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Statement for the UNCITRAL Working Group III: Investor-State Dispute Settlement Reform

January 16, 2024

1) Submission on behalf of ICSID Secretariat

   The ICSID Secretariat appreciates the opportunity to submit the points below for the consideration of States participating in UNCITRAL Working Group III. These observations are based on ICSID's extensive experience with investor-State dispute settlement (ISDS), having administered more than 75% of all ISDS arbitration. They are also informed by the experience of ICSID leading to the comprehensive procedural reforms adopted in the ICSID Arbitration Rules of July 2022.

2) ICSID would like to raise several points on the Draft Provisions on Procedure in A/CN.9/WG.III/WP.231 (WP 231). The draft provisions were prepared "for inclusion in existing and future international investment agreements" and for inclusion in a Multilateral instrument on ISDS reform [MIIR]. We understand their objective is to create uniformity in procedural matters, and to promote consistency and coherence in the practice of ISDS.

   Many of the UNCITRAL draft provisions overlap with the 2022 ICSID Arbitration Rules or the ICSID Convention. This raises several systemic points which delegates should consider:

   i. Is it desirable to include procedural provisions in treaties, as opposed to maintaining them as rules?

   ii. What effect could this approach have on uniformity of interpretation of procedural provisions? and

   iii. What might be the systemic impact of this approach?

i. Is it desirable to include procedural provisions in treaties, as opposed to keeping them as rules?

Technically, it is possible to include procedural provisions in a treaty, and this has been done in some investment treaties (IIAs). The question for delegates is whether this approach is "best practice" and whether it will achieve the stated goals. We would suggest that procedure should primarily be left to arbitral rules,

and that “one off” variations to procedure in IIAs should be avoided or, at most, extremely limited.

This suggestion is made because procedural rules are designed to work together as a scheme. As a result, changing, adding, or omitting one piece of the puzzle (in an IIA or the MIIR) without considering how it works in the applicable procedural scheme for the case risks contradictions and ambiguity.

Concern about rules working as a cohesive scheme was evident in the approach to amendment of the ICSID Rules. The Secretariat and delegates went to great lengths to (a) order rules logically, ensuring that they worked with one another; (b) test the interaction of various rules, including applicable time limits; and (c) ensure balance between the disputing parties.

The more delegations adopt “one off” variations in individual IIAs or through adoption (full or partial) of MIIR recommendations, the greater is the likelihood of having disjointed procedure that does not fit with applicable rules.

A related concern is that if procedural rules are included in a treaty (IIA or MIIR), they will require treaty amendment to be modified. All States agree that treaty amendment is a difficult, and hence infrequent, process. Placing procedural provisions in treaties (rather than rules) will freeze the provisions in time and prevent their further modernization or improvement. Not having to obtain a treaty amendment to modify procedural rules is simply more practical.

(ii) What effect will this have on procedural uniformity?

The inclusion of procedural provisions in investment treaties could lead to greater fragmentation, uncertainty, and increased cost.

In the case of ICSID, more than 75% of all ISDS cases are administered under the ICSID rules, which ensures that the same procedural rules are applied to most pending ISDS cases. This results in a known and consistent procedural jurisprudence, which is accessible to parties and potential litigants. In turn, this leads to certainty and economy of the process.

To achieve anything near this level of uniformity, a set of rules in the MIIR would need (a) a substantial number of States to adopt those MIIR provisions, and (b) to adopt the rule as written in the MIIR, rather than a modification of proposed MIIR text.

Absent this level of uniformity, the inclusion of procedural provisions in individual IIAs and the MIIR will lead to increased fragmentation: some tribunals will apply ICSID Rules, others UNCITRAL rules, some will apply the MIIR provisions, while others will apply treaty-specific rules – this is the opposite of cohesion and predictability.

One might also be concerned about the extent to which there would be a sufficient level of adoption of MIIR procedural provisions. States should be concerned that proceeding in this fashion with basic procedural rules will lead to fragmentation or even ineffectiveness for something as fundamental as the procedural rules governing a proceeding.

Compare this to the ICSID rules amendment process that concluded in 2022. The ICSID amendment was made through the consultation and voting formula envisaged in the ICSID Convention, with active participation from States. It took 5.5 years, 6 large working papers, and hundreds of consultations. The 2022 ICSID Arbitration Rules were approved unanimously by all voting States (85%), including most of the States participating in UNCITRAL WG III. Not a single State voted against them, and their implementation has been seamless. They represent best practice in international arbitration and most importantly, they represent a current consensus among States on these issues. To date, ICSID has received only positive reactions to the rule amendments from all users, including States.

From an ICSID perspective, it is concerning that WG III is contemplating the adoption of procedural provisions (some of which diverge from the ICSID Rules), in a treaty instrument that would purport to override individual ICSID rules applied in ICSID cases.

In our respectful view, the amended ICSID Rules represent *state-of-the-art* procedure and have been achieved through careful development of an international consensus. Indeed, delegates may want to adopt the ICSID rules in other sets of rules, including potentially UNCITRAL Arbitration Rules specific to investor-State arbitration. In any event, delegates should not agree to a process that would alter individual rules already in the ICSID scheme.

(iii) What might be the systemic impact of this approach?

Including procedural provisions in treaties will create uncertainty and complexity regarding their application. Some of the provisions proposed in WP 231 differ from the ICSID Rules in their wording and in some cases, substance. This could lead to inconsistent application and subsequent complexity rather than clarity.

For example, would a Draft Provision incorporated in the MIIR entirely replace the ICSID Rule, or would it displace the ICSID Rule only to the extent they are incompatible? If they are intended to complement each other, what would be the final text of the rule? Who would decide this? And at what stage of proceedings?

It is possible that States may want to specifically change the UNCITRAL Rules for investor-State disputes. However, updating the UNCITRAL Rules as they apply to ISDS should not be at the cost of disaggregating the cohesive approach available under the ICSID Convention and Additional Facility Rules.

Conclusion

In view of the above, ICSID would suggest the following alternative approaches:

1. Procedural provisions should not be included in treaties or should be kept to a minimum in treaties. There is no need to address provisions applicable to ICSID cases in a treaty, given that delegates recently and thoroughly addressed them in the 2022 ICSID Rules. For UNCITRAL cases, delegates may wish to consider adopting UNCITRAL Arbitration Rules for investor-State disputes, as they may wish to align those rules with the 2022 ICSID Rules.

2. If the WG does wish to include procedural provisions in a treaty, the ICSID Rules could be exempted from the proposals in WP 231. The ICSID Rules are a specific and cohesive set of rules, built for purpose, updated after almost 6 years of consultation and discussion, pursuant to a treaty process agreed by all ICSID Member States, and adopted unanimously by them.

3. If the WG does wish to include procedural provisions in a treaty, the 2022 ICSID Rules could be adopted for that purpose. This approach would avoid disrupting the procedural scheme in the ICSID rules in ICSID cases, and their application in non-ICSID cases would enhance uniformity and certainty overall. This approach also has the added benefit of allowing States to conclude their discussions on procedure and dedicate the relevant time to other pending agenda items. However, this would mean that any future update of the ICSID Rules would also require an update of the relevant treaty provisions. As noted above, treaty amendment is a difficult process and is better avoided.

ICSID will make substantive rule-by-rule comments as needed in the plenary sessions. However, we remain available to address any questions on these submissions or to provide further information to WG III.