United Nations A/CN.9/WG.III/WP.248

General Assembly

Distr.: Limited
15 November 2024

Original: English

United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
Fiftieth session
Vienna, 20–24 January 2024

Possible reform of investor-State dispute settlement (ISDS)

Additional provisions on procedural and cross-cutting issues and resources available to the Working Group

Comments from the European Union and its Member States:

The European Union and its Member States refer to paragraph 125 of the report of Working Group III on the work of its 50th session (A/CN.9/1195) as well as communication from the UNCITRAL Secretariat dated 6 February 2025, where delegations are invited to provide written comments on draft provisions 21 and 22 in document A/CN.9/WG.III/WP.248.

The European Union and its Member States therefore submit the below comments on draft provisions 21 and 22 and suggest an additional draft provision on "applicable law".

This is without prejudice to the position that the European Union and its Member States may take in light of the discussions in Working Group III.

Draft provision 21: Joint interpretation

Comments from the European Union and its Member States:

The European Union and its Member States wish to recall that they have submitted a paper on the draft multilateral instrument (A/CN.9/WG.III/WP.246) suggesting to create a mechanism for joint interpretation within the multilateral instrument.[1] As that submission made clear, it is imperative that such a mechanism be available at a minimum as regards the standing mechanism, irrespective of whether such a provision appears in the underlying agreement. Hence, the European Union and its Member States have suggested the inclusion of a joint interpretation mechanism in the multilateral instrument as giving the greatest possible scope for application. This proposed mechanism for joint interpretation is inspired by draft provision 21. The text included in the multilateral instrument should be adjusted as a function of the outcome of the discussion of the text here.

[1] *See* paper submitted by the European Union and its Member States, available at https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/2025.02.14_submission_mi_joint_interpretation.pdf

Nevertheless, and in so far as draft provision 21 in WP.248 is considered as a treaty provision to be retrofitted into existing treaties, the European Union and its Member States suggest the following edits to the text:

1. Parties to the Agreement may issue an interpretation jointly agreed by the Parties with regard to any provision of the Agreement (the "joint interpretation"), including through a body established for such a purpose under the Agreement. ***The Parties may decide that an interpretation shall have binding effect from a specific date.***

On paragraph 1, it is suggested to add the possibility for the treaty Parties to set a specific date from which an interpretation shall have binding effect, in order to leave the choice to the treaty Parties to decide whether to apply an interpretation to pending proceedings or not.

2. Upon a request by a Party to the Agreement to issue a joint interpretation, the other Party or Parties to the Agreement shall give due consideration to that request.

3. The Tribunal may, at the request of a disputing party or on its own initiative, ~~seek~~ ***request*** a joint interpretation of any provision of the Agreement that is the subject of the dispute. ***It shall address such a request to both of the Parties to the Agreement pursuant to which the dispute is lodged.***

On paragraph 3, it is suggested to replace "seek" by "request" as a more appropriate term, and to clarify that when the Tribunal requests a joint interpretation, it shall address such request to both of the Parties to the treaty pursuant to which the dispute is taking place, and not only to the Party to the treaty involved in the dispute.

4. A joint interpretation pursuant to paragraph 3 shall be issued within 90 days from the date the Tribunal seeks the joint interpretation, ***unless the Parties to the Agreement concerned jointly request an extension of that period***. If the joint interpretation is not issued within the time period, the Tribunal shall decide the issue.

On paragraph 4, it is suggested to provide flexibility on the timing to issue a joint interpretation, as 90 days may be too short depending on the internal processes of a State or REIO. Therefore, the Parties to the treaty should have the power to jointly request an extension to issue such a joint interpretation.

5. A joint interpretation issued pursuant to paragraphs 1 and 3 shall be binding on ***the*** Tribunals ***that are seized of a dispute under the relevant*** ~~established in accordance with the~~ Agreement. Tribunals shall ensure that their decisions and awards are consistent with the joint interpretation.

On paragraph 5, it is suggested to clarify that the joint interpretation is binding on "Tribunals that are seized of a dispute under the relevant Agreement" to more clearly cover: (i) a first-instance and appeals Tribunals as currently discussed in the draft statute of a standing mechanism (A/CN.9/WG.III/WP.240) and (ii) a Tribunal seized of a dispute but whose jurisdiction is contested. It could indeed be debated whether such Tribunals are established "in accordance with the Agreement". The replacement phrase covers all possible situations.

Draft provision 22: Submission by a non-disputing Treaty Party

Comments from the European Union and its Member States:

Draft provision 22 is in line with the similar provision from the UNCITRAL Transparency Rules (Article 5) and the 2022 ICSID Arbitration Rules (Rule 68). Accordingly, the Working Group should avoid reopening its substance and should instead focus on targeted adjustments. In this regard, the European Union and its

Member States would support the addition of a new paragraph 3bis allowing the non-disputing Treaty Party to have access to the relevant documents of the case in order to decide whether to file or not a submission on its own initiative or at the invitation of a Tribunal.

Furthermore, since this provision is already present in the UNCITRAL Transparency Rules, it can already be retrofitted by a State joining the Mauritius Convention. The European Union and its Member Stares are concerned that permitting retrofitting of one aspect of the Transparency Rules may undermine the attractiveness of the Mauritius Convention.

Nevertheless, the European Union and its Member States would not object to the retrofitting of draft provision 22 into existing treaties if there is strong support in the Working Group.

The European Union and its Member States could also support the inclusion of this draft provision in Section A of WP.244, as a supplement to the UNCITRAL Arbitration Rules. This draft provision shall also be included in the rules of procedure of a standing mechanism, which should in any event include a full set of transparency provisions as in the UNCITRAL Transparency Rules.

1. The Tribunal shall allow a Party to the Agreement that is not a party to the dispute ("non-disputing Treaty Party") to make a submission on the interpretation of the Agreement at issue in the dispute. The Tribunal may, after consultation with the disputing parties, invite a non-disputing Treaty Party to make such a submission.

2. The Tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Treaty Party. In determining whether to allow such submissions, the Tribunal shall take into consideration, among others:

(a) Whether the non-disputing Treaty Party has a significant interest in the proceedings;

(b) The extent to which the submission would assist the Tribunal in the determination of a factual or legal issue related to the proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties, and

(c) The need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.

3. The Tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.

3bis. The Tribunal shall provide the non-disputing Treaty Party with relevant documents filed in the proceeding, unless otherwise publicly available pursuant to applicable rules on the publication of documents.

4. The Tribunal shall ensure that a submission by a non-disputing Treaty Party does not disrupt or unduly burden the proceedings, or unfairly prejudice any disputing party.

5. The Tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Treaty Party.

Additional draft provision 23: Applicable law

Comments from the European Union and its Member States:

The European Union and its Member States would like to suggest the addition of a new draft provision on applicable law. Many investment treaties contain a

clause on the applicable law, as is the case for EU agreements. It would be a useful addition to the provisions that could be retrofitted into existing treaties where they do not have rules on applicable law or very limited rules. It should also be given consideration in the context of the discussions on applicable law with regard to the statute of a standing mechanism.

The following language is suggested as an additional provision:

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

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