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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fiftieth session (Vienna, 20–24 January 2025)

Contents

I. Introduction

1. At its fiftieth session in 2017, the Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). From its thirty-fourth to thirty-seventh session, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.[1] From its thirty-eighth to forty-eighth session, the Working Group considered concrete solutions for ISDS reform.[2]

2. At its fifty-seventh session in 2024, the Commission adopted the Statute of the Advisory Centre on International Investment Dispute Resolution in principle and further acknowledged that the operationalization of the Advisory Centre would require further preparatory work.[3] The Commission also took note of the current status of work on the draft toolkit on prevention and mitigation of international investment disputes (A/CN.9/1185) and called on all States and other organizations to share information on existing practices for inclusion in the draft toolkit and to verify the correctness of information contained therein.[4] Expressing its satisfaction with the progress made by the Working Group, the Commission requested the Working Group to continue its work in an effective manner and encouraged it to present the outcome of its work relating to procedural and cross-cutting issues and a draft statute on a standing mechanism at its next session in 2025.[5]

3. At its forty-ninth session in September 2024, the Working Group considered articles 7 to 10 of the draft statute of a standing mechanism for the resolution of international investment disputes (A/CN.9/WG.III/WP.239 and A/CN.9/WG.III/WP.240), the categorization of the draft provisions on procedural and cross-cutting issues (A/CN.9/WG.III/WP.244 and A/CN.9/WG.III/WP.245) as well as draft provisions 10, 12, 13 and 20 therein, and articles 1 to 4 of the draft multilateral instrument on ISDS reform (A/CN.9/WG.III/WP.246).[6]

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its fiftieth session from 20 to 24 January 2025 at the Vienna International Centre.

5. The session was attended by the following States members of the Working Group: Algeria, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Greece, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mexico, Morocco, Nigeria, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, Türkiye, Turkmenistan, Ukraine, United Kingdom of Great Britain and Northern Ireland, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

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[1] The deliberations and decisions of the Working Group at its thirty-fourth to thirty-seventh session are set out in documents A/CN.9/930/Rev.1; A/CN.9/930/Rev.1/Add.1; A/CN.9/935; A/CN.9/964; and A/CN.9/970, respectively.

[2] The deliberations and decisions of the Working Group at its thirty-eighth to forty-eighth session are set out in documents A/CN.9/1004*; A/CN.9/1004/Add.1; A/CN.9/1044; A/CN.9/1050; A/CN.9/1054; A/CN.9/1086; A/CN.9/1092; A/CN.9/1124; A/CN.9/1130; A/CN.9/1131; A/CN.9/1160; A/CN.9/1161 and A/CN.9/1167.

[3] *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 17* (A/79/17), paras. 21, 157–167.

[4] Ibid., paras. 168–169. Comments received on the draft toolkit are available at https://uncitral.un.org/en/investmentmediationanddisputeprevention.

[5] Ibid., paras. 246 and 247.

[6] The deliberations and decisions of the Working Group at its forty-ninth session are set out in document A/CN.9/1194.

6. The session was attended by observers from the following States: Bahrain, Brunei Darussalam, Denmark, Egypt, El Salvador, Estonia, Guatemala, Latvia, Lebanon, Lesotho, Lithuania, Malta, Myanmar, Namibia, Netherlands (Kingdom of the), Norway, Oman, Pakistan, Paraguay, Philippines, Portugal, Romania, San Marino, Serbia, Sierra Leone, Slovakia, Sri Lanka, Sweden, Tajikistan, Togo, Tunisia, Tuvalu, United Republic of Tanzania, Uruguay and Zambia.

7. The session was also attended by observers from the European Union.

8. The session was also attended by observers from the following international organizations:

(a) *United Nations System*: International Centre for Settlement of Investment Disputes (ICSID) and United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: African Union (AU), Commonwealth Secretariat, Gulf Cooperation Council (GCC), Organisation for Economic Co-operation and Development (OECD), Organization of the Petroleum Exporting Countries (OPEC), Permanent Court of Arbitration (PCA) and South Centre;

(c) *Invited non-governmental organizations*: ACP Legal, Academic Forum, Académie Africaine de la Pratique du Droit International (AAPDI), African Arbitration Association (AFAA), African Center of International Law Practice (ACILP), American Arbitration Association – International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), ArbitralWomen, Asian Academy of International Law (AAIL), Association for the Promotion of Arbitration in Africa (APAA), Belgian Centre for Arbitration and Mediation (CEPANI), British Institute of International and Comparative Law (BIICL), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Investment and Commercial Arbitration (CIICA), Centre for International Law, National University of Singapore (CIL), Centre for International Legal Studies (CILS), Centre of Excellence for International Courts (iCourts), Centro de Estudios de Derecho, Economia y Politica (CEDEP), Chartered Institute of Arbitrators (CIArb), China Council for the Promotion of International Trade (CCPIT), China International Economic and Trade Arbitration Commission (CIETAC), China Society of Private International Law (CSPIL), Climate Change Counsel, Columbia Centre on Sustainable Investment (CCSI), Comité Français de L'arbitrage (CFA), Corporate Counsel International Arbitration Group (CCIAG), European Chinese Arbitrators Association (ECAA), Europa-Institut (EI), European Law Institute (ELI), Forum for International Conciliation and Arbitration (FICA), Hong Kong International Arbitration Centre (HKIAC), Institute for Transnational Arbitration (CAIL/ITA), Instituto Ecuatoriano de Arbitraje (IEA), International and Comparative Law Research Center (ICLRC), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International Law Association (ILA), International Law Institute (ILI), Max Plank Institute for Comparative Public Law and International Law (MPIL), Milan Chamber of Arbitration, New York City Bar Association (NYCBAR), New York International Arbitration Center (NYIAC), Organisation of Islamic Cooperation Arbitration Centre (OIC-AC), Russian Arbitration Association (RAA), School of International Studies at the University of Trento (SIS), Stockholm Chamber of Commerce Arbitration Institute (SCC Arbitration Institute), Swiss Arbitration Association (ASA), United States Council for International Business (USCIB) and Vienna International Arbitration Centre (VIAC).

9. The Working Group elected the following officers:

Chairperson: Mr. Shane Spelliscy (Canada)

Rapporteur: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

10. The Working Group had before it the following documents: (i) annotated provisional agenda (A/CN.9/WG.III/WP.247); (ii) a draft statute of a standing

mechanism for the resolution of international investment disputes and annotations thereto (A/CN.9/WG.III/WP.239 and A/CN.9/WG.III/WP.240); (iii) draft provisions on procedural and cross-cutting issues and annotations thereto (A/CN.9/WG.III/WP.244 and A/CN.9/WG.III/WP.245); (iv) additional provisions on procedural and cross-cutting issues and resources available to the Working Group (A/CN.9/WG.III/WP.248); (v) a submission from the Government of Switzerland (A/CN.9/WG.III/WP.241); and (vi) a summary of the intersessional meeting on ISDS reform submitted by the Government of the People's Republic of China (A/CN.9/WG.III/WP.249). In addition, the following informal documents were made available: (i) a corrigendum to the draft provisions on procedural and cross-cutting issues[7]; (ii) an updated compilation of international investment agreement (IIA) provisions and arbitration rules related to procedural and cross-cutting issues;[8] (iii) a compilation of IIA provisions and arbitration rules on joint interpretation and submission by a non-disputing Treaty Party;[9] and (iv) a compilation of comments on the draft provisions on procedural and cross-cutting issues.[10]

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Possible reform of investor-State dispute settlement (ISDS).
5. Other business.
6. Adoption of the report.

12. As to the scheduling of the session, it was agreed that the discussions during the first two and a half days would begin with the draft provisions on procedural and cross-cutting issues (draft provisions 1 to 9, 11 and 12 in A/CN.9/WG.III/WP.244) and time permitting, other provisions, which would be followed by the discussions on the draft statute of a standing mechanism (sections B, D and F in A/CN.9/WG.III/WP.239). It was also agreed that the discussions during the last half day of the session would be devoted to the resources available to the Working Group, including whether to recommend the extension of additional resources (A/CN.9/WG.III/WP.248, paras. 21 to 64).

13. The Working Group expressed its appreciation for the contributions to the UNCITRAL trust fund from the European Union, the Government of France, the Swiss Agency for Development and Cooperation and the Federal Ministry of Economic Cooperation and Development of Germany, aimed at allowing the participation of representatives of developing States in the deliberations of the Working Group, securing interpretation in informal sessions, and ensuring that the process would remain inclusive and fully transparent.

III. Draft provisions on procedural and cross-cutting issues and annotations thereto (A/CN.9/WG.III/WP.244 and A/CN.9/WG.III/WP.245)

A. Introduction

[7] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/corrigendum_to_the_draft_provisions_on_procedural_and_cross.pdf.

[8] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp244_comparison_chart_iias_icsid_uars.pdf.

[9] Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/compilation_of_provisions_on_dp_and_ndtp_for_website.pdf.

[10] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_of_comments_on_wp.244_7_jan_2025.pdf.

14. The Working Group recalled that at its forty-ninth session in September 2024, it had considered the draft provisions on procedural and cross-cutting issues, as contained in document A/CN.9/WG.III/WP.244. That document was accompanied by document A/CN.9/WG.III/WP.245, containing the annotations to the draft provisions.

15. At that session, the Working Group discussed draft provisions 10, 12, 13 and 20 (A/CN.9/1194, paras. 71–104). It was suggested that draft provisions 1 to 9, draft provision 11 and draft provisions 12 (paragraphs 1 to 5 and 7), could be drafted to supplement the UNCITRAL Arbitration Rules (UARs) and the draft provisions in sections B and C could be considered collectively as treaty provisions for use by parties (A/CN.9/1194, para. 68). It was further agreed that draft provisions on non-disputing Treaty Party submissions and joint interpretation would be developed (see document A/CN.9/WG.III/WP.248) and their placement would be further considered.

16. To facilitate the discussions on the draft provisions in section A, delegations had been invited to submit written comments in advance of the session to streamline the deliberations. A compilation of the comments was made available by the secretariat.[11]

B. General remarks

17. At the outset, views were expressed that procedural rules reform was a crucial pillar of the ISDS reform that could address the concerns identified by the Working Group. The need to update and modernize the procedural rules governing ISDS proceedings was stressed, including the means for States to implement the reforms by retrofitting their old-generation investment agreements. In that context, it was observed that the Working Group should take into account the interests of States, in particular those of developing and least developed countries, as well as investors and should develop comprehensive reforms.

18. The Working Group discussed how it wished to proceed with regard to the draft provisions in section A, including the form in which they should be presented. A number of options were suggested, including the preparation of: (a) a set of rules to supplement the UARs; (b) a comprehensive set of rules to govern ISDS proceedings; and (c) a set of treaty provisions, which could apply to proceedings under the UARs as well as other applicable rules. It was further suggested that the draft provisions in section A could form the basis of the procedural rules of a standing mechanism, and the Working Group would turn to this aspect subsequently.

19. With regard to option (a), it was suggested that the primary objective should be to update the UARs in line with the 2022 amendments to the ICSID Arbitration Rules (ICSID Rules). It was said that those rules as a supplement reflecting the unique nature of ISDS should not have an impact on non-investment disputes under the UARs. It was observed that the task of harmonization might require less time and the supplementary rules could be presented to the Commission for its consideration this year. It was noted that there could be different ways to incorporate the supplementary rules into the UARs, which could also address the concerns about their scope of application.

20. With regard to option (b), it was suggested that a comprehensive set of rules to govern ISDS proceedings would enable States to implement the reforms as a whole. It was noted that a complete and self-contained set of rules for ISDS could provide for clarity, ease of application, and harmonization. However, it was mentioned that this might require substantial additional work, for example, to consider other rules not addressed in section A. It was also mentioned that option (b) might not result in the desired harmonization, as this would depend largely on the uptake by States and disputing parties.

21. In support of option (c), it was argued that the impact of option (a) would be limited to proceedings under the UARs when chosen by the claimant and would not

[11] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_of_comments_on_wp.244_7_jan_2025.pdf.

extend to other procedural rules. Calls were made to have the reforms apply more broadly, regardless of the chosen procedural framework. In that context, the need to include the set of rules in the multilateral instrument on ISDS reform (MIIR) was underlined. In response, it was highlighted that some degree of fragmentation would be unavoidable, as States retained sovereignty over their treaty commitments.

22. Following the discussions, the Working Group agreed to review the draft provisions in section A as rules to supplement the UARs, as a first step, with a view to presenting them to the Commission for its consideration. As a second step, the Working Group would consider how to transform them into treaty provisions or make them applicable to existing investment agreements and to proceedings under other arbitration rules through the MIIR. It was further agreed that how those draft provisions could become applicable to procedures in a standing mechanism would be discussed at a third stage. As a drafting point, it was agreed that if the draft provisions contained language identical to the UARs, they should be retained to the extent that the Working Group did not wish to deviate from that approach.

C. Provisions to supplement the UNCITRAL Arbitration Rules

Draft Provision 1 – Evidence

Paragraphs 1 and 2

23. While a suggestion was made to include an additional sentence ("For greater clarity, each disputing party submitting a claim has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration and customary international law.") in paragraph 1, this did not receive support as the meaning, particularly of the latter part, was not clear and without that part the sentence, it would not provide any meaningful clarification. Therefore, it was agreed that paragraph 1 (replicating UARs 27(1)) remain unchanged.

24. It was agreed that paragraph 2 (replicating UARs 27(3)) remain unchanged.

Paragraph 3

25. With regard to paragraph 3, it was felt that the document production phase could become burdensome, even be abused and complicate ISDS proceedings and there was a need to set forth clear procedures for such a phase. Therefore, it was agreed that paragraph 3 should be revised along the following lines:

> "3. At the request of a disputing party, the Tribunal may, after consultation with the disputing parties and if it deems appropriate, establish a procedure whereby each party may request another party to produce documents. In establishing the procedure, the Tribunal shall consult the disputing parties and consider the benefits and burdens of document production in the circumstances of the particular case.
>
> 3 *bis*. In deciding a dispute arising out of a party's objection to the other party's request for production of documents, the Tribunal shall consider all relevant circumstances, including: (a) the scope and timeliness of the request; (b) the relevance and materiality of the documents requested; (c) the burden of production; and (d) the basis of the objection."

26. It was agreed that there would be merit in highlighting the importance of consultation with the parties in both sentences of paragraph 3. It was mentioned that the use of the terms "appropriate" or "necessary" in paragraph 3 would not make a difference in practice and the former would be preferable for consistency with the UARs. It was clarified that paragraph 3 *bis* would apply when a party requested the production of documents in accordance with the procedure set out in accordance with paragraph 3 and not when a party requested the establishment of such a procedure.

Paragraph 4

27. It was suggested to add at the end of paragraph 4 the following: ", may take formal notice of such failure and may, if appropriate, make negative/adverse inferences against that party." However, it was generally felt that UARs already provided Tribunals with the discretionary power to make such negative inferences. It was also said that in ISDS proceedings, respondent States might not necessarily be in a situation to produce evidence or do so within the established period of time. A suggestion to replace the word "invited" with "requested" did not receive support. Accordingly, it was agreed that paragraph 4 (replicating UARs article 30(3)) should remain unchanged.

Paragraph 5

28. It was agreed that UARs article 27(2) should be inserted as a new paragraph to precede paragraph 2 in draft provision 1. Noting that paragraph 5 provided a rule different from that provided in the second sentence of UARs article 27(2), the Working Group considered whether to retain that second sentence. While support was expressed for "allowing" parties to present witness statements in writing unless directed otherwise by the Tribunal, it was generally felt that the default rule should be that witness statements should be in writing. It was said that this would ensure the efficiency of the proceedings and align with ICSID Rule 38(1) as well as the general ISDS practice. A suggestion to require the Tribunal to consult the disputing parties before it directed the parties did not receive support as such an obligation was deemed implicit (see also para. 55 below).

29. It was noted that the second sentence of the paragraph 5 granted Tribunals the discretion to determine which witnesses would testify before the Tribunals in a hearing. However, it was said that UARs article 17(3) addressed the holding of hearings and UARs article 28(2) provided that witnesses might be heard under the conditions, and examined in the manner, set by the Tribunal. As such, it was stated that disputing parties should be able to request the appearance of any witnesses, including for the purposes of cross-examination at a hearing. Accordingly, it was agreed that the second sentence of paragraph 5 was not necessary.

Paragraph 6

30. It was agreed that paragraph 6 (replicating UARs article 27(4)) should remain unchanged.

31. In that context, a suggestion to include a detailed provision on the involvement and management of experts appointed by the Tribunal or the disputing parties, including for the calculation of damages and through means often referred to as "hot-tubbing" did not receive support. It was observed that the Tribunals had the discretion to engage experts in such issues and in such a manner, and including such a paragraph would be redundant.

Paragraph 7

32. Different views were expressed over whether the procedure for excluding evidence and for precluding requests for document production should be separated, and whether the reasons for each would differ. Questions were raised about the meaning of the phrase "obtained illegally". As to the reasons to be listed, the following were mentioned: (i) evidence obtained contrary to the law of the State in which it was collected; (ii) evidence that was falsified, fabricated or fraudulent; (iii) evidence protected from disclosure under the rules on confidentiality or privilege under the applicable law; and (iv) evidence relating to national security or public interest. Reference was also made to article 9(2) and (3) of the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules), which listed the reasons for excluding evidence or production. A question was raised whether evidence classified as confidential should be excluded only when it was classified as such prior to the proceedings. It was suggested that confidential information and information protected from disclosure would be otherwise protected and need not be repeated in paragraph 7.

33. Differing views were expressed on whether the Tribunals should be obliged to exclude evidence or preclude document production for the above-mentioned reasons, or whether they should be given discretion (using the word "may"). It was further mentioned that if the reasons for exclusion or preclusion resulted from systemic behaviour (for example, if a disputing party consistently falsified evidence or fabricated evidence to support the claim in part or as a whole)), the Tribunal should be given the discretion to dismiss the case in its entirety as such acts should be deemed contrary to public order.

34. On the latter point, the Working Group agreed to consider whether systemic behaviour would constitute grounds for early dismissal under draft provision 4 or as conduct to be considered under draft provision 9(2)(b).

35. The Working Group continued its discussion based on the following draft:

> "7. The Tribunal shall, at the request of a disputing party or on its own initiative, exclude documents, exhibits or other evidence:
>
> (a) Which were obtained contrary to the law of the State where they were collected;
>
> (b) Which were falsified or fabricated or are found to be fraudulent;
>
> (c) The use of which as evidence is prohibited under the applicable law or privileges; or
>
> (d) The use of which as evidence is contrary to the respondent's essential security interests."

36. It was observed that paragraph 6 provided the Tribunal with general discretion to determine the admissibility of any evidence and paragraph 7 listed specific instances where the Tribunal would be obliged to exclude from evidence certain documents.

37. Regarding subparagraph (a), it was noted that it might be difficult to ascertain the State or location where evidence was collected, particularly if they were in digital form. Nonetheless, it was generally felt that where the evidence was collected as well as whether the collection was done in violation of the law of that place of collection should be determined by the Tribunal.

38. Regarding subparagraph (c), it was suggested to refer to "confidentiality" and applicable "domestic" law. It was also proposed that the language should be aligned with article 9(2)(b) of the IBA Rules.

39. While support was expressed for subparagraph (d), differing views were expressed. It was suggested that the host State's interests should also be mentioned, in light of the great importance generally attached by States to national security. It was also said that objections to production of evidence contrary to national security would be addressed by the new paragraph 3 *bis* (see para. 25 above). Concerns were expressed over: (i) the meaning of "essential security interests", (ii) the possibility that a State could classify documents as confidential to hinder document production and exclude them from evidence, and (iii) the difficulty for a Tribunal to determine what was contrary to the respondent's essential security interests. It was asked whether the subparagraph would preclude a party from using documents as evidence even when it was contrary to that party's essential security interests. In response to the points raised, it was suggested that the text be aligned with article 9(2)(f) of the IBA Rules, which refers to "grounds of special political or institutional sensitivity (including evidence classified as secret by a government or a public international institution) that the arbitral tribunal determined to be compelling".

40. After discussion and noting that such issues could be addressed under other subparagraphs, the applicable rules or the relevant provisions in investment agreements, the Working Group agreed to leave out subparagraph (d) from the revised paragraph 7 (see para. 35 above).

Paragraph 8

41. The Working Group agreed to include language from ICSID Rule 40(2) and (3) as additional sentences in paragraph 8 to provide clarity on the procedure for making visits and inquiries. A question was raised whether such powers of the Tribunal would need to be provided in the underlying investment agreement, as found in article 43 of the ICSID Convention.

Other issues

42. With regard to draft provision 1, a suggestion was made that a Tribunal-appointed expert, particularly during the quantum phase, should be limited to only reporting on factual issues or those of technical nature due to their lack of awareness of the local conditions. In response, it was pointed out that UARs article 29 provided broad discretion to the Tribunal on the issues that its experts could report on, which was also in line with ICSID Rule 39. The Working Group noted that this issue could be considered further, perhaps when discussing the provision on damages based on a specific written proposal clarifying the issue.

43. As a general point, it was clarified that the inclusion of additional draft provisions as rules specific to ISDS, particularly those expressly clarifying the discretionary powers of the Tribunal, should not be interpreted to mean that the Tribunal did not have those powers under the UARs. It was explained that the draft provisions were being prepared to achieve harmonization with provisions in recent investment agreements and the ICSID Rules and to codify and harmonize existing practice, thereby providing clarity and consistency. It was suggested that those points should be made clear when the Commission took its decision to adopt the relevant provisions.

Draft Provision 2 – Bifurcation

44. The Working Group considered how to structure the draft provision on bifurcation noting that the ICSID Rules 42 to 45 addressed the request for bifurcation in conjunction with preliminary objections. It was noted that UARs article 23 addressed pleas as to the jurisdiction of the arbitral tribunal (including the time frames) and the introduction of a supplementary rule on bifurcation would need to be read in conjunction with that rule. It was generally felt that: (i) there was no need to replicate ICSID Rules 44 and 45; (ii) draft provision 2 drew appropriately from ICSID Rule 42; and (iii) the provision sufficiently clarified the parties' right to request and the discretionary power of the Tribunal to order bifurcation.

Paragraph 1

45. The Working Group agreed to include in paragraph 1 the assessment of damages as an example of an issue that could be bifurcated.

46. It was suggested that a party by making a request for bifurcation should not be deprived of its right to raise a plea as to the jurisdiction or any other objections at a later stage. Accordingly, it was agreed to include the following sentence: "A request for bifurcation in accordance with paragraph 1 does not prejudice any right that a party may have to raise any other objections on the jurisdiction of the Tribunal pursuant to article 23." It was further clarified that the reference to article 23 would need to be adapted, should the draft provision be transformed into treaty language.

Paragraph 2

47. It was suggested that paragraph 2 should clarify the meaning of "as soon as possible" by indicating a fixed time (for example, as found in ICSID Rule 44(1)) and detail the procedure for how requests for bifurcation should be handled by the Tribunal. In response, it was observed that UARs article 23 provided the time frame for raising a plea as to the jurisdiction and that it would be preferable to give the discretion to the Tribunal to determine whether the request for bifurcation was made

"as soon as possible" considering that the request might address non-jurisdictional issues. After discussion, it was agreed that paragraph 2 should remain unchanged.

Paragraph 3

48. A number of suggestions were made including that: (i) the words "serving procedural economy" should be added in the chapeau; (ii) the word "would" in subparagraph (a) be replaced with the word "could"; (iii) subparagraph (a) should be revised to also mention that the Tribunal needed to consider the possible delays and increased costs when the request for bifurcation was denied; and (iv) subparagraph (c) should not deter Tribunals from ordering bifurcation (for example, in situations where certain factual issues needed to be ascertained to rule on the jurisdiction). While noting those suggestions, it was agreed that paragraph 3 should remain unchanged.

Paragraph 4

49. It was agreed that the Tribunal should be required to decide on a request for bifurcation within 30 days. It was suggested that the Tribunal may grant a request in full or in part, or reject it. It was also suggested that a Tribunal should provide reasons for any decision on bifurcation, whether it ordered bifurcation or not. Reference was made to UARs article 34(3).

50. After discussion, it was agreed that paragraph 4 could read along the following lines: "The Tribunal shall decide on the request for bifurcation within 30 days after the last submission on the request. The Tribunal may decide to accept the request in full or in part, or to reject it. The Tribunal shall state the reasons upon which the decision is based, and shall fix any period of time necessary for the further conduct of the proceeding."

Paragraph 5

51. A suggestion was made that the proceedings should be suspended when the Tribunal received a request for bifurcation, instead of when the Tribunal ordered bifurcation. It was said that this would be particularly relevant when a disputing party requested that a jurisdictional plea be addressed in a separate phase of the proceedings, and it would enhance judicial economy. Reference was made to ICSID Rule 44(1)(c).

52. After discussion, it was agreed to insert an additional sentence in paragraph 5 along the following lines: "When a request for bifurcation is made, which includes a plea that the Tribunal does not have jurisdiction, the Tribunal shall suspend the proceeding on the merits until the Tribunal takes a decision on the request for bifurcation, unless the disputing parties agree otherwise." The secretariat was requested to consider whether the current text of paragraph 5 would need to be clarified on how it would apply to a request for bifurcation without a jurisdictional plea.

53. A suggestion to delete the phrase "unless the disputing parties agree otherwise" did not receive support. It was said that it was important to retain the parties' autonomy to agree that consideration of certain issues could continue.

Paragraph 6

54. It was clarified that paragraph 6 granted the Tribunal the discretion to bifurcate the proceedings on its own initiative, allowing it to address jurisdictional pleas separate from the merits even when a party's request for bifurcation did not include jurisdiction as an issue to be addressed separately. It was said that this would also be in line with UARs article 23(3).

55. It was agreed that the Tribunal should consult the parties before taking a decision to bifurcate on its own initiative. Accordingly, it was agreed that the phrase "after inviting the disputing parties to express their views" or "after consultation with the disputing parties" be inserted in paragraph 6 (see paras. 25 and 26 above). As a drafting point, it was noted that ICSID Rule 27(3) provided a general rule requiring the Tribunal to consult the parties prior to making an order or decision which it could

make on its own initiative. Accordingly, it was suggested that further consideration be given to this issue in the context of the remaining draft provisions.

Draft Provision 3 – Interim/provisional measures

56. The Working Group considered how to prepare the draft provision on interim measures, mainly whether it should be based on UARs article 26 or ICSID Rule 47. While support was expressed for aligning the draft provision with the ICSID Rules, it was generally felt that UARs article 26 should form the basis, as its operation had not posed serious concerns in the context of ISDS and the draft provision could usefully supplement UARs article 26. More generally, it was mentioned that the Working Group should make efforts to supplement existing rules in the UARs rather than to replace them.

57. Suggestions were made that draft provision 3 should: (i) ensure that the Tribunal cannot enjoin the application of the measure alleged to constitute the breach; (ii) ensure that the granting of the interim measure would not prevent the exercise of a State's right to regulate and would, in general, respect State sovereignty; (iii) allow the Tribunal to grant interim measures on its own initiative; and (iv) address the form of the interim measure as well as its enforceability.

58. It was further suggested that States should not be ordered to provide a means of preserving assets out of which the eventual award might be satisfied (see UARs article 26(2)(c)) in the ISDS context.

59. It was said that draft provision 3 could provide that interim measures were final, binding and enforceable. In response, it was noted that such measures were temporary in nature and their enforceability would depend on their form and the law of the State where enforcement was sought.

60. After discussion, it was generally felt that there was a need to limit the discretion of the Tribunal in granting interim measures in the context of ISDS. Accordingly, the following text was suggested:

> "The Tribunal shall not grant an interim measure:
>
> (a) Which orders attachment or enjoins the application of the measure alleged to constitute a breach referred to in the claim; or
>
> (b) Which impedes the right of a State to regulate in the public interest, including in order to protect life, health and environment."

61. While there was general support for subparagraph (a), doubts were expressed about subparagraph (b), as it might be difficult for the Tribunal to make the necessary assessment, given the interim character of these measures. It was clarified that subparagraph (b) did not aim to prejudice the State's right to regulate, which was to be addressed in draft provision 19. The Working Group decided to place subparagraph (b) in square brackets for further consideration.

62. It was further agreed that the Tribunal should not be able to grant interim measures on its own initiative.

Draft Provision 4 – Manifest lack of legal merit/early dismissal

63. It was observed that draft provision 4 would grant the disputing parties a procedural right to raise an objection at an early stage of the proceeding and provide a tool for the Tribunal to ensure procedural efficiency. It was further observed that the draft provision would not deprive the disputing parties of the right to raise an objection at a later stage in the proceedings, as confirmed in paragraph 7.

Paragraph 1

64. It was suggested that under paragraph 1, a party should be able to request the dismissal of a claim when evidence had been excluded by the Tribunal in accordance with draft provision 1(7)(a) or (b) (see para. 35 above). It was explained that this

would sanction abusive conduct by the parties beyond it being taken into account in the allocation of costs. While the Working Group did not agree to take up the suggestion, it was pointed out that if evidence substantiating a claim were excluded, that could result in the claim being dismissed by the Tribunal though not necessarily through the mechanism under draft provision 4.

65. It was agreed that the Tribunal should not be able to dismiss a claim under draft provision 4 on its own initiative.

Paragraph 2

66. While support was expressed for retaining the 45-day time frame, it was suggested that the time frame be 60 days to allow sufficient time for respondents to coordinate internally and take decisions. It was said that the Tribunal could determine a period other than the indicated period with sufficient justifications.

67. It was suggested that a disputing party should be able to make an objection within a short and specified time period after that party discovered or became aware of new facts, which would form the basis of the objection. It was, however, said that such a situation would likely be covered by the current second sentence.

68. Subject to reflecting the time frame as 60 days, it was agreed that paragraph 2 would remain unchanged.

Paragraphs 3 to 7

69. It was agreed that paragraphs 3, 5 and 7 would remain unchanged. It was also agreed that the square brackets in paragraph 4 would be removed, and the rest remain unchanged. It was further agreed that paragraph 6 should be placed in draft provision 9 on allocation of costs and considered in conjunction with that provision.

IV. Draft statute of a standing mechanism for the resolution of international investment disputes and annotations thereto (A/CN.9/WG.III/WP.239 and A/CN.9/WG.III/WP.240)

A. General remarks

70. The Working Group recalled that, at its forty-eighth session in April 2024, it had completed a reading of articles 2 to 6 and 14 to 17 of the draft statute of a standing mechanism in the context of a first-tier standing mechanism, and that, at the forty-ninth session in September 2024, it had completed a reading of articles 7 to 10(4) of the draft statute.

71. Views were reiterated that participation in the discussions on a standing mechanism was without prejudice to the respective States' views on the desirability or possible models of a standing mechanism, as well as whether they would become a party to any such mechanism.

B. Selection and appointment of the members of the Tribunals

Article 10 – Selection Committee

Paragraph 5

72. With regard to paragraph 5, it was agreed that the recommendation of the Selection Committee would not be a condition for the Conference to carry out an open call under article 9 (see A/CN.9/1194, paras. 44–45). Suggestions were made to include objective criteria based on which the Selection Committee would make the recommendation or to require it to provide reasons for making a recommendation.

73. After discussion, it was agreed that paragraph 5 would read as follows: “Upon the review of the list of candidates, the Selection Committee may recommend to the Conference that an open call be made for additional candidates. The recommendation shall state the reasons upon which it is made.”

74. It was suggested that an open call for candidates should follow the nomination by States, including where the Selection Committee found the number of screened candidates insufficient. It was also suggested that an open call could take place simultaneously with the State nomination phase. After discussion, it was generally felt that the sequencing could be left to the Conference. It was questioned whether the Contracting Parties should be able to nominate additional candidates when the Conference decided to carry out an open call for additional candidates based on a recommendation by the Selection Committee. In that regard, it was suggested that if a candidate nominated by a Contracting Party was disqualified by the Selection Committee, that Contracting Party should be given an opportunity to nominate another individual as a substitute for consideration by the Selection Committee. The Working Group agreed to consider this approach further.

75. With respect to concerns expressed about the geographical distribution of candidates identified through an open call, it was said that this would be addressed by the Conference when composing the Tribunals (A/CN.9/1194, paras. 27–33).

Paragraphs 6 and 7

76. Questions were raised about the circumstances that would justify the Conference deciding to not disclose the list under paragraph 6. It was clarified that the disclosure would be for transparency purposes and not to solicit comments from the public. It was suggested that the phrase “upon final review” be deleted. After discussion, it was agreed that paragraph 6 would read as follows: “The Selection Committee shall present the final list of suitable candidates to the Conference for its consideration. The list shall be made public.”

77. It was agreed that that list prepared by the Selection Committee could function as a roster for future elections, the management of which could be further detailed in the regulations. It was said that the regulations would need to detail how the roster would be maintained, including the handling of candidates nominated by Contracting Parties and their continued availability. It was suggested that it might be preferable to maintain the roster for each election cycle rather than maintaining a permanent roster. It was said that, for example, if a member of the Tribunal needed to be replaced during a cycle, it could be selected from the roster prepared for that cycle.

78. With regard to paragraph 7, it was suggested that the classification of the candidates should be done by the Selection Committee and not the Executive Director. After discussion, it was agreed that paragraph 7 be deleted and instead the following two sentences would be placed in paragraph 6: “The list shall classify the candidates by gender and by regional groups based on their nationality. In the case that the candidate was nominated by a Contracting Party of which he or she is not a national, the regional group to which the nominating Contracting Party belongs shall also be indicated.”

Article 11 – Appointment by the Conference of the Contracting Parties

79. There was general support for paragraph 1. In order to provide guidance on how to structure the appointment process, the Working Group considered the questions posed in paragraph 32 of document A/CN.9/WG.III/WP.240.

80. On whether each Contracting Party should have one vote for each or both of the Tribunals (referred to in the draft statute as the Dispute Tribunal and the Appeals Tribunal), it was widely felt that a State should have a vote in each of the respective Tribunal to which it was a Contracting Party. It was, however, said that each Contracting Party should only have one vote if members of the Dispute Tribunal and the Appellate Tribunal were appointed from a single list of candidates (see para. 83

below). It was stated that each Contracting Party should be able to cast up to the same number of votes as the number of seats to be filled. It was suggested that the voting rules applicable to regional economic integration organizations be set out in the statute and reference was made to article 64(2) of the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction as one example.

81. While it was suggested that elections could be held among the entire list of candidates, there was general support for elections to take place among candidates from each regional group. It was suggested that the Contracting Parties should be able to cast votes for candidates from other regional groups and not only those from the same regional group. While a doubt was expressed about cross-regional voting, it was said that this was the standard practice in existing international courts and tribunals and would ensure the legitimacy of the elected members.

82. On the question of quorum, it was suggested that a simple majority of the Contracting Parties would suffice. As to the requirements for each candidate to be appointed, reference was made to the general decision-making rule in article 4(7) and (8) and support was expressed for candidates with the highest number of votes being elected from each regional group. It was, however, suggested that there should be a minimum requirement to be met by a candidate, which could be an absolute majority or a two-thirds majority. It was further suggested that reference could be made to the practice in other judicial bodies and that measures be in place to allow remote participation and to cast votes in writing.

83. On whether members of the Dispute Tribunal and the Appellate Tribunal should be appointed from a single list of candidates or separate lists, it was suggested that the elections should be conducted separately with separate screening processes, especially if the qualifications for the Tribunals differed. However, it was said that a single list of candidates might be more efficient. It was said that this question would depend largely on the structure of a standing mechanism.

84. It was generally felt that the same rules of appointment should apply to a member replacing another member, while there might be benefit in making the process simpler, for example, by allowing appointments from the existing roster. It was noted that replacements should be made from the same regional group and in a manner that maintained gender representation (see para. 109 below). After discussion, it was agreed that this be left to the Conference.

85. It was suggested that States might require time to consider whether to become a Party to the standing mechanism. As such, a staggered approach was suggested to ensure that Contracting Parties joining later would be able to participate in shaping the composition of the Tribunals.

86. It was suggested that the basic principles on how to compose the Tribunals should be set forth in the draft statute, while more details on the appointment procedure, including those relating to the election, set forth in the regulations to be adopted by the Conference.

87. In that regard, it was emphasized that those rules should ensure that the principles of equitable geographical distribution, the representation of the principal legal systems and equal gender representation as embodied in article 8 (A/CN.9/1194, para. 33) were realized in the composition of the Tribunals. It was recalled that the Working Group had moved the substance of Article 8 to Article 11 (A/CN.9/1194, para. 27). It was reiterated that geographical distribution should refer to global distribution rather than distribution among the Contracting Parties.

88. It was generally felt that the members of the Tribunals shall be elected by secret ballot. The Secretariat was requested to produce draft language reflecting the outcome of the discussions on Article 11.

Article 12 – Term of office

Paragraph 1

89. There was general support for a longer term of office to ensure independence and impartiality and references were made to five to nine years. It was suggested that the duration of the term should take into account: (i) paragraph 6, whereby a member would continue to discharge his or her duties in ongoing proceedings; and (ii) the need to enable Contracting Parties joining at a later stage to participate in the composition of the Tribunals.

90. It was suggested that the term of office be the same for members of both Tribunals. Alternatively, it was suggested that the term of the Appeals Tribunal members could be shorter. It was pointed out that, since the Tribunals might not be established simultaneously, the election cycles of the two Tribunals might not coincide.

91. There was general support for a non-renewable term to ensure judicial independence and avoid the politicization of the Tribunals. It was noted that this could also ensure new and diverse perspectives within the Tribunals. It was, however, stated that the issue of renewability might be better addressed by the Contracting Parties at a later stage depending on the caseload of the Tribunals. The possibility of non-consecutive reappointments was suggested as well as granting the President of the Tribunals a longer term to ensure institutional continuity. Questions were raised whether an appointment to one Tribunal would preclude the member from being subsequently appointed to the other Tribunal. It was suggested that members could rotate between the two Tribunals if they were established as a single structure, with their designation to a specific Tribunal decided by a lot. It was, however, said that members of the Dispute Tribunal should not handle appeals of a case which they had handled, even if they were allowed to be elected as a member of the Appeals Tribunal. Other limitations were mentioned, such as a cooling-off period.

Paragraph 2

92. There was general support for paragraph 2, which provided a staggered appointment process to ensure that members would not be replaced all at once. While support was expressed for having half of the members serving a full term and the other half serving half of the term (for example, nine years and four and a half years, respectively), it was suggested that it might be preferable to have half of the members serve a full term with the remaining serving a prolonged term (for example, six years and nine years, respectively).

93. While support was expressed for members elected in the initial phase with a shorter term being eligible for reappointment, it was said that this could have a negative impact on their independence and impartiality and put a burden to campaign for re-election while in office. On the other hand, concerns were raised that a very short term might hinder members from adequately handling cases. In addition, it was noted that this might lead to financial burden on the standing mechanism, because members would continue to serve in proceedings pursuant to paragraph 6. A short term would also make the position less attractive, particularly in light of the limits on roles for former judges under article 4(3) and (4) of the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution (the “Code”). Therefore, it was suggested that the term should be at least 6 years, if those members were not eligible for reappointment.

94. After discussion, the Working Group agreed that the term of the members should be nine years. With regard to paragraph 2, it was agreed that half of the members selected by a lot would serve for a term of six years. It was further agreed that regardless of the term, no member would be eligible for reappointment. Hence, it was agreed that the phrase “subject to paragraph 2 and article 13(3)” be deleted from paragraph 1 (see para. 110 below). The secretariat was requested to consider the election cycle in this context.

Paragraph 3

95. The meaning of “full-time” in paragraph 3 was questioned. In that regard, reference was made to the Code, which obliged judges to not engage in a professional occupation, which was incompatible with their obligation of independence and impartiality or with the demands of the terms of office. After discussion, it was agreed to delete paragraph 3 on the basis that the terms and conditions of office would outline the obligations of the members, including whether they would serve full-time.

Paragraph 4

96. It was agreed to add the words “professional and” before the word “ethical” in paragraph 4.

Paragraph 5

97. It was clarified that the reference to “annual salary” was intended to indicate that members would be remunerated regularly rather than based on their caseload or a fee schedule, which would depend on the time spent. However, it was questioned whether the term “annual” was appropriate, particularly as the payment schedule could differ. Questions were asked if all members of the Tribunal would receive the same salary. It was clarified that “compensation” referred to other payments that a member might receive, for example, to cover expenses or as pension, medical or other benefits. It was also queried how members serving pursuant to paragraph 6 would be remunerated. It was generally felt that those matters could be addressed by the terms and conditions of office adopted by the Conference.

98. After discussion, it was agreed that paragraph 5 would read as follows: “Members of the Tribunals shall receive a salary. In addition, the President and the Vice-President shall receive a special allowance. The salaries, allowances and other compensation shall be fixed by the Conference.”

Paragraph 6

99. It was said that the phrase “continue in the office” in paragraph 6 could be interpreted that the member retained his or her status as a member of the Tribunal resulting in the seat not being vacated. To address that concern, it was agreed that the phrase be replaced with “continue to discharge the duties”. It was also agreed that reference be made to removal and resignation as well as any other circumstance to be addressed in article 13, instead of the word “replaced”.

100. It was agreed that the heading of article 12 be modified to reflect its content (for example, “terms and conditions of appointment”).

Article 13 – Removal, resignation, vacancies and replacement

Paragraph 1

101. The Working Group discussed how the removal process would be initiated, based on what grounds, which body could take the decision, and the procedure for doing so.

102. It was highlighted that there was a need to ensure due process in the removal process, which should only occur in exceptional instances. It was suggested that the removal process should only be initiated upon the recommendation by the President or the Vice-President, stating the reasons. It was also suggested that corruption be listed as an additional ground for removal. In response, it was pointed out that corruption was captured by article 5 of the Code, which was incorporated into the draft statute (Protocol) by article 12(4). It was said that failure to comply with the Code would constitute a breach of the Protocol. It was suggested that only serious breaches of the Protocol should be grounds for removal.

103. While it was suggested that the decision to remove should lie with the Conference as the appointing authority, it was widely felt that the decision should be taken by the other members of the Tribunal to avoid undue interference. It was widely felt that the decision should be taken by a qualified majority and suggestions were made for a two-thirds or three-fourths majority. Suggestions to detail the procedure in the statute, including an appeal process, did not receive support.

104. After discussion, it was agreed that the process to remove a member of a Tribunal should be initiated by the President or the Vice-President (in case it related to the President) through a recommendation to the respective Tribunal. It was further agreed that the basis of such recommendation should be a serious breach of the Protocol (which included the Code and the regulations adopted by the Conference on the conduct as well as other relevant professional and ethical obligations) or a failure to perform the duties. It was also agreed that the decision be made by a three-fourths majority of the members of the respective Tribunal excluding the member under scrutiny and that the President or the Vice-President would need to inform the Conference of any such decision before it took effect. The secretariat was requested to prepare text for consideration.

105. While it was suggested that the impossibility of a member to perform his or her functions (for example, due to death, illness or other incapacity) could be addressed through paragraph 1, it was felt that a separate rule should be prepared.

106. Noting that paragraph 1 dealt with the removal of a member from the Tribunals, it was suggested that the draft statute include a rule to address instances when a member of a panel or chamber was challenged resulting in their disqualification from the panel or chamber but not from the Tribunal. Reference was made to article 41 of the Statute of the International Criminal Court as well article 57 of the ICSID Convention. The secretariat was requested to prepare text for consideration.

Paragraph 2

107. It was agreed that paragraph 2 elaborate on the procedure for the resignation by the President, which could be done by notifying the Vice-President. It was noted that such procedure could also be addressed in the regulations rather than in the statute.

Paragraph 3

108. It was agreed that the first sentence address the procedure for replacing a member whose seat has been vacated pursuant to paragraphs 1 and 2, as well as when they would be unable to perform their functions (see para. 105 above). It was agreed that language along the lines of “or the seat has otherwise been vacated” would be added.

109. Noting that a full-fledged appointment process might require cost and time, various suggestions were made on how to fill the vacancy. One was for the Conference to appoint the incoming member using the final list of suitable candidates prepared by the Selection Committee for the previous election, eliminating the need for a nomination phase. Another was to rely on the results of the previous elections, so that candidates who met the minimum requirement but were not appointed due to lack of votes could be automatically appointed. Yet another was for the Conference to appoint alternate members along with the members during the election phase, with the alternate member stepping in when a vacancy occurred. It was suggested that the Conference should have the power to introduce a simplified procedure for the filling of vacancies. It was widely felt that the incoming member should, in any case, be confirmed and appointed by the Conference and that equitable geographical distribution and equal gender representation be maintained. The secretariat was requested to prepare a provision giving the discretion to the Conference to make the reappointment through a simplified procedure.

110. While it was suggested that the replacing member should not be eligible for reappointment and serve the full nine-year term, concerns were expressed about the challenge of managing multiple elections cycles.

C. The Appeals Tribunal

Article 18 – Jurisdiction

111. The Working Group agreed to discuss article 18 at a later stage.

Article 19 – Request for appeal

Paragraph 1

112. Rather than having the appellant send the request to the appellee, it was suggested that the appellant be required to include the appellee's contact details in the request, which the Executive Director could use to send a copy of the request. It was said that the time frames to send a copy of the request and for the appellee to send a reply should be specified in the rules of procedure.

113. It was agreed to place the time frame for requesting an appeal (currently in article 28(2)) after paragraph 1, and that it be 120 days to ensure sufficient time for the parties to prepare, and therefore that the sentence would read as follows: "A request for appeal shall be made within 120 days from the date of award or decision." It was widely felt that the time frame should begin when the award or decision was rendered. This could be when the certified copies were dispatched, rather than the date of receipt. It was suggested that the time frames should differ depending on whether the subject of the appeal was an arbitral award or a decision of the Dispute Tribunal.

Paragraph 2

114. It was agreed that the request for appeal contain information on the nature of appeal, including the relevant grounds listed in article 29. It was also agreed that paragraph 2 be clarified to require "information" on consent. It was mentioned that the Executive Director should be able to request additional information, and pursuant to paragraph 3, deny the registration of the request if it lacked the necessary information.

115. It was clarified that "decision" in paragraph 2 and in the draft statute referred to those made by the Dispute Tribunal and not decisions made by an arbitral tribunal during its proceedings. It was noted that whether the Appeals Tribunals would have jurisdiction over awards rendered by arbitral tribunals as well as whether the standing mechanism would be composed of two tiers had yet to be determined.

Paragraph 3

116. The meaning of "manifestly outside the jurisdiction" was questioned and references were made to the practice of ICSID and PCA. Situations where the appellant or the appellee was not a Contracting Party to the statute, or where the underlying agreement containing the consent had not entered into force were provided as examples. It was emphasized that the question of jurisdiction would need to be determined by the Appeals Tribunal, and the Executive Director should exercise this power only in limited instances (for example, where there was no reasonable possibility that the Appeals Tribunal would reach a different conclusion, and where the appellant had not provided a plausible argument). It was noted that if the appellant wished to challenge the Executive Director's decision, it would need to submit another request. It was agreed that the Executive Director should notify its decision "promptly".

Article 20 – Chambers and the assignment of appeals

117. It was recalled that the Working Group had considered the equivalent provision (article 16) in the context of the Dispute Tribunal, where diverging views had been

expressed (A/CN.9/1167, paras. 103–110). Therefore, discussions focused on whether the approach should be different in the context of the Appeals Tribunal.

118. It was said that pre-established Chambers would ensure independence and efficiency, and that some of the concerns about them could be addressed through paragraphs 3 and 5.

119. However, the complexities introduced by pre-established Chambers were highlighted. It was said that a large number of members would be needed to take into account the many elements relevant to constituting Chambers including those in article 8, language proficiency, expertise, caseload, issue conflicts, and different terms of the members. As such, the secretariat was requested to revise article 20 to reflect that Chambers would be constituted after a request was registered, yet in a manner that would ensure independence, neutrality and opportunity for the members to serve (for example, on a random rotation basis).

Article 21 – Powers and functions of the Chamber

120. It was queried whether paragraph 1 was necessary. Further, a suggestion was made to replace "competence" with "jurisdiction" considering the context of a standing mechanism. In response, it was noted that "competence" was a broader notion, and replacing the term might pose problems if the decision by the Appeals Tribunal was to be enforced under the New York Convention.

121. After discussion, the Working Group agreed to replace "competence" with "jurisdiction" in articles 17(1) and 21(2) and to consider them further. With regard to paragraph 2 in both articles, it was agreed to replace the phrase "a party to the dispute" with "a disputing party."

V. Way forward and other business

122. The Working Group was informed that the fifty-first session would be held in New York in two parts, first part from 17 to 19 February 2025 and second part from 7 to 11 April 2025.

Way forward on the reform elements

123. While written comments on the draft provisions on procedural and cross-cutting issues were found to be useful, it was suggested that it would be more useful if the chair, the rapporteur and the secretariat reflected on those comments and prepared a revised text for the Working Group's consideration, particularly for the draft provisions in section A of A/CN.9/WG.III/WP.244.

124. It was further suggested that the revised text could be discussed during informal meetings. Noting concerns about the number and frequency of informal meetings, it was agreed that informal meetings could be held on the margins of the Working Group's sessions, with remote participation to the extent possible, and with translation and interpretation, resources permitting (see para. 135 below). The secretariat was requested to limit the number of other side events held during formal sessions.

125. After discussion, delegations were invited to submit written comments on draft provisions 5–9, 11, 12 (paragraph 1–5, and 7) in document A/CN.9/WG.III/WP.244 and draft provisions 21 and 22 in document A/CN.9/WG.III/WP.248 by 7 March 2025. It was further agreed that, with regard to those draft provisions, the chair, the rapporteur and the secretariat would be tasked to prepare a revised text based on the comments received, for the Working Group's consideration at its fifty-second session in the fall of 2025. It was clarified that calls for written comments would not in any way limit the Working Group's formal deliberations on those draft provisions. It was cautioned that this informal method of work should not set a precedent for other reform elements.

126. Noting the deliberations at the forty-ninth session (A/CN.9/1194, paras. 71–104), the Working Group agreed that the second part of the fifty-first session in April 2025 would be devoted to draft provisions 13 to 19. Delegations were welcome to submit written comments on those provisions.

127. It was suggested that the Working Group should seek to prepare an entire set of procedural rules for ISDS, considering the potential impact that supplementary ISDS rules could have on the UARs, and the difficulties faced in drafting those rules at the current session. It was said that piecemeal amendments or supplements to the UARs might have a negative impact on the overall application of the UARs and reduce their attractiveness as a whole, and that such an approach could risk the integrity and coherence of the UARs. It was generally felt that this could be considered further after the revised set of draft provisions were prepared.

128. Regarding the draft statute of a standing mechanism, the Working Group decided to consider articles 27 to 34 during the second part of the fifty-first session in April 2025. Noting the submission from the Government of Switzerland (A/CN.9/WG.III/WP.241), the secretariat was asked to provide a side-by-side comparison.

129. It was also agreed that the Working Group would have a discussion on how to structure the standing mechanism at its fifty-second session in the fall of 2025. In that regard, it was agreed that articles 14 and 18 and other relevant articles, would be discussed then. For that purpose, the secretariat was requested to prepare an informal paper containing the revised version of the draft statute based on the deliberations of the Working Group.

Agenda of the fifty-first session

130. It was agreed that the first part of the fifty-first session in February 2025 would be devoted to: (i) an exchange of views on the summary of the first meeting on the operationalization of the Advisory Centre on International Investment Dispute Resolution (the “Advisory Centre”) (A/CN.9/WG.III/WP.251), without the Working Group needing to take any decision on that summary; and (ii) the draft multilateral instrument on ISDS reform (MIIR) (A/CN.9/WG.III/WP.246).

131. It was further agreed that the second part of that session would be divided between the consideration of: (i) the draft provisions on procedural and cross-cutting issues (see para. 126 above); and (ii) the draft statute of a standing mechanism (see para. 128 above).

Intersessional meetings

132. The Working Group heard an oral report on the eighth intersessional meeting on ISDS Reform, which took place on 24 and 25 October 2024 in Chengdu, China and focused on key issues concerning an appellate mechanism and the MIIR (A/CN.9/WG.III/WP.249).

133. The Working Group was informed that arrangements were being made to hold the ninth intersessional meeting in Santiago, Chile from 5 to 7 November 2025. The Working Group also heard a proposal by the Government of Viet Nam to hold an intersessional meeting during the first half of 2026.

Operationalization of the Advisory Centre on International Investment Dispute Resolution

134. The Government of Egypt expressed its interest in hosting the Advisory Centre. The Working Group was informed that preparations were underway to hold the second meeting on the operationalization of the Advisory Centre in Yerevan, Armenia from 6 to 8 May 2025. The Government of France informed the Working Group that it was considering hosting the third meeting in Paris tentatively during the first week of December 2025.

Contributions to the UNCITRAL Trust Fund

135. The Working Group expressed its appreciation to the Government of France for its additional contributions to the UNCITRAL trust fund aimed at supporting: (i) the inclusive participation of representatives of developing States in the Working Group and (ii) the translation of documents and interpretation during informal meetings into French.

Resources and planning

136. The Working Group recalled that the General Assembly, in 2021, decided to allocate one additional one-week session per year for a single period of four years from 2022 to 2025 and additional support to the Commission to allow the Working Group to continue to implement its work with respect to ISDS reform, on the condition that the Commission would during its annual sessions re-evaluate and, if needed, revisit its decision concerning the need for allocating an additional one-week session to Working Group and related support based on its annual report on the use of its resources (A/RES/76/229, para. 15).

137. The Working Group considered the possible implications of the expiry of the additional resources, and how the Working Group could further its work as presented in document A/CN.9/WG.III/WP.248.

138. While concerns were expressed, broad support was expressed for recommending a request for additional resources, to enable the Working Group to maintain its momentum and to continue to make progress. It was also agreed that the Working Group would take further efforts to increase the efficiency of its work. It was suggested that resources be sought to enable livestreaming of the formal sessions of the Working Group, to safeguard the inclusiveness of the process.

139. The importance of ISDS reform and the need to deliver concrete results in a timely fashion were emphasized. Upon review of the workplan and the resourcing plan, the Working Group recommended that the Commission request the extension of the resources allocated to it by the General Assembly. This would be (i) one additional one-week session per year for a period of two years from 2026 to 2027, and (ii) additional support to the Commission to allow the Working Group to continue to implement its work with respect to ISDS reform (document resources, secretariat human resources and ICT resources for livestreaming).