




---

**United Nations Commission on  
 International Trade Law**  
**Working Group III (Investor-State  
 Dispute Settlement Reform)**  
**Thirty-eighth session (*resumed*)**  
 Vienna, 20-24 January 2020

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

### Appellate and multilateral court mechanisms

#### Note by the Secretariat

#### Contents

	<i>Page</i>
I. Introduction .....	2
II. Appellate and multilateral court mechanisms .....	3
A. Appellate mechanism	3
1. Proposals in Submissions .....	3
2. Questions for consideration .....	3
3. Options for establishing an appellate mechanism	8
B. Standing multilateral investment court .....	11
1. Proposal and questions in Submissions	11
2. Questions for consideration .....	13
3. Linkage with other reform options .....	15

---

## I. Introduction

1. At its thirty-fourth to thirty-seventh sessions, the Working Group undertook work on the possible reform of ISDS, based on the mandate given to it by the Commission at its fiftieth session, in 2017.<sup>1</sup> At those sessions, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.
2. At its thirty-eighth session, the Working Group agreed on a project schedule (A/CN.9/1004, paras. 16-27 and 104).<sup>2</sup>
3. With regards to the current session, the Working Group agreed that it would consider the following topics: (i) stand-alone review or appellate mechanism; (ii) standing multilateral investment court; and (iii) selection and appointment of arbitrators and adjudicators (A/CN.9/1004, paras. 25 and 27).
4. Accordingly, this Note aims at outlining the key issues relevant to an appellate mechanism and a standing multilateral investment court. The reform options regarding the selection and appointment of ISDS tribunal members, which should be considered in conjunction with the current Note, are contained in document A/CN.9/WG.III/WP.169.
5. This Note was prepared with reference to a broad range of published information on the topic,<sup>3</sup> and does not seek to express a view on the possible reform options, which is a matter for the Working Group to consider.

## II. Appellate and multilateral court mechanisms

### A. Appellate mechanism

6. The suggestion for the establishment of an appellate mechanism is contained in various proposals submitted by Governments in preparation for the deliberations on the third phase of the mandate of the Working Group (“Submissions”).<sup>4</sup> The main

---

<sup>1</sup> *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 263 and 264. For deliberations and decisions at the thirty-fourth to thirty-seventh sessions, see A/CN.9/930/Rev.1 and its Addendum, A/CN.9/935, A/CN.9/964, and A/CN.9/970, respectively.

<sup>2</sup> For deliberations and decisions at the thirty-eighth session, see A/CN.9/1004; document A/CN.9/WG.III/WP.166 provides an overview of reform options.

<sup>3</sup> This includes: the CIDS Research Paper, *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap*, by Gabrielle Kaufmann-Kohler and Michele Potestà, available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids\\_research\\_paper\\_mauritius.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_research_paper_mauritius.pdf); the OECD Working Papers on International Investment No 2012/3, OECD Investment Division 2012, *Investor-state dispute settlement: A scoping paper for the investment policy community*, by D. Gaukrodger et al.; the Policy Options Paper, E15 Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 2016, *The Evolving International Investment Law and Policy Regime: Ways Forward*, by K. Sauvant; *Reshaping the Investor-State Dispute Settlement System, Journeys for the 21<sup>st</sup> Century*, edited by Jean E. Kalicki and Anna Joubin-Bret, Nijhoff International Investment Law Series, Volume: 4; *Appeals Mechanisms in International Investment Disputes*, edited by Karl Sauvant, Oxford University Press; *Appeal mechanism for ISDS Awards, Interaction with New York and ICSID Conventions, Conference on Mapping the Way Forward for the Reform of ISDS*, Albert Jan van den Berg; *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, Options regarding the Institutionalization of Investor-State Dispute Settlement*, and *Standalone Appeal Mechanism: Multilateral Investment Appeals Mechanisms* by Marc Bungenberg and August Reinisch, European Yearbook of International Economic Law; see also bibliographic references published by the Academic Forum, available under “Additional resources” at [https://uncitral.un.org/en/library/online\\_resources/investor-state\\_dispute](https://uncitral.un.org/en/library/online_resources/investor-state_dispute) and <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/>.

<sup>4</sup> A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States (Appellate body); A/CN.9/WG.III/WP.161, Submission from the Government of Morocco (Prior scrutiny of the award and standing appellate mechanism); A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan (Treaty-specific appellate review mechanism); A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador (Standing review and appellate mechanisms); A/CN.9/WG.III/WP.177, Submission from the Government of China (Stand-alone appellate mechanism); the reform option is also discussed in A/CN.9/WG.III/WP.176, Submission from the Government of South Africa and A/CN.9/WG.III/WP.180, Submission from the Government of Bahrain.

---

questions for consideration regarding the establishment of such a mechanism are outlined below, together with the possible forms that this reform option could take.

## **1. Proposals in Submissions**

7. The Submissions which propose the creation of an appellate mechanism highlight that its main functions would be to address concerns identified in the first two phases of the mandate of the Working Group. In particular, it is pointed out that this reform option aims at ensuring procedural and substantive correctness of decisions and at rectifying errors in decisions by ISDS tribunals.<sup>5</sup> In this regard, it is noted in a Submission that an appellate mechanism would make it possible for decisions by ISDS tribunals to be reviewed and corrected, thereby providing parties with a coherent and fair decision.<sup>6</sup> It is further indicated that, given the increased number of ISDS cases, an appellate mechanism would serve to improve consistency, coherence and predictability in ISDS decisions. The objective would be that, over time, the dispute settlement process would be more accountable, and a body of legally authoritative general principles and interpretations could be developed so as to increase the coherence and predictability of the investment regime.<sup>7</sup>

8. The creation of an appellate mechanism is also referred to in a Submission as a means to enhance the legitimacy of ISDS and as an important factor in promoting application of the rule of law to the settlement of disputes between investors and States.<sup>8</sup> This would bring the ISDS regime more in line with adjudicatory mechanisms which usually provide for judicial review of first instance decisions in order to control judicial errors and ensure consistency and coherence in adjudication.

9. The impact of an appellate mechanism on the costs and the length of proceedings is also highlighted.<sup>9</sup> This aspect, as well as the extent to which an appeal would duplicate the first instance process itself, would need to be taken into account in efforts to design an appellate mechanism.

## **2. Questions for consideration**

### *a. Nature and scope of appeal*

10. The questions of grounds of appeal and standard of review are central to the setting-up of an appellate mechanism.

#### *(i) Scope of review*

11. A question for consideration is whether (i) an error in the interpretation of the law or in its application should be a ground for appeal and, if so, whether review for errors as to law should be limited to certain questions of law; and (ii) an error as to finding of facts could also be a ground for appeal.

12. The Working Group may wish to note that if only issues of law would be subject to appeal, the appellate procedure would be relatively streamlined and faster, and the caseload management would be easier.<sup>10</sup> Indeed, a review of issues of law and fact would be more time consuming as it would require the parties to present their case again. However, it may be at times difficult to differentiate issues of law and fact as they might be closely intertwined.

13. By way of illustration, an appeal at the Appellate Body of the World Trade Organization (WTO AB) is limited to “issues of law covered in the panel report and

---

<sup>5</sup> [A/CN.9/WG.III/WP.161](#), Submission from the Government of Morocco; [A/CN.9/WG.III/WP.175](#), Submission from the Government of Ecuador; [A/CN.9/WG.III/WP.177](#), Submission from the Government of China.

<sup>6</sup> See [A/CN.9/WG.III/WP.175](#), Submission from the Government of Ecuador.

<sup>7</sup> [A/CN.9/WG.III/WP.161](#), Submission from the Government of Morocco; [A/CN.9/WG.III/WP.175](#), Submission from the Government of Ecuador; [A/CN.9/WG.III/WP.177](#), Submission from the Government of China.

<sup>8</sup> [A/CN.9/WG.III/WP.177](#), Submission from the Government of China.

<sup>9</sup> See [A/CN.9/WG.III/WP.175](#), Submission from the Government of Ecuador; see also [A/CN.9/WG.III/WP.180](#), Submission from the Government of Bahrain, commenting on this reform option.

<sup>10</sup> See [A/CN.9/WG.III/WP.175](#), Submission from the Government of Ecuador, which suggests that appeals should be limited to errors in the application of the law.

---

legal interpretations developed by the panel.”<sup>11</sup> Similarly, under the Southern Common Market (Mercosur) regime, only matters of law can be subject to an appeal.<sup>12</sup> An appeal at the Court of Justice of the European Union is limited to “points of law”.<sup>13</sup>

14. By contrast, recently concluded investment treaties that contain an appellate mechanism provide that the grounds for appeal extend to factual issues (including the appreciation of relevant domestic law), and to the grounds of Article 52 (1) (a)-(e) of the ICSID Convention.<sup>14</sup>

15. An ICSID award is not subject to any appeal but might be annulled on limited grounds.<sup>15</sup> In this regard, in 2004, a proposal was made for the establishment of an ICSID Appeals Facility (referred to as the “2004 ICSID Appeals Facility proposal”), which would have allowed an award to be challenged on the grounds of errors of law, errors of fact and any of the five grounds for annulment set out in Article 52 of the ICSID Convention.<sup>16</sup>

16. At various international courts and tribunals in the field of criminal law, a decision may be appealed on the grounds of errors of law and/or fact.<sup>17</sup> Procedural errors are an additional ground for appeal at the International Criminal Court and the Special Court for Sierra Leone.<sup>18</sup> The appeal panel at the Court of Arbitration for Sport has “full power to review the facts and the law”.<sup>19</sup>

17. At other international bodies such as the International Court of Justice, the International Tribunal for the Law of the Sea and several regional courts, judgments cannot be appealed but may be subject to revision upon the discovery of a new fact.<sup>20</sup> Revision is different from appeal, not only because of the more limited ground for which such type of review can be sought, but because it is performed by the same body that issued the original decision. By contrast, an appeal normally assumes that the appellate function is performed by a different body that does not include any of the adjudicators in the first instance.

18. At the domestic level, two main systems can be differentiated. In civil law countries, appeal is frequently *de novo* with respect to issues of fact and law. In common law countries, appeal is usually limited to a *de novo* review of issues of law, giving high deference to factual determinations made in the first instance. In both legal systems, recourse to a supreme court is usually limited to questions of law and manifest error in giving reasons.

(ii) *Standard of review*

19. A question for consideration is whether an appellate mechanism should provide for a review of issues *de novo* or whether it should accord some degree of deference to the findings of the first adjudicator. Formulations limiting the appeal to “clear”,

---

<sup>11</sup> Article 17 (6) of Annex 2 of the WTO Agreement “Understanding on rules and procedures governing the settlement of disputes”.

<sup>12</sup> Article 17 (2) of the Protocolo de Olivos para la Solución de Controversias en el MERCOSUR.

<sup>13</sup> Article 58 of the Statute of the Court of Justice of the European Union.

<sup>14</sup> See, for instance, Article 3.19 of the European Union-Singapore Investment Protection Agreement (signed on 19 October 2018); Article 3.54 of the European Union-Viet Nam Investment Protection Agreement (signed on 30 June 2019); Article 8.28 of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (provisionally in force since 21 September 2017).

<sup>15</sup> Article 52(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States.

<sup>16</sup> Discussion Paper on Possible Improvement of the Framework for ICSID Arbitration, prepared by the ICSID Secretariat (22 October 2004), “Annex - Possible Features of an ICSID Appeals Facility”, para.7.

<sup>17</sup> Article 81 (1) of the Rome Statute of the International Criminal Court; Article 25 (1) of the Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 26 (1) of the Statute of the Special Tribunal for Lebanon; Article 20 of the Statute of the Special Court for Sierra Leone.

<sup>18</sup> Article 81 (1) of the Rome Statute and Article 20 of the Statute of the Special Court for Sierra Leone.

<sup>19</sup> Rule 57 of the Procedural Rules of the Court of Arbitration for Sport.

<sup>20</sup> Articles 59-61 of the Statute of the International Court of Justice; Article 127 of the Rules of the International Tribunal for the Law of the Sea; Rule 80 of the Rules of the European Court of Human Rights; Article 48 (1) of the Protocol on the Statute of the African Court of Justice and Human Rights; Article 26 of Treaty Creating the Court of Justice of the Cartagena Agreement.

---

“serious” or “manifest” errors of law/assessment of the facts, depending on the grounds for appeal, would thus limit the scope of review, and define the “balance of power” between the first and second tier. In a Submission, it is suggested that an appellate mechanism should be tasked to review, in addition to errors of law, manifest errors in the appreciation of the facts, but that it should not undertake a *de novo* review of the facts (see below, para. 53).<sup>21</sup>

20. By way of illustration, the standard for the review of legal issues in international appellate mechanisms is rarely limited.<sup>22</sup> It may be noted, however, that in the 2004 ICSID Appeals Facility proposal, a limitation of the legal review to “a clear error of law” was suggested,<sup>23</sup> and appellate mechanisms in the area of criminal law frequently limit the review of legal issues to those “invalidating the decision”.<sup>24</sup>

21. The standard of the review of factual issues is usually limited, for instance, to “manifest errors” in several recent investment treaties,<sup>25</sup> or to “serious errors of fact”, a ground to “be narrowly defined to preserve appropriate deference to the findings of fact of the arbitral tribunal” as suggested in the 2004 ICSID Appeals Facility proposal.<sup>26</sup> The review of factual issues by appellate mechanisms of several international criminal courts is limited to errors of fact which have “occasioned a miscarriage of justice”.<sup>27</sup>

*(iii) Appealable decisions*

22. The Working Group may wish to consider the scope of appeal, such as whether it should be limited to first instance decisions on the merits by ISDS tribunals, or also apply to other decisions, such as decisions on challenges and interim measures.

23. To avoid creating a burdensome and duplicative regime, and maximize the use of an appeal, the Working Group may wish to consider whether an appellate mechanism could be tasked to review awards and decisions made by various bodies, i.e., arbitral tribunals, any standing multilateral investment court, regional investment courts, and international commercial courts. In addition, it may be considered whether decisions by domestic courts could be subject to the appellate mechanism in situations where there would be a violation of claimant’s rights (for instance, a denial of justice, which is well recognized under customary international law) (see below, para. 48).

***b. Effect of appeal***

*(i) Relation between first and second tier*

24. Questions regarding the relation between the first instance and the appellate mechanism would require careful consideration. These questions include whether or to which extent the second tier would be provided the ability to remand the first instance decision with instructions, or whether it would be able to affirm, reverse, modify the decision and render a final decision on a matter without referring it back to the first instance tribunal. The possibility to remand a case back to the original tribunal may be considered in light of various elements, including the impact on the

---

<sup>21</sup> A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States.

<sup>22</sup> See, for example, Article 17 (6) of Annex 2 of the WTO Agreement “Understanding on rules and procedures governing the settlement of disputes”; Article 17 (2) Protocolo de Olivos para la Solución de Controversias en el MERCOSUR; Article 58 Statute of the Court of Justice of the European Union.

<sup>23</sup> Discussion Paper on Possible Improvement of the Framework for ICSID Arbitration, prepared by the ICSID Secretariat (22 October 2004), “Annex - Possible Features of an ICSID Appeals Facility”, para.7.

<sup>24</sup> Article 20 of the Statute of the Special Court for Sierra Leone; Article 26 (1)(a) Statute of the Special Tribunal for Lebanon.

<sup>25</sup> Article 3.19 of the European Union-Singapore Investment Protection Agreement (signed on 19 October 2018); Article 3.54 of the European Union-Viet Nam Investment Protection Agreement (signed on 30 June 2019); Article 8.28 of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (provisionally in force since 21 September 2017).

<sup>26</sup> Discussion Paper on Possible Improvement of the Framework for ICSID Arbitration, prepared by the ICSID Secretariat (22 October 2004), “Annex - Possible Features of an ICSID Appeals Facility”, para.7.

<sup>27</sup> Article 20 of the Statute of the Special Court for Sierra Leone; Article 26 (1)(b) Statute of the Special Tribunal for Lebanon.

---

overall duration of the proceedings and the nature (ad hoc or permanent) of the ISDS tribunals whose decisions would be subject to appeal.

25. A further question is whether an appellate mechanism would provide for the ability to not only revise a first instance decision but also annul it in order to prevent complexities in the relevant procedures.

26. The Working Group may wish to consider whether an appeal should temporarily suspend the validity of the first instance decision and whether it should also eliminate the possibility of an appeal against the first instance decision before national courts, for example in the process of recognition and enforcement.

27. By way of illustration, the WTO AB can “uphold, modify or reverse the legal findings and conclusions of the panel” but does not have a remand authority. The WTO AB reports are binding upon the parties to the dispute after the adoption by the Dispute Settlement Body.<sup>28</sup> Under the Mercosur regime, the permanent appellate mechanism may confirm, modify or revoke the decision of the ad hoc tribunal. Its decision is binding and prevails over the decision of the ad hoc tribunal.<sup>29</sup>

28. On the other hand, the Court of Justice of the European Union may quash the appealed decision and issue a final judgement or – “where the state of the proceedings so permits” – refer the matter back to the General Court.<sup>30</sup>

29. Several appellate mechanisms with grounds for appeal extending to issues of fact provide for a possibility of referring the matter back to the original tribunal. Under a recently concluded investment treaty, the appeal tribunal may modify or reverse the legal findings and shall refer the matter back to the original tribunal for issuing a revised award based on the binding findings and conclusions of the appeal tribunal.<sup>31</sup> Under another investment treaty, the appeal tribunal shall refer the matter back to the first instance tribunal only if the facts established by that tribunal do not allow the appeal tribunal to render a final decision.<sup>32</sup>

30. In the 2004 ICSID Appeals Facility proposal, it is suggested that the appeal tribunal could order that the case be returned to the original arbitral tribunal if it annulled the award or if the decided modification or reversal would result in an award that does not “dispose of the dispute”.<sup>33</sup>

31. The International Criminal Court and the Special Court for Sierra Leone appeals chamber may call evidence for errors of fact to determine the issue, or may remand such issue to the original trial chamber for it to determine and to report back.<sup>34</sup> The Court of Arbitration for Sport may “issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance”.<sup>35</sup>

*(ii) Effect on the parties to the dispute and on the Parties to the investment treaty*

32. A question for consideration is whether the appeal decision would bind the disputing parties only (and the first instance tribunal in case of remand) or whether it should have broader effect in particular if the appellate mechanism takes the form of a permanent body, tasked to consider identical or similar issues arising under investment treaties.

---

<sup>28</sup> See Article 17 (13) of Annex 2 of the WTO Agreement “Understanding on rules and procedures governing the settlement of disputes”; the Dispute Settlement Board can decide by consensus not to adopt the Appellate Body Report (Article 17 (14) of Annex 2 of the WTO Agreement “Understanding on rules and procedures governing the settlement of disputes”).

<sup>29</sup> Article 22 of the Protocolo de Olivos para la Solución de Controversias en el MERCOSUR.

<sup>30</sup> Article 61 of the Statute of the Court of Justice of the European Union.

<sup>31</sup> Article 3.19 of the European Union-Singapore Investment Protection Agreement (signed on 19 October 2018).

<sup>32</sup> Article 3.54 of the European Union-Viet Nam Investment Protection Agreement (signed on 30 June 2019).

<sup>33</sup> Discussion Paper on Possible Improvement of the Framework for ICSID Arbitration, prepared by the ICSID Secretariat (22 October 2004), “Annex - Possible Features of an ICSID Appeals Facility”.

<sup>34</sup> Article 83 (2) of the Rome Statute of the International Criminal Court and Article 21 of the Statute of the Special Court for Sierra Leone.

<sup>35</sup> See R57 of the Procedural Rules of the Court of Arbitration for Sport.



---

33. Regarding the Parties to the investment treaty on the basis of which the dispute arises, a question for consideration is whether the Parties would be given an opportunity to be heard on treaty interpretation or have the power to reject decisions of an appellate panel through joint statements or joint interpretations. A further question relates to the level of deference that the appellate panel would be required to accord to joint interpretations of the Parties to the applicable investment treaty.

***c. Composition of the ISDS appellate body or panels***

34. The method of selection and appointment of members of the appellate body or panels would need to be considered. This question is closely connected to the form of the appellate mechanism: consideration of issues would vary depending on whether the appellate mechanism would be modelled on the current arbitration model, where parties select and appoint the arbitrators; whether a system of roster would be established; or whether permanent adjudicators would compose the chambers of an appellate mechanism. The Working Group may wish to consider the questions raised in document A/CN.9/WG.III/WP.169 in that respect.

35. The Working Group may wish to note that under institutional rules in commercial arbitration which provide for internal appeals, the right to appoint an arbitrator at the appellate level is usually either entirely taken away from the parties and placed in the hands of the institution,<sup>36</sup> or restricted through list procedures.<sup>37</sup>

***d. Applicable procedural law***

36. The determination of the law applicable to the appellate procedure would depend on the manner in which the appellate mechanism would be set-up. Options range from application of the law that was applied before the first-tier tribunal, a different law if the seat of the appeal is not the same as in the first instance or a completely de-nationalized appellate mechanism, subject only to international law.<sup>38</sup>

***e. Enforcement***

*New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (“New York Convention”)*

37. The question whether the decisions made by an appellate panel could be enforced under the New York Convention largely depends on how the appellate mechanism would be set up (see below, paras. 39-48). If it is set-up as a second-tier mechanism for the review of arbitral awards, this would most probably not change the nature of the whole process as there already exist examples of arbitration regimes, whether under institutional arbitration rules<sup>39</sup> or national laws,<sup>40</sup> which provide for internal appellate review of arbitral awards. If the appellate panel is part of a mechanism that could not qualify as arbitration, the Convention would not be applicable. It is generally accepted that the question of whether a document constitutes an award is to be determined under the arbitration law applicable to the

---

<sup>36</sup> See, for instance, European Court of Arbitration (ECA), Article 28(5) of ECA Arbitration Rules (“The Court will appoint all the members of the Appellate Arbitral Tribunal consisting of three arbitrators, without the parties being involved in the least in such appointments [...]”).

<sup>37</sup> See American Arbitration Association (AAA) (2013), *Optional Appellate Arbitration Rules*; JAMS (2003), *Optional Arbitration Appeal Procedure*; and International Institute for Conflict Prevention & Resolution (CPR) (2015), *Arbitration Appeal Procedure*.

<sup>38</sup> See CIDS report, paras. 193-195.

<sup>39</sup> See Arbitrators' and Mediators' Institute of New Zealand (AMINZ) (2009), *Arbitration Appeal Rules* (2009); American Arbitration Association (AAA) (2013), *Optional Appellate Arbitration Rules*; JAMS (2003), *Optional Arbitration Appeal Procedure*; International Institute for Conflict Prevention & Resolution (CPR) (2015), *Arbitration Appeal Procedure*; European Court of Arbitration (ECA) (2015), *Arbitration Rules*, Article 28; in the commodity sector, see the Grain and Feed Trade Association (GAFTA) (2014), *Arbitration Rules No. 125*, Articles 10–15 (entitling parties to appeal to an internal “Board of Appeal” within 30 days of a GAFTA award).

<sup>40</sup> See, for instance, the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, p. 35, para. 45 (noting, in relation to Article 34 of the Model Law, that “a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades)”). See also Dutch Arbitration Act (1986, as amended in 2015), Articles 1061(a) to 1061(l) (providing an opt-in set of rules for arbitral appeal).

---

award, which is almost always the arbitration law of the place of arbitration. If the appellate mechanism is governed by treaty provisions, the interpretation of the term “arbitral award” in both the New York Convention and the treaty would need to be considered for that determination.

#### *ICSID Convention*

38. The Working Group may wish to consider the operation of an appellate mechanism in the context of the ICSID Convention. Article 53 of the ICSID Convention provides that ICSID awards “shall not be subject to any appeal or to any other remedy except those provided for in the Convention”. Given that the amendment of the Convention would be difficult to implement as it would require acceptance of all existing Parties under article 66, a possible avenue to explore would be an *inter se* modification of the ICSID Convention among the States establishing an appellate mechanism. This would be implemented following the procedure of article 41 of the Vienna Convention on the Law of Treaties (VCLT), whereby contracting parties may modify a treaty “as between themselves alone”.<sup>41</sup> The development of an appellate mechanism would in any case require close coordination with ICSID.

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

39. Several options for the establishment of an appellate mechanism are conceivable, as follows.

#### ***a. Model appellate mechanism for application by treaty Parties, disputing parties or institutions***

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

##### *(i) Treaty-specific appellate mechanism*

41. In a Submission, reference is made to treaty-specific appellate mechanism.<sup>42</sup>

42. The proposal for an appellate mechanism in ISDS found its way in investment treaties as programmatic language, with some investment treaties providing for the possibility of establishing an appellate mechanism in the future, either on a multilateral<sup>43</sup> or bilateral<sup>44</sup> basis. Certain treaties refer to both a multilateral agreement establishing an appellate mechanism in the future and negotiations regarding a bilateral appellate system,<sup>45</sup> some refer to a multilateral agreement

---

<sup>41</sup> See also CIDS report, paras. 237-245.

<sup>42</sup> A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan.

<sup>43</sup> See, for instance, Article 28(10) of the 2004 United States Model Bilateral Investment Treaty (which originates from the 2002 Trade Promotion Authority legislation in the United States of America, 19 U.S.C. § 3802(b)(3)(G)(iv), referring to “an appellate body [...] to provide coherence to the interpretations of investment provisions in trade agreements.”) and the 2012 United States Model Bilateral Investment Treaty, articles 28 and 34, Annex D; See also the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), Article 9.23(11), which provides that if an appellate mechanism is constituted in the future, the awards rendered under the CPTPP will be subject to this mechanism.

<sup>44</sup> See, for instance, Annex D to the 2004 United States Model Bilateral Investment Treaty.

<sup>45</sup> Singapore-USA Free Trade Agreement of 6 June 2003 (1 January 2004), Article 15.19(10); Chile - USA Free Trade Agreement (1 January 2004), Article 10.19 (10), Annex 10-H; Morocco - USA Free Trade Agreement (1 January 2006), Article 10.19(10), Annex 10-D; Uruguay - USA Bilateral Investment Treaty (31 October 2006), Article 28(10), Annex E; Peru - USA Free Trade Agreement (1 February 2009), Article 10.20(10), Annex 10-D; Oman - USA Free Trade Agreement (1 January 2009), Article 10.19(9)(b), Annex 10- D; Panama - USA Free Trade Agreement (31 October 2012), Article 10.20(10), Annex 10-D; Colombia - USA Free Trade Agreement (2012), Article 10.20(10), Annex 10-D; Australia – Republic of Korea Free Trade Agreement (12 December 2014), Article 11.20(13), Annex 11-E; Central America Free Trade Agreement between Costa Rica, Dominican Republic, Guatemala, Honduras, Nicaragua, El Salvador, and USA (1 January



---

establishing an appellate mechanism in the future,<sup>46</sup> and others to negotiations for a bilateral appellate system.<sup>47</sup> Recent treaties have included bilateral appeal mechanisms for decisions made by tribunals as part of a standing mechanism.<sup>48</sup>

*(ii) Ad hoc appellate mechanism*

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

*(iii) Institutional appellate mechanism*

44. An appellate mechanism could be developed for use by institutions handling ISDS cases, to the extent that the instrument that established the relevant institutions would permit such mechanism (see above, para. 38). Possible features of an appellate mechanism had been developed by ICSID in the 2004 ICSID Appeals Facility proposal. The proposal suggests that a single appellate mechanism under the ICSID framework would be preferable over multiple mechanisms under different treaties. The new facility was suggested to be designed so as to be compatible with any type of investment arbitration (under the ICSID Convention and Rules, the UNCITRAL Arbitration Rules or other rules).<sup>49</sup>

**b. Permanent multilateral appellate body**

45. The reform may take the form of the establishment of a permanent multilateral appellate body, which could either complement the existing arbitration regime, or constitute the second tier in a multilateral investment court. As indicated above, certain investment treaties already include a reference to an appellate body to be set up on a multilateral basis (see above, para. 42). Most of the Submissions that suggest the establishment of an appellate mechanism refer to a permanent multilateral body.<sup>50</sup> It is indicated in a Submission that regulating an appellate mechanism by formulating multilateral rules might be more efficient than doing so through bilateral investment agreements.<sup>51</sup> The Working Group may wish to consider the questions regarding structure and financing of a permanent appellate body. They are similar to those regarding the establishment of a standing multilateral investment court, addressed below in paras. 58 and 62-66.

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

---

2009), Article 10.20(10), Annex 10-F.

<sup>46</sup> Panama – Peru Free Trade Agreement (1 May 2012), Article 12.21(9); Costa Rica – Peru Free Trade Agreement (1 June 2013), Article 12.21(9); Nicaragua – Taiwan Free Trade Agreement (1 January 2008), Article 10.20(9); Article 9.23(11), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Viet Nam, (30 December 2018); See also Dutch 2018 Model Investment Agreement, Article 15.

<sup>47</sup> China - Australia Free Trade Agreement (20 December 2015). Article 9.23 provides: “Within three years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards rendered under Article 9.22 in arbitrations commenced after any such appellate mechanism is established. Any such appellate mechanism would hear appeals on questions of law.”; Canada - Republic of Korea Free Trade Agreement (1 January 2015), Annex 8-E.

<sup>48</sup> See for e.g. Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (provisionally in force since 21 September 2017), Chapter 8, Section F; European Union-Viet Nam Investment Protection Agreement (signed on 30 June 2019), Chapter 3, Section B; European Union-Singapore Investment Protection Agreement (signed on 19 October 2018).

<sup>49</sup> See ICSID Secretariat (2004), Possible Improvements of the Framework for ICSID Arbitration, Discussion Paper; the discussion paper further suggests that an appeals panel could consist of 15 persons elected for staggered terms of 6 years. Each member would be from a different country, would have to be persons of recognized authority, with demonstrated expertise in law, international investment and investment treaties. The rules could provide for the parties’ undertaking not to seek enforcement of an award pending its review by the appeal tribunal.

<sup>50</sup> [A/CN.9/WG.III/WP.159/Add.1](#), Submission from the European Union and its Member States; [A/CN.9/WG.III/WP.161](#), Submission from the Government of Morocco; [A/CN.9/WG.III/WP.175](#), Submission from the Government of Ecuador; [A/CN.9/WG.III/WP.177](#), Submission from the Government of China.

<sup>51</sup> [A/CN.9/WG.III/WP.177](#), Submission from the Government of China.

---

46. A multilateral appellate body could be established as a complement to the current ISDS regime, which would maintain most of its basic features.

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

47. A multilateral appellate body could also be established as a second tier in a multilateral investment court, staffed by tenured, professional judges and supported by a permanent secretariat.

48. The Working Group may wish to consider whether it would be conceivable that a multilateral appellate body could be tasked to review first instance decisions made by arbitral tribunals, first instance decisions in a multilateral investment court, as well as decisions by regional investment courts, international commercial courts and domestic courts in case of denial of justice (see above, para. 23).

**c. Other mechanisms**

49. The Working Group may wish to note that, as grounds for appeal normally encompass the narrower grounds for annulment, the existence of an appeal would make any further review, including annulment, redundant.<sup>52</sup> Keeping the annulment remedy would *de facto* create a three-tier dispute settlement system, which might run contrary to the objectives of finality and efficiency (including cost-efficiency).

50. The Working Group may also wish to consider alternatives or complements to an appellate mechanism, such as review of decisions of ISDS tribunals,<sup>53</sup> preliminary rulings<sup>54</sup> and prior consultation mechanisms.<sup>55</sup>

---

<sup>52</sup> Appeal generally focuses on compliance with due process and the substantive correctness of the decision. By contrast, annulment more narrowly focusses on compliance with due process, regardless of errors in the application of the law or the findings of fact. Grounds for appeal are normally broader than the usual grounds for annulment (see CIDS report, paras. 107 and 115).

<sup>53</sup> A suggestion in a Submission (see [A/CN.9/WG.III/WP.161](#), Submission from the Government of Morocco) is to establish a procedure for the prior scrutiny of arbitral awards, similar to the procedure used by the International Court of Arbitration of the International Chamber of Commerce (ICC) (see *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, 1 January 2019, para. 129, available at <https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf>). The procedure established by the ICC Court is as follows. All draft awards are subject to a three-step review process. Article 34 of the ICC Rules of Arbitration provides that the ICC Court may lay down modifications as to the form of the draft award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. The ICC Court's comments range from formal comments to substantive comments. Modifications to the substance of draft awards by arbitral tribunals will result from the ICC Court identifying inconsistencies in the arbitral tribunal's reasoning, pointing out its failure to provide sufficient reasons for certain decisions or its failure to address certain claims but also deciding issues or claims not raised by the parties. Arbitral tribunals maintain the right to make the final decision on any points of substance. The arbitral tribunal may provide an explanation to the ICC Court/Secretariat for not addressing a comment. The parties are not involved in the exchanges between the Court and the arbitral tribunal during the scrutiny process; they will only see and receive the award in final form once approved by the ICC Court, signed by the arbitral tribunal and notified by the ICC Secretariat. The confidentiality of the scrutiny process safeguards the integrity of the arbitral tribunal's decision-making process, preserves the secrecy of the arbitral tribunal's deliberations and prevents the parties from becoming aware of the outcome of their claims before an award is rendered. For arbitrations involving a State or a state entity, or matters in which one or more arbitrators have dissented, draft awards are scrutinised at a monthly plenary session of the ICC Court (instead of during the weekly three-member committee session), and an ICC Court member prepares a report with recommendations on the draft award in addition to the Secretariat's review. In treaty-based cases, the draft award is scrutinised by the President and/or Vice-Presidents of the ICC Court and ICC Court members having experience in investment treaty arbitration.

<sup>54</sup> "Preliminary ruling" procedure can be described as a procedure whereby a court refers a decision on a specific issue arising in pending proceedings to a different court, normally with a view to having a provision of law interpreted. The proceedings before the court seeking the ruling are normally suspended pending the determination by the other court, and such ruling will usually bind the court requesting it, which will then incorporate it into its overall resolution of the dispute before it. The preliminary ruling procedure addresses problems of inconsistency *ex ante*, rather than correcting possible deficiencies *ex post*, as is the case of appeals. It is a means to address the concerns of lack of consistency to the extent that a preliminary ruling would have *de facto* impact beyond the single treaty at issue. Whenever a tribunal faces an important legal question, it would be required to suspend proceedings and request a ruling from a permanent body established for that purpose. An added advantage of such a system would be that it is compatible with Article 53 of the ICSID Convention, since it does not affect the principle of finality.

<sup>55</sup> See, for instance, 2004 United States Model Bilateral Investment Treaty, which provides for a procedure of review/comment of the award by the disputing parties before it becomes final, as follows: "In any arbitration conducted under

---

## B. Standing multilateral investment court

### 1. Proposal and questions in Submissions

51. The proposal to establish a standing first instance and appeal investment court is made in a Submission.<sup>56</sup> It is based on the view that the concerns identified by the Working Group are intertwined and systemic, and that addressing specific concerns in a piecemeal approach would leave some concerns unaddressed.<sup>57</sup>

#### a. Proposal

##### (i) Two levels of adjudication

52. According to the Submission, a standing mechanism with full-time adjudicators should have two levels of adjudication. A first instance tribunal would hear disputes. It would conduct, as currently done by arbitral tribunals, fact finding and then apply the relevant law to the facts. It would also deal with cases remanded to it by the appellate tribunal where the appellate tribunal could not dispose of the case. It would have its own rules of procedure.

53. An appellate tribunal would hear appeals from the tribunal of first instance (see above, para. 47). In the Submission, it is suggested that grounds of appeal could be errors of law (including serious procedural shortcomings) or manifest errors in the appreciation of the facts. It should not undertake a *de novo* review of the facts. Mechanisms for ensuring that the possibility to appeal is not abused should be included such as requiring the provision of security.<sup>58</sup>

54. A high level of transparency of the proceedings should be ensured. It should also be provided that third parties, for example representatives of communities affected by the dispute, be permitted to participate in investment disputes.

##### (ii) Adjudicators

55. According to the Submission, adjudicators would be employed full-time. They would not have any outside activities. The number of adjudicators should be based on projections of the workload of the permanent body. They would be paid salaries comparable to those paid to adjudicators in other international courts. Independence from governments would be ensured through a long-term non-renewable term of office, combined with a transparent appointment process.

56. It is suggested to use comparable qualification requirements as for other international courts. Mechanisms should be used to ensure both geographical and gender diversity. The appointment process should guarantee the independence and impartiality of the adjudicators, who would be subject to strict ethical requirements.

##### (iii) Enforcement

57. It is suggested in the Submission that the international instrument creating a multilateral investment court should create its own enforcement regime, which would not provide for review at domestic level. The Submission further suggests that awards under a future multilateral investment court should additionally be capable of enforcement under the New York Convention, on the basis that enforcement is possible for awards made by “permanent arbitral bodies” (see article 1(2) of the Convention).

---

this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Party. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period”.

<sup>56</sup> A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

---

*(iv) Financing*

58. Contributions to the financing of a standing mechanism would be made, in principle, by the contracting Parties. These would be weighted in accordance with their respective level of development, so that least developed and developing countries would bear a lesser burden than developed countries. The weighting mechanism adopted could be derived from or based on the weighting applied in other international organizations. Consideration should also be given to requiring that users of the standing mechanism pay certain fees.

*(v) Application to existing treaties*

59. According to the Submission, a standing mechanism would apply to disputes under existing and future investment treaties, through a combination of (i) accession to the instrument establishing the standing mechanism and (ii) a specific notification (“opt-in”) that a particular existing or future treaty would be subject to the jurisdiction of the standing mechanism.

***b. Comments and questions in Submissions***

60. Some Submissions contain comments and questions on this reform option. The points they raise focus on the systemic implications and practical challenges of the establishment of a multilateral investment court,<sup>59</sup> including the compatibility of the reform option with the current ISDS regime (ICSID Convention, New York Convention and investment treaties), the transition period within which States would have to deal with ISDS proceedings under their existing regime while, at the same time, handling proceedings on a newly created standing mechanism,<sup>60</sup> the interaction with domestic courts,<sup>61</sup> and the safeguards to be established regarding the composition of the court.<sup>62</sup>

61. Those Submissions also outline that any process for establishing a multilateral investment court should be fair and neutral, and that the court should have a detailed and transparent set of rules of procedure. It is also indicated that a court ought to be neutral, effective, legally predictable and coherent in its dispute settlement system protection and its enforcement. Further, public access should be established to preserve confidence and independence.<sup>63</sup>

**2. Questions for consideration**

***a. Structure and financing***

62. The Working Group may wish to consider the option of a standing mechanism that would provide for a built-in two-tier system, structured on a “first instance” layer, followed by an appeal or review on limited grounds by a different body. As underlined in Submissions, a formula to secure the financial resources to fund a new multilateral arrangement and to allocate the costs between the States deserves careful attention.<sup>64</sup>

63. In that respect, two options for the setting up of such a mechanism might be envisaged: one possibility would be to design the system as an add-on to the current ISDS regime.

64. Another possibility would be that a multilateral investment court would be established independently from any existing mechanism or institution. In such a case, it could be conceived that States that have consented to the statute of a multilateral

---

<sup>59</sup> A/CN.9/WG.III/WP.176, Submission from the Government of South Africa; A/CN.9/WG.III/WP.179, Submission from the Government of the Republic of Korea; and A/CN.9/WG.III/WP.180, Submission from the Government of Bahrain.

<sup>60</sup> A/CN.9/WG.III/WP.179, Submission from the Government of the Republic of Korea.

<sup>61</sup> A/CN.9/WG.III/WP.176, Submission from the Government of South Africa.

<sup>62</sup> A/CN.9/WG.III/WP.176, Submission from the Government of South Africa; A/CN.9/WG.III/WP.180, Submission from the Government of Bahrain.

<sup>63</sup> A/CN.9/WG.III/WP.176, Submission from the Government of South Africa.

<sup>64</sup> A/CN.9/WG.III/WP.179, Submission from the Government of the Republic of Korea; A/CN.9/WG.III/WP.180, Submission from the Government of Bahrain.

---

investment court would generally be responsible for the financing of the court;<sup>65</sup> also, the users of the system, including claimant-investors could be charged a fee, which would contribute to the financing of the system and could potentially serve to discourage frivolous claims.<sup>66</sup>

65. As to the budget structure of the system, three broad items can be identified. The first item is the remuneration of the adjudicators, which would depend on a number of variables like the number of adjudicators, their employment status (fully-employed, part-time, on-call) and their salaries, privileges and immunities including tax benefits and pension. The second item is the financing of the registrar or secretariat. Again, the budget would vary depending on the number of staff, their employment status and their salary structure as well as the services to be provided. The third item is the operating facilities, which would cover the premises, costs of maintenance, security, information and communication and others.

66. Another question relevant to the structure and financing relates to the possibility of a multilateral investment court having regional offices to give better access to its services.

***b. Composition, selection and appointment process***

67. It may be noted that, in a standing mechanism, the disputing parties would have no role in the appointment of the individuals composing the panels and the tribunal would be composed of tenured members, appointed by the Parties to the multilateral investment court statutes for a specific term, to whom disputes would be assigned in a “random and unpredictable way”.<sup>67</sup> Document A/CN.9/WG.III/WP.169 covers the question of selection and appointment of adjudicators under such a model, covering the selection of adjudicators to be part of a multilateral investment court (including the questions whether States would wish to establish “full representation” or “selective representation” bodies, how to ensure diversity and balanced representation), as well as the assignment of cases to adjudicators.

***c. Jurisdictional issues***

68. The determination of disputes over which a standing mechanism would have adjudicative authority needs consideration, in particular whether the jurisdiction of the standing mechanism over disputes arising under a given investment treaty would be defined by that investment treaty, given the variety of approaches to this question under investment treaties. A broad survey of investment treaties shows that investor-State tribunals may have jurisdiction (i) over “any” or “all” disputes relating to investments; (ii) only over alleged violations of the substantive provisions of the treaty itself;<sup>68</sup> (iii) over a plurality of sources, such as an investment authorization, an investment agreement or an alleged breach of the treaty;<sup>69</sup> or (iv) over disputes relating to the quantum of an expropriation.<sup>70</sup> In addition, the Working Group may wish to consider whether jurisdiction should be limited to ISDS under investment treaties, or should encompass all forms of ISDS regardless of the basis upon which the cases arise (investment treaty, contract, or otherwise).

---

<sup>65</sup> Questions to be considered include how best to allocate the budget among those constituent States, noting that not all States might be joining at the initial stages and that the number of investment treaties concluded by States as well as claims brought against those States differ; an element to be taken into account would be the impact of the level of economic development of States on their financial contribution.

<sup>66</sup> See comparative analysis of budgets and cost implications of an international court in document A/VN.9/WG.III/WP.153, paras. 66-75.

<sup>67</sup> A similar mechanism can be found in the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), Article 8.27.7; and the EU-Viet Nam Free Trade Agreement, Article 13(9).

<sup>68</sup> See the North American Free Trade Agreement (NAFTA); the Energy Charter Treaty (ECT).

<sup>69</sup> Investment treaties based on the U.S. Model BITs of 2004 and 2012.

<sup>70</sup> Certain first-generation investment treaties.

---

#### *d. Enforcement*

69. The enforcement of the decisions of a multilateral investment court is essential to ensure the effectiveness of the system. The questions that would deserve preliminary consideration regarding that matter are as follows:

(i) Whether the statute of a multilateral investment court should include a specific enforcement regime? With regard to the enforcement of decisions of a multilateral investment court in the territory of a State that would have consented to its statute, there are two possible options; the first option would be to provide in the statute a special enforcement regime, for instance obliging a Contracting State to recognize a decision of the a multilateral investment court as binding and enforce the obligations arising therefrom as if it were a final judgment of its courts; a second option would be to provide that decisions of the a multilateral investment court are enforceable pursuant to the New York Convention, under which States would retain some control over the decision through the grounds for non-recognition and non-enforcement as provided for in article V of the Convention;<sup>71</sup>

(ii) How could decisions of a multilateral investment court be enforced in States that would not be party to its statute? In particular, what would be the role of domestic courts in enforcing decisions of the a multilateral investment court? States not party to the statute would not be bound by any enforcement regime provided therein; there is currently no uniform regime for the enforcement of judgments of international courts and, in most States, there is currently no statutory basis or judicial mechanism for enforcing such judgments; therefore, enforceability of decisions by a multilateral investment court would largely depend on whether its decisions would fall within the scope of the New York Convention;<sup>72</sup> and

(iii) If the multilateral investment court would not have a specific enforcement regime, what would be required so that its decisions could be enforceable under the New York Convention?<sup>73</sup>

### **3. Linkage with other reform options**

70. A standing mechanism might also include (i) mechanisms for ensuring early dismissal of unfounded claims; (ii) a possibility for encouraging parties to solve their dispute through mediation; (iii) a mechanism to cater for possible counter-claims by respondents; (iv) a mechanism for consolidation of cases, and management of the relation between procedures at the domestic level and remedies that can be obtained through international proceedings, in order to limit instances of concurrent proceedings;<sup>74</sup> (v) rules on the legal costs of the disputing parties, as such costs constitute a significant portion of the overall costs of the current ISDS regime; (vi) rules on admissibility of third party funding; and (vii), sanctions in case of breach of a code of conduct. A standing mechanism may also be entrusted with inter-State disputes on the interpretation/application of an investment treaty either as sole remedy or alternatively in addition to inter-State arbitration.<sup>75</sup> A standing mechanism could also provide the forum to bring claims for denial of justice by domestic courts under treaties that require the exhaustion of local remedies.

---

<sup>71</sup> See CIDS report, para. 140.

<sup>72</sup> See CIDS report, para. 143.

<sup>73</sup> The CIDS report addresses in detail the question of enforcement. It discusses whether a permanent dispute settlement body would qualify as a “permanent arbitral body” under the New York Convention, either under the “ordinary meaning” of article I(2) of the New York Convention or under an “evolutionary interpretation” of the phrase which would take account of developments in international law and arbitration since 1958. (see CIDS report, paras. 138-164).

<sup>74</sup> See A/CN.9/917, para. 31.

<sup>75</sup> See the Iran-U.S. Claims Tribunal (Claim Settlement Declaration (“CSD”), Article II(1)), Article II(2)), and Article II(3)); similarly, both the Arab Investment Court (see Unified Agreement, Articles 25–36); see also the European Court of Human Rights (Articles 33–34), competent both in respect of individual-State complaints and State-to-State disputes.

---

---