

## Possible reform of investor-State dispute settlement (ISDS)

### Appellate mechanism

#### Note by the Secretariat

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## I. Introduction

1. At its resumed thirty-eighth session, in January 2020, the Working Group undertook a preliminary consideration of the main elements of a possible appellate mechanism with the goal of clarifying, defining and elaborating such option, without prejudice to any delegations' final position<sup>1</sup> (A/CN.9/1004/Add.1, paras. 16-51). At its fortieth session, in February 2021, the Working Group continued its deliberations on the basis of draft provisions on an appellate mechanism, including issues regarding the enforcement of decisions that would be rendered through a standing mechanism. The Working Group requested the Secretariat to undertake further preparatory work on these matters (A/CN.9/1050, para. 113).
2. Accordingly, this Note contains provisions addressing the main elements of the functioning and establishment of a possible appellate mechanism. Further insights on the issue of enforcement of decisions resulting from a standing mechanism, including an appellate mechanism, are contained in documents [*reference to be included*] (addressing general questions) and [*reference to be included*] (reproducing a note on the topic by the ICSID Secretariat). Document [*reference to be included*] elaborates on the financial aspects of establishing an appellate mechanism in the form of a permanent body.
3. This Note was prepared with reference to a broad range of published information on the topic,<sup>2</sup> and does not seek to express a view on the possible reform options, which is a matter for the Working Group to consider.

## II. Appellate mechanism

4. At its resumed thirty-eighth session, in January 2020 the Working Group had noted that the various components of an appellate mechanism were interrelated and would need to be considered, whatever form such mechanism might take – ad hoc appeal mechanism, a permanent stand-alone appellate body, or an appeal mechanism as the second tier of a standing court (all these various possible form options are referred to as “appellate mechanism”; the panel of ISDS appellate tribunal members is referred to as “appellate tribunal”) (A/CN.9/1004/Add.1, paras. 16 and 25). It had also indicated that the objectives of avoiding duplication of review proceedings and further fragmentation as well as of finding an appropriate balance between the possible benefits of an appellate mechanism and any potential costs should guide the work (A/CN.9/1004/Add.1, para. 24). The draft provisions in section A below are based on the deliberations of the Working Group at its fortieth session, in February 2021 (A/CN.9/1050, paras. 63-114).

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<sup>1</sup> By way of background information, the suggestion for the establishment of an appellate mechanism is contained in various proposals submitted by Governments in preparation for the deliberations on reform options: A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States (Appellate body); A/CN.9/WG.III/WP.161, and A/CN.9/WG.III/WP.198, Submissions from the Government of Morocco (Prior scrutiny of the award and standing appellate mechanism); A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan (Treaty-specific appellate review mechanism); A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador (Standing review and appellate mechanisms); A/CN.9/WG.III/WP.177, Submission from the Government of China (Stand-alone appellate mechanism); the reform option is also discussed in A/CN.9/WG.III/WP.176, Submission from the Government of South Africa and A/CN.9/WG.III/WP.180, Submission from the Government of Bahrain; A/CN.9/WG.III/WP.188, Submission from the Government of Russia; A/CN.9/WG.III/WP.195, Submission from the Government of Morocco.

<sup>2</sup> See the list of publications contained in document A/CN.9/WG.III/WP.202, (footnote 2); see also bibliographic references published by the Academic Forum, available at the UNCITRAL website, Working Group III, Additional resources, at [https://uncitral.un.org/en/library/online\\_resources/investor-state\\_dispute](https://uncitral.un.org/en/library/online_resources/investor-state_dispute) and [www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/](http://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/).

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## A. Main provisions on the functioning of an appellate mechanism

### 1. Scope of appeal

5. The Working Group may wish to consider the scope of appeal, including which disputes and types of decisions could be subject to appeal.

#### *Draft provision 1*

1. *Decisions by first-tier tribunal[s] that are final and that settle an international investment dispute are subject to appeal to the appellate tribunal.*

2. *Option 1: Decisions whereby [a][the] first-tier tribunal upholds or declines its own jurisdiction are also subject to appeal. If the first-tier tribunal upholds its jurisdiction, the decision is subject to appeal after the final decision on merits is rendered.*

*Option 2: Decisions whereby [a][the] first-tier tribunal upholds or declines its own jurisdiction are also subject to appeal. If the first-tier tribunal rules as a preliminary question on its own jurisdiction and upholds it, any party may request the appellate tribunal to review the matter; while such a request is pending,*

*Sub-option 1: the first-tier tribunal may continue the proceedings and make [an award][a decision].*

*Sub-option 2: the first-tier tribunal shall stay the proceedings until a decision is made by the appellate tribunal.*

#### *Comments on draft provision 1*

##### *(i) Decisions*

##### *- Final decisions*

6. Paragraph 1 reflects the suggestion that final decisions, on either merits or jurisdiction, are subject to appeal (A/CN.9/1050, paras. 86, 87 and 113; A/CN.9/1004/Add.1, para. 55). Article 1 refers to “decisions” by first-tier tribunal(s) and does not address the form of such decisions (an award or any other form). It does not differentiate either on whether the first-tier tribunal would be an arbitral tribunal under the ICSID or non-ICSID framework, or a permanent first instance multilateral court (if one were to be established).

##### *- Decisions on jurisdiction*

7. Paragraph 2 includes options on appeal of decisions on jurisdiction, taking into account various aspects including when such an appeal could be made, its effect on the first-tier proceedings, and the circumstances under which appeal would be allowed. A wide range of views were expressed in the Working Group, including on whether the first-tier tribunal should stay or continue the proceedings when appeal on a decision on jurisdiction was pending and on whether the appellate tribunal could overturn a decision by the first-tier tribunal stating that it does not have jurisdiction (A/CN.9/1050, para. 87; see also A/CN.9/1004/Add.1, para. 33). Draft provision 1(2) contains different options covering decisions declining jurisdiction over the entirety of the dispute or with respect to certain parts, aimed at reflecting the divergent views expressed.

- Option 1 provides that an appeal could be made only after the final decision on the merits so as to ensure that the appellate tribunal would be presented with the full record of the case before rendering its decision; noteworthy on this matter is the Annex of the 2004 Discussion paper on Possible Improvement of the Framework for ICSID Arbitration, which provides that "to avoid discrepancies of coverage between ICSID and non - ICSID cases, the Appeals Facility Rules might either provide that

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challenges could in no case be made before the rendition of the final award or allow challenges in all cases in respect of interim awards and decisions."<sup>3</sup>

- Option 2 provides that an appeal could be made at an early stage of the first-tier proceedings (A/CN.9/1004/Add.1, para. 33).<sup>4</sup> It contains two sub-options, addressing the question whether the proceedings at first-tier should continue or be stayed, in particular in light of the cost involved under either option.

8. The Working Group may wish to note that the question of possible parallel procedures to challenge decisions on jurisdiction (both under the equivalent, in the domestic arbitration law, of article 16 of the Model Law and under an appellate mechanism) is addressed in the documents referred to in para. 2 above.

- *Ancillary question*

9. The Working Group may wish to consider whether decisions on admissibility of a claim by a first-tier tribunal should be mentioned specifically or whether they are deemed sufficiently covered by the reference in the comments to decisions “on the merits”.

10. The Working Group may also wish to consider whether draft provision 1 should be expanded to also clarify whether interim decisions are appealable (for instance, a decision upholding liability but deferring quantum to a later stage). In that light, it may wish to consider how to address decisions addressing part of the dispute, for instance, a decision upholding jurisdiction on some claimants or claims and denying jurisdiction on some other claimants or claims. For instance, if a decision declines jurisdictions over an investor (but upholds it over a different investor), it should be considered whether the aggrieved investor should be able to appeal the decision immediately as the decision is final. The Working Group may wish to consider whether partial decisions regarding claims, for instance a decision declining jurisdiction over certain claims only, could be appealed immediately or only with the final decision that terminates the proceedings.

#### (ii) *Type of disputes*

11. Article 1 provides an indication of the type of disputes that falls under the scope of the appellate mechanism. Reference is made in paragraph 1 to “an international investment dispute”. The text is aligned with wording used in other standards under preparation, such as the draft code of conduct for adjudicators in international investment disputes (A/CN.9/1086, paras. 32-43). The Working Group may wish to consider that the appellate mechanism may also operate outside the context of treaty-based ISDS, such as where the basis for jurisdiction would be an investment law or an investment contract with an element of internationality (A/CN.9/1050, para. 88; see also A/CN.9/1004/Add.1, para. 56).

## **2. Grounds for appeal and standard of review**

12. The Working Group noted that, given their impact on the effective operation of any appellate mechanism, the grounds for appeal and the standard of review ought to be clearly defined. It was also pointed out that the aim should be to keep the appellate mechanism simple, so that it would be accessible to all users, including small- and medium-sized enterprises (A/CN.9/1050, para. 63). In that light, the Working Group may wish to consider the following draft provision addressing the scope and standard of review of an appellate mechanism (A/CN.9/1050, paras. 64-84 and 113).

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<sup>3</sup> Discussion Paper on Possible Improvement of the Framework for ICSID Arbitration, prepared by the ICSID Secretariat (22 October 2004), “Annex - Possible Features of an ICSID Appeals Facility”, para. 8. More generally, in the ICSID context, no decision can be subject to annulment – it is only once the (final) award is issued that an annulment can be raised, and then only on the basis of a ground stipulated in Art 52(1)(a) – (e).

<sup>4</sup> In certain systems, it is not possible to challenge positive jurisdictional decisions until the final award while in others, decisions on jurisdictions must be challenged immediately.

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## **Draft provision 2**

*A disputing party may appeal a decision on the ground that:*

- (a) The first-tier tribunal made an error in the application or interpretation of the law;*
- (b) The first-tier tribunal made a manifest error in the assessment of the facts;*
- (c) [The first-tier tribunal made an error in the assessment of damages, including calculation errors];*
- (d) Any of the first-tier tribunal members lacked impartiality or independence or the tribunal was improperly appointed or constituted;*
- (e) The first-tier tribunal wrongly accepted or denied jurisdiction;*
- (f) The first-tier tribunal ruled beyond the claims submitted to it;*
- (g) There has been a serious departure from a fundamental rule of procedure.*

### **Comments on draft provision 2**

#### *(i) Errors of law, fact, damages*

13. Draft provision 2(a) refers to “error in the application or interpretation of the law” without any reference to specific standards in investment treaties ([A/CN.9/1050](#), para. 66; see also [A/CN.9/1004/Add.1](#), paras. 26 and 27). The Working Group may wish to confirm that “an error in the application of the law to the facts of a case” would be considered as covered under this provision.

14. Draft provision 2(b) refers to “manifest error in the assessment of the facts”, without listing examples of appreciation of facts ([A/CN.9/1050](#), para. 113). It reflects the preference expressed in the Working Group for a higher standard of review to ensure appropriate deference to the first-tier tribunal ([A/CN.9/1050](#), para. 67; see also [A/CN.9/1004/Add.1](#), para. 28).

15. The Working Group may wish to note that the following provision in the previous draft has been deleted, as requested: “The appellate body may also undertake a review of errors of law or fact in exceptional circumstances, to the extent they are not covered under paragraph 1 (a) and (b).”

16. Draft provision 2(c) addresses error in the assessment of damages, including error in the calculation of compensation based on (i) the suggestion that valuation techniques and their application should be included explicitly in the scope of review, possibly as a separate provision, as they are critical in ISDS; and (ii) the divergence of views regarding whether an error in the assessment of damages might constitute an error of law or of fact ([A/CN.9/1050](#), para. 72; see also [A/CN.9/1004/Add.1](#), para. 28). The Working Group may wish to note that appeal mechanisms usually refer to errors of law or of fact, and no reference is found to a separate category. The assessment of damages includes applying the law and establishing the facts related to damages. Hence, complaints about damages would necessarily fall either under subparagraph (a) or under (b). The Working Group may wish to consider whether a third category might create confusion and overlaps. In addition, it may be noted that calculation errors are typically remedied in rectification proceeding.

#### *(ii) Standard of review*

17. With respect to the standard of review, draft provision 2 limits the instances of appeal to errors of law and “manifest” errors of fact, thereby according some degree of deference to the findings of the first-tier tribunals ([A/CN.9/1050](#), paras. 64-67; see also [A/CN.9/1004/Add.1](#), para. 29).

18. “Manifest” error is used to determine whether an error of fact existed and was patent and obvious, such as dishonest testimony by a key witness or the failure to take account of an important exhibit, and whether it possibly also had an influence on the outcome of the decision by the first-tier tribunal. Such standard is based on the

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proposition that the first-tier tribunal heard the testimony and has the best understanding of the evidence. Thus, the first-tier tribunal receives substantial deference. Limiting re-litigation of “manifest” errors of fact might also serve to reduce costs and delays.

19. The word “manifest” is commonly interpreted as meaning unambiguous and uncontroversial. For instance, in the context of Rule 41(5) of the ICSID Arbitration Rules on the early dismissal of claims without legal merit, arbitral tribunals have repeatedly interpreted the word manifest as requiring the requesting party to establish its objection clearly and obviously, with relative ease and despatch. Tribunals have also specified that the exercise could be complicated but never difficult.<sup>5</sup> In the context of “manifest errors of fact”, the error should be obvious or plain on its face, and the appellate tribunal should not need to undertake a complex analysis to conclude that such an error exists.<sup>6</sup>

*(iii) Grounds for annulment and setting aside*

20. Draft provisions 2(d) to (g) aim at covering grounds for annulment found in article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”) and those under national arbitration law for non-ICSID investment arbitrations (such as those under Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”), which closely reflect the grounds for refusal of recognition and enforcement under article V the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the “New York Convention”), with adjustments.<sup>7</sup> An important question from the point of view of procedural efficiency is how to ensure that existing annulment or setting aside procedures would not apply alongside an appellate mechanism so as to avoid overlap. This question is addressed under draft provision 3 below. An alternative to draft provision 2(d) to (g) would be to refer to Article 52 ICSID Convention and to the annulment grounds existing under the applicable law of the country of the seat where the decision is made. However, spelling out grounds that are considered to be applicable in an investment treaty context and therefore providing autonomous formulations crafted from a transnational viewpoint might be a preferable approach for the sake of clarity and certainty.

21. The Working Group may wish to note that ground (f) does not address the situation where a tribunal has failed to decide one of the claims as the usual remedy in such a situation would be to request a supplemental or additional decision from the ISDS tribunal. Alternatively the ground that “the Tribunal has failed to decide one of the claims” could be provided only where the remedy of supplemental award or decision is lacking.

22. The Working Group may wish to consider whether draft provision 2(g) is sufficiently broad to encompass all most serious procedural violations, including violation of the right to be heard, equal treatment of the parties, and other such procedural rights.

*(iv) New facts*

23. With regards to facts discovered or arising after the decision of the first-tier tribunal is rendered, it may be noted that such a ground would aim at “revision” which is a different remedy that is subject to strict conditions and must be available much

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<sup>5</sup> See e.g., *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, para. 88.

<sup>6</sup> See e.g., *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent’s Application under Rule 41(5), 20 March 2017, para. 41.

<sup>7</sup> The Working Group may wish to note the grouping of provisions in the ICSID Convention and New York Convention, as follows: paragraph 2(a) covers article 52(1)(a) of the ICSID Convention and article 34 (2)(a)(ii) of the Model Law; paragraph 2(b) covers article 52(1)(b) of the ICSID Convention and article 34 (2)(a)(iii) of the Model Law; paragraph 2(c) covers article 52(1)(c) of the ICSID Convention; paragraph 2(d) covers article 52(1)(d) of the ICSID Convention; paragraph 2(e) covers article 52(1)(e) of the ICSID Convention. paragraph 3 contains grounds applicable where the first instance tribunal has been constituted on the basis of an arbitration agreement: paragraph 3(a) covers article 34 (2)(a)(ii) of the Model Law; paragraph 3(b) covers article 34 (2)(a)(i) of the Model Law; and paragraph 3(c) covers article 34 (2)(a)(iv) of the Model Law.

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longer than the appeal. Therefore, a question for consideration is whether such an application should be brought to the first-instance tribunal rather than the appellate tribunal.

24. If the Working Group were to decide that new facts should be a ground for appeal, a draft provision on this matter could read as follows: “*A disputing party may appeal a decision on the ground of new facts that were not known at the time of the proceedings before the first-tier tribunal rendered its decision and which could have been a decisive factor in reaching the decision.*” A further question for consideration is whether the party invoking the new facts should show that the facts were unknown to the first-tier tribunal and that the ignorance of the facts was not due to its negligence.

### **3. Timeline**

25. The Working Group may wish to consider draft provision 3 below addressing the timeline and conditions for bringing an appeal.

#### ***Draft provision 3***

*A disputing party may appeal a decision within [90][60][120] days from the date the decision of the first-tier tribunal is [rendered][notified to the parties].*

#### ***Comments on draft provision 3***

26. Draft provision 3 reflects the parties’ “right to appeal” rather than the “right to request leave of an appeal” (A/CN.9/1050, para. 113).

27. With regard to the time frame for appeal, suggestions were made, ranging from 60, 90 to 120 days. The Working Group may wish to consider the starting point for such time frame (A/CN.9/1050, para. 93). It may also wish to consider whether different time frames would need to be determined, depending on the type of decisions that would be appealable.

### **4. Suspensive effect of appeal**

28. The Working Group may wish to consider draft provision 4 below addressing the effect of appeal.

#### ***Draft provision 4***

*1. A disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure in relation to a decision by the first-tier tribunal before any other fora.*

*2. No action for enforcement of a decision by the first-tier tribunal may be brought until either [90][60][120] days from the issuance of the decision by the first-tier tribunal has elapsed and no appeal has been initiated, or until an initiated appeal has been decided or withdrawn.*

#### ***Comments on draft provision 4***

29. The establishment of an appellate mechanism raises the question of the interplay between this mechanism and existing annulment/setting aside and enforcement stages.

30. The Working Group may wish to note that any parallel proceedings for review or annulment should be excluded. With regards to enforcement proceedings, automatic stay would limit parallel proceedings and avoid having one of the parties proceed with enforcement proceedings in a given jurisdiction. Accordingly, draft provision 4 prohibits annulment/setting aside proceedings and provides that a disputing party shall not seek enforcement of decisions by first-tier tribunals until the lapse of time for appeal (A/CN.9/1050, para. 114; see also A/CN.9/1004/Add.1, para. 42).

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31. The legal issues to be considered require taking into account the distinction between ICSID and non-ICSID arbitrations, which are subject to different legal regimes.

32. In the case of ICSID arbitration, the Washington Convention establishes a self-contained procedural framework, governed exclusively by public international law. In ICSID arbitration, the arbitration law of the seat plays no role and national courts have no jurisdiction in aid or control of the arbitration.

33. By contrast, non-ICSID investor-State arbitrations are subject to a national arbitration law. For non-ICSID arbitrations, the national courts thus play a role in support and control of investment arbitrations. It may be noted that, under draft provision 2, the scope of review includes grounds for annulment and setting aside, thereby indicating that the appellate mechanism would be designed to substitute rather than be combined with any annulment-type review present under national law (or the ICSID Convention). The addition of a second layer of review would make the courts' supervisory role largely unnecessary.<sup>8</sup> This would mean that a domestic court examining a request for setting aside of a first-tier tribunal decision should not admit an action from the disputing parties for setting aside such decision.

34. In order to implement the appellate mechanism, a waiver of judicial review in respect of such decisions should be provided for. Implementation of such a waiver is also connected to the more general question of implementation of reform options, and the possible development of a multilateral instrument on ISDS reform (see [A/CN.9/WG.III/WP.194](#)). Indeed, the multilateral instrument implementing the reform options (or establishing the appellate mechanism) could regulate these matters to avoid uncertainties regarding court intervention. With regard to ICSID awards, the appellate mechanism could similarly exclude any annulment of ICSID awards under Article 52 of the ICSID Convention.

35. Regarding solutions aimed at reducing the need to amend domestic laws governing such procedure should an appellate mechanism be established ([A/CN.9/1050](#), para. 95), it should be noted that any new multilateral mechanism usually requires the conclusion of a convention so as to be made applicable in the legal order of each State Party as well as among them.

36. A further question to consider is that not all domestic laws would necessarily recognize such a waiver as a valid agreement to exclude the right to seek annulment before their courts. Therefore, States may need to consider passing legislation to this effect. In that context, it should also be provided that the arbitration (including the appeals phase, should it not be de-localized for all types of proceedings) must be seated in a State that is a party to the statute of the appellate mechanism if it is set up as a permanent body. Otherwise, in circumstances where the seat is situated in a third State, there is a risk that such State would not recognize the waiver of judicial review as valid.

37. Further analysis and research regarding the interplay of any time frames under the appellate mechanism with those under existing instruments currently applicable in ISDS (such as the New York Convention and the ICSID Convention,) including any statute of limitation in other international conventions or domestic laws ([A/CN.9/1050](#), para. 94) are contained in the document referred to in para. 2 above.

#### *Enforcement*

38. The Working Group may wish to note that the matter of avoidance of multiple procedures is covered under documents [A/CN.9/WG.III/WP.—](#) (addressing general questions) and [A/CN.9/WG.III/WP.—](#) (reproducing a note on the topic by the ICSID Secretariat).

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<sup>8</sup> MP and GKK



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## 5. Decisions by the appellate tribunal

39. The Working Group may wish to consider draft provision 5 below addressing the decisions that the appellate tribunal may take.

### **Draft provision 5**

*1. The appellate tribunal may confirm, modify or reverse the decisions of the first-tier tribunal. Its decision shall specify precisely how it has modified or reversed the relevant findings and conclusions of the first-tier tribunal. Its decision shall be final and binding on the parties.*

*2. The appellate tribunal may also annul in whole or in part the decisions of the first-tier tribunal on any of the grounds set forth in draft provision 2(d) to (g) [, upon request by a party].*

*3. Where the facts established by the first-tier tribunal so permit, the appellate tribunal shall apply its own legal findings and conclusions to such facts and render a final decision.*

*Option 1: If that is not possible, it shall refer the matter back to the first-tier tribunal with detailed instructions [or, when 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, to a new tribunal to be constituted and to operate under the same rules as the first-tier tribunal].*

*Option 2: [If that is not possible, it may refer back to the first-tier tribunal with detailed instructions and either party may seize the first-tier tribunal to amend the decision accordingly.]*

*The decision by the first-tier tribunal as amended shall be [final][subject to appeal. The appellate tribunal shall render a final decision].*

*[4. Decisions by the appellate tribunal are not subject to any annulment or setting aside procedures and are final and enforceable].*

### **Comments on draft provision 5**

- *Confirm, reverse, modify or annul the decisions*

40. Paragraph 1 reflects the support expressed for the appellate tribunal to be able to confirm, modify, or reverse the first-tier decision, which would make the decision final and binding on the parties as confirmed, modified or reversed ([A/CN.9/1050](#), para. 113; see also [A/CN.9/1004/Add.1](#), para. 40).

41. Paragraph 2 provides that an appellate body should have the authority to annul or set aside an award, based on the grounds listed in draft provision 2(d) to (g). It further contains the option of annulment upon request of a party ([A/CN.9/1050](#), paras. 99 and 113; see also [A/CN.9/1004/Add.1](#), paras. 30 and 40).

- *Remand authority*

42. Paragraph 3 provides for a remand authority when the appellate tribunal would not be in a position to complete the analysis. It contains options for consideration by the Working Group.

43. At the thirty-eighth and fortieth sessions of the Working Group, differing views were expressed with regard to the ability of the appellate tribunal to remand a case to the first-tier: views were expressed that an appellate tribunal should have a broad remand authority; yet, other views were that remand authority should be provided only in specific circumstances or under limited grounds, where the appellate tribunal would not be in a position to complete the legal analysis based on the facts available before it, and still other views were expressed that in light of costs and time considerations, remand should not be possible ([A/CN.9/1050](#), paras. 101-104; see also [A/CN.9/1004/Add.1](#), para. 41).

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44. The Working Group may wish to note that the advantages and disadvantages of granting an appellate tribunal remand authority are closely connected to the standard of review and to the option retained for the establishment of the appellate mechanism (A/CN.9/1050, para. 113). If the scope of review is limited to review of law, remand authority is needed, as the appellate tribunal will lack the necessary information on facts. However, remand might be difficult to implement, in particular in a situation where the appellate tribunal would find procedural irregularities (for example, lack of independence), which would make it inappropriate to remand the case to the first-tier tribunal. Remand might work better as an option, not an obligation, and this option approach would work better where the standard of review includes both law and facts. Then, remand would be more efficient in the context of a standing mechanism, also providing for a standing first-tier body. Remand could also be workable on decisions rendered by ad hoc first-tier tribunals, provided a procedure is designed to allow for the suspension of their functions, pending the decision by the appellate tribunal.

*Finality of the decisions of the appellate tribunal*

45. Regarding draft paragraph 4, the Working Group may wish to consider whether it should be provided that decisions by the appellate tribunal are not subject to any annulment or setting aside procedures.

**6. Duration of the appellate proceedings**

46. The Working Group may wish to consider draft provision 6 on the limits to the duration of the appellate proceedings below.

***Draft provision 6***

*1. The appeal proceedings shall not exceed [--] days from the date a party to the dispute formally notifies its decision to appeal to the date the appellate tribunal issues its decision. For appeals on the grounds under draft provision 2(--), and (--), and for appeals on [list the procedural measures], the appeal proceedings shall not exceed [--] days.*

*2. When the appellate tribunal considers that it cannot issue its decision in time, it shall inform the disputing parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its decision. In no case should the proceedings exceed [--] days.*

***Comments on draft provision 6***

47. Regarding reasonable time frames within which the appellate tribunal would be required to render its decision, the guiding principles discussed were that timelines should be short and be strictly adhered to by the appellate tribunal, and that they need to take into account timeliness to avoid unnecessary delay in the resolution of disputes and correctness (A/CN.9/1050, para. 113; see also A/CN.9/1004/Add.1, paras. 33 and 55). Suggestions ranged from 90 days, 180 days, to a maximum of 300 days, should the appellate tribunal extend the time (A/CN.9/1050, para. 106). The Working Group may wish to note that recent investment treaties tend to provide for a timeline of 180 days for the appellate tribunal to render its decision from the commencement of the proceedings.

48. The Working Group may wish to consider the suggestion in the second sentence of paragraph 1 for the application of accelerated proceedings in certain instances where the subject of the appeal is limited to a distinct issue (for example, for some procedural questions, or certain grounds for appeal). Accelerated procedure would include the possibility of, in addition to shorter timelines, even more efficient procedures, such as the case being heard by a single member, with limited briefing.

49. The Working Group may wish to consider whether the discretion of the appellate tribunal to extend the timelines should be limited, with the provision defining the limited circumstances in which delays might be allowed, and whether an exhaustive determination of such circumstances is possible.

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50. Regarding an analysis of the issue of timelines, considering other comparable appellate mechanisms, it may be noted that most appeal mechanisms take more than one year to issue their decisions, even close to two years in a number of cases, and do not prescribe hard deadlines.<sup>9</sup> When specific deadlines are determined, empirical data demonstrates systematic non-compliance with timelines.<sup>10</sup> Moreover, providing for hard deadlines that are not complied with creates uncertainty about the fate of the appeal, which should be avoided.

51. Regarding the possible measures to ensure compliance with the time frames and the consequences for non-compliance, the Working Group may wish to consider several options from non-coercive to more radical measures. The appellate tribunal could describe the steps taken to comply with the timeline and suggest any modifications to the procedures and practice to ensure that any failure to comply with the deadline is not repeated. The appellate tribunal may also be required to use its best efforts to meet the time limits and have a duty to advise the parties if it is unable to comply with the deadline and to state when it anticipates issuing the decision. Another option would be for the appellate tribunal to obtain the parties' consent to extend a prescribed deadline. A more radical measure would consist in reducing the pay of the judges of the appellate tribunal in proportion to the length of the delay.<sup>11</sup> If a permanent body does not comply with deadlines, it may also be for structural reasons, for instance insufficient resources, which would be a matter for the constituting States to address.

## **7. Post-decision remedies**

52. Draft provision 7 provides for post-decision remedies, including interpretation and correction ([A/CN.9/1050](#), paras. 105 and 113; see also [A/CN.9/1004/Add.1](#), para. 46).

### ***Draft provision 7***

*1. The appellate tribunal may correct any errors in computation, any clerical or typographical errors or any errors of similar nature on the request of a party, with notice to the other party, or on its own initiative within [30] days of the date of the decision it rendered.*

*2. If so agreed by the parties, a party, with notice to the other party, may request the appellate tribunal to give an interpretation of a specific point or part of the decision. If the appellate tribunal considers the request to be*

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<sup>9</sup> For instance, the International Criminal Court (ICC) does not specify any deadline for its Appeals Chamber to issue its decisions. Rule 156(4) of the Rules of Procedure and Evidence of the ICC states that the appeal shall be heard as expeditiously as possible. Based on the ICC website and the decisions of the Appeals Chamber, the time period between the filing of the appeal or grant of leave to appeal and the Appeals Chamber's decisions varied between 440 days and 796 days. Likewise, the statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) does not provide any timeline for the Appeals Chamber to render its decisions. A sample of cases shows that the time period between the judgement of the first instance and the Appeals Chamber's decisions ranged from 394 days to 828 days. However, Rule 116bis of the Rules of Procedure and Evidence provides for expedited appeals procedure, on the basis of the original record of the first instance and written briefs only, for specific decisions such as preliminary motions. In one example of such expedited procedure, the appeals decision was issued 23 days after the first instance decision (Case No.: IT-02-54-AR65.1, Appeals Chamber's Decision of 17 March 2006). Similar procedures can be found for the International Criminal Tribunal for Rwanda. Based on a review of some cases, the time periods between the original decision and the Appeals Chamber's decisions ranged from 375 days to 1,004 days. In comparison, studies on ICSID annulment procedures report durations of 639 days or 730 days between the registration of the annulment request and the decision of the ad hoc committee.

<sup>10</sup> Pursuant to Article 17.5 of the DSU, the Appellate Body should issue its report within 60 days of the appeal notification. If it cannot comply with this deadline, it shall inform the Dispute Settlement Body in writing of the reasons for the delay and issue the report within 90 days of the appeal notification. Based on a report of USTR on the Appellate Body of the WTO dated February 2020, before 2011, the Appellate Body met the 90-day deadline in an overwhelming majority of cases (87 out of 101 appeals). In 14 cases the Appellate Body obtained the parties' consent to exceed that deadline. After 2011, the average length of an appeal was 133 days. After 2014, not a single appeal has been completed within the 90-day deadline. The average for appeals filed from May 2014 to February 2017 was 149 days.

<sup>11</sup> The ICC International Court of Arbitration has established such a practice since 2016. The Court may lower the fees unless it is satisfied that the delay is attributable to factors beyond the arbitrators' control or to exceptional circumstances, and without prejudice to any other measures that it may take, such as replacing one or more of the arbitrators. See Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration, 1 January 2021, para. 156.

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*justified, it shall make the correction or give the interpretation within [30] days of receipt of the request. The interpretation shall form part of the decision.*

## **8. Manageable case load and issue of systematic or frivolous appeal**

53. The Working Group agreed that further elaboration was needed regarding how to ensure a manageable caseload and to avoid systematic appeals by disputing parties.

### **a. Scope of review in article 2**

54. A first approach would be to ensure that the scope of review in article 2 would not result in a large number of appeals, possibly by introducing a control mechanism to filter or dismiss frivolous or dilatory appeals that would not meet on a prima facie basis the grounds for appeal (A/CN.9/1050, para. 113).

55. This could be implemented through an institution or a body which, by assigning cases within the appeals facility to one or the other chamber or team of judges would also monitor, control and apply filter, and dismiss cases. This question is therefore also closely connected to the overall organization of the appellate mechanism and the various organs that will compose it. In addition, the Working Group may wish to consider whether to allow the tribunal to make use of sanctions against frivolous appeal on jurisdiction.

### **b. Rules of procedure and evidence**

56. The Working Group may wish to consider that the rules of procedure to be adopted by the appellate mechanism would also have an impact on the manageability of case load and might assist to filter claims. While such rules would need to be determined by the appellate mechanism itself, a generic provision referring to them might be considered, as follows.

#### ***Draft provision 8***

*The appellate tribunal shall ensure that the proceedings are held in a fair and expeditious manner and that proceedings are conducted in accordance with the rules of procedure and evidence.*

#### ***Comment on draft provision 8***

57. The rules of procedure and evidence would contain indications that parties must submit the arguments for appeal, clear references to the records, the factual and the legal basis for appeal; they could have the obligation to not only show that the first-tier tribunal committed an error, but also to prove that this error caused a miscarriage of justice, which would imply a rather higher threshold than simply a reassessment of the evidence. The rules could also provide a detailed list of issues the requesting party must submit to ensure that there is no unnecessary back and forth between the tribunal and the parties.

### **b. Early dismissal mechanism**

58. The Working Group may wish to consider the following draft provision on early dismissal of manifestly unfounded appeals, modelled after Rule 41(5) of the ICSID Arbitration Rules (A/CN.9/1050, para. 59):<sup>12</sup>

#### ***Draft provision 9***

*1. A party may, no later than 30 days after the notice of appeal, and in any event before the first session of the appellate tribunal, file an objection that*

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<sup>12</sup> As indicated by ICSID, some investment treaties contain procedures similar to Rule 41(5), which are applicable to cases brought to ICSID under these instruments. An example of this is Articles 10.20.4 and 10.20.5 of the United States-Dominican Republic - Central America Free Trade Agreement (CAFTA). These provisions were invoked in: *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, August 2, 2010; and *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, November 17, 2008

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*the appeal is manifestly without merit. The party shall precisely indicate the basis for the objection.*

*2. The appellate tribunal, after giving the other party the opportunity to present its observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to object, in the course of the proceeding, that an appeal lacks merit.*

**Comments on draft provision 9**

59. The purpose of draft provision 9 would be to dispose of unmeritorious appeals at the preliminary stage of a proceeding. It would apply to appeals on jurisdiction, as well as on the merits. If the entire appeal were to be dismissed because of a manifest lack of merit, the appellate tribunal would render a decision which disposes of the appeal. The Working Group may wish to consider whether an early dismissal mechanism should be provided, given the risk that such a mechanism might result in additional delays, and in light of the possibly already existing disincentives for bringing a frivolous appeal.

**c. Security for costs**

60. The Working Group considered that security for costs could deter unnecessary or frivolous appeals and could function as a filter to ensure the manageability of appeals.<sup>13</sup> The Working Group may wish to consider the following draft provision on security for costs:

**Draft provision 10**

*1. The appellate tribunal may request the [appellant][investor] to provide security for the costs of appeal [and for any amount awarded against it in the provisional decision of the first-tier tribunal]. It may also request the placement of a bond of up to – percent of the amount of the decision of the first-tier tribunal that is appealed.*

*2. [criteria/requirements for ordering security for costs – Guidance on amount]*

**Comments on draft provision 10**

61. It was noted in the Working Group that if understood as a filter, the security for cost should nevertheless not be excessively high, so as to avoid limiting the access to justice for small and medium-sized enterprises in particular, in addition to other investors. It was suggested that specific criteria/requirements for ordering security for costs should be provided and that guidance should be provided to the appellate tribunal regarding the amount of security for cost (A/CN.9/1050, paras. 109-111). Also, in light of the suspensive effect of appeal, and the accrual of interest, paragraph 1 provides for the possibility to post a bond to prevent frivolous appeals

62. The Working Group may wish to note the options contained in paragraph 1 and consider whether security for costs should apply to the party making the appeal. The Working Group may wish to consider whether security for costs could become a condition for presenting an appeal, with possible exceptions for SMEs and small claims, or for appeals by Least Developed Countries.

63. Paragraph 2 would aim at limiting the scope of security for costs by providing specific criteria/requirements for ordering security for costs. It is meant to include specific guidance to the appellate tribunal with regard to the amount. It is suggested that this provision would follow the text to be developed by the Working Group on this matter (see document [reference to be included] (on procedural rules reform)).

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<sup>13</sup> The Working Group may wish to consider document A/CN.9/WG.III/WP.192 on security for cost and frivolous claims and may wish to consider this issue in light of its more general consideration of the topic.

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## **B. Additional draft provisions**

### **1. Miscellaneous provisions**

64. The Working Group may wish to note that, besides the questions of selection, appointment, removal methods for adjudicators at the appellate level which were preliminarily discussed at the fortieth session (A/CN.9/1050, paras. 45-47; see also A/CN.9/WG.III/WP.— (Selection and appointment of ISDS tribunal members), the provisions to be addressed include the notice of appeal, the written pleadings of the parties (content and time limits for filing), the extension of deadlines, the hearing (open or confidential), the evidence, provisional measures, default of one party, discontinuance, the content of the decision, and the publication of decisions.

65. If the appellate mechanism is institutional, the Working Group might also wish to consider the administrative services to be provided.

### **2. Draft provisions for a multilateral instrument**

66. The Working Group requested the Secretariat to prepare a draft provision on possible declarations/reservations by States, providing flexibility with regard to the type of decisions that could be subject to appeal (A/AN.9/1050). In that light, the Working Group may wish to consider the following draft provision:

*“A Party to this Convention may declare that the right to appeal [can][cannot] be exercised in relation to the following decisions: [(a) decision on jurisdictions; --*

## **C. Options for establishing an appellate mechanism**

### **1. General comments**

67. In considering the various possible models below, the Working Group may wish to keep in mind the view expressed by some delegations during preliminary discussions at its resumed its thirty eighth session, that States parties to an investment treaty should be given the opportunity to express their views on treaty interpretation during the appellate procedure and appellate tribunals should be required to accord deference to any joint interpretation by treaty parties or to treat it as binding when the treaty designate it as such (while also noting the need to ensure the independence and impartiality of the appellate tribunal) (A/CN.9/1004/Add.1, para. 47). It may be noted that diverging views were expressed on whether a decision by an appellate tribunal should be subject to confirmation or some review by the States parties to the relevant investment treaty (see the review of interim panel reports, or adoption of the panel or Appellate Body Reports, in the WTO through reverse consensus) (A/CN.9/1004/Add.1, para. 48).

68. In addition, the Working Group may wish to note that the form under which the appellate mechanism would be established will have an impact on the ability of such mechanism to harmonize an increasingly fragmented international jurisprudence and law and to contribute to consistency, integrity and certainty.

### **2. Possible models**

#### **a. *Appellate mechanism for application by treaty Parties, parties to an investment contract, disputing parties or institutions***

69. An appellate mechanism may be developed as a model (i) for inclusion in investment treaties by Parties, or in investment contracts, (ii) for use on an ad hoc basis by disputing parties, or (iii) as an option available under the rules of institutions handling ISDS cases. The development of a model appellate mechanism would ensure that the appellate process available in ISDS would be harmonized to the extent that the users would not alter it. However, the appellate mechanism would function in a decentralized manner. While such a mechanism would aim at ensuring correctness of decisions, the Working Group may wish to consider that its impact on consistency and predictability might be more limited.

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(i) *Treaty-specific appellate mechanism*

70. The proposal for an appellate mechanism in ISDS found its way in investment treaties as programmatic language, with some investment treaties providing for the possibility of establishing an appellate mechanism in the future, either on a multilateral<sup>14</sup> or bilateral<sup>15</sup> basis. Certain treaties refer to both a multilateral agreement establishing an appellate mechanism in the future and negotiations regarding a bilateral appellate system,<sup>16</sup> some refer to a multilateral agreement establishing an appellate mechanism in the future,<sup>17</sup> and others to negotiations for a bilateral appellate system.<sup>18</sup> Recent treaties have included bilateral appeal mechanisms for decisions made by tribunals as part of a standing mechanism.<sup>19</sup>

(ii) *Ad hoc appellate mechanism*

71. An appellate mechanism could also be developed on a purely ad hoc basis, with the appellate panels being constituted by the parties on a case-by-case basis, following the same pattern as the constitution of first instance arbitral tribunals in the current ISDS framework based on international arbitration. Such appellate tribunals could be constituted in the context of particular disputes and in a manner similar to the way in which the first-level ad hoc arbitral tribunals were established.

(iii) *Institutional appellate mechanism*

72. An appellate mechanism could be developed for use by institutions handling ISDS cases, to the extent that the instrument that established the relevant institutions would permit such mechanism. This would come close to the setting up of a permanent body, hosted by an existing institution. The proposal by ICSID suggests that a single appellate mechanism under the ICSID framework would be preferable over multiple mechanisms under different treaties. The new facility was suggested to be designed so as to be compatible with any type of investment arbitration (under the ICSID Convention and Rules, the UNCITRAL Arbitration Rules or other rules).<sup>20</sup>

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<sup>14</sup> See, for instance, Article 28(10) of the 2004 United States Model Bilateral Investment Treaty (which originates from the 2002 Trade Promotion Authority legislation in the United States of America, 19 U.S.C. § 3802(b)(3)(G)(iv), referring to “an appellate body [...] to provide coherence to the interpretations of investment provisions in trade agreements.”) and the 2012 United States Model Bilateral Investment Treaty, articles 28 and 34, Annex D; see also the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), Article 9.23(11), which provides that if an appellate mechanism is constituted in the future, the awards rendered under the CPTPP will be subject to this mechanism.

<sup>15</sup> See, for instance, Annex D to the 2004 United States Model Bilateral Investment Treaty.

<sup>16</sup> Singapore-USA Free Trade Agreement of 6 June 2003 (1 January 2004), Article 15.19(10); Chile - USA Free Trade Agreement (1 January 2004), Article 10.19 (10), Annex 10-H; Morocco - USA Free Trade Agreement (1 January 2006), Article 10.19(10), Annex 10-D; Uruguay - USA Bilateral Investment Treaty (31 October 2006), Article 28(10), Annex E; Peru - USA Free Trade Agreement (1 February 2009), Article 10.20(10), Annex 10-D; Oman - USA Free Trade Agreement (1 January 2009), Article 10.19(9)(b), Annex 10- D; Panama - USA Free Trade Agreement (31 October 2012), Article 10.20(10), Annex 10-D; Colombia - USA Free Trade Agreement (2012), Article 10.20(10), Annex 10-D; Australia – Republic of Korea Free Trade Agreement (12 December 2014), Article 11.20(13), Annex 11-E; Central America Free Trade Agreement between Costa Rica, Dominican Republic, Guatemala, Honduras, Nicaragua, El Salvador, and USA (1 January 2009), Article 10.20(10), Annex 10-F.

<sup>17</sup> Panama – Peru Free Trade Agreement (1 May 2012), Article 12.21(9); Costa Rica – Peru Free Trade Agreement (1 June 2013), Article 12.21(9); Nicaragua – Taiwan Free Trade Agreement (1 January 2008), Article 10.20(9); Article 9.23(11), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Viet Nam, (30 December 2018); see also Dutch 2018 Model Investment Agreement, Article 15.

<sup>18</sup> China - Australia Free Trade Agreement (20 December 2015). Article 9.23 provides: “Within three years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards rendered under Article 9.22 in arbitrations commenced after any such appellate mechanism is established. Any such appellate mechanism would hear appeals on questions of law.”; Canada - Republic of Korea Free Trade Agreement (1 January 2015), Annex 8-E.

<sup>19</sup> See for e.g. Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (provisionally in force since 21 September 2017), Chapter 8, Section F; European Union-Viet Nam Investment Protection Agreement (signed on 30 June 2019), Chapter 3, Section B; European Union-Singapore Investment Protection Agreement (signed on 19 October 2018).

<sup>20</sup> See ICSID Secretariat (2004), Possible Improvements of the Framework for ICSID Arbitration, Discussion Paper.

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**b. Permanent plurilateral or multilateral appellate body**

73. The reform may take the form of the establishment of a permanent multilateral appellate body, which could either complement the existing arbitration regime, or constitute the second tier in a multilateral investment court. Certain investment treaties already include a reference to an appellate body to be set up on a multilateral basis.

(i) *As a standalone appellate body, complementing the current arbitration regime*

74. A multilateral appellate body could be established as a complement to the current ISDS regime, which would maintain most of its basic features. A multilateral appellate body could be staffed by tenured, professional adjudicators and supported by a permanent secretariat.

(ii) *As a second tier in a multilateral investment court*

75. A multilateral appellate body could also be established as a second tier in a multilateral investment court, staffed by tenured, professional judges and supported by a permanent secretariat.<sup>21</sup>

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<sup>21</sup> A standing mechanism might also include (i) mechanisms for ensuring early dismissal of unfounded claims; (ii) a possibility for encouraging parties to solve their dispute through mediation; (iii) a mechanism to cater for possible counter-claims by respondents; (iv) a mechanism for consolidation of cases, and management of the relation between procedures at the domestic level and remedies that can be obtained through international proceedings, in order to limit instances of concurrent proceedings; (v) rules on the legal costs of the disputing parties, as such costs constitute a significant portion of the overall costs of the current ISDS regime; (vi) rules on admissibility of third party funding; and (vii), sanctions in case of breach of a code of conduct. A standing mechanism may also be entrusted with inter-State disputes on the interpretation/application of an investment treaty either as sole remedy or alternatively in addition to inter-State arbitration (See the Iran-U.S. Claims Tribunal (Claim Settlement Declaration (“CSD”), Article II(1), Article II(2), and Article II(3)); and the Arab Investment Court (see Unified Agreement, Articles 25–36). See also the European Court of Human Rights (Articles 33–34), competent both in respect of individual-State complaints and State-to-State disputes. A standing mechanism could also provide the forum to bring claims for denial of justice by domestic courts under treaties that require the exhaustion of local remedies.