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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fifty-first session, second part (New York, 7–11 April 2025)

Contents

I. Introduction

1. The second part of the fifty-first session of the Working Group was held from 7 to 11 April 2025 at the United Nations Headquarters in New York. The following reflects the deliberations and discussions of the Working Group during the second part of the session and should be read in conjunction with the report of the first part of the session (A/CN.9/1196).

II. Organization of the session

2. In addition to those listed in paragraph 6 of A/CN.9/1196, the session was attended by the following States members of the Working Group: Czechia, Germany, Ghana, Israel, Peru, Türkiye, Uganda and Venezuela (Bolivarian Republic of).

3. In addition to those listed in paragraph 7 of A/CN.9/1196, the session was attended by observers from the following States: Bolivia (Plurinational State of), Costa Rica, Maldives, Mauritania, Oman, Romania and Slovakia.

4. In addition to those listed in paragraph 9 of A/CN.9/1196, the session was attended by observers from the following international organizations:

(a) […];

(b) *Intergovernmental organizations*: Commonwealth Secretariat and South Centre;

(c) *Invited non-governmental organizations*: ACP Legal, Academic Forum, American Society of International Law (ASIL), Belgian Centre for Arbitration and Mediation (CEPANI), British Institute of International and Comparative Law (BIICL), Centre for International Law at the National University of Singapore (CIL), Centre of Excellence for International Courts (iCOURTS), Centro de Estudios de Derecho, Economia y Politica (CEDEP),Chamber of Commerce of the United States of America, Chartered Institute of Arbitrators (CIARB), Climate Change Counsel, Comité Français de L'Arbitrage (CFA), Compliance Politics and International Investment Disputes (COPIID), Geneva Center for International Dispute Settlement (CIDS), International Institute for Sustainable Development (IISD), Organisation of Islamic Cooperation Arbitration Centre (OIC-AC), School of International Studies at the University of Trento (SIS) and Stockholm Chamber of Commerce Arbitration Institute (SCC Arbitration Institute).

5. In addition to the documents listed in paragraph 14 of A/CN.9/1196, the following informal documents were made available on the Working Group web page: (i) comparative table of articles in section F of the draft statute of a standing mechanism; and (ii) initial draft of working papers to be presented to the Working Group in the autumn of 2025, including the draft guidelines on the calculation of damages and compensation in ISDS.

III. 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.241)

A. General remarks

6. The Working Group recalled that at its fiftieth session (Vienna, 20–24 January 2025), it had decided to consider articles 27 to 34 during the current session and noting the submission from the Government of Switzerland (A/CN.9/WG.III/WP.241), it had requested the secretariat to provide a side-by-side comparison (A/CN.9/1195, para. 128).

7. Discussions were held based on the text in documents A/CN.9/WG.III/WP.239 and A/CN.9/WG.III/WP.241, as it was noted that they usefully complemented each other.

8. It was stated that participation in the discussions on a standing mechanism was without prejudice to the respective States' views on the desirability of such a mechanism, the possible models thereof and their decision to become a party to any such mechanism.

B. The Appeals Tribunal procedure

Article 27 – Scope of appeal

9. Diverging views were expressed on how to define the scope of appeal.

10. One view was to provide for a broad scope of appeal, allowing for an award or decision on jurisdiction or merits to be the subject of appeal, unless expressly excluded (as reflected in article 27 of A/CN.9/WG.III/WP.239). Another view was to provide for a narrower scope of appeal, limited to final awards or decisions (as reflected in article 27(1) of A/CN.9/WG.III/WP.241). Other views, such as that final awards or decisions as well as positive decisions on jurisdiction should be subject to appeal, were also expressed.

11. It was suggested that the meaning of "final" be further clarified. It was explained that an award or decision would be final when a tribunal had thereby disposed of all relevant issues and thus could include partial awards or decisions. It was questioned whether an award or decision on jurisdiction or merits included decisions on quantum made separately.

12. It was said that, regardless of the approach taken, due consideration should be given to the overall efficiency of the dispute resolution process, the right of a party to appeal, possible delays and costs arising from appeal, and the correctness, consistency and coherence of decisions that an appeal mechanism would provide.

13. It was suggested that the scope of appeal would need to consider arbitral awards subject to recognition and enforcement under the New York Convention and those subject to annulment under the ICSID Convention. It was also suggested that the terminology used to refer to the final outcome of a standing first-tier mechanism (currently "final decision" in the draft statute) might need to be carefully considered.

14. Views diverged on whether decisions on interim measures should be subject to appeal. It was suggested that certain decisions – particularly those affecting the rights of a party including state sovereignty or having a significant impact on the integrity of the proceedings – should be subject to appeal. References were made to decisions on security for costs and on challenges of arbitrators or those relating to the constitution of a tribunal. It was suggested that appeals of such decisions need not lead to the suspension of the first-tier proceedings and could be conducted through an expedited process, which might be based only on the existing record of the proceedings.

15. It was said that a decision in which the tribunal determined that it did not have jurisdiction would be a final decision and therefore could be subject to appeal. It was also suggested that a decision by the tribunal confirming its jurisdiction should be the subject of appeal in itself, even if not contained in a "final" award or decision. Drafting suggestions were made in that regard. It was mentioned, however, that under the ICSID regime, a positive determination of jurisdiction became part of the final award and was subject to annulment thereafter. Further, it was said that subjecting jurisdictional decisions to appeal could discourage first-tier tribunals from bifurcating the proceedings on jurisdiction and merits, even when tribunals might otherwise consider bifurcation to be appropriate.

16. It was queried whether post-award remedies, such as interpretation or revision, should be the subject of appeal and, if so, when the time frame to request such appeal

would commence. It was mentioned that post-award remedies might be subject to appeal only as part of the award or decision, but not independent thereof.

17. It was noted that article 27(2) in A/CN.9/WG.III/WP.241 addressed the consequences when parties had not appealed an award or decision within the 120-day time frame (as agreed by the Working Group at its fiftieth session and moved to article 19, see A/CN.9/1195, para. 113). It was explained that this time frame would also apply to a non-final award or decision subject to appeal, which would eventually become part of a final award or decision. It was stated that this would prevent the possibility of multiple appeals being requested at different phases of the proceeding.

18. It was questioned whether the statute should address the final and binding nature of awards or decisions that had not been appealed, which was usually dealt with in the laws applicable to the first-tier tribunal (that is, the investment agreement, law at the place of arbitration, or applicable arbitration rules). It was also mentioned that not all awards or decisions might be considered "binding on the disputing parties" (for example, a positive determination on jurisdiction). It was therefore suggested to expressly provide in the statute, such as in article 19, 27 or 31, that such awards or decisions would no longer be subject to appeal after the relevant time frame had passed. It was said that this would promote legal certainty.

19. After discussion, the Working Group agreed to further its deliberations on the basis of a revised draft, which adopted a narrower scope of appeal. The draft would elaborate on the meaning of "final" awards or decisions, and include the possibility of appealing a decision by the tribunal confirming its jurisdiction and of an expedited appeal procedure. Whether or not decisions on interim measures may be subject to appeal would require further consideration. It was also agreed to include a rule that, after the lapse of the 120-day time frame for requesting an appeal, parties would no longer be able to request an appeal.

Article 28 – Conditions for appeal

20. Views diverged on whether an appeal should be the exclusive remedy or coexist with other remedies, such as annulment or set-aside. However, there was general agreement that parallel proceedings should be avoided and discussions focused on how to achieve that result.

21. It was said that if an award or decision was subject to appeal under the statute, other remedies should be automatically excluded (article 31(1) in A/CN.9/WG.III/WP.241). In support, it was said that this approach would avoid parallel proceedings and fragmentation, enhance legal certainty, and ensure judicial efficiency. It was also explained that excluding other remedies would not amount to disputing parties losing their ability to challenge an award or decision when they currently had that ability, as the grounds of appeal included the current grounds of annulment and set-aside (see article 29 in A/CN.9/WG.III/WP.241). It was explained that an appeal would become the sole remedy for first-tier awards or decisions by virtue of the relevant States becoming a Party to the statute and opting into the appellate mechanism. Under this approach, a party appealing an award or decision would be deemed to have consented to the exclusion of other remedies. It was noted that, for appeals of ICSID awards, this approach would require an inter se modification of the ICSID Convention, which currently foresaw annulment as the exclusive remedy. However, concerns were expressed that the exclusion of remedies available in domestic legislation might require amendments to domestic law (as mentioned in article 31(4) in A/CN.9/WG.III/WP.241), which might be burdensome for certain States. It was also said that certain jurisdictions might not permit the exclusion of a right to set aside. Questions were also raised about a situation where a party nonetheless sought annulment, set-aside, or recognition and enforcement of that award or decision, including whether the authority seized with that request could reject the request based on the award or decision possibly being subject to appeal.

22. On the other hand, it was said that flexibility should be provided to parties to choose between appeal and other remedies, with the statute addressing parallel

proceedings by requiring a waiver as a condition for appeal (as reflected in article 28(1) in A/CN.9/WG.III/WP.239). It was explained that appeal should only be available if the parties waived their right to initiate other remedies. If a party chose not to appeal, annulment or set-aside proceedings could still be pursued. While support was expressed for this approach, doubts were expressed about the practical operation, particularly when parties respectively opted for different types of remedies. In response, it was mentioned that joint waivers could be sought. Concerns were raised about a party possibly benefitting from multiple remedies (for example, when a decision on annulment was rendered within the time frame for requesting an appeal). Questions were also raised about the form and duration of the waiver and it was suggested that the process should be detailed. It was further suggested that article 28, which addressed the conditions of appeal, would need to be examined in conjunction with article 31, which addressed the effects of an appeal. Separately, it was suggested that if the grounds for appeal were not identical to the grounds for set annulment or set aside, the waiver or exclusion required as a condition for appeal should be limited to the pendency of the appeal proceedings and annulment or set-aside of the award would continue to be available following the appellate process.

23. It was suggested that recognition and enforcement of an award or decision of a first-tier tribunal should be treated differently from the annulment or set-aside thereof. It was further suggested that the discontinuation of an appeal proceeding and its impact on other remedies should be assessed. It was also suggested that the appeal of a partial award and its impact on remedies relating to the remaining parts of the award would need to be clarified.

24. It was also pointed out that providing appeal as the exclusive remedy with regard to an award or decision was closely linked to the jurisdiction of the Appeals Tribunal (article 18). In that context, it was said that where the Appeals Tribunal did not have exclusive jurisdiction in accordance with article 18(3) (for example, where only the respondent State was a Party to the statute or where neither State were Parties to the statute), it might be necessary to require the disputing parties to waive their rights to remedies in other instruments when consenting to the appeal. However, it was also said that it might be possible to provide for exclusivity of appeal even in those circumstances, which could be addressed in article 18.

25. Accordingly, the Working Group agreed to further consider article 28 after its consideration of articles 18 and 29.

Article 29 – Grounds of appeal

26. Views were expressed in support of the structure in A/CN.9/WG.III/WP.239, of that in A/CN.9/WG.III/WP.241, as well as of combinations of the two structures (for example, the chapeau and subparagraphs (a) and (b) in A/CN.9/WG.III/WP.241 combined with paragraph 2 in A/CN.9/WG.III/WP.239). In addition, it was suggested that reference could be made to article V of the New York Convention and article 52(1) of the ICSID Convention without listing those grounds in article 29.

27. With regard to errors in the application or interpretation of the law, concerns were raised about the meaning of “manifest” and questions were raised on whether an alternative standard should apply. However, it was generally felt that errors in the application or interpretation of the law should be grounds of appeal without the error needing to be manifest.

28. While views were expressed that errors in the assessment or appreciation of facts (referred to below as “errors of facts”) should not be a ground of appeal, it was suggested that “manifest” errors of facts should constitute a ground of appeal, and that a suitable qualifier was needed to ensure that an appeal did not become a full de novo review. It was said that if errors of facts were to be a ground of appeal, mechanisms to prevent any abuse (such as early dismissal of appeals or allocation of costs for frivolous appeals) should be provided. Concerns were expressed that the meaning of “manifest” was unclear and subjective and could be replaced by clearer wording. Questions were raised whether assessment of domestic legislation was an

issue of law or fact. While suggestions were made to include the reference to domestic legislation in subparagraph (b), suggestions were also made to not include any such reference. It was also suggested that reference to damages was not necessary.

29. With regard to article 29(2) in A/CN.9/WG.III/WP.239, questions were raised regarding the reference to "incapacity" in subparagraph (a) and its relevance in the context of investment disputes, the meaning of "serious departure from a fundamental rule of procedure" in subparagraph (d), and the meaning of "international public policy" in subparagraph (g). It was said that any breach of the fundament rights of the parties, for example, to be treated with equality and to be given full opportunity to present their case, could be a serious departure from a fundamental rule of procedure. It was questioned whether there was a need to include "public policy" grounds at all, since such grounds were relevant to enforcement by domestic courts. It was further suggested that subparagraph (h) be deleted as new or newly discovered facts could be addressed by the first-tier tribunal through revision or an additional award. In that context, it was suggested that it might be necessary to address the relationship between such proceedings and an appeal (including when a new fact arose after an appeal was raised). It was said that subparagraph (i) overlapped with subparagraph (f) and could be deleted.

30. With regard to article 29 in A/CN.9/WG.III/WP.241, it was suggested that the word "applicable" be inserted before the word "law" in subparagraph (a). It was suggested that the phrases in square brackets in subparagraphs (a) and (b) be retained to minimize disputes over the grounds of appeal. It was also suggested that the square bracketed phrases be deleted. It was questioned whether a tribunal's failure to state the reasons would be covered by subparagraphs (a) and (b). It was suggested that a first-tier tribunal's failure to state the reasons on which the award is based should also be a ground of appeal. It was suggested that a ruling that did not address the claims submitted to it, or that ruled beyond the claims submitted to it, would fall under subparagraph (a) or (b), as would a ruling on the validity of the arbitration agreement. In response to a question whether corruption on the part of a member of a first-tier tribunal was covered by subparagraph (b), it was said that such corruption would be covered by subparagraph (c). It was queried how the inclusion of "lack of impartiality and independence" in subparagraph (c) related to the decisions on challenges possibly being the subject of appeal. In response, it was said that subparagraph (c) would allow such lack to be addressed when the final award was made, even if the decision on challenge had not been the subject of appeal.

31. Although reservations were expressed about departing from the grounds for refusal of enforcement in article V of the New York Convention which had withstood the test of time, it was stated that article 29 in A/CN.9/WG.III/WP.241 was streamlined, provided clarity and reflected the specificities of ISDS as opposed to commercial arbitration. However, it was said that the text should be reviewed to ensure that all existing grounds for annulment and set-aside were indeed covered.

32. After discussion, it was said that article 29 could be revised along the following lines:

"A party may appeal an award or decision referred to in article 27 on the ground that:

(a) The first-tier tribunal made an error in the application or interpretation of the law;

(b) The first-tier tribunal made [a manifest error] [alternative drafting such as "an error apparent on its face"] in the assessment of the facts;

(c) A member of the first-tier tribunal lacked impartiality or independence or was improperly appointed, or the first-tier tribunal was improperly constituted;

(d) The first-tier tribunal ruled beyond the claims submitted to it;

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

(f) The award or decision of the first-tier tribunal failed to state the reasons on which it is based, unless the parties have agreed otherwise."

33. It was explained that the revised article 29 would provide an exhaustive list of grounds of appeal, without departing from the grounds for annulment or set-aside in the current regimes.

34. Suggestions were made to include references in the revised article 29 to the grounds in article 52(1) (a)–(e) of the ICSID Convention and article 34(2) of the Model Law on International Commercial Arbitration ("Model Law"), in so far as they were not covered by subparagraphs (a) and (b).

35. In response to a suggestion that subparagraph (f) could be covered under subparagraph (e), it was said that under the Model Law, parties were free to agree to not have reasoned awards. However, it was questioned whether such an approach was appropriate in the ISDS context.

Article 30 – Effect of an appeal on ongoing first-tier tribunal proceeding

36. The Working Group considered the impact of a request for appeal on ongoing first-tier tribunal proceedings. It was observed that if only "final" awards or decisions were the subject of appeal, article 30 might not be necessary as the first-tier arbitral proceeding would have terminated. Noting the interest in the Working Group to extend the scope of appeal to interlocutory or non-final awards or decisions (for example, decisions confirming jurisdiction or on interim measures, see para. 19 above), it was felt that there was merit in retaining article 30 with adjustments. It was, however, suggested that a conclusion on article 30 could only be reached after the scope of appeal in article 27 was determined.

37. Views diverged on whether the registration of an appeal should result in the suspension of the first-tier proceedings. It was said that a suspension could reduce costs of the overall proceeding and potential inconsistencies from having the proceedings proceed in parallel. It was, however, said that if suspension was automatic, appeals might be used by parties as a dilatory tactic.

38. Diverging views were also expressed over whether the first-tier tribunal should be obliged or have discretion to suspend its proceedings. It was questioned whether the suspension should be automatic as soon as a request for appeal was made or registered and whether there should be suspension only upon a party's request or an order of the Appeals Tribunal. It was also questioned whether the statute of an appellate mechanism could address the procedure of a first-tier tribunal (in particular, ad hoc arbitral tribunals), which might be subject to a separate rule on the stay of its proceedings. It was suggested that the standing mechanism be required to inform the first-tier tribunal of any appeal.

39. It was stated that automatic suspension of a first-tier proceeding could be foreseen where both the home State of the claimant and the host respondent State were Parties to the statute and an investor had submitted a claim under a treaty subject to the jurisdiction of the Appeals Tribunal in accordance with article 18. It was stated that in such a circumstance, a first-tier tribunal could be bound by article 30 to suspend the proceedings. It was said that implementing the rule in article 30 within a two-tier standing mechanism would not pose difficulties. However, it was suggested that for other circumstances, including where one of the States was not a Party to the statute or where the claim was based on a contract or domestic legislation, there would need to be other means of ensuring that there was clarity, at least at the moment of the claim being submitted, over whether or not the Appeals Tribunal had jurisdiction. While it was said that consent to dispute resolution would typically include consent to jurisdiction of the Appeals Tribunal, it was also suggested that the possibility of consenting to the jurisdiction of the Appeals Tribunal during a first-tier proceeding or thereafter (including after the award or decision was made) should not be ruled out.

40. It was suggested that if a first-tier tribunal had discretion to stay its proceedings in the case of an appeal, guidance could be provided. In that context, it was said that the first-tier tribunal should take into consideration the decision subject of appeal, and the stage at which the appeal was requested. It was also suggested that the first-tier tribunal be required to consult all disputing parties before suspending proceedings.

41. It was suggested that a suspension would last till a decision was made by the Appeals Tribunal, including a decision to terminate the appeals proceeding. The consequence of the Appeals Tribunal not rendering any decision was raised, as was the Appeals Tribunal's power to enforce a first-tier tribunal to suspend its proceedings.

Article 31 – Effect of an appeal on proceedings for annulment, set aside, recognition and enforcement of the award or decision subject of appeal

42. The Working Group agreed to consider article 31 at a later stage as it related to the jurisdiction and scope of appeal.

Article 32 – Conduct of the Chamber proceedings

43. With respect to article 32(2), which contained a reference to article 22, doubts were expressed about the appropriateness of paragraphs 3 to 5 of article 22 in the appeals context, as those paragraphs respectively addressed applicable law, the application of the UNCITRAL Transparency Rules and mediation. It was suggested that it would be better to spell out the relevant rules than to provide for their application to the Chamber proceedings on a mutatis mutandis basis.

44. It was said that article 32(3), modelled after article 34(4) of the Model Law, provided a useful tool by allowing the Appeals Tribunal to remit a case to a first-tier tribunal to address the grounds of appeal, thereby promoting judicial economy. While considered practical to address instances, for example, where correction of an award was sought or an additional award was sought due to newly discovered facts after an appeal was registered, it was questioned under which circumstances the Appeals Tribunal could take such a decision (as it would have to rule on the grounds of appeal in any case), and how such powers would interact with the power to remand the dispute.

45. It was said that if article 28 was retained to require a waiver for an appeal, there should be provisions allowing the Appeals Tribunal to discontinue its proceedings in case the appellant sought remedies that it had waived.

46. After discussion, it was agreed that paragraph 3 would be deleted and further considered in the context of remand in article 34.

Article 33 – Decision by the Chamber

47. The Working Group agreed that paragraphs 1, 2 and 6 to 11 in article 33 in document A/CN.9/WG.III/WP.239 as well as paragraphs 3 to 8 in article 33 in document A/CN.9/WG.III/WP.241 would form the basis of its deliberations.

48. It was said that article 33 would need to be examined in conjunction with article 34 on the effects of the decisions. It was further said that article 33 would need to be considered in conjunction with article 36 on recognition and enforcement, for example, to address how an ICSID first-tier award subsequently modified or reversed by an Appeals Tribunal would be enforced in a State Party to the ICSID Convention but not a Party to the statute.

49. The Working Group approved paragraph 1 of A/CN.9/WG.III/WP.239, unchanged.

50. With regard to paragraph 2 of A/CN.9/WG.III/WP.239, it was agreed that the phrase "in consultation with the President of the Appeals Tribunal" be deleted as it might create confusion as to who should decide and might deter efficiency in decision-taking. On whether the paragraph should be developed further along the

lines of article 33(2) of the UNCITRAL Arbitration Rules (UARs), it was agreed that detailed rules on when the presiding member should take such decisions along with other powers of that member might be better addressed in the rules of procedure adopted by the Conference of the Contracting Parties. Accordingly, it was agreed to add the phrase "in accordance with the rules of procedure adopted by the Conference". The Working Group agreed that this change should also be reflected in article 23(2).

51. The Working Group approved paragraph 3 of A/CN.9/WG.III/WP.241, according to which a Chamber would have the power to uphold, modify or reverse an award or decision in whole or in part (including the findings of a first-tier tribunal as mentioned in paragraph 3 of A/CN.9/WG.III/WP.239).

52. With regard to paragraph 4 of A/CN.9/WG.III/WP.241, it was suggested that a Chamber should be encouraged to modify an award or decision based on the facts presented to or before the first-tier tribunal rather than embarking on its own fact-finding process. It was suggested that such independent fact-finding by a Chamber should happen only in exceptional circumstances, and that the phrase "in principle" be replaced with the phrase "as far as possible". It was also suggested that a Chamber should modify an award or decision only when the facts before it allowed it to take a decision. However, it was also said that a Chamber's own fact-finding power should not be too restricted, particularly if the grounds of appeal would include manifest errors of facts.

53. It was clarified that a decision by a Chamber to reverse an award or decision without remand (which was not addressed in paragraphs 3–8 of A/CN.9/WG.III/WP.241) would require the Chamber to modify the first-tier award or decision.

54. After discussion, the Working Group agreed that paragraph 4 would read as follows: "If the Chamber does not uphold the award or decision, it shall as far as possible modify the award or decision on the basis of the facts before the first-tier tribunal or if the Chamber deems it necessary and appropriate, through its own fact-finding."

55. It was questioned whether the preference to be given to modifying an award or decision would be contrary to the conclusion reached by the Working Group to delete article 32(3), noting the value of possible remission to the first-tier tribunal (see paras. 44 and 46 above).

56. It was said that there was a need to strike a balance between an effective appeals process and the time and costs of such an appeal and as such, remand to the first-tier tribunal should be done in more limited situations. With regard to the authority to remand, it was suggested that the following text could be added to achieve inter se modification of the ICSID Convention: "With regard to awards rendered under the ICSID Convention, Article 48 of the ICSID Convention is modified to add the following paragraph: (6) If the Appeals Tribunal decides to remand a dispute decided in an award rendered under the ICSID Convention, the dispute shall be remanded to the original tribunal or, if this shall not be possible or the Chamber determines that it would be inappropriate do so, a new tribunal shall be constituted upon the request of either party in accordance with Section 2 of this Chapter." It was said that a similar provision would be required regarding reversal with resubmission.

57. There was general support for paragraphs 5 to 8 of A/CN.9/WG.III/WP.241.

58. With regard to the period of time in paragraph 6 of A/CN.9/WG.III/WP.239, it was said that providing a fixed time frame would promote efficiency. However, it was also mentioned that if there was a fixed deadline, the possible consequence of not meeting it would need to be considered, including whether a decision rendered after lapse of the deadline might face difficulties in its enforcement. In that context, it was said that a Chamber would have the option of remand to the first-tier tribunal.

59. As to the time frame, it was suggested that 120 days would be appropriate, with the possibility of a 30-day extension. However, it was also suggested that a longer,

more realistic period, possibly no less than 180 days, should be considered, taking into account among others the time frames provided in article 19 (as revised to indicate 120 days to request an appeal). It was generally felt that an extension of the original time frame should be possible, and that any extension should be justified with reasons. It was questioned how it would be determined if those reasons were justifiable and what the consequences would be if the reasons were not justifiable. It was suggested that, to avoid a Chamber unilaterally extending its own deadline, the Chamber could be required to consult the parties, or seek the agreement of one or both parties.

60. Another view was that it would be difficult to include a specific time frame in the statute, as the appropriate amount of time needed to render a decision on appeal would depend on the complexity of the individual case, owing to factors such as the nature of the decision subject to appeal and of the underlying dispute, the grounds for appeal, and the scope of the Chamber's review. It was suggested that using phrases such as "without undue delay" or "as promptly as possible" might be more appropriate. In that context, it was said that the Appeals Tribunal could be left with the discretion to set time frames depending on the circumstances of the case, possibly in consultation with the parties.

61. After discussion, it was agreed that the time frame for a Chamber to render a decision should be reflected in the statute in a manner that provided the Chamber with sufficient flexibility so as to avoid problems arising from the eventual decision not being enforceable. It was also agreed that any time frame should commence from the date of the last submission by the parties rather than of the request for appeal itself.

62. There was general support for paragraphs 7 to 11 of A/CN.9/WG.III/WP.239.

63. Regarding the first sentence in paragraph 9 of A/CN.9/WG.III/WP.239, it was suggested that item (iii) should be distinguished from items (i) and (ii). In response, it was explained that the paragraph simply listed the typical post-award remedies. It was suggested that the time frames in paragraph 9 should be aligned with those in article 23(5).

64. It was agreed that paragraph 10 of A/CN.9/WG.III/WP.239 should be aligned with article 27 of the Statute of the International Court of Justice and revised as "… shall be considered as rendered by the Appeals Tribunal".

65. It was suggested that draft provision 4 on early dismissal as found in A/CN.9/WG.III/WP.244 should apply to the appeals process with necessary adjustments.

C. Way forward

66. After discussion, the Working Group agreed that the time to be allocated to the standing mechanism in the fifty-second session in the autumn of 2025 would be devoted to the consideration of article 34, followed by the structure and design of the standing mechanism. It was agreed that issues such as whether the standing mechanism would be a two-tier body or two separate bodies (which would also impact the protocol(s) to be prepared), the scope (treaty, contract, domestic legislation-based disputes) and nature (exclusive or not) of jurisdiction, means of consent to the standing mechanism including by disputing parties, interaction with the underlying investment agreement(s) and any other applicable rules, the relationship between appeal and existing remedies, inter se modification of the ICSID Convention and recognition and enforcement of decisions by the standing mechanism could be discussed. The secretariat was requested to prepare a note outlining these issues along with an informal draft statute of the standing mechanism reflecting the deliberations of the Working Group so far. In order to assist the Working Group with its deliberations, it was suggested that a submission by the European Union and its Member States on certain aspects of the jurisdiction of the standing mechanism be

made available as a working paper for the session in autumn 2025, subject to resources permitting.

IV. 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

67. The Working Group recalled that at its forty-ninth session in September 2024 and fiftieth session in January 2025, it had considered draft provisions 10, 12, 13 and 20 (A/CN.9/1194, paras. 71–104), and 1 to 4 (A/CN.9/1195, paras. 23–69), respectively. The Working Group further recalled that at its forty-ninth session, it had been 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).

68. The Working Group continued its deliberations on the draft provisions on procedural and cross-cutting issues (hereinafter "DP") in document A/CN.9/WG.III/WP.244 along with document A/CN.9/WG.III/WP.245, containing the annotations thereto.

B. Draft provisions on procedural and cross-cutting issues

Draft Provision 14: Local remedies

69. Support was expressed for DP14, as reflecting a compromise informed by the forty-sixth session (A/CN.9/1160, paras. 120-124). It was said that DP14 provided a balanced approach, by encouraging rather than mandating investors to assess whether recourse to local remedies was a viable option.

70. It was queried how the claimant could prove that it had considered recourse to local remedies. It was suggested to replace "shall" with "may" to avoid placing the burden on the claimant to demonstrate that the possibility of the recourse had been considered. It was suggested that the phrases "recourse before a court or competent authority" and "when available" be further elaborated.

71. Suggestions were made to further incentivize a claimant to seek local remedies, for example, by suspending or extending the limitation period in DP16 when local remedies were sought. It was suggested that the draft provision should indicate a reasonable time period, such as 12 or 18 months, within which the investor would have to consider or would have to seek recourse to local remedies, as a precondition for raising a claim to arbitration or to other remedies provided under the relevant Agreement.

72. It was questioned how DP14 would interact with an Agreement that required the exhaustion of local remedies and it was suggested that the following phrase be added: "subject to the provision in the underlying Agreement". It was said that States wishing to impose a requirement of the exhaustion of local remedies could do so as a precondition for raising a claim, and it was suggested to include this option in the draft provision for States.

73. Concerns were raised regarding the interaction of DP14 with an Agreement that contained a so-called "fork-in-the-road" clause or "no U-turn" clause. In response, it was said that DP14 would not necessarily contradict those clauses and could supplement them.

74. In response to whether DP15 may prevent investors from seeking local remedies, it was explained that investors would be required to waive their rights only after initiating a claim and could seek local remedies prior to initiating a claim.

75. After discussion, it was suggested that DP14 could be revised as follows:

> "1. Prior to submitting a claim to the tribunal, a party may initiate proceedings before a court or competent authority of a Contracting Party where available.
>
> 2. Where a claim is submitted for resolution in [local adjudicatory proceedings][before a court or competent authority] of a Contracting Party, the limitation period [in draft provision 16] shall begin (i) after the claimant has obtained a final decision of the court of last resort of that Contracting Party, or (ii) 36 months following the initiation of local adjudicatory proceedings if no final decision is reached [within] [after the lapse of] that period, [whichever is earlier]."

76. Concerns were raised with regard to paragraph 2 as the limitation period would commence or be renewed after the conclusion of the local remedies or a fixed period, possibly extending the period significantly. Accordingly, it was suggested that the limitation period should instead be suspended during the local adjudicatory proceedings, or that a maximum limitation period should be provided for instead. It was questioned whether it would be feasible to obtain a final decision in local courts within 36 months. In response, it was said that paragraph 2 could incentivize local remedies to be finalized within that time frame. It was further noted that "local remedies" or "recourse before a court or competent authority" should be understood broadly to include administrative tribunals, ombudspersons and local arbitration centres, but not amicable settlement.

77. It was agreed that DP14 would be revised in view of the Working Group's deliberations. As to how the seeking of local remedies would impact the limitation period, it was agreed that three options could be prepared for further consideration by the Working Group. The first option would be to provide for a maximum limitation period. The second option would be to restart the limitation period once domestic remedies were exhausted, thereby granting a claimant a new full limitation period. The third option would be to suspend the limitation period during the domestic proceedings phase.

Draft Provision 15: Waiver of rights to initiate dispute resolution proceeding

78. It was suggested that DP15 be deleted because of the political nature of the issue of waiver of rights, which meant that each State would want to decide the matter for themselves. However, there was general support to retain the provision, as it would prevent investors from initiating claims in multiple forums and thus enhance judicial efficiency. It was said that the provision should strike a balance between the need to limit parallel proceedings and the right of parties to initiate or continue adjudicatory proceedings.

79. It was said that the term "adjudicatory dispute resolution proceeding" should be understood broadly and further elaborated on in paragraph 1 as including judicial, administrative and arbitral proceedings. In support, it was said that the term should include both international and domestic proceedings. It was observed that a waiver would not prevent a disputing party from potentially requesting an appeal of the award or decision.

80. A suggestion to replace the word "may" with "shall" in paragraph 1 did not receive support. It was suggested to clarify in paragraph 1 that an "investor" required to waive its right would include locally established enterprises, parent companies and affiliated entities including those controlled by the investor. However, it was also stated that a claimant could not be required to waive the rights of its shareholders or its parent companies, and could be required to waive the rights of its subsidiaries only to the extent that it had control over them. It was suggested that the scope and duration of the waiver be further clarified.

81. In that context, it was said that DP18 would need to be considered in conjunction with DP15. It was mentioned that if a shareholder waived its right in accordance with paragraph 1, the company should not be restricted by such waiver nor should the

company be requested to waive its rights in order for the shareholder to submit a claim.

82. It was suggested that failure to comply with the waiver commitment shall be grounds for the Tribunal to "dismiss" the case of the claimant and that in such cases, the "claimant" would include: (a) if the claim is submitted by an investor acting on its own behalf, claims by all persons who, directly or indirectly, have an ownership interest in or are controlled by the investor and claim to have suffered the same loss or damage as the claimant; or (b) if the claim is submitted by an investor acting on behalf of a locally established enterprise, all persons who, directly or indirectly, have an ownership interest in or are controlled by the locally established enterprise, and claim to have suffered the same loss or damage as the locally established enterprise.

83. A question was raised whether DP15 would create an asymmetry with respect to counterclaims by respondent States and contract-based disputes, where such waiver might not be required.

84. It was stated that DP15 combined with DP16 might result in needless ISDS claims. It was also suggested that the phrase "with respect to the subject matter" or "the measure alleged" would need to be clarified and possibly narrowed to the "claim" or "subject matter of the dispute", so as not to unduly limit the domestic court proceedings that might need take place. It was suggested that the phrase "and shall only apply to the extent issues of waiver are not already addressed in the Agreement" be added at the end of subparagraph 3.

85. After discussion, the secretariat was requested to revise DP15 based on the drafting suggestions and provisions in recent investment agreements. It was agreed that DP15 should detail the scope of entities that would need to waive their rights for the claim to be submitted and the extent to which a waiver by the investor may impact the rights of other affiliated entities to initiate proceedings. It was said that the different circumstances would need to be analysed also taking into account the fact that investment agreements have used different language. It was also agreed that the meaning and scope of "adjudicatory dispute resolution proceeding" would need to be clarified. Lastly, it was noted that the relationship of DP15 with provisions in the Agreement would need to be further assessed.

Draft Provision 16: Limitation period

86. Support was expressed for DP16 as it would enhance legal certainty by protecting States from indefinite exposure to claims. It was suggested to clarify that "resolution" did not include mediation, consultations, or negotiations. While it was said that knowledge of the breach alone should trigger the limitation period, it was generally felt that knowledge of both the breach and the incurred loss/damage was necessary. It was emphasized that the causative link between the loss/damage and the breach should be clearly established in the text, and various drafting suggestions were made.

87. It was questioned how DP16 would interact with an Agreement that had different limitation periods and that determined the limitation period from a request for consultations rather than the submission of the claim to arbitration.

88. Views differed regarding the appropriate duration of the limitation period, with suggestions ranging from three to five years, and up to ten years. Concerns were raised that a shorter period might lead to claims by investors being filed on a precautionary basis.

89. It was suggested that the limitation period be suspended or extended particularly during efforts of amicable settlement or recourse to local remedies. It was said that disputing parties should be allowed to agree to extend the limitation period, though it was questioned if this was necessary since the respondent State could refrain from raising the argument. It was also questioned whether the disputing parties could agree otherwise despite the limitation period being fixed in the Agreement. It was said that DP16 would need to be considered in conjunction with DP14.

90. A suggestion to suspend or extend the limitation period if the investor was unable to raise the claim due to actions by the host country or force majeure was not supported.

91. After discussion, it was agreed to revise DP16 to: (i) limit claims being submitted to arbitration but not other amicable means of settlement; (ii) provide for a limitation period of 3 to 5 years, which may be extended or suspended by the agreement of the parties; (iii) indicate that loss and damage need to arise from a breach of the Agreement. It was further agreed that the interplay with provisions in the Agreement would need to be considered.

Draft Provision 17: Denial of benefits

92. Noting that DP17 touched upon the substantive protection standards and the extent to which investors could benefit from the Agreement, it was questioned whether work on the provision was within the mandate of the Working Group. It was also said that paragraph 2 went beyond similar provisions found in recent investment agreements and that jurisprudence of tribunals on the issue varied. It was queried how DP17 would operate when the Agreement contained a similar provision that was differently drafted. Nonetheless, noting that old-generation treaties did not necessarily contain provisions on denial of benefits, support was expressed for developing DP17 as an option for States to update their treaties.

93. It was widely felt that the chapeau of paragraph 1 should not only address investments of an investor where the enterprise was owned or controlled by a person of a non-Contracting Party, but also of the denying Contracting Party (to address "round-tripping") and that paragraph (a) should be revised accordingly. It was also widely felt that the paragraph should be split into two paragraphs to deal with the different situations and make clear that denial of benefit (i) could be invoked at any time, even after the initiation of dispute settlement, on the understanding that a State should seek to do so as soon as it was aware of a claim; (ii) could be invoked without any formalities; and (iii) would only apply to the dispute at hand and would have retroactive effect to the time of investment. It was said that the "measures" referred to in paragraph (b) should be limited in scope to prevent a State adopting measures that may not be justifiable under the exceptions under the Agreement. Views diverged over whether to address the scope of measures in paragraph (b) and whether it was appropriate to expressly limit the scope to measures relating to the maintenance of international peace and security. Views were expressed that such matters would fall outside of the mandate of the UNCITRAL and should not be further addressed.

94. Support was expressed for the inclusion of paragraph 2, on the basis that the aim should not be to codify existing provisions but to reform and modernize the ISDS regime to reflect contemporary concerns. However, concerns were expressed over paragraph 2 on the basis that it was novel and represented a significant departure from existing treaty practice. It was pointed out that paragraph 2 touched upon issues of jurisdiction and admissibility, which could lead to confusion. It was said that paragraph 2 raised policy questions that might not be easy or desirable to harmonize. It was noted that there was overlap between subparagraphs (b) and (c), and that these subparagraphs related to the scope of "protected investments" under the Agreement. It was suggested that minor breaches or those lacking significant consequences be excluded from the scope of subparagraphs (a) to (c). It was questioned whether subparagraphs (a) and (d) were appropriate to address misconduct by investors, noting that other corrective measures were available, including those in DP12. In response, the preventive effect of the provision was highlighted. It was also said that subparagraph (d) was overly broad and should be revised to specifically address treaty shopping. It was suggested that an investor restructuring with the primary purpose of obtaining access to the ISDS mechanism should also be denied benefits. However, it was queried under which circumstances this could be invoked in addition to the paragraphs on shell companies. It was questioned whether the Working Group should develop paragraph 2 as an additional safeguard in addition to those provided for in the Agreement.

95. Noting the divergence in views, the Working Group agreed to consider DP17 further based on a revised draft reflecting the deliberations above.

Draft Provision 18: Shareholder claims

96. It was said that, similar to DP17, DP18 did not fall within the mandate of the Working Group, as it touched upon the scope and coverage of the Agreement. It was also said that DP18 would deny protections given to shareholders under the Agreement. It was said that investors were often required to carry out their investment through local enterprises that did not have access to ISDS and that DP18 might lead to a de facto prohibition of claims by shareholders. It was also said that there were other more targeted tools to address multiple proceedings involving parties from the corporate chain and double recovery (such as waiver, consolidation and abuse of process). In that context, it was noted that jurisprudence had largely recognized reflective loss claims by shareholders.

97. In response, it was said that DP18 aimed to provide an additional tool to address multiple proceedings and double recovery, to achieve consistency in jurisprudence, and to resolve issues arising from the payment of monetary damages to a certain group of shareholders, which could have negative impacts on the enterprise and other stakeholders. It was said that DP18 provided a balanced approach clarifying the scope of shareholders' claims for direct loss and limiting indirect or derivative claims. It was said that as a procedural solution, DP18 would fall within the scope of the Working Group's broad mandate to reform ISDS. It was explained that DP18 aimed to address the risks in a systemic manner, rather than opting for a piecemeal approach.

98. Views diverged on whether and how to refine DP18. With regard to paragraph 1, it was stated that the limitations therein would lead to the prohibition of direct loss claims by shareholders. It was suggested that the second and third sentences be revised possibly as a "for greater certainty" clause. With regard to paragraph 2, it was said that the limitation on reflective loss claims was far reaching as it was only available to shareholders that owned or controlled the enterprise. It was suggested that attention be given to minority shareholders. It was generally felt that the notions of ownership and control of the enterprise in paragraph 2 and subparagraph 3(a) needed to be clarified. On subparagraph 2(b), it was questioned what the standard of "akin to a denial of justice" would be, and whether other circumstances should be included. With regard to paragraph 3, the appropriateness of the requirements in subparagraphs (b) and (c) were questioned. It was suggested that paragraph 4 should contain further elaboration on how tribunals should award remedies to the enterprise.

99. After discussion, the secretariat was requested to revise DP18 based on the above deliberations and reflect further on existing treaty provisions.

Draft Provision 19: Right to regulate

100. It was generally agreed that the States' right to regulate was a principle of sovereignty in customary international law. It was further noted that States have affirmed or reaffirmed that principle in their recent bilateral and regional investment agreements, though in different forms.

101. In light of the view that ISDS claims or the mere threat of one could result in regulatory chill, there was support for retaining and developing DP19 further. It was suggested that references in DP19 could be broadened to include measures relating to economic, fiscal and monetary policies, the environment, climate and ecosystem, consumer protection, subsidies, personal data and privacy, while questions were raised about the reference to measures to preserve cultural diversity. It was said that development of DP19 with certain adjustments would fall within the Working Group's mandate.

102. On the other hand, it was said that DP19 should be deleted, as it related to the substantive protection standards and obligations of States in the Agreement and were

not necessarily found in the section addressing ISDS. It was said that such work would go beyond the mandate of the Working Group. It was further highlighted that work on the right to regulate was under way in other forums, such as OECD. It was, however, noted that such processes did not involve all member States of the United Nations nor did they foresee the negotiation of a binding multilateral instrument. It was said that the inclusion of DP19 could result in depriving investors of the protection provided under the Agreement and essentially foreclose claims, which might disincentivize investment, contrary to the primary objective of investment agreements. It was also suggested that there might be other tools to address regulatory chill, though views diverged over whether such tools included the establishment of a standing mechanism.

103. Noting that DP19 currently outlined three possible alternative formulations, differing views were expressed as to whether any and if so, which formulation should be the basis for future work. On the one hand, caution was expressed over all of the options. The first option was said to allow for self-judging and to be a combination of drafting in different investment agreements; the second option was said to heavily favour States and set the bar too low; and the third option was said to be far-reaching and could undermine the objective of the Agreement. On the other hand, it was suggested that the three formulations could all be pursued, as complements to each other, with the first option providing policy guidance, the second option providing guidance to a tribunal as to how to interpret the Agreement, and the third option providing the consequence of the State's regulation of investment. Others suggested that the formulations could be provided to States as options to choose from.

104. A number of suggestions were made with regard to the three formulations. Generally, it was suggested that the formulations should be more balanced with the appropriate safeguards, for example, requiring measures by States to not be applied in a manner inconsistent with the Agreement. It was further noted that exceptions based on essential security interest were typically dealt with separately in investment agreements and the interplay between DP 19 and those provisions would need to be assessed.

105. With regard to the first formulation, it was suggested that the phrase "consider appropriate" be avoided so that it would not allow self-judging and become subject to abuse. It was also suggested that the first formulation should instead reaffirm the right to regulate. With regard to the second formulation, it was suggested that the phrase giving a "high level of deference" should be clarified and that the phrase "sensitive to" be replaced with "necessary to". It was suggested that reference to specific treaties should be avoided and the meaning of "essential security interest" be reconsidered.

106. It was observed that the mandate of the Working Group did not extend to substantive obligations in investment agreements. However, it was suggested that DP19 could be further developed to focus on the procedural aspects of ISDS, by providing guidance to tribunals, similar to how the Working Group was addressing damages, joint interpretation as well as submission by non-disputing Treaty Party submissions. It was further suggested that a possible procedural carveout could also be developed. On the other hand, it was felt that the first formulation should not be pursued as it touched upon the interpretation of the substantive obligations in the Agreement.

107. After discussion, while acknowledging that there was no agreement in the Working Group on whether DP19 should be included as a reform element, the secretariat was requested to prepare a revised draft of the latter two formulations, as alternatives for consideration by the Working Group.

C. Way forward

108. It was recalled that at its fiftieth session in January 2025, the Working Group agreed that the Chair, the Rapporteur and the secretariat would prepare a revised text

of draft provisions 5–9, 11, 12 (paragraph 1–5, and 7) in document A/CN.9/WG.III/WP.244 based on written comments received. It was further noted that at the current session, the Working Group was not able to consider DP21 and DP22 in document A/CN.9/WG.III/WP.248, for which written comments had also been received. It was also noted that the secretariat was preparing the draft guidelines on the calculation of damages and compensation. It was further noted that the secretariat was preparing a revised version of the draft provisions on procedural and cross-cutting issues based on the deliberations of the Working Group.

109. After discussion, the Working Group agreed that the time to be allocated to the procedural and cross-cutting issues in the fifty-second session in the autumn of 2025 would be devoted to the draft provisions mentioned above (5–9, 11, 12, 21 and 22) as well as, time permitting, the draft guidelines on the calculation of damages and compensation. It was further agreed that the Working Group should reflect on the appropriate form of the draft provisions and means of implementation, including how they should interact with the underlying investment agreements.