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Possible reform of investor-State dispute settlement (ISDS)

Annotations to the draft statute of a standing mechanism for the resolution of international investment disputes

Note by the Secretariat

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V.24-02036 (E)

I. Introduction

1. This Note contains annotations to the draft statute of a standing mechanism for the resolution of international investment disputes contained in document A/CN.9/WG.III/WP.239. The annotations have been prepared to assist in understanding how the articles could operate and how they relate to each other. The annotations also pose questions for the Working Group to address in its consideration. This Note does not seek to express a view on the reform option, which is a matter for the Working Group's consideration.

II. Annotations to the draft statute of a standing mechanism for the resolution of international investment disputes

A. Establishment and structure of the standing mechanism

2. The articles in this section address the establishment, general principles, structure and composition of the standing mechanism.

Article 1 – Establishment

3. Article 1 establishes the Standing Mechanism and states its objective to "resolve international investment disputes". The phrase is used broadly to refer to a broad range of parties to the disputes, various means to settle the disputes as well as a wide range of legal bases for the disputes. The article aims to clarify the general scope of competence of the Standing Mechanism rather than to define its jurisdiction, which is dealt with in articles 14 and 18.

Article 2 – General principles

4. Article 2 is based on article 3 of the draft statute of an advisory centre on international investment dispute resolution (A/CN.9/WG.III/WP.238, para. 5). The Working Group may wish to consider whether the same principles should govern the operation of the Standing Mechanism.

Article 3 – Structure and composition

5. Article 3 outlines the main organs of the Standing Mechanism. The Working Group may wish to consider whether it wishes to proceed to develop: (i) a two-tier mechanism with a first-instance body (referred to in the draft statute as the "Dispute Tribunal") and an appellate body (referred to as the "Appeals Tribunal") or (ii) a one-tier mechanism composed of either the Dispute Tribunal or the Appeals Tribunal. A number of models have been suggested (see A/CN.9/WG.III/WP.233, paras. 22–23) and the nomenclature would be adjusted depending on the model. For example, it may be possible for a one-tier Appeals Tribunal to not only handle appeals but also handle cases as the first-instance body in exceptional circumstances.

6. Articles 3 also addresses how the organs are to be composed leaving the functions of each organ to the following articles. The Working Group may wish to confirm that the Standing Mechanism should be established as an intergovernmental organization. Articles 3(2) and 41 foresee that the States and regional economic integration organizations that are parties to the statute would form the Conference of the Contracting Parties (the "Conference").

7. Paragraphs 3 and 4 address how the Dispute Tribunal and Appeals Tribunal are composed, mainly that they would consist of individuals appointed by the Conference. The Working Group may wish to consider the number of members of each Tribunal, including whether the number should be different for the two Tribunals. Article 4(2)(c) foresees that the Conference may adjust those numbers. Selection and appointment of the members as well as their term in office are detailed in Section B.

8. With regard to paragraphs 5 and 6, the Working Group may also wish to consider whether the term “Secretary” is more appropriate as the head of the Secretariat and whether the Chairperson of the Conference should represent the Standing Mechanism.

Article 4 – Conference of the Contracting Parties

9. Paragraphs 1 and 2 focus on the authority of the Conference and lists some of the key functions, which would largely depend on the overall structure of the Standing Mechanism and how it would operate.

10. For example, as the number of the Contracting Parties and the workload of the Standing Mechanism (which would also depend on the instruments listed by the Contracting Parties in accordance with articles 14(2) and 18(2)) are difficult to estimate, article 4(2)(c) gives the authority to the Conference to adjust the number of the members of the Tribunals. This could avoid the need to make an amendment to the Protocol. The procedure for making the adjustment, including who can propose the adjustment and the circumstances that would justify it, could be set forth in the regulations adopted by the Conference.

11. Paragraph 2(h) provides that the Conference would adopt the rules of procedure of the Tribunals. With regard to paragraph 2(k), the Working Group may wish to consider whether the remuneration of other individuals (for example, the Bureau members and the members of the Selection Committee) should be foreseen, as this would also have an impact on the budget and the contributions of each Contracting Party foreseen in paragraph 2(l). In assessing the contributions, the level of economic development, investment flows, the number of instruments listed by the Contracting Party, the anticipated number of disputes and other relevant factors may be taken into account.

12. The terms “adopt” and “determine” in paragraph 2 are understood to include the authority to amend or revise, and the terms “elect” and “appoint” in the same paragraph are understood to include the authority to remove the individuals from their position (with regard to the members of the Tribunals, see article 13(1)).

13. Paragraph 3 establishes the Bureau of the Conference. The Working Group may wish to consider its composition and the functions that could be delegated by the Conference to the Bureau or to the Chairperson of the Bureau. Regulations may be developed with regard to the operation of the Bureau, including, for example, when the Vice-Chairperson may exercise the functions of the Chairperson and which Vice-Chairperson would be designated to do so.

14. With regard to paragraph 6, the Chairperson may decide to invite the members of the Tribunals, States and regional economic integration organizations that have signed and not yet ratified the statute, other States as well as international governmental and non-governmental organizations with relevant expertise and experience to participate in the meetings of the Conference.

15. Regarding paragraphs 7 and 8, the Working Group may wish to consider whether the consensus-based approach is appropriate for decision-making in the Conference, particularly in relation to some of its functions (for example, the adjustment in numbers, and the appointment, of the members of the Tribunals, see paragraph 2(c) and article 11). The Working Group may wish to consider the decision-making rules for the Bureau, the Tribunals (for example, with regard to the election of the President and removal of a member), the Selection Committee and other organs of the Standing Mechanism.

16. Paragraph 9 sets forth the official and working languages of the Conference. The Working Group may wish to consider whether the same should apply to the Standing Mechanism as a whole, in particular the Tribunals, in light of the fact that the language(s) of the proceedings may vary depending on the dispute.

Article 5 – Dispute Tribunal, Appeals Tribunal and their Presidency

17. Paragraph 1 provides a general description of the functions of the Tribunals, which is further detailed in Sections C and D.

18. Paragraph 2 establishes the Presidency of the Dispute Tribunal to be composed of two members of the Disputes Tribunal and with a renewable term (which should be determined based on the overall term of the members set forth in article 12(1)). Paragraph 2 provides the rule in case the President is not able to exercise his functions. The Working Group may wish to consider more generally the functions to be carried out by the Presidency.

19. Paragraph 4 applies paragraphs 2 and 3 to establish the Presidency of the Appeals Tribunal. Should the Standing Mechanism be established as a two-tier mechanism, additional provisions could be prepared with regard to the establishment of the Presidency of both Tribunals and the role to be played by the President and the Vice-President of each of the Tribunals (for example, in representing the Standing Mechanism, see article 3(6)).

Article 6 – Secretariat

20. Article 6 outlines the role and functions of the Secretariat, headed by the Executive Director. The Working Group may wish to consider the appropriate term and conditions of the Executive Director and decide on whose recommendation, he or she should be appointed (for example, whether the Presidency of the Tribunals or the Selection Committee should have a role).

B. Selection and appointment of the members of the Tribunals

21. Section B addresses the selection and appointment of the members of the Tribunals based largely on document A/CN.9/WG.III/WP.213 and previous deliberations (A/CN.9/1124, paras. 13–41; A/CN.9/1092, paras. 15–78; see also A/CN.9/WG.III/WP.233, paras. 39–57). Articles 7 to 13 have been simplified in the anticipation that many of the issues could be further detailed in the regulations to be adopted by the Conference.

Article 7 – Qualifications and requirements

22. Article 7 sets forth the minimum qualifications required of the individual members of the Tribunals. The Working Group may wish to consider whether additional criteria should be mentioned (for example, jurists with experience working in or consulting governments, including as part of the judiciary). It may also wish to consider whether the requirements for members of the Appeals Tribunal should be different (for example, to require extensive adjudicatory experience).

23. With regard to paragraph 3, the Working Group may wish to consider whether members of the Tribunals should be required to be a national of a Contracting Party (see also, article 9(1)).

Article 8 – Composition of the Tribunals

24. Article 8 lists the elements to be taken in account when constituting the Tribunals, which would largely depend on the number of members to be stipulated in article 3(3) and (4). This obligation lies mainly on the Conference in appointing the members in accordance with article 11. With regard to equitable geographical distribution, the Working Group may wish to consider whether the regional groupings in the United Nations (Asia and the Pacific, Africa, Latin America and the Caribbean, Western Europe and others, and Eastern Europe) should be the basis.

25. If a two-tier mechanism were to be established, the Working Group may wish to consider whether the elements listed in paragraph 1 (as well as paragraph 2) should apply to the entirety of the members of both Tribunals, or to each of the Tribunals

separately. It may also wish to consider the limitation in paragraph 2 in light of the anticipated number of Contracting Parties (see article 7(3)) as well as the overall number of members of the Tribunals.

Article 9 – Nomination of candidates

26. Article 9 foresees a nomination process involving the Contracting Parties as well as an open process to be initiated upon the discretion of the Conference (see article 10(5), which allows the Selection Committee to recommend to the Conference that an open call for nomination is made). A person nominated in accordance with article 9 is considered to be a "candidate" to which the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution shall apply.

Article 10 – Selection committee

27. Article 10 provides for the establishment of the Selection Committee to determine the suitability of candidates. The Working Group may wish to consider whether such a body should be established or it might be preferable for the Executive Director to determine the suitability of candidates based on objective criteria set forth in article 7 and further by the Conference. The resource implications should also be considered (see para. 11 above).

28. Paragraph 2 outlines how to compose the Selection Committee, with paragraph 3 deferring much of the details to the regulations adopted by the Conference. The regulations should address the overall process (including time frames) and decision-making (including when to request an open call for nominations) in the Selection Committee as well as the removal or replacement of a member.

29. Paragraph 4 addresses the obligations of the members of the Selection Committee and any conflict of interest that may arise. Candidates as well as members of the Selection Committee should be required to disclose any circumstances that could give rise to doubts about their independence.

30. In addition to article 7, regulations adopted by the Conference could detail objective criteria to be met by each candidate, which would guide the Selection Committee in presenting the list of suitable candidates in accordance with paragraph 6. In so doing, the Selection Committee may request additional information from, or conduct interviews with, the candidates. The Working Group may wish to consider whether the list should be prepared for each election or could function as a roster for future elections or other purposes (see article 16(6)).

Article 11 – Appointment by the Conference of the Contracting Parties

31. Paragraph 1 states the basic rule that the members of the Tribunals would be appointed by the Conference and from the list of suitable candidates prepared by the Selection Committee. The detailed rules on elections would depend largely on the number of members of the Tribunals as well as the anticipated number of Contracting Parties.

32. The Working Group may wish to provide guidance on the following, among others, to develop this article further:

- Whether each Contracting Party should have one vote for each or both of the Tribunals;
- How to meet the requirements in article 8, for example, whether elections shall be held among each group of candidates (see article 10(7));
- Whether a Contracting Party should be allowed to vote for any of the candidates or only for a candidate from a regional group that it belongs to;
- Quorum and voting requirements for each member to be appointed (see para. 15 above);

- In a two-tier mechanism, whether the members of the Dispute Tribunal and the Appeals Tribunal would be appointed at the same time from a single list or whether elections would be separate or sequenced; and
- Whether the same election rules should apply to a member replacing another member (see para. 37 below).

Article 12 – Term of office

33. With regard to paragraph 1, the Working Group may wish to consider the appropriate term of the members including whether the term should be renewable. It may also wish to consider whether the term should be different for members of the Dispute Tribunal and those of the Appeals Tribunal.

34. Paragraph 2 aims to ensure stability in the Tribunals and consistency among their members so that not all of the members are replaced at once, while allowing for those appointed for a shorter term to be re-elected. Paragraph 6 also allows a member of the Tribunal to complete an assigned case to ensure that the expiration of his or her term would not have an impact on the decision to be rendered.

35. Paragraph 3 leaves open the possibility for members of the Tribunals to work part-time to adjust to the caseload of the Tribunals. The detailed terms and conditions of a part-time member would need to be detailed in the regulations adopted by the Conference.

Article 13 – Removal, resignation, vacancies and replacement

36. Article 13 addresses the possible changes in the composition of the Tribunals, including through voluntary resignation by, or removal of, a member of the Tribunal. The Working Group may wish to consider: (i) whether additional grounds of removal should be provided in paragraph 1; (ii) the role, if any, of the Presidency or the Conference (as the appointing body) in the process; and (iii) the voting requirements for removal.

37. With regard to paragraph 3, the Working Group mish wish to consider whether the process for appointing a member in articles 9 to 11 shall apply equally to a replacing member, or whether it should be possible to appoint one from an existing list of suitable candidates.

C. The Dispute Tribunal

Article 14 – Jurisdiction

38. Article 14 addresses the jurisdiction of the Dispute Tribunal, which is based on the consent of the disputing parties to its jurisdiction. The Working Group may wish to consider whether the reference to “international investment dispute” in paragraph 1 may raise the issue of the so-called “double keyhole” or “twofold” test under article 25 of the ICSID Convention and the underlying instrument of consent. The term “international investment dispute” is used broadly in the draft statute to refer to a wide range of disputes relating to investment and is not defined (see para. 3 above). While it may be possible to avoid the double keyhole test by deleting the reference entirely, this may unduly broaden the jurisdiction of the Dispute Tribunal to any type of disputes, including a non-investment dispute between private parties. The Working Group may wish to consider whether non-Contracting Parties would be able to consent to the jurisdiction of the Dispute Tribunal without becoming a Party to the draft statute. The same question arises with regard to nationals of non-Contracting Parties. Both questions may be resolved by allowing Contracting Parties to make a reservation in accordance with article 39.

39. Paragraph 2 aims to capture the consent of the Contracting Parties to the jurisdiction of the Dispute Tribunal in addition to the consent it may have provided in existing instruments or legislation. The regulations could provide how the instruments or legislations are to be identified in the list, for example, instruments by

the title and the name of the parties, and legislation by the name and year of enactment. Under paragraph 2, Contracting Parties are permitted to consent to the jurisdiction of the Dispute Tribunal by providing a list of instruments to which it is a party. The term "instrument" is used to encompass not only treaties providing for the protection of investments or investors but also investment contracts. It further allows the Contracting Party to list its legislation governing foreign investments. The Working Group may wish to consider whether this is appropriate or if it would be necessary to limit the consent that could be provided under paragraph 2 and more generally under the draft statute (for example, to treaties only). As to future instruments or legislation, the Contracting Party may express its consent by expressly referring to the jurisdiction of the Disputes Tribunal in such treaties or legislation and notifying the Executive Director and the depositary. It should be noted that paragraph 2 only covers the consent of the Contracting Party and not the consent of the constituent subdivision of the Contracting State or an agency of a Contracting State or an REIO.

40. Paragraph 3 establishes exclusive jurisdiction of the Dispute Tribunal over a dispute if the instrument that is the basis of the dispute is listed by all parties to that instrument in accordance with paragraph 2. For example, if Contracting Parties A and B have both included treaty X to which they are a party in the list pursuant to paragraph 2, an investor who is a national of State B would not be able to submit a claim against State A based on a consent provided by State A to another forum in treaty X as the Dispute Tribunal would have exclusive jurisdiction. This paragraph would need to be carefully considered as it modifies the consent provided in an existing treaty. As to drafting, the Working Group may wish to consider whether the Dispute Tribunal should have jurisdiction over a "claim initiated" instead of a "dispute submitted". The draft statute currently provides that the Dispute Tribunal would have jurisdiction over a "dispute" and the Appeals Tribunal over an "appeal" (see article 18).

41. If the list-approach is taken, it may be necessary to consider whether the formulation of such lists would be entirely up to each Contracting Party or the Conference would be able to review the list and possibly object to the inclusion of certain instruments or legislation. It would be necessary to specify how the list is to be maintained and made public so that parties would be aware of the consent therein (paragraph 4).

Article 15 – Request for dispute resolution

42. Modelled on article 36 of the ICSID Convention, article 15 addresses the procedure for making a request before the Dispute Tribunal. The Working Group may wish to consider whether the generic term "claim" should be used instead of "dispute settlement proceeding" (see also article 19(1), using the term "appeal proceedings"). It may wish to consider how the Executive Director is expected to handle a request that does not meet the requirements in paragraph 2 and in the rules of procedure.

Article 16 – Panels and the assignment of disputes

43. Article 16 foresees that the Dispute Tribunal would function in the form of Panels constituted prior to the dispute with the dispute being assigned on a random basis. The practicalities of operating such Panels would depend on the number and composition of the members as well as their areas of expertise, language proficiency and other relevant criteria as outlined in paragraph 2. The modalities of constituting such pre-determined Panels and assigning cases would need to be set forth in the regulations.

44. The Working Group may wish to consider whether such an approach is appropriate or some flexibility should be provided to the President, for example, by assigning individuals members to a Panel after the submission of a request yet on a random basis, or by constituting ad hoc Panels taking into account the elements mentioned in paragraph 2. The need to balance the workload among the members as

well as the possibility for the Panel to be supported by experts appointed by it or translators/interpreters shall also be considered.

45. Paragraph 3 provides flexibility in situations where it would not be appropriate to assign a dispute to a Panel or a member thereof, allowing the Presidency to either replace the relevant member or assign the dispute to another Panel. Drafted on the assumption that a Panel would consist of three members of the Dispute Tribunal, paragraph 5 allows for the constitution of a larger Panel and paragraph 6 provides for the possibility to appoint ad hoc members in addition to the three members, yet under limited circumstances and upon the joint request of the disputing parties. If ad hoc members are to be allowed, the Working Group may wish to consider their appointment process including whether they should only be chosen from the list of suitable candidates prepared by the Selection Committee.

Article 17 – Powers and Functions of the Panel

46. Article 17 provides that the competence of the Dispute Tribunal shall be determined by itself. The Working Group may wish to consider the role to be played by the Panel and possibly by the Presidency, if any, with regard to an objection by a disputing party that the dispute falls outside the jurisdiction of the Dispute Tribunal.

D. The Appeals Tribunal

Article 18 – Jurisdiction

47. Article 18 addresses the jurisdiction of the Appeals Tribunal, which is based on the consent of the parties regarding an award or decision rendered by an arbitral tribunal or any other adjudicatory body (referred to as "first-tier tribunal"). In a one-tier standing mechanism composed of only the Appeals Tribunal, such awards or decisions would be rendered outside the Standing Mechanism and brought before it. In a two-tier standing mechanism, decisions by the Dispute Tribunal would be brought before the Appeals Tribunal with the possibility that awards or decisions rendered outside the Standing Mechanism might also be brought before the Appeals Tribunal. For ease of reference, article 18 refers to the "first-tier tribunal" to distinguish it from the Appeals Tribunal. The term is used to encompass the Dispute Tribunal as well as ad hoc tribunals established outside the Standing Mechanism.

48. The term "appeal" is used in a broad sense to encompass the notions of requesting an annulment of an award under article 52 of the ICSID Convention and the application to set aside an award under article 34 of the UNCITRAL Model Law on International Commercial Arbitration (see article 29 of the draft statute, which includes the grounds for requesting annulment and for applying to set aside an award in paragraph 2). However, it does not refer to: (i) the request for correction or interpretation of the award or the request for an additional award; (ii) the request for recognition and enforcement of the award; or (iii) the request that the enforcement of the award be refused. The Working Group may wish to confirm this understanding.

49. Paragraph 1 allows the parties to consent to the jurisdiction of the Appeals Tribunal with regard to an award or decision of a first-tier tribunal. In contrast to article 14 (jurisdiction of the Dispute Tribunal), no reference is made to the term "international investment dispute" which may avoid the double keyhole issue but broadens the jurisdiction quite extensively. The Working Group may wish to consider this further as well as the possibility of non-Contracting Parties and their nationals to consent to the jurisdiction of the Appeals Tribunal (see para. 38 above).

50. Paragraph 2 aims to capture the consent of the Contracting Parties to the jurisdiction of the Appeals Tribunal in addition to the consent they may have provided in existing instruments or legislation. By providing a list of instruments to which it is a party and its legislation, the Contracting Party would consent that an award or decision rendered pursuant to that instrument or legislation is subject to the jurisdiction of the Appeals Tribunal.

51. The Working Group may wish to consider paragraphs 2 and 3 in conjunction with article 14(2) and (3) as they pose similar issues (see paras. 39 to 41 above).

52. With regard to paragraph 4, which applies only in a two-tier mechanism, the Working Group may wish to consider whether a party consenting to the jurisdiction of the Dispute Tribunal would be deemed to have consented to that of the Appeals Tribunal or if it would be possible for the party to consent only to the jurisdiction of the Dispute Tribunal. This question also needs to be considered in the context that the Contracting Parties to Section C (Dispute Tribunal) may differ from those of Section D (Appeals Tribunal).

53. Paragraph 4 supposes that, in a two-tier mechanism, the Appeals Tribunal would have jurisdiction over appeals with regard to all decisions rendered by the Dispute Tribunal. However, the Dispute Tribunal's jurisdiction under article 14 extends to disputes involving a national of a non-Contracting Party or a non-Contracting Party as long as they consent to its jurisdiction. Whether that consent should be automatically deemed to be a consent to the jurisdiction of the Appeals Tribunal is questionable. Another question is whether the Contracting Parties to Section D (if different from Section C) would wish for the Appeals Tribunal to address all such appeals arising from a mechanism which they are not a Party to. This would likely have budget implications on the operation of the Appeals Mechanism.

54. Paragraph 5 limits the jurisdiction of the Appeals Tribunal when the law applicable to the first-tier tribunal prohibits appeals, for example, article 53 of the ICSID Convention. In order to lift such limitation, means to seek inter se modification of that Convention based on article 41 of the Vienna Convention on the Law of Treaties would need to be sought (see A/CN.9/WG.III/WP.233, paras. 80–83). The Working Group may wish to confirm whether this is the approach to be taken.

Articles 19–21 (Request for appeals; Chambers and the assignment of appeals; and Powers and functions of the Chamber)

55. The Working Group may wish to consider the annotations to articles 15 to 17 and questions posed therein as they relate to the Appeals Tribunal.

56. With regard to article 20, the Working Group may wish to consider that if the number of members of the Appeals Tribunal is less than the number of members of the Dispute Tribunal, this may pose difficulties in constituting fixed Chambers. There may be a high number of instances where a Chamber of more than three members has to be constituted (for example, with regard to the any jurisprudence established by the Appeals Tribunal). It should also be noted that the possibility of appointing ad hoc members to a Panel of the Dispute Tribunal in article 16(6) is not foreseen for a Chamber of the Appeals Tribunal in article 20.

E. The Dispute Tribunal procedure

57. Section E contains basic articles governing the procedural framework of the Dispute Tribunal (see A/CN.9/WG.III/WP.213, para. 20). The Working Group may wish to consider the extent to which such rules should be provided for in the draft statute and how the rules of procedure applicable to Panels would be formulated (for example, whether it would resemble arbitration rules) and by whom.

Article 22 – Conduct of the Panel proceedings

58. Paragraph 1 provides that the draft statue and the rules of procedure adopted by the Conference would regulate the conduct of the proceedings before the Panels of the Dispute Tribunal. Modelled on article 17(1) of the UNCITRAL Arbitration Rules, paragraph 2 provides the underlying principles to be followed by the Panel and the discretion of the Panel to conduct the proceedings as it considers appropriate.

59. The Working Group may wish to note that there may be other sets of rules that may apply to the Panel proceedings. One set of rules would be the procedural rules

contained in the underlying instrument pursuant to which the dispute is submitted. Another may be the rules of the ICSID Convention. Lastly, whether it would be possible for the disputing parties to choose another set of rules to apply to the proceedings while consenting to the jurisdiction of the Dispute Tribunal would need be clarified, because if it is allowed, those set of rules could also govern the Panel proceedings. In any case, considering the possible application of multiple set of rules, a conflict rule would need to be developed to clarify which rules would prevail and how the rules would supplement each other.

60. In addition, the Working Group may wish to consider: (i) whether and how the draft provisions on procedural and cross-cutting issues (A/CN.9/WG.III/WP.231) would apply to the Panel proceedings; (ii) whether and how to incorporate the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (see, for example, article 23(7)), which requires the decisions of the Dispute Tribunal to be made public; (iii) whether the possibility of mediation during the Panel proceedings should be incorporated into its rules of procedure.

61. With regard to paragraph 3, the Working Group may wish to consider issues related to the substantive law to be applied by the Panel, which is often contained in investment treaties and contracts (see A/CN.9/WG.III/WP.213, paras. 75–78). Paragraph 3 provides that the law applicable would be determined by the parties. The Working Group may wish to consider whether this approach is appropriate or further guidance should be provided, for example, if the interpretation by the Panels shall be done in accordance with customary rules of interpretation of public international law, following article 3.2 of the Dispute Settlement Understanding of the WTO.

62. With regard to the last sentence of paragraph 3, the effect of any joint interpretation by the Parties of that applicable instrument or by the Conference should be considered. It would be necessary to detail the process of issuing such joint interpretation as well as the extent of its binding nature (for example, only upon the acceptance by each Contracting Party).

Article 23 – Decision by the Panel

63. Article 23 addresses the decisions to be rendered by the Panel.

64. With regard to paragraph 2 on questions of procedure, the Working Group may wish to consider whether there should be a presiding member of the Panel who could take such decisions and the extent to which the Presidency of the Dispute Tribunal would have a role in addressing such questions.

65. Paragraph 5 provides the rule on possible interpretation, correction or additional decision by the Panel. Considering that the time period for any recourse against the decision would commence after such a request is disposed of by the Panel (see article 24(2)), the timeline for such remedies is set forth in the last sentence of article 23(5).

66. Paragraph 6 clarifies that the decision of a Panel is a decision of the Dispute Tribunal, which is subject of recognition and enforcement in article 26. The Working Group may wish to consider whether such clarification is necessary and whether the Presidency of the Dispute Tribunal should have any role in confirming the decision of the Panel as the decision of the Dispute Tribunal.

Article 24 – Recourse against decision

67. In a one-tier mechanism consisting only of the Dispute Tribunal, it is foreseen that there should be a review mechanism akin to the annulment procedure in the ICSID Convention. In a two-tier mechanism, that might not be necessary as the Appeals Tribunal could function as the review mechanism.

68. With regard to the annulment process, the Working Group may wish to consider which body could be responsible for handling the annulment and whether a process modelled on article 52 of the ICSID Convention should be provided for.

69. Modelled on article 34(3) of the UNCITRAL Model Arbitration Law and article 52(2) of the ICSID Convention, paragraph 2 limits the time period within which a request for annulment or appeal shall be made and regulates when that time period commences.

Article 25 – Effect of the decision

70. Article 25 provides that the decision by the Panel is subject only to the remedies in the draft statute and that once the time period for requesting such remedies lapse, the decision is final and binding on the parties. The Working Group may wish to confirm this understanding.

Article 26 – Recognition and enforcement

71. Modelled on article 54 of the ICSID Convention, article 26 provides for a self-contained recognition and enforcement mechanism within the draft statute for decisions rendered by the Dispute Tribunal.

72. The phrase "subject to article 31" tailors for a two-tier mechanism and addresses a situation whereby a party appeals a decision while the other party seeks to enforce the decision in accordance with article 26.

73. Paragraph 3 tailors for instances where a decision of the Dispute Tribunal needs to be enforced in a non-Contracting Party. If a non-Contracting Party or nationals thereof are allowed to consent to the jurisdiction of the Dispute Tribunal, it should be possible for the decision to be enforced in that State and paragraph 3 aims to make it possible to enforce the decision in accordance with the New York Convention. It may be worthwhile to consider requiring non-Contracting Parties to be bound by article 26, when consenting to the jurisdiction of the Dispute Tribunal to avoid any uncertainty.

74. The Working Group may wish to consider whether a provision akin to paragraph 3 should also be prepared with regard to the ICSID Convention.

75. With regard to paragraph 4, the Working Group may wish to consider whether it should be possible for a party to request that the competent court or other authority refuse recognition and enforcement along the lines of article V of the New York Convention. Considering the possible recourse by requesting annulment (in a one-tier mechanism) or by an appeal (in a two-tier mechanism), it may not be necessary to have another review at the enforcement phase.

F. The Appeals Tribunal procedure

76. Section F contains the articles governing the procedural framework of the Appeals Tribunal. Many of the issues had been presented in detail in document A/CN.9/WG.III/WP.224. However, due to the limited time at the forty-fourth session of the Working Group, only the provisions on scope of appeal and grounds for appeal were discussed (A/CN.9/1130, paras. 125–148). It is therefore suggested that the annotations to Section F are read in conjunction with document A/CN.9/WG.III/WP.224 as well as the summary of the sixth intersessional meeting (A/CN.9/WG.III/WP.233, see paras. 58–73). Similar to Section D, the Working Group may wish to consider the extent to which such rules should be provided in the draft statute and how the rules of the Chamber procedure would be formulated and by whom.

Article 27 – Scope of appeal (see A/CN.9/WG.III/WP.224, paras. 4–8)

77. Article 27 should be read in conjunction with article 18, which provides for the jurisdiction of the Appeals Tribunal. Paragraph 1 provides that an appeal may relate to the award or decision of the first-tier tribunal (see para. 47 above) on its jurisdiction or on its merits. It mentions interim measures ordered by the first-tier tribunal as a type of decision that can be appealed. Paragraph 2 lists the types of decisions or orders that may not be the subject of appeal. The list-approach in article 27 is based on the understanding that the scope of appeal should not be too broad so as to ensure efficient

operation of the Appeals Tribunal. However, it may not be possible to detail all types of awards or decisions to be included or excluded.

78. In this regard, the Working Group may wish to clarify whether only final awards or decisions should be the subject of appeal or whether non-final awards or partial awards could also be the subject of appeal. It may also be prudent to focus its discussion on whether decisions on jurisdiction (both positive and negative) prior to the issuance of the award on merits could be the subject of appeal (A/CN.9/1130, paras. 128–135).

Article 28 – Conditions for appeal (see A/CN.9/WG.III/WP.224, para. 16)

79. Article 28 should be read in conjunction with article 19, which provides the parties the right to request appeal, as well as article 24(2), which limits the time period for requesting an appeal. As article 24(2) is only applicable in a two-tier mechanism, paragraph 2 limits the time period in which an appeal could be requested, particularly with regard to awards or decisions rendered outside the Standing Mechanism.

80. Paragraph 1 requires the parties to expressly waive any rights they may have to initiate annulment, set aside, recognition, or enforcement proceedings. Whether the waiver should be limited in time (only "during the appeal proceedings") or should be a general waiver deserves consideration. If the latter approach is taken, it may be possible to reformulate paragraph 1 as follows: "By consenting to the appeal, the parties agree to waive their right to initiate annulment, set aside, recognition and enforcement proceedings with regard to the award or decision of the first-tier tribunal." This would bind not only the appellant but also the appellee who has consented to the appeal.

Article 29 – Grounds of appeal (see A/CN.9/WG.III/WP.224, paras. 9–15)

81. Article 29 lists the grounds of appeal. While paragraph 1 aims to limit such grounds, paragraph 2 aims to ensure that appeals can function as the sole recourse to awards or decisions by the first-tier tribunal by referring to the grounds for annulment in the ICSID context and for set aside in domestic courts. The Working Group may wish to consider the grounds provided for in both paragraphs with an aim to provide clarity on the grounds and to ensure a balanced approach for an efficient operation of the Appeals Tribunal (A/CN.9/1130, paras. 136–148).

Article 30 – Effect of an appeal on ongoing first-tier tribunal proceeding (see A/CN.9/WG.III/WP.224, paras. 17–18)

82. Article 30 addresses the interaction between an appeal and a first-tier tribunal proceeding, which may be ongoing (for example, when the decision on its jurisdiction was the subject of appeal). It provides that the first-tier tribunal "may" suspend its proceeding upon the request of a party. This is because the rules applicable to the first-tier tribunal would govern whether the first-tier tribunal must or could suspend its proceedings.

83. In a two-tier mechanism, article 30 may needed to be adjusted so that the Dispute Tribunal is required to suspend its proceedings or so that only final decisions in accordance with article 25 are subject of appeal (which would make article 30 meaningless as there will not be any ongoing proceeding).

Article 31 – Effect of an appeal on proceedings for annulment, set aside, recognition and enforcement of the award or decision subject of appeal (see A/CN.9/WG.III/WP.224, paras. 19–21)

84. Article 31 addresses the interaction between an appeal and proceedings in other forums with regard to the same award or decision (referred to below as "other proceedings").

85. Paragraph 1 deals with a situation where the other proceeding has yet to commence. As the registration of the request for appeal requires the consent of both

parties (article 19), it sets out the rule that the first-tier award or decision shall not be the subject of other proceedings.

86. Paragraph 2 deals with a situation where the other proceeding has already commenced. In that case and upon the request of a party, it is left to the body responsible for the other proceeding to determine whether to stay the proceeding in accordance with the applicable rules. It would be necessary for the party making the request for stay to state the rationale as the outcome of the Appeals Tribunal would likely have an impact on the other proceedings.

Article 32 – Conduct of the Chamber proceedings (see A/CN.9/WG.III/WP.224, paras. 22–28 and 37)

87. The Working Group may wish to consider the annotations to article 22 and questions posed therein as they relate to the Appeals Tribunal. It may wish to consider whether additional rules should be provided in the context of the Chamber proceedings.

88. For example, paragraph 3 (modelled on article 34(4) of the UNCITRAL Model Law on International Commercial Arbitration), allows the Chamber to temporarily suspend its proceedings to give the first-tier tribunal an opportunity to address the issues that are the subject of appeal, which may make the appeal no longer necessary.

89. The Working Group may also wish to consider providing stricter rules on early dismissal and on security for costs than those for the first-tier tribunal, to deter frivolous or unmeritorious appeals.

Article 33 – Decision by the Chamber (see A/CN.9/WG.III/WP.224, paras. 29–34)

90. With regard to paragraphs 1 and 2, the Working Group may wish to consider the annotations to article 23 and questions posed therein as they relate to the Appeals Tribunal.

91. Paragraphs 3 and 4 list the type of decisions that can be made by the Chamber. Regarding paragraphs 4 and 5, the Working Group may wish to consider whether a Chamber should be able to remand an award or decision, which aims to avoid a possible de novo review of the dispute by the Chamber. However, there may be practical difficulties in reconstituting the first-tier tribunal and ensuring that the instructions of the Chamber are followed by the newly constituted tribunal. It may also result in delaying the resolution of the dispute (see also article 34(3) and para. 96 below).

92. In a two-tier standing mechanism, it may be possible to envisage that the Panel of the Dispute Tribunal would function as the new first-tier tribunal when the Chamber remands an award or decision of the first-tier tribunal established outside the Standing Mechanism. This, however, would mean that the parties that have consented to the jurisdiction of the Appeals Tribunal would be deemed to have consented to the jurisdiction of the Dispute Tribunal.

93. Paragraph 6 imposes a time period within which a Chamber is required to make its decision, with the possibility to extend that time period when so required. The Working Group may wish to consider whether a similar time limit should be provided for the Dispute Tribunal.

Article 34 – Effect of the decision (see A/CN.9/WG.III/WP.224, paras. 35–36)

94. Article 34 addresses the effect of the decisions of the Appeals Tribunal, depending on the type of decision it makes. It addresses the effect of the Appeals Tribunal's decision on the first-tier tribunal award or decision, ensuring that the latter is final and binding on the parties subject to the conditions being met. The decision of the Appellate Tribunal would also be binding on the parties in accordance with paragraph 4.

95. The Working Group may wish to consider whether the binding effect of the decisions of the Appeals Tribunal should be limited to the disputing parties or should be broader. For example, in a two-tier mechanism, such decisions may be binding on the Dispute Tribunal. They may also have a persuasive effect of jurisprudence affecting other Contracting Parties. Such an effect would need to be further clarified in the article.

96. With regard to paragraph 3, the Working Group may also wish to consider whether the process to remand anticipates the possibility of the new award or decision being the subject of another appeal.

Article 35 – Recourse against the decision (see A/CN.9/WG.III/WP.224, para. 36)

97. Article 35 confirms the absence of any recourse against decisions of the Appeals Tribunal. It aims to provide parties with a definitive resolution and to prevent the prolongation of the dispute.

Article 36 – Recognition and enforcement (see A/CN.9/WG.III/WP.224, para. 38)

98. Modelled on article 54 of the ICSID Convention, article 36 provides for a self-contained recognition and enforcement mechanism within the draft statute for decisions rendered by the Appeals Tribunal. The Working Group may wish to consider the annotations to article 26 and questions posed therein as they relate to the Appeals Tribunal.

99. It should be noted that the decision by the Appeals Tribunal to remand to the first-tier tribunal might not be enforceable in accordance with article 36 as relating to the first-tier or newly constituted tribunal.

G. Operation of the Standing Mechanism

Article 37 – Financing[1]

100. Similar to the Advisory Centre, it is suggested that the Standing Mechanism is financed by contributions from Contracting Parties (initial or annual or both), fees for services, and voluntary contributions. The Working Group may wish to consider whether such a financing structure provides a sustainable financial basis and sufficiently ensures the independence, effectiveness, and sustainability of the Standing Mechanism.

101. It may be prudent that the budget for the operation of the Tribunals (in particular, the remuneration of the members of the Tribunals) relies only on contributions by Contracting Parties rather than on fees to be charged by the Standing Mechanism. This would also ensure the independence and integrity of the Tribunals.

Article 38 – Legal status and liability

102. The legal status of the Standing Mechanism would depend on how it is established, including whether it would be established under the auspices of an existing organization.

[1] For reference, see informal document on the cost and financing structure of a standing mechanism, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/financing_of_a_standing_mechanism_sept.2023.pdf.

H. Final clauses

Articles 39–44 (Reservations; Depositary; Signature, ratification, acceptance, approval, accession; Entry into force; Amendments; and Withdrawal)

103. Articles 39 to 44 are final clauses found in multilateral conventions.

104. Article 39 allows for certain types of reservations that would limit the scope of certain articles for the Contracting Party making the reservation. This may relate, for example, to the jurisdiction of the Standing Mechanism, or the extent to which it would recognize and enforce decisions rendered by the Tribunals. While some examples are provided for discussion purposes, the reservations would be better formulated once the contents of the draft statute, including the obligations of the Contracting Parties, are confirmed.

105. With regard to the depositary provided for in article 40, the Working Group may wish to consider the role to be played by the depositary with regard to the lists mentioned in articles 14 and 18 with regard to the jurisdiction of the Tribunals.

106. Article 41 provides that States and REIOs may become a Contracting Party. The Working Group may wish to consider whether flexibility should be provided so as to accommodate entities that might not fall within the two categories but may be established in the future to have competence over the matter addressed in the draft statute and capacity to become a Party and be bound by the draft statute. The Working Group may wish to consider this issue in conjunction with article 4(6) on their possible participation in the meetings of the Conference.

107. Article 42 provides the rule on entry into force of the draft statute. Similar to the draft statute of the advisory centre, the Working Group may wish to consider the conditions to be imposed for its entry into force in addition to the number of Contracting Parties (for example, with regard to geographical representation as well as the anticipated contribution to ensure successful operation during the initial phase).

108. Article 43 provides that Contracting Parties may propose amendments to the draft statute. Article 44 addresses withdrawal by a Contracting Party and the effect of withdrawal on ongoing proceedings in the Standing Mechanism. The Working Group may wish to consider whether the possibility of terminating the draft statute should also be provided for in the draft statute.