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Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters

Note by the Secretariat

Contents

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I. Introduction

1. At its thirty-fifth session, the Working Group suggested that the Secretariat (i) prepare a list of the concerns about investor-State dispute settlement (ISDS) raised during its thirty-fourth and thirty-fifth sessions, (ii) set out a possible framework for its future deliberations, and (iii) consider the provision of further information to assist States with respect to the scope of some concerns (A/CN.9/935, paras. 99 and 100).

2. Document A/CN.9/WG.III/WP.149 addresses items (i) and (ii) at an overview level. This Note considers the topic of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals, and provides additional information on that topic.

3. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic,[1] and does not seek to express a view on the desirability of reforms, which is a matter for the Working Group to consider.

II. Consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals

A. Assessment of identified concerns

1. Identified concerns

4. This note focuses on the concerns raised at the thirty-fourth and thirty-fifth sessions of the Working Group with respect to the consistency, coherence, predictability and correctness of decisions made by arbitral tribunals in ISDS cases (A/CN.9/930/Add.1/Rev1, paras. 9–35; and A/CN.9/935, paras. 20–44).

5. At the thirty-fourth session of the Working Group, it was indicated that criticism of a lack of consistency and coherence was one of the reasons behind the Commission's decision to embark on work on possible ISDS reform, thereby acknowledging the importance of ensuring a coherent and consistent ISDS regime. It was said that consistency and coherence would support the rule of law, enhance confidence in the stability of the investment environment and further bring legitimacy to the regime. It was also said that inconsistency and lack of coherence, on the other hand, could negatively affect the reliability, effectiveness and predictability of the ISDS regime and its credibility (A/CN.9/930/Add.1/Rev.1, para. 11).

6. It may be noted that different factors may justify differences between arbitral decisions or awards. For example, differences may emerge because the fundamental rules of treaty interpretation (codified in Articles 31–33 of the Vienna Convention on the Law of Treaties) require a decision maker to consider more than the plain language of a treaty provision when interpreting it. Further, differences in reasoning and outcome may inevitably flow from differences in the manner and extent to which relevant evidence was presented, and positions were argued.

7. In order to delineate these concerns, a distinction was made between divergent decisions that were justified (reflecting, for example, rules of treaty interpretation or different facts and evidence before the tribunal) and differing interpretations which

[1] This Note was prepared with reference to a broad range of published information on the topic (see bibliographic references published by the Academic Forum, available under "Additional resources" at http://www.uncitral.org/uncitral/en/publications/online_resources_ISDS.html). The preparation of this note, and in particular section A.2, benefitted from contributions by the Practitioners Group (see more information on the Group at http://www.uncitral.org/pdf/english/workinggroups/wg_3/Practitioner_Group_Statement_of_Purpose.pdf), by the Geneva Center of International Dispute Settlement (CIDS) as well as by the following experts: José J. Caicedo, Damien Charlotin, Melida Hodgson, Lise Johnson (CCSI), Josef Ostransky (CIDS), Michele Potestà (CIDS), Jeremey Sharpe and Derek Smith.

could not be justified (for example, contradictory interpretations of the same substantive standard in the same treaty or the same procedural issue). The Working Group agreed to focus its discussions on the latter category (unjustifiable inconsistency) and to consider its prevalence and impact (A/CN.9/935, para. 25).

8. During the discussion in the Working Group, it was also agreed that seeking to achieve consistency should not be to the detriment of the correctness of decisions, and that predictability and correctness should be the objective rather than uniformity (A/CN.9/935, para. 26).[2] Indeed, the Working Group considered that consistency and coherence were not objectives in themselves and that caution should be taken in trying to achieve uniform interpretation of provisions across the wide range of investment treaties, considering that the underlying investment treaty regime itself was not uniform (A/CN.9/930/Add.1/Rev.1, paras. 11, 17 and 18).

2. Prevalence and impact of unjustified inconsistency

9. During the thirty-fourth session of the Working Group, some States reported the experience of having investment treaties with similar provisions interpreted differently by tribunals, including in an instance of concurrent proceedings in which the facts, parties, treaty provisions and applicable arbitration rules were identical (A/CN.9/930/Add.1/Rev.1, para. 14).[3] It was further said that international rules on treaty interpretation and customary international law were not always consistently applied by ad hoc tribunals (A/CN.9/930/Add.1/Rev.1, para. 13). At its thirty-fifth session, the Working Group considered that inconsistency, and the resulting lack of predictability, was more of a concern where the same investment treaty standard or same rule of customary international law was interpreted differently in the absence of justifiable ground for the distinction (A/CN.9/935, para. 21).

10. The Working Group may wish to consider (i) the main scenarios under which inconsistency in decision-making has arisen in practice, and (ii) illustrations from areas of law affected by inconsistent decisions.

(a) Different scenarios

11. *First*, different tribunals have reached different conclusions about the same standard in the same investment treaty or about the same procedural issue, including where the facts were similar, or had differences that have been considered not to be sufficient to justify a different outcome. The often-cited examples include decisions by arbitral tribunals under the North American Free Trade Agreement (NAFTA),[4] as well as decisions in arbitrations interpreting, for instance, the essential security clause.[5] Similarly, arbitral tribunals have come to different interpretations of certain notions contained in the ICSID Convention (see paras. 17 and 25 below).

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[2] See also the OECD study at http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf, p. 61.

[3] See also UNCTAD, IIA Issues Note No.2, *Reform of investor-state dispute settlement* (Arbitral decisions that have been made publicly available have "exposed recurring episodes of inconsistent findings … [including] divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases involving the same facts. Sometimes, divergent outcomes can be explained by the differences in wording of a specific IIA applicable in a particular case; however, often they represent the differences in the views of individual arbitrators.")

[4] *S. D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001.

[5] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005; *Enron Corporation Ponderosa Assets, L.P. v. The Republic of Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007; *LG&E Energy Corp., L&E Capital Corp., LG&E International Inc. v. The Republic of Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006; *Continental Casualty Company v. The Republic of Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008.

12. *Second*, arbitral tribunals organized under different investment treaties have reached different conclusions about disputes involving the same measure, related parties, and similar treaty standards and/or applicable legal rules. 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; in part, the same claimant from an economic perspective (Mr. Lauder who brought a claim in his own name in one proceeding and as a shareholder of CME in the other), but different legal persons (CME and Mr. Lauder), with 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).[6]

13. *Third,* arbitral tribunals organized under different investment treaties or the same investment treaty have dealt with disputes involving unrelated parties, but similar facts and have reached opposite interpretations of the applicable legal rules. This situation typically arises when a measure taken by a State has an impact on a number of unrelated investors.[7] States have often adopted policies relating generally to foreign investments, as part of their efforts to attract investments into given sectors, thereby increasing the occurrence of dealings with a wide range of investors. When a State adopts a measure that potentially affects a number of investors, it may be faced with multiple claims from those unrelated investors in relation to that measure. For example, a change of a State policy (or that of a state-owned entity) may affect a whole range of investments made by different investors. While issues of law and fact raised in those proceedings will generally be common to all of the claimants, it is foreseeable that decisions rendered by separate tribunals may yield different interpretations.

(b) Areas of law concerned

14. At its thirty-fourth session, the Working Group heard examples of inconsistent decisions from delegations. The examples concerned the definition of “investment” and whether investments were required to be made “in” or “for the benefit of” the host country; the application of the most-favoured nation (MFN) clause to dispute settlement; the notion of indirect expropriation; the interpretation of the scope and effect of the umbrella clause; the identification and application of principles of customary international law; procedural decisions on security in annulment proceedings; treatment of awards in terms of enforcement; ability of States and investors to contract out of ISDS provisions (see A/CN.9/935, paras. 31 and 32); situations of concurrent or multiple proceedings (see also A/CN.9/915, paras. 5 and 6); general rules of customary international law involving the state of necessity/emergency, the law of attribution, and the legal principles regarding damages (A/CN.9/930/Add.1/Rev.1, para. 30).

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[6] *CME and Lauder (CME Czech Republic B.V. v. Czech Republic*, Ad hoc UNCITRAL Arbitration Rules, Partial Award of 13 September 2001, Final Award of 14 March 2003 and *Lauder v. Czech Republic*, Ad hoc UNCITRAL Arbitration Rules, Final Award, 3 September 2001) as well as the *SGS cases* which involve interpretation of the so-called umbrella clauses *(SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003 and *SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004; SGS *Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012).

[7] See A/CN.9/881, paras. 8 and 20(ii). See, for instance, *Charanne and Construction Investments v. Kingdom of Spain*, SCC Case No. V 062/2012; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36; *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153; *Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30.

15. The Working Group may wish to consider the illustrative list below of instances of divergent interpretations of substantive standards; divergent interpretations relating to jurisdiction and admissibility; and procedural inconsistency. The Working Group may wish to note that the focus in this illustrative list is recent or relatively recent cases (rendered over the past 15 years) in an effort to take account of evolving trends.

16. Examples of substantive protection standards that have been interpreted differently are as follows:

(i) Fair and Equitable Treatment (FET): Even if commentators have observed certain trends over time,[8] there remains inconsistency in the determination of the content and level of the obligations under FET clause.[9] Divergent interpretations may be noted regarding:

- Whether the notion of denial of justice covers substantive denials of justice and not merely procedural ones,[10] and the standard for finding a denial of justice in the context of FET protection;[11]
- Whether a breach of an investor's legitimate expectations could in itself breach the FET standard and, if so, whether these expectations must be grounded in a specific commitment on the part of the host State or can arise from general legislation;[12]

[8] For example, commentators have noted that tribunals seem to have increasingly: emphasized the need for a stable legal and business framework in the host State; abandoned the requirement of bad faith on the part of the host State; and taken into account the legitimate expectations of the foreign investor. See, for instance, Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013); Jonathan Bonnitcha, *Substantive Protection under Investment Treaties* (Cambridge University Press, 2014), Chapter 4.

[9] See, for instance, decisions interpreting FET rather broadly: *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015; and by contrast, decisions interpreting FET more restrictively, for instance, *Waste Management Inc. v United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award 30 April 2004; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006; *Invesmart v. Czech Republic*, UNCITRAL, Award, 26 June 2009.

[10] See, for instance, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt,* ICSID Case No. ARB/04/13, Award, 6 November 2008 (paras. 207–261, where the Tribunal looked at both allegations of substantive and procedural denial of justice but without finding that they were sustained)*;* See also *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic,* UNCITRAL, Final Award, 23 April 2012 (paras. 276–99)*; Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, 31 May 2016 (paras. 239 to 270, which only covers procedurals denials of justice)*;* See also *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan,* ICSID Case No. ARB/13/38 (paras. 427 seq., on the procedural denial of justice examination).

[11] For a proposition that customary international law denial of justice and FET are inseparable and have evolved into a modern version of denial of justice see, for instance, *OAO Tatneft v. Ukraine*, UNCITRAL, 29 July 2014, Award on the Merits; for a proposition that FET refers to the customary international law notion of denial of justice see, for instance, *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012.

[12] For cases denying the possibility of protected expectations arising out of legislation see, for instance, *Charanne and Construction Investments v. Kingdom of Spain*, SCC Case No. V 062/2012, Award, 21 January 2016; *Philip Morris Brands Sárl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016; *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012; *Convial Callao S.A. and CCI — Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, 21 May 2013; in contrast for decisions implying or explicitly allowing this possibility, for instance, *CMS Gas Transmission Company v. The Republic of Argentina,* ICSID Case No. ARB/01/8, Award, 12 May 2005; *Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19*,* Decision on

- Whether investment treaties providing for FET "in accordance with international law" (or similar wording) refer to the minimum standard of treatment under international law, or to another "autonomous" standard (by contrast with investment treaties that just refer to "FET").[13]

(ii) Umbrella Clauses: Some decisions adopt restrictive or conditional interpretations of umbrella clauses,[14] whereas others adopt broad and unconditional interpretations, irrespective of the wording of the clause itself.[15]

(iii) Essential security provisions/Necessity doctrine: It is generally accepted that the customary international law doctrine of necessity is embodied in article 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (the "Draft Articles") of the International Law Commission.[16] The doctrine of necessity was extensively argued in cases either as the primary defence or, in the presence of a treaty-based "essential security" provision, as an alternative defence.[17] In a series of ICSID arbitral decisions, inconsistency when discussing the notion of necessity is found between arbitral tribunals and ad hoc Committees in charge of reviewing the application for annulment of the awards.[18]

Jurisdiction, Applicable Law and Liability, 30 November 2012; *Total S.A. v. The Republic of Argentina,* ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010.

[13] See, for instance, *S. D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (see paras. 262–263: "The phrases ... fair and equitable treatment ... and ... full protection and security ... cannot be read in isolation. They must be read in conjunction with the introductory phrase ... treatment in accordance with international law.[…] The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective"; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001 (see para. 111: "The Tribunal interprets that formulation as expressly adopting the additive character of the fairness elements. Investors are entitled to those elements, no matter what else their entitlement under international law. A logical corollary to this language is that compliance with the fairness elements must be ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law."

[14] *SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003; *SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (2004); *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay,* ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009.

[15] *Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. The Republic of Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012.

[16] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Yearbook of the Int'l Law Commission, 2001, Vol. II Part 2 also available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[17] See, for instance, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Award, 24 December 2007, paras. 387–388; *CMS*, para. 318 seq.*; Total S.A. v. The Republic of Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 219.

[18] *Sempra Energy International v. The Republic of Argentina*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, paras 186–207; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Republic of Argentina*), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 406 seq.; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, para. 150. The application for annulment in CMS was dismissed despite the ad hoc Committee's disagreement with the analytical approach taken by the CMS tribunal, while afterwards the ad hoc Committees in both the *Enron* and *Sempra* cases annulled the findings of the arbitral tribunals based in part on the logic provided in the CMS annulment on Argentina's necessity defence.

(iv) Favourable investment conditions: Arbitral tribunals have given inconsistent interpretations of the commitment made by States in many investment treaties to create "favourable investment conditions".[19]

17. Illustrations of divergent interpretations relating to jurisdiction and admissibility are as follows:

(i) In cases before ICSID, arbitral tribunals vary in their interpretations of the outer limits of subject-matter jurisdiction under article 25(1) of the ICSID Convention. As an illustration, there have been divergent interpretations on whether:

- The contribution to the host State's economic development is a criteria for the definition of an investment;[20]
- An offtake agreement is an investment under an investment treaty and the ICSID Convention;[21]
- Portfolio investments are protected;[22] and
- The notion of a company's head office should be interpreted under domestic law, or as an autonomous term under the applicable investment treaty, or by reference to customary international law, and whether an autonomous definition would amount to an effective seat or place of registration.[23]

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[19] While some tribunals have considered it as an obligation to "encourage and promote favourable conditions for investors" but not a "stand-alone, positive commitment giving rise to substantive rights" in *White Industries Australia Limited v. India*, UNCITRAL, Final Award, 30 November 2011, para. 9.2.12, others have recognized a substantive obligation to encourage favourable conditions for investors, as in *National Grid v. The Republic of Argentina*, UNCITRAL, Award, 3 November 2008, para. 170.

[20] For decisions accepting the requirement of contribution to the economic development, see for instance, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia,* ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007; for decisions which do not recognize a contribution to the economic development as a jurisdictional requirement, see for instance, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010; *Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010.

[21] For cases not accepting offtake agreement as an investment see, for instance, *Tenaris S.A. and Talta — Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/26, Award, 29 January 2016*;* for cases accepting an offtake agreement as an investment being part of a larger economic transaction see, for instance, *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/19, Award, 30 October 2017.

[22] For decisions accepting portfolio investments as protected see, for instance, *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997; *Abaclat and Others v. The Republic of Argentina*, ICSID Case No. ARB/07/5 (formerly *Giovanna Beccara and others v. The Argentine Republic*), Decision on Jurisdiction and Admissibility, 4 August 2011; *Ambiente Ufficio S.p.A. and others v. The Republic of Argentina*, ICSID Case No. ARB/08/9 (formerly *Giordano Alpi and others v. Argentine Republic*), Decision on Jurisdiction and Admissibility, 8 February 2013; *Giovanni Alemanni and Others v. The Republic of Argentina*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014; for decisions holding to the contrary see, for instance, *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015.

[23] For decisions interpreting the term "*siège social*" under the applicable BITs as "place of effective management", see, for instance, *Tenaris S.A. and Talta — Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016 and *Tenaris S.A. and Talta — Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Award, 12 December 2016; for decisions interpreting the term "*siège social*" under the applicable BIT as "registered office", see, for instance, *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*,

(ii) Diverging interpretations have been given regarding the impact of denunciation of the ICSID Convention on arbitral tribunal's jurisdiction.[24]

(iii) Different approaches have been observed on whether the effective control of a claimant over a relevant entity must be merely legal or also factual.[25]

(iv) Whether an award could qualify as an investment.[26]

(v) Related parties' pursuit of multiple claims for damages: three divergent approaches can be distinguished from the practice. Under a first approach, the claims are admissible, but the tribunal must prevent double recovery (i.e., solution sought at level of damages).[27] Under a second approach, a tribunal

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ICSID Case No. ARB/12/35, Final Award, 31 May 2017. See also *Central European Aluminium Company (CEAC) v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016.

[24] For decisions accepting jurisdiction for arbitration filed post-denunciation within the 6-months period mentioned in article 71, see, for instance, *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award, 3 April 2015; *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016; *Tenaris S.A. and Talta — Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuel*a, ICSID Case No. ARB/12/23, Award, 12 December 2016; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award, 26 April 2017; *Transban Investments Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/24, Award, 22 November 2017; for decisions not accepting jurisdiction for cases filed within the 6-months period, see, for instance, *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Award, 13 November 2017.

[25] See *Banro American Resources, Inc. & Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/98/7, Award, 1 September 2000 where the Tribunal held that the transfer from one entity to another of an investment would not be sufficient to allow the latter entity to trigger ICSID arbitration, considering the need for consent of the parties (paras. 3–5); *Caratube International Oil Company LLP and Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017 ("There can be no dispute that the wording of Article 25(2)(b) of the ICSID Convention does not specify the required form and extent of foreign control and, more specifically, does not expressly require actual, effective control, rather than legal control", paras. 611–615); *BG Group PLC v. The Republic of Argentina*, UNICTRAL, Final Award, 24 December 2007 (see notably para. 113, where the Tribunal verified both the legal (participation in the subsidiaries) and factual aspects (testimony provided in order to supplement the participation)); *Daimler Financial Services AG v. The Republic of Argentina*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (see para. 83: "Subparagraph b) of this definition makes clear that the Claimant's 99% shareholding in DCS Argentina indeed constitutes a protected investment under the Treaty."; *TSA Spectrum de Argentina, S.A. v. The Republic of Argentina*, ICSID Case No. ARB/05/5, Award, 19 December 2008 (see paras. 134–162, where the Tribunal held that "it is necessary to pierce the corporate veil and establish whether or not the domestic company was objectively under foreign control."); *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (see para. 316: "the Tribunal considers that a more flexible and pragmatic approach to the meaning of "investment" is appropriate"); *Consortium Groupement LESI—DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005 (see paras. 37–41, where the Tribunal adopted a strict legal view on the claimant (a consortium) incapacity to request for arbitration in lieu of the subsidiary which signed the investment contract); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003 (see paras. 136–137: the Tribunal looked at the factual details, notably the transfer of money to establish and operate liaison offices in Pakistan, to define the notion of investment through a local subsidiary).

[26] For cases not accepting arbitral awards as investments see, for instance, *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011; for cases accepting awards as investment, although for different reasons, see, for instance, *Saipem SpA v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009; *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010; *White Industries Australia Limited v. India*, UNCITRAL, Final Award, 30 November 2011.

[27] See *CME Czech Republic B.V. v. Czech Republic*, Ad hoc UNCITRAL Arbitration Rules, Partial Award, 13 September 2001, Final Award, 14 March 2003 and *Lauder v. Czech Republic*, Ad hoc

held that once jurisdiction is established, the claimant must elect in which proceeding it wished to pursue the overlapping portion of its claims. Failure to do so could trigger an abuse of process finding by the arbitral tribunal at subsequent procedural stages (i.e. solution found at level of merits).[28] Under a third approach, a tribunal stated that "where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights for purposes that are alien to those for which these rights were established" (i.e., solution found at level of admissibility).[29]

18. Illustrations of procedural inconsistencies are as follows.

(i) Before the commencement of arbitral proceedings:

- Most Favoured Nation (MFN) clause: Major differences have arisen regarding the application of the MFN clause to dispute settlement provisions. Some decisions have accepted that the MFN clause would permit modification of the dispute settlement provisions of otherwise applicable treaties,[30] while others have denied that possibility;[31]
- Different treatments or approaches have been observed regarding:
  - The waiting or cooling-off period;[32]

UNCITRAL Arbitration Rules, Final Award, 3 September 2001 as well as the *SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 and *SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6.

[28] See *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on jurisdiction, 1 February 2016, paras 330–339. *Mr. Yosef Maiman and Others v. Egypt*, UNCITRAL (not public).

[29] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2017, para. 543.

[30] See, for instance, *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000; *Gas Natural SDG, S.A. v. The Republic of Argentina*, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005; *National Grid plc v. The Republic of Argentina*, Decision on Jurisdiction, 20 June 2006; *AWG Group Ltd. v. The Republic of Argentina*, UNCITRAL, Decision on Jurisdiction, 3 August 2006; *Impregilo S.p.A. v. The Republic of Argentina, ICSID Case No. ARB/07/17*, Award, 21 June 2011; *Hochtief AG v. The Republic of Argentina*, Decision on Jurisdiction, 24 October 2011; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, October 2007.

[31] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005; *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012; *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006.

[32] For cases viewing the cooling-off period as an admissibility issue see, for instance, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016; for cases viewing it as jurisdictional, see, for instance, *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014. In *SGS v. Pakistan*, where the concept of the consultation period is seen as very flexible (see para. 184: "Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction"), whereas the arbitral tribunal in *Murphy Exploration and Production Company International v. Republic of Ecuador,* ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010 adopted a very strict definition of this mandatory process (providing at paras. 140–157: "In accordance with [the Vienna Convention on the Law of Treaties], it is not possible to ignore the existence of the norms contained in Article VI of the [US-Ecuador] BIT, regarding the obligation of the parties to attempt negotiations in order to resolve their disputes and the impossibility to resort to ICSID before the six-month term has elapsed … the Tribunal rejects Claimant's argument that the six-month waiting period required by Article VI(3)(a) does not constitute a jurisdictional requirement.").

- The interpretation of the notion of unilateral offer to arbitrate;[33]
- The ability to resort to arbitration on the basis of a repealed foreign investment law;[34] and
- The timing and nature of a State's denial of benefits.[35]

(ii) During the arbitral proceedings, different treatments or approaches have been observed regarding:

- The existence of the requirement to exhaust local remedies;[36]
- The impact of recourse to domestic courts prior to launching an investment arbitration;[37]
- The notion of "continuing breach" as an exception for the applicable statute of limitation of claims;[38]

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[33] For cases holding the principle of *effet utile* applicable, see, for instance, *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33; for cases rejecting applicability of the principle of *effet utile,* see, for instance*, CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15.

[34] See *ABCI Investments N.V. v. Republic of Tunisia*, ICSID Case No. ARB/04/12; *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*; ICSID Case No. ARB/10/16. In the *ABCI Investments* award, the arbitral tribunal made its decision based on the facts of the case (see. paras 99–100), whereas in the *AES Corporation* the question was clearly answered through the consultation of the relevant legal instruments (see para. 216).

[35] The question receives very different interpretations in arbitral tribunals: in *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, paras. 148–151, it is held that the State cannot deny an investor the benefits of treaty after the investor has filed a request for arbitration, therefore refusing the retroactive effect of benefits clause; in *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, para. 376, however, the tribunal concluded that it *"*cannot agree with the Claimants when they argue that the Respondent is precluded from applying the denial of benefits clause retroactively".

[36] It is generally accepted that there is no need to exhaust local remedies where consent has been given to investor-state arbitration (see Dolzer and Schreuer, *Principles of International Investment Law*, 2nd ed., p. 264). Certain tribunals have nevertheless held that an investor must make some attempt to find a local remedy to establish that the relevant substantive standard of investment protection has been violated. See *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003. See also *Helnan International Hotels* A/S *v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008 which was subsequently annulled on this ground by a decision of the ad hoc Committee dated 14 June 2010.

[37] In *Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan,* ICSID Case No. ARB/13/38, Award,14 December 2017, the Tribunal held that, once a measure taken by a State has been challenged before domestic courts, the compatibility of such measure with an investment treaty (i.e., arbitrariness of the measure) can no longer be reviewed by the Tribunal and only a denial of justice claim is available to the investor. However, another ICSID tribunal, in *Generation Ukraine v. Ukraine*, articulated the principle that "[I]t is not enough for an investor to seize upon an act of maladministration ... without any effort at overturning the administrative fault; and thus to claim an international delict ... In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable — not necessarily exhaustive — effort by the investor to obtain correction." (*Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2004, para. 20.30).

[38] *United Parcel Service v. Canada*, UNCITRAL, Award on the Merits, 24 May 2007 (see para. 28 "continuous course of conduct constitute continuous breaches of legal obligations and renew the limitation period accordingly"); *Eli Lilly v. Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017 (see para. 170); *Corona Materials LLC v. Dominican Republic*, ICSID Case No ARB(AF)/14/3, Award on the respondent's expedited preliminary objections in accordance with Article 10(20)(5) of the DR-CAFTA*,* 31 May 2016 (no acceptation of continuous breaches of legal obligations, paras. 200–238); *Spence International Investments, LLC, Berkowitz, et al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 25 October 2016 (see para. 208 "While it may be that a continuing course of conduct constitutes a continuing breach, the Tribunal considers that such conduct cannot renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely, to draw a

- The allocation of costs;[39] and
- The legal reasoning and the methodology for evaluating damages.

(iii) After the award is rendered:

- Certain aspects of ICSID annulment proceedings, for instance regarding the application for the stay of enforcement of an award.[40]

B. Current mechanisms

19. At the thirty-fifth session of the Working Group, significant concerns were expressed that current mechanisms were not sufficient to ensure that investment treaties would be consistently and correctly interpreted (A/CN.9/935, para. 38).

20. Concerns expressed in the Working Group about inconsistency, incoherence, lack of predictability, and potentially lack of correctness were often linked to questions regarding the adequacy of the existing mechanisms to address such issues (A/CN.9/935, paras. 39–41). The Working Group may wish to consider the extent to which the current mechanisms can operate to achieve consistency among ISDS cases, in particular among investment treaties with the same or substantially similar investor protection standards, or can assist in correcting awards.

21. It was noted that under the current framework, the options for addressing inconsistent or incorrect decisions are limited, as these options have been designed to review awards with the aim to address a limited set of major procedural deficiencies. The existing review mechanisms address the integrity and fairness of the process rather than the consistency, coherence or correctness of the outcomes (see A/CN.9/WG.III/WP.142, para. 39 and A/CN.9/935, para. 23).

22. The options include requesting modification of an award under applicable arbitration rules. However, the rules applicable to the arbitration strictly circumscribe the type of conduct that might justify rectification, and only minor clerical errors tend to be corrected.[41]

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line under the prosecution of historic claims. Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period."); *Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (see para. 206, where the Tribunal acknowledged the inconsistency in interpretation of the time bar provision between arbitral tribunals "The Tribunal is mindful in this respect that NAFTA jurisprudence is not at one in answering the question of how time concerning continuing and composite acts should be computed." and eventually refused the continuous breach exception, at para. 208).

[39] See *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 322 ("The Tribunal notes that the traditional position in investment arbitration, in contrast to commercial arbitration, has been to follow the public international rule which does not apply the principle that the loser pays the costs of the arbitration and the costs of the prevailing party"), by contrast to *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 533: ("[T]he Tribunal can find no reason to depart from the starting point that the successful party should receive reimbursement from the unsuccessful party."). See also *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, para. 107 ("Though aware of a common practice in ICSID arbitrations for the parties to bear their own costs and bear the costs of ICSID and the tribunal equally regardless of the outcome of the case, this Tribunal is among those who favour the general principle that costs should follow the event"); the two different approaches have been recalled in the *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award, 31 May 2007, at para. 583, without being reconciled.

[40] *Tenaris S.A. and Talta — Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26 which views the stay as exceptional; *Tenaris S.A. and Talta — Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, viewing a grant of stay as normal absent unusual circumstances.

[41] Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521 (2005).

23. Another option is challenging an arbitral award on a limited number of grounds. However, arbitral awards are final and subject to review only in set-aside applications or enforcement procedures in domestic courts and, in the case of ICSID awards, in annulment proceedings. Because of the notion of finality, remedies against awards are by nature limited.

24. In the ICSID system, the procedure for the annulment of arbitral awards is based on assessment of the integrity of the procedure itself, and does not affect the substance of the dispute by reconsidering the resolved case. The grounds on which annulment may be requested are prescribed in a limitative manner indicating the main feature of this process: it is designed to be an exception, and to be used very narrowly, based on strictly defined grounds.

25. It may be noted that there have been inconsistencies in applying the annulment grounds in the ICSID context. The first generation of annulment decisions[42] were criticized for having adopted an overly expansive view of the scope and standard of review.[43] Later decisions were seen to have corrected this.[44] More recently, decisions have reintroduced inconsistency into the annulment process — in part because of differing views on whether a misinterpretation of the relationship between an investment treaty and customary international law constitutes grounds for annulment.[45] Some committees have concluded that serious misapplication of the law may lead to annulment, where others have considered that such an approach would amount to an appeal.[46] The Working Group may wish to note the recent proposals for amendment of the ICSID Rules of Procedure for Arbitration Proceedings.[47]

26. In non-ICSID cases, annulment of awards as well as enforcement proceedings will take place in State courts. Here also, the process focuses essentially on compliance with fundamental rules of procedure, and does not include a review of the merits, based on the principle that arbitral awards are final and binding once rendered. The system applies to both commercial and investment arbitration.

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[42] *Klockner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Ad hoc Committee Decision on Annulment, 3 May 1985; *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Ad hoc Committee Decision on the Application for Annulment, 16 May 1986.

[43] W. Michael Reisman, *Repairing ICSID's Control System: Some Comments on Aron Broches - Observations on the Finality of ICSID Awards* (1992) 7 ICSID Review - Foreign Investment Law Journal 196.

[44] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee partially annulling the Award, 22 December 1989; *Klöckner Industrie- Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Second ad hoc Committee Decision rejecting the application for annulment, 17 May 1990; *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Second Annulment Request (17 December 1992).

[45] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007; *Sempra Energy International v. The Republic of Argentina*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010; *Enron Creditors Recovery Corporation and Ponderosa Assets L.P. v. The Republic of Argentina*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010; *Helnan International Hotels* A/S *v Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee, 14 June 2010.

[46] See Nicholas Fletcher, *Should ICSID have or not a new appellate process? Contemporary Issues in International Arbitration and Mediation*, The Fordham Papers 2015.

[47] See ICSID Secretariat, Proposals for Amendment of ICSID Rules — Working Paper, August 2, 2018, pp. 270–289, available at https://icsid.worldbank.org/en/Documents/Amendments_Vol_Three.pdf.

C. Desirability of reform

27. The Working Group may wish to note that the questions below are also discussed in document A/CN.9/WG.III/WP.149, which provides a general framework for considering the desirability of reforms.

1. General comments

(a) Questions for consideration

28. The need for consistency and coherence relates to the need for certainty, predictability, and equal treatment. At the thirty-fourth session of the Working Group, predictability and correctness were said to be values that support the rule of law, enhance confidence in the stability of the investment environment, further bring legitimacy to the regime, and contribute to the development of investment law (A/CN.9/930/Add.1/Rev.1, para. 11). A consequence of predictability mentioned in the Working Group was that it would allow States to understand whether their actions, such as possible future legislative or regulatory activities, might breach their obligations. In this regard, it was said that predictability would assist States in setting their investment policies. Predictability would also allow investors to assess whether certain treatment was in accordance with treaty obligations (A/CN.9/930/Add.1/Rev.1, para. 15). Indeed, investment arbitrations frequently address the scope of the regulatory powers of the host States. Delegations confirmed that they had undertaken consultations with their various constituents and stakeholders. The outcome of the consultations as reported was that predictability was important to investors as well, in that lack of predictability could constitute a risk factor for investors and so inhibit investment. It was added that investors valued a dispute settlement system that ensured predictability, given the costs involved (A/CN.9/935, para. 37).

29. Given the characteristics of the investment treaties and ISDS, an issue raised in the Working Group was the desirability of, and the need for, more predictability of outcomes as well as increased uniformity and harmony in the evolution of jurisprudence (A/CN.9/930/Add.1/Rev.1, para. 16; A/CN.9/935, paras. 34–38).

30. In this regard, the Working Group may wish to consider whether the very nature of investment law and the fact that investment law and investment protection standards are fragmented in different sources of law, including numerous investment treaties and domestic regimes, mean that the method of resolving investment disputes must play a central role in the development of consistent legal standards. The Working Group may also wish to consider whether the need in ISDS for decision makers to apply a body of rules that is less developed and still in the process of being formed, means that their decision will have greater impact on the establishment of predictable rules and the development of consistent legal standards in the future.[48]

31. The Working Group may also wish to bear in mind the ultimate objective of investment treaties and investment laws to foster foreign investment flows among countries of a kind and type that meets sustainable development goals, and consider, beyond the impact of inconsistency and lack of predictability on States signatories to the investment treaties, the impact on foreign investors and assessment of the political and economic risks associated with an investment abroad.

(b) Preliminary views expressed by States

32. At its thirty-fourth and thirty-fifth sessions, the Working Group heard some preliminary views regarding how inconsistency and incoherence could be addressed so as to enhance predictability of the ISDS framework. Suggestions included the following: amending investment treaties that contained vague wording; providing solutions to give greater control by State parties to investment treaties, such as joint

[48] Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?* The 2006 Freshfields Lecture.

interpretative statements and guidelines on interpretation of standards, non-disputing party submissions to allow other member States to provide their views about the interpretation of a standard, a mechanism through which tribunals could direct questions to the treaty partners prior to the issuance of awards; adopting a systemic approach through institutional solutions (appeal mechanisms or permanent adjudicatory bodies); considering reforming the domestic framework on investment, including substantive standards of protection contained in domestic laws; introducing or implementing a system of precedents; encouraging consolidation where possible, as well as coordination among tribunals; improving the existing review mechanisms and annulment procedures; and enhancing the role of domestic courts (A/CN.9/930/Add.1/Rev.1, para. 34; and A/CN.9/935, para. 43).

33. Certain solutions listed above would be for States to implement, either through their treaty drafting or through treaty actions. In its World Investment Report, 2017, UNCTAD lists ten options for reforms that States can undertake. [49]

34. For instance, what are termed "second-generation" treaties have better circumscribed the scope of various standards as compared with their "first-generation" counterparts, which contain vague formulations, susceptible to different interpretations (A/CN.9/935, para. 28). The second-generation treaties have brought more clarity in substantive protection standards and in procedural provisions. States may therefore wish to consider negotiating new investment treaties or negotiating amendments to existing ones. As a general comment, States may consider using the above study of inconsistencies as a "map" of issues where their intended policy outcome may be shaped by more clearly defining procedural or substantive requirements. However, the Working Group may wish to consider the time required for this approach, and whether it is a viable solution for the many first-generation treaties.

35. In addition, States may consider the issuance of detailed and, possibly mandatory, guidance for arbitral tribunals. Examples include binding interpretations or the use of other procedural tools, such as submissions from non-disputing treaty Parties (A/CN.9/930/Add.1/Rev1, paras. 22 and 23).[50] In the past, such interpretations have been issued ad hoc, or based on an institutionalized forum or standing committee for consultation (for instance, the NAFTA standing body composed of representatives of Governments of the three member States, which can issue binding notes of interpretation for NAFTA Chapter XI tribunals). Certain investment treaties also foresee that some questions should be raised with the States parties to the investment treaty in order to receive their joint interpretations.[51]

36. Further, the Working Group may wish to consider the effectiveness of such guidance and, in particular, the relationship between those State statements and arbitral tribunals' subsequent interpretations of the standards.[52]

2. Possible reforms on a multilateral basis

(a) Introducing a system of precedent

37. From an historical viewpoint, consistency and coherence are not features built in to the ISDS regime. Decisions are made by arbitral tribunals established on an ad hoc basis, with no formal obligation with regard to the principle of precedent.

38. The Working Group may wish to consider that "consistency", "coherence", and "predictability" of decisions in ISDS would, in most cases, mean that decision makers

[49] UNCTAD, World Investment Report 2017, at p. 131; available on the Internet at http://unctad.org/en/PublicationChapters/wir2017ch3_en.pdf.

[50] See also UNCTAD IIA Issues Notes, No. 3, December 2011, *Interpretation of IIAs: What States can do*; UNCTAD Series on Issues in International Investment Agreements II, Investor-State Dispute Settlement: A Sequel, 2014.

[51] See the treaty between Uruguay and the United States of America, article 31.

[52] See, for instance, Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) where the treaty provides that a joint interpretation shall be binding on arbitral tribunals.

take into account pre-existing case law and conform to the extent possible or desirable to the legal interpretations set out therein. It would also imply that a tribunal, in the event it considers that the interpretative approaches and legal reasoning in a previously rendered decision do not apply to the instant case, may adopt a different position on the basis of a reasoned explanation. In a "coherent" and "predictable" system, conflicting decisions would be based upon a consistent interpretative approach to the issues at stake, extending beyond the instant case, and one that takes into account pre-existing case law and contributes to the development of investment law and jurisprudence.

39. Despite the diversity of investment treaties, patterns of consistent interpretation of the common denominators of recurring provisions may be established, and core standards and principles may thus be clarified through consistent and coherent interpretation (A/CN.9/930/Add.1/Rev.1, para. 16). It may be noted in that respect that the transparency standards in ISDS, as designed by ICSID in 2006, and by UNCITRAL in 2013 and 2014, foresee access to orders and decisions by arbitral tribunals. With the use of such standards and publication of ISDS decisions, arbitral tribunals will more easily gain access to earlier decisions, which would contribute to promoting a system of precedent.

40. Currently, while tribunals seem to agree that there is no doctrine of binding precedent per se, they also concur on the need to consider earlier cases. Awards frequently express the tribunal's conviction that it must pay due regard to earlier decisions of international courts and tribunals and that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent decisions.[53] Nonetheless, this has not always secured consistency among arbitral awards as this approach is difficult to implement in a decentralized mode of decision-making, composed of ad hoc tribunals only.[54] Also, certain tribunals, while acknowledging that consistency is generally desirable, have stressed that "[*t*]*here is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunal*s".[55] If the Working Group considers that a system of binding precedent should be introduced, it

[53] See, for instance, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, para. 187 (recording an individual arbitrator's view that there is no duty to follow jurisprudential trends, but providing that: "[T]he Tribunal believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law").

[54] By comparison, in the International Court of Justice, there is no de jure *stare decisis* (see Article 59 of the ICJ Statute); there is, however, a strong reliance on earlier judicial decisions, which are listed as "subsidiary means for the determination of rules of law" in Article 38 of the ICJ Statute, and practice shows that past decisions are highly persuasive to the court.

[55] See *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, para. 97 ("The ICSID Convention provides only that awards rendered under it are "binding on the parties" (Article 53(1)), a provision which might be regarded as directed to the res judicata effect of awards rather than their impact as precedents in later cases. In the Tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State. Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals."). See also *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 224 ("This Tribunal is required to decide the arguments advanced by the Parties in this arbitration based on the evidence adduced by the Parties in these proceedings. It cannot be influenced therefore by the result of a different arbitration, where an investor's claim appears to have been formulated differently and decided on different arguments and evidence").

may wish to consider the feasibility of implementing such solution given the characteristics of the ISDS regime.

41. Despite being primarily responsible for rendering decisions on the matters submitted to them, arbitral tribunals also operate in the framework of a larger adjudicatory system with public relevance. Indeed, investment treaty tribunals contribute to articulating and clarifying the meaning of core treaty standards.[56] Therefore, a related question is whether it should be considered that arbitrators are under a general duty towards an international system of justice, to act in the public interest (A/CN.9/935, paras. 85 and 86), and if so, how to implement such duty (see also, on that matter, document A/CN.9/WG.III/WP.153).

(b) Providing guidance to arbitral tribunals

42. There are a number of procedural mechanisms that arbitral tribunals can use or be encouraged to use in order to coordinate better their decision-making, including in situations of concurrent proceedings. These tools are described in document A/CN.9/915, paras. 10–33. They include various approaches, such as proactive use of consolidation, exchange of information, stay of proceedings, as well as use of doctrines of *lis pendens* and *res judicata*.

(c) Prior scrutiny of arbitral awards

43. A system allowing for prior scrutiny of draft arbitral awards could also be considered. Scrutiny of awards is a feature of the Rules of the ICC International Court of Arbitration, which has often been described as beneficial in that it enhances quality and enforceability of the awards. A similar system could be designed to ensure consistency, avoid legal mistakes and ensure quality of awards rendered by ISDS tribunals.

(d) Appellate mechanism

44. Illustrations of the Parties' intention to include appellate review mechanisms can be found in certain investment treaties.[57]

45. A further option often cited is the creation of a standalone appellate mechanism. The main functions of an appellate body is to ensure procedural and substantive correctness of decisions. It would be tasked with a substantive review of decisions, and would permit implementation of a system of binding precedent.[58] The scope of review by an appellate mechanism would need to be circumscribed to avoid de novo review.

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[56] See *Glamis Gold Ltd. v. United States of America*, UNCITRAL Arbitration (NAFTA), Award, 8 June 2009, at para. 7, where the tribunal provided as follows: "this Tribunal, in undertaking its primary mandate of resolving this particular dispute, does so with an awareness of the context within which it operates. The Tribunal emphasizes that it in no way views its awareness of the context in which it operates as justifying (or indeed requiring) a departure from its duty to focus on the specific case before it. Rather it views its awareness of operating in this context as a discipline upon its reasoning that does not alter the Tribunal's decision, but rather guides and aids the Tribunal in simultaneously supporting the system of which it is only a temporary part." See also *Saipem S.p.A v. The People's Republic of Bangladesh,* ICSID Case N0. ARB/05/07.

[57] See, for instance, the Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment, 4 November 2005 (entry into force 1 November 2006), Annex E; the Free Trade Agreement between the Government of the Republic of Chile and the Government of the United States of America, 6 June 2003 (entry into force 1 January 2004), Art. 10.19 (10) and Annex 10-H; the Dominican Republic-Central America Free Trade Agreement, 5 August 2004; the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), at article 8.28.

[58] See also ICSID-Secretariat, Discussion Paper: Possible Improvements of the Framework for ICSID Arbitration (22 October 2004), available at https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents.

(e) System of preliminary rulings

46. Under this option, arbitral tribunals should be allowed to refer any question concerning the application and interpretation of a legal matter to a specific body.

(f) Setting up an international court system

47. Certain recent investment treaties have foreseen the creation of a court, set up as a permanent international institution.[59] The rationale is that by sitting permanently and deciding cases over time, judges would deliver consistent decisions.

[59] See for instance, the Canada-European Union Comprehensive Economic and Trade Agreement (CETA); the European Union-Viet Nam Free Trade Agreement.