UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

COMMISSION DES NATIONS UNIES POUR LE DROIT COMMERCIAL INTERNATIONAL

Vienna International Centre
P.O. Box 500, A-1400 Vienna, Austria
Telephone: (43-1) 26060-4060 Fax: (43-1) 26060-5813
E-Mail: uncitral@un.org Internet: uncitral.un.org

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Re: UNCITRAL Working Group III (ISDS Reform) - Informal online meetings – 2-3 March 2022

Dear Delegates to Working Group III,

It is my pleasure to share with you a summary, prepared by the Rapporteur and myself with the assistance of the Secretariat, of the main points discussed during the informal meetings held on 2-3 March 2022 on the draft provisions on the functioning of an appellate mechanism and the options for its establishment.

The purpose of these meetings was to explore the topic of an appellate mechanism in detail in order to support delegations in their preparation for the next Working Group session at which this topic will be considered and make such discussions more efficient. In addition, informal meetings are helpful in providing technical support to the Secretariat tasked with the preparation of revised versions of the working papers to be formally presented to the Working Group. No decisions are taken at these meetings.

The meetings were held in English and French, with the interpretation being sponsored by the Government of France.

- ***Draft provisions 1-10***

Participants considered draft provisions 1-10 on the basis of the initial draft on an appellate mechanism (initial draft) (available here).

General comments included the following:

- An appellate mechanism would mainly serve the purpose of ensuring the correctness and consistency of decisions. It would also impact the costs and duration of ISDS proceedings.
- The provisions in the initial draft would need to be adjusted, based on how the appellate mechanism would be set-up (as a stand-alone body, as a second instance of a permanent investment court, or as an ad hoc mechanism), as well as take into account whether the appellate mechanism would deal with treaty-based disputes only, or also cover contract or investment law-based disputes, perhaps even State-to-State disputes.
- There should be further research regarding how decisions of an appellate mechanism would tie into the existing legal framework, including national review mechanisms.

Draft provision 1 on scope of appeal

Comments included the following:

- An appellate mechanism should extend to decisions on jurisdiction. Appeals of decisions on jurisdiction should be conducted in an expedited manner, and the mechanism should be designed so as to avoid dilatory tactics.
- Both immediate or postponed appeals of decisions on jurisdiction have benefits and drawbacks and, if the mechanism would allow for immediate appeal, sub-option 1 (no suspension of the proceedings) might be preferable. At the same time, suspending proceedings might be more efficient.
- Regarding the options under paragraph 2: Option 1, providing for the possibility to appeal after a final decision on the merits has been rendered, was seen as reflecting provisions in recently concluded IIAs; Option 2 in combination with sub-option 2 was seen as an efficient solution.
- Doubts were expressed with regard to the possibility of appealing interim decisions, which were, by definition, not final, generally did not address the merits of the case and of which shortcomings could be addressed at the end of the proceedings.

Draft provision 2 on grounds for appeal and standard of review

Comments included the following:

- Regarding the structure of draft provision 2, it should be explored whether the grounds for appeal and the standard of review should be addressed in two separate provisions.
- Consistency with existing rules on review should be carefully considered.

- The various limbs of draft provision 2 should not be too broad, as this would impact the costs and duration of proceedings.
- With regard to sub-paragraphs (a) and (b) being provisions commonly found in appellate mechanisms and sub-paragraphs (d)-(g) meaning to address grounds pertaining to annulment and setting aside proceedings, various observations were made:
    - The scope of sub-paragraph (a) or (b) was discussed.
    - It should be explored whether sub-paragraphs (c)-(g) were also covered by sub-paragraphs (a) and (b).
    - The grounds for appeal in sub-paragraphs (d)-(g) were autonomous formulations partly drawn from existing annulment mechanisms, in particular the ICSID Convention, in order to avoid cross-references to those mechanisms.
    - It was queried whether the ground regarding "the failure to state reasons" found in article 52 of the ICSID Convention was covered under draft provision 2.
    - It was queried whether the notions of "serious departure" and "fundamental rule of procedure" in sub-paragraph (g) were clear enough. It was pointed out that sub-paragraph (g) mirrored a ground for annulment under article 52 of the ICSID Convention.
- With regard to sub-paragraph (c), a separate ground for appeal relating to errors in the assessment of damages may create confusion and overlaps. It could be clarified that such ground was covered under sub-paragraphs (a) or (b). It was further suggested that only manifest errors in the assessment of damages should be a ground for appeal.
- The reference to "application of the law" in sub-paragraph (a) may need clarification. It could be understood as covering errors in the application of the law to the facts, leading to a full review of the case. It could be clarified that the ground under sub-paragraph (a) was not meant to be a de novo review of the case.

Draft provision 4 on suspensive effect of appeal

Comments included the following:

- A waiver of judicial review would promote procedural efficiency. However, such a waiver would have to be carefully considered.

- A waiver of judicial review may require a reform of domestic laws. It was discussed whether such a reform would be difficult to achieve, and whether statutes of a multilateral investment tribunal could address the issue.

Draft provision 5 on decisions by the appellate tribunal

Comments included the following:

- A remand provision would concord with the desire to have less extensive appeals, and there were merits to permitting annulments of only the affected parts of first-tier decisions.
- Consideration should be had of how often a matter should be allowed to be remanded or re-appealed.
- Appeals on the basis of the grounds in draft provision 2(d) and 2(g) would not be necessary if the appellate mechanism was to be set-up in the context of a multilateral investment tribunal. Similarly, the phrase in paragraph 3, option 1 referring to the case in which "a challenge based on the fact that the tribunal was not constituted in accordance with the applicable rules or lack impartiality or independence has been upheld*"* would not be necessary.
- An appellate tribunal should have the ability to remand cases to the first-tier tribunal only in cases in which the factual record was incomplete. A first-tier tribunal, having been constituted for a case, may be better qualified to evaluate the facts of the case.

Draft provision 6 on the duration of appellate proceedings

Comments included the following:

- With regard to the deadlines provided in draft provision 6, it was discussed whether expeditiousness would be pursued at the expense of quality.
- The extent to which the experience of the Appellate Body of the World Trade Organization should be considered in the development of the appellate mechanism.

Filter mechanism suggested in para. 55 of the initial draft

Para. 55 of the initial draft contains a suggestion for an early filter mechanism, enabling an assessment whether an application for appeal would meet all formal requirements. Such "administrative" filter mechanism by institutions would be complemented with the legal mechanism proposed under draft provision 9 (early dismissal mechanism) where judges would be tasked with the review. Comments in the discussion included the following:

- A mechanism to filter unwarranted appeals and a broad scope of appeal, providing for a de novo review, are inherently in tension.
- The right to appeal should be preserved and the filter mechanism should be limited to review of whether jurisdictional and formal requirements for appeal are fulfilled. Therefore, the legal criteria for the scope of such filter mechanism should be carefully defined.

Draft provision 9 on early dismissal mechanism

Comments included the following:

- Draft provision 9 was prepared based on article 41(5) of the ICSID Arbitration Rules as a model. Reference was made to the use of the mechanism in the ICSID context. A similar provision was being prepared as part of the procedural rules reform to apply to proceedings at the first-tier and also in the context of Working Group II as a means to enhance the efficiency of arbitration proceedings.
- With regard to the standard of the early dismissal ("manifestly without merit"), the word "legal" found in article 41(5) was omitted to respond to comments by States in the Working Group calling for a broad scope of the early dismissal mechanism.
- Different views were expressed on whether both respondent States and investors should be able to initiate the early dismissal mechanism. One view was that both should have the opportunity as the purpose of such procedure was to determine whether the "appeal" lacked merit and not the claim itself.
- An early dismissal mechanism, while aimed at expediting the proceedings and possibly limiting frivolous appeals, may lead to delays in the proceedings and thus would need to be considered in the context of the time frames to be provided for in draft provision 6.
- It was discussed whether the appellate tribunal should be able to dismiss an appeal on its own initiative and without a request by the parties. Questions were also raised on the relationship between the filtering/control mechanism to limit frivolous appeals and the early dismissal mechanism.
- It was queried whether the early dismissal mechanism in the context of appeals should be a two-stage determination (first to decide whether to take up the process and then to decide whether to dismiss the claim), and whether lack of jurisdiction of the appellate tribunal would also be a ground for early dismissal.
- To consider whether the time frames in draft provision 9 were consistent and to consider further the phrase "no later than 30 days after the notice of appeal, and in any event before the first session of the appellate tribunal".

Draft provision 10 on security for costs

Comments included the following:

- The draft provision would address the concern expressed by States that encountered problems in recovering their legal costs in case of a favourable cost award. Exceptions should be provided for developing countries and potentially small and medium sized enterprises and the criteria for ordering security for costs in paragraph 2 should be elaborated.
- Only investors should be ordered to provide security for costs as the provision sought to address frivolous claims by investors. Another view was that as this was in the context of an appeal, both States and investors should be able to request security for costs.
- With respect to the security for costs being calculated based on the amount awarded by the first-tier tribunal, some doubts were expressed as this could be a burden on States in submitting appeals.

- ***Possible models for an appellate mechanism***

Participants discussed the possible models for the establishment of an appellate mechanism outlined in the initial draft (paras. 67-75). Comments included the following:

- In line with the objective to achieve coherence of the jurisprudence in ISDS, the most efficient way forward would be to create a standing mechanism including a first instance and an appeal tribunal. States should have the option to join the standing mechanism, or only the appellate mechanism.
- It was suggested to consider how an appellate mechanism could be set-up within ICSID.
- The benefits and drawbacks of the option to establish ad hoc or treaty specific appellate tribunals was also discussed. Such option would constitute a flexible solution. At the same time, it would not be conducive to enhancing consistency of decisions made by ISDS tribunals.
- The appellate mechanism should be set-up so as to avoid a further fragmentation of the current ISDS regime.