United Nations A/CN.9/WG.III/WP.224

General Assembly

Distr.: Limited
17 November 2022

Original: English

United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
Forty-fourth session
Vienna, 23–27 January 2023

Possible reform of investor-State dispute settlement (ISDS)

Appellate mechanism

Note by the Secretariat

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V.22-26077 (E)

I. Introduction

1. At its resumed thirty-eighth session in January 2020, the Working Group undertook a preliminary consideration of an appellate mechanism based on document A/CN.9/WG.III/WP.185 with the goal of defining and elaborating the contours of such appellate mechanism (A/CN.9/1004/Add.1, paras. 16–51). At its fortieth session in February 2021, the Working Group continued its deliberations on the basis of document A/CN.9/WG.III/WP.202, which contained draft provisions on an appellate mechanism and addressed issues regarding the enforcement of decisions rendered through a standing mechanism (A/CN.9/1050, paras. 63–114). After discussion, the Working Group requested the Secretariat to undertake further preparatory work (A/CN.9/1050, para. 113).

2. The Working Group noted that the various components of an appellate mechanism were interrelated and would need to be considered, whatever form such a mechanism might take – an ad hoc appeal mechanism, a permanent stand-alone appellate body, or an appeal mechanism as the second tier of a standing mechanism (A/CN.9/1004/Add.1, paras. 16 and 25). Accordingly, chapter II of this Note contains draft provisions relating to the functioning of an appellate mechanism regardless of its form. Chapter III addresses issues to be considered in the implementation of this reform element, including the possible ways to establish an appellate mechanism and to constitute an appellate tribunal. Therefore, references to an "appellate mechanism" or an "appellate tribunal" in this Note are without prejudice to the decision to be made by the Working Group on how to implement this reform element.

3. This Note was prepared with reference to a broad range of published information on the topic[1] and based on the deliberations of the Working Group at its previous sessions. It also reflects the comments received by the Secretariat from States and interested parties on an initial draft circulated for comments in March 2022.[2] This Note does not seek to express a view on the possible options, which is a matter for the Working Group to consider.

II. Draft provisions on the functioning of an appellate mechanism

1. Scope of appeal

Draft provision 1

1. A disputing party may appeal a decision made by a first-tier tribunal on its jurisdiction or on the merits in relation to an international investment dispute.

2. Notwithstanding paragraph 1, the following types of decisions by a first-tier tribunal shall not be subject to appeal:

(a) A decision on interim measures;

(b) A decision that it does not have jurisdiction;

(c) […].

4. Draft provision 1 addresses the scope of appeal, in other words, the types of disputes and the types of decisions, which would be subject to appeal (A/CN.9/1050,

[1] See footnote 2 of document A/CN.9/WG.III/WP.202; see also bibliographic references published by the Academic Forum, available at the UNCITRAL website, Working Group III, Additional resources, at https://uncitral.un.org/en/library/online_resources/investor-state_dispute and www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/.

[2] See compilation of comments on the initial draft on an appellate mechanism at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_0.pdf.

paras. 63–84). The provision provides for a "right to appeal" rather than a "right to request leave for an appeal" (A/CN.9/1050, paras. 92 and 113).

5. Paragraph 1 refers to decisions by "a first-tier tribunal", which would include an arbitral tribunal constituted to resolve an international investment dispute as well as a first-tier tribunal envisaged in a standing mechanism.

6. Paragraph 1 provides that decisions on jurisdiction as well as those on the merits are subject to appeal (see also A/CN.9/1050, paras. 86, 87 and 113; A/CN.9/1004/Add.1, para. 55). Accordingly, final decisions concluding the proceedings as well as prior decisions on jurisdiction (including on the admissibility of a claim), partial decisions on the merits (including, for example, a decision upholding liability but deferring assessment of damages to a later stage) can be the subject of appeal. The term "decision" encompasses awards rendered by arbitral tribunals and decisions by a first-tier tribunal of a standing mechanism.

7. Paragraph 1 refers to an "international investment dispute", building upon the definition the Working Group is currently developing in the context of the draft code of conduct (see A/CN.9/WG.III/WP.223, article 1 (a); see also A/CN.9/1050, para. 88).[3]

[***Note to the Working Group**: The Working Group may wish to confirm that the scope of appeal should not be limited to final decisions. Allowing for appeals of decisions rendered prior to the final decision could ensure the effectiveness of the first-tier process since the disputing parties would not have to wait until the conclusion of the proceedings to raise an appeal. The Working Group may wish to also consider the impact that such an appeal would have on an ongoing first-tier proceeding (see draft provision 4). On the other hand, limiting the scope of appeal to final decisions could ensure that the appellate tribunal would have the full record of the case to review when rendering its decision.*[4]]

8. Paragraph 2 provides that certain decisions by a first-tier tribunal are not subject to appeal.

[***Note to the Working Group**: If the scope of appeal is broadened to non-final decisions, there may be a need to exclude certain types of decisions, such as procedural orders, decisions on interim measures, decisions on bifurcation, and decisions on challenges. While such decisions would generally not be considered decisions on jurisdiction or on the merits, the Working Group may wish to list such decisions in paragraph 2 for clarity purposes. The Working Group may also wish to consider whether a decision by an arbitral tribunal declining its jurisdiction should be subject to appeal, considering the consequences of a possible reversal by an appellate tribunal (A/CN.9/1050, para. 87; see also A/CN.9/1004/Add.1, para. 33). This issue may, however, be resolved by the second sentence of draft provision 7(2).*]

2. Grounds for appeal

Draft provision 2

1. An appeal should be limited to:

   (a) An error in the application or interpretation of the law; or

[3] "International investment dispute" (IID) means a dispute between an investor and a State or a regional economic integration organization (REIO) [or any constituent subdivision of a State or agency of a State or an REIO] submitted for resolution pursuant to: (i) a treaty providing for the protection of investments or investors; (ii) legislation governing foreign investments; or (iii) an [international] investment contract.

[4] In the context of the International Centre for Settlement of Investment Disputes (ICSID) context, it is only when the (final) award is issued that an annulment can be raised, and then only on the basis of a ground stipulated in article 52(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").

(b) A manifest error in the appreciation of the facts, including the appreciation of relevant domestic legislation and the assessment of damages.

2. Notwithstanding paragraph 1, an appeal may be raised on one or more of the following grounds:

(a) A party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it;

(b) The first-tier tribunal was not properly constituted;

(c) The first-tier tribunal has manifestly exceeded its powers or ruled beyond the claims submitted to it;

(d) There was corruption on part of a member of the first-tier tribunal;

(e) There has been a serious departure from a fundamental rule of procedure;

(f) The first-tier tribunal decision failed to state the reasons on which it is based, unless the parties have agreed otherwise; and

(g) The decision by the first-tier tribunal is in conflict with international public policy.

9. Draft provision 2 provides the grounds upon which a disputing party may raise an appeal (see A/CN.9/1050, paras. 63–84 and 113). The draft provision should be read in conjunction with draft provision 7 on the possible decisions that an appellate tribunal could make with regard to the first-tier tribunal's decision.

10. Paragraph 1 provides limited grounds for raising an appeal (A/CN.9/1050, paras. 64–67; A/CN.9/1004/Add.1, paras. 28 and 29).

11. Subparagraph 1(a) reflects the wording found in recent international investment agreements[5] and refers to an error in the application or interpretation of the law. "Law" means the law applied by the first-tier tribunal in its decision, which could be a treaty providing for the protection of investments or investors, a domestic legislation governing foreign investment or a law governing the investment contract. Issues of law addressed by the first-tier tribunal in its decision as well as the interpretation thereof form the basis of an appeal.

12. Subparagraph 1(b) also reflects the wording found in recent international investment agreements,[6] and extends the grounds for appeal to issues of fact. However, it is only a ground for appeal when the error by the first-tier tribunal is "manifest" – commonly understood as there being no ambiguity or controversy that an error exists (A/CN.9/1050, para. 67). In the context of Rule 41(5) of the ICSID Arbitration Rules on preliminary objections (renumbered Rule 41 in the 2022 ICSID Arbitration Rules to address a claim that is manifestly without legal merit), arbitral tribunals have interpreted the word "manifest" as requiring the requesting party to establish its objection clearly and obviously with relative ease and dispatch.[7] In the context of an appeal, the error should be obvious or plain on its face, and should not require a complex analysis.

[5] See European Union-Singapore Investment Protection Agreement (IPA) (2018), article 3.19 (1); EU-Viet Nam IPA (2019), article 3.54 (1); EU-Canada Comprehensive Economic and Trade Agreement (CETA), article 8.28 (2)(a); Investment Agreement for the COMESA (Common Market for Eastern and Southern Africa) Common Investment Area, article 13 (1); International Institute for Sustainable Development (IISD) Model International Agreement on the Investment for Sustainable Development, article 14 (1).

[6] Ibid.

[7] Michele Potestà, "Preliminary Objections to Dismiss Claims that are Manifestly Without Legal Merit under Rule 41(5) of the ICSID Arbitration Rules" in Crina Baltag (ed.), ICSID Convention after 50 Years: Unsettled Issues (Kluwer 2017), 249–271; See further: Christoph Schreuer et al, The ICSID Convention: A Commentary (CUP 2010), 938.

13. The phrase "including the appreciation of relevant domestic law and the assessment of damages" in subparagraph 1(b) clarifies that a manifest error in the interpretation or application of domestic legislation other than that covered by subparagraph 1(a) (A/CN.9/1050, paras. 68–69)[8] as well as in the calculation of damages or compensation may be the subject of appeal (A/CN.9/1050, para. 72; see also A/CN.9/1004/Add.1, para. 28).

[***Note to the Working Group****: The Working Group may wish to confirm whether express reference should be made to domestic legislation and damages in subparagraph 1(b).*]

14. While paragraph 1 provides limited grounds for appeal, paragraph 2 reflects grounds provided for in existing annulment procedures (article 52 (1) of the ICSID Convention) or setting aside procedures (provided for in domestic legislation based on article 34 of the UNCITRAL Model Law on International Commercial Arbitration[9] (the "Model Law")). This would avoid duplication of review by the appellate mechanism and by existing annulment and setting aside mechanisms.

Grounds in draft provision 2 (2)	*Relevant articles of the ICSID Convention*	*Relevant articles of the Model Law*
2 (a)		34 (2)(a)(i)
2 (b)	52 (1)(a)	34 (2)(a)(iv)
2 (c)	52 (1)(b)	34 (2)(a)(iii)
2 (d)	52 (1)(c)	
2 (e)[10]	52 (1)(d)	34 (2)(a)(ii)
2 (f)	52 (1)(e)[11]	
2 (g)		34 (b)(ii)

[***Note to the Working Group****: The Working Group may wish to consider the extent to which the grounds for annulment and setting aside should be listed as grounds for appeal. This relates to whether an appellate mechanism may substitute or replace those procedures. In light of views expressed for avoiding duplication of review proceedings (see A/CN.9/1050, paras. 77 and 112), an approach would be to include all such grounds in draft provision 2 and further limit parallel review proceedings (see draft provision 5). However, this might not be entirely possible, if domestic laws provide other grounds for courts to set aside an award. While an alternative approach would be to encourage coordination between the appellate tribunal and the annulment or setting aside authority, it is questionable whether those authorities would be willing to defer their authorities. The Working Group may wish to further consider whether the grounds for appeal would be different when the appellate mechanism was implemented as a second tier of a standing mechanism with both tiers.*]

[8] See CETA article 8.28 (2)(b).

[9] Article 34 of the Model Law is modelled on article V the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention") providing grounds for refusing recognition and enforcement of an award.

[10] The phrase "fundamental rules of procedure" in subparagraph (e) encompasses the right to be heard (given the opportunity to present its case), equal treatment of the parties, and other such procedural rights.

[11] This stems from article 48 (3) of the ICSID Convention which provides: "The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based." In comparison, see article 31(2) of the Model Law which states: "The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30." Similar language can be found in article 34(3) of the UNCITRAL Arbitration Rules: 3. "The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given".

15. Draft provision 2 does not foresee grounds related to requests for an additional award,[12] a revision,[13] or the correction or interpretation of the first-tier tribunal's decision. Under existing rules, the first-tier tribunal is tasked with these duties.[14]

[***Note to the Working Group:*** *The Working Group may wish to consider whether the grounds for requesting an additional award, or a revision of an award should also be included as grounds for appeal. While a request for an additional award may be made within 30 days of the receipt of the award under the UNCITRAL Arbitration Rules, an application for a revision under the ICSID Convention may be made within 90 days after the discovery of fact and in any event within 3 years from the date of the award. The Working Group may wish to consider the possible overlap between these post-award processes and the appellate proceedings as well as the relevant time frames.*]

3. Time frame for appeal

Draft provision 3

An appeal shall be raised within [a short period of time to be indicated] from the date of the decision by the first-tier tribunal.

16. Draft provision 3 provides the time frame within which a disputing party may raise an appeal, which commences with the decision by the first-tier tribunal.

[***Note to the Working Group****: The Working Group may wish to consider the appropriate time frame (60, 90 or 120 days) within which an appeal may be raised. After that time frame, the disputing party would be barred from raising an appeal. The time frame should allow appropriate time for the disputing parties to prepare their case but should also not be too long and allow for the effective resolution of the dispute. Depending on the approach to be taken in draft provision 2, the time frame should also take into account time frames for requesting other post-award remedies, such as correction, interpretation, revision, annulment and setting aside of the award.*[15]]

[***Note to the Working Group****: Considering that draft provision 1 allows for an appeal of not only final but prior decisions by the first-tier tribunal, the time frame commences when the first-tier tribunal makes the decision. The Working Group may wish to consider the time frame commencing instead upon the disputing party's receipt of the decision (A/CN.9/1050, para. 93). In both cases, an issue that arises is whether a disputing party would be time-barred from raising an appeal with regard to a decision rendered prior to the final decision but also included in the final decision.*

[12] Article 39(1) of the UNCITRAL Arbitration Rules provides: "Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal".

[13] Article 51 of the ICSID Convention provides that a disputing party may request revision of the award on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

[14] See for example articles 37 and 38 of the UNCITRAL Arbitration Rules, article 50 of the ICSID Convention and rules 69 and 70 of the ICSID Arbitration Rules.

[15] Regarding the time frames for corrections of the award: see article 49 (2) ICSID Convention (45 days), rule 61 ICSID Arbitration Rules (45 days), article 33 UNCITRAL Model Law (30 days), article 38 UNCITRAL Arbitration Rules (30 days); regarding interpretation: see article 50 ICSID Convention (at any time after the award is rendered), rule 69 ICSID Arbitration Rules (at any time after an award is rendered); article 33 UNCITRAL Model Law (30 days), article 38 UNCITRAL Arbitration Rules (30 days); regarding revision: see article 51 ICSID Convention (90 days, or within 3 years after the award was rendered), rule 69 ICSID Arbitration Rules (90 days, or within 3 years after the award was rendered); regarding annulment: see article 52 ICSID Convention (120 days, or no later than 3 years following the discovery of corruption), rule 69 ICSID Arbitration Rules (within 120 days after the discovery of corruption and in any event within three years after the award); Regarding setting aside: see article 34 UNCITRAL Model Law (90 days).

For example, if the first-tier tribunal makes a decision on jurisdiction earlier on in the proceedings and includes that decision in its final decision, whether an appeal on jurisdiction could be made after the final decision is unclear. Therefore, an alternative approach would be to have the time frame commence with the final decision. Further, the Working Group may wish to consider whether the time frames need to be adjusted depending on the type of decision appealed as well as the grounds upon which the appeal is raised.]

4. Effect of an appeal on the first-tier proceeding

Draft provision 4

When an appeal is raised, the first-tier tribunal may, where appropriate and so requested by a disputing party, suspend the proceedings until a decision is made by the appellate tribunal.

17. Draft provision 1 provides for the possibility to appeal a decision on jurisdiction or on the merits made prior to the final decision by the first-tier tribunal. This means that the first-tier proceeding may still be ongoing when the appeal is raised. The first-tier tribunal could either continue its proceedings and render a final decision while the appeal is pending or suspend its proceedings until the appellate tribunal decides on the appeal.[16] There may be benefits in suspending the first-tier proceedings particularly if the appellate tribunal's decision would render the first-tier proceeding meaningless (for example, if a positive decision on jurisdiction is reversed). On the other hand, an automatic suspension would result in the final decision by the first-tier tribunal being delayed and could lead to systematic appeals (A/CN.9/1050, para. 96).

18. Draft provision 4 provides that when an appeal is raised, any disputing party may request the first-tier tribunal to suspend the proceedings until the appellate tribunal has decided on the appeal. It gives the discretion to the first-tier tribunal to determine whether to suspend its proceedings based on the circumstances of the case ("where appropriate"). In exercising its discretion, the first-tier tribunal should take into consideration, among others, the type of decision subject to appeal, at which stage of the proceedings the appeal was raised and the need to avoid undue delays and costs. Draft provision 4 would not apply when a final decision of the first-tier tribunal is appealed after the conclusion of the first-tier proceedings.

5. Effect of an appeal on the first-tier decision and the relationship with annulment, setting aside and enforcement proceedings

Draft provision 5

1. An appeal shall suspend the effect of the decision of the first-tier tribunal and that decision shall not be subject to setting aside, annulment or any other review proceedings before any other forums.

2. Recognition and enforcement proceedings of a decision of the first-tier tribunal shall be stayed until the time period in draft provision 3 has elapsed and if an appeal is raised within that time period, until the appellate tribunal makes a decision or the appellate proceedings are terminated.

19. Draft provision 5 provides that an appeal would temporarily suspend the effect of the first-tier decision. It further addresses the relationship between the appellate mechanism and existing annulment, setting aside and enforcement mechanisms. It

[16] See, for example, article 16(3) of the Model Law, which provides that an arbitral tribunal may rule that it has jurisdiction as a preliminary question (instead of in an award on the merits) and that when it does so, any party may request the competent court to decide on the matter. It further provides that while such request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

aims to provide an overall framework that would avoid the first-tier decision being subject to multiple proceedings, possibly resulting in conflicting decisions. Draft provision 5 is closely linked with draft provision 2 on the grounds of appeal and how an appellate mechanism would be implemented (see chapter III).

20. Paragraph 1 provides that a first-tier decision that is subject to an appeal before the appellate mechanism would no longer have any effect and that such a decision should not be the subject of any setting aside, annulment, or a similar review procedure.[17]

[***Note to the Working Group****: The ICSID Convention establishes a self-contained framework. Article 53 of the ICSID Convention provides that an award shall not be subject to any appeal or to any other remedy except those provided for in the Convention, including an annulment provided for in Article 52. Parties in non-ICSID arbitration, in contrast, may seek to set aside an award before domestic courts under the law of the place of arbitration. The effect that an appeal would have in relation to such procedures would largely depend on whether the appellate mechanism is intended to replace such existing procedure or exist in parallel. If the grounds provided for in existing setting aside or annulment procedures are included as grounds for appeal under draft provision 2 (see paras. 9–14 above), draft provision 5(1) would avoid duplication of the proceedings. However, it might not necessarily prevent a disputing party from seeking annulment or setting aside of an award instead of pursuing an appeal. It may also require amendments to domestic legislation governing the setting aside of an award. In this context, the Working Group may wish to consider whether the envisaged appellate mechanism should aim to replace the existing review procedures entirely and the extent to which this can be done through a multilateral instrument on investor-State dispute settlement reform (MIIR), which may provide that the only recourse for decisions covered by draft provision 1 is an appeal under the appellate mechanism. Another approach would be to require the disputing party raising an appeal to waive its right to annul or set aside an award. However, not all domestic laws would necessarily recognize such a waiver as a valid agreement, and it would not bind the other parties.*]

21. Paragraph 2 provides for an automatic stay of recognition and enforcement proceedings for a short period of time within which an appeal can be raised by a disputing party and extends the stay further if an appeal is raised (A/CN.9/1050, para. 114; see also A/CN.9/1004/Add.1, para. 42). This would prevent a disputing party from pursuing enforcement while there exists the likelihood of an appeal and when an appeal is eventually raised.

[***Note to the Working Group****: The Working Group may wish to consider whether it would be feasible to restrict the right of the disputing parties to seek recognition and enforcement under existing mechanisms by way of a treaty or a MIIR.*]

6. Conduct of the appellate proceedings

Draft provision 6

1. The appellate tribunal shall ensure that the proceedings are conducted in a fair and expeditious manner and in accordance with [the rules of procedure to be specified].

2. Members of the appellate tribunal shall comply with the Code of Conduct for [arbitrators/judges].

[17] At the resumed thirty-eighth session of the Working Group, doubts were expressed on whether decisions on jurisdiction should fall under the scope of an appellate mechanism, in particular as they were already subject to review procedures under domestic law provisions mirroring article 16 of the Model Law (see supra note 16); see also A/CN.9/1004/Add.1, para. 33). Including the phrase “any other review proceedings before any other forums” could avoid parallel procedures to challenge a preliminary decision on jurisdiction in domestic courts and in an appellate mechanism.

3. Joint interpretations by the Contracting Parties shall be binding on the appellate tribunal if this is provided in the applicable treaty.

4. At the request of the other disputing party, the appellate tribunal may order the disputing party raising the appeal to provide security amounting to [a percentage to be specified] of the amount awarded in the decision by the first-tier tribunal.

5. The appellate tribunal may, where appropriate and so requested by a disputing party, suspend the appellate proceedings for a fixed period of time in order to give the first-tier tribunal an opportunity to continue or resume the proceedings or to take such other action as in the appellate tribunal's opinion will eliminate the grounds for appeal.

22. Draft provision 6 includes rules on how the appellate proceedings should be conducted.

23. Paragraph 1 provides for an obligation of the appellate tribunal to ensure fair and expeditious proceedings and to conduct the proceedings in accordance with a set of procedural rules which would need to be determined.

[***Note to the Working Group****: The Working Group may wish to consider including a reference to existing rules*[18] *or formulate separate rules to apply to the appellate proceedings. These rules may relate to, among others, the appointment of the members of the appellate tribunal (A/CN.9/1050, paras. 45–47), the notice of appeal, the written pleadings of the parties (content and time limits for filing), the extension of deadlines, hearings (open or confidential), rules on evidence, provisional measures, the default of one party, discontinuance, and the publication of decisions. The Working Group may further wish to consider rules relating to cross appeals.*]

24. Paragraph 2 shows the interplay with another reform element that the Working Group is preparing and requires the members of the appellate tribunal to observe the applicable Code of Conduct, which would largely depend on how the appellate tribunal is composed.

25. Paragraph 3 provides a rule on treaty interpretation, requiring the appellate tribunal to take into account any joint interpretation by the treaty parties to the applicable investment treaty.

[***Note to the Working Group****: The Working Group may wish to consider adding a general provision on treaty interpretation, which could clarify that the Vienna Convention on the Law of Treaties, in particular articles 31 and 32 apply. The Working Group may further wish to consider whether the provision should provide for the power of the appellate tribunal to request the parties to the applicable treaty to submit a statement on the interpretation of the applicable treaty or the application of its provisions (A/CN.9/1004/Add.1, para. 47).*]

Mechanisms to address frivolous or systematic appeals

26. The Working Group highlighted the need to introduce a control mechanism to filter or dismiss frivolous or dilatory appeals and to ensure that the appeal mechanism does not result in systematic appeals (A/CN.9/1050, paras. 59, 109–111). In this regard, the draft provisions on procedural reform as proposed in document A/CN.9/WG.III/WP.219 could similarly apply in the context of an appeal mechanism, in particular, the provisions on early dismissal of claims manifestly without merit (A/CN.9/1124, paras. 107–119) and on security for costs. A provision on early dismissal of appeals could be used to filter appeals that do not meet on a prima facie basis the grounds for appeal provided for in draft provision 2 (A/CN.9/1050, para. 113).

[18] For example, article 52(4) of the ICSID Convention provides that "the provisions of Articles 41–45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply mutatis mutandis to proceedings before the [ad hoc] Committee".

27. In addition to the ordering of security for costs of the appellate proceedings, paragraph 4 allows the appellate tribunal to order as security a percentage of the amount awarded by the first-tier tribunal as a means to deter frivolous or systematic appeals.

[***Note to the Working Group****: A control mechanism could also be implemented by the appellate tribunal or through an administering institution responsible for handling the appeals. This question is therefore closely connected to the overall structure of an appellate mechanism.*]

28. Paragraph 5 mirrors draft provision 4 which gives the discretion to the first-tier tribunal to suspend its proceedings where appropriate.[19] If the appellate tribunal, upon the request of a disputing party, concludes that there could be benefit in allowing the first-tier tribunal to continue or resume its proceedings or to take actions to address the grounds of appeal, it may suspend its proceedings for a specified period of time. Paragraph 5 in conjunction with draft provision 4 aims to facilitate the coordination between the first-tier and the appellate tribunals.

7. Decisions by the appellate tribunal

Draft provision 7

Types of decisions

1. The appellate tribunal may uphold, modify, or reverse the decision of a first-tier tribunal.

2. Where the facts established by the first-tier tribunal are insufficient for the appellate tribunal to render a decision in accordance with paragraph 1, it may remand the dispute to the first-tier tribunal. If the first-tier tribunal is no longer in a position to consider the dispute, or where it would be inappropriate for the first-tier tribunal to consider the dispute, upon the request of either disputing party, a new tribunal shall be constituted in accordance with the same applicable rules.

Form and contents of the decision

3. The decision by the appellate tribunal shall be in writing and state the reasons upon which it is based.

4. When the appellate tribunal modifies or reverses any part of the decision of the first-tier tribunal, it shall indicate as precisely as possible how the relevant findings or conclusions of the first-tier tribunal are modified or reversed. When the appellate tribunal remands a decision to the first-tier tribunal, it may provide, where appropriate, detailed instructions.

Time frames for the decisions and possible extension

5. A decision by the appellate tribunal shall be made within [a period of time to be specified] from the date of the [appeal][constitution of the appellate tribunal].

6. When the appellate tribunal considers that it cannot issue its decision within the time period referred to in paragraph 5, it shall inform the disputing parties in writing of the reasons for the delay together with an estimated period of time within which it will issue its decision, which shall not exceed [a period of time to be specified].

Effect on the decision of the first-tier tribunal

7. A decision of the first-tier tribunal upheld by the appellate tribunal shall be final and binding on the disputing parties.

8. A decision of the first-tier tribunal modified or reversed by the appellate tribunal shall be final and binding on the disputing parties as amended by the appellate tribunal.

[19] See also article 34 (4) of the Model Law.

Finality of the decision of the appellate tribunal

9. A decision by the appellate tribunal shall be final and binding on the parties and shall not be subject to any appeal or review.

Correction and interpretation

10. Within [30] days of the receipt of the decision by the appellate tribunal, a disputing party, with notice to the other parties, may request the appellate tribunal: (i) to correct any error in computation, any clerical or typographical errors or any errors of a similar nature; or (ii) to give an interpretation of its decision.

11. If the appellate tribunal considers that the request is justified, it shall make the correction or give the interpretation within [30] days of the receipt of the request. Such a correction or an interpretation shall form part of the decision.

29. Draft provision 7 addresses the different aspects of a decision that an appellate tribunal may render.

30. Paragraph 1 provides that the appellate tribunal should be able to uphold, modify, or reverse the first-tier decision (A/CN.9/1050, para. 113; see also A/CN.9/1004/Add.1, para. 40).

31. Paragraph 2 permits an appellate tribunal to remand the dispute to the first-tier tribunal when it is not in a position to complete the analysis based on the facts established by the first-tier tribunal (A/CN.9/1050, paras. 101–104; see also A/CN.9/1004/Add.1, para. 41). While providing for remand authority could avoid prolonged appellate proceedings, it would need to be considered in conjunction with the standard of review (see draft provision 2) and issues related to the implementation of the appellate mechanism, in particular in the ad hoc context.

32. The second sentence of paragraph 2 not only captures a situation where the first-tier tribunal cannot consider the dispute but also where it would not be appropriate for the matter to be remanded to the first-tier tribunal. This would be the case, for example, if the appeal was based on grounds related to the constitution of the first-tier tribunal or to corruption on the part of a member of the first-tier tribunal.

[***Note to the Working Group****: The Working Group may wish to consider, whether upon remand, the subsequent decision of the first-tier tribunal (including a newly constituted tribunal) would continue to be subject to appeal, which might, however, result in multiple rounds of appeal.*]

33. Paragraphs 3 and 4 deal with the form and contents of the decision to be made by an appellate tribunal.

34. Paragraphs 5 and 6 deal with the time frames within which an appellate tribunal would be required to render its decision (see A/CN.9/1050, para. 113 and A/CN.9/1004/Add.1, paras. 33 and 55).

[***Note to the Working Group****: The Working Group may wish to consider the appropriate time frame (for example, 90 or 180 days) within which the appellate tribunal should render a decision and if extended, the maximum period of time within which a decision should be rendered (for example, 9 or 12 months) (A/CN.9/1050, para. 106).*[20] *The Working Group may wish to consider when both time frames should commence, for example, the date of the appeal, the date of the constitution of the*

[20] See for example article 17.5 of the Word Trade Organization Understanding on Rules and Procedures Governing the Settlement of Disputes, which provides for a time frame of 60 days from the appeal notification, or 90 days in case of delay; See also the United States Trade Representative, Report on the Appellate Body of the WTO (February 2020): Prior to 2011 the Appellate Body met the 90-day deadline in 87 out of 101 appeals. In 14 cases the Appellate Body obtained the parties' consent to extend the deadline. After 2011, the average length of an appeal was 133 days. After 2014 no appeals had been completed within the 90-day deadline. The average length of an appeal filed from May 2014 to February 2017 was 149 days.

appellate tribunal or the date of the last submission (see for example, ICSID Arbitration Rules 72(5)). The Working Group may wish to consider introducing an expedited procedure for certain types of appeals or certain grounds for appeal with a sole member tribunal, shorter time frames and a simplified procedure.]

35. Paragraphs 7 and 8 address the effect of a decision by the appellate tribunal on the decision by the first-tier tribunal.

36. Paragraph 9 provides that the decision of the appellate tribunal itself is also final and binding and that such a decision shall not be subject to any appeal or further review.

[***Note to the Working Group**: The Working Group may wish to consider whether a decision by an appellate tribunal should be subject to confirmation or some review by the States parties to the relevant investment treaty (see the review of interim panel reports, or adoption of the panel or Appellate Body Reports, in the World Trade Organization (WTO) through reverse consensus) (A/CN.9/1004/Add.1, para. 48). The Working Group may wish to further consider whether decisions by the appellate tribunal should have precedential effect for future cases involving the same or similar legal or factual issues and if so, how to give such an effect.*]

37. Paragraphs 10 and 11 provide for post-decision remedies, including interpretation and correction by an appellate tribunal (A/CN.9/1050, paras. 105 and 113; A/CN.9/1004/Add.1, para. 46).

8. Recognition and Enforcement

Draft provision 8

1. Each State Party shall recognize a decision rendered by an appellate tribunal pursuant to [these draft provisions] as binding and enforce the obligations imposed by that decision within its territories as if it were a final judgment of a court in that State. A State Party with a federal constitution may enforce such a decision in or through its federal courts and may provide that such courts shall treat the decision as if it were a final judgment of the courts of a constituent state.

2. A party seeking recognition or enforcement in the territory of a State Party shall furnish a copy of the decision to a court or other authority which such State shall have designated for this purpose.

3. Execution of a decision shall be governed by the laws concerning the execution of judgments in force in the State Party in whose territory such execution is sought.

4. Nothing in [these draft provisions] shall be construed as derogating from the law in force in any State Party relating to immunity of that State Party or of any foreign State from execution.

38. Draft provision 8 addresses the recognition and enforcement of decisions of the appellate tribunal, largely based on articles 54 and 55 of the ICSID Convention.

[***Note to the Working Group**: The Working Group may wish to consider whether the draft provision would need to address the recognition and enforcement of decisions by not only an appellate tribunal but also a first-tier tribunal, as the decision by the appellate tribunal may uphold or modify the first-tier decision. The Working Group may wish to note that if an appellate mechanism was established as part of a standing mechanism along with a first-tier tribunal, recognition and enforcement of decisions at both tiers could be dealt together. Draft provision 8, drafted as a provision of a treaty, might not be fully operational, if the appellate mechanism is established ad hoc.*]

III. Issues relating to the implementation of an appellate mechanism

39. The draft provisions in chapter II have been prepared for possible inclusion in a multilateral instrument on ISDS reform (MIIR) (see A/CN.9/1124, para. 71) but could be adjusted for inclusion in investment treaties or institutional rules.

1. Models for implementation

40. The draft provisions in chapter II do not address to whom the appeal should be raised, which would largely depend on how an appellate mechanism is implemented. An appellate mechanism could be established ad hoc or as a standing mechanism. The mode of implementation would also determine how an appellate tribunal would be composed.

Ad hoc appellate mechanism

41. An appellate mechanism could be developed on a purely ad hoc basis, with an appellate tribunal constituted by the disputing parties on a case-by-case basis, following the pattern of the constitution of first-tier tribunals in the current ISDS framework. Such an appellate mechanism could be administered by institutions handling ISDS cases.

Standing appellate mechanism

42. A standing multilateral appellate mechanism could be established as a stand-alone body to complement the current ISDS framework or as a second tier of a standing mechanism consisting of both a first tier and a second tier (see A/CN.9/WG.III/WP.213 on the selection and appointment of ISDS tribunal members and related matters).

43. Some investment treaties have established bilateral permanent appellate mechanisms and provide that the contracting parties shall enter into negotiations on a multilateral appellate mechanism which may replace the established bilateral mechanism.[21] Other treaties provide that the parties shall enter into negotiations on the establishment of an appellate mechanism[22] or provide that in the event that an appellate mechanism is developed in the future the Parties shall consider whether it should apply to awards rendered under their treaty.[23]

2. Relationship with existing mechanisms

44. The functioning of an appellate mechanism is closely related to the existing regime for rendering awards as well as the existing mechanisms for annulment, recognition, and enforcement of those awards in the context of the ICSID Convention, domestic arbitration laws or the New York Convention (see A/CN.9/WG.III/WP.202,

[21] See EU-Viet Nam IPA (2019), article 3.39 and 3.41; see also CETA (2016), article 8.38 and 8.29 and EU-Singapore IPA (2018), article 3.10 and 3.12.

[22] See for instance China-Australia FTA (2015), article 9.23.

[23] See for instance Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018), article 9.23(11). Further examples of provisions on a potential appellate mechanism see Panama-Peru FTA (2011), article 12.21(9); Costa Rica-Peru FTA (2011), article 12.21(9); Nicaragua-Taiwan FTA (2006), article 10.20(9); Canada-Republic of Korea FTA (2015), annex 8-E; Singapore-US FTA (2003), article 15.19(10); Chile-US FTA (2003), article 10.19 (10), annex 10-H; Morocco-US FTA (2004), article 10.19(10), annex 10-D; Uruguay-US BIT (2005), article 28(10), annex E; Peru-US FTA (2006), article 10.20(10), annex 10-D; Oman-US FTA (2006), article 10.19(9)(b), annex 10-D; Panama-US FTA (2007), article 10.20(10), annex 10-D; Colombia-US FTA (2012), article 10.20(10), annex 10-D; Australia-Republic of Korea FTA (2014), article 11.20(13), annex 11-E; FTA between Central America, the Dominican Republic and the United States of America (CAFTA) (2004), article 10.20(10), annex 10-F; United States Model BIT (2004), article 28(10), annex D; United States Model BIT (2012), article 28(10); and Dutch 2018 Model Investment Agreement, article 15.

chapter II.B). As noted in chapter II, some of those issues might be better addressed in a MIIR for the proper functioning of an appellate mechanism.

3. Other issues

45. The Working Group may wish to consider the temporal scope of an appellate mechanism, for example, whether it would apply to claims raised or decisions rendered after a certain period of time. This question also relates to the consent of the disputing parties not only to the first-tier proceedings but also to the possibility of an appellate procedure following the first-tier proceeding.