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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 as provided in document A/CN.9/WG.III/WP.231. The annotations have been prepared to assist the Working Group in understanding how the draft provisions could operate and how they relate to each other as well as to other reform elements being developed by the Working Group.

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

A. Submission of a claim – conditions and limitations

2. The draft provisions in this section address the conditions for the submission of a claim by an investor. However, they do not generally address who can submit a claim and the types of dispute resolution proceeding that can be chosen, which are left to the respective international investment agreement (IIA). Accordingly, the draft provisions have been prepared to apply generally to all types of dispute settlement mechanisms (including arbitration, a standing mechanism and State-to-State dispute settlement mechanisms). They address the various steps and conditions to be met for an investor to bring a claim (cooling-off period, local remedies, and waiver) and also establish limitations and exceptions thereto (limitation period, denial of benefits and shareholder claims). Also included is a rule allowing for counterclaims by respondents and a rule aimed to strengthen the States' right to regulate to achieve different policy objectives in response to the concerns expressed in the Working Group with regard to regulatory chill.[1]

Draft provision 1: Consultation and negotiation & Draft provision 2: Mediation

3. Draft Provisions 1 and 2 aim to promote the amicable settlement of investment disputes. Draft Provision 1 encourages disputing parties to settle their dispute through consultation or negotiation and Draft Provision 2 incorporates the UNCITRAL Model Provisions on Mediation for International Investment Disputes (Model Provisions on Mediation).[2] Both provisions are aligned with recently concluded IIAs which contain explicit references to the use of consultation, negotiation, and mediation.[3]

4. Both provisions emphasize the voluntary nature of consultation, negotiation and mediation and alert the parties of their availability at any time of the dispute, including after the commencement of an adjudicatory proceeding pursuant to Draft Provision 3. They require an invitation to engage in consultation, negotiation, or mediation to be made in writing and to contain minimum information. Such an invitation would trigger the period for amicable settlement provided for in Draft Provision 5, which needs to elapse in order for an investor to submit a claim under Draft Provision 3.

Draft Provision 3: Dispute resolution proceedings

5. Draft Provision 3 functions as a placeholder to refer to the dispute settlement mechanism provided for in the IIA that the Draft Provisions would be incorporated into (referred to as the "Agreement" in the Draft Provisions). It takes into consideration that IIAs provide different means to resolve investment disputes, including arbitration

[1] See A/CN.9/1124, para. 103 and A/CN.9/970, para. 36.

[2] Adopted by the Commission at its fifty-sixth session. See *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 17* (A/78/17), Annex I.

[3] See for example Comprehensive Trade and Economic Agreement between Canada and the European Union (CETA), Articles 8.19–8.20, the provisions of the Trans-Pacific Partnership Agreement incorporated, by reference, into and made part of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Article 9.18 and Agreement between the United States of America, the United Mexican States, and Canada (USMCA), Article 14.D.2.

under different sets of rules. It takes into account that IIAs may refer claims by investors to local courts or to a State-to-State dispute settlement mechanism.[4] It also reflects the fact that some IIAs already refer to a standing mechanism to resolve investment disputes and that the Working Group is discussing the possible establishment of a multilateral standing mechanism to resolve investment disputes, which may be referred to in the IIAs in the future. The inclusion of Draft Provision 3 is to ensure that the Draft Provisions as a whole would apply to all such mechanisms or proceedings and for ease of reference. Similarly, the term "Tribunal" in the Draft Provisions covers different adjudicatory bodies, including arbitral tribunals, chambers in a standing mechanism, domestic courts, and other competent authorities. Draft Provision 3 should, however, not be understood as altering the consent provided by States in the respective IIA.

Draft provision 4: State-to-State dispute settlement

6. Draft Provision 4 provides for a State-to-State dispute settlement mechanism to resolve investment disputes. It allows a State to claim compensation on behalf of its investor against another State, which is a party to the Agreement, for damages caused by a measure of that State. A number of recently concluded IIAs contain similar provisions.[5]

7. As to how such a proceeding should be conducted, Draft Provision 4 refers to the State-to-State dispute settlement mechanism in the Agreement and provides arbitration under the UNCITRAL Arbitration Rules as a default in case there is no such mechanism or where the States agree not to utilize the mechanism. The Working Group may wish to note that State-to-State dispute settlement provisions in IIAs typically concern disputes regarding the interpretation or application of the Agreement and may not be suited for resolving investment disputes.[6]

8. Draft Provision 4 does not address the domestic process through which an investor would request its State to raise a claim. However, it provides that the investor may be allowed to participate in the proceeding (paragraph 3) and that the Tribunal may order the payment directly to the investor, if requested by the State (paragraph 4).

Draft provision 5: Period for amicable settlement

9. Draft Provision 5 requires disputing parties to seek amicable settlement in accordance with Draft Provisions 1 and 2 for a certain period of time (referred to as a "cooling-off" period) before a claim is submitted to an adjudicatory process pursuant to Draft Provisions 3 or 4.

10. The cooling-off period in Draft Provision 5 commences with an invitation by a disputing party to engage in amicable settlement. This is to encourage the parties to make use of such means.

11. The cooling-off period should be sufficiently long to allow for the parties to exchange views on a possible settlement, while it should also not be too long, as this may delay the final resolution of the dispute (for example, when a settlement seems unlikely). Many recently concluded IIAs contain a cooling-off period of 6 months or 180 days.[7]

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[4] The use of a State-to-State dispute resolution mechanism and the exhaustion of local remedies identified as possible reform elements (A/CN.9/1124, para. 103), are further elaborated in Draft Provisions 4 and 6.

[5] See Brazil-Ethiopia BIT (2018), Article 24; Brazil-Guyana BIT (2018), Article 25; Brazil-Suriname BIT (2018), Article 25; Brazil-United Arab Emirates BIT (2019), Article 25; Brazil-Ecuador BIT (2019), Article 25.

[6] USMCA (2020), Article 31.2; CETA (2016), Article 29.2; CPTPP, Article 28.3; Australia-Uruguay BIT (2019), Article 12 and 13; Canada Model BIT (2021), Article 54; India Model BIT (2015), Article 31; US Model BIT (2012), Article 37.

[7] 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 from the submission of a notice of intent before submitting a claim to arbitration.

12. It should be noted that disputing parties are free to withdraw from consultation, negotiation and mediation at any time and that Draft Provision 5 does not impose a duty on the parties to engage in such proceedings during the cooling-off period.

Draft provision 6: Recourse to local remedies

13. Draft Provision 6 requires an investor to seek remedies in the host State prior to submitting a claim pursuant to Draft Provisions 3 and 4.[8] 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).[9] Local-remedies-first clauses require an investor to pursue local remedies for a certain period of time (for example, 30 months[10]) before initiating other dispute resolution proceedings.[11]

14. The Working Group may wish to consider whether the approach in Draft Provision 6 is appropriate or whether it should simply encourage disputing parties to settle their dispute by local remedies.[12]

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

15. Draft Provision 7 aims to avoid multiple proceedings by limiting an investor from seeking relief in multiple forums for the same breach. As a condition to submitting a claim pursuant to Draft Provisions 3 or 4, the investor is obliged to waive its rights to initiate or continue proceedings in other forums.[13] The waiver would, however, not apply to a subsequent proceeding, for example, relating to the enforcement of decisions rendered during the proceeding.

16. 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 forums,[14] or a more prescriptive provision, which would prohibit an investor from initiating or continuing any other type of dispute resolution upon the commencement of any dispute resolution pursuant to Draft Provisions 3 or 4.

17. Draft Provision 7 may need to be adjusted depending on the approach taken with regard to recourse to local remedies in Draft Provision 6.

Draft Provision 8: Limitation period

18. Draft Provision 8 provides for a period within which an investor needs to raise a claim, similar to the statute of limitation in domestic legal systems.[15] The Working Group may wish to consider the appropriate period of time and when that period

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[8] See A/CN.9/970, para. 30.

[9] 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); See also IISD Model International Agreement on Investment for Sustainable Development, Article 45 (b).

[10] USMCA, Article 14.D.5.1.a&b.

[11] 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).

[12] See for example Korea, Republic of-Uzbekistan BIT (2019), Art. 11(2), which provides that the "investor and the Contracting Party in whose territory the investments are made shall endeavour to settle the dispute by consultations and negotiations in good faith, and at the same time, by local remedies of the Contracting Party".

[13] See UNCTAD Series on International Investment Agreements II, available at https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf, p. 86.

[14] Another type of provision aiming at the avoidance of the use of multiple forums are so called fork-in-the-road provisions, which require an investor to choose a dispute settlement forum at the very beginning. Once a choice is made, the investor does not have recourse to another forum. See United Nations Conference on Trade and Development (UNCTAD), Investor-State Dispute Settlement, UNCTAD Series on Issues in International Investment Agreements II. A Sequel, p. 86.

[15] Recently concluded IIAs also 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).

should commence. In Draft Provision 8, the period commences when the investor acquired or should have acquired knowledge of not only the measure which is alleged to constitute the breach but also that the investor had incurred loss or damage.

19. The Working Group may wish to consider whether Draft Provision 8 would also apply to a claim submitted by a State pursuant to Draft Provision 4 and if so, when the time period should commence. It may wish to further consider instances where the limitations period would be suspended, for example, when an invitation to engage in mediation was sent in accordance with Draft Provision 2 or when the investor had initiated dispute resolution proceedings before a local court in accordance with Draft Provision 6.

Draft Provision 9: Denial of benefits

20. Draft Provision 9 allows a Contracting Party to deny the protection it had offered in the Agreement to investors that it did not intend to protect. For example, IIAs 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.[16]

21. Paragraph 1 is based on similar provisions in recently concluded IIAs.[17] 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 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 IIAs and aims to limit forum shopping.[18]

22. 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 corruption and illegality.[19] The Working Group may wish to consider other instances to be added, for example, with regard to shareholder reflective claims currently dealt with in Draft Provision 10. Subparagraph (d) is a catch-all paragraph, which addresses any abuse of process by the claimant.

23. According to Draft Provision 9, 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 needs to be narrowed to procedural benefits, for example, to raise a claim pursuant to Draft Provisions 3 or 4.

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[16] Loukas A. Mistelis and Crina Baltag, Denial of Benefits' clause in Investment Treaty Arbitration, Queen Mary University of London, School of Law, 2018, pp. 1–4; Yas Banifatemi, Taking Into Account Control Under Denial of Benefits Clauses, Jurisdiction in Investment Treaty Arbitration, IAI Series on International Arbitration No.8 (edited by E Gaillard and Y. Banifatemi), p. 223.

[17] See for example CETA, Article 8.16; CPTPP, Article 9.15; USMCA, Article 14.14; See also UK-Japan Comprehensive Economic Partnership Agreement (CEPA) (2020), Article 8.13; Japan-Morocco BIT (2020), Article 20; Comprehensive Economic Cooperation and Partnership Agreement between the Republic of Mauritius and the Republic of India (CECPA) (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.

[18] See also A/CN.9/WG.III/WP.182, p. 9.

[19] Regarding the notion of good faith in international investment law, see Emily Sipiorski, Good Faith in International Investment Arbitration, Oxford International Arbitration Series (Feb 2019); See regarding corruption and illegality Corruption as a Jurisdiction Bar in Investment Treaty Arbitration: A Strategic Reform, George Martsekis, available at www.itainreview.org/articles/Fall 2019/corruption-as-a-jurisdiction-bar-in-investment-treaty-arbitration.html.

Draft Provision 10: Shareholder claims[20]

24. Draft Provision 10 builds on the joint work on shareholder reflective loss claims with the OECD.[21] As noted (see para. 2 above), whether a shareholder has standing as an investor to raise a claim under the Agreement is left to the Agreement and not dealt with in the Draft Provision.

25. 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. Paragraph 3 then 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.

26. The Working Group may wish to consider a number of other issues that arise with regard to shareholder claims for reflective loss as outlined in A/CN.9/WG.III/WP.170 and whether to address them in the draft provisions.

Draft Provision 11: Counterclaim[22]

27. Recent IIAs have included provisions explicitly allowing for counterclaims by respondent States,[23] which could reduce uncertainty, promote fairness and ultimately ensure a balance between the disputing parties in ISDS. Allowing counterclaims to be heard together with the original claim enhances procedural efficiency and could avoid multiple proceedings in different forums involving the same disputing parties.

28. Applicable procedural rules contemplate the possibility of the respondent raising counterclaims but under certain conditions.[24] Paragraph 1 aims to broaden the scope of counterclaims that can be brought, particularly with subparagraph (c) allowing for counterclaims based on the investor's breach of its obligations regardless of any link with the claim itself. The subparagraph, however, does not list nor specify such obligations of investors but indicate where they could be found. The Working Group may wish to consider whether it wishes to develop a provision based on recent IIAs that imposes certain obligations on investors.[25]

29. Paragraph 2 ensures that counterclaims made by respondents in accordance with paragraph 1 would fall within the jurisdiction of the arbitral tribunal (A/CN.9/1044, para. 61). This is because procedural rules typically limit counterclaims to those that

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[20] 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); See also Julian Arato, Kathleen Claussen, Jaemin Lee, Giovanni Zarra, Reforming shareholder claims in investor-state dispute settlement, Journal of International Dispute Settlement Vol.14, Issue 2, June 2023, pp. 242–258.

[21] Shareholder Claims for Reflective Loss in Investment State Dispute Settlement: A "Component-by-Component" Approach to Reform Proposals, Informal Discussion Paper, December 2021, available at https://uncitral.un.org/sites/uncitral.un.org/files/oecd_shareholder_claims_for_reflective_loss_in_isds_-_informal_discussion_paper_for_uncitral_wg_iii.pdf.

[22] 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).

[23] For example, CPTPP, Article 9.19(2); Slovakia-Iran BIT (2016), Article 14(3); Argentina-United Arab Emirates BIT (2018), Article 28(4).

[24] UNCITRAL Arbitration Rules, Article 21(3); 2022 ICSID Arbitration Rules, Rules 48; SCC Arbitration Rules, Article 9(1)(iii); and ICC Arbitration Rules, Article 5.

[25] 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.

fall within the jurisdiction,[26] with arbitral tribunals often dismissing counterclaims on grounds of lack of consent by the claimant.[27]

Draft Provision 12: Right to regulate[28]

30. 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). Views had been 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, for example, to protect human, economic, social and environmental rights of its people.[29] The inherent asymmetry of the ISDS system, costs associated with the ISDS proceedings and high amount of damages awarded by tribunals were also mentioned as elements that undermine the States' ability to regulate (A/CN.9/970, para. 36). At the same time, the need to balance the protection of the States' regulatory space and the protection of foreign investment was highlighted.[30]

31. States have taken various approaches and combinations thereof to address this issue. They have inserted the notion of the right to regulate in the preamble of IIAs,[31] excluded certain measures from being the subject of ISDS or included standalone provisions on the right to regulate and to preserve state police powers.[32] Draft provision 12 outlines some of the possible approaches for consideration by the Working Group. For example, paragraph 3 carves out measures adopted by States for the protection of public health, public safety, the environment, and cultural diversity from the scope of ISDS.[33]

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[26] See for example, UNCITRAL Arbitration Rules, Article 21(3), which states, "provided that the arbitral tribunal has jurisdiction over it" and 2022 ICSID Arbitration 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".

[27] 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.

[28] See also A/CN.9/964, para. 111; A/CN.9/935, para. 36, 97; A/CN.9/970, para. 36, 37; A/CN.9/1044, para. 78; On questions related to the definition of the "right to regulate" see Ted Gleason and Catharine Titi, The Right to Regulate, Academic Forum on ISDS Concept Paper 2022/2, 20 October 2022, pp. 1–3; On different varieties of regulatory chill see Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement", Transnational Environmental Law, 7:2 (2018), pp. 229–250; On regulatory chill from a political science perspective, see Kyla Tienhaara, Regulatory Chill and the Threat of Arbitration: A View from Political Science in Chester Brown and Kate Miles (eds), Evolution in Investment Treaty Law and Arbitration (CUP 2011), 615.

[29] See Submission of Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the right to development; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; the Special Rapporteur on the rights of indigenous peoples; the Independent Expert on the promotion of a democratic and equitable international order; and the Special Rapporteur on the human rights to safe drinking water and sanitation (7 March 2019), p. 2, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24396.

[30] See A/CN.9/WG.III/WP.214, paras. 50–51.

[31] See for example preamble of CETA: "Recognising that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity".

[32] 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.

[33] See UNCTAD, Investment Policy Framework for Sustainable Development (IPFSD) (2015), p. 103.

B. Conduct of the proceedings

32. The way in which dispute resolution proceedings are conducted impacts the overall length and cost of such proceedings. Therefore, provisions have been developed in IIAs as well as arbitration rules to streamline the process and to enhance procedural efficiency. Draft provisions in section B build on some of the procedural reforms found in recent IIAs and the 2022 ICSID Arbitration Rules (which resulted from the ICSID Rules and Regulations Amendment Process) as well as the deliberations of the Working Group on document A/CN.9/WG.III/WP.219. As noted (see para. 5 above), the Draft Provisions have been prepared to apply not only to the conduct of arbitration, but more generally to all types of dispute resolution proceedings with an aim to promote greater predictability and clarity. Draft Provisions 17 and 18 incorporate the texts adopted by Commission and implement them as they also address the conduct of the proceedings.

33. The Working Group may wish to consider whether the development of the following provisions is appropriate in light of existing rules governing the conduct of arbitration. While the Draft Provisions have been prepared to complement the relevant provisions in IIAs and in arbitration rules, it may be particularly necessary to address the relationship between the provisions in section B and those other provisions as they may overlap. The Working Group may wish to also consider whether a comprehensive set of rules should be developed on the conduct of the proceedings.

Draft provision 13: Evidence

34. Draft Provision 13 deals with the taking of evidence during the proceedings. Paragraph 1 affirms that each disputing party has the burden of proving the elements of its claims (or counterclaims) or defence,[34] and the remaining paragraphs clarify the discretion of the Tribunal in the taking of evidence and its evaluation.[35]

35. Paragraph 2 allows the Tribunal to require the disputing parties to submit evidence relied upon at any time. Considering the vast amount of evidence provided by the disputing parties in investment disputes, it also allows the Tribunal to decide which evidence are to be produced and the time frame within which it should be produced.

36. Paragraph 3 provides as a default rule that statements by witnesses are to be presented in written form, signed by them. A written witness statement may eliminate the need to hear a witness for example if facts are undisputed.[36] The paragraph also clarifies that the Tribunal has the authority to choose the witnesses to testify in a hearing.

37. Paragraph 5 affirms the discretionary power of the Tribunal to not provide for a procedure where one disputing party requests another disputing party to produce documents (“document production”). And paragraph 6 addresses the consequence of late submissions of evidence or failure thereof.[37]

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[34] The general principle regarding the burden of proof stems from the maxim *onus probandi actori incumbit*, meaning “who asserts must prove”. However, the principle is not absolute. Investment tribunals have held that it does not apply to “obvious or notorious facts” and that it only applies to factual questions as opposed to legal questions. *See for example Venezuela US v. Venezuela – PCA, Partial Award (Jurisdiction and Liability), 2021; or Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) ICJ, Judgment 2012.* See UNCITRAL Arbitration Rules, Article 27(1); 2022 ICSID Arbitration 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.

[35] See UNCITRAL Arbitration Rules, Article 27(4), IBA Rules Article 9(1), 2022 ICSID Arbitration Rules, Rule 41(1).

[36] See UNCITRAL Notes on Organizing Arbitral Proceedings, para. 88.

[37] See UNCITRAL Arbitration Rules, Article 30(3).

Draft provision 14: Bifurcation

38. Bifurcation refers to the separation of the proceeding into different phases addressing distinct issues.[38] 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.

39. Bifurcation may be done at the request of a disputing party (paragraph 1) or upon the initiative of the Tribunal (paragraph 6). Paragraph 2 requires a disputing party making a request for bifurcation to do so as soon as possible, stating the issues to be bifurcated. The Working Group may wish to consider whether jurisdictional issues are to be included in the scope of Draft Provision 14, in light of existing rules addressing jurisdictional questions.[39]

40. Paragraph 3 provides a non-exhaustive list of circumstances to be considered by the Tribunal when it decides whether to bifurcate or not. 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.

41. Paragraph 4 foresees a time period within which the Tribunal has to determine whether to bifurcate (for example, 30 days), upon which it shall suspend the proceeding with regard to issues to be determined at a later phase in accordance with paragraph 5.

Draft provision 15: Consolidation of proceedings

42. Consolidation refers to the combining of multiple proceedings, which had been commenced separately, into a single proceeding. Consolidation could reduce the time and cost required to handle multiple or parallel proceedings, which may be burdensome on the disputing parties. It may also prevent inconsistent decisions by Tribunals with regard to same measure or issues.[40] Many recent IIAs[41] and arbitration rules[42] provide for consolidation.

43. While it would be ideal to consolidate proceedings that have an issue of law or fact in common or that arise out of the same events or circumstances, Draft Provision 15 relies on the disputing parties' consent for consolidation. 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 consolidate such proceedings.

44. When determining whether to consolidate, 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 would serve the interests of fair and efficient resolution of the claims including the interest of obtaining consistent decisions. Consolidation joins all aspects of the proceedings sought to be consolidated and results in one decision.

45. Paragraph 3 provides that the disputing parties agree upon the proposed terms of the consolidated proceeding, which may indicate the Tribunal tasked with the consolidated proceeding (or how it should be composed) as well as any appliable rules

[38] 2022 ICSID Arbitration Rules, Rules 42 and 44, the latter addressing requests for bifurcation relating to a preliminary objection.

[39] UNCITRAL Arbitration Rules, Article 23 and 2022 ICSID Arbitration Rules, Rules 43 and 44.

[40] 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.

[41] 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.

[42] See 2022 ICSID Arbitration Rules, Rule 46(2); ICC Arbitration Rules, Article 10; SIAC Rules, Rule 7; LCIA Rules, Article 22.1 (ix).

or a procedural schedule. The terms should also address the termination of the proceedings that are sought to be consolidated.

Draft provision 16: Interim/provisional measures

46. 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 in Article 26 of the UNCITRAL Arbitration Rules and Rule 47 of the 2022 ICSID Arbitration Rules, which also provide 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 time during the course of the proceedings. The Working Group may wish to consider whether it will be necessary to prepare a detailed provision on interim or provisional measures based on existing rules.

Draft provision 17: Codes of Conduct

47. At its fifty-sixth session in July 2023, the Commission adopted the Code of Conduct for Arbitrators in International Investment Dispute Resolution and adopted in principle the Code of Conduct for Judges in International Investment Dispute Resolution. Both seek to promote the integrity of the ISDS process and reduce conflicts of interest, which often gave rise to criticism about the legitimacy of the ISDS system. The Code of Conduct for Arbitrators reinforces the duty of independence and impartiality of arbitrators, broadens the disclosure requirements, and regulates the practice of double-hatting. The UNCITRAL Code of Conduct for Judges provides a comprehensive set of ethical rules for members of a potential standing mechanism established to resolve investment disputes.

48. When adopting the two Codes, the Commission recommended that States and other relevant stakeholders involved in the negotiation of international investment instruments make reference to the Codes as appropriate.[43] Accordingly, Draft Provision 17 incorporates the Codes of Conduct with the aim of providing a tool to implement them and to make them binding on the adjudicators appointed to resolve claims pursuant to Draft Provisions 3 or 4.

Draft provision 18: Transparency

49. Provisions on transparency address the extent to which information about the proceedings, including documents produced therein, can be made publicly accessible or available. Transparency contributes to a perception of fairness and fosters the legitimacy of the ISDS system. Transparency also increases accountability and promotes good governance. Recently concluded IIAs contain provisions on transparency.[44]

50. At its forty-sixth session in July 2013, the Commission adopted the Rules on Transparency in Treaty-based Investor-State Arbitration (the "Transparency Rules"),[45] a set of procedural rules that provides for transparency and for accessibility to the public of treaty-based investor-State arbitration. As the Transparency Rules apply in relation to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to an IIA concluded on or after 1 April 2014, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the

[43] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 17* (A/78/17), para. 90.

[44] Republic of Korea-New Zealand FTA (2015), Article 10.27; Canada-Guinea BIT (2015), Article 31; Australia-China FTA (2015), Article 9.17; Chile-Hong Kong BIT (2015), Article 28; CETA (2016), Article 8.36; Ethiopia-Qatar BIT (2017), Article 16; Australia-Peru FTA (2018), Article 8.25; EU-Singapore IPA (2018), Article 3.16; USMCA (2018), Article 14.D.8; India-Kyrgyzstan BIT (2019), Article 22; EU-Viet Nam IPA (2019) Article 3.46; Hong Kong-Mexico BIT (2020), Article 25; Georgia-Japan BIT (2021), Article 8; Israel-Republic of Korea FTA (2021), Article 9.24; Bahrain-Japan BIT (2022), Article 22.

[45] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), chapter III and annexes I and II.

Mauritius Convention on Transparency) was prepared by the Commission to capture the consent of its State Parties to apply the Transparency Rules to IIAs concluded before 1 April 2014.

51. In the same vein, it may be necessary to promote transparency with regard to all types of dispute resolution proceedings initiated pursuant to Draft Provisions 3 or 4. The Working Group may wish to consider whether the Transparency Rules should apply to all such proceedings, regardless of whether it is treaty-based and whether it is arbitration initiated under the UNCITRAL Arbitration Rules. Draft Provision 18 suggests that the scope of the Transparency Rules be expanded to apply to any such proceeding. Otherwise, the Working Group may wish to consider developing separate provisions addressing the different aspects dealt with in the Transparency Rules, among others, the publication of information at the commencement of the proceedings, publication of documents including orders, decisions and awards by the Tribunal, participation by a non-disputing Contracting Party and third persons as well as public hearings.[46] In that case, provisions providing for exceptions to transparency, mainly with regard to confidential and protected information, would also need to be developed.

Draft provision 19: Early dismissal[47]

52. Allowing for early dismissal of frivolous and manifestly unfounded claims has been viewed as an important tool to prevent abuse of the ISDS system and to guarantee effective access to justice for other claims.[48] An early dismissal procedure allows manifestly unmeritorious claims to be dismissed early in the process before they unnecessarily consume the disputing parties' resources.

53. Draft Provision 19 provides that the Tribunal may dismiss a claim, a counterclaim (see Draft Provision 11), or parts thereof, which are found to be manifestly without legal merit. The Tribunal can do so upon the request of a disputing party or on its own initiative.

54. Paragraphs 2 to 4 provide for 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.

55. Paragraph 5 provides the consequence of the Tribunal finding that all claims are manifestly without legal merit and that the prevailing party would be awarded reasonable costs arising from the early dismissal process (see Draft Provision 25(4)). Paragraph 6 clarifies that even if a disputing party had not prevailed in the early dismissal process, it may argue later in the proceedings that the Tribunal lacks jurisdiction or that the claim lacks legal merit.

[46] See for example, 2022 ICSID Arbitration Rules, Rules 62–68.

[47] 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 July 2023, adopted an additional note to the UNCITRAL Notes on Organizing Arbitral Proceedings on early dismissal and preliminary determination (A/78/17, Annex VII, forthcoming).

[48] 2022 ICSID Arbitration 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.

Draft provision 20: Security for costs[49]

56. Security for costs could protect a respondent States against a claimant's inability or unwillingness to pay costs and further discourage frivolous claims.[50]

57. Paragraph 1 provides that an order for security for costs shall be made at the request of a disputing party. Security for costs could be ordered against a party making a claim or a counterclaim. Paragraph 2 addresses how a disputing party should make the request to the Tribunal, which should be as soon as possible. Paragraph 3 addresses how the Tribunal should proceed and indicate the time frame within which it should order security for costs (for example, 30 days after the last submission by the disputing parties). The Tribunal is required to take into account the views expressed by the other disputing parties.

58. Paragraph 4 provides a non-exhaustive list of circumstances to be considered by the Tribunal, including the existence of third-party funding (see Draft Provision 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 termination of the proceeding (see Draft Provision 22).

59. 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.

Draft provision 21: Third-party funding[51]

60. Disclosure of third-party funding is a way of preventing conflict of interests and enhancing transparency. As such, a number of recent IIAs and arbitration rules include rules on disclosure of third-party funding.[52] Furthermore, in order to comply with article 11(2)(a)(iv) of the UNCITRAL Code of Conduct for Arbitrators and article 9(3)(a)(iv) of the UNCITRAL Code of Conduct for Judges, it would be necessary for an arbitrator or a judge to have information about any third-party funder.

61. Draft provision 21 takes 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 certain circumstances. Accordingly,

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[49] At its forty-third session in September 2022, the Working Group did not have time to consider the draft provision on security for costs as contained in document A/CN.9/WG.III/WP.219 (paras. 19–31), which reflected the discussion of the Working Group at its thirty-ninth session (A/CN.9/1044, paras. 64 and 74–77). Draft Provision 20 is largely based on the text in document A/CN.9/WG.III/WP.219.

[50] See for example, 2022 ICSID Arbitration Rules, Rule 53. In addition, the Modernization Agreement includes a new provision giving a Contracting Party the possibility to request a claimant to post security for costs in certain cases, such as risks of not honouring an adverse decision on costs.

[51] 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 in light of its impact on ISDS proceedings and the regime as a whole. 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). While the Working Group did not have the time to consider the proposed way forward, Draft Provision 21 has been prepared largely based on that proposal.

[52] See 2022 ICSID Arbitration 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. Third-party funding is defined as: "… any funding provided by a natural or legal person who is not a party to the dispute, to finance, directly or indirectly, the pursuit or defence of the arbitral proceedings under Article 26(4) through a donation or grant or through an agreement in return for a remuneration dependent upon the outcome of the dispute."

paragraph 1 provides a broad definition of third-party funding to ensure adequate disclosure, which would allow for the identification of any conflict of interests.

62. Paragraphs 2 to 5 deal with the disclosure requirements. While a disputing party in receipt of third-party funding is required to provide minimum basic information in accordance with paragraph 2, paragraph 3 provides the discretion to the Tribunal to request additional information in order to address some of the concerns expressed about third-party funding. Such information may be used by the Tribunal to impose additional conditions (for example, requiring the disputing party to confirm that the third-party funder agrees to cover any costs awarded against that disputing party or to confirm that the legal representative was appointed by the disputing party and not by the third-party funder).

63. Paragraph 6 provides that the Tribunal may limit third-party funding in the exceptional circumstances listed therein. The Working Group may wish to consider whether to take this approach and if so, the circumstances or the types of funding to be listed in the paragraph (for example, if a disputing party had provided false information or concealed information with regard to third-party funding).

64. 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, as found in recent IIAs. [53]

Draft provision 22: Suspension and termination of the proceeding

65. One way to ensure procedural efficiency is to suspend or stay the proceeding or bring it to an end under certain conditions. Draft Provision 22 aims to clarify the situations in which the Tribunal may suspend or terminate (discontinue) the proceedings.

66. Paragraph 1 provides that the Tribunal should suspend or terminate 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 Model Provisions on Mediation, Provision 3). Paragraph 2 gives the 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.

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

68. Paragraph 5 clarifies the discretion of the Tribunal to terminate the proceedings upon the request by a disputing party, unless objected to by the other party within a time frame fixed by the Tribunal. If the other disputing party objects, the proceeding continue.

69. Paragraph 6 aims to address default situations where a disputing party fails to take the necessary steps in the proceeding resulting in delays. In those instances, the Tribunal may require the disputing party to take the necessary steps within a fixed time frame (for example, 30 days), after which the Tribunal may order the termination of the proceedings, if continuation is deemed unnecessary (paragraph 7).

C. Decisions by the Tribunal

70. Draft provisions in section C address issues regarding the final decision by the Tribunal, which may be an award if rendered by an arbitral tribunal or a judgment rendered by a standing mechanism. Draft Provision 23 deals with the assessment of

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

damages and compensation to be awarded, Draft Provision 24, with the time frame within which the Tribunal shall render the final decision and Draft Provision 25, with the allocation of costs.

71. The Working Group may wish to consider two additional aspects which may be addressed in draft provisions regarding the decision by the Tribunal. One relates to the applicable law[54] and the other relates to the Contracting Parties' control over the interpretation of the Agreement. Recent IIAs have included provisions on both matters.[55]

Draft provision 23: Assessment of damages and compensation[56]

72. Paragraph 1 provides that the Tribunal may award only monetary damages or restitution of property. Subparagraph 1(a) along with paragraph 2 provides that the Tribunal may award interests, which may be pre-award as well as post-award and further provides that such interest shall be "simple" and not "compound" interest and be set at a reasonable rate. Subparagraph (b) provides that in the case of expropriation and 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. Several regional model agreements and IIAs provide for "fair and adequate" compensation,[57] which is different from the "fair market value" standard. The respondent State would be able to choose between restitution of the property and paying monetary damages.

73. Paragraph 3 addresses causality as well as the circumstances to be taken into account by the Tribunal in assessing damages. Paragraph 4 provides for the conditions under which the Tribunal may calculate monetary damages based on expected future cash flows. It aims to address the concerns with regard to the speculative nature of

[54] The UNCITRAL Arbitration Rules in Article 35 stipulate that "[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute." The ICSID Convention in Article 42(1) provides that "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

[55] See, for example, CETA, Article 8.31 (Applicable law and interpretation), which reads:

"1. When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.

2. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.

3. Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date".

[56] At its forty-third session in September 2022, the Working Group considered the issue of assessment of damages and compensation based on document A/CN.9/WG.III/WP.220. At that session, the Working Group requested the Secretariat to draft text comprised of draft provisions and guidelines that could address concerns about correctness and consistency, as well as cost and duration, that damages and compensation presented (see A/CN.9/1124, para. 100). The Secretariat has engaged with experts to obtain inputs on the draft provision and to prepare the guidelines as requested by the Working Group.

[57] 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).

the assumptions underlying such calculation, in particular, the use of the discounted-cash-flow (DCF) method.[58]

74. Paragraphs 5 and 6 address the involvement of experts appointed by the Tribunal or the disputing parties in the assessment of damages.

75. Paragraph 7 expressly prohibits the awarding of punitive damages in line with recently concluded IIAs.[59] In order to address the concerns with regard to the high amounts of compensation, paragraph 8 provides for a cap of the compensation to the amount actually invested by the investor, the actual expenditures adjusted taking into inflation.[60]

76. Paragraph 9 aims to address excessive claims by allowing the Tribunal to take that factor into account when apportioning the cost of the proceedings.[61] The Working Group may wish to consider whether paragraph 9 should indicate a threshold, for example, if the amount of damages claimed by the claimant exceeds the proven amount by a certain percentage and how the difference could be reflected in the allocation.[62]

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

77. Draft Provision 24 addresses the concerns expressed with regard to the cost and duration of ISDS proceedings by requiring the Tribunal to conduct the proceedings in a timely and effective manner and imposing a time frame within which the final decision should be made. In doing so, the Tribunal should give the disputing parties indications as to the organization of the proceedings and the manner in which it intends to proceed.

78. The Working Group may wish to consider the appropriate duration for making the final decisions, which may vary depending on the case. It may also wish to consider when that time frame should commence, as suggested in paragraph 2. Paragraph 3 provides for an extension of the time frame, which is largely left to the Tribunal to determine.

Draft provision 25: Allocation of costs[63]

79. 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").[64] An alternative rule would be that each disputing party bears its own legal costs and its proportion of the costs of the proceeding. Draft Provision 25 does not define the meaning and scope of "costs", which is left to be determined by the applicable rules.

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

[59] See for example CPTPP, Article 9.29 (6); CETA, Article 8.39 (4); USMCA, Article 14.D.13 (6). In addition, the Modernization Agreement includes a new provision which clarifies that an arbitral award may provide for monetary damages or restitution in case of expropriation. Monetary damages are limited to the loss suffered by an Investor and may not include punitive damages.

[60] See for example CPTPP, Article 9.29 (4).

[61] See A/CN.9/WG.III/WP.220, paras. 70–73.

[62] See for example Colombia Model BIT (2017), Article [##]-Monetary Damages, p.21; See also Jonathan Bonnitcha, Sarah Brewin, Compensation Under Investment Treaties, IISD Best Practices Series (November 2020), available at www.iisd.org/system/files/publications/compensation-treaties-best-practicies-en.pdf, p. 25.

[63] At the thirty-sixth session in October 2018, the Working Group concluded that it was desirable that reforms be developed to address concerns with respect to allocation of costs by arbitral tribunals in ISDS (see A/CN.9/964, paras. 124–127). The Working Group considered questions relating to the impact of the parties' behaviour and third-party funding in allocating costs. Furthermore, the difficulty in allocating costs in proportion to the success of the disputing parties was mentioned. The Working Group considered the draft provision on allocation of costs (A/CN.9/WG.III/WP.219, paras. 32–43) during its forty-third session in September 2022 (see A/CN.9/1124, paras. 120–124).

[64] See CETA, article 8.39 (5) and EU-Singapore IPA(2018), Article 3.21 (1), both of which read – "The Tribunal shall order that the costs of the proceedings shall be borne by the unsuccessful disputing party."

Paragraph 2 provides that the Tribunal may allocate the costs of the proceeding when deemed reasonable and lists the factors to be taken into account by the Tribunal when allocating the costs.[65] The Tribunal shall also consider whether the amount of monetary damages claimed by the claimant significantly exceeds the amount awarded by the Tribunal as provided by Draft Provision 23(9).

80. Paragraph 3 reflects the view that costs related to third-party funding should not be allocated and thus recoverable (A/CN.9/1004, para. 93). However, discretion is provided to the Tribunal to determine otherwise. Paragraph 4 clarifies that the default rule in paragraph 1 applies to the early dismissal procedure in Draft Provision 19. This means that if the party making the request is unsuccessful, the costs arising therefrom should be borne by that party. Paragraph 5 provides that the Tribunal does not have to wait until the final decision to make an interim award on costs, which may be at the request of the disputing party or on its own initiative.

81. As stated in paragraph 6, the Tribunal should ensure that its decisions on costs are reasoned and form part of the final decision. The Working Group may wish to note that whether that decision should be subject to appeal is being considered as part of the draft provisions on the functioning of an appellate mechanism.

[65] See 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.”