

**Comments of the Russian Federation on the drafts of the Working Papers  
on appellate mechanism and on selection and appointment of the tribunal  
members in investor-state dispute settlement developed by the UNCITRAL  
Secretariat**

The Russian Federation thanks the UNICTRAL Secretariat for preparing the drafts of the Working Papers on appellate mechanism and on selection and appointment of the tribunal members in investor-State dispute settlement and considers it expedient to improve it regarding the following areas:

I. On the draft of the Working Paper on appellate mechanism:

1. Para 4. of the Working Paper draft on appellate mechanism (hereinafter – draft WP on appellate mechanism) provides that the Working Group III should consider the grounds and limits for appeal of the investment tribunal’s decision to the appellate mechanism. Among such grounds are: *error of law, error of fact*, including *error in the assessment of damages*. Nevertheless, it may be expedient to consider the possibility to include in the grounds for appeal occurrence of circumstances (facts), new or previously unknown (at the time of consideration) by the tribunal.

2. Para. 6 of the draft WP on appellate mechanism stipulates that the appellate mechanism has the right to determine *in its practice* whether a manifest error in the appreciation of the facts can be deemed an error of law, and whether the issue of interpretation or application of national law belongs to the category of errors in the appreciation of the facts or errors of law, when a *manifest error in the appreciation of the facts can constitute an error of law*. We believe that such cases should be provided for by the rules of the appellate proceedings, and not dictated by the practice of the appellate mechanism.

3. In para. 8 of the draft WP on appellate mechanism, the Secretariat concludes that the appeal procedure is close to the *annulment* or *setting aside* procedures. This conclusion does not appear to be sufficiently justified due to the fact that the Working Party has not come to a decision on the grounds and limits for appeal. In this regard, it

is appropriate to replace the words “*which might run contrary*” with “*which might raise questions as to its compliance with.*”

4. Para. 12 of the draft WP on appellate mechanism describes the nature of the appeal proceedings. Given the different nature and procedure for cases before investment tribunals and national courts, it remains unclear whether the appellate mechanism should or can address only those arguments submitted by the parties on appeal, or whether it can go beyond the parties’ claims.

5. Para. 18 of the draft WP on appellate mechanism provides that the decision of the investment tribunal may be appealed to the appellate mechanism both on *merits and procedural matters*. It is expedient to clarify which procedural (process-related) issues may be covered by the subject of appeal. In other words, can a party to a dispute appeal any or only part of the procedural issues, given that in para. 19 of the draft WP on appellate mechanism, the Secretariat suggests that the parties should not be granted the right to appeal on appointment of investment tribunal members and the imposition of interim measures.

6. Para. 26 of the draft WP on appellate mechanism deals the issue of the return of the decision by the appellate mechanism to the tribunal that considered the case in the “first” instance. However, different nature of the proceedings in national courts and arbitral tribunals should be taken into account. After the decision is rendered, the investment tribunal completes its work. The return of the decision by the appellate mechanism to the already “dissolved” tribunal of the “first” instance raises the question of who will consider such “returned case.” The parties to the dispute must reform the arbitral tribunal, pay fees, and bear the counsel costs. It does not reduce the total cost of legal proceedings, and also increases the time of the consideration of the case. Para. 9 of the rules developed by the Secretariat for the appellate mechanism (para. 59 of the draft WP on the appeal) (hereinafter – draft rules) envisages the “return” of the case to the “first-tier” tribunal. It remains unclear how the situation will be handled if the newly formed “first-tier” tribunal does not agree with the decision of the appellate mechanism and confirms its previous decision. How many times can the

appellate mechanism return the case to the “first-tier” tribunal? Furthermore, the re-formation of the arbitral tribunal is not possible without the explicit consent of the parties.

7. Regarding para. 42 of the draft WP on the appellate mechanism we consider it necessary to raise the following issue: law of which country will be applicable to the appeal of the appellate mechanism’s decisions? As a general rule, such law would be the law of the country where the *seat of arbitration* situated. Existence of a specific State as a seat of arbitration can lead to the monopolization of this State’s position, since its courts will have the right to set aside the appellate mechanism’s decisions. A similar comment applies to para. 58 of the draft WP on appellate mechanism.

8. Article X, para. 3, of the draft rules provides that, in exceptional circumstances, the appellate mechanism may also decide on issues of error of law or fact. Firstly, it is unclear what is understood by “exceptional circumstances.” This concept is “vague” and requires clarification when used throughout the document (paras. 11, 14, 31 of the draft WP on appellate mechanism). Secondly, this provision provides *broad discretion* to the court, which may lead to the *abuse of process*, since the grounds for its application are not defined by the draft rules.

It remains unclear whether the appellate mechanism that suspends or overturns the decision of the tribunal can be considered as the “competent authority of the country” for the purposes of applying article 5(1) of the 1958 New York Convention.

Paras. 5 and 6 of the article X of the draft rules should be correlated. Para. 5 does not provide for the possibility of the suspension of the case of one of the parties to the dispute requests the appellate mechanism to consider the issue of jurisdiction, while para. 6 provides for such possibility.

9. Article X, para. 7, of the draft rules envisages the right of the appellate mechanism to confirm the decision of the “first-tier” tribunal (*a confirmation would render the award by the first-tier tribunal final and binding on the parties*). However, the procedure for such confirmation is unclear. If the decision of the “first-tier” tribunal requires an approval by the appellate mechanism, there should be a time limit

after which the decision of the “first-tier” tribunal “enters” into force. Such time limit may be provided for cases before national courts. The nature of investment arbitration is different from that of state (national) courts. The automatic transfer of “constructions” envisaged in national law to the international level requires additional justification.

II. On the draft of the Working Paper on the selection and appointment of the ISDS tribunal members:

1. Para. 9 of the WP draft provides for a list of substantive qualifications for investment tribunal members (arbitrators). It remains unclear whether such qualifications are to be imposed on tribunal members not only of the “first-tier” tribunal but also of the appellate mechanism. A detailed analysis of the qualifications is also required. The list of qualifications is seen as too broad, which may cause difficulties for the investor-state dispute settlement (hereinafter - ISDS) parties in the selection of an arbitrator, meeting all the qualifications. A similar observation applies to para. 31 of the WP draft, where the list of requirements for an arbitrator includes age group, gender, legal system, but does not mention qualifications (in fact, the main requirement for the arbitrator).

2. Moreover, the clarification of how and who (which institution) will monitor the arbitrator's compliance with the imposed requirements and qualifications is required.

3. Para. 11 of the WP draft provides for the participation of “*junior*” persons either as a part of the tribunal or as “*silent observers*.” However, how this provision relates to the ISDS’ confidentiality remains unclear. Furthermore, the participation of “silent observers” in the dispute must require the parties’ explicit consent.

4. The meaning of the word “*accountability*” referred to in para. 12 and further requires clarification.

5. Para. 13 of the WP draft contains a provision that the use of interpretative declarations (joint interpretation) of investment treaties by their parties would reduce the “interpretative autonomy of ISDS tribunals.” It is important to exclude this

provision's incorrect reading as limiting the tribunal's right to such interpretation. We presume, that the tribunal will interpret the investment treaty's provisions in light of interpretative declarations (joint interpretation), given by State-parties.

6. Para. 16 of the WP draft contains a list of requirements for members (judges) of standing institutions. However, these examples are not relevant to the *ad hoc* mechanism, in which States independently choose an arbitrator based on their preferences. We invite the Secretariat to also consider the adjustment of the requirements and qualifications for arbitrators in *ad hoc* investment arbitration system.

7. Para. 19 of the WP draft stipulates that permanent bodies contribute to the *independence* and *integrity*. This conclusion requires additional justification.

8. Para. 24 of the WP draft indicates arbitrators' selection and appointment by an appointing authority, as well as the use of a *pre-established list or roster of arbitrators*, as one of the focal areas of the ISDS reform. First, granting an advantage in the process of arbitrators' appointment to the appointing authority over disputing parties requires reasoning. Second, it remains unclear whether the disputing parties retain the right to choose an arbitrator, or whether they would only have to select an arbitrator from such a pre-established list. Inasmuch paras. 35 and 41 of the WP draft indicate that the list of arbitrators can be used either on a voluntary or mandatory basis, we invite the Secretariat to similarly elaborate para. 24.

9. Para. 36 of the WP draft provides that there may be a list of *established arbitrators*, that could be regularly updated with new candidates. It remains unclear how to establish such a list in the first place. We invite the Secretariat to consider how such a list might be established.

10. Para. 37 of the WP draft stipulates that lists of arbitrators can be established by States as well as through *institutional nomination*. First, it is not clear whether the list of arbitrators will be established by such an institution only if the dispute is considered by such an institution, or such a list will be rather universal in nature and will be used by other arbitration institutions. Second, the investor (party to

the dispute) will be deprived of the right to participate in the list of arbitrators' establishment (as compared to the current system).

11. Para. 39 of the WP draft provides for the arbitrator's removal from the list of arbitrators after some time. It is necessary to stipulate a number of grounds for an arbitrator's removal from the list. It appears, for example, that if an arbitrator has not been involved in disputes' arbitration for several years for various reasons, such non-involvement may not constitute a ground for this arbitrator's removal from the list.

12. Para. 40 of the WP draft stipulates the possibility of establishing a standing mechanism that would compile and update the list of arbitrators. The funding source for such a standing mechanism is unclear. It appears that the additional financial burdens' assignment on States and /or investors will discourage the ISDS reform. In addition, para. 40 of the WP draft contains the partial passage from the A/CN.9/1004/Add.1 (hereinafter - document 1004). Para. 110 of the document 1004 indicates the possibility of participation in the assessment and evaluation of arbitrators' actions. Meanwhile, this issue was not reflected in para. 40 of the WP draft. We encourage the Secretariat to elaborate on this part of the document.

The comments, noted above by the Russian Federation, are preliminary and shall not be considered as limiting the Russian Federation's position in course of a subsequent discussion of WP drafts on the appellate mechanism and on selection and appointment of the ISDS tribunal members, as well as the Russian Federation's position in any investment dispute, either existing or which may arise in the future.