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# Possible reform of investor-State dispute settlement (ISDS)

# Appellate mechanism and enforcement issues

## Note by the Secretariat

Contents

# I. Introduction

1. At its thirty-eighth session, in October 2019, the Working Group agreed on a project schedule of possible reform options, in accordance with the third phase of its mandate (A/CN.9/1004, paras. 16–27 and 104).[1] At its resumed thirty-eighth session, in January 2020, the Working Group continued its deliberations on reform options and undertook a preliminary consideration of the main elements of a possible appellate mechanism with the goal of clarifying, defining and elaborating such option, without prejudice to any delegations' final position (A/CN.9/1004/Add.1, paras. 16-51). It also undertook a preliminary consideration of issues related to the enforcement of decisions rendered through a permanent appellate mechanism or a standing first-tier body (A/CN.9/1004/Add.1, paras. 62-81). The Working Group requested the Secretariat to undertake further preparatory work on these matters (A/CN.9/1004/Add.1, paras. 52-61 and 81).

2. Accordingly, this Note addresses the main elements of the functioning and establishment of a possible appellate mechanism and provides further insights on the issue of enforcement of decisions resulting from any possible appellate mechanism. This Note was prepared with reference to a broad range of published information on the topic,[2] and does not seek to express a view on the possible reform options, which is a matter for the Working Group to consider.

[1] For deliberations and decisions at the thirty-eighth session, see A/CN.9/1004; by way of background, at its thirty-fourth to thirty-seventh sessions, the Working Group undertook work on the possible reform of ISDS, based on the mandate given to it by the Commission at its fiftieth session, in 2017 (see *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 263 and 264; for deliberations and decisions at the thirty-fourth to thirty-seventh sessions, see A/CN.9/930/Rev.1 and its Addendum, A/CN.9/935, A/CN.9/964, and A/CN.9/970, respectively); at those sessions, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns; the third phase of the mandate consists in the development of any relevant ISDS reform solutions to be recommended to the Commission; document A/CN.9/WG.III/WP.166 provides an overview of reform options.

[2] This includes: the CIDS Research Paper (referred to as the "CIDS report"), titled *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap*, by Gabrielle Kaufmann-Kohler and Michele Potestà, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids research paper mauritius.pdf; the OECD Working Papers on International Investment No 2012/3, OECD Investment Division 2012, *Investor-state dispute settlement: A scoping paper for the investment policy community*, by David Gaukrodger et al.; the Policy Options Paper, E15 Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 2016, *The Evolving International Investment Law and Policy Regime: Ways Forward*, by Karl Sauvant; *Reshaping the Investor-State Dispute Settlement System, Journeys for the 21st Century*, edited by Jean E. Kalicki and Anna Joubin-Bret, Nijhoff International Investment Law Series, Volume: 4; *Appeals Mechanisms in International Investment Disputes*, edited by Karl Sauvant, Oxford University Press; *Appeal mechanism for ISDS Awards, Interaction with New York and ICSID Conventions, Conference on Mapping the Way Forward for the Reform of ISDS, by* Albert Jan van den Berg; *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, Options regarding the Institutionalization of Investor-State Dispute Settlement*, and *Standalone Appeal Mechanism: Multilateral Investment Appeals Mechanisms*, by Marc Bungenberg and August Reinisch, European Yearbook of International Economic Law; Gabrielle Kaufmann-Kohler and Michele Potestà, *Investor-State Dispute Settlement and National Courts. Current Framework and Reform Options* (Springer, 2020); see also bibliographic references published by the Academic Forum, available at the UNCITRAL website, Working Group III, Additional resources, at https://uncitral.un.org/en/library/online_resources/investor-state_dispute and www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/.

# II. Functioning of an appellate mechanism

## A. Main elements

3. The suggestion for the establishment of an appellate mechanism is contained in various proposals submitted by Governments in preparation for the deliberations on reform options (the "Submissions").[3] On that basis, and on the basis of document A/CN.9/WG.III/WP.185, the Working Group undertook preliminary consideration of the main components relating to the nature, scope and effect of appeal. It noted that the various components were interrelated and would need to be considered, whatever form such mechanism might take – ad hoc appeal mechanism, a permanent stand-alone appellate body, or an appeal mechanism as the second tier of a standing court (all these various possible forms options are referred to as "appellate mechanism"; the panel of ISDS appellate tribunal members is referred to as "appellate tribunal") (A/CN.9/1004/Add.1, paras. 16 and 25). It also indicated that the objectives of avoiding duplication of review proceedings and further fragmentation as well as of finding an appropriate balance between the possible benefits of an appellate mechanism and any potential costs should guide the work (A/CN.9/1004/Add.1, para. 24).

### 1. Scope and standard of review

#### *a. Scope of review*

*(i) Errors of law and fact*

4. With respect to the scope of review, the draft provisions below (see para. 59) seek to reflect the preliminary deliberations of the Working Group and propose that grounds for appeal could cover: (i) errors in the interpretation or application of the law, with the possibility of further limiting the appeal to certain types of errors or to certain issues of law (for example, common standards found in investment treaties, like expropriation, fair and equitable standards and non-discrimination) (A/CN.9/1004/Add.1, paras. 26 and 27); and (ii) errors in the finding of any relevant facts, including an error in the assessment of damages (A/CN.9/1004/Add.1, para. 28).

5. The Working Group may wish to note that the selection of the appropriate standard of review is contextual. A question of law involves an interpretation of a norm which usually is of general application. It does not include any question as to whether the decision rendered by the first-tier tribunal was supported by any evidence or whether the tribunal drew the correct inferences from the facts. A question of fact involves an inquiry into whether something has happened. It is separate from any assertion as to its legal effect. An error of fact means that the decision-maker at the first level assessed the facts incorrectly. A mixed question of law and fact may arise, as shown and addressed by the jurisprudence of the WTO Appellate Body.[4]

6. Questions that would deserve express clarification either in the relevant provision on the appellate mechanism or in its practice include whether a manifest error in the

[3] A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States (Appellate body); A/CN.9/WG.III/WP.161, and A/CN.9/WG.III/WP.198, Submissions from the Government of Morocco (Prior scrutiny of the award and standing appellate mechanism); A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan (Treaty-specific appellate review mechanism); A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador (Standing review and appellate mechanisms); A/CN.9/WG.III/WP.177, Submission from the Government of China (Stand-alone appellate mechanism); the reform option is also discussed in A/CN.9/WG.III/WP.176, Submission from the Government of South Africa and A/CN.9/WG.III/WP.180, Submission from the Government of Bahrain; A/CN.9/WG.III/WP.188, Submission from the Government of Russia; A/CN.9/WG.III/WP.195, Submission from the Government of Morocco.

[4] For instance, the WTO AB has held that there can be an appeal on the characterisation of the facts, i.e., the legal consequences or inferences that are drawn from a particular characterisation of the facts.

appreciation of the facts can constitute an error of law; and whether a question of interpretation or application of domestic law falls in the category of error of law or error of fact (A/CN.9/1004/Add.1, paras. 27 and 53).

*(ii) Grounds in the existing annulment or setting aside procedures*

7. As mentioned above (see para. 3), an important question from the point of view of procedural efficiency is whether existing annulment or setting aside procedures should continue to exist alongside an appellate mechanism and, if so, how to ensure that they would not overlap (A/CN.9/1004/Add.1, para. 30). The legal issues to be considered in this context are significant and would require taking into account the distinction between proceedings under the rules of the International Centre for Settlement of Investment Disputes ("ICSID") and non-ICSID proceedings, which are subject to different legal regimes.[5]

8. The Working Group may wish to consider whether the grounds for annulment under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") and those under national arbitration law for non-ICSID investment arbitrations (such as those under Article 34 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), which closely reflect the grounds for refusal of recognition and enforcement under article V the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention")) should be grounds for appeal.[6] The Working Group may wish to note that, as the grounds for appeal normally encompass the narrower grounds for annulment and setting aside,[7] the existence of an appeal could be seen as making any further review, including annulment or setting aside, redundant. Keeping the annulment or set-aside remedies might *de facto* create a three-tier dispute settlement system, which might run contrary to the objectives of finality and efficiency (including the time and cost-efficiency).[8]

9. If the grounds for annulment and setting aside under the ICSID Convention and the Model Law are made grounds for appeal, it would be necessary to ensure that disputing parties would not be able to commence annulment or setting aside procedures and that States would be required to waive the right of review of decisions

[5] See Gabrielle Kaufmann-Kohler and Michele Potestà, *Investor-State Dispute Settlement and National Courts. Current Framework and Reform Options* (Springer, 2020), Ch. 4.3 (discussing the relationship between a potential appellate mechanism and annulment, and examining the models of jurisdictional coordination between national and international fora and the role of national courts in support and control of these international fora).

[6] Article 52 (1) of the ICSID Convention provides as follows: *Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based."* Article 34 (2) of the Model Law on international Commercial Arbitration provides as follows: "*(2) An arbitral award may be set aside by the court specified in article 6 only if:(a) the party making the application furnishes proof that (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or (b) the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or(ii) the award is in conflict with the public policy of this State.*"

[7] Appeal generally focuses on compliance with due process and the substantive correctness of the decision. By contrast, annulment more narrowly focuses on compliance with due process, regardless of errors in the application of the law or the findings of fact. Grounds for appeal are normally broader than the usual grounds for annulment (see CIDS report, paras. 107 and 115).

[8] CIDS Report, para. 196.

made by the appellate mechanism. The implementation of such waiver would depend on how the appellate mechanism is to be set-up (see section III below). Because not all domestic laws would necessarily recognize such a waiver as a valid agreement to exclude the right to seek setting aside before their courts, States Parties to the appellate mechanism might need to consider passing legislation to this effect. With regard to ICSID awards, the appellate mechanism could similarly exclude any annulment of ICSID awards under Article 52 of the ICSID Convention.

10. Implementation of such a waiver is also connected to the more general question of implementation of reform options, and the possible development of a multilateral instrument on ISDS reform (see A/CN.9/WG.III/WP.194). Indeed, the treaty establishing the appellate mechanism could thus regulate these matters to avoid uncertainties regarding court intervention. [9]

### *b. Standard of review*

11. With respect to the standard of review, the draft provision below (see para. 59) includes, for the consideration of the Working Group:

- Limiting the instances of appeal to errors of law, "manifest" errors of fact, thereby according some degree of deference to the findings of the first-tier tribunals, and mixed errors of law and fact (A/CN.9/1004/Add.1, para. 29); and
- The possibility of an appellate mechanism conducting a "de novo" review of both law and facts to consider other types of errors in exceptional circumstances (A/CN.9/1004/Add.1, para. 29).

12. Under "de novo" review, the appellate courts usually act as if they were considering the question for the first time, affording no deference to the decisions of the first-tier tribunal. It is usual for questions of law to be reviewed de novo, as appellate mechanisms are primarily concerned with enunciating the law, and therefore, they give no deference to the first-tier tribunal regarding assessment of purely legal questions.

13. By contrast, the standard of review of fact usually tends to be more deferential, placing some weight on decision by the first-tier tribunal, and could be limited to "manifest" errors. "Manifest" error is used by appellate mechanisms to determine whether an error of fact, such as dishonest testimony by a key witness, or the failure to take account of an important exhibit, influenced the outcome of the decision by the first-tier tribunal. Such standards are based on the proposition that the first-tier tribunal has presided over the trial, heard the testimony, and has the best understanding of the evidence. Thus, the first-tier tribunal receives substantial deference. Limiting re-litigation of factual issues might serve to reduce costs and delays.

### *c. Illustration from existing appellate mechanisms*

14. Due to the particularities of international adjudication based on consent and without a hierarchical court system, an appeal mechanism—as distinct from interpretation and revision by the same adjudicative body —remains the exception.

15. Appeal in international criminal jurisdiction is an atypical procedure which reflects to a large extent the national criminal system and plays a role apart from the system of international courts and tribunals, as is explicitly stated in the statutes of the international criminal tribunals.[10]

[9] See Gabrielle Kaufmann-Kohler and Michele Potestà, *Investor-State Dispute Settlement and National Courts. Current Framework and Reform Options* (Springer, 2020), Ch. 4.3.

[10] See, for instance: (1) Rome Statute of the International Criminal Court: "*A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:(a) The Prosecutor may make an appeal on any of the following grounds:(i) Procedural error, (ii) Error of fact, or (iii) Error of law; (b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds: (i) Procedural error, (ii) Error of fact, (iii) Error of law, or (iv) Any other ground that affects the fairness or reliability of the proceedings or decision*." (2) Updated Statue of the International Criminal Tribunal for the Former Yugoslavia: "*The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on*

16. In the economic context and the field of investment, appeal procedures have been provided for, although they are not found as frequently as procedures on interpretation and revision. They have often constituted as a means of securing the uniformity of application and interpretation of the underlying law. They thus come close to other types of review by a higher court, comparable to a supreme court function. They have narrower grounds for appeal, usually limited to issues of law.[11] Some recent bilateral or regional investment treaties with proposed appellate mechanisms also provide that manifest errors of fact can be grounds for appeal.[12]

17. The ICSID discussion paper on "Possible Improvements of the Framework for ICSID Arbitration" of 22 October 2004 contained the draft features of an ICSID Appeals Facility in its Annex. The discussion paper suggested that appeal, conceived as a means to ensure consistency and coherence, could be brought for "a clear error of law or on any of the five grounds for annulment of an award set out in Article 52 of the ICSID Convention. A further ground for challenging an award might consist in serious errors of fact; this ground would be narrowly defined to preserve appropriate deference to the findings of fact of the arbitral tribunal."[13]

## 2. Appealable decisions

18. The draft provision (see para. 59 below) provides, for the consideration of the Working Group, that decisions on both merits and procedural matters are subject to appeal (A/CN.9/1004/Add.1, para. 55), while certain other decisions are excluded from the scope of appeal (even if any of the grounds for appeal is met), so as to ensure both the right to appeal and the efficiency and manageability of an appellate mechanism (A/CN.9/1004/Add.1, para. 31).

### *a. Decisions on challenge and on interim measures*

19. As discussed by the Working Group at its resumed thirty-eighth session, the Working Group may wish to further consider whether certain procedural decisions

*the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice*." (3) Statute of the Special Tribunal for Lebanon: "*The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:(a) An error on a question of law invalidating the decision; (b) An error of fact that has occasioned a miscarriage of justice*." (4) Statute of the Special Court for Sierra Leone: "*The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds: a. A procedural error; b. An error on a question of law invalidating the decision; c. An error of fact which has occasioned a miscarriage of justice*." (5) Example from the field of sport arbitration: Statutes of the Bodies Working for the Settlement of Sports-Related Disputes: "*The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance*." See also database of case law, United Nations, International Residual Mechanisms for Criminal Tribunals. https://cld.irmct.org/notions/show/310/errors-of-fact#

[11] See, for instance: (1) WTO agreement: "*An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.*" The Appellate Body has no authority to examine new factual evidence or re-examine existing factual evidence upon which the panel report is based; even a manifest error of fact would not be reviewable by the Appellate Body; (2) MERCOSUR: "*The appeal shall be limited to the questions of law dealt with in the dispute and to the legal interpretations developed in the award of the Ad Hoc Arbitral Tribunal*."(3) Court of Justice of the European Union: "*An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court. No appeal shall lie regarding only the amount of the costs or the party ordered to pay them*."

[12] See, for instance: EU-Singapore Investment Protection Agreement: "*The grounds for appeal are: (a) that the Tribunal has erred in the interpretation or application of the applicable law; (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or, (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b)*.

[13] See https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf.

might not be subject to appeal, particularly in light of the possible impact on the cost and duration of the proceeding, including:

- Decisions on challenge of ISDS tribunal members, as appeal on such decisions could overburden the appellate mechanism (A/CN.9/1004/Add.1, para. 32); and
- Decisions on interim measures as they are often specific to a case, temporary in nature, and could be reversed by the tribunal ordering them (A/CN.9/1004/Add.1, para. 34).

#### *b. Decisions on jurisdiction*

20. At the resumed thirty-eighth session of the Working Group, doubts were expressed on whether decisions on jurisdiction should fall under the scope of the appellate mechanism, in particular as they were already subject to review procedures, for instance under domestic law provisions mirroring article 16 of the Model Law (A/CN.9/1004/Add.1, para. 33). The Working Group may wish to consider whether parallel procedures to challenge decisions on jurisdiction under the equivalent, in the domestic arbitration law, of article 16 of the Model Law and under an appellate mechanism, should be avoided.

21. If decisions on jurisdiction were to be included in the scope of appeal, a question for consideration is whether an appeal could be made while the proceedings are ongoing.[14] On one side, it might be preferable that an appellate tribunal be presented with the full record of the case before rendering its decision, and therefore, an appeal should be made possible only after the final decision on the merits; on the other side, appeal of a decision on jurisdiction at an earlier stage of the proceedings might save cost and time, assuming dilatory challenges can be avoided (A/CN.9/1004/Add.1, para. 33). Noteworthy on this matter is the Annex of the 2004 Discussion paper on Possible Improvement of the Framework for ICSID Arbitration, which provides that "to avoid discrepancies of coverage between ICSID and non - ICSID cases, the Appeals Facility Rules might either provide that challenges could in no case be made before the rendition of the final award or allow challenges in all cases in respect of interim awards and decisions."[15]

22. The Working Group may wish to consider whether, regarding other interim or partial decisions such as on liability, an appeal should be made possible only after the final decision on the merits in order to ensure that the appellate body have the full record.

### 3. Effect of appeal

#### *a. Temporary suspension of first-tier tribunal decisions*

*Final decisions by the first-tier tribunal*

23. The draft provision below (see para. 59) provides for the consideration of the Working Group that an appeal would temporarily suspend the effect of the first-tier decision.

24. The Working Group may wish to consider safeguards that might need to be provided for in the overall framework to avoid that the first-tier decision is enforced or set-aside to avoid duplication of proceedings and the risk of conflicting decisions (A/CN.9/1004/Add.1, para. 42). For instance, this would mean that a domestic court examining a request for enforcement of a first-tier tribunal decision should not, within the appealable period, admit an action from the disputing parties for setting aside or enforcing such decision.

[14] In certain systems, it is not possible to challenge positive jurisdictional decisions until the final award while in others, decisions on jurisdictions must be challenged immediately.

[15] Discussion Paper on Possible Improvement of the Framework for ICSID Arbitration, prepared by the ICSID Secretariat (22 October 2004), "Annex - Possible Features of an ICSID Appeals Facility", para. 8. More generally, in the ICSID context, no decision can be subject to annulment – it is only once the (final) award is issued that an annulment can be raised, and then only on the basis of an error stipulated in Art 52(1)(a) – (e).

25. The suspensive effect also raises the issue of accrual of interest and of the possible need to post a bond to prevent frivolous appeals.

*Non-final (interim) decisions of the first-tier tribunal*

26. The Working Group may wish to consider whether the first instance proceedings should be stayed pending the outcome of an appeal on a non-final decision in the event that immediate appeals on such decisions are allowed. Such decisions on stays of proceedings could be made by the appellate body or alternatively by the first instance court/tribunal.

***b. Affirm, reverse, modify or annul the decisions***

27. As proposed in the draft provision below (see para. 59), the Working Group may wish to consider whether an appellate tribunal should be able to affirm, reverse or modify the decision of the first-tier tribunal and to render a final decision based on the facts before it (A/CN.9/1004/Add.1, para. 40). In addition, the Working Group may wish to consider whether the appellate tribunal should also be able to annul or set aside the award (as provided for under the relevant provisions of the ICSID Convention and the relevant domestic legislation) (A/CN.9/1004/Add.1, paras. 30 and 40).

***c. Remand authority***

28. At the thirty-eighth session of the Working Group, differing views were expressed with regard to the ability of the appellate tribunal to remand a case to the first-tier: views were expressed that an appellate tribunal should have a broad remand authority; yet, other views were that remand authority should be provided only in specific circumstances or under limited grounds, where the appellate tribunal would not be in a position to complete the legal analysis based on the facts available before it (A/CN.9/1004/Add.1, para. 41), and still other views were expressed that in light of costs and time considerations, remand should not be possible.

29. If the appellate tribunal were to have remand authority, the following practical questions would need to be addressed:

- How to re-establish the first-tier tribunal (if it had already been dissolved, and given the current ad hoc nature of first-tier tribunals);
- Whether the decision by the first-tier tribunal as revised would be final or subject to further appeal;
- Whether a specific request for remand should come from one or all of the parties to the dispute; and
- How to address a situation where the appellate tribunal found procedural irregularities (for example, lack of independence), which would make it inappropriate to remand the case to the first-tier tribunal.

30. A further question would be how to address situations where an appellate tribunal would lack remand authority and has insufficient information on the facts to render a final decision, or the parties have not been adequately heard on the facts, to render a final decision.

***d. Rectification of errors***

31. The Working Group may wish to consider the introduction of a mechanism, as proposed for in the draft provision below (see para. 58) which would make it possible for an appellate tribunal to rectify its previous decision in exceptional circumstances (A/CN.9/1004/Add.1, para. 46).

***e. Illustration from existing appellate mechanisms***

32. The international adjudicatory bodies which have or are designed to have two or more tiers generally specify clear rules on the effect of appeal. Most international criminal jurisdictions, of which both tiers are permanent, often provide for appeal with broad powers,

including authority to remand or reverse the issue to the first-tier.[16] The same is found in the Statute of the Court of Justice of the European Union and the Court of Arbitration for Sport.[17]

33. International adjudicatory bodies specialized in trade and investment, of which the first-tiers are usually ad hoc, often provide for a appeal without a remand power.[18]However, some recent bilateral or regional trade and investment treaties provide more authority to appellate bodies, which include the authority to remand or provide for remand under certain circumstances.[19]

34. The Annex of the 2004 Discussion paper on Possible Improvement of the Framework for ICSID Arbitration: Possible Features of an ICSID Appeals Facility[20] sought to make the proposed appellate mechanism consistent with the annulment mechanism in the ICSID Convention. Under the possible Appeals Facility Rules, an appeal tribunal might uphold, modify or reverse the award concerned. It could also annul it in whole or in part on any of the grounds borrowed from Article 52 of the ICSID Convention. The award as upheld, modified or reversed by the appeal tribunal would be the final award binding on the parties. However, if an appeal tribunal annulled an award or decided on a modification or reversal resulting in an award that did not dispose of the dispute, either party could submit the case to a new arbitral tribunal to be constituted and that would operate under the same rules as the first arbitral tribunal. The Appeals Facility Rules might allow appeal tribunals in some such situations to order that the case instead be returned to the original arbitral tribunal.

### 4. Manageable case load

35. The Working Group agreed that further elaboration was needed regarding how to ensure a manageable caseload and to avoid systematic appeals by disputing parties. A distinction can be made between conditions and filters provided within the appellate mechanism itself and provisions outside of the appellate mechanism which may have an indirect effect on the caseload.

[16] See, for instance: (1) article 83 (2) Rome Statute of the International Criminal Court: "*If the Appeals Chamber finds that the proceedings appealed from appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:(a) Reverse or amend the decision or sentence; or (b) Order a new trial before a different Trial Chamber. For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment*." (2) article 21 of the Statute of the Special Court for Sierra Leone: *"Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement. 2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate: (a) Reconvene the Trial Chamber; (b) Retain jurisdiction over the matter*."

[17] (3) Procedural Rules R57 of the Court of Arbitration for Sport: "*The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.*" (4) Article 61 (1) Statute of the Court of Justice of the European Union: "*If the appeal is well founded, the Court of Justice shall quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment*."

[18] See for instance: (1) WTO agreement: "*The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.*" (2) MERCOSUR: "*The Permanent Review Court may confirm, modify or revoke the legal bases and decisions of the Ad Hoc Arbitral Tribunal*."

[19] See, for instance: (1) EU-Singapore Investment Protection Agreement: "*If the appeal is well founded, the Appeal Tribunal shall modify or reverse the legal findings and conclusions in the provisional award in whole or in part. The Appeal Tribunal shall refer the matter back to the Tribunal, specifying precisely how it has modified or reversed the relevant findings and conclusions of the Tribunal*." (2) EU-Vietnam Investment Protection Agreement: "*If the Appeal Tribunal finds that the appeal is well founded, the decision of the Appeal Tribunal shall modify or reverse the legal findings and conclusions in the provisional award in whole or part. Its decision shall specify precisely how it has modified or reversed the relevant findings and conclusions of the Tribunal. Where the facts established by the Tribunal so permit, the Appeal Tribunal shall apply its own legal findings and conclusions to such facts and render a final decision. If that is not possible, it shall refer the matter back to the Tribunal.*"

[20] To be found at: https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf

36. Mechanisms in the structure of the appeal mechanism may indeed be useful in managing caseload and unwarranted appeals. The Working Group may wish to note that the standards of review in the context of international bodies are usually very high. Regarding the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber for instance, the parties must submit the arguments for appeal, clear references to the records, the factual and the legal basis for appeal; they have not only to show that the Trial Chamber committed an error, but it must be proven that this error caused a miscarriage of justice, which implies a rather higher threshold than simply a reassessment of the evidence. [21] From the earliest days of appellate review of decisions to the present, criminal appellate courts have provided a limited interpretation of the grounds of review and of the extent to which they can or should legitimately "interfere" with the original sentence.

37. Regarding provisions outside of the appellate mechanism, security for costs, cost allocation and early dismissal constitute possible means to indirectly ensure that the caseload of a system of appeal would remain manageable (A/CN.9/1004/Add.1, para. 54). In that respect, the Working Group may wish to consider document A/CN.9/WG.III/WP.192 on security for cost and frivolous claims.

#### 5. Timelines

38. Suggested timelines for the consideration of the Working Group are provided for in the draft provision below (see para. 59) in order to ensure that appeal proceedings will not unnecessarily delay the resolution of disputes. The Working Group may wish to note that the provision does not include any consequence for non-compliance with the timelines.

39. Recent investment treaties provide for a timeline of 180 days for the appellate tribunal to render its decision from the commencement of the proceedings. The WTO Dispute Settlement Procedure provides for a maximum of 60 days for an appeal proceeding but in no case should it take longer than 90 days. [22] Shorter timelines could be provided for the parties to appeal a decision on jurisdiction as well as for the appellate tribunal to render its decision on jurisdictional matters (A/CN.9/1004/Add.1, paras. 33 and 55).

40. The Working Group may wish to consider whether accelerated proceedings should apply in certain instances where the subject of the appeal is limited to a distinct issue (for example, for some procedural questions). Accelerated procedure would include the possibility of, in addition to shorter timelines, even more efficient procedures, such as the case being heard by a single member, with limited briefing. Different timeframes could be provided based on the grounds for appeal. The Working Group may also wish to consider whether to provide for a procedure for the early dismissal of manifestly unfounded appeals, modelled around Rule 41(5) of the ICSID Arbitration Rules (see also above, para. 37). [23]

## B. Enforcement

41. Awards rendered by ISDS tribunals are generally enforceable through the New York Convention and the ICSID Convention, which respectively provide robust regimes for enforcement. At the resumed thirty-eighth session of the Working Group, various views were expressed on whether the decisions made by an appellate mechanism could be enforced under the New York Convention and the ICSID Convention. It may be noted that any instrument that would be developed in the reform process may include its own enforcement regime, requiring enforcement of

[21] See the Kunarac Case (Prosecutor v Kunarac [Judgment] ICTY-96-23&23/1 [12 June 2002]; Fair Trial, Right to, International Protection)

[22] For statistics on WTO AB cases and duration, see https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm.

[23] See Elsamex, S.A. v. Republic of Honduras, ICSID Case No. ARB/09/4, Annulment, Decision on Elsamex S.A.'s Preliminary Objections, 7 January 2014; Venoklim Holding B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/22, Annulment, Decision on Respondent's Preliminary Objections pursuant to ICSID Arbitration Rule 41(5), 8 March 2016.

decisions by ISDS tribunals in the States Parties to such a regime (see document A/CN.9/WG.III/WP.194 on multilateral instrument to implement reform options). The sections below focus on the question of enforcement of decisions made by appellate tribunals, including where they are set up as permanent bodies, for the consideration by the Working Group.

### 1. Under the New York Convention

42. The possible application of the enforcement mechanism under the New York Convention to decisions rendered by an appellate mechanism would depend on how such a mechanism would be set up, in particular the extent to which its decisions could qualify as arbitral awards. If it is set-up as a second-tier mechanism for the review of arbitral awards, this would most probably not change the nature of the whole process as there already exist examples of arbitration regimes, whether under institutional arbitration rules[24] or national laws,[25] which provide for internal appellate review of arbitral awards.[26] It may also be open to States to opt for a specific enforcement regime for awards subject to an appeal.[27]

43. If the appellate mechanism is part of a regime that could not necessarily qualify as arbitration, the application of the New York Convention is more questionable, and the development of an enforcement mechanism as suggested in the example of provisions below (see paras. 58 and 59) might be necessary. Such an enforcement mechanism would bind the States parties that agree to abide to it.[28] With respect to enforcement in States that would not participate in such enforcement mechanism ("non-participating States"), it should be considered whether the existing procedure under the New York Convention could still find application, and under what conditions. For instance, in order to address the uncertainty regarding whether an appellate mechanism established as a permanent body could fall under article I(2) of the New York Convention, which refers to awards "made by permanent arbitral bodies to which the parties have submitted", the following may be considered:

- To include in the instrument establishing the appellate mechanism a provision indicating the intention that the New York Convention would be deemed to apply to decisions rendered by a permanent body; however, the effect of such a provision on non-participating States may be limited;
- To prepare a recommendation on the interpretation of article I (2) of the New York Convention (similar to the Recommendation regarding the interpretation of article II, para. 2, and article VII, para. 1, of the New York Convention adopted by UNCITRAL in 2006), which would indicate that the New York Convention applied to decisions rendered by the permanent body (for example, considering it to be a "permanent arbitral body" and its decisions to be "foreign arbitral awards") to guide domestic courts faced with the enforcement;

[24] See Arbitrators' and Mediators' Institute of New Zealand (AMINZ) (2009), Arbitration Appeal Rules (2009); American Arbitration Association (AAA) (2013), Optional Appellate Arbitration Rules; JAMS (2003), Optional Arbitration Appeal Procedure; International Institute for Conflict Prevention & Resolution (CPR) (2015), Arbitration Appeal Procedure; European Court of Arbitration (ECA) (2015), Arbitration Rules, Article 28; in the commodity sector, see the Grain and Feed Trade Association (GAFTA) (2014), Arbitration Rules No. 125, Articles 10–15 (entitling parties to appeal to an internal "Board of Appeal" within 30 days of a GAFTA award).

[25] See, for instance, the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, p. 35, para. 45 (noting, in relation to Article 34 of the Model Law, that "a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades)."). See also Dutch Arbitration Act (1986, as amended in 2015), Articles 1061(a) to 1061(l) (providing an opt-in set of rules for arbitral appeal).

[26] See CIDS Report, paras. 191, 199-200.

[27] See See Gabrielle Kaufmann-Kohler and Michele Potestà, *Investor-State Dispute Settlement and National Courts. Current Framework and Reform Options* (Springer, 2020), Ch. 4.3.

[28] See CIDS Report, sect. V.E.

- To provide, as done under recent investment treaties that include an appellate mechanism, for both the deemed applicability of the New York Convention and the obligations of the disputing parties with respect to enforcement.

44. More generally, without it being limited to enforcement under the New York Convention, the following might be considered:

- To provide for mechanisms to ensure investor's compliance, such as security for costs, as enforcement must also be effective against the investor, for example, if costs awards are made against the investor, if counter-claims are successfully pleaded or even if, in the future, cases could be directly initiated against investors;
- To permit non-participating States to opt into the enforcement mechanism that would be established under the instrument on appellate mechanism; and
- To provide for a possible role of States in facilitating enforcement, such as through joint commissions or committees (which could be open to States opting into the enforcement mechanism).

### 2. Under the ICSID Convention[29]

45. An ICSID Award is binding and enforceable in accordance with articles 53 to 55 of the ICSID Convention. This simplified enforcement mechanism is unique to ICSID. It allows a party enforcing pecuniary obligations in an ICSID Convention Award to have the Award recognized and enforced in any member State upon presentation of a certified copy of the Award to the relevant domestic court(s).

46. The simplified enforcement mechanism is available only for ICSID Awards, which are the final decision in an ICSID Convention case. Article 53 of the ICSID Convention states that ICSID Awards should "not be subject to any appeal or to any other remedy except those provided for in the Convention". The post-award remedies currently in the Convention are rectification (article 49), interpretation (article 50), revision (article 51), and annulment (article 52). Arbitration rule 49 also allows a request for a supplementary decision.

47. There are at least two ways in which appeal could be integrated into the ICSID mechanism. The first would be through an amendment of article 53; the second would be through an inter se modification of the Convention pursuant to article 41 of the Vienna Convention on the Law of Treaties ("VCLT").

#### *(a) Amendment of ICSID Convention*

48. Article 66 of the ICSID Convention establishes the process to amend the Convention. It requires that a member State propose an amendment, that such proposal be circulated to all members, and that the proposal be ratified, accepted or approved by all Contracting States.

49. An amendment under the Convention binds all States that have ratified the Convention. Additionally, article 66(2) of the Convention states that an amendment cannot affect the rights or obligations of any party with respect to consent to ICSID jurisdiction that existed prior to the amendment.

50. To date, no amendment of the ICSID Convention has been proposed by a member State. However, given that article 53 of the Convention prohibits appeal and other post-Award remedies "except for those provided in the ICSID Convention", it is evident that an amendment could supplement or revise the current post-Award remedies. For example, amendments could supplement the article 52 grounds of annulment with typical appeal grounds of review (i.e., error of law and manifest error of fact). Article 53 could also be amended to make these enforceable under the Convention.

51. Alternatively, an amendment could be worded to allow individual States to elect whether to apply "appeal grounds". For example, some States might prefer to offer

[29] This section (paras. 43 to 54) has been prepared by the ICSID Secretariat.

only annulment, as is currently the case. Others might opt to provide appeal grounds on review of investment treaties only, and not for example, with respect to investment contracts.

52. In short, an amendment proposal could be drafted to accommodate different approaches.

**(b) Inter Se Modification in accordance with article 41 VCLT**

53. An alternative approach to allow for appeal in ICSID Convention cases would be through an inter se modification of the ICSID Convention following the procedure of article 41 VCLT. Inter se modification differs from amendment in that amendment changes the applicable treaty provisions for all Contracting States, whereas inter se modification changes the treaty provisions only for those endorsing the modification. Article 41 VCLT allows inter se modification where the modification is not prohibited by the treaty and does not (i) affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; and (ii) relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

54. Modification is not prohibited by the ICSID Convention; hence the only question is compliance with (i) and (ii). There is no case law on these provisions. Some scholars writing on this topic have disagreed on whether an article 41 VCLT modification under the ICSID Convention would be effective. However, a large body of scholarly comment is that such a modification would be effective. Many view this as a viable option.

55. In the 2004 Discussion paper on Possible Improvement of the Framework for ICSID Arbitration: Possible Features of an ICSID Appeals Facility,[30] ICSID proposed to establish an Appeals facility and cited article 41 VCLT as the basis for doing so. Again, the wording of the inter se modification is determinative. However, an inter se modification could adopt the same type of approach as noted above with respect to amendment.

56. At the resumed thirty-eighth session of the Working Group, ICSID undertook to provide a more detailed paper examining the options for amending or modifying the ICSID Convention. This will be circulated once received.

## C. Consolidated draft provision on appellate mechanism and enforcement

### 1. General comments

57. It may be noted that an appellate mechanism would require the determination of rules on appointment and challenge of appellate tribunal members (see draft Note on the selection and appointment of ISDS tribunal members) and on procedural matters (such as filing of appeal, statements in support of appeal and defence, cross appeal, hearings, time-limits, security for cost, as well as costs and fees). The need for such rules and their features would depend on the appellate structure. They are not addressed in this Note.

58. Further questions for consideration not covered by the draft provision below include: (i) the interpretative effect a decision rendered by an appellate tribunal should have (including whether to establish a system of precedent (doctrine of stare decisis), noting that the design and features of an appellate body as well as the nature of the first-tier tribunals would have an impact on the effect of the decision (A/CN.9/1004/Add.1, paras. 18, 20, 44 and 58); and (ii) the determination of the law

[30] To be found at: https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf

applicable to the appellate procedure as it would depend on the manner in which the appellate mechanism would be set-up.[31]

## 2. Draft provisions

### *a. Appellate procedure*

59. The Working Group may wish to consider the following preliminary draft provision regarding an appellate mechanism, which could be presented in a multilateral instrument or in a bilateral investment treaty or separate rules on appellate procedure. It may wish to note that the term "decision" used below would need to be defined in light of the types of decisions that would be appealable (see above, paras. 18 to 22). "Decisions" may include "awards", depending on the reform option that the Working Group might decide to pursue.

*Article X – Appellate [Mechanism][Rules][Court]*

[Scope and standard of review]

"1. *A disputing party may appeal a decision on the grounds that the decision by the first-tier [arbitral][ISDS] tribunal is based upon:*

(a) Option 1: [*An error of law that is material and prejudicial*] - Option 2: [*Errors in the application or interpretation of [applicable law][the following standards: (to be listed - for instance: expropriation, fair and equitable treatment and non-discrimination)*];

[ (b) Option 1: [*Determinations of fact that are clearly erroneous*] – Option 2: [*Manifest errors in the appreciation of facts [, including the appreciation of relevant domestic law and the assessment of damages,]*]; and

[ (c) *An error in the application of the law to the facts of a case*.] ]

*2.* Option 1: [*A disputing party may also appeal on any of the five grounds for annulment of an award as set out in Article 52 of the ICSID Convention and on the grounds under Article V[(1)] of the New York Convention to the extent they are not covered under paragraph (1) (a) and (b) above.*] Option 2: [*Grounds to be fully enumerated instead of referring to the provisions of relevant provisions, for the sake of clarity*][32]

*3. The [appellate [body][court][tribunal]] may also undertake a review of errors of law or fact in exceptional circumstances, to the extent they are not covered under paragraph (1) (a) and (b) above*.

[Appealable decisions]

*4. Decisions by the first-tier tribunal settling a dispute between an investor and a State or State-owned entity [that arises under an investment treaty][33] are subject to appeal under the [appellate [body][court][tribunal]] [Rules on Appeal].*

[31] Options range from application of the law that was applied before the first-tier tribunal, a different law if the seat of the appeal is not the same as in the first instance or a completely de-nationalized appellate mechanism, subject only to international law (see CIDS report, paras. 193–195).

[32] Paragraph (2) of the draft provision aims to avoid a three-step process under which subsequent ICSID proceedings or litigation before domestic courts could take place after the appeal proceedings. It should be completed with provisions ensuring that it would not be possible for the parties to undertake such procedures. An alternative to a reference to the provisions of the ICSID and New York Conventions would be to spell out the grounds. In that regard, it should be noted that reference is made to article V(1) of the New York Convention only, which leaves room for intervention by domestic courts on the grounds of arbitrability and public policy.

[33] In relation to the bracketed text, the Working Group may wish to consider how an appellate mechanism might work outside the context of treaty-based ISDS, such as where the basis for jurisdiction were a foreign investment law or an investment contract (A/CN.9/1004/Add.1, para. 56).

*5. [Decisions by the first-tier tribunals on their own jurisdiction are also subject to appeal. If the first-tier tribunal rules as a preliminary question that it has jurisdiction, any party may request the appellate [body][court][tribunal] to decide the matter; while such a request is pending, the first-tier tribunal may continue the proceedings and make [an award][a decision]].*

[Effect of Appeal]

*6. A disputing party may [formally notify its decision to][request to] appeal a decision within ** days from the date the award is rendered. An appeal made during that period shall suspend the effect of the decision of the first-tier tribunal.*

*7. The appellate [body][court][tribunal] may confirm, modify or reverse the decisions of the first-tier tribunal. Its decision shall specify precisely how it has modified or reversed the relevant findings and conclusions of the first-tier tribunal. A confirmation would render the award by the first-tier tribunal final and binding on the parties.*

*8. The appellate [body][court][tribunal] may also annul in whole or in part the decisions of the first-tier tribunal* on *[any of the grounds for annulment of an award as set out in Article 52 of the ICSID Convention and Article V[(1)] of the New York Convention][the following grounds: (to be listed)].*

*9. Where the facts established by the first-tier tribunal so permit, the appellate [body][court][tribunal] shall apply its own legal findings and conclusions to such facts and render a final decision. If that is not possible, it shall refer the matter back to the first-tier tribunal.*

*10. The appellate [body][court][tribunal] may correct any errors in computation, any clerical or typographical errors or any errors of similar nature on its own initiative within [thirty] days of the date of the decision it rendered.*

[Timelines]

*11. As a general rule, the appeal proceedings shall not exceed [--] days from the date a party to the dispute formally notifies its decision to appeal to the date the appellate [body][court][tribunal] issues its decision. When the appellate [body][court][tribunal] considers that it cannot issue its decision in time, it shall inform the disputing parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its decision. In no case should the proceedings exceed [--] days.*

[Security for cost]

*12. The appellate tribunal may request the appellant to provide security for the costs of appeal and for any amount awarded against it in the provisional decision of the first-tier tribunal*."

***b. Enforcement***

60. The Working Group indicated that the enforcement mechanism provided for in article 54 of the ICSID Convention, as well as language in recent bilateral and multilateral investment treaties could provide useful models (A/CN.9/1004/Add.1, para. 64). They read as follows:

Article 54 ICSID Convention:

"(1) *Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment*

*of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.*

*(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.*

*(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.*"

61. Provision under recent investment treaties reads as follows:

"Article xx - Enforcement of Awards*:*

*1. An award issued pursuant to this Section shall not be enforceable until it has become final pursuant to Article xx [article dealing with final awards after appeal]. A final award issued pursuant to this Section shall be binding between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy.*

*2. A Party shall recognise an award issued pursuant to this Section as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party.*

*3. Execution of the award shall be governed by the laws concerning the execution of judgments in force where such execution is sought. 4. For the purposes of Article 1 of the New York Convention, final awards issued pursuant to this Section are arbitral awards relating to claims that are considered to arise out of a commercial relationship or transaction.*

*5. For greater certainty and subject to paragraph 1, if a claim has been submitted to dispute settlement pursuant to Article 6(2)(a) (Submission of a claim), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the ICSID Convention."*

Article xx [consent] : "*The consent pursuant to paragraphs 1 and 3 requires that the disputing parties refrain from: (a) Enforcing an award issued pursuant to this Section before such award has become final pursuant to Article 30 (Final Award); and (b) Seeking to appeal, review, set aside, annul, revise or initiate any other similar procedure before an international or domestic court or tribunal, as regards an award pursuant to this Section."*

# III. Options for establishing an appellate mechanism

## 1. General comments

62. In considering the various possible models below, the Working Group may wish to keep in mind the view expressed by some delegations during preliminary discussions at its resumed thirty eighth session, that States parties to an investment treaty should be given the opportunity to express their views on treaty interpretation during the appellate procedure and appellate tribunals should be required to accord deference to any joint interpretation by treaty parties or to treat it as binding when the treaty designate it as such (while also noting the need to ensure the independence and impartiality of the appellate tribunal) (A/CN.9/1004/Add.1, para. 47). It may be noted that diverging views were expressed on whether a decision by an appellate tribunal should be subject to confirmation or some review by the States parties to the relevant

investment treaty (see the review of interim panel reports, or adoption of the panel or Appellate Body Reports, in the WTO through reverse consensus) (A/CN.9/1004/Add.1, para. 48).

63. Regarding the possible models for an appellate mechanism, the Working Group may wish to refer to document A/CN.9/WG.III/WP.185, paras. 39-50.