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

### Multiple proceedings and counterclaims

Note by the Secretariat

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## I. Introduction

1. During its thirty-fourth to thirty-seventh sessions, the Working Group undertook work on the possible reform of ISDS, based on the mandate given to it by the Commission at its fiftieth session, in 2017.<sup>1</sup> During those sessions, the Working Group discussed and identified concerns regarding ISDS and determined that reform was desirable in light of the identified concerns.
2. At its thirty-eighth session, the Working Group agreed on a project schedule on the reform options and began its consideration.<sup>2</sup> It was agreed that the thirty-ninth session would be allocated to consider, among others, multiple proceedings including counterclaims.
3. Accordingly, this note addresses the topics of multiple proceedings and counterclaims, where the lack of a framework was identified as a concern and one that deserved reforms. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic,<sup>3</sup> and does not seek to express a view on the possible reform options, which is a matter for the Working Group to consider.

## II. Multiple proceedings

### A. General

4. In the Working Group's discussions on coherence, consistency, predictability and correctness of ISDS tribunal decisions, it was noted that conflicting outcomes were more acute in situations of multiple proceedings brought pursuant to investment treaties, laws, instruments and agreements that provided access to the ISDS mechanism ([A/CN.9/935](#), para. 22). It was considered that multiple proceedings resulting in divergent interpretation by ISDS tribunals were one of the reasons leading to the lack of consistency ([A/CN.9/964](#), para. 42), that multiple proceedings had a negative impact on the overall cost and duration of the proceedings, thus impairing judicial economy ([A/CN.9/964](#), para. 45), and that multiple proceedings could distort the balance of rights and interests of relevant stakeholders ([A/CN.9/964](#), para. 42). It was also said that multiple proceedings undermined predictability more generally, and had damaging effects, in particular for developing States ([A/CN.9/964](#), para. 46). After deliberations, the Working Group concluded that development of reforms by UNCITRAL was desirable to address those concerns ([A/CN.9/964](#), para. 53).

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

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

<sup>3</sup> Christoph Schreuer, "Multiple Proceedings", in Andrea Gattini, Attila Tanzi, and Filippo Fontanelli (eds.), *General Principles of Law and International Investment Arbitration* (Brill Nijhoff, 2018), pp. 152–167; Hanno Wehland, "The Regulation of Parallel Proceedings in Investor-State Disputes", *ICSID Review* 31(3) (2016), pp. 576–596; Gabrielle Kaufmann-Kohler, "Multiple Proceedings—New Challenges for the Settlement of Investment Disputes", in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill Nijhoff, 2015), pp. 3–12; José Antonio Rivas, "ICSID Treaty Counterclaims: Case Law and Treaty Evolution" in Jean E. Kalicki and Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (2015, Brill Nijhoff), pp. 779–827; Andrea K. Bjorklund, "The Role of Counterclaims in Rebalancing Investment Law", *Lewis & Clark Law Review* 17 (2013), pp. 461–464; Arnaud de Nanteuil, "Counterclaims in Investment Arbitration: Old Questions, New Answers?" in *The Law and Practice of International Courts and Tribunals* 17 (2018), pp. 374–392; Jean E. Kalicki, "Counterclaims by States in Investment Arbitration", *IISD Investment Treaty News* (14 January 2013).

5. Submissions received from States on reform options for the third phase of the mandate (the “Submissions”) also touch upon related aspects. For example, it is suggested that soft law instruments could be prepared to deter claimants from filing the same claim at different arbitral, judicial or administrative institutions.<sup>4</sup> It is also suggested that consolidation of multiple claims instituted under the same treaty has the benefit of time and cost savings and ensures that one decision is rendered for cases with similar facts.<sup>5</sup> It is further suggested that a standing court mechanism will bring a significant advantage in the management of multiple claims.<sup>6</sup>

6. Multiple proceedings result mainly from two types of situations. The first type is where different entities within the same corporate structure have a right of action against a State or state-owned entity in relation to the same investment, with regard to the same State measure and for the benefit of substantially the same interests. Those entities may raise their claims in various forums and under different sources of law, yet seeking substantially the same relief for the same measure, which could result in multiple recovery.<sup>7</sup> The second type of situation is where a measure by a State has an impact on a number of investors which are not related. For example, a change of a State’s policy may affect a whole range of contracts containing a stabilization clause concluded with different investors. While issues of law and fact in those proceedings will generally be common to all the claimants, it is foreseeable that decisions rendered by separate tribunals may yield different outcomes.

7. The following sets forth existing mechanisms for, and issues to be considered in, addressing multiple proceedings in ISDS. It is based on the work undertaken by the Secretariat on the topic of concurrent proceedings for consideration by the Commission, which had been on the agenda since its forty-sixth session.<sup>8</sup>

## B. Existing mechanisms

8. States have developed various mechanisms and tools in their investment treaties outlined below aimed at preventing the occurrence of multiple proceedings or limiting their impact ([A/CN.9/964](#), para. 50).

### *Definition of investors and investment*

9. The definitions of the terms “investor” and “investment” in investment treaties determine which investors are protected and are able to bring claims against host States. Treaty provisions have been drafted to prevent abusive use of an investment treaty by prohibiting claims by investors who engage in “treaty shopping” or “nationality planning” through “mailbox” companies that channel investments but do not engage in any real business operation in the host State.<sup>9</sup>

10. There are different ways to carve out certain investors or investments with the aim of limiting possibilities of multiple claims. One such way is through a denial of benefits clause referring to qualifications of substantial business activity and ownership or control.<sup>10</sup>

<sup>4</sup> [A/CN.9/WG.III/WP.174](#), Submission from the Government of Turkey, p. 2.

<sup>5</sup> [A/CN.9/WG.III/WP.161](#), Submission from the Government of Morocco, para. 9.

[A/CN.9/WG.III/WP.176](#), Submission from the Government of South Africa, para. 75.

<sup>6</sup> [A/CN.9/WG.III/WP.159/Add.1](#), Submission from the European Union and its member States, para. 56.

<sup>7</sup> Reference should also be made to document [A/CN.9/WG.III/WP.170](#), which address shareholder claims and reflective loss.

<sup>8</sup> Documents [A/CN.9/848](#), [A/CN.9/881](#) and [A/CN.9/915](#) outline the causes and impact of concurrent proceedings, existing principles and mechanisms to address concurrent proceedings in international arbitration and possible future work in that area.

<sup>9</sup> UNCTAD World Investment Report (2015), chapter IV, pp. 143–144 and 148.

<sup>10</sup> NAFTA, art. 1113(2); ECT, art. 17(1).

*Shareholder claims and reflective loss*

11. Treaty provisions on shareholder claims based on reflective loss provide clarity on whether such claims could be raised and thus address another source of multiple proceedings. Some investment treaties contain provisions that set out the level of indirect ownership that is required for a shareholder to acquire standing under the investment treaty (see document [A/CN.9/WG.III/WP.170](#), paras. 25–34).

*Abuse of process*

12. Treaty provisions prohibiting the abuse of process provide the necessary mechanisms to allow arbitral tribunals to dismiss abusive claims and thus encourage investors to agree on a single forum for the resolution of their claims.<sup>11</sup> By providing clear criteria on which of the multiple proceedings are to be regarded as abusive, investment treaties limit the occurrence of multiple proceedings and enable disputing parties to have a clear understanding of such circumstances.

*Consolidation*

13. Provisions on consolidation are also found in investment treaties.<sup>12</sup> The first type of the provisions restates the general rule that consolidation is possible when all of the concerned parties agree. The purpose is to draw attention of the disputing parties to the possibility of consolidation, without necessarily providing the mechanism for consolidation. The second type qualifies the circumstances in which consolidation is allowed, for example where the claims have a question of law or fact in common and arise out of the same events or circumstances.<sup>13</sup> These clauses usually set out a very detailed mechanism, under which any disputing party to the related, ongoing proceedings can request the consolidation of proceedings. This request triggers a process that involves the establishment of a consolidation tribunal.<sup>14</sup>

14. Consolidation may also be carried out under applicable institutional arbitration rules.

*Coordination or concentration mechanisms*

15. Certain investment treaties provide for coordination or concentration mechanisms. For instance, the requirement that the claimant waives or terminates any other proceedings or remedies – also referred to as “no U-turn” approach – is found in many recent investment treaties. The so-called “fork-in-the-road” clauses offer the investor a choice between the host State’s domestic courts and international arbitration; once the choice is made, it is final.

**C. Issues for consideration**

16. The application of the above-mentioned mechanisms may however be limited ([A/CN.9/964](#), para. 49), particularly as the majority of the investment treaties do not include any provision to such mechanism ([A/CN.9/964](#), para. 51). Another example of the limitation is that consolidation may apply only if the disputes are identical (same parties, same interests, and same legal basis) and it is usually not possible to consolidate proceedings which have started under different arbitration rules or were administered by different arbitration institutions. The consent of all parties, including the respondent State, is required. Furthermore, consolidation of claims based on different underlying treaties (as well as based on contracts and domestic law) could

<sup>11</sup> Colombia-UK BIT (2010), art. IX.12; *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award (9 January 2015).

<sup>12</sup> UNCTAD Series on International Investment Agreements, II, 2014.

<sup>13</sup> NAFTA, arts. 1117(3) and 1126; USMCA, art. 14.D.12; CAFTA-DR, art. 10.25; CETA, art. 8.43; CPTPP, art. 9.28; US-Panama TPA, art. 10.25.

<sup>14</sup> In ordering consolidation, arbitral tribunals are to consider the interest of fair and efficient resolution of the claims and to hear the views of the disputing parties (see, for example, article 14.D.12(6) USMCA).

prove difficult because they might contain differing substantive obligations, as well as diverging time limits, and procedural obligations ([A/CN.9/964](#), para. 49). Some very recent treaties, however, foresee consolidation across dispute settlement mechanisms.<sup>15</sup>

17. Considering the views that the current ISDS regime lacks adequate mechanisms to address concerns arising from multiple proceedings, the Working Group may wish to establish a more predictable framework to address multiple proceedings, which would be in the interest of investors and States, and which would promote procedural efficiency, reliability and legitimacy ([A/CN.9/964](#), para. 48). In developing relevant solutions, the Working Group may wish to focus on the negative consequences of multiple proceedings and recurring problems, such as contradictory and irreconcilable decisions ([A/CN.9/964](#), para. 48), yet also taking into account party autonomy and consensual nature of arbitration as well as the right of access to justice ([A/CN.9/964](#), paras. 46–47).

## 1. Scope of work – Defining multiple proceedings

18. As noted above (see para. 6 above), circumstances leading to multiple proceedings vary, such as the involvement of multiple parties possibly located in different jurisdictions, the existence of multiple legal bases or causes for claims, the availability of multiple forums as well as the lack of coordination among the competing forums.

19. The Working Group may wish to reach a working assumption on the meaning of multiple proceedings with the aim of narrowing the scope of its work.<sup>16</sup> As not all multiple proceedings are problematic, the Working Group may wish to focus on addressing those that are more detrimental to ISDS, for example, where multiple proceedings result in a State having to defend several claims in relation to the same measure, with possibly the same economic damage at stake, leading to a duplication of efforts, additional costs, procedural unfairness and potentially contradictory outcomes and multiple recovery ([A/CN.9/964](#), para. 46). The Working Group may also wish to consider whether it wishes to focus on solutions limited to addressing treaty-based multiple proceedings ([A/CN.9/964](#), para. 43).

## 2. Development of mechanisms to address multiple proceedings

20. The Working Group may wish to further develop mechanisms to prevent, or limit the impact of, multiple proceedings.

### *Joinder or consolidation*

21. Work could focus on providing mechanisms to allow for joinder of third parties and consolidation of multiple proceedings. Subject to a reasonable assessment of fairness, due process and efficiency, these can be an effective tool to reduce or avoid multiple proceedings and promote efficiency. However, such work would be of limited use if it does not include the possible cooperation among arbitral institutions

<sup>15</sup> EU-Singapore Investment Protection Agreement Article 3.24(5) provides that: “The consolidating division of the Tribunal shall conduct its proceedings in the following manner: (a) unless all disputing parties otherwise agree, where all the claims for which a consolidation order is sought have been submitted under the same dispute settlement rules, the consolidating division shall proceed under the same dispute settlement rules; (b) where the claims for which a consolidation order is sought have not been submitted under the same dispute settlement rules: (i) the disputing parties may agree on the applicable dispute settlement rules available under Article 3.6 (Submission of Claim to Tribunal) which shall apply to the consolidation proceedings; or (ii) if the disputing parties cannot agree on the same dispute settlement rules within thirty days from the request made pursuant to paragraph 3, the UNCITRAL arbitration rules shall apply to the consolidation proceedings.” Article 14.D.12(8) USMCA provides that the consolidated tribunal “shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified”.

<sup>16</sup> For example, it should be clarified that multiple proceedings include concurrent, parallel as well as successive proceedings ([A/CN.9/964](#), para. 43).

administering such proceedings. In addition, as joinder and consolidation are based on parties' consent, work could address ways to take account of possible concerns of the different parties involved.

*Stay or suspension of proceedings*

22. Once an arbitral tribunal is constituted and its jurisdiction established, the tribunal has inherent powers which could be exercised to prevent or limit the impact of multiple proceedings.<sup>17</sup> For instance, a tribunal, after having ascertained to have jurisdiction, might, in certain circumstances, exercise discretion to stay or suspend the proceeding until the decision of another court or tribunal is rendered, and it could do so by application of various principles, including efficiency and fairness in the administration of justice, and deference to the work of other courts or tribunals.

23. Work could consist in the preparation of a clause determining circumstances in which an arbitral tribunal could or ought to stay or suspend its proceedings. It could also address whether upon staying or suspending its proceedings, the tribunal should then accord due consideration to the decision rendered in the other forum or justify any deviation in this regard.

*Abuse of process*

24. One of the grounds upon which an arbitral tribunal could dismiss a claim is abuse of process.<sup>18</sup> In the context of multiple proceedings, the prohibition of abuse of process is most likely to become relevant and find application where an investor has already obtained a decision on the merits in one forum but continues to pursue the same claim in another forum. Abuse of process may also arise where a claimant makes or restructures its investment in order to raise a claim against the host State at a time where the dispute is foreseeable but has not occurred yet (i.e., abusive attempt to acquire the right).<sup>19</sup> The principle of abuse of process would allow for an arbitral tribunal to determine situations where multiple proceedings are acceptable and those that are not.

25. Work could be undertaken to further elaborate on the principle of abuse of process, and to provide guidance on how an arbitral tribunal could determine situations where there is an abuse of process.

*Information-sharing and other coordination mechanisms*

26. Work could provide guidance to tribunals on the various initiatives that are available for sharing information with other tribunals as well as their limits and issues that might be encountered, for example, conflicts with confidentiality obligations with regard to sharing of information. Examples of such tools could be holding joint hearings or presenting a common set of evidence, with the aim of preventing unnecessary delays and costs related to double or multiple fact-finding endeavours and avoiding duplicative written and oral submissions.

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

<sup>17</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 27 November 1985 (“[e]very court has inherent powers to stay proceedings when justice so requires, and this Tribunal’s discretion to do so is established by Article 44 of the Convention”).

<sup>18</sup> *Phoenix Action, Ltd v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009); *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award (9 January 2015); *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015).

<sup>19</sup> *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent’s Jurisdictional Objections (1 June 2012), paras. 2.47 and 2.99; *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015).

27. Work could also focus on developing the doctrines of *lis pendens*, *res judicata* and *forum non conveniens* in ISDS.

28. In a domestic litigation setting, various doctrines have been developed to prevent or limit the impact of multiple court proceedings. For instance, in civil law systems, a court would apply the *lis pendens* doctrine, i.e. the court seized with the second proceeding will likely stay the proceedings until a decision is made by the court seized with the first proceeding. In common law systems, the doctrine of *stare decisis* that binds courts to follow the precedents or remedies of *forum non conveniens* and anti-suit injunctions, including anti-enforcement injunctions, may be used. If one of the two proceedings is concluded with a judgment, the *res judicata* doctrine would likely apply.

29. Possible work may consist in providing guidance to arbitral tribunals on the principles of *lis pendens* and *res judicata*, even if their application might be limited.<sup>20</sup> They may give rise to complex issues, in particular as different governing laws may come into play (the law of the place of the previous arbitration; the law of the place of the subsequent arbitration; the law governing the merits of the dispute), and as it may have different scopes in different legal systems.

#### *Possible form of work*

30. A framework for addressing multiple proceedings should also be considered in conjunction with the other reform options currently being discussed by the Working Group, for example, on security for cost, frivolous claims, counterclaims, shareholder claims, which could all potentially reduce the occurrence of multiple proceedings. It should also be considered in conjunction with the appointment mechanism (with regard to consolidated tribunals) and in the context of an appellate mechanism and the alternatives or complements thereto, as well as a multilateral investment court.

31. The Working Group may wish to consider the various means of implementation of a reform related to addressing multiple proceedings. The Working Group may wish to consider formulating various clauses that could be included in investment treaties, arbitration rules or a multilateral instrument on procedure reform, such as (i) providing the level of indirect ownership required for an investor to acquire standing under an investment treaty; (ii) prohibiting claims by investors where the company itself is pursuing a remedy in a different judicial forum; (iii) permitting a submission of a claim by an investor only if the investor and the local company withdraw any pending claim and waive their rights to seek remedy before other forums; and (iv) limiting forum selection options to claims that have not yet been asserted elsewhere. Provisions on consolidation and joinder (or less formal procedures to deal with related claims) or abuse of process could also be developed for inclusion in investment treaties, arbitration rules or a multilateral instrument on procedure reform.

### III. Counterclaims

#### A. 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](#),

<sup>20</sup> See International Law Association on Recommendations on *lis pendens* and *res judicata* and arbitration, Seventy-Second International Law Association Conference on International Commercial Arbitration, Toronto, Canada, 4–8 June 2006. This recommendation provides that arbitral awards should have conclusive and preclusive effects in further arbitral proceedings to promote efficiency and finality of international commercial arbitrations and that such effects need not necessarily be governed by national law but may be governed by transnational rules to be developed (recommendations 1 and 2).

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.<sup>21</sup> 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.<sup>22</sup>

34. Procedural rules applicable to ISDS generally contemplate the possibility of the respondent raising counterclaims during the proceedings.<sup>23</sup> Recent investment treaties have also included provisions allowing counterclaims.<sup>24</sup> 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 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.<sup>25</sup>

<sup>21</sup> [A/CN.9/WG.III/WP.161](#), Submission from the Government of Morocco, para. 9.

<sup>22</sup> [A/CN.9/WG.III/WP.176](#), Submission from the Government of South Africa, paras. 64–65.

<sup>23</sup> 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.

<sup>24</sup> 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".

<sup>25</sup> 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



## B. 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).<sup>26</sup>

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 counterclaim. 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.<sup>27</sup> 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.

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(7 February 2017), [Decision on Counterclaims](#); *Perenco Ecuador Ltd. v. The Republic of Ecuador*, ICSID Case No. ARB/08/6.

<sup>26</sup> 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).

<sup>27</sup> 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](#).

*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.

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