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Discussions on Draft Provisions on Damages in the Investor-State Dispute Settlement System in UNCITRAL Working Group III

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SOUTH CENTRE

RESEARCH PAPER

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DISCUSSIONS ON DRAFT PROVISIONS ON DAMAGES IN THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM IN UNCITRAL WORKING GROUP III

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SOUTH CENTRE

29 AUGUST 2024

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ABSTRACT

This paper summarizes the discussions within the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WG III) on the reform of investor-state dispute settlement (ISDS) regarding the two draft provisions on damages prepared by the UNCITRAL Secretariat as part of the two drafts on procedural and cross-cutting issues. It covers the period from September 2022 to July 8, 2024. It describes the draft provisions on damages and related provisions on procedural and cross-cutting issues of document A/CN.9/WG.III/WP.231, dated 26 July 2023, as well as the comments made on it by some members of WG III and observers. It also describes the changes to the above document contained in the second draft on the procedural and cross-cutting issues, dated July 8, 2024, contained in document A/CN.9/WG.III/WP.244.

The purpose of this paper is to provide an overview of the comments made by some States on the draft provisions on damages, the substantive changes made by the Secretariat to the first draft, mostly based on the comments made by some States, and the exclusion of important aspects highlighted by some Global South States in their interventions. In the light of this review, countries of the Global South may consider commenting on document A/CN.9/WG.III/WP.244 to ensure that their concerns are effectively taken into account.

Le présent document résume les discussions qui ont eu lieu au sein du groupe de travail III de la Commission des Nations unies pour le droit commercial international (CNUDCI) sur la réforme du règlement des différends entre investisseurs et États concernant les deux projets de dispositions relatives à l'évaluation de l'indemnisation et des dommages-intérêts préparés par le Secrétariat de la CNUDCI dans le cadre de l'examen des projets de dispositions relatives aux questions de procédure et aux questions transversales. Couvrant la période allant de septembre 2022 au 8 juillet 2024, le document présente un état des lieux des projets de dispositions relatives à l'évaluation de l'indemnisation et des dommages-intérêts et celles concernant les questions de procédure et les questions transversales s'y rapportant qui sont contenus dans le document A/CN.9/WG.III/WP.231 en date du 26 juillet 2023, ainsi que les commentaires formulés à leur sujet par certains membres du Groupe de travail et des observateurs. Il détaille également les modifications apportées au document susmentionné dans le deuxième projet sur les dispositions relatives aux questions de procédure et les questions transversales, en date du 8 juillet 2024, qui figure dans le document A/CN.9/WG.III/WP.244.

Son objectif est d'offrir une vue d'ensemble des commentaires formulés par certains États sur le projet de dispositions relatives à l'évaluation de l'indemnisation et des dommages-intérêts, des modifications de fond apportées par le Secrétariat au premier projet, principalement sur la base des commentaires formulés par certains États, et des points importants qui ont été laissés de côté, ainsi qu'il a été souligné par certains États du Sud dans leurs interventions. Compte tenu de ces modifications, les pays du Sud pourraient envisager de formuler des observations sur le document A/CN.9/WG.III/WP.244 afin de s'assurer que leurs préoccupations sont réellement prises en compte.

Este documento resume los debates en el seno del Grupo de Trabajo III (GT III) de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI) sobre la reforma del sistema de solución de controversias entre inversionistas y Estados (ISDS) en relación con los dos proyectos de disposiciones sobre daños y perjuicios preparados por la Secretaría de la CNUDMI como parte de los dos proyectos sobre cuestiones procesales y transversales. Abarca el período comprendido entre septiembre de 2022 y el 8 de julio de

2024. Describe los proyectos de disposiciones sobre daños y perjuicios y las disposiciones conexas sobre cuestiones procesales y transversales del documento A/CN.9/WG.III/WP.231, de fecha 26 de julio de 2023, así como las observaciones formuladas al respecto por algunos miembros del GT III y observadores. También se describen los cambios al documento antes mencionado contenidos en el segundo proyecto sobre las cuestiones procesales y transversales, de fecha 8 de julio de 2024, que figura en el documento A/CN.9/WG.III/WP.244.

La finalidad del presente documento es ofrecer una visión general de las observaciones formuladas por algunos Estados sobre el proyecto de disposiciones sobre daños y perjuicios, los cambios sustantivos introducidos por la Secretaría en el primer proyecto, basados en su mayor parte en las observaciones formuladas por algunos Estados, y la exclusión de aspectos importantes destacados por algunos Estados del Sur Global en sus intervenciones. A la luz de esta revisión, los países del Sur Global pueden considerar la posibilidad de formular observaciones sobre el documento A/CN.9/WG.III/WP.244 para garantizar que sus preocupaciones se tengan en cuenta de manera efectiva.

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I. BEGINNING OF DISCUSSIONS ON DAMAGE ASSESSMENT AND COMPENSATION

In the session from September 5 to 16, 2022, the WG III initiated the discussion on damage assessment and compensation, recalling the inconsistency of *ad hoc* tribunals' decisions regarding the application of legal principles.[2] Views differed as to whether there was sufficient time to discuss all the relevant issues and whether the mandate included standards' reform. In this regard "it was emphasized that it would be important to develop reforms to particularly address concerns that have severe consequences in developing countries."[3] Thus, the work should focus on how damages are assessed, as well as the unjustifiable inconsistency and lack of correctness of decisions on damage calculation. It was also mentioned that investors should be encouraged to make more reasonable claims for damages and to ensure that the tribunal's determination of damages is reasonable and justified.

Along these lines, WG III agreed to address the "issues of compensation standards, valuation methodology, causation, criteria for assessing inflated claims and possible penalties (cost allocation, penalizing the difference between claimed and awarded damages), burden of proof, valuation date, speculative evidence, the role of experts (including divergence of damage calculations by party-appointed experts), the impact of investor conduct on awarded damages, and interest."[4] Additionally, it was mentioned that "reforms regarding damages should aim to ensure that investor claims (as well as awards rendered by the arbitral tribunal) were realistic and proportionate to the damages suffered." In addition, it was said that parties should have the right to appoint their own experts, and that most arbitration rules provide that tribunals have the power to appoint their own experts. "In that context, it was said that the relationship between the calculation of the experts (including the methodology used) and the burden of proof should be examined."[5]

Even though there was no agreement on the legal form resulting from the discussion (treaty, guidelines or model clauses), "the instrument to be developed in this regard should have the general objective of providing guidance",[6] and the Secretariat was requested to draft provisions on the procedural and cross-cutting issues identified, as well as guides to address concerns about the correctness and consistency of awards on damages and compensation. The draft provisions and guides could be based on existing treaty rules addressing those concerns. The text could also, *inter alia*, "address issues related to, among others, the avoidance of relying on speculative evidence, clarification of causation requirements, allocation of the burden of proof and other evidentiary matters, allocation of costs based on the conduct of the parties and the role of experts". In addition, the Secretariat was requested to prepare explanatory texts to provide guidance on how a tribunal should apply any such a provision. For instance, "the draft provision on speculative evidence could be accompanied by guidance on valuation methodologies, valuation date and interest rates."[7]

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[2] See, UNCITRAL A/CN.9/1124, paras. 89-90 & 94. Report of October 7, 2022.
[3] *Ibidem*, para. 94.
[4] *Ibid*., para. 95.
[5] *Ibid*., para. 96.
[6] *Ibid*., para. 99.
[7] *Ibid*., para. 100.

II. Draft provisions on procedural and cross-cutting matters - A/CN.9/WG.III/WP.231

On 26 July 2023, the Secretariat circulated for comments a draft of 25 provisions on procedural and cross-cutting issues,[8] with a view to including provisions in existing and future international investment agreements (IIAs), which could also be included in investment treaties, instruments of regional economic integration organizations and local regulations, subject to the assessment of WG III at a later stage as to whether there are elements to be excluded or included.

The assessment of damages and compensation provided for in draft provision 23 is directly related to several draft provisions of the proposal: provision 10 on shareholders' claims, provision 13 on evidence, provision 20 on the guarantee for the payment of costs, provision 21 on third-party financing and provision 25 on the tribunal's decision on the apportionment of costs.

Draft provision 10.1 proposes that shareholders may sue "in their own name only for direct loss or damage suffered as a result of a breach of the agreement, i.e., the loss or damage alleged to have been suffered must be separate and distinct from any other alleged loss or damage suffered by the company in which the shareholder holds shares. Direct loss or damage may not include a decrease in the value of the shareholding or the distribution of dividends to the shareholder because of the loss or damage suffered by the company".[9] Additionally, "...the tribunal shall award the corporation pecuniary compensation, in addition to interest or restitution of assets, as appropriate."

The purpose of paragraph 1 is to limit the type of claim that shareholders may file, *only* for direct losses or damages, thus excluding reflex or indirect loss claims.[10]

Provision 13.1 provides that each party shall have the burden of proving the facts on which it relies to support its claim or defense.[11] In this line, the damage and its cause must be proved by the party alleging it, as well as the facts showing that it did not exist, was not caused or was diminished.

On costs, a party may request the tribunal to order the other party to provide security for the payment of costs in the claim or counterclaim. When ordering the security, the tribunal shall specify the conditions and time limit for providing the security. If the party fails to comply with the order to guarantee payment of costs, the tribunal may stay the proceedings for a specified period and order their termination in accordance with draft provision 22.[12] According to the Note, this guarantee may protect States "against the claimant's inability, or unwillingness, to pay costs" and may help to discourage unfounded claims.[13]

Third-party funding is not prohibited, but its disclosure may be important to avoid conflicts of interest and to increase transparency,[14] and therefore it is proposed to regulate it. Provision 21.2 states that the party receiving third-party funding must disclose it. In addition, the tribunal

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[8] See UNCITRAL A/CN.9/WG.III/WP.231. Argentina, Colombia, Israel, Singapore, European Union and its member States submitted comments on the damage elements of the Note.
[9] UNCITRAL A/CN.9/WG.III/WP.231. Provision 10.1 of the Proposed Draft.
[10] See, UNCITRAL A/CN.9/WG.III/WP.232, para. 25.
[11] Provision 13. Proof. The *onus probandi actori incumbit* principle is not absolute, because "investment tribunals have held that it does not apply to obvious or publicly known facts" and that it only applies to questions of fact, not law. See footnote 34, UNCITRAL A/CN.9/WG.III/WP.232. Comments.
[12] See, Provision 20, paragraphs 1, 5 and 6.
[13] See UNCITRAL A/CN.9/WG.III/WP.232. Comments, para. 56.
[14] *Ibid.*, para. 60.

may require disclosure of "whether the third-party providing funding agrees to bear any costs imposed if the decision on costs is adverse." In case of failure to comply with the duty to disclose information on the general terms and conditions of the financing or those requested by the tribunal, the tribunal may stay or terminate the proceedings, order that a security for costs be provided, or take that fact into account when allocating costs.

In accordance with the Secretariat's draft, in the final decision on the calculation of damages and determination of compensation, the tribunal may only: a) award monetary compensation and reasonable applicable interest (pre- or post-award), which may be simple; or b) award restitution of property. In the case of expropriations, "instead of restitution of property, [it] may pay monetary compensation equivalent to the fair market value of such property at the time immediately prior to the knowledge of the expropriation or the imminence thereof, whichever occurs first, plus applicable interest".[15]

With respect to causation in estimating or calculating damages, paragraph 3 of provision 23 provides that, "the tribunal shall only take into account loss or damage suffered by reason of, or arising out of, the breach of the agreement." Likewise, the tribunal must consider a) whether there has been concurrent fault of the claimant, willful or negligent; b) whether the parties have failed to mitigate the loss or damage; c) any prior monetary damages for the same loss or damage; d) the restitution [of the assets]; e) the revocation or modification of the measure being sued; and, f) any failure of the claimant to comply with the United Nations (UN) Guiding Principles on Business and Human Rights and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.

Paragraph 4 of draft provision 23 states that monetary damages must be based on sufficient evidence, "which does not in itself inherently constitute speculation." Additionally, in order to rely on future cash flows, it can only do so if the calculation is based on a case-by-case analysis of the facts. Along these lines, among other factors, it must take into account whether the investment has been made "for a sufficient period of time to establish a history of profitability."[16]

In addition, paragraph 8 imposes limits on monetary damages, which is equal to the sum of "the total expenses (adjusted for inflation) incurred by the claimant in making its investment".

Paragraph 9 authorizes the tribunal to take this conduct into account in allocating the costs of the proceeding. [17]

Finally, regarding the costs related to the calculation of damages provided for in draft provision 25, depending on the circumstances of the case, the tribunal may allocate them taking into account the existence of third party financing and its expenses, which should not be allocated as costs of the proceeding, and, "the amount of the pecuniary compensation claimed by the plaintiff in relation to the amount awarded by the tribunal". Likewise, the tribunal must give reasons for all decisions on costs and they must form part of the final decision.[18]

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[15] *Ibid*., paras. 71-72. In connection with the tribunal's decision, WG III may also include the law applicable to the dispute and the control of the disputing parties over the interpretation of the agreement.
[16] *Ibid*., para. 74. Paragraphs 5 and 6 address the participation of experts appointed by the tribunal or by the litigating parties for the calculation of damages.
[17] The Secretariat invited the WG III to consider whether paragraph 9 should establish a limit like the one established by Colombia in its Model bilateral investment treaty (BIT), which provides that when the amount of damages claimed by the claimant exceeds by a certain percentage the amount proven in the process, the difference between both amounts could be reflected in the allocation of costs as a percentage of these.
[18] See, UNCITRAL A/CN.9/WG.III/WP.231. Draft Provision 25, para. 2(e); para. 2(f); para. 6.

Comments by States on documents A/CN.9/WG.III/WP.231 and A/CN.9/WG.III/WP.232[19]

On July 31, 2023, the Secretariat circulated the annotations to the draft provisions on procedural and cross-cutting issues, to assist WG III in understanding how the provisions might be implemented and the relationship between them, as well as with other reform elements that are the subject of WG III's work.[20]

Argentina considered it necessary to clarify draft provision 10, with respect to: (i) the effects that the claim or the potential decision of a tribunal could have on the rest of the company's shareholders, regardless of their shareholding; (ii) whether the minority shareholder may claim in cases where there was consent of the company on the challenged measure but such consent does not include that of all of its shareholders; and, iii) in relation to parallel proceedings initiated by the company and its shareholders, include a section that prevents the company and the shareholders, or any of them, from initiating parallel claims for the same measures that may result in double recovery or double payment.

It also noted with respect to the guarantee of payment of costs in draft provision 20, that a rule requiring this guarantee may contribute to deter plaintiffs from claiming without merit, abusively and unfoundedly and to the dismissal of such claims at an early stage. This guarantee should not be required of the State when it files a counterclaim, because this guarantee, among others, is justified when there is a risk of not recovering the costs award. This risk does not exist when the State is ordered to pay costs since there is no risk of its disappearance. Likewise, it agrees with the seventh paragraph on the plaintiff's failure to provide a guarantee of recovery of costs to be sanctioned by the suspension or termination of the proceedings, after the expiration of a specified period of time.

In view of the provision of the existence of third-party financing as a factor to be taken into account in evaluating whether or not to order a guarantee for the payment of costs, Argentina proposed to explicitly establish that in cases of third party financing the payment of a guarantee will be mandatory.

Regarding the third-party financing provided for in draft provision 21, Argentina pointed out that it detracts from the purpose of the investor-state dispute settlement system, which is to facilitate the resolution of a dispute between an investor and the State. The financing by third parties alters the dynamics of the cases and converts the disputes into assets subject to commercial operations. Consequently, the investor loses interest in the settlement of the case, and the objective becomes to obtain a large compensation in its favor. The provision should make it clear that the financing should be disclosed as soon as possible, and that this also includes the case where the law firm representing the parties is providing the financing.

The third-party funding provision should more clearly contemplate the tribunal's duty to verify that third-party funding complies, among others, with the following principles: (a) the funded party should not assign the claim or the right to collect its outcome; (b) the funded party should have independent legal advice from the funder; (c) the funder should not directly or indirectly cause the funded party's lawyers to act in breach of their professional duties, or control the lawyers' decisions; (d) the funder should not seek to influence the funded party's lawyers to relinquish control or conduct of the dispute to the funder; e) the funder should follow the same rules of confidentiality applicable to the parties to the arbitration; f) the funder should not be permitted to withdraw its support during the proceedings, except in circumstances clearly set

[19] On the one hand, Argentina, Colombia, Singapore, the European Union and its Member States, and Viet Nam submitted comments on UNCITRAL A/CN.9/WG.III/WP.231. On the other hand, Israel submitted comments to documents UNCITRAL A/CN.9/WG.III/WP.231 and UNCITRAL A/CN.9/WG.III/WP.232.
[20] UNCITRAL A/CN.9/WG.III/WP.232

out in the contract or in the event of the funded party's breach of the funding agreement; g) the funder should not be a disguised party or the real party in interest.

Argentina stated that the high amounts of compensation usually awarded by investment tribunals are elements that may undermine the regulatory capacity of States. Along these lines, the initial claim for disproportionate compensation in many cases seeks that tribunals award less exaggerated amounts that, although still unfounded, appear reasonable in comparison with the initial request.

Regarding the valuation methods for the calculation of damages, Argentina pointed out its concern about the fact that the application of certain methods for calculating compensation (such as the Discounted Cash Flow method, DCF) generates an increase in compensation, which sometimes greatly exceeds the amounts invested by investors. In this regard, although paragraph 4 may be a step forward, it should be noted that past performance is no guarantee of future performance. Consequently, knowing the profitability history would only serve to know if the company was indeed profitable during the period claimed, but it is problematic to use it as a criterion for setting compensation.

Argentina considered the reference to simple interest to be positive, and that the reference to a reasonable interest rate is too discretionary, and therefore it suggested keeping the reference to simple interest, clarifying that this would be a "reasonable" interest rate.

Finally, it considered that the analysis on the determination of compensation should not ignore the economic situation of the respondent State and its ability to pay such compensation, which could be assessed by reviewing the relationship between the State's budget and the amount of compensation.

On the other hand, given that in investment arbitration generally no party is either a complete winner or a complete loser, Argentina questioned the need to establish a strict rule that costs should be borne by the losing party, beyond the possible exceptions. Looking only at the final result of the proceeding may lead to partial and inaccurate conclusions, since there are other relevant factors for the decision on the distribution of costs, among others, how much each party spent, the disproportion between the costs of one party and the other, or the procedural conduct of each party. Therefore, it suggested adding factors to be taken into account: (a) the degree to which each claim, exception or defense has been successful; (b) the proportion in which the amount claimed is reflected in the compensation awarded, if any; and (c) the conduct of the parties during the proceeding. Also, to increase transparency, it suggested incorporating into draft provision 25 the possibility of requiring the parties and the tribunal to submit a cost estimate from the beginning of the case, with the possibility of requesting additional information if necessary. The tribunal could also be asked to consult the parties on the possibility of establishing a fixed or acceptable budget for the process.

Colombia stated that the draft procedural and cross-cutting provisions, which are expected to result in a binding instrument, are of critical importance.[21] With respect to the matters relating to shareholder claims provided for in draft provision 10, it expressed its agreement with the wording of paragraph 1, with the limitation on the types of claims that a shareholder may bring, to allow shareholders to claim only direct injury or damage and not any type of loss or damage caused solely to the company. It also agreed with the stipulations in the first and second paragraphs, and with respect to the third paragraph, it considered the clarification unnecessary, as it is inherently implicit in the relevant expropriation provisions of the treaties.[22]

[21] See, Comments from the Republic of Colombia on Draft provisions on procedural and cross-cutting issues, Note by the Secretariat, January 12, 2024, para. 2. The comments go as far as Provision 12.
[22] *Ibid*., paras. 16-17.

Singapore stated that the Working Group III should prioritize only a few provisions given the limited time available. In particular, those that update, modify or, in fact, harmonize existing arbitration procedures, such as the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules and the UNCITRAL Arbitration Rules. To this end, it considered that the discussion should focus on draft provisions 13-16, 19-22 and 24-25, because the others go beyond the Working Group's mandate and deviate into substantive elements or have been adequately dealt with in existing instruments. Therefore, in the interest of efficiency, it is not necessary to revisit them.

Regarding the guarantee of costs in draft provision 20, Singapore supports a rule on the subject of deterring frivolous or meritless claims. It stated that such a rule would contribute to reforming ISDS, and therefore suggested adapting Rule 53 of the ICSID Arbitration Rules 2022. In relation to third party funding and its link to the guarantee of costs, it stated that this is not a relevant factor in itself. Therefore, it did not agree with the inclusion of subparagraph 4(d), because a party may obtain third party financing for a multitude of reasons. The existence of funding is not in itself a signal that that party will not be able to satisfy a costs award. Rule 53(4) of the ICSID Arbitration Rules 2022 addresses the issue of third-party funding in a more indirect and finely balanced manner.

In general, on third-party funding, Singapore welcomed efforts to address the issue and recognized the potential risks of conflicts of interest that this may entail, especially where there is a lack of transparency. This lack of transparency can affect the actual or perceived independence of arbitrators and the integrity of the process.

Vietnam, commented on draft provision 13 that it deals only with the general principles of obtaining evidence during proceedings and does not address problems arising from ISDS practices, such as illegally obtaining evidence, falsification or fabrication of evidence. Therefore, it suggested the following wording:

> *(i) The Tribunal shall not consider evidence that has been shown not to have been obtained in accordance with the law of the State in which it was obtained.*
> *(ii) The Tribunal shall not consider evidence that presents clear indications of falsification or fabrication.*

Regarding the guarantee of costs in draft provision 20, Vietnam agreed with the draft and suggested that the following wording be considered in order to address this issue in a realistic manner:

> *(i) Only the State may apply for a bond for costs, since non-payment of costs under an arbitration award usually comes from the investor.*
> *(ii) The guarantee of costs is mandatory in cases involving third-party financing.*

On third party funding, Vietnam agreed with draft provision 21, but noted that the draft does not fully address the concerns expressed in previous sessions, and therefore proposed to (i) revise paragraph 3 as follows:

> "*3. In addition, at the request of a disputing party or at its own discretion, the Tribunal may require the disputing party to disclose:"*

and, (ii) add to paragraph 6 the following:

> "*(c) Where the third-party funding arrangement enables the third-party funder to control or influence the management of the claim or the proceeding*;"

Israel noted that the draft provisions are not a model treaty, but rather model recommendations to be freely included in future treaties. Furthermore, that some provisions of the A/CN.9/WG.III/WP.231 document are outside the scope of investor-state dispute settlement. For example, draft provision 4 - State-State Dispute Settlement, draft provision 9 - Denial of Benefits or draft provision 12 - Right to Regulate.

On the other hand, Israel is not convinced that the wording of draft provision 13 on evidence adds anything to Article 27 of the UNCITRAL Arbitration Rules. Among other reasons, because it does not address "fishing expeditions"; it suggested expanding draft provision 13(4) on admissibility and assessment of evidence, based on Article 9 of the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration.[23]

Israel welcomed the Costs Guarantee draft provision,[24] and the permissive approach to the use of third-party funding because it is useful for access to justice for individual investors and small and medium-sized enterprises. It also agreed with the inclusion of disclosure obligations, and the possibility to suspend and terminate proceedings.

Israel proposed to delete draft provision 23(3)(f), because the concurrent fault of the claimant, provided for in draft provision 23(3)(a) would include non-compliance with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. On the other hand, it considered it necessary to clarify the interaction between draft provision 23(4) ("The Tribunal may award monetary damages on the basis of expected future cash flows...") and draft provision 23(8) ("The Tribunal shall not award monetary damages in excess of the total expenses (adjusted for inflation) incurred by the claimant in making its investment"), because these provisions could, in specific cases, overlap and contradict each other.[25]

The **European Union** (EU) argued that some draft provisions would be incorporated into existing IIAs, others into the Multilateral Investment Court (MIC), and the rest would be left out because those provisions are not considered necessary, either because it can be negotiated in other forums or simply because the EU does not agree with the proposed provision. The EU paper expresses three objectives:

First, to indicate for each individual draft provision whether further work is needed, based on, among others, the procedural scope of the WG III's mandate, its current workload, existing procedural rules to avoid duplication, as well as other ongoing reform processes, in particular the work on the future of the OECD investment treaties.[26]

The second objective is to indicate what the form of the provisions and destination should be, for which it identifies four options: (i) model clauses for future IIA negotiations; (ii) provisions that would be incorporated into existing IIAs through a multilateral instrument; (iii) supplementary rules to the UNCITRAL Arbitration Rules; or, (iv) procedural rules of a permanent mechanism.[27] But, in order to avoid dispersing the results over too many different instruments and destinations, it considers that the WG III should concentrate on reforms that bring significant improvements. Accordingly, the EU would not give priority to work on complementary rules to the existing UNCITRAL Arbitration Rules. On the other hand, it states that using the draft provisions as mere model clauses for future IIA negotiations would not

[23] See, Israel's Comments on Draft Provisions on Procedural and Cross-cutting Issues (A/CN.9/WG.III/WP.231, A/CN.9/WG.III/WP.232), para. 10.
[24] *Ibid*., para. 15.
[25] *Ibid*., para. 17.
[26] See, A/CN.9/WG.III/WP.231, *Comments made by the European Union and its Member States in this document are without prejudice to the position that the European Union and its Member States may take in light of the discussions in Working Group III*, p. 4.
[27] See, UNCITRAL.A/CN.9/1160, paras. 92-95.

achieve the objective of significantly reforming the current ISDS regime. Accordingly, priority should be given to drafting provisions (i) to be incorporated into existing IIAs through a specific protocol to a multilateral instrument and/or (ii) to be included in the statute or rules of procedure of the standing mechanism, which may also be established through a specific (but distinct) protocol to a multilateral instrument.

The third objective seeks to guide and support the Secretariat with drafting suggestions for the preparation of a revised working document.

On reflexive losses, the EU states that its treaty practice does not contain explicit language on these, although those EU treaties that contain the "on behalf of approach" would, it is understood, preclude such claims. Even so, it would not exclude exploring a formulation that reflects the concern, which requires assessing other procedural rules that may be agreed, i.e. provisions on the use of a "on behalf of approach". The EU recalls that the policy rationale underlying the principle of reflexive loss is that shareholders should not be able to claim for the loss, when the company is entitled to claim against the same wrongdoer. Thus, unless a shareholder can show that it has suffered a loss separate and distinct from that experienced by the company, it should not be able to bring a claim on its own behalf on the basis of reflexive loss.[28]

The EU suggests that it is not a priority to address draft provision 13 on evidence, as this could be done by updating the Rules of Procedure. Instead, this provision may be incorporated into the Rules of Procedure of the Permanent Mechanism.

With regard to the guarantee of payment of costs in draft provision 20, it considered that this was a step in the right direction and that, depending on the discussion, it could be included in the rules of procedure of the Permanent Mechanism. On the existence of third-party funding in paragraph 4(d), it considers that it could be linked to the information that the tribunal can request on the funding in draft provision 21(3).

Regarding third-party funding, the EU notes that it can have a positive impact on favoring meritorious claims and helping small investors to access ISDS. As funding is related to arbitrators' conflicts of interest, it is addressed through disclosure and transparency, which is linked to the Code of Conduct for arbitrators and judges.

In principle, the EU does not agree with limiting third-party funding, outside of non-compliance with disclosure obligations, because it would be contrary to the objective of facilitating access to the ISDS system for small actors, which must be guaranteed. Therefore, it would be pertinent to introduce this provision into the protocol of a multilateral instrument with a view to its adaptation to existing treaties, in addition to its inclusion in the statutory/procedural rules of the permanent mechanism.

On damage assessment and compensation in draft provision 23, the EU considers it relevant to continue working on this to be included in the protocol of the multilateral instrument to adapt it to existing treaties, and to be included in the statutory/procedural rules of the permanent mechanism, because as the concerns on damage assessment relate to dispute settlement procedures that impact the outcome of cases, these are resolved by its proposal to establish a permanent appeal mechanism.

The EU notes that the principles to be applied should not derogate from the principles of international law. It also recalls excerpts from the October 2023 session (A/CN.9/1160, paras.

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[28] A/CN.9/WG.III/WP.231, *Comments made by the European Union and its Member States in this document are without prejudice to the position that the European Union and its Member States may take in light of the discussions in Working Group III*, p. 13.

114-115), where the Secretariat was requested: "*to further develop a draft treaty Provision that could fill the gaps in existing IIAs by revising draft Provision 23, and to prepare guidelines for arbitral tribunals on the assessment and calculation of damages and compensation*."

It recalls also that: "the *Secretariat was requested to revise draft Provision 23 to be consistent with the general principle of full reparation and to clarify that: (i) a tribunal could award monetary damages and/or restitution of property; (ii) a tribunal could award reasonable interest; (iii) causation between the breach and the damage would be required; (iv) in assessing damages, a number of elements would need to be taken into account, including contributory fault, duty of mitigation efforts and avoidance of double recovery; (v) damages should be based on clear rules on the burden of proof requiring satisfactory evidence; and (vi) punitive damages should not be awarded. In addition, the Secretariat was requested to consider including the paragraphs on the use of experts and the allocation of costs in the draft provisions on the conduct of the proceedings. It was suggested that the guidelines could further detail, for example, methods of calculation, means to avoid speculative damages, rules on causation, as well as interest to be awarded."*[29]

The EU notes that most IIAs do not provide guidance on the calculation of damages when standards other than expropriation are breached, but fair market value based on internationally recognized principles and standards is used. It interprets the reference to "internationally recognized principles and standards" as intended to limit the discretion of tribunals by creating an obligation not to resort to unproven or unpopular theories or to apply certain methods in scenarios that would not normally justify such methods. It also interprets its own investment agreements as limiting the amounts to be awarded by stating that "monetary damages shall not exceed the loss suffered by the claimant", which establishes an outer limit and does not rule out the application of any valuation method.[30]

While highlighting the need for more guidance in assessing damages and compensation, and agreeing with the conclusions of the WG III, it considers that in assessing damages, tribunals should have a flexible general framework that adjusts to the specificities of each case. This framework should consist of rules that establish performance and guidelines because "[g]iven the high degree of subjectivity in such valuation, it could not easily be captured by a standard. This is because a value is less an actual fact than the expression of an opinion based on the set of facts before the expert and the tribunal. The guidelines could also help reduce the tribunals' considerable reliance on expert accountants."[31]

Regarding paragraph (1) of draft provision 23, it proposes to replace "or" at the end of (a) with "and". This is because when a claim of expropriation includes the violation of another norm it is possible that an award that only provides for the restitution of the property may not be sufficient.

With regard to paragraph (2), it considers that the term "reasonable" interest carries a great degree of subjectivity that alone is not clear to guide a tribunal and “that limiting interest to simple interest in all cases does not reflect” economic reality or regulation in national laws. Furthermore, it considers that the way forward is to "develop guidelines to guide tribunals on the choice of the appropriate interest rate at a given point in time (including cases where compound interest may be more appropriate)."

Regarding (3), the EU opines that the mitigation of damages and concurrent fault are largely considered by the tribunals as principles of international law, but others, such as (c)(e) and (f) are debatable. On c), it is necessary to clarify what the prior monetary damages are to ensure

[29] *Ibid*., p. 24.
[30] *Ibid*.
[31] *Ibid*., p. 25.

that they do not include insurance money. Element e) runs the risk of indicating that a repeal or modification of the respondent measure could be considered as a solution in the face of financial losses.[32] Finally, the violation of the human rights guidelines in (f) relates to investor obligations and counterclaims that cannot be adequately addressed in a stand-alone manner in the damages section.

Regarding paragraph 4, it considers that the parameters for calculating future cash flows can be better addressed by guidelines that determine in which situations it is appropriate or not to award compensation. It sees a contradiction between paragraph 4, which allows awards based on future cash flows, and paragraph 8, which prohibits awards when they exceed the total costs incurred by the claimant in making its investment. The latter, being a method of calculation, should be moved to the guidelines.

Regarding paragraph 9, the EU believes that it is necessary to distinguish between claims that are inflated in bad faith, where there is a failure to substantiate them, and those that are based on situations where an investor assesses damages and, after review by a tribunal, they fall below the tribunal's assessment. The first case is already covered by the rules on cost allocation. The latter, for the EU, does not constitute punishable conduct.

On the causation requirement, it suggests emphasizing this by adopting a wording along the following lines: "*The Tribunal shall not award pecuniary damages and applicable interest in excess of the loss directly caused to the claimant by the wrongful act of the respondent*". It also sees it important to elaborate on (i) the regulation of moral damages and non-pecuniary remedies such as specific performance and (ii) the use of satisfaction (including for monetary damages) within the meaning of Article 37(1) of the International Law Commission (ILC) draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[33]

On the allocation of costs in draft provision 26, the EU agrees that the losing party should bear the costs. Therefore, only exceptionally, the winning party should bear part of the costs. Paragraph 2 should therefore be clarified to take this exceptionality into account. This provision could appear in a protocol to a multilateral instrument to be adopted regarding existing IIAs and could be included in the statutory/procedural rules for a permanent mechanism.

Other comments

The **Institute for Transnational Arbitration** (ITA) presented several criticisms of draft provision 23 of document A/CN.9/WG.III/WP.231. The language of the provision should not limit tribunals to awarding monetary damages and restitution of property, as declaratory or injunctive relief may be appropriate under the circumstances. Nor should they be limited to awarding only "simple" interest and that the fair market value is that of the date immediately before the expropriation decision became known.

In assessing the factors limiting pecuniary damages, according to ITA arbitral tribunals should consider all relevant factors, and exclude limits for "any breach by the claimant of the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises", because the tribunal should preliminarily assess non-compliance with these instruments, without having the mandate to do so.

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[32] The EU recalls that many investment treaties specify the nature of the remedies and may prohibit the tribunal from ordering the repeal or modification of the domestic measure.

[33] A/CN.9/WG.III/WP.231, *Comments made by the European Union and its Member States in this document are without prejudice to the position that the European Union and its Member States may take in light of the discussions in Working Group III*, p. 26.

To avoid speculative calculation of monetary damages, tribunals may impute costs to avoid this behavior. DCF remains the most reliable method if the circumstances warrant it and the role of experts will remain important. This seems to justify their opposition to awarding damages only when these are established on the basis of satisfactory evidence and to setting limits on the use of DCF as set out in paragraph 4, on consideration of, among other factors, whether the investment has not been in operation for a sufficient period of time to establish a track record of profitability performance.[34]

The joint contribution by **the Columbia Center on Sustainable Investment (CCSI), the International Institute for Environment and Development (IIED), the International Institute for Sustainable Development (IISD), and the South Centre (SC)** draws attention to the classification of the WG III into three categories for prioritization: (i) for "harmonization" with existing procedural rules; (ii) "harmonization plus" on existing investment treaty rules, to be drafted as treaty provisions for adoption; and (iii) those not found in procedural rules that would require new negotiations. This reflects the view expressed in the Report of the Seventh Intersessional Meeting that categories (i) and (ii) should be given priority because they are not considered to involve a significant amount of work.[35]

This contribution calls for flexibility to approach a ranking and prioritization that will allow WG III sufficient time to address the most pressing ISDS reform issues, i.e. those consistent with category (iii). This flexibility will be key to avoid limiting potential achievements on any one issue, which would ensure the development and presentation of an effective and meaningful reform package on ISDS concerns. Failure to do so will leave little time for in-depth discussion of reform options and risks simply codifying the *status quo* rather than bringing about real reform.

They noted that a few delegations from developed countries would suggest prioritizing groups (i) and (ii). However, most of the developing country delegations from Africa, Asia and Latin America who spoke emphasized the broad mandate of WG III, rejected the exclusion of certain provisions and suggested submitting written comments on the issue of prioritization. Excluding category (iii) provisions from the reforms ignores the disproportionate impact of ISDS claims and the aspirations of developing countries for the reforms to have a real impact. Eliminating or abandoning these priorities will significantly reduce the impact of the reforms.

Regarding draft provision 23, the organizations' document mentions that the issue of damage assessment and compensation is a central concern in the WG III process, to the extent that several States have pointed out that without significant reform of the calculation of damages, the legitimacy of the Working Group would be seriously undermined. More than 20 developing countries supported prioritizing the issue of damages; several developed country delegations said they were open to addressing the issue; and a minority questioned whether the issue fell within the Working Group's mandate. Finally, it was clarified that the mandate of WGIII is not limited to a distinction between substantive procedures, but it is a broad mandate to address ISDS reform, and it is clear that properly addressing damages is a key element for the legitimacy of this dispute settlement system. [36]

The document notes convergence on some issues. Submissions during Session 46 by developed countries focused on the international law principle of full reparation, which outlined the work on the topic, where it was stated that WG III would not look at modifying this principle.

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[34] Institute for Transnational Arbitration, Comments on document A/CN.9/WG.III/WP.231, pp. 1-2.
[35] Columbia Center on Sustainable Investment (CCSI), the International Institute for Environment and Development (IIED), the International Institute for Sustainable Development (IISD), and the South Centre, *Prioritization of the Draft Provisions on Procedural and Cross-Cutting Issues*, Comments on document UNCITRAL A/CN.9/WG.III/WP.231, p. 1.
[36] *Ibid*., p. 4.

On the other hand, there was convergence on the possibility of awarding a combination of monetary and non-monetary compensation; the principle of not awarding excessive interest; the importance of causation, which requires further elaboration and work - specifically, only compensating losses directly caused by a specific breach; acceptance of the principles of mitigation, concurrent fault and the prohibition of double recovery; ensuring that damage awards are based on clear rules on burden of proof and satisfactory evidence, while recognizing that punitive damages are not appropriate in ISDS.[37]

In this context, and due to the restrictions in its agenda, the WG III must devote the necessary time and effort to the issue of damages, which is considered a top priority by the delegations. The issue of damage requires an outcome in multiple ways, so it is not appropriate to downgrade the priority category to a predetermined low-impact outcome. Additionally, because the A/CN.9/WG.III/WP.231 document reflects early and continuing efforts to narrow the scope of UNCITRAL's original mandate, to the point that many issues of critical importance to dispute settlement reform are not even on the agenda. Thus, further narrowing the focus of the main issues contradicts the mandate of the reform process as understood by State delegations and observers, particularly those States most affected by the ISDS system.

Prioritizing categories (i) and (ii) over issues in category (iii), or those that do not fall into any of the three categories, would not only allow to devote more time to issues already addressed in other forums, but could leave significant issues out of the debate; thus, it would be more prudent to focus on standards that have not yet received attention.

[37] *Ibid*., p. 5.

III. THE SECOND DRAFT OF PROCEDURAL AND CROSS-CUTTING ISSUES OF 8 JULY 2024, A/CN.9/WG.III/WP.244 AND ITS ANNOTATIONS A/CN.9/WG.III/WP.245

These documents, prepared by the Secretariat and issued on July 8, 2024, are based on its understanding of the tasks assigned to it at the forty-seventh session of the WG III in January 2024 and the summary of the intersessional meeting in March 2024 prepared by the Government of Belgium. The Secretariat's document A/CN.9/WG.III/WP.244 and the Belgian summary (A/CN.9/WG.III/WP.242, paras. 60-65) ignored the fact that the classification of issues into three categories was only intended to organize the discussions and sessions, not to exclude issues from discussion.

The Secretariat therefore presents a set of provisions based on its understanding of the deliberations of WG III at the 48th session, the comments received on document A/CN.9/WG.III/WP.231 and the Belgian summary mentioned above, for which it has divided the previous draft into three sections. Section A of document A/CN.9/WG.III/WP.244 contains draft provisions that would supplement existing procedural rules. These deal with costs and duration of proceedings and aim to streamline procedures and improve their efficiency. To also achieve harmonization, the document mentions that the draft provisions have been closely aligned with the ICSID Arbitration Rules and are complementary to the UNCITRAL Arbitration Rules.

The Secretariat notes that WG III could consider including additional provisions inspired by the ICSID Rules and other institutional rules to improve the efficiency of the procedure (para. 4).

In addition, it is noted that Section B is based on existing rules and procedural provisions in recent investment agreements that have been drafted as treaty provisions to supplement pre-existing investment agreements, so that the relationship between the provisions of Section B and those of the relevant investment agreement would need to be addressed (para. 5), while Section C contains provisions designed to address concerns about regulatory cooling off and the calculation of damages (para. 6).

The new draft on procedural and cross-cutting issues contains multiple changes in almost all draft provisions, which will require an effort on the part of WG III to review and comment on them again in the next sessions. In the following section we will only refer to those issues that would relate to damages.

Draft Provision 1 on evidence corresponds to the draft provision 13 mentioned above.

Paragraph 2 has a new wording which does not seem to omit anything from what was said in paragraph 2 of the previous draft provision 13. Basically, it allows the tribunal to determine the evidence to be presented.[38]

Paragraph 3 corresponds to paragraph 5 on the joint production of documents. This paragraph 3 requires the tribunal to consider all relevant circumstances, including the scope and timing of the request, its admissibility, the relevance, materiality and weight of the documents, the burden of production and the basis for any objections.

Paragraph 4 is equivalent to paragraph 6 of draft provision 13.

[38] A/CN.9/WG.III/WP.245, para. 3.

Paragraph 5 corresponds to paragraph 3 draft provision 13.

Paragraph 6 corresponds to paragraph 4 draft provision 13.

Paragraphs 7 and 8 have been added to draft provision 13. The first relates to the power to exclude evidence or the production of any document, exhibit or evidence that has been illegally obtained. The second refers to the power of the tribunal to visit any place connected with the dispute and, if necessary, to make inquiries therein.

Draft Provision 5 on security (guarantee) of costs corresponds to the previous draft provision 20.

Paragraph 1 placed in brackets the expression [or counterclaim] which is not clear if it is intended to grant or exclude the authority for the tribunal to order a State to provide security for costs.

Paragraph 2 corresponds to paragraph 2 of the previous draft provision 20, except that it clarifies the language used in the first part and adds the obligation of the court or tribunal to fix the period within which the parties are to make their submissions on the application for security for costs.

Paragraph 3 is the same as paragraph 3, with the language simplified, and specifies that the tribunal must decide on the application within 30 days after the last submission on the application.

Paragraph 4 corresponds to paragraph 4, on the minimum considerations to be taken into account by the tribunal, in which several subparagraphs are changed. Letter c) leaves the expression of the counterclaim in brackets. Letter e) on the existence of third-party funding has been left in brackets as well.

Paragraph 5 corresponds to paragraph 5 of the previous draft provision on the content of the tribunal's order to pay costs, with the following clarification of the language: “The Tribunal shall specify any relevant terms…”, which grants wide discretion to the Tribunal.

Paragraph 6 is the same as the previous paragraph 6 regarding a party's failure to comply with an order to provide security for costs. The phrase "may *order* the suspension" is added. It also modifies the previous language by adding an additional period of time for allegations before ordering termination of the proceeding if the party fails to post the security within the 90-day suspension period. In practice, more than 120 days may elapse.

Draft Provision 9 corresponds to the previous draft provision 25 on allocation of costs.

Paragraph 2, subparagraph e) corresponds to paragraph 2, subparagraph e) of draft provision 25, regarding the existence of a third-party funder as an element to be taken into account for the allocation of costs. The new provision only establishes the existence of a third-party funder as an element of cost allocation. The previous provision 25 also established that the disclosure of the third-party funder had to be made in accordance with draft provision 21 regarding the regulation on third-party funders.

Paragraph 2, subparagraph f) corresponds to paragraph 2, subparagraph f) of draft provision 25, on the proportion of the amount of the damages claimed, where the new provision f) includes language on the amount of the compensation claimed. The new wording of this subparagraph gives greater discretion to the arbitrators with respect to the previous wording, as explained below.

Draft Provision 12 corresponds to the previous draft provision 21 referred to above on third-party funding.

Section 1 includes donations or loans within the definition of third-party funding.

Draft Provision 18 corresponds to the previous draft provision 10 on shareholder claims.

Paragraph 1 adds language to the effect that the loss of an opportunity to engage in a business activity, or an activity that the company expects to engage in, does not constitute direct loss or damage.

Paragraph 3 is new and includes the requirements to be met by the shareholder when filing the claim.

Paragraph 4 corresponds to paragraph 3, which also includes an obligation for the tribunal to state in the award that it is made without prejudice to any rights that any person may have under the applicable law of the responding State.

Draft Provision 20 corresponds to the previous draft provision 23 on damage assessment and compensation.

According to document A/CN.9/1160, paras. 99-115,[39] the new draft provision 20 reflects the discussion at the 46th session in October 2023. In fact, this document shows the various concerns and disagreements within the WG III on fundamental issues of damage assessment.[40] It clearly summarizes the disagreements and different perspectives during the meeting. In view of the different views on these important issues, the task given to the Secretariat was i) to develop a draft treaty provision that could fill the existing gaps in the IIAs by revising draft provision 23; ii) to develop guidelines for arbitral tribunals on the assessment and calculation of damages and compensation; and iii) to ensure that the revision of provision 23 was consistent with the principle of full reparation by clarifying some of the developments in the provisions.[41]

The tasks assigned to the Secretariat by WG III did not provide for the deletion of texts of interest to the Global South without formal discussion at WG III meetings. For example, the removal of the obligation for tribunals to award only simple interest (see paragraph 2), or the removal of the consideration of whether property has been returned (paragraph 3(d)) and the consideration of non-compliance with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises (paragraph 3(f)), or the rule on the use of the DCF (see paragraph 4).

Thus, the revision of the previous draft provision 23 as incorporated in the new provision 20[42] has profoundly reworked several paragraphs and left out important elements for the countries of the Global South.[43] Proposing these exclusions,[44] without a prior discussion during the meetings by the members of the WG III, does not seem to be the right way to go, because they exclude the concerns, interests and vital positions of the countries of the Global South and, above all, they empty the reforms on the assessment of damages of any significant content regarding the avoidance of inconsistencies in awards, excessive compensation based

[39] A/CN.9/WG.III/WP.245, para. 72.
[40] On disagreements during the session see: A/CN.9/1160, paras. 100-103, 106, 108, 111.
[41] A/CN.9/1160, paras. 114 & 115.
[42] A/CN.9/WG.III/WP.244
[43] A/CN.9/1160, paras. 99-115. At the session, several countries expressed their concerns regarding the matters that have been eliminated.
[44] A/CN.9/WG.III/WP.231

on speculation, and lack of consistency in the application of damage assessment methodologies.

In accordance with the tasks requested to the Secretariat,[45] draft provision 20 of document A/CN.9/WG.III/WP.244 should be amended to include wording obliging the tribunals to follow the Guidelines, which should be annexed to the Procedural and Cross-Cutting Issues.

As mentioned, draft provision 20 modified previous draft provision 23 as follows:

Paragraph 1 b) includes a parenthesis to the expression 'whichever is earlier' which, if excluded, leaves considerable discretion to the Tribunal to decide whether the respondent pays damages representing the fair market value at the time immediately before the expropriation or impending expropriation became known.

Paragraph 2 excluded the obligation to grant simple interest leaving open and again with ample discretion to the Tribunal to award the interest rate as it considers reasonable.

Paragraph 3, relating to the elements to be taken into account by the tribunal in calculating, *inter alia*, the amount of damages, contains several significant changes.

- It excluded paragraph f) on the claimant's non-compliance with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

- Subparagraph (d) on restitution of property has also been deleted.

- Subparagraph (b) places the burden to mitigate the loss or damage solely on the claimant. Thus, the Tribunal should take into account the failure to mitigate the loss or damage by the claimant, provided that all reasonable efforts were made by it. The language of the previous draft of provision 23 would have provided the State with the obligation to mitigate the loss or damage of the claimant.

- The previous paragraph e) becomes paragraph c), and,

- Paragraph (d) modifies the language and scope of the original paragraph (c). Paragraph d) now states that it will take into account "any other compensation received by or awarded to the claimant with regard to the same breach". This is in contrast to the previous wording which stated "prior monetary damages received by the claimant for the same loss or damage". The amendment to paragraph (d) now requires that the calculation of the amount of damages should be limited to cases relating to the same breach, i.e. cases relating to the same measures and breach of the provision of the IIA.

Paragraph 4 incorporates the previous paragraph 7 on the prohibition of punitive damages. In addition, it removed the second part of paragraph 4 of the previous draft provision 23 that obliged the tribunal to consider expected future cash flows only if they are based on a case-by-case examination of the facts, taking into account, among other things, whether the investment has been in operation long enough to establish a performance record of profitability. By deleting the second part of the previous draft of paragraph 4, tribunals can continue to allow parties to use DCF even though the investment was not in operation.

Paragraphs 5, 6, 8 and 9 of former draft provision 23 have been deleted.

[45] A/CN.9/1160, paras. 114 & 115.

The deleted paragraph 5 established the power of the tribunal to appoint experts to report on matters related to the assessment of damages, subject to the agreement of the parties.

Paragraph 6, which was deleted, provided that "[t]he Tribunal may require that experts, if any, appointed by the Parties work on matters relating to the assessment or calculation of damages on the basis of a harmonized and clearly defined set of instructions based on similar assumptions".

The eliminated paragraph 8 stated that "The Tribunal shall not award monetary damages that exceed the total expenses (adjusted for inflation) incurred by the claimant in making its investment".

Deleted paragraph 9 provided that, "If the amount of damages claimed by the claimant significantly exceeds the amount awarded by the Tribunal, the Tribunal may take this into account when awarding costs". In turn, provision 9 (f) (2) of draft WP 244, paragraph 9 (2), appears to replace this provision. But it has not. The previous wording has been modified and its scope limited, leaving the decision once again to the discretion of the tribunal. In fact, the new provision only provides for the consideration of "(f) the amount of damages claimed by the claimant in relation to the amount awarded by the court." As can be seen, the elimination of the conditional, *if*, together with the phrase "*significantly exceeds the amount awarded*" gives a high margin of discretion, depending on the subjectivity of what the tribunal considers proportional, which may lead it to point out that the amount was proportional (reasonable) according to the methodology used or some other reason.

IV. FINAL REMARKS

WG III has advanced the adoption of texts on codes of conduct for arbitrators and judges for the Permanent Multilateral Investment Court (MIC), the Multilateral Advisory Center of the Permanent Multilateral Investment Court, and guidelines on the prevention and mitigation of international investment disputes. In the remaining period until September 2025, when the mandate of WG III expires, the forthcoming sessions should discuss (a) reforms of the Rules of Procedure and cross-cutting issues; (b) the structure, functions and appointment of the judges of the MIC; (c) the Appellate Mechanism; and (d) the multilateral instrument to implement the reforms.

Discussing and adopting these four instruments in their entirety in four sessions and achieving a reasonable balance will be a task that will require flexibility, creativity and understanding of the concerns of WG III members, given the complexity of many issues and the entrenched positions of some countries on many of them. For example, it will have to overcome the position of several developed countries that want to exclude several issues from the discussion of procedural and cross-cutting reforms of interest to countries in the Global South through the classification of issues.[46]

In addition to the above, the general agenda proposed for the next two sessions shows the accomplishment of the risk that a slow and a fast track discussion would be promoted.[47] The slow track for cross-cutting and procedural issues and the fast track for other issues, contrary to the consensus reached at the 37th session on the principle of a balanced allocation of time and two simultaneous tracks.[48]

[46] Submission to UNCITRAL Working Group III by CCSI, IIED, IISD, and South Centre, “Prioritization of the Draft Provisions on Procedural and Cross-Cutting Issues”.
[47] Jose Manuel Alvarez Zarate, “On the Forty-eighth Session of UNCITRAL Working Group III”, *SouthViews* No. 265, 31 May 2024 (Geneva, South Centre). Available from https://www.southcentre.int/southviews-no-265-31-may-2024/.
[48] UNCITRAL A/CN.9/970, para. 83. Report, 37th Session.

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