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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 8–12 February 2021)

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I. Introduction

1. At its fiftieth session, 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) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, 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

2. From its thirty-fourth to thirty-seventh sessions, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns. At its thirty-eighth to thirty-ninth sessions, the Working Group considered the following reform options: the establishment of an advisory centre, a code of conduct for adjudicators, the regulation of third-party funding, appellate and multilateral court mechanisms, the selection and appointment of ISDS tribunal members, dispute prevention and mitigation as well as other means of alternative dispute resolution, multiple proceedings and counterclaims, including shareholder claims and reflective loss, security for costs and means to address frivolous claims, interpretation of investment treaties by treaty parties, and a multilateral instrument on ISDS reform.

3. At its fifty-third session, in 2020, the Commission expressed its satisfaction with the progress made by the Working Group through a constructive, inclusive and transparent process, and for the support provided by the Secretariat, including the outreach activities it organized.²

4. At its thirty-ninth session, the Working Group had agreed that the Chair and the Rapporteur would work with all interested delegations to develop an initial draft of a work and resourcing plan with the support of the Secretariat to be presented to the Working Group for its approval and subsequently to the Commission in 2021 as the Working Group's plan. The Working Group noted that, as the initial draft had been prepared and circulated to delegations, delegations were now invited to provide comments so that a revised draft could be prepared for its consideration at its resumed session, in May 2021.

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its fortieth session in Vienna from 8 to 12 February 2021 in accordance with the decision on the format, officers and methods of work of the UNCITRAL working groups during the coronavirus disease 2019 (COVID-19), adopted on 19 August 2020 by the State members of UNCITRAL (contained in document [A/CN.9/1038](#)), and extended by decision dated 9 December 2020 (see document [A/CN.9/LIII/CRP.14](#)). Arrangements were made to allow delegations to participate in person and remotely.

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

² *Ibid.*, *Seventy-fifth session, Supplement No. 17 (A/75/17, part II)*, paras. 31–36.

6. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Cameroon, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Dominican Republic, Ecuador, France, Germany, Ghana, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Lebanon, Libya, Malaysia, Mali, Mauritius, Mexico, Nigeria, Peru, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

7. The session was attended by observers from the following States: Angola, Armenia, Azerbaijan, Bahrain, Bosnia and Herzegovina, Botswana, Bulgaria, Burkina Faso, Costa Rica, Egypt, El Salvador, Gabon, Greece, Guatemala, Iceland, Jordan, Lao People's Democratic Republic, Latvia, Lithuania, Maldives, Morocco, Myanmar, Netherlands, Panama, Paraguay, Portugal, Qatar, Senegal, Serbia, Slovakia, Sweden, Tunisia and Uruguay.

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

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

(a) *United Nations System*: International Centre for Settlement of Investment Disputes (ICSID), United Nations Conference on Trade and Development (UNCTAD), and World Health Organization (WHO);

(b) *Intergovernmental organizations*: African Union (AU), Council of the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (CIS), Energy Charter Secretariat, Eurasian Economic Commission (EEC), Hague Conference on Private International Law (HCCH), Organisation for Economic Co-operation and Development (OECD), Organisation of African, Caribbean and Pacific States (ACP), Permanent Court of Arbitration (PCA) and South Centre;

(c) *Invited non-governmental organizations*: African Academy of International Law Practice (AAILP), African Association of International Law (AAIL), American Arbitration Association (AAA)/International Centre for Dispute Resolution (ICDR), American Bar Association (ABA), 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), Association pour la Promotion de l'Arbitrage en Afrique (APAA), Association of Swiss Arbitrators (ASA), Australian National University (ANU), British Institute of International and Comparative Law (BIICL), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Investment and Commercial Arbitration (CIICA), Centre for International Legal Studies (CILS), Centre de Recherche en Droit Public (CRDP), Centre for International Law (CIL), Centre for International Governance Innovation (CIGI), Centro de Estudios de Derecho, Economía y Política (CEDEP), Chartered Institute of Arbitrators (CIArb), China Council for the Promotion of International Trade (CCPIT), China Society for Private International Law (CSPIL), Centre for Research on Multinational Corporations (SOMO), Columbia Centre on Sustainable Investment (CCSI), Corporate Counsels' International Arbitration Group (CCIAG), 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), Georgian International Arbitration Centre (GIAC), Hong Kong International Arbitration Centre (HKIAC), iCourts, Institute for Transnational Arbitration (ITA), Institute of International Law (IDI), Instituto Ecuatoriano de Arbitraje (IEA), Inter-American Bar Association (IABA), International Academy of Mediators (IAM) International and Comparative Law Research Center (ICLRC), International Bar Association (IBA), International

Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International Law Association (ILA), International Law Institute (ILI), Islamic Chamber Of Commerce, Industry & Agriculture (ICCIA), Inter-Pacific Bar Association (IPBA), Japan Association of Arbitrators (JAA), Kozolchyk National Law Center, Max Planck Institute, Pluricourts, Queen Mary University of London School of International Arbitration (QMUL), Regional Centre For International Commercial Arbitration Lagos-Nigeria (RCICAL), Russian Arbitration Association (RAA), Singapore International Arbitration Centre (SIAC), Singapore International Mediation Centre, the Law Association for Asia and the Pacific (LAWASIA), The Moot Alumni Association (MAA), The New York City Bar Association (NYCBA), New York International Arbitration Council (NYIAC), Third World Network, United States Chamber of Commerce (USCC), United States Council for International Business (USCIB), University College London (UCL), and Vienna International Arbitration Centre (VIAC).

10. According to the decision made by the State members of the Commission (see para. 5 above), the following persons continued their offices:

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.200); (b) notes by the Secretariat on (i) the draft code of conduct (A/CN.9/WG.III/WP.201); (ii) appellate mechanism and enforcement issues (A/CN.9/WG.III/WP.202); and (iii) the selection and appointment of ISDS tribunal members (A/CN.9/WG.III/WP.203); and (c) an informal document containing a draft work and resourcing plan. The Working Group was informed that documents containing comments from governments and international organizations on the notes by the Secretariat were available on the website of UNCITRAL.³

12. The Working Group adopted the following agenda:

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

III. Possible reform of investor-State Dispute Settlement

13. The Working Group considered the following reform options: (i) selection and appointment of ISDS tribunal members (A/CN.9/WG.III/WP.203, paras. 41–72); and (ii) appellate mechanism (A/CN.9/WG.III/WP.202, paras. 57–59). The Working Group noted that written comments had been made by delegations prior to the session (“written comments”).

14. The Working Group agreed to consider the relevant issues in the above-mentioned documents, including the draft provisions contained therein, with the goal of providing further instructions to the Secretariat, which would be without prejudice to any delegations’ final position on the reform options. It was clarified that the Working Group would not be making any decision on whether to adopt a particular reform option at the current stage of the deliberations.

15. As a general point, it was suggested that work should focus on reform options and issues where it would be more feasible to achieve consensus so that concrete discussion could take place. It was also said that the issue of the selection and

³ See https://uncitral.un.org/en/working_groups/3/investor-state and https://uncitral.un.org/en/library/online_resources/investor-state_dispute.

appointment of decision makers was relevant to both ad hoc and standing mechanisms, and a discussion of the issue first in the context of ad hoc mechanisms would be useful. In response, it was said that the decision of the Working Group to work simultaneously on different reform options in parallel streams was due to the fact that there were diverging views on the reform options and issues.

16. It was mentioned that each reform option should not be a goal of itself but rather one of the many tools to achieve the goal of overall ISDS reform. It was further mentioned that the reform options should be considered collectively to assess their effectiveness in addressing a number of the identified concerns. It was also said that a cost-benefit analysis would be required particularly when departing from the existing ISDS mechanism (including for both ad hoc arbitration and the creation of new standing bodies).

A. Selection and appointment of adjudicators in a standing mechanism (A/CN.9/WG.III/WP.203, paras. 41–72)

1. Selection and appointment issues

Background information

17. The Working Group recalled that, at its resumed thirty-eighth session, it had a preliminary discussion on the selection and appointment of adjudicators in a standing ISDS mechanism (referred to below as a “standing mechanism” or a “standing body”) (A/CN.9/1004/Add.1, paras. 115–129). It had been noted that disputing parties would have no or little influence on the appointment of the adjudicators in a standing mechanism, which would make it similar to existing international courts and tribunals. It was noted that while States, as treaty Parties or members, participated in the selection of judges in existing courts and tribunals, as disputing parties, they had little say in the appointment of the judges who would handle the dispute.

18. In that respect, it was generally highlighted that the selection and appointment mechanism in the current arbitration-based ISDS regime represented a balance among a number of interests involved, and preserved party autonomy and flexibility. It was said that reform efforts should focus on improving the existing regime rather than replacing it. It was said that the selection of the adjudicators must be made by the parties and that using a predetermined list of adjudicators or roster would be against the essence of arbitration, unless done on a voluntary basis or where the list or roster would be used for guidance purpose only. It was also mentioned that transparency and ethics in the appointment process under the ISDS regime as well as avoidance of any suspicion of cronyism and other forms of corruption were essential. A concern was expressed that the role of the investors in the appointment of adjudicators would be diminished if not eliminated in a standing body, which posed serious concerns about the legitimacy of the system.

19. Some concerns were expressed about engaging on a discussion on the selection and appointment of adjudicators in a standing body when the Working Group had yet to determine whether it would be desirable to establish a standing body, particularly in light of the financial resources that would be required. During the deliberations, differing views were reiterated on whether a standing body would be effective in resolving the concerns identified by the Working Group, such as inconsistency, incoherency, lack of transparency and legitimacy, and cost and duration.

20. Some delegations qualified their interventions as referring to a standing body to review cases from first-tier ad hoc tribunals. It was also noted that a critical mass of States needed to participate in any permanent structure for it to function properly and be financially and logistically viable. It was stated that the Working Group should focus to develop solutions common to the selection and appointment of adjudicators in both ad hoc and standing body contexts.

21. Considering that the selection and appointment authority would be shifted from the disputing parties to contracting States in a permanent framework, the importance

of guaranteeing the independence of the adjudicators mostly (though not only) by and vis-à-vis the contracting Parties to the statutes of a standing body was emphasized. It was added that designing a selection process that, inter alia, would ensure that adjudicators would be independent from the constituent States would be more critical in a standing body than in the present ISDS regime. It was noted, however, that a process involving the election of adjudicators would inevitably introduce an element of politics to the process and this political aspect should be acknowledged.

22. A comment was made that disputes based on treaties, contracts and domestic laws might require different mechanisms to select and appoint the appropriate adjudicators. It was further pointed out that a reformed system should remain flexible so as to take account of both State-to-State and investor-State dispute settlement as well as possibly disputes involving local communities affected by investments and investments made by small and medium-sized enterprises.

(a) Composition of a permanent body

- “Full representation” or “selective representation”

23. The Working Group considered whether to establish a “full representation” or “selective representation” body. It was clarified that in full representation bodies, each contracting State would appoint an adjudicator on a permanent basis, usually a national of that State; in selective representation bodies, not all contracting States would be represented in the pool of adjudicators.

24. It was said that full representation might be difficult to achieve, particularly in light of the cost implications and considering the anticipated caseload. In support, it was said that a standing body with many adjudicators would be expensive and complex to operate. Preference was expressed for the selective representation model, which could be based on balanced representation as outlined below.

- Ad hoc judges

25. The Working Group considered whether there should be ad hoc judges to hear cases where the respondent State was not represented in the standing body (in the selective representation model). It was suggested that the possibility of appointing an ad hoc judge would ensure that one of the adjudicators hearing the case would be familiar with the legal system of the respondent State. It was noted that the ability to appoint an ad hoc judge could contribute to the legitimacy of any outcome.

26. It was said that international courts and tribunals generally had a system of ad hoc judges, such as the International Court of Justice, the International Tribunal for the Law of the Sea and the European Court of Human Rights. In that context, it was noted that an ad hoc judge appointed by a State need not be its national as what mattered most was to be involved in the appointment of the judge or arbitrator. It was further suggested that if the State party to the dispute was to have the right to appoint a judge ad hoc, the same right would need to be granted to the investor, to ensure equality. It was, however, pointed out that there might then be little difference between a standing body with ad hoc judges and the existing ISDS mechanism based on arbitration if, in particular, the chamber of this standing body would consist of three adjudicators. It was highlighted that some flexibility in forming, with the consent of the parties, particular chambers for specific cases should be provided for, as foreseen, for instance, in the Statute of the International Court of Justice.

27. A wide range of views were expressed regarding ad hoc judges, including that (i) they could provide expertise and input on the domestic laws which were applicable to the dispute as well as the underlying policies and government operation; (ii) while domestic legal systems could be relevant in some disputes, that was not always the case and that disputing parties rarely appointed arbitrators simply because of their domestic law expertise; (iii) not all legal systems were unique; (iv) information on domestic legal systems could also be effectively offered by experts appointed by the

adjudicator; and (v) experts appointed by the adjudicators would not have any decision-making role and should not be selected by the adjudicators.

- Determination of the number of judges

28. The Working Group also considered the number of judges in the selective model and its adjustment over time. It was said that the number should be based on a projected caseload, with subsequent adjustments as the number of contracting States increased. It was also said that the number of judges should be based on the number of contracting States.

29. It was said that determining the number of judges based on the workload was practical but not desirable in the earlier stages, as the contracting States might not be appropriately represented, and diversity could not be achieved. It was also questioned whether an increased workload would necessarily justify an increase in the number of judges, considering the operational costs of a standing body.

(b) Nomination of candidates

30. The Working Group considered issues relating to the nomination stage, in case there would be one before the selection and appointment stage. Different options for nominating candidates were suggested, including: (i) by participating States; (ii) by an independent entity established within the permanent body; (iii) by individuals themselves; or (iv) a combination thereof.

31. It was underlined that the nomination process needed to be open and transparent.

(c) Selection and appointment process

32. The Working Group noted that the options for selection and appointment included the following: (i) direct appointment by each State; (ii) appointment by a vote of the contracting States; or (iii) appointment by an independent commission.

33. It was pointed out that appointments on the basis of expertise and integrity rather than on political consideration would be more likely if the selection process were to be (i) multilayered; (ii) open to stakeholders; and (iii) transparent. In that context, it was suggested that selection panels and consultative committees should first screen the candidates, before candidates would be appointed by a vote of the contracting States. It was further suggested that the selection panels and consultative committees should also be subject to transparency. Further suggestions were made on the appropriate number of selection panel members, also noting that non-State stakeholders should be included in order to ensure the perceived legitimacy of the standing mechanism as well as to ensure that all users and stakeholders of the system were heard. It was suggested that the Working Group should consider concrete text proposals as provided in the written comments.

34. In that respect, a series of questions was raised including how the selection panel would be constituted, how such panel members would be appointed, how to ensure that they would be qualified and be representative of the different interests, and how to ensure that there would be no conflict of interest between such panel members and the nominated candidates. In that regard, a view was expressed that direct selection by the contracting States might be preferable.

35. Doubts were expressed about a multilayered selection process as limiting the political influence on the selection of adjudicators because the constitution of the selection panel itself would likely require contracting States to make political choices.

36. It was suggested that candidates could be appointed through a vote. It was proposed that an absolute majority and a qualified majority of two-thirds of the contracting Parties should be required for an appointment. The possibility of appointment through consensus was also mentioned. In response, concerns were raised about the implementation of such voting rules in particular in the early stages of the establishment of the standing body, as a group of States could have veto power.

37. Concerns were expressed that an appointment mechanism driven by contracting Parties to the standing body would result in the adjudicators being indebted to States and biased in their favour. In response, it was said that judges, even if appointed by States, had held States accountable for any breach of their obligation as had been evidenced by numerous court decisions at both the national and the international level. With regard to the selection and appointment process, it was mentioned that the disputing parties should somehow continue to be involved in the appointment process and that if a separate entity or an appointing authority were to be tasked with the appointment, they would need to take into account the views of the disputing parties. In response, it was said that States would need to balance not only their interest as respondent States but also the interest of their investors when appointing adjudicators to a standing body and as such, should not be involved in the appointment of the adjudicator to a specific dispute.

38. In that context, it was suggested to further explore whether there should be a role for investors to play in the appointment process, and if so, what role this should be and what corresponding mechanism should be developed. It was further suggested that not only investors, but also the civil society might have an interest in being associated to the selection, appointment and removal processes. It was suggested that the role of stakeholders could be consultative in nature.

(d) Terms of office and renewal

39. A number of options were mentioned regarding terms of office and renewal, including the possibility of longer terms on a non-renewable basis, which could ensure that the members would not be affected by undue influence. A view was expressed in favour of one-time renewal of the term. It was also mentioned that in determining the appropriate term, the average duration required to resolve ISDS cases as well as the need to ensure a workload balance among the adjudicators would need to be taken into account. The need to ensure financial security, as well as the ability to attract high-quality candidates and the accumulation of experience and expertise on the court were noted. Suggestions were made that the term of office could range from 6 to 9 years, with staged replacements to achieve stability in the operation of the standing body and of the jurisprudence.

40. The importance of security of tenure, and longer non-renewable terms with financial security so as to ensure the independence of the adjudicators was emphasized. It was noted that the factors that ensured independence could limit accountability and that trade-off should be considered.

(e) Removal procedures

41. It was noted that most statutes of international courts referred to misconduct and inability to perform duties due to illness as grounds for removal. It was further noted that the draft code of conduct likewise contained provisions on these matters. A general comment was made that the procedure for the selection and appointment of adjudicators should be consistent with the draft code of conduct currently developed.

42. It was pointed out that the standing mechanism itself should include rules on removal, and contracting States to the statutes of the standing body should not be allowed to intervene in that process to ensure the independence of the adjudicators. It was also suggested that the president of the standing body could be tasked with decisions on that matter, also based on a collegial consultation mechanism involving other adjudicators. It was said that the threshold for removing an adjudicator ought to be high. It was suggested that decisions on removal of adjudicators should always be made through a transparent process and be reasoned.

(f) Assignment of a case to members of a permanent body

43. The need to assign the most qualified member to handle a case was mentioned. Concerns were raised that a small pool of adjudicators would result in there being no expertise in the standing body to resolve the dispute nor the capacity. With regard to

a case where the assigned adjudicator 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.

44. Different models for assigning cases were mentioned, drawing on the practices of different international courts. It was suggested that the assignment of cases could be random to ensure that parties would not know in advance who the adjudicators would be. It was however pointed out that random assignment might result in the appointment of adjudicators with little knowledge of the case at hand. It was also said that the process of selecting judges for specific cases could fall to an institution managing a list of adjudicators. It was pointed out that such mechanisms need not be placed in the statute of the standing body. It was suggested that allocation should be done so as to ensure collegiality between the adjudicators, for the sake of consistency and predictability.

Differentiated nomination and selection process between first and second tier

45. The Working Group considered whether the selection and appointment methods for adjudicators at the appellate level might follow a pattern similar to that of the first instance ISDS tribunal or whether there should be different requirements and procedures applicable to the selection and appointment of adjudicators depending on the level of adjudication. Different views were expressed.

46. It was noted that the qualifications for judges at different tiers might vary, and that establishing different standards and separate procedures would be more appropriate as adjudicators in an appellate body would be tasked to ensuring consistency and correctness of decisions. It was stated that distinct procedure could contribute to strengthen the perception of the legitimacy of the reformed system.

47. It was said that the disputing parties should not have the right to choose the adjudicators at the appellate level, while they would be able to choose the adjudicator at the first instance from a mandatory roster. In that light, the need to further consider the possible role of rosters was emphasized.

(g) Cross-cutting issues: representativeness, diversity, qualifications, independence

48. The Working Group noted the interest in ensuring balanced representation and diversity (regional groups, gender, legal traditions, expertise, language capabilities) to promote legitimacy, accountability, independence and procedural fairness. The possibility of rotating the adjudicators' posts to ensure diverse representation was mentioned. It was pointed out that several mechanisms would need to be put in place to shield the institution collectively and the adjudicators individually from external influences. The most important ones that were mentioned included security of tenure, terms of office (see paras. 38 and 39 above), financial security, adequate resources, rules on incompatibilities, privileges and immunities, and case assignment rules.

49. It was also noted that these diverse principles would sometimes pull against each other. It was said that, as an illustration, while renewable terms would ensure that expertise remained on the bench, it could also lead to a decrease in independence because the possibility to be selected again could shade decision-making. It was said that one solution to maintaining expertise without renewable terms could be to require adjudicators to make accessible any legal materials which they developed during their term, and that transparency would also support accountability. As a further illustration, it was said that long terms could better ensure independence but might reduce accountability. As a general point, the need to balance accountability and independence of the adjudicators was highlighted.

50. Concerns were raised that diversity would not be achieved in a standing body with limited number of adjudicators, compared with the current ad hoc system where the pool of arbitrators was larger. In response, it was pointed out that the large number of arbitrators handling ISDS cases did not represent diversity as most were from a specific group of States. It was questioned how a higher degree of diversity could be

reached with definite and limited number of adjudicators in a standing body. In addition, it was said that disputes would require very different expertise and that a one-size-fits-all system would therefore not appropriately respond to the different needs.

51. Regarding the qualifications of adjudicators, it was mentioned that these should not be too stringent, it should include knowledge of public international law and investment law at a minimum. It was also suggested that adjudicators should be experienced in dealing with governments, be attentive to the intent of the States parties to the investment treaty and should also be trained in mediation as well as other means of dispute resolution. It was added that they should have knowledge on how to calculate compensation for damages, or at least understand the opinions provided by experts. It was said that they would retain the possibility of engaging expert witnesses for specialized matters. It was also pointed out that adjudicators should be attentive to the sustainable development policies of the respondent State. Furthermore, it was questioned how to retain the overall quality of the adjudicator's knowledge of investment treaties, when there existed 3,000 or more of them. In response, it was said that there were quite some similarities across treaties as they used similar wording and well-established standards.

52. It was also said that setting individual qualifications might not be sufficient, as the standing mechanism would need to abide by certain requirements for its composition as a whole and that diversity and representativeness would be essential to enhance its legitimacy. In that respect, it was said that the selection process would need to guarantee sufficient geographic and gender representation. It was further said that recent reforms to permanent courts such as the International Criminal Court (ICC) or the European Court of Human Rights (ECHR) showed how diversity criteria could be effectively factored into the selection process. It was mentioned that, while reference could be made to international courts, a distinction would need to be made with those that handled State-to-State disputes as in the case of investment disputes, one party would not be a State. It was also mentioned that the ICC would not be a good reference point for establishing an investment court, considering that the aim of ISDS was to protect both the investors and the host State, whereas the ICC had a clear objective of prosecuting serious crimes of concern to the international community. Doubts were also expressed about the ECHR providing a valid reference for future consideration, considering its lack of an enforcement mechanism and the difference in the cases brought.

53. With respect to independence of adjudicators, it was said that since most decisions on challenge were based on the arbitrator's relationship with a party and affiliation bias, it would be essential that causes that lead to lack of independence and impartiality such as double hatting, previous contacts of an adjudicator with a party, and/or multiple repeat appointments be tackled.

54. More generally, considering that a number of questions and concerns were raised with regard to the overall operation of a standing body, it was suggested that those questions and concerns should be compiled for further consideration. It was also suggested that clarifications on how those concerns (for example, the appointment of the adjudicator by a disputing party) could be addressed in a standing body should be further elaborated.

2. Preparatory work on the selection and appointment of adjudicators in a standing mechanism

55. After discussion, the Working Group requested the Secretariat to prepare a text on selection and appointment of adjudicators in the context of a standing ISDS mechanism. It was stressed that the Working Group had yet to make any decision on the desirability and feasibility of such a standing mechanism, which would be considered at a later stage. In that context, it was said that the text to be prepared should aim to assist the Working Group in considering the topic in more detail at a future session. In addition and as had been the practice, the Secretariat was requested

to involve interested States in the preparation of the text and to utilize a number of informal means, such as drafting or expert groups. It was suggested that such an approach should apply to the development of all reform options being considered by the Working Group.

56. It was generally felt that the text to be prepared by the Secretariat should be generic to be applicable to any standing body. As to the specific contents, the Secretariat was requested to:

- Provide a cost-benefit analysis of a standing body and the level of commitment by States for it to function properly in a multilateral context and include information on the cost of setting up and operating other adjudicative bodies;
- Prepare draft text reflecting selective representation rather than full representation;
- Provide information on the appropriate number of adjudicators in a standing body, comparing with that in other adjudicative bodies and their caseload;
- Provide mainly two options in the composition of a standing body: (i) a smaller number of adjudicators based on the anticipated caseload, with a formula that could see the number increase or decrease as needed; and (ii) a larger number of adjudicators (with the possibility of serving part-time) for greater diversity and inclusiveness;
- Include draft language on general qualifications that would be required of adjudicators in the various stages of the appointment and for first-tier and appellate level;
- Offer options for nomination procedures, which should be open and transparent and provide means for non-State entities (for example, investors, civil society and individuals) to be involved;
- Propose a selection and appointment mechanism, which should be multilayered, transparent, merit-based, open to stakeholders including non-State actors, and reflect diversity and balanced representation;
- Include formulations on the use of selection panels or committees, including their role in the appointment process, how the members of those panels would be chosen and how to ensure their independence;
- Offer options for the final appointment process, which would involve independent committee (such as the selection committee) or the contracting States, and options for the appropriate voting procedure;
- Suggest options for the term of the adjudicators and whether the terms would be renewable up to once;
- Provide language on early removal of an adjudicator from the standing body, including the circumstances that would justify the removal, the procedure as well as the possible involvement of the contracting States, an independent body or the standing body itself in that process;
- Provide options on how adjudicators would be assigned to hear cases, which should ensure balanced representation, diversity, independence and impartiality, which could include randomized appointments with oversight, appointments by the president of the tribunal, or appointments by some other independent committee;
- Present options which would allow the disputing parties to be involved in the assignment process, including through the appointment of an ad hoc adjudicator (hybrid-model); and
- Propose options on how to appoint an ad hoc adjudicator, which could include direct appointment by parties, from a defined roster and others.

B. Appellate mechanism (A/CN.9/WG.III/WP.202, paras. 57–59)

1. General remarks

57. The Working Group considered the main components relating to the nature, scope and effect of an appellate mechanism on the basis of the draft provisions contained in paragraph 59 of document [A/CN.9/WG.III/WP.202](#) (referred to below as the “draft provisions”), with the understanding that adjustments might be needed depending on the form such a mechanism might take – ad hoc, a standing appellate body, or as the second tier of a standing court (referred to below collectively as an “appellate mechanism”).

58. It was said that an appeal mechanism could enhance the correctness and consistency of decisions rendered by ISDS tribunals, and thereby increase the overall predictability and the efficiency of ISDS. References were made to recently concluded free trade agreements that contained provisions on appellate mechanisms. Reference was also made to existing appellate mechanisms, like the WTO Appellate Body.

59. However, the need to ensure that an appellate mechanism would not result in a full rehearing on each and every aspect of the cases, nor lead to systematic or frivolous appeals was underlined. In that regard, it was said that features in the appellate mechanism, such as a high standard of review, security for costs and early dismissal of manifestly unfounded appeals, modelled after Rule 41(5) of the ICSID Rules, would need to be developed to ensure a manageable caseload. In response, doubts were expressed with regard to the effectiveness of security for costs in limiting the caseload, and of tools developed to address frivolous claims which might not prove useful at the appellate level. In that context, the high rate of requests for annulment of ICSID decisions and appeal of WTO panel reports were mentioned.

60. It was stated that the development of an appellate mechanism ought to take into account the current fragmented investment regime, consisting of many different investment treaties, and the potential impact an appellate mechanism might have on the development of investment law. Views were expressed that decisions rendered through an appellate mechanism should not have precedential value. The view was also expressed that an appellate mechanism should not have effect until there was a critical mass of Contracting Parties.

61. It was further said that the establishment of an appellate mechanism might result in increasing the complexity of the ISDS regime, possibly harming efficiency, such as increasing the cost and duration of ISDS proceedings. It was suggested that there existed other means to achieve the desired level of consistency and predictability, which might be less disruptive, including clear drafting of treaty provisions, use of treaty interpretation tools by treaty parties and review mechanisms of arbitral decisions either by the disputing parties themselves or by an independent body before they were rendered.

62. The view was also expressed that more empirical data were needed regarding whether inconsistencies or incorrectness of decisions by ISDS tribunals originated from errors of law, of facts, or a misinterpretation of standards commonly found in investment treaties. Furthermore, it was said that additional information on the different possible models (such as an ad hoc or institutional appellate mechanism) would be needed to consider the particularities of an appellate mechanism and its compatibility with the existing ISDS regime. In response, it was said that there was merit in undertaking a consideration of draft provisions so as to focus the discussion on the main issues in designing a functional appellate mechanism.

2. Appellate mechanism

(a) Scope and standard of review (paragraphs 1 to 3 of the draft provisions)

63. It was noted that the scope and standard of review would have an impact on the effective operation of any appellate mechanism and that both the grounds for appeal

and standard of review should be clearly defined for the sake of certainty and efficiency. It was also pointed out that the aim should be to keep the appellate mechanism simple, so that it would be accessible to all users, including small- and medium-sized enterprises.

(i) *Errors of law and fact*

- *Errors of law (paragraph 1(a))*

64. The view was expressed that there needed to be very clear standards as to what would be considered as an error of law or an error of fact. It was also stated that distinguishing between issues of law and issues of fact and assessing when a tribunal's assessment of factual evidence would be subject to appellate review was complicated and could lead to more inconsistency. The Working Group considered paragraph 1(a) of the draft provisions, which contained two options: option 1 introduced a standard that an error of law had to be material and prejudicial to be subject to appeal, whereas option 2 contained alternative texts, either that the appeal would be permitted with respect to any errors in the application or interpretation of applicable law, or that it could be limited to review of certain standards (for example, common standards found in investment treaties, like expropriation, fair and equitable standards and non-discrimination).

65. While it was said that option 1 could limit the number of appeals, it was generally felt that: (i) the phrase "material and prejudicial" was unclear; and (ii) its interpretation might create uncertainties as the terms "material and prejudicial" were not commonly used in the context of an appellate mechanism.

66. Preference was expressed for option 2, first alternative, on the basis that an appellate mechanism would aim at correcting errors in the application or interpretation of applicable law (even though it was recognized that what was an applicable law could be the subject of debate in many appeals). It was, however, indicated that errors of law should be substantial, so as to limit the occurrence of appeals and to deter frivolous or systematic appeals. Regarding the second alternative in option 2, it was said that there would be little value in limiting appeals to only review certain standards found in investment treaties.

- *Errors of fact (paragraph 1(b))*

67. Diverging views were reiterated on whether appeal on the basis of errors of fact should be permitted (with those opposing expressing concerns about rehearing of the case entirely, cost, and abusive and dilatory appeals). If it were to be permitted, preference was expressed for a higher standard of review to ensure appropriate deference to the first-tier tribunal. In that light, preference was expressed for option 2, which referred to "manifest errors" in the appreciation of facts. It was suggested that the notion of "manifest" error would need to be elaborated on so that a common understanding could be developed. A further suggestion was that while it would be desirable to limit the re-examination of the facts, the mechanism should allow the admission of the facts revelation or discovery of which took place after the last hearing of the first-tier tribunal, and which could have had an influence on the decision. It was also suggested that factual review could be limited to instances where such review was essential to conduct the review of law.

- *Reference to "domestic law"*

68. The Working Group considered whether an issue in the interpretation or application of domestic law would fall in the category of legal or factual error, and whether there should be explicit characterization of domestic law issues in the draft provisions.

69. It was said that, under certain legal systems, questions of domestic law would fall under the standard of review of factual errors, but that was not a generally accepted approach. It was underlined that, given the different ways in which domestic

laws were applied in the context of ISDS, it might be too prescriptive to characterize issues of domestic law as mere errors of fact (as provided for under para. 1(b), option 2), in particular in instances where, as indicated in some investment treaties and article 42(1) of the ICSID Convention, the domestic law could be an applicable law to the dispute (and therefore covered under paragraph 1(a)). For the sake of clarity as to the applicable standard of review, it was suggested to include a separate provision in the scope of review addressing appeal on domestic law issues. A different suggestion was to avoid any reference to domestic law as the context would determine whether any error in interpretation or application would be treated as a legal or factual error.

70. Concerns were expressed that a review of the interpretation of domestic law might result in the appellate mechanism, an international body, having the authority to interpret domestic laws which could contradict the interpretation of the same law by the national authority. Accordingly, it was stated that an interpretation of domestic law by an appellate mechanism should not have a binding effect on the national authority.

71. A suggestion was made that domestic courts could be involved in the interpretation of domestic laws should the appellate body defer the matter to such courts. However, doubts were expressed on the feasibility of such an approach, mainly regarding the authority for an international body to make such a request.

- Reference to “damages”

72. Diverging views were expressed on whether an error in the assessment of damages would constitute an error of fact. It was suggested that an error in the application of the relevant standard for the assessment of damages might constitute an error of law, and therefore, it would be preferable not to include assessment of damages under paragraph 1(b). Similarly, it was said that if a high threshold were to be introduced for the errors of fact, errors in valuation techniques would not be subject to review. It was stressed that, for the sake of clarity, valuation techniques and their application should be included explicitly in the scope of review, possibly as a separate provision, as they were critical in ISDS, particularly with high amounts at stake.

- Error in the application of the law to a fact (paragraph 1(c))

73. It was said that paragraph 1(c) of the draft provisions, which addressed an error in applying the law to the facts of a case, was redundant and need not be retained as that matter was covered under paragraph 1(a). It was also said that whether an article such as this was necessary depended on the final scope of paragraph 1(a).

- De novo review

74. The possibility of an appellate mechanism conducting a “de novo” review of both law and fact was also mentioned but concerns were expressed that that could lead to increased cost and duration of the proceedings.

75. It was suggested that cases relating to critical issues, such as public health and environmental law, should be subject to de novo review.

(ii) Grounds in the existing annulment or setting aside procedures (paragraph 2)

76. The Working Group considered paragraph 2 of the draft provisions, which included options for the scope of review of an appellate mechanism to cover grounds for annulment and setting aside.

77. It was noted that, as the grounds for appeal normally encompassed the narrower grounds for annulment and setting aside, the existence of an appeal could be seen as an additional layer of review, making annulment and setting aside redundant. It was suggested that the grounds for annulment and setting aside also be included as grounds for review to avoid a multiplication of proceedings. Doubts were expressed about the functionality of such an approach, questioning whether domestic courts

would be willing to defer their authority to an international body and whether member States to ICSID would be willing to consider such a change. While the challenges of establishing a well-coordinated appellate mechanism were mentioned, it was felt that none of the options should be ruled out, particularly if the concerned States had the willingness to move forward. It was further mentioned that the case law developed in the operation of the ICSID annulment committees could foster this transition.

78. The view was expressed that the grounds for annulment and setting aside under the ICSID Convention and those under national arbitration laws for non-ICSID investment arbitrations (such as those under article 34 of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”)) could be included as grounds for appeal. It was said that it might be preferable to spell out clearly such grounds in the draft provisions, instead of incorporating them by reference to the relevant instruments. Further questions were raised on whether the grounds found in those instruments were compatible, and whether those found in the Model Law, which mirrored the grounds under article V of the New York Convention, were all relevant in the context of appeal. It was said that more analysis was required on those questions, including on whether the creation of an appellate mechanism would be compatible with current procedures. It was suggested that the analysis should cover whether an appellate mechanism could co-exist with the current ISDS legal framework and, if so, how.

79. It was also mentioned that disputing parties might be required to submit a waiver when making an appeal stating that they would not seek to annul or set aside the first-tier tribunal’s decision. In that context, concerns were expressed that requiring such a waiver might undermine the independence of the judicial system of a State, be unconstitutional in certain jurisdictions, or would require the enactment of new legislation.

80. Regarding safeguards to avoid duplication of proceedings and the risk of conflicting decisions, it was suggested that a domestic court examining a request for enforcement of a first-tier tribunal decision should not enforce such a decision within the period that the parties could appeal that decision.

81. A further question was raised regarding whether States would be required to, and could, waive the right of review of decisions rendered through the appellate mechanism.

(iii) *Appeal in exceptional circumstances (paragraph 3)*

82. The Working Group considered paragraph 3 of the draft provisions which allowed review of errors of law or fact in exceptional circumstances not covered in paragraphs 1 and 2. It was pointed out that paragraph 3 might only be necessary if errors of law or fact that could be reviewed, and the standard of review, under the preceding paragraphs were narrowly defined.

83. Concerns were raised that paragraph 3 was too open-ended and could unintentionally expand the scope of review. It was pointed out that the phrase “in exceptional circumstances” was too vague and would add a layer of uncertainty. It was generally felt that paragraph 3 would create confusion and ambiguity and would be redundant given the current approach to the determination of the scope.

84. Questions were raised, such as whether the occurrence of new circumstances potentially resulting in an error of law or fact and whether the first-tier tribunal’s failure to review all of the arguments made or evidence submitted by the parties could be grounds for appeal. Further, a suggestion was made that another criterion that deserved further research was to have any decision that would order the payment of compensation higher than a certain percentage of a country’s GDP be automatically subject to appeal.

(b) Decisions by ISDS tribunals subject to appeal (paragraphs 4 and 5 of the draft provisions)

85. The Working Group considered paragraphs 4 and 5 of the draft provisions, which illustrated the decisions that could be the subject of appeal. The objective of those provisions was to list and limit the type of appealable decisions to ensure the efficiency of an appellate mechanism.

86. It was generally felt that only final decisions rendered at the end of the first-tier proceedings should be subject to appeal. Therefore, it was stated that decisions on interim measures, which were temporary in nature, and could be reversed by the tribunal ordering them, should be excluded from the scope.

87. While it was generally felt that decisions on merit should be subject to appeal, different views were expressed on whether procedural decisions should also be subject to appeal. For example, it was suggested that decisions on challenge of arbitrators should not be subject to appeal. With regard to decisions on the jurisdiction or competence of the first-tier tribunal (also through a bifurcated procedure), a wide range of views were expressed partly in conjunction with the effect that such an appeal would have on the first-tier process. It was noted that the time at which such an appeal could be made would have an impact on the efficiency of the appellate mechanism. It was stressed that challenge to decision on jurisdiction should be made during the proceedings and not at the stage of the final decision. Views diverged on whether the first-tier tribunal should stay or continue its proceedings when a decision on the jurisdiction was pending in the appellate mechanism and, in that context, concerns about systematic or frivolous appeals which would delay the process were raised. It was questioned whether the appellate mechanism could rule on the issue of jurisdiction when the final award on the merits was the subject of appeal, and whether the appellate body could overturn a decision by the first-tier tribunal stating that it did not have the competence to rule on the case.

88. While some expressed a preference for limiting the scope of appeal to decisions rendered from treaty-based ISDS disputes, others expressed the need to have a broader scope, including allowing an appeal of decisions arising from disputes based on contracts or national investment laws as well as State-to-State disputes. In addition, a suggestion was made that disputes involving State-owned entities need not be included in paragraph 4, since the involvement of State-owned entities would be dependent on the functions they exercised at the relevant time.

89. Suggestions were made to consider the possibility of expedited procedures for appeals for interim measures.

90. A question was raised whether a third party to a dispute that was directly affected by the findings of a tribunal in the application or interpretation of applicable law should be allowed to appeal as a disputing party.

(c) Effect of appeal (paragraph 6 of the draft provisions)

91. The Working Group considered paragraph 6 of the draft provisions, which addressed the effect of appeal.

92. A first question considered was whether the disputing parties would have a right to appeal or be required to request leave (authorization) for appeal. While preference was expressed for a right to appeal (including on the basis that the authorization process might add another layer), it was said that there should be a mechanism for the appellate body to efficiently filter and dismiss appeals that did not meet on a prima facie basis the grounds for appeal, so as to ensure an efficient process and limit caseload. It was further said that clear criteria should be provided, should there be an authorization stage or a dismissal mechanism.

93. With regard to the time frame for appeal, suggestions were made, ranging from 60, 90 to 120 days. It was indicated that time frames might also depend on the type

of decisions that would be appealable. It was suggested to clearly define the starting points for such time frame.

94. It was underlined that further analysis and research were needed regarding the interplay of any time frames under the appellate mechanism with those under existing instruments currently applicable in ISDS (such as the New York Convention and the ICSID Convention,) including any statute of limitation in other international conventions or domestic laws.

95. Some support was expressed for automatic suspension of the effect of the decision rendered by the first-tier tribunal during the period of appeal. It was stated that automatic stay would limit parallel proceedings, and avoid having one of the parties proceed with annulment or enforcement proceedings in a given jurisdiction. In that light, comments were made that introducing such a rule would also require a careful analysis of its impact on annulment and enforcement procedures under existing instruments. It was mentioned that work could be undertaken to identify practical solutions aimed at reducing the need to amend domestic laws governing such procedure should an appellate mechanism be established.

96. Concerns were expressed that an automatic suspension would likely lead to systematic and frivolous appeals.

(d) Authority of the appellate body (paragraphs 7 to 9 of the draft provisions)

97. It was generally felt that an appellate tribunal should be able to confirm, modify or reverse the decision of the first-tier tribunal, as provided for in paragraph 7 of the draft provisions. Views were expressed that the most cost and time effective approach would be for the appellate tribunal to render the final decision, rather than return it to the first-tier tribunal.

98. The Working Group considered paragraph 8 of the draft provisions which allowed the appellate tribunal to annul in whole or in part the decision of the first-tier tribunal on grounds similar to those for annulment as set out in article 52 of the ICSID Convention and for refusal of enforcement in article V of the New York Convention.

99. With regard to annulment, questions were raised about the compatibility with the existing legal framework, in particular domestic setting aside proceedings and the annulment mechanism under the ICSID Convention.

100. It was said that partial annulment could be an option to be considered. In that context, reference was made to the ICSID annulment proceedings, with some annulment committees annulling part of the ICSID decisions and correcting the amounts awarded.

101. With regard to remand of a case to the first-tier tribunal, views were expressed that an appellate tribunal should have a broad remand authority in particular if the scope of review was to be limited to review of law. Reference was made to domestic court systems which provided such authority and case law of the WTO Appellate Body, which illustrated the need for such an authority. Remand was said to address situations where an appellate tribunal had insufficient information on the facts, or the parties had not been adequately heard on the facts, to render a final decision.

102. Yet, other views were that remand authority should be provided only in limited circumstances, where the appellate tribunal was not in a position to complete the legal analysis based on the facts available before it, in order to render a final conclusion. Views were also expressed that the appellate tribunal should not have a remand authority.

103. It was stated that cost and duration of a remand process (including the possibility that the decision rendered by the first-tier tribunal after remand could be subject to another appeal) would need to be considered in light of the benefits of limiting the scope of review.

104. It was suggested that remand would be more efficient in the context of a standing mechanism, also providing for a standing first-tier body. Other views were expressed that remand could also be workable on decisions rendered by ad hoc first-tier tribunals, provided a procedure is designed to allow for the suspension of their functions, pending the decision by the appellate tribunal. A suggestion was made that remand, if provided, could be conditional upon a request by the disputing parties.

(e) Rectification of errors (paragraph 10 of the draft provisions)

105. The Working Group considered paragraph 10 which provided for the rectification of decisions in exceptional circumstances. General interest was expressed to further develop this provision. It was suggested that paragraph 10 should be broader and encompass other traditional post-decision remedies like interpretation and revision. A suggestion was made that rectification should be limited to instances where disputing parties made the request.

(f) Timelines (paragraph 11 of the draft provisions)

106. The Working Group considered paragraph 11 of the draft provisions regarding timelines for the appeal procedure. It was said that timelines should be short and be strictly adhered to by the appellate tribunal. Suggestions ranged from 90 days, 180 days, to a maximum of 300 days, should extensions be granted. Reference was made to the timelines established under the procedure of the WTO Appellate Body.

107. In that regard, concerns with regard to frequent non-compliance with timelines were raised. In view of the complexity of ISDS cases, it was said that timelines needed to be realistic so as to ensure correctness of decisions. Reference was made to the length of annulment procedures. In that context, it was said that full time judges in an appellate mechanism as part of a two-tier permanent structure would be more likely to comply with timelines as they would not have conflicting obligations outside their duty at the permanent body, although it was also said that the focus should be on the quality of decision-making and deliberation rather than on the speed of the outcome.

108. Moreover, it was suggested that the provisions should spell out the limited circumstances in which delays might be allowed, as well as the consequences of non-compliance. It was suggested that the provision could include an obligation to publish the reasons for non-compliance. It was suggested that a thorough analysis should be undertaken on the issue of timelines, considering other comparable appellate mechanisms and on the basis of empirical data on non-compliance with timelines.

(g) Security for costs (paragraph 12 of the draft provisions)

109. The Working Group considered paragraph 12 of the draft provisions which allowed the tribunal to order security for costs. It was said that such a provision could deter unnecessary or frivolous appeals, and could thereby address concerns relating to cost and duration and function as a filter to ensure the manageability of appeals. In response, it was said that if understood as a filter, and if the security for cost would be excessively high, such provision could inadvertently limit the access to justice for small and medium-sized enterprises in particular, in addition to other investors.

110. Regarding the scope of security for costs in draft paragraph 12, the view was expressed it was too broad and that specific criteria/requirements for ordering security for costs should be provided. Regarding the amount of security for costs, one view was that it should be at the discretion of the appellate tribunal to determine the necessary amount, which could include the costs of appeal as well as the amount awarded in the first-tier decision, or at least a certain percentage thereof. Another view was that the provision should include specific guidance to the appellate tribunal with regard to the amount.

111. In addition, it was said that respondent States were often not able to recover a substantial part or any of their costs in defending unsuccessful cases by investors and

that security for costs should therefore at least cover the procedural costs of the respondent State. Furthermore, it was said that security for costs should only be imposed on the investor, not on the State. It was suggested that this would be appropriate because States were likely to be involved in several disputes unlike the investors.

3. Preparatory work on the appellate mechanism and enforcement issues

112. It was generally felt that if appellate mechanisms were to be developed, with the aim to address the concerns expressed about the correctness, coherence and consistency of ISDS awards, the Working Group should also take into account its potential impact on the cost and duration of the overall proceedings, which was also a concern identified. Accordingly, the need to ensure an efficient appellate mechanism through various tools to avoid duplication of review and to minimize abuse was underlined. After discussion, the Working Group requested the Secretariat to further develop the provisions on an appellate mechanism and to further report on the issues that arose relating to enforcement.

113. With regard to the draft provisions more specifically, the Secretariat was requested to:

- In paragraph 1(a), focus future development of the text on option 2 without any reference to specific standards in investment treaties;
- In paragraph 1(b), focus future development of the text on option 2 clarifying the meaning of the word “manifest” and without listing examples of appreciation of facts;
- Remove from the draft text for now paragraph 1(c), but hold it in reserve should it be necessary once the final language of paragraph 1(a) was agreed;
- Develop options to ensure that the scope of review in paragraph 1 would not result in a large number of appeals, possibly by introducing a control mechanism to filter or dismiss frivolous or dilatory appeals;
- In paragraph 2, for the sake of clarity, (i) list the specific grounds found in article 52 of the ICSID Convention and article V of the New York Convention that could be applicable, (ii) consider which of those grounds would be appropriate in the context of an appeal, and (iii) develop options to avoid the appellate mechanism resulting in a three-tier system;
- Remove paragraph 3 from the draft text for now, but hold it for further consideration should the scope of coverage change;
- Further consider when and how facts discovered or arising after the decision of the first-tier tribunal could be grounds for appeal;
- Consider the possibility of States having the flexibility to choose which types of decisions/reservations would be the subject of appeal through reservations, if the final instrument were to be a convention;
- Further elaborate paragraph 4 to reflect the preference expressed that only final decisions should be the subject of appeal;
- With regard to whether decisions on jurisdiction should also be subject to appeal, provide options taking into account a number of aspects including when such an appeal could be made, its effect on the first-tier proceedings, the circumstance under which such an appeal would be allowed, and so forth;
- In paragraph 6, reflect the parties’ “right to appeal” rather than the “right to request leave of an appeal”;
- Clarify the options regarding the effect that an appeal would have on decisions, for example, whether it would have a suspensive effect and whether parties would be allowed to seek enforcement in domestic courts;

- In paragraph 7, reflect the support expressed for the appellate body to be able to confirm, modify, or reverse the first-tier decision, which would make the decision final and binding on the parties as confirmed, modified or reversed;
- Provide options on whether and when an appellate body should have the authority to annul or set aside an award and the circumstances which would justify annulment (including whether a party must request one), also in light of the grounds to be provided in paragraph 2 and based on further information on the possible interplay between an appellate mechanism, the ICSID annulment and domestic set aside mechanisms;
- Outline the advantages and disadvantages of granting an appellate body remand authority and accordingly, develop options on whether and when an appellate body should have such authority (for example, when it would not be in a position to complete the analysis) and how the appellate body could provide instruction so as to avoid a cycle of remand and appeal;
- Retain paragraph 10 for further consideration and provide further options regarding which other post-award remedies should be included in the draft, if any;
- In paragraph 11, suggest reasonable time frames within which the appellate tribunal would be required to render its decision taking into account the need to ensure timeliness and correctness as well as outlining measures to ensure compliance with the time frames and the consequences for non-compliance; and
- In paragraph 12, consider whether the rules on security for costs should be different from those for first-tier proceedings, whether security for costs would be an effective tool to address frivolous appeals and further whether it could limit access to certain parties, as well as whether the amount awarded by the first-tier tribunal should be included.

114. In light of the impact of an appellate mechanism on the legal framework under the New York Convention and the ICSID Convention, the Secretariat was requested to undertake thorough research on the matters addressed by the Working Group in considering these questions, as well as to continue its research regarding enforcement issues arising from the set-up of standing mechanisms. The ICSID Secretariat indicated their willingness to provide further analysis and research on the issues raised, including on the ways in which appeal could be integrated into the ICSID mechanism.

115. In addition, the Secretariat was requested to provide further insights on the costing of a standing mechanism. Considering the preparatory work to be conducted, it was noted that the Secretariat would continue its close cooperation with all delegations and interested stakeholders. In that context, the Academic Forum and other organizations indicated their readiness to provide assistance, including on undertaking a comparative analysis of the costing of existing adjudicative bodies. They also indicated their readiness to provide additional research papers on topics covered during the session.

116. Due to the limited time available at the session, the Working Group decided to defer its discussion on topics of enforcement and the code of conduct for adjudicators in ISDS to a future session.

IV. Other Business

117. The Working Group expressed its appreciation for the support provided by the Government of France and the German Federal Ministry for Economic Cooperation and Development (BMZ) to increase the capacity of the Secretariat and to provide some interpretation support for virtual intersessional meetings.