



# Preparation for the fall session

**Procedural rules, third-party  
funding & calculation of damages**

# Procedural rules - draft provisions

- **Early dismissal**
- **Security for costs**
- **Allocation of costs**
- **Counterclaims**

# Early dismissal

1. The arbitral tribunal, at the request of a party or on its own initiative, may at any time during the proceedings rule that a claim, a counterclaim, or a counterclaim for the purposes of set-off (a “claim”) is manifestly without merit.
2. A party should make the request referred to in paragraph 1 as promptly as possible and no later than 30 days after the submission of the claim. The arbitral tribunal may admit a later request if it considers the delay justified.
3. The party shall specify as precisely as possible the facts and the legal basis justifying its request. The party shall also demonstrate that a ruling by the arbitral tribunal will expedite the proceedings and be material to the outcome of the proceedings.
4. Within 30 days from the date of the request by the party, the arbitral tribunal shall determine, after inviting the parties to express their views, whether it will rule on the request.
5. If the arbitral tribunal determines that it will rule on the request, it shall indicate a period of time within which it will make the ruling and invite the parties to express their views.
6. The arbitral tribunal may rule by issuing an order or making an award on the merits.
7. A ruling by the arbitral tribunal, including a determination not to consider the request by a party, shall be without prejudice to the right of that party to object, in the course of the proceeding, that a claim lacks merit.

# Security for costs

1. Upon request of a party, the arbitral tribunal may order any party asserting a claim or counterclaim to provide security for costs.
2. The following procedure shall apply:
  - (a) the request shall specify the circumstances that require security for costs;
  - (b) the arbitral tribunal shall fix time limits for written and oral submissions on the request, as required;
  - (c) if a party requests security for costs before the constitution of the arbitral tribunal, the arbitral tribunal shall consider the request promptly upon its constitution; and
  - (d) the arbitral tribunal shall issue its decision on the request within 30 days after the later of the constitution of the arbitral tribunal or the submission on the request.
3. In determining whether to order a party to provide security for costs, the arbitral tribunal shall consider all relevant circumstances, including:
  - (a) that party's ability to comply with an adverse decision on costs;
  - (b) that party's willingness to comply with an adverse decision on costs;
  - (c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and
  - (d) the conduct of the parties.

# Security for costs (continued)

4. The arbitral tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (3), including the conduct of the parties and the existence of third-party funding.
5. The arbitral tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit for compliance with the order.
6. If a party fails to comply with an order to provide security for costs, the arbitral tribunal may suspend the proceeding. If the proceeding is suspended for more than 90 days, the arbitral tribunal may, after consulting with the parties, order the discontinuance of the proceeding.
7. A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.
8. The arbitral tribunal may at any time modify or revoke its order on security for costs, on its own initiative or upon a party's request.

# Allocation of costs

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties.
2. The arbitral tribunal may allocate the costs between the parties taking into account the circumstances of the case, including, for example:
  - (a) the outcome;
  - (b) the conduct of the parties;
  - (c) the reasonableness of the costs claimed; and
  - (d) the existence of third-party funding; ...
3. When the arbitral tribunal makes a ruling in accordance with [the provisions on early dismissal], it shall award ...
4. All decisions on costs should be reasoned and form part of an award.

# Counterclaims

1. The consent of the respondent to the submission of a claim is subject to the condition that the claimant consents to the submission of any counterclaims by the respondent.
2. The respondent may make a counterclaim for damages or relief:
  - option A: arising directly out of the subject-matter of the dispute.
  - option B: in connection with the factual and legal basis of the claim.
  - option C: that the claimant has breached its obligations under relevant rules and principles of domestic law and international law.
  - option D: that the claimant has breached its obligations under this treaty.

# Draft provisions on third-party funding

- 1. Definitions
- 2A. Prohibition model
- 2B. Access to justice model
- 2C. Sustainable development model
- 2D. Restriction list model
- 3. Sanctions
- 4. Disclosure requirement
- 5. Security for costs
- 6. Allocation of costs



# Assessment of damages and compensation

## Issues for consideration:

- Valuation methodology
- Causation – Attributing loss by investors to the breach of the States
- Evidentiary Requirements (Burden and standard of proof)
- Awarding Interest and how to calculate interest
- Role of Experts
- Other factors limiting the amount of compensation

## Possible scope of work:

- The complexity and uncertainty of the current practice
- Valuation methods, including calculation of interest
- Means to address the discrepancy between claimed loss and awarded damages, including excessive claims



**Thank you for your attention!**

**Further information:  
<http://www.uncitral.org/>**