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明治大学駿河台キャンパス

投資条約仲裁「判例」に「一貫性」は必要か
－UNCITRAL における制度改革議論との関連において－

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【資料 1】GKK 理論

Wirtgen v. Czech Republic, PCA Case No. 2014-03, Final Award, 11 October 2017 [Gabrielle Kaufmann-Kohler, Bary Born, Peter Tomka].

181. The Tribunal is not bound by the decisions of other arbitral tribunals. At the same time, however, the Tribunal considers that it should pay due respect to such decisions. Unless there are reasons to the contrary, the Tribunal will adopt the approach established in a series of consistent cases, subject, of course, to the specifics of the Treaty and to the circumstances of the actual case. By doing so, the Tribunal is of the view that it will act in conformity with its duty to contribute to the harmonious development of investment law and meet the legitimate expectations of the community of States and investors towards legal certainty and the rule of law.

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UP and CD Holding Internationale v. Hungary, ICSID Case No. ARB/13/35, Award, 9 October 2018 [Karl-Heinz Böckstiegel, L. Yves Fortier, Daniel Bethlehem].

146. As provided in the "Supplementary means of interpretation" of Article 32 VCLT, the Tribunal may have recourse to supplementary means of interpretation (i) in order to confirm the meaning resulting from the application of Article 31 VCLT, or (ii) when the interpretation according to Article 31 VCLT either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. Those supplementary means of interpretation include, but are not limited to, the preparatory work of the treaty and the circumstances of its conclusion.

147. The Parties have extensively referred to decisions of other tribunals. However, there is no dispute that in any event the decisions of other tribunals are not binding on this Tribunal. The many references by the Parties to certain arbitral decisions in their pleadings do not contradict this conclusion.

148. However, this does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they shed any useful light on the issues that arise for the decision in the present case.

【資料 3】

Mox Plant (Ireland v. United Kingdom), ITLOS, Request for provisional measures, Order, 3 December 2001.

51. Considering also that the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*;

【資料 4-1】

Masdar v. Spain, ICSID Case No. ARB/14/1, Award, 16 May 2018 [John Beechey, Gary Born, Brigitte Stern]

490. There are two schools of thought on this question. In essence, one school of thought considers that such commitments can result from general statements in general laws or regulations. The other considers that any such commitments have to be specific.

[...]

511. Be that as it may, and to whichever of the two schools of thought individual members of the Tribunal might adhere, this Tribunal need not be detained by the decision of the majority of the *Charanne* tribunal, in that it has to consider in this case not only the totality of the Spanish legislative regime applicable to CSP installations, but it must also take account of the existence of specific commitments, outside the general legislation or general documentation.

【資料 4-2】

Charanne c. España, SCC Arbitraje No: 062/2012, laudo final, 21 de enero de 2016 [Alexis Mourre, Guido Santiago Tawil, Claus von Webeser].

497. Es cierto que estos documentos y las presentaciones de los mismos que se realizaron en España indican la voluntad de la Demandada de promover y atraer inversiones en el sector de generación de energías renovables. Sin embargo, estos documentos no son suficientemente específicos como para haber generado expectativa alguna en cuanto al hecho de que los RD 661/2007 y 1578/2008 no iban a ser modificados. Aunque la presentación de 2007 efectivamente contiene una referencia al RO 66112007, la misma no incluye ningún lenguaje del cual se pueda razonablemente deducir que la tarifa regulada permanecería inmutada durante toda la vida regulatoria de las plantas.

【資料 4-3】

Novenergia II v. Spain, SCC Arbitration (2015/063), Final Arbitral Award, 15 February 2018 [Johan Sidklev, Antonio Crivellaro, Juez Bernardo Sepúlveda-Amor].

650. The Claimant has argued that legitimate expectations arise naturally from undertakings and assurances made by, or on behalf of, the state and that such undertakings and assurances need not be specific. The arbitral tribunal in *Electrabel*, acknowledged that "[w]hile specific assurances given by the host State may

reinforce the investor's expectations, such an assurance is not always indispensable". The Tribunal agrees. A multitude of arbitral tribunals have established that undertakings or assurances can be explicit or implicit. [...]

[...]

652. The standard to which the Tribunal must measure the actions of the Respondent is thus, whether the Respondent by virtue of its statements and conduct (including through RD 661/2007 itself) has given rise to a legitimate and reasonable expectation on the Claimant's part that the regulation implemented through RD 661/2007 would be stable.

【資料 4-4】

Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016 [Piero Bernardini, Gary Born, James Crawford].

422. It is common ground in the decisions of more recent investment tribunals that the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.

423. On this basis, changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment "outside of the acceptable margin of change."

424. The Tribunal in *EDF v. Romania* has stated in that regard: [...]

425. A similar view has been expressed by the tribunal in *El Paso v. Argentina*: [...]

426. It clearly emerges from the analysis of the FET standard by investment tribunals that legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment. Provisions of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law.

【資料 5】

Possible reform of investor-State dispute settlement (ISDS), Submission from the European Union, 12 December 2017, U.N. Doc. A/CN.9/WG.III/WP.145.

21. The ad hoc nature of the system impacts consistency and predictability. The ad hoc constitution of arbitral tribunals potentially influences outcomes, inasmuch as arbitrators are repeat players, or are seeking to be repeat players, in a system where

the adjudicators need to be appointed afresh for each dispute. When considered at a systemic level, this can be considered as likely to lead to more fact-specific outcomes.11 This does not enhance the stability and consistency of the system and hence the ability of stakeholders, be they businesses, governments or civil society actors to seek guidance on previous cases to try to determine how the rules will be applied in a particular set of circumstances.

22. There are a number of examples of inconsistent arbitral decisions on core aspects of the traditional investment protection provisions. The questions raised in those conflicting cases concern general concepts and functions of the substantive investment rules that are repeatedly raised in many disputes where consistent responses would be desirable.

International Centre for Settlement of Investment Disputes

IOAN MICULA,
VIOREL MICULA,
S.C. EUROPEAN FOOD S.A.,
S.C. STARMILL S.R.L.
AND
S.C. MULTIPACK S.R.L.

CLAIMANTS

v.

ROMANIA

RESPONDENT

ICSID Case No. ARB/05/20

AWARD

Rendered by an Arbitral Tribunal composed of:

Dr. Laurent Lévy, President
Dr. Stanimir A. Alexandrov, Arbitrator
Prof. Georges Abi-Saab, Arbitrator

Secretary of the Tribunal
Ms. Martina Polasek

Assistant to the Tribunal
Ms. Sabina Sacco

Date of Dispatch to the Parties: 11 December 2013

499. In view of the above, the Respondent submits that there are four propositions that the Claimants must prove in order for their fair and equitable treatment claim to succeed, and they have failed to prove them. These propositions are (Tr., Day 13, 45:1-20 (King)):

(i) First, the Claimants must prove that Romania's actions, and in particular the 31 August 2004 amendment of EGO 24, were manifestly unreasonable.

(ii) Second, the Claimants must prove that Romania promised them ten years of stabilization of the EGO 24 facilities.

(iii) Third, the Claimants must prove that they made investments in reasonable reliance on the legitimate expectation that the EGO 24 facilities would not change until 2009.

(iv) Fourth, the Claimants must prove that Romania acted in such a non-transparent and inconsistent way as to violate the fair and equitable treatment clause.

500. The Respondent has clarified that these propositions are not cumulative except (ii) and (iii). In other words, the Respondent's position is that the Tribunal could find a breach if the Claimant can prove that either proposition (i), propositions (ii) and (iii) jointly, or proposition (iv) are true (Tr., Day 13, 58:5-60:7).

501. In addition, as noted in paragraph 279 above, the Respondent argues as a general matter that the Claimants' case on fair and equitable treatment hinges on the testimony of their witnesses, which the Respondent contends is neither credible nor reliable. It also argues that, despite the Claimants' shift in focus, this is not and has never been a case about whether Romania acted transparently; it has only become so because the hearing undermined the Claimants' previous legal theories (Tr., Day 13, 19-43 (King)).

2. Nature, interpretation and content of the fair and equitable treatment standard

502. The Tribunal will now address the nature, interpretation and content of the fair and equitable treatment standard.

a. Interpretation and general contours of the standard

503. The Parties seem to agree on the basics of the fair and equitable treatment standard, with certain nuances. The Respondent does not contest the Claimants' portrayal of the standard as an autonomous one, different from the international minimum standard. Nor does it contest that the standard has specific meaning. Likewise, both Parties agree that the interpretation of Article 2(3) of the BIT should start from the normal canons of treaty interpretation as contained in Articles 31 and 32 of the VCLT. Romania is not a party to the VCLT, but it is common ground that the VCLT reflects

customary international law[77] and Romania relies on it as the appropriate method to interpret the BIT.[78]

504. To establish the content of the standard, the Tribunal must first turn to the plain meaning of the terms "fair and equitable." The plain meaning of these terms, however, does not provide much assistance. As noted by the tribunal in *MTD v. Chile*, "[i]n their ordinary meaning, the terms 'fair' and 'equitable' [...] mean 'just', 'even-handed', 'unbiased', 'legitimate'."[79] Similarly, the tribunal in *S.D. Myers v. Canada* stated that unfair and inequitable treatment meant "treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[80] This Tribunal agrees with the *Saluka* tribunal in that "[t]his is probably as far as one can get by looking at the 'ordinary meaning' of the terms of Article 3.1 of the Treaty."[81]

505. The question is rather how those concepts should be applied to the facts. It is undisputed that an analysis of whether a state's conduct has been fair and equitable requires an assessment of all the facts, context and circumstances of a particular case. As stated in *Mondev v. United States*:

> When a tribunal is faced with the claim by a foreign investor that the investment has been unfairly or inequitably treated or not accorded full protection and security, it is bound to pass upon that claim on the facts and by application of any governing treaty provisions. A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.[82]

506. Similarly, the tribunal in *Waste Management II* said that "the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[83] This has been echoed by several tribunals, including in *Lauder v. Czech Republic*[84], *CMS v. Argentina*, *Noble Ventures v. Romania*[85], *Saluka v. Czech Republic*.

507. That being said, as the Claimants point out and the Respondent does not contest, the content of the fair and equitable treatment standard does not depend on a tribunal's

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[77] *See, e.g., Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad),* [1994] ICJ Reports 6, ¶ 41 ("The Court would recall that, in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.")

[78] *See, e.g.,* R-CM, ¶¶ 73-75.

[79] *MTD v. Chile*, ¶ 113.

[80] *S.D. Myers v. Canada*, ¶ 263.

[81] *Saluka v. Czech Republic*, ¶ 297.

[82] *Mondev v. United States*, ¶ 118. See also *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Award, 31 July 2007, ¶ 370.

[83] *Waste Management v. Mexico II*, ¶ 99.

[84] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (hereinafter, *"Lauder v. Czech Republic"*).

[85] *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award, 12 October 2005.

idiosyncratic interpretation of the standard but "must be disciplined by being based upon state practice and judicial or arbitral case law or other sources of customary or general international law" (C-SoC, ¶ 193, citing *ADF Group*, ¶ 184). The tribunal in *Saluka* held:

> This does not imply, however, that such standards as laid down in Article 3 of the Treaty would invite the Tribunal to decide the dispute in a way that resembles a decision *ex aequo et bono*. This Tribunal is bound by Article 6 of the Treaty to decide the dispute on the basis of the law, including the provisions of the Treaty. Even though Article 3 obviously leaves room for judgment and appreciation by the Tribunal, it does not set out totally subjective standards which would allow the Tribunal to substitute, with regard to the Czech Republic's conduct to be assessed in the present case, its judgment on the choice of solutions for the Czech Republic's. As the tribunal in *S.D. Myers* has said, the "fair and equitable treatment" standard does not create an "open-ended mandate to second-guess government decision-making". The standards formulated in Article 3 of the Treaty, vague as they may be, are susceptible of specification through judicial practice and do in fact have sufficient legal content to allow the case to be decided on the basis of law. Over the last few years, a number of awards have dealt with such standards yielding a fair amount of practice that sheds light on their legal meaning.[86]

508. In any event, it is established that the state's conduct does not need to be egregious to violate the standard (*Mondev, ADF Group, Waste Management II – see* paragraph 524 below).

509. Further, both Parties agree that the fair and equitable treatment standard should be interpreted in the light of the object and purpose of the BIT as reflected in its Preamble. This was also the approach taken by the *Saluka* tribunal, which noted that "[t]he preamble thus links the 'fair and equitable treatment' standard directly to the stimulation of foreign investments and to the economic development of both Contracting Parties."[87] The Respondent further argues that the standard should be interpreted in the broader context of EU accession.

510. The Preamble of the BIT states that the Contracting Parties have agreed on the terms of the BIT:

> *desiring* to intensify economic cooperation to the mutual benefit of both States and to maintain fair and equitable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,
>
> *recognizing* that the promotion and protection of such investments favour the expansion of the economic relations between the two Contracting Parties and stimulate investment initiatives, [...]

511. The Parties agree that the Preamble reflects the BIT signatories' goal of intensifying economic cooperation between Romania and Sweden, but disagree on what interpretation of "fair and equitable treatment" is appropriate to achieve this goal. The

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[86] *Saluka v. Czech Republic*, ¶ 284.

[87] *Id*, ¶ 298.

Claimants do not suggest a specific interpretation of the fair and equitable treatment standard in this context, other than to argue that attracting investors through tax exemptions and other incentives that are promised for a certain period of time, and then withdrawing those incentives unilaterally, is not conducive to the intensification of economic cooperation or to the stimulation of investment initiatives.

512. The Respondent for its part contends that the Contracting Parties' intention was to intensify economic relations in the context of Romania's accession to the EU. The Respondent argues that the BIT was signed pursuant to Article 74 of the Europe Agreement, which prompted Romania to sign investment protection treaties with EU member states. As the goal of the Europe Agreement was to integrate Romania and the EU at a political level, which carried with it the obligation to harmonize Romanian law to EU law, the goal of the BIT between Romania and Sweden must be interpreted in this context. Therefore, Romania's obligation to afford fair and equitable treatment to Swedish investors must be interpreted in such a way that it is consistent with EU law.

513. It is undisputed that the Europe Agreement predated the BIT and, indeed, promoted the conclusion of BITs such as the Sweden-Romania BIT. Despite the lack of express reference in the BIT to EU accession or the EU, the Tribunal has also found that the general context of EU accession must be taken into account when interpreting the BIT.

514. That being said, the Tribunal cannot conclude in the abstract (as Romania seems to suggest) that the revocation of the incentives is fair and equitable solely because it was undertaken pursuant to Romania's obligation under the Europe Agreement to harmonize its law with EU law. As previously stated, whether the state's conduct is unfair and inequitable must be assessed in view of all the facts and surrounding circumstances.

515. The Tribunal must bear in mind that the goal of the BIT is the "intensif[ication of] economic cooperation to the mutual benefit of both States" and, in this context, "to maintain fair and equitable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party", and that when the Contracting States set this goal they recognized "that the promotion and protection of such investments favour the expansion of the economic relations between the two Contracting Parties and stimulate investment initiatives." In this respect, the Claimants argue that the objective of the BIT was to help Romania raise its level of economic development so it could join the EU (Tr., Day 1, 181-184 (Gaillard)).

516. In view of these considerations, the Tribunal favors a balanced view of the goals of the BIT similar to that adopted by the *Saluka* tribunal:

> This is a more subtle and balanced statement of the Treaty's aims than is sometimes appreciated. The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the

> protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.
>
> Seen in this light, the "fair and equitable treatment" standard prescribed in the Treaty should therefore be understood to be treatment which, if not proactively stimulating the inflow of foreign investment capital, does at least not deter foreign capital by providing disincentives to foreign investors. An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable.[88]

517. Finally, the Tribunal agrees with the Respondent that the fair and equitable treatment standard is not a laundry list of potential acts of misconduct. Whether a state has treated an investor's investments unfairly and inequitably defies abstract analysis or definitions, and can only be assessed when looking at the totality of the state's conduct. As noted by the tribunal in *Total S.A. v. Argentina*,[89] "[s]ince this standard is inherently flexible, it is difficult, if not impossible, 'to anticipate in the abstract the range of possible types of infringements upon the investor's legal position'." [90]

518. Nonetheless, as noted by Professors Dolzer and Schreuer, one way to "gauge the meaning of an elusive concept such as FET" is "to identify typical factual situations to which this principle has been applied. An examination of the practice of tribunals demonstrates that several principles can be identified, which are embraced by the standard of fair and equitable treatment."[91] As noted by the *Total* tribunal, "[o]n the premise that a 'judgement of what is fair and equitable cannot be reached in the abstract; it must depend on the fact[s] of the particular case' and that 'the standard is to some extent a flexible one which must be adapted to the circumstances of each case', tribunals have endeavoured to pinpoint some typical obligations that may be included in the standard, as well as types of conduct that would breach the standard, in order to be guided in their analysis of the issue before them." [92]

519. According to Dolzer and Schreuer, tribunal practice shows that the concepts of transparency, stability and the protection of the investor's legitimate expectations play a central role in defining the FET standard, and so does compliance with contractual obligations, procedural propriety and due process, action in good faith and freedom

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[88] *Saluka v. Czech Republic*, ¶¶ 304-309.

[89] *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/01), Decision on Liability, 27 December 2010 (hereinafter *"Total S.A. v. Argentina"* or *"Total"*).

[90] *Total S.A. v. Argentina*, ¶ 107.

[91] R. Dolzer and C. Schreuer, Principles of International Investment Law, 2008, p. 133.

[92] *Total S.A. v. Argentina*, ¶ 109.

from coercion and harassment.[93] Cases reflecting these conclusions include *Bayindir v. Pakistan*[94] and *Total S.A. v. Argentina*.[95]

520. In this context, the Parties appear to agree that there are certain types of conduct that are usually deemed to violate the fair and equitable treatment standard, bearing in mind the facts of the particular case. For analytical purposes, the Tribunal will use the Respondent's distinction between (i) conduct that is substantively improper (because it is arbitrary, unreasonable, discriminatory or in bad faith), (ii) conduct that violates legitimate expectations relied upon by the investor (including here the Claimants' stability "strand"), and (iii) conduct that is procedurally improper. That being said, the Tribunal is not persuaded that the Claimants' claim that Romania acted non-transparently and inconsistently is based on an assertion that the violation is "procedural," so the Tribunal will not use the Respondent's terminology for that claim.

521. The Tribunal addresses the standard for substantively proper conduct in Section (b) below, the standard for determining when a legitimate expectation has arisen in Section (c) below, and the standard for transparency in Section (d) below.

b. Conduct that is substantively improper

522. There is no dispute that conduct that is substantively improper, whether because it is arbitrary, manifestly unreasonable, discriminatory or in bad faith, will violate the fair and equitable treatment standard. As stated by the *Waste Management II* tribunal:

> "[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in

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[93] *Id.*

[94] *Bayindir v. Pakistan*, Award, 27 August 2009, ¶ 178 ("The Tribunal agrees with Bayindir when it identifies the different factors which emerge from decisions of investment tribunals as forming part of the FET standard. These comprise the obligation to act transparently and grant due process [*Metalclad v. Mexico*], to refrain from taking arbitrary or discriminatory measures [*Waste Management v. Mexico II, Lauder v. Czech Republic*], from exercising coercion [*Saluka v. Czech Republic*] or from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment [*Duke Energy v. Ecuador*].")

[95] *Total S.A. v. Argentina*, ¶¶ 109 ("A breach of the fair and equitable treatment standard has been found in respect of conduct characterized by 'arbitrariness' [*ELSI* case] and of 'acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith' [*Genin v. Estonia*]. It has been also held that the standard requires 'treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment' [*MTD v. Chile*], thereby condemning conduct that is arbitrary, grossly unfair, unjust or idiosyncratic or that 'involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in administrative process' [*Waste Management v. Mexico II*]. Awards have found a breach in cases of discrimination against foreigners and 'improper and discreditable' or 'unreasonable' conduct. [*Saluka v. Czech Republic*] This does not mean that bad faith is necessarily required in order to find a breach: 'A State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.' [*Mondev v. U.S.*]").

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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018)

I. Introduction

1. At its fiftieth session, the Commission had before it notes by the Secretariat on "Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration" (A/CN.9/915); on "Possible future work in the field of dispute settlement: Ethics in international arbitration" (A/CN.9/916), and on "Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS)" (A/CN.9/917). Also, before it was a compilation of comments by States and international organizations on the investor-State dispute settlement (ISDS) framework (A/CN.9/918 and addenda).

2. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission entrusted the Working Group with a broad mandate to work on the possible reform of ISDS. In line with the UNCITRAL process, the Working Group would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and fully transparent. The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).[1]

3. At its thirty-fourth and thirty-fifth sessions, the Working Group considered possible reform of ISDS on the basis of a Note by the Secretariat (A/CN.9/WG.III/WP.142) and submissions from Intergovernmental Organizations (A/CN.9/WG.III/WP.143). The deliberations and decisions of the Working Group at

[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 263 and 264.

such concerns at the current phase as they were closely linked with the legitimacy of the ISDS regime as a whole.

24. It was also mentioned that document A/CN.9/WG.III/WP.149 included reform options that had been presented during the previous deliberations of the Working Group to illustrate the wide range of possible solutions. It was said that the options were presented to facilitate the discussion of the Working Group on the desirability of reforms. It was emphasized that those options were not exclusive nor was the list of options exhaustive.

B. Concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals

25. The Working Group undertook its consideration of whether the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals were concerns that warranted some form of reform, on the basis of documents A/CN.9/WG.III/WP.149 (paras. 9 and 10), A/CN.9/WG.III/WP.150 and A/CN.9/915.

26. During its deliberation, the attention of the Working Group was drawn to an IBA report titled "Consistency, efficiency and transparency in investment treaty arbitration", which outlined specific questions regarding consistency and efficiency, including potential solutions.

1. Divergent interpretations of substantive standards, divergent interpretations relating to jurisdiction and admissibility, and procedural inconsistency

27. The Working Group first considered concerns relating to divergent interpretations of substantive standards, divergent interpretations relating to jurisdiction and admissibility, and procedural inconsistency.

28. The Working Group recalled its previous discussion where the importance of a coherent and consistent ISDS regime providing for correct and predictable outcomes was highlighted as enhancing confidence in the investment environment and legitimacy of the ISDS regime. The Working Group had noted that different factors might lead to different arbitral decisions (for example, the rules of treaty interpretation required a tribunal to consider more than the ordinary meaning to be given to the terms of a treaty provision when interpreting it, the manner and the extent to which relevant evidence were presented, and how disputing parties made their arguments). The Working Group further recalled that a distinction had been made between divergence in decisions that could be justified and differing interpretations which could not be justified (for example, contradictory interpretations of the same substantive standard in the same treaty, or of the same procedural issue, particularly when the facts were similar). It was recalled that the Working Group had agreed to focus its discussion on those scenarios in which different interpretations could not be justified.

29. In response to a suggestion that the questions of consistency, coherence, predictability and correctness of arbitral decisions deserved a more in-depth analysis, it was clarified that the focus of the discussion should be on whether the overall situation as illustrated in document A/CN.9/WG.III/WP.150 raised concerns that made reforms desirable, and not on specific examples of divergent treaty interpretations. It was further mentioned that the examples presented in that document were illustrative and not exhaustive. It was said that States were invited to conduct more in-depth analysis of those examples. It was further said that some States had conducted such an analysis and had concluded that some, but not all, of the examples were instances of unjustifiable inconsistency.

30. Views were expressed that the lack of consistency, coherence, predictability and correctness of arbitral decisions was a material concern and not only one of

perception. It was said that such a lack negatively affected the reliability, effectiveness and predictability of the ISDS regime and its overall credibility and legitimacy. The view was expressed that this would run contrary to fostering foreign direct investment to achieve the Sustainable Development Goals. It was further mentioned that the lack of consistency could also have financial and political impact on States as they relied on a coherent and predictable framework when developing their investment policies. Further, investors would also be affected when deciding whether to invest in a State and whether to pursue an ISDS claim.

31. It was said that concerns were particularly acute when different ISDS tribunals had reached contradicting conclusions about the same or similar substantive standard or about the same procedural issue, particularly when the facts were similar or a different outcome could not be justified. It was indicated that document A/CN.9/WG.III/WP.150 provided some examples where inconsistent decisions by tribunals were viewed as problematic.

32. It was indicated that the concerns also related to annulment as well as recognition and enforcement of arbitral awards, as these procedures have also given rise to inconsistent approaches and outcomes. The distinction between procedures involving ICSID and non-ICSID awards was underlined. While ICSID awards were subject to annulment procedures under the ICSID Convention, arbitral awards rendered in non-ICSID arbitrations were subject to set aside and enforcement procedures in national courts.

33. It was suggested that it might be useful to identify the causes or sources leading to the lack of consistency, coherence, predictability and correctness of arbitral decisions in order to develop any possible solution. In that light, it was mentioned that substantive protection standards were found in different sources of law, including investment treaties and domestic investment laws, which resulted in fragmentation. It was further pointed out that investment disputes were being resolved by tribunals constituted ad hoc for solving individual disputes.

34. Further, it was suggested that the discussion should not focus on inconsistency among decisions but on ensuring the correct interpretation of investment treaty provisions. It was explained that the main concern was not that decisions were inconsistent, but that arbitral tribunals had interpreted the treaty provisions incorrectly, sometimes not taking account of the intention of the treaty parties. It was said that in considering any reform options, it would be important to consider their possible impact on States' control over their treaties. It was also questioned whether procedural reform alone could address the question of inconsistency and unpredictability.

35. The view was expressed that the divergent interpretations and procedural inconsistency were intrinsic elements of the ISDS regime and further linked with other concerns, for instance, that arbitrators did not regard themselves as under a general duty towards an international system of justice, to act in the public interest, or to take into account the rights and interest of non-disputing parties. It was further said that related questions included how the mandate of arbitrators and their powers were determined and what limitations should apply to their decision-making and interpretative powers. It was further suggested that the concerns under consideration were closely linked to the efficiency of ISDS.

36. Diverging views were expressed on the level of priority to be accorded to these concerns about unjustifiable inconsistency. Some considered that addressing these concerns was of utmost priority while others expressed the view that it was of less priority and required a long-term approach.

37. The Working Group heard examples of how States were currently addressing these concerns in their investment treaties, such as including provisions on joint interpretative declarations, providing more guidance to arbitral tribunals on the meaning of certain terms and standards, and establishing joint committees on treaty interpretation.

38. However, it was suggested that while these approaches were useful for the interpretation of a specific treaty, they did not constitute solutions for interpreting similar treaty provisions in different treaties. The importance of addressing these matters at a multilateral level was underlined. Therefore, it was said that there would be merit in discussing the options at UNCITRAL.

Decision by the Working Group

39. The Working Group completed its discussion with respect to divergent interpretations of substantive standards, divergent interpretations relating to jurisdiction and admissibility, and procedural inconsistency. During its discussion, the Working Group was guided by the distinction made in its previous work between divergent interpretations that were justified and those that could not be justified, and its agreement to focus its discussion on the latter (see para. 28 above). There was consensus in the Working Group that there were instances of unjustifiable inconsistency.

40. The Working Group concluded that the development of reforms by UNCITRAL was desirable to address the concerns related to unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law by ISDS tribunals.

2. Lack of a framework to address multiple proceedings

41. The Working Group considered concerns relating to the lack of a framework to address multiple proceedings, and whether such concerns warranted some form of reform. The Working Group recalled that that matter had been on the agenda of the Commission since its forty-sixth session, in 2013. It was noted that document A/CN.9/915 outlined 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.

42. At the outset, it was mentioned that multiple proceedings resulting in divergent interpretation by ISDS tribunals was one of the reasons leading to the lack of consistency as previously discussed. It was mentioned that multiple proceedings distorted the balance of rights and interests of relevant stakeholders and raised other concerns as identified below.

43. It was suggested that it would be necessary for the Working Group to have a shared understanding of what was meant by multiple proceedings. For example, it was mentioned that it could be broader than concurrent or parallel proceedings encompassing successive proceedings. It was said that circumstances leading to multiple proceedings were varied, including situations where various parties, claiming in various forums and under different sources of law, sought substantially the same relief for the same measure and situations where a State faced multiple claims from unrelated investors in relation to the same measure. Furthermore, acceptance by arbitral tribunals of claims for reflective loss raised by shareholders was another instance leading to multiple claims in investment arbitration. Reference was made to work undertaken by OECD in that respect.

44. In addition, it was pointed out that an investor might pursue its claim on different legal bases, including investment treaties and contracts, as well as in different forums, including State courts, domestic arbitration, international arbitration either institutional or ad hoc. In light of the various situations, it was questioned whether relevant discussion should be limited to multiple ISDS proceedings arising under investment treaties.

45. It was recalled that, at its thirty-fourth session, the Working Group decided to focus on treaty-based ISDS and later consider the possibility of extending the results of its work to ISDS arising under contracts and investment law (see document A/CN.9/930/Rev.1, paras. 27-30). However, it was stated that concerns relating to the lack of a framework to address multiple proceedings were not limited