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Settlement Reform)
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Possible reform of investor-State dispute settlement (ISDS)

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

Note by the Secretariat

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I. Introduction

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

2. This Note contains a draft statute establishing a standing mechanism to resolve international investment disputes based on the previous deliberations. Similar to the draft statute of an advisory centre (A/CN.9/WG.III/WP.238), the draft statute has been prepared in the form of a possible protocol to the multilateral instrument on ISDS reform (MIIR). Document A/CN.9/WG.III/WP.240 provides annotations to the articles listing issues for further consideration by the Working Group. As different notions had been used in the previous working papers discussing the selection and appointment of adjudicators, appellate mechanism and the standing mechanism, efforts were made to use consistent terminology throughout the text.

3. As the Working Group has yet to determine whether and how a standing mechanism would operate and how to proceed with the deliberations on these reform elements, the draft statute compiles the common components discussed so far taking into account some possible models (see A/CN.9/WG.III/WP.233, paras. 22–23). These components have been outlined in separate sections with an aim to allow the Working Group to construct the standing mechanism as it fits appropriate. For example, should the Working Group wish to discuss a standing mechanism composed only of an appellate mechanism, it may wish to proceed with the consideration of sections A, B, D, F, G and H. A two-tier standing mechanism would require the consideration of all the sections.

4. The draft statute would need to be adjusted depending on the model to be developed by the Working Group. The Working Group may wish to also consider whether a preamble and definitions of key terminology should be prepared along with the final clauses, some of which have been set forth in Section H (A/CN.9/1092, para. 17).

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

A. Establishment and structure of the standing mechanism

Article 1 – Establishment

The [*name of the standing mechanism to be determined* (hereinafter, the “Standing Mechanism”)] is hereby established to resolve international investment disputes.

Article 2 – General principles

1. The Standing Mechanism shall operate in a manner that is effective, affordable, accessible and financially sustainable.
2. The Standing Mechanism shall be independent and free from undue external influence, including from its donors.
3. The Standing Mechanism shall cooperate with international and regional organizations and coordinate, as appropriate, its activities to ensure the efficient use of its resources.

Article 3 – Structure and composition

1. The Standing Mechanism shall consist of the Conference of the Contracting Parties (the “Conference”), the Dispute Tribunal and the Appeals Tribunal (jointly referred to as the “Tribunals”) as well as the Secretariat.
2. The Conference shall be composed of all Contracting Parties that have ratified or acceded to this Protocol in accordance with article 41.
3. The Dispute Tribunal shall be composed of [*number to be determined*] members appointed by the Conference in accordance with Section B.
4. The Appeals Tribunal shall be composed of [*number to be determined*] members appointed by the Conference in accordance with Section B.
5. The Secretariat shall be headed by an Executive Director and composed of staff members.
6. The Standing Mechanism shall be represented externally by the President of the Tribunal(s).

Article 4 – Conference of the Contracting Parties

1. The Conference of the Contracting Parties shall ensure that the Standing Mechanism operates and functions in accordance with the general principles set out in article 2.
2. For this purpose, the Conference shall:
 - (a) Elect the members of its Bureau;
 - (b) Appoint the members of the Dispute Tribunal and the Appeals Tribunal;
 - (c) Adjust the number of members of the Dispute Tribunal and the Appeals Tribunal;
 - (d) Appoint the Executive Director of the Secretariat;
 - (e) Adopt its own rules of procedure;
 - (f) Adopt administrative, financial and other regulations on the operation of the Standing Mechanism;
 - (g) Adopt regulations concerning the conduct and ethical obligations of the members of the Dispute Tribunal and the Appeals Tribunal as well as the Executive Director and the staff members of the Secretariat;
 - (h) Adopt the rules of procedure of the Dispute Tribunal and the Appeals Tribunal to supplement Sections E and F;
 - (i) Evaluate and monitor the activities of the Standing Mechanism and adopt the annual report prepared by the Executive Director;
 - (j) Adopt the annual budget of the Standing Mechanism prepared by the Executive Director and reviewed by the Dispute Tribunal and the Appeals Tribunal;
 - (k) Determine the amount of remuneration of the members of the Dispute Tribunal and the Appeals Tribunal;
 - (l) Determine the amount of financial contribution of each Contracting Party on the basis of [*criteria to be determined*];
 - (m) Adopt the fee structure of the Standing Mechanism prepared by the Executive Director;
 - (n) Approve the establishment of any subsidiary bodies of the Standing Mechanism, including any regional or local offices of the Secretariat;
 - (o) Perform any other functions in accordance with this Protocol.

3. The Conference shall have a Bureau consisting of a Chairperson and [*number to be determined*] Vice-Chairpersons. The Chairperson and the Vice-Chairpersons shall be elected by the Conference for a non-renewable period of [*number to be determined*] years. The Bureau shall meet regularly to assist the Conference in discharging its functions.
4. The Conference shall meet at least once a year. When considered necessary or upon the request of [*number to be determined*] Contracting Parties, the Chairperson may convene a special meeting of the Conference.
5. The Chairperson shall chair the meetings of the Conference and be responsible for submitting matters to the consideration of the Conference. In the absence of the Chairperson, a Vice-Chairperson may exercise the functions of the Chairperson.
6. The Chairperson may determine who may participate in the meetings of the Conference.
7. The Conference shall endeavour to make all decisions by consensus.
8. If a decision cannot be made by consensus, the Chairperson may submit the matter to a vote, which requires the presence of a majority of the Contracting Parties. Each Contracting Party shall have one vote. Decisions shall require a four-fifths majority of the Contracting Parties present and voting. If the majority of the Contracting Parties are not present, the same subject matter may be submitted for a second vote at the next meeting of the Conference, the decision of which may be made by a four-fifths majority of the Contracting Parties present and voting.
9. The official languages of the Conference shall be [*to be determined*]. The working languages shall be [*to be determined*].

Article 5 – Dispute Tribunal, Appeals Tribunal and their Presidency

1. The Dispute Tribunal and the Appeals Tribunal shall carry out adjudicatory and any other functions in accordance with this Protocol.
2. The President and the Vice-President of the Dispute Tribunal shall be elected by majority of votes by members of the Dispute Tribunal for a renewable period of [*a period of time to be specified*] years. The President and the Vice-President shall constitute the Presidency of the Dispute Tribunal, which shall be responsible for its operation and administration. In the absence of the President, the Vice-President may exercise the functions of President.
3. A member elected to replace the President or the Vice-President before the expiry of the period in paragraph 2 shall serve for the remainder of the term.
4. Paragraphs 2 and 3 also apply mutatis mutandis to the Appeals Tribunal.

Article 6 – Secretariat

1. The Secretariat headed by the Executive Director shall carry out administrative and any other functions in accordance with this Protocol. It shall support the activities of the Conference and its subsidiary bodies and assist in the functioning of the Tribunals.
2. The Executive Director shall be appointed by the Conference for a renewable period of [*a period of time to be specified*] years based on a recommendation by the Bureau of the Conference.
3. The Executive Director shall be accountable to the Conference.
4. The Executive Director shall:
 - (a) Manage the day-to-day operation of the Standing Mechanism;
 - (b) Employ and manage the staff members of the Secretariat in accordance with the staff regulations adopted by the Conference;

- (c) Prepare the annual report on the operation of the Standing Mechanism for adoption by the Conference;
 - (d) Prepare the annual budget of the Standing Mechanism for adoption by the Conference;
 - (e) Propose the amount of remuneration of the members of the Tribunals, the amount of financial contribution of each Contracting Party and the fee structure for adoption by the Conference;
 - (f) Prepare rules of procedure and regulations for adoption by the Conference;
 - (g) Engage and cooperate with other organizations and institutions;
 - (h) Prepare proposals on the establishment of any subsidiary bodies of the Secretariat, including regional or local offices;
 - (i) Act as the registrar for proceedings administered under this Protocol, authenticate decisions rendered by the Tribunals and certify copies thereof;
 - (j) Perform any other functions in accordance with this Protocol.
5. The Executive Director and the staff members of the Secretariat shall not seek or accept instructions from any government or any other authority other than the Standing Mechanism. They shall not hold any other employment or engage in any other occupation without the approval of the Bureau of the Conference as concerns the Executive Director, or the Executive Director as concerns the staff members.

B. Selection and appointment of the members of the Tribunals

Article 7 – Qualifications and requirements

1. The members of the Tribunals shall be persons of high moral character, enjoying the highest reputation for fairness and integrity with recognised competence in public international law, private international law, international investment law or the resolution of international investment disputes.
2. The members of the Tribunals shall be fluent in at least one of the [official][working] languages referred to in article 4(9).
3. The members of the Tribunals shall be nationals of Contracting Parties. An individual who is a national of more than one State shall be deemed to be a national of the one in which he or she [has his or her habitual residence][ordinarily exercises civil and political rights].

Article 8 – Composition of the Tribunals

1. The composition of [the Tribunals] [the Dispute Tribunal and of the Appeals Tribunal] shall reflect equitable geographical distribution, the representation of the principle legal systems and equal gender representation.
2. No two members of the Tribunals shall be nationals of the same State.

Article 9 – Nomination of candidates

1. A Contracting Party may nominate [*number to be determined*] individual(s) as candidate(s) for appointment as members of the Tribunal. The candidate need not be a national of that Contracting Party. In nominating the candidate(s), the Contracting Party shall take into gender representation and make all efforts to consult representatives of the government, judiciary and other bodies, the civil society, bar associations, business associations, academic and other relevant organizations.
2. Pursuant to an open call by the Conference for candidates, individuals may be nominated as candidates for appointment as members of the Tribunal. In that case, the Conference shall adopt regulations governing the nomination process, including which organizations may nominate the candidates.

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

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

Article 10 – Selection committee

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

2. The Selection Committee shall be composed of [*number to be determined*] persons. The Executive Director shall serve *ex officio* in the Selection Committee.

3. The Conference shall adopt regulations on the procedure and operation of the Selection Committee, which set forth the rules on the appointment of the Selection Committee members, their qualifications and their terms of services.

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

5. Upon the review of the initial list of candidates, the Selection Committee may recommend to the Conference that an open call be made for additional candidates.

6. Upon final review, the Selection Committee shall present the list of suitable candidates to the Conference for its consideration. The list shall be made public unless determined otherwise by the Conference.

7. For the purposes of the appointment by the Conference, the Executive Director shall classify the candidates by gender and by regional groups based on their nationality. In the case that the candidate was nominated by a Contracting Party of which he or she is not a national, the regional group to which the nominating Contracting Party belongs shall also be indicated.

Article 11 – Appointment by the Conference of the Contracting Parties

1. The Conference shall appoint the members of the Tribunals in accordance with article 8 and from the list of suitable candidates presented by the Selection Committee.

[...]

Article 12 – Term of office

1. Members of the Tribunals shall hold office for a term of [*a period of time to be specified*] years and subject to paragraph 2 and article 13(3), shall not be eligible for reappointment.

2. At the first election to appoint the members of the Tribunals, [*half*] of the members shall be selected by lot to serve for a term of [*half of the period in paragraph 1*] years. Those members shall be eligible for reappointment for a full term.

3. Members of the Tribunals shall serve full-time, unless determined otherwise by the Conference.

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

5. Members of the Tribunals shall receive an annual salary. In addition, the President and the Vice-President shall receive a special annual allowance. These salaries, allowances, and compensation shall be fixed by the Conference.
6. Notwithstanding paragraph 1, a member of the Tribunals assigned to a case shall continue in the office to complete the proceeding which has commenced, unless he or she has been replaced or removed in accordance with article 13.

Article 13 – Removal, resignation, vacancies and replacement

1. A member of the Tribunals may be removed from office in case of non-compliance with this Protocol or for failure to perform his or her duties by a [unanimous decision by] [a two-thirds majority of] the members of the respective Tribunal excluding the member under scrutiny.
2. A member may resign from his or her office by notifying the President of the respective Tribunal. The resignation shall become effective upon acceptance by the President.
3. The removed or resigning member shall be replaced in accordance with articles 9 to 11. A member who is appointed as a replacement shall remain in office for the remaining term of the removed or resigning member and shall be eligible for reappointment for a full term.

C. The Dispute Tribunal

Article 14 – Jurisdiction

1. The jurisdiction of the Dispute Tribunal shall extend to any international investment dispute, which the parties to the dispute consent in writing to submit it to the Dispute Tribunal. When the disputing parties have given their consent, no party may withdraw its consent unilaterally.
2. A Contracting Party may consent to the jurisdiction of the Dispute Tribunal by providing a list of instruments to which it is a party or legislation governing foreign investments which it has enacted. The list may be provided when depositing the instrument of ratification or accession or by subsequently notifying the Executive Director and the depositary of the Protocol in writing.
3. The Dispute Tribunal shall have exclusive jurisdiction over a dispute submitted for resolution pursuant to an instrument listed in paragraph 2, when both or all relevant Contracting Parties have included the instrument in their list.
4. The Executive Director shall be responsible for maintaining the list of instruments or legislation provided by each Contracting Party and making it publicly available.

Article 15 – Request for dispute resolution

1. Any party wishing to initiate a dispute resolution proceeding before the Dispute Tribunal shall address a request to that effect in writing to the Executive Director, who shall send a copy of that request to the other disputing party.
2. The request in paragraph 1 shall contain information concerning the issues in dispute, the identity of the disputing parties and their consent to the jurisdiction of the Dispute Tribunal in accordance with the rules of procedure.
3. The Executive Director shall register the request unless, on the basis of the information contained in the request, it is found that the dispute is manifestly outside the jurisdiction of the Dispute Tribunal. The Executive Director shall notify the parties of the registration or refusal to register.

Article 16 – Panels and the assignment of disputes

1. As soon as possible after the appointment of the members of the Dispute Tribunal and the election of the President and the Vice-President, the Presidency shall

assign the members to Panels, each consisting of [three] members. The President and the Vice-President shall also be assigned to a Panel.

2. In constituting the Panels, the Presidency shall take into account elements referred to in article 8(1) as well as areas of expertise, language proficiency and other relevant criteria as set out in the regulations adopted by the Conference.

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

4. The Presidency may decide to assign two or more disputes to the same Panel if the issues in the disputes are similar.

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

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

Article 17 – Powers and functions of the Panel

1. The Dispute Tribunal shall be the judge of its own competence.

2. Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Dispute Tribunal shall be considered by the Panel assigned to the dispute, which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

D. The Appeals Tribunal

Article 18 – Jurisdiction

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

2. A Contracting Party may consent to the jurisdiction of the Appeals Tribunal by providing a list of instruments to which it is a party or legislation governing foreign investments which it has enacted, pursuant to which an award or decision may have been or may be made by an arbitral tribunal or any other adjudicatory body. The list may be provided when depositing the instrument of ratification or accession or by subsequently notifying the Executive Director and the depositary of the Protocol in writing.

3. The Appeals Tribunal shall have exclusive jurisdiction over appeals with regard to an award or decision rendered pursuant to an instrument listed in paragraph 2, when both or all relevant Contracting Parties have included the instrument in their list.

4. The Appeals Tribunal shall have jurisdiction over appeals with regard to a decision rendered by the Dispute Tribunal in accordance with Section C.

5. The jurisdiction of the Appeals Tribunal is subject to any limitation in the law(s) applicable to the proceedings of the first-tier tribunal and article **.
6. The Executive Director shall be responsible for maintaining the list of instruments or legislation provided by each Contracting Party and making it publicly available.

Article 19 – Request for appeal

1. Any party wishing to institute appeal proceedings before the Appeals Tribunal shall address a request to that effect in writing to the Executive Director, who shall send a copy of that request to the other disputing party.
2. The request in paragraph 1 shall contain information concerning the award or decision, the identity of the disputing parties and their consent to the jurisdiction of the Appeals Tribunal in accordance with the rules of procedure.
3. The Executive Director shall register the request unless, on the basis of the information contained in the request, it is found that the appeal is manifestly outside the jurisdiction of the Appeals Tribunal. The Executive Director shall notify the parties of the registration or refusal to register.

Article 20 – Chambers and the assignment of appeals

1. As soon as possible after the appointment of the members of the Appeals Tribunal and the election of the President and the Vice-President, the Presidency shall assign the members to Chambers, each consisting of [three] members. The President and the Vice-President shall also be assigned to a Chamber.
2. In constituting the Chambers, the Presidency shall take into account elements referred to in article 8(1) as well as areas of expertise, language proficiency and other relevant criteria as set out in the regulations adopted by the Conference.
3. When a request is registered in accordance with article 19(3), the Presidency shall assign the appeal to a Chamber on a random basis. If the appeal is assigned to a Chamber consisting of a member, who is a national of the State party to the appeal or of the State whose national is a party to the appeal, the Presidency shall replace that member with another member of the Appeals Tribunal or may assign the appeal to another Chamber.
4. The Presidency may decide to assign two or more appeals to the same Chamber if the issues of the appeals are similar.
5. In the circumstances outlined in the regulations adopted by the Conference, the Presidency may decide to assign an appeal to a Chamber consisting of more than [three] members.

Article 21 – Powers and functions of the Chamber

1. The Appeals Tribunal shall be the judge of its own competence.
2. Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Appeals Tribunal shall be considered by the Chamber assigned to the dispute, which shall determine whether to deal with it as a preliminary question or to join it to the merits of the appeal.

E. The Dispute Tribunal procedure

Article 22 – Conduct of the Panel proceedings

1. The Panel shall conduct the proceedings in accordance with this Protocol and the rules of procedure adopted by the Conference.
2. Subject to paragraph 1, the Panel may conduct the proceedings in such manner as it considers appropriate, provided that the parties are treated with equality and that

at an appropriate stage of the proceedings, each party is given a reasonable opportunity of presenting its case. The Panel shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute.

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

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

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

Article 23 – Decision by the Panel

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

2. Questions of procedure may be decided by the presiding member of the Panel in consultation with the President of the Dispute Tribunal.

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

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

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

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

7. The Executive Director shall communicate the certified copies of the decision to the parties and shall also make it available to the public.

Article 24 – Recourse against the decision

1.

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

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

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

Article 25 – Effect of the decision

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

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

Article 26 – Recognition and enforcement

1. [Subject to article 31,] each Contracting Party shall recognize a decision by the Dispute Tribunal as binding and enforce the obligations imposed by that decision within its territories as if it were a final judgment of a court in that Contracting Party. A Contracting Party with a federal constitution may choose to enforce such a decision in or through its federal courts and may provide that such courts shall treat the decision as if it were a final judgment of the courts of a constituent State.
2. A party seeking recognition or enforcement in the territory of a Contracting Party shall supply to a competent court or other authority, which that Contracting Party shall have designated for this purpose, a copy of the decision certified by the Executive Director in accordance with article 23, paragraph 5.
3. For the avoidance of doubt and for the purposes of recognition and enforcement in the territory of a non-Contracting Party, a decision by the Dispute Tribunal shall be treated as an “arbitral award” as defined in article I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
4. Recognition and enforcement may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent court or authority where the recognition and enforcement is sought, proof that: [*grounds to be listed and the procedure to be detailed*].
5. Execution of a decision shall be governed by the laws concerning the execution in the Contracting Party in whose territory such execution is sought.

F. The Appeals Tribunal procedure

Article 27 – Scope of appeal

1. When requesting an appeal in accordance with article 19, a party may appeal an award or decision of the first-tier tribunal on its jurisdiction or on its merits, including:
An interim measure ordered by the first-tier tribunal to preserve a party’s rights.
2. The following types of an award or decision shall not be subject to appeal:
 - (a) Procedural orders;
 - (b) Decisions on bifurcation;
 - (c) Decisions on challenges of arbitrators or adjudicators;
 - (d) [...].

Article 28 – Conditions for appeal

1. An appeal may be requested in accordance with article 19 only if the party expressly waives its rights to initiate annulment, set aside, recognition or enforcement proceedings with regard to the award or decision of the first-tier tribunal [during the appeal proceedings].
2. A request for appeal in article 19 shall be made within [*a period of time to be specified*] days from the date of the award or decision.

Article 29 – Grounds of appeal

1. An appeal should be limited to:
 - (a) An [manifest] error in the application or interpretation of the law; or

(b) A manifest error in the appreciation of the facts, [including the appreciation of relevant domestic legislation] [and the assessment of damages].

2. Notwithstanding paragraph 1, an appeal may be raised on one or more of the following grounds:

(a) A party to the agreement to initiate the first-tier proceeding was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it;

(b) The first-tier tribunal was not properly constituted;

(c) The first-tier tribunal has manifestly exceeded its powers or ruled beyond the claim/dispute submitted to it;

(d) There was corruption on part of a member of the first-tier tribunal;

(e) There has been a serious departure from a fundamental rule of procedure by the first-tier tribunal;

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

(g) [The decision by the first-tier tribunal is in conflict with international public policy];

(h) [New or newly discovered facts;]

(i) [Unsubstantiated award, absence or lack of reasoning; and]

(j) [].

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

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

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

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

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

Article 32 – Conduct of the Chamber proceedings

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

2. Article 22 shall apply mutatis mutandis to the Chamber proceedings.

3. The Chamber may, where appropriate and so requested by a party, suspend the appeals proceedings for a fixed period of time to give the first-tier tribunal an opportunity to continue or resume the proceedings or to take such other action as in the Chamber's opinion will eliminate the grounds for appeal.

Article 33 – Decision by the Chamber

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

2. Questions of procedure may be decided by the presiding member of the Chamber in consultation with the President of the Appeals Tribunal.

3. The Chamber may uphold, modify or reverse the award or decision of the first-tier tribunal, including its findings.
4. Where the facts established by the first-tier tribunal are insufficient for the Chamber to make a decision in accordance with paragraph 3, it may remand the dispute to the first-tier tribunal. If the first-tier tribunal is not able to consider the dispute, or where it would be inappropriate to do so, a new tribunal shall be constituted upon the request of either disputing party in accordance with the rules that were applied to the first-tier tribunal.
5. When the Chamber modifies or reverses any part of the award or decision of the first-tier tribunal, it shall indicate as precisely as possible how the relevant findings or conclusions of the first-tier tribunal are modified or reversed. When the Chamber remands the dispute to the first-tier tribunal, it may provide detailed instructions where appropriate.
6. The Chamber shall make a decision within [*a period of time to be specified*] days from the date the request for appeal is registered in accordance with article 19, paragraph 3. When the Chamber is not in position to make the decision within that period of time, it shall inform the parties in writing of the reasons for the delay together indicating a fixed period of time within which it will make its decision, which shall not exceed [*a period of time to be specified*] days.
7. The decision of the Chamber shall be in writing and shall be signed by the members of the Chamber.
8. The decision of the Chamber shall state the reasons upon which it is based.
9. Within [*a period of time to be specified*] days of the communication of the decision by the Chamber, a party may make a request to the Executive Director that the Chamber: (i) give an interpretation of the decision; (ii) correct any error in computation, any clerical or typographical errors or any error or omission of a similar nature; or (iii) make an additional decision as to issues presented in the proceedings but not decided by the Chamber. The Executive Director shall notify the other party and if the request is justified, the Chamber shall make an interpretation, correction or additional decision within [*a period of time to be specified*] days, which shall form part of the decision of the Chamber.
10. The decision of a Chamber shall be considered a decision of the Appeals Tribunal.
11. The Executive Director shall communicate the certified copies of the decision to the parties and shall also make it available to the public.

Article 34 – Effect of the decision

1. An award or decision of the first-tier tribunal upheld by the Chamber shall be final and binding on the disputing parties.
2. An award or decision of the first-tier tribunal modified or reversed by the Chamber shall be final and binding on the disputing parties as amended by the Chamber.
3. An award or decision of the first-tier tribunal which was remanded by the Chamber shall have no effect. A subsequent award or decision made by the first-tier tribunal or a new tribunal in accordance with article 33, paragraphs 4 and 5 shall not be subject to appeal.
4. After the lapse of time in article 33, paragraph 9, the decision shall be binding on the parties and final, upon which each party shall comply with the terms of the first-tier decision as upheld or amended by the Chamber without delay.

Article 35 – Recourse against the decision

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

Article 36 – Recognition and enforcement

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

2. A party seeking recognition or enforcement in the territory of a Contracting Party shall supply to a competent court or other authority, which that Contracting Party shall have designated for this purpose, a copy of the decision certified by the Executive Director in accordance with article 33, paragraph 10.

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

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

G. Operation of the Standing Mechanism**Article 37 – Financing**

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

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

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

4. The Standing Mechanism may receive voluntary contributions, whether monetary or in-kind, from Contracting Parties, non-Contracting Parties, international and regional organizations, and other persons or entities in accordance with the regulations adopted by the Conference and provided that the receipt of such contribution is consistent with the objectives of the Standing Mechanism, is reported in the annual report, and does not create a conflict of interest or otherwise impede its independent operation.

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

Article 38 – Legal status and liability

1. The Standing Mechanism shall have full legal personality. It shall have the capacity as necessary to fulfil its functions, including to contract, to acquire and dispose of immovable and movable property, and to institute legal proceedings.

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

3. The Standing Mechanism shall enjoy in the territories of each Contracting Party the privileges and immunities as necessary for the fulfilment of its functions.
4. The Standing Mechanism, its property and assets shall enjoy immunity from all legal processes, except when the Standing Mechanism waives this immunity.
5. The Standing Mechanism, its property, assets and income, and its operations and transactions authorized by this Protocol shall be exempt from all taxation and customs duties. The Standing Mechanism shall also be exempt from liability for the collection or payment of any taxes or customs duties.
6. The member of the Bureau, the members of the Tribunals, the Executive Director and the staff members of the Secretariat, when engaged in the functions of the Standing Mechanism and necessary for the performance of their functions, shall be accorded the same level of privileges and immunities that is accorded to the staff members of permanent diplomatic missions or international organizations.
7. Paragraph 6 shall also apply to persons appearing in proceedings of the Standing Mechanisms as parties, agents, legal representatives, witnesses or experts, as is necessary for the proper functioning of the Standing Mechanism and insofar as in connection with their travel to and from, and their stay at, the place of the proceedings.

H. Final clauses

Article 39 – Reservations

1. A Contracting Party may declare that:
 - (a) It shall apply this Protocol only to proceedings initiated under instruments or legislation included in the list provided by it pursuant to articles 14 and 18;
 - (b) It shall not apply the Protocol to arbitrations conducted under the ICSID Convention or awards resulting thereof;
 - (c) The consent provided in paragraphs 2 of articles 14 and 18 shall apply only when the claimant is a national of a Contracting Party or a Contracting Party;
 - (d) Articles 26 and 36 shall only apply to decisions involving a national of another Contracting Party or another Contracting Party and on the basis of reciprocity with regard to decisions involving a national of a non-Contracting Party or non-Contracting Party; [...]
2. No reservations are permitted except those expressly authorized in this article.

Article 40 – Depositary

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

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

1. This Protocol is open for signature by a State or a regional economic integration organization [*place and time to be determined*].
2. This Protocol is subject to ratification, acceptance or approval by the signatories.
3. This Protocol is open for accession by a State or a regional economic integration organization that is not a signatory from the date it is open for signature.
4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 42 – Entry into force

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

Article 43 – Amendments

1. Any Contracting Party may propose an amendment to this Protocol to the Conference. The proposal shall be promptly communicated to all Contracting Parties. The Conference may adopt the amendment, which shall be communicated to the depositary.
2. The depositary shall submit the adopted amendment to all Contracting Parties for ratification, acceptance or approval. The adopted amendment shall enter into force 30 days after the date of deposit of the instrument of ratification, acceptance or approval by all Contracting Parties.

Article 44 – Withdrawal

1. Any Contracting Party may at any time withdraw from this Protocol by means of a formal notification addressed to the depositary. The depositary shall inform the Executive Director, who shall inform the Contracting Parties promptly. The withdrawal shall take effect [*a period of time to be specified*] days after the notification is received by the depositary.
 2. The provisions of the Protocol shall apply to the proceedings before the Tribunals in which the withdrawing Contracting Party is a party, if the proceedings have commenced prior to the withdrawal taking effect.
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