This document is an initial draft of a working paper prepared by the UNCITRAL secretariat for the sixth intersessional meeting of Working Group III (Singapore, 7 and 8 September 2023). The draft has been prepared to facilitate the informal discussions at the meeting and reflects work in progress. Reference is be made to document A/CN.9/WG.III/WP.213, which was discussed by the Working Group at the 42nd session and the report of that meeting. The document does not pertain to reflect the views of the Working Group or the secretariat. Comments on this draft should be communicated to the secretariat (jaesung.lee@un.org; corentin.basle@un.org) by 30 September 2023.

The EU and its Member States thank the UNCITRAL Secretariat for this working paper and wish to clarify that comments in this document are without prejudice to the position that the European Union and its Member States may take in subsequent discussions of Working Group III.

Draft statute of a standing mechanism for the resolution of international investment disputes

Draft article 1 – Establishment and objective

1. The Contracting Parties hereby establish a standing mechanism for the resolution of international investment disputes[1] (the "Standing Mechanism").

2. The objective of the Standing Mechanism is to administer and adjudicate international investment disputes in accordance with the Statute, the established rules of procedure and the applicable law.

Comments from the European Union and its Member States:

The European Union (EU) and its Member States understand "international investment dispute" as referring to investor-State dispute settlement as we understand it today, including mediation and State-to-State dispute resolution. As such, we should avoid having a footnote reference to the restricted definition under the Code of conduct for arbitrators. The jurisdiction of the Standing Mechanism needs to be flexible enough to cover future disputes (including against investors) and agreements that the Contracting Parties may wish to subject to it.

Also, as a general comment, the EU and its Member States wonder whether the instruments to be covered by the jurisdiction of the Standing Mechanism should be in an Annex or included in a list. It is the view of the EU and its Member States that amending an Annex would be a more burdensome process than amending a list, in particular in view of draft article 8(4) giving the powers to the Executive Director to "update" and so amend the list of instruments in the Annex. See comments to draft article 8(4).

[1] Article 1 of the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution defines "international investment disputes" as follows.
(a) "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 an instrument of consent;
(b) "Instrument of consent" means:
(i) A treaty providing for the protection of investments or investors;
(ii) Legislation governing foreign investments; or
(iii) An investment contract between a foreign investor and a State or an REIO or any constituent subdivision of a State or agency of a State or an REIO,

upon which the consent to arbitrate is based.

The EU and its Member States would suggest redrafting draft provision 1 as follows:

*1. The Contracting Parties hereby establish a standing mechanism for the resolution of ~~international investment~~ **disputes** **[as provided for in this Statute]** **covered in the instruments [listed/in the Annex] or otherwise subject to the jurisdiction of the mechanism** (the "Standing Mechanism").*

*2. The ~~objective~~ functions of the Standing Mechanism is to administer and adjudicate ~~international investment~~ disputes in accordance with ~~the~~ **this** Statute, the established rules of procedure and the applicable law.*

A/CN.9/WG.III/WP.213 **Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters**

7. As a general remark, the Working Group may wish to note that the notion of "international investment dispute" would need further consideration so as to be clearly defined and to apply to all relevant reform elements in a uniform manner. Draft provisions 1 to 3 below aim at providing the general framework within which the selection and appointment of tribunal members would take place. With respect to draft provision 3, should the tribunal be developed with an "open architecture" that would allow contracting States with the flexibility to determine which elements they would like to adopt, consideration may need to be given to how the roles and responsibilities of States within the Committee of the Parties may vary.

8. Draft provision 1 – "Establishment of the Tribunal" reads as follows:

A Multilateral Investment Tribunal composed of a first instance and an appellate level is hereby established (referred to as "the Tribunal").

Report of the forty-second session (New York, 14–18 February 2022), document A/CN.9/1092:

17. It was noted that the establishment of a Multilateral Investment Tribunal would likely require the preparation of a statute, which would be open for adoption by States and regional economic integration organizations. It was said that such a statute should have a preamble setting forth the objectives of the Tribunal and a section on key definitions. It was observed that the statute would need to be supplemented by rules or regulations addressing detailed procedural matters and that the draft provisions in document A/CN.9/WG.III/WP.213 would also need to be adjusted accordingly. Differing views were expressed as to whether these supplemental procedures should be drafted by the Working Group or by the Committee of the Parties at a later date.

Comments from the European Union and its Member States:

The views of the EU and its Member States on the procedural matters are twofold. In terms of procedural rules commonality, A/CN.9/WG.III/WP.231 on draft provisions on procedural and cross-cutting issues, in particular the draft provisions on the conduct of the proceedings, depending on the outcome of the discussions, may be integrated into the Standing Mechanism as supplemental rules. With regard to procedural rules concerning the administration and functioning of the Standing Mechanism, some rules would have to be reflected in this Statute, as is already the case, but others should be left to a secondary or supplemental document adopted by the Conference of the Contracting Parties.

18. The Working Group considered draft provisions 1 to 3, which provided the general framework for the selection and appointment of Tribunal members.

19. It was said that draft provision 1 would need to be further elaborated to address aspects such as the setting up of the Tribunal, whether it would include an appellate mechanism, where its seat would be, how it would be funded, and its interaction with the current ISDS regime. It was mentioned that some of those aspects would be addressed in the statute establishing the Tribunal.

20. As a matter of drafting, it was suggested that the "standing" nature of the Tribunal should be highlighted in the provision.

Draft article 2 – Structure of the Standing Mechanism

1. The Standing Mechanism shall consist of the Conference of the Contracting Parties (the "Conference"), the First Instance Tribunal, the Appeal Tribunal and the Secretariat.

2. The Conference of the Contracting Parties shall be composed of States and regional economic integration organizations that have ratified or acceded to this Statute in accordance with article **.

3. The First Instance Tribunal shall be composed of [X] members appointed by the Conference of the Contracting Parties in accordance with article **.

4. The Appeal Tribunal shall be composed of [Y] members appointed by the Conference of the Contracting Parties in accordance with article **.

5. The Secretariat headed by the Executive Director shall support the activities of the Conference, assist in the functioning of the First Instance Tribunal as well as the Appeal Tribunal, and act as registrar for the proceedings administered by the Standing Mechanism.

6. The Standing Mechanism shall be represented by [the Chairperson of the Conference] [the President of the Tribunals].

Comments from the European Union and its Member States:

The EU and its Member States wonder whether paragraphs 2, 3, 4 and 5 are necessary in this article as they could create redundancy with draft article 3(1), article 4(1) and (2) and article 5 respectively.

With regard to paragraph 6, the EU and its Member States are in favour of the President of the Appeal Tribunal representing externally the Standing Mechanism, as he or she should be more neutral and less connected to the Contracting Parties than the Chairperson of the Conference.

In the event that Working Group III decide to shorten the length of draft article 2, it could provide as follows:

"1. The Standing Mechanism shall consist of the Conference of the Contracting Parties (the "Conference"), the First Instance Tribunal ***and*** *the Appeal Tribunal* ***(the "Tribunals"),*** *and the Secretariat.*

2. The Standing Mechanism shall be represented externally by the President of the Appeal Tribunal."

A/CN.9/WG.III/WP.213 **Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters**

4. Governance structure

15. Draft provision 3 – "Governance structure" reads as follows:

(a) Committee of the Parties

1. There shall be a committee of the Parties composed of representatives of all the Parties to this Agreement establishing the Tribunal (referred to as "the Committee of the Parties"). The Committee of the Parties shall meet regularly and as appropriate to address matters concerning the functioning of the Tribunal.

2. The Committee of the Parties shall establish its own rules of procedure and shall carry out the functions assigned to it by this Agreement.

3. It shall establish the rules of procedure for the Selection Panel, the first instance and the appellate level, [the Advisory Centre], and the Secretariat. It may review and, if needed, modify these rules on a regular basis.

4. It shall determine the financial rules for the costs to be attributed to the general budget of the Tribunal. This includes rules on the operational costs of the Selection Panel and any reasonable expenses incurred by its members in the exercise of their function.

5. Decisions of the Committee of the Parties shall be adopted by [a simple] [two-thirds] majority.

(b) Tribunal and its President

1. The Tribunal shall determine the relevant rules for carrying out its functions. In particular, it shall lay down regulations necessary for its routine functioning.

2. The Tribunal shall elect its President and Vice-President by a confidential internal voting procedure with each member having one vote. The President and Vice-President shall be elected for a term of three years with the possibility of one re-election.

3. The Tribunal shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

16. Draft provision 3(a) introduces the concept of a committee of the parties which would be responsible for carrying out various functions, including the establishment of rules of procedure for the tribunal and for developments and adjustments, such as on the number of tribunal members. The Working Group may wish to consider whether the decision-making process at the committee of the parties ought to be defined at this stage.

17. The committee of the parties would delegate to the tribunal the determination of rules of procedure pertaining to its routine functioning. Draft provision 3(b) therefore clarifies that the tribunal itself shall develop its own rules of functioning, as is customarily provided in international courts and tribunals.[2] It provides for the election of the president and vice-president of the tribunal by vote from other tribunal members. The Working Group may wish to consider whether, in a standing body having both a first-instance and an appellate level, the president of the tribunal is the president of the entire dispute settlement body or whether there should be one president for the first-instance and another one for the appellate level.

Comments from the European Union and its Member States:

The EU and its Member States prefer that the President of the Appeal Tribunal be responsible for external representation of the Standing Mechanism and that the First Instance and Appeal Tribunal administer themselves separately.

Report of the forty-second session (New York, 14–18 February 2022), document A/CN.9/1092:

27. The Working Group considered draft provision 3 which addressed the governance structure of a standing multilateral mechanism. It was generally suggested that the

[2] See, for example, ICJ Statute, Article 30(1) ("The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure"); and ITLOS Statute, Article 16 ("The Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure"). See also Articles 51–52 Rome Statute of the International Criminal Court (ICC) (articulating a distinction between the Rules of Procedure and Evidence, to be adopted by the Assembly of States Parties, and the Regulations of the Court "necessary for its routine functioning", to be adopted by the Court).

draft provision should be further elaborated to provide clarity on the functions and the role of the different bodies to be established in the governance structure.

Committee of the Parties

28. To ensure more efficiency in the exercise of the missions of the Committee of the Parties, which would be a forum where decisions would be taken, it was proposed that the governance structure should include a Committee of the Parties (the Committee), composed of representatives of all the parties and a Sub-Committee whose members would be elected by the Committee from among the members of the Committee of the Parties which would be responsible for exercising the functions of the Committee under its supervision. It was suggested that the Committee should be able to make determination on aspects pertaining to the operation of the standing multilateral mechanism. It was also suggested that the number of the Committee meetings as well as their interval would need to be specified.

29. It was mentioned that the statute providing for the establishment of a standing multilateral mechanism would generally set forth the role of the Committee and the Tribunal which should be balanced to ensure the proper functioning of the Tribunal with a certain oversight by the Committee of the activities of the Tribunal. Similarly, the power to establish rules of procedure and relevant regulations would need to be carefully distributed between the Committee and the Tribunal. In that context, it was suggested that flexibility should be given to the Tribunal to update its rules and adapt its procedure when necessary.

30. It was said that the Advisory Centre should be a separate and independent institution and not be part of the Tribunal. It was stressed that doing otherwise and merging two institutions in one could lead to conflicts of interest and raise questions regarding the autonomous operation of the Advisory Centre.

31. With regard to the decision-making process in the Committee, it was suggested that paragraph 5 would need to be elaborated to specify a quorum, whether majority were to be determined based on those present, those who cast the votes or the number of parties to the Committee. It was further suggested that while a simple majority rule could apply to most procedural decisions, a qualified majority of two thirds or more might be require for most substantive decisions. In that context, it was mentioned that the Committee should also be able to amend the statute through such a majority. It was suggested that mechanisms to balance the views of the different regional groups could be elaborated.

Presidency of the Tribunal

32. Regarding draft provision 3 (b), it was suggested that the scope of procedural rules to be determined by the Tribunal needed to be specified against the background of the work of the Working Group on procedural reform solutions and it was said that further clarifications on what would be the routine functioning was needed.

33. Regarding paragraph 2, it was suggested to foresee several vice-presidents to allow for diversity within the presidency of the Tribunal, reflecting the diversity of its member States.

34. The Working Group considered whether, in a standing body having both a first-instance and an appellate level, the president of the Tribunal would be the president of the entire dispute settlement body or whether there should be one president for the first-instance and another one for the appellate level. In that context, the establishment of a secretariat was suggested to serve both instances. More generally, it was suggested that the selection of the secretariat members and the role of the secretariat should be clarified.

Draft article 3 – Conference of the Contracting Parties

1. The Conference of the Contracting Parties shall function as the management oversight and legislative body of the Standing Mechanism. It shall be composed of the representatives of States and regional economic integration organizations that have ratified or acceded to this Statute.

Comments from the European Union and its Member States:

The EU and its Member States suggest the following changes to, first, ensure that the Conference in carrying out its functions is respecting the independence and effective operation of the Standing Mechanism in particular its Tribunals, and, second, to be inclusive and to leave details of categories of possible Members to the provisions on signature and accession:

1. The Conference of the Contracting Parties shall ensure the effective and independent functioning of the Standing Mechanism. It shall be composed of the representatives ***of Contracting Parties that have ratified or acceded to this Statute in accordance with [article on signature]***. ~~*of States and regional economic integration organizations that have ratified or acceded to this Statute.*~~

2. The Conference shall carry out the functions ascribed to it under this Statute, including to:

(a) Appoint the members of the First Instance Tribunal and the Appeal Tribunal;

(b) Decide to alter the number of the members of the First Instance Tribunal and the Appeal Tribunal, when deemed necessary;[3]

(c) Appoint the Executive Director [, …] of the Secretariat;

(d) Adopt and revise regulations on the operation of the Standing Mechanism, including its own rules of procedure and any administrative or financial regulation of the Standing Mechanism;

(e) Adopt and revise the rules of procedure applicable to the First Instance Tribunal and the Appeal Tribunal;

(f) Adopt the annual budget of the Standing Mechanism, including the amount of contribution to be made by each Contracting Party[4] as well as the budget to be allocated to the First Instance Tribunal, the Appeal Tribunal and the Secretariat;

(g) Determine the remuneration of the members of the First Instance Tribunal and the Appeal Tribunal as well as the Executive Director of the Secretariat;

(h) Evaluate and monitor the operation of the Standing Mechanism and approve the annual report of its operation;

(i) Approve the establishment of any regional or local presence of the Standing Mechanism;

(j) Approve the fee scheme for services[5] provided by the Standing Mechanism;

(k) Perform any other functions in accordance with this Statute.

Comments from the European Union and its Member States:

[3] This should take due account of the workload of the Tribunals, the number of Contracting Parties as well as the number of instruments listed by the Contracting Parties in Annex I.

[4] This should take due account of the level of economic development of the Contracting Parties, investment flows arising from the instruments listed in Annex I, anticipated number of international investment disputes involving the Contracting Party and other relevant factors.

[5] Services other than adjudication of disputes to be considered, for example, with regard to mediation.

With regard to (d), the EU and its Member States suggest the following change to the language "*and any administrative or financial regulation of the Standing Mechanism*" as it gives the impression that such regulations could be optional while they seem to be related to and necessary under draft article 6 (Financing):

"(d) Adopt and revise regulations on the operation of the Standing Mechanism, including its own rules of procedure and ~~any~~ administrative ~~or~~ and financial regulation of the Standing Mechanism;"

With regard to (e), the EU and its Member States' preference is to have the rules of procedure applicable to the First Instance Tribunal and the Appeal Tribunal adopted and revised by the Tribunals themselves, see comments to draft article 4 below. However, the Conference would be able to amend or supplement these rules. We suggest the following wording:

(e) ~~Adopt and revise~~ ***Amend or supplement*** *the rules of procedure applicable to the First Instance Tribunal and the Appeal Tribunal*;

With regard to (f) and footnote 4, the EU and its Member States would be in favour of listing the criteria serving as a basis for the amount of contribution to be made by each Contracting Party. In order to retain a simple and consistent approach to the level of contribution to be made, the EU and its Member States would prefer that the principle for categorisation be based on UN standards (least developed countries, developing and developed regions).

Also, in view of the UNCITRAL Code of conduct for judges in International Investment Dispute Resolution, the EU and its Member States suggest adding another subparagraph to the list, providing that the Conference should adopt and revise any further stipulations concerning the ethical obligations of the members of the Standing Mechanism, to allow for any necessary adjustments. Therefore, the EU and its Member States suggest the following wording:

(x) Adopt and revise any necessary further stipulations concerning the ethical obligations of members of the Standing Mechanism;

3. The Conference shall have a Bureau consisting of a Chairperson and […] vice-Chairpersons elected by the Conference for a non-renewable term of [three] years. The Bureau shall meet regularly to assist the Conference in discharging its functions.

Comments from the European Union and its Member States:

The EU and its Member States suggest adding under this paragraph the possibility for the Conference to establish subsidiary bodies as may be necessary. A similar provision is found in the Statute of the International Criminal Court (Article 112(4)). The Conference of the Contracting Parties would then be able to decide in due course whether this is indeed necessary or if it is able to perform these functions by itself. This additional paragraph would read as follows:

"The Conference may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection and evaluation of the Standing Mechanism, in order to enhance its efficiency and effectiveness."

4. The Conference shall meet at least once a year to address matters concerning the functioning of the Standing Mechanism. When considered necessary or upon the request of [] Contracting Parties, the Chairperson may convene a meeting of the Conference.

5. The Chairperson shall chair the meetings of the Conference and be responsible for submitting matters to the consideration of the Conference. In case the Chairperson is unable to exercise such functions, one of the vice-Chairpersons shall exercise those functions.

6. States and regional economic integration organizations that have signed but not ratified the Statute may attend the meetings of the Conference as observers. The Chairperson may invite other States and regional economic integration organizations as well as international governmental and non-governmental organisations with expertise or experience in international investment dispute resolution to attend the meeting as observers. The President, the First Vice-President, the Second Vice-President as well as the Executive Director may participate, as appropriate, in the meeting of the Conference.

Comments from the European Union and its Member States:

In line with our comment on draft article 1 on broadening the jurisdiction of the standing mechanism, the EU and its Member States suggest reflecting this approach in paragraph 6 in relation to observers allowed to attend the meeting of the Conference. As such, we suggest the following drafting:

6. States and regional economic integration organizations that have signed but not ratified the Statute may attend the meetings of the Conference as observers. The Chairperson may invite other States and regional economic integration organizations as well as international governmental and non-governmental organisations with expertise or experience in ~~international investment dispute resolution~~ ***matters covered by the jurisdiction of the standing mechanism*** *to attend the meeting as observers. The President, the First Vice-President, the Second Vice-President as well as the Executive Director may participate, as appropriate, in the meeting of the Conference.*

7. Each Contracting Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Conference and in the Bureau. If consensus cannot be reached and unless otherwise provided in this Statute, decisions by the Conference and the Bureau shall be taken by [two-thirds majority][simple majority] of Contracting Parties present and voting. Decision may be taken through a written procedure.

Comments from the European Union and its Member States:

With regard to paragraph 7, the EU and its Member States would prefer to avoid having a reference to adoption by consensus. Having such rule as the principle may create delays in the adoption of essential decisions. The preferred option would be adoption by vote and further details to be developed by the Conference of the Parties.

Also, the EU and its Member States would like clarification on the reference to the Bureau in paragraph 7 and wonder whether there is a decision-making procedure foreseen for the Bureau as well.

8. The official and working languages of the Conference and the Bureau shall be […].

Article 4 - First Instance Tribunal and Appeal Tribunal

1. The First Instance Tribunal shall be composed of [X] members appointed by the Conference of the Contracting Parties for a [non-renewable] term of [eight] years in accordance with [see Draft Provisions on Selection and Appointment of Tribunal Members, which address the term of office, renewability of the term as well as staggered terms during the initial establishment phase].

2. The Appeal Tribunal shall be composed of [Y] members appointed by the Conference of the Contracting Parties for a [non-renewable] term of [eight] years in accordance with [see Draft Provisions on Selection and Appointment of Tribunal Members].

Comments from the European Union and its Member States:

For the EU and its Member States, the non-renewability of the term for judges is essential as it would prevent politicisation of the selection and appointment process and would better guarantee independence and impartiality. Eight years is a suitable period of time for terms.

In addition, the EU and its Member States are supportive of a staged turnover for the members elected at the first election, as is provided under draft provision 9 of the draft provisions on "selection and appointment of tribunal members of a standing mechanism".

Also, the EU and its Member States, in line with our suggested changes below on the rest of draft article 4, suggest to add at the end of both paragraphs 1 and 2 "*It shall elect its President and Vice-President.*"

3. The President of the First Instance Tribunal and the Appeal Tribunal (the "Tribunals") shall be elected by majority of votes by members of both Tribunals for a [renewable] term of [two] years. The First Vice-President shall be elected by majority of votes by members of the Appeal Tribunal for a [renewable] term of [two] years. The Second Vice-President shall be elected by majority of votes by members of the First Instance Tribunal for a [renewable] term of [two] years.

4. The President, the First Vice-President and the Second Vice-President shall constitute the Presidency, which shall be responsible for the operation and administration of the Tribunals and other functions conferred to it by this Statute. The First Vice-President shall act in place of the President in the event that the President is unavailable or is otherwise unable to act. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or are otherwise unable to act.

5. A member appointed to replace the President, the First Vice-President or the Second Vice-President before the expiry of his or her term of office shall serve for the remainder of his or her predecessor's term.

Comments from the European Union and its Member States:

The EU and its Member States suggest several changes to paragraphs 3,4 and 5 in order to clarify the presidency structure of each Tribunal which we believe should be separated in two with each Tribunal administering itself. Therefore, the First Instance Tribunal and the Appeal Tribunal would have their own President and Vice-President, while only the President of the Appeal Tribunal would represent externally the Standing Mechanism (as provided in our comment under Article 2). We suggest the following changes:

*3. The Presidents **and Vice-Presidents** of the First Instance Tribunal and the Appeal Tribunal ~~(the "Tribunals")~~ shall be elected by majority of votes by members of both Tribunals for a [**non-**renewable] term of [~~two~~ **four**] years. ~~The First Vice-President shall be elected by majority of votes by members of the Appeal Tribunal for a [renewable] term of [two] years. The Second Vice-President shall be elected by majority of votes by members of the First Instance Tribunal for a [renewable] term of [two] years.~~*

*4. The Presidents~~, the First Vice-President and the Second Vice-President shall constitute the Presidency, which~~ shall be responsible for the operation and administration of the Tribunals and other functions conferred to it by this Statute. The ~~First~~ Vice-Presidents shall act in place of the Presidents in the event that the President ~~is~~ **are** unavailable or **are** ~~is~~ otherwise unable to act. ~~The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or are otherwise unable to act.~~*

~~5. A member appointed to replace the President, the First Vice-President or the Second Vice-President before the expiry of his or her term of office shall serve for the remainder of his or her predecessor's term.~~

6. All members of the Tribunal as well as candidates who are under consideration for appointment as a member of the Tribunal shall be bound by the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution.[6]

[6] See also Draft Provision 10 in the Draft Provisions on Selection and Appointment of Tribunal Members and Draft Provision 17 in document A/CN.9/WG.III/WP.231 (Draft Provisions on Procedural and Cross-cutting issues).

Comments from the European Union and its Member States:

The EU and its Member States think that "Tribunal" should be in plural in paragraph 6 and also suggest adding the following sentence at the end of paragraph 6, to reflect our comment to draft article 3(2):

*6. All members of the Tribunal**s** as well as candidates who are under consideration for appointment as a member of the Tribunal**s** shall be bound by the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution **and any ethics rules adopted by the Conference of the Contracting Parties**.*

In addition, as provided under draft article 3(2), the EU and its Member States prefer that the Tribunals adopt and revise their own rules of procedure, and not leave this to the Conference. Therefore, we would suggest adding an additional paragraph with the following wording:

The First Instance Tribunal and the Appeal Tribunal shall adopt and revise their respective rules of procedure.

Draft article 5 – Secretariat

1. The Secretariat shall be composed of the Executive Director and staff members.

Comments from the European Union and its Member States:

The EU and its Member States believe that "Secretary General" would be a more suitable title for the Executive Director considering the nature of the standing mechanism.

2. The Executive Director shall be appointed by the Conference of the Contracting Parties for a [renewable] term of [six] years on the basis of a recommendation by the Bureau.

3. The Executive Director shall be responsible for:

(a) Managing the administrative operation of the Standing Mechanism;

(b) Supporting the activities of the Conference of the Contracting Parties and the Tribunals;

(c) Employing and managing the staff members of the Secretariat and their respective duties;

(d) Reporting to the Conference of the Contracting Parties;

(e) Acting on behalf of the Standing Mechanism with regard to administrative matters, including with regard to administrative arrangements with other organizations and institutions relating to the use of facilities or the establishment of regional or local presence;

(f) Functioning as the registrar for proceedings administered by the Standing Mechanism with the power to authenticate decisions rendered by the Tribunals and to certify copies thereof;

Comments from the European Union and its Member States:

The EU and its Member States wonder whether it is desirable to have the Secretariat acting as a "registrar" for the proceedings administer by the Standing Mechanism, rather than the Tribunal themselves.

(g) Proposing staff regulations for adoption by the Conference of the Contracting Parties.

4. The Executive Director and the staff members of the Secretariat shall not exercise any political function. They shall not seek or accept instructions from any government or any other authority other than the Standing Mechanism and may not hold any other employment or engage in any other occupation of a professional nature except with the

approval of the Conference of the Contracting Parties as concerns the Executive Director, or the Executive Director as concerns the staff members.

Draft article 6 - Financing

1. The expenses of the Standing Mechanism, including the Conference of the Contracting Parties, its Bureau, the First Instance Tribunal, the Appeal Tribunal and the Secretariat, shall be borne by the annual budget of the Standing Mechanism as adopted by the Conference.

2. The budget of the Standing Mechanism shall be funded by the assessed annual contribution of the Contracting Parties as determined by the Conference and any voluntary contribution made by Governments, international organizations, private entities or individuals in accordance with financial regulations.

Comments from the European Union and its Member States:

The EU and its Member States would like to emphasise that voluntary contribution should be strictly regulated by the Conference of the Parties so as to prevent conflicts of interest or undermining the independence and impartiality of the Standing Mechanism. The EU and its Member States also suggest the following changes:

"2. The budget of the Standing Mechanism shall be funded by the assessed annual contribution of the Contracting Parties as determined by the Conference and any voluntary contribution made by Governments, international organizations, private entities or individuals in accordance with the ~~financial~~ regulations ***adopted by the Conference/of the Standing Mechanism]****."*

3. The budget of the Standing Mechanism may be supplemented by fees charged to the disputing parties for services rendered by the Standing Mechanism. The calculation and payment of such fees and the conditions thereof shall be determined by the Conference based on a proposal by the Executive Director.

Comments from the European Union and its Member States:

On paragraph 3, the EU and its Member States suggest to clarify that the fees charged to the disputing parties shall not be used to remunerate the members of the Tribunals. Supplemental rules to be adopted on the budget could provide further details on the use of the charged fees. We suggest the following addition to paragraph 3:

3. The budget of the Standing Mechanism may be supplemented by fees charged to the disputing parties for services rendered by the Standing Mechanism. The calculation and payment of such fees and the conditions thereof shall be determined by the Conference based on a proposal by the Executive Director, ***but shall not in any event be used to remunerate the members of the Tribunals****.*

4. During the annual meeting of the Conference, the Executive Director shall present to the Conference the financial statement of the expenditures of the past year and the proposed annual budget for the next year for its adoption.

5. Each Contracting Party shall promptly pay the assessed contribution to the budget of the Standing Mechanism. In the event that a Contracting Party fails to make the contribution, any such arrears will remain payable with appropriate interest. If a Contracting Party fails to contribute for more than three years, the Conference of the Contracting Parties may exclude that Contracting Party and legal or juridical persons falling under its jurisdiction from benefiting from this Statute.

Draft article 7- Status, privileges and immunities

Comments from the European Union and its Member States:

The EU and its Member States suggest moving draft article 7 toward the end of the Statute with other general clauses. Also, the EU and its Member States would be in favour of the

Standing Mechanism being part of the United Nations system, which would provide benefits in particular with regard to privileges and immunities.

1. The Standing Mechanism shall have legal personality. It shall have the capacity to contract, to acquire and dispose of immovable and movable property and to institute legal proceedings.

Comments from the European Union and its Member States:

However, the EU and its Member States consider that it would also be possible to stop this provision after the first sentence. If that approach is not followed, we would like clarification as to the meaning of "institute legal proceedings". As an alternative, we would suggest the following wording:

"The Standing Mechanism shall have legal personality. ***It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.*** ~~It shall have the capacity to contract, to acquire and dispose of immovable and movable property and to institute legal proceedings~~"

2. The Standing Mechanism shall have its seat(s) at […] based on host country agreement(s) with […]. The Secretariat will be headquartered in […].

Comments from the European Union and its Member States:

The EU and its Member States' position is that the decision on the seat of the Standing Mechanism shall be left to the Conference of the Contracting Parties, which is better placed to take this decision as it represents the interests of the Members to the Standing Mechanism.

3. The Standing Mechanism shall enjoy in the territory of each Contracting Party such privileges and immunities as are necessary for the fulfilment of its objectives. The members of the Bureau, the members of the Presidency and the Tribunals, the Executive Director and the staff members of the Secretariat shall be accorded the same level of privileges and immunities that is accorded to the staff members of permanent diplomatic missions or international organizations. The same shall apply to persons appearing in proceedings of the Standing Mechanisms as parties, agents, legal representatives, witnesses or experts insofar as in connection with their travel to and from, and their stay at, the place of the proceedings.

Comments from the European Union and its Member States:

The EU and its Member States suggest to clarify that privileges and immunities are limited to what is necessary for the functioning of the standing mechanism. The EU and its Member States suggest adding "counsel" to the list of persons able to enjoy privileges and immunities when they appear in proceedings of the Standing Mechanism. Paragraph 3, which could be split to make it more readable, could read as follows:

"3. *The Standing Mechanism shall enjoy in the territory of each Contracting Party such privileges and immunities as are necessary for the fulfilment of its objectives.*

The members of the Bureau, the members of the Presidency and the Tribunals, the Executive Director and the staff members of the Secretariat, when engaged on or with respect to the business of the Standing Mechanism and necessary for the performance of their functions, shall be accorded the same level of privileges and immunities that is accorded to the staff members of permanent diplomatic missions or international organizations.

The same shall apply to persons appearing in proceedings of the Standing Mechanisms as parties, agents, legal representatives, counsel, witnesses or experts, as is necessary for the proper functioning of the Standing Mechanism and insofar as in connection with their travel to and from, and their stay at, the place of the proceedings."

Draft article 8 – Instruments subject to the jurisdiction of the Standing Mechanism

1. When depositing the instrument of ratification or accession to this Statute, each Contracting Party shall provide a list of instruments to which it is a Party that contains provisions on the protection of investments or investors and a right for an investor to raise a claim against it[7] that the Contracting Party wishes to subject to the jurisdiction of the Standing Mechanism. Each instrument shall be identified by the title and name of the contracting parties to that instrument.

Comments from the European Union and its Member States:

The current wording of paragraph 1 seems to exclude investment law and investment contracts from the jurisdiction of the Standing Mechanism, since the Contracting Party has to provide a list of instruments "to which it is a Party" (e.g. is a State party to an investment law it has enacted? Would a Contracting party be able to bring under the jurisdiction of the Standing Mechanism an investment contract to which a State agency or State-owned company is a party?). Also, the current wording does not include instrument that would only provide for State-to-State dispute settlement as the language limits the instruments covered to those that contain "a right for an investor to raise a claim against" a Contracting Party. Therefore, in line with the discussions in Working Group III and the interests shared by many Members to have State-to-State dispute settlement, investment law and investment contracts covered, the EU and its Member States suggest that the language in paragraph 1 be clarified as follows:

1. When depositing the instrument of ratification or accession to this Statute, each Contracting Party shall provide a list of instruments to which it is a Party ***or that it has enacted*** *that contains provisions on the protection of investments or investors* ~~*and a right for an investor to raise a claim against it*~~ *that the Contracting Party wishes to subject to the jurisdiction of the Standing Mechanism. Each instrument shall be identified by the title****,*** *and name of the contracting parties* ***where applicable****, to that instrument.*

2. A Contracting Party may declare that only appeals with regard to a decision or an award rendered by an arbitral tribunal or any other adjudicatory body with respect to a claim initiated by an investor in accordance with an instrument listed in Annex I shall be subject to the jurisdiction of the Appeal Tribunal of the Standing Mechanism.

Comments from the European Union and its Member States:

The EU and its Member States understand paragraph 2 as giving the possibility to agree only to the jurisdiction of the Appeal Tribunal, to the exclusion of the First Instance Tribunal. We suggest the following adjustments to clarify this option, and also to have a wording that broaden the scope of disputes covered:

2. ***When [listing] [notifying] an instrument [under Annex I],*** *a Contracting Party may declare that* ***the jurisdiction of the Standing Mechanism shall only cover*** *appeals with regard to a decision or an award rendered by an arbitral tribunal or any other adjudicatory body with respect to a claim initiated* ***in accordance with a listed instrument*** ~~*by an investor in accordance with an instrument listed in Annex I shall be subject to the jurisdiction of the Appeal Tribunal of the Standing Mechanism.*~~

The EU and its Member States also suggest that the Statute should provide for the possibility to agree only to the jurisdiction of the First Instance Tribunal. As such, we would suggest adding the following paragraph:

[7] See article 1(2) of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, which reads: The term "investment treaty" means any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against contracting parties to that investment treaty.

2bis. When [listing] [notifying] an instrument [under Annex I], a Contracting Party may declare that the jurisdiction of the Standing Mechanism shall only cover the First Instance Tribunal to the exclusion of the Appeal Tribunal of the Standing Mechanism.

Another option is to create separate lists of instruments using different parts of the Standing Mechanism (e.g. one list for first instance and appeal, another for appeal only etc) as reflected in our comment to the Annex below.

3. The Contracting Party shall notify the Depository of any modifications to its list of instruments, including any new instruments concluded following the ratification or accession, which provide that the Standing Mechanism shall have jurisdiction over any claims raised by an investor under that instrument.

Comments from the European Union and its Member States:

The EU and its Member States suggest the following change to paragraph 3 to include both situations where the new instrument provides for the jurisdiction of the Standing Mechanism and where it does not, and also to broaden the scope of disputes that could be covered:

"3. The Contracting Party shall notify the Depository of any modifications to its list of instruments, including any new instruments concluded following the ratification or accession of this Statute. ~~which provide that the Standing Mechanism shall have jurisdiction over any claims raised by an investor under that instrument.~~"

4. The Executive Director shall maintain and update the list of instruments as Annex I of this Statute.

Comments from the European Union and its Member States:

The EU and its Member States would like to clarify that the terms "update" would not mean "amend" the Annex(es), as this would not fall under the power of the Executive Director. The Executive Director is only competent to keep up to date the list based on the notifications made by Contracting Parties. Also, we suggest the following edit to make this paragraph more general and not make a specific reference to the Annex:

4. The Executive Director shall maintain and update the list of instruments ***over which the standing mechanism has jurisdiction*** *~~as Annex I of this Statute.~~*

Furthermore, the EU and its Member States' position is that this Statute shall explicitly contemplate the possibility for Contracting Parties to list other instruments than those provided in paragraph 1 of draft article 8. This Statute shall include sufficient flexibility in its provisions, in particular by referring to the possibility of future adjustments by the Conference of the Contracting Parties. As such, an additional paragraph 5 could be added to draft article 8:

5. The Conference of the Parties may agree that other instruments may be listed [in Annex I] and may adopt any necessary administrative arrangements.

Draft article 9 – Jurisdiction of the First Instance Tribunal and the Appeal Tribunal

1. The First Instance Tribunal shall have exclusive jurisdiction over a claim initiated in accordance with an instrument listed in Annex I, when: (a) the claimant is a national of a Contracting Party or a Contracting Party and the respondent is a Contracting Party; and (b) both Contracting Parties have listed the instrument in Annex I.

Comments from the European Union and its Member States:

As previously stated under draft article 8, the current wording on the scope of jurisdiction of the Standing Mechanism seems to exclude investment law and investment contract. The EU and its Member States also understand the language in paragraph 1(a) as also excluding the situation of counterclaims and where a Contracting Party would bring a claim against an investor based on the underlying instrument. Furthermore, the reference

to "a national of a Contracting Party" could establish a nationality requirement creating a double test for this requirement to be met under both this Statute and the underlying instrument (such as the double-barrelled test under the ICSID Convention, Article 25(1)).

Therefore, to avoid this double test and in order to capture all situations and provide for a broader jurisdiction that would encompass all interests shared by Working Group III Members, the EU and its Member States would suggest deleting (a) in paragraph 1. In addition, to take into account the possibility to only agree to the jurisdiction of the Appeal Tribunal to the exclusion of the jurisdiction of the First Instance Tribunal, we would suggest to make a specific reference to draft article 8.2 as a carve out. Paragraph 1 would therefore read as follows:

1. Subject to the provisions of [draft] article 8.2, the First Instance Tribunal shall have exclusive jurisdiction over a claim initiated in accordance with an instrument ***[listed] [published in the list] [in Annex I] when both Contracting Parties have [listed] [notified] the instrument [in Annex I]****.*

In addition, as previously stated under draft article 8, the scope of jurisdiction of the Standing Mechanism should be flexible enough to include other instruments that Contracting Parties wish to list. To reflect our suggested additional paragraph 5 in draft article 8 into draft article 9, the EU and its Member States suggest adding a paragraph 1bis that would provide as follows:

1bis. The First Instance Tribunal shall have jurisdiction over a dispute initiated pursuant to any other instrument [listed] [notified] [and published in the list] [in Annex I] in accordance with Article 8(5).

2. The First Instance Tribunal shall have jurisdiction over a claim initiated by a national of a non-Contracting Party or by a non-Contracting Party insofar as: (a) the claim was made in accordance with an instrument listed by the respondent in Annex I and (b) the claimant agrees to the jurisdiction of the Standing Mechanism.

Comments from the European Union and its Member States:

As already explained, the EU and its Member States would prefer a reference to a "published list" rather than an Annex. Also, we think that Contracting Parties would be disadvantaged as compared to non-Contracting Parties with the current drafting, since non-Contracting Parties would be able to bring a claim under the Standing Mechanism as long as it gives consent, and the instrument is listed by the respondent Contracting Party. However, a claimant Contracting Party would only be able to bring a claim against a respondent Contracting Party if both Contracting Parties have listed that instrument. Also, in line with our previous comment, we believe that the reference to "national of a Contracting Party" could add a double test. Therefore, paragraph 2 could read as follows:

2. The First Instance Tribunal shall have jurisdiction over a claim initiated by a national of a Contracting Party or a non-Contracting Party or by a Contracting Party or a non-Contracting Party insofar as: (a) the claim was made in accordance with an instrument ***[listed][notified] by the respondent [and published in the list] [in Annex I]*** *and (b) the claimant agrees to the jurisdiction of the Standing Mechanism. Or*

2. The First Instance Tribunal shall have jurisdiction over a claim ~~initiated by a national of a non-Contracting Party or by a non-Contracting Party~~ insofar as: (a) the claim was made in accordance with an instrument ***[listed][notified] by the respondent [and published in the list] [in Annex I]*** *and (b) the claimant agrees to the jurisdiction of the Standing Mechanism*

3. The jurisdiction of the First Instance Tribunal shall extend to an international investment dispute where the claimant and the respondent consent in writing to submit the dispute to the Standing Mechanism, which is not objected to by the majority of the Conference of the Contracting Parties within 30 days of the submission.

Comments from the European Union and its Member States:

As already stated, in order to provide States with options for the jurisdiction of the Standing Mechanism, paragraph 3 should make reference to "international dispute falling under the jurisdiction of the Standing Mechanism". Also, the EU and its Member States suggest to clarify the process when both the claimant from a non-Contracting Party and a non-Contracting Party respondent to the Statute consent to the jurisdiction of the Standing Mechanism. Paragraph 3 would read as follows:

*3. The jurisdiction of the First Instance Tribunal shall extend to an international ~~investment~~ dispute **falling under the jurisdiction of the Standing Mechanism** where the claimant and the respondent consent in writing to submit the dispute to the Standing Mechanism. **The Conference of Contracting Parties shall be notified by the Executive Director of such agreements and may object**, ~~which is not objected to~~ by ~~the~~ **a** majority of the Conference of the Contracting Parties within 30 days of the ~~submission~~ **notification**.*

4. The Appeal Tribunal shall have jurisdiction over appeals initiated by a disputing party with regard to a decision rendered by the First Instance Tribunal in accordance with paragraphs 1 to 3.

Comments from the European Union and its Member States:

In the view of the EU and its Member States, paragraph 4 needs to be clarified as it creates some confusion on the different situations covered by paragraphs 1 to 3. Paragraph 3 provides for instances where both disputing parties are not (from) Contracting Parties but agree to the jurisdiction of the First Instance Tribunal, and we assume that their consent is for the first tier only. However, paragraph 4 provides that the Appeal Tribunal would have jurisdiction over paragraph 3, which would mean that when submitting a claim under paragraph 3, disputing parties not (from) Contracting parties would not only agree to the jurisdiction of the First Instance Tribunal but also automatically agree to the jurisdiction of the Appeal Tribunal. The same reasoning would apply to paragraph 2.

Whether we want the jurisdiction of the Appeal Tribunal to cover all instances in paragraphs 1 to 3 is a policy choice. What is important however is to provide certainty and clarity to all litigants on the remedies they have access to.

As far as the EU and its Member States are concerned, we are in favour of promoting the use and application of the two-tiers wherever possible. However, we are conscious that some Working Group III Members may prefer another approach, and we are therefore open to discuss the different possibilities for having access to only one or both tiers, in particular where disputing parties are nationals from non-Contracting Parties or non-Contracting Parties. Also, as the Appeal Tribunal would be mostly financed by Contracting Parties that have accepted its jurisdiction, automatically opening its jurisdiction would have budgetary implications.

A possibility would be to establish as a default rule that all instruments listed have access to both the First Instance Tribunal and the Appeal Tribunal, unless the Contracting Party or Parties have made a declaration opting in or out for one specific tier. As for disputing parties that are nationals of a non-Contracting Party or a non-Contracting party, we could contemplate automatic access to the Appeal mechanism but with higher fees to be charged.

5. The Appeal Tribunal shall have jurisdiction over appeals with regard to a decision or an award rendered by an arbitral tribunal or any other adjudicatory body with respect to a claim initiated in accordance with an instrument listed in Annex I.

Comments from the European Union and its Member States:

As already explained, the EU and its Member States would prefer a reference to a "published list" rather than an Annex. Therefore, paragraph 5 would read as follows:

5. The Appeal Tribunal shall have jurisdiction over appeals with regard to a decision or an award rendered by an arbitral tribunal or any other adjudicatory body with respect to a claim initiated in accordance with an instrument ***listed [in the published list] [in Annex II]****.*

A/CN.9/WG.III/WP.213 **Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters**

3. Jurisdiction

10. Draft provision 2 – "Jurisdiction" reads as follows:

1. [Option 1: The jurisdiction of the Tribunal shall extend to any dispute, between Contracting States as well as between a Contracting State and a national of another Contracting State, arising out of an investment [under an international investment agreement], which the parties consent to submit to the Tribunal.]

[Option 2: The Tribunal shall exercise jurisdiction over any dispute which the parties have consented to submit to the Tribunal.]

2. Consent to submit a dispute to a tribunal established under an international investment agreement shall be deemed to be a consent to submit the dispute to the Tribunal under paragraph 1.

11. Paragraph 1, option 1, provides that jurisdiction extends to disputes arising out of an investment, whereas option 2 does not refer to the notion of "investment" to avoid a double test regarding the notion of "investment" under the applicable treaty and the statute establishing the tribunal. The bracketed text in option 1, if retained, would mean that jurisdiction would be limited to treaty-based disputes.

12. The emphasis of the provision is on the requirement of consent rather than on the particular type of instrument of consent. It may be noted that membership in the agreement establishing the tribunal would not automatically entail that the State in question consents to the adjudication of a given dispute before that tribunal. The tribunal would exercise jurisdiction over disputes arising out of an investment which the parties agreed to submit to the tribunal through offer and acceptance. Provisions on the consent to the jurisdiction of the multilateral investment tribunal could be included in future investment treaties. In addition, the multilateral instrument on ISDS reform to be further considered by the Working Group may provide for a mechanism to incorporate a provision on consent to the jurisdiction of the multilateral investment tribunal in existing investment treaties.8

13. The Working Group may wish to note that the term "parties" in paragraph 1 could refer either to the State parties to an investment treaty or to the disputing parties, depending on the situation. The Working Group may wish to consider whether this should be further clarified.

14. Paragraph 2 aims to address the question of consent in investment treaties.

Report of the forty-second session (New York, 14–18 February 2022), document A/CN.9/1092:

21. A wide range of views were expressed regarding draft provision 2 addressing the jurisdiction of the Tribunal. Various views were expressed with regard to the two options in paragraph 1.

22. With regard to option 1 (which provided that the jurisdiction of the Tribunal was limited to disputes "arising out of an investment"), it was said that the option might result in requiring a double test of not only meeting the notion of "investment" under the applicable underlying investment instrument but also under draft provision 2. Therefore, support was expressed for deleting the reference to "investment" or, as an

[8] Submission by the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, p. 8, point 3.14.

alternative, for clarifying that the notion of "investment" should be determined in accordance with the underlying investment instrument. While suggestions were made that the jurisdiction of the Tribunal should not cover disputes between States, another view was that such disputes should fall under the jurisdiction of the Tribunal as long as they arose out of, or related to, an investment. A suggestion was made that the words in square brackets ("under an international investment agreement") could be deleted in option 1 to include disputes based on investment contracts and national investment laws. Another suggestion was that the words "nationals of another Contracting State" should be replaced with the words "investors of another Contracting State".

23. Views were expressed in support of option 2, which provided that the Tribunal would have jurisdiction over any dispute which the parties had consented to submit to it. One of the reasons mentioned was that it would avoid the double test requirement as it did not include any reference to "investment". However, concerns were also expressed that option 2 would endow the Tribunal with a too broad jurisdiction, possibly resulting in other types of disputes falling under its jurisdiction (trade or commercial disputes) and disputes ending up in multiple fora. To clarify the nature of the disputes to be covered, it was suggested that option 2 should refer to "international investment", or "investment" disputes to also include claims based on domestic investment laws. Another proposal was to simply refer to "disputes" as the consent qualification would provide the necessary flexibility to States. It was suggested that further clarification and explanation could be included in a commentary accompanying the draft provision. It was further noted that the underlying investment instrument would in any case have the effect of limiting the jurisdiction of the Tribunal.

24. More generally, it was stated that the resources available to the Tribunal should be taken into account when determining its scope of jurisdiction in order to ensure its proper functioning.

25. It was suggested that draft provision 2 should require consent to be in writing and further elaborate on how such consent could be given, whether by treaty parties or disputing parties. It was further suggested that mechanisms should be developed to allow States to consent to the jurisdiction of the Tribunal, including for disputes arising out of existing treaties (akin to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration or the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting). It was further pointed out that States should be able to specify and list investment agreements with regard to which they would opt-in to the jurisdiction of the Tribunal and that the framework should provide for a coordination mechanism between States to do so.

26. With regard to paragraph 2 of draft provision 2, it was suggested that it should be made clear that it was merely a deeming provision and that consent to submit a dispute to a tribunal established under an international investment agreement was not to be considered as automatically recording consent to submit the dispute to the Tribunal. It was stated that the paragraph might have the effect of automatically transferring the jurisdiction of a tribunal established under an international investment agreement to the Tribunal and, if so, the scope of the jurisdictions would need to be further clarified. A suggestion was made that the words "international investment agreements" might need to be revised to include instances where the consent was not necessarily based on a treaty but other instruments.

Draft article 10 – Proceedings before the First Instance Tribunal

1. The First Instance Tribunal shall conduct its proceedings in accordance with [the rules of procedure adopted by the Conference of the Contracting Parties] [the rules of procedure in the instrument listed by the Contracting Party] [see also A/CN.9/WG.III/WP.231 containing draft provisions on procedural and cross-cutting issues, some of which address the conduct of the proceedings].

Comments from the European Union and its Member States:

Draft article 10 should read *"Proceedings before the First Instance Tribunal and the Appeal Tribunal"*

The EU and its Member States would then modify paragraph 1 to be in line with our comments on the adoption of procedural rules by the Tribunals.

It is also necessary to allow the Standing Mechanism to apply the rules of the ICSID Convention to the extent that these rules do not conflict with the rules of the Standing Mechanism and rules adopted pursuant to this Statute. This is also done to ensure that the enforcement rules of the ICSID Convention can be applied to awards or decisions under this Statute when enforcement is sought in States which are not Parties to the Statute. See suggested revisions in draft article 11.

Therefore, the EU and its Member States would modify paragraph 1 as follows:

1. The First Instance Tribunal shall conduct its proceedings in accordance with ~~[the rules of procedure adopted by the Conference of the Contracting Parties]~~ [the rules of procedure in the instrument [listed] ***[notified]*** *by the Contracting Party* ***under [the published list]*** *[Annex I],* ***subject to the rules set out in this Statute and as supplemented by any rules of procedures and any procedural or supplemental rules adopted by the Tribunals or the Conference of the Contracting Parties.*** *~~[see also A/CN.9/WG.III/WP.231 containing draft provisions on procedural and cross-cutting issues, some of which address the conduct of the proceedings].~~* ***Where the conditions pursuant to Article 25 of the ICSID Convention are met, and a dispute is filed before the standing mechanism pursuant to those rules the First Instance Tribunal shall apply the ICSID Convention except where this Statute or rules adopted pursuant to this Statute conflict with the ICSID Convention.***

2. The Appeal Tribunal shall conduct its proceedings in accordance with [the rules of procedure adopted by the Conference of the Contracting Parties, see Draft Provisions on an Appellate Mechanism, which address the scope of appeal, grounds of appeal, time frame for appeal, effects of an appeal, the conduct of the appellate proceedings and decisions by the Appeal Tribunal].

Comments from the European Union and its Member States:

As mentioned above, the EU and its Member States would modify paragraph 2 to make reference to the rules of procedure adopted by the Tribunals:

2. The Appeal Tribunal shall conduct its proceedings in accordance with ~~[~~the rules of procedure adopted ***by the Tribunals****, ~~the Conference of the Contracting Parties~~, see Draft Provisions on an Appellate Mechanism, which address the scope of appeal, grounds of appeal, time frame for appeal, effects of an appeal, the conduct of the appellate proceedings and decisions by the Appeal Tribunal].*

3. In the event of a conflict, […] shall prevail.

Comments from the European Union and its Member States:

To address issues of conflict, it is the view of the EU and its Member States that this Statute and the rules adopted pursuant to it shall prevail over the rules in the underlying instrument. This would bring consistency, in particular since the Standing Mechanism is expected to have or adopt procedural rules that are based on the most recent and updated rules and may directly incorporate the current work undertaken by Working Group III in this regard. Paragraph 3 would therefore read:

In the event of conflict, ***this Statute and rules adopted pursuant to it*** *shall prevail.*

III. Other matters related to a standing multilateral mechanism

B. Procedural question

72. The Working Group may wish to consider issues related to the procedural framework of a standing multilateral body.

73. While the general rules of procedure could be provided in the agreement establishing the tribunal, the Working Group may wish to consider whether the detailed procedure should be defined in secondary law, which could be developed and updated by the Committee of the Parties and, as necessary, by the Tribunal itself (see draft provision 3).[9] A definition of the procedure in secondary law would facilitate later modifications and updates of the procedural rules. Secondary law with a detailed procedure has been developed for example for the ICJ,[10] ITLOS,[11] and ECHR.[12]

74. The Working Group may wish to consider incorporating the following reform solutions into the procedural framework of a standing multilateral mechanism, which are being discussed as procedural rules reform: means to address frivolous claims; multiple proceedings; reflective loss; counterclaims; security for costs; and regulation of third-party funding. It has also been suggested to provide for the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and to provide for the possibility of third parties participation, for example, representatives of communities affected by the dispute, to participate in the proceedings.[13]

Comment from the European Union and its Member States:

The procedural rules reform undertaken by Working Group III pertaining to the conduct of the proceedings, when finalized, may be included into a standing mechanism, as well as other relevant procedural aspects. The Tribunal itself and the Conference of the Contracting Parties should develop secondary law provisions on the conduct of the proceedings (evidence, bifurcation, consolidation etc), possibly incorporating the work undertaken by Working Group III in A/CN.9/WG.III/WP.231. We presume it will be possible for the Standing Mechanism to decide certain matters in broader or full composition, this could be reflected in the rules of procedure.

Comments from the European Union and its Member States:

For the EU and its Member States, it is necessary to add a provision stating that the First Instance Tribunal and Appeal Tribunal shall be obliged to follow any binding interpretation adopted by the Parties to the instrument which is the basis for the dispute. This could be drafted as follows, noting that the second and third paragraphs could also be located in a multilateral instrument:

The First Instance Tribunal and the Appellate Mechanism shall be bound by any binding interpretation adopted by the Parties to an instrument which it is interpreting.

Contracting Parties which propose such binding interpretations shall submit it to the Executive Director who shall circulate it to the Conference of Contracting Parties. Any

[9] See for example the reference in Article III (2) of the US-Iran Claims Settlement Declaration to the UNCITRAL Arbitration Rules and the option for modification by the Tribunal or the Parties.
[10] See Article 30 ICJ Statute and Rules of Court, (1978) adopted on 14 April 1978, available at https://www.icj-cij.org/en/rules.
[11] See Article 16 of the Statute of the International Tribunal for the Law of the Sea, Annex VI to the United Nations Convention on the Law of the Sea and Rules of the Tribunal (ITLOS/8), available at www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf.
[12] See Article 5 European Convention and Rules of Court 2 June 2021, available at https://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules&c=.
[13] Submission by the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, p. 7.

Contracting Party which wishes to accept such a binding interpretation shall submit a notification to that effect to the Executive Director.

The Executive Director shall maintain a list of such binding interpretations including which Contracting Parties have accepted the binding interpretations. The Executive Director shall ensure that the list is kept up to date and is available to the Tribunal of First Instance and the Appellate mechanism. The Executive Director shall inform the Tribunal of First Instance and the Appellate Mechanism of any such binding interpretation.

Draft article 11 – Recognition and Enforcement

1. Each Contracting Party shall recognise a decision rendered by the First Instance Tribunal or the Appeal Tribunal pursuant to this Statute 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 [or a regional economic integration organization]. A Contracting Party with a federal constitution may choose to 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.

Comments from the European Union and its Member States:

The EU and its Member States suggest the following change to be inclusive and to leave details of categories of possible Members to the provisions on accession:

1. Each Contracting Party shall recognise a decision rendered by the First Instance Tribunal or the Appeal Tribunal pursuant to this Statute 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 ***Contracting Party*** ~~*that State [or a regional economic integration organization]*~~*. A Contracting Party with a federal constitution may choose to 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 territories of a Contracting Party shall furnish to a competent court or other authority which such State [or a regional economic integration organization] shall have designated for this purpose a copy of the decision certified by the Executive Director.

Comments from the European Union and its Member States:

The EU and its Member States suggest the following change to be inclusive and to leave details of categories of possible Members to the provisions on accession:

2. A party seeking recognition or enforcement in the territories of a Contracting Party shall furnish to a competent court or other authority which such ~~*State [or a regional economic integration organization]*~~ ***Contracting Party*** *shall have designated for this purpose a copy of the decision certified by the Executive Director.*

3. Execution of a decision shall be governed by the laws concerning the execution of judgments in force in the State [or a regional economic integration organization] in whose territories such execution is sought.

4. A non-Contracting Party that consents to the jurisdiction of the Standing Mechanism pursuant to article 9 shall recognize and enforce the decision rendered by the First Instance Tribunal and/or the Appeal Tribunal pursuant to this Statute as if it were a final judgment of a court in that State [or a regional economic integration organization].

Comments from the European Union and its Member States:

The EU and its Member States suggest adding provisions on the deeming of awards to ensure enforceability also in non-Contracting States. There would also be an obligation on parties to a dispute under this Statute not to seek set aside or annulment where this is sought in a jurisdiction which has not signed up to the Statute. This new provision would read as follows:

For the purposes of Article 1 of the New York Convention of 1958, [final] decisions rendered by the First Instance Tribunal and/or the Appeal Tribunal shall be deemed to be arbitral awards and to relate to claims arising out of a commercial relationship or transaction.

A decision or award rendered by the Standing Mechanism brought pursuant to [draft article 10(1)] shall be regarded as an award under the ICSID Convention. References to the certification of decisions or awards by the ISCID Secretary General pursuant to the ICSID Convention shall be replaced, for the purposes of decisions or awards pursuant to this Statue, by references to the Executive Director.

The Parties to this Statute understand the relevant provisions of this Statute and rules which may be adopted pursuant to this Statute as an inter se modification of the ICSID Convention in the sense of Article 41 of the Vienna Convention of the Law of Treaties.

By submitting a dispute pursuant to this Statute or by accepting jurisdiction pursuant to this Statute, a disputing party agrees to refrain from seeking the set-aside, review, appeal, annulment or any other remedy in respect of an award or decision rendered by the Standing Mechanism in any jurisdiction irrespective of whether the jurisdiction in question is a Contracting Party to the present Statute.

Selected articles of the final provisions (the Statute would need to include provisions on signature, ratification, acceptance or approval, accession, depository, withdrawal, and amendments)

Comments from the European Union and its Member States:

The EU and its Member States suggest adding the following provisions on signature, ratification, acceptance or approval, accession and depository.

Article XX - Signature

This Statute shall be open for signature at […] from [..] to [..] by States, regional economic integration organisations and other entities which have international legal personality and competence over the matters dealt with in this Statute.

Comments from the European Union and its Member States:

As a matter of clarification, the EU and its Member States think that the categories of Members that could sign this Statute should be broad enough to include any future entity that may not fall within the first two categories but still have legal capacity to sign treaties and have competence over the matters dealt with in this Statute.

Article XX - Ratification, acceptance or approval

This Statute shall be subject to ratification, acceptance or approval by signatories. Instruments of ratification, acceptance or approval shall be deposited with the Depository.

Article XX - Accession

This Statute shall be open for accession, from the date on which it is closed for signature, by States, regional economic integration organisations and other entities which have competence over the matters dealt with in this Statute, on terms to be approved by the Conference of Contracting Parties. The instruments of accession shall be deposited with the Depository.

Article XX - Depository

The [Secretary General of the United Nations] shall be the Depository of this Statute.

Draft article 13 - Entry into force

This Statute shall enter into force on the first day of the month following the expiration of one year after the date of deposit of the [tenth] instrument of ratification, acceptance or approval or of accession.

Draft article 14 - Reservations

1. A Contracting Party may declare that:

> on the basis of reciprocity, it will apply draft article 11 on recognition and enforcement only to decisions involving a national of another Contracting Party or another Contracting Party;

[…]

2. No reservations are permitted except those expressly authorized in this article.

Comments from the European Union and its Member States:

The EU and its Member States are reluctant to have reservations such as in paragraph 1(a). Indeed, this could be contrary to the objectives of the Standing Mechanism and discourage investors from non-Contracting Parties as well as non-Contracting States to use the Standing Mechanism. Yet, giving them the possibility to have the full experience with certainty of enforcement is the best way to make the Standing Mechanism effective. Therefore, we would prefer to avoid the possibility of reservations to this Statute, which does not exclude the possibility for Contracting Parties listing instruments to opt only for the First Instance Tribunal or the Appeal Tribunal.

Comments from the European Union and its Member States:

The EU and its Member States suggest adding the following provisions on withdrawal and amendment:

Article XX - Withdrawal

1.A Contracting Party may give written notification to the Depository of its withdrawal from this Statute.

2.Any such withdrawal shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depository, or on such later date as may be specified in the notification of withdrawal.

3.The provisions of this Statute shall continue to apply to disputes submitted to the Standing Mechanism before the date when that Contracting Party's withdrawal takes effect.

4.The Conference of the Parties may adopt a decision fixing any other necessary modalities linked to the withdrawal of a Contracting Party.

Article XX - Amendments

1.Any Contracting Party may propose an amendment of this Statute. The text of a proposed amendment shall be communicated to the Chairperson of the Conference of the Parties who shall transmit it to the Conference of the Parties.

2.The Conference of Parties may adopt a decision to amend this Statute. Any such decision shall be subject to ratification, acceptance or approval by the Contracting Parties. The amendment shall enter into force on the ninetieth day after the date of deposit of the [tenth] instrument of ratification, acceptance or approval of the amendment for those Contracting Parties which have approved it. It shall enter into force for each subsequent Contracting Party ninety days after the date of deposit of its instrument of ratification, acceptance or approval of the amendment.

3.By derogation from paragraphs 1 and 2, Contracting Parties may add instruments to [the published list] by notification to the Executive Director, in accordance with [draft article 8].

Annex I – List of instruments subject to the jurisdiction of the Standing mechanism

[In accordance with draft article 8, each Contracting Party shall provide a list of agreements subject to the jurisdiction of the Standing Mechanism (First Instance

Tribunal and/or the Appeal Tribunal) to the Depository, including any reservations. Such information should be compiled and made publicly available.]

Comments from the European Union and its Member States:

As already provided in our comments to this Statute, the EU and its Member States believe that having a "published list" rather than an Annex or Annexes would be easier to manage and facilitate the process. Also, in order to clarify the different opt-in and opt-out options, the acceptance of the two-tier and acceptance of only one of the two-tier could be separated in different lists.

In accordance with draft article 8, each Contracting Party shall provide a list of agreements subject to the jurisdiction of the Standing Mechanism ~~(First Instance Tribunal and/or the Appeal Tribunal)~~ to the Depository ~~including any reservations~~. Such information should be compiled and made publicly available. In providing that list, Contracting Parties may notify or clarify that they would only cover the First Instance Tribunal or the Appeal Tribunal.

A/CN.9/WG.III/WP.213 **Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters**

III. Other matters related to a standing mechanism

66. In addition to the draft provisions on selection and appointment of ISDS tribunal members, the Working Group may wish to consider the following policy issues pertaining to the establishment and functioning of a standing multilateral body. These may serve to contextualize the draft provisions above and provide the Working Group with a basis for further consideration of this reform (A/CN.9/1050, para. 55).

67. The suggestions below are based on the comment made in the Working Group that a reformed system should remain flexible so as to take account of both State- State and investor-State dispute settlement as well, as possibly disputes involving local communities affected by investments and investments made by small and medium-sized enterprises (A/CN.9/1050, para. 22).

A. Means of establishment

68. Regarding the establishment of a multilateral investment tribunal, the Working Group may wish to consider general questions, including whether the tribunal would be created under the auspices of an existing international organisation such as the United Nations, or be established as a separate, independent international organisation.[14] As an international organization, the standing multilateral body would enjoy legal personality under international and national law, which would allow it to conclude treaties such as a seat agreement establishing the necessary privileges and immunities.[15]

69. Regarding the governance structure, the Working Group may wish to consider which organs might be set up under the agreement establishing the tribunal.

70. In addition to the committee of the parties, the Working Group may wish to note that usually a permanent administrative secretariat (or registrar) would be set up, either as a separate and stand-alone secretariat or as part of an existing institution, in which case the services of such an existing institution could be used. Its tasks would include the administration of pending cases, translation services and other support services.

[14] See From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, Options Regarding the Institutionalization of Investor-State Dispute Settlement, Second Edition (2020), by Marc Bungenberg and August Reinisch, available at https://link.springer.com/book/10.1007/978-3-662-59732-3, p. 175–182.

[15] Legal personality could also be expressly foreseen in the treaty establishing the organization, see for example Article 4 of the Rome Statute of the International Criminal Court.

71. Furthermore, the Working Group may wish to consider whether a standing multilateral mechanism would also be used to host an advisory centre on international investment law.[16] Such a facility could provide capacity building and act as a forum to share experience and technical assistance to member States with a view to building in-house capacity to deal with ISDS cases.

[…]

C. Applicable law and treaty interpretation

75. The Working Group may wish to consider issues related to the law to be applied by the tribunal. Many investment treaties contain a clause on the applicable law. These clauses generally refer to the treaty itself and international law. However, the agreement establishing the tribunal could provide for a rule on the applicable law in case of absence of a choice of law in the underlying treaty, investment law or contract.[17]

76. In order to develop a more consistent practice of the interpretation of investment treaties, the multilateral investment tribunal could provide for treaty interpretation tools, in particular for joint interpretative statements, which could be binding for the tribunal.[18] It may be noted that treaty interpretation is discussed by the Working Group as a separate reform solution.[19]

77. The Working Group may wish to consider whether it should be provided expressly that the interpretation to be made by tribunal members is done in accordance with customary rules of interpretation of public international law, following the example of article 3.2 of the Dispute Settlement Understanding of the WTO.

78. The Working Group may wish to consider whether a provision should be added (possibly under draft provision 11) to allow the tribunal to decide in broader or full composition when presented with an issue of systemic relevance, that is, an issue the resolution of which may have repercussions for the investment treaty regime as a whole; a new legal question never addressed before; a divergence of interpretations in the case law of the different chambers; or the intention to depart from an established line of cases.[20]

[16] For more information on the reform element of an advisory centre, see UNCITRAL webpage under https://uncitral.un.org/en/multilateraladvisorycentre.
[17] See for example ICSID Convention, Article 42: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."
[18] See document A/CN.9/WG.III/WP.191.
[19] See UNCITRAL webpage under https://uncitral.un.org/en/treatyparties.
[20] See CIDS Supplemental Report, para. 203.