



Way forward on the draft provisions on procedural and cross-cutting issues

Seventh Inter-sessional Meeting of
UNCITRAL Working Group III

Presentation by the UNCITRAL Secretariat

Conclusions of the Working Group at its 46th session

DP 1: Consultation and negotiation & **DP 5:** Period for amicable settlement

→ A draft provision on a “cooling-off” period.

DP 2: Mediation, **DP 3:** Dispute resolution proceedings, **DP 4:** State-to-State dispute settlement

→ Not to further develop.

DP 6: Recourse to local remedies

→ Provide options for encouraging recourse to local remedies without necessarily requiring them and to do so in conjunction with other requirements for raising claims.

DP 23: Assessment of damages and compensation

→ To develop a draft treaty provision and prepare guidelines for arbitral tribunals.

A/CN.9/1160 (Report of Working Group III on the work of its forty-sixth session), paragraphs 86-124.

Conclusion of the Working Group at its 47th session

Request to classify the draft provisions into three categories:

- A. those that aimed to achieve harmonization with existing procedural rules (including the 2022 ICSID Arbitration Rules) and could form a supplement to the UNCITRAL Arbitration Rules;
- B. those that would build on existing procedural rules and provisions found in recent investment treaties, which could be drafted as treaty provisions for adoption by States; and
- C. those that were not found in procedural rules addressing the so-called cross-cutting issues.

A/CN.9/1161 (Report of Working Group III on the work of its forty-seventh session), paragraph 116.

Category A

To reflect ICSID Rules and Regulation Amendment process as arbitration rules

- Draft provision 13: Evidence (ICSID AR 36-38)
- Draft provision 14: Bifurcation (ICSID AR 42 & 44)
- Draft provision 16: Interim/provisional measures (ICSID AR 47)
- Draft provision 19: Early dismissal (ICSID AR 41)
- Draft provision 20: Security for costs (ICSID AR 53)
- Draft provision 22: Suspension and termination of the proceeding (ICSID AR 54-57)
- Draft provision 24: Period of time for making the final decision (ICSID AR 58)
- Draft provision 25: Allocation of costs (ICSID AR 52)

Category A - Questions

- ✓ The amended ICSID Arbitration Rules of 2022 as the basis? Harmonization as the objective?
- ✓ Other ICSID reforms to enhance the efficiency?
 - Tribunals and parties obliged to act in a cost-effective and expeditious manner (ICSID AR 3)
 - Electronic filing (ICSID AR 4), stricter time limits, case management conferences (ICSID AR 31) & expedited arbitration (Chapter XII)
- ✓ How to incorporate ICSID amendments?
 - Direct reference to the ICSID AR? Certain ICSID rules to apply *mutatis mutandis* along with the applicable rules
 - Adjust to ICSID AR to the UNCITRAL Arbitration Rules in the form of an appendix or a supplement to apply to investment arbitration?
 - How to address the functions of the Secretary-General and the institutional aspects
 - Whether and how to apply to non-arbitration proceedings?

Category A – Example

UARs 26 – Interim measures

1. The arbitral tribunal may, at the request of a party, grant interim measures.
2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to: ...
3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that: (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. ...
4. ...
5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.
6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
7. The arbitral tribunal may require any party promptly to disclose any material change
8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.
9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

ICSID AR 47 – Provisional Measures

- (1) A party may at any time request that the Tribunal recommend provisional measures to preserve that party's rights, including measures to:
- (2) The following procedure shall apply: (a) the request shall specify the rights to be preserved, the measures requested, and the circumstances that require such measures; (b) the Tribunal shall fix time limits for submissions on the request; (c) if a party requests provisional measures before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request so that the Tribunal may consider the request promptly upon its constitution; and (d) the Tribunal shall issue its decision on the request within 30 days after the later of the constitution of the Tribunal or the last submission on the request.
- (3) In deciding whether to recommend provisional measures, the Tribunal shall consider all relevant circumstances, including: (a) whether the measures are urgent and necessary; and (b) the effect that the measures may have on each party.
- (4) The Tribunal may recommend provisional measures on its own initiative. The Tribunal may also recommend provisional measures different from those requested by a party.
- (5) A party shall promptly disclose any material change
- (6) The Tribunal may at any time modify or revoke the provisional measures, on its own initiative or upon a party's request.
- (7) A party may request any judicial or other authority to order provisional measures if such recourse is permitted by the instrument recording the parties' consent to arbitration.

Category B

To build on ICSID Rules and Regulation Amendment process as treaty provisions (ICSID +)

- Draft provision 11: Counterclaim (ICSID AR 48) + additional grounds including any breach of obligations by claimants
- Draft provision 15: Consolidation of proceedings (ICSID AR 46) + to ensure its application to non-ICSID proceedings
- Draft provision 21: Third-party funding (ICSID AR 14) + to require more than disclosure

To incorporate texts adopted by UNCITRAL

- Draft provision 17: Code of conduct → UNCITRAL Code of Conduct
- Draft provision 18: Transparency → UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

Category B - Questions

- ✓ Any concerns about fragmentation?
- ✓ Interaction with existing treaty provisions or the applicable arbitration rules? Should the provisions complement or prevail?
- ✓ How to incorporate the provisions in category B to apply to existing treaties?
 - As a protocol to the MIIR?
 - As a set of provisions which States agree to apply or as individual provisions which States can pick and choose
 - Should disputing parties be allowed to derogate from the provisions or should they be mandatory?
 - Application to ICSID proceedings?
 - Application to non-arbitration proceedings?
 - Application to non-treaty-based disputes?

Category B – Example

ICSID AR 14 – Notice of Third-party funding

- (1) A party shall file a written notice disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding"). If the non-party providing funding is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person.
- (2) A party shall file the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.
- (3) The Secretary-General shall transmit the notice of third-party funding and any notification of changes to the information in such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 19(3)(b).
- (4) The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3).

Draft provision 21: Third-party funding

1. "Third-party funding" means
2. A disputing party in receipt of third-party funding shall disclose to the Tribunal and the other disputing party, the following information:
 - (a) The name and address of the third-party funder; and
 - (b) The name and address of the beneficial owner of the third-party funder and any natural or legal person with decision-making authority for or on behalf of the third-party funder in relation to the proceeding.
3. In addition, the Tribunal may require the disputing party to disclose:
...
 4. The disputing party shall disclose the information listed in paragraph 2 when submitting its statement of claim, or if the funding agreement is entered into after the submission of the statement of claim, immediately thereafter. The disputing party shall disclose the information required by the Tribunal in accordance with paragraph 3 as promptly as possible.
 5. If there is any new information or any change in the information disclosed in accordance with paragraphs 2 and 3, the disputing party shall disclose
 - 6. The Tribunal may limit third-party funding in the following exceptional circumstances:**
 - (a) When the expected return to the third-party funder exceeds a reasonable amount;
 - (b) When the number of cases that the third-party funder funds against the respondent Contracting Party with regard to the same measure exceeds a reasonable number; or
 - (c) [...].
 - 7. If the disputing party fails to comply with the disclosure obligations in paragraph 2 to 5, the Tribunal may:**
 - (a) Suspend or terminate the proceeding in accordance with Draft Provision 22;
 - (b) Order security for costs in accordance with Draft Provision 20; or
 - (c) Take this fact into account when allocating costs in accordance with Draft Provision 25.
 8. If the disputing parties receive funding which is not permissible under paragraph 6, the Tribunal may take the measures listed in paragraph 7 **and in addition order the disputing party to terminate the funding agreement and to return any funding received.**

Category C

- Draft provision 7: Waiver of rights to initiate dispute resolution proceeding
 - Draft provision 8: Limitation period
 - Draft provision 9: Denial of benefits
 - Draft provision 10: Shareholder claims
 - Draft provision 12: Right to regulate
 - Draft provision 23: Assessment of damages and compensation
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- Divergence in views
 - Model treaty provisions for States?

Summary

- Procedural rules that are applicable to ISDS proceedings are found in different layers:
 - ✓ Investment treaties;
 - ✓ The ICSID Convention;
 - ✓ Applicable arbitration laws or the domestic law governing foreign investment;
 - ✓ Applicable arbitration rules;
 - ✓ Investment agreements; and
 - ✓ Separate agreements by disputing parties.
- Work could aim to develop:
 - ✓ Rules to supplement the UNCITRAL Arbitration Rules and possibly other arbitration rules (A); and
 - ✓ Treaty provisions to supplement existing investment agreements (B+C).
- Considering that existing investment agreement or the applicable arbitration rules may already include rules addressing the same issue, such conflicts need to be addressed.

Illustration – possible implementation

Depending on the level of consensus within the Working Group and the binding nature of the provisions, they could be placed in:

- ❑ The core provisions of the MIIR → Contracting States would not be able to opt-out. Disputing parties cannot derogate. This could achieve harmonization.
- ❑ A protocol to the MIIR on procedural rules reform → Flexibility left to States on whether to agree to apply the provisions in the protocol (either the entire set of provisions or some of the provisions). Disputing parties may be limited in derogating from these provisions.
- ❑ Model treaty provisions → Not part of the MIIR and left entirely to States to choose from.
- ❑ A set of rules to supplement the UARs → Flexibility left to the claimant investor to consent to the UARs and the supplementary provisions. Easier to update/amend based on practice.



Thank you for your attention!

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