This document is an initial draft of a 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. Reference is be made to document A/CN.9/WG.III/WP.213, which was discussed by the Working Group at the 42nd session and the report of that meeting. The document does not pertain to reflect the views of the Working Group or the secretariat. Comments on this draft should be communicated to the secretariat (jaesung.lee@un.org; corentin.basle@un.org) by 30 September 2023.

Draft statute of a standing mechanism for the resolution of international investment disputes

Draft article 1 – Establishment and objective

1. The Contracting Parties hereby establish a standing mechanism for the resolution of international investment disputes[1] (the "Standing Mechanism").

2. The objective of the Standing Mechanism is to administer and adjudicate international investment disputes in accordance with the Statute, the established rules of procedure and the applicable law.

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7. As a general remark, the Working Group may wish to note that the notion of "international investment dispute" would need further consideration so as to be clearly defined and to apply to all relevant reform elements in a uniform manner. Draft provisions 1 to 3 below aim at providing the general framework within which the selection and appointment of tribunal members would take place. With respect to draft provision 3, should the tribunal be developed with an "open architecture" that would allow contracting States with the flexibility to determine which elements they would like to adopt, consideration may need to be given to how the roles and responsibilities of States within the Committee of the Parties may vary.

8. Draft provision 1 – "Establishment of the Tribunal" reads as follows:

A Multilateral Investment Tribunal composed of a first instance and an appellate level is hereby established (referred to as "the Tribunal").

Report of the forty-second session (New York, 14–18 February 2022), document A/CN.9/1092:

17. It was noted that the establishment of a Multilateral Investment Tribunal would likely require the preparation of a statute, which would be open for adoption by States and regional economic integration organizations. It was said that such a statute should have a preamble setting forth the objectives of the Tribunal and a section on key definitions. It was observed

[1] Article 1 of the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution defines "international investment disputes" as follows.
(a) "International investment dispute (IID)" means a dispute between an investor and a State or a regional economic integration organization (REIO) or any constituent subdivision of a State or agency of a State or an REIO submitted for resolution pursuant to an instrument of consent;
(b) "Instrument of consent" means:
(i) A treaty providing for the protection of investments or investors;
(ii) Legislation governing foreign investments; or
(iii) An investment contract between a foreign investor and a State or an REIO or any constituent subdivision of a State or agency of a State or an REIO,

upon which the consent to arbitrate is based.

that the statute would need to be supplemented by rules or regulations addressing detailed procedural matters and that the draft provisions in document A/CN.9/WG.III/WP.213 would also need to be adjusted accordingly. Differing views were expressed as to whether these supplemental procedures should be drafted by the Working Group or by the Committee of the Parties at a later date.

18. The Working Group considered draft provisions 1 to 3, which provided the general framework for the selection and appointment of Tribunal members.

19. It was said that draft provision 1 would need to be further elaborated to address aspects such as the setting up of the Tribunal, whether it would include an appellate mechanism, where its seat would be, how it would be funded, and its interaction with the current ISDS regime. It was mentioned that some of those aspects would be addressed in the statute establishing the Tribunal.

20. As a matter of drafting, it was suggested that the "standing" nature of the Tribunal should be highlighted in the provision.

Draft article 2 – Structure of the Standing Mechanism

1. The Standing Mechanism shall consist of the Conference of the Contracting Parties (the "Conference"), the First Instance Tribunal, the Appeal Tribunal and the Secretariat.

2. The Conference of the Contracting Parties shall be composed of States and regional economic integration organizations that have ratified or acceded to this Statute in accordance with article **.

3. The First Instance Tribunal shall be composed of [X] members appointed by the Conference of the Contracting Parties in accordance with article **.

4. The Appeal Tribunal shall be composed of [Y] members appointed by the Conference of the Contracting Parties in accordance with article **.

5. The Secretariat headed by the Executive Director shall support the activities of the Conference, assist in the functioning of the First Instance Tribunal as well as the Appeal Tribunal, and act as registrar for the proceedings administered by the Standing Mechanism.

6. The Standing Mechanism shall be represented by [the Chairperson of the Conference] [the President of the Tribunals].

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4. Governance structure

15. Draft provision 3 – "Governance structure" reads as follows:

(a) Committee of the Parties

1. There shall be a committee of the Parties composed of representatives of all the Parties to this Agreement establishing the Tribunal (referred to as "the Committee of the Parties"). The Committee of the Parties shall meet regularly and as appropriate to address matters concerning the functioning of the Tribunal.

2. The Committee of the Parties shall establish its own rules of procedure and shall carry out the functions assigned to it by this Agreement.

3. It shall establish the rules of procedure for the Selection Panel, the first instance and the appellate level, [the Advisory Centre], and the Secretariat. It may review and, if needed, modify these rules on a regular basis.

4. It shall determine the financial rules for the costs to be attributed to the general budget of the Tribunal. This includes rules on the operational costs of the Selection

Panel and any reasonable expenses incurred by its members in the exercise of their function.

5. Decisions of the Committee of the Parties shall be adopted by [a simple] [two-thirds] majority.

(b) Tribunal and its President

1. The Tribunal shall determine the relevant rules for carrying out its functions. In particular, it shall lay down regulations necessary for its routine functioning.

2. The Tribunal shall elect its President and Vice-President by a confidential internal voting procedure with each member having one vote. The President and Vice-President shall be elected for a term of three years with the possibility of one re-election.

3. The Tribunal shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

16. Draft provision 3(a) introduces the concept of a committee of the parties which would be responsible for carrying out various functions, including the establishment of rules of procedure for the tribunal and for developments and adjustments, such as on the number of tribunal members. The Working Group may wish to consider whether the decision-making process at the committee of the parties ought to be defined at this stage.

17. The committee of the parties would delegate to the tribunal the determination of rules of procedure pertaining to its routine functioning. Draft provision 3(b) therefore clarifies that the tribunal itself shall develop its own rules of functioning, as is customarily provided in international courts and tribunals.[2] It provides for the election of the president and vice-president of the tribunal by vote from other tribunal members. The Working Group may wish to consider whether, in a standing body having both a first-instance and an appellate level, the president of the tribunal is the president of the entire dispute settlement body or whether there should be one president for the first-instance and another one for the appellate level.

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27. The Working Group considered draft provision 3 which addressed the governance structure of a standing multilateral mechanism. It was generally suggested that the draft provision should be further elaborated to provide clarity on the functions and the role of the different bodies to be established in the governance structure.

Committee of the Parties

28. To ensure more efficiency in the exercise of the missions of the Committee of the Parties, which would be a forum where decisions would be taken, it was proposed that the governance structure should include a Committee of the Parties (the Committee), composed of representatives of all the parties and a Sub-Committee whose members would be elected by the Committee from among the members of the Committee of the Parties which would be responsible for exercising the functions of the Committee under its supervision. It was suggested that the Committee should be able to make determination on aspects pertaining to the operation of the standing multilateral mechanism. It was also suggested that the number of the Committee meetings as well as their interval would need to be specified.

[2] See, for example, ICJ Statute, Article 30(1) ("The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure"); and ITLOS Statute, Article 16 ("The Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure"). See also Articles 51–52 Rome Statute of the International Criminal Court (ICC) (articulating a distinction between the Rules of Procedure and Evidence, to be adopted by the Assembly of States Parties, and the Regulations of the Court "necessary for its routine functioning", to be adopted by the Court).

29. It was mentioned that the statute providing for the establishment of a standing multilateral mechanism would generally set forth the role of the Committee and the Tribunal which should be balanced to ensure the proper functioning of the Tribunal with a certain oversight by the Committee of the activities of the Tribunal. Similarly, the power to establish rules of procedure and relevant regulations would need to be carefully distributed between the Committee and the Tribunal. In that context, it was suggested that flexibility should be given to the Tribunal to update its rules and adapt its procedure when necessary.

30. It was said that the Advisory Centre should be a separate and independent institution and not be part of the Tribunal. It was stressed that doing otherwise and merging two institutions in one could lead to conflicts of interest and raise questions regarding the autonomous operation of the Advisory Centre.

31. With regard to the decision-making process in the Committee, it was suggested that paragraph 5 would need to be elaborated to specify a quorum, whether majority were to be determined based on those present, those who cast the votes or the number of parties to the Committee. It was further suggested that while a simple majority rule could apply to most procedural decisions, a qualified majority of two thirds or more might be require for most substantive decisions. In that context, it was mentioned that the Committee should also be able to amend the statute through such a majority. It was suggested that mechanisms to balance the views of the different regional groups could be elaborated.

Presidency of the Tribunal

32. Regarding draft provision 3 (b), it was suggested that the scope of procedural rules to be determined by the Tribunal needed to be specified against the background of the work of the Working Group on procedural reform solutions and it was said that further clarifications on what would be the routine functioning was needed.

33. Regarding paragraph 2, it was suggested to foresee several vice-presidents to allow for diversity within the presidency of the Tribunal, reflecting the diversity of its member States.

34. The Working Group considered whether, in a standing body having both a first-instance and an appellate level, the president of the Tribunal would be the president of the entire dispute settlement body or whether there should be one president for the first-instance and another one for the appellate level. In that context, the establishment of a secretariat was suggested to serve both instances. More generally, it was suggested that the selection of the secretariat members and the role of the secretariat should be clarified.

Draft article 3 – Conference of the Contracting Parties

1. The Conference of the Contracting Parties shall function as the management oversight and legislative body of the Standing Mechanism. It shall be composed of the representatives of States and regional economic integration organizations that have ratified or acceded to this Statute.

2. The Conference shall carry out the functions ascribed to it under this Statute, including to:

(a) Appoint the members of the First Instance Tribunal and the Appeal Tribunal;

(b) Decide to alter the number of the members of the First Instance Tribunal and the Appeal Tribunal, when deemed necessary;[3]

(c) Appoint the Executive Director [, …] of the Secretariat;

[3] This should take due account of the workload of the Tribunals, the number of Contracting Parties as well as the number of instruments listed by the Contracting Parties in Annex I.

(d) Adopt and revise regulations on the operation of the Standing Mechanism, including its own rules of procedure and any administrative or financial regulation of the Standing Mechanism;

(e) Adopt and revise the rules of procedure applicable to the First Instance Tribunal and the Appeal Tribunal;

(f) Adopt the annual budget of the Standing Mechanism, including the amount of contribution to be made by each Contracting Party[4] as well as the budget to be allocated to the First Instance Tribunal, the Appeal Tribunal and the Secretariat;

(g) Determine the remuneration of the members of the First Instance Tribunal and the Appeal Tribunal as well as the Executive Director of the Secretariat;

(h) Evaluate and monitor the operation of the Standing Mechanism and approve the annual report of its operation;

(i) Approve the establishment of any regional or local presence of the Standing Mechanism;

(j) Approve the fee scheme for services[5] provided by the Standing Mechanism;

(k) Perform any other functions in accordance with this Statute.

2. The Conference shall have a Bureau consisting of a Chairperson and […] vice-Chairpersons elected by the Conference for a non-renewable term of [three] years. The Bureau shall meet regularly to assist the Conference in discharging its functions.

3. The Conference shall meet at least once a year to address matters concerning the functioning of the Standing Mechanism. When considered necessary or upon the request of [ ] Contracting Parties, the Chairperson may convene a meeting of the Conference.

4. The Chairperson shall chair the meetings of the Conference and be responsible for submitting matters to the consideration of the Conference. In case the Chairperson is unable to exercise such functions, one of the vice-Chairpersons shall exercise those functions.

5. States and regional economic integration organizations that have signed but not ratified the Statute may attend the meetings of the Conference as observers. The Chairperson may invite other States and regional economic integration organizations as well as international governmental and non-governmental organisations with expertise or experience in international investment dispute resolution to attend the meeting as observers. The President, the First Vice-President, the Second Vice-President as well as the Executive Director may participate, as appropriate, in the meeting of the Conference.

6. Each Contracting Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Conference and in the Bureau. If consensus cannot be reached and unless otherwise provided in this Statute, decisions by the Conference and the Bureau shall be taken by [two-thirds majority][simple majority] of Contracting Parties present and voting. Decision may be taken through a written procedure.

7. The official and working languages of the Conference and the Bureau shall be [ ].

Article 4 - First Instance Tribunal and Appeal Tribunal

1. The First Instance Tribunal shall be composed of [X] members appointed by the Conference of the Contracting Parties for a [non-renewable] term of [eight] years in accordance with [see Draft Provisions on Selection and Appointment of Tribunal

[4] This should take due account of the level of economic development of the Contracting Parties, investment flows arising from the instruments listed in Annex I, anticipated number of international investment disputes involving the Contracting Party and other relevant factors.

[5] Services other than adjudication of disputes to be considered, for example, with regard to mediation.

Members, which address the term of office, renewability of the term as well as staggered terms during the initial establishment phase].

2. The Appeal Tribunal shall be composed of [Y] members appointed by the Conference of the Contracting Parties for a [non-renewable] term of [eight] years in accordance with [see Draft Provisions on Selection and Appointment of Tribunal Members].

3. The President of the First Instance Tribunal and the Appeal Tribunal (the "Tribunals") shall be elected by majority of votes by members of both Tribunals for a [renewable] term of [two] years. The First Vice-President shall be elected by majority of votes by members of the Appeal Tribunal for a [renewable] term of [two] years. The Second Vice-President shall be elected by majority of votes by members of the First Instance Tribunal for a [renewable] term of [two] years.

4. The President, the First Vice-President and the Second Vice-President shall constitute the Presidency, which shall be responsible for the operation and administration of the Tribunals and other functions conferred to it by this Statute. The First Vice-President shall act in place of the President in the event that the President is unavailable or is otherwise unable to act. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or are otherwise unable to act.

5. A member appointed to replace the President, the First Vice-President or the Second Vice-President before the expiry of his or her term of office shall serve for the remainder of his or her predecessor's term.

6. All members of the Tribunal as well as candidates who are under consideration for appointment as a member of the Tribunal shall be bound by the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution.[6]

Draft article 5 – Secretariat

1. The Secretariat shall be composed of the Executive Director and staff members.

2. The Executive Director shall be appointed by the Conference of the Contracting Parties for a [renewable] term of [six] years on the basis of a recommendation by the Bureau.

3. The Executive Director shall be responsible for:

(a) Managing the administrative operation of the Standing Mechanism;

(b) Supporting the activities of the Conference of the Contracting Parties and the Tribunals;

(c) Employing and managing the staff members of the Secretariat and their respective duties;

(d) Reporting to the Conference of the Contracting Parties;

(e) Acting on behalf of the Standing Mechanism with regard to administrative matters, including with regard to administrative arrangements with other organizations and institutions relating to the use of facilities or the establishment of regional or local presence;

(f) Functioning as the registrar for proceedings administered by the Standing Mechanism with the power to authenticate decisions rendered by the Tribunals and to certify copies thereof;

(g) Proposing staff regulations for adoption by the Conference of the Contracting Parties.

[6] See also Draft Provision 10 in the Draft Provisions on Selection and Appointment of Tribunal Members and Draft Provision 17 in document A/CN.9/WG.III/WP.231 (Draft Provisions on Procedural and Cross-cutting issues).

4. The Executive Director and the staff members of the Secretariat shall not exercise any political function. They shall not seek or accept instructions from any government or any other authority other than the Standing Mechanism and may not hold any other employment or engage in any other occupation of a professional nature except with the approval of the Conference of the Contracting Parties as concerns the Executive Director, or the Executive Director as concerns the staff members.

Draft article 6 - Financing

1. The expenses of the Standing Mechanism, including the Conference of the Contracting Parties, its Bureau, the First Instance Tribunal, the Appeal Tribunal and the Secretariat, shall be borne by the annual budget of the Standing Mechanism as adopted by the Conference.

2. The budget of the Standing Mechanism shall be funded by the assessed annual contribution of the Contracting Parties as determined by the Conference and any voluntary contribution made by Governments, international organizations, private entities or individuals in accordance with financial regulations.

3. The budget of the Standing Mechanism may be supplemented by fees charged to the disputing parties for services rendered by the Standing Mechanism. The calculation and payment of such fees and the conditions thereof shall be determined by the Conference based on a proposal by the Executive Director.

4. During the annual meeting of the Conference, the Executive Director shall present to the Conference the financial statement of the expenditures of the past year and the proposed annual budget for the next year for its adoption.

5. Each Contracting Party shall promptly pay the assessed contribution to the budget of the Standing Mechanism. In the event that a Contracting Party fails to make the contribution, any such arrears will remain payable with appropriate interest. If a Contracting Party fails to contribute for more than three years, the Conference of the Contracting Parties may exclude that Contracting Party and legal or juridical persons falling under its jurisdiction from benefiting from this Statute.

Draft article 7- Status, privileges and immunities

1. The Standing Mechanism shall have legal personality. It shall have the capacity to contract, to acquire and dispose of immovable and movable property and to institute legal proceedings.

2. The Standing Mechanism shall have its seat(s) at […] based on host country agreement(s) with […]. The Secretariat will be headquartered in […].

3. The Standing Mechanism shall enjoy in the territory of each Contracting Party such privileges and immunities as are necessary for the fulfilment of its objectives. The members of the Bureau, the members of the Presidency and the Tribunals, the Executive Director and the staff members of the Secretariat shall be accorded the same level of privileges and immunities that is accorded to the staff members of permanent diplomatic missions or international organizations. The same shall apply to persons appearing in proceedings of the Standing Mechanisms as parties, agents, legal representatives, witnesses or experts insofar as in connection with their travel to and from, and their stay at, the place of the proceedings.

Draft article 8 – Instruments subject to the jurisdiction of the Standing Mechanism

1. When depositing the instrument of ratification or accession to this Statute, each Contracting Party shall provide a list of instruments to which it is a Party that contains provisions on the protection of investments or investors and a right for an investor to raise

a claim against it[7] that the Contracting Party wishes to subject to the jurisdiction of the Standing Mechanism. Each instrument shall be identified by the title and name of the contracting parties to that instrument.

2. A Contracting Party may declare that only appeals with regard to a decision or an award rendered by an arbitral tribunal or any other adjudicatory body with respect to a claim initiated by an investor in accordance with an instrument listed in Annex I shall be subject to the jurisdiction of the Appeal Tribunal of the Standing Mechanism.

3. The Contracting Party shall notify the Depository of any modifications to its list of instruments, including any new instruments concluded following the ratification or accession, which provide that the Standing Mechanism shall have jurisdiction over any claims raised by an investor under that instrument.

4. The Executive Director shall maintain and update the list of instruments as Annex I of this Statute.

Draft article 9 – Jurisdiction of the First Instance Tribunal and the Appeal Tribunal

1. The First Instance Tribunal shall have exclusive jurisdiction over a claim initiated in accordance with an instrument listed in Annex I, when: (a) the claimant is a national of a Contracting Party or a Contracting Party and the respondent is a Contracting Party; and (b) both Contracting Parties have listed the instrument in Annex I.

2. The First Instance Tribunal shall have jurisdiction over a claim initiated by a national of a non-Contracting Party or by a non-Contracting Party insofar as: (a) the claim was made in accordance with an instrument listed by the respondent in Annex I and (b) the claimant agrees to the jurisdiction of the Standing Mechanism.

3. The jurisdiction of the First Instance Tribunal shall extend to an international investment dispute where the claimant and the respondent consent in writing to submit the dispute to the Standing Mechanism, which is not objected to by the majority of the Conference of the Contracting Parties within 30 days of the submission.

4. The Appeal Tribunal shall have jurisdiction over appeals initiated by a disputing party with regard to a decision rendered by the First Instance Tribunal in accordance with paragraphs 1 to 3.

5. The Appeal Tribunal shall have jurisdiction over appeals with regard to a decision or an award rendered by an arbitral tribunal or any other adjudicatory body with respect to a claim initiated in accordance with an instrument listed in Annex I.

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3. Jurisdiction

10. Draft provision 2 – "Jurisdiction" reads as follows:

1. [Option 1: The jurisdiction of the Tribunal shall extend to 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 the parties consent to submit to the Tribunal.]

[Option 2: The Tribunal shall exercise jurisdiction over any dispute which the parties have consented to submit to the Tribunal.]

[7] See article 1(2) of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, which reads: The term "investment treaty" means any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against contracting parties to that investment treaty.

2. Consent to submit a dispute to a tribunal established under an international investment agreement shall be deemed to be a consent to submit the dispute to the Tribunal under paragraph 1.

11. Paragraph 1, option 1, provides that jurisdiction extends to disputes arising out of an investment, whereas option 2 does not refer to the notion of "investment" to avoid a double test regarding the notion of "investment" under the applicable treaty and the statute establishing the tribunal. The bracketed text in option 1, if retained, would mean that jurisdiction would be limited to treaty-based disputes.

12. The emphasis of the provision is on the requirement of consent rather than on the particular type of instrument of consent. It may be noted that membership in the agreement establishing the tribunal would not automatically entail that the State in question consents to the adjudication of a given dispute before that tribunal. The tribunal would exercise jurisdiction over disputes arising out of an investment which the parties agreed to submit to the tribunal through offer and acceptance. Provisions on the consent to the jurisdiction of the multilateral investment tribunal could be included in future investment treaties. In addition, the multilateral instrument on ISDS reform to be further considered by the Working Group may provide for a mechanism to incorporate a provision on consent to the jurisdiction of the multilateral investment tribunal in existing investment treaties.[8]

13. The Working Group may wish to note that the term "parties" in paragraph 1 could refer either to the State parties to an investment treaty or to the disputing parties, depending on the situation. The Working Group may wish to consider whether this should be further clarified.

14. Paragraph 2 aims to address the question of consent in investment treaties.

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21. A wide range of views were expressed regarding draft provision 2 addressing the jurisdiction of the Tribunal. Various views were expressed with regard to the two options in paragraph 1.

22. With regard to option 1 (which provided that the jurisdiction of the Tribunal was limited to disputes "arising out of an investment"), it was said that the option might result in requiring a double test of not only meeting the notion of "investment" under the applicable underlying investment instrument but also under draft provision 2. Therefore, support was expressed for deleting the reference to "investment" or, as an alternative, for clarifying that the notion of "investment" should be determined in accordance with the underlying investment instrument. While suggestions were made that the jurisdiction of the Tribunal should not cover disputes between States, another view was that such disputes should fall under the jurisdiction of the Tribunal as long as they arose out of, or related to, an investment. A suggestion was made that the words in square brackets ("under an international investment agreement") could be deleted in option 1 to include disputes based on investment contracts and national investment laws. Another suggestion was that the words "nationals of another Contracting State" should be replaced with the words "investors of another Contracting State".

23. Views were expressed in support of option 2, which provided that the Tribunal would have jurisdiction over any dispute which the parties had consented to submit to it. One of the reasons mentioned was that it would avoid the double test requirement as it did not include any reference to "investment". However, concerns were also expressed that option 2 would endow the Tribunal with a too broad jurisdiction, possibly resulting in other types of disputes falling under its jurisdiction (trade or commercial disputes) and disputes ending up in multiple fora. To clarify the nature of the disputes to be covered, it was suggested that option 2 should refer to "international investment", or "investment" disputes to also include claims based on domestic

[8] Submission by the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, p. 8, point 3.14.

investment laws. Another proposal was to simply refer to "disputes" as the consent qualification would provide the necessary flexibility to States. It was suggested that further clarification and explanation could be included in a commentary accompanying the draft provision. It was further noted that the underlying investment instrument would in any case have the effect of limiting the jurisdiction of the Tribunal.

24. More generally, it was stated that the resources available to the Tribunal should be taken into account when determining its scope of jurisdiction in order to ensure its proper functioning.

25. It was suggested that draft provision 2 should require consent to be in writing and further elaborate on how such consent could be given, whether by treaty parties or disputing parties. It was further suggested that mechanisms should be developed to allow States to consent to the jurisdiction of the Tribunal, including for disputes arising out of existing treaties (akin to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration or the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting). It was further pointed out that States should be able to specify and list investment agreements with regard to which they would opt-in to the jurisdiction of the Tribunal and that the framework should provide for a coordination mechanism between States to do so.

26. With regard to paragraph 2 of draft provision 2, it was suggested that it should be made clear that it was merely a deeming provision and that consent to submit a dispute to a tribunal established under an international investment agreement was not to be considered as automatically recording consent to submit the dispute to the Tribunal. It was stated that the paragraph might have the effect of automatically transferring the jurisdiction of a tribunal established under an international investment agreement to the Tribunal and, if so, the scope of the jurisdictions would need to be further clarified. A suggestion was made that the words "international investment agreements" might need to be revised to include instances where the consent was not necessarily based on a treaty but other instruments.

Draft article 10 – Proceedings before the First Instance Tribunal

1. The First Instance Tribunal shall conduct its proceedings in accordance with [the rules of procedure adopted by the Conference of the Contracting Parties] [the rules of procedure in the instrument listed by the Contracting Party] [see also A/CN.9/WG.III/WP.231 containing draft provisions on procedural and cross-cutting issues, some of which address the conduct of the proceedings].

2. The Appeal Tribunal shall conduct its proceedings in accordance with [the rules of procedure adopted by the Conference of the Contracting Parties, see Draft Provisions on an Appellate Mechanism, which address the scope of appeal, grounds of appeal, time frame for appeal, effects of an appeal, the conduct of the appellate proceedings and decisions by the Appeal Tribunal].

3. In the event of a conflict, […] shall prevail.

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III. Other matters related to a standing multilateral mechanism

B. Procedural question

72. The Working Group may wish to consider issues related to the procedural framework of a standing multilateral body.

73. While the general rules of procedure could be provided in the agreement establishing the tribunal, the Working Group may wish to consider whether the detailed procedure should be defined in secondary law, which could be developed and updated

by the Committee of the Parties and, as necessary, by the Tribunal itself (see draft provision 3).[9] A definition of the procedure in secondary law would facilitate later modifications and updates of the procedural rules. Secondary law with a detailed procedure has been developed for example for the ICJ,[10] ITLOS,[11] and ECHR.[12]

74. The Working Group may wish to consider incorporating the following reform solutions into the procedural framework of a standing multilateral mechanism, which are being discussed as procedural rules reform: means to address frivolous claims; multiple proceedings; reflective loss; counterclaims; security for costs; and regulation of third-party funding. It has also been suggested to provide for the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and to provide for the possibility of third parties participation, for example, representatives of communities affected by the dispute, to participate in the proceedings.[13]

Draft article 11 – Recognition and Enforcement

1. Each Contracting Party shall recognise a decision rendered by the First Instance Tribunal or the Appeal Tribunal pursuant to this Statute 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 [or a regional economic integration organization]. A Contracting Party with a federal constitution may choose to 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 territories of a Contracting Party shall furnish to a competent court or other authority which such State [or a regional economic integration organization] shall have designated for this purpose a copy of the decision certified by the Executive Director.

3. Execution of a decision shall be governed by the laws concerning the execution of judgments in force in the State [or a regional economic integration organization] in whose territories such execution is sought.

4. A non-Contracting Party that consents to the jurisdiction of the Standing Mechanism pursuant to article 9 shall recognize and enforce the decision rendered by the First Instance Tribunal and/or the Appeal Tribunal pursuant to this Statute as if it were a final judgment of a court in that State [or a regional economic integration organization].

Selected articles of the final provisions (the Statute would need to include provisions on signature, ratification, acceptance or approval, accession, depository, withdrawal, and amendments)

Draft article 13 - Entry into force

This Statute shall enter into force on the first day of the month following the expiration of one year after the date of deposit of the [tenth] instrument of ratification, acceptance or approval or of accession.

Draft article 14 - Reservations

[9] See for example the reference in Article III (2) of the US-Iran Claims Settlement Declaration to the UNCITRAL Arbitration Rules and the option for modification by the Tribunal or the Parties.
[10] See Article 30 ICJ Statute and Rules of Court, (1978) adopted on 14 April 1978, available at https://www.icj-cij.org/en/rules.
[11] See Article 16 of the Statute of the International Tribunal for the Law of the Sea, Annex VI to the United Nations Convention on the Law of the Sea and Rules of the Tribunal (ITLOS/8), available at www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf.
[12] See Article 5 European Convention and Rules of Court 2 June 2021, available at https://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules&c=.
[13] Submission by the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, p. 7.

1. A Contracting Party may declare that:

(a) on the basis of reciprocity, it will apply draft article 11 on recognition and enforcement only to decisions involving a national of another Contracting Party or another Contracting Party;

(b) […]

2. No reservations are permitted except those expressly authorized in this article.

Annex I – List of instruments subject to the jurisdiction of the Standing mechanism

[In accordance with draft article 8, each Contracting Party shall provide a list of agreements subject to the jurisdiction of the Standing Mechanism (First Instance Tribunal and/or the Appeal Tribunal) to the Depository, including any reservations. Such information should be compiled and made publicly available.]

A/CN.9/WG.III/WP.213 **Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters**

III. Other matters related to a standing mechanism

66. In addition to the draft provisions on selection and appointment of ISDS tribunal members, the Working Group may wish to consider the following policy issues pertaining to the establishment and functioning of a standing multilateral body. These may serve to contextualize the draft provisions above and provide the Working Group with a basis for further consideration of this reform (A/CN.9/1050, para. 55).

67. The suggestions below are based on the comment made in the Working Group that a reformed system should remain flexible so as to take account of both State- State and investor-State dispute settlement as well, as possibly disputes involving local communities affected by investments and investments made by small and medium-sized enterprises (A/CN.9/1050, para. 22).

A. Means of establishment

68. Regarding the establishment of a multilateral investment tribunal, the Working Group may wish to consider general questions, including whether the tribunal would be created under the auspices of an existing international organisation such as the United Nations, or be established as a separate, independent international organisation. [14] As an international organization, the standing multilateral body would enjoy legal personality under international and national law, which would allow it to conclude treaties such as a seat agreement establishing the necessary privileges and immunities.[15]

69. Regarding the governance structure, the Working Group may wish to consider which organs might be set up under the agreement establishing the tribunal.

70. In addition to the committee of the parties, the Working Group may wish to note that usually a permanent administrative secretariat (or registrar) would be set up, either as a separate and stand-alone secretariat or as part of an existing institution, in which case the services of such an existing institution could be used. Its tasks would include the administration of pending cases, translation services and other support services.

71. Furthermore, the Working Group may wish to consider whether a standing multilateral mechanism would also be used to host an advisory centre on international investment law.[16] Such a facility could provide capacity building and act as a forum to share experience and technical assistance to member States with a view to building in-house capacity to deal with ISDS cases.

[…]

C. Applicable law and treaty interpretation

[14] See From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, Options Regarding the Institutionalization of Investor-State Dispute Settlement, Second Edition (2020), by Marc Bungenberg and August Reinisch, available at https://link.springer.com/book/10.1007/978-3-662-59732-3, p. 175–182.

[15] Legal personality could also be expressly foreseen in the treaty establishing the organization, see for example Article 4 of the Rome Statute of the International Criminal Court.

[16] For more information on the reform element of an advisory centre, see UNCITRAL webpage under https://uncitral.un.org/en/multilateraladvisorycentre.

75. The Working Group may wish to consider issues related to the law to be applied by the tribunal. Many investment treaties contain a clause on the applicable law. These clauses generally refer to the treaty itself and international law. However, the agreement establishing the tribunal could provide for a rule on the applicable law in case of absence of a choice of law in the underlying treaty, investment law or contract.[17]

76. In order to develop a more consistent practice of the interpretation of investment treaties, the multilateral investment tribunal could provide for treaty interpretation tools, in particular for joint interpretative statements, which could be binding for the tribunal.[18] It may be noted that treaty interpretation is discussed by the Working Group as a separate reform solution.[19]

77. The Working Group may wish to consider whether it should be provided expressly that the interpretation to be made by tribunal members is done in accordance with customary rules of interpretation of public international law, following the example of article 3.2 of the Dispute Settlement Understanding of the WTO.

78. The Working Group may wish to consider whether a provision should be added (possibly under draft provision 11) to allow the tribunal to decide in broader or full composition when presented with an issue of systemic relevance, that is, an issue the resolution of which may have repercussions for the investment treaty regime as a whole; a new legal question never addressed before; a divergence of interpretations in the case law of the different chambers; or the intention to depart from an established line of cases.[20]

[17] See for example ICSID Convention, Article 42: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."
[18] See document A/CN.9/WG.III/WP.191.
[19] See UNCITRAL webpage under https://uncitral.un.org/en/treatyparties.
[20] See CIDS Supplemental Report, para. 203.