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Summary of the inter-sessional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of Singapore

This Note reproduces a submission from the Government of Singapore containing a summary of the sixth intersessional meeting on ISDS reform held on 7 and 8 September 2023 in Singapore. The English version of the summary was submitted on 12 October 2023 and the text received by the Secretariat is reproduced as an annex to this Note.

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Annex

Introduction

1. The sixth intersessional meeting on investor-State dispute settlement (ISDS) reform (hereinafter the "Meeting") was held on 7 and 8 September 2023 in Singapore and focused on the reform elements of a standing multilateral mechanism and an appellate mechanism.

2. Jointly organized by the Ministry of Law of the Republic of Singapore the United Nations Commission on International Trade Law ("UNCITRAL"), with the support of the National University of Singapore's Centre for International Law, the Meeting was attended by more than 300 in-person and virtual participants, comprising around 240 UNCITRAL representatives and 70 attendees from the wider legal and business communities. Simultaneous interpretation between English and French was provided during the Meeting.

3. The Meeting provided an opportunity for participants to discuss the two reform options holistically and to exchange informal views. The objectives, challenges, and design of a standing multilateral mechanism and an appellate mechanism were discussed through six public panel sessions as well as a roundtable discussion that was open only to UNCITRAL representatives. The discussions were facilitated by presentations by panellists and informal documents prepared by the UNCITRAL Secretariat for the Meeting.[1] The Meeting's programme, informal documents, presentation slides, and video recordings are available at this dedicated website: https://wg3intersessional.mlaw.gov.sg/.

4. The Republic of Singapore takes the opportunity to again express our sincere appreciation to the UNCITRAL Secretariat, the moderators and panellists, and Working Group representatives. The Republic of Singapore looks forward to further contributing to the discussions and reforms.

Opening remarks

5. The Meeting was opened by Ms. Daphne Hong (Solicitor-General and Director-General, International Affairs Division, Attorney-General's Chambers, Singapore), who outlined the aims of the Republic of Singapore in organizing the Meeting, namely, keeping policy discussions and decisions on the two reform elements fully informed and grounded, and crystallizing key issues to ensure that the reforms would achieve their objectives.

6. Mr. Shane Spelliscy (Chairperson of UNCITRAL Working Group III) observed that the Working Group was gaining momentum and thanked the co-organizers for providing the opportunity to discuss the two reform elements in depth.

7. Ms. Anna Joubin-Bret (Secretary of UNCITRAL) expressed appreciation to the Ministry of Law for hosting the Meeting, as well as to the co-organizers. Ms. Joubin-Bret noted that the Meeting would enable the Working Group to focus on a wide range of aspects pertaining to the standing mechanism and appellate mechanism and their interaction with the existing ISDS system.

Panel 1: A standing mechanism for ISDS – rationale and implications

[1] The following informal documents were prepared: (a) draft statute of a standing mechanism for the resolution of international investment disputes; (b) draft provisions on selection and appointment of tribunal members of a standing mechanism; (c) draft provisions on an appellate mechanism; (d) an outline on the financing of a standing mechanism; and (e) pertinent elements of selected permanent international courts and tribunals and are available on the dedicated website at https://wg3intersessional.mlaw.gov.sg/programme/.

8. Panel 1 was moderated by Mr. Jae Sung Lee (Secretary of UNCITRAL Working Group III) and consisted of: Mr. Colin Brown (European Commission); Mr. Lauren Mandell (WilmerHale); and Ms. Taylor St John (PluriCourts).

Defining a standing mechanism

9. A defining feature of a standing mechanism was considered to be the selection and appointment of adjudicators on a permanent basis, before and independently of any particular dispute.

10. It was said that adjudicators on a standing mechanism should have fixed terms, and be appointed to the standing mechanism by States or bodies composed of States. These adjudicators would then be assigned individual disputes by the president of the court or on a random basis. It was opined that a standing mechanism should create a system of precedent and serve as an authoritative focal point for States and investors. Further, a standing mechanism should employ a contribution-based funding model as opposed to a fee-based model more typically used by ad hoc mechanisms. It was also said that the adjudicators should be employed full-time.

Rationale for a standing mechanism

11. One view was that the establishment of a standing mechanism, including an appellate mechanism, would help resolve the various concerns about the existing ISDS system that had been identified: first, the lack of consistency or predictability, second, issues relating to the independence and impartiality of adjudicators, and third, the cost and duration of proceedings. An appellate mechanism would, over time, help provide clarity and consistency with regard to the interpretation of norms. A standing mechanism with full-time adjudicators would ensure that their integrity is not called into question. It could also have built-in structural elements to ensure gender and geographical diversity of adjudicators. A standing mechanism could help manage costs as it would not be necessary or appropriate to relitigate a point already resolved by a standing mechanism.

Concerns about a standing mechanism

12. Another view was that a standing mechanism would not be able to meet the requirements of a system for settling investment disputes, namely, that the system be neutral and balanced, yield enforceable awards, and be available and reliable. A standing mechanism would impair investor confidence, because investors would lose their right to appoint adjudicators. It was also argued that, given prevailing dynamics, the mechanism would only reflect the interests of a minority of States. Enforceability was of concern, as awards issued by the standing mechanism may not enjoy the nearly universal enforceability of awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”). The sustainability of a standing mechanism was also questioned, in light of concerns that international institutions tend to be underfunded and the challenges currently faced by the World Trade Organization (“WTO”).

Interpretative authority

13. It was observed that a key question was achieving the balance of interpretative authority between States and adjudicators. In that regard, the appropriate use of interpretative tools should be clarified in advance. To further ensure the effectiveness of any reform, the following was proposed: first, adjudicators must have sensitivity to the issues that underlie public policy making; second, adjudicators should give non-disputing parties’ submissions greater weight; third, there should be greater scope for amicus curiae briefs or other forms of participation from local communities; and fourth, an appellate mechanism was needed to correct first-tier decisions.

14. In a similar vein, it was highlighted that an adjudicatory body ought to communicate with treaty parties – a lesson learned from experiences at other international adjudicatory forums. It was suggested that there should be a forum to discuss whether treaty interpretations by the adjudicatory body were satisfactory.

Ensuring gender and geographical diversity and balance in a standing mechanism

15. It was suggested that rules could be introduced to achieve diversity and adequate representation. Reference was made to existing international institutions, such as the International Court of Justice ("ICJ") and the International Law Commission ("ILC"),. A query was, however, raised as to whether these international institutions were the most appropriate models. This topic was further discussed in Panel 3 and the roundtable discussion (see paras. 42–44, and110–112).

Interaction of a standing mechanism with the existing ISDS system

16. On whether a standing mechanism would co-exist with the current ISDS system or replace it, one view was that a standing mechanism should be the exclusive avenue for the settlement of investment disputes, so as to achieve consistency and predictability. In that regard, it was noted that a standing mechanism would need time to become established, and during that period, it would have to co-exist with the current ad hoc ISDS system. However, it was strongly doubted that a standing mechanism would eventually replace the current system. This would mean that two systems (i.e. a standing mechanism and the ad hoc ISDS system) would co-exist, which would lead to fragmentation. In response, it was asserted that a standing mechanism was the only solution that could effectively address all of the concerns identified by the Working Group and provide a sustainable basis for the future of the investment regime.

Effect of decisions on non-participating States

17. One concern expressed was that a standing mechanism's decisions may affect, and create precedent for, the interpretation of treaties involving States that are non-members of the standing mechanism. In response, it was suggested that this could be addressed through the standing mechanism's structure. For example, it could be nested within a larger institution or group that would keep various reforms under review. This issue was further discussed during the roundtable (see para. 117).

Other comments

18. Questions were raised on how to obtain consensus to establish the standing mechanism and buy-in from States to become its members. It was said that the establishment of a standing mechanism could take a long period, and hence the number of its initial members may not be a useful indicator of success.

19. It was suggested that a standing mechanism should be designed with the ability to respond and adapt to the future.

Panel 2: Structure, scope, and governance of a standing mechanism for ISDS

20. Panel 2 was moderated by Mr. Pasha Hsieh (Singapore Management University) and consisted of: Ms. Evgeniya Goriatcheva (Permanent Court of Arbitration); Ms. Susanna Kam (Canada); Ms. Lai Thi Van Anh (Viet Nam); and Mr. Ong Chin Heng (Singapore).[2]

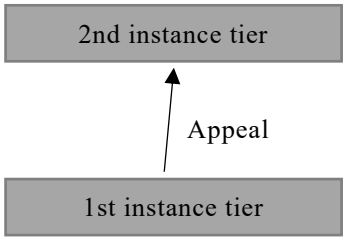
21. The panellists drew from their respective experiences in providing secretariat and registry services to existing standing tribunals, and in establishing standing

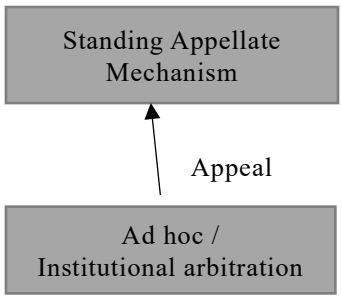
[2] Presentation slides are available on the dedicated website at https://wg3intersessional.mlaw.gov.sg/programme/.

mechanisms under the Canada–European Union Comprehensive Economic and Trade Agreement ("CETA"), the European Union–Singapore Investment Protection Agreement ("EUSIPA"), and the European Union–Viet Nam Investment Protection Agreement ("EUVIPA").

Design options for a standing mechanism

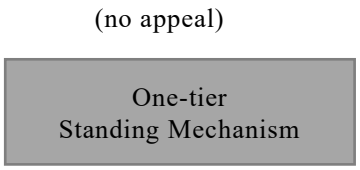
22. To facilitate the discussion, the following four models were provided:

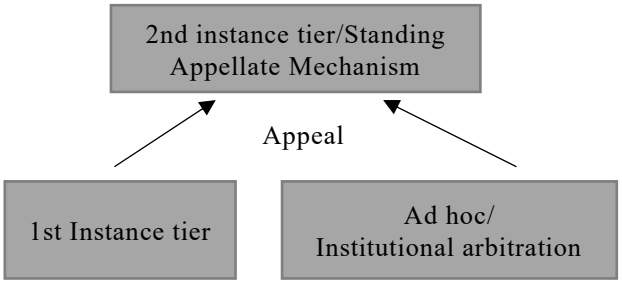




Model 1: This model envisages a two-tier standing mechanism, where decisions of the first instance tier are subject to appeal to a second instance tier.

Model 2: This model envisages a standalone appellate mechanism that would hear appeals from first instance decisions of ad hoc arbitral tribunals. There would be no standing first instance tier.

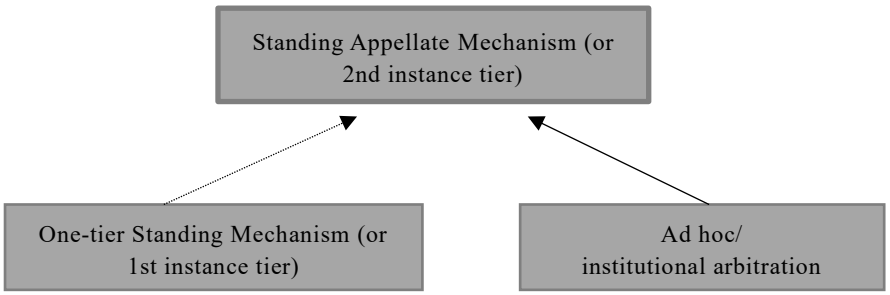




Model 3: This model envisages a standing mechanism that would make first instance decisions only.

Model 4: This model envisages a standing two-tier mechanism with an appellate tier that would hear appeals from first instance decisions of both its first tier and ad hoc arbitral tribunals.

23. In addition, another model was suggested as possibly increasing the predictability and consistency of decisions and ensuring time and cost savings by avoiding unnecessary appeals as follows:



Model 5: This model envisages a two-tier standing mechanism that gives (a) the option of relying only on the first instance tier, with no avenue of appeal to the second tier, and (b) the option of relying on the second instance/appellate tier for appeals from ad hoc arbitral tribunals.

24. It was said that there was value in having a two-tier standing mechanism, to ensure correctness, coherence, and consistency of decisions. In this connection, it was said that disputing parties should generally be able to exercise the right to appeal if they so wish. It was also noted that CETA, EUSIPA, and EUVIPA each envisaged a two-tier tribunal, with decisions from the first instance tier subject to appeal to the second instance tier.

25. It was also said that a standing mechanism could as well have jurisdiction over cases involving disputing parties which were, or were from, non-State parties to the standing mechanism, if another disputing party was, or was from, a State party and all disputing parties agreed to submit their dispute to the mechanism.

Size of a standing mechanism and terms of office: experiences with bilateral standing mechanisms

26. It was noted that the numbers of members of the standing mechanisms envisaged under CETA, EUSIPA, and EUVIPA vary. Under CETA, the first instance tribunal is composed of 15 members, while the appellate tribunal has six members. Under EUSIPA, the first instance and appellate tribunals are composed of six members each. Under EUVIPA, the first instance tribunal is composed of nine members, while the appellate tribunal has six members. In addition, the joint committee/committee of the parties under CETA, EUSIPA, and EUVIPA can decide to increase or reduce the number of tribunal members.

27. Under CETA, EUSIPA, and EUVIPA, members of the standing mechanism are not employed full-time as a default and are to be paid a monthly retainer fee (as well as relevant hearing and supplemental fees, if called upon to hear a case). It was explained that this ensured the members' availability and ability to perform their functions. Upon a decision by the joint committee/committee of the parties, the monthly retainer fee and other relevant fees may be converted into a regular salary, in which event the members are to serve on a full-time basis and shall not be permitted to engage in any occupation, whether paid or not, unless exemption was exceptionally granted.

28. It was also noted that under EUSIPA, the terms of office were renewable. This recognized that there might otherwise be a dearth of talent and interest in the position; further, there was a possibility that members might be replaced at the end of their terms prior to rendering a decision. Issues relating to the composition of a standing mechanism were further discussed in Panel 3.

Subject-matter jurisdiction

29. It was posited that a standing mechanism should have jurisdiction over only treaty-based disputes. It was noted that claims based on investment treaties were more easily identifiable and discrete than claims made pursuant to investment contracts or domestic investment laws, which could vary widely in nature and were often context-specific. It was also observed that the standing mechanisms envisaged under CETA, EUSIPA, and EUVIPA could only hear disputes arising under the respective treaties.

30. Another view was that the jurisdiction of the standing mechanism should extend to disputes based on investment contracts, provided there were clear rules requiring explicit consent by the disputing parties to the mechanism's jurisdiction.

31. It was also observed that giving the standing mechanism expansive jurisdiction would likely have implications, including for the qualifications each adjudicator should possess, and the financial resources needed to sustain the mechanism; an impact on financial resources could in turn impact the number of members to be selected to the standing mechanism, and whether they are to be employed on a part- or full-time basis.

Role of party autonomy

32. On whether a standing multilateral mechanism should be the exclusive means of recourse for disputing parties, one view was that there was merit in the mechanism being optional for disputing parties, at least for a period, to serve as an incentive for countries to subscribe to the standing mechanism, enabling it to gain traction.

33. It was, however, asserted that allowing the standing mechanism to be optional could lead to it being used as a "strategy". It was suggested that if States did not wish to use the standing mechanism as an exclusive avenue for remedy, this should be explained clearly and in advance of a dispute.

Institutional design

34. The possibility of establishing the standing multilateral mechanism within an existing institution was discussed. For example, the Permanent Court of Arbitration had provided, among other things, secretariat and registry services to various permanent and semi-permanent adjudicatory bodies organized pursuant to bilateral and multilateral instruments.[3] It was stated that, in general, relying on the infrastructure of an existing institution could help control costs of operating and upkeeping the mechanism, and enable access to pre-existing arrangements and benefits, such as offices across the world, and library resources. This topic was also discussed in Panel 5.

Governance and independence

35. It was observed that a committee of the parties would play an important role in ensuring that a standing mechanism is independent and free from political interference or pressure. To that end, the committee of the parties should be empowered to make necessary decisions and rules. It was considered important to build in protections against the encroachment of the mechanism's independence.[4]

36. It was suggested that each State Party should have one representative on the committee of the parties to participate in the mechanism's operations, including the selection and appointment of adjudicators, as well as decisions on working procedures. It was said that decisions should be made on the basis of consensus, although this may depend on the number of States parties to the mechanism. It was

[3] For example, the Eritrea-Ethiopia Claims Commission, the Bank for International Settlements Arbitral Tribunal, and the Iran-US Claims Tribunal.

[4] Reference was made to the Burgh House Principles on the Independence of the International Judiciary.

also pointed out that a State or few States should not be able to block decision-making.

Financing

37. Possible financing models canvassed included the "user-pays" model, where costs are shared amongst the disputing parties, or a hybrid model, involving a combination of contributions by States parties to the standing mechanism and user fees. Financial aspects were further discussed in the roundtable discussion (see para. 125).

Recognition and enforcement of decisions

38. It was noted that the standing mechanisms designed on a bilateral basis, for example, under EUSIPA, needed to navigate recognition and enforcement within the framework and constraints of the existing ISDS landscape.[5] In respect of a standing mechanism, in contrast, a self-contained enforcement regime was possible. This would nevertheless require time, as the standing mechanism would first need to have gained enough traction, in other words, a sufficient number of State parties. It was hence suggested that it might be preferable for decisions emanating from the standing mechanism to be characterized as "arbitral awards" so that enforceability could be assured under the New York Convention.[6] The issue of enforcement was further discussed in Panels 5 and 6.

Panel 3: Composition and procedure of a standing mechanism, including stakeholder participation

39. Panel 3 was moderated by Ms. Natalie Y. Morris-Sharma (Rapporteur, UNCITRAL Working Group III, Singapore), and consisted of: Ms. Nora Bellec (European Commission); Mr. Malcolm Langford (University of Oslo); Mr. Arpit Mallick (India); and Ms. Young Shin Um (Republic of Korea).

Process of selection and appointment

40. The importance of ensuring that the tribunal would be independent and impartial, and comprise qualified and experienced adjudicators, was highlighted. This would ensure the legitimacy of arbitral awards and their enforcement. To achieve this, it was proposed that the selection and appointment of tribunal members be removed from the hands of the disputing parties, and be conducted through a three-step process: (a) nomination by contracting parties, following open and transparent calls for candidacy and consultations with their national stakeholders, and possibly direct applications of individuals; (b) screening of candidates by an independent panel; and (c) election and appointment by contracting parties (possibly organized through regional groups). It was said that this process would increase public accountability, reduce risks of politicization, and create a competitive and sufficiently wide pool of candidates of high quality. It was also said that there should be two different tracks for the selection and appointment of the first tier and the second tier.

[5] It was explained that final awards issued under EUSIPA are characterized as arbitral awards, in order for Article 1 of the New York Convention to apply. For claims made pursuant to the ICSID Rules, the awards issued must comply with the requisite formalities under the ICSID Convention. It was noted that the ICSID Secretariat serves as the secretariat of the tribunal under EUSIPA.

[6] It was explained that, under EUSIPA, a decision by the first instance tribunal that is appealed against shall become a "provisional award". If the appeal tribunal upholds the appeal, it shall modify or reverse the legal findings and conclusions in the provisional award in whole or in part, and shall refer the matter back to the first instance tribunal, specifying precisely how it has modified or reversed the relevant findings and conclusions of the first instance tribunal. In this regard, the first instance tribunal shall be bound by such findings and conclusions of the appeal tribunal, and, if appropriate, shall revise its provisional award accordingly.

41. A question was raised as to how to protect the appointment process from vote trading. In reply, it was said that the aforementioned multi-layered selection and appointment process would reduce vote trading, and would ensure that only quality candidates would eventually be selected and appointed.

Ensuring diversity and balanced representation

42. A minimum level of geographical representation was considered necessary, regardless of the initial composition of members of the mechanism, to accommodate potential growth in membership and enhance legitimacy and public trust in the system. At the same time, there should be a flexible balance between factors such as diversity and qualifications, without excessive focus on one over the other.

43. On gender representation, and whether the International Criminal Court ("ICC") was a potential model, it was said that where institutions were involved in the appointment of adjudicators, women were more likely to be better represented. It was important to consider designing the appointment process to ensure the inclusion of women.

44. It was observed that there were pros and cons in the various approaches for seeking gender and geographic representation, and that balance needs to be struck.

Role of investors

45. In response to concerns that an inherent imbalance would be introduced if investors no longer had the ability to appoint the adjudicators, it was observed that the right of investors to appoint their arbitrators was an anomaly in the international legal system. The interests of investors could instead be taken into account through their participation in the selection and appointment process, including through their direct nomination of candidates, subject to certain requirements. It was said that building the trust of all stakeholders would help secure compliance with the standing mechanism's decisions.

Terms in office

46. On the duration of tribunal members' terms in office, this was said to involve a trade-off between ensuring independence and ensuring accountability. However, there may not be a need for this trade-off if other means of ensuring independence and accountability were utilized as well. In that regard, using renewable terms to ensure accountability was questioned, because measures such as joint interpretations could be used instead. In response, it was said that there were a range of accountability measures that could be used, including non-formal or non-legal means.

47. There was a concern that there might be difficulties, from a case administration perspective, if the terms of tribunal members ended and they were replaced before the conclusion of a case. A suggestion was made for a 6-year term, which could be renewed once automatically, unless a supermajority of contracting parties objected to it.

Use of chambers

48. The use of chambers within a standing mechanism was said to be appropriate, because ISDS cases were fact-based and heavily reliant on evidence. A grand chamber of the standing mechanism could be convened to rule on an important legal issue of broader significance, or an issue on which different chambers of the standing mechanism may take conflicting positions. The grand chamber could also be empowered to take over the hearing of the entire case, as appropriate. This was said to help ensure consistency and predictability.

Costs and financing

49. It was asserted that the funding required for a standing mechanism should be comparable to that required for other international courts and tribunals. The structural

design of the standing mechanism should manage costs in a reasonable way. It was also said that the standing mechanism would benefit from economies of scale.

Exhaustion of local remedies

50. Requiring recourse to local remedies as a precondition for bringing a claim before a standing mechanism was said to have several advantages: it would ensure that the domestic courts' interpretation of domestic laws could be considered by the standing mechanism, and local remedies would be more effectively complied with by respondent States. These advantages, on one view, outweighed the greater time and costs arising from recourse to local remedies.

51. It was suggested that there could be (a) a time limitation on the requirement to pursue local remedies, and (b) exceptions to such a requirement, so as to allow certain violations to be rapidly remedied or where there were no available domestic local remedies. It was also said that exhaustion of local remedies was preferable to a fork-in-the-road provision, as the latter would preclude the investor from pursuing ISDS after resorting to local remedies.

Screening mechanisms

52. In addition to the exhaustion of local remedies, other mechanisms that could help make the caseload of a standing mechanism manageable were discussed. It was suggested that a committee of the parties and the chair of the standing mechanism could screen out frivolous or abusive claims, and that the standing mechanism should have the power to decline jurisdiction in cases of treaty-shopping. In a similar vein, it was suggested that an administrative mechanism could be used to screen out cases that did not meet formal requirements.

53. The Secretariat's informal draft statute of a standing mechanism was observed to encompass the largest possible scope of disputes. It was suggested that the Working Group should, however, consider providing flexibility by complementing the list of treaties subject to the jurisdiction of a standing mechanism, and should further consider whether to grant exclusive jurisdiction to the standing mechanism.

Mediation

54. It was suggested that a standing mechanism may provide guidance to disputing parties on the availability of mediation, and possibly incorporate time for mediation in the proceeding's procedural calendar with the consent of the disputing parties. It was noted that mediation had the benefit of allowing the interests of all affected stakeholders, and not just those of the disputing parties, to be addressed. Whether a standing mechanism should have the mandate to consider the suitability of mediation or to administer mediation was however questioned.

Applicable law

55. As many treaties had clear provisions on the law to be applied to the dispute, the issue of applicable law may not pose difficulties in practice. It was said that any issue of domestic law should be a question of fact, and a standing mechanism should be required to follow the interpretation of the relevant domestic courts on that issue. It was suggested that where there is a lack of clarity or guidance in the relevant treaty, tribunals could rely more on customary international law.

Precedential effect of decisions of a standing mechanism

56. Without proposing a rule of binding precedent, it was said that greater deference should be given to the jurisprudence of an appellate tier of a standing mechanism, because its mandate should be to ensure correctness of decisions. This would improve the current ISDS system by introducing a more consistent methodology for approaching issues such as the valuation of damages. It was further said that the precedential effect of decisions of a standing mechanism would be influenced by its

membership. With respect to a treaty subject to the jurisdiction of the standing mechanism, it was suggested that a joint interpretation by the parties to that treaty should bind the standing mechanism, even if not all the treaty parties were contracting parties to the standing mechanism.

57. A concern was expressed that a standing mechanism would homogenize the interpretation of treaties, even where differences may have been intended by the treaty parties. This would effectively amend treaties by judicial interpretation. In response, it was said that a standing mechanism should be cautious in its interpretation and seek to give effect to those differences. Further, there were safeguards such as joint interpretative statements.

Panel 4: Issues related to an appellate mechanism

58. Panel 4 was moderated by Ms. Jean Ho (National University of Singapore) and consisted of: Ms. Locknie Hsu (Singapore Management University; Multi-Party Interim Appeal Arbitration Arrangement pool of arbitrators); Ms. Margie-Lys Jaime (Panama); Ms. Karin Kizer (United States of America); and Mr. Sun Zhao (China).

Rationale and challenges

59. An appellate mechanism was considered to enhance predictability, correctness, and consistency of decisions over time. At the same time, it was acknowledged that an appellate mechanism was not a panacea for all existing concerns.

60. Two broad challenges posed by an appellate mechanism were discussed: (a) costs and duration, and (b) the perception that such a mechanism would favour States. On (a), different views were expressed as to whether an appellate mechanism would entail more costs and longer durations than existing avenues for annulment and setting aside of awards. It was asserted that annulment under the current system led to protracted proceedings with no finality. It was said that the appellate mechanism could be designed to reduce the costs and time required; for example, timelines could be set out from the start of the proceedings.

61. On (b), it was said that an appellate mechanism would not necessarily favour States, and States in favour of establishing a standing appellate mechanism were aiming to also protect investors' rights.

Precedential effect of decisions of an appellate mechanism

62. It was said that the consistency of the appellate mechanism's decisions needed to be weighed against their reach, in view of the number of investment treaties, the different contracting parties, and the precise language in such treaties. One suggestion was to limit the precedential effect to instances where there was identical language in the underlying instruments of consent. It was also suggested that States with treaties with identical language should be allowed to participate in the appellate proceedings. It was predicted that a decision of an appellate mechanism, even if not setting an official precedent, was likely to serve as a de facto precedent, similar to the decisions of the ICJ and the WTO Appellate Body.

Standing vs ad hoc appellate mechanism

63. One view preferred a standing appellate mechanism, as it would have institutional memory. Further, by virtue of collegiality amongst the judges, different views would be aired and addressed during the decision-making process. These factors would contribute to the correctness of decisions. It was further opined that a standing appellate mechanism was better placed than an ad hoc appellate tribunal to address issues of costs and duration.

64. Another view was that an ad hoc appellate mechanism with a roster model could be more cost effective, and could be implemented within a shorter period of time, as it would require fewer structural changes.

Interaction with existing review systems (ICSID annulment; review by national courts)

65. It was said that there ought not be any further recourse to any other forums, once the disputing parties agreed to submit the dispute to an appellate mechanism. A question was raised as to whether such waiver of recourse to other forums should apply only when the instrument of consent was subject to the statute of the appellate mechanism. In response, it was opined that the waiver could also apply when the investor agreed to subject its dispute to the appellate mechanism.

66. Potential merit was seen in having exceptions to the finality of the appellate proceedings, where domestic courts would still play a role. It was suggested that the scope of such exceptions would need to be discussed. Another view was that domestic courts should not review appellate decisions at all, similar to ICSID's design as a delocalized and self-contained system.

Possible design features, including accountability mechanisms for treaty interpretation

67. To address the rationale and challenges of an appellate mechanism (see paras. 59–61), the following features were identified: security for costs, early dismissal, a screening mechanism, more regular use of non-disputing treaty party submissions, and explicit provision for the binding effect of joint interpretative statements. It was also suggested that WTO procedures could serve as a reference – for example, a WTO panel first circulates an interim panel report to the disputing parties to correct any errors of facts before issuing the final report.

68. To prevent "interpretative overreach", it was proposed that States, including States that did not participate in the appellate mechanism or in the proceedings, should be able to issue post-decision joint interpretative statements. A view was expressed that joint interpretative statements would ensure buy-in from States that might otherwise not join the appellate mechanism.

Jurisdictional scope

69. On the types of decisions subject to appeal, it was considered that final decisions and other substantive decisions, including partial decisions on the merits and decisions on jurisdiction, ought to be appealable. A view was expressed that a decision on bifurcation should not be appealable. On interim measures, views diverged.

70. On subject matter jurisdiction, it was asserted that appeals should be limited to disputes based on international investment treaties, as the correctness of decisions in disputes based on investment contracts or domestic law was of lesser concern.

Grounds of appeal and standard of review

71. It was said that the grounds of appeal should be limited so that not every first instance decision would be appealed. It was stated that important questions of sovereignty, and errors in the appreciation of law and facts should be appealable. One view was that errors of facts could include domestic laws and damages. It was further pointed out that the appreciation of domestic laws and damages could also be errors of law, depending on the circumstances. It was considered that both aspects needed not be considered as additional grounds for appeal provided that errors of law and errors of facts already constituted grounds for appeal.

72. Regarding the standard for review, the use of "manifest errors" of law or facts was suggested.

Issues for further consideration

73. How individual judges would be selected for chambers within an appellate mechanism was queried. It was noted that, at the WTO, members constituting a division of the Appellate Body were selected "on the basis of rotation, while taking

into account the principles of random selection, unpredictability and opportunity for all members to serve regardless of their national origin" (Working Procedures for Appellate Review, WT/AB/WP/6*, at paragraph 6(2)).

Panel 5: Compatibility of an appellate mechanism with the existing ICSID system

74. Panel 5 was moderated by Ms. Meg Kinnear (ICSID) and consisted of: Mr. Michele Potestà (Lévy Kaufmann-Kohler); and Mr. Mathieu Raux (France).[7]

75. The key question addressed by Panel 5 was how a multilateral appellate mechanism could be built into the ICSID system. For purposes of this panel, an appellate mechanism was assumed to have appellate jurisdiction over all arbitral awards, whether ICSID or non-ICSID. It was also assumed that no State should be prejudiced by their choice of annulment or setting aside as post-award remedies, instead of appeal.

76. An overview of some unique features of the ICSID system was provided. In particular, it was noted that appeals are prohibited under the ICSID Convention, but annulment of ICSID awards can be sought on certain grounds. Further, there is a simplified and automatic enforcement mechanism, as ICSID member States are bound to recognize and enforce an ICSID award as if it were a final judgment of their domestic courts.

Options involving ICSID Convention amendments

77. Possible ICSID Convention amendments to introduce an appeal avenue were canvassed. It was highlighted that the amendment requirements under Articles 65 and 66 of the ICSID Convention were stringent, and while untested, meeting these requirements were suggested to be practically impossible. With that caveat, two scenarios were put forward.

78. The first scenario involved establishing an appellate mechanism under the ICSID Convention. Enforcement of its appeal awards would be under the ICSID Convention in ICSID member States, and the New York Convention in the case of non-ICSID member States. Extensive amendments of the ICSID Convention would be necessary to include appeals as an optional post-award remedy and to establish the full structure of the appellate mechanism within the ICSID framework. There could also be ancillary issues, such as the amendment of domestic laws. Although this approach would allow all ICSID and non-ICSID appeal awards to be enforced under the ICSID Convention, it was observed that it would likely be difficult to achieve the necessary requirements for amendments.

79. The second scenario involved the creation of an appellate mechanism administered by ICSID but established under a different treaty. In this scenario, ICSID appeal awards could be enforced under the ICSID Convention in all ICSID member States. Non-ICSID appeal awards would be enforced under the treaty of the appellate mechanism in States that are party to the appellate mechanism. Enforcement could also be sought under the New York Convention; for example, where enforcement was sought in States that are neither party to the ICSID Convention nor the appellate mechanism. Compared to the first scenario, this scenario would involve a more surgical amendment to the ICSID Convention to provide the option of appeal of ICSID awards to a separate appellate mechanism established under a different treaty.

Option involving inter se modification of the ICSID Convention

80. A third scenario was presented, one that would not require the amendment procedure of the ICSID Convention. Like the second scenario, this scenario would

[7] Presentation slides are available on the dedicated website at https://wg3intersessional.mlaw.gov.sg/programme/.

involve the creation of an ICSID-administered appellate mechanism but established under a different treaty. It would involve an inter se modification under Article 41 of the Vienna Convention on the Law of Treaties (VCLT) between the ICSID member States that wished to allow for appeal. Consequently, ICSID appeal awards would be enforced under the ICSID Convention only in ICSID member States that were party to the inter se modification. Non-ICSID appeal awards would be enforced under the treaty of the appellate mechanism in States which are parties. Enforcement would have to be sought under the New York Convention in ICSID member States that were party to neither the inter se modification nor the appellate mechanism. Enforcement would also have to be sought under the New York Convention in non-ICSID member States that were not party to the appellate mechanism.

81. A presentation was given that examined the third scenario in detail. It was explained that the rationale for inter se modification was to allow for contracting parties of multilateral treaties to modify such treaties to adapt to changed circumstances, without prejudicing the rights of other treaty parties who did not wish for such modification. Applying Article 41 of the VCLT, the conditions for lawful inter se modification of the ICSID Convention were as follows: (a) it must not be expressly prohibited by the ICSID Convention; (b) it must not prejudice the rights of the other parties; and (c) it must not be incompatible with the ICSID Convention's object and purpose. It was said that these conditions could be met in this scenario.

82. It was stated that ICSID member States that were not party to the inter se modification would not be precluded from agreeing to enforce ICSID appeal awards – even though they would not be bound to do so. It was suggested that such States could be invited to make a voluntary declaration that they would enforce ICSID appeal awards.

83. It was explained that the third scenario would be implemented through three instruments. First, a treaty establishing the appellate mechanism. Second, an instrument for inter se modification of the ICSID Convention to allow for appeals of ICSID awards to the appellate mechanism. Third, an optional declaration by ICSID member States not party to the inter se modification of the ICSID Convention that they would enforce ICSID appeal awards under Article 54 of the ICSID Convention. There would be corollary issues, such as the temporal application of the inter se modification, and the implications of the most-favoured nation obligation. It was noted that the latter issue had been addressed in the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.

Experiences with establishing current bilateral appeal mechanisms

84. Experiences with inter se modifications of the ICSID Convention for bilateral appellate mechanisms were shared. Aspects highlighted were the use of a claimant's undertaking to only enforce awards that become final after appeal or the time for appeal had elapsed, an undertaking by the treaty parties to recognize such awards as binding and enforceable as if it were a final judgment of their courts, and express provision that an appeal award shall qualify as an arbitral award.

Possible design of an appellate mechanism

85. The view was expressed that an appellate mechanism should have an open architecture to maximize the scope of awards that could be appealed. It was also proposed that there should be cumulative grounds of appeal, so that the appellate mechanism could also operate as part of a standing two-tier mechanism.

Prospects for an appellate mechanism in the ICSID system

86. A conclusion drawn from the presentations was that an appellate mechanism could be achieved if desired by ICSID member States. It was, however, cautioned that a core number of States was required to make this viable, or else there would be a danger of fragmentation.

Discussion following the presentations

87. A question was raised about the consequences if the inter se modification were found to be prohibited under the ICSID Convention. In response, it was said that parties to that inter se modification would incur international responsibility, resulting in the typical consequences, such as having to cease the wrongful act. It was also noted that in case of conflicts concerning its interpretation or application, the ICSID Convention provides for State-to-State dispute proceedings before the International Court of Justice.

88. On the possibility of allowing investors of non-party States to access the appellate mechanism, and whether this would pose challenges to the inter se modification of the ICSID Convention, the initial response was that this would not pose a challenge, though such optionality needed to be carefully drafted and the option exercised early, rather than after the outcome of the arbitration.

89. It was queried whether an appellate mechanism was incompatible with the object and purpose of the ICSID Convention, since it could add to the cost of ISDS proceedings and disturb the balance between the rights of States and investors. In reply, it was said that the compatibility should be determined by taking into account other considerations such as ensuring consistency, correctness, and the legitimacy of the system. It was further observed that, ICSID annulment committees were not appointed by disputing parties but from a list of candidates appointed by States, and an appellate mechanism would therefore not affect the existing balance.

90. It was also said that an appellate mechanism would not be incompatible with the object and purpose of the ICSID Convention, as long as it was designed within the Convention's parameters and the independence of adjudicators was maintained.

Panel 6: Key common implementation and enforcement issues

91. Panel 6 was moderated by Mr. N. Jansen Calamita (Centre for International Law, National University of Singapore), and consisted of: Ms. Meg Kinnear (ICSID); Mr. Chester Brown (University of Sydney); and Ms. Laurence Bielen (Belgium).[8]

92. The panel considered, in turn, enforcement options for three hypothetical models for a standing mechanism: (1) a single-tier standing mechanism that would make first instance decisions only; (2) a standing appellate mechanism (with no first instance tier) that would hear appeals from first instance decisions of ad hoc arbitral tribunals; and (3) a standing two-tier mechanism comprising a first instance tier and an appellate tier.[9] This was not intended to preclude other possible designs. To keep the discussion focused, only final decisions on the merits were considered, as opposed to interim decisions.

Enforcement options for a standing single-tier, first-instance mechanism

93. Possible applicability of the New York Convention. In assessing whether a decision of a standing mechanism could be enforced as an arbitral award under the New York Convention, the following relevant issues were discussed:

(a) Whether a decision of the standing mechanism would satisfy the territorial requirement under Art. I (1) of the New York Convention. Academic authorities that regarded ICSID awards to be enforceable under the New York Convention in non-ICSID Contracting States were mentioned.

(b) Whether a decision of the standing mechanism would be considered an "arbitral award" and whether the mechanism would constitute a "permanent arbitral body", under Art. I (2) of the New York Convention. It was stated that there is no

[8] Presentation slides are available on the dedicated website at https://wg3intersessional.mlaw.gov.sg/programme/.

[9] See models 1, 2, and 3 at para. 22.

universal definition of “arbitration” or “permanent arbitral body”. It was suggested that decisions from a standing mechanism may qualify as an arbitral award under the New York Convention.

(c) Whether the term “commercial” under Art. I (3) New York Convention includes investment treaty disputes. It was stated that “commercial” has generally been interpreted broadly by national courts and would include investment treaty disputes.

(d) Whether the New York Convention requirements of an arbitration agreement under Art. II (1) would be satisfied. A view was expressed that consent to resolve disputes via a standing mechanism would satisfy the requirement of an arbitration agreement.

94. Possible applicability of the ICSID Convention. Doubt was expressed as to whether States could deem a decision of a standing mechanism/non-ICSID award to be an ICSID award and enforce it under the ICSID Convention.

95. Given the legal uncertainties around the possible enforcement under the New York Convention, it was stated that a self-contained enforcement mechanism would be preferable. A self-contained enforcement mechanism would eliminate legal uncertainty over whether a decision of a standing mechanism could be subject to further setting aside or other review by domestic courts pursuant to the New York Convention. It was suggested that, in parallel with a self-contained enforcement mechanism, enforcement in non-parties could be sought using the New York Convention.

Enforcement options for a standing appellate mechanism

96. For the ICSID Convention to play a role in the enforcement of the decisions of a standing appellate mechanism, three possible scenarios, as set out in session 5 (see paras. 77 to 83), were reiterated. In all three scenarios, the appellate mechanism would be able to hear appeals from both ICSID and non-ICSID awards.

97. A fourth scenario did not involve the ICSID Convention. In this scenario, the appellate mechanism would be established independently of ICSID. Consequently, the appellate mechanism would not be able to hear appeals from ICSID awards. Its awards would be enforced under the treaty establishing it, or, potentially, under the New York Convention.

Enforcement options for a standing two-tier mechanism

98. One panellist asserted that a standing two-tier mechanism was the model preferred by some States.

99. A preference was expressed for a self-contained enforcement mechanism similar to that provided in the ICSID Convention for a standing two-tier mechanism. Enforcement under the New York Convention was considered to be not ideal, as it would allow additional review of awards when there would already be an appeal avenue in the standing mechanism. In that regard, reference was made to draft article 11 of the Secretariat’s informal draft statute of a standing mechanism.

100. In States not participating in the standing mechanism, decisions of the mechanism could potentially be enforced under the New York Convention. Alternatively, non-participating States could be invited to join the self-contained enforcement mechanism, without joining the standing mechanism. It was questioned how States would be incentivized.

101. A waiver provision, such as the one included in Art. 3.22 of EUSIPA, was suggested as a means of ensuring that disputing parties would not seek a further review of the mechanism’s decisions, where enforcement was sought under the New York Convention.

Discussion following the presentations

102. It was reiterated that a standing multilateral mechanism should have a self-contained enforcement mechanism and rely on enforcement under the New York Convention as a fallback to maximize the chances of having its decisions enforced. It was therefore suggested that the standing multilateral mechanism should be set up in a State party to the New York Convention. In response, it was stated that territoriality was generally not a concern as the New York Convention also applied to delocalized ICSID awards (see para. 93 (a) above). It was, however, acknowledged that delocalized awards may be excluded from enforcement under the New York Convention if a State declares under Art. I (3) that it will only apply the New York Convention to awards made in the territory of another Contracting State on the basis of reciprocity.

103. On whether an annulment procedure similar to that in the ICSID Convention would be useful in a standing multilateral mechanism, it was stated that annulment would not be needed in a standing two-tier mechanism since disputing parties would be able to appeal the first-tier decision and there would be no merit in annulling the appeal decision.

104. It was asked if it was possible for a treaty establishing a standing multilateral mechanism to incorporate, by reference, other enforcement regimes, i.e. the ICSID Convention and the New York Convention. In response, it was cautioned that incorporation by reference and "deeming" provisions (e.g. provisions which deem decisions to be ICSID awards) may not be legally possible and may not produce its intended effects.

Roundtable discussion

105. The roundtable discussion was moderated, in turn, by Mr. Shane Spelliscy and Ms. Natalie Y. Morris-Sharma. Themes and issues raised during the preceding panels were discussed in further detail, and informal guidance was given to the Secretariat on the preparation of working papers.

Working papers and methods

106. As a general observation, it was said that the working papers should have sufficient detail to give States a sense of what they would be signing up to. It was also noted that only complete texts should be presented to the Commission.

107. It was considered necessary for the Working Group to identify the elements that ought to be decided on prior to the establishment of a mechanism, as well as those issues that could be decided on later in the process. Foundational elements should be set out in the mechanism's constitutive document, whereas other elements could be set out in subsidiary documents and decisions could be delegated to a committee of the parties. This would help ensure scalability and future-proofing, and accommodate the possible growth of and evolution in the membership of the standing mechanism. It was nevertheless observed that there was no bright-line rule distinguishing foundational elements from other elements; hence, all elements could and should be discussed by the Working Group.

108. A question was raised as to when and how the different papers prepared by the Secretariat would be integrated. It was explained that the papers were being developed as separate puzzle pieces that could be easily plugged into any structure or mechanism that the Working Group eventually develops. However, it was also said that a global picture of the reform options would need to be developed sooner rather than later. It was observed that the Working Group was taking a "building blocks" approach, and for some States, only some and not all blocks would be found to be fit for purpose. On a related note, the possible need to ensure consistency of definitions across reform options was pointed out.

109. The Secretariat was encouraged to prepare working papers reflecting the various design permutations to serve as a basis for the Working Group's discussions.

Broad geographical representation

110. Balanced geographical representation among adjudicators of a standing mechanism was, on one view, considered to be dependent on the means of composing its membership and related to its membership threshold to become operational. Further, it was observed that the number of adjudicators in the first tier of the standing mechanism would be an important factor affecting the design of the selection and appointment process, and the number of adjudicators in the appellate tier. It was suggested such issues should be addressed sooner rather than later.

111. Support was expressed for the use of regional groups in draft provision 8 of the framework for selection and appointment of ISDS tribunal members (A/CN.9/WG.III/WP.213).

Gender diversity

112. On having an express requirement for gender balance, it was recalled that options 1 and 2 of the current draft provision 6 were to be combined.[10] The experience of the ICC and the work of the Academic Forum should provide inspiration.

Ensuring equal participation of State members

113. It was said that the Working Group would need to consider how to adjust the decision-making process as membership grew, perhaps by allowing a committee of the parties to make the necessary adjustments. It was suggested that decision-making processes should be designed to avoid a vote and ensure that decisions are not blocked by requiring unanimity; reference was made to a "consensus minus x" model.

114. With regard to States that become members of a standing mechanism at a later stage, it was said that there should be safeguards and guarantees to avoid prejudicing their rights. The ICC and the WTO were noted to have addressed such concerns before. One way would be to allow signatories undergoing ratification certain rights of access and participation. It was noted that paragraph 5 of draft article 3 of the informal draft statute provided that signatories that had not yet ratified the statute could attend meetings of a conference of contracting parties as observers.

Non-State stakeholder participation

115. Support was expressed for non-State stakeholder participation in, for example, the process of selection and appointment of tribunal members, to reflect their interests.

Architecture and optionality

116. It was reiterated that a standing mechanism should have an open architecture. Interest was expressed in the possibility of allowing States the options of signing on to (a) only the appellate mechanism, (b) only the first tier of the standing mechanism, or (c) both tiers of the standing mechanism. It was suggested that such optionality was best explored in relation to draft provisions 8 and 9 of the informal draft statute.

Effect of decisions on non-participating States

117. The need for safeguards to prevent a standing mechanism from affecting the treaties of third-party States that contained identical or similar provisions was emphasized. A concern was expressed that, contrary to Article 41 of the VCLT, the persuasive effect of decisions of an appellate mechanism may be over-amplified, thereby undermining the right of non-disputing parties to not be bound by a decision.

[10] Option 1 of draft provision 6 in A/CN.9/WG.III/WP.213 refers to "the need to ensure equal representation of genders."

In response, it was said that there had been no objections to the current practice of making reference to certain tribunals as authoritative or strongly persuasive, despite such tribunals having been established under different treaties.

Enforcement in non-participating States

118. Enforcement in non-participating States was a key question. Draft article 11 of the informal draft statute – which obliges a non-contracting party that consents to the jurisdiction of the standing mechanism to recognize and enforce the relevant decision of the mechanism – was said to be in the right direction.

119. To maximize the availability of the New York Convention as a means of enforcement in non-participating States, the following could be explored: (a) the deeming language used in the treaties of existing bilateral standing mechanisms,[11] and (b) a waiver by parties to post-award remedies.

Execution of decisions of a standing mechanism

120. With reference to paragraph 3 of draft article 11 of the informal draft statute, it was queried whether the execution of decisions should be left to the laws of the territory in which enforcement is sought. In response, it was noted that the ICSID Convention contained such a provision and this had not posed issues in the enforcement of ICSID awards. An explanation was given of the distinction between "recognition", "enforcement" and "execution" by the highest court of a certain national jurisdiction: "recognition" is the court's determination that an award is entitled to be treated as binding, which gives rise to preclusive effects of res judicata and issue estoppel; "enforcement" is the legal process by which an award is reduced to a judgment of the domestic court and has the same status as one; and "execution" is the process of collecting on that judgment that has been enforced. Reference was also made to the UNCITRAL Secretariat Guide on the New York Convention.

"Procedural" work by the Working Group

121. The need to clearly distinguish among (a) procedural rules reform of the Working Group, (b) the administrative rules of a standing mechanism, and (c) the procedural rules of the proceedings, was highlighted. To illustrate the distinction between the second and third category of procedural rules, it was said that the set of procedural rules for the proceedings before a standing mechanism should be the same across all such proceedings, while the rules relating to the mechanism's day-to-day administration could allow for more flexibility.

122. Questions were raised as to how the procedural rules reform would be adopted. It was cautioned that there could be a question of compatibility between the procedural rules reform, and IIAs that might already contain relevant rules. It was anticipated that the procedural rules reform could apply retroactively to improve existing IIAs.

123. It was said that the retroactive application of the procedural rules reform might result in the amendment of the arbitration rules of another system or an institution, without necessarily abiding by the rules or procedures for amendment.

124. It was said that any amendment to existing instruments necessary to give effect to the reforms must take place in accordance with the relevant amendment procedures. There could be coordination between the relevant bodies and the Working Group to achieve the desired reforms.

[11] An example given was Article 3.22(5) of EUSIPA ("For purposes of Article I of the New York Convention, final awards issued pursuant to this Section are arbitral awards relating to claims that are considered to arise out of a commercial relationship or transaction") and Article 3.22(6) of EUSIPA ("For greater certainty, …, where a claim has been submitted to dispute settlement pursuant to Article 3.6(1)(a) (Submission of Claims to the Tribunal), a final award issued pursuant to this Section shall qualify as an award under Section 6 of Chapter IV of the ICSID Convention").

Financing

125. The importance of the financial sustainability of a standing mechanism was highlighted. Separately, it was observed that the international courts and tribunals considered in the informal document outlining the financing of a standing mechanism had fewer cases than that anticipated of the standing mechanism. Given this, it was asserted that the cost and financing structure of the standing mechanism would need to be re-examined.

Closing remarks

126. In closing, Ms. Anna Joubin-Bret provided an overview of the Working Group's work and output to-date. Noting that much remain to be accomplished, Ms. Joubin-Bret highlighted the need for the Working Group to consider how its products should be implemented, including how they should interact with the IIAs in existence today. Ms. Daphne Hong observed that the Meeting had successfully covered technical and complex issues in relation to a standing mechanism and appellate mechanism, and expressed confidence that the discussions would help advance the work of the Working Group.