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Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration

Note by the Secretariat

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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 (Dispute Settlement) 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] 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). It 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. In accordance with that request, at its forty-ninth session, in 2016, the Commission had before it a note by the Secretariat outlining the causes and impact of concurrent proceedings, existing principles and mechanisms to address concurrent proceedings in international arbitration and possible future work in that area (A/CN.9/881).[4] After discussion, the Commission agreed that the Secretariat should continue to further develop possible work that could be undertaken with regard to concurrent proceedings as mentioned in section IV of document A/CN.9/881, for consideration by the Commission at a future session.[5]

3. Accordingly, the purpose of this note is to provide additional information on work that could be undertaken by the Commission.[6] In line with a suggestion at the

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

[4] Ibid., *Seventy-first session*, *Supplement No. 17* (A/71/17), paras. 175-181.

[5] Ibid., para. 181.

[6] 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*, Gabrielle Kaufmann-Kohler, Laurence Boisson de Chazournes, Victor Bonnin, Makane Moïse Mbengue, Final Report of the Geneva Colloquium (22 April 2006); *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; The International Law of Investment Claims, Zachary Douglas, 2009; *Parallel Proceedings in International Arbitration*, Bernardo M. Cremades and Ignacio Madalena, Arbitration International Vol. 24., No. 4 (2008); *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, Hanno Wehland, Oxford International Arbitration Series (2013); *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, Herbert Smith Freehills and SMU School of Law Asian Arbitration Lecture (24 November 2015); *Le concours de procedures arbitrales dans le droit des investissements*, Emmanuel Gaillard, Mélanges en l'honneur du Professeur Pierre Mayer, LGDJ Lextenso Editions, October 2015; *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, Vol. 33, No. 4, (December 2015); *The Regulation of Parallel Proceedings in Investor-State Disputes*, Hanno Wehland, ICSID Review, Vol. 31, Issue 3 (October 2016); *Parallel Proceedings in Investment Arbitration*, Giovanni

forty-ninth session of the Commission, the note addresses not only concurrent but also, where relevant, successive proceedings, thus encompassing the full range of instances comprising multiple proceedings.[7] This note focuses mainly on the issue as it arises in investment arbitration.[8]

II. Possible future work

A. Summary of issues and purpose of work

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

5. In investment arbitration, concurrent proceedings may result from mainly two types of situation. The first type 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.[9] 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. 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. Given the large number of investment treaties, the participants in an investor-State relationship (i.e. the foreign company investing in a host State and the shareholders of various nationalities) may be governed by multiple treaties. Even if the investing company and its shareholders are protected under the same treaty, their ability to file separate claims could result in the formation of multiple tribunals hearing essentially the same claim. It may be noted that investors do not necessarily have the choice to bring their claims in proceedings before a single forum as there may not be a single forum with jurisdiction over all of the claims.

6. The second type is where a measure by a State has an impact on a number of investors which are not related.[10] States have developed policies favouring foreign

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Zarra G. Giappichelli Editore and Eleven International Publishing (2016); *Abuse of Process in International Arbitration*, Emmanuel Gaillard, ICSID Review Vol. 32, Issue 1 (2017); *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency*, David Gaukrodger, OECD Working Papers on International Investment, 2013/03; *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, David Gaukrodger, OECD Working Papers on International Investment, 2014/02; *Investment Treaties and Shareholder Claims: Analysis of Treaty Practice*, David Gaukrodger, OECD Working Papers on International Investment, 2014/03; UNCTAD Series on International Investment Agreements, II, 2014; and UNCTAD World Investment Report (2015). In addition, this note builds on the discussions at the expert group meeting organized by the Secretariat and hosted by the French Ministry of Foreign Affairs and International Development in January 2016.

[7] *Official Records of the General Assembly, Seventy-first session, Supplement No. 17* (A/71/17), para. 180.

[8] At the forty-ninth session of the Commission, it was considered whether work should focus on investment and/or commercial arbitration, and it was suggested that a distinction should be made if work were to be undertaken. It was generally felt that there was a more pressing need for work to focus on concurrent proceedings in investment arbitration. It was also mentioned that concurrent proceedings in commercial arbitration deserved a similar level of attention (see *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 180).

[9] See A/CN.9/881, paras. 7, 11, 12, 14-16, 19 and 20(i).

[10] See A/CN.9/881, paras. 8 and 20(ii).

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, States or state-owned entities when concluding agreements with investors sometimes use standard contracts with similar provisions. A change of a State or state-owned entities' policy impacting those provisions may affect a whole range of contracts concluded with different investors. While issues of law and fact raised in those proceedings will generally be common to all the claimants, it is foreseeable that decisions rendered by separate tribunals may yield different outcomes.

7. 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 (see A/CN.9/848, para. 13). Concurrent proceedings involving entities within the same corporate structure (referred to in para. 5 above) 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.

8. The existing principles and mechanisms that could be applicable to prevent, or limit the impact of, concurrent proceedings include the doctrines of lis pendens and res judicata, consolidation, and coordination mechanisms in investment treaties (see section III of document A/CN.9/881). However, the possible application of the doctrines of lis pendens and res judicata is limited. Furthermore, the complexities of the investment protection framework make consolidation and coordination sometimes difficult to apply to concurrent proceedings in a treaty arbitration context. While almost all national legal/judicial systems have developed solutions to avoid the co-existence of concurrent proceedings and conflicting outcomes, at present there is no solution aimed at resolving that issue in international arbitration.

9. The purpose of undertaking work on concurrent proceedings as they occur in investment arbitration would be to provide a more predictable framework for coordinating concurrent proceedings in the interest of investors and States, and to promote procedural and cost efficiency, reliability and legitimacy of the process, while respecting parties' rights in resolving disputes (see A/CN.9/881, paras. 18-22). The work could consist in designing appropriate mechanisms for addressing some of the negative consequences of concurrent proceedings and recurring problems, such as contradictory and irreconcilable decisions and awards.

B. Guidance to arbitral tribunals

10. When the Commission considered briefly the possible form of work on the issue of concurrent proceedings at its forty-ninth session, in 2016, support was expressed for providing guidance to arbitral tribunals faced with concurrent proceedings, for example, on utilizing inherent powers provided in article 17 of the UNCITRAL Arbitration Rules and similar provision in other rules.[11]

11. Guidance to arbitral tribunals could be developed so as to form part of the procedural legal framework. Indeed, investment treaties, arbitration rules and arbitration law rarely include guidance to arbitral tribunals on the matter. In such a case, and when the parties to the dispute have also not agreed on how to address concurrent proceedings, an arbitral tribunal might have to render a final decision on

[11] *Official Records of the General Assembly, Seventy-first session*, *Supplement No. 17* (A/71/17), para. 179.

the merits without taking any measures, for example, coordinating with other tribunals.

12. Guidance to arbitral tribunals could also be provided in the form of a soft law instrument including a list of options and methodology for the tribunal to deal with concurrent proceedings, providing the tribunal flexibility to assess which option would be most appropriate in the case at hand. Such a soft law instrument could provide arbitral tribunals with possible measures or actions they could take within the framework of their procedural powers. It could also clarify why an arbitral tribunal should take certain measures even when the existence of concurrent proceedings was not perceived as detrimental by the parties. The work could also highlight the limitations, given the role of parties' consent to arbitration and its relationship to a tribunal's authority to decide matters.

1. Stay of Proceedings

13. Once an arbitral tribunal is constituted and its jurisdiction established, the tribunal has inherent powers which could be exercised to prevent or limit the impact of concurrent proceedings. For instance, a tribunal, after having ascertained to have jurisdiction, might, in certain circumstances, exercise discretion to suspend the proceedings until the decision of another court or tribunal is rendered, and it could do so by application of various principles, including efficiency and fairness in the administration of justice, and deference to the work of other courts or tribunals..

Possible work

14. In that context, work could consist in the preparation of an instrument determining circumstances in which arbitral tribunals could or ought to stay proceedings. Work could expand on providing information to arbitral tribunals on (i) their power to temporarily stay/suspend proceedings as part of a tribunal's inherent authority to conduct the proceedings in line with the requirements of justice and efficiency; and (ii) the legal basis and criteria that could guide tribunals in exercising their discretion in this regard. Considerations of good faith, the finality of decisions, the timing of proceedings, and the ability of a forum to fulfil its judicial function would be elements to be taken into account.

15. Work could also address circumstances where an arbitral tribunal decides to stay the proceedings to await the outcome in a parallel action, and whether it should then accord due consideration to the decision rendered in the other forum or justify any deviation in this regard. More generally, work could also focus on guiding arbitral tribunals to consider how the various forums relate one to the other, such as whether following the application of certain rules, the decision of one forum would be taken into account by others.

16. In relation to successive proceedings, work could focus on whether an arbitral tribunal could, in the exercise of its discretion, take previous proceedings as well as the resulting award into account when deciding, for instance, whether a party could and should have raised a matter or claim in a previous proceeding, and if so, whether the party should subsequently be barred from bringing the matter or claim in the current proceedings. Arbitral tribunals could be encouraged to assess a case in the context of the overall circumstances of the parties' dispute.

2. Abuse of process

17. A ground upon which an arbitral tribunal could dismiss abusive claims is the prohibition of abuse of process, a generally recognized international law principle.

18. In the context of concurrent proceedings, the prohibition of abuse of process is most likely to become relevant and find application where an investor has already obtained a decision on the merits in one forum but continues to pursue the same claim in another forum. Abuse of process may also arise where a claimant makes or restructures its investment in order to raise a claim against the host State at a time where the dispute is foreseeable but has not occurred yet.[12]

19. The principle of abuse of process would allow for an arbitral tribunal to determine situations where concurrent proceedings are acceptable and those that are not. A situation where multiple proceedings are necessary to obtain adequate remedies and are unavoidable must be distinguished from a situation where an investor seeks to take advantage of the general lack of coordination of proceedings for the purpose of maximising its chances of success.

Possible work

20. Work could be undertaken in order to elaborate further on the principle of abuse of process, and to provide guidance on how an arbitral tribunal could determine situations where there is an abuse of process. Also, work could aim at clarifying the criteria for an arbitral tribunal to apply this principle so as to prevent concurrent proceedings from arising in the first place.

3. Information-sharing

21. Arbitral tribunals may be encouraged to seek information from one another in case of concurrent proceedings or to request disputing parties to inform the arbitral tribunal of any other related proceedings. In that context, arbitral tribunals could also seek whether parties would be willing to have their disputes heard in a single forum.

22. In that respect, it may be noted that information-sharing may gain pace in light of the trend favouring transparency in treaty-based investor-State dispute settlement. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration have been referred to in a number of treaties concluded since the date of their coming into force, in April 2014.[13] It is also foreseeable that transparency will progressively be applied in the context of arbitration commenced under investment treaties concluded before April 2014, once the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration comes into effect.[14]

Possible work

23. Work could include listing the various initiatives that are available to arbitral tribunals as well as their limits and issues that might be encountered, for example, conflicts with confidentiality obligation with regard to sharing of information.

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[12] See case law where that matter was considered: Pac rim, Decision on the Respondent's Jurisdictional Objections (n 9), para. 2.41; Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia, PCA Case N0. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015).

[13] Information on the status of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration can be found on the Internet at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Rules_status.html.

[14] Information on the status of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration can be found on the Internet at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html.

4. Other forms of coordination

24. Attention of arbitral tribunals could be drawn to other forms of coordination, particularly where concurrent proceedings are unavoidable, for instance in situations mentioned in para. 6 above. These other forms of coordination would include holding joint hearings or presenting a common set of evidence.

Possible work

25. Work could focus on providing arbitral tribunals with a list of possible tools for managing such situations, with the aim of preventing unnecessary delays and costs related to double or multiple fact-finding endeavors, and avoiding duplicative written and oral submissions.

26. The work could also take the form of a protocol to be used by parties as part of their agreement to arbitrate. It could cover various elements which would permit coordination, and possibly consolidation.

5. Ordering consolidation, when admissible

27. Consolidation involves the aggregation of two or more claims or pending arbitrations into one proceeding. Consolidation requires a basis, whether in law or in a contract (including institutional rules) and it is usually based on parties' consent. Subject to a reasonable assessment of fairness, due process and efficiency, consolidation can be an effective tool to reduce or avoid concurrent proceedings.

Possible work

28. While work could focus on providing mechanisms to allow for consolidation of concurrent proceedings, such work would be of limited use if it does not include the possible cooperation among arbitral institutions administering such proceedings. In addition, as consolidation is based on parties' consent, work should address ways to take account of possible concerns of the parties. For example, an investor may oppose consolidation if it would be required to disclose sensitive business information to its co-claimants.

6. Lis pendens, res judicata, and *forum non conveniens*

29. In a domestic litigation setting, if there are two concurrent court proceedings, various doctrines have been developed to prevent them or limit their impact. For instance, in a civil law system, a court would apply the lis pendens rule, and the judge seized with the second proceeding will likely stay the proceedings until a decision is made by the judge seized with the first proceeding. In common law systems, remedies of *forum non conveniens* (and anti-suit injunctions) may be used. If one of the two proceedings is concluded with a judgment, the res judicata rule would likely apply.

Possible work

30. In the context of international arbitration, work may consist in providing guidance to arbitral tribunals on the principles of lis pendens and res judicata, even if their application might be limited (see A/CN.9/881, paras. 24-28). This work could complement the 2006 final reports of the International Law Association (ILA) on lis pendens and on res judicata in international commercial arbitration, which provided 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).[15]

31. The res judicata effect in international arbitration gives rise to complex issues, in particular as different laws 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 legal systems. Work in this field could also be developed to provide a more harmonized approach to the notion of res judicata.

7. Connexity or related action defense

32. Another tool known in litigation is the application of the connexity or related action defense.[16] This notion is broader than the doctrine of res judicata as it is not limited by the triple identity test. An example of this mechanism can be found in the Brussels Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter) which sets out a discretionary rule for "related actions", allowing for concentration of related or connected disputes in one forum.[17] 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." Under the Brussels Regulation, a court other than the court first seized of an action may stay its proceedings if a related action is already pending in another EU Member State and await the outcome of that related action before rendering its decision. Under certain circumstances, it may even decline jurisdiction if the law of the first court allows consolidation of the actions.

Possible work

33. Work could be undertaken on the feasibility of designing a similar mechanism in the context of international arbitration.

C. Provisions in investment treaties

34. Some investment treaties contain provisions aimed at preventing the occurrence of concurrent proceedings or limiting their impact (see section III. C of document A/CN.9/881). Concurrent proceedings could be tackled through different provisions in investment treaties, as briefly outlined below.

35. Work could be undertaken to call attention of States to the different types of treaty provisions available to address the matter.

1. Definition of investors

36. The definitions of the terms "investor" or "investment" in investment treaties determine which investors are protected and are able to bring claims against host

[15] See International Law Association on Recommendations on lis pendens and res judicata and arbitration, Seventy-Second International Law Association Conference on International Commercial Arbitration, Toronto, Canada, 4-8 June 2006.

[16] *Multiple Proceedings in International Arbitration: Blessing or Plague?*, Gabrielle Kaufmann-Kohler, Herbert Smith Freehills and SMU School of Law Asian Arbitration Lecture (24 November 2015).

[17] 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."

States (see A/CN.9/848, paras. 8 and 9). Liberal definitions of "investor" and investment" contained in many treaties extend protection to indirect investments made through one or more corporate entities.

37. Treaty provisions have been drafted to prevent abusive use of an investment treaty by prohibiting claims by investors who engage in "treaty shopping" or "nationality planning" through "mailbox" companies that channel investments but do not engage in any real business operations in the host State.[18] There are different ways to define protected investors or investments with the aim of limiting possibilities of multiple claims, such as referring to criteria of "substantial business activity" and defining its meaning, and the nationality of the company's ultimate controller.[19]

38. Also, some investment treaties contain provisions that set out the level of indirect ownership that is required for a shareholder to acquire standing under the investment treaty. Such clarity is meant to reduce parallel proceedings in situations where the same parties (related by control) initiate proceedings under different treaties in relation to the same State measure.

39. Attention of States could be called to various options in investment treaties, such as (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; and (iv) limiting forum selection options to claims that have not yet been asserted elsewhere.

2. Preventing abuse of process

40. Treaty provisions on prohibiting abuse of process could provide the necessary mechanisms to allow arbitral tribunals to dismiss abusive claims and thus encourage investors to agree on a single forum for the resolution of their claims. If investment treaties are drafted providing a clear criteria on which concurrent proceedings will be regarded as abusive (see paras. 17-20 above), they could limit concurrent proceedings to those that are legitimate and enable disputing parties to have a clear understanding of those situations.[20]

3. Compensation mechanism, and notion of reflective loss

41. Treaty provisions on the compensation mechanism (including the allocation of costs) could also have an effect on limiting the impact of concurrent proceedings.[21]

42. Regarding the specific notion of reflective loss, recent OECD working papers and intergovernmental discussions at OECD have highlighted the importance of the distinction between direct and reflective loss in considering concurrent claims in investment arbitration.[22] In claims brought under investment treaties, arbitral tribunals

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[18] UNCTAD World Investment Report (2015), Chapter IV.

[19] Ibid.

[20] See *The Regulation of Parallel Proceedings in Investor-State Disputes*, Hanno Wehland, ICSID Review Vol. 31, Issue 3 (October 2016).

[21] See for instance, UNCTAD Series on International Investment Agreements, II, 2014; see also OECD, *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.

[22] 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

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, including 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. Only the directly-injured company can claim. OECD works indicate that acceptance of claims for reflective loss is an important aspect of concurrent claims in investment arbitration.

43. Intergovernmental discussions at 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.

4. Consolidation

44. Provisions on consolidation are also increasingly found in investment treaties (see A/CN.9/881, paras. 32-34). There are two types of provisions on consolidation.[23] The first is a restatement of the general rule that consolidation is possible, if all of the concerned parties agree. The purpose of such provisions is to draw attention of the disputing parties to the possibility of consolidation, without necessarily providing the mechanism for consolidation. The second type permits yet limits consolidation to where there is a "question of law or fact in common" (for example, NAFTA Article 1126.2), or where common questions "arise out of the same events or circumstances" (for example, article 10.25 CAFTA-DR). Article 1117 of NAFTA specifically calls for consolidation of actions by different shareholders for claims made on behalf of a locally incorporated entity. 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. These clauses usually set out a very detailed consolidation mechanism. Under the second type of provisions, any disputing party to the related, ongoing proceedings can request the consolidation of proceedings. This request triggers a process that involves the establishment of a consolidation tribunal.

45. 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 and/or administered by different arbitration institutions. Consolidating claims based on different underlying treaties can prove difficult because they may contain differing substantive obligations, as well as diverging time limits, procedural obligations and dispute settlement forums. It is 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).[24]

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.

[23] UNCTAD Series on International Investment Agreements, II, 2014.

[24] 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

5. Other treaty provisions

46. Various mechanisms have been developed over time in investment treaties to tackle this issue. Certain investment treaties provide for additional coordination or concentration mechanisms. For instance, the requirement that the claimant waives or terminates any other proceedings — also referred as “no U-turn” approach — is found in many recent investment treaties; the so-called, “fork-in-the-road” clauses offer the investor a choice between the host State’s domestic courts and international arbitration; once the choice is made, it is final.

47. The usefulness of such clauses in the context of concurrent proceedings is limited as they apply only if the disputes are identical (same parties, same interests, and same legal basis). For example, such provisions would not preclude separate claims by majority and minority shareholders.

III. Concluding remarks

48. The Commission may wish to consider whether work should be undertaken on providing information on available tools, as suggested in section B above, to arbitral tribunals faced with concurrent proceedings. This may involve developing further certain principles of subsidiarity and of abuse of process.

49. At the forty-ninth session of the Commission, it was suggested that concrete examples of existing mechanisms or provisions in investment treaties and possible models to be followed could be provided, supplementing the work already done by other organizations.[25] The Commission may wish to consider whether attention of States should be directed to available mechanisms in investment treaties, as briefly outlined in section C above, to avoid the concurrent proceedings from occurring in the first place, or to limit their impacts.

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.”

[25] *Official Records of the General Assembly, Seventy-first session*, *Supplement No. 17* (A/71/17), paras. 178 and 179.