The Egyptian General Authority for Investment and Free Zones

Notes Regarding to the Permanent Mechanism for Reforming the Investor-State Dispute Settlement System
According to the documents submitted by Working Group III on the subject within the framework of the United Nations Commission on International Trade Law (UNCITRAL)

Egypt appreciates the efforts made by Working Group III towards reforming the Investor-State Dispute Settlement (ISDS) system. In this context, we highly appreciate the efforts of Working Group III's and proposal to establish a permanent mechanism aimed at reforming the system for resolving disputes between states and investors, that necessitates serious national consultations within each member state. After reviewing the documents related to the reform of the ISDS system, we are pleased to share some observations that we believe should be considered:

Firstly: Concerning to the project of establish a Multilateral Investment Court and Appellate Mechanisms:

- The establishment of a multilateral permanent investment court is a significant topic that could constitute an effective reform of the ISDS system if used as an alternative option for state parties when concluding future international investment agreements or for disputing parties when resolving disputes concerning existing investment agreements. This is especially relevant if resorting to the permanent court proves to be less costly than other arbitration systems, which can impose a substantial financial burden on both the state and the investor.
- The importance of having an appellate stage for decisions issued by the court adds significant value to the permanent court by ensuring justice between the disputing parties through the review of its judgments.
- Having an appellate mechanism for the decisions issued by the multilateral court or other arbitral bodies is an important reform option. It aims to ensure the procedural and substantive correctness of the decisions and to rectify errors in arbitration rulings in ISDS cases, thereby providing the parties with consistent and fair decisions.
- Furthermore, the existence of an appellate mechanism would make the ISDS system more aligned with judicial mechanisms that allow for judicial review of trial decisions, from the primary (trial court) to the appellate (appellate court) level. This

allows for the correction of judicial errors and ensures consistency and coherence in adjudication.

1- Issues Considered as Grounds for Appeal:

The documents presented indicate that the issues to be considered as Grounds for appeal include:

- **Error in the application or interpretation of the law**,
- **A manifest error in the appreciation of the facts** may also constitute grounds for appeal.

As referred in Article 29 of the Draft Statute, which states that "appeals shall be limited to two primary grounds: error in the application or interpretation of the law and manifest error in the assessment of facts." According to the Working Group's perspective, limiting appeals to legal issues only would make the appeal process relatively quicker than reviewing both legal and factual issues, which would require the parties to present their case again before the appellate court, consuming more time. This view is supported by examples such as the appeals limited to legal issues before the Appellate Body of the World Trade Organization and the dispute resolution system within the framework of Mercosur, for instance.

While we agree in principle with the Working Group's view that subjecting only legal issues to appeal would expedite the resolution of disputes, we express reservations regarding the establishment of a new court to which the dispute would be referred, as per Article 33, paragraph 4, and Article 34 of the Draft Statute concerning the formation of a new court if the first-instance court cannot review the dispute. Our concerns are as follows:

- Paragraphs (3) and (4) of Article 33 of the Draft Statute state that "the appellate panel may affirm, amend, or overturn an arbitration award or decision issued by the first-tier tribunal. If the facts established by the first- tier tribunal are insufficient, the appellate panel may remand the dispute to the first- tier tribunal for further proceedings, and **if the first- tier tribunal is unable or unsuitable to review the dispute, a new tribunal may be constituted upon the request of either disputing party in accordance with the rules applied to the first- tier tribunal"**.

In this context, we see no utility in forming a new court with new members to review the case or dispute afresh. We suggest that the appellate court should have the authority to review both factual and legal issues and to render a final decision, especially since, under Article 34, the decision of the new court is final and binding on the disputing parties. Thus,

there will be no possibility of further appeal against the decision of the new court. Similarly, the decision of the appellate court is not subject to further appeal or review by any other court as per Article 35.

Therefore, we propose granting the appellate court the authority to decide on both legal and factual issues as a second level of judicial review. This approach would prevent the prolongation of the dispute due to the procedures involved in forming a new first-instance court to hear the case again, even if the decision of the new court is final.

2- Jurisdiction of the Court and Appointment of Arbitrators:

Jurisdiction of the Appellate Court:

One of the advantages of having an appellate mechanism is that the scope of appeal is not limited to the decisions of the first-instance court or the substantive bases of arbitral tribunals in investor-state disputes. Instead, the scope of appeal extends further to include appellate review of arbitration awards or decisions issued by arbitral or other adjudicatory bodies (such as permanent arbitral bodies, regional investment courts, and international commercial courts, as stated in the paper submitted by Working Group III in January 2020), provided that the disputing parties agree in writing to submit the case to the appellate court. Once **the disputing parties** grant their consent, no party may unilaterally withdraw its consent, as stipulated in Article 18, paragraph (1) of the Draft Statute of the Court.

In this context, we see the following:

- On our part, we welcome this provision, which broadens the jurisdiction of the appellate court, benefiting states that suffer from arbitration awards against them, thus burdening their budgets. It provides an opportunity to present the arbitration award to an appellate body, potentially altering the decision or alleviating the burden on the party against whom the arbitration award was issued. **(Egypt is among the first countries facing a considerable number of investment disputes filed against it before international arbitration platforms, making an appellate mechanism a significant benefit for such states.)**
- On the other hand, referring to Article 18, paragraph (3) of the Draft Statute, which states, "The appellate court shall have exclusive jurisdiction over any appeal relating to an arbitration award or decision rendered under an instrument listed in

paragraph (2) when the relevant contracting parties or all concerned parties have listed the instrument in their list**," we find a conflict with paragraph (1) of the same article due to the lack of a clear definition of "disputing parties" mentioned in paragraph (1). Does it refer to the parties to the agreement or to non-parties to the agreement?** If it refers to the parties to the agreement, we see no need to maintain paragraph (1) since the appellate court has exclusive jurisdiction over any appeal concerning an arbitration award or a first-instance court decision. Consequently, written consent from the disputing parties to submit the dispute to the appellate court per paragraph (1) would not be necessary. Therefore, a definition for "disputing parties" should be provided to resolve this issue.

Appointment of Arbitrators:

- According to the Draft Statute for the Permanent Mechanism for International Investment Dispute Settlement, the disputing parties will have no role in appointing the arbitration panel, which will consist of permanent members appointed for a single, fixed term, with disputes referred to them randomly and unpredictably. While this may appear neutral if implemented fairly and impartially, as stated in Article 16, paragraph (3), which notes, "Upon registration of the request, the presidency assigns the dispute to a panel on a random basis. If a member of the panel is a national of a state party to the dispute or a national of a state whose citizen is a party to the dispute, the presidency replaces that member with another from the court or may assign the dispute to another panel," & **we tend to agree with China's view, as presented in its paper on the freedom to choose arbitrators.**
- We believe that the right of parties to appoint arbitrators is a fundamental feature of international arbitration as traditionally practiced and embodies the will of the parties. Participants in investment arbitration (investors, government officials of the host country, lawyers, or arbitrators) regard this as a key and attractive feature of international arbitration. Since investment disputes often involve complex factual and legal issues at the initial stages of legal proceedings, parties must consider various factors when determining the composition of the arbitration panel and the suitability of the selected arbitrators, such as legal background, experience, nationality, and the level of expertise required in a particular case.
- It is worth noting that most other dispute resolution mechanisms in public international law, international economics, and trade involve similar practices, allowing disputing parties to select trusted experts to consider their cases. The original purpose of establishing international investment arbitration mechanisms was to protect investments, allowing parties to choose and form such mechanisms.

Therefore, this aspect cannot be overlooked. The right of parties to appoint arbitrators at the initial stage of investment arbitration is a widely accepted institutional arrangement that provides significant support in enhancing the confidence of the disputing parties, particularly investors, and should be maintained in any reform process.

3- Concerning Members of the Arbitration Panel:

- The independence and impartiality of arbitrators are of paramount importance and crucial to the legitimacy of the investor-state dispute settlement (ISDS) system. One of the court's key advantages is that the selection and appointment of its members are based on qualifications and requirements characterized by integrity, fairness, and competence. These members must be highly proficient in international law, private law, international investment law, or the settlement of international investment disputes, as stipulated in Article 7, paragraph (1) of the Draft Statute of the Court. It would be preferable for the provision to require that the appointed member be qualified or competent in all the mentioned fields, rather than just one.
- Another advantage we see is the stipulation in Article 12, paragraph (3), which states that members of the courts shall work on a full-time basis **unless the conference decides otherwise.** However**, we express reservations about the phrase "unless the conference decides otherwise" and suggest its removal**. Limiting the duties of the court members to their roles ensures many criticisms concerning their independence and impartiality are mitigated. These criticisms include potential favoritism towards investors or states that previously appointed them to secure future appointments in other disputes, and conflicts of interest resulting from individuals acting as both arbitrator and counsel in various ISDS procedures. Such situations could lead a court member to influence the panel's decision to benefit their position in another arbitration body. **Therefore, we believe it is essential to require that members of both courts (first-tier tribunal and appeals tribunal) appointed on a full-time basis with no external engagements, as this is necessary to mitigate conflicts of interest.**
- One of the criticisms we see in the draft statute of the court regarding the appointment of one of the members of the two courts is what is stated in the text of Article (7), paragraph (3): "The members of the two courts shall be citizens of the contracting parties, and a member who holds the nationality of more than one state shall be considered a citizen of the state in which he has his usual place of residence or in which he usually exercises his civil and political rights."

We reject the principle of dual nationality because it may be considered a pretext for bad faith for a member of the two courts to assume the consideration of a dispute brought before him, one of the parties being a state with a political position hostile to the state whose nationality the member of the court holds. Therefore, dual nationality is considered a cover that may result in harming the interests of the state party to the dispute. This is in addition to the text of Article (8) in its second paragraph, which states that "Two members of the two courts may not be citizens of the same state," as it is considered a text that contradicts the text of Article (7) previously referred to in the event that one of the members has more than one nationality, as this may lead to a lack of transparency on the basis of which the conference adopted the desired reform process for settling disputes between investors and states.

4- <u>Financing to operate the standing mechanism:</u>

- The issue of financing the court raises several questions, foremost among them being the sources of funding. The financing of the court by external entities, regardless of the form of the arbitration body, poses ethical concerns and potential harm to the interests of one party. It could also negatively affect the dispute resolution process. <u>In this context, we note that financing is a complex matter, necessitating a clear and decisive formula to secure the financial resources required to fund the court, thereby preventing harm to the interests of the disputing parties.</u>
- Particularly, Article 37 of the Draft Statute of the Court is vague**, lacking restrictions that could prevent funding from external entities potentially influencing the court's decisions and directions**. Notably, paragraph (4) of the mentioned article explicitly states that " The Standing Mechanism may receive voluntary contributions, whether monetary or in-kind, from Contracting Parties, "**non-Contracting Parties"**, international and regional organizations, and other persons or entities…." thereby openly allowing other parties to finance the court. This presents a clear risk of external entities influencing the arbitration process within the courts.

Furthermore, regarding the second paragraph of the same Article (37), it may contain flaws and advantages in the following cases:

- **Unfair and Inflexible Provision**: The text states that "if a contracting party fails to pay its contributions, the conference may decide to restrict its rights or obligations or modifications according to the standards established by the regulations adopted by the conference." This provision contradicts one of the fundamental objectives of establishing the court, which is to alleviate the financial burden on developing countries concerning the costs of resorting to international arbitration bodies, which can result in significant arbitration costs. Therefore, this article should be reconsidered in cases where a developing member state fails to pay its contribution.
- **Restriction on Economically Powerful Countries**: On the other hand, such a provision can serve as a restriction on economically powerful countries, limiting their ability to influence the fate of the court if they decide not to pay their contributions as members. This would prevent them from evading restrictions on their rights, obligations, or modifications according to the standards that the conference will adopt.

  Therefore, its necessary to provide a clear explanation of the restrictions the conference intends to implement in cases where a member fails to pay their contribution. This will allow us to assess and offer a well-informed legal opinion on whether to maintain or amend this provision.

5- <u>Regarding the Recognition and Enforcement of Court Decisions:</u>

- **Binding Nature of Court Decisions**: One of the most critical points to consider in the draft statute of the court is the provisions in Articles (26), (35), and (36), which state that the court's decisions are binding and not subject to any further review by other courts. <u>Therefore, it is preferable to stipulate that the disputing parties should first be given the opportunity to present their dispute before the competent local judicial authorities before resorting to the court.</u>
- Additionally, the court's statute should include a clause that grants the disputing parties a mandatory period to exhaust amicable or alternative dispute resolution methods before resorting to the permanent court. **This is similar to what is stipulated in Article 13 concerning amicable settlement and Article 14 concerning local remedies in the procedural and cross-cutting issues protocol**, which state that disputing parties should, as much as possible, resort to amicable settlement through consultation, negotiation, mediation, or any other means before submitting a request for arbitration. The party should consider the possibility of

filing a lawsuit before a court or competent authority of the other contracting party where available.

This is due to the flexibility offered to state parties in the multilateral agreement concerning the reform of the dispute settlement system between investors and states, allowing them to choose the protocols mentioned in the agreement. If a party that has joined the agreement selects one of the permanent dispute settlement mechanism protocols without adhering to the protocol on procedural and cross-cutting issues that handles the arbitration request procedures, it becomes necessary to explicitly state in the permanent dispute settlement mechanism protocol that parties must first resort to amicable settlement methods before filing for arbitration.

We agree with the views expressed by both the Republic of South Africa and the People's Republic of China in their respective submissions on this matter:

- **The Republic of South Africa,** in its submission, pointed out that there are no suggestions that investors, before being allowed to resort to the Investment Court, should first exhaust local remedies or demonstrate that the local courts will be unable to address a particular issue.
- **The Republic of China**, it was stated that they support the inclusion of pre-arbitration consultation procedures in this regard, specifying that both the investor and the central government of the host country are the primary parties responsible for overseeing the consultation process. It also suggests that consultations should be mandatory for both parties. Similar provisions have been incorporated into several international investment agreements and have played a positive role in resolving investment disputes. The consultation process should last from three to six months before arbitration proceedings commence. This procedure allows investors and host countries to better understand each other's claims and the measures prescribed in the legal frameworks of the host country, while also exploring potential solutions to avoid escalating disputes into arbitration proceedings."

Secondly: Regarding to the establishment of the Advisory Centre on International Investment Dispute Resolution

- We believe that the establishment of an advisory center aimed at providing training, consultation, support, and assistance related to the procedures for international investment disputes and enhancing the ability of countries and regional economic integration organizations to prevent and address such disputes, as outlined in the Statute of the Center, is a positive addition, especially in supporting developing and least developed countries in reforming their investment frameworks and avoiding the negative consequences that may arise from these agreements, in accordance with Articles (6) and (7) of the Statute of the Center, which relate to providing technical assistance, capacity building, and legal consultation and support concerning international investment dispute procedures.
- The creation of an advisory center dedicated to resolving disputes arising from international investment agreements could be a strong addition in terms of building capacity and exchanging experiences for government officials concerned with this matter in those countries. This is particularly relevant given that the Statute of the Center, in Article (12), permits economic integration organizations to become members of the advisory center. This could serve as a foundation for providing advice and expertise to developing countries from those organizations on how to avoid falling into investment disputes.
- However, we may disagree with the provision in paragraph (1) of Article (7), which allows, upon the request of a member, the representation of the Center on behalf of a member in a specific international investment dispute, including hearing sessions. This is considered inconsistent with the principle of confidentiality in the dispute resolution process. Moreover, it could provide a gateway for third parties to support one side of the dispute in a way that harms the interests of the opposing party.