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## Possible reform of investor-State dispute settlement (ISDS)

### Security for cost and frivolous claims

Note by the Secretariat

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## I. Introduction

1. During its thirty-fourth to thirty-seventh sessions, the Working Group undertook work on the possible reform of ISDS, based on the mandate given to it by the Commission at its fiftieth session, in 2017.<sup>1</sup> During those sessions, the Working Group discussed and identified concerns regarding ISDS and determined that reform was desirable in light of the identified concerns.
2. At its thirty-eighth session, the Working Group agreed on a project schedule on the reform options and began its consideration.<sup>2</sup> It was agreed that the thirty-ninth session would be allocated to consider, among other things, security for costs and means to address frivolous claims.
3. Accordingly, this note addresses the topics of security for costs and frivolous claims, where the lack of a framework was identified as a concern and one that deserved reforms. 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,<sup>3</sup> and does not seek to express a view on the possible reform options, which is a matter for the Working Group to consider.

## II. Security for costs

### A. General

4. During the deliberations, the difficulties often faced by successful respondent States in recovering costs of ISDS from claimant investors, coupled with the limited availability of security for costs, was identified as a concern ([A/CN.9/930/Rev.1](#), paras. 56 and 68). It was stated that ISDS tribunals seldom ordered security for costs and had done so in very exceptional circumstances, despite the fact that some arbitration rules provided for that possibility. As a result, respondent States had not been able to recover a substantial part or any of their costs in defending unsuccessful, frivolous or bad faith claims by investors ([A/CN.9/964](#), para. 129).
5. In general, security for costs addresses the risk that a party to a dispute does not comply with an adverse cost award and therefore assists in addressing the difficulties faced by States in recovering costs. When one of the parties requests security for costs, the tribunal determines whether to order such security based largely on whether and under what circumstances it is permitted under the applicable rules. An order for

<sup>1</sup> *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 263 and 264. The deliberations and decisions of the Working Group during the thirty-fourth to thirty-seventh sessions are set out respectively in documents [A/CN.9/930/Rev.1](#) and its addendum, [A/CN.9/935](#), [A/CN.9/964](#) and [A/CN.9/970](#).

<sup>2</sup> The deliberations and decisions of the Working Group at the thirty-eighth session are set out in document [A/CN.9/1004](#). Document [A/CN.9/WG.III/WP.166](#) provides an overview of the reform options.

<sup>3</sup> “Excessive Costs & Insufficient Recoverability of Cost Awards”, Academic Forum on ISDS, Working Group 1, 14 March 2019, available at [www.cids.ch/images/Documents/Academic-Forum/1\\_Costs\\_-\\_WG1.pdf](http://www.cids.ch/images/Documents/Academic-Forum/1_Costs_-_WG1.pdf); Jakob Ragnwaldh and Nils Eliasson, “Security for Costs in Investment Arbitration” in Kaj Hober and others (eds.), *Between East and West: Essays in Honour of Ulk Franke* (JurisNet 2010); Christoph H. Schreuer and others, *The ICSID Convention: A Commentary* (2nd ed., CUP 2009); Susan D. Franck, *Arbitration Costs – Myths and Realities in Investment Treaty Arbitration* (Oxford University Press 2019); Christine Sim, “Security for Costs in Investor-State Arbitration”, *Arbitration International*, vol. 33, issue 3, pp. 427–495; ICCA-Queen Mary Task Force, “Costs and Security for Costs” in the Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018, The ICCA Reports No. 4; Lars A. Markert, Security for Costs Applications in Investment Arbitrations Involving Insolvent Investors, *Contemporary Asia Arbitration Journal*, vol. 11, No. 2, pp. 217–249 (November 2018); B. Ted Howes, Allison M. Stowell, and William Choi, The Impact of Summary Disposition on International Arbitration: A Quantitative Analysis of the ICSID’s Rule 41(5) on Its Tenth Anniversary, *Dispute Resolution International*, vol. 13, No. 1 (May 2019).

security for costs obliges the party to provide security to cover the estimated cost that the other party will incur in defending itself against the claim. Depending on the tribunal's allocation of costs at the end of the proceedings, the security will be either returned to the party or collected by the other party.

6. The Working Group underlined that a balanced approach should be taken in addressing security for costs taking into account different interests at stake ([A/CN.9/964](#), para. 131). While it is often suggested that the availability of security for costs could deter frivolous claims, it is also suggested that the impact such a mechanism may have on the possibility for small and medium-sized enterprises to access ISDS needs to be considered. Furthermore, it was said that ordering of security for costs might not be appropriate, particularly if the impecuniosity of the investor was caused by a State measure.

7. Submissions received from States on reform options for the third phase of the mandate (the "Submissions") also indicate that a mechanism for tribunals to order security for costs (in some cases, requiring the order of security for costs) could protect States from the risk of the investor declaring bankruptcy upon the issuance of a cost award and could be an effective means to deter frivolous claims.<sup>4</sup> The Submissions have also addressed the ordering of security for cost in relation to the existence of third-party funding.<sup>5</sup>

## B. Existing mechanisms

8. Arbitration rules generally recognize the tribunal's power to order security for costs as a provisional measure and some arbitration rules have recently included explicit provisions on security for costs.<sup>6</sup>

9. Under the UNCITRAL Arbitration Rules, it is generally understood that tribunals have the power to grant security for costs. Article 26(2) of the UNCITRAL Arbitration Rules provides for the tribunal's power to grant interim measures, which may include an order for the party to provide a means of preserving assets out of which a subsequent award may be satisfied. The conditions for granting interim measures are set forth in article 26(3).

10. Article 47 of the ICSID Convention provides that the tribunal may, if it considers that the circumstances so require, recommend any provisional measures necessary to preserve the parties' rights.<sup>7</sup> This provides a basis for a respondent State to request that the claimant provide a financial guarantee as a condition for the proceedings to continue.<sup>8</sup> Notably, the tribunal in *RSM v. Saint Lucia* ordered security for cost particularly based on a consistent procedural history of non-payment of requested advances, doubts about whether the third-party funder would assume responsibility for honouring a cost award and the resulting material risk of the claimant's

<sup>4</sup> See [A/CN.9/WG.III/WP.161](#) – Submission from the Government of Morocco, paras. 31–32; [A/CN.9/WG.III/WP.174](#) – Submission from the Government of Turkey, p.3; and [A/CN.9/WG.III/WP.176](#) – Submission from the Government of South Africa, para. 62.

<sup>5</sup> See [A/CN.9/WG.III/WP.161](#) – Submission from the Government of Morocco, para. 33; [A/CN.9/WG.III/WP.176](#) – Submission from the Government of South Africa, p. 10; [A/CN.9/WG.III/WP.179](#) – Submission from the Government of the Republic of Korea, p. 5; [A/CN.9/WG.III/WP.182](#) – Submission from the Governments of Chile, Israel, Japan, Mexico and Peru, p. 6.

<sup>6</sup> HKIAC Rules, Article 24; SIAC Investment Arbitration Rules, Article 24(1)(k); 2017 SCC Arbitration Rules, Article 38; VIAC Rules, Article 33(6) and (7).

<sup>7</sup> See also Rule 39 of the ICSID Arbitration Rules on Provisional Measures.

<sup>8</sup> Schreuer, *supra note* 3, Article 47, para. 90 f.

unwillingness or inability to reimburse the respondent for its incurred costs.<sup>9</sup> The suggestion to include a separate provision on security for costs in the ICSID Arbitration Rules has been the subject of discussion during the ICSID Rules and Regulations Amendment process.<sup>10</sup>

11. A recent development is that a number of investment agreements expressly provide for the right of the respondent State to request security for costs.<sup>11</sup> They provide for the power of the tribunal to order security for costs if there are reasonable grounds to believe that the claimant would not be able to comply with a cost award.<sup>12</sup> These agreements further provide that the tribunal may order the suspension or termination of the proceedings if security for costs is not posted as ordered.

12. While there have been many instances where States have requested security for costs, there have been few decisions in which tribunals have granted security for costs.<sup>13</sup> Arbitral tribunals have generally required evidence of “exceptional circumstances”, further analysing the urgency and the necessity of such orders.<sup>14</sup> Accordingly, tribunals have rejected such applications for security for costs based on different arguments, in particular, impropriety of prejudging case on the merits, failure to establish concrete risk of non-payment by claimant, insufficiency to prove that claimant is a vehicle or has no assets, risk of limitation of access to justice for claimants and no threat by rejection of security for costs to integrity of proceedings (see para. 15 below).<sup>15</sup>

### C. Issues for consideration

13. The Working Group may wish to consider whether work should aim at providing a more predictable framework for security for costs and in that context, may wish to

<sup>9</sup> RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security for Costs (13 August 2014) paras. 81 and 83. This is the first publicly reported case in which a security for cost was granted by an ICSID tribunal. See Romesh Weeramantry, Montse Ferrer, “RSM Production Corporation v Saint Lucia: Security for Costs – A New Frontier?”, *ICSID Review – Foreign Investment Law Journal*, vol. 30, issue 1, Winter 2015, p. 32, available under <https://doi.org/10.1093/icsidreview/siu034>.

<sup>10</sup> Proposals for Amendment of the ICSID Rules – Working Paper # 3, volume 1, ICSID Secretariat, August 2, 2018, Rule 52, available under [https://icsid.worldbank.org/en/Documents/WP\\_3\\_VOLUME\\_1\\_ENGLISH.pdf](https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf).

<sup>11</sup> Academic Forum Paper, *supra* note 3, p. 32.

<sup>12</sup> European Union-Viet Nam Investment Protection Agreement (signed on 30 June 2019), Article 3.48, available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>; Modernisation of the European Union-Mexico Global Agreement – agreement in principle on trade (2018), Article 22, available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1833>; Indonesia-Australia Comprehensive Economic Partnership Agreement, Article 14.28, available at <https://dfat.gov.au/trade/agreements/not-yet-in-force/iacepa/iacepa-text/Pages/default.aspx>; Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (signed on 19 January 2016), Article 21 (6), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3601/download>; Agreement between the Government of the Republic of India and the Government of the Republic of Belarus for the Promotion and Protection of Investments, Article 28 available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5724/download>; Czech Republic Model Agreement for the Promotion and Reciprocal Protection of Investments (2016), Article 8 (13), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5407/download>.

<sup>13</sup> Manuel García Armas et al. v. Bolivarian Republic of Venezuela, PCA Case No. 2016-08, Procedural Order No. 9, 20 June 2018.

<sup>14</sup> Academic Forum Paper, *supra* note 3, p. 34.

<sup>15</sup> ICCA-Queen Mary Task Force, *supra* note 3, p. 175.

consider the conditions to be satisfied in order for the parties to request, and for the tribunal to order, security for costs. Such conditions could include, for example:

- Expectation that a party would not comply with an adverse cost award;<sup>16</sup>
- Parties inability to pay (impecuniosity or insolvency);<sup>17</sup>
- Claims raised by shell companies or equivalent;
- The existence of third-party funding and the lack of commitment of the third-party funder to take responsibility of cost awards;<sup>18</sup>
- Other relevant circumstances, such as a failure to pay advance payments, failure to comply with cost awards in other prior proceedings and parties' disposal of assets.<sup>19</sup>

14. With regard to whether third-party funding should have an impact on the ordering of security for costs, the Working Group had a preliminary discussion at the thirty-eighth session. It was felt that while the existence of third-party funding would be an element that the tribunal could take into account, its mere existence would not be sufficient to justify ordering security for costs. Others expressed the view that the existence of third-party funding could be sufficient to justify ordering security for costs. It was noted that the existence of third-party funding did not necessarily mean that the claimant was impecunious as third-party funding could be used to manage costs and risk associated with ISDS. Some policy and practical considerations on whether and under what circumstances ISDS tribunals should order security for costs were discussed in that context ([A/CN.9/1004](#), para. 94).

15. In addition to the above, the Working Group may wish to consider:

- Whether the request for security for costs should be equally available to claimants;
- Whether the tribunal could order security for costs without any request from any of the parties;
- Whether the tribunal could allow non-disputing party submissions subject to the condition that the non-disputing party provides security for the additional legal costs reasonably incurred by the parties in responding to the submission;<sup>20</sup>
- Whether the ordering of security for costs should be mandatory in certain instances, for example, in cases involving third-party funding;<sup>21</sup>
- The appropriate amount to be ordered as security (for example, a reasonable proportion of the legal costs incurred by the parties in connection with the proceeding, the costs of the tribunal, and administrative cost of any institution<sup>22</sup>) as well as other elements to be taken into account in calculating the amount of security (for example, the amount of claim<sup>23</sup>);
- The modalities for complying with an order for security for costs, for example, a deposit in escrow account, bank guarantees and insurance schemes;<sup>24</sup>

<sup>16</sup> Existing provisions in investment agreements require “reasonable grounds to believe”, “a reason to believe” or “reasonable doubt”. The current draft of the revised ICSID Arbitration Rules leaves the decision to the discretion of the tribunal and merely suggest to “consider the party’s ability to comply with an adverse decision on costs and any other relevant circumstances”.

<sup>17</sup> Unless the respondent State’s measure was the cause of the claimant’s impecuniosity or insolvency.

<sup>18</sup> Markert, *supra* note 3, p. 217; ICCA-Queen Mary Task Force, *supra* note 3, p. 221 f.

<sup>19</sup> See *RSM v. Saint Lucia*, *supra* note 9.

<sup>20</sup> See *Eiser Infrastructure Limited and Energia Solar S.À R.L. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, paras. 67–68.

<sup>21</sup> [A/CN.9/WG.III/WP.176](#) – Submission from the Government of South Africa, para. 62.

<sup>22</sup> [A/CN.9/WG.III/WP.174](#) – Submission from the Government of Turkey, p. 3.

<sup>23</sup> [A/CN.9/WG.III/WP.176](#) – Submission from the Government of South Africa, para. 62.

<sup>24</sup> Academic Forum Paper, *supra* note 3, p. 30.

- The consequences of non-compliance with an order for security for costs (for example, suspension or termination of the proceedings); and
- Other procedural aspects (for example, time frames for requesting and ordering security for costs and the possible modification or revocation of an order for security for costs).

16. The broader availability of security for costs could balance the positions of the parties in ISDS proceedings and may facilitate the enforcement of cost awards by respondent States. However, the Working Group may wish to note that the difficulties faced by States in recovery of costs could be tackled through other means, for example, ordering the claimant to pay all advances on costs.<sup>25</sup> The Working Group may also wish to ensure that security for costs do not function to unduly limit investors access to ISDS as well as possible participation by third parties.

17. A framework for security for costs in ISDS should also be considered in conjunction with the other reform options currently being discussed by the Working Group to address concerns regarding frivolous claims (see section III below) and third-party funding as well as its possible function in an appeal mechanism.

*Possible form of work*

18. The Working Group may wish to consider the various ways of implementing reforms related to security for costs in ISDS. For example, a clause on security for costs could be developed expressly providing that the tribunal has the power to order security for costs, which could be included in investment treaties, arbitration rules or a multilateral instrument on procedure reform. In addition, guidance could be provided to the arbitral tribunal on their power to order security for costs under the existing mechanisms as well as any newly developed framework on security for costs.

### III. Means to address frivolous claims

#### A. General

19. At its thirty-fourth session, it was stated that the excess cost and duration of ISDS could be partially attributed to the absence of a mechanism to address frivolous or unmeritorious cases in ISDS (A/CN.9/930/Rev.1, para. 46). Frivolous claims have also been said to harm the reputation of host States and to generate regulatory chill.

20. At its thirty-sixth session, the Working Group considered the lack of a mechanism to address frivolous claims in the broader context of whether the concerns expressed with regard to the cost and duration of ISDS proceedings warranted some type of reform (A/CN.9/964, paras. 110–123). The Working Group discussed a wide range of possible mechanisms that were being introduced by States and institutions to improve the efficiency of ISDS, including the early dismissal of frivolous or unmeritorious claims and other measures to address such claims and other applications (A/CN.9/964, para. 118).

21. The Submissions touch upon such mechanisms. They generally refer to mechanisms to dismiss frivolous claims at an early stage of the proceedings<sup>26</sup> and an expedited process to address unfounded or frivolous claims.<sup>27</sup>

<sup>25</sup> See UNCITRAL Arbitration Rules, Article 43(1); ICSID Arbitration Rule 28 (1)(a) and ICSID Administrative and Financial Regulation 14; 2017 SCC Arbitration Rules, Article 51(3); ICC Arbitration Rules, Article 37(2).

<sup>26</sup> A/CN.9/WG.III/WP.156 – Submission from the Government of Indonesia, para. 9; A/CN.9/WG.III/WP.178 – Submissions from the Government of Costa Rica, p. 5; A/CN.9/WG.III/WP.174 – Submission from the Government of Turkey, p. 3.

<sup>27</sup> A/CN.9/WG.III/WP.161 – Submission from the Government of Morocco, para. 9; A/CN.9/WG.III/WP.174 – Submission from the Government of Turkey, p. 3; A/CN.9/WG.III/WP.176 – Submission from the Government of South Africa, para. 71.

## B. Existing mechanisms

22. A number of institutional arbitration rules<sup>28</sup> as well as some recent investment treaties<sup>29</sup> provide procedures to address unmeritorious claims.

23. A mechanism that has been most invoked in ISDS is the ICSID Arbitration Rule 41(5), which provides an expedited procedure to dispose of unmeritorious claims at the preliminary stage of a proceeding.<sup>30</sup> The rationale is to allow claims that manifestly lack legal merit to be dismissed early in the process before they unnecessarily consume the parties' resources. A party raising an objection (to jurisdiction or the merits) should do so no later than 30 days after the constitution of the tribunal and, in any event, before the tribunal holds its first session. It must state the basis for its objection "as precisely as possible." After the objection is raised, the tribunal fixes a schedule for one or two rounds of written observations by the parties, usually followed by oral submissions made at the first session. The tribunal must notify the parties of its decision on the objection at its first session or promptly thereafter. A decision upholding the objection dismisses the claim that manifestly lacks legal merit. For any remaining claims, a decision rejecting the objection is without prejudice to the right of a party to file an objection pursuant to ICSID Arbitration Rule 41(1) or to object to the merits of the claim in the proceeding. If the entire case is dismissed because of a manifest lack of legal merit, the tribunal renders an award which disposes of the case. The Working Group may wish to note that this provision has been the subject of discussion during the ICSID Rules and Regulations Amendment process.<sup>31</sup>

24. Since the adoption of ICSID Arbitration Rule 41(5) in 2006, the procedure has been invoked in 33 cases.<sup>32</sup> Tribunals have upheld the objection in full in 5 cases,<sup>33</sup> partially in 3 cases<sup>34</sup> and rejected the objection in 12 cases. It can be said that tribunals have applied a rather high threshold for satisfying the prima facie requirement of a manifest lack of merit.

25. The average time for an ICSID Arbitration Rule 41(5) proceeding was less than 3 ½ months from the filing of the objection to a decision by the tribunal. Despite the majority of the objections being denied and the additional 3 ½ months to the arbitral process, the relevant cases were resolved approximately a year faster than the average of all other ICSID arbitrations.<sup>35</sup>

<sup>28</sup> For example, CIETAC Investment Arbitration Rules, Article 26; SIAC Investment Arbitration Rules, Rule 26; 2017 SCC Arbitration Rules, Article 39; HKIAC Administered Arbitration Rules, Article 43.

<sup>29</sup> For example, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Article 9.23(4)–(6) (Conduct of the Arbitration) and Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA), Articles 8.32 (Claims manifestly without legal merit) and 8.33 (Claims unfounded as a matter of law).

<sup>30</sup> This paragraph is based on information available on the ICSID webpage "Manifest Lack of Legal Merit – ICSID Convention Arbitration" at <https://icsid.worldbank.org/en/Pages/process/Manifest-Lack-of-Legal-Merit.aspx>.

<sup>31</sup> Proposals for Amendment of the ICSID Rules – Working Paper # 3, volume 1, ICSID Secretariat, August 2, 2018, Rule 41, available at [https://icsid.worldbank.org/en/Documents/WP\\_3\\_VOLUME\\_1\\_ENGLISH.pdf](https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf).

<sup>32</sup> The list of cases is available at <https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Manifest-Lack-of-Legal-Merit.aspx>.

<sup>33</sup> Global Trading Resource Corp. and Globex International, Inc. v. Ukraine (ICSID Case No. ARB/09/11), RSM Production Corporation and others v. Grenada (ICSID Case No. ARB/10/6), Ansong Housing Co., Ltd. v. People's Republic of China (ICSID Case No. ARB/14/25), Edenred SA v. Hungary (ICSID Case No. ARB/13/21) – Revision and Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait (ICSID Case No. ARB/18/2).

<sup>34</sup> Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/07/25); Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary (ICSID Case No. ARB/12/3); Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary (ICSID Case No. ARB/12/2).

<sup>35</sup> Howes et al, *supra* note 3, p. 16.

26. The Working Group may wish to note that Working Group II (Dispute Settlement), which is preparing draft provisions on expedited arbitration primarily in the international commercial arbitration context, is also considering provisions on early dismissal and preliminary determination ([A/CN.9/WG.II/WP.212](#), paras. 110–113).

### C. Issues for consideration

27. The Working Group may wish to consider whether reforms should aim at providing a more predictable framework to address frivolous claims, for example, by drafting a clause providing procedures/mechanisms to address such claims.

28. In developing such a framework, the Working Group may wish to consider the following:

- The type(s) of claims to be addressed, including those that have the potential to increase duration and costs of the ISDS proceedings, for example, claims by shell companies, inflated and unsubstantiated claims ([A/CN.9/930/Add.1/Rev.1](#), para. 2) or claims based on abuse of process (for example, treaty shopping) and the terminology to be used, for example, “frivolous” claims or those “manifestly lacking legal merit”; and
- Whether the framework would apply to claims that relate to the merits/substance and/or the jurisdiction of the tribunal.

29. The Working Group may wish to further consider:

- Possible actions to be taken by the tribunal when it determines that a claim was frivolous, for example, early dismissal or cost allocation;
- So as to ensure that the procedure for addressing frivolous claims does not delay the overall ISDS proceedings and is not abused by the parties, introducing means to expedite the procedure, for example, by introducing strict timelines for parties to make any objection and for the tribunal to make the determination; and
- The rules on allocation of costs arising from an early dismissal procedure, for both when a claim was found to be frivolous and when an objection was found to be unmeritorious (the latter would be a disincentive to assert frivolous objections).<sup>36</sup>

30. The Working Group may wish to consider the framework for addressing frivolous claims in conjunction with the other reform options being discussed by the Working Group, for example, security for costs as a deterrent to frivolous claims (see section II above), regulation of third-party funding which may be a reason for increase in the number of frivolous claims ([A/CN.9/1004](#), para. 82) as well as other means to address multiple proceedings (see document [A/CN.9/WG.III/WP.193](#)).

#### *Possible form of work*

31. The Working Group may wish to consider the various means of implementing reforms to provide a framework for addressing frivolous claims in ISDS. For example, relevant provisions could be developed, which could be included in investment treaties, arbitration rules or a multilateral instrument on procedure reform. In addition, guidance could be provided to arbitral tribunals on the relevant framework and on how to address frivolous claims and objections thereto in a consistent manner.

<sup>36</sup> The MOL Hungarian Oil and Gas Company tribunal, for example, reasoned, “[g]iven that one of the main reasons behind the introduction of Rule 41(5) was to spare respondent States the wasted trouble and expense of having to defend wholly unmeritorious claims, it must follow per contra that a Respondent invoking the procedure under the Rules takes on itself the risk of adverse cost consequences should its application fail”. *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*, ICSID Case No. ARB/13/32, [Decision on Respondent’s Application Under ICSID Arbitration Rule 41\(5\)](#), para. 54.