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Concurrent proceedings in international 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] 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 by the Secretariat, briefly outlining the issues at stake (A/CN.9/816, Addendum). The Commission agreed that the Secretariat should explore the matter further, in close cooperation with experts and other organizations working actively in that area and that that work should focus on treaty-based investor-State arbitration, without disregarding the issue in the context of international commercial arbitration.[2] The Commission requested the Secretariat to report to the Commission outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the area.[3]

2. At its forty-eighth session, in 2015, the Commission considered a note by the Secretariat in relation to concurrent proceedings in investment arbitration (A/CN.9/848). After discussion, the Commission requested the Secretariat to report to the Commission at a future session with a detailed analysis of the topic including possible work that could be carried out.[4]

3. Accordingly, the purpose of this note is to identify and analyse the issues at stake, the current approaches that allow for the appropriate management and avoidance of concurrent proceedings, and to suggest possible future work in that area. The note addresses concurrent proceedings in international arbitration in a general fashion, while highlighting aspects specific to commercial and to investment arbitration.[5]

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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), paras. 126-127 and 130.

[3] Ibid., para. 130.

[4] Ibid., *Seventieth session, Supplement No. 17* (A/70/17), para. 147.

[5] This note is based mainly on the following documentation: *Consolidation of Proceedings in Investment Arbitration: How can multiple proceedings arising from the same or related situations be handled efficiently*, Final Report of the Geneva Colloquium held on 22 April 2006, Gabrielle Kaufmann-Kohler, Laurence Boisson de Chazournes, Victor Bonnin, Makane Moïse Mbengue; *Contract claims et clauses juridictionelles des traités relatifs à la protection des investissements*, Pierre Mayer, Lalive lecture, 22 May 2008; *Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties*, Robin F. Hansen, The Modern Law Review, Vol. 73, No. 4, July 2010; *Multiple Proceedings, New Challenges for the Settlement of Investment Disputes*, Gabrielle Kaufmann-Kohler, Contemporary Issues in International Arbitration and Mediation, The Fordham Papers 2013; *Investment treaties as corporate law: Shareholder claims and issues of consistency. A preliminary framework for policy analysis*, David Gaukrodger, OECD Working Papers on International Investment, No. 2013/3, OECD Investment Division; *Admissibility: Shareholder claims*, Zachary Douglas, The International Law of Investment Claims; *Parallel Proceedings in International Arbitration*, Bernardo M. Cremades and Ignacio Madalena; *The Coordination of Multiple Proceedings in Investment Arbitration*, Hanno Wehland, Oxford International Arbitration Series; *Concurrent Proceedings in Investment Disputes*, IAI Series No. 9 (E. Gaillard and D. Reich, eds., 2014); *Multiple Proceedings in International Arbitration: Blessing or Plague?*, Gabrielle Kaufmann-Kohler, Asian Arbitration Lecture, 24 November 2015,

II. Causes and impact of concurrent proceedings

A. Circumstances that give rise to concurrent proceedings

4. Concurrent proceedings in international arbitration may result from different factors such as (i) the involvement of multiple parties located in different jurisdictions in an investment or a contractual arrangement; (ii) the existence of multiple legal bases or causes for claims; and (iii) the availability of multiple forums and the lack of coordination among those forums.

1. Multiplicity of parties

5. In an increasingly globalized economic world, investors are developing more complex structures to carry out their investments cross-border and may seek to maximize their protection when making such investments. It is not unusual that an investment is made through a chain of entities.

6. In commercial arbitration where none of the parties is a State or State-owned entity, circumstances that could lead to concurrent proceedings would include multiple parties to the same contract taking different approaches in choosing the dispute resolution mechanism; the same parties concluding multiple contracts; and multiple parties being involved in multiple contracts (for instance, in a construction project, or other transactions where various aspects of a project are subcontracted during various phases).

7. In investment arbitration, concurrent proceedings may result from mainly two categories of situation. The first category is where different entities within the same corporate structure have a right of action against a State or state-owned entity in relation to the same investment, with regard to the same State measure and for the benefit of substantially the same interests, as long as all entities qualify as investors under an applicable investment treaty, or have a right of action under a contract or under domestic investment law. Each entity may have the possibility to commence arbitration proceedings under a different treaty, in addition to bringing claims under the dispute resolution mechanism provided for in an investment contract (see below, paras. 14 and 15). In short, one might have various parties, claiming in various forums and under different sources of law, yet seeking substantially the same relief for the same measure.

8. The second category is where a measure by a State has an impact on a number of investors which are not related. States have developed policies favouring foreign investments, thereby increasing the occurrence of dealings with a wide range of investors. When a State takes a measure which potentially affects a number of investors, it may be faced with multiple claims from those unrelated investors in relation to that measure, in addition to claims from majority and minority

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available on the Internet at http://bit.ly/Kaufmann-Kohler-Multiple; *Le concours de procedures arbitrales dans le droit des investissements*, Emmanuel Gaillard, Mélanges en l'honneur du Professeur Pierre Mayer; *Recent Developments on the Doctrine of Res Judicata in International Arbitration from a Swiss Perspective: A Call for a Harmonized Solution*, Nathalie Voser, Julie Raneda, ASA Bulletin, Vo. 33, No. 4, 2015. In addition, the Secretariat organized in January 2016 an expert group meeting hosted by the French Ministry of Foreign Affairs and International Development.

shareholders of different nationalities of those unrelated investors with a right of action under different investment treaties. In addition, States or state-owned entities when concluding agreements with investors sometimes use standard contracts with similar provisions. A change of a State's policy impacting those provisions may affect a whole range of contracts concluded with different investors. While some issues raised in those proceedings will be identical, it is foreseeable that decisions rendered by separate tribunals may yield different outcomes.

2. Varied legal bases for claims

9. The legal bases for bringing claims may vary. In commercial arbitration, a party may start litigation in a State court and may commence arbitration on the basis of an arbitration agreement. Articles II (3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and article 8 (1) of the Model Law on International Commercial Arbitration are meant to prevent such circumstances, as where parties have concluded a valid arbitration agreement, the parties would be referred to arbitration.

10. In investment arbitration, the situation is potentially more complex, as described below.

(a) Treaty-based claims

11. An increasing number of bilateral and multilateral investment treaties have been concluded among States with the purpose of promoting economic activities and protecting investments and investors. And most, if not all, contain provisions on resolving disputes relating to investments. Yet, a large majority of those investment treaties do not take into consideration the potential for multiple claims resulting from a wide definition of protected investors and investments. At the time of their conclusion, negotiators of such investment treaties did not foresee the potential for multiple claims, whether by related or unrelated investors, and such treaties lack the mechanisms to appropriately deal with such claims.

12. In addition, arbitral case law has consistently recognized the right of direct and indirect shareholders of a local company to commence arbitration on the basis of an investment treaty seeking compensation for the damages incurred by the local company. By contrast, national legislation and case law generally do not permit shareholders to claim for damages incurred by the company solely on the basis that it is a shareholder.[6]

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[6] 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; *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency*, OECD Working Papers on International Investment, 2013/03, David Gaukrodger; *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, OECD Working Papers on International Investment, 2014/02, David Gaukrodger; *Investment Treaties and Shareholder Claims: Analysis of Treaty Practice*, OECD Working Papers on International Investment, 2014/03, David Gaukrodger; see also *Reflective Loss* (presentation to Freedom of Investment Roundtable, 16 October 2013), Eilis Ferran, 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

(b) Contractual claims

13. It is not unusual for certain types of investments to require the conclusion of related contracts (e.g. a concession contract) between the investor or an affiliate and the State or a state-owned entity, which form the basis of contractual claims and which include a separate clause for resolving disputes arising out of such contracts.

(c) Combination of treaty and contract claims

14. An investor may wish to pursue its claim based on both an investment treaty and a contract. Certain dispute resolution clauses in investment treaties limit the offer for arbitration to claims based on a breach of the substantive clauses of the treaty, thus excluding claims based on a breach of the investment contract (which must thus be pursued under a separate arbitration or in State courts). Therefore, claims of the investor, which are based on the same facts and relate to the same harm for loss due to a measure taken by the host State, may have to be submitted to different tribunals, which may result in contradictory outcomes and double recovery.

15. As an illustration, a foreign investor may set up a local company in the host State and the local company may conclude a contract with the State. In the event that the State terminates the contract, proceedings against the host State may be commenced by the local company for unlawful contract termination under the contract in accordance with the dispute resolution clause therein and by the foreign shareholder of the local company claiming a violation of certain provisions of the investment treaty concluded between the host State and the State of the foreign shareholder. This would result in concurrent proceedings, (i) a contract-based arbitration or proceeding in State court between the local company and the host State, and (ii) a treaty-based arbitration between the foreign shareholder and the host State about the same measure (the termination of the contract). In addition, minority shareholders of the local company may file their own treaty-based claims, for instance, if they are of a nationality different from the majority shareholder, and may benefit from the protection of a separate investment treaty. It could also be possible for the shareholders of the shareholders who hold interests further up the corporate chain to file one or several treaty-based claims.[7]

16. Considering the chronology of the decisions in multiple proceedings, if the claim of the local company is decided first and damages awarded, the value of the claimant company is restored and any shareholders' claim for reflective loss (loss in the value of their shares as a consequence of the damage incurred by the company) is no longer relevant. In the reverse situation where shareholders' claims are decided and compensated first, consequences for the company and its creditors are less clear.

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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 *Improving the System of Investor-State Dispute Settlement*, OECD Working Papers on International Investment, 2006/01, Yannaca-Small, K; OECD, *International Investment Perspectives (2006)* (chapter entitled *Consolidation of claims: A promising avenue for investment arbitration*).

[7] See *Multiple Proceedings in International Arbitration: Blessing or Plague?*, Gabrielle Kaufmann-Kohler, Asian Arbitration Lecture, 24 November 2015, available on the Internet at http://bit.ly/Kaufmann-Kohler-Multiple.

3. Multiplicity of forums and lack of coordination mechanism

17. There exist various forums for resolving disputes arising from commercial or investment relationship. The forums available for investors to bring claims against a State or a state-owned entity include (i) forums for contract disputes, which may be the State courts, domestic arbitration, and international arbitration; and (ii) investment treaty-based forums, generally arbitration under the auspices of various arbitral institutions or ad hoc. Parties to commercial transactions that do not involve any State or state-owned entity would have the ability to bring a claim to the forums described in (i) above. There is currently no common template to coordinate multiple proceedings arising among different forums.

B. Illustration and policy considerations

18. Taken together, there may be various causes that lead to multiplicity of proceedings.

19. The most prominent illustration in investment arbitration may be the often cited cases of Lauder v. Czech Republic on the basis of the US-Czech Republic bilateral investment treaty (BIT) and CME Republic BV v. Czech Republic on the basis of the Netherlands-Czech BIT. These two proceedings involved: the same measure and harm (loss caused by the revocation of a license); in part, the same claimant from an economic perspective (Mr. Lauder who claimed in his own name in one proceeding and as a shareholder of CME in the other), but different legal persons (CME and Mr. Lauder), having different nationalities (Dutch and American); and two separate investment treaties. In the end, the two arbitrations resulted in contrary outcomes (a (quasi) dismissal of the claims in one case and an award of damages in the other).

20. For ease of illustration, multiple proceedings in investment arbitration may be grouped into three categories:

(i) Where substantially related claimants initiate the same claim against the same respondent (i.e., the host State or a state-owned entity) with regard to the same host State measure before different forums;

(ii) Where unrelated claimants initiate separate proceedings against the same respondent with regard to the same measure (under an investment treaty and/or a contract); and

(iii) Where the respondent initiates a separate proceeding against the claimant in a different forum.

21. As indicated in document A/CN.9/848, paragraph 13, the multiplicity of proceedings may result in a State having to defend several claims in relation to the same measure, with possibly the same economic damage at stake, leading to a duplication of efforts, additional costs, procedural unfairness and potentially contradictory outcomes (for instance, in the situations referred to above in paragraph 20 (i) and (ii)). Similarly, investors may be faced with multiple counterclaims by States. In relation to the situation described in paragraph 20 (iii), the main problem — apart from costs and potentially conflicting outcomes — is the uncertainty as to which forum will have the final say in the event there is no

coordination between the forums. Concurrent claims give rise to a risk of multiple recovery of the same damage and may create dissatisfaction among users of investment treaty arbitration, thus undermining predictability more generally.

22. Similarly, in commercial arbitration, a framework to limit the occurrence of multiple proceedings could result in more expedited and cost-efficient outcomes in addition to avoiding conflicting decisions on the same issues of law and fact.

III. Existing principles and mechanisms

23. A number of principles and mechanisms exist to deal with the situations of concurrent proceedings described in section II above and to a certain extent, they are useful. However, they lack the mechanism or framework to coordinate application in appropriate circumstances.

A. Lis pendens and res judicata

24. As indicated in document A/CN.9/848, paragraph 23, lis pendens and res judicata are principles that may be referenced as part of the lex causae of a dispute.

25. The doctrine of lis pendens, familiar to many legal systems, allows a party to request a court to stay or dismiss an action because the same action is already pending in front of a different forum. For lis pendens to apply, triple identity is required between the various actions: identity of the parties, facts, and the cause of action. That triple identity requirement may make it difficult to apply the doctrine to concurrent proceedings described in section II above. For instance, in the context of investment treaty arbitration, determining the "same parties" for the purposes of applying such a principle could present a challenge in the context of multiple shareholders bringing claims for the same harm caused to the company due to the same measure of a host State.

26. The Brussels Regulation 1215/2012 ("Brussels Regulation") may shed some light on the application of lis pendens to concurrent proceedings as it provides less strict conditions. Article 29(1) of the Brussels Regulation provides an illustration of a lis pendens mechanism in the context of civil litigation proceedings (as mentioned in document A/CN.9/816, Addendum, paras. 23 and 24).[8] Article 30 of the Brussels Regulation also sets out a discretionary rule for "related actions", allowing for concentration of related or connected disputes in one forum.[9] Article 30.3 provides that "actions are deemed to be related where they are so connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings."

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[8] Article 29(1) provides that: "[w]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established."

[9] Article 30(1) and (2) provide that: "1. Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings. 2. Where these actions are pending at first instance, any court other than the court first seized may also, on application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof."

27. Pursuant to the doctrine of res judicata, a dispute cannot be adjudicated twice (a party is precluded from pursuing the same claim twice) and thus, the doctrine applies in the context of successive proceedings. In that regard, the Commission may wish to consider whether the topic of concurrent proceedings should be expanded to also include successive proceedings (see below, para. 42). The res judicata effect in international arbitration gives rise to complex issues, in particular as different legal systems may come into play to govern the application of res judicata (the law of the place of the previous arbitration; the law of the place of the subsequent arbitration; the law governing the merits of the dispute), and res judicata has different scopes in different national legal systems.

28. It may be noted that the 2006 final reports of the International Law Association (ILA) on lis pendens and on res judicata in international commercial arbitration provide 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).

B. Consolidation

29. Consolidation involves the aggregation of two or more claims or pending arbitrations into one proceeding. Subject to a reasonable assessment of fairness and efficiency, consolidation can be an effective tool to reduce or avoid concurrent proceedings. Due process considerations are an important aspect of the consolidation framework. Consolidation requires a basis, whether in law or in a contract (including institutional rules) and it is usually based on parties' consent. It is necessary to differentiate between commercial and treaty-based investor-State arbitration, as the basis for consolidation may be different.

1. Commercial arbitration

30. Some jurisdictions have enacted legislation allowing State courts to consolidate different arbitral proceedings, where the cases have common issues of law and fact. Compulsory consolidation by State courts in itself may raise some challenges for arbitration. Some of these challenges relate to issues of consent, appointment of arbitrators, issues of procedure, and enforcement of the arbitration award.

31. Consolidation provisions are also increasingly found in institutional arbitration rules which permit consolidation at an early stage of the proceedings where the arbitral proceedings have started under the same set of rules. Consolidation usually requires the consent of the parties, whether in advance through the conclusion of an umbrella arbitration agreement or after the dispute has arisen. It is also usually possible where all relevant contracts contain arbitration agreements that would subject the dispute to the same set of arbitration rules, administered by the same arbitral institution. A key challenge in a multiparty context is the principle that each party to the arbitral proceedings should be given an equal opportunity to be heard and to participate in the constitution of the arbitral tribunal.

2. Treaty-based investor-State arbitration

32. Provisions on consolidation are also increasingly found in investment treaties. A review of investment treaties concluded between October 2014 and September 2015 identified 21 new treaties, out of which 18 are available in full texts. Out of these 18, 14 have investor-state dispute settlement provisions. Out of these 14, 5 have consolidation provisions.

33. Consolidation is made possible in investment treaties for instance where there is a "question of law or fact in common" (for example, NAFTA Article 1126.2),[10] or where common questions "arise out of the same events or circumstances" (for example, article 10.25 CAFTA-DR). Article 1117 NAFTA specifically calls for consolidation of actions by different shareholders for claims made on behalf of a locally incorporated entity.[11] The guidance provided to arbitral tribunals in certain investment treaties is that the tribunal must rule in the interest of fair and efficient resolution of the claims when considering whether to consolidate.

34. As mentioned above, consolidation may also be carried out under applicable institutional arbitration rules. However, it is usually not possible to consolidate proceedings which have started under different arbitration rules. In that respect, it may be interesting to note that a recent treaty allows for consolidation across dispute settlement mechanisms (see article 9.29 of the EU-Singapore Free Trade Agreement).[12]

C. Coordination mechanisms in investment treaties

35. Certain investment treaties provide for additional coordination or concentration mechanisms. For instance, the requirement that the claimant waives or

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[10] Paragraph 2 provides that: "Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order: (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others."

[11] Paragraph 3 provides that "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 arising out of the same events (...), and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby."

[12] Article 9.29 (5) provides that: "The consolidating tribunal shall conduct its proceedings in the following manner: (a) unless all disputing parties otherwise agree, where all the claims for which a consolidation order is sought have been submitted to arbitration under the same dispute settlement mechanism, the consolidating tribunal shall proceed under the same dispute settlement mechanism; (b) where the claims for which a consolidation order is sought have not been submitted to arbitration under the same dispute settlement mechanism: (i) the disputing parties may agree on the applicable dispute settlement mechanism available under Article 9.16 (Submission of Claim to Arbitration) which shall apply to the consolidation proceedings; or (ii) if the disputing parties cannot agree on the same dispute settlement mechanism within thirty days from the request made pursuant to paragraph 3, the UNCITRAL arbitration rules shall apply to the consolidation proceedings."

terminates any other proceedings — also referred as “no U-turn” approach — is found in many recent investment treaties.[13]

36. Some examples of such treaty provisions are the so-called “fork-in-the-road” provisions, which require the claimant to make an irrevocable choice of forum between proceedings in the host State courts and investment arbitration, and waiver clauses, which require the investor to waive all other available forums before applying to investment arbitration.

D. Other mechanisms

37. Other mechanisms that may have the effect of limiting concurrent proceedings include class actions, joinders, as well as anti-suit and anti-arbitration injunctions.

38. Provisions allowing joinder of third parties are contained in certain institutional arbitration rules. Arbitral tribunals usually do not have the possibility to join third parties to arbitration unless expressly provided for in the applicable arbitration rules or otherwise agreed by the parties.

39. Anti-suit and anti-arbitration injunctions are mechanisms that can be used to avoid concurrent proceedings. However due to their unilateral nature, anti-suit or anti-arbitration injunctions may not necessarily constitute helpful coordination tools.

E. Conclusion

40. The available mechanisms considered above provide a means for addressing the consequences of concurrent proceedings in some cases, but also have limitations. As noted, some mechanisms require the parties’ consent for their application. Others are provided in arbitration rules and with respect to investment arbitration, provided in investment treaties. Failing parties’ agreement or in the absence of a particular doctrine or procedure, arbitrators may lack any basis to take the initiative when faced with concurrent proceeding situations. They may not be aware of the options available to them and of the limits of available tools or may be prevented from taking appropriate action to avoid negative consequences when the parties had not agreed on a particular approach. Other factors that may compete with concerns that arise from concurrent proceedings relate to, inter alia, the need to respect party autonomy given the consensual nature of arbitration, and the treatment of protected and confidential information submitted in the arbitration.

IV. Possible future work

41. The Commission may wish to consider whether the purpose of undertaking work on concurrent proceedings as they occur in investment and in commercial arbitration would be to create appropriate mechanisms for limiting some of the negative consequences identified with concurrent proceedings, such as undue risk of

[13] For instance, the Singapore-European Union and the Singapore-United States of America Free Trade Agreements.

contradictory and irreconcilable decisions or awards, and to promote procedural and cost efficiency, while respecting parties' rights in resolving disputes.

42. As multiple proceedings in investment and commercial arbitration may be concurrent or successive in time, the Commission may wish to consider whether to also include in its consideration of the topic successive proceedings (see above, para. 27). The framework of international arbitration is multilayered. Possible work in relation to concurrent proceedings could thus be considered for development at different levels.

A. Providing guidance to arbitral tribunals

43. The mandate of an arbitral tribunal to resolve disputes is usually based on the parties' agreement. An arbitral tribunal should solve the dispute efficiently and within the limits of its jurisdiction. The procedural legal framework (investment treaty, arbitration rules, and arbitration law) rarely includes guidance to arbitral tribunals on how to deal with concurrent proceedings. In most cases, where there is no agreement between the parties to take into account the potential for concurrent proceedings, an arbitral tribunal may believe that it has to render a final decision on the merits without being able to coordinate with other tribunals.

44. The UNCITRAL Arbitration Rules, in article 17 (1), contain the principle that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case." Most institutional arbitration rules contain a similar provision. The Commission may wish to consider whether work could be undertaken with the aim of clarifying, or expanding upon, the discretionary powers that arbitral tribunals may exercise when faced with concurrent proceedings. The purpose would be to provide arbitral tribunals with possible tools that could be used for managing such situations.

45. The work could cover in a flexible manner initiatives that an arbitral tribunal might, depending upon the circumstances, consider taking, such as:

- Seeking information from another tribunal, or ordering parties to inform the arbitral tribunal of other related proceedings,
- Coordinating parallel arbitrations (for instance, holding joint hearings or presenting a common set of evidence),
- Staying proceedings, or declining jurisdiction, for instance, based on a finding that claims are inadmissible (e.g. because a parallel action is already pending elsewhere),
- Assessing if there was an abuse of rights, and
- Ordering consolidation, when admissible.

The work would also highlight the limits of such initiatives, given the role of party consent to arbitration and its relationship to a tribunal's authority to decide matters.

46. A question for consideration is whether guidance to arbitral tribunals should identify specific measures that an arbitral tribunal could consider in determined

situations. While the discretion of the arbitral tribunal to adopt a specific measure would be preserved, guidance could be provided as to the description of possible tools, with an illustration of the circumstances in which they can be used. However, as concurrent proceedings can take a wide range of forms, it may be difficult for any guidance text to provide an exhaustive list of all scenarios.

47. Guidance to arbitral tribunals could be provided in the form of a soft law instrument including a list of options for arbitrators and the methodology to deal with concurrent proceedings situations, leaving it to the tribunal to assess which option would be relevant in the case at hand. Any guidance could also clarify why the arbitral tribunal would take certain measures if the situation of concurrent proceedings is not perceived as detrimental by the parties and the basis of a tribunal's authority to take such measures in the absence of the parties' agreement for it to do so.

48. The work could also take the form of a protocol to be used by parties as part of their agreement to arbitrate.

B. Encouraging States to adopt specific mechanisms in their investment treaties

49. As indicated in section III C. above, States have begun to include provisions in investment treaties to limit certain claims. Some investment treaties contain provisions aimed at limiting the occurrence of concurrent proceedings, or providing solutions, such as consolidation. Such treaties restrict certain substantive and procedural rights of the claimants through provisions on the definitions of investors and investments, as well as the computing of damages.

50. The Commission may wish to consider whether the attention of States should be directed to those mechanisms in investment treaties, and whether work should be undertaken to supplement the work of United Nations Conference on Trade and Development (UNCTAD) in this area.[14]

C. Coordination among arbitral institutions

51. As concurrent proceedings often commence under different arbitration rules, coordination among arbitral institutions might be considered as a useful feature for addressing concurrent proceedings.

D. Creating an international framework

52. The Commission may wish to consider whether preventing or avoiding concurrent proceedings might be an issue best dealt with at the multilateral level.

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[14] For instance, the UNCTAD Investor-State Dispute Settlement Sequel (2014) contains sections on consolidation of claims, "Fork-in-the Road" and "No-U-turn" clauses (with some treaty examples). Chapter IV (Reforming the International Investment Regime) of the UNCTAD World Investment Report (2015) discusses some related issues, including reform options on, for instance, the definition of investment and investor, preventing treaty "abuse" and relief for the same violation in multiple forums.

53. In that respect, the Commission may wish to consider whether the Secretariat should further explore the feasibility of a multilateral instrument with a purpose to improve the framework for the settlement of international disputes in the interest of fairness and justice.[15] The doctrine of res judicata, the priority to decide on the validity of the arbitration agreement, and the treatment of related actions could be subject matters of such a multilateral instrument.

[15] See *Multiple Proceedings in International Arbitration: Blessing or Plague?*, Gabrielle Kaufmann-Kohler, Asian Arbitration Lecture, 24 November 2015, available on the Internet at http://bit.ly/Kaufmann-Kohler-Multiple.