Commentary on selected Draft Provisions on Procedural and Cross-Cutting Issues (A/CN.9/WG.III/WP.231)

Draft Provision	Commentary
1. Consultation and negotiation	Draft provision 1 responds to concerns by States on the need to engage in consultations or negotiations prior to bringing a claim to international arbitration. This approach follows the practice of different States that have promoted consultation and negotiation as a means to resolve disputes before arbitration. Nonetheless, it only materializes the voluntary nature of these mechanisms, rather than strengthening them as prerequisites for arbitration. A number of developing countries have considered the need to initiate negotiations and consultations as binding requirements for bringing any claims for arbitration. This approach follows the decision by the tribunal in *Tulip Real Estate v. Turkey* (para. 72), which recognises that such a requirement should not be a "mere statement of aspiration" but an essential element for countries' consent to arbitrate. In this line, it would be important to strengthen the language included in Draft Provision 1.1, in order to make the requirement to seek consultation and negotiation as binding, rather than voluntary, which is the status quo. It is also necessary to consider whether the period proposed (60 days) is sufficient to accept or reject such an invitation, and implications related to a party which unreasonably refuses to enter consultations or negotiations.
5. Period for amicable settlement	This provision is closely linked to Draft Provisions 1 and 2. It is necessary to consider if the period of time is sufficient, or whether it should be increased, given the processes that States require to study and accept an invitation to negotiate a dispute arising from an investment.
6. Recourse to local remedies	Draft provision 6 strengthens the role of local courts in the resolution of investment disputes. While this improvement is welcomed, the efficacy of the provision depends on two further factors. First, the ultimate time limitation included in the provision (too short a period will not encourage investors to settle the dispute through local remedies). Second, it should be made explicit that arbitration tribunals must interpret the provision as an obligatory condition to jurisdiction (earlier tribunals have refused to give effect to similar provisions

	based on the argument that local proceedings would have been futile or inefficient, see e.g. *Hochtief v Argentina* (para 54); *Abaclat v. Argentina* (para 576-591). It is also important to consider that, if this requirement is made subject to a period of time (in brackets), this period should be sufficiently long to allow for local remedies to operate effectively.
10. Shareholder claims	Draft provision 10 is a significant improvement over the status quo. The provision would align ISDS practice on shareholder claims with other municipal legal systems and international law regimes of the world. The provision is likely to also reduce the frequency of parallel proceedings significantly (given that many parallel ISDS proceedings have been facilitated by the possibility of various shareholders bringing individual claims for the same measure). The provision is squarely within the mandate of the WGIII and the delegates are strongly advised to support the inclusion of the provision in any WG´s final outcome.
12. Right to regulate	Draft provision 12(3) contains a dispute settlement carve-out for measures that are adopted to protect public health, public safety or the environment, the promotion and protection of cultural diversity, or other measures that the WG decides to include in the provision. Such a provision is desirable in the sense that it allows for wide removal of public interest measures from the purview of arbitration, or other applicable dispute settlement mechanisms (DSMs). The DSM will limit its review to the applicability of the carve-out. Given the provision is drafted in a way that the measure only needs to be "adopted to protect/promote", and does not include more stringent nexus requirements, such as "necessary to protect", the review is likely to be merely summary. In practice, the DSM will be only limited to the review of whether there exists a reasonable relationship between the measure and the stated public purpose. Even then, however, States may wish to retain more control over the determination of the applicability of the carve-out; for example, by devising mechanisms for their own national authorities to determine the scope and breadth, perhaps jointly (see here). This provision might attract a lively debate during negotiations due to the wide-ranging formulation of the carve-out. Delegates interested in taking this agenda forward might wish to come to the Session well-prepared to engage in the debate.

20. Security for Costs	The annotations to Draft provision 20 outline the objective for security for costs. In particular, it notes that security for costs is to protect a respondent State against a claimant's inability or unwillingness to pay costs, and to further discourage frivolous claims. However, Draft provision 20.1 suggests that 'counterclaims' provide security for costs. This would result in increasing the burden on respondent States, and in fact, counters the objective as stated in the annotations provided by the Secretariat.
23. Assessment of damages and compensation	**Para 2. Interest** It is commendable that simple interest is proposed. However, the provision still leaves tribunals with wide discretion as to what is a "reasonable" rate. States may wish to clarify whether the interest is at a commercial or risk-free (sovereign bonds) rate. **Para 3. Causality and balancing factors.** This provision adds a set of important balancing factors for tribunals to consider when arriving at their damages calculations. In this sense, it is a welcomed development. However, the provision does not include any mention of considerations of the host State regulatory environment, such as the public interest behind the disputed measure and the nature of the measure. These considerations may have a significant impact on the construction of the counterfactual against which the damages are calculated. These considerations are particularly salient in the context of climate action measures. For instance, when it comes to the regulation of fossil fuel energy, if a State aims to phase out or limit the use of fossil fuels, the relevant counterfactual cannot be a situation in which fossil fuels' use continues unabated and unregulated. **Para 4. Income-based methods (DCF) and speculative damages.** This Draft provision aims to address the use of income-based methods and limit the impact of their speculative nature. As such, it reflects the growing consensus within WGIII that speculative damages should not be granted. This provision aligns the use of valuation methods with customary international law, as expressed in the ILC Commentary to Articles on Responsibility of States for Internationally Wrongful Acts. The Commentary recognizes that DCF should not be applied to investments in their early stages or those that are in the planning phase, given their inherently

	speculative nature. Instead, it suggests limiting the use of DCF to cases where the future income streams are contractually arranged or where a well-established history of profits exists. While this provision is welcomed and should be retained, it is important to recognize that this approach operates under the assumption that the current methods for calculating damages are suitable and require only clarifications to resolve inconsistencies. Additionally, it is worth noting that the provision lacks guidance on how to construct the DCF valuation. For instance, it does not address the inconsistency in current ISDS practice regarding factors like the inclusion of the so-called country-risk or the consideration of changes in the host State's regulatory environment and framework. While an innovative and improved solution, this provision does not propose a more fundamental change in the compensation principles, as Para 8 does (below). **Paras 5 and 6: The Role of Experts** This Draft provision encourages a wider use of tribunal-appointed experts, addressing concerns about potential bias from party-appointed expert witnesses. While this provision represents an improvement on existing rules, there is room for clearer delineation of tribunals' authority in this regard. The ideal solution would involve explicitly limiting party autonomy concerning expert witnesses on damages. Tribunals should have the authority to appoint their own experts and provide them with guidance based on the dispute's merits and their own discretion. Parties should not have the ability to obstruct this authority. Given the adversarial nature of ISDS proceedings, having impartial and non-adversarial expertise in damages is essential. In this context, it may be worthwhile to consider the creation of a shared pool of experts affiliated with an international organization, court or tribunal. **Para 8. Cap on compensation** This Draft provision proposes a significant improvement in the compensation rules over the status quo. It presents a cap on damages at the level of amounts actually invested, and precludes the tribunal from awarding damages for future lost profits. It is in line with recent theoretical models that propose a compensation rule that prevents opportunistic behaviour and does not overcompensate investors.

	It should be noted that in case this provision is adopted, the regulation of income-based methods (DCF) (above, Para 7) becomes redundant, as the tribunal will be precluded from awarding damages based on future lost profits. **Para 9. Anchoring** This provision is a positive step towards addressing the practice known as "splitting of the baby", where tribunals tend to be biased by the size of damages requested, regardless of how inflated they may be. The goal of the provision is to discourage exaggerated claims by imposing the risk of covering costs in the event of an unsuccessful claim (see also Draft Provision 25(2)(f)). While this provision does provide clarification of current practices, its effectiveness in curbing excessive claims for damages remains uncertain.