UNCITRAL Working Group III -- USG Comments on Working Paper 244: Section A and Related Procedural Provisions

Date of Submission: December 5, 2024

The United States submits the following comments on draft provisions 1-9, 11, and 12(1)-(5), (7) (referred to collectively as the "Draft Provisions"), as set out in WP 244 and WP 245. These comments are preliminary, offered on a technical basis, and subject to further development based on discussions within the Working Group. The comments, which respond to the request for comments made during the 49th session of Working Group III, focus on the suitability of the Draft Provisions for inclusion in a set of supplemental rules to the UNCITRAL Arbitration Rules (UAR), for use in investor-state dispute settlement (ISDS) proceedings. In particular, the comments note whether a draft rule is already reflected in the UAR, or whether it tracks the revised ICSID Arbitration Rules (2022). **In our view, it would be useful to develop a set of procedural arbitration rules that bring the UAR in line with the revised 2022 ICSID Arbitration Rules so that both sets of rules reflect common procedures for the conduct of arbitration between foreign investors and host States.** These rules, like the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, would be specifically designed for use in ISDS proceedings as a supplement to the UAR; they are not intended to replace the UAR and do not address all applicable UAR rules. There may also be rules in the UNCITRAL Expedited Arbitration Rules (EAR) that could usefully be applied in the ISDS context, regardless of whether the proceeding is expedited or not. The Draft Provisions would not be intended for use in international commercial disputes, and we would support language clarifying that if appropriate. Any adaptation of these provisions for use in international commercial arbitration would be more appropriately considered by Working Group II, given its mandate to address that topic.

Overall, we thank the Secretariat for its work on these improved Draft Provisions, which are largely consistent with the revised 2022 ICSID Arbitration Rules. They will serve as a solid basis for achieving consensus on this element of the Working Group's reform agenda and submission to the Commission during its 2025 session.

Draft Provision 1 – Evidence

Much of this provision replicates UAR Articles 27 and 30(3), is not necessary for a separate set of required rules for ISDS proceedings, and can be omitted from the Draft Provisions. The exception is paragraph 3, which sets out a rule for addressing disputes over document production requests. It could be useful to include a slightly modified version of paragraph 3 as a standalone provision, similar to ICSID Arbitration Rule 37. We would suggest modifying paragraph 3 to include the second sentence of EAR 15(1) following the first sentence of paragraph 3, deleting "such" from what is currently the second sentence of paragraph 3, and adding cross-references to UAR Articles 27 and 30(3). Paragraph 5 is currently discussed in the UNCITRAL Notes on Organizing Arbitral Proceedings (2016) at para. 88.

Draft Provision 2 – Bifurcation

This draft provision reflects ICSID Arbitration Rule 42 (Bifurcation). Given that there are instances where bifurcation may be useful, for example to efficiently dismiss claims that do not meet jurisdictional conditions required under international investment agreements (IIAs), we support including Draft Provision 2 in order to provide clarity on the criteria relevant to a decision on bifurcation. Thirty days reflects an appropriate amount of time for the tribunal to decide on such a request.

Draft Provision 3 – Interim Measures

UAR 26 already provides for interim measures, so this provision is not strictly needed for a supplemental set of rules for ISDS. It may be worth considering, however, whether additional limitations on granting interim measures may be appropriate in ISDS. For example, in modern U.S. IIA practice, interim measures are allowed only to preserve evidence, to preserve the rights of a disputing party, or to protect the tribunal's jurisdiction, but not to enjoin a challenged measure. A recent example is USMCA Art. 14.D.7(9).

Draft Provision 4 -- Manifest lack of legal merit/early dismissal

This draft provision reflects ICSID Arbitration Rule 41 (Manifest Lack of Legal Merit) and Rule 52(2). Currently, there is no separate provision for early dismissal under the UAR, although the UNCITRAL Notes on Organizing Arbitral Proceedings, Note 21 at para. 147–54, confirm that a tribunal, under UAR Article 17, has the authority to dismiss claims as a preliminary matter when appropriate. Nevertheless, in the ISDS context, a rule setting out a specific procedure could provide greater clarity and predictability for the dismissal of meritless or frivolous claims. We note that ICSID Arbitration Rule 44 provides an additional accelerated procedure for bifurcation and preliminary objections, which could be a useful addition to the UAR for ISDS proceedings.

We are not certain that, in the ISDS context, it is appropriate to require that costs be awarded to the prevailing party absent exceptional circumstances, as set out in paragraph 6, although we recognize that ICSID Arbitration Rule 52(2) includes a similar presumption, as does UAR Article 42 ("shall" award costs to prevailing party unless not appropriate). We note that in modern U.S. IIA practice, the most recent example of which is USMCA Article 14.D.7(6), the tribunal has the discretion to award costs and is required to consider whether the claim or an objection thereto was frivolous.

Draft Provision 5 – Security for costs

This draft provision reflects ICSID Arbitration Rule 53 (Security for Costs), including taking into account third-party funding (TPF) as a factor. Currently, there is no separate provision for security for costs in the UAR. In particular, we support the bracketed language in para. 4(e) to make TPF a required factor in security for costs and a regular part of claimant's disclosures. We question whether it is necessary to terminate the proceeding if a host State fails to provide security for costs (para. 6), as it may create an incentive not to comply with such an order, and

note that the provision as drafted does not clearly apply symmetrically to both claimants and respondents.

Draft Provision 6 – Suspension of the proceeding

This draft provision reflects ICSID Arbitration Rule 54 (Suspension of the Proceeding). Currently, there is no separate provision for suspension in the UAR, and we believe that it is appropriate to add such a supplemental rule for ISDS.

Draft Provision 7 – Termination of the proceeding

This draft provision reflects ICSID Arbitration Rules 55(1) and 56(1), which usefully supplement the provisions under the UAR allowing termination of the proceedings when the disputing parties have reached a settlement (UAR 36(1)) or when one of the disputing parties defaults (UAR 30) by providing additional detail on grounds and procedure. This clarity on termination could be useful for ISDS proceedings, by allowing for dismissal of a case where appropriate, for example due to a failure to prosecute a claim or other undue delays.

In terms of drafting, given that UAR Article 36 addresses settlement, it may be useful to include a cross-reference for clarity.

Draft Provision 8 – Period of time for making the award

This draft provision reflects ICSID Arbitration Rule 58 (Timing of the Award). Currently, there is no separate provision for setting the time for making the award in the UAR, and such a rule could be an appropriate addition as a supplemental rule for ISDS proceedings to address concerns about the duration of such proceedings. However, in keeping with ICSID Arbitration Rule 58(1)(c), the time period for an award (para. 2) should be measured from the date of final written or oral submissions, whichever are later, rather than from the date of constitution of the Tribunal, as variations in the duration of time between the date of constitution of the Tribunal and the final written or oral submissions are more likely to be driven by the parties or by the complexity of the case, rather than by Tribunal delay. As for the appropriate duration of time between the final written submissions or hearing (whichever is later) and the award, the United States proposes a maximum of 240 days, in keeping with ICSID Arbitration Rule 58(1)(c).

Draft Provision 9 – Allocation of costs

Although the proposed rule follows UAR Article 42, which presumes the losing party should pay costs, we prefer in the ISDS context the approach followed in ICSID Rule 52 (Decisions on Costs), which sets out an illustrative list of criteria that an arbitral tribunal should consider when issuing an award on costs, among other considerations relevant to a cost award decision. Taking away the presumption that the loser pays does not mean that costs will not be awarded to the prevailing party; it simply means that arbitral tribunals should assess all of the factors relevant to a cost award, including but not limited to the outcome of the dispute. This approach applies equally to claimants and respondents and avoids discouraging claimants with meritorious claims. A specific rule for frivolous or meritless claims is a more targeted solution to the concern about these types of claims.

With respect to the annotation at para. 32 of WP 245, the United States agrees that paras. 2(e) and (f) are useful additions and are not in conflict with ICSID Rule 52(1), which provides an illustrative and non-exhaustive list of relevant factors.

Regarding para. 3 in Draft Provision 9, further discussion or additional input is needed regarding what "expenses [are] incurred by a disputing party related to or arising from third-party funding," and how those costs are distinguishable from other costs that are recoverable.

Draft Provision 11 – Consolidation and coordination of proceedings

This draft provision reflects ICSID Arbitration Rule 46 for voluntary consolidation by agreement of the disputing parties and would be appropriate to include in a supplemental set of rules for ISDS proceedings under the UARs. It also appropriately preserves the disputing parties' ability to use alternative consolidation provisions that may be included in the underlying IIA.

Should the Working Group wish to make consolidation a requirement in certain circumstances, such a provision would be better developed as a treaty provision. We note that under U.S. modern practice, most recently in USMCA Article 14.D.12, arbitral tribunals are authorized to resolve questions of consolidation or coordination.

Draft Provision 12 – Third Party Funding (Disclosure Only)

Paragraphs 1-5 of this draft provision reflect ICSID Arbitration Rule 14. There is no comparable provision in the UARs and a supplemental rule for ISDS proceedings would be welcome. We have two additional observations. First, the inclusion of the disclosure of the beneficial owner of a third-party funder is a welcome clarification. Second, a "subject to applicable law" caveat should be added to paragraph 3 to clarify that it does not displace any existing limits on disclosure required under applicable laws on privilege.

On paragraph 7, subparagraphs (b) and (c) are consistent with ICSID Arbitration Rules 52 and 53(4), and would be appropriate to include as a supplemental rule for ISDS proceedings under the UARs. We note that subparagraph (a) is not included in the ICSID Arbitration Rules but, given that it is discretionary, could be a useful incentive to promote disclosure. However, its use should be limited to exceptional circumstances and we would welcome a discussion of whether there are any unintended consequences of such a provision.