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# Summary of the intersessional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the People's Republic of China

This Note reproduces a submission from the Government of the People's Republic of China containing a summary of the eighth intersessional meeting on ISDS reform held on 24 and 25 October 2024 in Chengdu. The summary was submitted to the secretariat on 5 December 2024 and is reproduced as an annex to this Note.

# Annex

## Introduction

1. The eighth intersessional meeting of Working Group III on investor-State dispute settlement (ISDS) reform (the "Meeting") was held on 24 and 25 October 2024 in Chengdu. The meeting focused on key issues related to an appellate mechanism and a multilateral instrument on ISDS reform.

2. The Meeting was jointly organized by the Ministry of Commerce of the People's Republic of China and the UNCITRAL Secretariat, with the support of the People's Government of Sichuan Province and China International Economic and Trade Arbitration Commission (CIETAC). The Meeting, which was held both in-person and online, was attended by participants from 43 States, with more than 150 participants attending the meeting in person including delegates and observers from Working Group III, and over 500 members from the wider public. Simultaneous interpretation between Chinese and English was provided during the Meeting.

## Opening remarks

3. Mr. Fei Li (Vice Minister, Ministry of Commerce, People's Republic of China) opened the meeting by extending his gratitude to all participants and underscoring the significance of this event as the first to be held in mainland China. In his address, he presented three pivotal insights: first, emphasizing the importance of the ISDS mechanism while acknowledging the imperative for reform; second, highlighting the existing multilateral experience and practice of appellate mechanisms, and third, stressing the need to restore confidence in the ISDS system by addressing the concerns related to consistency, fairness and balance. Furthermore, he emphasized China's steadfast commitment and proposal for reforming the ISDS mechanism, highlighting the need to establish a permanent appellate mechanism for ensuring a fair and effective dispute resolution system.

4. Ms. Anna Joubin-Bret (Secretary of UNCITRAL) presented the reform progress made by the Working Group and the Commission since 2017, including the adoption of the UNCITRAL Model Provisions on Mediation for International Investment Disputes, the UNCITRAL Guidelines on Mediation for International Investment Disputes, the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution and UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution and the Statute of an Advisory Centre on International Investment Dispute Resolution. She noted the importance of the appellate mechanism as a reform element being developed by the Working Group, and that China had advocated for the establishment of a permanent appellate mechanism for ISDS disputes since 2019.

5. Mr. Chengjie Wang (Vice Chairman and Secretary General of CIETAC) discussed the challenges faced by the ISDS mechanism and the importance of a just and efficient dispute resolution system in the current global economic climate. He recognized UNCITRAL's efforts towards ISDS reform and expressed CIETAC's support for the establishment of a standing appellate mechanism, highlighting CIETAC's contributions to the development of international investment arbitration in China, including the establishment of the China International Investment Arbitration Forum and the publication of the CIETAC International Investment Dispute Arbitration Rules in 2017.

6. Mr. Shane Spelliscy (Chair of Working Group III) highlighted the significant task of reforming the ISDS mechanism to address the legitimacy crisis and ensuring a fair dispute settlement system. He acknowledged the dedication of delegates and observers in engaging in multilateral negotiations and discussions over the past years. He stressed the importance of intersessional meetings to deepen understanding, develop ideas and informally discuss the reform elements. He encouraged participants to further explore, discuss, and debate extensively over the next two days, which was

crucial for the success of the Meeting and the finalization of the project by the Working Group.

**Panel I: An Appellate Mechanism for ISDS: Rationale and Implications**

7. Panel I was moderated by Mr. Wenhua Ji (Professor of School of Law, University of International Business and Economics) and consisted of Ms. Anna Joubin-Bret (Secretary of UNCITRAL), Mr. Michael Imran Kanu (Ambassador and Permanent Representative of Sierra Leone to the United Nations), Mr. Peter van den Bossche (Former Director of Studies, World Trade Institute) and Ms. Teresa Cheng (Founding Member, Asian Academy of International Law).

*Rationale for an appellate mechanism*

8. It was recalled that concerns identified by the Working Group during the first phase included the lack of consistency, coherence, correctness and predictability of arbitral awards, the issues of the costs and duration of proceedings, and ultimately the legitimacy of the ISDS mechanism. Other concerns were also mentioned, including but not limited to trust deficit, crippling effect of damages, third-party funding, lack of diversity, and impartiality and independence of the arbitrators and the decision makers.

*Objective of an appellate mechanism*

9. The objective of an appellate mechanism was considered. It was emphasized that a more predictable framework for coordinating concurrent proceedings should be sought, which would be in the interests of both investors and States, by securing, among other considerations, settlement, neutrality, finality and party autonomy. The establishment of an appellate mechanism within the context of multilateral negotiations would provide opportunity for the stakeholders, member States and those who engaged in the ISDS system to open up the scope of review to address existing systemic concerns as identified by the Working Group.

10. It was further said that the design of an appellate mechanism should ensure that the advantages of international investment arbitration remain unaffected, balance finality and correctness of arbitral awards, and make the award enforceable under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), and to enhance the legitimate expectations of Contracting Parties and disputing parties. Also, it was mentioned that establishing criteria for appeals, rather than making them automatic, would help balancing between finality and correctness of awards.

11. Referring to the persuasive effect of "guiding cases" in China, it was suggested that a mechanism could be established where the decisions of the appellate mechanism would have a persuasive or precedential impact extending beyond the immediate parties involved. This could potentially address the original concerns of States regarding the lack of consistency, coherence, and predictability, and might ultimately contribute to establishing an ideal legal order with consistent jurisprudence. In response, it was asserted that the value to be placed on the decisions of the appellate mechanism had to be clarified. It was recognized that international case law, while generally not setting binding precedents, carried a persuasive effect and could be referred to – therefore, it was necessary to strike a balance between the correctness of the ISDS decisions and fundamental principles such as party autonomy, finality, and neutrality.

*Lessons drawn from other appellate mechanisms*

12. It was suggested that the current review mechanisms by ICSID annulment committees or domestic courts had limited scope, such as limited issues for annulment, limited jurisdiction, lack of harmonization, and lack of correctness and inconsistency within the ISDS system.

13. Drawing lessons from the experience of the WTO Appellate Body and bearing in mind the difference between investment and trade dispute settlement, the panelists put forward recommendations for establishing the appellate mechanism with regard to standard of selection and appointment, composition of chambers, grounds of appeal, decision-making process, role of the secretariat and precedential effect of an appellate decision. In addition to ensuring representation across regions, legal systems and gender, it was suggested that representation in the levels of development of States might also be taken into consideration.

14. With regard to the appointment of members, it was further mentioned that lessons should be learned from other appellate mechanisms . While reference was made to the voting rules in the draft statute of a standing mechanism for the resolution of international investment disputes (A/CN.9/WG.III/WP.239), the currently proposed threshold of a 4/5 supermajority was deemed to be too much. It was proposed that an open call for candidates could possibly be initiated to regain the trust of other stakeholders, and a selection committee could be entrusted to rank candidates on the basis of qualifications and support received. It was further suggested to consider random composition of chambers rather than random assignment of cases to chambers, and to allow appellate tribunal members to have the same nationality as the parties.

15. As to the duration of the tribunal members' term in office, a non-renewable term of nine years was suggested. The importance of requiring full-time commitment, offering competitive conditions of employment and ensuring strict compliance with rules of conduct and avoidance of conflicts of interest were also highlighted. It was noted that one distinction from the WTO was that there was not a single institution responsible for both the functionality of dispute resolution and the treaty that established the organization. In other words, the power of the secretariat in the appellate mechanism was different from that given to the secretariat in the WTO where there was a need for a separate secretariat.

16. It was said that the standard of appellate review, whether de novo or a reasonableness review, had an impact on the qualification required for the members of the appellate tribunal. As for the grounds of appeal, which may include manifest error in the appreciation of facts, they should be clearly defined in order to filter frivolous appeals and reduce the incentives to appeal. It was noted that if ensuring consistency was one of the intents of the appellate mechanism, the number of tribunal members should be limited to facilitate internal dialogue and ensure consistency of the case law. The members might have extensive experience at higher levels of adjudication, both nationally and internationally, and experience in dealing with the issues of fact.

*Implications of an Appellate Mechanism*

17. Possible implications of an appellate mechanism were considered. One view was that the structural reform would facilitate investments because it would increase investor confidence, encourage investment, promote fair competition and provide level playing field for all investors. The point was also raised that an appellate mechanism would improve the quality of the award and would benefit the international investment regime.

**Panel II: Structuring an Appellate Mechanism**

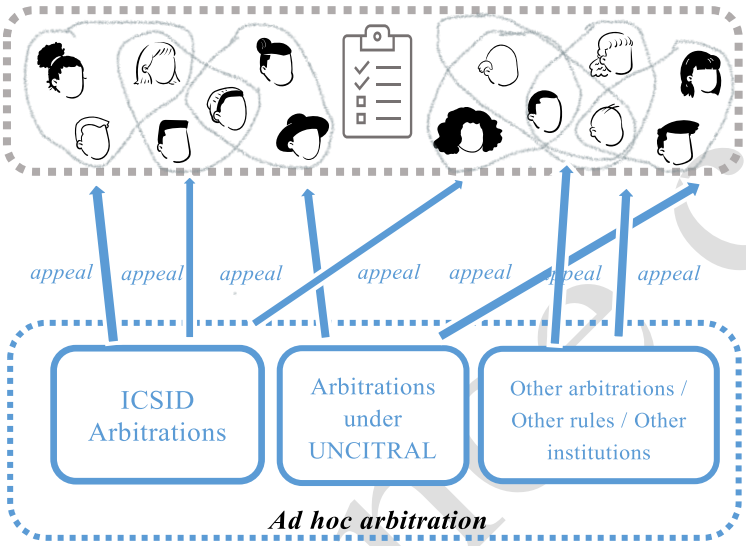
18. Panel II was moderated by Ms. Danni Liang (Associate Professor of School of Law, Sun Yat-Sen University) and consisted of Mr. Chin Heng Ong (Senior Director / Senior State Counsel of International Affairs Division, Attorney-General's Chambers, Singapore), Ms. Margie-Lys Jaime (Head of Investment Arbitration Office, Minister of Finance and Economy, Republic of Panama), Mr. Seung Wha Chang (Chairman, Korean Commercial Arbitration Board INTERNATIONAL) and Ms. Evgeniya Goriatcheva (Senior Legal Counsel, Permanent Court of Arbitration).

*Possible Models for an appellate mechanism*

19. Several options for the establishment of the appellate mechanism which had been discussed in 2019 (A/CN.9/WG.III/WP.185) were brought to attention, including (i) the inclusion in investment treaties by parties, (ii) for use on an ad hoc basis by disputing parties, or (iii) the establishment of a permanent multilateral appellate body. It was further said that since the model to follow was undecided, the creation of two separate protocols could be contemplated within the proposed multilateral instrument framework, one protocol for the appellate mechanism, the other for a two-tier standing mechanism.

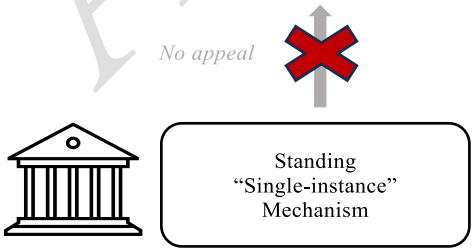
20. The following four basic and three hybrid options to structure the appellate mechanism were set out:

**Model 1: Roster / List of Appellate Adjudicators**



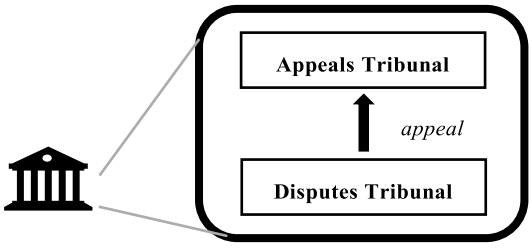

Model 1: This model contemplates a roster mechanism for the parties to choose when they wish to avail themselves to an appeal remedy.

**Model 2: Standing One-Tier Mechanism**



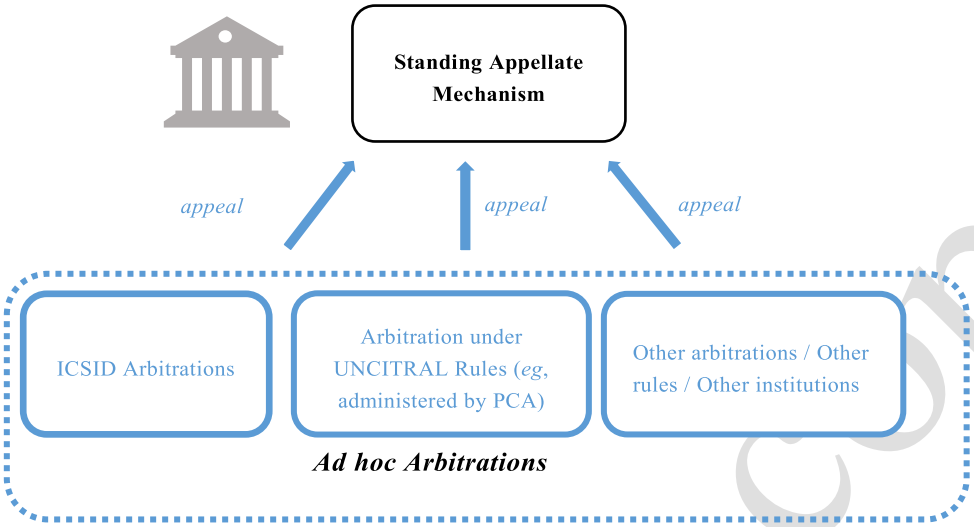

Model 2: This model contemplates a standing one-tier mechanism without appeal.

**Model 3: Standing Two-Tier Mechanism**



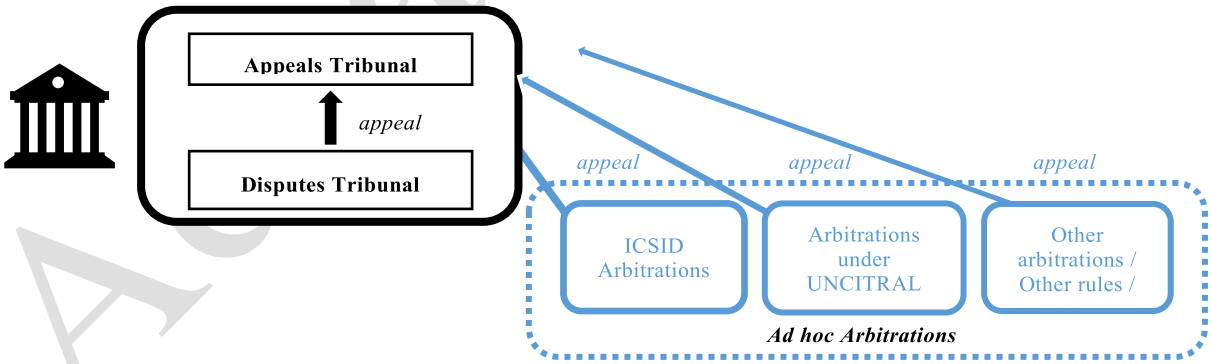

Model 3: This model contemplates a standing two-tier mechanism, where the decisions of the dispute tribunal are subject to appeal to the appeals tribunal.

**Model 4: Standing Appellate Mechanism**



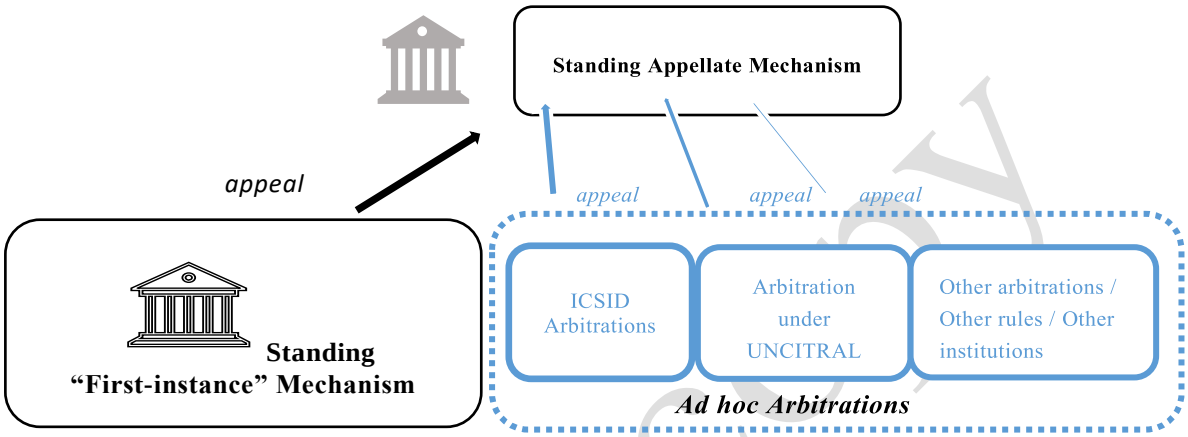

Model 4: This model contemplates a standalone standing appellate mechanism serving as an appellate body for the existing *ad hoc* cases.

**Hybrid A: Consolidated Standing Two-Tier Mechanism**



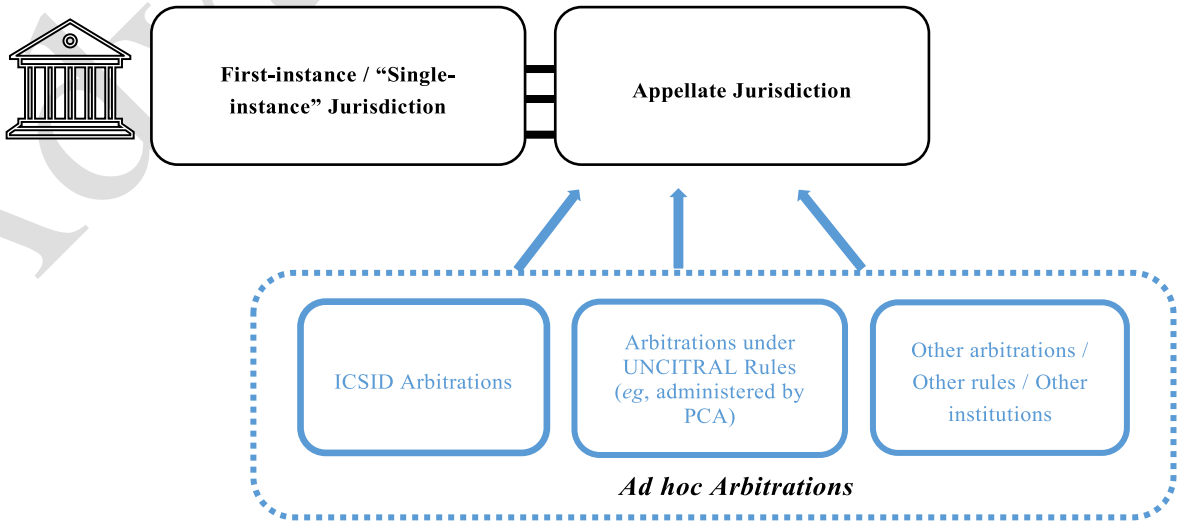

Hybrid A: This model contemplates a consolidated standing two-tier mechanism, where appeals tribunal would hear appeals from both the dispute tribunal and *ad hoc* arbitrations.

**Hybrid B: Separate Standing Mechanisms**




Hybrid B: This model contemplates a separate standing mechanism, where a standing appellate body would hear appeals from both a standing first instance body and *ad hoc* tribunals.

**Hybrid C: "Dual Purpose" Standing Single-Instance plus Appellate Mechanism**




Hybrid C: This model contemplates a standing mechanism with dual purpose for serving as an appellate body hearing the appeals from *ad hoc* tribunals or a first instance body without appeals.

*Comments on possible models for an appellate mechanism*

21. As to the ad hoc appellate model (Model 1), doubts were raised on whether it was helpful to achieve the goals of ensuring correctness or consistency of awards because (i) there was no way to ensure that decisions by ad hoc appellate adjudicators were effectively binding on first tier arbitrators; (ii) having ad hoc adjudicators would bring insufficient incentive to ensure the consistency of awards due to the lack of collegiality; (iii) duration of the proceedings might be prolonged due to the part-time nature of their functions; (iv) party autonomy was limited due to the list-based selection system; (v) conflict issues, such as double hatting and perceived biases, would remain; (vi) no body would be entrusted to establish and administrate the list; (vii) there was no standard yet for the selection and qualification of the adjudicators.

22. It was said that a standalone first instance model (Model 2 and hybrid C) was inappropriate because it would be too powerful and leave no leeway to raise an annulment. Regarding the standing two-tier mechanism (Model 3), some doubts were expressed that: (i) it was a fundamental departure or a "revolution" from the existing system that respected party autonomy and generated the benefits of arbitration; (ii) it required double costs (financial burden) for Contracting Parties; (iii) it was uncertain whether the appellate tribunal was superior to the first instance tribunal members; (iv) there might be unnecessary tensions between the two-tier tribunals, thus resulting in a decrease in coherence or predictability; (v) there would not be sufficient qualified candidates for both tribunals; (vi) there would be no room for accommodating ad hoc cases and other cases where the parties would only want a first instance tier.

23. It was discussed that an ideal appellate mechanism should build on the existing values of international investment arbitration including party autonomy, efficient dispute resolution and addressing the concerns about the incorrectness and inconsistency of the awards. One view was that an appellate mechanism was expected to be stable, institutional and with secretariat support. However, another view was that a standing appellate mechanism might place too much emphasis on internal consistency, resulting in a deviation from the intent of treaty parties and would have spillover effects affecting non-parties to the disputes or non-signatories to an appellate mechanism. It was further commented that an appellate mechanism should be well structured with filter mechanisms so as not to prolong the proceedings and to become costly.

24. Discussion touched upon the fact that an appellate mechanism, whether standing, ad hoc or hybrid model, would give rise to questions about how it interacted with existing institutions. One response was that a permanent secretariat in an existing institution could support the work of permanent judges or adjudicators appointed on an ad hoc basis, referring to the examples of the International Court of Justice, International Criminal Court, WTO Appellate Body, Eritrea-Ethiopia Claims Commission, tribunal of the Bank for International Settlements and Iran-United States Claims Tribunal in its early years. However, it was stated that a standing secretariat may become necessary when the caseload would reach a certain level.

**Panel III Key components of an Appellate Mechanism**

25. Panel III was moderated by Ms. Ying Zhu (Assistant Professor at Faculty of Law, University of Hong Kong) and consisted of Ms. Aurelia Antonietti (Senior Legal Adviser, International Centre for Settlement of Investment Disputes), Ms. Lai Thi Van Anh (Deputy Director General of Department of International Law, Ministry of Justice of Viet Nam), Ms. Jingxia Shi (Wu Yuzhang Chair Professor of School of Law, Renmin University of China), Ms. Nora Bellec (Legal Officer at Directorate General for Trade, European Commission), and Mr. Eduardo Cagnoni (Counselor of Legal Advisor's Office, Ministry of Foreign Affairs, Trade and Worship, Argentine Republic). The Panel discussed the key components of an appellate mechanism, paying particular attention to Articles 18, 27, 28 and 29 of the draft statute (A/CN.9/WG.III/WP.239).

*Jurisdictional scope and conditions for appeal*

26. The panel began by examining Article 18 of the statute, emphasizing that the jurisdiction of the Appellate Tribunal would extend to appeals of an award or decision rendered by an arbitral tribunal or any other adjudicatory body (first-tier tribunal) based on the consent of the disputing parties.

27. It was noted that an inclusion of broad jurisdiction could enable comprehensive adjudication across a range of disputes, potentially covering State-to-State issues, counterclaims and investors from non-Contracting parties. Broader jurisdiction may benefit all with being entitled to a high standard of adjudication, but such inclusivity might increase costs and administrative burdens. One view was to highlight some preference for exclusive jurisdiction of the appellate mechanism, which will bring consistency of interpretation of treaties that may not be achieved through ad hoc arbitration. It was recommended that jurisdiction be limited to ISDS-related matters to prevent overburdening the appellate mechanism. As such, flexibility could be given to the Contracting Parties to agree on expanding the scope of jurisdiction in the future if they deemed appropriate.

28. The discussion also centered around Article 27, which pertained to the scope of appeal. It was pointed out that paragraph 1 of Article 27 included broad expressions, such as allowing appeals of interim measures by first-tier tribunals, while paragraph 2 restricted certain types of awards or decisions from being subject to appeals. This dual approach could reflect a compromise: ensuring error rectification while preventing cost escalation and potential misuse of appeal rights. Arguments were made that limiting the types of decisions appealable could prevent unnecessary delays and that interim measures may not be necessary, since they did not affect the final decision of the disputes, while others held the view that interim measures should remain appealable to preserve fairness. It was also mentioned, however, that the scope of the appeal mechanism should exclude challenges to arbitrator appointments, as this could mirror issues observed in the WTO's appellate system, though others deemed it necessary that a serious departure from fundamental rule of procedure and improper constitution of the first-tier tribunal should be included as grounds of appeal. The discussion also covered how the scope of appeal could affect the appellate mechanism's efficiency.

29. In examining Article 28, discussions took place regarding the requirement for parties seeking an appeal to waive specific rights, such as initiating separate proceedings. This provision should aim to prevent duplicative litigation and conflicting judgments, thereby reinforcing the finality of the appellate process. Debates were conducted on whether this requirement might limit parties' access to judicial remedies and its impact on domestic courts. Another critical aspect was setting deadlines for appeal requests, with recommendations for timeframes ranging from 30 to 90 days. One proposal was to adopt the WTO's 60-day timeline for appeals, with flexibility for complex cases. It was pointed out that a clear timeline could encourage parties to act promptly, preventing strategic delays that could disrupt the appellate process. The flexibility regarding deadlines provided in Article 28 was also emphasized, especially for cases involving significant amount of evidence or complex legal questions. Panelists noted that while shorter timelines enhanced efficiency, extended deadlines for complex cases may be needed. The panel agreed that Article 28 must balance efficiency and fairness to uphold the integrity of ISDS proceedings.

*Grounds of appeal*

30. The panel turned to Article 29 of the statute, which specified grounds of appeal, and focused on ISDS's need for predictability and coherence. Arguments were made on the importance of appeal rights to correct errors in treaty interpretation, and emphasized that inconsistencies in interpretation could lead to unjust awards. One view expressed was that any errors in the interpretation and application of treaties should be appealable, because they could result in errors in the final award. It was further suggested that only manifest errors of fact should be appealable.

31. Some panelists advocated for including misapplication of domestic law and miscalculation of damages as appealable grounds, with interim measures to be further assessed, as errors in these areas could affect the legitimacy of awards and compensation amounts. However, it was also argued that broader grounds could lengthen proceedings, possibly complicating the appellate process and inflating costs. Discussions were made on ICSID's annulment standards, such as "manifest excess of power" and "serious departure from fundamental rules of procedure". It was explored whether these standards should be integrated into the appellate mechanism, or whether the appellate mechanism should adopt distinct standards. One view was that ICSID's annulment mechanism was overly restrictive, which might limit just outcomes. Another view suggested to broaden the grounds of appeal, possibly beyond the ICSID approach, to enhance the appellate mechanism's capacity to issue fair decisions.

*Means to introduce an appellate mechanism within the ICSID system*

32. Reference was made to Article 18 while the means to introduce an appellate mechanism within the ICSID framework was discussed, with focus on how ISDS appellate procedures could coexist with the ICSID regime. It was pointed out that Article 18, paragraph 5, would limit appellate jurisdiction and Article 53 of the ICSID Convention prohibited appeals or any other remedy not specified in the ICSID Convention. A significant point regarding the need to disable specific ICSID provisions – particularly Article 52 and the prohibition in Article 53 – to allow for appellate functions was highlighted. By modifying these articles, ICSID awards would become subject to appeal rather than annulment. It was suggested that such a modification would clarify appeal procedures, streamline jurisdiction, and eliminate the need for separate annulment and appeal processes within the ISDS framework. Several issues were raised on the inter se modification. First, the draft statute would apply to cases for which consent was given after the statute entered into force, while the consent of investors would be expressed through the modified underlying treaty. Second, assuming that the inter se modification was possible, it was suggested to clearly indicate that the relevant provisions in Article 52 and Article 53 shall not apply.

33. Support was expressed on changing, or even removing, the wording of Article 18, paragraph 5, if inter se modifications were to be implemented. The need for clear language within the protocol, addressing jurisdictional consequences and enforcement criteria, particularly if non-contracting parties were to participate, was underscored.

**Panel IV Impact of an appeal on the first-tier proceeding and award as well as other proceedings**

34. Panel IV was moderated by Ms. Huawei Sun (Partner, Zhong Lun Law Firm) and consisted of Mr. Michele Potestà (Partner, Lévy Kaufmann-Kohler, Switzerland), Mr. Joost Pauwelyn (Professor of International Law, Graduate Institute of International and Development Studies, Co-founder of European Office, Cassidy Levy Kent (Europe)), Mr. David Bigge (Chief of Investment Arbitration, Department of State, United States), Mr. Simon Batifort (Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP) and Mr. Zhao Sun (Division Director, Ministry of Commerce, China). The panel discussed the impact of an appeal on the first-tier proceeding and award as well as other proceedings.

*How far should the Appellate Mechanism's decision-making power go?*

35. Discussions focused on the extent of the appellate mechanism's decision-making power. The types of decisions to be made under the appellate mechanism, based on Article 33, paragraph 3, of the statute, were considered. Discussions emphasized that the appellate tribunal's authority differed from a tribunal's authority in the annulment framework in that it could uphold, modify, or reverse first-instance decisions. While in the annulment mechanism a tribunal (or committee) would typically only confirm or annul a decision, the appellate tribunal would be allowed to

modify the first-instance decision itself to correct manifest factual errors As such, it may modify or even complete the analysis itself based on the established factual record, allowing a more efficient resolution of the dispute. However, in complex or incomplete cases, the appellate tribunal may need to remand the decision to the first-instance tribunal or, in exceptional cases involving impartiality and independence concerns, permit the resubmission of the dispute. It was highlighted that a precise articulation of powers of the appellate tribunal was important and that if the appellate tribunal could complete the analysis itself, it should be allowed to do so. It was noted that in some cases, remand to first instance would be necessary and efficient, and it was reminded that diversity in grounds of appeal would also reflect the possible differences in the outcome of the appeal process.

36. Further, discussions were held on whether the appellate mechanism should have remand authority, weighing its pros and cons. Unlike the WTO appellate body which should not look at facts in principle, it was suggested that remand could enable better fact-finding and due process in investment dispute, allowing the first-instance tribunal to resolve factual gaps. However, it might delay the resolution of the dispute, add costs, and risk repetitive cycles. The need to clearly define conditions for remand was highlighted, such as the absence of sufficient facts, significant legal questions or due process issues, and it was suggested that the draft statute should establish a timeframe for remand completion and should specify if remanded decisions could be appealed again. The appellate tribunal's ability to finalize its analysis was considered crucial, particularly when only minor factual issues remain, ensuring judicial economy by avoiding repetitive proceedings.

37. Emphasis was made on retaining the strengths of the ISDS system. It was underscored that the appellate review should avoid fact-finding since re-evaluating evidence in appeal could inflate costs and time. Instead, judicial efficiency would be reached by allowing the appellate tribunal to guide first-instance tribunals in areas needing further evidence assessment which might be helpful for the first-tier tribunal to engage in in-depth examination of the complex factual issues. While appeals could support detailed instruction for clearer evaluation of complex facts, it was suggested that tribunals should avoid an excessive review of the facts to ensure efficiency.

*Would the appellate mechanism help avoid parallel proceedings and create more certainty or instead unduly delay the proceedings?*

38. Discussions delved into whether an appellate mechanism could mitigate parallel proceedings and improve certainty in ISDS, or if it might unintentionally lead to delays. The discussion started with the types of decisions that might be subject to appeal. The discussion noted that final awards and jurisdictional decisions could be subject to appeal, emphasizing that there should be high thresholds for interim measures to be appealable, for instance only if it would result in irreparable harm to a disputing party. In general, interim measures should not be appealable unless in exceptional circumstances where States' legitimate rights would be restricted.

39. The panel also focused on whether the appellate mechanism should replace existing annulment or set-aside procedures. The discussion also examined how to strike the balance between exclusivity and finality. A question was raised on whether the appellate tribunal's decision would be the end of the matter. Under the current draft statute, a party could pursue set-aside or annulment procedures if no appeal had been filed, and the bracketed language in Article 28 would permit set-aside or annulment if parties were unsatisfied with the appellate tribunal's ruling. Exclusivity would promote simplicity and coherence by avoiding parallel proceedings, while maintaining multiple options could be beneficial, especially given the appellate mechanism's novelty. Finality could streamline proceedings and reduce costs, but retaining set-aside or annulment procedures as a safeguard might be prudent to address any fundamental issues overlooked by the appellate tribunal. It was noted that achieving exclusivity and finality would necessitate amendments to the draft statute.

40. Coordination between the proposed appellate mechanism and existing ICSID and non-ICSID proceedings was also mentioned, focusing on the Swiss proposal. The proposal discouraged endless review cycles and advocates for an automatic exclusion, as opposed to a waiver or a three-tier review system. To streamline ICSID processes, it was proposed that an express provision be added to Article 31 for States to opt out of ICSID Articles 52 and 53, which pertain to annulment and appeal limitations. For non-ICSID cases, it was stressed that disabling the annulment review mechanism at the seat of arbitration was important, in order to prevent additional layers of procedural complexity.

*Should the decisions by an appellate mechanism have any effect on non-members and non-disputing parties?*

41. It was said that the primary objectives of an appellate mechanism in ISDS was to promote correctness and consistency in decision-making. However, while a consistent body of appellate rulings could reduce legal uncertainty, it was highlighted that internal consistency could risk entrenching errors or diverging from the original intentions of Treaty Parties. Once an appellate mechanism were to establish a position on a substantive issue, it would often be resistant to change, an effect referred to as "institutional stickiness." Such rulings could also influence non-parties to the disputes or parties outside the appellate framework, having spillover effect on non-parties to the dispute due to the perceived authority and greater persuasive power of the appellate mechanism decisions, compared to ad hoc tribunal decisions.

42. To address these potential consequences, several possible solutions were discussed. For instance, permitting non-disputing Treaty Party submissions at the appellate level would offer additional perspectives that might lead to more accurate interpretations and thus reduce the need for appellate review. Additionally, providing States with a formal process to object to a decision of the appellate body was mentioned. Although limiting the binding or precedential value of appellate decisions solely to the disputing parties could theoretically mitigate the spillover risk, it was noted that in practice, decisions from international dispute bodies were frequently referenced as persuasive authority in unrelated contexts, diminishing the effectiveness of such limitations.

43. Further, it was highlighted that facilitating non-disputing party submissions could improve consistency of legal interpretation, potentially enhancing correctness in rulings. However, there could be practical challenges: some tribunals might overlook these submissions, and developing States might lack resources to submit statements, while developed States might hesitate to make submissions should they conflict with their national interests. To overcome these challenges, it was emphasized that a well-coordinated secretariat could work effectively with the judiciary to ensure fair consideration of all submissions and viewpoints.

44. Finally, lessons from the WTO appellate system were discussed, particularly concerning criticisms of "overreaching" decisions. It was noted that while such criticisms were common, they were often overstated. In the ISDS context, an appellate mechanism that were to remain focused on its core objectives of correctness and consistency, with cautious and restrained decision-making, could foster greater stability and confidence in the ISDS system without over-extending its influence to impact non-Contracting States or other existing legal frameworks.

**Panel V: Standing Mechanism and Issues Relating to an Appellate Mechanism**

45. Panel V was moderated by Mr. Wenhua Shan (Assistant President, Senior Professor in Humanities and Social Sciences, Dean of Law School, Xi'an Jiaotong University) and consisted of Ms. Alexis Choquet (Deputy Head of international Trade and investment Unit, French Treasury), Ms. Dafina Atanasova (Economic Affairs Officer, UN Trade and Development), Mr. Moritz Lumma (Head of the Foreign Investment Division, Federal Ministry for Economic Affairs and Climate Action, Germany) and Ms. Deborah Aba Aikins (First Secretary and Legal Advisor of

Embassy and Permanent Mission of Ghana to the United Nations and other International Organizations in Vienna). The panel reflected on various issues related to a standing appellate mechanism, including the concerns and advantages of a standing appellate mechanism, its composition and the recognition and enforcement of its decisions.

*Concerns related to a Standing Mechanism and an Appellate Mechanism*

46. Under the assumption that a standing appellate mechanism were to serve as an exclusive remedy for resolving the disputes, four concerns were raised:

(i) Correctness: it was said that ensuring correctness was crucial, and that a standing appellate mechanism was generally more effective than other options. Furthermore, a two-tier standing mechanism with an appellate component was seen as more effective than a one-tier mechanism.

(ii) Predictability: While a standing mechanism may enhance predictability, it was recalled that there were concerns about potential judicial overreach and "excessive consistency" (so-called spillover effect). It was noted that these concerns are not unique to standing bodies but also exist in the current ISDS system, and that they could be addressed through the establishment of a standing multilateral forum for States to discuss and resolve these issues.

(iii) Balance between correctness, duration, and cost: An appellate or standing mechanism may lower the costs associated with individual cases compared to the current dispute settlement system, for two reasons: (i) the costs can be spread across the membership and over time, thus reducing court costs, and (ii) a more predictable dispute settlement system can lower representation costs.

(iv) Reform of ISDS: The reform of ISDS presents an opportunity for States to update their "old generation" investment treaties, on which 98% of ISDS disputes were based, and adapt those treaties to the current framework.

*Alleviation of concerns on the current ISDS system through a standing mechanism, from a government perspective*

47. It was pointed out that there was a diversity of policy choices for a State to protect investments with or without ISDS and thus the design of the standing mechanism should be able to cater for both State-to-State dispute settlement and ISDS. Two scenarios were raised to explain how the standing mechanism may alleviate two concerns of ISDS, namely predictability and judicial economy. Firstly, from the legal advice scenario of government officials, a standing mechanism would allow more coherent and predictable interpretations of treaty issues, which would be important for States' policy-decision makers. Secondly, from the litigation scenario, a standing mechanism could provide more active adjudicators with more active case management or applying more active case management techniques, which would then be beneficial for judicial economy.

*Composition of the appellate tribunal*

48. It was said that because an appellate tribunal must promote the rule of law, justice and fairness, its members should possess the highest professional, moral and integrity standards as well as those set out in the Code of Conduct for Judges. Three qualifications for tribunal members were discussed in the Panel, including: (1) experience of public service, including judicial experience; (2) specialization in unique area, ensuring a wide scope of expertise; (3) equal geographical representation and gender balance. It was said that disputing parties' role in the appointment process should be limited (for instance, to advance independence and impartiality of members) and that the selection processes should be transparent and very well structured.

*Recognition and enforcement of awards*

49. Three levels of recognition and enforcement of awards were presented: awards controlled by States, New York Convention system and ICSID system. Article 26 and Article 31 of the draft statute of a standing mechanism (see A/CN.9/WG.III/WP.239) were discussed in light with Article 5 of the New York Convention and Article 53 of the ICSID Convention. It was said that Article 26 built upon Article V of the New York Convention and that, under the draft statute, States would be obliged to enforce the award automatically as they currently do under Article 54 of the ICSID Convention.

*Other comments*

50. In response to a question on whether it would be possible to build a "dialogue system" between a contracting party and the appellate mechanism (for instance, after the issuance of the award so as to help the State better understand the award reasoning and prepare future treaties), caution was expressed on such institutionalized dialogue as it may affect the independence of the tribunal. One comment pointed out that in European Union law, referrals from domestic tribunals ensured judicial coherence.

**Panel VI: Multilateral instrument on ISDS reform and issues relating to Appellate Mechanism**

51. Panel VI was moderated by Mr. Jae Sung Lee (Secretary of Working Group III) and consisted of Mr. Colin Brown (Head of Unit, legal Aspects of Trade and Sustainable Development and Investment at Directorate General for Trade, European Commission), Mr. Kraijakr Thiratayakinant (Counsellor at Department of Treaties and Legal Affairs, Ministry of Foreign Affairs of Thailand), Ms. Mariana Pinto Schmidt (Legal Advisor to the investment, Services and Digital Economy Department, Undersecretariat of International Economic Affairs of Chile), Ms. Taylor St John (Researcher at PluriCourts, University of Oslo) and Mr. Manjiao Chi (Professor and Founding Director of Center for international Economic Law and Policy of School of Law, University of International Business and Economics). The panel focused on the implementation of an appellate mechanism through the multilateral instrument on ISDS reform ("MIIR") and its application to existing investment treaties.

*How and when do States and investors consent to the jurisdiction of the appellate mechanism*

52. On the question on how to consent, two scenarios were analyzed. First, it was suggested that two States could give consent by changing the provisions in their investment agreement, possibly through the MIIR. Second, the States could give consent in the underlying treaty, allowing investors to initiate arbitration against them. As for when to give consent, States could choose the standing appellate mechanism as the exclusive means to resolve investment disputes in the treaty, while disputing parties could also agree to appeal in a specific dispute at the beginning of the procedure or before the issuance of an award.

*Modification of existing investment treaties through the MIIR*

53. It was acknowledged that the MIIR would reduce the time and resources of states to modify investment treaties. It was suggested that the Working Group III should addresss the divergence in views on the reform from two contracting States parties, which type of dispute can be appealed, how to deal with the discrepancy between the underlying treaty and the MIIR and the effect of the MIIR on future treaties.

*Further issues to clarify in the MIIR*

54. Technical issues, structural issues and investors' rights were discussed. Firstly, it was pointed out that certain factors about the appeal procedure, like discontinuance of the appeal by parties, were missing from the statute of the standing mechaism, which needed to be further clarified. Secondly, the MIIR would need to deal with the relationship between arbitration provisions or even appeal arbitration provisions provided in current treaties and the potential appellate mechanism as it aimed to

modify existing investment treaties. Thirdly, the MIIR should make it clear for investors from the non-contracting States to the appellate mechanism whether they could subject the dispute or award to an appeal.

*Potential general impact of the MIIR on existing investment treaties*

55. Examples of various bilateral or even multilateral treaties that referred to the subsequent establishment of an appellate mechanism were mentioned, including treaties between the US and other countries, Chile-Colombia FTA, Pacific Alliance Additional Protocol and CPTPP. It was stated that the MIIR would provide incentives for them to consider joining the appellate mechanism or become a party to the MIIR. Another viewpoint was that there was an increasing number of EU Member States that included provisions on a standing mechanism in their treaties and the specific wording of these provisions was very important for States to consider.

*Potential overlaps between the MIIR secretariat and the appellate mechanism secretariat*

56. Three potential overlaps between the MIIR secretariat and the appellate mechanism secretariat were discussed. The first overlap relates to which secretariat should be responsible for maintaining a user-friendly interface to manage the notifications of the list of investment treaties provided in Article 6 of the draft MIIR (A/CN.9/WG.III/WP.246) and Article 18 of the draft statute of a standing mechanism(A/CN.9/WG.III/WP.239). It was pointed out that such a system may address legal certainty and public perceptions. The benefit of having the MIIR secretariat responsible for managing the notifications was that it would provide a user-friendly, dynamic, coherent, transparent process enabling the public to see which treaties have been modified, which would however come at a cost. Another approach was that the appellate mechanism secretariat would maintain a website showing which instruments were subject to its jurisdiction, which might be a more decentralized process. Another issue for the Working Group to address was whether it would be necessary to capture all of these notifications in the MIIR Protocol. Another view was that having different notifications from the parties to the same treaty may rather cause more complexity.

57. The second overlap relates to the interactions between the Conference of the Contracting Parties of the appellate mechanism and Conference of the Parties of the MIIR since the memberships and the main tasks of these governing bodies would be different. The third overlap lies within the technicalities of ratification and notification, as this would affect the allocation of tasks and the independency or interdependency between the two secretariats.

58. It was pointed out that under the current institutional structure of the MIIR, States Parties to the MIIR would be subject to entirely different treaty obligations with another country which would lead to a significant, complicated and fragmented treaty network. Therefore, it was suggested that establishing a new body for that would be helpful to coordinate the treaty network.

*Incorporation in the MIIR of some existing rules in international treaties*

59. It was explained that for the first instance, the MIIR would “displace” the provisions found in treaties that allow disputing parties to either choose for ICSID arbitration or other forms of dispute settlement, and provide the exclusivity of jurisdiction to the standing mechanism. For the appellate level, treaty provisions related to the recognition and enforcement of the first-instance awards would need to be changed. Further, any other rules of the underlying treaties which may be inconsistent with the rules in the MIIR would need to be carefully considered. It was also mentioned that there was need to develop a conflict clause in the MIIR.

*Binding effect of the MIIR on investors and States*

60. It was expressed that once the Contracting Parties decided to modify an earlier treaty to incorporate their consent to an appellate mechanism, that consent should not

be modified by the disputing parties. Another view was that the investors' right to choose another settlement mechanism should also be considered.

*Inter se modifications through the MIIR*

61. One opinion was that inter se modifications of the ICSID Convention would be acceptable if conducted in an effective and efficient way without causing confusion. However, it was said that from the perspective of non-ICSID Parties, such inter se modifications might not fit well with the protocol on an appellate mechanism. It was added that inter se modifications would involve notifications and cooperation between both the MIIR secretariat and the ICSID secretariat.

*Scope of the MIIR*

62. On the question whether the MIIR should modify instruments like contracts or domestic law, it was stated that the MIIR should focus only on treaties. On the other hand, a more open approach towards contract and domestic-based ISDS disputes were expressed.

**Roundtable Discussions**

63. The roundtable discussions were moderated by Mr. Shane Spelliscy and Ms. Natalie Morris-Sharma (Director, Singapore Attorney-General's Chambers and Rapporteur, Working Group III).

*Structure of the Appellate Mechanism*

64. Part 1 of the roundtable focused on the structure of the appellate mechanism, weighing the pros and cons of a standing mechanism versus an ad hoc one. Proponents of a standing mechanism argued that it would have operational sustainability and promote consistency, predictability, and ethical standards in ISDS. An ad hoc mechanism could face logistical limitations and lack the authority. On the other hand, it was argued that an ad hoc mechanism could also be effective depending on the members appointed and would be easier to implement. A suggestion was made for a hybrid approach, whereby permanent members could provide continuity and consistency, while ad hoc members could be appointed as needed to address specific cases.

65. Participants also discussed distinctions and correlations between how an ad hoc and a standing mechanism would operate, with possible overlaps. According to the draft statute (A/CN.9/WG.III/WP.239), an ad hoc appointment of additional judges in the first tier (in limited circumstances) was possible whereas this was not foreseen in the appellate procedure. It was held that a mechanism would be considered "ad hoc" if not limited to a small group of adjudicators and if there was party autonomy in the selection of adjudicators in particular cases. It was argued that an ad hoc tribunal would be formed for a specific case only. Although some of those same adjudicators may receive further appointments to an appeal later on, they would not be obliged to adhere to their prior decisions.

66. Additionally, the process for screening appeals was discussed, with the possibility of permanent members acting as "gatekeepers" to filter certain cases for appeal. This approach could streamline proceedings, ensuring that only substantial cases advance to the appeal stage. The concept of a five-member tribunal was also proposed to enhance credibility, with a government-appointed council overseeing the roster of adjudicators.

67. A discussion emerged regarding whether adjudicators should be employed full-time or should be allowed to hold other functions. It was noted that remuneration must be competitive if the mechanism required full-time commitment. The WTO model was discussed, although participants acknowledged that flexibility may be necessary to accommodate a variety of models (see paragraphs 19-24 above).

*How to manage the potential risk of excessive appeals*

68. Part 2 of the roundtable addressed how to manage the potential risk of excessive appeals, based on Article 29 of the draft statute (A/CN.9/WG.III/WP.239). It was said that the list of grounds included in Article 29 may be overly detailed and could be more clearly articulated, and that the inclusion of all ICSID annulment grounds could be further explained. Also, some of the grounds reflected in Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") or in the New York Convention may not be appropriate in the ISDS context. Certain grounds, such as public policy and newly discovered facts, were deemed less relevant for ISDS. Suggestions included removing the word "manifest" from "manifest error of law" and/or "manifest errors in the appreciation of facts" to avoid limiting the tribunal's scope, especially if the factual issues should still substantially affect the decision. In addition, a high threshold, for instance "irreparable harm to a disputing party" should be established to appeal the interim measures. It had to be made clear whether it was de novo review or on points of law. Others believed that Articles 28 and 31 of the draft statute were not very clearly articulated, and that Article 34 of the UNCTIRAL Model Law or Article 52 of the ICSID Convention could provide a more familiar model.

69. Participants noted that limiting the frequency of appeals would enhance procedural efficiency and recommended the establishment of mechanisms to quickly dismiss unmeritorious cases. The possibility of a screening mechanism that was mentioned in the first part of the roundtable was reiterated, whereby permanent members (instead of arbitrators selected from the pool) should conduct the screening process for consistency. Also, it was said that Article 31 could specify a clear timeframe for registering an appeal. Security for cost and request for appeal were also discussed.

*Powers of the appellate tribunal*

70. Part 3 of the roundtable addressed the powers of the appellate tribunal, particularly regarding the tribunal's authority over factual determination and remand. It was noted that if the appellate tribunal made new factual determinations or new factual findings, there might need to be further recourse for correctness. It was argued that the appellate tribunal should remand cases to the original tribunal to ensure that any final, enforceable decision remains within the jurisdiction of the initial tribunal. Also, it was argued that remand should be reserved for exceptional circumstances, with the appellate tribunal having the opportunity to directly completed the analysis whenever possible.

*Effects of the appellate tribunal's decisions*

71. Part 4 of the roundtable turned to the effects of the appellate tribunal's decisions, especially enforceability under the ICSID Convention and the New York Convention. Concerns were raised about whether modified decisions would qualify as ICSID awards and thus be enforceable among ICSID States parties, and whether such awards may fall under the New York Convention. It was also pointed out that States that were not parties to the inter se modification might not enforce these modified decisions under the ICSID's enforcement framework. Only States opting for these modifications should be required to enforce appellate decisions, as this concerned ICSID's original framework and protects non-participating States from obligations they did not agree to. While non-participating States would not be legally bound to enforce such appellate decisions, some may still do so under a separate international enforcement protocols.

*The effect of decisions of the Appellate Mechanism on non-disputing parties*

72. The final discussion focused on the effect of decisions of the appellate mechanism on non-disputing parties and to non-Contracting Parties to the appellate mechanism. Both joint interpretations and non-disputing party submissions were mentioned. There was broad support for allowing submissions from non-disputing treaty parties to promote correct legal interpretations. It was suggested that provisions allowing such submissions should be incorporated into the MIIR to ensure treaty

consistency, though care should be taken to prevent retroactive or prejudicial effects on pending proceedings.

73. Three categories of non-disputing parties were listed during the discussion: (1) non-disputing parties to the treaty subject of the dispute; (2) parties to the appellate mechanism that are not parties to the treaty in dispute; (3) non-parties to the standing mechanism, appellate mechanism and the underlying treaty but that have a particular interest in the dispute (for example, due to similar wording). Non-disputing parties should be encouraged to make submissions with the understanding that these are not binding but should be taken into account under the Vienna Convention on the Law of the Treaties ("VCLT"). A proposal was made to set up a mechanism allowing States to officially register their disagreement with appellate decisions either at the time they are rendered or afterwards.

74. It was suggested that the MIIR should include core provisions, rather than merely specifying how protocols would be implemented. Concerns were raised about the practicality of each State needing to specify the necessary modifications, particularly for those with numerous BITs. It was said that this could become cumbersome due to the need for States to consult with their treaty partners to reach agreements on the modifications whereas the MIIR was intended to facilitate modifications without requiring renegotiating each treaty. It was said that the MIIR could provide clarity on how such modifications would be implemented.