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ICSID's Comments on the Draft Provisions in Category A

and Certain Draft Provisions from Category B

(November 29, 2024)

The Secretariat of the International Centre for Settlement of Investment Disputes (ICSID) appreciates the opportunity to submit observations (below and in Annex A) on the Draft Provisions on Procedure in the Report of Working Group III on the work of its 49th Session (A/CN.9/1194) and on the categorization presented in Report A/CN.9/WG.III/WP.244. These observations are based on ICSID's extensive experience with investor-State dispute settlement (ISDS) and its comprehensive procedural reforms adopted in the ICSID Arbitration Rules of July 2022 ("2022 ICSID Rules").

As a preliminary point, ICSID recommends that all Draft Provisions included by Working Group III in Category A, together with certain provisions from Category B (Counterclaim, Consolidation and Coordination, and Third-Party Funding), be consolidated into a cohesive set of procedural rules in Category A. This approach would mitigate the risk of fragmentation of procedural rules applicable in ISDS cases.

Further, ICSID recommends that the draft provisions in Category A and certain provisions in Category B (Counterclaim, Consolidation and Coordination, and Third-Party Funding) be adopted as a supplement to the UNCITRAL Arbitration Rules for investor-State arbitration rather than as treaty provisions, for the following reasons (see also ICSID's submission to UNCITRAL Working Group III of January 16, 2024):

1. There is no necessity to update the 2022 ICSID Rules. The 2022 ICSID Rules were recently revised to include provisions addressing matters discussed in UNCITRAL Working Group III. These Rules reflect extensive amendments that garnered wide consensus among States. The 2022 ICSID Rules have been well received by users and are functioning effectively.

2. While the 2022 ICSID Rules do not require further amendments, the UNCITRAL Arbitration Rules need to be updated to (a) incorporate provisions being discussed in Working Group III, and (b) align them with the 2022 ICSID Rules. This would lead to greater harmonization and consistency of procedural rules used in ISDS.

3. A supplement to the UNCITRAL Arbitration Rules could be tailored to update and enhance the provisions and language in the UNCITRAL Arbitration Rules. As a supplement to the UNCITRAL Arbitration Rules, these provisions would not need to be adjusted to account for ICSID-specific language and the considerations of the ICSID Convention. Each set of rules is a cohesive whole, and provisions need to integrate seamlessly.

4. A supplement to the UNCITRAL Arbitration Rules would prevent the fragmentation of the rules used in ICSID proceedings, depending on a State's opt-in to similarly worded or different provisions in a treaty, as such treaty provisions would purport to override individual ICSID rules.

5. A supplement to the UNCITRAL Arbitration Rules would avoid complexities in determining which provisions apply to specific cases, depending on the disputing parties' nationalities or other factors yet to be determined.

6. Adopting a supplement to the UNCITRAL Arbitration Rules would ensure that future updates to the Rules would be less burdensome than if those rules had been adopted in the form of treaty provisions. Rules need modernization and amendment over time, as demonstrated by the processes to amend the ICSID and UNCITRAL Arbitration Rules, and a flexible amendment process is preferable to facilitate changes.

7. A supplement to the UNCITRAL Arbitration Rules could be adopted independently and in advance of a multilateral instrument on investor-State dispute settlement reform ("MIIR"). This supplement could subsequently be implemented through a protocol to a MIIR, similar to the UNCITRAL Transparency Rules.

ICSID remains available to address any questions on these submissions or to provide further information to Working Group III.

ICSID

ANNEX A: ICSID's Comments on the Draft Provisions in Category A and Certain Draft Provisions in Category B

Draft Provision	Overlapping ICSID Provision ICSID Convention Article 2022 ICSID Arbitration Rules ("AR") 2022 ICISD Additional Facility Arbitration Rule ("AF AR")	ICSID Comment
1.Evidence	ICSID Convention Art. 43 AR 36, 37, 38, 39, and 40 AF AR 46, 47, 48, 49 and 50	No comment
2.Bifurcation	AR 42, 43, and 44 AF AR 52, 53, and 54	The 2022 ICSID Arbitration Rules (the "2022 Rules") distinguish between requests for bifurcation of preliminary objections (AR 44), and all other requests for bifurcation (AR 42) for example on quantum. By contrast, Draft Provision 2 proposes only one rule on bifurcation that does not specifically address requests for bifurcation of preliminary objections. The vast majority of requests for bifurcation under the ICSID Arbitration Rules (2006 and 2022) pertain to preliminary objections. Under AR 44(1), (bifurcation with preliminary objections), unless the parties agree otherwise, the request for bifurcation must be filed within 45 days after the filing of the Memorial on the Merits. This default time limit was added under the 2022 Rules to accelerate proceedings and enhance efficiency. It does not appear in AR 42, which is applicable to all other requests for bifurcation.

		An analysis of the requests for bifurcation under AR 44(1) shows that in at least half of the cases, parties have agreed on a deadline for the submission of a request for bifurcation of preliminary objections other than the 45- day default (from 35-60 days) and are including such a deadline in their procedural calendars. In light of the above, the Working Group may wish to consider distinguishing between requests for bifurcation of preliminary objections and all other requests for bifurcation and adding a default deadline for a request for bifurcation of preliminary objections. Paragraph 64 of the Report of Working Group III on the work of its 49th Session (A/CN.9/1194) states that "*it was suggested that section B could include* […] *the presumption of bifurcation of jurisdictional issues*." ICSID case law shows that many tribunals have stated that there is no presumption for or against bifurcation. The ICSID Rules provide guidance with regard to the circumstances that tribunals should consider when deciding whether to bifurcate proceedings. Bifurcation of preliminary objections does not always lead to a reduction of time and costs. The research of the ICSID Secretariat as part of the process which led to the adoption of the 2022 Rules showed that where jurisdiction was upheld in bifurcated proceedings and an award on the merits followed, the proceedings were over 550 days longer than the general average. Where the bifurcated proceeding led to an award declining jurisdiction, it was almost 600 days shorter than the average. (ICSID Working Paper No. 1, p. 902). In order to avoid fragmentation, and because it is a procedural provision, Draft Provision 2 in its entirety could be kept in Category A.

3.Interim/ Provisional Measures	ICSID Convention Art. 47 AR 47 AF AR 57	Working Group III was invited to consider whether Draft Provision 3 should be more aligned with AR 47 or whether Article 26 of the UNCITRAL Arbitration Rules sufficiently addresses the issues related to interim/provisional measures. The main differences between Article 26 and AR 47 are: AR 47(1) mirrors Article 26(2) of the UNCITRAL Arbitration Rules on the possible type of measures, except that preserving assets is not in the non-exhaustive list under AR 47. The notion of preserving assets was understood to appear to cater more broadly to commercial arbitration than to investor-state arbitration. AR 47(3) does not contain any standard such as "irreparable harm," or a "risk thereof," or "harm not adequately reparable by an award of damages" (Article 26(3)(a)) of the UNCITRAL Arbitration Rules), as these notions have not been uniformly adopted in investment cases and may not be suitable in every circumstance. It does, however, specify that the tribunal must consider all the circumstances and imposes the requirements of urgency and necessity, which have uniformly been required in cases to date. Article 26(3)(a) of the UNCITRAL Arbitration Rules contains a standard that is suitable both for commercial and investment arbitration and that can be interpreted consistently in both types of arbitration. Finally, paragraph 64 of the Report of Working Group III on the work of its 49th Session (A/CN.9/1194) states that "*it was suggested that section B could include draft provisions on interim/provisional measures* […]." A new free-standing provision in Category B as a treaty provision could lead to further fragmentation of the matter.
4.Manifest Lack of Legal Merit/ early dismissal	AR 41 AF AR 51	Draft Provision 4 largely aligns with AR 41(1) except that Draft Provision 4(2) adds that the tribunal may admit a later objection [i.e., an objection made after the 45-day deadline] if it considers that the delay is justified. This exception does not exist under the 2022 Rules because the purpose of the rule was to allow claims that manifestly lack legal merit to be dismissed early in the process before they unnecessarily consume the

		parties' resources, and because the 45-day deadline was considered sufficient time to file such an objection. In practice, the average time to reach the stage of tribunal constitution is approximately 5-6 months. The party wishing to object to a claim on these grounds thus has sufficient time to prepare the submission. Paragraph 64 of the Report of Working Group III on the work of its 49th Session (A/CN.9/1194) states that "*it was suggested that section B could include draft provisions on* […] *early dismissal* [and] *frivolous claims* […]," in particular "*[…] a provision in Section B that addresse*[s] *the standard for the preliminary dismissal of a claim for which there was no legal basis for rendering an award*." (para 62). ICSID tribunals have applied a high standard for determining whether a claim manifestly lacks legal merit under AR41(1). Tribunals have required the moving party to establish its objection clearly and obviously, with relative ease and dispatch (see ICSID's Experience with Objections that a Claim Manifestly Lacks Legal Merit; data as of 10 March 2021 posted under the 74th Session of Working Group II). Working Group III may wish to consider keeping Draft Provision 4, in its entirety, in Category A. Dividing it into a general provision and a further provision/s to be included in Category B as a treaty provision addressing the legal standard would lead to uncertainty, possible inconsistencies in the application of the rule, and to further fragmentation.
5.Security for Costs	AR 53 AF AR 63	Draft Provision 5 seems to be largely modeled after AR 53, save for that in Draft Provision 5, third party funding is a circumstance in and of itself to order Security for Costs. In AR 53, the existence of third-party funding comes in as evidence adduced in relation to the circumstances tribunals should consider when determining whether to order a party to provide security for costs. The existence of third-party funding is typically considered as part of the evidence to show that a party is impecunious and unable or unwilling to comply with an adverse

		decision on costs. It is not sufficient by itself to justify granting security for costs but may be considered as evidence of a circumstance listed in paragraph 53(3).
6.Suspension	AR 54 AF AR 65	No comment
7.Termination	AR 55, 56, and 57 AF AR 65, 66, and 67	No comment
8.Period of Time for Making the Award	AR 58 AF AR 69	Draft Provision 8 currently does not contain any deadlines. Working Group III may wish to consider the time limits adopted under the 2022 ICSID Rules which are: - Decision or Award on Manifest Lack of Legal Merit: Within **60** days after the later of the constitution of the Tribunal or the last submission on the objection (AR 58(1)(a)) - Decision or Award on Jurisdiction: Within **180** days after the last submission (AR 58(1)(b)) - Award on the Merits: Within **240** days after the last submission (AR 58(1)(c))
9.Allocation of Costs	ICSID Convention Art. 61 AR 51 and 52 AF AR 61 and 62	Under Article 61(2) of the ICSID Convention, tribunals have the discretion to allocate costs and there is no presumption that costs will follow the event. The allocation of costs under the ICSID Rules is thus different from current provision Article 42 of the UNCITRAL Arbitration Rules and Draft Provision 9. AR 51 does not include a presumption that the unsuccessful party bears the costs (as is the case in the UNICITRAL Rules and in Draft Provision 9 (except where there is an award rendered pursuant to AR 41(3) (MLLM)).

		AR 51(2) sought to provide tribunals with guidance as to how to allocate costs by introducing factors used in practice by ICSID tribunals. Draft Provision 9 explicitly includes the existence of third-party funding as one of the circumstances that a tribunal considers when determining the allocation of costs. AR 52 does not specifically mention third-party funding as a consideration for cost allocation. Nevertheless, tribunals retain the discretion to consider all relevant circumstances, including third-party funding, when making their decisions on cost allocation. Finally, Working Group III may also wish to consider whether AR 51 on statements of, and submissions on, costs should be incorporated in Draft Provision 9.
10.Counterclaims	ICSID Convention Art. 46 AR 48 AF AR 58	Working Group III may wish to consider moving this provision to Category A as it is a procedural provision covered by most rules. Under Article 46 of the ICSID Convention and AR 48, "*unless the parties agree otherwise, a party may file* […] *a counterclaim* […] *arising directly out of the subject-matter of the dispute*" provided that it is "*within the scope of the consent of the parties and the jurisdiction of the Centre.*" The scope of Draft Provision 10 is broader than Article 46 and AR 48 because it also encompasses counterclaims that have a "*[close]* connection with the factual or legal basis of the claim". The scope of counterclaims is even broader under ICSID Additional Facility Arbitration Rule 58(1) which captures incidental or additional claims and counterclaims provided that they are "*within the scope of the arbitration agreement of the parties*." Such wording could also be considered by the Working Group as it would encompass Draft provisions 10(1)(a) and potentially (b). Finally, if draft Provision 10 were to be considered in Category B, a treaty could extend the scope of the counterclaims under the ICSID Convention since the language "*unless the parties agree otherwise*" is used in the ICSID Convention.

11.Consolidation and Coordination	AR 46 AF AR 56	ICSID welcomes the Working Group's suggestion to move Draft Provision 11 from Category B to Category A. AR 46 contains provisions on the consolidation or coordination of two or more arbitrations. Consolidation is for two or more cases registered under the Convention which involve the same State. A similar rule is contained in Additional Facility Arbitration Rule 56. Consolidation will result in one award. Coordination, by contrast, aligns procedural aspects of one or more arbitrations (possibly under different procedural rules) and results in separate awards. Paragraph 61 of the Report of Working Group III on the work of its 49th Session (A/CN.9/1194) suggests that "*elements of draft provision 11 on voluntary consolidation could be placed in section A, while a provision addressing the consolidation and coordination of proceedings under different procedural rules or administered by different institutions could be considered in section B*" Consolidation under the ICSID Rules is only available for two or more ICSID Convention cases or two or more AF cases, not for proceedings administered under other rules or by other institutions. Coordination could be used for proceedings under different procedural rules or administered by different institutions. Pursuant to Administrative and Financial Regulation (AFR) 22, "[t]*he Secretariat of the Centre is the only body authorized to administer proceedings conducted under the* [ICSID] *Convention*." The same applies under the Additional Facility AFR 11. Consequently, if one of the cases that was being coordinated was an ICSID Convention or an Additional Facility case, the coordinated cases would need to be administered by the ICSID Secretariat.

12.Third-Party Funding	AR 14 AF AR 23	ICSID welcomes the suggestion to move Draft Provision 12 from Category B to Category A. Paragraph 46 of A/CN.9/WGIII/WP.245 states that "[d]*isclosure of third-party funding serves to prevent conflicts of interest and enhance transparency*". AR 14 was developed to prevent conflicts of interest. To this end, in AR 14, the timing for the disclosure of third-party funding is upon registration of the Request for Arbitration, or immediately upon securing third party funding if that happens later in the proceeding. Draft Provision 12(4) only requires disclosure "*when submitting the statement of claim*". The Working Group may wish to consider whether requiring parties to disclose the existence of third-party funding earlier in the proceeding, for example at the stage of the Notice of Arbitration or thereafter, could further transparency and the prevention of conflicts of interest. Draft Provision 12.7 includes sanctions if the disputing party fails to comply with disclosure obligations, including suspension or termination of the proceeding, ordering security for costs, or considering non-compliance when allocating costs. Because AR 14 was developed to prevent conflicts of interest, there is no sanction in Rule 14 for failure to comply with disclosure obligations. Nevertheless, when tribunals allocate costs, they must consider a number of factors, including (AR 52(1)(b)) "*the conduct of the parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner and complied with these Rules and the orders and decisions of the Tribunal*." Consequently, failing to disclose third-party funding, in violation of AR 14, is considered by a tribunal in allocating costs and no specific provision needs to be added to that effect.