may relate to the jurisdiction of the Tribunal or the substance of the claim or counterclaim. The request shall specify the grounds on which it is based and contain a statement of the relevant facts, laws and arguments.

4. After inviting the disputing parties to express their views within a fixed period of time, the Tribunal shall make its decision within [period of time (for example, 60 days)] after the last submission by the disputing parties.

5. If the Tribunal decides that all claims are manifestly without legal merit, it shall render a decision to that effect. Otherwise, the Tribunal shall issue a decision on the request and fix any time frames for the further conduct of the proceeding. The Tribunal shall award the prevailing party its reasonable costs, unless the Tribunal determines that there are exceptional circumstances justifying a different allocation of costs.

6. A decision by the Tribunal that a claim is not manifestly without legal merit shall be without prejudice to the right of the disputing party to argue subsequently in the proceeding that the Tribunal lacks jurisdiction or that the claim or counterclaim is without legal merit.

Draft provision 20: 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. A disputing party shall make the request referred to in paragraph 1 by specifying the relevant circumstances that justify the security for costs and include supporting documents.

3. After inviting the disputing parties to express their views within a fixed period of time, the Tribunal shall make a decision whether to order security for costs within [period of time (for example, 30 days)] after the last submission by the disputing parties.

4. When determining whether to order a disputing party to provide security for costs, the Tribunal shall consider all relevant circumstances of the case, 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 existence of third-party funding to support that disputing party in pursuing its claim or counterclaim; and

(e) The conduct of the disputing parties.

5. When ordering security for costs, the Tribunal shall specify the terms and fix a period of time for compliance with the order.

6. If a disputing party fails to comply with the order to provide security for costs, the Tribunal may suspend the proceeding for a fixed period of time, after which it may order the termination of the proceeding in accordance with Draft Provision 22.

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

8. The Tribunal may, at the request of a disputing party or on its own initiative, modify or terminate its order to provide security for costs.

Draft provision 21: Third-party funding

1. "Third-party funding" means the provision of any direct or indirect funding to a disputing party by a natural or legal person who is not a party to the proceeding but enters into an agreement to provide, or otherwise provides, funding ("third-party funder") for a proceeding initiated pursuant to Draft Provisions 3 or 4 in return for remuneration dependent on the outcome of the proceeding.

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. In addition, the Tribunal may require the disputing party to disclose:

(a) Information regarding the funding agreement and the terms thereof;

(b) Whether the third-party funder agrees to cover any adverse cost award;

(c) Any right of the third-party funder to control or influence the management of the claim or the proceeding or to terminate the funding agreement;

(d) Any agreement between the third-party funder and the legal representative of the disputing party; and

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

4. The disputing party shall disclose the information listed in paragraph 2 when submitting its statement of claim, or if the funding agreement is entered into after the submission of the statement of claim, immediately thereafter. The disputing party shall disclose the information required by the Tribunal in accordance with paragraph 3 as promptly as possible.

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. The Tribunal may limit third-party funding in the following exceptional circumstances:

(a) When the expected return to the third-party funder exceeds a reasonable amount;

(b) When the number of cases that the third-party funder funds against the respondent Contracting Party with regard to the same measure exceeds a reasonable number; or

(c) […].

7. If the disputing party fails to comply with the disclosure obligations in paragraph 2 to 5, the Tribunal may:

(a) Suspend or terminate the proceeding in accordance with Draft Provision 22;

(b) Order security for costs in accordance with Draft Provision 20; or

(c) Take this fact into account when allocating costs in accordance with Draft Provision 25.

8. If the disputing parties receive funding which is not permissible under paragraph 6, the Tribunal may take the measures listed in paragraph 7 and in addition order the disputing party to terminate the funding agreement and to return any funding received.

Draft provision 22: Suspension and termination of the proceeding

1. The Tribunal shall suspend or terminate the proceeding when requested jointly by the disputing parties.

2. The Tribunal may suspend the proceeding at the request of a disputing party or on its own initiative after inviting the disputing parties to express their views.

3. When ordering suspension, the Tribunal shall specify the period of suspension and any terms of the suspension. Time frames set out in the rules applicable to the proceeding shall be extended by the period of time for which the proceeding was suspended.

4. The Tribunal may extend the period of suspension, after inviting the disputing parties to express their views.

5. The Tribunal may terminate the proceeding at the request of a disputing party, unless the other disputing party objects thereto in writing within a period of time fixed by the Tribunal.

6. If the disputing parties fail to take any steps in the proceeding for more than [period of time], the Tribunal shall notify them of the time elapsed since the last step taken and fix a period of time to take any necessary steps.

7. If either of the disputing parties takes the necessary step within the period of time referred to in paragraph 6, the proceeding shall continue. If the disputing parties fail to take the necessary step within that period of time, the Tribunal shall issue an order of termination if it finds that the continuation of the proceeding has become unnecessary.

C. Decisions by the Tribunal

Draft provision 23: Assessment of damages and compensation

1. When the Tribunal makes a final decision, it may only award:

(a) Monetary damages and any applicable interest; or

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

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

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

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

(b) Failure by the disputing parties to mitigate loss or damage;

(c) Prior monetary damages received by the claimant for the same loss or damage;

(d) Restitution of property;

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

(f) Any non-compliance by the claimant with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

4. The Tribunal shall only award monetary damages that are established in accordance with Draft Provision 13 on the basis of satisfactory evidence and that are not inherently speculative. The Tribunal may award monetary damages on the basis of expected future cash flows only insofar as they are based on a case-by-case, fact-based inquiry that takes into consideration, among other factors, whether the investment has been in operation in the territory of the respondent Contracting Party for a sufficient period of time to establish a performance record of profitability.

5. The Tribunal may, at the request of a disputing party or on its own initiative, appoint one or more experts to report to it in writing on issues related to the assessment or calculation of damages, subject to any terms and conditions agreed with the disputing parties.

6. The Tribunal may require that experts appointed by the parties, if any, on issues related to the assessment or calculation of damages work on the basis of a harmonized, clearly defined set of instructions based on similar assumptions. The Tribunal may also require:

(a) A joint statement by the experts to explain any difference in their opinions;

(b) Alternative calculations in case the experts disagree on facts and legal approaches; and

(c) Joint report by those experts.

7. The Tribunal shall not award punitive damages.

8. The Tribunal shall not award monetary damages exceeding the total expenditures (adjusted for inflation) incurred by the claimant in making its investment.

9. If the amount of monetary damages claimed by the claimant significantly exceeds the amount awarded by the Tribunal, the Tribunal may take this fact into account when allocating costs in accordance with Draft Provision 25.

Draft provision 24: Period of time for making the final decision

1. The Tribunal shall ensure the proceeding is carried out in a timely and efficient manner and make the final decision as soon as possible.

2. Unless otherwise agreed by the disputing parties, the Tribunal shall make the final decision within [period of time] after the last submission by the disputing parties or a hearing, whichever is later.

3. The Tribunal may, after inviting the disputing parties to express their views, extend the period of time established in accordance with paragraph 2 and indicate a period of time within which it shall make the final decision.

Draft provision 25: Allocation of costs

1. The costs of the proceeding shall in principle be borne by the unsuccessful disputing party.

2. However, the Tribunal may allocate the costs between the disputing parties, if it determines the allocation to be reasonable taking into account all relevant circumstances of the case, including:

(a) The outcome of the proceeding or any parts thereof;

(b) The conduct of the disputing parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner in accordance with the applicable rules and complied with the orders and decisions of the Tribunal;

(c) The complexity of the issues;

(d) The reasonableness of the costs claimed by the disputing parties;

(e) The disclosure by the disputing parties on the existence of third-party funding in accordance with Draft Provision 21; and

(f) The amount of monetary damages claimed by the claimant in proportion to the amount awarded by the Tribunal.

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. Paragraphs 1 to 3 apply to any costs arising from a request by a disputing party that a claim is manifestly without legal merit pursuant to Draft Provision 19.

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

6. The Tribunal shall ensure that its decision on costs is reasoned and form part of the final decision.