
**This is an initial draft of some procedural rules for discussion
during the intersessional meeting of Working Group III
scheduled to take place on 2-3 September 2021
hosted by the Government of the Republic of Korea.**

Possible reform of investor-State dispute settlement (ISDS)

Procedural rules with regard to early dismissal, abuse of process, security for costs, allocation of costs, and counterclaims

Contents

I. Early dismissal and abuse of process	2
A. Note by the secretariat on means to address frivolous claims (A/CN.9/WG.III/WP.192, paras. 19-31) .	2
B. Discussions at the Working Group (October 2020, A/CN.9/1044, paras. 78-89).....	5
C. Provisions on early dismissal and preliminary determination	6
D. Provisions on abuse of process	17
II. Security for costs and allocation of costs	19
A. Note by the secretariat on security for costs (A/CN.9/WG.III/WP.192, paras. 4-18)	19
B. Discussions at the Working Group (October 2020, A/CN.9/1044, paras. 64-77).....	23
C. Provisions on security for costs	25
D. Provisions on the allocation of costs.....	30
III. Counterclaims	32
A. Note by the secretariat on counterclaims (A/CN.9/WG.III/WP.193, paras. 32-45)	32
B. Discussions at the Working Group (October 2020, A/CN.9/1044, paras. 57-63).....	35
C. Provisions on counterclaims	36

I. Early dismissal and abuse of process

A. Note by the secretariat on means to address frivolous claims (A/CN.9/WG.III/WP.192, paras. 19-31)

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 proceedings¹ and an expedited process to address unfounded or frivolous claims.²

Existing mechanisms

22. A number of institutional arbitration rules³ as well as some recent investment treaties⁴ 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.⁵ 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

¹ 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.

² 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.

³ 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.

⁴ 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).

⁵ 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>.

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.⁶

24. Since the adoption of ICSID Arbitration Rule 41(5) in 2006, the procedure has been invoked in 33 cases.⁷ Tribunals have upheld the objection in full in 5 cases,⁸ partially in 3 cases⁹ 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.¹⁰

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).

⁶ 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.

⁷ The list of cases is available at <https://icsid.worldbank.org/en/Pages/Process/Decisions-on-Manifest-Lack-of-Legal-Merit.aspx>.

⁸ 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).

⁹ 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).

¹⁰ Howes et al, *supra note* 3, p. 16.

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).¹¹

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

¹¹ 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.

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.

B. Discussions at the Working Group (October 2020, A/CN.9/1044, paras. 78-89)

78. There was general support for developing a more predictable framework to address frivolous claims, which would make it possible to dismiss such claims at an early stage of the proceedings and provide an expedited process. It was noted that such a framework could address, among others, concerns about the cost and duration of ISDS as well as regulatory chill.

79. While it was noted that a number of recently concluded investment treaties included provisions to address frivolous claims, it was also mentioned that the majority of claims were currently being brought on the basis of treaties that did not contain such provisions.

80. With regard to the types of claims to be addressed in such a framework, reference was made to claims that were manifestly lacking legal merit, unsubstantiated or unmeritorious claims, unfounded claims as a matter of law, and claims resulting from treaty shopping (including through corporate restructuring). It was mentioned that the framework should provide clear language to guide ISDS tribunals in identifying frivolous claims. It was further suggested that a stringent threshold would be more appropriate in light of due process concerns of limiting the investor's access to justice. It was also generally felt that the framework should apply to claims that related to the merits as well as to the jurisdiction of the tribunal.

81. With regard to the actions to be taken by an ISDS tribunal when it determined that a claim was frivolous, a number of examples were provided including ordering of security for costs, early dismissal of claims, preliminary determination as well as cost allocation. It was generally felt that the actions to be taken by the ISDS tribunal would differ depending on the type of claim and that flexibility should be provided to the tribunal to take the appropriate action.

82. Attention was drawn to the risk of abuse or misuse of a framework to address frivolous claims by respondents, which could lead to increased costs and delays in the proceedings. To address such risk, it was suggested that the framework could address the allocation of costs and provide for strict time frames for the respondent to make any objection and for the tribunal to make the determination. It was suggested that there could be a two-stage determination process, with the first determination being whether to hear the objection.

83. It was noted that the issue of frivolous claims could be considered together with other reform options, mainly security for costs and third-party funding. It was also mentioned that the reform option of establishing a multilateral standing body could include a mechanism to deter frivolous claims.

Preparatory work on the topic of frivolous claim

Way Forward

84. The Secretariat was requested to work with relevant organizations to compile information about provisions in existing investment agreements and arbitration rules (such as article 41(5) of the ICSID Arbitration Rules) as well as relevant jurisprudence to capture the wide range of approaches to address frivolous claims at an early stage of the proceedings. Delegations with relevant treaty practice were invited to provide information to the Secretariat.

85. Based on that work, the Secretariat was requested to prepare options for a model clause, which would create a clear framework for the early dismissal of frivolous claims, while giving flexibility to the ISDS tribunal to handle frivolous, vexatious and other types of claims. The options should also include, as an alternative to that single broad-based clause, an approach which would offer multiple different clauses for the early dismissal of a variety of claims which might offer slightly different mechanisms depending on the reason for the dismissal being sought.

86. It was further requested that the framework provide a prompt determination of any request for dismissal, and that the model clause should provide for the termination of the proceedings when a claim had been abandoned and the request for dismissal had not been challenged by the claimant.

87. The clause should also ensure due process for the claimant as well. It was requested that the clause be prepared to include options for allocating costs related to frivolous claims, bearing in mind that access to justice should not be unduly impinged. It was also noted that balance should be sought between the efficiency that would be achieved through early dismissal and the possible obstruction that could result from the misuse of such mechanism. Therefore, the clause to be prepared should provide options that would address instances where requests for early dismissals themselves were frivolous, for example, through allocation of costs. However, it was noted that given the high threshold for early dismissal, an unsuccessful request should not be deemed frivolous.

88. In addition, it was requested that the model clause explore the role that a lack of clarity in initial pleadings might have in essentially requiring States to make objections they would not otherwise make if the initial pleadings were clearer and more information was provided.

89. Lastly, the work should illustrate how the model clause could be implemented, possibly in arbitration rules, by States in investment treaties or in a multilateral instrument on procedural reform and in a multilateral standing mechanism.

C. Provisions on early dismissal and preliminary determination

Draft provision

<i>1. A party may raise a plea that:</i>
--

-
- (a) *A claim or defence is manifestly without legal merit;*
- (b) *Issues of fact or law supporting a claim or defence are manifestly without merit;*
- (c) *Certain evidence is not admissible;*
- (d) *No award could be rendered in favour of the other party even if issues of fact or law supporting a claim or defence are assumed to be correct;*
- (e) *...*
2. *A party shall raise the plea as promptly as possible and no later than 30 days after the submission of the relevant claim/defence, issues of law or fact or evidence. The arbitral tribunal may admit a later plea if it considers the delay justified.*
3. *The party raising the plea shall specify as precisely as possible the facts and the legal basis for the plea and demonstrate that a ruling on the plea will expedite the proceedings considering all circumstances of the case.*
4. *After inviting the parties to express their views, the arbitral tribunal shall determine within [15] days from the date of the plea whether it will rule on the plea as a preliminary question.*
5. *Within [30] days from the date of the plea, the arbitral tribunal shall rule on the plea. The period of time may be extended by the arbitral tribunal in exceptional circumstances.*
6. *A ruling by the arbitral tribunal on a plea shall be without prejudice to the right of a party to object, in the course of the proceeding, that a claim or defence lacks legal merit.*

Agreement between the United States of America, the United Mexican States, and Canada (USMCA)

Article 14.D.7: Conduct of the Arbitration

[...]

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the competence of the tribunal, including an objection to the tribunal's jurisdiction, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 14.D.13 (Awards) or that a claim is manifestly without legal merit.

(a) An objection under this paragraph shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment.

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph that a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 14.D.13 (Awards), the tribunal shall assume to be true the claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in the relevant article of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence, including an objection to jurisdiction, or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 or any objection that the dispute is not within the tribunal's competence, including an objection that the dispute is not within the tribunal's jurisdiction. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection, stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

Article 9.23: Conduct of the Arbitration

[...]

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the competence of the tribunal, including an objection to the tribunal's jurisdiction, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 9.29 (Awards) or that a claim is manifestly without legal merit.

(a) An objection under this paragraph shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment. (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

[...]

Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA)

Article 8.32: Claims manifestly without legal merit

1. The respondent may, no later than 30 days after the constitution of the division of the Tribunal, and in any event before its first session, file an objection that a claim is manifestly without legal merit.

[...]

Article 8.33: Claims unfounded as a matter of law

1. Without prejudice to a Tribunal's authority to address other objections as a preliminary question or to a respondent's right to raise any such objections at an appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted pursuant to Article 8.23 is not a claim for which an award in favour of the claimant may be made under this Section, even if the facts alleged were assumed to be true.

[...]

Indonesia–Australia Comprehensive Economic Partnership Agreement

Article 14.21: Exclusion of Claims

1. Without prejudice to the scope of any applicable exceptions, non-conforming measures, principles of international law or the disputing Party's ability to rely upon such exceptions, non-conforming measures or principles of international law during the proceedings, no claim may be brought under this Section:

[...]

(d) if the claim is frivolous or manifestly without merit.

2. If the disputing Party considers that a claim brought under this Section is covered by paragraph 1, it may submit an objection on that basis as a preliminary question in accordance with Article 14.30, without prejudice to its ability to raise such an objection at another stage in the proceedings.

Article 14.30: Conduct of the Arbitration

1. Where issues relating to jurisdiction or admissibility are raised as preliminary objections, a tribunal shall decide the matter before proceeding to the merits.

2. A disputing Party may, no later than 60 days after the constitution of the tribunal, file as a preliminary objection that a claim is excluded under Article 14.20. A disputing Party may also file an objection that a claim is otherwise outside of the jurisdiction or competence of the tribunal. The disputing Party shall specify as precisely as possible the basis for the objection. This is without prejudice to a disputing Party's ability to raise such an objection at another stage of the proceedings.

3. The tribunal shall address any such objection as a preliminary question apart from the merits of the claim. The disputing parties shall be given a reasonable

opportunity to present their views and observations to the tribunal. If the tribunal decides that the claim is excluded under Article 14.20, or is otherwise not within the jurisdiction or competence of the tribunal, it shall render an award to that effect.

4. In the event that the disputing Party so requests within 60 days after the tribunal is constituted, the tribunal shall decide on an expedited basis any preliminary objection raised under this Article. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection, stating the grounds therefore, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

Colombia-UK BIT

ARTICLE IX Settlement of Disputes between one Contracting Party and an Investor of the other Contracting Party

[...]

12. Before ruling on the merits, the tribunal shall, if it deems it to be necessary and appropriate in the circumstances, rule on the preliminary questions of competence and admissibility.

Dominican Republic-Central America FTA

Article 10.20: Conduct of the Arbitration

[...]

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18

of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

Slovakia – Iran BIT

ARTICLE 20 Claims manifestly without legal merits and claims unfounded as matter of law

1. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim is not amongst the claims for which an award might be made under this Agreement.

a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor. c) In deciding an objection under this paragraph, the tribunal shall assume the alleged facts to be true and may also consider any relevant facts not in dispute.

d) The respondent does not waive any objection as to jurisdiction or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 2.

e) The tribunal shall dismiss the claimant's claim upon an objection under this paragraph submitted by the respondent particularly, but not exclusively, if

i. the claimant has challenged in its claim a measure of the respondent which has not yet been adopted;

ii. the claimant has challenged the legislative procedure of a measure of the respondent;

iii. the claim of the claimant relating to the measure underlying the claim under this Agreement has been already resolved via other legal remedies; or

iv. the claimant has failed to fulfill the condition under Article 17, paragraph 1, letters (c) and (d) of this Agreement.

2. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 1 and any objection that the dispute is not within the tribunal's competence or that a claim is manifestly without legal merits. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds thereof, no later than 180 days after the date of the request. However, if the Disputing Party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

Belarus-India BIT

Article 21 Dismissal of Frivolous Claims

21.1 Without prejudice to the Tribunal's authority to address other objections, a Tribunal shall address and decide as a preliminary question any objection by the Defending Party that a claim submitted by the investor is: (a) not within the scope of the Tribunal's jurisdiction, or (b) manifestly without legal merit or unfounded as a matter of law.

21.2 Such objection shall be submitted to the Tribunal as soon as possible after the Tribunal is constituted, and in no event later than the date the Tribunal fixes for the Defending Party to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the Tribunal fixes for the Defending Party to submit its response to the amendment).

International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings (Arbitration Rules)

Rule 41 Preliminary Objections

(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.

(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

(3) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

(4) The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (1) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

(6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.

Proposed rules 41 and 43 of ICSID Arbitration Rules (Working Paper #5 - June 2021)

Rule 41 Manifest Lack of Legal Merit

(1) A party may object that a claim is manifestly without legal merit. The objection may relate to the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal. (2) The following procedure shall apply:

(a) a party shall file a written submission no later than 45 days after the constitution of the Tribunal;

(b) the written submission shall specify the grounds on which the objection is based and contain a statement of the relevant facts, law and arguments;

(c) the Tribunal shall fix time limits for submissions on the objection;

(d) if a party files the objection before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the objection, so that the Tribunal may consider the objection promptly upon its constitution; and

(e) the Tribunal shall render its decision or Award on the objection within 60 days after the later of the constitution of the Tribunal or the last submission on the objection.

(3) If the Tribunal decides that all claims are manifestly without legal merit, it shall render an Award to that effect. Otherwise, the Tribunal shall issue a

decision on the objection and fix any time limit necessary for the further conduct of the proceeding.

(4) A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 43 or to argue subsequently in the proceeding that a claim is without legal merit.

Rule 43 Preliminary Objections

(1) A party may file a preliminary objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or for other reasons is not within the competence of the Tribunal (“preliminary objection”).

(2) A party shall notify the Tribunal and the other party of its intent to file a preliminary objection as soon as possible.

(3) The Tribunal may at any time on its own initiative consider whether a dispute or an ancillary claim is within the jurisdiction of the Centre or within its own competence.

(4) The Tribunal may address a preliminary objection in a separate phase of the proceeding or join the objection to the merits. It may do so upon request of a party pursuant to Rule 44 or at any time on its own initiative, in accordance with the procedure in Rule 44(2)-(4).

CIETAC Investment Arbitration Rules 2017

Article 26 Early Dismissal of Claim or Counterclaim

1. A party may apply to the arbitral tribunal for the early dismissal of a claim or counterclaim in whole or in part on the basis that such a claim or a counterclaim is manifestly without legal merit, or is manifestly outside the jurisdiction of the arbitral tribunal.

2. An application for the early dismissal of a claim or counterclaim shall be in writing and shall state the facts and legal basis supporting the application.

3. The party shall apply for the early dismissal of a claim or counterclaim as early as possible. Unless otherwise designated by the arbitral tribunal, an application for early dismissal on the basis that a claim or counterclaim is manifestly without legal merit shall be raised no later than the submission of the Statement of Defense or the Reply to the Counterclaim.

4. The arbitral tribunal shall have the power to decide on whether to accept and consider an application for the early dismissal of a claim or counterclaim after consulting the parties.

5. The arbitral tribunal shall make a decision on the application for early dismissal and state the reasons for such decision within ninety (90) days from the date when such an application is filed. At the request of the arbitral tribunal, the President of the Arbitration Court of CIETAC may extend the aforementioned time limit where he/she considers such extension justified and necessary.

6. Where the application for the early dismissal of a claim or counterclaim is granted, in whole or in part, the arbitral tribunal shall terminate the trial of the respective claim(s) or counterclaim(s). Such decision shall not prevent the

arbitral tribunal from continuing the proceedings of other claims or counterclaims, if any.

Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules 2017

Rule 26 Early Dismissal of Claims and Defences

26.1 A party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that:

- a. a claim or defence is manifestly without legal merit; or
- b. a claim or defence is manifestly outside the jurisdiction of the Tribunal; or
- c. a claim or defence is manifestly inadmissible.

26.2 An application for the early dismissal of a claim or defence under Rule 26.1 shall state in detail the facts and legal basis supporting the application. The party applying for early dismissal shall, at the same time as it files the application with the Tribunal, send a copy of the application to the other party, and shall notify the Tribunal that it has done so, specifying the mode of service employed and the date of service.

26.3 The Tribunal may, in its discretion, allow the application for the early dismissal of a claim or defence under Rule 26.1 to proceed. If the application is allowed to proceed, the Tribunal shall, after giving the parties the opportunity to be heard, decide whether to grant, in whole or in part, the application for early dismissal under Rule 26.1.

26.4 If the application is allowed to proceed, the Tribunal shall make an order or Award on the application, with reasons, which may be in summary form. The order or Award shall be made within 60 days of the date of filing of the application, unless, in exceptional circumstances, the Registrar extends the time.

Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules 2017

Article 39 Summary procedure

(1) A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration.

(2) A request for summary procedure may concern issues of jurisdiction, admissibility or the merits. It may include, for example, an assertion that:

- (i) an allegation of fact or law material to the outcome of the case is manifestly unsustainable;
- (ii) even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or
- (iii) any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.

(3) The request shall specify the grounds relied on and the form of summary procedure proposed, and demonstrate that such procedure is efficient and appropriate in all the circumstances of the case.

(4) After providing the other party an opportunity to submit comments, the Arbitral Tribunal shall issue an order either dismissing the request or fixing the summary procedure in the form it deems appropriate.

(5) In determining whether to grant a request for summary procedure, the Arbitral Tribunal shall have regard to all relevant circumstances, including the extent to which the summary procedure contributes to a more efficient and expeditious resolution of the dispute.

(6) If the request for summary procedure is granted, the Arbitral Tribunal shall seek to make its order or award on the issues under consideration in an efficient and expeditious manner having regard to the circumstances of the case, while giving each party an equal and reasonable opportunity to present its case pursuant to Article 23 (2).

Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018

Article 43 – Early Determination Procedure

43.1 The arbitral tribunal shall have the power, at the request of any party and after consulting with all other parties, to decide one or more points of law or fact by way of early determination procedure, on the basis that:

- (a) such points of law or fact are manifestly without merit; or
- (b) such points of law or fact are manifestly outside the arbitral tribunal's jurisdiction; or
- (c) even if such points of law or fact are submitted by another party and are assumed to be correct, no award could be rendered in favour of that party.

43.2 Any party making a request for early determination procedure shall communicate the request to the arbitral tribunal, HKIAC and all other parties.

43.3 Any request for early determination procedure shall be made as promptly as possible after the relevant points of law or fact are submitted, unless the arbitral tribunal directs otherwise.

43.4 The request for early determination procedure shall include the following:

- (a) a request for early determination of one or more points of law or fact and a description of such points;
- (b) a statement of the facts and legal arguments supporting the request;
- (c) a proposal of the form of early determination procedure to be adopted by the arbitral tribunal;
- (d) comments on how the proposed form referred to in Article 43.4(c) would achieve the objectives stated in Articles 13.1 and 13.5; and
- (e) confirmation that copies of the request and any supporting materials included with it have been or are being communicated simultaneously to all

other parties by one or more means of service to be identified in such confirmation.

43.5 After providing all other parties with an opportunity to submit comments on the request, the arbitral tribunal shall issue a decision either dismissing the request or allowing the request to proceed by fixing the early determination procedure in the form it considers appropriate. The arbitral tribunal shall make such decision within 30 days from the date of filing the request. This time limit may be extended by agreement of the parties or, in appropriate circumstances, by HKIAC.

43.6 If the request is allowed to proceed, the arbitral tribunal shall make its order or award, which may be in summary form, on the relevant points of law or fact. The arbitral tribunal shall make such order or award within 60 days from the date of its decision to proceed. This time limit may be extended by agreement of the parties or, in appropriate circumstances, by HKIAC.

43.7 Pending the determination of the request, the arbitral tribunal may decide whether and to what extent the arbitration shall proceed.

D. Provisions on abuse of process

Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA)

Article 8.18: Scope

[...]

3. For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.

Colombia-UK BIT

ARTICLE IX Settlement of Disputes between one Contracting Party and an Investor of the other Contracting Party

[...]

12. ... When deciding on any objection of the respondent, the tribunal shall rule on the legal costs and costs of arbitration incurred during the proceedings, considering whether or not the objection prevailed. The tribunal shall consider whether either the claim of the claimant or the objection of the respondent is frivolous or an abuse of process, and shall provide the disputing parties a reasonable opportunity for comments. In the event of a claim which is frivolous or an abuse of process, the tribunal shall award costs against the claimant.

Slovakia – Iran BIT

Article 14 General Provision

2. For avoidance of doubt, an investor may not submit a claim under this Agreement where the investor or the investment has violated the Host State

law. The Tribunal shall dismiss such claim, if such violation is sufficiently serious or material. For avoidance of any doubt, the following violations shall always be considered sufficiently serious or material to require dismissal of the claim:

- a) Fraud;
- b) Tax evasion;
- c) Corruption and bribery; or
- d) Investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.

Belarus-India BIT

Article 13 Scope

13.3 An investor may not submit a claim to arbitration under this Chapter if the investment has been made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanisms.

EU-Vietnam Investment Protection Agreement 2019

Article 3. 27

1. ...

2. For greater certainty, a claimant shall not submit a claim under this Section if its investment has been made through fraudulent misrepresentation, concealment, corruption or conduct amounting to an abuse of process

II. Security for costs and allocation of costs

A. Note by the secretariat on security for costs (A/CN.9/WG.III/WP.192, paras. 4-18)

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 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.¹² The Submissions have also addressed the ordering of security for cost in relation to the existence of third-party funding.¹³

¹² 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.

¹³ 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.

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.¹⁴

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.¹⁵ 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.¹⁶ 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 unwillingness or inability to reimburse the respondent for its incurred costs.¹⁷ 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.¹⁸

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.¹⁹ 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.²⁰ These agreements further provide that the

¹⁴ 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).

¹⁵ See also Rule 39 of the ICSID Arbitration Rules on Provisional Measures.

¹⁶ Schreuer, *supra note 3*, Article 47, para. 90 f.

¹⁷ 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>.

¹⁸ 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.

¹⁹ Academic Forum Paper, *supra note 3*, p. 32.

²⁰ 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>;

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.²¹ Arbitral tribunals have generally required evidence of “exceptional circumstances”, further analysing the urgency and the necessity of such orders.²² 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).²³

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 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;²⁴
- Parties inability to pay (impecuniosity or insolvency);²⁵
- 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;²⁶
- 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.²⁷

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

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>.

²¹ *Manuel Garcia Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, 20 June 2018.

²² Academic Forum Paper, *supra note 3*, p. 34.

²³ ICCA-Queen Mary Task Force, *supra note 3*, p. 175.

²⁴ 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”.

²⁵ Unless the respondent State’s measure was the cause of the claimant’s impecuniosity or insolvency.

²⁶ Markert, *supra note 3*, p. 217; ICCA-Queen Mary Task Force, *supra note 3*, p. 221 f.

²⁷ See *RSM v. Saint Lucia*, *supra note 9*.

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;²⁸
- Whether the ordering of security for costs should be mandatory in certain instances, for example, in cases involving third-party funding;²⁹
- 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 institution³⁰) as well as other elements to be taken into account in calculating the amount of security (for example, the amount of claim³¹);
- The modalities for complying with an order for security for costs, for example, a deposit in escrow account, bank guarantees and insurance schemes;³²
- 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.³³ The Working Group may also wish to ensure that security for costs

²⁸ 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.

²⁹ [A/CN.9/WG.III/WP.176](#) – Submission from the Government of South Africa, para. 62.

³⁰ [A/CN.9/WG.III/WP.174](#) – Submission from the Government of Turkey, p. 3.

³¹ [A/CN.9/WG.III/WP.176](#) – Submission from the Government of South Africa, para. 62.

³² Academic Forum Paper, *supra note 3*, p. 30.

³³ 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).

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.

B. Discussions at the Working Group (October 2020, A/CN.9/1044, paras. 64-77)

64. The Working Group reaffirmed the need to develop a more predictable and clearer framework for security for costs in ISDS. The difficulties often faced by successful respondent States in recovering costs of ISDS from claimant investors were reiterated. It was noted that security for costs could further protect States against a claimant's inability or unwillingness to pay, as well as contribute to discouraging frivolous claims. However, it was also underlined that a balanced approach would need to be taken as security for costs could limit access to justice for certain investors, particularly small and medium-sized enterprises. It was further mentioned that security for costs should not inadvertently delay the proceedings or increase costs and that due consideration should be given to preserving procedural fairness.

65. It was pointed out that arbitration rules generally recognized the arbitral tribunal's power to order security for costs as a provisional measure. However, it was noted that such provisions might not provide a sufficient framework. It was also noted that a number of recently concluded investment treaties expressly provided for the right of the respondent State to request security for costs. Moreover, it was mentioned that a security for costs mechanism had been considered during the ICSID Rules and Regulations amendment process.

66. Empirical evidence mentioned during the discussion showed that security for costs was ordered in very exceptional circumstances reflecting a high threshold of existing mechanisms and that ISDS tribunals were generally reluctant to grant such orders. As such, it was suggested that some guidance should be provided to ISDS tribunals on the ordering of security for costs under existing mechanisms.

67. A number of suggestions were made on the circumstances which would justify the ordering of security for costs. It was suggested that providing clarity on those circumstances and/or the factors to be considered by the tribunal would be essential. It was, however, said that a certain degree of

flexibility should be provided to tribunals when considering requests for security for costs, so that they would be able to take into account the overall circumstances of the case. For example, 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.

68. It was generally felt that indications that a party would not be willing to comply with an adverse cost award or would not be able to do so, such as impecuniosity or insolvency or past instances of non-compliance with cost awards, were key circumstances for ordering security for costs. It was said that claims channelled through shell companies with no funds of their own may be an indication of an investor's unwillingness and inability to pay costs.

69. It was generally felt that the existence of third-party funding or the lack of commitment of the third-party funder to take responsibility for cost awards were elements to be taken into account when ordering security for costs. While views were expressed that security for costs should always be ordered when there was third-party funding, it was felt that the mere existence of third-party funding would not justify an order for security for costs and should be considered with other elements mentioned above.

70. The Working Group also considered some procedural aspects relating to security for costs. It was generally felt that security for costs should be ordered upon the request by a party and not *ex officio* by the tribunal. While some support was expressed for allowing the claimant to request security for costs, it was generally felt that the main rationale for security for costs was to protect a successful respondent State. In response, it was mentioned that counterclaims by the respondent State could justify the claimant requesting security for costs. It was further mentioned that the likelihood of success of either the claim or defence should not be an element to be considered in ordering security for costs.

71. It was suggested that a party requesting security for costs should be required to justify its request. On the other hand, a suggestion was made that the burden of proof could be shifted to the other party. It was widely felt that third parties (including non-disputing treaty parties) should not be ordered to provide security for costs, as that could undermine their ability to participate in ISDS proceedings.

72. With regard to the consequences of non-compliance of a party with regard to an order for security for costs, it was mentioned that suspension of the proceeding followed by termination should be considered.

73. It was suggested that a formula or guideline could be prepared to guide ISDS tribunals on the appropriate amounts to be ordered as security. It was generally felt that the amount of the security to be ordered as well as the modalities for complying with the order, such as a deposit in escrow or a bank guarantee, could be left to the discretion of ISDS tribunals. It was suggested that guidance should be provided to ISDS tribunals on other procedural issues, for example, in case of multi-party proceedings.

Preparatory work on the topic of security for costs

74. After discussion, the Working Group requested the Secretariat to leverage the work done by ICSID in order to compile existing approaches to the issue of security for costs. Delegations with a relevant treaty experience on security

for costs were invited to provide information to the Secretariat. It was said that, building on that work and experience, a model clause should be prepared, which might be included in a potential multilateral instrument on ISDS reform, and which would (i) primarily focus on making security for costs available for respondents against claimants, (ii) clarify that security for costs would only be available on request of a party, and (iii) not apply against third parties. The model clause should cover the conditions and threshold and specify options for consequences in case of failure to comply.

75. Regarding the conditions, a number of options should be prepared, in terms of what those conditions might be, ranging (i) from general options which would give more discretion to ISDS tribunals (such as a reasonable apprehension of an unwillingness or lack of ability to pay), (ii) to options that list items for consideration more expressly but leave how to apply these to the ISDS tribunals together or in combination (such as impecuniosity, where the investor was a shell corporation, where there were multiple claimants, history of compliance with awards and the existence of third-party funding), and (iii) to options that would include very prescriptive lists mandating security for costs in defined circumstances (such as third-party funding). In crafting these conditions, it should be ensured that (i) a balance would be found between ensuring effective rights for States on the one hand and access to justice on the other, and (ii) the ISDS tribunal would not be required to prejudge the dispute.

76. Furthermore, the Working Group requested the Secretariat to prepare guidelines and best practices regarding how the security for costs provisions could be applied in a fair and consistent manner. It was indicated that such guidelines could not only instruct ISDS tribunals on the appropriate application of the conditions but could also address issues regarding how much security would generally be required, how it could be paid, and other such practical questions.

77. It was further noted that the impact of any framework on security for costs should be considered in conjunction with the other ISDS reform options currently being discussed by the Working Group.

C. Provisions on security for costs

Draft provision (based on the proposed rule 53 of ICSID Arbitration Rules (see Working Paper #5 - June 2021))

1. Upon request of a party, the arbitral tribunal may order any party asserting a claim or counterclaim to provide security for costs.
2. The following procedure shall apply:
 - (a) the request shall specify the circumstances that require security for costs;
 - (b) the arbitral tribunal shall fix time limits for written and oral submissions on the request, as required;
 - (c) if a party requests security for costs before the constitution of the arbitral tribunal, the arbitral tribunal shall consider the request promptly upon its constitution; and

-
- (d) the arbitral tribunal shall issue its decision on the request within 30 days after the later of the constitution of the arbitral tribunal or the submission on the request.
3. In determining whether to order a party to provide security for costs, the arbitral tribunal shall consider all relevant circumstances, including:
- (a) that party's ability to comply with an adverse decision on costs;
 - (b) that party's willingness to comply with an adverse decision on costs;
 - (c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; and
 - (d) the conduct of the parties.
4. The arbitral tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (3), including the existence of third-party funding.
5. The arbitral tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit for compliance with the order.
6. If a party fails to comply with an order to provide security for costs, the arbitral tribunal may suspend the proceeding. If the proceeding is suspended for more than 90 days, the arbitral tribunal may, after consulting with the parties, order the discontinuance of the proceeding.
7. A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.
8. The arbitral tribunal may at any time modify or revoke its order on security for costs, on its own initiative or upon a party's request.

UNCITRAL Arbitration Rules

Article 26 Interim measures

1. The arbitral tribunal may, at the request of a party, grant interim measures.
2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
 - (a) Maintain or restore the status quo pending determination of the dispute;
 - (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
 - (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
 - (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

EU-Vietnam Investment Protection Agreement 2019

Article 3.48 Security for Costs

1. For greater certainty, the Tribunal may, upon request, order the claimant to provide security for all or a part of the costs if there are reasonable grounds to

believe that the claimant risks not being able to honour a possible decision on costs issued against the claimant.

2. If the security for costs is not provided in full within 30 days of the Tribunal's order, or within any other time period set by the Tribunal, the Tribunal shall so inform the disputing parties. The Tribunal may order the suspension or termination of the proceedings.

Article 3.37

When applying Article 3.48 (Security for Costs), the Tribunal shall take into account whether there is third-party funding. When deciding on the cost of proceedings pursuant to paragraph 4 of Article 3.53 (Provisional Award), the Tribunal shall take into account whether the requirements provided for in paragraphs 1 and 2 of this Article have been respected.

Indonesia–Australia Comprehensive Economic Partnership Agreement

Article 14.28 Security for Costs

1. For greater certainty, on request of the disputing Party, the tribunal may order the disputing investor to provide security for all or a part of the costs if there are reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against it.

2. If the security for costs is not provided in full within 30 days after the tribunal's order or within any other time period set by the tribunal, the tribunal shall so inform the disputing parties and thereafter the tribunal may order the suspension or termination of the proceedings.

Slovakia – Iran BIT

Article 21 Awards

[...]

6. A tribunal may order security for costs if it considers that there is a reasonable doubt that claimant would be not capable of satisfying a costs award or consider it necessary from other reasons.

Belarus-India BIT

Article 28 Costs

[...]

2. The Tribunal may order security for costs at the proposal of the Defending Party. The Tribunal shall especially consider security for costs when there is a reason to believe: a) that the investor will be unable to pay, if ordered to do so, a reasonable part of attorney fees and other costs to the Contracting Party which is the party to the dispute; or b) that the investor has divested assets to avoid the consequences of the proceedings. Should the investor fail to pay the security for costs ordered by the tribunal, the Tribunal shall terminate the arbitral proceedings.

EU-Singapore Investment Protection Agreement 2018

Article 3.19 Appeal Procedure

[...]

5. A disputing party lodging an appeal shall provide security for the costs of appeal. The disputing party shall also provide any other security as may be ordered by the Appeal Tribunal.

Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules 2017

Article 24 Additional Powers of the Tribunal

Unless otherwise agreed by the parties, in addition to the other powers specified in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to:

...

(k) order any Party to provide security for legal or other costs in any manner the Tribunal thinks fit

...

Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules 2017

Article 38 Security for costs

(1) The Arbitral Tribunal may, in exceptional circumstances and at the request of a party, order any Claimant or Counterclaimant to provide security for costs in any manner the Arbitral Tribunal deems appropriate.

(2) In determining whether to order security for costs, the Arbitral Tribunal shall have regard to:

(i) the prospects of success of the claims, counterclaims and defences;

(ii) the Claimant's or Counterclaimant's ability to comply with an adverse costs award and the availability of assets for enforcement of an adverse costs award;

(iii) whether it is appropriate in all the circumstances of the case to order one party to provide security; and

(iv) any other relevant circumstances.

(3) If a party fails to comply with an order to provide security, the Arbitral Tribunal may stay or dismiss the party's claims in whole or in part.

(4) Any decision to stay or to dismiss a party's claims shall take the form of an order or an award.

UNCITRAL initial draft on the regulation of third-party funding

Draft provision 9 (Security for costs)

Option A

When a party has entered into an agreement on or been provided third-party funding, the tribunal shall order the funded party to provide security for costs, unless the funded party demonstrates that:

- a) the respondent State was responsible for its impecuniosity; or
- b) it is not able to pursue its claim without the third-party funding; and/or
- c) the third-party funder would cover any adverse cost decision against the funded party.

Option B

When a party has been provided third-party funding, the tribunal may order the funded party to provide security for costs.

Commentary on Draft Provision 9: Draft provision 9 addresses the ordering of security for costs where a party has received third-party funding. One of the objectives is to address concerns regarding the respondent States' inability to recover their costs, particularly when an impecunious claimant had brought the claim with the support of third-party funding (A/CN.9/1004, para. 94). The options reflect the different views expressed during the Working Group.

Option A reflects the view that security for costs should be mandatory when there is third-party funding,³⁴ unless the funded party could justify that the ordering of the security for costs would be inappropriate. The Working Group may wish to consider whether such justifications should be provided (without which, the existence of third-party funding would make security for costs mandatory) and whether the list of justification in option A are adequate. Option B reflects the view that mere existence of third-party funding would not be sufficient to justify ordering security for costs (A/CN.9/1004, para. 94) and provides flexibility to the tribunal. Option B could be supplemented by a rule that the existence of third-party funding is not by itself sufficient to justify an order for security for costs.

If a general provision on security for costs is to be prepared,³⁵ draft provision 9 could possibly be merged with that provision, similar to those found in recent investment treaties stating that the tribunals shall take third-party funding into consideration when deciding to order security for costs.³⁶

³⁴ See A/CN.9/WG.III/WP.161, para. 33; A/CN.9/WG.III/WP.176, p. 10 - Security for costs should be a mandatory requirement in cases funded by third parties.

³⁵ See A/CN.9/WG.III/WP.161, para. 33; A/CN.9/WG.III/WP.176, p. 10; Submission from the Government of the Republic of Korea (A/CN.9/WG.III/WP.179), p. 5; Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182), p. 6.

³⁶ EU-Vietnam, Article 3.37 – “When applying Article 3.48 (Security for Costs), the Tribunal shall take into account whether there is third-party funding. When deciding on the cost of proceedings pursuant to paragraph 4 of Article 3.53 (Provisional Award), the Tribunal shall take into account whether the requirements provided for in paragraphs 1 and 2 of this Article have been respected”. For a different approach, see ICCA Report, p. 16:

D. Principles on Security for Costs

D.1. An application for security for costs should, in the first instance, be determined on the basis of the applicable test, without regard to the existence of any funding arrangement.

D.2. The terms of any funding arrangement, including “after-the-event” (ATE) insurance, may be relevant if relied upon to establish that the claimant (or counterclaimant) can meet any adverse costs award (including, in particular, the funder's termination rights).

D.3. In the event that security turns out not to have been necessary, the tribunal may hold the requesting party liable for the reasonable costs of posting such security.

The Working Group may wish to consider whether further guidance should be provided with regard to the amount of security to be ordered, including staggered or flexible mechanisms.

D. Provisions on the allocation of costs

Draft provision (based on Article 42 UNCITRAL Arbitration Rules)

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. The arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. *If the arbitral tribunal determines that a claim is frivolous, the tribunal [may/shall] require the party who brought the claim to pay all costs incurred by the other party to respond to the claim.*

3. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

Article 9.29: Awards

[...]

4. For greater certainty, for claims alleging the breach of an obligation under Section A with respect to an attempt to make an investment, when an award is made in favour of the claimant, the only damages that may be awarded are those that the claimant has proven were sustained in the attempt to make the investment, provided that the claimant also proves that the breach was the proximate cause of those damages. If the tribunal determines such claims to be frivolous, the tribunal may award to the respondent reasonable costs and attorney's fees.

Australia-Indonesia Comprehensive Economic Partnership Agreement IACEPA

Article 14.21: Exclusion of Claims

1. Without prejudice to the scope of any applicable exceptions, non-conforming measures, principles of international law or the disputing Party's ability to rely upon such exceptions, non-conforming measures or principles of international law during the proceedings, no claim may be brought under this Section:

[...]

(d) if the claim is frivolous or manifestly without merit.

2. If the disputing Party considers that a claim brought under this Section is covered by paragraph 1, it may submit an objection on that basis as a preliminary question in accordance with Article 14.30, without prejudice to its ability to raise such an objection at another stage in the proceedings.

Article 14.34: Awards

[...]

3. If the tribunal determines that a claim is brought in contravention of Article 14.21 the tribunal shall make an award requiring the disputing investor to pay all costs and attorney's fees incurred by the disputing Party to respond to the claim, unless the tribunal considers that there are exceptional circumstances that warrant the disputing parties to bear costs in other specified proportions.

Colombia-UK BIT

ARTICLE IX Settlement of Disputes between one Contracting Party and an Investor of the other Contracting Party

[...]

12. ... When deciding on any objection of the respondent, the tribunal shall rule on the legal costs and costs of arbitration incurred during the proceedings, considering whether or not the objection prevailed. The tribunal shall consider whether either the claim of the claimant or the objection of the respondent is frivolous or an abuse of process, and shall provide the disputing parties a reasonable opportunity for comments. In the event of a claim which is frivolous or an abuse of process, the tribunal shall award costs against the claimant.

For discussion purposes only

III. Counterclaims

A. Note by the secretariat on counterclaims (A/CN.9/WG.III/WP.193, paras. 32-45)

General and existing mechanisms

32. In considering the issues relating to the respondent State's counterclaims in ISDS, the general understanding was that any work by the Working Group should not foreclose the possibility that claims might be brought against an investor, where there was a legal basis for doing so (A/CN.9/930/Add.1/Rev.1, paras. 3–7, A/CN.9/970, paras. 34–35). It was further noted that it would be important to take this into account as the Working Group developed tools to address other identified concerns so that they are considered legitimate by all relevant stakeholders (A/CN.9/970, para. 39).

33. The Submissions also touched upon related aspects. Enabling the host State to submit a counterclaim if an investor failed to comply with one or more of its obligations under the treaty was introduced as one of the main innovations in a model treaty.³⁷ It was also stated that respondent States should be allowed to bring counterclaims against an investor for any breach to address the imbalance in the existing ISDS mechanisms.³⁸

34. Procedural rules applicable to ISDS generally contemplate the possibility of the respondent raising counterclaims during the proceedings.³⁹ Recent investment treaties have also included provisions allowing counterclaims.⁴⁰ Allowing counterclaims to be heard together with the initial claim in one set of proceedings by the same arbitral tribunal could enhance procedural efficiency and may avoid multiple proceedings in different forums involving the same parties.

35. The fundamental concern arises from the fact that investment treaties impose obligations on host States, whereas no or very limited obligations are imposed on investors. This limits the possibility of respondent States bringing counterclaims against the investor claimant for breach of its obligations under the treaty. Counterclaims can also be raised with regard to the breach of investor's obligations in investment contracts (A/CN.9/930/Rev.1/Add.1, para. 5) as well as the investor's conduct resulting in the violation of, or non-compliance with, domestic laws and regulations. However, such claims have rarely been framed as counterclaims in treaty-based ISDS; rather States have resorted to domestic courts to seek affirmative relief.

36. Another issue relates to the admissibility, i.e. the jurisdiction of the tribunal to hear the counterclaims, and the sources of investor consent to State

³⁷ A/CN.9/WG.III/WP.161, Submission from the Government of Morocco, para. 9.

³⁸ A/CN.9/WG.III/WP.176, Submission from the Government of South Africa, paras. 64–65.

³⁹ ICSID Convention, Article 46 and ICSID Arbitration Rules, Rule 40; UNCITRAL Arbitration Rules, Article 21(3); SCC Arbitration Rules, Article 9(1)(iii); and ICC Rules of Arbitration, Article 5.

⁴⁰ For example, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Article 9.19(2) (Submission of a Claim to Arbitration) reads "..., the respondent may make a counterclaim in connection with the factual and legal basis of the claim".

counterclaims. For example, article 46 of the ICSID Convention provides that unless the parties had agreed otherwise, counterclaims should (a) arise directly out of the subject matter of the dispute; (b) be within the scope of the consent of the parties; and (c) be otherwise within the jurisdiction of ICSID. If both parties had consented to arbitration under the ICSID Arbitration Rules, the question arises whether the investor's consent is sufficient to imply a consent to the counterclaim or whether an affirmative consent is further required. This question needs to be considered also in light of the specific language in the investment treaties regarding the State's offer to arbitrate and claims that can be brought as well as any dispute resolution clause which may exist in the relevant investment contract.

37. There have been a few ISDS cases in which respondent States had filed counterclaims. Some have been accepted by tribunals, while others have been dismissed on grounds of lack of jurisdiction or merits.⁴¹

Issues for consideration

38. The Working Group may wish to consider devising a framework in which States could raise counterclaims in ISDS, which would reduce uncertainty, promote fairness and rule of law, and ultimately ensure a balance between respondent States and claimant investors. Such a framework could also have a positive impact on the duration and cost of the proceedings as well as on a number of other procedural issues (A/CN.9/930/Rev.1/Add.1, para. 5).

Legal basis for counterclaims – obligation of investors

39. Counterclaims raise a peculiar issue in ISDS as investment treaties generally provide protection to investors through formulation of State obligations and do not contain reciprocal obligations for investors. As such, the respondent States often lack the legal basis to bring a counterclaim against the investor under the treaty.

40. At its thirty-seventh session, the Working Group considered proposals with respect to whether obligations of investors (for example, in relation to human rights, the environment as well as to corporate social responsibility) warranted further consideration. It was noted that that question was closely related to whether respondent States would be allowed to raise counterclaims (A/CN.9/970, para. 34).⁴²

⁴¹ For example, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1 (7 December 2011), [Award](#), paras. 859–877; *Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi*, ICSID Case No. ARB/01/2 (21 June 2012), [Award](#), paras. 267–287; *Hesham T. M. Al Warraq v. Republic of Indonesia* (15 December 2014), [Award](#), paras. 655–672; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26 (8 December 2016), [Award](#), paras. 1110–1221; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/15 (22 August 2016), [Award](#), paras. 618–629; *Oxus Gold plc v. Republic of Uzbekistan* (17 December 2015), [Award](#), paras. 906–959; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (7 February 2017), [Decision on Counterclaims](#); *Perenco Ecuador Ltd. v. The Republic of Ecuador*, ICSID Case No. ARB/08/6.

⁴² The Working Group may wish to consider whether the framework for counterclaims by respondent States could be expanded to allow for claims by third parties against investors (A/CN.9/970, para. 34).

41. In that context, the Working Group may wish to consider formulating provisions on investor obligations which would form the basis for a State's counterclaims. For example, the obligations may relate to the protection of human rights and the environment, compliance with domestic law, measures against corruption and the promotion of sustainable development.⁴³ The Working Group may wish to further consider how to impose such obligations in investment treaties as well as in relevant contracts or domestic laws governing foreign investment.

42. The Working Group may, however, also wish to consider the suggestion that it should not address the topic, as its work was to focus on the procedural aspects of ISDS dispute settlement rather than on the substantive provisions in investment treaties (A/CN.9/930/Rev.1, para. 20; A/CN.9/930/Rev.1/Add.1, para. 4; A/CN.9/970, para. 27).

Admissibility of counterclaims

43. The Working Group may wish to further address the admissibility of counterclaims in ISDS tribunals. As noted above, while procedural rules contemplate the possibility of respondents raising counterclaims, whether the counterclaim falls within the jurisdiction of the tribunal has often been questioned. In determining this question, the consent of the investor claimant and the connection of the counterclaim with the subject matter of the dispute have generally been examined.

44. In that context, the Working Group may wish to consider formulating clauses for use by States in their offer to arbitrate in investment treaties, which would be broad enough to cover any counterclaim that States may raise. Such a clause could reduce, if not eliminate, uncertainty about the consent of the parties as well as any connection requirement, whether factual or legal. Such work could be accompanied by development of concrete criteria to be applied by the tribunals in determining the jurisdiction.

Possible form of work

45. The Working Group may wish to consider the various means of implementing reforms to provide a framework for allowing counterclaims by respondent States in ISDS. For example, provisions on investor obligation could be included in investment treaties. Similarly, provisions on the possibility of raising counterclaims as well as on the admissibility of such claims could be explicitly included in investment treaties, arbitration rules or a multilateral instrument on procedure reform. In addition, guidance could be provided to arbitral tribunals on how to address counterclaims in a consistent manner.

⁴³ For example, Articles 9 to 12 of the [Model Text for the Indian Bilateral Investment Treaty](#); Article 13 of the [Investment Agreement for the Common Market for Eastern and Southern Africa \(COMESA\) Common Investment Area](#); Part 3 of the [Southern African Development Community \(SADC\) Model Bilateral Investment Treaty Template](#).

B. Discussions at the Working Group (October 2020, A/CN.9/1044, paras. 57-63)

57. The Working Group considered the issues relating to respondent States' counterclaims in ISDS. It was noted that two distinct aspects needed to be considered, one being the procedural aspect, or the admissibility of counterclaims and the jurisdiction of tribunals to examine them; and the other being the substantive obligations of investors, the breach of which would form the basis of the counterclaims.

58. On the procedural aspect, it was reiterated that any work on ISDS reform should not foreclose the possibility of respondent States bringing a counterclaim against an investor, where there was a legal basis for doing so. While a view was expressed that it would be necessary for States parties to investment treaties to agree on the use of counterclaims, it was pointed out that procedural rules applicable to ISDS generally contemplated the possibility of the respondent State raising counterclaims and that recent investment treaties included explicit provisions allowing counterclaims. It was noted that a framework allowing for counterclaims would permit ISDS tribunals with expertise in the field to hear such claims and could avoid multiple proceedings. The impact of allowing counterclaims on the outcome of the dispute was also noted. It was generally felt that procedural issues such as the jurisdiction and admissibility of counterclaims deserved further consideration, also in the context of a multilateral standing body.

59. On the second aspect, it was stated that the current work on ISDS reform should not address the obligation of investors or the legal basis for counterclaims, as such work would touch upon the substantive aspects, whereas the focus of the work should be on procedural aspects of ISDS. In that context, it was explained that counterclaims could be raised with regard to the breach of investor's obligations in investment treaties as well as contracts and that the investor's conduct was often taken into account by ISDS tribunal when rendering the final award. It was pointed out that that matter could be considered further in light of investor's obligations that were not purely economic, such as obligations in relation to human rights, the environment as well as to corporate social responsibility. It was also mentioned that the issue of counterclaims would need to be considered in light of possible resort to domestic courts by States to seek affirmative relief as well as the need to provide a linkage with the claim raised by the investor.

60. During the discussion, it was pointed out that one of the primary reasons for the lack of counterclaims in ISDS was the absence of substantive obligations on the part of investors in investment treaties. It was clarified that drafting such obligations was not within the mandate of the Working Group focusing on procedural reforms. Nonetheless, it was felt that further work of a procedural nature on counterclaims should remain part of the work. It was noted that, while rare, counterclaims were being permitted in limited cases. Benefits of allowing counterclaims mentioned included procedural efficiency, deterring frivolous claims, and avoiding a multiplicity of claims in different forums.

Way forward

61. After discussion, the Working Group requested the Secretariat to continue to work on the topic of counterclaims with a focus on the procedural aspects. The Secretariat was asked to prepare model clauses that could be used as consent clauses, whether in treaty-based arbitration or in a multilateral standing body, that would condition a State's consent to ISDS on the consent of the investor to have the same tribunal hear counterclaims. It was said that such a clause could clarify the jurisdiction of the ISDS tribunals to hear counterclaims as well as the question of admissibility.

62. Regarding the admissibility of claims, the Working Group requested the Secretariat to prepare options to clarify the conditions under which a counterclaim could be brought, including factual linkage with the primary claim.

63. Regarding the existing sources of law for counterclaims, it was suggested that it would be useful to examine the applicable sources of existing substantive law that provided for investor obligations and hence the legal basis for counterclaims. It was further said that such exploratory work, which could be carried out jointly with the Academic Forum, and take the form of webinars and preparation of research papers by the Academic Forum, should also examine the procedural tools that would allow for the bringing of counterclaims.

C. Provisions on counterclaims

UNCITRAL Arbitration Rules

Article 21(3)

3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.

ICSID Convention

Article 46

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

ICSID Arbitration Rules

Rule 40 Ancillary Claims

(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.

(2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the countermemorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.

(3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

CPTPP

Article 9.19: Submission of a Claim to Arbitration

[...]

2. When the claimant submits a claim pursuant to paragraph 1(a)(i)(B), 1(a)(i)(C), 1(b)(i)(B) or 1(b)(i)(C), the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant.*

* (footnote) In the case of investment authorisations, this paragraph shall apply only to the extent that the investment authorisation, including instruments executed after the date the authorisation was granted, creates rights and obligations for the disputing parties.

Comprehensive Trade and Economic Agreement between Canada and the European Union (CETA)

Article 22.3 Cooperation and promotion of trade supporting sustainable development

2. The Parties affirm that trade should promote sustainable development. Accordingly, each Party shall strive to promote trade and economic flows and practices that contribute to enhancing decent work and environmental protection, including by:

(a) encouraging the development and use of voluntary schemes relating to the sustainable production of goods and services, such as eco-labelling and fair trade schemes;

(b) encouraging the development and use of voluntary best practices of corporate social responsibility by enterprises, such as those in the OECD Guidelines for Multinational Enterprises, to strengthen coherence between economic, social and environmental objectives;

(c) encouraging the integration of sustainability considerations in private and public consumption decisions; and

(d) promoting the development, the establishment, the maintenance or the improvement of environmental performance goals and standards.

Pan-African Investment Code (PAIC) prepared by the African Union

Article 43 Counterclaims by Member States

1. Where an investor or its investment is alleged by a Member State party in a dispute settlement proceeding under this Code to have failed to comply with its obligations under this Code or other relevant rules and principles of domestic and international law, the competent body hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.

2. A Member State may initiate a counterclaim against the investor before any competent body dealing with a dispute under this Code for damages or other relief resulting from an alleged breach of the Code.

Article 21 Bribery

1. Investors shall not offer, promise or give any unlawful or undue pecuniary or other advantage or present, whether directly or through intermediaries, to a public official of a Member State, or to a member of an official's family or business associate or other person in order that the official or other person act or refrain from acting in relation to the performance of official duties.
2. Investors shall also not aid or abet a conspiracy to commit or authorize acts of bribery.

Article 22 Corporate Social Responsibility

1. Investors shall abide by the laws, regulations, administrative guidelines and policies of the host State.
2. Investors shall, in pursuit of their economic objectives, ensure that they do not conflict with the social and economic development objectives of host States and shall be sensitive to such objectives.
3. Investors shall contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host State.

Article 23 Obligations as to the use of Natural Resources

1. Investors shall not exploit or use local natural resources to the detriment of the rights and interests of the host State.
2. Investors shall respect rights of local populations, and avoid land grabbing practices vis-à-vis local communities.

Article 24 Business Ethics and Human rights

The following principles should govern compliance by investors with business ethics and human rights:

- a. support and respect the protection of internationally recognized human rights;
- b. ensure that they are not complicit in human rights abuses;
- c. eliminate all forms of forced and compulsory labor, including the effective abolition of child labor;
- d. eliminate discrimination in respect of employment and occupation; and
- e. ensure equitable sharing of wealth derived from investments.

Argentina–Qatar BIT

ARTICLE 11 Compliance with the laws of the host State

The Contracting Parties acknowledge that investors and their investments shall comply with the laws of the host Contracting Party with respect to the management and operation of an investment.

ARTICLE 12 Corporate social responsibility

Investors operating in the territory of the host Contracting Party should make efforts to voluntarily incorporate internationally recognized standards of corporate social responsibility into their business policies and practices.

Slovakia – Iran BIT

Article 14 General provisions

3. The respondent may assert as a defense, counterclaim, right of set off or other similar claim that the claimant has not fulfilled its obligations under this Agreement to comply with the Host State law or that it has not taken all reasonable steps to mitigate possible damages. For avoidance of any doubt, if the tribunal does not dismiss the claim under paragraph 2 above, it shall take such violations into account when assessing the claim if raised as a defense, counterclaim, right of set off or other similar claim by the respondent.

Article 17 Submission of a Claim to Arbitration

1. The claimant may submit the claim to arbitration if, cumulatively:

- a) the claimant gives express and written consent:
 - i. to pursue its claim in arbitration under this Article; and
 - ii. that the Host State may pursue any defense, counterclaim, right of set off or other similar claim pursuant to Article 14 of this Agreement in arbitration under this Section;

Model Text for the Indian Bilateral Investment Treaty

14.11 Counterclaims by Parties

(i) A Party may initiate a counterclaim against the Investor or Investment for a breach of the obligations set out under Articles 9, 10, 11 and 12 of Chapter III of this Treaty before a tribunal established under this Article and seek as a remedy suitable declaratory relief, enforcement action or monetary compensation.

(ii) In assessing the monetary compensation to be paid to a Party under this Article, the tribunal can take into consideration the following: a. whether the breach justifies an award of damages; and b. whether that Party has taken steps to mitigate its losses.

(iii) The Parties agree that a counterclaim made in accordance with this Article 14.11 shall not preclude or operate as a res judicata against applicable legal, enforcement or regulatory action in accordance with the Law of the Host State or in any other proceedings before judicial bodies or institutions of the Host State.

(iv) An initiation of a counterclaim by a Party shall not be deemed to be a waiver of that Respondent Party's objection to the tribunal's jurisdiction over an Investment Dispute.

Article 9: Obligation against Corruption

9.1 Investors and their Investments in the Host State shall not, either prior to or after the establishment of an Investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage. ...

Article 10: Disclosures

10.1 Investors and Investments must timely comply with the requirements of the Law of the Host State to disclose true and complete information regarding their activities, structure, financial situation, performance, relationships with affiliates, ownership, governance, or other matters. ...

Article 11: Taxation

11.1 Investors and their Investments must comply with the provisions of Host State's Law on taxation including timely payment of their tax liabilities in accordance with the Law of the Host State.

Article 12: Compliance with Law of Host State

12.1 Investors and their Investments shall be subject to and comply with the Law of the Host State. This includes, but is not limited to, the following: (i) Law concerning payment of wages and minimum wages, employment of contract labour, prohibition on child labour, special conditions of work, social security and benefit and insurance schemes applicable to employees; (ii) information sharing requirements of the Host State concerning the Investment in question and the corporate history and practices of the Investment or Investor, for purposes of decision making in relation to that Investment or for other purposes; (iii) environmental Law applicable to the Investment and its business operations; (iv) Law relating to conservation of natural resources; (v) Law relating to human rights; (vi) Law of consumer protection and fair competition; and (vii) relevant national and internationally accepted standards of corporate governance and accounting practices.

12.2 Investors and their Investments shall strive, through their management policies and practices, to contribute to the development objectives of the Host State. In particular, Investors and their Investments should recognise the rights, traditions and customs of local communities and indigenous peoples of the Host State and carry out their operations with respect and regard for such rights, traditions and customs.

Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area

ARTICLE 13 Investor Obligation

COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made.

Southern African Development Community (SADC) Model Bilateral Investment Treaty Template

Part 3: Rights and Obligations of Investors and State Parties

Article 10: Common Obligation against Corruption

Article 11: Compliance with Domestic Law

Article 12: Provision of Information

Article 13: Environmental and Social Impact Assessment

Article 14: Environmental Management and Improvement

Article 15: Minimum Standards for Human Rights, Environment and Labour

Article 16: Corporate Governance Standards

Article 17: Investor Liability

Article 18: Transparency of Contracts and Payments

Article 19: Relation to Dispute Settlement

Article 20: Right of States to Regulate

Article 21: Right to Pursue Development Goals

Article 22: Obligations of States on Environment and Labour Standards

Morocco Model BIT 2019

Article 18 Respect des lois internes et des obligations internationales

18.1 Les investissements sont régis par les lois et règlements de la Partie Hôte et les investisseurs et leurs investissements doivent se conformer à ces lois et règlements en vigueur tout au long de leur existence sur le territoire de cette dernière Partie.
[...]

Article 28 Objet et champ d'application

[...]

28.4 Lorsqu'un investisseur ou son investissement ne s'est pas acquitté des obligations qui lui incombent en vertu de l'article 18 (Respect des lois internes et des obligations internationales) ou a violé l'article 19 (Lutte contre la corruption, le blanchiment des capitaux et le financement du terrorisme), la Partie Hôte peut déposer une demande reconventionnelle devant tout tribunal établi conformément à la présente Section.