

Prioritization of the Draft Provisions on Procedural and Cross-Cutting Issues¹

During the 47th Session in January 2024, UNCITRAL Working Group III (WGIII) delegates reached a consensus to keep all the cross-cutting and procedural issues on the agenda.² This decision came after certain delegations suggested dropping or deprioritizing certain items. Given the limited time remaining for WGIII to complete its reform project, delegates will need to develop and implement a clear work plan for these topics. To facilitate effective planning of the Working Group’s calendar, at the end of the 47th Session, the Chair called on delegations and observers to share their views on the classification, prioritization and form of the 25 draft provisions on cross-cutting and procedural issues. This submission responds to that call.

Following on the 47th Session, the draft provisions on cross-cutting and procedural issues have been **classified into three categories**: (i) those that aim to achieve “harmonization” with existing procedural rules (including the 2022 ICSID Arbitration Rules) and could form the object of a supplement to the UNCITRAL Arbitration Rules; (ii) those that would build on existing procedural rules and provisions found in recent investment treaties or procedural rules (“harmonization plus”), which could be drafted as treaty provisions for adoption by States (or take other forms); and (iii) those that are not found in procedural rules addressing the cross-cutting issues, and would therefore require further negotiations within the Working Group. With respect to the **prioritization of the draft provisions**, it was suggested during the 47th Session that categories (i) and (ii) should be prioritized

¹ Submission to UNCITRAL Working Group III prepared by Ladan Mehranvar, Lorenzo Cotula, Lise Johnson, Josef Ostránský and Daniel Uribe.

² See UNCITRAL, “Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural and Cross-Cutting Issues” (Vienna, 9–13 October 2023), A/CN.9/WG.III/WP.231. After hearing from a number of delegations on Friday 26 January 2024 (in the last 45 mins of the Session), the Chair concluded that no rules should be excluded at this time.

since they will not entail a significant amount of work. This view was reiterated in the Report of the Seventh Intersessional Meeting.³

This submission calls for an approach to classification and prioritization that allows WGIII sufficient time to address issues that are particularly pressing in ISDS reform debates. These issues are likely to address the concerns identified by WGIII *and* generate significant discussion within the Working Group. Since many of these pressing issues fall disproportionately under category (iii), or are currently not classified, **this approach involves prioritizing category (iii) issues and ensuring that the framing of the three categories can cater to all relevant issues.** Flexibility in classification is key to avoiding limitations on potential achievements for any given topic. For instance, some issues currently listed under categories (i) or (ii) could benefit from exploring reform options beyond mere “harmonization” or “harmonization plus”. Moreover, the classification should not preempt discussions about the most appropriate reform instruments, as draft provisions categorized together may require different types of instruments. This course of action ensures the Working Group can develop and deliver an effective reform package that meaningfully addresses the concerns about ISDS, as articulated by delegates throughout the reform process.

Comments related to the overarching criteria for prioritization

The stated rationale for prioritizing categories (i) and (ii) is that these rules, having been previously deliberated and codified elsewhere, are presumed to require less effort to achieve consensus within WGIII. However, attaining consensus on these rules will still be time-consuming, as the Working Group has experienced in the past. Moreover, focusing on the “low-hanging fruit” may leave little time for the Working Group to discuss the deeper reform options that could more meaningfully address the concerns expressed by delegations about ISDS throughout the reform process. In effect, this approach risks merely codifying the status quo rather than instigating genuine reform.

It is worth noting that, during the 47th Session, delegations expressed diverse views about the option of prioritizing the “harmonized” and “harmonized plus” rules over category (iii) rules. While a few delegations – all developed countries – seemed to suggest such a prioritization, the majority of delegations that took the floor highlighted the broad mandate of WGIII, rejected suggestions that certain provisions be excluded and suggested that delegates be given the opportunity to submit written comments on the issue of prioritization. This included interventions from a number of developing countries and regional organizations, including delegations from the African continent, Asia, and Latin America. Like a large number of other developing countries, some of these delegations are impacted most acutely by the ISDS system. They are therefore keen to meaningfully reform the ISDS system, which would include developing rules for issues classified in category (iii).

³ UNCITRAL, “Summary of the intersessional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of Belgium” (28 March 2024), para. 65.

A suggestion to suspend the discussion on the provisions of category (iii) was voiced by two developed country delegations at the 47th Session, and documented in the Report of the Seventh Intersessional Meeting.⁴ This proposal poses a significant challenge for many developing countries, especially those disproportionately affected by ISDS claims, and particularly those who had aspired to see the Working Group process deliver real reform. For example, the current classification, as presented in the Report of the Seventh Intersessional Meeting, places draft provisions 10 (shareholder claims), 12 (right to regulate), and 23 (assessment of damages and compensation) in the third category - yet these provisions all respond to issues that have consistently emerged as key concerns in the Working Group process. In addition, some key draft provisions are missing *entirely* from any of the three categories provided in the Intersessional Report, most critically draft provisions 4 (state-to-state dispute settlement), and 6 (recourse to local remedies). Deprioritizing (or even abandoning) these issues will significantly reduce the reform project's potential impact.

Comments related to specific draft provisions

In relation to draft provision 10 (shareholder claims), for example, it has been widely acknowledged that one factor contributing to the proliferation of ISDS claims is ISDS tribunals' practice of permitting foreign shareholders to bring claims for losses suffered by the domestically incorporated companies in which they hold shares. As noted in a paper produced by members of the Academic Forum, "ISDS stands alone in empowering shareholders to bring [such] claims for reflective loss".⁵ The permissive approach adopted by ISDS tribunals to reflective loss claims is unlike other public international law regimes and domestic legal systems, which generally bar these types of suits.

The Academic Forum paper also underscores how the approach adopted by ISDS tribunals leads to significant costs, rendering it undesirable from a policy standpoint. Allowing shareholders, including minority and non-controlling shareholders, to independently pursue claims related to harms suffered by the companies in which they hold shares can exacerbate the risks of multiple or parallel claims arising from a single measure. This situation can undermine States' ability to effectively resolve disputes, which can increase the likelihood of inconsistent decisions and prolong the duration and increase the costs of disputes - issues that the WGIII aims to address. Moreover, granting certain foreign shareholders in a company the right to claim "reflective losses" can undermine the rights and interests of other stakeholders in that company, such as creditors and domestic shareholders. This, in turn, may discourage other stakeholders from investing in local firms, ultimately undermining the very purpose of investment treaties.⁶

⁴ UNCITRAL, "Summary of the intersessional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of Belgium" (28 March 2024), para. 65.

⁵ Julian Arato, Kathleen Claussen, Jaemin Lee, and Giovanni Zarra, "Reforming Shareholder Claims in ISDS", *University of Michigan Law School Scholarship Repository* (2023), p. 2, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=3765&context=articles>.

⁶ See e.g., *ibid.* See also David Gaukrodger, "Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency", *OECD Working Papers on International Investment 2013/03*, https://www.oecd.org/daf/inv/investment-policy/WP-2013_3.pdf.

Similarly, **draft provision 12** on the “right to regulate” responds to one of the most pressing concerns regarding ISDS throughout the WGIII process⁷ and in public discourses more broadly. Providing a meaningful response to this issue is critical for the Working Group’s reform package to be seen as adequately addressing concerns about ISDS. While the substantive provisions of investment treaties greatly influence these matters, there are several policy options for ISDS reform aimed at mitigating concerns about regulatory chill. These options may include narrowing the scope of consent for submitting disputes to ISDS, such as by excluding certain types of measures, assets, sectors or even causes of action from open offers of consent. Additionally, establishing procedural filters could enable State parties to the relevant investment treaty to assess whether a measure falls within the scope of a carve-out.⁸

Draft provision 23 (assessment of damages and compensation) also addresses a core concern within the WGIII process. During the 46th Session in October 2023, numerous States emphasized the importance of prioritizing work on damages. Multiple States expressed their concerns about the way damages are currently calculated, at times leading to exorbitant and speculative amounts, and thus further exacerbating the chilling effect on public regulation. In addition, concerns were raised about the lack of predictability and coherence in the assessment of damages, and about the associated increase in the duration and costs of proceedings. Several States and observers have expressed concerns over the inappropriate incentives within the ISDS system, which encourage inflated damages claims, along with the absence of control mechanisms regarding the application of relevant rules and principles.⁹ Some States went as far as noting that, without significant reform on the calculation of damages, the legitimacy of the Working Group would be seriously undermined.

Support for prioritizing the issue of damages was expressed by over 20 States (all developing countries from different parts of the world). Other (developed country) delegations affirmed their openness to the Working Group tackling the issue of the calculation of compensation and damages. A small minority of States expressed their concerns about whether the topic is within the Working Group’s

⁷ See e.g. UNCITRAL, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session” (New York, 1–5 April 2019), paras. 36-38; UNCITRAL, “Summary of the inter-sessional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Republic of Korea” (12 January 2022), paras. 46, 47, 50; UNCITRAL, “Possible reform of Investor-State dispute settlement (ISDS) Comments by the Government of Indonesia” (9 November 2018), para. 10; UNCITRAL, “Possible reform of Investor-State dispute settlement (ISDS) Submission from the Government of South Africa” (17 July 2019), para. 11; UNCITRAL, “Possible reform of Investor-State dispute settlement (ISDS) Submission by the Government of Burkina Faso” (9 November 2020), para. 10.

⁸ For a fuller discussion of these aspects, see CCSI, IIED and South Centre, “UNCITRAL Working Group III: Contribution on the ‘Right to Regulate’ Provision”, Submission to UNCITRAL Working Group III prepared by Lorenzo Cotula, Lise Johnson, Ladan Mehranvar, Anirudh Nanda and Daniel Uribe (18 January 2024), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/r2r_memo_for_wgiii_47th_session.pdf.

⁹ See UNCITRAL, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its forty-sixth session” (Vienna, 9–13 October 2023), para. 99. See also CCSI, IIED and IISD, “Submission to UNCITRAL Working Group III on ISDS Reform, contributed by the Columbia Center on Sustainable Investment (CCSI), the International Institute for Environment and Development (IIED), and the International Institute for Sustainable Development (IISD)” (12 November 2021), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ccsi_iisd_iied_submission_to_uncitral_wg_iii_on_damages.pdf.

mandate. However, it was clarified that the WGIII mandate is not delineated by the substance-procedure distinction; rather, it is a broad mandate to deal with reform of ISDS, and it is clear that damages is a key element of this dispute settlement system.

Importantly, the Working Group’s deliberations on the topic thus far allow for a more targeted and consequently less time-consuming approach. During the 46th Session, there was a convergence on certain issues. Notably, discussions centered on some points of principle, raised mostly by developed country delegations and some observers, particularly the customary international law principle of “full reparation”, which delineated the scope of the work on the topic. The consensus was that the Working Group would not seek to modify this principle. The main concerns revolved around the application of broad customary law principles, with a focus on instances where tribunals have misapplied them.

In addition, convergence emerged on several broad points of principle at the 46th Session: the possibility of awarding a combination of monetary and non-monetary compensation; the principle of not awarding excessive interest; the importance of causation, which necessitates further elaboration and work - specifically, only compensating for losses directly caused by a specific breach; acceptance of the principles of mitigation, contributory fault, and the prohibition of double recovery; ensuring damages awards are based on clear rules on burden of proof and satisfactory evidence, while also acknowledging that punitive damages are not appropriate in ISDS.¹⁰ This set of issues outlines the direction for future deliberations on the topic.

Given this context, it seems appropriate that the Working Group devotes necessary time and efforts to a topic that is viewed as a priority by so many delegations and that has already formed the object of significant consensus building. As there is recognition within the Working Group that the issue of damages may require an outcome in multiple forms, it appears inappropriate to designate the topic to a low priority category with a low-impact predetermined outcome, such as model clauses.

Comments related to missing provisions

With respect to **draft provision 6** (recourse to local remedies), States have recognized the need for prioritizing this issue within WGIII.¹¹ Recognizing the role of domestic judicial institutions in settling investment disputes is relevant to respecting the right and duty of States to regulate and to strengthening their domestic legal frameworks. It would also align investment law with the approach taken in customary international law and international human rights law. Further, there is recognition that ISDS procedures have often circumvented domestic legal institutions, resulting in a differential treatment between domestic and foreign investors. Discussing recourse to local remedies would

¹⁰ UNCITRAL, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its forty-sixth session” (Vienna, 9–13 October 2023), para. 115.

¹¹ See e.g., UNCITRAL, “Comentarios de la República Argentina sobre el documento A/CN.9/WG.III/WP.231”; UNCITRAL, “Possible reform of Investor-State dispute settlement (ISDS) Submission from the Government of South Africa” (17 July 2019), A/CN.9/WG.III/WP.176.

provide an opportunity to address concerns regarding procedural fairness and the role of international arbitration in resolving disputes between States and investors.

The current classification of draft provisions also reflects certain assumptions about the ambition of reform options. For example, the issue of **third-party participation** has been part of the cross-cutting issues discussed by the Working Group since 2019 and reiterated in 2022.¹² While **draft provision 18** (transparency) envisages the application of the UNCITRAL Rules on Transparency, which include *amicus curiae* submissions as an avenue for third parties to input into the proceedings, States and observers in WGIII expressed concerns about the more direct impact of ISDS proceedings on the rights of specific third parties, highlighting that the role and intent of *amicus curiae* submissions were insufficient and not intended to address those concerns.¹³ At the moment, the draft provisions do not cater for these aspects - and the classification of draft provision 18 within category (ii) could limit scope for the reform to innovate beyond “harmonization plus”. In effect, this approach risks codifying the status quo rather than bringing about meaningful reform.

The way forward

It is important to acknowledge the significant limitations of the current agenda in UNCITRAL WGIII. The procedural and cross-cutting issues outlined in WP 231 reflect early and consistent efforts to shape and narrow the scope of UNCITRAL’s original mandate.¹⁴ Many critically important considerations for dispute settlement reform are not even on the agenda. Continuing to narrow the focus of the most salient issues contradicts the very mandate of this reform process, as understood by State delegations and observers, in particular, those most impacted by the ISDS system. As such, an effective approach to prioritization would be to give precedence to category (iii) draft provisions, some category (ii) provisions, and those not addressed in other procedural rules.

¹² UNCITRAL, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session” (New York, 1-5 April 2019), paras. 31-33; UNCITRAL, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Forty-Third Session” (Vienna, 5–16 September 2022), para. 103 (13th bullet point: “Non-disputing party submission as well as third-party participation, including of affected parties”). See also, Jesse Coleman, Lise Johnson, and Brooke Güven (CCSI), and Lorenzo Cotula and Thierry Berger (IIED), “Third-Party Rights in Investor-State Dispute Settlement: Options for Reform” (15 July 2019), <https://ccsi.columbia.edu/sites/default/files/content/docs/our%20focus/uncitral-submission-third-party-participation-en.pdf>.

¹³ UNCITRAL, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Seventh Session” (New York, 1-5 April 2019), para. 31. See also the audio recordings of the 37th Session, afternoon of 1 April 2019 and morning of 5 April 2019. These issues are discussed more fully in Lorenzo Cotula and Ladan Mehranvar, “How a Documentary Film Can Help UNCITRAL Working Group III Think through ISDS Reform” (10 April 2024) EJIL:Talk!, <https://www.ejiltalk.org/how-a-documentary-film-can-help-uncitral-working-group-iii-think-through-isds-reform/>.

¹⁴ Lorenzo Cotula and Thierry Berger (IIED), Lise Johnson, Brooke Güven and Jesse Coleman (CCSI), “UNCITRAL Working Group III on ISDS Reform: How Cross-Cutting Issues Reshape Reform Options” (15 July 2019), https://ccsi.columbia.edu/sites/default/files/content/pics/our_focus/uncitral-submission-cross-cutting-issues-en.pdf; Lea Di Salvatore and Ladan Mehranvar, “Unlocking Expectations: UNCITRAL Working Group III Finalized its First Drafts - Does it Deliver?” (31 May 2023), <https://ccsi.columbia.edu/news/unlocking-expectations-uncitral-working-group-iii-finalized-its-first-drafts-does-it-deliver>.

This approach would avoid the postponement, and potential abandonment, of some of the most critical issues for the Working Group to engage with. As noted by one regional organization, these draft provisions happen to be some of the provisions that are most critical and of top importance for certain countries, particularly those heavily affected by ISDS cases. Given the time constraints of the Working Group, it is prudent to address the most critical and priority provisions first. This approach allows progress on provisions not covered in existing rules, rather than allocating more time to less controversial provisions already discussed, negotiated and drafted in other forums and arbitration rules.

For instance, many States participating in WGIII have recently revised the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules. This reform initiative, launched in 2016, was based on suggestions from Member States and the general public. In 2022, ICSID Member States adopted the Amended Rules,¹⁵ aiming to modernize the arbitration process based on case experience, and to enhance its time and cost efficiency. This discussion led to several changes related to issues falling within categories (i) and (ii), such as bifurcation, provisional measures, early dismissal, security for costs, suspension of proceedings, time limits for issuances of decisions and awards and enhanced transparency, among others.

These amended provisions were thoroughly discussed within the framework of existing rules and institutions over nearly six years. Prioritizing categories (i) and (ii) over other issues included in category (iii), or those that are not included in any of the three categories, would not only devote more time to matters already addressed in other forums but could also sideline significant issues from the discussion.¹⁶ Given the amount of time allocated to discussing these provisions in ICSID, it would be more prudent to focus on procedural rules that have yet to receive attention, especially those highlighted in this submission.

¹⁵ ICSID, “ICSID Rules and Regulations Amendment” (1 July 2022), <https://icsid.worldbank.org/resources/rules-amendments>.

¹⁶ See also ICSID, “Statement for the UNCITRAL Working Group III: Investor-State Dispute Settlement Reform” (16 January 2024), para. 3 of the conclusion, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/comments_from_icsid.pdf.