This is a draft working paper prepared by the UNCITRAL secretariat for the sixth intersessional meeting of Working Group III (Singapore, 7 and 8 September 2023). The draft has been prepared to facilitate the informal discussions at the meeting and reflects work in progress. It does not pertain to reflect the views of the Working Group or the secretariat. Any comments on this draft should be communicated to the secretariat (jaesung.lee@un.org; corentin.basle@un.org) by 30 September 2023.

Draft provision on an appellate mechanism

I. Introduction

1. At its resumed thirty-eighth session in January 2020, the Working Group undertook a preliminary consideration of an appellate mechanism based on document A/CN./WG.III/WP.185 with the goal of defining and elaborating the contours of such appellate mechanism (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 in document A/CN./WG.III/WP.202 (A/CN.9/1050, paras. 63-114).

2. At its forty-fourth session, the Working Group considered draft provisions on the functioning of an appellate mechanism based on document A/CN.9/WG.III/WP.224 on the basis that the views expressed during the session were not to be understood as indicating the need for an appellate mechanism and without prejudice to the final position of States on the various aspects of this reform element (A/CN.9/1130, para. 119-120).

3. The Working Group considered in particular the scope of appeal, the grounds of appeal and different options for the implementation of an appellate mechanism (A/CN.9/1130, para. 125-165).

4. The Secretariat was requested to continue to develop draft provisions on the functioning of an appellate mechanism, which could be employed regardless of the chosen model for implementation and to explore how each model could be implemented and interact with existing review mechanisms, while ensuring the efficiency of the overall system (A/CN.9/1130, para. 166).

5. This Note was prepared with reference to a broad range of published information on the topic[1] and based on the deliberations of the Working Group at its previous sessions.

II. General considerations

At its forty-fourth session, the Working Group considered the interaction of an appellate mechanism with existing review mechanisms as well as models for implementation in its session in January 2023 (see report A/CN.9/1130, paras. 149-165).

149. The Working Group engaged in a discussion on issues relating to the implementation of an appellate mechanism, among others, how it would interact with the existing annulment and set aside mechanisms (referred to as "existing review mechanisms" below), advantages and disadvantages of a three-tier system, and different models of implementation.

1. Interaction with existing review mechanisms

150. Although views were expressed with regard to the need for existing review mechanisms following an appellate review, it was generally felt that the creation of an appellate mechanism should not result in an additional layer of review or a three-tier

[1] See footnote 2 of document A/CN.9/WG.III/WP.202; 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/.

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system, which might result in additional costs and delays in resolving ISDS cases. It was further observed that an appellate mechanism would operate differently depending on whether the decision subject to appeal was one rendered by a first-tier tribunal in a standing mechanism, by an ICSID tribunal (thus not subject to appeal under the ICSID Convention) or a non-ICSID tribunal.

151. It was suggested that an appellate mechanism should aim to replace existing review mechanisms. It was said that for that purpose, grounds for review under existing review mechanisms should, in principle, be included as grounds for appeal and that the decisions of the appellate mechanism should not be subject of review under existing review mechanisms (see para. 159 below). It was highlighted that the grounds for appeal should be broader than the existing review mechanisms to not only address procedural irregularities but also incorrectness or inconsistency of substance.

152. On the other hand, it was observed that an appellate mechanism would need to inevitably operate with existing review mechanisms and should not aim to replace them. This was in light of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the ICSID Convention (which had different States Parties) as well as domestic laws that provided for set-aside procedures, which might not be easy to amend. This was also based on the ground that disputing parties should have the freedom to choose from the different mechanisms. It was said that the safeguards provided for in the New York Convention should be retained, with additional guarantees against possible delays. It was also said that some arbitral proceedings, such as those at the Court of Arbitration for Sport, allowed for appeal but were incorporated into existing review mechanisms, such as those under the New York Convention.

153. It was said that an appellate mechanism should consequently entail the development of means to avoid parallel as well as subsequent proceedings. It was suggested that the instrument providing for an appellate mechanism (including a multilateral instrument on ISDS reform) should contain clear rules addressing the relationship with existing review mechanisms.

154. Additional means to avoid an appellate mechanism creating a three-tier system or leading to multiple proceedings were discussed.

155. One possibility was through a waiver by the disputing parties, whereby they would agree to not resort to any review mechanism in case of an appeal. As to the timing of such a waiver, it was said that the waiver could be a condition for initiating arbitration or for submitting an appeal. It was, however, questioned whether domestic courts would recognize such a waiver.

156. Another possibility was that while disputing parties would be allowed to choose from the appellate or existing review mechanisms, once that choice was made, it would be final (similar to a fork-in-the-road clause). However, it was pointed out that disputing parties might not necessarily agree on the choice, which might lead to multiple proceedings in different forums.

157. Yet another possibility was to eliminate the finality of the first-tier decisions when an appeal was raised, making them no longer subject to existing review mechanisms. It was said that in such instance, a decision would only become final and binding when rendered through an appellate mechanism.

158. It was also mentioned that another possibility would be to ensure that decisions that were the subject of existing review mechanisms and the outcomes thereof did not fall under the scope of an appellate mechanism.

159. While different views were expressed on whether decisions of an appellate process should be subject to existing review mechanisms, it was generally felt that at least the substance of the decision should be final and not subject to further review. This was in light of the fact that there would be other ways to ensure control by States (for example, binding interpretations by States parties to the underlying investment treaty, or decisions by the member States of an appellate mechanism with regard to the decisions rendered

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and the operation of the mechanism more broadly). It was suggested that further consideration should be given to means to ensure due process and the procedural integrity of the appellate process, and to whether such tools could be made part of a self-contained appellate mechanism.

160. In the same vein, views were expressed that the enforcement of decisions rendered by an appellate mechanism should be addressed within the mechanism (draft provision 8) rather than relying on existing enforcement mechanisms under the ICSID Convention or the New York Convention. In support, it was said that this would avoid the creation of a possible fourth tier and lead to a more legally stable framework. However, views were also expressed that ways to make use of existing enforcement mechanisms should continue to be explored.

2. Models for implementation

161. It was said that the interaction with existing review mechanisms and the means to avoid multiple review proceedings would largely depend on how an appellate mechanism were to be implemented. It was recalled that the Working Group had considered an appellate mechanism being established ad hoc (possibly administered by existing institutions) or as a standing mechanism (either as a stand-alone body or a second tier of a body with both first and second-tier tribunals).

162. Preference was expressed for focusing on the development of a standing appellate mechanism, as it could provide for more predictability and ensure correctness of awards. On the other hand, it was stated that it was premature to rule out other models, as an ad hoc model could be more cost-effective, in line with the principle of party autonomy, and avoid political influence.

163. It was noted that a permanent registry or administering institution, full-time judges with an independent appointment process, a secure budget for operation, and a permanent venue, were characteristics that would distinguish a standing appellate mechanism from an ad hoc one. On the other hand, it was mentioned that there could be some commonalities, for example, if a roster were to be established or if an existing institution were to function as the administering institution or the secretariat. It was therefore suggested that work could be undertaken to assess how a roster could be established and operate both in an ad hoc and a standing setting, also taking into account the practice at ICSID. It was also suggested that the establishment of chambers could be envisaged to address certain types of disputes or disputes among States from the same regional groups or regarding the same investment treaty. In this context, the benefits of embedding an appellate mechanism within a standing body composed of both tiers were also underlined.

164. It was mentioned that in further considering the implementation models, due consideration should be given to how an appellate mechanism could impact on States which were not members of the appellate mechanism, as well as investors from those States. This included questions like whether and how they might be bound by or have access to an appellate mechanism as well as the possible impact that an appellate decision could have on the interpretation of their investment treaties.

165. It was generally felt that the advantages and disadvantages of the different models of implementation would need to be further examined in light of the main objectives of an appellate mechanism. It was also mentioned that discussions with regard to other reform elements (notably, the structure and financing of a standing multilateral body, the selection and appointment of adjudicators in a standing mechanism and the selection criteria of ad hoc arbitrators) could shed light on the discussions for an appellate mechanism, with necessary adjustments.

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III. Draft provisions on an appellate mechanism

[The Working Group considered draft provision 1 on the scope of appeal and draft provision 2 on the grounds of appeal at its forty-fourth session in January 2023 (see A/CN.9/1130, paras. 125-148). Those draft provisions have been updated below based on the deliberations in the Working Group. Draft provisions 3-11, which have not yet been discussed in the Working Group, are included from document A/CN.9/WG.III/WP.224 unchanged. It should be noted that the Draft provisions on procedural and cross-cutting issues (A/CN.9/WG.III/WP.231) contain provisions which may also apply to the conduct of the appellate proceedings].

1. Scope of appeal

At its forty-fourth session, the Working Group had considered draft provision 1 (see report A/CN.9/1130, paras. 125-135).

1. Draft provision 1 – "Scope of Appeal"

125. The Working Group considered draft provision 1 which provided for the right of appeal by the disputing parties as well as the scope of appeal.

126. Views diverged on whether disputing parties should be provided a right to appeal or a right to request leave for appeal. It was stated that even when a disputing party had a right to appeal, there should be a filter or a screening mechanism particularly to avoid appeals that were dilatory, unmeritorious, or otherwise unjustified, so that not every decision would necessarily be reviewed by an appellate mechanism. In this regard, references were made to mechanisms providing for early dismissal, security for costs and time limitations, as well as the exploration of other types of mechanisms.

127. Those in support of a right to request leave for appeal highlighted that this would shift the burden of substantiating the appeal to the appellant. The need to ensure efficiency of an appellate mechanism and the need to limit the number of appeals, particularly frivolous appeals, was underscored. It was, however, questioned how such requests would be handled and by whom. It was suggested that for certain decisions (for example, interlocutory decisions), disputing parties would be required to request leave, while other decisions might be appealed without such a requirement.

Decisions subject to appeal

128. As to the decisions that would be subject to appeal, it was widely felt that the scope should not be too broad to ensure an efficient appellate mechanism. It was said that this could be achieved by providing for a limited overall scope or by providing for a broad scope with a list of exclusions. Preference was expressed for the latter approach.

129. As to the types of investment disputes, it was said that "international investment disputes" as defined in the Codes of Conduct provided a good basis for discussion, which might need to be adjusted, for example, to include State-to-State disputes and in light of the different nature of an appellate mechanism.

130. At the current stage, there was general support for including decisions rendered by arbitral tribunals and first-tier tribunals in a standing mechanism within the scope of appeal. It was clarified that decisions by domestic courts would not be the subject of appeal.

131. It was generally felt that decisions on jurisdiction as well as on the merits should both be the subject of appeal. However, views diverged on whether only final awards which had been notified to the parties should be the subject of appeal. In support, it was said that limiting appeals to a final award would bring more certainty, allow the appellate tribunal to have an overview of the entire case and would not interfere with and possibly delay the first-tier proceedings.

132. On the other hand, the advantages of allowing appeal of non-final awards as well as partial awards, particularly those that could have a significant impact on the first-tier proceedings, were also highlighted. In this context, divergent views were expressed on whether certain decisions such as procedural orders, decisions on bifurcation and challenges, should be subject to appeal.

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133. With regard to subparagraph (a), views diverged on whether decisions on interim measures should be excluded from the scope. It was said that they should not be excluded as such decisions could have a substantial impact on the conduct of States, while it was also said that it would depend on the type of temporary measure that was ordered. It was suggested that the meaning of the term should be clarified before any determination could be made.

134. With respect to subparagraph (b), it was generally felt that positive and negative decisions on jurisdiction should equally be the subject of appeal. In support, it was said that there was no reason to differentiate between the two, which might create an imbalance between the rights of the disputing parties. It was further mentioned that in case of remand or reversal, it was possible to either reconstitute the first-tier tribunal or to constitute a new tribunal. The need for clarity on which decisions would and would not be subject to appeal was underscored.

135. With regard to the scope of appeal, the Secretariat was requested to explore further any screening or filter mechanisms to limit the scope of appeal, whether partial or non-final decisions should be subject to appeal and if so at which point, and further develop the types of decisions that could be excluded from the scope of appeal.

6. Draft provision 1 provides for a broad right to appeal decisions on jurisdiction and merits, a right to request leave to appeal interim measures and a list of exceptions from the scope of appeal (see A/CN.9/1130, paras. 127 and 128).

Draft provision 1

1. A disputing party may appeal a decision made by a first-tier tribunal on its jurisdiction or on the merits in relation to an international investment dispute.

2. A disputing party may request leave to appeal an interim measure ordered by a first-tier tribunal to preserve a party's rights.

3. The following types of decisions by a first-tier tribunal shall not be subject to appeal:

(a) procedural orders;

(b) decisions on bifurcation;

(c) decisions on challenges of adjudicators;

(d) […].

Paragraph 1

7. Paragraph 1 refers to decisions by "a first-tier tribunal", which would include an arbitral tribunal constituted to resolve an international investment dispute as well as a first-tier tribunal envisaged in a standing mechanism (see A/CN.9/1130, para. 130), and to an "international investment dispute", building upon the definitions in the UNCITRAL Codes of Conduct for Arbitrators in International Investment Dispute Resolution.

8. It provides that decisions on jurisdiction as well as those on the merits are subject to appeal (see also A/CN.9/1050, paras. 86, 87 and 113; A/CN.9/1004/Add.1, para. 55). Accordingly, final decisions concluding the proceedings as well as prior decisions on jurisdiction (including on the admissibility of a claim), partial decisions on the merits (including, for example, a decision upholding liability but deferring assessment of damages to a later stage) can be the subject of appeal. The term "decision" encompasses awards rendered by arbitral tribunals and decisions by a first-tier tribunal of a standing mechanism.

9. Paragraph 1 establishes a right to appeal for decisions on jurisdiction and on the merits. Alternatively, all decisions covered could be made subject to a right to request leave to appeal (see A/CN.9/1130, para. 126; see also A/CN.9/1050, paras. 92 and 113). The Working Group may wish to further consider filter and screening mechanisms addressing concerns expressed that a right to appeal may lead to dilatory, unmeritorious or otherwise unjustified appeals (A/CN.9/1130, para. 126).

Paragraph 2

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10. Paragraph 2 provides that a disputing party may also request leave to appeal interim measures (see A/CN.9/1130, para. 127, 133).[2] Interim measures may include measures to:

- Maintain or restore the status quo pending determination of the dispute;
- Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
- Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- Preserve evidence that may be relevant and material to the resolution of the dispute.[3]

Paragraph 3

11. Paragraph 3 provides that certain decisions by a first-tier tribunal are not subject to appeal and an exemplary list of such decisions including procedural orders, decisions on bifurcation and decisions on challenges of adjudicators (see A/CN.9/1130, para. 128).

2. Grounds for appeal

At its forty-fourth session, the Working Group had considered draft provision 2 (see report A/CN.9/1130, paras. 136-148).

2. Draft provision 2 – "Grounds for Appeal"

136. The Working Group considered the grounds for appeal provided in draft provision 2.

137. It was generally felt that the draft provision should aim to limit appeals, ensuring a balance between the underlying objectives of an appellate mechanism (for example, achieving consistency and correctness of awards) and the efficiency of the dispute resolution process (avoiding undue delays and costs).

Paragraph 1

138. In order to limit the grounds for appeal, it was suggested that only "unreasonable", "ungrounded" or "fundamental" errors should be grounds for appeal. It was suggested that the same standard could be applied to both subparagraphs. It was generally felt that a de novo review of the case should be avoided.

Subparagraph (a)

139. Some doubts were expressed about the use of the term "application", and it was suggested that subparagraph (a) should refer only to "interpretation" of the law.

Subparagraph (b)

140. It was stated that if errors in the appreciation of the facts were to be grounds for appeal, it should be restricted, for example, requiring the error to be manifest as stipulated in subparagraph (b). However, questions were raised on the meaning of "manifest". It was questioned who would determine whether an error was "manifest". It was also stated that deference should be given to first-tier tribunals with regard to facts and that if errors of fact were found, the case should be remanded to the first-tier tribunal.

141. Differing views were expressed on whether "appreciation of domestic legislation" and "assessment of damages" should be expressly mentioned as a matter of fact under subparagraph (b).

142. It was said that their inclusion might unduly broaden the grounds for appeal. It was also said that they might also fall under subparagraph (a), for example, errors in the assessment of damages

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[2] On interim measures see "David Goldberg, Yarik Kryvoi, Ivan Philippov. Provisional measures in investor-state arbitration, BIICL/White & Case, London, 2023, available at https://www.biicl.org/documents/157_provisional-measures-in-investorstate-arbitration-2023.pdf.

[3] See Article 26 UNCITRAL Arbitration Rules / ICSID Arbitration Rules 47.

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could arise from an error in the interpretation of the law. On the other hand, it was said that if "errors in assessment of damages" were not included as an express ground, errors in the choice or application of the valuation method might not fall under any ground for appeal.

143. It was said that the dichotomy between law and domestic legislation might be clearer in treaty-based investment disputes as the underlying law would be an international instrument. It was also said that the dichotomy might be blurred if disputes arising from treaties, domestic legislation governing foreign investment and investment contracts were to fall under the scope of an appellate mechanism, as the interpretation of domestic laws could be a matter of law. However, it was said that the assessment of domestic law other than the legislation applicable to the dispute (for example, the underlying laws or regulation of a measure that negatively impacted the investor's rights) should be considered a matter of fact. It was also said that contradictions in the interpretation of domestic law by domestic courts and by the appellate mechanism should be avoided.

Paragraph 2

144. It was explained that paragraph 2 was drafted to reflect the grounds provided for in existing annulment and set-aside procedures on the basis that a comprehensive set of grounds in an appellate mechanism could avoid duplication of review. It was said that this could prevent a three-tier review system.

145. However, it was also said that the inclusion of the grounds in paragraph 2 might actually lead to additional overlaps and therefore, a lack of clarity.

146. Some questions were raised with regard to the application and relevance of subparagraph (a) in the context of investment disputes as well as the law that would determine the validity of the arbitration agreement. Questions were raised about the utility of subparagraph (c), in view of paragraph 1, and about subparagraph (d), which was seldomly used, and the costs arising from such cases.

147. It was noted that subparagraph (g) aimed to replicate the grounds found in article 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration, which provided for the setting aside of an award which was in conflict with the public policy of the forum State. In this regard, doubts were expressed about whether a similar concept based on domestic law could be contemplated in an international appellate mechanism. Doubts were expressed about the meaning of "international public policy", and it was generally felt that the subparagraph could cause confusion.

148. Suggestions were made that "new or newly discovered facts" or "unsubstantiated award, absence or lack of reasoning" should be grounds for appeal. It was also suggested that grounds for correction and interpretation should also be grounds for appeal.

12. Draft provision 2 provides the grounds upon which a disputing party may raise an appeal (see A/CN.9/1050, paras. 63-84 and 113). The draft provision should be read in conjunction with draft provision 7 on the possible decisions that an appellate tribunal could make with regard to the first-tier tribunal's decision.

Draft provision 2

1. An appeal should be limited to:

(a) an [manifest] error in the [application or] interpretation of the law; or

(b) a manifest error in the appreciation of the facts, including the appreciation of relevant domestic legislation [and the assessment of damages].

2. Notwithstanding paragraph 1, an appeal may be raised on one or more of the following grounds:

(a) a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it;

(b) the first-tier tribunal was not properly constituted;

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(c) the first-tier tribunal has manifestly exceeded its powers or ruled beyond the claims submitted to it;

(d) there was corruption on part of a member of the first-tier tribunal;

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

(f) the first-tier tribunal decision failed to state the reasons on which it is based, unless the parties have agreed otherwise; and

(g) [the decision by the first-tier tribunal is in conflict with international public policy];

(h) [new or newly discovered facts;]

(i) [unsubstantiated award, absence or lack of reasoning; and]

(j) [grounds for correction and interpretation could be added here].

13. Paragraph 1 provides limited grounds for raising an appeal (A/CN.9/1050, paras. 64-67; A/CN.9/1004/Add.1, para. 28, 29).

14. Subparagraph 1(a) is based on the wording found in recent international investment agreements[4] and refers to an error in the application or interpretation of the law. The notion of "manifest" has been added to address the view expressed in the Working Group that only "unreasonable", "ungrounded" or "fundamental" errors should be grounds for appeal (A/CN.9/1130, para. 138).

15. "Law" means the law applied by the first-tier tribunal in its decision, which could be a treaty providing for the protection of investments or investors, a domestic legislation governing foreign investment or a law governing the investment contract. Issues of law addressed by the first-tier tribunal in its decision as well as the interpretation thereof form the basis of an appeal.

16. Subparagraph 1(b) extends the grounds for appeal to issues of fact and also reflects the wording found in recent international investment agreements.[5] However, it is only a ground for appeal when the error by the first-tier tribunal is "manifest" – commonly understood as there being no ambiguity or controversy that an error exists (A/CN.9/1050, para. 67). In the context of Rule 41(5) of the ICSID Arbitration Rules on preliminary objections (renumbered Rule 41 in the 2022 ICSID Arbitration Rules to address a claim that is manifestly without legal merit), arbitral tribunals have interpreted the word "manifest" as requiring the requesting party to establish its objection clearly and obviously with relative ease and dispatch.[6] In the context of an appeal, the error should be obvious or plain on its face, and should not require a complex analysis.

17. The phrase "including the appreciation of relevant domestic law and the assessment of damages" in subparagraph 1(b) clarifies that a manifest error in the interpretation or application of domestic legislation other than that covered by subparagraph 1(a) (A/CN.9/1050, paras. 68-69)[7] as well as in the calculation of damages or compensation may be the subject of appeal (A/CN.9/1130, para. 143; A/CN.9/1050, para. 72; see also A/CN.9/1004/Add.1, para. 28). The Working Group may wish to consider whether this phrase

[4] See European Union (EU)-Singapore Investment Protection Agreement (IPA) (2018), article 3.19 (1); EU-Viet Nam IPA (2019), article 3.54 (1); EU-Canada Comprehensive Economic and Trade Agreement (CETA), article 8.28 (2)(a); Investment Agreement for the COMESA (Common Market for Eastern and Southern Africa) Common Investment Area, article 13 (1); International Institute for Sustainable Development (IISD) Model International Agreement on the Investment for Sustainable Development, article 14 (1).

[5] Ibid.

[6] Michele Potestà, "Preliminary Objections to Dismiss Claims that are Manifestly Without Legal Merit under Rule 41(5) of the ICSID Arbitration Rules" in Crina Baltag (ed.), ICSID Convention after 50 Years: Unsettled Issues (Kluwer 2017), 249-271; See further: Christoph Schreuer et al, The ICSID Convention: A Commentary (CUP 2010), 938.

[7] See CETA article 8.28 (2)(b).

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unduly broadens the scope of appeal or is already (partially) covered by subparagraph (a) (A/CN.9/1130, para. 142).

18. While paragraph 1 provides limited grounds for appeal, paragraph 2 reflects grounds provided for in existing annulment procedures (article 52 (1) of the ICSID Convention) or setting aside procedures (provided for in domestic legislation based on article 34 of the UNCITRAL Model Law on International Commercial Arbitration[8] (the "Model Law")). This would avoid duplication of review by the appellate mechanism and by existing annulment and setting aside mechanisms.

Grounds in draft provision 2 (2)	Relevant articles of the ICSID Convention	Relevant articles of the Model Law
2 (a)	-	34 (2)(a)(i)
2 (b)	52 (1)(a)	34 (2)(a)(iv)
2 (c)	52 (1)(b)	34 (2)(a)(iii)
2 (d)	52 (1)(c)	-
2 (e)[9]	52 (1)(d)	34 (2)(a)(ii)
2 (f)	52 (1)(e)[10]	-
2 (g)	-	34 (b)(ii)
2 (h)	-	-
2 (i)	-	-
2 (j)	-	-

*[**Note to the Working Group:** The Working Group may wish to consider the extent to which the grounds for annulment and setting aside should be listed as grounds for appeal. This relates to whether an appellate mechanism may substitute or replace those procedures. In light of views expressed for avoiding duplication of review proceedings (see A/CN.9/1130, para. 144; A/CN.9/1050, paras. 77 and 112), an approach would be to include all such grounds in draft provision 2 and further limit parallel review proceedings (see draft provision 5). An alternative approach would be to encourage coordination between the appellate tribunal and the annulment or setting aside authority. It is however questionable whether those authorities would be willing to defer their authorities. The Working Group may also wish to consider whether all of the grounds under paragraph 2 are relevant for the types of disputes subject to the appeal mechanism and clarify the meaning of the notion of "international public policy" in subparagraph (2)(g) (see A/CN.9/1130, para. 146, 147). Subparagraphs (h)-(j) have been added to reflect views expressed in the Working Group (see A/CN.9/1130, para. 148).]*

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[8] Article 34 of the Model Law is modelled on article V the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention") providing grounds for refusing recognition and enforcement of an award.

[9] The phrase "fundamental rules of procedure" in subparagraph (e) encompasses the right to be heard (given the opportunity to present its case), equal treatment of the parties, and other such procedural rights.

[10] This stems from article 48 (3) of the ICSID Convention which provides: "The award shall deal with every question submitted to the Tribunal and shall state the reasons upon which it is based." In comparison, see article 31(2) of the Model Law which states: "The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30." Similar language can be found in article 34(3) of the UNCITRAL Arbitration Rules: 3. "The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given".

19. Draft provision 2 does not foresee grounds related to requests for an additional award[11] or a revision[12]. Under existing rules, the first-tier tribunal is tasked with these duties.[13]

*[**Note to the Working Group:** The Working Group may wish to consider whether the grounds for requesting an additional award, or a revision of an award should also be included as grounds for appeal. While a request for an additional award may be made within 30 days of the receipt of the award under the UNCITRAL Arbitration Rules, an application for a revision under the ICSID Convention may be made within 90 days after the discovery of fact and in any event within 3 years from the date of the award. The Working Group may wish to consider the possible overlap between these post-award processes and the appellate proceedings as well as the relevant time frames.]*

3. Time frame for appeal

> **Draft provision 3**
>
> An appeal shall be raised within [a short period of time to be indicated] from the date of the decision by the first-tier tribunal.

20. Draft provision 3 provides the time frame within which a disputing party may raise an appeal, which commences with the decision by the first-tier tribunal.

*[**Note to the Working Group:** The Working Group may wish to consider the appropriate time frame (60, 90 or 120 days) within which an appeal may be raised. After that time frame, the disputing party would be barred from raising an appeal. The time frame should allow appropriate time for the disputing parties to prepare their case but should also not be too long and allow for the effective resolution of the dispute. Depending on the approach to be taken in draft provision 2, the time frame should also take into account time frames for requesting other post-award remedies, such as correction, interpretation, revision, annulment and setting aside of the award.[14]]*

*[**Note to the Working Group:** Considering that draft provision 1 allows for an appeal of not only final but prior decisions by the first-tier tribunal, the time frame commences when the first-tier tribunal makes the decision. The Working Group may wish to consider the time frame commencing instead upon the disputing party's receipt of the decision (A/CN.9/1050, para. 93). In both cases, an issue that arises is whether a disputing party would be time-barred from raising an appeal with regard to a decision rendered prior to the final decision but also included in the final decision. For example, if the first-tier tribunal makes a decision on jurisdiction earlier on in the proceedings and includes that decision in its final decision, whether an appeal on jurisdiction could be made after the final decision is unclear. Therefore, an alternative approach would be to have the time frame commence with the final decision.*

[11] Article 39(1) of the UNCITRAL Arbitration Rules provides: "Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal".

[12] Article 51 of the ICSID Convention provides that a disputing party may request revision of the award on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

[13] See for example articles 37 and 38 of the UNCITRAL Arbitration Rules, article 50 of the ICSID Convention and rule 69,70 of the ICSID Arbitration Rules.

[14] Regarding the time frames for corrections of the award: See article 49 (2) ICSID Convention (45 days), rule 61 ICSID Arbitration Rules (45 days), article 33 UNCITRAL Model Law (30 days), article 38 UNCITRAL Arbitration Rules (30 days); Regarding interpretation: see article 50 ICSID Convention (at any time after the award is rendered), rule 69 ICSID Arbitration Rules (at any time after an award is rendered); article 33 UNCITRAL Model Law (30 days), article 38 UNCITRAL Arbitration Rules (30 days); Regarding revision: see article 51 ICSID Convention (90 days, or within 3 years after the award was rendered), rule 69 ICSID Arbitration Rules (90 days, or within 3 years after the award was rendered); Regarding annulment: see article 52 ICSID Convention (120 days, or no later than 3 years following the discovery of corruption), rule 69 ICSID Arbitration Rules (within 120 days after the discovery of corruption and in any event within three years after the award); Regarding setting aside: see article 34 UNCITRAL Model Law (90 days).

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Further the Working Group may wish to consider whether the time frames need to be adjusted depending on the type of decision appealed as well as the grounds upon which the appeal is raised.]

4. Effect of an appeal on the first-tier proceeding

Draft provision 4

When an appeal is raised, the first-tier tribunal may, where appropriate and so requested by a disputing party, suspend the proceedings until a decision is made by the appellate tribunal.

21. Draft provision 1 provides for the possibility to appeal a decision on jurisdiction or on the merits made prior to the final decision by the first-tier tribunal. This means that the first-tier proceeding may still be ongoing when the appeal is raised. The first-tier tribunal could either continue its proceedings and render a final decision while the appeal is pending or suspend its proceedings until the appellate tribunal decides on the appeal.[15] There may be benefits in suspending the first-tier proceeding particularly if the appellate tribunal's decision would render the first-tier proceeding meaningless (for example, if a positive decision on jurisdiction is reversed). On the other hand, an automatic suspension would result in the final decision by the first-tier tribunal being delayed and could lead to systematic appeals (A/CN.9/1050, para. 96).

22. Draft provision 4 provides that when an appeal is raised, any disputing party may request the first-tier tribunal to suspend the proceedings until the appellate tribunal has decided on the appeal. It gives the discretion to the first-tier tribunal to determine whether to suspend its proceedings based on the circumstances of the case ("where appropriate"). In exercising its discretion, the first-tier tribunal should take into consideration, among others, the type of decision subject to appeal, at which stage of the proceedings the appeal was raised and the need to avoid undue delays and costs. Draft provision 4 would not apply when a final decision of the first-tier tribunal is appealed after the conclusion of the first-tier proceedings.

5. Effect of an appeal on the first-tier decision and the relationship with annulment, setting aside and enforcement proceedings

Draft provision 5

1. An appeal shall suspend the effect of the decision of the first-tier tribunal and that decision shall not be subject to setting aside, annulment or any other review proceedings before any other fora.

2. Recognition and enforcement proceedings of a decision of the first-tier tribunal shall be stayed until the time period in draft provision 3 has elapsed and if an appeal is raised within that time period, until the appellate tribunal makes a decision or the appellate proceedings are terminated.

23. Draft provision 5 provides that an appeal would temporarily suspend the effect of the first-tier decision. It further addresses the relationship between the appellate mechanism and existing annulment, setting aside and enforcement mechanisms. It aims to provide an overall framework that would avoid the first-tier decision being subject to multiple proceedings, possibly resulting in conflicting decisions. Draft provision 5 is closely linked with draft provision 2 on the grounds of appeal and how an appellate mechanism would be implemented (see chapter III).

[15] See, for example, article 16(3) of the Model Law, which provides that an arbitral tribunal may rule that it has jurisdiction as a preliminary question (instead of in an award on the merits) and that when it does so, any party may request the competent court to decide on the matter. It further provides that while such request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

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24. Paragraph 1 provides that a first-tier decision that is subject to an appeal before the appellate mechanism would no longer have any effect and that such a decision should not be the subject of any setting aside, annulment, or a similar review procedure.[16]

*[**Note to the Working Group:** The ICSID Convention establishes a self-contained framework. Article 53 of the ICSID Convention provides that an award shall not be subject to any appeal or to any other remedy except those provided for in the Convention, including an annulment provided for in Article 52. Parties in non-ICSID arbitration, in contrast, may seek to set aside an award before domestic courts under the law of the place of arbitration. The effect that an appeal would have in relation to such procedures would largely depend on whether the appellate mechanism is intended to replace such existing procedure or exist in parallel. If the grounds provided for in existing setting aside or annulment procedures are included as grounds for appeal under draft provision 2 (see paras. 9-14 above), draft provision 5(1) would avoid duplication of the proceedings. However, it might not necessarily prevent a disputing party from seeking annulment or setting aside of an award instead of pursuing an appeal. It may also require amendments to domestic legislation governing the setting aside of an award. In this context, the Working Group may wish to consider whether the envisaged appellate mechanism should aim to replace the existing review procedures entirely and the extent to which this can be done through a multilateral instrument on investor-State dispute settlement reform (MIIR), which may provide that the only recourse for decisions covered by draft provision 1 is an appeal under the appellate mechanism. Another approach would be to require the disputing party raising an appeal to waive its right to annul or set aside an award. However, not all domestic laws would necessarily recognize such a waiver as a valid agreement, and it would not bind the other parties.]*

25. Paragraph 2 provides for an automatic stay of recognition and enforcement proceedings for a short period of time within which an appeal can be raised by a disputing party and extends the stay further if an appeal is raised (A/CN.9/1050, para. 114; see also A/CN.9/1004/Add.1, para. 42). This would prevent a disputing party from pursuing enforcement while there exists the likelihood of an appeal and when an appeal is eventually raised.

*[**Note to the Working Group:** The Working Group may wish to consider whether it would be feasible to restrict the right of the disputing parties to seek recognition and enforcement under existing mechanisms by way of a treaty or a multilateral instrument.]*

6. Conduct of the appellate proceedings

[See also Draft provisions on procedural and cross-cutting issues (A/CN.9/WG.III/WP.231)]

Draft provision 6

1. The appellate tribunal shall ensure that the proceedings are conducted in a fair and expeditious manner and in accordance with [the rules of procedure to be specified].

2. Members of the appellate tribunal shall comply with the Code of Conduct for Arbitrators/Judges in International Investment Dispute Resolution.

3. Joint interpretations by the Contracting Parties shall be binding on the appellate tribunal if this is provided in the applicable treaty.

4. At the request of the other disputing party, the appellate tribunal may order the disputing party raising the appeal to provide security amounting to [a percentage to be specified] of the amount awarded in the decision by the first-tier tribunal.

[16] At the resumed thirty-eighth session of the Working Group, doubts were expressed on whether decisions on jurisdiction should fall under the scope of an appellate mechanism, in particular as they were already subject to review procedures under domestic law provisions mirroring article 16 of the Model Law (see supra note 16); See also A/CN.9/1004/Add.1, para. 33). Including the phrase "any other review proceedings before any other fora" could avoid parallel procedures to challenge a preliminary decision on jurisdiction in domestic courts and in an appellate mechanism.

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5. The appellate tribunal may, where appropriate and so requested by a disputing party, suspend the appellate proceedings for a fixed period of time in order to give the first-tier tribunal an opportunity to continue or resume the proceedings or to take such other action as in the appellate tribunal's opinion will eliminate the grounds for appeal.

26. Draft provision 6 includes rules on how the appellate proceedings should be conducted.

27. Paragraph 1 provides for an obligation of the appellate tribunal to ensure fair and expeditious proceedings and to conduct the proceedings in accordance with a set of procedural rules which would need to be determined.

*[**Note to the Working Group:** The Working Group may wish to consider including a reference to existing rules*[17] *or formulate separate rules to apply to the appellate proceedings. These rules may relate to, among others, the appointment of the members of the appellate tribunal (A/CN.9/1050, paras. 45-47), the notice of appeal, the written pleadings of the parties (content and time limits for filing), the extension of deadlines, hearings (open or confidential), rules on evidence, provisional measures, the default of one party, discontinuance, and the publication of decisions. The Working Group may further wish to consider rules relating to cross appeals.]*

28. Paragraph 2 shows the interplay with another reform element that the Working Group is preparing and requires the members of the appellate tribunal to observe the applicable Code of Conduct, which would largely depend on how the appellate tribunal is composed.

29. Paragraph 3 provides a rule on treaty interpretation, requiring the appellate tribunal to take into account any joint interpretation by the treaty parties to the applicable investment treaty.

*[**Note to the Working Group:** The Working Group may wish to consider adding a general provision on treaty interpretation, which could clarify that the Vienna Convention on the Law of Treaties, in particular Articles 31 and 32 apply. The Working Group may further wish to consider whether the provision should provide for the power of the appellate tribunal to request the parties to the applicable treaty to submit a statement on the interpretation of the applicable treaty or the application of its provisions (A/CN.9/1004/Add.1, para. 47).*]

Mechanisms to address frivolous or systematic appeals

30. The Working Group highlighted the need to introduce a control mechanism to filter or dismiss frivolous or dilatory appeals and to ensure that the appeal mechanism does not result in systematic appeals (A/CN.9/1050, paras. 59, 109-111). In this regard, the draft provisions on procedural reform as proposed in document A/CN.9/WG.III/WP.219 could similarly apply in the context of an appeal mechanism, in particular, the provisions on early dismissal of claims manifestly without merit (A/CN.9/1124, paras. 107-119) and on security for costs. A provision on early dismissal of appeals could be used to filter appeals that do not meet on a prima facie basis the grounds for appeal provided for in draft provision 2 (A/CN.9/1050, para. 113).

31. In addition to the ordering of security for costs of the appellate proceedings, paragraph 4 allows the appellate tribunal to order as security a percentage of the amount awarded by the first-tier tribunal as a means to deter frivolous or systematic appeals.

*[**Note to the Working Group:** A control mechanism could also be implemented by the appellate tribunal or through an administering institution responsible for handling the appeals. This question is therefore closely connected to the overall structure of an appellate mechanism.]*

32. Paragraph 5 mirrors draft provision 4 which gives the discretion to the first-tier tribunal to suspend its proceedings where appropriate.[18] If the appellate tribunal, upon the request of

[17] For example, article 52(4) of the ICSID Convention provides that "the provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the [ad hoc] Committee".
[18] See also article 34 (4) of the Model Law.

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a disputing party, concludes that there could be benefit in allowing the first-tier tribunal to continue or resume its proceedings or to take actions to address the grounds of appeal, it may suspend its proceedings for a specified period of time. Paragraph 5 in conjunction with draft provision 4 aim to facilitate the coordination between the first-tier and the appellate tribunals.

7. Decisions by the appellate tribunal

[See also Draft provisions on procedural and cross-cutting issues (A/CN.9/WG.III/WP.231) Section C]

Draft provision 7

Types of decisions

1. The appellate tribunal may uphold, modify, or reverse the decision of a first-tier tribunal.

2. Where the facts established by the first-tier tribunal are insufficient for the appellate tribunal to render a decision in accordance with paragraph 1, it may remand the dispute to the first-tier tribunal. If the first-tier tribunal is no longer in a position to consider the dispute, or where it would be inappropriate for the first-tier tribunal to consider the dispute, upon the request of either disputing party, a new tribunal shall be constituted in accordance with the same applicable rules.

Form and contents of the decision

3. The decision by the appellate tribunal shall be in writing and state the reasons upon which it is based.

4. When the appellate tribunal modifies or reverses any part of the decision of the first-tier tribunal, it shall indicate as precisely as possible how the relevant findings or conclusions of the first-tier tribunal are modified or reversed. When the appellate tribunal remands a decision to the first-tier tribunal, it may provide, where appropriate, detailed instructions.

Time frames for the decisions and possible extension

5. A decision by the appellate tribunal shall be made within [a period of time to be specified] from the date of the [appeal][constitution of the appellate tribunal].

6. When the appellate tribunal considers that it cannot issue its decision within the time period referred to in paragraph 5, it shall inform the disputing parties in writing of the reasons for the delay together with an estimate period of time within which it will issue its decision, which shall not exceed [a period of time to be specified].

Effect on the decision of the first-tier tribunal

7. A decision of the first-tier tribunal upheld by the appellate tribunal shall be final and binding on the disputing parties.

8. A decision of the first-tier tribunal modified or reversed by the appellate tribunal shall be final and binding on the disputing parties as amended by the appellate tribunal.

Finality of the decision of the appellate tribunal

9. A decision by the appellate tribunal shall be final and binding on the parties and shall not be subject to any appeal or review.

Correction and interpretation

10. Within [30] days of the receipt of the decision by the appellate tribunal, a disputing party, with notice to the other parties, may request the appellate tribunal: (i) to correct any error in computation, any clerical or typographical errors or any errors of similar nature; or (ii) to give an interpretation of its decision.

11. If the appellate tribunal considers that the request is justified, it shall make the correction or give the interpretation within [30] days of the receipt of the request. Such a correction or an interpretation shall form part of the decision.

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33. Draft provision 7 addresses the different aspects of a decision that an appellate tribunal may render.

34. Paragraph 1 provides that the appellate tribunal should be able to uphold, modify, or reverse the first-tier decision (A/CN.9/1050, para. 113; see also A/CN.9/1004/Add.1, para. 40).

35. Paragraph 2 permits an appellate tribunal to remand the dispute to the first-tier tribunal when it is not in a position to complete the analysis based on the facts established by the first-tier tribunal (A/CN.9/1050, paras. 101-104; see also A/CN.9/1004/Add.1, para. 41). While providing for remand authority could avoid prolonged appellate proceedings, it would need to be considered in conjunction with the standard of review (see draft provision 2) and issues related to the implementation of the appellate mechanism, in particular in the ad hoc context.

36. The second sentence of paragraph 2 not only captures a situation where the first-tier tribunal cannot consider the dispute but also where it would not be appropriate for the matter to be remanded to the first-tier tribunal. This would be the case, for example, if the appeal was based on grounds related to the constitution of the first-tier tribunal or to corruption on the part of a member of the first-tier tribunal.

*[**Note to the Working Group:** The Working Group may wish to consider, whether upon remand, the subsequent decision of the first-tier tribunal (including a newly constituted tribunal) would continue to be subject to appeal, which might, however, result in multiple rounds of appeal.]*

37. Paragraphs 3 and 4 deal with the form and contents of the decision to be made by an appellate tribunal.

38. Paragraphs 5 and 6 deal with the time frames within which an appellate tribunal would be required to render its decision (see A/CN.9/1050, para. 113 and A/CN.9/1004/Add.1, paras. 33 and 55).

*[**Note to the Working Group:** The Working Group may wish to consider the appropriate time frame (for example, 90 or 180 days) within which the appellate tribunal should render a decision and if extended, the maximum period of time within which a decision should be rendered (for example, 9 or 12 months) (A/CN.9/1050, para. 106).[19] The Working Group may wish to consider when both time frames should commence, for example, the date of the appeal, the date of the constitution of the appellate tribunal or the date of the last submission (see for example, ICSID Arbitration Rules 72(5)). The Working Group may wish to consider introducing an expedited procedure for certain types of appeals or certain grounds for appeal with a sole member tribunal, shorter time frames and a simplified procedure.]*

39. Paragraphs 7 and 8 address the effect of a decision by the appellate tribunal on the decision by the first-tier tribunal.

40. Paragraph 9 provides that the decision of the appellate tribunal itself is also final and binding and that such a decision shall not be subject to any appeal or further review.

*[**Note to the Working Group:** The Working Group may wish to consider 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 World Trade Organization (WTO) through reverse consensus) (A/CN.9/1004/Add.1, para. 48). The Working Group may wish to further consider whether decisions by the appellate tribunal should have precedential effect for*

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[19] See for example article 17.5 of the Word Trade Organization Understanding on Rules and Procedures Governing the Settlement of Disputes, which provides for a timeframe of 60 days from the appeal notification, or 90 days in case of delay; See also the United States Trade Representative, Report on the Appellate Body of the WTO (February 2020): Prior to 2011 the Appellate Body met the 90-day deadline in 87 out of 101 appeals. In 14 cases the Appellate Body obtained the parties consent to extend the deadline. After 2011, the average length of an appeal was 133 days. After 2014 no appeals had been completed within the 90-day deadline. The average length of an appeal filed from May 2014 to February 2017 was 149 days.

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future cases involving the same or similar legal or factual issues and if so, how to give such an effect.

41. Paragraphs 10 and 11 provide for post-decision remedies, including interpretation and correction by an appellate tribunal (A/CN.9/1050, paras. 105 and 113; A/CN.9/1004/Add.1, para. 46).

8. Recognition and Enforcement

[See also the Draft Statute of a Standing Mechanism, Draft Article 11]

Draft provision 8

1. Each State Party shall recognize a decision rendered by an appellate tribunal pursuant to [these draft provisions] as binding and enforce the obligations imposed by that decision within its territories as if it were a final judgment of a court in that State. A State Party with a federal constitution may enforce such a decision in or through its federal courts and may provide that such courts shall treat the decision as if it were a final judgment of the courts of a constituent state.

2. A party seeking recognition or enforcement in the territory of a State Party shall furnish a copy of the decision to a court or other authority which such State shall have designated for this purpose.

3. Execution of a decision shall be governed by the laws concerning the execution of judgments in force in the State Party in whose territory such execution is sought.

4. Nothing in [these draft provisions] shall be construed as derogating from the law in force in any State Party relating to immunity of that State Party or of any foreign State from execution.

42. Draft provision 8 addresses the recognition and enforcement of decisions of the appellate tribunal, largely based on Articles 54 and Article 55 of the ICSID Convention.

*[**Note to the Working Group**: The Working Group may wish to consider whether the draft provision would need to address the recognition and enforcement of decisions by not only an appellate tribunal but also a first-tier tribunal, as the decision by the appellate tribunal may uphold or modify the first-tier decision. Draft provision 8, drafted as a provision of a treaty, might not be fully operational, if the appellate mechanism is established ad hoc.]*

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