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Concurrent proceedings in investment arbitration

Note by the Secretariat

Contents

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I. Introduction

1. At its forty-sixth session, in 2013, the Commission identified that the subject of concurrent proceedings was increasingly important particularly in the field of investment arbitration and might warrant further consideration.[1]

2. At its forty-seventh session, in 2014, the Commission considered whether to mandate its Working Group II (Arbitration and Conciliation) to undertake work in the field of concurrent proceedings in investment arbitration, based on a note prepared by the Secretariat, briefly outlining the issues at stake (A/CN.9/816, Addendum). The Commission was informed that the International Arbitration Institute (IAI, Paris), the Geneva Centre for International Dispute Settlement (CIDS) and the Secretariat jointly organized a conference on that topic on 22 November 2013. It was mentioned that other organizations, including the Organization for Economic Cooperation and Development (OECD), had carried out research in relation to certain aspects of that topic.[2]

3. At that session, it was said that concurrent proceedings were posing serious issues in the field of treaty-based investor-State arbitration, and that future work in that area could be beneficial. In response, it was suggested that UNCITRAL ought not to limit its work to parallel proceedings arising in the context of investment arbitration, but rather, in light of the implication such work might have on other types of arbitration practice, to extend that work to commercial arbitration as well. It was also said, however, that parallel proceedings in investment arbitration, and those in commercial arbitration, raised different issues and might need to be considered separately.[3]

4. After discussion, the Commission agreed that the Secretariat should explore the matter further, in close cooperation with experts and other organizations working actively in that area. That work should focus on treaty-based investor-State arbitration, without disregarding the issue in the context of international commercial arbitration. The Commission requested the Secretariat to report to the Commission at a future session, outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the area.[4]

5. The purpose of the present note is to outline the practical issues, the various options available to address those issues, and the possible form of any instrument to be developed in that area. This note focuses on concurrent proceedings that relate to investment arbitration, and on issues specific to treaty-based arbitration. Therefore, this note does not address concurrent proceedings in commercial arbitration.

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[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 129-133 and 311.

[2] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 126.

[3] Ibid., para. 127.

[4] Ibid., para. 130.

II. Concurrent proceedings in investment arbitration

A. Issues raised by concurrent proceedings

1. Generic approach

6. Investment disputes tend to be complex as they relate to claims arising under different legal instruments (such as investment treaties and contracts), they may involve separate and yet economically related entities, and they may be resolved through more than one forum (such as arbitral tribunals set-up under different treaties and domestic courts). Different legal bases exist for assessing whether multiple claims against a State constitute "concurrent proceedings". In this note, that concept generally refers to situations where two or more investment-related claims against a State are, or can be, filed before different forums, and where such claims involve substantially related parties, irrespective of their location, in relation to the same measure or substantially identical measures taken by that State. The approach retained in this note is voluntarily broad so as to possibly address the variety of situations under which concurrent proceedings may arise in treaty-based arbitration.

2. Variety of situations

Corporate structures

7. The complexity of multinational corporate structures, of the investment structures themselves and of contractual and treaty-based relationships between parties necessarily lead to a variety of forms in which more than one claim could be raised, leading to concurrent proceedings. Investments are often structured through a number of different legal entities, more than one of which may be in a position to bring a claim against a State. Indeed, a number of different entities within the same corporate structure may have a right of action in relation to the same investment and against the same State measure, as long as all of them qualify as investors under an applicable investment treaty.

"Investor" and "investment" under investment treaties

8. Investment treaties may provide a broad definition of "investor" such that both direct shareholders and indirect shareholders further up the corporate chain may be considered investors. This expands the number of entities with standing under a given investment treaty. Investment treaties typically protect the shares themselves as a "protected asset" and consequently even minority shareholders in a local company have been held to be protected against the loss of their share value under an investment treaty.

9. In addition, a substantial number of investment treaties contain special provisions for a locally incorporated but foreign-controlled company. Some provisions of this type allow a controlling shareholder to claim on behalf of the company (with recovery for the company). Others deem the company to be foreign and allow the company itself to claim under the investment treaty.

Variety of sources of law

10. A number of different sources of law may confer rights and obligations upon investors and States. Contracts and treaties provide discrete bases for substantive claims (with often different applicable law), and a single measure from a host State can give rise to both contractual and treaty-based claims. A contractual claim and a treaty-based claim arising from the same measure can be brought in different forums and under different substantive laws, even though the parties might be substantially the same and seeking substantially the same relief.

Variety of forums

11. The facts leading to investor-State disputes may give rise to investment treaty arbitration, as well as to other proceedings between the same or closely related parties regarding those facts before other tribunals, domestic courts, specialized international forums, for instance the European Court of Human Rights. As the rights of investors may be protected under different types of instruments, some investors tend to initiate proceedings in different forums to ensure that their rights are taken into account or to maximize their chances of success; that situation may lead to abuse of process by investors, an effect that was obviously not foreseen by States when concluding investment treaties.

Claims for "reflective loss"

12. Recent OECD working papers and intergovernmental discussions at the OECD have highlighted the importance of the distinction between direct and reflective loss in considering concurrent claims in investment arbitration.[5] In claims brought under investment treaties, arbitral tribunals have found that shareholders are entitled to recover for reflective loss. In contrast, domestic law systems generally bar shareholder claims for reflective loss, both for corporate law reasons and procedural reasons (see below, paragraph 14). Only the directly-injured company can claim.

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[5] Shareholders' reflective loss is incurred as a result of injury to "their" company, typically a loss in value of the shares; it is generally contrasted with direct injury to shareholders' rights, such as interference with shareholders' voting rights; Gaukrodger, D. (2013), "Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency", OECD Working Papers on International Investment, 2013/03; Gaukrodger, D. (2014), "Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law", OECD Working Papers on International Investment, 2014/02; Gaukrodger, D. (2014), "Investment Treaties and Shareholder Claims: Analysis of Treaty Practice", OECD Working Papers on International Investment, 2014/03; see also Eilis Ferran, Reflective Loss (presentation to Freedom of Investment Roundtable, 16 October 2013), available on the Internet at www.slideshare.net/OECD-DAF/ferran-oecdfoipresentation; Summary of discussion at Freedom of Investment Roundtable 18 (March 2013), pp. 4-9, available on the Internet at www.oecd.org/daf/inv/investment-policy/18thFOIRoundtableSummary.pdf; Summary of discussion at Freedom of Investment Roundtable 19 (October 2013), pp. 12-19, available on the Internet at www.oecd.org/daf/inv/investment-policy/19thFOIroundtableSummary.pdf. Earlier OECD work for the OECD Investment Committee has also considered multiple and parallel proceedings and consolidation of claims. See Yannaca-Small, K., "Improving the System of Investor-State Dispute Settlement", OECD Working Papers on International Investment, 2006/01; OECD, International Investment Perspectives (2006) (chapter entitled "Consolidation of claims: A promising avenue for investment arbitration").

The OECD works indicate that acceptance of claims for reflective loss is an important aspect of concurrent claims in investment arbitration.

3. Concurrent proceedings as detrimental to investment practice

13. Concurrent proceedings may be perceived as detrimental in investment treaty practice. Many criticisms regarding concurrent proceedings relate to concerns about the fairness of dispute settlement. Confidence in investment treaty arbitration may also be undermined by concurrent proceedings and their consequences. The main criticisms can be outlined as follows:

(i) Where concurrent proceedings are brought, a State must defend several claims in relation to the same measure, with potentially the same economic damage at stake, leading to a duplication of efforts, additional costs and procedural unfairness;

(ii) Multiple claims give rise to a risk of multiple recovery of the same damage from the host State;

(iii) Concurrent proceedings in relation to the same State measure may result in inconsistent or contradictory case law outcomes on issues of fact or law; and

(iv) The existence or even the risk of concurrent proceedings can hinder amicable settlement, may create some dissatisfaction for users of investment treaty arbitration and can undermine predictability more generally.

14. The OECD working papers, referred to above in paragraph 12, demonstrate that domestic law generally bars shareholders' claims for reflective loss based on a series of policy considerations. Many of the policy reasons are similar to the concerns about concurrent claims noted above, and include the desire to promote judicial economy by reducing the number of cases necessary to address the injury, consistency, predictability, the avoidance of double recovery, and fairness to defendants. Intergovernmental discussions at the OECD have preliminarily concluded that, while reflective loss claims raise significant policy issues, there does not appear to be any strong policy rationale for the general acceptance of reflective loss claims under investment treaties.[6]

B. Possible options for addressing concurrent proceedings

15. As suggested in the addendum to document A/CN.9/816, concurrent proceedings can be addressed through different means, which include (i) treaty provisions to limit the instances of concurrent proceedings; (ii) coordination and exchange of information among arbitral tribunals; (iii) consolidation of proceedings; and (iv) guidance on concepts of lis pendens, res judicata and abuse of rights. These options are elaborated below.

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[6] Summary of Discussion of Freedom of Investment Roundtable 19, pp. 18-19, available on the Internet at www.oecd.org/daf/inv/investment-policy/19thFOIroundtableSummary.pdf.

1. Model treaty provisions on waiver, consolidation and limitation of forum selection

16. Provisions aimed at addressing concurrent proceedings can be found mainly in recent investment treaties. An annex to this note contains an illustration of those provisions. It is noteworthy that treaty provisions on the matter reflect a variety of approaches, as follows.

- *Limitations of investor's rights; Waiver of rights*

(i) Providing the level of indirect ownership required for an investor to acquire standing under an investment treaty;

(ii) Prohibiting claims by investors where the company itself is pursuing a remedy in a different judicial forum;

(iii) Permitting a submission of a claim by an investor only if the investor and the local company withdraw any pending claim and waive their rights to seek remedy before other forums;

(iv) Limiting forum selection options to claims that have not yet been asserted elsewhere;

- *Consolidation of proceedings*

(v) Requiring claims to be consolidated under certain conditions, or providing certain mechanisms for consolidation; for instance, some investment treaties provide for the creation of a new arbitral tribunal when there is a request for consolidation; when the new arbitral tribunal assumes jurisdiction over all the claims, the initial tribunals lose their powers to decide on the claims submitted to them; if the consolidation is only partial, the initial tribunals may decide those claims over which the new arbitral tribunal does not assume jurisdiction; the new arbitral tribunal may order a stay of the initial arbitrations pending its decision;

- *Arbitral tribunal to decline jurisdiction*

(vi) Providing an obligation for the arbitral tribunal to decline its jurisdiction where an investor or a company fails to fulfil the requirements for the submission of claims or where a consolidation tribunal is established; and

- *Stay of proceedings by arbitral tribunal*

(vii) Providing an obligation for the arbitral tribunal to stay its proceedings or take into account in its decision the proceedings (and decisions) of other forums where a claim is being considered also by another forum.

Suggestion for possible future work

17. Investment treaty provisions on waiver, stay of proceedings and consolidation provide a legal basis to address situations of concurrent proceedings. As outlined above, various complementary provisions could be used by States to address these matters in their investment treaties.

18. Given the current trend, the Commission may wish to consider whether the preparation of such model treaty provisions to be inserted in future investment

treaties could be of assistance to States. That work would include consideration of potential limits on recovery of reflective loss. Consistency in treaty provisions addressing concurrent proceedings would provide guidance to investors, States, arbitral tribunals and other relevant parties to the dispute, while ensuring that a similar mechanism would apply with respect to concurrent proceedings.

2. Guidance text for arbitral tribunals on stay of proceedings, cooperation and exchange of information, situations of abuse of rights or of process

19. The Commission may wish to consider preparing a guidance text to assist arbitral tribunals in the management of disputes and in decision-making with regard to concurrent proceedings. The text may touch upon such issues as whether there is an inherent power of arbitral tribunal to stay proceedings, decline jurisdiction or proceed to consolidation when faced with concurrent proceedings. The text could also provide guidance on how to address situations of abuse of process or abuse of rights.

20. For instance, guidance may extend to the criteria for temporarily staying proceedings such as the weight to be given to considerations such as the sequence in which proceedings have been initiated, the possible outcome of other proceedings in relation to the current case, potential prejudice that may result from the stay of proceedings, the ability of the other forum to fulfil its judicial functions and the level of similarity required from the concurrent proceedings.

21. Guidance may also be provided on exchange of information among arbitral tribunals faced with concurrent proceedings, underlying the benefits and limits of that practice.

Suggestion for possible future work

22. The Commission may wish to consider whether the preparation of a guidance text as outlined above in paragraphs 19-21 would be useful. In addition, a matter for possible consideration could be whether existing UNCITRAL texts, for example the Model Law on Cross-Border Insolvency, which includes provisions on cooperation in relation to concurrent litigation proceedings in the matter of insolvency, could provide a model for such a guidance text on concurrent proceedings.

3. Lis pendens and res judicata

23. Lis pendens and res judicata are principles that are recognized in public international law and thus may be referenced as part of the *lex causae* of an investment dispute. In the often cited *Lauder v. Czech Republic* and *CME Republic BV v. Czech Republic* cases, the tribunal acknowledged the potential problem of conflicting awards, and that the second deciding court or tribunal could take the first decision into account when assessing final damage.

24. Unlike in civil law or common law litigation proceedings, traditionally the concept of lis pendens has not been applied in international arbitration; an arbitral tribunal seized second in time with the same matter as another arbitral tribunal previously seized nonetheless has exclusive jurisdiction pursuant to the arbitration agreement conferring that jurisdiction.

25. The Commission may wish to note the 2006 final reports of the International Law Association (ILA) on lis pendens and on res judicata in international commercial arbitration, both of which contain respective sets of corresponding recommendations.[7]

26. The ILA report on lis pendens analysed concurrent proceedings in domestic law, in international law and in international commercial arbitration and concluded with seven recommendations. Recommendations 2 to 5 set out principles to be considered by arbitral tribunals, in the interest of avoiding conflicting decisions, preventing costly duplication of proceedings or protecting parties from oppressive tactics, when requested by a party to decline jurisdiction or to stay the arbitration on the basis of concurrent proceedings. Recommendation 6 sets out the conditions to be met for an arbitral tribunal to temporarily stay its proceedings upon request by the parties, for sound case management purposes in addition to the reasons mentioned above.

27. The ILA report on res judicata considered the effect of an international commercial arbitral award upon further or subsequent arbitration proceedings between the same parties. However, it did not address similar issues raised in relation to domestic court judgments. The report concludes that arbitral awards should have conclusive and preclusive effects in further arbitral proceedings to promote efficiency and finality of international commercial arbitrations and that such effects need not necessarily be governed by national law but may be governed by transnational rules to be developed (recommendations 1 and 2). Recommendation 3 sets out the conditions for res judicata and recommendation 4 touches upon the extended notion of res judicata as to the underlying reasoning and issue of fact or law, which led to the dispositive part of an arbitral award. Recommendation 5 proposes an abuse-of-process standard and procedural unfairness and recommendations 6 and 7 address the procedural aspects of raising res judicata. It should, however, be noted that ILA refrained from addressing certain issues due to their complexity and in order not to pre-empt any such development (see paragraphs 7-8 of the final ILA report on res judicata).

28. These two concepts have in common a number of requirements, as they apply where claims brought at the same level of judicial hierarchy are essentially identical.

III. Concluding remarks

29. Consultations on possible work on concurrent proceedings by the UNCITRAL secretariat tend to indicate that an effective way for addressing that matter would consist in the development of solutions of a procedural nature, combining model treaty provisions on waiver, stay of proceedings and consolidation, and preparing a guidance text for arbitral tribunals regarding their inherent powers when faced with concurrent proceedings, as outlined above under paragraphs 17, 18 and 22. It is suggested that undertaking work on substantive issues such as lis pendens and res judicata might not produce as effective results.

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[7] The ILA report and the recommendations are available as Conference Report and Resolution Toronto (2006), available on the Internet at www.ila-hq.org/en/committees/index.cfm/cid/19.

30. Based on the above, the Commission may wish to consider whether to mandate the Secretariat to conduct further work on concurrent proceedings in consultation with interested international organizations and experts with the aim of presenting at its forty-ninth session, in 2016, a project outlining concrete solutions to address concurrent proceedings, including a toolkit for States and arbitral tribunals (focusing on waiver, stay of proceedings, exchange of information, potential limits on recovery of reflective loss (as underlined in the works of the OECD referred to above under paragraphs 12 and 14) and consolidation) comprising model clauses to be included in future investment treaties, best practices and guidelines.

Annex

Illustration of provisions addressing concurrent proceedings in investment treaties

North American Free Trade Agreement (NAFTA)

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

[…] 3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116[8] arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120,[9] the claims should be heard together by a Tribunal established under Article 1126,[10] unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby. […]

Article 1121: Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim under Article 1116 to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise: […] (b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party. […]

4. Only where a disputing Party has deprived a disputing investor of control of an enterprise: (a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and (b) Annex 1120.1(b) shall not apply.

Article 1126: Consolidation

[…] 8. A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.

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[8] Article 1116 refers to Claim by an Investor of a Party on Its Own Behalf.

[9] Article 1120 refers to Submission of a Claim to Arbitration.

[10] Article 1126 refers to Consolidation.

9. On application of a disputing party, a Tribunal established under this Article, pending its decision under paragraph 2, may order that the proceedings of a Tribunal established under Article 1120 be stayed, unless the latter Tribunal has already adjourned its proceedings. […]

Australia-Republic of Korea FTA[11]

Article 11.18: Conditions and Limitations on Consent of Each Party

[…] 2. No claim may be submitted to arbitration under this Section unless: (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and (b) the notice of arbitration is accompanied: (i) for claims submitted to arbitration under Article 11.16.1(a),[12] by the claimant's written waiver; and (ii) for claims submitted to arbitration under Article 11.16.1(b),[13] by the claimant's and the enterprise's written waivers, of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 11.16. […]

Colombia-Turkey BIT[14]

Article 12: Settlement of Disputes Between One Contracting Party and Investors of the Other Contracting Party

[…] 7. Once the investor has submitted the dispute to one or the other of the dispute settlement forums mentioned in paragraph 6 of this Article, the choice of one of these forums shall be final. […]

Canada-Republic of Korea FTA[15]

Article 8.22: Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim to arbitration pursuant to Article 8.18 only if: […] (e) the disputing investor and, if the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the disputing investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before an administrative tribunal or court under the domestic law of any Party, or other dispute settlement procedures, proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 8.18, except as set out in Annex 8-C.

2. A disputing investor may submit a claim to arbitration pursuant to Article 8.19 only if: […] (e) both the disputing investor and the enterprise waive their right to initiate or continue before an administrative tribunal or court under the domestic law of any Party, or other dispute settlement procedures, proceedings with respect to the

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[11] Signed on 08/04/2014.

[12] Article 11.16.1(a) refers to submission of a claim to arbitration by the claimant, on its own behalf.

[13] Article 11.16.1(b) refers to submission of a claim to arbitration by the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly.

[14] Signed on 28/07/2014.

[15] Signed on 22/09/2014.

measure of the disputing Party that is alleged to be a breach referred to in Article 8.19, except as set out in Annex 8-C. […]

4. A waiver from the enterprise under paragraph 1(e) or 2(e) shall not be required only if a disputing Party has deprived a disputing investor of control of the enterprise.

5. Failure to meet any of the conditions precedent provided for in paragraphs 1, 2, and 3 nullifies the consent of the Parties given in Article 8.24.[16]

Canada-Mali BIT[17]

Article 21: Conditions Precedent to Submission of a Claim to Arbitration

[…] 2. A disputing investor may submit a claim to arbitration under Article 20 (Claims by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise) only if: (e) in the case of a claim submitted under Article 20(1) (Claims by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise): […] (ii) the disputing investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the disputing investor owns or controls directly or indirectly, the enterprise waive its right to initiate or continue before a court or any administrative tribunal or court of a Party, or other dispute settlement procedures, proceedings with respect to the measure of the respondent Party that is alleged to be a breach referred to in Article 20 (Claims by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise), except for a proceeding for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court of the respondent Party; (f) in the case of a claim submitted under Article 20(2) (Claims by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise): […] (ii) both the disputing investor and the enterprise waive their right to initiate or continue before an administrative tribunal or court of a Party, or other dispute settlement procedures, proceedings with respect to the measure of the respondent Party that is alleged to be a breach referred to in Article 20 (Claims by an Investor of a Party on Its Own Behalf or on Behalf of an Enterprise), except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court of the respondent Party.

3. A consent and waiver required under paragraph 2 is delivered to the respondent Party and is included in the submission of a claim to arbitration. A waiver from the enterprise under paragraph 2(e)(ii) or 2(f)(ii) is not required if a respondent Party has deprived the investor of control of an enterprise.

Japan-Uruguay BIT[18]

Article 21: Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party

[…] 7. No investment dispute may be submitted to arbitration under this Article unless: (a) the disputing investor consents in writing to arbitration in accordance

[16] Article 8.24 refers to Consent to Arbitration.
[17] Signed on 28/11/2014.
[18] Signed on 26/01/2015.

with the procedures set out in this Article; and (b) the disputing investor gives the disputing Party written waiver of any right to initiate before any administrative tribunal, or court of justice under the law of the disputing Party, or other dispute settlement procedures, any proceedings with respect to the investment dispute.

Note: For greater certainty, if the disputing investor has submitted an investment dispute to an arbitration by virtue of written waiver in accordance with subparagraph (b), the election of forum shall be definitive.

8. Notwithstanding paragraph 7, the disputing investor may initiate or continue an action that seeks interim injunctive relief that does not involve the payment of damages before an administrative tribunal or court of justice under the law of the disputing Party.

9. Once the disputing investor has submitted an investment dispute to administrative tribunal or court of justice of the disputing Party, the election of forum shall be definitive and the disputing investor may not submit thereafter the same investment dispute to any arbitration under this Article. […]

DRAFT EU-Canada Comprehensive Trade and Economic Agreement (CETA)[19]

Article X.21: Procedural and Other Requirements for the Submission of a Claim to Arbitration

1. An investor may submit a claim to arbitration under Article X.22 (Submission of a Claim to Arbitration) only if the investor: […]

(d) fulfils the requirements related to the request for consultations;

(e) does not identify measures in its claim to arbitration that were not identified in its request for consultations;

(f) where it has initiated a claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration, provides a declaration that: (i) a final award, judgment or decision has been made; or (ii) it has withdrawn any such claim or proceeding;

The declaration shall contain, as applicable, proof that a final award, judgement or decision has been made or proof of the withdrawal of any such claim or proceeding; and

(g) waives its right to initiate any claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration.

2. Where the submission of a claim to arbitration is for loss or damage to a locally established enterprise or to an interest in a locally established enterprise that the investor owns or controls directly or indirectly, both the investor and the locally established enterprise shall provide a declaration pursuant to subparagraph 1(f) and a waiver pursuant to subparagraph 1(g).

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[19] As published on 26 September 2014; available on the Internet at: http://ec.europa.eu/trade/policy/in-focus/ceta/.

3. The requirements of subparagraphs 1(f), (g) and paragraph 2 do not apply in respect of a locally established enterprise where the respondent or the investor's host State has deprived an investor of control of the locally established enterprise, or has otherwise prevented the locally established enterprise from fulfilling such requirements.

4. Upon request of the respondent, the Tribunal shall decline jurisdiction where the investor or, as applicable, the locally established enterprise fails to fulfil any of the requirements of paragraphs 1 and 2.

5. The waiver provided pursuant to subparagraph 1(g) or paragraph 2 as applicable shall cease to apply:

(a) where the Tribunal rejects the claim on the basis of a failure to meet the requirements of paragraphs 1 or 2 or on any other procedural or jurisdictional grounds;

(b) where the Tribunal dismisses the claim pursuant to Article X.29 (Claim manifestly without legal merit) or Article X.30 (Claims Unfounded as a Matter of Law); or

(c) where the investor withdraws its claim, in conformity with applicable arbitration rules, within 12 months of the constitution of the tribunal.

Article X.23: Proceedings under different international agreements

Where claims are brought both pursuant to this Section and another international agreement and (a) there is a potential for overlapping compensation; or (b) the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Section, a Tribunal constituted under this Section shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings pursuant to another international agreement are taken into account in its decision, order or award.

DRAFT EU-Singapore FTA[20]

Article 9.20 Conditions to the Submission of Claim to Arbitration

1. A claim may be submitted to arbitration under this Section only if: […]

(f) the claimant: (i) withdraws any pending claim submitted to a domestic court or tribunal concerning the same treatment as alleged to breach the provisions of Section A (Investment Protection); and (ii) declares that it will not submit such a claim before a final award has been rendered pursuant to this Section;

(g) the claimant: (i) withdraws any pending claim concerning the same treatment as alleged to breach the provisions of Section A (Investment Protection) submitted to another international tribunal established pursuant to this Section, or any other treaty or contract; and (ii) declares that it will not submit such a claim in the future; and […]

[20] Version October 2014 (before legal revision); available on the Internet at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=961.

3. Upon request of the respondent, the tribunal shall decline jurisdiction where the claimant fails to respect any of the requirements or declarations referred to in paragraphs 1 and 2. […]