United Nations A/CN.9/WG.III/WP.244

General Assembly

Distr.: Limited
8 July 2024

Original: English

United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
Forty-ninth session
Vienna, 23–27 September 2024

Possible reform of investor-State dispute settlement (ISDS)

Draft provisions on procedural and cross-cutting issues

Note by the Secretariat

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I. Introduction

1. The Working Group had a preliminary discussion on procedural reform of investor-State dispute settlement (ISDS) at its thirty-sixth session in October 2018 based on documents A/CN.9/WG.III/WP.149 and A/CN.9/WG.III/WP.153 (A/CN.9/964, paras. 124–134) and at its thirty-ninth session in October 2020 based on documents A/CN.9/WG.III/WP.192 and A/CN.9/WG.III/WP.193 (A/CN.9/1044, paras. 41–89). At its forty-third session in September 2022, the Working Group considered the draft provisions on procedural reform based on document A/CN.9/WG.III/WP.219 and the cross-cutting issues (A/CN.9/1124, paras. 89–104).

2. At its forty-sixth session in October 2023, the Working Group considered the draft provisions on procedural and cross-cutting issues in documents A/CN.9/WG.III/WP.231 and A/CN.9/WG.III/WP.232 (A/CN.9/1160, paras. 86–124). At its forty-seventh session in January 2024, after considering how to advance its work on those provisions, the Working Group requested the Secretariat to classify the provisions largely into three categories: (i) those that aim to achieve harmonization with existing procedural rules (including the 2022 ICSID Arbitration Rules, referred to below as the "ICSID Rules") and could form a supplement to the UNCITRAL Arbitration Rules; (ii) those that would build on existing procedural rules and provisions found in recent investment agreements, which could be drafted as treaty provisions; and (iii) those that were not found in procedural rules addressing cross-cutting issues (A/CN.9/1161, paras. 113–116).

3. Accordingly, chapter II of this Note presents a set of revised draft provisions (referred to collectively as the "Draft Provisions") based on the deliberation of the Working Group and comments received on document A/CN.9/WG.III/WP.231, including at the seventh intersessional meeting in March 2024 (A/CN.9/WG.III/WP.242, paras. 60–65).[1] The document is accompanied by document A/CN.9/WG.III/WP.245, which contains the annotations to the Draft Provisions.

4. Section A contains the provisions to supplement the applicable procedural rules. They address, among others, concerns expressed regarding the cost and duration of the proceedings and aim to streamline the proceedings and enhance procedural efficiency. To also achieve harmonization, the provisions in this section have been closely aligned with the ICSID Rules and drafted to supplement the UNCITRAL Arbitration Rules. As such, they have been prepared largely in the context of arbitral proceedings, while they may also be applicable to other types of adjudicatory dispute resolution proceedings (for example, a standing mechanism). The Working Group may wish to consider whether to include additional provisions taking inspirations from the ICSID Rules and other institutional rules to improve the efficiency of the proceedings (for example, the application of the UNCITRAL Expedited Arbitration Rules and Chapter XII of the ICSID Rules, provisions on case management conferences found in Rule 31 of the ICSID Rules and Article 9 of the UNCITRAL Expedited Arbitration Rules).

5. Section B builds on existing procedural rules and provisions found in recent investment agreements. Draft Provisions 10 and 11 build on the ICSID Rules and have been expanded to also apply in a non-ICSID context. Draft Provision 12 provides the rule on the regulation of third-party funding building on Rule 14 of the ICSID Rules. Based on recent investment agreements, Draft Provisions 13 to 18 address the various steps for an investor to bring a claim (amicable settlement, cooling-off period, local remedies, and waiver) and establish certain limitations (limitation period, denial of benefits and shareholder claims). Prepared as treaty provisions to complement existing investment agreements, the relationship between the provisions in section B and those in the respective investment agreement would need to be addressed.

[1] The comments are available on the Working Group III web page below the documents for the forty-seventh session (https://uncitral.un.org/en/working_groups/3/investor-state).

6. Section C includes the provisions aimed at addressing the concerns about regulatory chill and the calculation of damages.

7. The Draft Provisions need to be read in the context of the applicable international investment agreement (referred to in the Draft Provisions as the "Agreement"), domestic legislation and the applicable procedural rules. The Draft Provisions (particularly those in section B) do not address who can submit a claim and the types of dispute resolution proceedings that can be chosen, which are left to the underlying investment agreement or domestic legislation. For example, references to "investor", "investment", "claim" and "dispute" should be understood in the context of the respective agreement or in the domestic legislation and as defined therein. "Contracting Party" in the Draft Provisions refers to the parties to the Agreement and "disputing parties" refers generally to an investor raising a claim under the Agreement and a respondent Contracting Party. Similarly, the term "Tribunal" in the Draft Provisions refers to the adjudicatory body provided for in the Agreement or domestic legislation to resolve the disputes, including an arbitral tribunal.

8. As a way forward, the Working Group may wish to consider the final form of the Draft Provisions, including: (i) whether they should be presented as a comprehensive set of provisions or individual provisions; (ii) whether they should apply only to arbitration or other forms of adjudicatory dispute resolution proceedings (for example, a standing mechanism); (iii) whether they should apply to disputes and proceedings arising from investment agreements, domestic legislation as well as investment contracts; and (iv) how they would be implemented by States.

II. Draft provisions on procedural and cross-cutting issues

A. Provisions to supplement the applicable procedural rules

Draft Provision 1: Evidence

1. Each disputing party shall have the burden of proving the facts relied on to support its claim or defence.

2. At any time during the proceeding, the Tribunal may require the disputing parties to produce documents, exhibits or other evidence within such a period of time as the Tribunal shall determine.

3. The Tribunal may reject any request, unless made by all disputing parties, to establish a procedure whereby each party can request another party to produce documents. In considering such requests for production of documents, the Tribunal shall consider all relevant circumstances, including:

(a) The scope and timeliness of the request;

(b) The admissibility, relevance, materiality and weight of the documents requested;

(c) The burden of production; and

(d) The basis of any objection by the other party.

4. If a disputing party, duly invited by the Tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the Tribunal may make the award on the evidence before it.

5. Unless otherwise directed by the Tribunal, statements by witnesses, including expert witnesses, shall be presented in writing, and signed by them. The Tribunal may decide which witnesses, including expert witnesses, shall testify before the Tribunal if hearings are held.

6. The Tribunal shall determine the admissibility, relevance, materiality and weight of evidence offered.

7. The Tribunal may, at the request of a disputing party or on its own initiative, exclude from evidence or production any document, exhibits or evidence obtained illegally or based on the following reasons: […]

8 The Tribunal may order a visit to any place connected with the dispute, at the request of a disputing party or on its own initiative and may conduct inquiries there as appropriate.

Draft Provision 2: Bifurcation

1. A disputing party may request that an issue, including a plea that the Tribunal does not have jurisdiction, be addressed in a separate phase of the proceeding ("request for bifurcation").

2. The request for bifurcation shall be made as soon as possible and shall state the issue to be bifurcated. The Tribunal shall fix the period of time within which submissions on the request for bifurcation shall be made by the disputing parties.

3. When determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) Bifurcation would materially reduce the time and cost of the proceeding;

(b) Determination of the issues to be bifurcated would dispose of all or a substantial portion of the claim; and

(c) The issues to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.

4. The Tribunal shall decide on the request for bifurcation within [30] days after the last submission on the request and shall fix any period of time necessary for the further conduct of the proceeding.

5. If the Tribunal orders bifurcation, it shall suspend the proceeding with respect to any issues to be addressed at a later phase, unless the disputing parties agree otherwise.

6. The Tribunal may at any time on its own initiative decide whether an issue should be addressed in a separate phase of the proceeding.

Draft Provision 3: Interim/provisional measures

1. The Tribunal may, at the request of a disputing party, grant interim/provisional measures.

[…]

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

1. A disputing party may object that a claim is manifestly without legal merit.

2. A disputing party shall make the objection as soon as possible after the constitution of the Tribunal and no later than [45] days after its constitution. The Tribunal may admit a later objection if it considers the delay justified.

3. The objection may relate to the substance of the claim or the jurisdiction of the Tribunal. The objection shall specify the grounds on which it is based and contain a statement of the relevant facts, laws and arguments. The Tribunal shall fix the period of time within which submissions on the objection shall be made by the disputing parties.

4. The Tribunal shall decide on the objection within [60] days after the last submission on the objection.

5. If the Tribunal decides that all claims are manifestly without legal merit, it shall make an award to that effect. Otherwise, the Tribunal shall make a decision on the objection and fix any period of time for the further conduct of the proceeding.

6. If the Tribunal makes an award in accordance with paragraph 5, the Tribunal shall award the prevailing party its reasonable costs, unless the Tribunal determines that there are exceptional circumstances justifying a different allocation of costs.

7. A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of the disputing party to raise a plea that the Tribunal does not have jurisdiction or to argue subsequently in the proceeding that the claim is without legal merit.

Draft Provision 5: Security for costs

1. At the request of a disputing party, the Tribunal may order any disputing party making a claim [or counterclaim] to provide security for costs.

2. The request shall include a statement of the relevant circumstances and the supporting documents. The Tribunal shall fix the period of time within which submissions on the request shall be made by the disputing parties.

3. The Tribunal shall decide on the request within [30] days after the last submission on the request.

4. In determining whether to order a disputing party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:

(a) That disputing party's ability to comply with an adverse decision on costs;

(b) That disputing party's willingness to comply with an adverse decision on costs;

(c) The effect that providing security for costs may have on that disputing party's ability to pursue its claim [or counterclaim];

(d) The conduct of the disputing parties; and

[(e) The existence of third-party funding to support that disputing party in pursuing its claim or counterclaim].

5. The Tribunal shall specify any relevant terms in an order to provide security for costs and fix a period of time for compliance with that order.

6. If a disputing party fails to comply with the order to provide security for costs, the Tribunal may order the suspension of the proceeding for a fixed period of time. If the proceeding is suspended for more than [90] days, the Tribunal may, after inviting the disputing parties to express their views, order the termination of the proceeding.

7. A disputing party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

8. The Tribunal may at any time modify or terminate its order to provide security for costs, at the request of a disputing party or on its own initiative.

Draft Provision 6: Suspension of the proceeding

1. The Tribunal shall order the suspension of the proceeding when requested jointly by the disputing parties.

2. The Tribunal may, at the request of a disputing party or on its own initiative, order the suspension of the proceeding after inviting the disputing parties to express their views.

3. In its order of suspension, the Tribunal shall specify the period of suspension and any relevant terms of the suspension. Time frames set out in the rules applicable to the proceeding shall be extended by the period of time for which the proceeding is suspended.

4. The Tribunal may, at the request of a disputing party or on its own initiative, extend the period of suspension prior to its expiry, after inviting the disputing parties to express their views. The Tribunal shall extend the period of suspension prior to its expiry by agreement of the disputing parties.

Draft Provision 7: Termination of the proceeding

1. The Tribunal shall order the termination of the proceeding when requested jointly by the disputing parties.

2. If a disputing party requests the termination of the proceeding, the Tribunal shall fix the period of time within which the other disputing party may object to the termination.

3. If no objection is made within the fixed period of time, the other disputing party shall be deemed to have agreed to the termination and the Tribunal shall order the termination of the proceeding. If an objection is made within the fixed period of time, the proceeding shall continue.

Draft Provision 8: Period of time for making the award

1. The Tribunal shall make the award as soon as possible.

2. Unless otherwise agreed by the disputing parties, the Tribunal shall make the award within [period of time] after the date of the constitution of the Tribunal.

3. The Tribunal may, in exceptional circumstances and after inviting the disputing parties to express their views, extend the period of time established in accordance with paragraph 2 and indicate a period of time within which it shall make the award.

Draft Provision 9: Allocation of costs

1. The costs of the proceeding shall in principle be borne by the unsuccessful disputing party.

2. However, the Tribunal may allocate the costs between the disputing parties, if it determines the allocation to be reasonable taking into account all relevant circumstances of the case, including:

(a) The outcome of the proceeding or any parts thereof;

(b) The conduct of the disputing parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner in accordance with the applicable rules and complied with the orders and decisions of the Tribunal;

(c) The complexity of the issues;

(d) The reasonableness of the costs claimed by the disputing parties;

(e) The existence of third-party funding; and

(f) The amount of monetary damages/compensation claimed by the claimant in proportion to the amount awarded by the Tribunal.

3. Unless otherwise determined by the Tribunal, expenses incurred by a disputing party related to or arising from third-party funding shall not be included in the costs of the proceeding.

4. Paragraphs 1 to 3 apply to any costs arising from a request by a disputing party that a claim is manifestly without legal merit pursuant to Draft Provision 4.

5. The Tribunal may, at the request of a disputing party or on its own initiative, make an interim decision on costs at any time.

6. The Tribunal shall ensure that all decisions on costs are reasoned and form part of the award.

B. Provisions building on existing procedural rules and investment agreements including on the submission of a claim

Draft Provision 10: Counterclaim

1. Where a claim is submitted for resolution, the respondent may make a counterclaim:

(a) Arising directly out of the subject matter of the claim;

(b) In connection with the factual and legal basis of the claim;

(c) That the claimant has failed to comply with its obligations under the Agreement, domestic law, any relevant investment contract or any other instrument binding on the claimant.

2. For the avoidance of doubt, the consent of the respondent to the submission of a claim by the claimant is subject to the condition that the claimant consents to any submission of a counterclaim referred to in paragraph 1.

3. A counterclaim shall be made no later than in the statement of defence, unless the Tribunal considers that the delay was justified under the circumstances.

Draft Provision 11: Consolidation and coordination of proceedings

1. Where two or more claims have been submitted separately, the disputing parties may agree to consolidate or coordinate the relevant proceedings.

2. Consolidation shall join all aspects of the proceedings sought to be consolidated and result in a single decision. Coordination aligns specific procedural aspects of the proceedings, but they remain separate and result in separate decisions.

3. The disputing parties shall provide the proposed terms for the conduct of the consolidated or coordinated proceedings to the Tribunals.

4. This provision shall be without prejudice to the right of a disputing party to seek consolidation or coordination under the Agreement.

Draft Provision 12: Third-party funding

1. “Third-party funding” means the provision of any direct or indirect funding to a disputing party by a natural or legal person that is not a party to the proceeding but enters into an agreement to provide, or otherwise provides, funding (“third-party funder”) for a proceeding either through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.

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 funded party to disclose:

(a) Information regarding the funding agreement and the terms thereof;

(b) Whether the third-party funder agrees to cover any adverse cost award;

(c) Any right of the third-party funder to control or influence the management of the claim or the proceeding or to terminate the funding agreement;

(d) Any agreement between the third-party funder and the legal representative of the disputing party; and

(e) Any other information deemed necessary by the Tribunal.

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 such information to the Tribunal and the other disputing party as promptly as possible.

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 paragraphs 2 to 5, the Tribunal may:

(a) Suspend or terminate the proceeding in accordance with Draft Provisions 6 or 7;

(b) Order security for costs in accordance with Draft Provision 5; or

(c) Take this fact into account when allocating costs in accordance with Draft Provision 9.

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.

Draft Provision 13: Amicable settlement

1. A dispute shall, as far as possible, be settled amicably through consultation, negotiation, mediation or any other means.

2. A party may invite the other party to engage in means of amicable settlement referred to in paragraph 1. The other party should make all reasonable efforts to accept such invitation.

3. [Upon such invitation, the parties shall refrain from submitting a claim to the Tribunal for a period of [6] months from the date of receipt of the invitation.] [No claim may be submitted to the Tribunal for resolution, unless [6] months have elapsed from the date of receipt of the invitation.]

Draft Provision 14: Local remedies

Prior to submitting a claim to the Tribunal, a party shall consider initiating recourse before a court or competent authority of a Contracting Party, where available.

Draft Provision 15: Waiver of rights to initiate dispute resolution proceeding

1. No claim may be submitted to the Tribunal unless the investor waives its right to initiate or continue any other adjudicatory dispute resolution proceeding with respect to the same subject matter or the measure alleged to constitute a breach of the Agreement.

2. When submitting a claim to the Tribunal, the investor shall provide:

(a) A statement that it will not initiate any such adjudicatory dispute resolution proceeding; and

(b) A statement that it has withdrawn from or discontinued such adjudicatory dispute resolution proceeding, if applicable.

3. Paragraphs 1 and 2 shall not apply to proceedings where the investor seeks interim/provisional measures.

Draft Provision 16: Limitation period

No claim may be submitted for resolution if [3] years have elapsed since the investor first acquired, or should have first acquired, knowledge of the alleged breach of the Agreement and knowledge that it has incurred loss or damage.

Draft Provision 17: Denial of benefits

1. A Contracting Party may deny the benefits of the Agreement to an investor of the other Contracting Party that is an enterprise of that Contracting Party and to investments of that investor if the enterprise is owned or controlled by a person of a non-Contracting Party and:

(a) The enterprise has no substantial business activities in the territory of any Contracting Party other than the denying Contracting Party; or

(b) The denying Contracting Party adopts or maintains measures with respect to the non-Contracting Party or a person of the non-Contracting Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of the Agreement were accorded to the enterprise or to its investments.

2. A Contracting Party may deny the benefits of the Agreement to an investor of the other Contracting Party and to investments of that investor if:

(a) The investor receives third-party funding in a manner inconsistent with Draft Provision 12;

(b) The investment was made in violation of the denying Contracting Party's laws and regulations;

(c) The investment involved or was made by way of corruption, fraud, or deceitful conduct; or

(d) The claim would constitute a misuse of the Agreement and its objectives.

Draft Provision 18: Shareholder claims

1. A shareholder may submit a claim on its own behalf only for direct loss or damage incurred as the result of a breach of the Agreement, which means that the alleged loss or damage is separate and distinct from any alleged loss or damage to the enterprise in which the shareholder holds shares. Direct loss or damage does not include diminution in the value of the shareholding or in the distribution of dividends to the shareholder as a result of loss or damage incurred by the enterprise. The loss of an opportunity to conduct business activities carried out or expected to be carried out by the enterprise also does not constitute direct loss or damage.

2. A shareholder may submit a claim to a Contracting Party on behalf of an enterprise of that Contracting Party, which the shareholder owns or controls, only in the following circumstances:

(a) All assets of that enterprise are directly and wholly expropriated by that Contracting Party; or

(b) The enterprise sought remedy in that Contracting Party to redress its loss or damage but has been subject to treatment akin to a denial of justice under customary international law.

3. When submitting a claim, the shareholder shall provide:

(a) Evidence of its alleged ownership or control of the enterprise;

(b) A statement that the enterprise and itself will not initiate any other adjudicatory dispute resolution proceeding with respect to the same subject matter or the measure alleged to constitute a breach of the Agreement; and

(c) A statement that the enterprise and itself has withdrawn from or discontinued such adjudicatory dispute resolution proceeding, if applicable.

4. When the Tribunal makes an award in favour of the shareholder in a proceeding pursuant to paragraph 3, the Tribunal shall award monetary damages and any applicable interest or restitutions of property to the enterprise. The award shall provide that it is made without prejudice to any right that any person may have under the applicable law in the respondent Contracting Party with respect to the relief provided therein.

C. Provisions on cross-cutting issues

Draft Provision 19: Right to regulate

Nothing in the Agreement shall be construed as preventing the Contracting Parties from exercising their right to regulate and to adopt, maintain and enforce any measure that they consider appropriate to ensure that investments are made in a manner sensitive to the protection of public health, public safety, human rights, essentials security interests or the environment, the promotion and protection of cultural diversity, or [...].

When assessing the alleged breach by a Contracting Party of its obligation under the Agreement, the Tribunal shall give a high level of deference that international law accords to Contracting Parties with regard to [the development of domestic policies as well as implementation of international commitments (including compliance with the Paris Agreement or any principle or commitment contained in articles 3 and 4 of the United Nations Framework Convention on Climate Change),] the right to regulate and the right to adopt, maintain and enforce measures sensitive to the protection of public health, public safety, human rights, essential security interests or the environment, the promotion and protection of cultural diversity, or [...].

No claim may be submitted if the measure alleged to constitute a breach of the Agreement was adopted by the Contracting State to protect public health, public safety, human rights, essential security interests or the environment, to promote and protect cultural diversity, or […].

Draft Provision 20: Assessment of damages and compensation

1. The Tribunal may award:

(a) Monetary damages and any applicable interest;

(b) Restitution of property, in which case the decision shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation or impending expropriation became known (whichever is earlier) and any applicable interest in lieu of restitution.

2. The Tribunal may award pre-award and post-award interest at a reasonable rate.

3. In assessing or calculating monetary damages, the Tribunal shall reflect only loss or damage incurred by reason of, or arising out of, a breach of the Agreement. The Tribunal shall also consider among others and as applicable:

(a) Contributory fault of the claimant, whether deliberate or negligent;

(b) Failure by the claimant to make all reasonable efforts to mitigate loss or damage;

(c) Repeal or modification of the measure alleged to constitute a breach of the Agreement; and

(d) Any other compensation received by or awarded to the claimant with regard to the same breach.

4. The Tribunal shall only award monetary damages that are established on the basis of satisfactory evidence and that are not inherently speculative. The Tribunal shall not award punitive damages.