Comments on the Initial draft on Appellate mechanism

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REPUBLICA ARGENTINA

COMMENTS ON UNCITRAL WORKING GROUP III APPELLATE MECHANISM INITIAL DRAFT - ARGENTINA

General comment:

1.- Argentina highlights there are numerous drafts regarding option for the reform of the ICSID system. In this regard, it must be noted that all comments and suggestions Argentina makes are only for the purpose of constructive debate and cannot be taken as defining a position on the substantive underlying issue of each project.

2.- We consider discussions of both the proposed Appellate Mechanism and other alternative mechanisms to address some of the current ICSID system shortcomings should be oriented by the need for it to be efficient, to guarantee due process, and to be accessible to both developing and developed countries

3.- All comments presented below are preliminary and non exhaustive. Further suggestions and comments may be made at a later stage of the discussions.

Draft provision 1

1. Decisions by first-tier tribunal[s] that are final and that settle an international investment dispute are subject to appeal to the appellate tribunal.
2. Option 1: Decisions whereby [a][the] first-tier tribunal upholds or declines its own jurisdiction are also subject to appeal. If the first-tier tribunal upholds its jurisdiction, the decision is subject to appeal after the final decision on merits is rendered.
Option 2: Decisions whereby [a][the] first-tier tribunal upholds or declines its own jurisdiction are also subject to appeal. If the first-tier tribunal rules as a preliminary question on its own jurisdiction and upholds it, any party may request the appellate tribunal to review the matter; while such a request is pending,
Sub-option 1: the first-tier tribunal may continue the proceedings and make [an award][a decision].
Sub-option 2: the first-tier tribunal shall stay the proceedings until a decision is made by the appellate tribunal.

Comments:

Argentina find it more suitable that all decision of the first-tier tribunal might be subject to appeal. It should be possible to appeal decisions on the merits, decisions on preliminary objections (both jurisdiction and admissibility), decisions on liability, as well as other decisions that are not purely procedural (e.g. cost guarantee decisions) and recommendations on interim measures.

Also we prefer that decisions be appealed at the time they are issued, with suspensive effect, that is, suspending the procedure until there is a final decision by the higher tier (the appellate tribunal or other authority in charge of resolving the appeal). We believe this would avoid problems that may arise when the proceeding partially move forward while part of the claims

are subject to appeal. We argue that the suspensive effect of the appeal should also be extended to all co-complainant and co-respondents. Argentina expresses its preference for Option 2 with Sub-Option 2, notwithstanding the issues identified and any other adjustment that may be made to address these concerns.

Draft provision 2

(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 in the assessment of the facts;
(c) [The first-tier tribunal made an error in the assessment of damages, including calculation errors];
(d) Any of the first-tier tribunal members lacked impartiality or independence or the tribunal was improperly appointed or constituted;
(e) The first-tier tribunal wrongly accepted or denied jurisdiction;
(f) The first-tier tribunal ruled beyond the claims submitted to it;
(g) There has been a serious departure from a fundamental rule of procedure.

Comments:

In general, Argentina agrees with the grounds for appeal of draft provision 2. Preliminarily, we deem it appropriate to include a separate ground for appeal linked to "unsubstantiated decisions", and we reserve the right to add other options once the discussion on this matter be ongoing.

We believe that the standard of review should be broad, or at least not exceptional or restrictive as it is for the current proceeding of annulment. It is essential to assess the matter in detail, including other possible standards of review such as the "reasonably founded" one.

Regarding whether “new facts” should be a ground for appeal, our view is that, initially, it is reasonable to include the option under this draft provision. Notwithstanding this, we consider it essential to thoroughly assess any possible interaction with the current review mechanism, should both proceedings coexist.

Draft provision 3

A disputing party may appeal a decision within [90][60][120] days from the date the decision of the first-tier tribunal is [rendered][notified to the parties].

Comments:

Regarding the timeline, it must be taken into account that certain decision-making processes, as well as the drafting of the submissions take longer when one of the parties is the State.

Draft provision 4

1. A disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure in relation to a decision by the first-tier tribunal before any other fora.
2. No action for enforcement of a decision by the first-tier tribunal may be brought until either [90][60][120] days from the issuance of the decision by the first-tier tribunal has elapsed and no appeal has been initiated, or until an initiated appeal has been decided or withdrawn.

Comments:

Argentina considers this a central provision, but it will addressed it once there is more clarity to understand whether and how the different proceedings will coexist; especially, in the case of annulment and review (be it parallel or successive).

Also, we consider it essential that action for enforcement is not enabled until the deadline for filing an appeal expires without it being initiated or, if it has been filed, until the appeal decision is issued.

Draft provision 5

1. The appellate 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. Its decision shall be final and binding on the parties.
2. The appellate tribunal may also annul in whole or in part the decisions of the first-tier tribunal on any of the grounds set forth in draft provision 2(d) to (g) [, upon request by a party].
3. Where the facts established by the first-tier tribunal so permit, the appellate tribunal shall apply its own legal findings and conclusions to such facts and render a final decision.
Option 1: If that is not possible, it shall refer the matter back to the first- tier tribunal with detailed instructions [or, when a challenge based on the fact that the tribunal was not constituted in accordance with the applicable rules or lack impartiality or independence has been upheld, to a new tribunal to be constituted and to operate under the same rules as the first- tier tribunal].
Option 2: [If that is not possible, it may refer back to the first-tier tribunal with detailed instructions and either party may seize the first-tier tribunal to amend the decision accordingly.]
The decision by the first-tier tribunal as amended shall be [final][subject to appeal. The appellate tribunal shall render a final decision].
[4. Decisions by the appellate tribunal are not subject to any annulment or setting aside procedures and are final and enforceable].

Comments:

Argentina is of the view that wording in paragraph 2 will depend on other aspects of the document, particularly on the interaction with other proceedings, since it is assuming that annulment would not be enabled. It is important to thoroughly assess this coexistence and interaction.

We agree paragraph 3 addresses an important issue that is intimately linked to the standard of review, which is still pending of definition. It requires further consideration.

Regarding paragraph 4, our preference will depend on other aspects of the document, particularly on the interaction with other proceedings, since it is assuming that annulment would not be enabled.

Draft provision 10

1. The appellate tribunal may request the [appellant][investor] to provide security for the costs of appeal [and for any amount awarded against it in the provisional decision of the first-tier tribunal]. It may also request the placement of a bond of up to – percent of the amount of the decision of the first-tier tribunal that is appealed.
2. [criteria/requirements for ordering security for costs – Guidance on amount]

Comments:

Argentina have some concerns regarding this provision, as we believe it may generate cost-related obstacles to initiating proceedings under valid reasons when no security for the cost of appeal can be presented at the beginning. Imposing costs to the appellate proceedings should be assess thoroughly by States, especially, taking into account the excessive burden it could mean for developing countries; as well as the eventual discouraging effect it might bring regarding the initiation of these proceedings, which could in fact result in a limitation on the legitimate exercise of the right of the defence.

We think other alternatives may be considered, for example that the costs of the appeal are borne by the person filing the claim, as is the case in the case of annulments of ICSID awards, without prejudice to the fact that, eventually, the order for costs in the decision may provide something different.

Initial Draft on Appellate Mechanism: Comments of the Republic of Armenia

We consider that cost-effectiveness should be central to the question of a potential appellate mechanism. Such a mechanism could lower systemic costs by fostering a more stable and coherent jurisprudence in the various dispute settlement fora, particularly if the Working Group were to propose to add to them. However, it could also increase the cost burden without providing commensurate benefits. The conditions for the creation and operation of the mechanism – in particular, embedding the mechanism within the existing framework – are key to the creation of incentives for practitioners that promote systemic efficiency.

At this stage, we consider the 'options establishing an appellate mechanism' as the first issue to address and suggest that future drafts be restructured accordingly. This is because the procedural issues covered up to paragraph 66 of the Initial Draft are greatly affected by the model to be adopted for the mechanism itself. We suggest to focus the draft on identifying the options for an appellate mechanism before proceeding to examine operational details.

As to the three options presented at paragraphs 69 to 72, we have an initial preference for the 'institutional appellate mechanism' over the other two. This is because the rationale for any appellate mechanism is to increase the coherence of the jurisprudence and to provide redress for errors by first-instance tribunals. An *ad hoc* mechanism, on the face of it, would only add to the existing complexity of the ISDS system. While a treaty-specific mechanism might be practicable, it is questionable whether that approach adds value to the architecture. In other words, why should there be a new and freestanding mechanism, as opposed to adding one?

An institutional appellate mechanism also brings potential problems. While the proposal by ICSID for a single appellate mechanism under the ICSID framework might be attractive in the interest of promoting simplicity and using a proven institution, two questions would need to be considered: 1) whether treaty-level reform would be necessary to create such a mechanism; and 2) how to embed the mechanism into the UNCITRAL/PCA system, as well as, potentially, a multilateral investment court.

As the Initial Draft considers at paragraphs 73 to 75, another alternative might be to embed the mechanism into a multilateral investment court. Whether as a standalone appellate body or as a 'second tier' of that court, the immediate question would become: how to enable the arbitral systems to use that tier? Unless the appellate mechanism were embedded in the architecture of the arbitral systems, it is likely that the costs would outweigh the limited benefit.

Finally, an option that is not considered in the Initial Draft is recourse to the International Court of Justice through its advisory jurisdiction. The Court has experience in exercising an appellate jurisdiction over the United Nations Administrative Tribunal and the Administrative Tribunal of the International Labour Organisation. In addition, the Permanent Court of International Justice exercise appellate jurisdiction from mixed arbitral tribunals. While formally done through the advisory jurisdiction of the Court and done as a 'review', the procedure is substantially an appellate one because the Court is not bound by the terms of the question put to it and it may take into account all external factors that might have influenced the lower tribunal. The 'opinions' of the Court are binding on them.

The costs of the Court being covered by the United Nations, it would reduce the financial burden of a permanent multilateral investment court. To enable the Court to manage the increase to its docket efficiently, it is likely a standing chamber of seven to hear investment appeals could be considered.

These remarks are without prejudice to the position of the Republic of Armenia on participation in any appellate mechanism that might be created.

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)
Working Group III: Investor-State Dispute Settlement Reform

Appellate Mechanism

Note by the Secretariat

Comments from the Republic of Colombia

I. General comments

1. Colombia thanks the Secretariat for preparing this Initial draft provisions on Appellate Mechanism, addressing the main elements of the functioning and establishment of a possible appellate mechanism; and submits its comments to such draft.

2. As Colombia pointed out in its submission (document A/CN.9/WG.III/WP.173) the "Appellate Body" block should be considered as part of minimum standards. Therefore, this issue, as part of the reform options identified by the Working Group, would be of particular relevance, acknowledging, though, its complexity.

3. It is worth noting that the mere fact of submitting these comments does not prejudge Colombia's position regarding the functioning and establishment of a possible appellate mechanism nor signals it is in favor or against said mechanism. Colombia is conducting internal assessments in order to determine the convenience and impact of this reform option, from a holistic perspective.

4. Colombia is still evaluating if the purported benefits it will bring in terms of consistency, will outweigh issues of cost and efficiency. Colombia is also considering the efforts it will take to make such a mechanism compatible within the existing framework provided by the New York Convention (NYC) and the ICSID Convention.

5. Colombia reserves its right to modify, withdraw or make further comments or state a specific position on this and any other issues in the course of discussions taking place within the Working Group III on a possible Investor-State dispute settlement (ISDS) reform.

II. Specific comments

1. Scope of the appeal

DP 1.2

6. Colombia favors option 2.

2. Grounds for appeal and standard of review

DP 2

7. While Colombia appreciates the efforts to conciliate in a single provision consistency with the ICSID system and the NY Convention, it considers many questions still prevail.

8. How will pre-existing annulment grounds co-exist in the international playing field with these provisions?

9. Why is a second tribunal able to decide on a shorter amount of time, the questions that the first tribunal had more resources to answer? The comparison with domestic law should be avoided. A second-tier tribunal is generally composed by the most prestigious and experienced judges of the country. Such distinction cannot be made in the case of two arbitral tribunals. The comparison with annulment in international arbitration under ICSID or the NYC is not quite the same either, since annulment grounds are way more limited and, as a consequence, the parties could have a *de novo* opportunity to plead their case.

10. On the specific grounds, Colombia wonders what would not be covered by errors of law, manifest error in the assessment of the facts, error in the assessment of damages, lack of impartiality and errors in the constitution of the arbitral tribunal, errors in jurisdiction, errors in the scope of the claims and departure from a fundamental rule of procedure? Colombia is concerned about that answering these questions will open the door in almost every case to the appellate mechanism. In other words, only what was manifestly correct will escape the appellate mechanism, and "Manifest" is a high standard to achieve.

3. **Timeline**

11. Colombia considers 60 days is not enough to prepare an appeal. 90 days is still a short time for a State, as it has the additional burden of starting a procurement process in order to hire its legal representation. Therefore, Colombia favors 120 days.

4. Suspensive effect of appeal

DP 4.1

12. Colombia understands the necessity of DP 4.1. Yet, local jurisdictions have already decided this question, at least with respect to the NYC which contains similarities with some of the provisions of DP2.

13. Regarding the time limit incorporated in DP 4.2, Colombia favors 120 days.

5. Decisions by the appellate tribunal

DP 5

14. This provision contains a mélange that calls for careful consideration. The possibility of modifying the decision of the first-tier tribunal could be controversial, even more so if a time-limit is established. The first tribunal would have had more time to make its finding than the second one, but the latter would nonetheless be able to make a completely new decision.

6. Duration of the appellate proceedings

DP 6

15. Colombia appreciates the intention behind the establishment of a deadline. However, the Working Group should be mindful that it might compromise the quality and correctness of the decisions, particularly in complex cases. Therefore, Colombia considers of utmost importance paragraph 2 of DP6, as it will allow to extend the timeframe for the issuance of decisions by the appellate tribunal.

9.

b. Early dismissal mechanism

DP 9.1

16. Colombia considers an early dismissal is an important component of any IDS procedure. However, it reiterates that given the scope of the appeal it appears that not many disputes would meet the tacit manifest standard.

c. Security for Costs

DP 10

17. Colombia supports the bracketed text "investor" and "and for any amount awarded against it in the provisional decision of the first-tier tribunal".

III. Additional comments

Draft provisions for a multilateral instrument

18. Colombia favors the inclusion of a draft provision that addresses the interaction between a multilateral instrument and an appellate mechanism. This instrument, with opt-in and opt-out provisions, would allow for more States to consent to the implementation of an appellate level.

Options for establishing an appellate mechanism

a. Appellate mechanism for application by treaty Parties, parties to an investment contract, disputing parties or institutions

(i) *Treaty-specific appellate mechanism*

19. Colombia has agreed to study the feasibility of appellate mechanisms in some of its IIAs. However, this approach is currently linked to individual IIAs and is not systematic to all IIAs. Colombia considers it would not be feasible a systematic appeals mechanism for each IIA.

(ii) *Ad hoc appellate mechanism*

20. If there is not a specialized and robust institutional framework regulating the responsibility of decision makers, an ad hoc appellate mechanism will suffer from the same systemic problems currently affecting tribunals. Besides that, it would not be efficient to design a particular mechanism for each IIA, as each one of them has its own particularities.

b. Permanent plurilateral or multilateral appellate body

21. In theory, this option may attend various concerns. However, it does not depend to the mere existence of this body, which is in itself bureaucracy. It depends on its effective implementation (application of international law rules, no party appointment, diversity, etc.).

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Possible reform of investor-State dispute settlement (ISDS)

Appellate mechanism

Note by the Secretariat

Contents

I. Introduction

1. At its resumed thirty-eighth session, in January 2020, the Working Group 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 [1] (A/CN.9/1004/Add.1, paras. 16-51). At its fortieth session, in February 2021, the Working Group continued its deliberations on the basis of draft provisions on an appellate mechanism, including issues regarding the enforcement of decisions that would be rendered through a standing mechanism. The Working Group requested the Secretariat to undertake further preparatory work on these matters (A/CN.9/1050, para. 113).

2. Accordingly, this Note contains provisions addressing the main elements of the functioning and establishment of a possible appellate mechanism. Further insights on the issue of enforcement of decisions resulting from a standing mechanism, including an appellate mechanism, are contained in documents [*reference to be included*] (addressing general questions) and [*reference to be included*] (reproducing a note on the topic by the ICSID Secretariat). Document [*reference to be included*] elaborates on the financial aspects of establishing an appellate mechanism in the form of a permanent body.

3. 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.

II. Appellate mechanism

4. At its resumed thirty-eighth session, in January 2020 the Working Group had noted that the various components of an appellate mechanism 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 form 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 had 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). The draft provisions in section A below are based on the deliberations of the Working Group at its fortieth session, in February 2021 (A/CN.9/1050, paras. 63-114).

[1] By way of background information, the suggestion for the establishment of an appellate mechanis m is contained in various proposals submitted by Governments in preparation for the deliberations on reform options: 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.

[2] See the list of publications contained in document A/CN.9/WG.III/WP.202, (footnote 2); 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/.

A. Main provisions on the functioning of an appellate mechanism

1. Scope of appeal

5. The Working Group may wish to consider the scope of appeal, including which disputes and types of decisions could be subject to appeal.

Draft provision 1

1. Decisions by first-tier tribunal[s] that are final and that settle an international investment dispute are subject to appeal to the appellate tribunal.

2. Option 1*: Decisions whereby [a][the] first-tier tribunal upholds or declines its own jurisdiction are also subject to appeal. If the first-tier tribunal upholds its jurisdiction, the decision is subject to appeal after the final decision on merits is rendered.*

Option 2*: Decisions whereby [a][the] first-tier tribunal upholds or declines its own jurisdiction are also subject to appeal. If the first-tier tribunal rules as a preliminary question on its own jurisdiction and upholds it, any party may request the appellate tribunal to review the matter; while such a request is pending,*

Sub-option 1: the first-tier tribunal may continue the proceedings and make [an award][a decision].

Sub-option 2: the first-tier tribunal shall stay the proceedings until a decision is made by the appellate tribunal.

Comments on draft provision 1

(i) Decisions

- *Final decisions*

6. Paragraph 1 reflects the suggestion that final decisions, on either merits or jurisdiction, are subject to appeal (A/CN.9/1050, paras. 86, 87 and 113; A/CN.9/1004/Add.1, para. 55). Article 1 refers to "decisions" by first-tier tribunal(s) and does not address the form of such decisions (an award or any other form). It does not differentiate either on whether the first-tier tribunal would be an arbitral tribunal under the ICSID or non-ICSID framework, or a permanent first instance multilateral court (if one were to be established).

[**European Union and Member States:** The European Union and its Member States agree that final decisions on merits should be subject to appeal and are open to discuss the possibility of appeals against decisions on jurisdiction.

In any event, it would need to be ensured that any such appeals would be lodged in a timely manner and that dilatory challenges (i.e. systematically leading to successive appeals, e.g. one of jurisdiction and another on the merits) will be effectively prevented. This might be managed, for example, by the appeal mechanism having to give leave for appeal, and allowing it to hear preliminary arguments both on the substance and on whether the appeal is made with dilatory effect, or by requiring that security be posted for part of the potential award.]

- *Decisions on jurisdiction*

7. Paragraph 2 includes options on appeal of decisions on jurisdiction, taking into account various aspects including when such an appeal could be made, its effect on the first-tier proceedings, and the circumstances under which appeal would be allowed. A wide range of views were expressed in the Working Group, including on whether the first-tier tribunal should stay or continue the proceedings when appeal on a decision on jurisdiction was pending and on whether the appellate tribunal could overturn a decision by the first-tier tribunal stating that it does not have jurisdiction (A/CN.9/1050, para. 87; see also A/CN.9/1004/Add.1, para. 33). Draft provision 1(2) contains different options covering decisions declining jurisdiction over the entirety

of the dispute or with respect to certain parts, aimed at reflecting the divergent views expressed.

- Option 1 provides that an appeal could be made only after the final decision on the merits so as to ensure that the appellate tribunal would be presented with the full record of the case before rendering its decision; 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."[3]

- Option 2 provides that an appeal could be made at an early stage of the first-tier proceedings (A/CN.9/1004/Add.1, para. 33). [4] It contains two sub-options, addressing the question whether the proceedings at first-tier should continue or be stayed, in particular in light of the cost involved under either option.

[**European Union and Member States:** The European Union and its Member States submit that the question on whether decisions on jurisdiction should be subject to appeal is a very complex one that needs careful consideration. There are pros and cons to both approaches and hence a delicate balance should be attained.

Although the most recent practice of the European Union and its Member States in bilateral agreements is closer to Option 1, in that only final decisions that settle the dispute are subject to appeal, the European Union and its Member States would be ready to explore options around Option 2, where positive decisions on jurisdiction may also be appealed. In that regard sub-option 2 where the first instance tribunal or appellate tribunal (feasible if the first instance tribunal and appeal tribunal are part of the same mechanism) would stay the proceedings on merits for the duration of the appeal would have the advantage of preventing costly proceedings on the merits that could become unnecessary in case a positive decision on jurisdiction is reversed on appeal. An additional possibility to consider could be to allow the first instance tribunal to decide, based on the individual circumstances of each case and with due regard to ensuring due process and avoiding unnecessary delays, whether proceedings on merits should continue or be stayed. This being said, systematic and dilatory appeals would need to be prevented.]

8. The Working Group may wish to note that the question of possible parallel procedures to challenge decisions on jurisdiction (both under the equivalent, in the domestic arbitration law, of article 16 of the Model Law and under an appellate mechanism) is addressed in the documents referred to in para. 2 above.

- *Ancillary question*

9. The Working Group may wish to consider whether decisions on admissibility of a claim by a first-tier tribunal should be mentioned specifically or whether they are deemed sufficiently covered by the reference in the comments to decisions "on the merits".

10. The Working Group may also wish to consider whether draft provision 1 should be expanded to also clarify whether interim decisions are appealable (for instance, a decision upholding liability but deferring quantum to a later stage). In that light, it may wish to consider how to address decisions addressing part of the dispute, for instance, a decision upholding jurisdiction on some claimants or claims and denying jurisdiction on some other claimants or claims. For instance, if a decision declines jurisdictions over an investor (but upholds it over a different investor), it should be considered whether the aggrieved investor should be able to appeal the decision immediately as the decision is final. The Working Group may wish to consider whether partial decisions regarding claims, for instance a decision declining jurisdiction over certain claims only, could be appealed immediately or only with the final decision that terminates the proceedings.

[**European Union and Member States:** The European Union and its Member States are of the opinion that it would be useful to clarify what type of decisions exactly are covered by the reference to "interim decisions" in paragraph 10, as this language is typically used across agreements to describe a number of decisions of a different nature. The European Union and its Member States note that, while certain bilateral agreements specify what such decisions may consist of (for example, the most recent EU bilateral agreements including establishing an Investment Court System), others stay silent about the issue.

In this sense, the European Union and its Member States also note that a decision "upholding liability but deferring quantum" as referred to in paragraph 10 would in principle be considered a decision on merits.

While clearly favouring that decisions on merits and on jurisdiction be subject to appeal,

the European Union and its Member States are in general not convinced about the proposal to allow appeals against other types of interim decisions, notably those concerning less significant procedural aspects such as a decision to bifurcate proceedings in merits and jurisdiction, interim measures of protection or decisions on challenges to adjudicators. These types of decisions do not address the substance of the case. Any shortcomings regarding these decisions may be raised at the end of the proceedings, once the appeal tribunal has the full picture of the case before it.]

(i) Type of disputes

11. Article 1 provides an indication of the type of disputes that falls under the scope of the appellate mechanism. Reference is made in paragraph 1 to "an international investment dispute". The text is aligned with wording used in other standards under preparation, such as the draft code of conduct for adjudicators in international investment disputes (A/CN.9/1086, paras. 32-43). The Working Group may wish to consider that the appellate mechanism may also operate outside the context of treaty-based ISDS, such as where the basis for jurisdiction would be an investment law or an investment contract with an element of internationality (A/CN.9/1050, para. 88; see also A/CN.9/1004/Add.1, para. 56).

[**European Union and Member States:** The European Union and its Member States note that this question is also before this Working Group in the context of related discussions, notably those on a Code of Conduct and the establishment of a permanent tribunal. In this connection reference is made to the need for consistency across elements of work of Working Group III.

More substantively and in line with the position expressed in those other discussions, the European Union and its Member States submit that unduly limiting the scope of appealable decisions to decisions settling disputes between an investor and a State or a State-owned entity would be overly narrow. Said approach would unduly exclude other types of decisions that could benefit from an appeal mechanism such as those arising in the context of investor-state disputes based on contracts or domestic laws or state-to-state disputes.

It is also noted that the appeal is an essential element of the European Union and its Member States' preferred reform option of establishing a permanent court. In that sense, the types of disputes that could benefit from an appeal would need to be in line with the jurisdiction of said permanent court.]

2. Grounds for appeal and standard of review

12. The Working Group noted that, given their impact on the effective operation of any appellate mechanism, the grounds for appeal and the standard of review ought to be clearly defined. It was also pointed out that the aim should be to keep the appellate mechanism simple, so that it would be accessible to all users, including small- and medium-sized enterprises (A/CN.9/1050, para. 63). In that light, the Working Group may wish to consider the following draft provision addressing the scope and standard of review of an appellate mechanism (A/CN.9/1050, paras. 64-84 and 113).

[3] 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 a ground stipulated in Art 52(1)(a) – (e).

[4] 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.

Draft provision 2

A disputing party may appeal a decision 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 in the assessment of the facts;
(c) [The first-tier tribunal made an error in the assessment of damages, including calculation errors];
(d) Any of the first-tier tribunal members lacked impartiality or independence or the tribunal was improperly appointed or constituted;
(e) The first-tier tribunal wrongly accepted or denied jurisdiction;
(f) The first-tier tribunal ruled beyond the claims submitted to it;
(g) There has been a serious departure from a fundamental rule of procedure.

Comments on draft provision 2

(i) Errors of law, fact, damages

13. Draft provision 2(a) refers to "error in the application or interpretation of the law" without any reference to specific standards in investment treaties (A/CN.9/1050, para. 66; see also A/CN.9/1004/Add.1, paras. 26 and 27). The Working Group may wish to confirm that "an error in the application of the law to the facts of a case" would be considered as covered under this provision.

14. Draft provision 2(b) refers to "manifest error in the assessment of the facts", without listing examples of appreciation of facts (A/CN.9/1050, para. 113). It reflects the preference expressed in the Working Group for a higher standard of review to ensure appropriate deference to the first-tier tribunal (A/CN.9/1050, para. 67; see also A/CN.9/1004/Add.1, para. 28).

15. The Working Group may wish to note that the following provision in the previous draft has been deleted, as requested: " The appellate body 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)."

[**European Union and Member States:** The European Union and its Member States are of the view that, as pointed out, manifest errors in the appreciation of facts could be listed as self-standing grounds for appeal without necessarily having to be qualified as errors of law.]

16. Draft provision 2(c) addresses error in the assessment of damages, including error in the calculation of compensation based on (i) the suggestion that valuation techniques and their application should be included explicitly in the scope of review, possibly as a separate provision, as they are critical in ISDS; and (ii) the divergence of views regarding whether an error in the assessment of damages might constitute an error of law or of fact (A/CN.9/1050, para. 72; see also A/CN.9/1004/Add.1, para. 28). The Working Group may wish to note that appeal mechanisms usually refer to errors of law or of fact, and no reference is found to a separate category. The assessment of damages includes applying the law and establishing the facts related to damages. Hence, complaints about damages would necessarily fall either under subparagraph (a) or under (b). The Working Group may wish to consider whether a third category might create confusion and overlaps. In addition, it may be noted that calculation errors are typically remedied in rectification proceeding.

[**European Union and Member States:** The European Union and its Member States agree with the second and subsequent sentences of paragraph 16 that errors in the assessment of damages would already be covered either by draft provision 2(a) as errors of law or by draft provision 2(b) as errors of fact. In this connection it is submitted that a separate ground for appeal focused on damages only like draft provision 2(c) would cause unnecessary overlaps and is therefore not necessary.]

(ii) Standard of review

17. With respect to the standard of review, draft provision 2 limits the instances of appeal to errors of law and "manifest" errors of fact, thereby according some degree of deference to the findings of the first-tier tribunals (A/CN.9/1050, paras. 64-67; see also A/CN.9/1004/Add.1, para. 29).

18. "Manifest" error is used to determine whether an error of fact existed and was patent and obvious, such as dishonest testimony by a key witness or the failure to take account of an important exhibit, and whether it possibly also had an influence on the outcome of the decision by the first-tier tribunal. Such standard is based on the

proposition that the first-tier tribunal heard the testimony and has the best understanding of the evidence. Thus, the first-tier tribunal receives substantial deference. Limiting re-litigation of "manifest" errors of fact might also serve to reduce costs and delays.

19. The word "manifest" is commonly interpreted as meaning unambiguous and uncontroversial. For instance, in the context of Rule 41(5) of the ICSID Arbitration Rules on the early dismissal of claims without legal merit, arbitral tribunals have repeatedly interpreted the word manifest as requiring the requesting party to establish its objection clearly and obviously, with relative ease and despatch. Tribunals have also specified that the exercise could be complicated but never difficult. [5] In the context of "manifest errors of fact", the error should be obvious or plain on its face, and the appellate tribunal should not need to undertake a complex analysis to conclude that such an error exists.[6]

[**European Union and Member States:** The European Union and its Member States agree that while questions of law should be fully reviewable, the review of errors in the appreciation of facts should be limited to manifest errors. This would strike the right balance between ensuring the right to appeal and the efficiency and manageability of an appeal mechanism.]

(iii) Grounds for annulment and setting aside

20. Draft provisions 2(d) to (g) aim at covering grounds for annulment found in article 52 of 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"), with adjustments.[7] An important question from the point of view of procedural efficiency is how to ensure that existing annulment or setting aside procedures would not apply alongside an appellate mechanism so as to avoid overlap. This question is addressed under draft provision 3 below. An alternative to draft provision 2(d) to (g) would be to refer to Article 52 ICSID Convention and to the annulment grounds existing under the applicable law of the country of the seat where the decision is made. However, spelling out grounds that are considered to be applicable in an investment treaty context and therefore providing autonomous formulations crafted from a transnational viewpoint might be a preferable approach for the sake of clarity and certainty.

[**European Union and Member States:** The European Union and its Member States agree with the proposed approach of spelling out the grounds for appeal covered by Article of the 52.1 ICSID Convention, in addition to manifest error in the appreciation of facts and error in the appreciation of law.

It is of the utmost importance for the European Union and its Member States that the grounds of appeal not be raised in the context of annulment or setting aside procedures (draft provision 4). Indeed, a three-tier system should be avoided.]

21. The Working Group may wish to note that ground (f) does not address the situation where a tribunal has failed to decide one of the claims as the usual remedy in such a situation would be to request a supplemental or additional decision from the ISDS tribunal. Alternatively the ground that "the Tribunal has failed to decide one of the claims" could be provided only where the remedy of supplemental award or decision is lacking.

22. The Working Group may wish to consider whether draft provision 2 (g) is sufficiently broad to encompass all most serious procedural violations, including violation of the right to be heard, equal treatment of the parties, and other such procedural rights.

[**European Union and Member States:** The European Union and its Member States agree with draft provision 2(g) which mirrors the language of letter (d) of Article 52.1 of the ICSID Convention.]

(iv) New facts

23. With regards to facts discovered or arising after the decision of the first-tier tribunal is rendered, it may be noted that such a ground would aim at "revision" which is a different remedy that is subject to strict conditions and must be available much

[5] See e.g., Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, para. 88.

[6] See e.g., Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), 20 March 2017, para. 41.

[7] The Working Group may wish to note the grouping of provisions in the ICSID Convention and New York Conve ntion, as follows: paragraph 2(a) covers article 52(1)(a) of the ICSID Convention and article 34 (2)(a)(ii) of the Model Law; paragraph 2(b) covers article 52(1)(b) of the ICSID Convention and article 34 (2)(a)(iii) of the Model Law; paragraph 2(c) covers article 52(1)(c) of the ICSID Convention; paragraph 2(d) covers article 52(1)(d) of the ICSID Convention; paragraph 2(e) covers article 52(1)(e) of the ICSID Convention. paragraph 3 contains grounds applicable where the first instance tribunal has been constituted on the basis of an arbitration agreement: paragraph 3(a) covers article 34 (2)(a)(ii) of the Model Law; paragraph 3(b) covers article 34 (2)(a)(i) of the Model Law; and paragraph 3(c) covers article 34 (2)(a)(iv) of the Model Law.

longer than the appeal. Therefore, a question for consideration is whether such an application should be brought to the first-instance tribunal rather than the appellate tribunal.

24. If the Working Group were to decide that new facts should be a ground for appeal, a draft provision on this matter could reads as follows: *"A disputing party may appeal a decision on the ground of new facts that were not known at the time of the proceedings before the first-tier tribunal rendered its decision and which could have been a decisive factor in reaching the decision."* A further question for consideration is whether the party invoking the new facts should show that the facts were unknown to the first-tier tribunal and that the ignorance of the facts was not due to its negligence.

[**European Union and Member States:** The European Union and its Member States consider the question of whether the discovery of new facts should constitute a ground for revision to be a delicate one. While allowing for such revision may contribute to the correctness of decisions, issues of legal certainty may speak in favour of limiting the exposure of final decisions to revision, even in the event that new facts are discovered.

The European Union and its Member States submit that a possible option to explore could be the setting of a deadline after a decision becomes final for revision in the event that new facts are discovered.

The European Union and its Member States therefore consider that the discovery of new facts should be an issue for the first instance tribunal to review, rather than for the appeal tribunal to consider in the context of an appeal. Indeed, The European Union and its Member States consider that the discovery of new facts is not comparable to the grounds of appeal outlined above. This type of revision would best work in the context of a permanent body including a first and an appeal instance, where the case could be revised by the same first instance tribunal that had originally decided on it.]

3. Timeline

25. The Working Group may wish to consider draft provision 3 below addressing the timeline and conditions for bringing an appeal.

Draft provision 3

> *A disputing party may appeal a decision within [90][60][120] days from the date the decision of the first-tier tribunal is [rendered][notified to the parties].*

Comments on draft provision 3

26. Draft provision 3 reflects the parties' "right to appeal" rather than the "right to request leave of an appeal" (A/CN.9/1050, para. 113).

27. With regard to the time frame for appeal, suggestions were made, ranging from 60, 90 to 120 days. The Working Group may wish to consider the starting point for such time frame (A/CN.9/1050, para. 93). It may also wish to consider whether different time frames would need to be determined, depending on the type of decisions that would be appealable.

[**European Union and Member States:** The European Union and its Member States recall that their most recent bilateral practice provides that decisions may be subject to appeal within 90 days from the issuance of such decisions by the Tribunal of First Instance. The European Union and its Member States therefore consider that a comparable timeframe would be appropriate also at the multilateral level.]

4. Suspensive effect of appeal

28. The Working Group may wish to consider draft provision 4 below addressing the effect of appeal.

Draft provision 4

> *1. A disputing party shall not seek to review, set aside, annul, revise or*

initiate any other similar procedure in relation to a decision by the first-tier tribunal before any other fora.

2. No action for enforcement of a decision by the first-tier tribunal may be brought until either [90][60][120] days from the issuance of the decision by the first-tier tribunal has elapsed and no appeal has been initiated, or until an initiated appeal has been decided or withdrawn.

Comments on draft provision 4

29. The establishment of an appellate mechanism raises the question of the interplay between this mechanism and existing annulment/setting aside and enforcement stages.

30. The Working Group may wish to note that any parallel proceedings for review or annulment should be excluded. With regards to enforcement proceedings, automatic stay would limit parallel proceedings and avoid having one of the parties proceed with enforcement proceedings in a given jurisdiction. Accordingly, draft provision 4 prohibits annulment/setting aside proceedings and provides that a disputing party shall not seek enforcement of decisions by first-tier tribunals until the lapse of time for appeal (A/CN.9/1050, para. 114; see also A/CN.9/1004/Add.1, para. 42).

[**European Union and Member States:** The European Union and its Member States attach great importance to draft provision 4(1) ensuring that existing annulment or setting aside procedures do not apply alongside with an appeal, in other words that there be no third tier after an appeal. This is important especially from the perspective of procedural efficiency. Draft provision 4(2) is important to ensure that appeal proceedings cannot be rendered pointless through premature enforcement actions that may be initiated by a disputing party before the appeal proceedings are finalised.]

31. The legal issues to be considered require taking into account the distinction between ICSID and non-ICSID arbitrations, which are subject to different legal regimes.

32. In the case of ICSID arbitration, the Washington Convention establishes a self-contained procedural framework, governed exclusively by public international law. In ICSID arbitration, the arbitration law of the seat plays no role and national courts have no jurisdiction in aid or control of the arbitration.

33. By contrast, non-ICSID investor-State arbitrations are subject to a national arbitration law. For non-ICSID arbitrations, the national courts thus play a role in support and control of investment arbitrations. It may be noted that, under draft provision 2, the scope of review includes grounds for annulment and setting aside, thereby indicating that the appellate mechanism would be designed to substitute rather than be combined with any annulment-type review present under national law (or the ICSID Convention). The addition of a second layer of review would make the courts' supervisory role largely unnecessary. [8] This would mean that a domestic court examining a request for setting aside of a first-tier tribunal decision should not admit an action from the disputing parties for setting aside such decision.

34. In order to implement the appellate mechanism, a waiver of judicial review in respect of such decisions should be provided for. 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 multilateral instrument implementing the reform options (or establishing the appellate mechanism) could regulate these matters to avoid uncertainties regarding court intervention. With regard to ICSID awards, the appellate mechanism could similarly exclude any annulment of ICSID awards under Article 52 of the ICSID Convention.

35. Regarding solutions aimed at reducing the need to amend domestic laws governing such procedure should an appellate mechanism be established (A/CN.9/1050, para. 95), it should be noted that any new multilateral mechanism usually requires the conclusion of a convention so as to be made applicable in the legal order of each State Party as well as among them.

36. A further question to consider is that not all domestic laws would necessarily

recognize such a waiver as a valid agreement to exclude the right to seek annulment before their courts. Therefore, States may need to consider passing legislation to this effect. In that context, it should also be provided that the arbitration (including the appeals phase, should it not be de-localized for all types of proceedings) must be seated in a State that is a party to the statute of the appellate mechanism if it is set up as a permanent body. Otherwise, in circumstances where the seat is situated in a third State, there is a risk that such State would not recognize the waiver of judicial review as valid.

[**European Union and Member States:** The European Union and its Member States agree that the issue of waivers is closely connected to the implementation of specific reform options, which may have different implications on, inter alia, the ability of judicial bodies to examine or not certain requests. In particular regarding the establishment of a permanent multilateral court including an appeal mechanism, the treaty establishing such mechanism could and should address the question of the Contracting Parties to such treaty waiving their right to further recourse to review or annulment proceedings before other international or domestic fora.

More broadly, the statute of the permanent court should regulate the interplay between the permanent appeal mechanism and existing annulment or set aside procedures, by providing that any relevant grounds are to be addressed at the appeal stage and therefore that there would be no third instance after the appeal.

Concerning the recognition by third countries that have not acceded to the permanent court of decisions thereof that would not be subject to further recourse to review or annulment proceedings, this is an aspect that could be addressed by the multilateral instrument on the implementation of ISDS reform. In particular, this mechanism could provide that signatories recognise and enforce decisions of the dispute settlement mechanism agreed as part of the reform.]

37. Further analysis and research regarding the interplay of any time frames under the appellate mechanism with those under existing instruments currently applicable in ISDS (such as the New York Convention and the ICSID Convention,) including any statute of limitation in other international conventions or domestic laws (A/CN.9/1050, para. 94) are contained in the document referred to in para. 2 above.

Enforcement

38. The Working Group may wish to note that the matter of avoidance of multiple procedures is covered under documents A/CN.9/WG.III/WP.— (addressing general questions) and A/CN.9/WG.III/WP.— (reproducing a note on the topic by the ICSID Secretariat).

[8] MP and GKK

5. Decisions by the appellate tribunal

39. The Working Group may wish to consider draft provision 5 below addressing the decisions that the appellate tribunal may take.

Draft provision 5

1. The appellate 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. Its decision shall be final and binding on the parties.

2. The appellate tribunal may also annul in whole or in part the decisions of the first-tier tribunal on any of the grounds set forth in draft provision 2(d) to (g) [, upon request by a party].

3. Where the facts established by the first-tier tribunal so permit, the appellate tribunal shall apply its own legal findings and conclusions to such facts and render a final decision.

Option 1: If that is not possible, it shall refer the matter back to the first-tier tribunal with detailed instructions [or, when a challenge based on the fact that the tribunal was not constituted in accordance with the applicable rules or lack impartiality or independence has been upheld, to a new tribunal to be constituted and to operate under the same rules as the first-tier tribunal].

Option 2: [*If that is not possible, it may refer back to the first-tier tribunal with detailed instructions and either party may seize the first-tier tribunal to amend the decision accordingly.]*

The decision by the first-tier tribunal as amended shall be [final][subject to appeal. The appellate tribunal shall render a final decision].

[4. Decisions by the appellate tribunal are not subject to any annulment or setting aside procedures and are final and enforceable].

Comments on draft provision 5

- *Confirm, reverse, modify or annul the decisions*

40. Paragraph 1 reflects the support expressed for the appellate tribunal to be able to confirm, modify, or reverse the first-tier decision, which would make the decision final and binding on the parties as confirmed, modified or reversed (A/CN.9/1050, para. 113; see also A/CN.9/1004/Add.1, para. 40).

41. Paragraph 2 provides that an appellate body should have the authority to annul or set aside an award, based on the grounds listed in draft provision 2(d) to (g). It further contains the option of annulment upon request of a party (A/CN.9/1050, paras. 99 and 113; see also A/CN.9/1004/Add.1, paras. 30 and 40).

[**European Union and Member States:** Concerning the authority of the appeal tribunal to annul an award, the European Union and its Member States agree that where an appeal is grounded on draft provisions 2(d) to 2(g) which cover procedural irregularities (i.e. the annulment grounds of Article 52.1 of the ICSID Convention, the appeal tribunal should indeed wholly or partially annul the decision that is vitiated.

In this regard the European Union and its Member States attach particular importance to the fact that the appeal tribunal enjoys sufficient discretion to decide, on a case-by-case basis, whether the relevant decision has to be annulled in whole or in part.

This being said, the European Union and its Member States submit that the procedural irregularities captured by draft provisions 2(d) to 2(g) are significantly less likely to arise (in fact, removed) in the context of a permanent tribunal of first instance. That is the case inasmuch as any independence or ethics-related concerns of adjudicators will already be dealt with at the moment of appointment to the permanent body.]

- *Remand authority*

42. Paragraph 3 provides for a remand authority when the appellate tribunal would not be in a position to complete the analysis. It contains options for consideration by the Working Group.

43. At the thirty-eighth and fortieth sessions 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, and still other views were expressed that in light of costs and time considerations, remand should not be possible (A/CN.9/1050, paras. 101-104; see also A/CN.9/1004/Add.1, para. 41).

[**European Union and Member States:** Concerning the extent of the authority of remand, the European Union and its Member States submit that the appeal tribunal should have the authority to remand where it would not be in a position to complete the legal analysis based on facts available before it. It is noted that the appeal tribunal being able to complete the analysis of the case and render its own final award would contribute to limiting the costs and duration of the proceedings, especially as compared to current annulment committees under ICSID which do not have the competence to keep the dispute and issue a new award. In other words, only when the factual record before the appeal tribunal would be incomplete, should the appeal tribunal be able to remand the case back to the tribunal of first instance.

In the scenario where a permanent multilateral court with an appeal tribunal is established, remand would be made to the same division of the Tribunal of First Instance that heard the case originally for implementation of the changes decided on appeal and completion of the analysis. This possibility which is unrealistic under the current ad hoc system due to arbitral tribunal being disbanded after they render a decision, would be more effective in that it would limit costs and duration of proceedings as well as contribute to correctness of decisions.

That being said, reference is made to the comment on paragraph 41 above on the ability of the appeal tribunal to annul decisions in whole or in part on the basis of procedural irregularities, instead of remanding them to the first instance tribunal that was affected by such irregularities.

With regard to the second sentence of paragraph 3 of draft provision 5, the European Union and its Member States favour option 1, where in the cases where the appeal tribunal could not complete the decision on its own, remand would take place automatically, with no need for a disputing party to seize the first instance tribunal.

Concerning the third sentence of paragraph 3 of draft provision 5, the European Union and its Member States submit that decisions of the first instance tribunal should be subject to appeal, notably where such tribunal has failed to correctly implement the instructions from the appeal tribunal. In order to prevent abusive or repeated appeals, such appeals could be made subject to the requirement to ask for leave for appeal before the appeal tribunal.]

44. The Working Group may wish to note that the advantages and disadvantages of granting an appellate tribunal remand authority are closely connected to the standard of review and to the option retained for the establishment of the appellate mechanism (A/CN.9/1050, para. 113). If the scope of review is limited to review of law, remand authority is needed, as the appellate tribunal will lack the necessary information on facts. However, remand might be difficult to implement, in particular in a situation where the appellate tribunal would find procedural irregularities (for example, lack of independence), which would make it inappropriate to remand the case to the first -tier tribunal. Remand might work better as an option, not an obligation, and this option approach would work better where the standard of review includes both law and facts. Then, remand would be more efficient in the context of a standing mechanism, also providing for a standing first-tier body. Remand could also be workable on decisions rendered by ad hoc first-tier tribunals, provided a procedure is designed to allow for the suspension of their functions, pending the decision by the appellate tribunal.

[**European Union and Member States:** In relation to the question of whether remand should be designed as an option or an obligation, the European Union and its Member States submit that the decision to remand or not in a particular case should be taken ex officio by the appeal tribunal, depending on the facts available before it.]

Finality of the decisions of the appellate tribunal

45. Regarding draft paragraph 4, the Working Group may wish to consider whether it should be provided that decisions by the appellate tribunal are not subject to any annulment or setting aside procedures.

[**European Union and Member States:** As discussed above, the European Union and its Member States submit that the revised decision issued by the tribunal of first instance following remand should not be subject to annulment under ICSID or setting aside by

domestic courts.]

6. Duration of the appellate proceedings

46. The Working Group may wish to consider draft provision 6 on the limits to the duration of the appellate proceedings below.

Draft provision 6

1. 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 tribunal issues its decision. For appeals on the grounds under draft provision 2(--) and (--), and for appeals on [list the procedural measures], the appeal proceedings shall not exceed [--] days.

2. When the appellate 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.

Comments on draft provision 6

47. Regarding reasonable time frames within which the appellate tribunal would be required to render its decision, the guiding principles discussed were that timelines should be short and be strictly adhered to by the appellate tribunal, and that they need to take into account timeliness to avoid unnecessary delay in the resolution of disputes and correctness (A/CN.9/1050, para. 113; see also A/CN.9/1004/Add.1, paras. 33 and 55). Suggestions ranged from 90 days, 180 days, to a maximum of 300 days, should the appellate tribunal extend the time (A/CN.9/1050, para. 106). The Working Group may wish to note that recent investment treaties tend to provide for a timeline of 180 days for the appellate tribunal to render its decision from the commencement of the proceedings.

[**European Union and Member States:** The European and its Member States note that in the European Union's most recent practice appeal proceedings are expected to be conducted within 180 days and in no case exceed 270 days. The European and its Member States submit that a comparable timeframe should be considered at the multilateral level.]

48. The Working Group may wish to consider the suggestion in the second sentence of paragraph 1 for the application of accelerated proceedings in certain instances where the subject of the appeal is limited to a distinct issue (for example, for some procedural questions, or certain grounds for appeal). 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.

[**European Union and Member States:** The European Union and its Member States agree that the appeal tribunal should be able to dismiss appeals early where such appeals are manifestly unfounded.]

49. The Working Group may wish to consider whether the discretion of the appellate tribunal to extend the timelines should be limited, with the provision defining the limited circumstances in which delays might be allowed, and whether an exhaustive determination of such circumstances is possible.

50. Regarding an analysis of the issue of timelines, considering other comparable appellate mechanisms, it may be noted that most appeal mechanisms take more than one year to issue their decisions, even close to two years in a number of cases, and do not prescribe hard deadlines.[9] When specific deadlines are determined, empirical data demonstrates systematic non-compliance with timelines.[10] Moreover, providing for hard deadlines that re not complied with creates uncertainty about the fate of the appeal, which should be avoided.

51. Regarding the possible measures to ensure compliance with the time frames and the consequences for non-compliance, the Working Group may wish to consider several options from non-coercive to more radical measures. The appellate tribunal could describe the steps taken to comply with the timeline and suggest any modifications to the procedures and practice to ensure that any failure to comply with the deadline is not repeated. The appellate tribunal may also be required to use its best efforts to meet the time limits and have a duty to advise the parties if it is unable to comply with the deadline and to state when it anticipates issuing the decision. Another option would be for the appellate tribunal to obtain the parties' consent to extend a prescribed deadline. A more radical measure would consist in reducing the pay of the judges of the appellate tribunal in proportion to the length of the delay. [11] If a permanent body does not comply with deadlines, it may also be for structural reasons, for instance insufficient resources, which would be a matter for the constituting States to address.

7. Post-decision remedies

52. Draft provision 7 provides for post-decision remedies, including interpretation and correction (A/CN.9/1050, paras. 105 and 113; see also A/CN.9/1004/Add.1, para. 46).

Draft provision 7

1. The appellate tribunal may correct any errors in computation, any clerical or typographical errors or any errors of similar nature on the request of a party, with notice to the other party, or on its own initiative within [30] days of the date of the decision it rendered.

2. If so agreed by the parties, a party, with notice to the other party, may request the appellate tribunal to give an interpretation of a specific point or part of the decision. If the appellate tribunal considers the request to be

[9] For instance, the International Criminal Court (ICC) does not specify any deadline for its Appeals Chamber to issue its decisions. Rule 156(4) of the Rules of Procedure and Evidence of the ICC states that the appeal shall be heard as expeditiously as possible. Based on the ICC website and the decisions of the Appeals Chamber, the time period between the filing of the appeal or grant of leave to appeal and the Appeals Chamber's decisions varied between 440 days and 796 days. Likewise, the statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) does not provide any timeline for the Appeals Chamber to render its decisions. A sample of cases shows that the time period between the judgement of the first instance and the Appeals Chamber's decisions ranged from 394 days to 828 days. However, Rule 116bis of the Rules of Procedure and Evidence provides for expedited appeals procedure, on the basis of the original record of the first instance and written briefs only, for specific decisions such as preliminary motions. In one example of such expedited procedure, the appeals decision was issued 23 days after the first instance decision (Case No.: IT-02-54-AR65.1, Appeals Chamber's Decision of 17 March 2006). Similar procedures can be found for the International Criminal Tribunal for Rwanda. Based on a review of some cases, the time periods between the original decision and the Appeals Chamber's decisions ranged from 375 days to 1,004 days. In comparison, studies on ICSID annulment procedures report durations of 639 days or 730 days between the registration of the annulment request and the decision of the ad hoc committee.

[10] Pursuant to Article 17.5 of the DSU, the Appellate Body should issue its report within 60 days of the appeal notification. If it cannot comply with this deadline, it shall inform the Dispute Settlement Body in writing of the reasons for the delay and issue the report within 90 days of the appeal notification. Based on a report of USTR on the Appellate Body of the WTO dated February 2020, before 2011, the Appellate Body met the 90 -day deadline in an overwhelming majority of cases (87 out of 101 appeals). In 14 cases the Appellate Body obtained the parties' consent to exceed that deadline. After 2011, the average length of an appeal was 133 days. After 2014, not a single appeal has been completed within the 90 -day deadline. The average for appeals filed from May 2014 to February 2017 was 149 days.

[11] The ICC International Court of Arbitration has established such a practice since 2016. The Court may lower the fees unless it is satisfied that the delay is attributable to factors beyond the arbitrators' control or to exceptional circumstances, and without prejudice to any other measures that it may take, such as replacing one or more of the arbitrators. See Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration, 1 January 2021, para. 156.

justified, it shall make the correction or give the interpretation within [30] days of receipt of the request. The interpretation shall form part of the decision.

[**European Union and Member States:** The European Union and its Member States note that language along the lines of draft provision 7, which are also foreseen in the ICSID system, are useful and would be ready to consider them.]

8. Manageable case load and issue of systematic or frivolous appeal

53. 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. Scope of review in article 2

54. A first approach would be to ensure that the scope of review in article 2 would not result in a large number of appeals, possibly by introducing a control mechanism to filter or dismiss frivolous or dilatory appeals that would not meet on a prima facie basis the grounds for appeal (A/CN.9/1050, para. 113).

55. This could be implemented through an institution or a body which, by assigning cases within the appeals facility to one or the other chamber or team of judges would also monitor, control and apply filter, and dismiss cases. This question is therefore also closely connected to the overall organization of the appellate mechanism and the various organs that will compose it. In addition, the Working Group may wish to consider whether to allow the tribunal to make use of sanctions against frivolous appeal on jurisdiction.

[**European Union and Member States:** The European Union and its Member States are open to exploring options to filtering appeals with a view to ensuring a manageable case load of the appeal tribunal and avoiding systematic or frivolous appeals. While the European Union and its Member States' original idea is that the functions of the filter described in paragraph 55 would be carried out by the appeal tribunal, it is noted that different mechanisms could also be envisaged..

The understanding is that this mechanism would operate alongside the possibility for manifestly unfounded appeals to be dismissed early as described in draft provision 9 below.]

b. Rules of procedure and evidence

56. The Working Group may wish to consider that the rules of procedure to be adopted by the appellate mechanism would also have an impact on the manageability of case load and might assist to filter claims. While such rules would need to be determined by the appellate mechanism itself, a generic provision referring to them might be considered, as follows.

Draft provision 8

The appellate tribunal shall ensure that the proceedings are held in a fair and expeditious manner and that proceedings are conducted in accordance with the rules of procedure and evidence.

Comment on draft provision 8

57. The rules of procedure and evidence would contain indications that parties must submit the arguments for appeal, clear references to the records, the factual and the legal basis for appeal; they could have the obligation to not only show that the first-tier tribunal committed an error, but also to prove that this error caused a miscarriage of justice, which would imply a rather higher threshold than simply a reassessment of the evidence. The rules could also provide a detailed list of issues the requesting party must submit to ensure that there is no unnecessary back and forth between the tribunal and the parties.

b. Early dismissal mechanism

58. The Working Group may wish to consider the following draft provision on early dismissal of manifestly unfounded appeals, modelled after Rule 41(5) of the ICSID

Arbitration Rules (A/CN.9/1050, para. 59):[12]

Draft provision 9

1. A party may, no later than 30 days after the notice of appeal, and in any event before the first session of the appellate tribunal, file an objection that

[12] As indicated by ICSID, some investment treaties contain procedures similar to Rule 41(5), which are applicable to cases brought to ICSID under these instruments. An example of this is Articles 10.20.4 and 10.20.5 of the United States -Dominican Republic - Central America Free Trade Agreement (CAFTA). These provisions were invoked in *: Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, August 2, 2010; and *Railroad Development Corporation v. Republic of Guatemala* , ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, November 17, 2008

the appeal is manifestly without merit. The party shall precisely indicate the basis for the objection.

2. The appellate tribunal, after giving the other party the opportunity to present its observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to object, in the course of the proceeding, that an appeal lacks merit.

Comments on draft provision 9

59. The purpose of draft provision 9 would be to dispose of unmeritorious appeals at the preliminary stage of a proceeding. It would apply to appeals on jurisdiction, as well as on the merits. If the entire appeal were to be dismissed because of a manifest lack of merit, the appellate tribunal would render a decision which disposes of the appeal. The Working Group may wish to consider whether an early dismissal mechanism should be provided, given the risk that such a mechanism might result in additional delays, and in light of the possibly already existing disincentives for bringing a frivolous appeal.

[**European Union and Member States:** In view of the European Union and its Member States, the idea that the appeal tribunal be able to dismiss appeals early where such appeals are manifestly unfounded is a desirable one and note that a similar mechanism is part of its most recent practice in the context of the Investment Court system.]

c. Security for costs

60. The Working Group considered that security for costs could deter unnecessary or frivolous appeals and could function as a filter to ensure the manageability of appeals.[13] The Working Group may wish to consider the following draft provision on security for costs:

Draft provision 10

1. The appellate tribunal may request the [appellant][investor] to provide security for the costs of appeal [and for any amount awarded against it in the provisional decision of the first-tier tribunal]. It may also request the placement of a bond of up to – percent of the amount of the decision of the first-tier tribunal that is appealed.

*2. [*criteria/requirements for ordering security for costs – Guidance on amount*]*

Comments on draft provision 10

61. It was noted in the Working Group that if understood as a filter, the security for cost should nevertheless not be excessively high, so as to avoid limiting the access to justice for small and medium-sized enterprises in particular, in addition to other investors. It was suggested that specific criteria/requirements for ordering security for costs should be provided and that guidance should be provided to the appellate tribunal regarding the amount of security for cost (A/CN.9/1050, paras. 109-111). Also, in light of the suspensive effect of appeal, and the accrual of interest, paragraph 1 provides for the possibility to post a bond to prevent frivolous appeals

62. The Working Group may wish to note the options contained in paragraph 1 and consider whether security for costs should apply to the party making the appeal. The Working Group may wish to consider whether security for costs could become a condition for presenting an appeal, with possible exceptions for SMEs and small claims, or for appeals by Least Developed Countries.

[**European Union and Member States:** The European Union and its Member States consider that the reference in paragraph 1 to "costs of appeal" may need to be defined more precisely, in particular in the scenario of a permanent mechanism with a permanent (and not case-specific) remuneration of the adjudicators. In order to prevent that the posting of very significant amounts as security for costs acts as a barrier to appeal, it is the view of the European Union and its Member States that some guidance should be provided to take into account the situation of developing countries as well a certain categories of investors (such

as SMEs or vulnerable investors).

With regard to the second sentence of paragraph 1, the European Union and its Member States are open to exploring options relating to the placement of a bond to prevent abusive appeals. It would be advisable however to subject such requirement to clear guidance for the appeal tribunal, in order to prevent that it results in undue barriers to justice for specific actors, notably least-developed countries or SMEs.

63. Paragraph 2 would aim at limiting the scope of security for costs by providing specific criteria/requirements for ordering security for costs. It is meant to include specific guidance to the appellate tribunal with regard to the amount. It is suggested that this provision would follow the text to be developed by the Working Group on this matter (see document [*reference to be included*] (on procedural rules reform)).

[**European Union and Member States:** Similar considerations to those made in relation to the second sentence of paragraph 1 would apply in relation paragraph 2. Reference is made to the importance of ensuring that rules do not have undue implications for certain actors.]

[13] The Working Group may wish to consider document A/CN.9/WG.III/WP.192 on security for cost and frivolous claims and may wish to consider this issue in light of its more general consideration of the topic.

B. Additional draft provisions

1. Miscellaneous provisions

64. The Working Group may wish to note that, besides the questions of selection, appointment, removal methods for adjudicators at the appellate level which were preliminarily discussed at the fortieth session (A/CN.9/1050, paras. 45-47; see also A/CN.9/WG.III/WP.— (Selection and appointment of ISDS tribunal members), the provisions to be addressed include the notice of appeal, the written pleadings of the parties (content and time limits for filing), the extension of deadlines, the hearing (open or confidential), the evidence, provisional measures, default of one party, discontinuance, the content of the decision, and the publication of decisions.

65. If the appellate mechanism is institutional, the Working Group might also wish to consider the administrative services to be provided.

2. Draft provisions for a multilateral instrument

66. The Working Group requested the Secretariat to prepare a draft provision on possible declarations/reservations by States, providing flexibility with regard to the type of decisions that could be subject to appeal (A/AN.9/1050). In that light, the Working Group may wish to consider the following draft provision:

> *"A Party to this Convention may declare that the right to appeal [can][cannot] be exercised in relation to the following decisions: [(a) decision on jurisdictions; --*

C. Options for establishing an appellate mechanism

1. General comments

67. 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 its 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).

68. In addition, the Working Group may wish to note that the form under which the appellate mechanism would be established will have an impact on the ability of such mechanism to harmonize an increasingly fragmented international jurisprudence and law and to contribute to consistency, integrity and certainty.

2. Possible models

a. ***Appellate mechanism for application by treaty Parties, parties to an investment contract, disputing parties or institutions***

69. An appellate mechanism may be developed as a model (i) for inclusion in investment treaties by Parties, or in investment contracts, (ii) for use on an ad hoc basis by disputing parties, or (iii) as an option available under the rules of institutions handling ISDS cases. The development of a model appellate mechanism would ensure that the appellate process available in ISDS would be harmonized to the extent that the users would not alter it. However, the appellate mechanism would function in a decentralized manner. While such a mechanism would aim at ensuring correctness of decisions, the Working Group may wish to consider that its impact on consistency and predictability might be more limited.

(i) *Treaty-specific appellate mechanism*

70. The proposal for an appellate mechanism in ISDS found its way in investment treaties as programmatic language, with some investment treaties providing for the possibility of establishing an appellate mechanism in the future, either on a multilateral [14] or bilateral [15] basis. Certain treaties refer to both a multilateral agreement establishing an appellate mechanism in the future and negotiations regarding a bilateral appellate system, [16] some refer to a multilateral agreement establishing an appellate mechanism in the future, [17] and others to negotiations for a bilateral appellate system. [18] Recent treaties have included bilateral appeal mechanisms for decisions made by tribunals as part of a standing mechanism. [19]

(ii) *Ad hoc appellate mechanism*

71. An appellate mechanism could also be developed on a purely ad hoc basis, with the appellate panels being constituted by the parties on a case-by-case basis, following the same pattern as the constitution of first instance arbitral tribunals in the current ISDS framework based on international arbitration. Such appellate tribunals could be constituted in the context of particular disputes and in a manner similar to the way in which the first-level ad hoc arbitral tribunals were established.

(iii) *Institutional appellate mechanism*

72. An appellate mechanism could be developed for use by institutions handling ISDS cases, to the extent that the instrument that established the relevant institutions would permit such mechanism. This would come close to the setting up of a permanent body, hosted by an existing institution. The proposal by ICSID suggests that a single appellate mechanism under the ICSID framework would be preferable over multiple mechanisms under different treaties. The new facility was suggested to b e designed so as to be compatible with any type of investment arbitration (under the ICSID Convention and Rules, the UNCITRAL Arbitration Rules or other rules).[20]

[14] See, for instance, Article 28(10) of the 2004 United States Model Bilateral Investment Treaty (which originates from the 2002 Trade Promotion Authority legislation in the United States of America, 19 U.S.C. § 3802(b)(3)(G)(iv), referring to "an appellate body [...] to provide coherence to the interpretations of investment provisions in trade agreements.") and the 2012 United States Model Bilateral Investment Treaty, articles 28 and 34, Annex D; see also the Comprehensi ve and Progressive Trans-Pacific Partnership (CPTPP), Article 9.23(11), which provides that if an appellate mechanism is constituted in the future, the awards rendered under the CPTPP will be subject to this mechanism.

[15] See, for instance, Annex D to the 2004 United States Model Bilateral Investment Treaty.

[16] Singapore-USA Free Trade Agreement of 6 June 2003 (1 January 2004), Article 15.19(10); Chile - USA Free Trade Agreement (1 January 2004), Article 10.19 (10), Annex 10-H; Morocco - USA Free Trade Agreement (1 January 2006), Article 10.19(10), Annex 10-D; Uruguay - USA Bilateral Investment Treaty (31 October 2006), Article 28(10), Annex E; Peru - USA Free Trade Agreement (1 February 2009), Article 10.20(10), Annex 10 -D; Oman - USA Free Trade Agreement (1 January 2009), Article 10.19(9)(b), Annex 10 - D; Panama - USA Free Trade Agreement (31 October 2012), Article 10.20(10), Annex 10-D; Colombia - USA Free Trade Agreement (2012), Article 10.20(10), Annex 10 -D; Australia – Republic of Korea Free Trade Agreement (12 December 2014), Article 11.20(13), Annex 11 -E; Central America Free Trade Agreement between Costa Rica, Dominican Republic, Guatemala, Honduras, Nicaragua, El Salvador, and USA (1 January 2009), Article 10.20(10), Annex 10-F.

[17] Panama – Peru Free Trade Agreement (1 May 2012), Article 12.21(9); Costa Rica – Peru Free Trade Agreement (1 June 2013), Article 12.21(9); Nicaragua – Taiwan Free Trade Agreement (1 January 2008), Article 10.20(9); Article 9.23(11), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Viet Nam, (30 December 2018); see also Dutch 2018 Model Investment Agreement, Article 15.

[18] China - Australia Free Trade Agreement (20 December 2015). Article 9.23 provides: "Within three years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards rendered under Article 9.22 in arbitrations commenced after any such appellate mechanism is established. Any such appellate mechanism would hear appeals on questions of law."; Canada - Republic of Korea Free Trade Agreement (1 January 2015), Annex 8-E.

[19] See for e.g. Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (provisionally in force since 21 September 2017), Chapter 8, Section F; European Union-Viet Nam Investment Protection Agreement (signed on 30 June 2019), Chapter 3, Section B; European Union-Singapore Investment Protection Agreement (signed on 19 October 2018).

[20] See ICSID Secretariat (2004), Possible Improvements of the Framework for ICSID Arbitration, Discussion Paper.

b. Permanent plurilateral or multilateral appellate body

73. The reform may take the form of the establishment of a permanent multilateral appellate body, which could either complement the existing arbitration regime, or constitute the second tier in a multilateral investment court. Certain investment treaties already include a reference to an appellate body to be set up on a multilateral basis.

(i) *As a standalone appellate body, complementing the current arbitration regime*

74. A multilateral appellate body could be established as a complement to the current ISDS regime, which would maintain most of its basic features. A multilateral appellate body could be staffed by tenured, professional adjudicators and supported by a permanent secretariat.

(ii) *As a second tier in a multilateral investment court*

75. A multilateral appellate body could also be established as a second tier in a multilateral investment court, staffed by tenured, professional judges and supported by a permanent secretariat.[21]

[**European Union and Member States:** As the European Union and its Member States have explained in past interventions and submissions, the preferred reform option is the establishment of a permanent multilateral court encompassing standing first instance and appeal tribunals. For the reasons detailed above, the standing nature of the court, including the appeal tribunal, would allow for it to function in a manner that ethical matters would be dealt with before a dispute is initiated. In addition, proceedings under the permanent court would also ensure efficiency and its procedural rules would prevent abuse.]

[21] A standing mechanism might also include (i) mechanisms for ensuring early dismissal of unfounded claims; (ii) a possibility for encouraging parties to solve their dispute through mediation; (iii) a mechanism to cater for possible counter-claims by respondents; (iv) a mechanism for consolidation of cases, and management of the relation between procedures at the domestic level and remedies that can be obtained through international proceedings, in order to limit instances of concurrent proceedings; (v) rules on the legal costs of the disputing parties, as such costs constitute a significant portion

of the overall costs of the current ISDS regime; (vi) rules on admissibility of third party funding; and (vii), sanctions in case of breach of a code of conduct. A standing mechanism may also be entrusted with inter-State disputes on the interpretation/application of an investment treaty either as sole remedy or alternatively in addition to inter -State arbitration (See the Iran-U.S. Claims Tribunal (Claim Settlement Declaration ("CSD"), Article II(1), Article II(2), and Article II(3)); and the Arab Investment Court (see Unified Agreement, Articles 25 –36). See also the European Court of Human Rights (Articles 33–34), competent both in respect of individual-State complaints and State-to-State disputes. A standing mechanism could also provide the forum to bring claims for denial of justice by domestic courts under treaties that require the exhaustion of local remedies.

The United Nations Commission on International Trade Law

Working Group III (Investor-State Dispute Settlement Reform)

Comments from the Government of the Republic of Korea on the Initial Draft on the Appellate Mechanism

I. Introduction

The Republic of Korea ("Korea") expresses its sincere gratitude to the UNCITRAL Secretariat ("Secretariat") for its tremendous work in preparing the initial draft on the appellate mechanism. Since the Working Group initiated discussions on this topic, Korea has participated in the process of addressing and paid due consideration to this issue and provided its first comments on the appellate mechanism on 15 December 2020. After considering the discussions and progress within the Working Group, Korea hereby submits its comments on the initial draft on the appellate mechanism for the Working Group's further consideration. Any views and comments presented herewith are preliminary in nature and are without prejudice to Korea's future position on this topic. Korea reserves the right to submit additional comments.

II. General comments

As noted in Korea's first comment, the discussion on the appellate mechanism requires a balanced assessment of various factors, including the basic function of the mechanism, the final form of adoption, implementation, and enforcement of the mechanism, amongst others. Each and every discussion on this topic should take into account that the main objective and purpose of introducing an appellate mechanism is to address current concerns on ISDS jurisprudence and to enhance correctness, consistency, coherence, and predictability. At the same time, the Working Group should consider various ways to guarantee effective management of the appeal mechanism to avoid undue cost, time, or unnecessary delay. The Working Group should also aim to prevent further fragmentation of or conflict with the existing mechanism, particularly with regard to the existing review proceedings under the ICSID and in national courts.

III. Comments on draft provisions

1. Scope of appeal – Draft provision 1

(1) Paragraph 1 – final decisions

Paragraph 1 stipulates that decisions by first-tier tribunals that are final and settle an international investment dispute are subject to appeal to the appellate tribunal. Korea welcomes this approach, in the sense that it does not differentiate the form of decisions, and whether the decision is made under an ICSID or non-ICSID framework. Such broad

application will facilitate the development of a harmonized system once the appellate mechanism is introduced.

(2) Paragraph 2 – decisions on jurisdiction

While Korea does not yet hold a strong view on this issue, Korea is of the view that Option 1 is preferable in consideration of the underlying concept that any appeal should be permitted for decisions of a final nature, as set forth in paragraph 1. Option 2 appears to lack the finality requirement as is set forth in draft provision 1(1) and may cause delay in and add complication to the resolution of disputes. Korea also finds Option 1 more cost-efficient and less burdensome, as this allows the appellate tribunal to review all issues and a full record of the case at the same time.

(3) Ancillary questions

Allowing appeals on interim and/or partial decisions may create contradictions within the appellate mechanism, which in principle is designed to review final decisions by first-tier tribunals. In this regard, Korea is of the view that interim and/or partial decisions shall not be subject to appeal unless and until final decisions are made by first-tier tribunals. Any and every interim and/or partial decision should be reviewed along with final decisions by the appellate tribunal.

2. Grounds for appeal – Draft provision 2

Standard of review or grounds for appeal is the foremost important element in shaping the appellate mechanism, as this relates to the determination on the scope of decisions to be covered by the appellate mechanism and would further affect the overall management of the system. As such, grounds for appeal should be clearly defined in order to provide accessibility and predictability.

(1) Grounds for review – Errors of law, fact and damages [draft provisions 2(a) –2(c)]

In its first comment, Korea expressed its support for the approach that the main ground for appeal should be errors in the interpretation or application of the law to address lack of correctness and consistency in current ISDS jurisprudence. As application of the law in this context entails application of the law to relevant facts, Korea is of the view that "an error in the application of the law to the facts of a case" is covered in the current text of draft provision 2(a).[1]

Korea understands the need to particularly address the grounds pertaining to factual assessment and at the same time agrees with the current draft allowing deference to the first-tier tribunal. In this context, the proviso "manifest" has to play a key role so as not to result in de novo or extensive factual review by the appellate tribunal. Although the Secretariat explained in

[1] See, Id. at para. 13.

detail and provided good examples,[2] Korea proposes to provide in the commentary the relevant standard to refer to in determining what would amount to a "manifest error in the assessment of facts" in the context of draft provision 2(b).

Draft provision 2(c) stipulates a specific standard for assessment of damages. Korea notes that error of assessment of damages involves either the wrongful application of relevant legal principles or incorrect assessment of facts affecting the damages claimed. Therefore, the existing Draft provision 2(a) or 2(b) may serve as the grounds for appealing based on errors in the assessment of damages. In addition, simply defining calculation error as an independent ground for appeal is unnecessary as it may be corrected through rectification in the first-tier tribunal. If an error in the assessment of damages remains as an independent ground for appeal as set forth in the draft, any factual determination relating to damages may also be subject to appeal even though no "manifest" error in the assessment of the facts can be found. In this regard, Korea prefers not to treat damage assessment as an independent ground for appeal to avoid any abuse of the appellate mechanism.

(2) Grounds for annulment and setting aside [draft provisions 2(d) - 2(g)]

This issue is heavily related to the fundamental question of how the Working Group decides to set its relationship with the existing review mechanisms, mainly the annulment proceedings under the ICSID and setting aside proceedings in national courts. At this stage, although Korea does not hold a strong view on this matter, it does not seem advisable to attempt to substitute the entirety of the existing mechanisms. In particular, it would be difficult to coordinate with every national court to confirm waiver of judicial review with respect to setting aside proceedings - and such waiver requirement may create a situation in which States would be reluctant to agree to the appellate mechanism, let alone deal with the issue of amending relevant domestic laws. In this regard, Korea proposes maintaining existing review mechanisms to the greatest extent possible and engaging in further discussions on the way forward.

Regardless of the Working Group's ultimate decision, Korea understands the need to avoid potential overlap with the existing review proceedings. However, Korea finds draft provision 2 confusing as it elaborates grounds for annulment or setting aside in draft provisions 2(d) - 2(g) along with the errors of law and errors of fact. It is questionable whether it would be reasonable to allow the appellate tribunal to modify or reverse the substance of the first-tier tribunal's decision purely based on procedural irregularities.

Korea is also concerned about draft provision 2(e). Any appeal on the ground of jurisdiction requires review either of facts or relevant laws and may thus be covered by draft provisions 2(a) and 2(b). Korea finds draft provision 2(e) unclear on whether it requires "manifest" error in the assessment of the facts as is stipulated in draft provision 2(b) for a factual finding on jurisdiction to be subject to appeal. In this regard, the Working Group may consider pursuing an appeal on jurisdiction in accordance with draft provisions 2(a) and 2(b) rather than maintaining a separate ground.

[2] See, Id. at paras 18-19.

If the Working Group decides to maintain the current draft, it should consider whether it would be reasonable and practicable or indeed possible to treat all grounds - errors in law and facts, grounds for annulment and setting aside - in an equivalent manner as is currently provided for in the draft provision 2.

3. Timeline – Draft provision 3

Korea has no particular view with regard to which of the specific timeframes - 60, 90 or 120 days - would be the most appropriate. Korea is of the view, however, that the timeframe for filing an appeal shall, in principle, be determined based on the requirements for filing an appeal. If the Working Group decides that mere confirmation on the intent to appeal suffices, 60 days may be enough. On the other hand, the Working Group may have to permit a longer timeframe if the appellate mechanism requires a full brief for filing an appeal.

With regard to the starting point of the timeframe, Korea is of the view that it should be when the decision of the first-tier tribunal is *notified to the parties.* This is to ensure that each party has acknowledged the decision and to allow the full benefit of the timeframe to exercise the parties' right to appeal. However, Korea acknowledges that this may trigger instances in which a party deliberately refuses to be notified of the decision in order to delay the process of appeal. There should be ways to prevent this, and one way would be adding a provision that includes the consequences of a party's intentional delay of the appeal process. Whether a separate provision is necessary and the specific method to alleviate the concerns regarding possible intentional delay should be further discussed.

4. Decisions by the appellate tribunal – Draft provision 5

Paragraph 2 states that the appellate tribunal may annul a decision on specific grounds, as set forth in draft provisions 2(d) to 2(g). Yet, paragraph 1 does not expressly specify on which grounds the appellate tribunal may "confirm, modify, or reverse" decisions. For the sake of greater clarity, Korea proposes indicating whether the appellate tribunal may "confirm, modify or reverse" decisions on all grounds set forth in draft provision 2, or only on certain grounds, for instance, 2(a) and 2(b).[3]

5. Management – Draft provisions 8-10

As referred to several times, the implementation of the appellate mechanism should strive to prevent abuse and undue costs or unnecessary delays. Thus, Korea supports the stipulation as set forth in draft provision 8, that the tribunal shall ensure a fair and expedited proceeding in accordance with the rules of procedure and evidence.

[3] Note that paragraph 2 specifically indicates that the appellate tribunal may also annul in whole or in part the decisions on any of the grounds set forth in draft provisions 2(d) to (g).

For the purpose of managing the overall caseload of the appellate mechanism, the Secretariat provided early dismissal on manifestly unfounded appeals (draft provision 9) and further invited the delegates to consider the efficacy of an early filter mechanism. While an early dismissal mechanism may enhance the efficacy of the proceedings by deterring frivolous appeals at an early stage, an additional layer of process may lead to further delays in the proceedings. In this regard, early dismissal in the appellate setting, if allowed, shall be implemented in a way that does not unduly burden the proceedings as a whole. Details of the procedural aspects and standards to be applied can be referenced to the document on early dismissal once it is completed within the Working Group.

Unlike in the case of early dismissal where the appellate tribunal has the authority to decide whether an appeal is manifestly frivolous or not, an early filter mechanism (draft provision 10) suggested by the Secretariat is more of an administrative function implemented through an institution of a body in charge of case management. In this regard, Korea proposes that the mandate of the filter mechanism be limited to review of the formalities rather than on a substantive review of the nature of claims, and relevant standards be carefully designed to avoid a de novo review. Reference can be made to the registration process in ICSID where the institution reviews whether the request for arbitration is manifestly outside its jurisdiction.[4]

[4] ICSID Convention, Article 36(3)

Comments by the Republic of Panama on the Appellate Mechanism initial draft

The Republic of Panama ("Panama") expresses its gratitude to the Secretariat of UNCITRAL for preparing the Note on the establishment of an Appellate Mechanism.

Panama wishes to make three (3) general comments (I) before turning to the specific draft provisions under discussions by the Working Group III (II).

I. General Comments

First, Panama welcomes the opportunity to discuss about the possibility of establishing an appellate mechanism. The overarching purpose behind the establishment of an appellate mechanism for investment arbitration is to enhance coherence and consistency in the ISDS system by creating an appellate body able to review manifest errors in the interpretation and application of treaty law. In this sense, an appellate mechanism could avoid decisions where treaty provisions have been improperly interpreted by tribunals, not reflecting the intent of the parties to the treaty, or contrary to the applicable rules of interpretation.

Second, the comments on specific draft provisions, as expressed in this document, are preliminary and without prejudice of any final determination made by Panama regarding the establishment of an appellate body. Indeed, the establishment of an appellate body raises questions regarding the standard of review and the enforcement of appeal decisions under the existing regimes. Even if we accept that a final award issued by an appeal tribunal should be deemed final under the New York and the ICSID Conventions, it is still no clear how it would be enforced in practice.

Third, Panama has not addressed in this document specific comments regarding the options for establishing an appellate mechanism. Although Panama is a Party to investment agreements that contemplate future discussions regarding the establishment of an appellate body, it seems premature to take a stance on the subject of possible models for the creation of a permanent multilateral appellate body.

II. Comments on Specific Draft Provisions

1. Scope of Appeal

Draft provision 1

1. Decisions by first-tier tribunal[s] that are final and that settle an international investment dispute are subject to appeal to the appellate tribunal.

2. Option 1*: Decisions whereby [a][the] first-tier tribunal upholds or declines its own jurisdiction are also subject to appeal. If the first-tier tribunal upholds its jurisdiction, the decision is subject to appeal after the final decision on merits is rendered.*

Option 2*: Decisions whereby [a][the] first-tier tribunal upholds or declines its own jurisdiction are also subject to appeal. If the first-tier tribunal rules as a preliminary question on its own jurisdiction and upholds it, any party may request the appellate tribunal to review the matter; while such a request is pending,*

Sub-option 1: the first-tier tribunal may continue the proceedings and make [an award][a decision].

Sub-option 2: the first-tier tribunal shall stay the proceedings until a decision is made by the appellate tribunal.

Comment:

It is not clear the scope of the term "final" in paragraph 1. The commentary states that paragraph 1 reflects the suggestion that "final decisions, on either merits or jurisdiction, are subject to appeal"; however, according to both, *option 1* and *option 2*, decisions whereby a first-tier tribunal upholds or declines its own jurisdiction are subject to appeal. In Panama's view, decisions upholding jurisdiction are not final decisions that settle the dispute and should therefore be excluded from appeal. This is in line with the current system before ICSID, in the sense that only final awards are subject to annulment.

If the Working Group seeks to include decisions upholding jurisdiction then paragraph 1 needs to be reformulated. Furthermore, *option 2* may increase the numbers of appeals and would not allow the appellate tribunal to have the full record of the case before rendering its decision. Therefore, *option 1* seems to be preferable. If the Working Group would decide to follow *option 2*, then *sub-option 2* seems to be more appropriate as *sub-option 1* would imply parallel procedures, which can be burdensome for the Parties, and particularly for developing States.

Other interim or partial decisions regarding claims should only be subject to appeal after having a final decision that ends the proceedings. On the other hand, Working Group might want to consider the possibility of being able to appeal a decision upholding liability but deferring quantum to a later stage. Indeed, a decision upholding liability would settle the dispute on the merits, even if the quantification of the damages is still pending.

2. Grounds for appeal and standard of review

Draft provision 2

A disputing party may appeal a decision 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 in the assessment of the facts;
(c) [The first-tier tribunal made an error in the assessment of damages, including calculation errors];
(d) Any of the first-tier tribunal members lacked impartiality or independence or the tribunal was improperly appointed or constituted;
(e) The first-tier tribunal wrongly accepted or denied jurisdiction;
(f) The first-tier tribunal ruled beyond the claims submitted to it;
(g) There has been a serious departure from a fundamental rule of procedure.

Comment:

Panama appreciates the Secretariat's effort for listing specific grounds for appeal instead of incorporating grounds by reference to other international instruments such as Article 52 of the ICSID Convention and/or Article V of the New York Convention. Panama believes this is the right path to set the appropriate grounds and standard of review. Keeping the reference to both lists of grounds (under ICSID and New York Conventions) could create a double standard, allowing the appellant to argue the most advantageous provision or combination of provisions to its case.

Appeals based upon errors of law are necessary in order to correct errors in treaty interpretation. Indeed, in treaty-based arbitrations, arbitral tribunals are called on to interpret a wide range of standards included in IIAs, as well as a larger spectrum of principles and norms under public international law. This being said, there is a need to clarify the scope of the term 'law' and whether the provision would cover an error in the "application of the law to the facts of the case", and not only errors in the interpretation of the law.

Similar to the notion of 'law', there is a need to clarify the meaning of 'fact'. Panama is of the view that errors in the appreciation of facts should be limited to manifest errors. This would provide a substantial degree of deference to the findings of the first instance tribunal, reducing unnecessary costs and delays. Certainly, a complete *de novo* review of both law and facts could have a negative impact on the cost and duration of the proceedings.

With respect to errors in the assessment of damages, if included, errors must be manifest, and not simple calculation errors. Calculation errors are already covered by other means. For instance, under the ICSID Convention (Article 49), the Tribunal may rectify any clerical, arithmetical or similar error in the award, at the request of a party. Besides, the Working Group should consider whether it is necessary to have a separate ground on the assessment of damages or if such errors are not already comprised within the grounds of manifest errors in the assessment of facts. The latter seems to be more appropriate.

Lack of impartiality or independence is certainly a relevant matter as to the legitimacy of the award. Arbitrator's bias and breaches of the principles of independence and impartiality have been found to be a breach of procedural public policy.[1] On the other hand, the inclusion of procedural irregularities in the appointment or constitution of the tribunal as a ground for appeal seems to be based in Article V(1)(d) of the New York Convention, although it is silent on the role of the parties' agreement concerning the composition of the tribunal and arbitral procedure. In this regard, the Working Group might want to include a reference to the applicable rules, as follows: *"(d) Any of the first-tier tribunal members lacked impartiality or independence or the tribunal was improperly appointed <u>in accordance with the applicable ethical and procedural rules</u>*".

The appeal based on a wrongly acceptance or denial of jurisdiction needs to be revised in light of *Draft Provision 1* related to the scope of appeal.

With respect to the ground related to ruling beyond the claims submitted to it (i.e., *ultra petita*), one can note that the ground does not apply to awards which fail to address all the issues submitted to the tribunal. This is in accordance with the scope of Article V(1)(c) of

[1] UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016), ¶38.

the New York Convention, allowing for partial recognition of the portion of the award that address issues within the scope of the submission of the arbitration.[2] Ruling beyond the claims submitted to the tribunal could also be considered as a manifest excess of powers under Article 52 of the ICSID Convention. Unlike the case of an annulment proceeding, it is conceivable that under an appeal proceeding, the second-tier tribunal may complete the resolution of the dispute. The Commentary may include clarifications regarding the scope of this ground.

Panama agrees with the inclusion of a serious departure from a fundamental rule of procedure which is a ground that steams from the principle of due process and thus, it is one of the most frequently alleged grounds under Article 52 of the ICSID Convention.

Finally, the Working Group may want to consider the inclusion of the ground set in Article 52(1)(e) of the ICSID Convention on the failure to state the reasons on which the award is based. This is another frequently invoked ground in the context of ICSID proceedings. It is also a requirement under a plurality of arbitration legislations. This ground can be distinguished from an error in the interpretation or the application of the law, yet, one can expect that the appellate body would be able to reexamine the correctness of the legal premises on which the award is based, which it is different from the current annulment system.

3. Timeline

Draft provision 3

> *A disputing party may appeal a decision within [90][60][120] days from the date the decision of the first-tier tribunal is [rendered][notified to the parties].*

Comment:

Panama is flexible on the timeline but it is leaned to setting 90 days from the date the decision of the first-tier tribunal is notified to the parties, following the UNCITRAL Model Law.

4. Suspensive effect of appeal

Draft provision 4

> *1. A disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure in relation to a decision by the first-tier tribunal before any other fora.*
>
> *2. No action for enforcement of a decision by the first-tier tribunal may be brought until either [90][60][120] days from the issuance of the decision by the first-tier tribunal has elapsed and no appeal has been initiated, or until an initiated appeal has been decided or withdrawn.*

[2] Ibid, ¶29.

Comment:

Draft provision 4 is an important provision to ensure that a disputing party would not seek to initiate a similar proceeding in another forum. Panama is also in agreement with an automatic stay of the first-tier decision, excluding parallel proceedings.

Regarding the timeline, Panama is from the point of view that whatever the lapse of time for appeal is provided, this period should be the same for not seeking enforcement of decisions.

5. Decisions by the appellate tribunal

Draft provision 5

1. The appellate 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. Its decision shall be final and binding on the parties.

2. The appellate tribunal may also annul in whole or in part the decisions of the first-tier tribunal on any of the grounds set forth in draft provision 2(d) to (g) [, upon request by a party].

3. Where the facts established by the first-tier tribunal so permit, the appellate tribunal shall apply its own legal findings and conclusions to such facts and render a final decision.

Option 1: If that is not possible, it shall refer the matter back to the first-tier tribunal with detailed instructions [or, when a challenge based on the fact that the tribunal was not constituted in accordance with the applicable rules or lack impartiality or independence has been upheld, to a new tribunal to be constituted and to operate under the same rules as the first-tier tribunal].

Option 2: [*If that is not possible, it may refer back to the first-tier tribunal with detailed instructions and either party may seize the first-tier tribunal to amend the decision accordingly.]*

The decision by the first-tier tribunal as amended shall be [final][subject to appeal. The appellate tribunal shall render a final decision].

[4. Decisions by the appellate tribunal are not subject to any annulment or setting aside procedures and are final and enforceable].

Comment:

Panama is in favor of the power of the appellate tribunal to confirm, modify or reverse the legal findings and conclusions of the first tribunal.

Panama further agrees with the idea that decisions by the appellate tribunal are not subject to any annulment or setting aside procedures and are final and enforceable.

Regarding the remand authority, Panama could support *option 1*, keeping the text in the brackets in order to remand the matter to a new tribunal where the challenge is based on the fact that the tribunal was not constituted in accordance with the applicable rules, or lack impartiality or independence has been upheld.

The decision by the first-tier tribunal as amended shall be final and not be subject to appeal; however, where the case has been remanded to a new tribunal, then, this decision shall be subject to appeal, as it is the case in the current system. This should apply in exceptional circumstances only.

6. Duration of the appellate proceedings

Draft provision 6

1. 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 tribunal issues its decision. For appeals on the grounds under draft provision 2(--) and (--), and for appeals on [list the procedural measures], the appeal proceedings shall not exceed [--] days.

2. When the appellate 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.

Comment:

In the current ICSID system, the arbitral tribunal or the Committee shall issue its decision within 120 days *after the last submission on the application* (new Arbitration Rule 72(5)). Thus, the Working Group may want to consider a similar provision.

7. Post-decision remedies

Draft provision 7

1. The appellate tribunal may correct any errors in computation, any clerical or typographical errors or any errors of similar nature on the request of a party, with notice to the other party, or on its own initiative within [30] days of the date of the decision it rendered.

2. If so agreed by the parties, a party, with notice to the other party, may request the appellate tribunal to give an interpretation of a specific point or part of the decision. If the appellate tribunal considers the request to be justified, it shall make the correction or give the interpretation within [30] days of receipt of the request. The interpretation shall form part of the decision.

Comment:

The possibility of interpretation and correction of a decision is consistent with the current system. The Working Group may want to consider the inclusion of a revision remedy in cases where there is a discovery of a fact of such nature as decisively to affect the decision, in cases where the appellate body will be competent to analyze the facts of the case.

8. Manageable case load and issue of systematic or frivolous appeal

Draft provision 8

The appellate tribunal shall ensure that the proceedings are held in a fair and expeditious manner and that proceedings are conducted in accordance with the rules of procedure and evidence.

Comment:

This provision seems to be an ethical obligation for the decision makers that could be covered by the code of conduct (e.g., *duty of diligence*, *other duties*). Furthermore, issues related to a frivolous appeal could be addressed by *Draft provision 9*, discussed below.

9. Early dismissal mechanism

Draft provision 9

1. A party may, no later than 30 days after the notice of appeal, and in any event before the first session of the appellate tribunal, file an objection that the appeal is manifestly without merit. The party shall precisely indicate the basis for the objection.

2. The appellate tribunal, after giving the other party the opportunity to present its observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to object, in the course of the proceeding, that an appeal lacks merit.

Comment:

An early dismissal mechanism for frivolous appeals is an important feature to dismiss manifestly unmeritorious claims early in the process, before unnecessarily consuming the parties' resources. The Working Group may want to consider more details concerning timelines for the procedure, such as a provision stating that the appellate body must render its decision within 60 days after the last submission on the objection.

10. Security for costs

Draft provision 10

1. The appellate tribunal may request the [appellant][investor] to provide security for the costs of appeal [and for any amount awarded against it in the provisional decision of the first-tier tribunal]. It may also request the placement of a bond of up to – percent of the amount of the decision of the first-tier tribunal that is appealed.

*2. [*criteria/requirements for ordering security for costs – Guidance on amount*]*

Comment:

From Panama's point of view, the appellate tribunal may request the *appellant* to provide security for costs at the request of the other party. In determining whether to order the appellant to provide security for costs, the Appellate body should consider all relevant circumstances, including: (a) party's ability to comply with an adverse decision on costs; (b) party's willingness to comply with an adverse decision on costs; (c) the effect that providing security for costs may have on that party's ability to pursue its appeal; and (d) the conduct of the parties. Additional guidance for ordering security for costs could be found in the new ICSID Arbitration Rule 53. The Working Group may want to consider an exception for SMEs and Least Developed Countries.

Possible reform of investor-State dispute settlement (ISDS)

Singapore's comments on the Appellate mechanism

Singapore thanks the Secretariat for the excellent initial draft on an appellate mechanism. Singapore's comments on the initial draft are set out below, and we have no objections to the publication of these comments.

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
****New** Draft provision 0 – Scope of the Convention** **[Option 1:] Opt-in model adapted from the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("OECD MLI")]** [This Convention][Provisions XX of this Convention] shall apply to any dispute, arising out of an investment, between a Party and a national of another Party: (a) under an international investment agreement: (i) that is in force between two or more Parties; and (ii) with respect to which each such Party has made a notification listing the agreement as an agreement which it wishes to be covered by this Convention [note: the WG may wish to consider how future IIAs can be covered by this convention. For instance, a party to this convention could make an open-ended notification that it intends to cover all its future IIAs	(1) Since this is the first initial draft that touches on systemic reform and refers to a "convention", it might be useful to include a provision on the scope of this convention. This would set out how this convention interacts with *existing* and potential *future* international investment agreements ("IIAs"). Singapore has suggested two versions (an opt-out model and an opt-in model) for the Working Group's consideration and further discussion. Preliminarily, Singapore prefers option 1 (the "opt-in" model), as there would be greater clarity and certainty over which IIAs are or are not covered. We suggest that the "matchmaking" methodology in the OECD MLI could offer a helpful model for Contracting States in existing IIAs to match their consent. Moreover, if option 2 (the "opt-out" model) is selected, drafting changes would have to be made to include a provision on reservations, whose formulation will need to be flexible enough to accommodate various reservations that contracting Parties may contemplate making.

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
where the other part(y)(ies) is party to this convention, unless otherwise stated.] (b) [note: for the WG to consider possible inclusion of other non-treaty-based circumstances, eg, if disputing parties agree for a matter to be appealable, or if any contracting Party to this instrument chooses to notify of any other circumstances which it wishes the appellate mechanism to cover]. **[Option 2]: Opt-out model adapted from the Mauritius Convention on Transparency** [This Convention][Provisions XX of this Convention] shall apply to any dispute between a Party and a national of another Party, arising out of an investment [under an international investment agreement] in which the respondent is a Party that has not made a relevant reservation under provision [x] and the claimant is a national of a Party that has not made a relevant reservation under provision [x].	(2) In addition, we suggest that it would be useful to include a de-conflicting provision. Such a provision could state that the provisions of this Convention shall complement provisions of an applicable IIA pursuant to the opt-in or opt-out mechanism, and shall in the event of an inconsistency, prevail over that treaty. In particular, Singapore considers it important for draft provision 4(1) (Suspensive effect of appeal) to apply to any first-instance award that is covered by this Convention, such that the appellate procedure under this Convention shall be the disputing parties' only means of recourse. In this regard, we wonder if draft provision 4(1) may be appropriately located or articulated as a scoping provision such as here.
Draft provision 1 – Scope of appeal 1. [Awards][Decisions] by first-tier tribunal[s] that are final and that settle the merits of any international investment dispute are subject to appeal to the appellate tribunal. 2. **Option 1**: [Awards][Decisions] whereby [a][the] first-tier tribunal upholds or declines its own jurisdiction are also	(1) Singapore considers that: (a) awards on the merits (regardless of whether they include quantum); and (b) awards on jurisdiction (regardless of whether jurisdiction is upheld or denied), should be appealable. (2) In addition:

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
subject to appeal. If the first-tier tribunal upholds its jurisdiction, the [award][decision] is subject to appeal after the final [award][decision] on merits is rendered. **Option 2**: [Awards][Decisions] whereby [a][the] first-tier tribunal upholds or declines its own jurisdiction are also subject to appeal. If the first-tier tribunal rules as a preliminary question on its own jurisdiction and upholds it, any party may request the appellate tribunal to review the matter; while such a request is pending, **Sub-option 1**: the first-tier tribunal may continue the proceedings and make [an award][a decision]. **Sub-option 2**: the first-tier tribunal shall stay the proceedings until [an award][a decision] is made by the appellate tribunal.	(a) Awards on merits which uphold liability but defer quantum to a later stage should be appealable forthwith whilst the assessment stage is pending, instead of requiring an appellant to wait for the assessment stage to be completed. This helps to save time and costs of the assessment stage, if the appeal reverses the decision on liability. (b) Awards on jurisdiction which uphold jurisdiction should likewise be appealable forthwith whilst the merits stage is pending, instead of requiring an appellant to wait for the entire ISDS to be completed. This helps to save time and costs of litigating on the merits, if the appeal reverses the upholding of jurisdiction. (3) As regards specific drafting suggestions: (a) **"decisions":** Singapore has suggested drafting suggestions to the definition of "decisions" to make clear that they exclude procedural orders that *should not* be subject to appeal. We wonder whether it would be simpler to replace "decisions" with "awards", since "awards" is the terminology typically used in ISDS discourse (*ie*, award on jurisdiction, award on merits/liability and award on damages), and we have inserted this in square brackets in the text above. The term "award" is widely understood, including for purposes of the New York Convention, and Singapore

Proposed draft provision (with Singapore's suggested edits tracked in red)	Singapore's comments
	is keen to ensure that decisions/awards by the Appellate Tribunal are enforceable under the New York Convention. We note the Secretariat's explanation in paragraph 6 of the initial draft that "decisions" seeks to be inclusive so that it can also cover decisions/judgments of an investment court. However, rather than using the looser term "decisions" which risks being overly broad, we suggest instead that the Commentary can clarify that the term "award" should be interpreted as including judgments or similar rulings emanating from a court, which are analogous to awards on jurisdiction or merits from investment arbitration panels. The accompanying Commentary could also clarify that "an award on merits" would include an award upholding liability but deferring quantum to a later stage, and that "an award" can cover partial awards, in the sense (as observed in paragraph 10 of the Secretariat's initial draft) that some claims/claimants have been denied whilst others have been upheld in the award. (b) **"International investment dispute"**: Whilst Singapore has no objections to the phrase "international investment dispute", the Secretariat may wish to standardise how an "international investment dispute" is referred to across the various initial drafts and Working Papers in WG III. For instance, in the context of the Code of Conduct for Adjudicators, Working Paper 209 contains

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
	a working definition for this term. In contrast, Working Paper 213 on Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters, currently employs the description "*any dispute, between Contracting States as well as between a Contracting State and a national of another Contracting State, arising out of an investment [under an international investment agreement]*", which is in turn adapted from Article 25(1) of the ICSID Convention. (c) **"first-tier tribunal"**: The Secretariat may wish to consider whether to include a definition of a "first-tier tribunal" in this initial draft. Preliminarily, Singapore considers that an appellate mechanism should be able to review awards made by various first instance bodies, including a first-tier tribunal of a standing multilateral investment court (if one is established), regional investment courts and the current *ad-hoc* ISDS tribunals. As regards the last category, we recognise that this raises the question of how this appellate mechanism interplays with Article 53(1) of the ICSID Convention which provides that an ICSID award shall not be subject to any appeal or to any other remedy except those provided for in the ICSID Convention. Singapore looks forward to hearing from other WG III delegations and observers on reconciling a possible appellate mechanism with the current ICSID system.

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
Draft provision 2 – Grounds for appeal and standard of review A disputing party may appeal [an award][a decision] 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 in the assessment of the facts, including the appreciation of relevant domestic law; (c) [The first-tier tribunal made an error in the assessment of damages, including calculation errors]; (d) [Any of the first-tier tribunal members lacked impartiality or independence or] the first-tier tribunal was improperly appointed or constituted; (e) The first-tier tribunal wrongly accepted or denied jurisdiction; (f) The first-tier tribunal ruled beyond the claims submitted to it; (g) There has been a serious departure from a fundamental rule of procedure.	(1) **Draft provisions 2(a) and (b)**: Singapore supports draft provisions 2(a) and (b). Singapore suggests clarifying that the appreciation of relevant domestic law, in this context, should be treated as a factual matter. In Singapore's view, "manifest error" means that the factual error must be patently clear and obvious on its face, *per* the ordinary meaning of these words. (2) **Draft provision 2(c)**: Singapore does not support draft provision 2(c). Our view is that an error in the quantum of damages should not be appealable, as a ground unto itself. This is unless the error in the assessment of quantum arose out of an error in the application of law or a manifest error in the assessment of facts, in which case sub-paras (a) or (b) would already respectively address these situations. (3) **Draft provision 2(d) and (g)**: For draft provision 2(d), Singapore wonders whether there is a need to include the words "any of the first-tier tribunal members lacked impartiality or independence" and proposes that it be placed in square brackets. The New York Convention, the ICSID Convention[1], and the UNCITRAL Model Law do not explicitly provide for the lack of independence and impartiality as an independent ground to challenge the award. Nonetheless, we understand that the lack of independence and

[1] Article 57, read with Article 14(1), of the ICSID Convention simply provides that a party may propose to *disqualify* an arbitrator if he or she demonstrates a manifest lack of independence and impartiality.

Proposed draft provision (with Singapore's suggested edits tracked in red)	Singapore's comments
	impartiality can already be subsumed under the notion of the tribunal being "not properly constituted", which corresponds to Article V(1)(d) of the New York Convention and Articles 34(2)(a)(iv) and 36(1)(a)(iv) of the UNCITRAL Model Law.[2] Also, for the second part of 2(d), we propose to replace "the tribunal was improperly appointed or constituted" with "the tribunal was not properly constituted", to mirror the analogous element in Article 52(1)(a) of the ICSID Convention. (4) In addition, we consider that a lack of impartiality or independence on the part of tribunal members would also engage draft provision 2(g), given that such violation of natural justice can amount to a serious departure from a fundamental rule of procedure. (5) The Working Group may also wish to consider including an explicit link between this instrument and the (now draft) Code of Conduct. Draft provisions 2(d) and (g) do not identify the legal framework that would apply to determine whether the constitution of a tribunal has been "proper" or

[2] The Singapore High Court in *PT Central Investindo v Franciscus Wongso and others anor matter* [2014] 4 SLR 978 has considered the lack of impartiality or independence as a ground for setting aside under Art 34(2)(a)(iv) of the Model Law. The court stated, at [134]:

> "I am of the opinion that a challenge to an arbitrator's impartiality or independence is a ground for setting aside under Art 34(2)(a)(iv) [*of the Model Law*]… this is likely to be because of the fact that the requirement of impartiality or independence amounts to a mandatory provision implied under Art 12(2) the breach of which is "not in accordance with this Law".

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
	what rules of procedure apply. (This is unlike the UNCITRAL Model Law, which is self-referencing, and the New York Convention, which refers to the national law of the arbitral seat.) The accompanying Commentary could explain how "serious departure from a fundamental rule of procedure" and/or the ground that "the tribunal was not properly constituted" could encompass a "lack of independence or impartiality", and make appropriate references to the Code.
Draft provision 3 – Timelines A disputing party may appeal [an award][a decision] within [90][60][120] days from the date the [award][decision] of the first-tier tribunal is [rendered][notified to the parties].	(1) Singapore considers that a suitable timeline is 90 days from the date the award is notified to the parties. 90 days provides sufficient time for the party against whom the award is made to make a decision on whether to appeal, without unduly protracting the proceedings. We recognise that Article 52 of the ICSID Convention actually envisions 120 days for annulment applications (and if it is on the corruption ground, 120 days after the discovery of that corruption). Thus, if this present text is intended to eventually replace the analogous procedure in Article 52 of the ICSID Convention, we consider that this interaction will need to be adequately reconciled as we further develop this instrument. (2) Singapore prefers "notified to the parties" over "rendered". The former captures the underlying intent better, as a disputing party can only realistically consider whether it should file an appeal after having sight of the award. Whilst "rendered" was used in Article 52 of the ICSID Convention, it had a special meaning there, namely the date on which the

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
	certified copies of the award were dispatched to the disputing parties (see Article 49(1) of the ICSID Convention).
Draft provision 4 – Suspensive effect of appeal 1. A disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure in relation to [an award][a decision] by the first-tier tribunal before any other fora. 2. No action for enforcement of [an award][a decision] by the first-tier tribunal may be brought until either: (a) the expiry of the period specified in draft provision 3 ~~[90][60][120] days from the issuance of the decision by the first-tier tribunal has elapsed,~~ and no appeal has been initiated, or (b) ~~until~~ an initiated appeal has been rejected or withdrawn.	(1) Singapore supports the principle underlying draft provision 4(1). This paragraph should apply to respondent States and disputing investors which have commenced ISDS under an IIA covered by this Convention. Furthermore, regardless of whether an appeal is eventually filed, this appellate procedure shall be the disputing parties' only means of recourse. In other words, if the disputing investor or the respondent State chooses not to file an appeal under this Convention, they should still not have recourse to other procedures, such as the ICSID annulment procedure. Otherwise, a dissatisfied party could potentially have multiple bites of the cherry with the appeal procedure under this Convention, the annulment procedure under the ICSID Convention, or any setting aside procedure available in non-ICSID cases. (2) Singapore's comments in this regard should be read together with our earlier comments on draft provisions 0 and 1, including in particular, how to reconcile this proposed derogation with the current Article 53(1) of the ICSID Convention.
Draft provision 5 – [Awards][Decisions] by the appellate tribunal	(1) We have proposed deleting the last sentence of draft provision 5(1) (effect of the decision) as it is repetitive of draft provision 5(4), ie, that decisions of the appellate tribunal are final and binding.

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
1. The appellate tribunal may confirm, modify or reverse [an award][~~the~~ a decision~~s~~] of the first-tier tribunal. Its [award][decision] shall specify precisely how it has modified or reversed the relevant findings and conclusions of the first-tier tribunal. ~~Its decision shall be final and binding on the parties.~~ 2. The appellate tribunal may also annul in whole or in part [an award][~~the~~ a decision~~s~~] of the first-tier tribunal on any of the grounds set forth in draft provision 2, paragraph 2(d) to (g)[, upon request by a party]. 3. Where the facts established by the first-tier tribunal so permit, the appellate tribunal shall apply its own legal findings and conclusions to such facts and render a final [award][decision]. **Option 1**: If that is not possible, it shall refer the matter back to the first-tier tribunal with detailed instructions [or, when a challenge based on [the fact that the tribunal was not constituted in accordance with the applicable rules or lack impartiality or independence][Articles 2(d) or 2(g)] has been upheld, to a new tribunal to be constituted and to operate under the same rules as the first-tier tribunal]. **Option 2**: [If that is not possible, it may refer back to the first-tier tribunal with detailed instructions and either party may seize the first-tier tribunal to amend the [award][decision] accordingly.]	(2) In draft provision 5(3), Singapore proposes to replace "the fact that the tribunal was not constituted in accordance with the applicable rules or lack impartiality or independence" with "Articles 2(d) or 2(g)" to avoid having to enumerate the grounds for procedural irregularities separately. Please also see Singapore's comments on draft provision 2, where Singapore had earlier wondered there was a need for the lack of independence and impartiality to be articulated as an independent ground of appeal. (3) Singapore fully supports draft provision 5(4). In our view, after an appeal has been filed, a disputing party should not be able to apply to have recourse to other measures, including annulment proceedings pursuant to Article 52 of the ICSID Convention. Otherwise, a dissatisfied party could potentially have multiple bites of the cherry with the appeal procedure under this Convention, the annulment procedure under the ICSID Convention, and the setting aside procedure under the UNCITRAL Model Law. This should not, however, affect the possibility of requesting the Tribunal to revise, correct, or interpret an award pursuant to draft provision 7, as administrative remedies which do not affect the merits or the substance of the award. This distinction was similarly employed in Article 3.22(1) of the EU-Singapore Investment Protection Agreement.

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
The decision by the first-tier tribunal as amended shall be [final][subject to appeal. The appellate tribunal shall render a final decision]. ~~[~~4. [Awards][Decisions] by the appellate tribunal pursuant to paragraphs 1 through 2 are final and enforceable. A disputing party shall not seek to ~~not subject to any~~ annul~~ment~~, review, ~~or~~ set~~ting~~ aside or initiate any other similar procedure~~s~~ before any other fora ~~and are final and enforceable]~~.[3] 5. Each Party to this Convention shall recognize [an award][a decision] by the appellate tribunal as binding and enforce the [pecuniary] obligations imposed by that decision within its territories as if it were a final judgment of a court in that Party. A Party with a federal constitution may enforce such [an award][a decision] 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. 6. A disputing party seeking recognition or enforcement of the [award][decision] by the appellate tribunal in the territories of a Party to this Convention shall furnish to a	(4) Singapore suggests setting out how Contracting Parties are obliged to enforce the decisions of the appellate tribunal. To this end, we suggest paragraphs 5 to 7 for the Working Group's consideration, which are adapted from Articles 54(1) and (2) and Article 55 of the ICSID Convention. That said, we recognise, and leave open for the Working Group's consideration, the further question of how these paragraphs would operate in the case of a *non-ICSID award* that is subsequently modified by the appellate mechanism – in particular, whether this final award (after appeal) is distinct from the first instance award, and consequently, whether the recognition and enforcement of this final award would continue to fall under the ambit of the New York Convention, or only under this Convention, or both.

[3] For greater certainty, this does not prevent a disputing party from requesting the appellate tribunal to revise, correct, or interpret an award applicable to the proceedings in question.

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
court in that Party a copy of the [award][decision] certified by [X]. Execution of the [award][decision] shall be governed by the laws concerning the execution of judgments in force in the Party in whose territory such execution is sought. 7. Nothing in paragraphs 4 through 6 shall be construed as derogating from the law in force in any Contracting Party relating to immunity of that Party or of any foreign State or Regional Economic Integration Organisation from execution.	
Draft provision 6 – Duration of the appellate proceedings 1. The appeal proceedings shall not exceed [180] days from the date a party to the dispute formally notifies its decision to appeal to the date the appellate tribunal issues its decision. [For appeals on the grounds under draft provision 1(--) and (--), and for appeals on [list the procedural measures], the appeal proceedings shall not exceed [--] days.] 2. When the appellate 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~~ shall the proceedings exceed [270] days.	Singapore suggests that the appeal proceedings shall ordinarily not exceed 180 days (in para 1), and in no case shall the proceedings exceed 270 days (in para 2). Singapore is of the view that a single timeframe works for all types of appeals, including appeals on jurisdictional matters. Since Singapore does not support having appeals on purely procedural matters, Singapore considers that the second sentence in paragraph 1 (which contemplates accelerated timelines in such circumstances) is unnecessary, so we have placed it in square brackets for the Working Group's further consideration.
Draft provision 7 – Post-decision remedies	-

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
1. The appellate tribunal may correct any errors in computation, any clerical or typographical errors or any errors of similar nature on the request of a party, with notice to the other party, or on its own initiative within [30] days of the date of the decision it rendered. 2. If so agreed by the parties, a party, with notice to the other party, may request the appellate tribunal to give an interpretation of a specific point or part of the decision. If the appellate tribunal considers the request to be justified, it shall make the correction or give the interpretation within [30] days of receipt of the request. The interpretation shall form part of the decision.	
Draft provision 8 – Rules of procedure [and evidence] The appellate tribunal shall ensure that the proceedings are held in a fair and expeditious manner and that proceedings are conducted in accordance with the rules of procedure [and evidence.]	Whilst Singapore supports the spirit of draft provision 8, Singapore wonders whether it is necessary for the appellate body to have its own rules of evidence that are distinct from the rules of evidence governing the first-tier tribunal. In response to paragraph 57 of the initial draft, we wonder if draft provision 2 would already set out the higher legal thresholds surrounding the consideration of an appeal, than simply a reassessment of the evidence.
Draft provision 9 – Early dismissal mechanism [1. A party may, no later than 30 days after the notice of appeal, and in any event before the first session of the appellate tribunal, file an objection that the appeal is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection.	(1) Whilst Singapore strongly supports an early dismissal mechanism for claims that manifestly lack legal merit before first-instance tribunals, Singapore wonders whether such a mechanism is appropriate for an appellate tribunal. We understand from paragraph 58 of the initial draft that this provision is modelled after Rule 41(5) in the ICSID Arbitration Rules. However, the considerations at the appeal

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
2. The appellate tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to object, in the course of the proceeding, that a claim lacks legal merit.] [Alt text] The appellate tribunal may, on its own motion, summarily dismiss an appeal if it is satisfied that: (a) it does not have the jurisdiction to hear and determine the appeal; (b) the appeal manifestly lacks legal merit; or (c) [further grounds to be considered by the Working Group.]	stage are different from those at first instance. In addition, we recall that paragraph 59 of A/CN.9/1050 reflected the Working Group's view that "*doubts were expressed with regard to… tools developed to address frivolous claims which might not prove useful at the appellate level*". In the case of an appeal, the relatively shorter timelines for the process, and the provision of security for costs, should partially help to address the mischief of frivolous or manifestly unmeritorious appeals. Singapore is concerned that the provision, as drafted, would allow parties to file unmeritorious objections with a view to delaying the proceedings. (2) Singapore recalls that, at the informal meeting on 2-3 March 2022, the delegation of Zimbabwe suggested that the Tribunal have the power, *proprio motu*, to dismiss appeals where the circumstances called for it. Singapore supports this useful suggestion, which can help achieve the intended objective of early resolution of unmeritorious appeals, without providing additional procedural ammunition for the unnecessary protraction of proceedings. Singapore therefore suggests (in "Alt text" above) how such a power may be scoped, for the Working Group's consideration.
Draft provision 10 – Security for costs 1. A disputing party lodging an appeal shall provide security for the costs of the appeal[, unless the appellate tribunal orders otherwise]. The appellate tribunal may also order the disputing	(1) Singapore has suggested edits to streamline paragraph 1. Singapore's clear preference is for security for costs of the appeal to be *mandatory*. Conceptually, a mandatory furnishing of security for costs at the appeal stage can be justified on the basis that the appellant is seeking to review a

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
party lodging the appeal to provide any other security, [including ~~The appellate tribunal may request the [appellant][investor] to provide security for the costs of appeal [and for~~ any amount awarded against it in the provisional decision of the first-tier tribunal~~]. It may also request~~ or the placement of a bond of up to – percent of the amount of the decision of the first-tier tribunal that is appealed]. 1*bis*. A disputing party may request that the appellate tribunal vary or waive the amount of security ordered pursuant to paragraph 1 where: (a) the disputing party is a small- or medium-sized enterprise or a Least Developed Country; or (b) the amount in dispute on appeal is less than [X]. **[Only if ["unless the appellate tribunal orders otherwise"] is chosen in paragraph 1]** [2. ~~[criteria/requirements for ordering security for costs – Guidance on amount]~~ In determining whether a disputing party should be subject (fully or partially) to the requirement to provide security for the costs of the appeal, the Tribunal shall consider all relevant circumstances, including: (a) that party's ability to comply with an adverse decision on costs; (b) that party's willingness to comply with an adverse decision on costs;	judgment/award that has already been rendered. In this sense, at the appeal stage, the considerations for security for costs are arguably different from those in a case that has yet to be heard at first instance. Singapore further notes that Article 3.19(5) of the EUSIPA, Article 3(6) of the Decision by the CETA Joint Committee on the functioning of the Appellate Tribunal, and Article 3.54(6) of the EUVIPA, all provide that security for the costs of the appeal is *mandatory*. (2) That said, Singapore is aware that many WG III delegates have raised the impact of security for costs on access to justice, particularly for small- and medium-sized enterprises and least developed countries, or for smaller claims. These concerns have also been highlighted in paragraph 62 of the initial paper. Singapore thus suggests inserting paragraph 1*bis*, which enumerates the circumstances under which a disputing party may seek to vary or waive the requirement to provide security for costs. The Working Group may also wish to consider whether to include a definition for "small-, medium- or micro-sized enterprise" or a "Least Developed Country". If the Working Group is so inclined, the following definitions, which are adapted from Singapore's existing FTAs, could be used as a starting point: • "Least Developed Country" means any country designated as such by the United Nations and which has not obtained graduation from the least developed country category;

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
(c) the effect that providing security for costs may have on that party's ability to pursue its appeal; and (d) the conduct of the parties. 3. The Tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (2). The existence of third-party funding may form part of such evidence but is not by itself sufficient to justify an order for security for costs of the appeal.]	• "small- or medium-sized enterprise" means any small- or medium-sized enterprise, including any micro enterprise, as defined in accordance with the respective laws, regulations, or national policies of each Contracting Party. (3) If the Working Group is in favour of providing for further discretion in the usual requirement for security for costs of the appeal, Singapore suggests some possible relevant factors in paragraphs 2 and 3. Our suggested text is adapted from Rule 53(3) and (4) (Security for Costs) of the ICSID Amended Arbitration Rules, which represents a reasonable compromise across the spectrum of differing views that were expressed during the ICSID Rules Amendment Process.
Additional Draft provision for a treaty 1. A Party to this Convention may declare that the right to appeal [can][cannot] be exercised in relation to the following [awards][decisions]: (a) [an award][a decision] ~~on~~ affirming jurisdiction~~s~~; -- 2. A Party that has not made a declaration pursuant to a subparagraph in paragraph 1 may declare that the right to appeal cannot be exercised for that subparagraph with respect to [an award][a decision] arising from its international investment agreement with a Party that has made such a declaration.	(1) Singapore supports further discussions in WG III on whether the convention should provide the flexibility to scope to opt-in/opt-out of the appellate mechanism in relation to certain types of appeals. In relation to paragraph 1, Singapore prefers for this paragraph to allow Parties to declare which types of awards/decisions *cannot* be appealed (*ie*, with all other types being appealable). Singapore is of the view that a decision declining jurisdiction (even in respect of part of a claim) should always be appealable as such a decision is a final decision which extinguishes the claimant's rights over that claim.

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
	(2) Singapore suggests draft paragraph 2, which would enable a Party that has not made a declaration/reservation under paragraph 1, to nonetheless deny the right of appeal based on lack of reciprocity. This draft is adapted from similar provisions in the OECD MLI (see *eg*, Article 23(3)).
C. OPTIONS FOR ESTABLISHING AN APPELLATE MECHANISM	Singapore considers that an appellate mechanism, if established, should strive towards universal coverage. Thus, it should be able to review awards made by various first instance bodies, whether from any standing multilateral investment court (if one should be established), regional investment courts or *ad-hoc* ISDS tribunals. This will better promote the objectives of not just correctness, but also predictability and consistency. Against this backdrop, Singapore considers that a centralised institutional appellate mechanism, in the manner described in paragraph 73 of the Secretariat's initial draft paper, would be the most meaningful. Such an appellate institution would then be able to function both as a standalone appellate body to deal with appeals emanating from the current *ad hoc* system, and *also* as a second tier in a multilateral investment court (for those Parties which have an interest in establishing this). This structure can also benefit from structural synergies and cost-effectiveness in its operations. All of Singapore's comments in the sections above have therefore been made with this consideration in mind.

Proposed draft provision (with Singapore's suggested edits tracked in red)	**Singapore's comments**
	That being said, we recognise that the Working Group will need to also discuss and reconcile certain structural aspects of a permanent appellate mechanism, for example, how to integrate and enable it to interact with the existing ICSID system.

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Federal Department of Economic Affairs,
Education and Research EAER

State Secretariat for Economic Affairs SECO
International Investments and Multinational Enterprises

Comments submitted by Switzerland on UNCITRAL Draft Working Paper on Appellate Mechanism

Date : **13 May 2022**
For: **UNICITRAL Secretariat**

APPELLATE MECHANISM

I. General considerations

1. The UNCITRAL Secretariat Working Paper ("WP") on the Appellate Mechanism ("AM") significantly advances the discussion on the main issues that States will need to consider if they decide to set up such a mechanism. Switzerland is grateful to the Secretariat for its helpful work.

2. Below we provide a few comments and suggestions on the main draft provisions set out in the WP.

3. II. Scope of Appeal

4. Section A.1 of the WP is titled "Scope of Appeal". In fact, it mainly concerns the type of decisions that are subject to appeal.

5. In respect of Draft Provision 1, para. 1, the terms "and that settle an international investment dispute" are, in our view, not needed and not in line with international terminology describing decisions that put an end to the proceedings. As such, they may create uncertainty. The requirement that decisions must be "final" is sufficient in this context.

The main open issue in Draft Provision 1 is whether decisions affirming jurisdiction should be appealed immediately or later with the final decision on the merits (obviously decisions denying jurisdiction are appealable immediately as they are final).

6. As this delegation already pointed out in its comments to an earlier WP on the AM,[1] there are both benefits and drawbacks in allowing for an immediate appeal as opposed to postponing the appeal until the final decision on the merits is rendered. To draw a parallel with the annulment framework, under certain domestic laws, including Swiss law, decisions on jurisdiction must be appealed immediately (see, e.g., Art. 190(3) of the Federal Law on Private International Law); in the ICSID Convention framework, by contrast, only a final award is subject to annulment; hence, a party dissatisfied with a decision on jurisdiction rendered in an ICSID arbitration must wait until the end of the proceeding to challenge the tribunal's jurisdictional findings. The first system (reflected in Draft Provision 1, para. 2, Option 2) has the benefit of achieving immediate clarity over an important question, although it opens the path for potentially more than one challenge proceedings (e.g., one on the decision on jurisdiction and another one subsequently on the final award on the merits). It also makes room for annulment requests that are only motivated by the prospect of slowing down the continuation of the proceedings on the merits. The second system (reflected in Draft Provision 1, para. 2, Option 1) seeks to avoid that the challenge proceedings slow done the overall process and concentrates all challenges to the award into one proceeding. The drawback is that if a final award is set aside on jurisdictional grounds, the merits phase will have been carried out for nothing.

7. We have no strong views on whether one system should be preferred over the other. That said, if Option 2 were to be preferred (immediate appeal of jurisdictional decisions), in our view there should be *no* automatic stay of the first instance proceedings pending the appeal. Indeed, an automatic stay (as envisaged in Sub-option 2) may incentivize dilatory appeals and, in any event, is a delay factor. Hence, if Option 2 were to be retained, Sub-option 1 is clearly preferable, insofar as it leaves discretion to the first-tier tribunal to either continue or stay the proceedings (which discretion appears implicit in the word "may"). To make the rule clearer, Sub-option 1 could be rephrased as follows: "the first-tier tribunal may continue the proceedings and make [an award][a decision], unless it determines that it is appropriate to stay the proceedings until a decision is made by the appellate tribunal".

8. WP, para. 9, asks "whether decisions on admissibility of a claim by a first-tier tribunal should be mentioned specifically or whether they are deemed sufficiently covered by the reference in the comments to decisions 'on the merits'". Upon the understanding that the notion of admissibility is covered by the reference to "merits", we see no need for a specific mention of this point.

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[1] See Comments submitted by Switzerland on two UNCITRAL Draft Working Papers, 19 November 2020 ("Switzerland's Comments, 19 November 2020"), para. 11, third bullet point.

WP, para. 10, invites comments on a number of questions:

> “whether interim decisions are appealable (for instance, a decision upholding liability but deferring quantum to a later stage)”. In our view, this type of interim decisions should be appealed together with the final decision or award.

9.

- “if a decision declines jurisdiction over an investor (but upholds it over a different investor), it should be considered whether the aggrieved investor should be able to appeal the decision immediately as the decision is final”. In our view, this should indeed be the case, because as far as the aggrieved investor is concerned the decision is final. Indeed, there is no reason to oblige the aggrieved investor to wait until the dispute with a different investor is resolved by way of the final decision, not to mention the fact that no final decision will ever be forthcoming if the other investor and the respondent settle their dispute.

- “The Working Group may wish to consider whether partial decisions regarding claims, for instance a decision declining jurisdiction over certain claims only, could be appealed immediately or only with the final decision that terminates the proceedings”. In our view, if a decision declines jurisdiction over certain claims only, one falls within the issue discussed above in respect of Options 1 and 2 of Draft Provision 1, para. 2. The same considerations should thus apply here. A different question arises if a decision settles some claims on the merits and leaves other claims for resolution in another phase. In our experience, while this may very occasionally occur in commercial arbitration, it practically never does in investment arbitration. As a result, it should not be mentioned specifically, with the result that such a decision on part of the claims could only be appealed with the final decision.

10. ## III. Grounds for appeal and standard for review

Subject to our comment below on sub-letter (c), we are generally satisfied with the formulation of the grounds for appeal as reflected in Draft Provision 2. Such formulation appears appropriate as it spells out autonomous grounds crafted from a transnational viewpoint. Furthermore, the language is, in our view, sufficiently clear and concise and adequately tailored to the ISDS-specific needs.

11.

Sub-letter (c) of Draft Provision 2, which is currently square-bracketed, refers to the ground whereby “the first-tier tribunal made an error in the assessment of damages, including calculation errors”. We would suggest deleting this ground. In this respect, we share the observation at WP, para. 16, that such ground is unnecessary in light of the two preceding paragraphs and would only create confusion. As noted in the WP, para. 16:

> appeal mechanisms usually refer to errors of law or of fact, and no reference is found to a separate category. The assessment of damages includes ap-

> plying the law and establishing the facts related to damages. Hence, complaints about damages would necessarily fall either under subparagraph (a) or under (b). The Working Group may wish to consider whether a third category might create confusion and overlaps. In addition, it may be noted that calculation errors are typically remedied in rectification proceeding.

The last sentence from the quote refers to "rectification" proceedings. Further, WP, paras. 23-24, briefly discusses the possibility for "revision" of decisions/awards (and notes that it should be considered whether such application should be brought before the first-tier or appellate tribunal). Furthermore, Draft Provision 7 addresses "post-decision remedies (i.e. correction, which is the same as rectification, and interpretation). We

12. consider that more thought should be given to post-award/post-decision remedies, in particular as those envisaged in Draft Provision 7 appear to concern remedies against the decision of the *appellate tribunal* only. However, there may also be room for post-decision/post-award remedies (other than appeal) for decisions of *the first-instance tribunal*. We therefore encourage the Secretariat to suggest draft language so that the clear articulation of all those remedies with appeal can be further considered.

IV. Timeline

In respect of Draft Provision 3, we consider that 60 or 90 days, but not more, would be

13. a reasonable time limit for initiating an appeal. Under some domestic laws, the time limit to challenge an award is shorter; on the other hand, in the ICSID framework, the time limit to file an application for annulment is longer (120 days). Considering the criticism about the excessive duration of proceedings and the risk that the introduction of an appeal mechanism will increase the duration, we would favor a shorter rather than

14. a longer time period to file an appeal.

With respect to the *dies a quo* (WP, para. 27), it would seem that it should run from notification of the decision/award to the parties.

15.

V. Relationship with annulment and enforcement

We generally share the considerations that underlie Draft Provision 4, as they are set out in WP, paras. 29-37, in particular the need to exclude parallel proceedings for review or annulment (*ibid*., para. 30).[2] WP, paras. 31-37, raise important questions that will need to be considered further by the Working Group. It is indeed of paramount relevance to a properly functioning appeal mechanism that existing annulment remedies be so to say "disabled" in both ICSID and non-ICSID frameworks.

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[2] See also Switzerland's Comments, 19 November 2020, paras. 3-4.

VI. Decisions by the Appellate Tribunal

Draft Provision 5 deals with the effect of an appeal.

We generally agree with paras. 1 and 2.[3] We query, however, the rationale for introducing the square-bracketed requirement in para. 2 referring to annulment on request of a party. Assuming an appeal can only be initiated upon request of a party (as the *chapeau* of Draft Provision 2 makes clear: "A disputing party may appeal…"), it is not clear whether the reference to "upon request by a party" in Draft Provision 5, para. 2, purports to suggest that grounds (d) to (g) may only be invoked by a party, whereas the remaining grounds (a) and (b) (and (c) if that ground remains) may also be invoked by the appellate tribunal *proprio motu*, or whether such distinction only concerns the *effects* of the acceptance of an appeal based on the different grounds. In any event, the distinction should be spelled out together with its merits, demerits, and consequences to allow the Working Group to adopt wording in line with the objectives sought. We would welcome clarification in this respect.

16.

17.

With regard to remand (para. 3), we are in favor of granting such power to the appeal tribunal.[4] We consider that Option 1, including the square-bracketed text, is preferable. Indeed, if an appeal succeeds based on the ground of lack of independence of one or more of the tribunal members, it is obviously not possible to remand the case to the same first-instance tribunal. In that situation, the case should be submitted to a new tribunal. Beyond the scenario of an appeal based on lack of impartiality/independence, one aspect to be considered is the impossibility to remand the case to the first-tier tribunal for other reasons (because, for instance, one of its members is no longer able to act).

18.

19.

Finally, we are in favor of the principle set out in para. 4, which is currently square-bracketed, i.e. decisions by the appellate tribunal should not be subject to any annulment or setting aside procedures and should be final and enforceable. That said, such provision should be better articulated with the last sentence in para. 1 so as to avoid repetitions/overlaps.

20.

VII. Duration of appellate proceedings

At this stage, we have no specific comments on Draft Provision 6. We are in favor of providing reasonable time frames for appellate proceedings, as the new appellate mechanism should not unduly increase the length of ISDS proceedings. That said, time

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3 See also, in this respect, Switzerland's Comments, 19 November 2020, para. 12.

4 See also Switzerland's Comments, 19 November 2020, paras. 13-15.

limits should not be wholly unrealistic as review proceedings may be complex (especially if review extends to facts). Moreover, it is important for the legitimacy of the appellate mechanism that its decision be well-reasoned (if only, because the purpose of appellate mechanism is to ensure consistency and correctness of ISDS decisions), which means that the appellate tribunal should not work under unrealistic time pressure.

VIII. Frivolous appeals and security for costs

We agree that mechanisms should be introduced to allow the appellate tribunal to dismiss frivolous appeals on an expedited basis and to order a party to provide security for costs.

21. At this stage, we have no specific comments to Draft Provisions 9 and 10. Further inspiration on the possible language could also be found in the recent amendments to the ICSID Rules which have addressed both issues.

22. ***

Comments: Appellate Mechanism paper
The Corporate Counsel International Arbitration Group and the United States Council for International Business
May 15, 2022

Introduction

The Corporate Counsel International Arbitration Group (CCIAG)[1] and the United States Council for International Business (USCIB)[2] are grateful for the opportunity to submit comments on the UNCITRAL Secretariat's latest paper on a proposed appellate mechanism.

We understand that the purpose of the Secretariat's paper is to contribute to the task of designing an appellate mechanism, without prejudice to the merits of such a mechanism. Further, we understand, that the intention is to postpone discussion of the merits until the mechanism is fully designed. While we consider this approach to be problematic – it is akin to choosing the colors of the tile in the bathroom in the basement of your new house before you have decided to use tile, keep a basement bathroom, or even move to a new house – we endeavor to follow the current working method and limit our comments to select design features of an appellate mechanism.

In this introduction, we would only flag that we have raised numerous conceptual concerns with an appellate mechanism in our previous submissions to the working group.[3] In our view, an appellate mechanism, however it is designed, would increase substantially the cost and duration of disputes. Further, however it is designed, an appellate mechanism would create significant doubt regarding the enforceability of arbitral awards because, for example, appellate review is inconsistent with the ICSID Convention.

Our concerns would be compounded if the appellate mechanism is structured as a permanent standing body. A permanent appellate mechanism would undermine the legitimacy of the dispute settlement system. It would rob both states and investors of control of the proceedings. It would create precedents that would be difficult if not impossible to reverse, even if they are patently wrong. It would be expensive and burdensome to fund and maintain. In short, it would have most – if not all – the flaws that many working group delegations have highlighted with respect to the creation of a permanent investment court. These flaws are inherent in a permanent appellate mechanism; they cannot be solved through further technical work.

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[1] The CCIAG is an association of corporate counsel from a broad variety of international companies focused on international arbitration and dispute resolution.
[2] USCIB is an association of international companies, law firms, and business associations from every sector of the economy, dedicated to promoting international trade and investment. As sole U.S. affiliate of the International Chamber of Commerce (ICC), the International Organization of Employers (IOE), and Business at OECD, USCIB presents informed business views and solutions to government leaders and policy makers worldwide.
[3] Submission by the CCIAG to UNCITRAL Working Group III (December 18, 2019), https://uncitral.un.org/sites/uncitral.un.org/files/cciag_isds_reform_0.pdf; Submission by CCIAG and USCIB to UNCITRAL Working Group III (December 4, 2020), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/120420_cciag_and_uscib_comments_on_december_15_uncitral_papers.pdf.

We offer these candid views in our capacity as observers in the working group with all due respect to the diverse views of other delegations. We look forward to further discussions.

* * *

Draft provision 2 – Grounds for appeal and standard of review

A disputing party may appeal a decision 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 in the assessment of the facts;

(c) [The first-tier tribunal made an error in the assessment of damages, including calculation errors];

(d) Any of the first-tier tribunal members lacked impartiality or independence or the tribunal was improperly appointed or constituted;

(e) The first-tier tribunal wrongly accepted or denied jurisdiction;

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

(g) There has been a serious departure from a fundamental rule of procedure.

CCIAG/USCIB Comments on draft provision 2

Overall comment

- We have two main concerns regarding this provision: (1) the broad grounds for appeal and standards of review will invite appeals in nearly every case; and (2) filters will not prevent a flood of appeals.

- Paragraph (a)
  - This provision calls for *de novo* review of any tribunal decision with respect to the "interpretation of the law"; in other words, every decision on a matter of law on any issue, not matter how unimportant the issue is to the resolution of the dispute. This alone could prompt appeals in most cases, including strategic appeals on non-core issues designed to draw out the case and create leverage for settlement.
  - But more problematically, this provision extends *de novo* review to the "application" of the law. This would not just invite appeals in every case; it would invite appeals on nearly *every issue* in every case. That is because nearly every issue can be framed as pertaining to the application of the law, *e.g.*, whether the investor owns a covered investment, whether the state's conduct violated the legitimate expectations of the investor under the fair and equitable treatment rule, and whether the state discriminated between foreign and domestic investors in like circumstances in breach of the national treatment rule. There is also no clear

division between the tribunal's application of the law and its interpretation of facts.

  - We have heard the suggestion that the working group will develop "filters" that will ensure that a manageable number of cases are appealed. We think this effort will not be successful. There is no principled basis to allow some appeals but not others in a world of *de novo* review – for example, it is unlikely that an appeal on a legal issue will be regarded as frivolous or illegitimate if the appellate mechanism is empowered to wholly reexamine the legal issue. As an alternative, the working group could consider granting the appellate mechanism or a screening panel plenary discretion to decide which appeals can go forward. But this approach would be perceived as arbitrary and unaccountable.

- Paragraph (b)
  - Even if a clear line could be drawn between legal and factual issues – again, it cannot – limiting review of facts to "manifest" errors may not prove limiting at all. ICSID tribunals have held that a claim is "manifestly without legal merit" if the error can be established "clearly and obviously, with relative ease and despatch."[4] That is a reasonably straightforward task with respect to legal issues, since arbitrators have the training and experience to identify clearly unmeritorious legal arguments. But factual issues are different. An appellate mechanism member will have had no prior exposure to the facts of the case. To determine whether the tribunal's assessment of facts is manifestly erroneous, the appellate mechanism member will likely need to delve into the factual record, which they are not well-placed to do. And if all the facts are in play, there is an incentive for parties to appeal in every case.[5]
- Paragraph (c)
  - This provision appears to apply *de novo* review to any factual assessments pertaining to damages. The logic of applying a *de novo* standard to some facts, but a "manifest error" standard to others, is unclear. Further, with the *de novo* standard, it is especially difficult to foresee a scenario where an aggrieved state or investor would not move to relitigate damages at the appellate stage. There would also need to be a mini-trial on damages – with experts and fact witness testimony – in the appeal, which is inconsistent with the scope and timeframes envisioned.
- Paragraph (d)-(g)
  - These provisions paraphrase and restate some of the grounds for review in the ICSID Convention, the New York Convention, and the UNCITRAL Model Law. In addition to creating the specter of multiple overlapping reviews – discussed below – the drafting raises numerous questions. For example: Why were these grounds chosen and others omitted, *e.g.*, Article 52(1)(e) of the ICSID Convention (pertaining to the tribunal's failure to state reasons) and Article V(1)(b) of the New York Convention (pertaining to the inability to present one's case)?

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[4] *See Trans-Global Petroleum, Inc. v. Jordan*, ARB/07/25, Decision on the Respondent's objection, May 12, 2008, para. 88.

[5] To be clear, even if facts are not in play, an appellate mechanism would likely entertain appeals in most cases. In the WTO – where appeals on factual assessments, manifestly erroneous or otherwise, are excluded – appeals were requested in 71% of cases between 2011 and 2018.

* * *

Draft provision 4 – Suspensive effect of appeal

1. A disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure in relation to a decision by the first-tier tribunal before any other fora.

2. No action for enforcement of a decision by the first-tier tribunal may be brought until either [90][60][120] days from the issuance of the decision by the first-tier tribunal has elapsed and no appeal has been initiated, or until an initiated appeal has been decided or withdrawn.

CCIAG/USCIB Comments on draft provision 4

Paragraph 1

- We understand that the purpose of this provision is to eliminate the possibility that introducing an appellate mechanism would create three stages of review: (1) the tribunal; (2) the appellate mechanism; and (3) annulment/set-aside. Specifically, this provision would eliminate stage three. However, the provision poses practical and legal issues.
- With respect to non-ICSID awards, the Secretariat's commentary (paragraph 36) highlights a serious practical issue: states may need to pass legislation to waive the right to annulment under domestic arbitration law. There is reason to question whether many states would be willing to eliminate review powers that currently rest with the state, *e.g.*, the power to review whether an award violates domestic public policy.[6] Even if some states would amend their legislation, others would not. The result would be a highly fragmented landscape.
- With respect to ICSID awards, the Secretariat's commentary (paragraph 34) states that the appellate mechanism could exclude annulment under Article 52 of the ICSID Convention. Presumably an *inter se* amendment of the ICSID Convention is envisioned – but that may not pass muster under Article 41 of the Vienna Convention on the Law of Treaties, *i.e.*, it may be "incompatible with the effective execution of the object and purpose of the treaty as a whole." Individual courts and tribunals would decide. Inconsistency and fragmentation are guaranteed.

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Draft provision 5 – Decisions by the appellate tribunal

1. The appellate 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. Its decision shall be final and binding on the parties.

[6] *See*, *e.g.*, UNCITRAL Model Law, Art. 34(2).

2. The appellate tribunal may also annul in whole or in part the decisions of the first-tier tribunal on any of the grounds set forth in draft provision 2(d) to (g) [, upon request by a party].

3. Where the facts established by the first-tier tribunal so permit, the appellate tribunal shall apply its own legal findings and conclusions to such facts and render a final decision.

Option 1: If that is not possible, it shall refer the matter back to the first-tier tribunal with detailed instructions [or, when a challenge based on the fact that the tribunal was not constituted in accordance with the applicable rules or lack impartiality or independence has been upheld, to a new tribunal to be constituted and to operate under the same rules as the first-tier tribunal].

Option 2: [If that is not possible, it may refer back to the first-tier tribunal with detailed instructions and either party may seize the first-tier tribunal to amend the decision accordingly.] The decision by the first-tier tribunal as amended shall be [final][subject to appeal. The appellate tribunal shall render a final decision].

[4. Decisions by the appellate tribunal are not subject to any annulment or setting aside procedures and are final and enforceable]

CCIAG/USCIB Comments on draft provision 5

Paragraph 3

- We agree with the premise of this paragraph that an appellate mechanism would need to have remand authority, but we are concerned that the implications of remand have not been probed sufficiently. In particular, the following question needs to be studied: how often will remand be required because the appellate mechanism does not have sufficient facts to render a decision? This needs to be answered to estimate the impact of an appellate mechanism on the cost and duration of the proceedings.
- We suspect that remand will be necessary in many cases – significantly increasing the cost and duration of disputes – for two reasons.
- First, an appellate mechanism can be expected to regularly reverse or modify tribunal decisions. The WTO example is instructive: scholars estimate that the WTO Appellate Body reverses panel decisions in whole or in part in 85% of cases.[7] An investment appellate mechanism – with even broader review powers than the WTO Appellate Body – will also reverse tribunal decisions at a steady clip.
- Second, when the appellate mechanism reverses or modifies a tribunal decision, the appellate mechanism will need to defer to the tribunal to make factual determinations in many cases, since the appellate mechanism will not have the same familiarity with the facts as the tribunal, nor the capacity to engage in additional fact-finding.
    - Side note: If this is wrong and an appellate mechanism takes on the responsibility to make factual determinations despite lacking the tools to do so, there is an even greater problem.

[7] Michel Cartland, Gérard Depayre & Jan Woznowski, *Is Something Going Wrong in the WTO Dispute Settlement?*, Journal of World Trade, Vol. 46, Issue 5 (2012), at p. 989.

- Separately, we are troubled by the Secretariat's unsupported assertion in the commentary (paragraph 44) that "remand would be more efficient in the context of a standing mechanism." The *functus officio* status of an *ad hoc* tribunal after it issues its final decision could be addressed, as the Secretariat acknowledges in the commentary.[8] Further, remand to an *ad hoc* tribunal is arguably *more* efficient than remand to a standing court. For example, members of an *ad hoc* tribunal are better able to manage their caseload and ensure their availability to handle a remand than a standing mechanism, which would theoretically be responsible for handling all ISDS disputes under all investment treaties.

* * *

Draft provision 6 – Duration of the appellate proceedings

1. 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 tribunal issues its decision. For appeals on the grounds under draft provision 2(--) and (--), and for appeals on [list the procedural measures], the appeal proceedings shall not exceed [--] days.

2. When the appellate 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.

CCIAG/USCIB Comments on draft provision 6

Paragraph 1

- We understand that this provision proposes strict deadlines for the appellate mechanism to issue its decisions. As such, this provision does not seem to address the problem that the Secretariat identifies in the commentary (paragraph 50): "When specific deadlines are determined, empirical data demonstrates systematic non-compliance with timelines." This is a significant issue. In the WTO, for example, the Appellate Body is expected to resolve an appeal in 60 days, or 90 days at the latest, but WTO data reflects that between 1994 and June 2021 – effectively the entire history of the Appellate Body – the average length of appeal has been 179 days.
- We surmise that the issue is not that the WTO Appellate Body is unreasonably slow; it is that that the mechanism has been asked to perform a complex task in an unduly compressed period of time.
- The working group should bear this lesson in mind. The working group can impose strict timelines – and even impose punitive penalties, such as reducing the pay of judges that do not meet the deadlines – but the deadlines will not be met in many cases, and if they are met, it may be at the expense of the quality of the appellate mechanism's decision-making.

[8] The Secretariat states: "Remand could also be workable on decisions rendered by ad hoc first-tier tribunals, provided a procedure is designed to allow for the suspension of their functions, pending the decision by the appellate tribunal."

- The simple fact is that appellate review will be time-consuming and expensive. Strict timelines will not change that.

* * *

Draft provision 9 – Early dismissal mechanism

1. A party may, no later than 30 days after the notice of appeal, and in any event before the first session of the appellate tribunal, file an objection that the appeal is manifestly without merit. The party shall precisely indicate the basis for the objection.

2. The appellate tribunal, after giving the other party the opportunity to present its observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to object, in the course of the proceeding, that an appeal lacks merit.

CCIAG/USCIB Comments on draft provision 9

- We have no objection in principle to an early dismissal mechanism. However, we are concerned that such a mechanism will cause further delays in the appeals process – increasing both the cost and duration of the dispute settlement process – without effectively filtering claims.
- As discussed above, if Draft Provision 2 allows *de novo* review of the "application or interpretation of the law," very few appeals could be considered manifestly without merit.
- Separately, it may be instructive to consider data regarding the early dismissal mechanism in ICSID Arbitration Rule 41(5), as that rule employs a similar legal standard for dismissal – "manifestly without legal merit." The ICSID Secretariat reports that as of March 2021:[9]
    - Expedited dismissal requests had been filed in approximately 5% of cases (40 out of 754.
    - Of decided cases, approximately 20% had been dismissed in their entirety (7 of 37).
    - Thus, the percentage of the total number of cases that had been dismissed in their entirety for manifestly lacking legal merit was less than 1% (7 of 754).
- The implication of the ICSID experience is that utilizing an analogous mechanism to filter appeals will not reduce meaningfully the caseload of an appellate mechanism.

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Draft provision 10 – Security for costs

1. The appellate tribunal may request the [appellant][investor] to provide security for the costs of appeal [and for any amount awarded against it in the provisional decision of the first-

[9] ICSID, *In Focus: Objections that a Claim Manifestly Lacks Legal Merit (ICSID Convention Arbitration Rule 41.5))*, March 2021, https://icsid.worldbank.org/sites/default/files/publications/In%20Focus%20-%20Rule%2041.5_final.pdf.

tier tribunal]. It may also request the placement of a bond of up to – percent of the amount of the decision of the first-tier tribunal that is appealed.

2. [criteria/requirements for ordering security for costs – Guidance on amount]

CCIAG/USCIB Comments on draft provision 10

- We are agnostic as to whether the appellate mechanism should be empowered to order a security for costs. Our concern is that any such power should be used infrequently: when there is persuasive evidence that the appellant will be unable and/or unwilling to pay an adverse costs award, and provided that a security would not preclude access to justice. We strongly disagree with the suggestion in the commentary (paragraph 62) that paying a security could be made a condition of filing an appeal. We do not understand the policy rationale for this approach, which would simply make appeals less available for less wealthy states or investors.

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