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Dispute Settlement Reform)
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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session

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I. Introduction

1. At its fiftieth session, the Commission had before it notes by the Secretariat on “Possible future work in the field of dispute settlement: Concurrent proceedings in international arbitration” (A/CN.9/915); on “Possible future work in the field of dispute settlement: Ethics in international arbitration” (A/CN.9/916); and on “Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS)” (A/CN.9/917). Also, before it was a compilation of comments by States and international organizations on the ISDS Framework (A/CN.9/918 and addenda).

2. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission entrusted the Working Group with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). In line with the UNCITRAL process, the Working Group would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led with high-level input from all governments, consensus-based and fully transparent. The Working Group would proceed to: (i) identify and consider concerns regarding ISDS; (ii) consider whether reform was desirable in light of any identified concerns; and (iii) if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s).¹

3. At its thirty-fourth to thirty-eighth sessions, the Working Group considered possible reform of ISDS on the basis of the mandate.²

4. At its fifty-first session, in 2018, the Commission noted that the Working Group would continue its deliberations pursuant to the mandate given to it, allowing sufficient time for all States to express their views, but without unnecessary delay.³ At its fifty-second session, in 2019, it expressed its satisfaction with the progress made by the Working Group through a constructive, inclusive and transparent process and for the decision of the Working Group to elaborate and develop multiple potential reform solutions simultaneously. The Commission also expressed its appreciation for the support provided by the Secretariat.⁴ The Commission further expressed its appreciation for the contributions to the UNCITRAL trust fund from the European Union, the German Federal Ministry for Economic Cooperation and Development (BMZ), and the Swiss Agency for Development and Cooperation (SDC), aimed at allowing the participation of representatives of developing States in the deliberations of the Working Group as well as participation in regional intersessional meetings, and was informed about ongoing efforts by the Secretariat to secure additional voluntary contributions. States were urged to contribute to, and support, those efforts. The Commission also welcomed the outreach activities of the Secretariat aimed at raising awareness about the work of the Working Group and ensuring that the process would remain inclusive and fully transparent.⁵

5. At its current session, the Working Group expressed its appreciation for the contributions to the UNCITRAL trust fund from the European Union, France, the German Federal Ministry for Economic Cooperation and Development (BMZ), and

¹ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 263 and 264.

² The deliberations and decisions of the Working Group at its thirty-fourth to thirty-seventh sessions are set out in documents A/CN.9/930/Rev.1, A/CN.9/930/Rev.1/Add.1; A/CN.9/935; A/CN.9/964; and A/CN.9/970, respectively.

³ *Ibid.*, *Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 145.

⁴ *Ibid.*, *Seventy-fourth Session, Supplement No. 17 (A/74/17)*, para. 171.

⁵ *Ibid.*, *Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 142–144 and 146 and *Seventy-fourth Session, Supplement No. 17 (A/74/17)*, paras. 161–171.

the Swiss Agency for Development and Cooperation (SDC), that allowed participation of developing States in the deliberations of the Working Group.

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its resumed thirty-eighth session in Vienna from 20 to 24 January 2020. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Cameroon, Canada, Chile, China, Colombia, Croatia, Czechia, Dominican Republic, Ecuador, Finland, France, Germany, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Lesotho, Libya, Malaysia, Mali, Mauritius, Mexico, Nigeria, Pakistan, Peru, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Viet Nam.

7. The session was attended by observers from the following States: Albania, Bahrain, Bolivia (Plurinational State of), Bosnia and Herzegovina, Botswana, Bulgaria, Burkina Faso, Cambodia, Costa Rica, Cyprus, Democratic Republic of the Congo, Egypt, El Salvador, Eswatini, Gabon, Gambia, Georgia, Greece, Guinea, Iceland, Kuwait, Kyrgyzstan, Lebanon, Malta, Montenegro, Morocco, Myanmar, Netherlands, New Zealand, North Macedonia, Norway, Paraguay, Portugal, Qatar, Saudi Arabia, Serbia, Slovakia, Sweden, Tanzania (United Republic of), Tunisia and Uruguay.

8. The session was also attended by observers from the European Union.

9. The session was also attended by observers from the following international organizations:

(a) *United Nations System*: International Centre for the Settlement of Investment Disputes (ICSID); United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: African Union, Asian-African Legal Consultative Organisation (AALCO), Commonwealth Secretariat, Eurasian Economic Commission, Gulf Cooperation Council (GCC), Maritime Organisation of West and Central Africa (MOWCA), Organization for Economic Cooperation and Development (OECD), Permanent Court of Arbitration (PCA) and South Centre.

(c) *Invited non-governmental organizations*: ACP Legal, African Academy of International Law Practise (AAILP), African Association of International Law (AAIL), African Center of International Law Practice (ACILP), American Society of International Law (ASIL), Arbitral Women, Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asian Academy of International Law (AAIL), Asian International Arbitration Centre (AIAC), Asociación Americana de Derecho Internacional Privado (ASADIP), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Dispute Settlement (CIDS), Center for International Investment and Commercial Arbitration (CIICA), Center for International Legal Studies (CILS), Centre for International Governance Innovation (CIGI), Centre for International Law (CIL), Centre for Research on Multinational Corporations (SOMO), Chartered Institute of Arbitrators (CIArb), China International Economic and Trade Arbitration Commission (CIETAC), Client Earth, Columbia Centre on Sustainable Investment (CCSI), Corporate Counsel International Arbitration Group (CCIAG), Europa-Institut, European Federation for Investment Law and Arbitration (EFILA), European Society of International Law (ESIL), European Trade Union Confederation (ETUC), Forum for International Conciliation and Arbitration (FICA), Friends of the Earth International (FOEI), Georgian International Arbitration Centre (GIAC), Hong Kong International Arbitration Centre (HKIAC), ICOURTS, Institute for Transnational Arbitration (ITA),

Institute of International Law (IIL), Instituto Ecuatoriano de Arbitraje (IEA), Inter-Pacific Bar Association (IPBA), International and Comparative Law Research Centre (ICLRC), International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Dispute Resolution Institute (IDRI), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International Law Association (ILA), International Law Institute (ILI), Korean Commercial Arbitration Board (KCAB), Milan Chamber of Arbitration, Moot Alumni Association (MAA), New York City Bar Association (NYCBA), Pluricourts (UIO), Queen Mary University of London School of International Arbitration (QMUL), Russian Arbitration Association (RAA), Singapore International Mediation Centre (SIMC), Swiss Arbitration Association (ASA), The China Society of Private International Law (CSPIL), The Law Association for Asia and the Pacific (LAWASIA), Third World Network, United States Council for International Business (USCIB), and Vienna International Arbitration Centre (VIAC).

10. The Working Group elected the following officers:

Chairperson: Mr. Shane Spelliscy (Canada)

Rapporteur: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

11. The Working Group had before it the following documents: (a) annotated provisional agenda ([A/CN.9/WG.III/WP.184](#)); (b) Notes by the Secretariat on the selection and appointment of ISDS tribunal members ([A/CN.9/WG.III/WP.169](#)) and on appellate and multilateral court mechanisms ([A/CN.9/WG.III/WP.185](#)); (c) Submissions from Governments: Submission from the Government of Indonesia ([A/CN.9/WG.III/WP.156](#)); Submission from the European Union and its member States ([A/CN.9/WG.III/WP.159](#) and Add.1); Submission from the Government of Morocco ([A/CN.9/WG.III/WP.161](#)); Submission from the Government of Thailand ([A/CN.9/WG.III/WP.162](#)); Submission from the Governments of Chile, Israel and Japan ([A/CN.9/WG.III/WP.163](#)); Submissions from the Government of Costa Rica ([A/CN.9/WG.III/WP.164](#) and [A/CN.9/WG.III/WP.178](#)); Submission from the Government of Brazil ([A/CN.9/WG.III/WP.171](#)); Submission from the Government of Colombia ([A/CN.9/WG.III/WP.173](#)); Submission from the Government of Turkey ([A/CN.9/WG.III/WP.174](#)); Submission from the Government of Ecuador ([A/CN.9/WG.III/WP.175](#)); Submission from the Government of South Africa ([A/CN.9/WG.III/WP.176](#)); Submission from the Government of China ([A/CN.9/WG.III/WP.177](#)); Submission from the Government of the Republic of Korea ([A/CN.9/WG.III/WP.179](#)); Submission from the Government of Bahrain ([A/CN.9/WG.III/WP.180](#)); Submission from the Government of Mali ([A/CN.9/WG.III/WP.181](#)); Submission from the Governments of Chile, Israel, Japan, Mexico and Peru ([A/CN.9/WG.III/WP.182](#)); Submission from the Government of Kuwait ([A/CN.9/WG.III/WP.186](#)); Submission from the Government of Kazakhstan ([A/CN.9/WG.III/WP.187](#)); and Submission from the Government of the Russian Federation ([A/CN.9/WG.III/WP.188](#) and Add.1).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Possible reform of investor-State dispute settlement (ISDS).
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

13. The Working Group considered agenda item 4 on the basis of documents referred to in paragraph 11 above and agenda item 5. The deliberations and decisions of the Working Group with respect to items 4 and 5 are reflected in chapters IV and V, respectively.

IV. Possible reform of investor-State dispute settlement

14. Based on a decision at its thirty-eighth session (A/CN.9/1004, para. 25), the Working Group began to consider the following reform options: (i) stand-alone review or appellate mechanism; (ii) standing multilateral investment court; and (iii) selection and appointment of arbitrators and adjudicators.

15. In considering those reform options, the Working Group agreed to adopt the same approach as it had done at its thirty-eighth session and decided to undertake a preliminary consideration of the relevant issues with the goal of clarifying, defining and elaborating such options, without prejudice to any delegations' final position. It was clarified that the Working Group would not be making any decision on whether to adopt a particular reform option at this stage of the deliberations.

A. Appellate mechanism

16. The Working Group decided to undertake a preliminary consideration of questions arising with regard to the establishment of an appellate mechanism as outlined in document A/CN.9/WG.III/WP.185, paras. 10–33. It was suggested to consider the main components relating to the nature and scope of appeal and to the effects of appeals, while noting that the various aspects were interrelated.

1. General remarks

17. During the deliberations, it was pointed out that, in seeking to define and elaborate the contours of an appellate mechanism, the objectives of creating such a mechanism should guide any work on the topic including whether different objectives could yield different outcomes or approaches. Some general remarks were also made on how an appellate mechanism would operate in ISDS and how it could address the problems and concerns that had been identified by the Working Group.

18. In the context of those discussions, it was pointed out that the existing mechanisms for reviewing arbitral awards were too limited, and the goal of creating an appellate mechanism would be to increase the correctness, consistency, predictability and coherence of ISDS decisions and hence the legitimacy of ISDS. The view was also expressed that, in designing such a mechanism, increases in the costs and duration of proceedings should be avoided.

19. Some questioned whether the key objective would be to ensure the correctness and quality of the decisions or to enhance the coherence and consistency of the ISDS regime. It was reiterated that seeking to achieve consistency should not be to the detriment of the correctness of decisions, and that predictability and correctness should be the objective rather than uniformity (see also A/CN.9/935, para. 26 and A/CN.9/964, paras. 25–63).

20. It was further questioned whether an appellate body would be in the position to address the different standards and texts embodied in the numerous existing investment treaties. It was stated that, while coherence might be achieved by allowing an appellate body to render decisions regarding multiple treaties, it might also result in endowing too much interpretative power to such body.

21. Considering that States would be free to choose whether to adopt that reform option, concerns were raised that an appellate mechanism would add to the existing lack of coherence or consistency. It was mentioned that substantive protection

standards were found in different sources of law, including investment treaties and domestic investment laws, which resulted in fragmentation. On the other hand, views were reiterated that there were common standards in those sources of law, that could be interpreted in a more consistent and predictable manner than currently done by ad hoc arbitral tribunals.

22. Views were expressed that significant increases in costs and duration seemed inevitable no matter how the appellate mechanism was designed, and that an appropriate balance between the benefits of appeal and its burdens would be difficult to achieve. It was said that there were other effective tools which could achieve the same objectives of enhancing correctness and consistency in ISDS tribunals' decisions, such as scrutiny mechanisms prior to the issuance of a decision, and mechanisms to increase the role of Parties in treaty interpretation.

23. On the other hand, views were expressed that an appellate mechanism would actually lead to a decrease in costs and duration of ISDS in the long run as certainty and predictability were increased, and first level decision makers became more disciplined and rigorous. It was pointed out that that effect would be even greater with a permanent appellate mechanism, and even greater if that permanent mechanism was the second tier of a standing body with permanent first instance mechanism.

24. It was indicated that the above-mentioned matters (see paras. 18-23 above) would be considered at a later stage of the deliberations after the main elements of an appellate mechanism were clarified. It was generally felt that the objectives of avoiding duplication of review proceedings and further fragmentation as well as of finding an appropriate balance between the benefits of an appellate mechanism and any potential costs should guide the work.

2. Nature and scope of appeal

25. The Working Group considered the questions of scope and standard of the review to be undertaken in an appellate mechanism, if it were to be introduced, whatever form such mechanism might take – ad hoc appeal mechanism, a permanent stand-alone appellate body, or an appeal mechanism as the second-tier of a standing court.

(a) Scope and standard of review

26. With respect to the grounds for appeal (scope of review), it was noted that the existing procedures for annulment (under the ICSID Convention) or setting aside of an award were generally limited in scope as they did not allow for the review of the merits of the decisions rendered by the ISDS tribunals. Therefore, it was suggested that the grounds of appeals should be broader and possibly encompass the grounds provided for in such existing procedures (see also para. 30 below). On the other hand, it was also noted that broadening the scope of review to all issues of law and fact in the tribunal's decision would likely have a negative impact on the cost and duration of the proceedings, which was also an issue that needed to be addressed. Concerns were raised about the possibility that parties would appeal almost every decision. Therefore, it was suggested that there should be some limit to the grounds of appeal.

27. It was suggested that the grounds of appeal should include errors in the interpretation or application of law. In that context, the need to clarify the meaning or the scope of the "law" in ISDS was highlighted, for example, whether it referred to investment treaties and notions in public international law or whether it also encompassed the domestic laws of the respondent State as well as any law applicable to the dispute. It was also suggested that the grounds could be further limited to certain issues of law (for example, serious errors of law, common standards found in investment treaties, like expropriation, fair and equitable standards and non-discrimination).

28. It was also suggested that the grounds of appeal should cover errors in the finding of any relevant facts. It was suggested that an error in the assessment of damages could be another ground of appeal. Similar to the notion of "law", the need

to clarify the meaning of “fact” was highlighted, while also noting that it was difficult to distinguish between issues of law and facts, particularly with regard to investment disputes where law and facts were often intertwined. For example, it was questioned whether an error in the understanding of the meaning of domestic law as well as other relevant rules would be an error of fact and the same for calculation of damages.

29. Some concerns were expressed about the grounds of appeal being so broad as this would mean a review of all issues *de novo*, which would have a negative impact on the cost and duration of the proceedings. Accordingly, views were expressed in favour of limiting the instances of appeal to errors of law and “manifest” errors of fact, thereby according some degree of deference to the findings of the first-tier tribunals. It was said that such standard of review would make an appellate mechanism relatively streamlined and faster, and the caseload would be easier to manage. Similar to other terms mentioned above, the need to have a clear understanding of the terms “*de novo* review” and “manifest error” was noted. It was suggested that the possibility of an appellate body conducting a *de novo* review of both law and facts to consider other types of errors in exceptional circumstances, such as where the awarded damages passed a certain threshold, should be explored.

30. Different views were expressed on how an appellate mechanism would interact with the existing annulment or setting aside procedures and suggestions were made to clarify that relationship. For example, in order to avoid the duplication of proceedings and further fragmentation, as well as to ensure efficiency, it was suggested that the grounds for annulment under the ICSID Convention and the grounds for refusal of recognition and enforcement of arbitral awards under Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958, “New York Convention”) should also be grounds for appeal.

(b) Decisions subject to appeal

(i) Decisions on merits and on procedural matters

31. The Working Group considered whether the scope of appeal should be limited to decisions on the merits, or whether it should extend to other decisions. It was suggested that decisions on both merits and procedural matters should be subject to appeal, with the caveat that appeal should be possible only when those decisions were final. In that context, the need to ensure both the right to appeal and the efficiency and manageability of an appellate mechanism was underlined. Concerns were expressed that if all final decisions were to be subject of an appeal, particularly decisions on procedural matters like on document production, it could have a negative impact on the cost and duration.

32. Views were expressed that certain procedural decisions, such as those on challenges of ISDS tribunal members did not warrant appeal, as it could overburden the appellate mechanism. It was said that such decisions on challenges were already subject to review in existing mechanisms, including by domestic courts, and therefore an appeal could be duplicative.

33. Doubts were expressed on whether decisions on jurisdiction should fall under the scope of the appellate mechanism. It was suggested that the question of what decisions would be subject to appeal should be considered in the wider context of the time frames for an appeal, and whether an appeal could be made while the proceedings were ongoing. In that context, views were expressed that it might be preferable that an appellate tribunal be presented with the full record of the case before rendering its decision, and therefore, an appeal should be made possible only after the final decision on the merits. Other views were expressed that it should be possible to appeal a decision on jurisdiction at an earlier stage of the proceedings, as that might save cost and time. It was also suggested that a shorter time frame could be provided for the parties to appeal a decision as well as for the appellate tribunal to render its decision on jurisdictional matters.

34. Divergent views were expressed on whether decisions on interim measures would be subject to appeal. A view was that such measures were often specific to a

case, temporary in nature, and could be reversed by the tribunal ordering them. It was suggested that they should not be the subject of appeal, particularly in light of the negative impact on the cost and duration of the proceedings.

35. A suggestion was made to provide for a screening/filtering mechanism which would determine decisions that might be subject to appeal and limit frivolous or unfounded appeals. Further means to deter frivolous or unfounded appeals were mentioned, including security for cost and cost allocation.

(ii) Decisions by first-tier bodies

36. The Working Group considered a range of bodies (i.e., arbitral tribunals, any standing multilateral investment court, regional investment courts, and international commercial courts), the decisions of which could be subject to appeal.

37. It was suggested that decisions made by ISDS tribunals handling disputes arising out of investment treaties should be subject to appeal. Divergent views were expressed on whether decisions by ISDS tribunals on disputes arising out of investment contracts or domestic investment laws should also be subject to appeal. It was suggested that if such disputes were included, they should be subject to different procedural rules.

38. Finally, with respect to the decisions made by domestic courts on issues of foreign investment law, reservations were expressed about such decisions being reviewed through an international appellate mechanism. Views expressed in favour of that possibility underlined the benefits of an open architecture, which would leave the question of consent to the respective State.

3. Effect of appeal

39. The Working Group also discussed a number of issues related to the effect of appeal including those outlined in document A/CN.9/WG.III/WP.185, paras. 24 to 33.

40. With regard to the powers of an appellate tribunal, it was generally felt that it should be able to affirm, reverse or modify the decision of the first-tier tribunal and to render a final decision based on the facts before it. Reference was also made to the possibility of the appellate tribunal annulling or setting aside the award (as provided for in existing mechanisms) and the need to avoid duplication.

41. Differing views were expressed with regard to the ability of the appellate tribunal to remand a case to the first-tier, an issue which was considered to be closely linked with the scope of review. It was suggested that the current ad hoc nature of first-tier tribunals as well as the negative impact that such a remand process could have on the overall duration and cost of the ISDS proceedings would need to be carefully analysed. The need to balance the increased cost and duration with due process and fair resolution through a remand mechanism was mentioned. Concerns were also expressed about a situation where an appellate tribunal would lack remand authority and it would not have sufficient information on facts to render a final award. Therefore, views were expressed that an appellate tribunal should have a broad remand authority. Yet, other views were that remand authority should be provided only in exceptional circumstances or under limited grounds, where the appellate tribunal would not be in a position to complete the legal analysis based on the facts available before it.

42. In relation to the question of remand authority, some questions were raised, for example, on how to re-establish the first-tier tribunal (if it had already been dissolved) and the additional costs which might be incurred, whether the award by the first-tier tribunal as revised would be final or subject to further appeal, whether a specific request for remand should come from one or all of the parties to the dispute, and how to address a situation where the appellate tribunal found procedural irregularities (for example, lack of independence), which would make it inappropriate to remand the case to the first-tier tribunal.

43. It was suggested that an appeal should temporarily suspend the effect of the first-tier decision (pending a decision by an appellate tribunal) and that such a decision should not be enforceable, possibly through a stay on enforcement, nor subject to a set-aside procedure. In that regard, a question was raised whether decisions by an appellate tribunal would be binding on the domestic courts faced with requests for enforcement. The need to avoid duplication of proceedings including with regard to the enforcement was highlighted, while the need to preserve the enforcement mechanism through domestic courts was also emphasized.

44. Different views were expressed on the interpretative effect a decision rendered by an appellate tribunal should have. Some doubts were expressed about establishing a system of precedent (doctrine of stare decisis) and it was said that a decision rendered by an appellate tribunal should bind only the disputing parties and in case of remand, the first-tier tribunal. Another view was that the appellate body decision should have a broader effect to ensure consistency, particularly in cases where the tribunals would be interpreting the same provisions of an investment treaty or similar text. It was further noted that the design and features of an appellate body as well as the nature of the first-tier tribunals would have an impact on the effect of the decision.

45. It was noted that decisions rendered through a permanent appellate mechanism, even though they might not be binding on other ad hoc first-tier tribunals, could have a persuasive influence on those tribunals when interpreting identical or similar treaty provisions. At the same time, it was noted that the interpretative impact that a decision of an appellate tribunal could have on treaties with identical or similar language (in particular, when the relevant State party was not a party to the appellate mechanism) would need to be further examined to take into account both how to manage the interpretative impact for future disputes and in light of existing interpretation of such provisions, among other implication. It was also noted that the creation of an appellate body would not address the concerns with respect to inconsistency in ISDS, as not all States would be parties to that body and disputes arising from bilateral investment treaties would continue to be addressed by different arbitration tribunals.

46. With regard to concerns expressed about possibly incorrect decisions rendered by an appellate tribunal (which might have a binding effect), it was noted that mechanisms could be envisaged which would make it possible for an appellate tribunal to rectify its previous decision in exceptional circumstances.

47. It was generally felt that States Parties to an investment treaty should be given the opportunity to express their views on treaty interpretation during the appellate procedure. It was suggested that appellate tribunals should be required to accord deference to any joint interpretation by treaty Parties or to treat it as binding when the treaty designate it as such. It was questioned whether the appellate body should take into account joint interpretations submitted by treaty parties after the first-tier tribunal had rendered its decision. It was further suggested that an appellate mechanism could provide a forum for relevant parties (including non-disputing Parties as well as any other affected or interested third parties) to be involved in the interpretation process, while the need to ensure the independence and impartiality of the appellate tribunal was also highlighted.

48. Diverging views were expressed on whether a decision by an appellate tribunal should be subject to confirmation or some review by the States Parties to the relevant investment treaty. In that context, reference was made to the review of interim panel reports, or adoption of the panel or Appellate Body Reports, in the WTO through reverse consensus.

49. It was noted that while an appellate mechanism could address some of the concerns identified by the Working Group, the effectiveness in addressing those concerns would largely depend on the design of such a mechanism. For example, how an appellate mechanism could alleviate or aggravate concerns regarding consistency, correctness, costs, duration, diversity and independence would depend on the precise features along with a number of trade-offs among those features.

50. Considering some of the limitations that an appellate mechanism possessed, it was suggested that the viability of other alternative solutions (for example, interim awards, non-disputing party submission, joint interpretation, scrutiny of award) to address the concerns that an appellate mechanism aimed to address could be further analysed along with an appellate mechanism.

51. During the deliberation, some empirical observations were shared. The first was that ISDS so far had only addressed a small number of treaties and many of them multiple times – about 400 investment treaties had provided the basis for the 1,126 known treaty-based ISDS cases, with 546 cases resulting in awards with interpretation of 190 treaties. The second observation was that approximately 60 ISDS awards were rendered annually, which could provide a foresight on the workload of an appellate mechanism.

Preparatory work on appellate mechanism

52. After discussion, the Working Group agreed to consider further an appellate mechanism in ISDS as one of its possible reform options. In order to develop the option further, the Working Group provided the following guidance to the Secretariat (see paras. 53–61 below) in conducting preparatory work on the nature, scope and effect of appeal. It was said that the preparatory work could aim at preparing draft provisions regarding those matters as well as providing information on any other identified questions. The Secretariat was requested to present the different aspects in a tabular form (as provided in document A/CN.9/WG.III/WP.166/Add.1) or list the questions to be addressed by the Working Group.

53. First, further development and elaboration of a number of the key terms would be needed (for example, “de novo” review and “manifest errors of fact”, see para. 29 above). The meanings of the phrases “errors of law” and “errors of fact” would also need to be clarified, including whether an error in the application of the law to the facts as well as whether and under what circumstances questions of domestic law should be treated as errors of law or of fact.

54. Second, further elaboration on how to ensure a manageable caseload and to avoid systematic appeals by disputing parties would be necessary. For that purpose, information could be sought on how existing bodies managed their caseload, whether there were any conditions imposed on appeals and existing mechanisms to deter frivolous appeals such as security for costs, cost allocation and early dismissal.

55. Third, further elaboration would be needed on the types of decisions that would be subject to appeal and the time period during which parties would be allowed to make such appeal.

56. Fourth, further elaboration would be needed on how an appellate mechanism might work outside the context of treaty-based ISDS, such as where the basis for jurisdiction were a foreign investment law or an investment contract.

57. Fifth, clarification would need to be sought on any system of binding precedent in an appellate mechanism and, in particular, how it could interact with ad hoc arbitration. More broadly, further elaboration would be required on the interaction between an appellate mechanism and existing ISDS mechanisms.

58. Sixth, further work would be done on the impact that a decision of an appellate tribunal could have on the interpretation of treaties with similar or identical language (in particular, when the relevant State party was not a party to the appellate mechanism) and how to minimize any unintended consequences.

59. Seventh, the possible remand authority of an appellate tribunal would need to be reviewed further, in particular, to ensure that remand, if allowed, would not unduly increase cost and duration. In addition, some guidance could be provided to appellate tribunals on when to exercise its remand authority.

60. Eighth, further consideration should be given to the possible participation in the appellate proceedings of non-disputing States that are not parties to the relevant investment treaty, including the conditions for such participation.

61. Lastly, the potential impact of the place of arbitration or appeal on the overall functioning of the appellate mechanism would need to be further analysed, including its compatibility with domestic set-aside procedures in non-ICSID cases.

B. Enforcement

62. The Working Group undertook a preliminary consideration of issues related to the enforcement of decisions rendered through a permanent appellate mechanism or a standing first-tier body (referred to in this section as “decisions rendered by a permanent body”). It was emphasized that enforcement was a key feature of any system of justice and essential to ensure its effectiveness. It was recalled that awards rendered by ISDS tribunals were generally enforceable through the New York Convention and the ICSID Convention, which provided a robust regime for enforcement. During the deliberations, it was generally acknowledged that the possible application of the existing enforcement mechanisms to decisions rendered by a permanent body would depend on how such a body would be set up, in particular the extent to which its decisions could qualify as arbitral awards.

63. Questions under consideration included: (i) how decisions rendered by a permanent body would become enforceable, in particular, whether the instrument establishing such a permanent body (referred to below as the “founding convention”) would include a specific enforcement regime; and (ii) if so, how decisions of a permanent body could be enforced in States that were not party to the founding convention (referred to in this section as “non-participating States”) as those States would not be bound by any enforcement regime provided therein.

1. Enforcement in participating States

64. It was suggested that if a permanent body were to be established, it would be preferable that its founding convention included an internal enforcement mechanism. It was indicated that the enforcement mechanism provided for in article 54 of the ICSID Convention, as well as language in recent bilateral and multilateral investment treaties could provide useful models. It was noted that provisions in such investment treaties addressed both the deemed applicability of the New York Convention and the ICSID Convention and the obligations of the disputing parties with respect to enforcement.

65. It was suggested that consideration should be given to potential conflicts between the internal enforcement mechanism in the founding convention and existing enforcement regimes, for example, the risk that a disputing party might seek enforcement of an ICSID award in a non-participating State while the appeal was pending or after such award was reversed. It was said that such situations could arise in States which implemented the ICSID Convention, and thus consented to treating ICSID awards as final judgments of their own domestic courts. It was pointed out that such matters would deserve in-depth analysis and research.

66. It was highlighted that if an internal enforcement mechanism were to be developed, attention should be given to the assets of a State that would be subject to enforcement as well as issues relating to State immunity. In that regard, reference was made to the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (which applied to the immunity of a State and its property from the jurisdiction of the courts of another State) and article 55 of the ICSID Convention.

67. It was, however, questioned whether an internal enforcement mechanism based on models such as the ICSID Convention and recent investment treaties should be followed. As an alternative, it was suggested that a model which preserved the role for domestic courts possibly based on the New York Convention would be preferable. It was said that such a model would avoid the situation where a domestic court would

be required to enforce decisions that were contrary to the public policy of the State where enforcement was sought.

68. In that context, it was suggested that if an appellate mechanism were to be introduced for the review of arbitral awards, that would most probably not change the nature of the whole process, as there already existed examples of arbitration regimes, whether under institutional arbitration rules or national laws, which provided for a review of arbitral awards. In such circumstances, it could be envisaged that the New York Convention would apply.

2. Enforcement in non-participating States

69. With respect to enforcement of decisions rendered by a permanent body in non-participating States, considerations focused on the extent to which the New York Convention and the ICSID Convention would have an impact.

(a) New York Convention

70. The possibility of relying on the New York Convention for the enforcement of decisions by a permanent body in non-participating States was considered. It was stated that the New York Convention provided sufficient flexibility to apply to decisions rendered by a permanent body. Article 1(2) of the New York Convention was mentioned, which referred to awards “made by permanent arbitral bodies to which the parties have submitted”. A question raised was whether a permanent body could qualify as a “permanent arbitral body” under that article. Reference was made to case law with respect to the enforcement in United States court of decisions rendered by the Iran-United States Claims Tribunal, although it was also noted that the United States was a party to the Iran-United States Claim Tribunal. Reference was also made to the information contained in the UNCITRAL Secretariat Guide on the New York Convention.

71. It was pointed out that domestic courts which interpreted and applied the New York Convention could render divergent decisions on whether the Convention applied to decisions rendered by a permanent body. On the other hand, it was said that the interpretation and application of the New York Convention was not a question of domestic law even though it might be interpreted by domestic courts – instead its interpretation was a question of public international law. It was said that the New York Convention did not contain a dispute settlement clause and therefore that the divergent interpretation and application could subsist for a long time.

72. In that regard, it was suggested that means should be sought to provide more certainty regarding the application of the New York Convention. A suggestion was made that a provision could be inserted in the founding convention, indicating the intention of the participating Parties that the New York Convention would be deemed to apply to decisions rendered by a permanent body. The effect that such a provision could have on non-participating States was questioned.

73. Another suggestion was that a recommendation on the interpretation of article 1(2) the New York Convention could be prepared (similar to the Recommendation regarding the interpretation of art. II, para. 2, and art. VII, para. 1, of the New York Convention prepared by UNCITRAL in 2006), which would indicate that the New York Convention applied to decisions rendered by the permanent body (for example, considering it to be a “permanent arbitral body” and its decisions to be “foreign arbitral awards”) to guide domestic courts faced with the enforcement.

74. It was questioned whether there was a need to address enforcement in non-participating States, based on the argument that most decisions by ISDS tribunals were voluntarily complied with. It was said that the current rate of compliance resulted from the efficiency of the enforcement regimes under the New York Convention and the ICSID Convention. In that context, it was questioned whether the implementation of the reform options being considered by the Working Group could lead to a similar or higher level of compliance.

75. It was pointed out that compliance by investors with decisions made by ISDS tribunals was a matter that deserved consideration because the compliance rate of investors with regard to cost awards was substantially lower than that of States. A suggestion was made that other mechanisms to ensure investor compliance could be considered, such as security for costs, while it was also noted that the use of such tool was limited under current practice.

76. It was generally felt that further analysis would be required including on instances where enforcement was sought against a State or an investor, where it was sought in a State other than the respondent State, and how successful those attempts were.

77. The view was also expressed that the non-enforceability of decisions in non-participating States was a risk that could be borne in the process of reform. A suggestion to alleviate that risk was to permit non-participating States to opt into the enforcement mechanism that would be established under the founding convention.

(b) ICSID Convention

78. The compatibility of an appellate mechanism with the ICSID Convention was discussed. It was noted that article 53 of the ICSID Convention provided that ICSID awards should “not be subject to any appeal or to any other remedy except those provided for in the Convention”. It was explained that, as the amendment of the Convention in accordance with article 66 would be difficult to implement, a possible avenue to explore would be an inter se modification of the ICSID Convention among the States establishing an appellate mechanism. It was further explained that such modification could be implemented following the procedure of article 41 of the Vienna Convention on the Law of Treaties (VCLT), whereby contracting parties might modify a treaty “as between themselves alone”.

79. However, doubts were expressed whether article 41 of the VCLT could provide a basis for inter se modification of the ICSID Convention, given the conditions enumerated therein. It was suggested that that matter deserved further research by the Secretariat in coordination with the Secretariat of ICSID.

(c) Other questions

80. During the deliberations, various points were raised, including:

- The impact that the law applicable at the seat of a permanent body would have on the enforcement;
- The interaction with arbitration laws based on the UNCITRAL Model Law on International Commercial Arbitration, which provided that “recourse to a court against an arbitral award may be made only by an application for setting aside (...)”;
- Whether participating States would be able to waive the right of review under article V of the New York Convention and the implication such a waiver could have on non-participating States;
- Whether and to what extent to maintain the role for domestic courts in scrutinizing arbitral awards that were contrary to mandatory rules of law and essential public policies;
- How to address enforcement if the appellate mechanism were set up ad hoc and not as a permanent body;
- The possible role of States in facilitating enforcement, such as through joint commissions or committees;
- The effect of a stay to enforcement; and
- Whether domestic laws on the enforcement of foreign judgments or other international mechanisms, such as that provided in the 2019 Hague

Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters, could provide means of enforcement.

Preparatory work on enforcement

81. After discussion, the Working Group agreed to consider further the question of enforcement of decisions by a permanent body. The Secretariat was requested to conduct preparatory work on that topic, which would aim to provide an in-depth analysis of the questions raised during the deliberations and information on provisions in existing international instruments and on how such provisions could be adapted in the context of a permanent body.

C. Financing of a permanent body

82. The Working Group had a preliminary discussion on the financing of a permanent body, which could be tasked with handling appeals or composed of two-tiers to hear disputes.

83. The following were identified as the key budget components of such a permanent body:

- The remuneration of the adjudicators, which would depend on the number of adjudicators, their employment status (fully-employed, part-time) as well as the basis for their salaries, privileges and immunities including tax benefits and pension schemes;
- Cost related to the administration of the case;
- Cost of administrative staff supporting the tribunals, which would vary depending on the number of staff, their employment status and their salary structure as well as the services to be provided;
- Overhead cost of the permanent body, for example, the cost of premises, facilities, maintenance, security, communication and others.

84. It was suggested that a distinction could be made between the financing needed for the general operation of the permanent body and the costs related to administering ISDS cases, with the former allocated to participating States and the latter to disputing parties.

85. As to the sources of financing, a number of views were expressed.

86. One view was that a permanent body could be financed by States parties to the founding convention, which would ensure a more sustainable operation of the body. As to how those States would share the burden, different models could be sought based on examples of other international bodies. It was suggested that in assessing the contributions, the level of economic development and the number of claims brought against the respective States could be taken into account. It was, however, noted that such a contribution structure could have the negative consequence of certain States having more influence in the selection of adjudicators as well as the operation of the permanent body and thus it was suggested that disputing parties should be responsible for the financing with the remaining costs to be equally borne by the participating States. It was suggested to further consider the means to safeguard the independence of the permanent body and to ensure that there would be no discrimination based on contributions provided by States.

87. It was also noted that the number of participating States might change over time, which would also need to be taken into consideration.

88. While the financing through voluntary contributions was mentioned, it was also stated that such a mechanism would be volatile and might not ensure the independence of a permanent body as it could be subject to undue influence by the donors.

89. Another view was that the current practice of the disputing parties paying the costs of ISDS should be preserved. It was stated that that would better reflect the principle of equitability as those using the permanent body would be responsible for its expenses. It was suggested that a user-pay system in that case would ensure accountability and could deter systematic appeals as well as frivolous claims. It was also suggested that a user-pay system would allow for more scalability and flexibility in the operation of a permanent body as caseload increased or decreased. It was further suggested that a user-pay system should be designed so as to ensure that the disputing parties would not be directly remunerating the adjudicators and that it would not give that perception.

90. While the principle of equitability was highlighted, it was suggested that consideration should be given to small- and medium-sized enterprises as well as developing and least developed States when calculating the costs. Also noting that the legal fees of the disputing parties constituted a substantive portion of the cost of ISDS, it was suggested that means to reduce such fees could be considered.

91. Yet another view was that the sources of financing should be mixed based on contributions from both participating States and disputing parties. However, it was noted that that could be burdensome on respondent States, as they would be contributing as a participating State and as a disputing party. It was suggested that different formulas could be developed with regard to such a hybrid financing mechanism.

92. As a general point, it was said that in case of the establishment of a permanent body, it should not lead to unjustifiable increase in burden of developing States in comparison with the existing system.

93. In addition to the above, it was said that the following aspects should be considered:

- The quality and reliability of services rendered;
- The long-term sustainability;
- Whether the permanent body would be established as an intergovernmental body or through existing institutions;
- The transitional financing measures until the standing mechanism could operate in a sustainable manner;
- Contingency plans to address the possible lack of funds, for example, when the participating States did not pay their dues; and
- The flexibility in the budget structure to reflect the caseload including the possible accumulation of cases.

Preparatory work on financing of a permanent body

94. After discussion, it was agreed that exploratory work would be required on the financing aspects of a permanent body. The Secretariat was requested to continue to analyse and develop the options further taking into account the views expressed above. It was noted that such work could include an examination of hybrid models for financing, an examination of assessed contribution schemes for participating States which would also address the concerns expressed about undue influence by States with larger contributions, and a preliminary analysis on the potential budget of a permanent body based on comparable international judicial bodies.

D. Selection and appointment of ISDS tribunal members

95. The Working Group undertook a preliminary consideration of the selection and appointment of ISDS tribunal members on the basis of document [A/CN.9/WG.III/WP.169](#).

1. Key characteristics

(a) Qualifications and requirements

96. The Working Group considered the qualifications and requirements that ought to be met by individuals serving as ISDS tribunal members. They included certain competences, knowledge of the subject matter, independence and impartiality, accountability and integrity.

97. Regarding competence, it was generally felt that ISDS tribunal members should be cognizant of public international law, international trade and investment law. It was said that consideration could be given to expertise in private international law. It was further suggested that they should have an understanding of the different policies underlying investment, of issues of sustainable development, of how to handle ISDS cases and of how governments operated. In addition, it was mentioned that specific knowledge might be required with regard to the dispute at hand, for example, industry-specific knowledge, knowledge of the relevant domestic legal system and calculation of damages.

98. However, caution was expressed that if the qualifications were too many or too strict, it could reduce the pool of qualified individuals, which would run against the aim of achieving diversity.

99. It was further said that ISDS tribunal members should be neutral, independent and impartial. In addition, it was stated that they should possess high moral character and be accountable.

100. It was questioned whether the nationality or place of residence should have any impact on whether a person could serve as an ISDS tribunal member in a case involving that State, although it was noted that nationality could be important for legitimacy and accountability.

(b) Ensuring diversity

101. It was reiterated that geographical, gender and linguistic diversity as well as equitable representation of the different legal systems and cultures would be of essence in the ISDS system. It was highlighted that achieving diversity would enhance the quality of the ISDS process, as different perspectives, especially from different cultures and different levels of economic development could ensure a more balanced decision making. Diversity in age was also mentioned, which would allow younger professionals to be introduced to the ISDS field and thereby enlarge the pool of potential candidates. While it was said that specific measures would need to be taken to achieve adequate gender diversity, doubts were also expressed. It was also pointed out that achieving diversity need not be a goal in itself as the ultimate goal of ISDS would be a fair and efficient resolution of the dispute at hand.

2. Possible reform options

102. The Working Group considered the reform options in relation to the selection and appointment of ISDS tribunal members, which included the establishment of a roster of qualified candidates and the setting up of a permanent body composed of full-time adjudicators.

103. Views were expressed in support of the current methods of selection and appointment of ISDS tribunal members based on party appointment. It was said that both claimant investors and respondent States enjoyed broad autonomy in the selection and appointment of arbitrators under the current ISDS regime, which should be preserved in the context of other reforms under consideration, such as a code of conduct. It was said that such a mechanism whereby disputing parties had a say in the constitution of the tribunal brought confidence in the current ISDS system, particularly to the investors but also to States regarding their accountability to their policy stakeholders.

104. It was, however, suggested that there was a need to revisit the party-appointment mechanism in ISDS and to limit the involvement of the disputing parties, as party autonomy need not be a key component of ISDS. In support, it was said that party appointment was the main reason leading to concerns about the lack or apparent lack of independence and impartiality of decision makers in ISDS. It was further suggested that reforms would need to address all the concerns identified by the Working Group in a holistic manner.

(a) Establishment of a roster

105. Suggestions were made to regulate the method of selecting and appointing arbitrators, while preserving party autonomy, by establishing a list or roster of arbitrators. Further aspects to take into account included establishing more transparent procedures as limited information about selection and appointment methods were available, in particular where an appointing authority was involved.

106. Various models for establishing a roster were suggested, including a pre-established list of arbitrators who fulfilled the set criteria. It was noted that such a list could be open (and thus be indicative) or closed (thus restricting the choice of the disputing parties).

107. It was mentioned that rosters of pre-selected arbitrators were found in investment treaties. Therefore, it was suggested that reforms could consist in determining the criteria to be used by treaty Parties in establishing the roster.

108. It was suggested that in order to preserve the balance of the current system, both States and investors should be involved in the establishment of a roster, while another view was that only States should be involved in the establishment of a roster. Other selection and appointment mechanisms were also highlighted.

109. In line with the discussions above on qualifications of ISDS tribunal members, it was said that a roster would not need to be extensive but should list names of established arbitrators specialized in ISDS while also including new candidates to assist them in their appointment. A mechanism for the renewal of arbitrators on such a roster was considered necessary to ensure flexibility and to address the concern of lack of diversity. It was suggested that there could be a limited duration for a person to be placed on a roster, and possibly a period after which that person would be de-listed.

110. It was suggested that the administration of a roster should include a procedure to remove an arbitrator. Such removal procedure, however, would require sophisticated institutional mechanisms for evaluating and assessing the conduct of that arbitrator. In that regard, it was suggested that further study could be carried out, including on the possible role of existing arbitral institutions.

111. In that context, it was underlined that the conditions applicable to the management of the roster would deserve careful consideration. It was further said that the extent to which that proposed reform option could achieve its purpose, especially in a larger scale or in a multilateral context, depended largely on the role of the authority responsible for the roster.

112. It was suggested that arbitral institutions active in the field of ISDS already managed rosters of arbitrators and could therefore assist in the establishment of a roster and be more involved in providing assistance to the disputing parties in their selection and appointment of tribunal members. It was said that that would entail ensuring the independence and impartiality of such institutions, as well as more transparency in their role.

113. Comments were made on whether a roster could address some of the identified concerns. It was pointed out that if a roster only provided a directory of individuals, it would have minimal impact on improving the current appointment mechanism. It was suggested that other reform options (for example, a code of conduct) would also need to be pursued to address concerns on repeat appointments, conflict of interest,

and the practice of double hatting (individuals switching roles as arbitrator, counsel and expert in different ISDS proceedings). In addition, it was said that the lack of diversity could not be adequately addressed by establishing a roster, as a list of diverse candidates would not necessarily result in greater diversity in the tribunal members. In that context, the need for training opportunities for potential arbitrators as well as other technical assistance activities was highlighted.

(b) A permanent body composed of full-time adjudicators

114. The Working Group also had a preliminary discussion on the selection and appointment of adjudicators in a permanent body.

115. On how to compose a permanent body, a number of questions were raised, including whether all or some participating States would be represented in the body. It was suggested that the full representation might be difficult to achieve, also noting the cost implications. It was also suggested that the number of the adjudicators might need to evolve over time, due to an increasing number of participating States and increased caseload. It was stated that broad geographical representation as well as a balance of representation between developed, developing and least developed countries should be sought.

116. With regard to the possible ways of nominating candidates, a number of options were presented including nominations by participating States, by an independent entity established within the permanent body and by interested individuals themselves.

117. With regard to nominations by participating States, it was suggested that States should be able to nominate more than one candidate, which need not necessarily be its national. Differing views were expressed on whether the nomination and eventually the selection of the adjudicators by States would lead to the adjudicators being biased to favour State interests.

118. With regard to the selection process, a number of options were presented, including an election involving the participating States (through a vote or by consensus) or selection by a committee, possibly under the auspices of a body within the United Nations system. Lists established by such committee could then be endorsed by States. It was also suggested that the screening process could be multi-layered. Calls for transparency and fairness in the process were reiterated.

119. With regard to an election which would involve participating States, it was said that States should be able to vote for more than one candidate, which could ensure some balance and diversity. It was also said that elections through votes were favoured over election by consensus, which could be used to block the selection process. However, it was pointed out that elections involving participating States might be unduly influenced by other factors in international politics and that the selection process should be designed to be immune from such factors.

120. It was further noted that the selection process could involve a screening stage, during which a screening or advisory panel would review the candidates to ascertain that they fulfilled the set requirements (such as professional qualifications, expertise or language). It was stated that such screening by neutral independent bodies could contribute to a rigorous and transparent selection. However, questions were raised about how such bodies would be composed without being unduly influenced by participating States.

121. It was further noted that the selection process could involve a consultation stage whereby certain stakeholders could take part in the selection process (for example, representatives of investors). It was said that consultations might extend to other stakeholders, who had an interest in the interpretation and application of investment treaties and the outcome of the dispute (for example, professional associations in the field of international law and civil society). It was said that such consultations could enhance transparency in the selection process and endow a broader acceptance of the dispute mechanism and thus foster its ultimate credibility and legitimacy. However,

doubts were expressed on how the views of those stakeholders could be properly captured in the consultation process. Therefore, it was suggested that other means to engage with stakeholders could be sought.

122. It was also noted that the nomination and the selection process as well as the criteria to be applied could differ for members of the first-tier and the second-tier. The role to be played by the secretariat of the permanent body in the nomination and selection process was also questioned.

123. The qualification and requirements mentioned above (see paras. 96–100 above) would generally apply to adjudicators of a permanent body. As to the duration of their terms and the possibility of renewal, a number of options were mentioned including the possibility of longer terms on a non-renewable basis, which could ensure that the members would not be affected by undue influence. The need to ensure financial security was noted. It was suggested that the adjudicators should be subject to limitations on other professional activities so as to ensure their independence and integrity.

124. A number of questions were raised on how to assign a case to members of a permanent body, for example, the authority responsible for assigning the case, the method of assigning the case and any criteria to be applied.

125. On the authority for assigning the case, it was suggested that the president of the permanent body could undertake that role based on established criteria. While the possible involvement of participating States or disputing parties in the process was mentioned, it was said that there was a need to preserve the independence and neutrality of the assignment process so that it would not be influenced by any political consideration. It was also stated that there should be clear, pre-defined methods for assigning cases. The possibility of assigning cases on a random basis was mentioned.

126. Some questions were raised on the criteria to be applied in assigning the cases. It was suggested that the assignment should consider the specificities of the case, including whether a developing State was involved and the need for the tribunal to consider a number of other aspects (for example, environmental and social aspects or investment promotion). The need to assign the most appropriate member to handle the case was mentioned. With regard to a case where the assigned member might not have the specific expertise to handle some of the issues (for example, calculation of damages), the possibility of engaging with experts was mentioned. Questions were raised on how the assignment process could ensure diversity of the adjudicators.

127. It was further noted that there would be a need to manage the caseload of the different members of the permanent body so as to ensure balance of work and the rotation policy was mentioned. It was also mentioned that the assignment process would need to consider the remaining term of each of the adjudicators. It was also suggested that a cooling-off period should be introduced to limit the activities that the adjudicator could take part in after his/her term expired, which would ensure further neutrality.

128. It was stated that rules on challenges should be clearly set out and it was suggested that decisions on challenges should not be left to the assigned adjudicator. The possible role of the presiding adjudicator in those circumstances and more broadly in the assignment process was questioned. In that context, the need for a stringent code of conduct and possible sanctions for non-compliance was highlighted.

129. While it was suggested that a permanent body could alleviate concerns about “repeat appointments”, it was also noted that if the number of the members of a permanent body was limited, repeat appointments would be apparent.

130. In the context of the discussions, it was noted that the following aspects would also need to be given consideration:

- The location of the permanent body;

- Whether it would be hosted within an existing organization (possibly a body within the United Nations) or as a separate body;
- The need to put in place a mechanism to rectify any problems that could arise after the body was set up;
- The need to ensure sustainability and equitability;
- Means to ensure diversity in the composition of the secretariat; and
- The possible role of the permanent body in handling State-to-State disputes.

Preparatory work on selection and appointment of ISDS tribunal members

131. After discussion, it was agreed that further exploratory work would be required on the selection and appointment of ISDS tribunal members.

132. With respect to the qualifications and requirements of ISDS tribunal members, the Secretariat was requested to prepare options covering the different aspects identified during the deliberations, including the intended or any unintended consequences those qualifications and requirements could have either individually or collectively on the concerns identified by the Working Group, for example, on ensuring diversity. The Secretariat was further requested to present different options for incorporating those qualifications and requirements into investment treaties or any other relevant instrument.

133. With regard to the selection and appointment of ISDS tribunal members, the Secretariat was requested to further analyse the different mechanisms considered by the Working Group and to develop them for future consideration, including how those mechanisms, either individually or in combination, could be adapted and implemented in light of the wide range of reform options. It was stated that the specific features would largely depend on the broader design of how ISDS would be conducted, including whether the ad hoc nature would be preserved or whether a permanent structure would be sought.

V. Other business

134. At the end of the session, the Working Group was informed of the preparatory work undertaken by the Secretariat on the reform options to be considered at its next session, scheduled to be held in New York from 30 March to 3 April 2020.

135. The Working Group was also informed of the follow-up work being undertaken by the Secretariat on the reform options considered in Vienna last fall. Regarding the establishment of an advisory centre, it was noted that the Secretariat and the Academic Forum would organise the first webinar on 21 April 2020. States and organizations invited to the Working Group were invited to participate in the webinar, details of which would be available on the UNCITRAL website. It was further noted that a questionnaire would be circulated to States and to international organizations to collect information on existing capacity building activities in the field of ISDS. Regarding a code of conduct, it was noted that the Secretariat and the ICSID Secretariat were jointly preparing a draft code for consideration by the Working Group. Regarding third-party funding, it was noted that Secretariat was continuing to conduct research on the topic and would be preparing a draft text on its possible regulation. In addition to those topics, it was noted that the Secretariat was cooperating with ICCA and the Academic Forum to conduct further studies on damages and related issues. The Working Group was informed of a number of events in which the Secretariat took part to provide an update on the current progress being made by the Working Group.

136. The Working Group welcomed the proposal from the government of the People's Republic of China to host an inter-sessional meeting in Hong Kong Special Administrative Region, China during the first week of June 2020. It was noted that one of the proposed topics for discussion at the intersessional meeting would be

investment mediation. The Secretariat was requested to work closely with the Government of China and other governments expressing an interest in holding inter-sessional meetings and to provide an update at its next session in New York, based on which the Working Group could allocate topics that it wished to discuss further through those meetings. The Working Group also took note of the plans to hold a joint workshop with OECD on the topic of reflective loss and shareholder claims, tentatively scheduled for early July. Lastly, it was mentioned that the Secretariat was planning to hold a roundtable dialogue in cooperation with the ICC during the first half of 2020 to obtain the views of the investors with regard to the reform options being discussed by the Working Group.

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