Comments to the UNCITRAL Secretariat's Note
'Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues'

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Introduction

1. The following comments present considerations relating to the design and constitution of an appellate mechanism; and may be useful in setting up and establishing principles to guide the overall process. Our comments are organised as follows: 1) The need to approach the design of an appellate mechanism as a *unitary whole*; 2) The need to reconsider the possible control over issues governed by *domestic law*; 3) The need in clarifying what constitutes an *appealable decision*; 4) Ensuring that issues of contractual interpretation are *expressly* considered within the UNCITRAL reform process; and 5) Some specific comments regarding the Draft Secretariat's Note.

1) Designing the design process for an appellate mechanism

2. Conceptualising an appellate mechanism as **a unitary whole** increases the possibility that design choices will have an internal coherence by giving the necessary appreciation and consideration to relational dynamics between design choices. For instance, choosing to grant an appellate mechanism the power to *modify* an award/decision rendered by a first-tier tribunal requires that the appellate mechanism also has the power to engage in *de novo* assessment of facts and law. Similarly**,** remand authority would also require that an appellate mechanism has the power to engage in a *de novo* assessment of facts and law.
3. Additionally, the establishment of a core set of **fundamental principles** for the purpose of guiding the design of an appellate mechanism may have the advantage of ensuring that these core principles are maintained in the final design and that specific design decisions are consistent with the overall objectives of the appellate mechanism, and that the processes are efficiently managed and organized throughout.
4. Accordingly, Working Group III may wish first to attempt to find consensus on *the grand question* on **what is aimed to be achieved with the appellate mechanism?** In particular: Is it to ensure

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correctness of the decisions in applying public international law only or correctness of the decisions in terms of applying public international law *and* domestic law *and/or* facts? Does the appellate mechanism have the task to ensure *consistency* in the application of public international law in the jurisprudence of investment treaty arbitration? Upon answering the grand question on the appellate mechanism's **core purpose**, all other issues depend, including appealable decisions, scope, and standard of review, relevant filters ensuring the manageability of the caseload, effect and authority of the decisions of the appellate mechanism etc.

2) Appealable decisions

5. To ensure manageability of the appellate review, it is critical to have clarity over which decisions are appealable. The UNCITRAL Secretariat's Note carefully identifies this need in para. 19 by specifying the desirability to further consider whether certain procedural decisions might not be subject to appeal, like decisions on the challenge of arbitrators and decisions on interim measures. While this approach undoubtedly brings clarity on the matter, it shall be noted that it might be difficult, if at all possible, to have an exhaustive list of all procedural issues resolved in separate decisions. The first-tier tribunals' broad discretion to structure the decision-making as tribunals consider fit appears to be an obstacle to completeness in this context.[3]
6. Accordingly, it may be more pragmatic to concentrate on identifying those decisions that are appealable instead of concentrating on those that are not. Working Group III may wish to put efforts into identifying and expressly addressing *appealable decisions* only. Again, appreciation of the core purpose of appeal should help identify appealable decisions more easily.

3) Domestic law and the appellate mechanism

7. The UNCITRAL Secretariat's Note carefully identifies the desirability for Working Group III to clarify whether a question of interpretation or application of domestic law falls into the appellate mechanism's scope of review, as well whether interpretation and application of domestic law falls in the category of error of law or error of fact (para.6).
8. Whilst the latter distinction helps to specify the precise scope of review, it does not conclusively resolve all necessary complexities connected to interpretation and application of domestic law by the appellate mechanism. In this context, Working Group III may wish to consider the growing criticism against approaching domestic law as a matter of fact[4], as well as growing specification in a number of

[3] An alternative solution might be to have an exhaustive empirical overview of separate procedural decisions and awards in the known treaty-based cases to ensure that a broad range of types of procedural issues are considered by Working Group III. However, it shall be noted that even the most complete empirical study would not establish any exhaustive list of all possible types of procedural issues addressed in procedural decisions.

[4] See, for instance, Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017) 104-108 with further references.

recent free trade agreements (FTAs) that domestic law is a matter of fact.[5]

9. Working Group III may wish to clarify what the categorisation of domestic law as a question of law or a question of fact means for the appeal stage and whether the categorisation has any implication for the ascertainment of the content of domestic law for the appeal mechanism and the first-tier tribunal. In particular, clarification as to whether the *jura novit curia* principle extends to domestic law for the appellate mechanism and the first-tier tribunals would bring more clarity on the matter and could avoid numerous disputes as to the scope and admissibility of the future appeals.

4) Contractual interpretation and the appellate mechanism

10. Investment contracts are often central to investment treaty disputes. Decisions on jurisdiction, application of specific standards of investment protection, and damages may depend on the content of investment contracts. To ascertain their content, treaty-based tribunals engage in contractual interpretation.

11. While contractual interpretation in investment treaty arbitration is governed by domestic law[6] and thus generally falls into the category of a domestic-law-issue, it nevertheless deserves an express treatment by Working Group III.

12. The following four arguments support this proposition.

13. First, contractual interpretation pertains to **legal interpretation** along with treaty interpretation (omnipresent for treaty-based disputes) and statutory interpretation (occasional for treaty-based disputes). In designing the appellate mechanism, it is advisable not only to have clarity over the scope of review for issues governed by public international law and issues governed by domestic law but also to bring clarity to the scope of review regarding all the three types of interpretation, including contractual interpretation.

14. Second, contractual interpretation is hard to classify for the purpose of its review in appeal. Factual assessments often become intrinsically intertwined with the application of domestic law in contract interpretation. In other words, for the purpose of its possible review, contract interpretation may represent **a mixed question** of law and fact. Accordingly, in framing the scope of review for the appellate mechanism, it would be advisable to expressly address whether the appellate mechanism possesses the power to review contractual interpretation exercised by the first-tier tribunal and, if so, to what extent.

15. Third, as a type of **legal reasoning,** contractual interpretation closely integrates with reasoning governed by public international law. In

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[5] CETA (Article 8.31 (1), EU-Singapore Investment Protection Agreement (Article 3.13 (2), EU-Vietnam Investment Protection Agreement (Article 3.42 (2).

[6] Yuliya Chernykh, *Contract Interpretation in Investment Treaty Arbitration*, Series of Dissertations Submitted to the Faculty of Law, University of Oslo, No.149, 56-82. For a short summary of the dissertation *see* <https://jusmundi.com/en/document/wiki/en-contract-interpretation> (accessed on 7 December 2020).

exercising an appeal regarding the application of certain standards of investment protection, a question may arise as to whether the appeal mechanism has control over legal reasoning relating to contractual interpretation.

16. Fourth, if construction of contractual provisions falls into the scope of review for the appellate mechanism, parties to the appeal may spend substantial efforts attempting to exclude contractual interpretation from the appellate review. Addressing this issue at the design stage would avoid unnecessary disagreements at the appeal stage and ensure efficiency.

5) Specific comments

17. In the discussion of the standard of review (para. 13), the Working group may consider emphasizing the purpose of review in relation to the appeal mechanism's overall efficiency and consistency. The Note refers to these considerations on several occasions (a further mention of the 'manageable caseload' and the avoidance of 'systematic appeals' is made in para. 35), yet the subsequent discussions may benefit from clear goalsetting for the following reasons. The existing system of investor-state dispute settlement is based on the procedural framework of international arbitration. As such, it includes several distinctive features (such as limited opportunities for appeal/annulment and review on the merits, deferral of the issue of jurisdiction to the tribunal through limits on appeals, deadlines for challenging arbitration awards, etc.), which suit the interests of private parties bringing their commercial disputes. The Working Group may consider whether the participants in investor-state dispute resolution, as well as other stakeholders, share the goals of private parties when it comes to the predictability of legal outcomes, consistency of jurisprudence and transparency of the arbitral process. For instance, a desire to ensure legal consistency of arbitration awards may undermine other goals, such as procedural economy and cost reduction, when it comes to re-litigation of factual issues. The question arguably goes beyond the legal standard of review, as it defines the whole framework applicable to the challenge of decisions of the first-tier tribunal.[7]

[7] 'Chapter 10. Challenge of Arbitral Awards', in Blackaby Nigel, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Sixth Edition), 6th edition (Kluwer Law International; Oxford University Press 2015) pp. 569:

> 'One of the advantages of arbitration is that it is intended to result in the final determination of the dispute between the parties. If the parties want a compromise solution to be proposed, they should opt for mediation. If they are prepared to fight the case to the highest court in the land, they should opt for litigation. By choosing arbitration, the parties choose, in principle, finality. An arbitral award is not intended to be a mere proposal as to how the dispute might be resolved, nor is it intended to be the first step on a ladder of appeals through national courts.'

18. The discussion of the provisions on the temporary suspension of the first-tier tribunal decisions (paras. 23-25) may benefit from a closer study of the existing practice of ICSID annulment committees assessing the need for stay of enforcement. The Working Group may consider that certain factors may play a role in the assessment, such as the financial standing of the disputing parties, which may affect the prospects of recovery of the award.[8]

19. In the discussion of the remand authority of the appellate tribunal (para. 28), the Working Group may consider the risks resulting from different 'pools' of arbitrators in commercial and investment treaty arbitration and the existence of repeat players. One may suggest that the use of remand procedures in commercial arbitration involves a more diverse and potentially infinite pool of arbitrators, who do not belong to the same legal community as the judges of remanding courts. In investment treaty arbitration, the diversity of the pool is notoriously narrow. Many arbitrators share personal and professional connections with each other.[9] The lack of diversity combined with community networks can have significant effects, e.g. regarding success rates of arbitrator challenge decisions. It should be considered whether the adoption of the remand procedure may suffer from similar 'network' concerns regarding the relationship between the arbitrators sitting in the original tribunal and the appellate mechanism.

20. With regard to the potential introduction of a procedure for the early dismissal of manifestly unfounded appeals, 'modelled around Rule 41(5) of the ICSID Arbitration Rules' (para 40), the Working Group may benefit from an empirical study on the success rates and duration of such preliminary objections.[10] The study concludes that despite the low success of objections, their filing correlates with a significantly shorter duration of the arbitration proceedings.[11] While the causal connection remains unclear,[12] its side-effect of 'streamlining the proceedings' may contribute to their overall cost- and time-efficiency.

21. Regarding the suggested mechanisms for ensuring 'investor's compliance' with enforcement measures (para. 44), the Working Group may consider to level the playing field by designing a corresponding mechanism to ensure state compliance. The text of the draft provision follows the traditional path of leaving questions of immunity from execution to be governed by the domestic law (para. 61, part 3 of the proposed article). Given that the enforcement of

[8] For instance, in the recent decision on the stay of enforcement in *InfraRed v. Spain*, the Annulment Committee evaluated the 'balance of harms' resulting from the lifting of stay, which included different economic interests of the parties. See *InfraRed Environmental Infrastructure GP Limited and others v Kingdom of Spain, ICSID Case No ARB/14/12, Decision on Continuation of Stay of Enforcement of the Award (27 October 2020)* (Hafez, Zhang, Júdice) [165 *et seq.*].

[9] However, the networking effects may change depending on the Working Group's choice of composition strategies of first-tier and appellate tribunals.

[10] B Ted Howes, Allison Stowell and William Choi, 'The Impact of Summary Disposition on International Arbitration: A Quantitative Analysis of ICSID's Rule 41 (5) on Its Tenth Anniversary' (2019) 13 Dispute Resolution International 7.

[11] ibid 16.

[12] ibid 32.

arbitration awards against states' assets presents significant hurdles to private parties, the Working Group may consider the principle of restrictive immunity from execution (as stated in Article 19 United Nations Convention on Jurisdictional Immunities of States and Their Property).

22. The discussion of the appellate mechanism (para. 59 *et seq.*) may benefit from a clarification whether the decisions of appellate tribunals should play any more authoritative or persuasive role than the decisions of first-tier tribunals in unrelated cases. The Commentary to the ICSID Convention indicates that decisions of annulment committees do not have such authority.[13] The introduction of a new appellate mechanism may require reconsideration of the matter.

[13] Christoph H Schreuer and others, *The ICSID Convention: A Commentary : A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, Cambridge University Press 2009) 1041–1042: 'The ad hoc committee is not a higher authority that sets standards or makes policy. Its function is purely to clear the way for a fresh decision by a new tribunal.'