

Commentary on Procedural Concerns and Adoption Draft Provisions on Procedural and Cross-Cutting Issues (A/CN.9/WG.III/WP.231)

Background information and procedural concerns

This informal note has been prepared on the basis of UNCITRAL Working Paper 231 ([A/CN.9/WG.III/WP.231](#)), considering draft provisions on procedural and cross-cutting issues during the upcoming 46th Session of Working Group III, from 9-13 October 2023 in Vienna.

The concerns on the need to discuss cross-cutting issues in UNCITRAL Working Group III (WGIII) were firstly identified in a [submission by Thailand](#), recognizing that reform should focus on substantive matters, and followed the idea of drafting model clauses on these issues. It also mentioned that “substantive and procedural aspects of the ISDS system are often closely intertwined”. [Indonesia](#) also recognized certain concerns related to regulatory chill, the right to regulate, corporate social responsibility, among others.

Developing countries have noted a significant absence of attention to these issues in arbitral decisions related to policy measures taken by States in the public interest. Consequently, they believe that these matters demand specific analysis and consideration in the context of ISDS reform options. For instance, [South Africa](#) emphasized that the WGIII’s mandate was to promote a coordinated, comprehensive, and inclusive investment-related dispute alternative, including exploring options related to security for costs, regulatory chill, counterclaims, third-party funding, investor obligations, and third-party participation. South Africa also stressed the importance of WGIII proposals to consider an “expansive range of reform proposals and allocate sufficient time for their discussion.”

During its 43rd Session, WGIII discussed the need to identify the cross-cutting issues that would be addressed under the ‘auspices of procedural reform.’ Some delegations were of the view that “the current reform project already stretched the capacities of the Working Group and that it might be difficult to complete work on all of the issues within a reasonable time period” ([para. 101](#)). Therefore, only a limited number of ‘cross-cutting issues’ were included in an exhaustive list ([para. 103](#)) of issues requiring further work.

While [Working Paper 231](#) (WP 231) incorporates some of the elements identified during the 43rd Session of the WGIII, others have been only partially addressed or omitted entirely. For example,



the category of 'regulatory chill' is not included in WP 231. Instead, the WP includes provisions on the 'right to regulate' with the objective of addressing concerns arising from 'regulatory chill'. Such provisions would allow the carving out of measures taken by States to pursue specific public policy objectives from the scope of the agreement, thereby reducing the risk of 'regulatory chill'. Nonetheless, it is essential to consider the extent to which the carve-out outlined in provision 12.3 will be accepted by other States in WG-III, and to ensure that regulatory chill is further considered in the context of the assessment of damages and compensation. Similarly, the issue of joint binding interpretation by Parties to an agreement, as well as third party participation, have not been addressed in WP 231.

As a general point, we would encourage delegates to carefully consider allocating additional time to discussing the "procedural and cross-cutting issues," as some of these issues are of significant importance. In particular, it is critical for States to be present and active, in order to ensure that none of the draft provisions on procedural and cross-cutting issues presented in WP 231, regardless of the wording of those provisions at the moment, remains intact. Recall that the Chair has clarified numerous times that "[the Working Group would not be making any decision on whether to adopt a particular reform option at this stage of the deliberations.](#)" Therefore, at this stage, the WG is only deliberating, and therefore, it would be a missed opportunity to eliminate any of these provisions.

Comments on adoption procedure

UNCITRAL WP 231 clarifies that the draft provisions on procedural and cross-cutting issues have been prepared "for inclusion in existing and future international investment agreements" ([para. 3](#)). Likewise, it mentions that draft provisions have been designed to "apply generally to all such forums of dispute settlement (including a standing mechanism or an appellate mechanism)" ([para. 4](#)). Some relevant questions should be raised with regards to the adoption of these provisions.

During the 56th Session of UNCITRAL, four texts submitted by WGIII were adopted, including the UNCITRAL Model Provisions on Mediation, the UNCITRAL Guidelines on Mediation for International Investment Disputes, the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, and the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution. The last of these texts was adopted only in principle because the decision of the WGIII on the establishment of a standing mechanism and appellate mechanism has not yet been taken. While the Code of Conduct for Arbitrators was adopted as a standalone document that provides mandatory ethical rules for arbitrators, the Model Provisions on Mediation are recommended for inclusion in investment treaties.

The adoption of these texts show-cases the different methods used by the Commission for the adoption of possible reform options discussed by the WGIII. In line with these methods, it would



be important to consider how draft provisions on cross-cutting issues would be adopted, including the nature and means of their implementation.

The model whereby the Commission adopts the draft provisions merely as a set of clauses “for inclusion in existing and future international investment agreements” raises questions that would benefit from collective consideration in WGIII. In such a model, adoption by the Commission would only produce practical effects if and when States decide to integrate the provisions into their treaties and only if both (or all) States to a treaty align in their decision. This seems a major drawback as it is unclear whether this alignment will materialise at treaty-making or revision stage. Further, the process would likely take considerable time. In addition, if States integrate these provisions only in their new (or newly revised) treaties, this would not address issues surrounding the many existing treaties already in force. It is also possible that States may opt to integrate some clauses but not others, which makes it more difficult to assess the aggregate import of the draft provisions during WGIII discussions.

While drafting and recommending clauses for subsequent inclusion in investment treaties might make sense for themes such as mediation, the draft provisions on procedural and cross-cutting issues address themes that have consistently emerged as central to the reform process and the work of WGIII - such as third-party funding, counterclaims, the calculation of damages and the right to regulate. This would arguably justify exploring an adoption method that leads to a more immediate implementation pathway, such as a standalone instrument capable of directly amending existing treaties between the States that ratify the instrument.