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Planned and possible future work — Part II

Note by the Secretariat

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IV. Allocation of resources and prioritization (continued from document A/CN.9/807)

B. Activities to support the adoption and use of UNCITRAL texts

57. The following paragraphs will refer to the provision of technical assistance, promoting the uniform interpretation and application of UNCITRAL texts, coordination and cooperation with other relevant bodies in promoting and using UNCITRAL texts, and promoting the rule of law at the national and international levels. For convenience, the shorthand term "support activities" will be used to refer to all such activities collectively. Document A/CN.9/752 provides further details of past and ongoing support activities (paras. 41-51).

58. The report to the Commission for this session on "Technical cooperation and assistance" (document A/CN.9/818) summarizes the benefits of technical assistance, many of which apply to support activities as a whole. As the Commission has noted, engaging in support activities is a core part of UNCITRAL's mandate to harmonize international trade law (see, further, A/CN.9/752, para. 3). The Introduction to that report notes that support activities have been recognized and endorsed by the Commission and the General Assembly: the General Assembly also stated that they represent one of UNCITRAL's priorities, and encouraged steps to be taken to facilitate such work (document A/CN.9/818, para. 1 and footnote 1). The Commission is also referred to the other reports on support activities in the year to this Commission session listed in paragraph 7 of document A/CN.9/807.

59. Document A/CN.9/752 also notes that almost all such activities are undertaken through the Secretariat A/CN.9/752 (para. 57). As previously agreed by the Commission (A/CN.9/774, paras. 39-42, A/68/17, para. 307), and as further related at several places in the reports for this session referred to in the previous paragraph, the demand for such activities far exceeds the resources available in the Secretariat to meet it.

60. Indeed, in its forty-fifth session, the Commission noted that consequences of UNCITRAL's focus on legislative activity included a general lack of Secretariat staff and resources for support activities, including the servicing of existing texts, and a lack of Secretariat expertise to service some UNCITRAL texts (A/CN.9/752, paras. 56-60, also citing A/66/17, para. 257). If the Commission seeks to increase legislative activity as a whole through greater use of informal working methods, there is a risk that the resources available for support activities will be further reduced, and these consequences may be exacerbated.

61. One approach to mitigate these risks, which the Commission may wish to take up, would be to reconsider the generally swift move from adoption of one legislative text to the next topic for legislative development also noted in A/CN.9/752, paragraph 56. Also applying the suggestion that there could be a pause in legislative development through formal methods in some circumstances (see para. 39 of document A/CN.9/807), the Commission could build a pause between the completion of a text and commencement of work to develop a further text into UNCITRAL's legislative activity. So doing could allow time to focus on promotion of the recently-completed text and other support activities, such as identifying a strategy for promotion of a text and developing promotional materials (A/CN.9/752,

para. 62 (c)). Such a pause could also, as noted in paragraphs 40-45 of document A/CN.9/807 above, allow for the more regular turnover of subject areas and working groups, with the potential benefits noted above, and allow UNCITRAL to achieve an appropriate balance between developing new texts and administering existing texts (the need for which was noted in A/CN.9/752, para. 58).

62. Nonetheless, the Commission may consider that there will remain insufficient resources in the Secretariat for the optimum level of support activities.

63. Document A/CN.9/752, in considering this point, highlights several issues that the Commission may wish to consider to enhance the use of existing resources, including the need:

(a) To develop more efficient ways of delivering technical assistance, including the greater use of videoconferencing, online training and other communications technologies, and of alternative tools for the promotion of texts (such as issuing practice guides), in order to reduce the need for Secretariat travel and associated expenses;

(b) To define a more active role for the Commission and member States in delivering that assistance;

(c) To engage in outreach activities and better communication on the mandate and work of UNCITRAL with decision makers on trade law at the national and regional levels, perhaps through the formation of a support activities or strategic planning committee within the Commission; and

(d) For a technical assistance programme to reflect the different needs of different UNCITRAL texts and varying strategies to promote them as a result (A/CN.9/752, paras. 59-62).

64. The Commission has also heard setting priorities in subject areas (which would also be applied to support activities) would enable the Secretariat to take a more proactive role in defining and shaping a programme for technical assistance and other support activities (A/CN.9/752, paras. 56-58, citing A/66/17, para. 257).

65. Clearly, however, it is unlikely that the Secretariat would have adequate resources to implement such a programme. The Commission may recall that most support activities are not covered by the regular budget (A/CN.9/775, para. 89). Recognizing this, documents A/CN.9/752 (e.g. paras. 59-62) and A/CN.9/774 (e.g. paras. 43 and 44) made some suggestions as to ways to increase the resources available to the Secretariat, including:

(a) Developing more strategic partnerships and cooperation activities with other relevant bodies;

(b) Promoting increased awareness of UNCITRAL texts within the United Nations system, among bilateral and multilateral donors and among States, and encouraging them and non-governmental organizations to take a greater role in support activities; and

(c) Using working groups and the Commission as resources to identify appropriate expertise, and setting aside time at UNCITRAL meetings for the discussion of States' support for the implementation and use of UNCITRAL texts.

66. The Commission may consider that additional resources, from external sources, would also be necessary. The Commission has heard reports of existing in-kind contributions and contributions to the UNCITRAL Trust Fund for Symposia and to grant travel assistance to developing countries that are members of UNCITRAL, but that these additional resources are insufficient to address the needs concerned (A/CN.9/775, paras. 89-100). In addition to appealing for additional contributions, the Commission may wish to instruct the Secretariat to set aside time and resources both to develop a support activities programme for the medium-term and to seeking external resources to fund it, and that the Secretariat should report on the results of efforts in this regard at its next session.

67. The Commission noted at its forty-fifth session, in 2012, some preliminary proposals that could delineate the scope of a support activities programme so that it would involve an integrated approach from preparation for a legislative text through to technical assistance and monitoring of adopted texts (A/67/17, para. 230).

68. Elements suggested at that session, and other support activities could include:

(a) Hosting conferences, workshops or seminars, and issuing publications, to raise awareness and promote understanding of key legislative instruments, including developing practice guidelines for judges;

(b) Attendance at workshops, conferences and seminars related to existing UNCITRAL texts;

(c) Formalizing networking by creating a virtual list of participants that would allow experts to "meet" and exchange information, as well as help States that needed assistance to identify experts in the field;

(d) Partnering with other relevant bodies, such as those described above, to encourage them to include support activities for UNCITRAL texts into their own main activities and highlighting the role of the latter in helping States attract foreign trade and investment (A/67/17, para. 230); and

(e) Secretariat provision of advice, assistance and training to a wide range of potential users on UNCITRAL texts.

69. It will be evident that the resources needed for such activities would go beyond additional human resources, so that they could finance the production of additional materials for promotion and training (including the upgrading of the UNCITRAL website as the primary medium for dissemination of information), the hiring of expert consultants and the travel for the purpose of support activities.

70. Donor agencies would require indications of success in support activities. Here, the Commission may wish to consider whether the adoption of UNCITRAL texts alone would be too narrow a measure of success, and that ways to demonstrate the use of UNCITRAL texts by donor agencies and States should be developed.

71. The Commission may also wish to consider whether a support activities programme would, where adequately resourced, be able also to ensure that informal working methods can operate effectively, including as regards the maintenance of expertise in subject areas on the part of Secretariat staff, experts and that gained through participation in working groups. In this regard, a support activities programme could also underpin the potential benefits of the move between informal

and formal working methods, without jeopardizing the maintenance of this necessary expertise.

72. A key feature of such a support activities programme would be partnering with other relevant agencies, such as Unidroit and the multilateral development banks, to identify possible future topics for joint activities. The Commission may wish to consider whether to instruct the Secretariat, as part of the development of such a programme, to coordinate with those bodies to identify such topics.

V. Conclusions

73. Taking all these elements together, the Commission is invited to:

(a) Decide on the subject areas and possible texts in which legislative development should be undertaken using formal working methods during the period to the next Commission session, in 2015;

(b) Allocate the twelve weeks of conference time available to working groups accordingly, subject to any conference time to be devoted to colloquia and to any other recommendations for the conference time available for meetings of UNCITRAL and its working groups (up to sixteen weeks per annum);

(c) Decide on the extent to which legislative development should be undertaken using informal working methods in subject areas and for future texts during the period to the next Commission session, in 2015, if any;

(d) Decide whether conference time should be allocated to one or more colloquia during that period; and

(e) Decide on the subject areas and possible texts for which it is tentatively planned to engage in legislative development in the three to five years following that Commission session, and provide an indication as to the extent to which the legislative development will be undertaken using formal and/or informal methods; and

(f) Decide whether the Secretariat should engage in developing a support activities programme, and report to the Commission on progress at its forty-eighth session;

(g) Make such recommendations to the General Assembly or otherwise as to resources (including conference time, Secretariat staff and other resources) as the Commission may see fit.

ADDENDUM

POSSIBLE FUTURE WORK IN ARBITRATION — CONCURRENT PROCEEDINGS

I. Introduction

1. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission considered work that could be recommended in the field of international arbitration.[1] In that context, it was suggested that the subject of concurrent proceedings was increasingly important, particularly in the field of investment arbitration, and might warrant further consideration. In particular, it was said that it was not unusual for one arbitration to be initiated in relation to a particular dispute, and concurrently for related parties to initiate parallel proceedings, to seek, in whole or in part, the same relief. It was further said that addressing the subject of concurrent proceedings would also be in the spirit of promoting a harmonized and consistent approach to arbitration. Some delegations observed that the issue of concurrent proceedings was in such flux that developing a harmonized approach at the present time might be premature.[2] 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, and that the Secretariat would report to the Commission on issues identified at that conference.[3]

2. The purpose of the present note is to briefly introduce the practical issues raised by concurrent proceedings in investment arbitration, as presented during the Conference mentioned above[4] and the possible means to reduce the instances of concurrent proceedings. This note does not address parallel proceedings in commercial arbitrations.

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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., para. 131.

[3] A/CN.9/785, para. 18.

[4] This note is based on the following documentation: *Concurrent Proceedings in Investment Disputes*, IAI Series No. 9 (E. Gaillard and D. Reich, eds., 2014); "*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; "*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*", in The International Law of Investment Claims, Zackary Douglas; "*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; *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.

II. Issues relating to concurrent proceedings

A. Definition and types of concurrent proceedings

3. Multiple or concurrent judicial proceedings arising out of an investment are perceived as an increasingly problematic issue in the field of investor-State disputes.

4. However it is notable that a universal definition of "concurrent proceedings" does not exist in practice, and that for the purposes of any possible future work in relation to the perceived problems arising out these proceedings, a working definition would need to be agreed. Concurrent proceedings in this note refers to situations where more than one claim is filed against a State pursuant to an investment treaty, and where such claims involve substantially related parties, irrespective of their location, in relation to the same or substantially identical measure or measures taken by that same State. However it is notable that different legal bases exist for assessing whether more than one claim against a State amounts to "concurrent proceedings". This note does not purport to set out a comprehensive analysis in that respect.

5. The complexity of multinational corporate structures, the structures of investments themselves and the nature of contractual and treaty-based relationships between parties necessarily lead to a number of forms in which concurrent proceedings can arise. Several of these are set out below (under paras. 7 to 13).

6. Notably, although issues arising from the initiation of proceedings by substantially different investors (rather than related investors) (i) against the same State, in relation to the same State measure and the same applicable provisions of an investment treaty, or (ii) under different investment treaties, in relation to the same State measure, may both lead to similar disadvantages as in concurrent proceedings more strictly defined (for example, inconsistent jurisprudence), those categories of proceedings are not addressed further in this note.

Different instruments: contract claims, and investment claims under investment treaties

7. A number of different sources of law may confer rights upon investors and obligations on States. Contract and treaty obligations, for example, provide discrete bases for a substantive claim (with often different applicable substantive law), but a single measure from a host State can give rise to both a contract and a treaty claim.

8. The breach of a contract between an investor and a State may also serve as an indication that the treaty has been breached, and in some instances, umbrella clauses in investment treaties can premise a breach of a treaty on a contractual breach. However, the two are not necessarily codependent, and a contract claim and a treaty claim based on the same measure can be brought in different fora and under different substantive laws, even though the parties might be substantially the same and seeking substantially the same relief.

Different actors: investor comprised of multiple entities with standing

9. 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 host State.

10. A right of action has been consistently established in current investment arbitration where shares in the local company can show damage resulting from a State measure. 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.

11. Indirect ownership of assets in the host State has also been deemed to gain protection under investment treaties, as have shareholders and indirect investors further down the corporate chain.

12. Other treaties may provide a broad definition of “investor”, such that a locally incorporated but foreign-controlled or foreign-incorporated company may be considered an investor, thus expanding the number of entities with standing under a given investment treaty.

13. Consequently, 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 treaty.

B. Issues raised by concurrent proceedings

14. Concurrent proceedings are typically perceived as detrimental in investment treaty practice, which serves to undermine confidence in investment treaty arbitration.

15. Many criticisms of the practice of parallel proceedings relate to the possible breach of overarching principles of good faith and procedural fairness in the practice of international law. A number of specific criticisms can be described as follows.

16. First, where parallel 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 waste of resources and unnecessary costs.

17. Second, there is a risk of multiple recovery when claimants within the same corporate structure, but with distinct legal identities, claim on the basis of those separate identities in relation to the same or substantially the same damage.

18. Third, as with commercial arbitrations, concurrent proceedings in relation to the same State measure may result in inconsistent or contradictory jurisprudence. Parallel proceedings have likewise been criticized for inconsistent rulings on facts.

19. From a policy perspective, it may be considered that the existence or even the risk of concurrent proceedings might create some dissatisfaction for users of investment treaty arbitration and undermine predictability more generally.

C. Possible future work in the field of concurrent proceedings

20. A number of options might be considered as a means to harmonize the approach of disputing parties, treaty Parties or arbitral tribunals in relation to concurrent proceedings, and to reduce the negative consequences that can result

from those proceedings. The Commission may wish to consider that, in order to provide efficient results, certain options below would require a close cooperation with arbitral institutions active in the field of investment arbitration to devise any possible instrument.

Guidance to arbitral tribunals in relation to a *lis pendens* or res judicata principle

21. A matter for consideration might be the development of a standard or guidance in relation to the availability of concepts of res judicata or *lis pendens* within the realm of investor-State disputes.

22. 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. Nonetheless, *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.

23. A *lis pendens* rule in the context of civil litigation proceedings is set out in Article 27(1) of the Brussels Regulation 44/2001 ("Brussels Regulation"), which 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."

24. In the context of investment treaty arbitration, determining the "same parties" for the purposes of such a rule could present a challenge. The Brussels Regulation (Article 28) also sets out a discretionary rule for "related actions": "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 questions and its law permits the consolidation thereof. 3. Actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings."

25. Matters that could be considered in this respect include: (i) whether devising guidance for a *lis pendens* rule in the same or related investment proceedings would be a means to harmonize international practice and reduce the occurrences of parallel proceedings in investment arbitration; (ii) the form such guidance could take, and in particular whether a standard would need to be contained in the underlying investment treaty; and (iii) whether such a standard is appropriate as between national proceedings and investment arbitration proceedings. Staying a second-in-time proceeding whilst a related proceeding is pending in a different forum is also a possible means to redress the difficulties arising from concurrent

proceedings, and might better be considered as a matter of judicial comity, further addressed below.

26. It could be considered whether guidance or a definition of "same parties" and/or "related proceedings" could in any event be useful for the establishment of a harmonized standard in relation to concurrent proceedings.

Consolidation

27. Another matter for further consideration, albeit with its own legal and logistical complexities, that might serve to reduce the frequency of parallel proceedings, is the introduction of consolidation provisions in treaty text or in arbitration rules. Such provisions would provide a legal basis for consolidation.

28. As an illustration, the United States Model Bilateral Investment Treaty (2004) provides for requests for consolidation where "two or more claims … have a question of law or fact in common and arise out of the same events or circumstances …" — and other solutions, such as that contemplated by the OECD Negotiating Group on Multilateral Agreement on Investment (MAI; negotiated between 1995-1998, and discontinued), the text of which provided for a provision on consolidation of multiple proceedings (article 9). In the MAI, it was suggested that a separately constituted arbitral tribunal would be empowered to determine whether to consolidate all or part of the multiple proceedings.

29. Matters to be considered in relation to the design of a consolidation regime include the question of parties' consent to consolidation, the nature of the decision to consolidate if made by the arbitral tribunal, due process, consolidation of proceedings for parallel arbitrations arising under different treaties.

Coordination and exchange of information among arbitral tribunals

30. International judicial comity is another area which may provide a mechanism for the coordination of multiple proceedings. A matter for consideration could be whether existing UNCITRAL texts, for example the Model Law on Cross-Border Insolvency (New York, 1999) (the "Insolvency Model Law"), which provides for cooperation in relation to concurrent litigation proceedings in the matter of insolvency, could provide a model for a legislative text in the field of investment arbitration.

31. The Insolvency Model Law provides for cooperation and direct communication between the courts of different countries, or courts and administering institutions in different countries, in respect of concurrent proceedings involving the same debtor (articles 25-26); rules on the commencement of a local proceeding involving the same debtor when a foreign proceeding has previously commenced (article 28); rules concerning coordination of concurrent proceedings, particularly with respect to the granting of relief (articles 29-30); rules seeking to avoid double recovery in situations where concurrent proceedings involving the same debtor are taking place in different jurisdictions (article 32); and a basic factual presumption that the existence of a foreign proceeding in relation to that debtor is proof, absent evidence to the contrary, that the debtor is insolvent (article 31). The Insolvency Model Law is premised on the notion of the same debtor being subject to insolvency proceedings in multiple jurisdictions. Also noteworthy is the Practice Guide on Cross-Border Insolvency Cooperation which

provides information for insolvency practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases. It illustrates how the resolution of issues and conflicts that might arise in those cases could be facilitated by cross-border cooperation, in particular through the use of cross-border insolvency agreements, tailored to meet the specific needs of each case and the requirements of applicable law.

Definition of investor; limiting parties with standing

32. Commentators have suggested that investment treaties should clearly set out what level of indirect ownership is required for a shareholder to acquire standing under an investment treaty, and that such clarity could help 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.

33. A matter for the consideration might be whether guidance could be developed in relation to harmonizing a standard of corporate nationality, or creating model clauses for investment treaties to clarify investor standing under a treaty.

34. The UNCITRAL Legislative Guide on Insolvency Law (the "Insolvency Guide") observes that the laws of different jurisdictions vary in respect of the extent to which a law allows the veil of incorporation to be lifted, but that it is common for insolvency laws to address issues of intra-group liability in corporate groups on the basis of the relationship between the insolvent and related group companies in terms of both shareholding and management control (see part three, chapter I, paras. 26-30). It cites as an alternative to direct regulation of corporate groups the need to include sufficient definition in the relevant law to allow application of the relevant provisions to corporate groups, for example by establishing the subordination of "related parties".

III. Concluding remarks

35. The Commission may wish to consider whether UNCITRAL should hold a colloquium to consider further the matters highlighted in this note, including:

- The definition of the various issues at stake and whether those issues can be dealt with at a multilateral level;
- The matters to be covered in any instrument addressing concurrent proceedings;
- The form(s) such instrument(s) could take;
- The actors to be involved in the design of any possible solutions to that issue.