United Nations A/CN.9/WG.III/WP.**

General Assembly

Distr.: Limited
** 2025

Original: English

This informal document reflects work in progress and will be submitted as a working paper for the 53rd session of Working Group III in January 2026. It replaces the initial draft previously made available on the webpage for the 51st session in April 2025.

United Nations Commission on International Trade Law
Working Group III (Investor-State Dispute Settlement Reform)
Fifty-third session
New York, 12-16 January 2026

Possible reform of investor-State dispute settlement (ISDS)

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

Note by the Secretariat

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I. Introduction

1. The Working Group discussed the establishment of a standing mechanism and an appellate mechanism at its resumed thirty-eighth session in January 2020 (A/CN.9/1004/Add.1, paras. 14–133), fortieth session in February 2021 (A/CN.9/1050, paras. 13–116), forty-second session in February 2022 (A/CN.9/1092, paras. 15–78), forty-third session in September 2022 (A/CN.9/1124, paras. 13–41), forty-fourth session in January 2023 (A/CN.9/1130, paras. 119–166), and at the sixth intersessional meeting in Singapore in September 2023 (A/CN.9/WG.III/WP.233).

2. From its forty-eighth to fifty-first sessions held respectively in April 2024, September 2024, January 2025 and April 2025, the Working Group considered a draft statute establishing a standing mechanism for the resolution of international investment disputes based on documents A/CN.9/WG.III/WP.239, A/CN.9/WG.III/WP.240 and A/CN.9/WG.III/WP.241 (A/CN.9/1167, paras. 84–112, A/CN.9/1194, paras. 13–56, A/CN.9/1195, paras. 70–121, and A/CN.9/1196/Add.1, paras. 6–66 respectively). During those sessions, the Working Group focused its deliberations on draft articles related to the establishment and structure of a standing mechanism, the selection and appointment of Tribunal members, the Dispute Tribunal and the Appeals Tribunal, including the relevant procedure.[1] At its forty-ninth session in September 2024 and fifty-second session (first part) in February 2025, the Working Group considered the draft multilateral instrument on ISDS reform ("MIIR") contained in A/CN.9/WG.III/WP.246 and identified ways to implement its protocols, including the statute of a standing mechanism (A/CN.9/1194, paras. 105–121, and A/CN.9/1196, paras. 31–94). During this period, the eighth intersessional meeting took place in Chengdu in October 2024 to discuss an appellate mechanism (A/CN.9/WG.III/WP.249).[2]

3. At its fifty-second session in September 2025, the Working Group discussed the structure and the design of a standing mechanism based on document A/CN.9/WG.III/WP.256. [*short summary of the 52nd session to be included here*]

4. Accordingly, this Note contains a revised draft statute based on the deliberations of the Working Group. Similar to the Statute of the Advisory Centre on International Investment Dispute Resolution (A/79/17, Annex III), the draft statute has been prepared in the form of a protocol to a multilateral instrument on ISDS reform (MIIR) currently discussed by the Working Group, without prejudice to any determination on its final form under the MIIR (see Section II below).

[1] The term "Dispute Tribunal" refers to a first-tier tribunal and the term "Appeals Tribunal" refers to the appellate tribunal, both in the context of a standing mechanism. These terms should be understood without any prejudice to the structure of a standing mechanism or to the relationship between the two.

[2] Information about the eighth intersessional meeting is available at https://uncitral.un.org/en/8thintersessional.

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

A. Establishment and structure of the standing mechanism

Preamble[3]

The Contracting Parties to this Protocol,

Recalling that the increase in international trade and investment has given rise to disputes involving foreign investors and States and that arbitration has often been used to resolve such disputes,

Mindful that concerns have been raised due to the alleged high costs and long duration of investor-State dispute settlement proceedings, lack of diversity among the adjudicators and the lack of coherence, consistency and predictability of arbitral decisions,

Believing that those concerns need to be addressed in a holistic manner,

Mindful of the public interest involved in investor-State dispute settlement due to the nature of the parties involved and the subject matters of the disputes,

Noting that the establishment of the [*name of the standing mechanism to be determined* (hereinafter, the "Standing Mechanism")] would contribute to a fair and efficient settlement of international investment disputes and provide an alternative means for investor-State dispute settlement,

Convinced that the Standing Mechanism shall adjudicate disputes in an independent and impartial manner while being effective, affordable, accessible and financially sustainable,

Have agreed as follows:

Article 1 – Establishment and objective

The Standing Mechanism is hereby established to resolve international investment disputes.

Note to the Working Group

5. The Working Group may wish to consider whether the reference to "international investment disputes" in article 1 and 2 (2) is appropriate (see also A/CN.9/WG.III/WP.256, paras. 22-26).

Article 2 – General principles[4]

1. The Standing Mechanism shall be independent and free from undue external influence [, including from its donors].

2. The Standing Mechanism shall resolve international investment disputes in a fair, impartial and non-discriminatory manner.

3. The Standing Mechanism shall operate in a manner that is effective, affordable, accessible and financially sustainable.

Note to the Working Group

6. The Working Group may wish to note that the concerns identified by the Working Group with regard to ISDS that are to be addressed by the standing mechanism are set forth in the preamble.

[3] A/CN.9/1167, para. 91.
[4] A/CN.9/1167, para. 91.

7. The Working Group may wish to consider whether:

- The standing mechanism could accept voluntary contributions including from non-Contracting Parties, in which case, paragraph 1 could include the phrase "including from its donors";
- The obligation in paragraph 2 would be mainly that of the Tribunal members of the standing mechanism;
- Confidentiality/transparency of the proceedings is better addressed in the procedural rules and need not be reflected in the article; and
- Cooperation with other international and regional organizations need not be addressed in the article, as it is mostly an operational issue to be handled by the Registry.

Article 3 – Structure and composition[5]

1. The Standing Mechanism shall consist of the Conference of the Contracting Parties (the "Conference"), the Dispute Tribunal and the Appeals Tribunal (jointly referred to as the "Tribunals") as well as the Registry.

2. The Conference shall be composed of all Contracting Parties that have acceded to this Protocol in accordance with article 41.

3. The Dispute Tribunal shall be composed of at least [*number to be determined*] members appointed by the Conference in accordance with Section B.

4. The Appeals Tribunal shall be composed of at least [*number to be determined*] members appointed by the Conference in accordance with Section B.

5. The Registry shall function as the permanent secretariat of the Standing Mechanism. The Registry shall be headed by the Registrar and composed of staff members.

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

Note to the Working Group

8. The Working Group may wish to consider, depending on the model of the standing mechanism, whether a standing mechanism with two Tribunals could be governed by a single Conference of the Contracting Parties or whether it would be necessary to establish Conferences of the Contracting Parties for the Dispute Tribunal and the Appeals Tribunal respectively, should the Contracting Parties to each differ.

9. Paragraphs 3 and 4 indicate the minimum number of tribunal members to be appointed by the Conference. The Working Group may wish to determine the minimum number, taking into account the elements listed in article 11(1). Discretion is given to the Conference to appoint more members than indicated in the respective paragraphs, depending on the caseload (see also article 4(2)(b)).

10. The Working Group may wish to confirm the use of the terms "Registry" and "Registrar", which replaced the terms "Secretariat" and "Executive Director". Paragraph 5 refers to the "Registry" performing permanent secretariat functions, which leaves open the possibility for other bodies to function as the temporary secretariat, for example, during the initial phases of the operation of the standing mechanism. The possible costs of operating the Registry would need to be considered.

11. With regard to paragraph 6, the Working Group may wish to consider who should represent the Standing Mechanism externally. Regardless, the President of the respective Tribunals would represent each Tribunal externally.

[5] A/CN.9/1167, para. 92.

Article 4 – Conference of the Contracting Parties[6]

1. The Conference shall ensure that the Standing Mechanism operates and functions in accordance with the general principles set out in article 2.

2. For this purpose, the Conference shall:

(a) Elect the members of its Bureau;

(b) Fix the number of members of the Dispute Tribunal and the Appeals Tribunal and make any adjustments;

(c) Elect and appoint the members of the Dispute Tribunal and the Appeals Tribunal in accordance with article 11;

(d) [Appoint the Registrar];

(e) Adopt its own rules of procedure;

(f) Adopt administrative, financial and other regulations on the operation of the Standing Mechanism;

(g) Adopt regulations concerning the criteria to be met by the members of the Tribunals and the conduct and ethical obligations of the members of the Tribunals as well as the Registrar and the staff members of the Registry;

(h) Evaluate and monitor the activities of the Standing Mechanism and adopt the annual report prepared by the Registrar; (see article 6(4)(c))

(i) Adopt the annual budget of the Standing Mechanism prepared by the Registrar; (see article 6(4)(d)).

(j) Determine the amount of remuneration of the members of the Dispute Tribunal and the members of the Appeals Tribunal, including any criteria to be used;

(k) Determine the minimum amount of financial contribution of each Contracting Party; (see article 37)

(l) Adopt the fee structure of the Standing Mechanism prepared by the Registrar; (see article 6(4)(h))

(m) Approve the establishment of any subsidiary bodies of the Standing Mechanism, including any regional or local offices; and

(n) Perform any other functions in accordance with this Protocol.

3. The Conference shall have a Bureau consisting of a Chairperson and [*number to be determined*] Vice-Chairpersons. The Chairperson and the Vice-Chairpersons shall be elected by the Conference for a non-renewable period of [*number to be determined*] years. The Bureau shall meet regularly to assist the Conference in discharging its functions.

4. The Conference shall meet at least once a year. When considered necessary or upon the request of [*number to be determined*] Contracting Parties, the Chairperson may convene a special meeting of the Conference.

5. The Chairperson shall chair the meetings of the Conference and be responsible for submitting matters to the consideration of the Conference. In the absence of the Chairperson, a Vice-Chairperson may exercise the functions of the Chairperson.

6. The Chairperson may determine who may observe the meetings of the Conference.

7. The Conference shall endeavour to make all decisions by consensus.

8. If a decision cannot be made by consensus, the Chairperson may submit the matter to a vote, which requires the presence of a majority of the Contracting Parties. Each Contracting Party shall have one vote. Decisions shall require a four-fifths

[6] A/CN.9/1167, para. 93.

majority of the Contracting Parties present and voting. If the majority of the Contracting Parties are not present, the same subject matter may be submitted for a vote at the next meeting of the Conference, the decision of which may be made by a four-fifths majority of the Contracting Parties present and voting.

Note to the Working Group

12. With regard to paragraph 2(j), the Working Group may wish to give guidance on determining appropriate remuneration for the members of the Dispute Tribunal and the Appeals Tribunal and any criteria to be used to that effect, including whether such determination should be differentiated between the Tribunals.

13. In paragraph 2(k), reference to the determination of the minimum amount of financial contribution of each Contracting Party would ultimately depend on the financial structure of the standing mechanism.

14. With regard to paragraph 2(l), the term "fees" refers to administrative fees to be charged by the Standing Mechanism. The Working Group may wish to consider whether such fees shall be charged and whether they should be considered as a source of income for the Standing Mechanism, possibly on a cost-recovery basis. This would have an impact on the budget structure of the standing mechanism.

15. With regard to paragraph 3, the Working Group may wish to consider whether it would be sufficient to elect a Chairperson and a Vice-Chairperson or to form a Bureau with more individuals. Apart from this article, responsibilities of the Bureau are mentioned in articles 6(2) and (5). The Working Group may wish to confirm that the Chair and the member(s) of the Bureau would not be remunerated by the Standing Mechanism apart from expenses arising to fulfil their functions.

16. With regard to the second sentence in paragraph 5, the Working Group may wish to consider whether the Vice-Chairperson would be able to exercise the functions of the Chairperson in its absence only in the context of paragraph 5 (chairing the meeting and submitting matters) or more broadly, in which case the sentence may need to be placed elsewhere.

17. With regard to paragraph 6, the Working Group may wish to confirm that the details on the circumstances and scope of participation of non-Contracting Parties, the members of the Tribunals as well as other observers would be addressed in the rules of procedure of the Conference (see para. 2(e)).

18. With regard to paragraphs 7 and 8, the Working Group may wish to consider whether to list the types of decisions that do not necessarily require consensus (see for example, article 11 on the election and appointment of members of the Tribunals).

19. The Working Group may wish to confirm that the Protocol does not need to set forth the official or working languages of the standing mechanism, which can be determined by the Conference at a later stage (see note on article 7). It may wish to also confirm that the proceedings of the standing mechanism may be conducted in languages other than the official or working languages.

Article 5 – Dispute Tribunal, Appeals Tribunal and their Presidency[7]

1. The Dispute Tribunal and the Appeals Tribunal shall carry out adjudicatory functions in accordance with this Protocol. The Dispute Tribunal and the Appeals Tribunal shall respectively adopt its rules of procedure to supplement the provisions of this Protocol, in particular Sections E and F.

2. The President and the Vice-President of the Dispute Tribunal shall be [elected by majority of votes by members of the Dispute Tribunal] [selected among the members on a random basis] for a non-renewable period of [*number to be specified*] years. The President and the Vice-President should rotate among the regional groups.

[7] A/CN.9/1167, paras. 93-94.

3. The President and the Vice-President shall constitute the Presidency of the Dispute Tribunal, which shall be responsible for its operation and administration. In the absence of the President, the Vice-President may exercise the functions of President.

4. A member elected to replace the President or the Vice-President before the expiry of the period in paragraph 2 shall serve for the remainder of the term.

5. Paragraphs 2 to 4 also apply to the Appeals Tribunal.

Note to the Working Group

20. With regard to paragraph 1, the Working Group may wish to confirm that the Tribunals would not provide mediation and other alternative dispute resolution services (A/CN.9/1167, para. 94).

21. The Working Group may wish to confirm that the Dispute Tribunal or the Appeals Tribunal should be able to develop and adopt rules of procedure that are consistent with and supplement the provisions of the Protocol, in particular Sections E and F (A/CN.9/1167, paras. 93 and 94).

22. With regard to paragraph 2, the Working Group may wish to consider whether the Presidency should be elected by vote of the members of the Tribunals or selected on a random basis. In principle, the President and the Vice-President should be from different regional groups, and each position should rotate among the regional groups. The Working Group may also wish the determine the term of office of the Presidency, which may be one to three years. Reference should be made to article 12, which provides for a 9-year term for members of the tribunals and, with respect to initial members, half of them serving for nine years and the other half serving for six years.

23. Paragraph 3 notes that the Presidency shall be responsible for the overall operation and administration of the Tribunals as assisted by the Registrar (see article 6(1)).

24. With regard to paragraph 4, the Working Group may wish to consider whether the newly appointed President or the Vice-President should serve the full term instead of the remaining term (see article 13(5) for a comparison).

Article 6 – Registry[8]

1. The Registry shall carry out administrative and any other functions in accordance with this Protocol. It shall support the activities of the Conference and its subsidiary bodies and assist in the functioning of the Tribunals and their Presidency.

2. The Registrar shall be the head of the Registry and be appointed by the [Conference][Tribunals] for a renewable period of six years based on a recommendation by [the Bureau of the Conference] [the Presidency of the Tribunals].

3. The Registrar shall be accountable to the [Conference][Tribunals].

4. The Registrar shall:

(a) Manage the day-to-day operation of the Standing Mechanism;

(b) Employ and manage the staff members of the Registry in accordance with staff regulations adopted by the Conference;

(c) Prepare the annual report on the operation of the Standing Mechanism for adoption by the Conference;

(d) Prepare the annual budget of the Standing Mechanism for adoption by the Conference;

[8] A/CN.9/1167, para. 95.

(e) Prepare rules of procedure and regulations [applicable to the Registry] for adoption by the Conference;

(f) Engage and cooperate with other organizations and institutions, as appropriate;

(g) Act as the registrar for proceedings administered under this Protocol, authenticate decisions rendered by the Tribunals and certify copies thereof;

(h) Prepare the fee structure of the Standing Mechanism; and

(i) Perform any other functions in accordance with this Protocol.

5. The Registrar shall not seek or accept instructions from any government or any authority other than the Standing Mechanism and shall not hold any other employment or engage in any other occupation without the approval of the [Bureau of the Conference] [Presidency of the Tribunals].

6. Staff members of the Registry shall not seek or accept instructions from any government or any other authority other than the Standing Mechanism and shall not hold any other employment or engage in any other occupation without the approval of the Registrar.

Note to the Working Group

25. With regard to paragraph 1, the Working Group may wish to consider whether the "subsidiary bodies" of the Conference referred to in the second sentence should be expressly fleshed out in the statute, to avoid possible confusion with the "subsidiary bodies" of the Standing Mechanism contemplated under article 4(2)(m), and what they would be. For instance, while reference could be made to the Bureau of the Conference in accordance with article 4, it is not clear yet whether the Screening Committee in article 10 would be a subsidiary body of the Conference or of the Standing Mechanism.

26. With regard to paragraph 2, the Working Group may wish to determine the body that would appoint the Registrar and the process for doing so. The Working Group may also wish to confirm the body to which the Registrar would be accountable in paragraph 3.

27. In paragraph 4(b), it is expected that the "staff regulations" to be adopted by the Conference would form part of the "administrative regulations" currently contemplated under article 4(2)(f). The Working Group may wish to confirm this understanding.

28. The phrase "accept instructions" in paragraph 5 is intended to refer to following instructions given by the Contracting Parties that would not be acceptable under the Protocol. The Working Group may wish to confirm this understanding and consider whether the language needs to be clarified to that effect, also noting that this provision is connected with paragraph 3.

29. The Working Group may wish to consider whether the UNCITRAL secretariat should be tasked with identifying existing institutions that could carry out the functions of the Registry in full or in part and either temporarily or permanently, as well as whether the Protocol need to expressly indicate this possibility (A/CN.9/1167, paras. 92 and 95).

B. Nomination, screening, election and appointment of the members of the Tribunals

Article 7 – Requirements and qualifications[9]

[9] A/CN.9/1194, paras. 15-26.

1. The members of the Tribunals shall be independent and impartial and shall be persons of high moral character, enjoying the highest reputation for fairness and integrity with recognised competence in public international law or international investment law as well as in the resolution of international disputes.

2. The members of the Tribunal shall also meet any other criteria that is set forth in the regulations adopted by the Conference.

Note to the Working Group

30. Article 7 requires the members to be independent and impartial consistent with the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution (A/CN.9/1194, para. 20). The article also reflects the understanding of the Working Group that the minimum qualifications and requirements of members of the Tribunals should be set forth, without unduly limiting the pool of qualified candidates (A/CN.9/1194, paras. 15-17 and 22). It further reflects the view that experience in different areas and functions (for example, as an arbitrator, judge, mediator or counsel) should be considered holistically to ensure diversity in the composition of the Tribunals. While the areas of competencies are disjunctive, competency in the resolution of international disputes is a separate requirement.

31. The Working Group may wish to confirm that article 7 would apply equally to the members of the Appeals Tribunal (in other words, the qualifications required in the statute would be the same), while the Conference, in composing the Appeals Tribunal, may wish to weigh particular qualifications, such as adjudicatory experience, more heavily (A/CN.9/1194, paras. 18 and 21).

32. Article 7 does not stipulate language proficiency requirements and the official and working languages of the Tribunals are to be specified in the regulations adopted by the Conference (A/CN.9/1194, para. 23).

33. Members of the Tribunals need not be nationals of a Contracting Party to ensure a broader pool of qualified candidates with diverse backgrounds (A/CN.9/1194, para. 24). However, nationality of the members would in any case need to be taken into account to ensure balanced geographical representation and to prevent assigning of a dispute to a member who is a national of the State party to the dispute or of the State whose national is a party to the dispute (see articles 16(3) and 20(2)) (see also notes to article 10(6) on the list to be prepared by the Screening Committee). The Working Group may wish to consider whether it should be possible for a Contracting Party or an investor to object to the assignment of a dispute or an appeal of a decision to a member who is not a national of a Contracting Party to the Protocol (A/CN.9/1194, paras. 25 and 30).

Article 8 – Nationality of the members of the Tribunals[10]

1. No two members of the Dispute Tribunal shall be nationals of the same State.

2. No two members of the Appeals Tribunal shall be nationals of the same State.

Note to the Working Group

34. The Working Group may wish to consider the placement of article 8, as much of its prior content has now been moved to article 11. It reflects the agreement in the Working Group that the rule should apply to each of the Tribunals - in other words, appointment of a national to the Dispute Tribunal would not prevent another national from being appointed to the Appeals Tribunal and vice versa (A/CN.9/1194, para. 33).

35. The Working Group may wish to consider, should the provision be retained, whether the regulations adopted by the Conference would need to include a rule to determine the dominant and effective nationality of a member with more than one nationality (for example, whether to use the habitual residence or the place where

[10] A/CN.9/1194, paras. 27-33.

civil and political rights were exercised) (A/CN.9/1194, paras. 26 and 32, see also in relation to article 10(6)) (see also annotation to article 16(3)).

Article 9 – Nomination of candidates[11]

1. A Contracting Party may nominate up to four individuals as candidates for appointment as members of the Tribunal(s). The candidate need not be a national of a Contracting Party. In nominating the candidates, the Contracting Party shall take into account gender representation and, as appropriate, make efforts to consult relevant stakeholders, including representatives of the judiciary, civil society organizations, bar associations, business associations and academic organizations.

2. The Conference may carry out an open call for candidates, in which individuals may be nominated as candidates for appointment as members of the Tribunal. The Conference shall adopt regulations governing the nomination process, including which organizations may nominate candidates.

3. All nominations shall be accompanied by a statement specifying how the candidates fulfil the qualifications and requirements in article 7.

4. Candidates nominated pursuant to this article shall be subject to regulations adopted by the Conference concerning their conduct and ethical obligations and the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution.

Note to the Working Group

36. Article 9 foresees a nomination process involving the Contracting Parties as well as an open process to be initiated at the discretion of the Conference. A person nominated in accordance with article 9 is considered to be a "candidate" to which the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution shall apply.

37. Paragraph 1 reflects the understanding of the Working Group on nomination by Contracting Parties to the Tribunal(s) (A/CN.9/1194, para. 39). As the structure of the standing mechanism is not agreed yet, the Working Group may wish to confirm whether the four candidates would be nominated for both the Dispute and Appeals Tribunals, or just one of the Tribunals (see A/CN.9/WG.III/WP.256, paras. 7-14). The second sentence clarifies that the nominated candidate need not be a national of that Contracting Party nor a national of any Contracting Party (A/CN.9/1194, paras. 24 and 36; see annotation to article 7, para. 33 above). The third sentence provides guidance for Contracting Parties in their nomination process, which should be transparent and with an aim to identify the most qualified candidates (A/CN.9/1194, paras. 37 and 38). While Contracting Parties are encouraged to seek the views of relevant stakeholders, the sentence does not specify how such consultations should be conducted, who to consult, or the need to show proof of such consultations. For example, Contracting Parties may publish information about the process publicly as well as the list of potential candidates to facilitate stakeholder input.

38. Paragraph 2 reflects the views of the Working Group on nominations through an open call, a process for individuals to be nominated without the involvement of a Contracting Party (A/CN.9/1194, paras. 40 and 45). It reflects the views that an open call for nominations could (i) increase the legitimacy of the standing mechanism and its public reception; and (ii) enlarge the pool of suitable candidates, which could further enhance the diversity of Tribunal members. However, noting the complexities that may arise through an open call process (for example, nationals of a Contracting Party being nominated through that process in addition to nationals being nominated by the Contracting Party), paragraph 2 provides that the Conference would adopt procedures governing this process in its regulations. It is further expected that those

[11] A/CN.9/1194, paras. 34-48.

regulations would identify the organizations or types of organizations that could make nominations and also clarify whether self-nominations would be permitted.

39. The discretion whether to carry out an open call lies entirely with the Conference and the recommendation of the Screening Committee under article 10(5) would not be a condition for the Conference to carry out an open call (see A/CN.9/1195, para. 72; and A/CN.9/1194, para. 44). The sequencing of an open call (whether it should follow the initial nominations by Contracting Parties or can be done simultaneously) would also be left to the Conference and could be addressed in the regulations (A/CN.9/1195, para. 74; and A/CN.9/1194, para. 46).

Article 10 – Screening Committee[12]

1. The Conference shall establish a committee (the "Screening Committee") to review and verify whether the candidates nominated pursuant to article 9 meet the requirements and qualifications in article 7.

2. The Screening Committee shall be composed of [seven] individuals reflecting equitable geographical distribution, the representation of the principal legal systems and equal gender representation. The members of the Screening Committee shall be chosen from among former members of the Tribunals, current or former members of international or national supreme courts and lawyers or academics of high standing and recognized competence. The Registrar shall serve *ex officio* in the Screening Committee.

3. The Conference shall adopt regulations on the procedure and operation of the Screening Committee, which set forth the rules on the appointment of Screening Committee members, their qualifications and their terms of service, and which outline the procedure to ensure their independence and impartiality.

4. Members of the Screening Committee shall serve in their personal capacity and act independently and in the public interest, and not take instructions from any Contracting Party or any other State, organization or person. Members of the Screening Committee may not be appointed as a member of, or serve as counsel or expert before, the Tribunals during their term and for a period of [*a period of time to be specified*] years thereafter.

5. Upon review of the candidates, the Screening Committee may recommend to the Conference that an open call be made for additional candidates. The recommendation shall state the reasons for which it is made.

6. The Screening Committee shall present the final list of suitable candidates to the Conference for its consideration. The list shall be made publicly available. The list shall classify the candidates by gender and by regional groups based on their nationality. In the case that a candidate was nominated by a Contracting Party of which that candidate is not a national, the regional group to which the nominating Contracting Party belongs shall also be indicated.

Note to the Working Group

40. Paragraph 1 provides for the establishment of a committee to review and verify the nominated candidates (the "Screening Committee") (A/CN.9/1194, paras. 49-56). The Working Group may wish to confirm whether the Screening Committee would be tasked to review and verify all candidates, including those nominated by Contracting Parties and if necessary, have the authority to disqualify them (A/CN.9/1194, paras. 47 and 50). The Working Group may wish to consider whether the Screening Committee could be tasked with other functions, such as interviewing candidates.

41. The Working Group may wish to consider the consequences if the Screening Committee disqualifies a candidate nominated by a Contracting Party, including whether that Contracting Party should be given an opportunity to nominate another individual in place of the disqualified individual (as a substitute) for consideration by

[12] A/CN.9/1194, paras 49-56 and A/CN.9/1195.

the Screening Committee (A/CN.9/1195, para. 74), and whether that would unduly delay the nomination process.

42. Paragraph 2 reflects the understanding that the composition of the Screening Committee should be diverse and represent the views of all stakeholders including investors as well as other non-State stakeholders (A/CN.9/1194, paras. 53-54). The Working Group may wish to determine the appropriate number of Screening Committee members. Paragraph 2 then outlines the pool of potential candidates for appointment to the Screening Committee. The phrase "shall serve ex officio" means that the Registrar would serve as a member of the Screening Committee by virtue of his office/position, but would not have voting rights (if any are to be provided for in the regulations).

43. Paragraphs 3 and 4 are intended to ensure that the members of the Screening Committee act in an independent and accountable manner, including through the adoption of regulations by the Conference. The regulations should also set forth rules on members' terms of service, including whether the members would be remunerated and reimbursed for any costs arising from their functions (A/CN.9/1194, paras. 55-56).

44. With regard to paragraph 5, the Working Group may wish to note the deletion of the words "list of" in the first sentence to reflect that the review is of the candidates themselves, and an editorial change in the second sentence. The Working Group may also wish to consider whether Contracting Parties should be able to nominate additional candidates when an open call is carried out based on the recommendation of the Screening Committee (see A/CN.9/1195, para. 74).

45. With regard to paragraph 6, the regulations adopted by the Conference would likely need to include a rule to determine the dominant and effective nationality of a member with more than one nationality (for example, nationality where the member has habitual residence or ordinarily exercises civil and political rights) (A/CN.9/1194, para. 26).

46. The list prepared by the Screening Committee could function as a roster for future elections, the management of which could be further detailed in the regulations. The regulations should detail how to operate the roster and for what period (for example, for a specific election cycle or a fixed period), how the roster would be maintained, including the handling of candidates nominated by Contracting Parties and their continued availability (A/CN.9/1195, para.77).

47. The Working Group may wish to consider whether the list to be prepared by the Screening Committee should be for both Tribunals, from which the Conference would be able to elect the respective members. Alternatively, a separate list could be prepared for each of the Tribunals. This would largely depend on the structure of the standing mechanism (A/CN.9/1195, para. 83).

Article 11 – Elections of members of Tribunals and appointment by the Conference of the Contracting Parties[13]

1. The Conference shall appoint the members of the Tribunals, the composition of which shall [respectively] reflect, among others, equitable geographical distribution, the representation of the principal legal systems and equal gender representation.

2. The members of the Tribunals shall be elected at a meeting of the Conference in the case of the first election and by a procedure agreed to by the Conference in the case of subsequent elections. A simple majority of the Contracting Parties shall constitute a quorum for the elections.

3. The members of the Tribunals shall be elected from the final list of suitable candidates presented by the Screening Committee in accordance with article 10, paragraph 6.

[13] A/CN.9/1194, paras. 18-19 and 27-33 and A/CN.9/1195, paras. 79-88.

4. For the purposes of the elections:

(a) Subject to article 41 bis, each Contracting Party shall have one vote for each vacancy/seat;

(b) Candidates elected as members of the Tribunals shall be those who obtain the highest number of votes within each regional group and a two-thirds majority of the Contracting Parties present and voting provided that such majority includes a majority of the Contracting Parties;

(c) In the event that a sufficient number of members are not elected on the first ballot to fill the vacancies of a regional group, successive ballots shall be held until the remaining seats of that regional group have been filled; and

(d) The members of the Tribunals shall be elected by secret ballot.

Note to the Working Group

48. Article 11 provides the process for appointing the members of the Tribunals. Paragraph 1 sets forth the key criteria that should govern the composition of the Tribunals, while not preventing the Conference ("among others") from agreeing on additional criteria or expertise as deemed necessary or desirable for the composition of the Tribunals (see article 7, last sentence/paragraph 3; and A/CN.9/1195, para. 87; A/CN.9/1194, paras. 19, 27 and 33). While not expressly mentioned in the statute, the Conference in composing the Tribunals could consider (i) experience working in or dealing with governments, including as part of the judiciary or the foreign or civil service, to ensure that members have an understanding of public policy and States' decision-making; (ii) an understanding of investors' business operations; (iii) adjudicatory experience; and (iv) experience in financial services or in industries frequently the subject of investment disputes. While these areas of experience would be desirable, they need not be required of all the members. (A/CN.9/1194, para. 18). The Working Group may wish to consider whether any of these should be listed in the statute.

49. Paragraph 1 should be understood as setting forth the obligations of the Conference rather than merely guiding principles (A/CN.9/1194, para. 27). The Working Group may wish to confirm that such obligations apply to each Tribunal and not the two Tribunals as a whole (A/CN.9/1194, para. 29).

50. Equitable geographical distribution in paragraph 1 refers to global distribution based on United Nations regional groupings rather than distribution among the Contracting Parties (A/CN.9/1195, para. 87; and A/CN.9/1194, paras. 28 and 33). If a two-tier mechanism were to be established, the Working Group may wish to consider whether the elements listed in paragraph 1 should apply to the entirety of the membership of both Tribunals, or to each of the Tribunals separately ("respectively").

51. Paragraph 2 provides that the elections to initially compose the Tribunals should occur at a meeting of the Conference, with the procedure for subsequent elections to be agreed upon by the Conference. This allows for a flexible approach to conduct the elections, including the means to cast such votes remotely (A/CN.9/1195, paras. 82 and 86). The quorum for any election would be a simple majority of the Contracting Parties (A/CN.9/1195, para. 82).

52. Subparagraph (a) provides that each Contracting Party should have a vote in elections with respect to the Tribunal(s) to which it was a Contracting Party and be able to cast the same number of votes as the number of seats to be filled (A/CN.9/1195, para. 80). This is, however, subject to the voting rules applicable to regional economic integration organizations as set out in article 41 bis (A/CN.9/1195, para. 80).

53. Subparagraph (b) provides that candidates who obtained the highest number of votes within each regional group would be elected as members of the Tribunal. In cases where there is more than one vacancy within a regional group, those who

obtained the highest number of votes among the candidates and which meet the minimum requirement would be elected as members. The minimum requirement is set as a two-thirds majority of the Contracting Parties present and voting, provided that such majority includes a majority of the Contracting Parties (ITLOS statute, article 4(4), A/CN.9/1195, para. 82). In essence, this means that the election would take place among candidates from each regional group (A/CN.9/1195, para. 81). If there are two vacancies from regional group A, it is expected that each Contracting Party, regardless of their regional group, casts two votes on candidates from that group. Cross-regional voting and minimum requirement rules are introduced to ensure legitimacy of the elected members.

54. Subparagraph (c) provides that successive elections could be conducted to fill the vacancies within each regional group (A/CN.9/1195, para. 85). Subparagraph (d) provides for elections by secret ballot (A/CN.9/1195, para. 88).

55. More detailed rules would need to be set forth in the regulations to address situations such as ties between candidates as well as two nationals of the same Contracting Party (possibly one nominated by a State and another resulting from an open call) receiving the highest number of votes.

Article 12 – Term and conditions of appointment[14]

1. Members of the Tribunals shall hold office for a term of nine (9) years. At the first election to appoint the members of the Tribunals, half of the appointed members shall be selected by lot to serve for a term of six (6) years.

2. Members of the Tribunals shall not be eligible for reappointment.

3. A member of the Tribunal assigned to a dispute or an appeal for which the proceeding has commenced shall continue to discharge the duties to complete the proceeding, unless he or she has resigned or has been removed in accordance with article 13.

4. Members of the Tribunals shall be subject to regulations adopted by the Conference concerning their conduct, professional and ethical obligations, and the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution.

5. Members of the Tribunals shall receive a salary. In addition, the President and the Vice-President shall receive a special allowance. The salaries, allowances, and other compensation shall be fixed by the Conference.

Note to the Working Group

56. Paragraph 1 reflects the understanding that members should have a longer term of office (9 years) to ensure independence and impartiality. The President and the Vice-President have the same term of office. The paragraph also provides for a staggered appointment process to ensure that members would not be replaced all at once, with half of the members being appointed at the first election for a period of 6 years. This staggered approach would further ensure that Contracting Parties joining at a later stage would be able to participate in shaping the composition of the Tribunals (A/CN.9/1195, para. 85), with the second election expected to occur in 6 years (A/CN.9/1195, para. 93).

57. The Working Group may wish to consider whether the term of office should be shorter for members of the Appeals Tribunal (A/CN.9/1195, para. 90).

58. Paragraph 2 further reflects the understanding that members should have a non-renewable term to ensure judicial independence and to avoid the politicization of the Tribunals. The Working Group may wish to confirm whether an appointment to one Tribunal would preclude the member from being subsequently appointed to the other

[14] A/CN.9/1195, paras. 89-100.

Tribunal. It was suggested that members could rotate between the two Tribunals if they were established as a single structure, with their designation to a specific Tribunal decided by lot. It was, however, said that members of the Dispute Tribunal should not handle appeals of a case that they had handled, even if they were allowed to be elected as a member of the Appeals Tribunal. The Working Group may wish to consider whether the cooling-off period in article 4(3) and 4(4) of the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution (the "Code of conduct" or "Code") would apply in these instances.

59. Reference to "salary" in paragraph 5 indicates that members would be remunerated regularly rather than based on their caseload or a fee schedule, which would depend on the time spent. The Working Group may wish to confirm that all members of the Tribunal would receive the same salary. The term "compensation" in the paragraph is intended to refer to other payments that a member might receive, for example, to cover expenses or as pension, medical or other benefits.

Article 13 – Removal, resignation, vacancies and replacement[15]

1. A member of the Tribunal may be removed from office in the following circumstances:

(a) a [serious] breach of this Protocol;

(b) failure to perform his or her duties; or

(c) de jure or de facto impossibility to perform his or her functions.

2. In the circumstances listed in paragraph 1, the President of the respective Tribunal (in the case of the President, the Vice-President of the respective Tribunal) shall recommend the removal of that member of the Tribunal stating the reasons. The member shall be removed by a three-fourths majority vote by the members of the respective Tribunal excluding the member under scrutiny. The removal shall be effective upon notification to the Conference.

3. A member of the Tribunal may resign from office by notifying the President of the respective Tribunal (in the case of the President, by notifying the Vice-President). The resignation shall become effective upon acceptance by the President (or the Vice-President).

4. A member of the Tribunal who has been removed in accordance with paragraph 2 or who has resigned in accordance with paragraph 3 [or whose seat has otherwise been vacated] shall be replaced in accordance with articles 9 to 11 or a procedure adopted by the Conference.

5. A member of the Tribunal who is appointed to replace a member in accordance with paragraph 4 shall hold the office for a term of nine (9) years and shall not be eligible for reappointment.

Note to the Working Group

60. With regard to paragraph 1, the Working Group may wish to consider including de jure or de facto impossibility of a member to perform his or her functions (for example, due to death, illness or other incapacity – wording is from UARs article 12(3)) as additional reasons to initiate the removal process under paragraph 1. This may make the phrase "or whose seat has otherwise been vacated" in paragraph 3 unnecessary as it intended to cater for such situations (A/CN.9/1195, para. 108). Otherwise, a separate rule could be prepared, possibly with a less stringent voting requirement (for example, an absolute majority (A/CN.9/1195, para. 105).

61. The Working Group may wish to confirm that only "serious" breaches should be the subject of removal and, if so, what would constitute "serious breaches". The Code of conduct is incorporated through article 12(3) and breach of the Code would also be considered a ground for removal. In particular, corruption would be covered by article 5 of the Code (A/CN.9/1195, para. 102). Similarly, breach of regulations

[15] A/CN.9/1195, paras. 101-110.

adopted by the Conference on the conduct as well as other relevant professional and ethical obligations would constitute a breach of the Protocol.

62. Under paragraph 2, the decision to remove a member lies with the Tribunal itself and not the Conference to avoid undue interference (A/CN.9/1195, para. 103).

63. Paragraph 3 addresses the procedure for the resignation. The Working Group may wish to consider whether such procedure may be better addressed in the regulations (for example, to address situations where both the Presidency and Vice-Presidency may be vacant).

64. The Working Group may wish to note that under paragraph 4, the newly elected (replacing) members are expected to serve a full term upon election and not be eligible for reappointment. Paragraph 4 also provides that the Conference may adopt a simplified procedure for filling these vacancies (A/CN.9/1195, para. 84). One possibility would be for the Conference to conduct elections based on the (final) list of suitable candidates prepared by the Screening Committee for the previous election, eliminating the need for a nomination phase. Another would be to rely on the results of the previous elections, so that candidates who met the minimum voting requirements but were not appointed due to lack of votes could be automatically appointed (A/CN.9/1195 para. 109). The Working Group may wish to confirm that the new member should, in any case, be confirmed and appointed by the Conference and that equitable geographical distribution and equal gender representation be maintained. (A/CN.9/1195, paras. 84 and 109).

65. The Working Group may wish to consider the practicality of paragraph 5 in that it may result in elections being held to replace individual members rather than a batch of members. Under the current structure of article 12, elections would take place at the beginning of the standing mechanism's operation to elect all members of the Tribunal(s). The next elections would be in six years (to replace half of the members), nine years (to replace the remaining half) and then fifteen years. If elections are held to replace a member due to removal, resignation or other reasons, the substitute member would likely have to be from the same regional group and of same gender as the member to be replaced. Such elections may have a negative impact on the overall composition of the Tribunal whereby half of the Tribunal members are to be replaced. Furthermore, if more than one member were removed or resigned, it may result in elections taking place repeatedly at different times, making it difficult to manage those elections. (A/CN.9/1195, paras. 94 and 110). To mitigate this problem, it may be preferable that the substitute member serve for the remaining term of the removed or resigning member (as provided for under the ICJ statute) and only when the term is more than, for example, six years, not be eligible for reappointment.

C. The Dispute Tribunal

Article 14 – Jurisdiction[16]

1. The jurisdiction of the Dispute Tribunal shall extend to any [international] [investment] dispute, with respect to which the parties to the dispute have consented in writing to submit to the Dispute Tribunal. When all of the disputing parties have given their consent, no disputing party may withdraw its consent unilaterally.

2. A Contracting Party may consent to the jurisdiction of the Dispute Tribunal by submitting a list of instruments to which it is a party [or legislation governing foreign investments which it has enacted] (referred to as the "notification") to the Registrar. The notification may be provided when depositing the instrument of ratification, acceptance, approval or accession pursuant to article 41, or subsequently.

3. The Dispute Tribunal shall have exclusive jurisdiction over a dispute submitted for resolution pursuant to an instrument listed in the notification, when both or all

[16] A/CN.9/1167, paras. 96-101.

relevant Contracting Parties have included the instrument in their respective notifications.

4. The Registrar shall maintain and make publicly available the notifications made by the Contracting Parties, including the instruments [and legislation] listed therein.

Note to the Working Group

66. The jurisdiction of the Dispute Tribunal would largely depend on the structure and design of the standing mechanism.

67. With regard to the scope of jurisdiction, the Working Group may wish to further consider whether:

- Reference should be made to "international investment dispute" and if so, how it should be defined (see articles 1 and 18, and A/CN.9/WG.III/WP.256, paras. 22-26);
- To include SSDS in the scope of jurisdiction;
- The Dispute Tribunal should have the authority to issue advisory opinions;
- Jurisdiction should be limited to treaty-based disputes or include disputes based on investment contracts and domestic laws on foreign investment (see A/CN.9/WG.III/WP.256, paras. 26 and 33); and
- The Dispute Tribunal should have exclusive jurisdiction in the circumstances outlined in paragraph 3 (A/CN.9/1167, para. 100).

68. The following views would need to be taken into account:

- Jurisdiction should be strictly limited to instances where both or all parties to the underlying instrument had included that instrument in their respective notifications, which would avoid the Dispute Tribunal providing an interpretation of an agreement without the consent of all parties to that instrument;
- A decision or an interpretation by the Dispute Tribunal would not be binding on parties which had not given consent (which can be possibly clarified in article 25(2));
- While unilateral offers of consent could be envisaged, non-Contracting Parties and nationals of those Parties should generally not be able to consent to the jurisdiction based on such offer without that State (the non-Contracting Party) becoming a Contracting Party or permitting the unilateral offer to become applicable;
- Where non-Contracting Parties and their nationals can consent to the jurisdiction of the Dispute Tribunal, the terms and conditions (including fees and overall costs) be further developed;
- The possibility to extend jurisdiction to disputes between a constituent subdivision or agency of a Contracting Party designated by that State be examined, including how the subdivision or agency would consent to jurisdiction and whether such consent would require the approval of that State.

69. With regard to the list of instruments in paragraph 2, the Working Group may wish to consider (i) how they are to be identified in the list; (ii) whether the notification would relate only to existing instruments or legislation, or could include instruments concluded after the initial notification and if so, how the notification would be updated; (iii) how the entry into force, amendment or a termination of a listed instrument would be treated; (iv) whether Contracting Parties would be able to amend the notification (for example, to add or remove an instrument) and how that would affect consent or any proceeding initiated based on that instrument; (v) whether it should be made clear that consent to the jurisdiction through a notification is subject to any conditions/limits provided for in the instruments listed (for example, time

limits); (vi) whether disputes arising out of domestic legislation in the list would automatically be subject to the exclusive jurisdiction of the Dispute Tribunal.

70. It should be noted that paragraph 2 provides one of the ways of consenting to the jurisdiction of the Dispute Tribunal, particularly to modify or expand the consent given in existing instrument or legislation. The Working Group may wish to consider whether it is necessary to highlight such a mechanism in the statute as there may be other ways to express consent, including when the dispute arises.

71. The Working Group may also wish to confirm that that providing the list of instruments under paragraph 2 would fulfil the "in writing" requirement set out in paragraph 1.

72. The Working Group may wish to consider whether article 17 should address instances where a non-disputing Contracting Party objects to the jurisdiction of the Dispute Tribunal.

Article 15 – Request for dispute resolution[17]

1. Any party wishing to initiate a dispute resolution proceeding before the Dispute Tribunal shall address a request to that effect [in writing] to the Registrar [and to the other disputing party] [, who shall send a copy of that request to the other disputing party].

2. The request in paragraph 1 shall contain a brief description of the dispute, the issues in dispute, an indication of the amount involved, the identity of the disputing parties including the contact details and, where [appropriate][relevant], information about their consent to the jurisdiction of the Dispute Tribunal, in accordance with the rules of procedure. Following the receipt of the request, the Registrar may require the party to supplement the information therein or to provide additional information, including whether any requirement for the submission of a claim in the underlying instrument was met.

3. The Registrar shall register the request unless, on the basis of the information contained in the request or provided thereafter in accordance with paragraph 2, it is found that the dispute is manifestly outside the jurisdiction of the Dispute Tribunal.

4. The Registrar shall promptly notify the parties of the registration or refusal to register.

Note to the Working Group

73. With regard to paragraph 1, the Working Group may wish to confirm that, unlike a request for appeal in article 19, a request to initiate a dispute resolution proceeding before the Dispute Tribunal should be sent directly to the other disputing party in addition to the Registrar (A/CN.9/1167, para. 102, see in comparison, A/CN.9/1195, para. 112).

74. Paragraph 2 provides the information to be contained in the request for dispute resolution. The second sentence caters for instances where the underlying instrument for the submission of a claim includes requirements to be met in addition to those listed in paragraph 2 (A/CN.9/1167, para. 102). The Working Group may wish to consider how this provision could be drafted to require that claimants meet all necessary requirements for submission of a claim under the instrument in order to facilitate timely commencement of the proceeding, and whether the Registrar should be responsible for verifying whether these requirements are met.

75. With regard to paragraph 3, the Working Group may wish to consider the consequences when the request meets the requirements under paragraph 2 but does not meet the requirement in the underlying instrument, and in what circumstances, the Registrar should refuse registration.

[17] A/CN.9/1167, para. 102.

76. With regard to paragraph 4, the Working Group may wish to consider whether the wording in article 19(5) should be replicated.

Article 16 – Panels and the assignment of disputes[18]

1. As soon as possible after the appointment of the members of the Dispute Tribunal and the election of the President and the Vice-President, the Presidency shall assign the members to Panels, each consisting of [three] members. The President and the Vice-President shall also be assigned to Panels.

2. To ensure the effective functioning of the Panels, the Presidency, in composing the Panels, may take into account elements referred to in article 11(1) as well as areas of expertise, language proficiency, caseload of each member and other relevant criteria as set out in the regulations adopted by the Conference pursuant to article 7(2).

3. When a request is registered in accordance with article 15(3), the Presidency shall assign the dispute to a Panel on a random basis. If a dispute is assigned to a Panel including a member who is a national of the State party to the dispute or of the State whose national is a party to the dispute, the Presidency shall replace that member with another member of the Dispute Tribunal or assign the dispute to another Panel.

4. [Notwithstanding paragraph 3,] the Presidency may decide to assign two or more disputes to the same Panel, when the issues in the disputes are similar.

5. In the circumstances outlined in the regulations adopted by the Conference, the Presidency may decide to assign a dispute to a Panel consisting of [a sole member] [more than [three] members] [an odd number of members].

6. In the circumstances outlined in the regulations adopted by the Conference and upon the joint request by the disputing parties, the Presidency may appoint an individual or individuals as additional member(s) of the Panel for that specific dispute. Such an individual shall meet the qualifications and requirements in article 7 and be chosen from the list of suitable candidates prepared by the Screening Committee.

Note to the Working Group

77. Paragraph 1 provides that the Dispute Tribunal would function in the form of pre-constituted Panels. The Working Group may wish to consider whether the Dispute Tribunal should organize its work in this way, particularly in light of the decision to not have pre-established Chambers in the context of the Appeals Tribunal (A/CN.9/1195, para. 119; A/CN.9/1167, para. 103). The Working Group may wish to confirm the number of members that would constitute a Panel. The need to balance the workload among the members as well as the possibility for the Panel to be supported by experts appointed by it or translators/interpreters should also be further considered.

78. Paragraph 2 has been revised to reflect the doubts expressed about the practicalities of the Presidency taking into account the various elements in composing Panels. It provides more flexibility to the Presidency, including to consider other relevant criteria (A/CN.9/1167, para. 104). The paragraph may need to be adjusted depending on whether Panels are to be pre-established or not. For example, if Panels are composed after a request is registered, the possibility of random assignment could be foreseen as well as the possible involvement of the disputing parties or the Contracting Parties in the composition of the Panels (A/CN.9/1167, paras. 105-106).

79. The first sentence of paragraph 3 is based on the assumption that Panels would be pre-established and disputes would be assigned to them on a random basis (A/CN.9/1167, para. 105). Diverging views were expressed about the second sentence of paragraph 3 (including whether nationality should be an indicator of bias) (A/CN.9/1167, para. 107). The Working Group may wish to consider whether the

[18] A/CN.9/1167, paras. 103-110.

approach is appropriate also in light of article 20(2). The Working Group may also wish to confirm that in its application, all nationalities of the member should be considered and not just the dominant and effective nationality as the objective of paragraph was to address the perception of bias (A/CN.9/1194, para. 32).

80. Paragraph 4 does not address a situation where two proceedings are joined or consolidated but rather where there would be enhanced efficiency by having similar cases heard before the same Panel. The regulations could set forth detailed instances when the Presidency might exercise the discretion with a further elaboration on the meaning of "similar" (for example, the same measure, treaty, parties or similar factual issues) (A/CN.9/1167, para. 108). The phrase "notwithstanding paragraph 3" was added to indicate that this would be an exception to the random assignment provided for in the first sentence of paragraph 3. Furthermore, it is anticipated that Panels may may be assigned more than one dispute.

81. With regard to paragraph 5, the Working Group may wish to consider whether it should be possible to constitute a single-member Panel (for example, upon agreement of the disputing parties or for disputes that meet certain conditions – such as those under a particular threshold), as this could enhance efficiency (A/CN.9/1167, para. 109).

82. Paragraph 6 reflects a view that appointment of ad hoc members should be allowed, for example, to accommodate treaty requirements for particular expertise or language needs in a specific Panel. In this context, the Working Group may wish to consider the concerns expressed about ad hoc members, including their impact on collegiality within the Dispute Tribunal, selection criteria and process as well as related costs (A/CN.9/1167, para. 110). Paragraph 6 provides that if ad hoc members are permitted, they should meet the requirements in article 7 and be appointed from the list of suitable candidates prepared by the Screening Committee only upon the joint request by the disputing parties. The regulations to be adopted by the Conference would need to set out the detailed process for the appointment of ad hoc members, including the maximum number as well as their terms of service.

Article 16 bis – Disqualification and excusal[19]

1. A member of a Panel may be disqualified if circumstances exist that give rise to justifiable doubts as to that member's impartiality or independence:

[where the member has previously been involved in the dispute in any capacity prior to his or her appointment as a member of the Tribunal (for example, as a legal representative or an expert witness)];

[where the member has represented any of the disputing parties in any capacity prior to his or her appointment as a member of the Tribunal];

[where handling the dispute may lead to a breach of the Code of Conduct].

2. A disputing party may [challenge] [propose the disqualification of] a member of a Panel based on the grounds listed in paragraph 1. The challenge/proposal shall be submitted to the Presidency.

3. A member of a Panel may request to the Presidency that he or she be excused from handling a dispute assigned to the Panel [when …].

4. The Presidency shall make a determination on the [challenge] [proposal of disqualification] or the request for excusal in accordance with the rules of procedure. A member of a Panel who has been disqualified or excused shall be replaced by another member of the Dispute Tribunal.

Note to the Working Group

83. Whereas article 13 addresses the removal of a member from the Tribunals, article 16 bis addresses instances when a member of a Panel seeks to be excused from

[19] A/CN.9/1195, para. 106 and A/CN.9/1167, para. 106.

hearing a dispute or is challenged resulting in its disqualification from the Panel but not removal from the Tribunal. The Working Group may wish to consider whether the same procedure should apply to members of a Chamber in the Appeals Tribunal (see article 20 bis). The Working Group may also wish to consider whether this rule should be provided in the statute or in the rules of procedure.

84. The article was prepared based on article 12 of the UNCITRAL Arbitration Rules and article 41 of the Statute of the International Criminal Court. The square bracketed text in paragraphs 2 to 4 reflect a more generic approach based on the article 24 of the ICJ Statute and article 8 of the ITLOS Statute. The ICJ and ITLOS Statutes regulate this matter as conditions relating to participation of a member in a particular case, rather than as a challenge.

85. With regard to paragraph 1, the Working Group may wish to consider the grounds for the challenge (A/CN.9/1195, para. 106) and further confirm that (i) manifest lack of qualities required in article 7 or (ii) any ineligibility under section B (articles 7 to 11) would not be a basis for disqualification (see article 57 of the ICSID Convention).

86. With regard to paragraph 2, the Working Group may wish to consider whether the disputing parties should have a right to challenge the members of the Panel.

87. With regard to paragraph 3, the Working Group may wish to consider whether the grounds for excusing oneself from the Panel should be listed.

88. With regard to paragraph 4, the Working Group may wish to consider whether the determination on the challenge should be determined by the Presidency or alternatively, by the other members of the Panel or by the Tribunal at large (for example, by an absolute majority). In any case, the challenged member should be entitled to present his or her comments on the challenge but not be involved in the determination (see article 13). If the determination lies with the Presidency, additional rules on how to decide on challenges against the President or Vice-President, who may be serving as a member of a Panel, may also need to be prepared.

Article 17 – Objections to jurisdiction[20]

1. [The Dispute Tribunal shall be the judge of its own jurisdiction.]

2. Any objection by a disputing party that the dispute is not within the jurisdiction of the Dispute Tribunal shall be considered by the Panel assigned to the dispute in accordance with the rules of procedure.

Note to the Working Group

89. Article 17 provides that the Dispute Tribunal shall determine whether it has jurisdiction. The Working Group may wish to consider whether to retain paragraph 1, which may be stating the obvious in the context of a standing mechanism.[21]

90. The Working Group may wish to confirm that jurisdictional questions are to be determined by the respective Panels without the involvement of the Presidency or other members of the Dispute Tribunal. Reference is also made to the rules of procedure, which could provide that the Panel may determine whether to deal with jurisdictional issues as a preliminary question or to join them to the merits of the dispute.

D. The Appeals Tribunal

Article 18 – Jurisdiction

[20] A/CN.9/1195, paras. 120-121; A/CN.9/1167, para. 111.

[21] Article 36(6) of the ICJ statute provides: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

1. The jurisdiction of the Appeals Tribunal shall extend to appeals of an award or decision rendered by an arbitral tribunal or any other adjudicatory body (referred to in this section and Section F as the "first-tier tribunal"), with respect to which the parties to the dispute have consented in writing to submit to the Appeals Tribunal. When all of the disputing parties have given their consent, no disputing party may withdraw its consent unilaterally.

2. A Contracting Party may consent to the jurisdiction of the Appeals Tribunal by providing a list of instruments to which it is a party [or legislation governing foreign investments which it has enacted] (referred to as a "notification"), pursuant to which an award or decision may have been or may be made by an arbitral tribunal or any other adjudicatory body, to the Registrar. The notification may be provided when depositing the instrument of ratification, acceptance, approval or accession pursuant to article 41, or subsequently.

3. The Appeals Tribunal shall have exclusive jurisdiction over an appeal of an award or decision rendered pursuant to an instrument listed in the notification, when both or all relevant Contracting Parties have included the instrument in their respective notifications.

4. The Appeals Tribunal shall have [exclusive] jurisdiction over appeals of a decision rendered by the Dispute Tribunal in accordance with Section C.

5. The jurisdiction of the Appeals Tribunal is subject to any limitation in the law(s) applicable to the proceedings of the first-tier tribunal and article **.

6. The Registrar shall maintain and make publicly available the notifications made by the Contracting Parties, including instruments [and legislation] listed therein.

Note to the Working Group[22]

91. The Working Group may wish to recall that at its fiftieth session in 2025, it decided to defer its discussions on article 18 at a later stage. Therefore, only editorial changes have been made to article 18 from its previous version in document A/CN.9/WG.III/WP.239.

92. [*This section to be updated following the fifty second session of the Working Group in September 2025 which is expected to discuss aspects related to jurisdiction of the standing mechanism*.]

93. Article 18 addresses the jurisdiction of the Appeals Tribunal, which is based on the consent of the parties to hear an appeal of an award or decision rendered by an arbitral tribunal or any other adjudicatory body (referred to as "first-tier tribunal"). In a standing mechanism composed of only the Appeals Tribunal, such awards or decisions would be rendered outside the Standing Mechanism and brought before it. In a two-tier standing mechanism, decisions by the Dispute Tribunal would be brought before the Appeals Tribunal with the possibility that awards or decisions rendered outside the Standing Mechanism might also be brought before the Appeals Tribunal. For ease of reference, article 18 refers to the "first-tier tribunal" to distinguish those tribunals from the Appeals Tribunal. The term is used to encompass the Dispute Tribunal panels as well as ad hoc tribunals established outside the Standing Mechanism.

94. The term "appeal" is used in a broad sense to encompass the notions of requesting an annulment of an award under article 52 of the ICSID Convention and the application to set aside an award under article 34 of the UNCITRAL Model Law on International Commercial Arbitration (see article 29 of the statute, which includes the grounds for requesting annulment or set aside an award in paragraph 2). However, it does not refer to: (i) the request for correction or interpretation of the award or the request for an additional award; (ii) the request for recognition and enforcement of

[22] See A/CN.9/WG.III/WP.240, paras. 47-54.

the award; or (iii) the request that the enforcement of the award be refused. The Working Group may wish to confirm this approach.

95. Paragraph 1 allows the disputing parties to consent to the jurisdiction of the Appeals Tribunal regarding an appeal of an award or decision of a first-tier tribunal. In contrast to article 14 (Jurisdiction of the Dispute Tribunal), no reference is made to the term "international investment dispute" which may avoid the double keyhole issue but broadens the jurisdiction quite extensively (see articles 1 and 14; see also A/CN.9/WG.III/WP.256, paras. 22-26). The Working Group may wish to consider this further as well as the possibility of non-Contracting Parties and their nationals to consent to the jurisdiction of the Appeals Tribunal (see para. 68 above).

96. Paragraph 2 aims to capture the consent of the Contracting Parties to the jurisdiction of the Appeals Tribunal, including with respect to which of the existing instruments or legislation. By providing a list of instruments to which it is a party and its legislation, the Contracting Party would consent that an award or decision rendered pursuant to that instrument or legislation is subject to the jurisdiction of the Appeals Tribunal. It is also assumed that providing a notification would fulfil the "in writing" requirement set out in paragraph 1.

97. The Working Group may wish to consider paragraphs 2 and 3 in conjunction with article 14(2) and (3) as they pose similar issues (see paras. 66-72 above).

98. With regard to paragraph 4, which would apply only in a two-tier mechanism, the Working Group may wish to consider:

- Whether a disputing party consenting to the jurisdiction of the Dispute Tribunal would be deemed to have consented to that of the Appeals Tribunal or if it would be possible for the party to consent only to the jurisdiction of the Dispute Tribunal and, in doing so, take into consideration that the Contracting Parties to Section C (Dispute Tribunal) may differ from those to Section D (Appeals Tribunal);

- As the Dispute Tribunal's jurisdiction under article 14 currently extends to disputes involving a national of a non-Contracting Party or a non-Contracting Party as long as they consent to jurisdiction, whether such consent should be deemed to be consent also to the jurisdiction of the Appeals Tribunal; and

- Whether the Contracting Parties to Section D (if different from Section C) would wish for the Appeals Tribunal to address all such appeals arising from a mechanism to which they are not a Party, which might have budget implications for the operation of the Appeals Tribunal.

99. Paragraph 5 is intended to limit the jurisdiction of the Appeals Tribunal when the law applicable prohibits or otherwise limits appeals (e.g., article 53 of the ICSID Convention). In order to lift such limitation, means to seek inter se modification of that Convention based on article 41 of the Vienna Convention on the Law of Treaties would need to be sought (see A/CN.9/WG.III/WP.233, paras. 80–83). The Working Group may wish to confirm whether this is the approach to be taken.

Article 19 – Request for appeal[23]

1. Any party wishing to institute an appeal proceeding before the Appeals Tribunal shall address a request to that effect [in writing] to the Registrar, who shall send a copy of that request to the other disputing party.

2. The request in paragraph 1 shall contain information concerning the award or decision being appealed, the identity of the disputing parties including the contact details, [where relevant/appropriate] information about their consent to the jurisdiction of the Appeals Tribunal, and the ground(s) of appeal, in accordance with

[23] A/CN.9/1195, paras. 112-116, and A/CN.9/1196/Add.1, paras. 9-19.

the rules of procedure. Following the receipt of the request, the Registrar may require the party to supplement the information therein or to provide additional information.

3. The request in paragraph 1 shall be made within 120 days from the date of award or decision of the first-tier tribunal that is the subject of appeal. After this lapse of time has passed, the award or decision shall no longer be subject of appeal [and shall be considered final and binding in accordance with articles 24 and 25 or the applicable rules].

4. The Registrar shall register the request unless, on the basis of the information contained in the request or provided thereafter in accordance with paragraph 2, it is found that the appeal is manifestly outside the jurisdiction of the Appeals Tribunal.

5. The Registrar shall promptly notify the disputing parties of the registration or refusal to register, without prejudice to the ability of the parties to make a new request.

Note to the Working Group

100. Paragraph 1 confirms that the appellant does not need to send the request for appeal directly to the appellee but to the Registrar.

101. Paragraph 2 requires that the contact details of the disputing parties be provided in the request so that the Registrar could send a copy to the appellee. The rules of procedure should specify the details on when and how the copy should be sent. Paragraph 2 further requires that the request for appeal also include information about whether and how the disputing parties have consented to the jurisdiction of the Appeals Tribunal and basic information about the ground(s) of appeal. It further gives the discretion to the Registrar to seek additional information about the request or to supplement the initial request.

102. The 120-day time frame in paragraph 3 begins when the award or decision was rendered (A/CN.9/1195, para. 113), for example, when the certified copies are dispatched rather than when they are received by the disputing parties. The Working Group may wish to consider whether the timeframe should be shorter for an appeal of a decision of the Dispute Tribunal. The second sentence in paragraph 3 reflects the agreement in the Working Group to expressly include that after the lapse of the 120-day timeframe, parties would no longer be able to request an appeal (A/CN.9/1196/Add.1, para. 19). The Working Group may wish to consider whether the latter part of the sentence referring to the final and binding nature of the non-appealed award or decision should be retained.

103. With regard to the meaning of "manifestly outside the jurisdiction" in paragraph 4, references may be made to the practices of ICSID and the PCA. Situations where the appellant or the appellee was not a Contracting Party to the statute, or where the underlying agreement containing the consent had not entered into force may be examples. Considering that the question of jurisdiction would generally need to be determined by the Appeals Tribunal (article 21), the Registrar should exercise this power only in very limited instances (for example, where there was no reasonable possibility that the Appeals Tribunal would reach a different conclusion, and where the appellant had not provided a plausible argument) (A/CN.9/1195, para. 116).

104. Paragraph 5 requires the Registrar to notify his or her decision on the registration promptly. While the article does not envisage a procedure to challenge the Registrar's determination, it would be possible for the party to submit another request for appeal as long as it meets the conditions (A/CN.9/1195, para. 116).

Article 20 – Chambers and the assignment of appeals[24]

1. When a request is registered in accordance with article 19(4), the Presidency shall assign the appeal to a Chamber, which shall consist of three members of the

[24] A/CN.9/1195, paras. 117-119 and A/CN.9/1167, paras. 103-110.

Appeals Tribunal chosen on a random basis. The President and the Vice-President shall also be assigned to Chambers.

2. If an appeal is assigned to a Chamber including a member who is a national of the State party to the appeal or of the State whose national is a party to the appeal, the Presidency shall replace that member with another member of the Appeals Tribunal.

3. To ensure the effective functioning of the Chambers, the Presidency may take into account elements referred to in article 11(1) as well as areas of expertise, language proficiency, caseload of each member and other relevant criteria as set out in the regulations adopted by the Conference pursuant to article 7(2) to replace a member of the Chamber with another member of the Appeals Tribunal.

4. The Presidency may decide to assign two or more appeals to the same Chamber, when the issues of the appeals are similar.

5. In the circumstances outlined in the regulations adopted by the Conference, the Presidency may decide to assign an appeal to a Chamber consisting of [more than three members] [an odd number of members].

Note to the Working Group

105. Unlike article 16, which provides for pre-established Panels, article 20 provides that Chambers would be constituted after a request for appeal is registered, in a manner that would ensure independence, neutrality and opportunity for the members to serve (A/CN.9/1195, para. 119). This also takes into account the fact that the number of members of the Appeals Tribunal may be less than that of the Disputes Tribunal. Furthermore, the possibility of appointing ad hoc members (article 16(6)) is not foreseen for Chambers of the Appeals Tribunal.

106. With regard to paragraph 2, the Working Group may also wish to confirm that in its application, all nationalities of the member should be considered and not just the dominant and effective nationality, as the objective of the paragraph is to address the perception of bias (A/CN.9/1194, para. 32).

Article 20 bis – Disqualification and excusal [25]

1. A member of a Chamber may be disqualified if circumstances exist that give rise to justifiable doubts as to that member's impartiality or independence:

[where the member has previously been involved in the dispute in any capacity prior to his or her appointment as a member of the Tribunal (for example, as a legal representative or an expert witness)];

[where the member has represented any of the disputing parties in any capacity prior to his or her appointment as a member of the Tribunal];

[where handling the appeal may lead to a breach of the Code of Conduct].

2. A disputing party may [challenge] [propose the disqualification of] a member of a Chamber based on the grounds listed in paragraph 1.

3. A member of a Chamber may request that he or she be excused from handling an appeal assigned to the Chamber [when …].

4. The Presidency shall make a determination on the [challenge] [proposal of disqualification] or the request for excusal in accordance with the rules of procedure. A member of a Chamber who has been disqualified or excused shall be replaced by another member of the Appeals Tribunal.

Note to the Working Group

[25] A/CN.9/1195, para. 106 and A/CN.9/1167, para. 106.

107. Article 20 bis mirrors article 16 bis (see paras. 83-88 above). The Working Group may wish to consider whether the rule should be provided in the statute or in the rules of procedure.

Article 21 – Objections to jurisdiction[26]

1. [The Appeals Tribunal shall be the judge of its own jurisdiction.]

2. Any objection by a disputing party that the appeal is not within the jurisdiction of the Appeals Tribunal shall be considered by the Chamber assigned to the appeal in accordance with the rules of procedure.

Note to the Working Group

108. Article 21 mirrors article 17 and provides that the Appeals Tribunal shall determine whether it has jurisdiction. The Working Group may wish to consider whether to retain paragraph 1, which may be stating the obvious in the context of a standing mechanism.

109. The Working Group may wish to confirm that jurisdictional questions are to be determined by the respective Chambers without the involvement of the Presidency or other members of the Appeals Tribunal. Reference is also made to the rules of procedure, which may provide that the Chamber may determine whether to deal with jurisdictional issues as a preliminary question or to join them to the merits of the dispute.

E. The Dispute Tribunal procedure

Article 22 – Conduct of the Panel proceedings

1. The Panel shall conduct the proceedings in accordance with this Protocol and the rules of procedure adopted by the Conference.

2. Subject to paragraph 1, the Panel may conduct the proceedings in such manner as it considers appropriate, provided that the disputing parties are treated with equality and that at an appropriate stage of the proceedings, each disputing party is given a reasonable opportunity of presenting its case. The Panel shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute.

3. The Panel shall decide a dispute in accordance with the rules of law designated by the disputing parties as applicable to the substance of the dispute. Failing such designation by the disputing parties, the Panel shall apply the law which it determines to be appropriate. Any joint interpretation by the Contracting Parties of the applicable law or instrument shall be binding on the Panel.

4. The UNCITRAL Rules of Transparency in Treaty-based Investor-State Arbitration shall apply mutatis mutandis to the Panel proceedings.

5. The Panel may provide guidance to the disputing parties on the potential benefits of mediation as a means of resolving the dispute at any stage of the proceedings.

Note to the Working Group

110. With regard to the third sentence of paragraph 3, the Working Group may wish to consider whether the statute should have a separate rule on joint interpretation (see A/CN.9/WG.III/WP.253, Draft Provision 21) or such a rule can be incorporated in the rules of procedure. Such a rule should also address the impact of any joint interpretation on Chambers.

Article 23 – Decision by the Panel[27]

[26] A/CN.9/1195, paras. 120-121; A/CN.9/1167, para. 111.
[27] A/CN.9/1196/Add.1, para. 50.

1. Any decision of the Panel shall be made by a majority of the members.

2. Questions of procedure may be decided by the presiding member of the Panel in accordance with the rules of procedure adopted by the Conference.

3. The decision of the Panel shall [be made in writing and shall] be signed by the members of the Panel.

4. The decision of the Panel shall state the reasons upon which it is based.

5. Within [*a period of time to be specified*] days of the communication of the decision by the Panel, a party may make a request to the Registrar that the Panel: (i) give an interpretation of the decision; (ii) correct any error in computation, any clerical or typographical errors or any error or omission of a similar nature; or (iii) make an additional decision as to issues presented in the proceedings but not decided by the Panel. The Registrar shall notify the other party and if the request is justified, the Panel shall make an interpretation, correction or additional decision within [*a period of time to be specified*] days, which shall form part of the decision of the Panel.

6. The decision of a Panel shall be considered as rendered by the Dispute Tribunal.

7. The Registrar shall communicate the certified copies of the decision to the disputing parties and shall also make the decision available to the public.

Note to the Working Group

111. The Working Group may wish to confirm whether the requirement that the decision in paragraph 3 be made in writing is necessary, considering that decisions can also been made in electronic form.

Article 24 – Recourse against the decision

1.

[In a first-tier only mechanism] Either party may request the annulment of the decision by the Panel by submitting an application to the Registrar on one of the following grounds: [*grounds to be listed and the procedure to be detailed*].

[In a two-tier mechanism] Either party may appeal the decision by the Panel by requesting the institution of appeal proceedings before the Appeals Tribunal in accordance with article 19.

2.

[In a first-tier only mechanism] A request for annulment in paragraph 1 shall be made within 120 days from the date on which the decision was communicated to the disputing parties. If a request was made in accordance with article 23(5), a request for annulment shall be made within [*same period of time in the first sentence*] days from the date on which the request under article 23(5) has been disposed of by the Panel.

Note to the Working Group

112. With respect to paragraph 2, the period for annulment has been aligned with the period for appeal indicated in article 19(3). The Working Group may wish to confirm this approach, or consider whether the period should be different in the case of a request for annulment. The Working Group may wish to consider whether the period of time for requesting annulment should start from the date on which the request under article 23(5) has been disposed of by the Panel or the date on which the Panel's disposition of the request has been communicated to the disputing parties.

Article 25 – Effect of the decision[28]

1. A decision by the Panel shall not be subject to any other remedy except those provided for in articles 23 and 24.

[28] A/CN.9/1167, para. 99.

2. After lapse of the period of time in article 24, paragraph 2, the decision shall be final and binding on the disputing parties. Each disputing party shall comply with the terms of the decision without delay.

Note to the Working Group

113. Paragraph 2 is intended to confirm that the binding effect of the decision by the Panel is limited to disputing parties only and does not extend to other Contracting Parties or other non-disputing parties. The Working Group may wish to consider whether a decision could have such effect upon decision by the Conference. The Working Group may further wish to consider whether the language should also be reflected under article 34(4).

Article 26 – Recognition and enforcement[29]

1. [Subject to article 31,] each Contracting Party shall recognize a decision by the Dispute Tribunal as binding and enforce the obligations imposed by that decision within its territories as if it were a final judgment of a court in that Contracting Party. A Contracting Party with a federal constitution may choose to enforce such a decision in or through its federal courts and may provide that such courts shall treat the decision as if it were a final judgment of the courts of a constituent state.

2. A party seeking recognition or enforcement in the territory of a Contracting Party shall supply to a competent court or other authority, which that Contracting Party shall have designated for this purpose, a copy of the decision certified by the Registrar in accordance with article 23, paragraph 7.

3. For the avoidance of doubt and for the purposes of recognition and enforcement in the territory of a non-Contracting Party, a decision by the Dispute Tribunal shall be treated as an "arbitral award" as defined in article I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

4. Recognition and enforcement may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent court or authority where the recognition and enforcement is sought, proof that: [*grounds to be listed and the procedure to be detailed*].

5. Execution of a decision shall be governed by the laws concerning execution in the Contracting Party in whose territory such execution is sought.

F. The Appeals Tribunal procedure

Note to the Working Group

114. Section F contains the articles governing the procedural framework of the Appeals Tribunal. Similar to Section D, the Working Group may wish to consider which of the rules should be included in the statute and how the Appeals Tribunal's rules of the procedure would be formulated, and by whom.

Article 27 – Scope of appeal[30]

1. An appeal may be requested only with regard to a final award or decision of the first-tier tribunal on its jurisdiction or on the merits.

2. A final award or decision means an award or decision that has disposed of the issues/questions in dispute.

3. Notwithstanding paragraph 1, an appeal may be requested with regard to a determination/ruling by the first-tier tribunal, which:

[29] The Working Group may wish to refer to document A/CN.9/WG.III/WP.256, paras. 36-39, which contains a number of policy questions with regard to recognition and enforcement of decisions.
[30] A/CN.9/1196/Add.1, paras. 9-19. See also A/CN.9/1130, paras. 125-135.

[(a) Confirms its jurisdiction;

(b) Relates to the constitution of the first-tier tribunal;

(c) Relates to challenges/disqualification of arbitrators or members of the Dispute Tribunal;

(d) Orders a disputing party to provide security for costs;

(e) Grants interim measures to preserve a party's right];

(f) […]

Note to the Working Group[31]

115. Article 27 should be read in conjunction with article 18, which provides for the jurisdiction of the Appeals Tribunal. Article 27 is based on the understanding that the scope of appeal should not be too broad and that the efficient operation of the Appeals Tribunal should be ensured.

116. Paragraph 1 provides that a request for appeal may only be made with regard to a final award or decision of the first-tier tribunal which concerns its jurisdiction or the merits. The term "award" refers to the decision by an arbitral tribunal to resolve the dispute and the term "decision" refers to the decision rendered by the Dispute Tribunal in accordance with article 23.

117. Paragraph 2 clarifies that a "final" award or decision is one that has disposed of the issues/questions in dispute. The Working Group may wish to confirm whether the definition is appropriate, in particular whether it is broad enough to encompass all types of relevant decisions or awards or, conversely, whether its scope should be further refined. For instance, the Working Group may wish to consider whether a tribunal's determination/ruling that it has jurisdiction would fall under a "final" award (as distinct from a final award on the merits) or whether such decisions should be mentioned separately under paragraph 3. Similarly, the Working Group may wish to consider whether a "partial" award, as well as a decision that it does not have jurisdiction, would be covered by the definition in paragraph 2 and, if not, how they should be treated.

118. Paragraph 3 provides for the possibility to request an appeal over certain types of determinations/rulings, which may not necessarily fall under the scope of "final" decisions or awards (thus the use of the term "notwithstanding"). The term "determination/ruling" is used to distinguish them from "awards" or "decisions" in paragraph 1, while, in practice, the terms "decisions" or "order" would be often used. Typically, the term would include determinations on the constitution of the first-tier tribunal, on challenges/disqualification of arbitrators or members of the Dispute Tribunal, an order to provide security for costs, as well as other types of determinations. The Working Group may wish to confirm whether such determinations/rulings should be subject to appeal and, if so, which types, as well as under which conditions or circumstances.

119. The Working Group may further wish to consider whether an expedited procedure for appeal should be included for the types of determinations/ruling referred to in paragraph 3, and, if so, what this procedure would look like. For instance, the Working Group may wish to consider whether the time periods for requesting an expedited appeal and for the Chamber to render its decision should differ from the time periods provided in articles 19 and 33 respectively. In particular, the 120-day timeframe for making the request for appeal under article 19 could be reduced and could start from the date on which the tribunal has rendered the relevant determination/ruling, as opposed to the date of the final award or decision. This could result in some parts of the final award or decision not being subject to appeal as the timeframe for such parts (determination/ruling) would have passed (to be further considered if partial awards are subject to appeal). Similarly, the 180-day timeframe for the Chamber to render its decision under article 33 could be reduced and start from the date of the request (as

[31] A/CN.9/WG.III/WP.240, paras. 77-78.

opposed to the date of the last submission by the disputing parties), with the decision being based solely on the existing records, thus excluding its own fact-finding (see article 33(4)). Whether the Chamber should have the possibility to extend this timeframe in case of an expedited appeal would also require some consideration. The application of article 30 (suspension of the first-tier tribunal proceedings) and article 33 also deserves consideration in this context. In addition, the list of decisions to be covered by the expedited appeal process could be subject to further regulations by the Appeals Tribunal in order to limit the number of appeals. Altogether, such adjustments may make the process more expedient and limit the impact of the appeal of these types of determinations/rulings.

120. The Working Group may also wish to consider whether decisions on interim measures should also be the subject of appeal, and, if so, how. For instance, interim measures could be addressed through an expedited appeal process (see above), which would limit the impact of a possible appeal on the first-tier proceedings. On the other hand, not all types of interim measures may be appropriate for appeal, which could be clarified in the statute or in the rules and regulations to be adopted by the standing mechanism.

Article 28 – Conditions for appeal[32]

Option A: Waiver of the right to pursue other remedies as a condition for the appeal

An appeal may be requested only if the requesting party expressly waives any right it has to initiate annulment, set aside, recognition or enforcement proceedings with regard to the award or decision of the first-tier tribunal [during the appeal proceedings].

Option B: Automatic exclusion of other remedies

Where an award or decision of the first-tier tribunal is subject to appeal in accordance with articles 18 and 27, it shall not be subject to any other remedy, including annulment, set aside or any other review before any forums other than those set out in this Protocol.

Note to the Working Group

121. There are several ways to avoid parallel appellate-type proceedings in the context of a standing mechanism. One is to require a waiver by the requesting party of its right to initiate annulment, set aside, recognition, or enforcement proceedings as a condition for the appeal (option A). Another is to provide for appeal as the exclusive remedy, automatically excluding other remedies (option B). This question would largely depend on the jurisdiction in article 18.

122. If option A is chosen, the Working Group may wish to consider whether the waiver should be limited in time (so that the party waives its right only during the appeal proceedings) or should constitute a general waiver (precluding other remedies even after the appeal). If the latter, it may be possible to reformulate the article as follows: "By consenting to the appeal, the parties agree to waive their right to initiate annulment, set aside, recognition, and enforcement proceedings with regard to the award or decision of the first-tier tribunal." This formulation would bind not only the appellant (the party requesting appeal) but also the appellee who has consented to the appeal.

123. Option A should also be read in conjunction with article 31 addressing the effect of an appeal on proceedings for annulment, set aside, recognition and enforcement of the award or decision subject to appeal, which further requires that the request for appeal be "registered". Indeed, the exclusion of other remedies in article 31 is provided as a consequence of the appeal being initiated (and not simply being available), which suggests that a party may choose between the appeal or other remedies after the award or decision is rendered by the first-tier tribunal.

[32] A/CN.9/1195, paras. 113, and A/CN.9/1196/Add.1, paras. 20-25.

124. The Working Group may also wish to consider whether the requirement of a waiver to initiate appeal proceedings would imply that the other types of remedies listed in the article remain available for a party to pursue, either in lieu of the appeal (general waiver) or once the appeal proceeding is concluded (waiver limited in time only). The form, duration and process of such waiver would also need to be clarified (for instance, whether joint waivers should be required to avoid situations where parties opt for different remedies, whether waivers should be treated differently depending on the types of decisions and rulings appealed under article 27 and etc).

125. When considering the need and scope of a waiver, the Working Group may wish to refer to the grounds of appeal in article 29, as some of the grounds may already include remedies commonly found in annulment/set aside or enforcement regimes (see para. 130 below).

126. By contrast, the exclusion of other remedies contained in option B implies that the other remedies are automatically excluded if the first-tier decision is subject to appeal pursuant to article 18, thereby removing the ability of parties to choose other remedies as an alternative to the appeal. However, this poses a question of who would have the authority to determine that the first-tier award or decision is subject to an appeal under articles 18 and 27.

127. In any event, the optionality for parties to choose and the availability of other remedies would depend on the jurisdiction of the Appeals Tribunal in article 18.

128. The Working Group may further wish to note that the exclusion of certain remedies, such as annulment, set aside or enforcement, may require modifications of existing domestic legislation or international instruments. For instance, an inter-se modification of the ICSID Convention (article 52), which currently foresees annulment as the exclusive remedy, may be envisaged insofar as ICSID awards are concerned (see A/CN.9/WG.III/WP.256, paras. 41-43; see also *ICSID Note on a Potential Inter Se Modification of the ICSID Convention*, available on the Working Group III webpage).

129. Depending on the approach taken with regard to article 27(3), the Working Group may also wish to consider whether article 28 would need to be expanded to address appeals against determinations/rulings under that paragraph. However, such determinations/rulings are usually not subject to annulment or set aside.

Article 29 – Grounds of appeal[33]

A party may request an appeal 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] [an error apparent on its face] in the assessment of the facts;

(c) A member of the first-tier tribunal lacked impartiality or independence or was improperly appointed, or the first-tier tribunal was improperly constituted;

(d) The first-tier tribunal ruled beyond the claims submitted to it;

(e) There has been a serious departure from a fundamental rule of procedure; or

(f) The award or decision of the first-tier tribunal failed to state the reasons on which it is based, unless the disputing parties have agreed otherwise.

Note to the Working Group

130. Article 29 provides an exhaustive list of grounds of appeal, combining different grounds for annulment or set-aside under the current regimes, in particular article 52(1) of the ICSID Convention and article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration. It ensures broad coverage while streamlining

[33] A/CN.9/1196/Add.1, paras. 26-35. See also A/CN.9/1130, paras. 136-148.

the grounds of appeal to avoid overlaps and ensure their workability in the context of a standing mechanism. The Working Group may wish to confirm this approach and consider whether the revised list of grounds of appeal in article 29 is appropriate, or whether additional grounds found in article 52(1) of the ICSID Convention and article 34(2) of the Model Law should be included.

Article 30 – Effect of an appeal on ongoing first-tier tribunal proceeding[34]

(Option A) When a request for appeal is registered and upon the request by a disputing party, the first-tier tribunal may suspend its proceedings until a decision is made by the Appeals Tribunal, including a decision to terminate the appeal proceedings.

(Option B) When a request for appeal is registered and upon the request by a disputing party, the Dispute Tribunal shall suspend its proceedings until a decision is made by the Appeals Tribunal.

Note to the Working Group

131. Article 30 addresses the interaction between an appeal and a first-tier tribunal proceeding, which may be ongoing (for example, when a decision by the first-tier tribunal that it has jurisdiction is the subject of appeal). Option A provides that the first-tier tribunal "may" suspend its proceeding upon the request of a disputing party. This is because the rules applicable to the first-tier tribunal (particularly an arbitral tribunal not constituted under the statute) would likely govern whether the first-tier tribunal must or could suspend its proceedings (unless, for instance, there is a rule that states the statute or the rules applicable to the standing mechanism would prevail over any such applicable rules). The Working Group may wish to consider whether this approach is appropriate and how the suspension of the first-tier proceeding would be decided in the case of an arbitral tribunal not constituted under the statute, which may be bound by specific applicable rules.

132. In a two-tier mechanism, the Dispute Tribunal would be required to suspend its proceedings pending the appeal (option B).

133. The Working Group may wish to consider whether suspension should be automatic and, if so, whether this could give rise to procedural abuse and how such abuse could be avoided. Similarly, the Working Group may wish to consider whether the first-tier tribunal should have discretion to order the stay of its proceedings and in that case, whether the disputing parties should be consulted first.

134. The rule on suspension in article 30 would also depend on the determination of the scope of appeal under article 27. For instance, should the appeal be possible only with regard to final awards or decisions, the rule on suspension would not be necessary, as the first-tier proceeding would already have terminated. Article 30 would most likely be relevant for appeals under article 27(3). Similarly, should interim decisions be subject of appeal, suspension may also be unnecessary - or adjustments might be needed - if the issue under consideration has no substantive impact on (part of) the remaining issues pending at the first-tier proceeding.

135. Other issues requiring consideration include whether the standing mechanism should be required to inform the first-tier tribunal of any appeal, the possible timeframe of the suspension, its enforcement, and any consequences of the Appeals Tribunal not rendering a decision during the suspension.

Article 31 – Effect of an appeal on proceedings for annulment, set aside, recognition and enforcement of the award or decision subject of appeal[35]

[34] A/CN.9/1196/Add.1, paras. 36-41.
[35] A/CN.9/1196/Add.1, para. 42.

1. When the request for appeal is registered, the award or decision of the first-tier tribunal shall no longer be the subject of annulment, set aside, recognition, enforcement or any other review proceedings before any forums.

2. A party may request the stay of the annulment, set aside, recognition, enforcement or any other review proceedings until a decision is made by the Appeals Tribunal, including a decision to terminate the appeal proceedings.

Note to the Working Group[36]

136. Article 31 addresses the interaction between an appeal and proceedings in other forums with regard to the same award or decision (referred to below as "other proceedings").

137. Paragraph 1 deals with a situation where the other proceeding has yet to commence. As the registration of the request for appeal requires the consent of both parties (article 19), it sets out the rule that the first-tier award or decision shall not be the subject of other proceedings. The Working Group may wish to consider whether paragraph 1 would also need to address the request for appeals of determinations/rulings under article 27(3).

138. Paragraph 2 deals with a situation where the other proceeding has already commenced. In that case and upon the request of a disputing party, it is left to the body responsible for the other proceeding to determine whether to stay the proceeding in accordance with the applicable rules. It would be necessary for the party making the request for stay to state the rationale as the outcome of the Appeals Tribunal would likely have an impact on the other proceedings.

Article 32 – Conduct of the Chamber proceedings[37]

1. The Chamber shall conduct the proceedings in accordance with this Protocol and the rules of procedure adopted by the Conference.

2. Subject to paragraph 1, the Chamber may conduct the proceedings in such manner as it considers appropriate, provided that the disputing parties are treated with equality and that at an appropriate stage of the proceedings, each disputing party is given a reasonable opportunity of presenting its case. The Chamber shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute.

3. The UNCITRAL Rules of Transparency in Treaty-based Investor-State Arbitration shall apply mutatis mutandis to the Chamber proceedings.

4. The Chamber may provide guidance to the disputing parties on the potential benefits of mediation as a means of resolving the dispute at any stage of the proceedings.

Note to the Working Group[38]

139. Article 32 includes the provisions in article 22 (Conduct of the Panel proceedings) with the necessary adjustments in the context of appeal. The Working Group may wish to consider whether all of the provisions referred to in article 22 are appropriate for the conduct of the Chamber proceedings. For instance, the Working Group may wish to confirm that article 22(3) on applicable law (which was not included in article 32) would be inappropriate as it would restrict the Chamber's power to consider errors in the application or interpretation of the law pursuant to article 29.

140. The Working Group may also wish to consider whether additional rules should be provided in the context of the Chamber proceedings.

[36] A/CN.9/WG.III/WP.240, paras. 84-86.
[37] A/CN.9/1196/Add.1, paras. 43-46.
[38] A/CN.9/WG.III/WP.240, paras. 87-89.

Article 33 – Decision by the Chamber[39]

1. Any decision of the Chamber shall be made by a majority of the members.

2. Questions of procedure may be decided by the presiding member of the Chamber in accordance with the rules of procedure adopted by the Conference.

3. The Chamber may uphold, modify or reverse the award or decision of the first-tier tribunal in whole or in part, including its findings.

Modification without remand

4. If the Chamber does not uphold the award or decision, it shall modify the award or decision: (i) as far as possible on the basis of the facts established by the first-tier tribunal and (ii) only when the Chamber deems it necessary and appropriate, through its own fact-finding.

Reversal with remand

5. If the Chamber does not uphold the award or decision and is unable to modify it in accordance with paragraph 4, it shall reverse the award or decision and remand the dispute with instructions.

6. The dispute shall be remanded, in principle, to the first-tier tribunal which rendered the decision or award. If one or more members of the original first-tier tribunal are no longer willing, available, or otherwise able to serve, any such member shall be replaced by a new member appointed in accordance with the rules applicable to the constitution of the first-tier tribunal.

7. If the Chamber determines that a remand pursuant to paragraph 6 is inappropriate, the dispute shall be remanded to a new tribunal constituted upon the request of either party and in accordance with the rules applicable to the constitution of the first-tier tribunal which had rendered the decision or award.

8. If the Chamber reverses the award or decision on the basis of article 29, paragraph (c), the dispute shall be remanded to a new tribunal in accordance with paragraph 7.

9. The Chamber shall make a decision under paragraph 3 within [180] days from the date of the last submission by the disputing parties. When the Chamber is not in the position to make a decision within that period of time, it shall inform the disputing parties in writing of the reasons for the delay and indicate a fixed period of time within which it will make its decision [, which shall not exceed [*a period of time to be specified*] days].

10. The decision of the Chamber shall [be made in writing and shall] be signed by the members of the Chamber.

11. The decision of the Chamber shall state the reasons upon which it is based.

12. Within [*a period of time to be specified*] days of the communication of the decision by the Chamber, a disputing party may make a request to the Registrar that the Chamber: (i) give an interpretation of the decision; (ii) correct any error in computation, any clerical or typographical errors or any error or omission of a similar nature; or (iii) make an additional decision as to issues presented in the proceedings but not decided by the Chamber. The Registrar shall notify the other disputing party and if the request is justified, the Chamber shall make an interpretation, correction or additional decision within [a period of time to be specified] days, which shall form part of the decision of the Chamber.

13. The decision of a Chamber shall be considered as rendered by the Appeals Tribunal.

[39] A/CN.9/1196/Add.1, paras. 47-65.

14. The Registrar shall communicate the certified copies of the decision to the disputing parties and shall also make it available to the public.

Note to the Working Group[40]

141. Paragraphs 1 and 2 are similar to the first two paragraphs in article 23 (Decision by the Panel), while paragraph 3 clarifies the types of decisions that can be made by the Chamber with regard to the first-tier decision subject of appeal.

142. Paragraphs 4 to 8 provide specific rules applying to three different scenarios implied under paragraph 3: (i) modification of the first-tier decision without remand, (ii) reversal of the decision with remand to the original first-tier tribunal, and (iii) reversal with remand to a new first-tier tribunal as resubmitted by a disputing party.

143. Where the Chamber decides to uphold the decision of the first-tier tribunal (as also foreseen in paragraph 3), the latter decision becomes final and binding on the disputing parties in accordance with article 34(1).

144. Paragraph 4 reflects the understanding of the Working Group and clarifies that the Chamber, if it does not uphold the decision or award of the first-tier tribunal, should seek to modify the decision or award based on the facts presented before the first-tier tribunal. The Chamber may also modify the award or decision "through its own fact-finding" where appropriate and necessary, which provides flexibility to the Chamber in the decision-making process and would ultimately serve judicial efficiency. The Working Group may wish to confirm what circumstances would typically be covered by the Chamber's "own fact-finding", for instance whether new facts presented before the Chamber would fall under this category and how far this fact-finding process should go. The Working Group may also wish to note its agreement to delete the provision related to the suspension of the Chamber's proceedings in article 32(3) of A/CN.9/WG.III/WP.239 and consider it further in the context of article 34 (A/CN.9/1196/Add.1, para. 46).

145. Pursuant to paragraph 5, the Chamber may also decide to reverse the first-tier decision or award and refer the dispute back to the first-tier tribunal ("remand"). This would be the case where the Chamber is unable to modify the decision in accordance with paragraph 4 - in other words, the facts which were brought before the first-tier tribunal or those sought through its own fact-finding are insufficient for the Chamber to modify the decision or award on its own. Such reversal with remand would also aim to avoid a possible de novo review of the dispute by the Chamber. The Working Group may wish to confirm this approach.

146. Paragraph 5 also clarifies that the Chamber, when remanding the dispute, should provide "instructions". The Working Group may wish to confirm that the language is clear enough to encompass all information necessary for the first-tier tribunal to render a new decision or award, such as any indications on how its first-tier decision is reversed by the Chamber [see former paragraph 5 in WP.239].

147. Paragraph 6 indicates that in the case of remand under paragraph 5, the dispute should be remanded, in principle, to the first-tier tribunal which had rendered the decision or award, with the possibility to replace certain original members where necessary and in accordance with the rules applicable to the constitution of that first-tier tribunal.

148. The Working Group may wish to consider whether there may be practical difficulties in reconstituting the first-tier tribunal and how to ensure that the instructions of the Chamber are followed by that tribunal.

149. Paragraphs 7 and 8 introduce the possibility to remand the dispute to a newly constituted tribunal, which would differ entirely from the first-tier tribunal. This would be the case in circumstances where remanding the dispute to the first-tier tribunal would be "inappropriate", such as where the appeal is based on the ground

[40] A/CN.9/WG.III/WP.240, paras. 90-93.

that a member of the first-tier tribunal lacked impartiality or independence or was improperly appointed, or the first-tier tribunal was improperly constituted pursuant to article 29(c). The term "inappropriate" therefore refers to circumstances other than the mere unavailability or incapacity of the original tribunal members to serve, with article 29(c) being one example of such circumstances. The assessment of whether it is appropriate to remand pursuant to paragraph 6 would be at the discretion of the Chamber. The Working Group may wish to consider which circumstances would be covered.

150. The Working Group may wish to confirm that despite the establishment of a new tribunal which is conditional upon the request by one of the disputing parties, the procedure under paragraphs 7 and 8 would still constitute "remand".

151. In a two-tier standing mechanism, it may be possible to envisage that a Panel of the Dispute Tribunal would function as the newly established first-tier tribunal when the Chamber remands an award or decision of the first-tier tribunal established outside the standing mechanism. This, however, would mean that the disputing parties that have consented to the jurisdiction of the Appeals Tribunal would be deemed to have consented to the jurisdiction of the Dispute Tribunal.

152. The Working Group may wish to confirm whether the different scenarios in paragraphs 5 to 8 are clearly identified and articulated. In addition, the role of the disputing parties in the remand and resubmission process may need to be further clarified. For instance, while a request of the disputing parties may be needed for resubmitting the dispute to a new tribunal under paragraphs 7 and 8 (in particular considering the time and costs involved), the Working Group may wish to consider whether a similar mechanism should be foreseen for remand under paragraphs 5 and 6. The answer may differ depending on whether the remand occurs in the context of an appeal of an arbitral award or of a decision of the Dispute Tribunal.

153. The Working Group may also wish to consider whether remanding or resubmitting the dispute under paragraphs 5 to 8 may result in delaying the resolution of the dispute, and how to avoid such delays (see also article 34(3) which excludes the possibility of appeal with regard to a subsequent award or decision made by the first-tier tribunal or a new tribunal).

154. The Working Group may wish to note that integrating an appellate process within the current ISDS framework which would include the possibility to remand or resubmit the dispute under paragraphs 5 to 8, would require modifying or disabling a number of existing rules under applicable instruments including the ICSID Convention (see also A/CN.9/WG.III/WP.256, para. 42). In that regard, the Working Group may wish to consider whether specific language should be included in article 33 to amend or modify the relevant existing rules (see, for instance, proposed language in A/CN.9/1196/Add.1, para. 56, and A/CN.9/WG.III/WP.256, para. 43).

155. Paragraph 9 imposes a time period within which a Chamber is required to make its decision, with the possibility to extend that time period when so required. The Working Group may wish to consider whether a period of 180 days is appropriate, also in light of the other timeframes applicable to the appeal process in the statute (see A/CN.9/1196/Add.1, para. 59). The Working Group may further wish to consider whether a similar time limit should be provided for the Dispute Tribunal in article 23. Regarding the possible extension, the Working Group may wish to consider whether the statute should indicate a maximum timeframe or if the Chamber should be left with some flexibility. The specific modalities could also require consideration, for instance whether any extension should be justified and whether the disputing parties should be consulted or should agree on the extension. The possible consequences of the Chamber not meeting the deadline(s) for rendering its decision, and whether the dispute would necessarily be remanded to the first-tier tribunal in that case (and how), would also need to be considered.

156. With regard to paragraph 10, see the note to article 23 (para. 111 above).

Article 34 – Effect of the decision

1. An award or decision of the first-tier tribunal upheld by the Chamber shall be final and binding on the disputing parties.

2. An award or decision of the first-tier tribunal modified by the Chamber shall be final and binding on the disputing parties as amended by the Chamber.

3. An award or decision of the first-tier tribunal which was reversed and remanded by the Chamber shall have no effect. A subsequent award or decision made by the first-tier tribunal or a new tribunal in accordance with article 33, paragraphs 5 to 8 shall not be subject to appeal.

4. After the lapse of time in article 33, paragraph 12, the decision shall be binding on the disputing parties and final, upon which each disputing party shall comply with the terms of the first-tier decision as upheld or amended by the Chamber without delay.

Note to the Working Group[41]

157. Article 34 addresses the effect of the decisions of the Appeals Tribunal, depending on the type of decision it makes. It addresses the effect of the Appeals Tribunal's decision on the first-tier tribunal award or decision, ensuring that the latter is final and binding on the disputing parties subject to the conditions being met. The decision of the Appellate Tribunal would also be binding on the disputing parties in accordance with paragraph 4.

158. The Working Group may wish to consider whether the binding effect of the decisions of the Appeals Tribunal should be limited to the disputing parties or should be broader. For example, in a two-tier mechanism, such decisions may be binding on the Dispute Tribunal. They may also have a persuasive effect of jurisprudence affecting other Contracting Parties. Such an effect would need to be further clarified in the article.

159. With regard to paragraph 3, the Working Group may also wish to consider whether the process to remand anticipates the possibility of the new award or decision being the subject of another appeal.

160. The Working Group may wish to recall that at its fifty-first session in April 2025, it decided to remove the provision relating to the suspension of the appeal proceeding from article 32 and consider further the issue in the context of remand in article 34. For reference, former paragraph 3 in article 32 reads as follows: "The Chamber may, where appropriate and so requested by a party, suspend the appeals proceedings for a fixed period of time to give the first-tier tribunal an opportunity to continue or resume the proceedings or to take such other action as in the Chamber's opinion will eliminate the grounds for appeal." This provision, which is modelled on article 34(4) of the UNCITRAL Model Law on International Commercial Arbitration, would allow the Chamber to temporarily suspend its proceedings to give the first-tier tribunal an opportunity to address the issues that are the subject of appeal, which may make the appeal no longer necessary. The Working Group may wish to consider whether such provision would be appropriate, and if so, whether it should be placed in article 34 or elsewhere in the statute, for instance in article 30 which deals with the effects of the appeal and the suspension of the first-tier proceeding. The Working Group may further wish to consider, should the provision be retained, how it would interact with the Chamber's power to remand the dispute under article 33.

Article 35 – Recourse against the decision

A decision by the Appeals Tribunal shall not be subject to appeal or any other review proceedings before any forums.

[41] A/CN.9/WG.III/WP.240, paras. 94-96.

Note to the Working Group[42]

161. Article 35 confirms the absence of any recourse against decisions of the Appeals Tribunal. It aims to provide parties with a definitive resolution and to prevent the prolongation of the dispute.

Article 36 – Recognition and enforcement[43]

1. Each Contracting Party shall recognize a decision by the Appeals Tribunal pursuant to this Protocol as binding and enforce the obligations imposed by that decision within its territories as if it were a final judgment of a court in that Contracting Party. A Contracting Party with a federal constitution may choose to enforce such a decision in or through its federal courts and may provide that such courts shall treat the decision as if it were a final judgment of the courts of a constituent state.

2. A disputing party seeking recognition or enforcement in the territory of a Contracting Party shall supply to a competent court or other authority, which that Contracting Party shall have designated for this purpose, a copy of the decision certified by the Registrar in accordance with article 33, paragraph 14.

3. For the avoidance of doubt and for the purposes of recognition and enforcement in the territory of a non-Contracting Party, a decision made by the Appeals Tribunal shall be treated as an "arbitral award" as defined in article I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

4. Execution of a decision shall be governed by the laws concerning execution in the Contracting Party in whose territory such execution is sought.

Note to the Working Group[44]

162. Modelled on article 54 of the ICSID Convention, article 36 provides for a self-contained recognition and enforcement mechanism within the statute for decisions rendered by the Appeals Tribunal. The Working Group may wish to consider the annotations to article 26 and questions posed therein as they relate to the Appeals Tribunal.

163. It should be noted that the decision by the Appeals Tribunal to remand the dispute to the first-tier or newly constituted tribunal might not be enforceable in accordance with article 36.

G. Operation of the Standing Mechanism

Article 37 – Financing

1. The operation of the Standing Mechanism shall be funded by initial and annual contributions of the Contracting Parties, the fees for services provided by the Standing Mechanism and voluntary contributions.

2. Each Contracting Party shall make financial contributions in accordance with the regulations adopted by the Conference. If a Contracting Party is in default of its contributions, the Conference may decide to limit or modify its rights or obligations in accordance with the criteria established in the regulations adopted by the Conference.

3. The Standing Mechanism shall charge fees for its services in accordance with the regulations adopted by the Conference.

[42] A/CN.9/WG.III/WP.240, para. 97.

[43] The Working Group may wish to refer to document A/CN.9/WG.III/WP.256, paras. 36-39, which contains a number of policy questions with regard to recognition and enforcement of decisions. See also *ICSID Note on a Potential Inter Se Modification of the ICSID Convention*, available on the Working Group III webpage.

[44] A/CN.9/WG.III/WP.240, paras. 98-99.

4. 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 in accordance with the regulations adopted by the Conference and provided that the receipt of such contribution is consistent with the objectives of the Standing Mechanism, is reported in the annual report, and does not create a conflict of interest or otherwise impede its independent operation.

5. The budget and expenditure of the Standing Mechanism shall be subject to internal and external audit.

Note to the Working Group[45]

164. Similar to the Advisory Centre, it is suggested that the Standing Mechanism is financed by contributions from Contracting Parties (initial or annual or both), fees for services, and voluntary contributions. The Working Group may wish to consider whether such a financing structure provides a sustainable financial basis and sufficiently ensures the independence, effectiveness, and sustainability of the standing mechanism.

165. It may be prudent that the budget for the operation of the Tribunals (in particular, the remuneration of the members of the Tribunals) relies only on contributions by Contracting Parties rather than on fees to be charged by the standing mechanism. This would also ensure the independence and integrity of the Tribunals.

Article 38 – Legal status and liability

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

2. The Standing Mechanism shall be headquartered in […] based on a host country agreement with […].

3. The Standing Mechanism shall enjoy in the territories of each Contracting Party the privileges and immunities as necessary for the fulfilment of its functions.

4. The Standing Mechanism, its property and assets shall enjoy immunity from all legal processes, except when the Standing Mechanism waives this immunity.

5. The Standing Mechanism, its property, assets and income, and its operations and transactions authorized by this Protocol shall be exempt from all taxation and customs duties. The Standing Mechanism shall also be exempt from liability for the collection or payment of any taxes or customs duties.

6. The members of the Bureau, the members of the Tribunals, the Registrar and the staff members of the Registry, when engaged in the functions of the Standing Mechanism and necessary for the performance of their functions, shall be accorded the same level of privileges and immunities that is accorded to the staff members of permanent diplomatic missions or international organizations.

7. Paragraph 6 shall also apply to persons appearing in proceedings of the Standing Mechanisms as parties, agents, legal representatives, witnesses or experts, as is necessary for the proper functioning of the Standing Mechanism and insofar as in connection with their travel to and from, and their stay at, the place of the proceedings.

Note to the Working Group[46]

166. The legal status of the standing mechanism would depend on how it is established, including whether it would be established under the auspices of an existing organization.

[45] A/CN.9/WG.III/WP.240, paras. 100-101.
[46] A/CN.9/WG.III/WP.240, para. 102.

H. Final clauses

Article 39 – Reservations

1. A Contracting Party may declare that:

(a) It shall apply this Protocol only to a proceeding initiated under instruments or legislation included in the notification submitted by it pursuant to articles 14 and 18;

(b) It shall not apply the Protocol to arbitrations conducted under the ICSID Convention or awards resulting thereof;

(c) The consent provided in paragraphs 2 of articles 14 and 18 shall apply only when the claimant is a national of a Contracting Party or a Contracting Party;

(d) Articles 26 and 36 shall only apply to decisions involving a national of another Contracting Party or another Contracting Party and on the basis of reciprocity with regard to decisions involving a national of a non-Contracting Party or non-Contracting Party; […]

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

Article 40 – Depositary

The [*to be identified*] is designated as the depositary of the Protocol.

Article 41 – Signature, ratification, acceptance, approval, accession

1. This Protocol is open for signature by a State or a regional economic integration organization [*place and time to be determined*].

2. This Protocol is subject to ratification, acceptance or approval by the signatories.

3. This Protocol is open for accession by a State or a regional economic integration organization that is not a signatory from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 42 – Right to vote[47]

1. Each Contracting Party shall have one vote, except as provided for in paragraph 2.

2. A regional economic integration organization that is a Contracting Party shall exercise its right to vote, on matters within its competence, with a number of votes equal to the number of its member States that are Contracting Parties to this Protocol. Such an organization shall not exercise its right to vote if any of its member States exercises its right to vote, and vice versa.

Article 43 – Entry into force

This Protocol shall enter into force six months after the date of deposit of the [*number to be determined*] instrument of ratification, acceptance or approval or of accession provided that: [*conditions to be set forth*].

Article 44 – Amendments

[47] A/CN.9/1195, para. 80. See articles 23 and 64(2) of the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction.

1. Any Contracting Party may propose an amendment to this Protocol to the Conference. The proposal shall be promptly communicated to all Contracting Parties. The Conference may adopt the amendment, which shall be communicated to the depositary.

2. The depositary shall submit the adopted amendment to all Contracting Parties for ratification, acceptance or approval. The adopted amendment shall enter into force 30 days after the date of deposit of the instrument of ratification, acceptance or approval by all Contracting Parties.

Article 45 – Withdrawal

1. Any Contracting Party may at any time withdraw from this Protocol by means of a formal notification addressed to the depositary. The depositary shall inform the Registrar, who shall inform the Contracting Parties promptly. The withdrawal shall take effect [*a period of time to be specified*] days after the notification is received by the depositary.

2. The provisions of the Protocol shall apply to the proceedings before the Tribunals in which the withdrawing Contracting Party is a party, if the proceedings have commenced prior to the withdrawal taking effect.

Note to the Working Group on articles 39-45[48]

167. Articles 39 to 45 are final clauses typically found in multilateral conventions.

168. Article 39 allows for certain types of reservations that would limit the scope of certain articles for the Contracting Party making the reservation. This may relate, for example, to the jurisdiction of the standing mechanism, or the extent to which it would recognize and enforce decisions rendered by the Tribunals. While some examples are provided for discussion purposes, the reservations would be better formulated once the contents of the statute, including the obligations of the Contracting Parties, are further developed.

169. With regard to the depositary provided for in article 40, the Working Group may wish to consider the role to be played by the depositary with regard to the lists of instruments [or legislation] mentioned in articles 14 and 18, together with the role of the Registry or the secretariat of the MIIR.

170. Article 41 provides that States and REIOs may become a Contracting Party. The Working Group may wish to consider whether flexibility should be provided so as to accommodate entities that might not fall within the two categories but may be established in the future to have competence over matters addressed in the statute and capacity to become a Party and be bound by the statute. The Working Group may wish to consider this issue in conjunction with article 4(6) on their possible participation in the meetings of the Conference.

171. The Working Group may wish to consider whether article 42 should be placed with article 4(7) and (8) or as a separate article on decision-making.

172. Article 43provides the rule on entry into force of the statute. Similar to the Statute of the Advisory Centre, the Working Group may wish to consider the conditions to be imposed for its entry into force in addition to the number of Contracting Parties (for example, with regard to geographical representation as well as the anticipated contribution to ensure successful operation during the initial phase).

173. Article 44 provides that Contracting Parties may propose amendments to the statute. Article 45 addresses withdrawal by a Contracting Party and the effect of withdrawal on ongoing proceedings in the standing mechanism. The Working Group may wish to consider whether the possibility of terminating the statute should also be provided for in the statute.

[48] See A/CN.9/WG.III/WP.240, paras. 103-108.