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Settlement of commercial disputes: presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-State dispute settlement

Note by the Secretariat

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I. Introduction

1. At its forty-eighth session, in 2015, the Commission noted with appreciation the ongoing cooperation and coordination efforts of the Secretariat with organizations active in the field of international arbitration and conciliation. The Commission further noted that UNCITRAL standards in that field were characterized by their flexibility and generic application to different types of arbitration, including both purely commercial arbitration and investor-State arbitration. In that light, the Commission agreed that the Secretariat should continue to coordinate with organizations in relation to the various types of arbitration to which UNCITRAL standards were applicable, and to closely monitor developments, further exploring areas for cooperation and coordination.[1]

2. In relation to investor-State arbitration, the Commission noted that the current circumstances posed a number of challenges and proposals for reform had been formulated by a number of organizations. In that context, the Commission was further informed that the Secretariat was conducting a study on whether the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency" or "Mauritius Convention") could provide a useful model for possible reforms in the field of investor-State arbitration, in conjunction with interested organizations, including the Center for International Dispute Settlement (CIDS), a joint research center of the Graduate Institute of International and Development Studies and the University of Geneva Law School. In that light, the Secretariat was requested to report to the Commission at a future session with an update on that matter.[2]

3. Pursuant to that request, the purpose of this note is to provide the Commission with an update on the study conducted within the framework of a research project of the CIDS (referred to as the "research paper") and to provide a short overview of its outcome.[3]

4. The purpose of the research paper is to analyze whether the Mauritius Convention on Transparency could be used as a model for implementing broader reform initiatives of the investor-State dispute settlement ("ISDS") framework, in the event that it would be decided, at a later stage, to carry out reforms at a multilateral level. As an illustration of a possible procedural reform to which the approach adopted under the Mauritius Convention could be useful, and in order to provide a basis for the analysis, the research paper examines the scope, possibilities, and challenges for an instrument similar to the Mauritius Convention, alone or in combination with other instruments, to create (i) a permanent dispute settlement body intended to replace or complement ISDS provisions in existing and future investment treaties; or (ii) an appeal mechanism for awards rendered in ISDS proceedings under existing or future investment treaties.

5. This note, however, is limited to reporting on the outcome of the legal study on the question whether the Mauritius Convention on Transparency could be used as

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[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 268.

[2] Ibid.

[3] The research paper is available on the UNCITRAL website, in English only, at: www.uncitral.org/uncitral/commission/sessions/49th.html.

a model for broader procedural reform initiatives in the field of ISDS should there be a decision to undertake reforms on a multilateral basis. This note contains, for information purposes only, a brief overview of legal questions raised by possible procedural reforms of ISDS, and does not provide a detailed analysis of such reforms as this would fall outside the scope of the mandate provided by the Commission. This note does not contain recommendations for possible future work on any such reforms, for which a separate decision would need to be made by the Commission.

II. Brief overview of the research paper: the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-State dispute settlement

A. Background: the features of the Mauritius Convention and current proposals for procedural reform

1. The "Mauritius Convention approach"

6. In 2013, UNCITRAL adopted the Rules on Transparency in Treaty-based Investor-State Arbitration (the "Transparency Rules") together with a new article 1(4) of the UNCITRAL Arbitration Rules (as revised in 2010).[4] The Transparency Rules, which came into effect on 1 April 2014, comprise a set of procedural rules that provides for transparency, and for accessibility to the public of treaty-based investor-State arbitration. The Transparency Rules apply in relation to disputes arising out of investment treaties concluded on or after 1 April 2014, when investor-State arbitration is initiated under the UNCITRAL Arbitration Rules, unless the Parties to the investment treaty have agreed otherwise.[5] The Transparency Rules apply in relation to disputes arising out of investment treaties concluded prior to 1 April 2014, when the Parties to the relevant investment treaty (i.e. States or regional economic integration organizations),[6] or the parties to the dispute (i.e. an investor and a State or a regional economic integration organization),[7] agree to their application. The Transparency Rules are also available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules, and in ad hoc proceedings.[8]

7. After the adoption of the Transparency Rules, UNCITRAL prepared a convention designed to facilitate the application of the Transparency Rules to the roughly 3,000 investment treaties concluded before the entry into force of the Transparency Rules, thereby providing States with an efficient mechanism to apply the Transparency Rules to their existing investment treaties, should they wish to do

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[4] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), chapter III and annexes I and II.

[5] Transparency Rules, Article 1(1).

[6] Transparency Rules, Article 1(2)(b). For multilateral investment treaties, it is sufficient that the State of the claimant and the respondent State have reached an agreement to this avail.

[7] Transparency Rules, Article 1(2)(a).

[8] Transparency Rules, Article 1(9).

so.[9] Indeed, the Mauritius Convention on Transparency is an instrument by which Parties to investment treaties concluded before 1 April 2014 express their consent to apply the Transparency Rules to arbitrations arising out of those treaties.

8. The Mauritius Convention allows the Transparency Rules to be applied to all existing bilateral, regional, and multilateral investment treaties, and in all available arbitral fora, if both the respondent State and the investor's home State are contracting parties to the Mauritius Convention or, alternatively, if the investor (as claimant) accepts the unilateral offer of the respondent State to apply the Transparency Rules. In essence, the "Mauritius Convention approach" can be described as introducing the substantive transparency standards embodied in the Transparency Rules into the fragmented treaty-by-treaty regime by way of a single multilateral instrument. It introduces a flexible regime as it foresees a limited number of reservations that Contracting Parties may formulate.

9. The Mauritius Convention is an instrument that incorporates into the existing myriad of investment treaties the notion of transparency, a procedural aspect generally not addressed under the vast majority of investment treaties. It supplements existing investment treaties with a uniform regime on transparency embodied in the Transparency Rules. At its forty-sixth session, the Commission reaffirmed the view expressed by a great number of delegations at the fifty-ninth session of Working Group II, namely that a convention on transparency, upon coming into force, would constitute a successive treaty creating new obligations pursuant to article 30 of the Vienna Convention on the Law of Treaties (1969) (the "Vienna Convention").[10]

10. A question for consideration is whether a convention implementing new reforms to existing investment treaties, modelled on the Mauritius Convention, would constitute a successive treaty creating new obligations pursuant to article 30 of the Vienna Convention, or whether it would constitute an amendment or modification of investment treaties (pursuant to provisions of existing investment treaties and Chapter IV of the Vienna Convention). If a convention implementing new reforms were to be considered as an amendment or a modification to underlying investment treaties, there would be some additional elements to be considered when drafting the convention (for instance, on procedures for amending/modifying treaties), and States parties to the Convention would need to consider possible domestic procedures to be followed to implement such reforms.

2. Challenges faced by investor-State dispute settlement mechanisms

11. The international investment law regime is composed of more than 3,000 investment treaties, including broader bilateral or multilateral free trade agreements containing a chapter on investment protection. Although investment

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[9] *Official Records of the General Assembly, Sixty-eighth session, Supplement No. 17* (A/68/17), para. 127.

[10] Ibid., *Sixty-ninth session, Supplement No. 17* (A/69/17), para. 25. When the Working Group examined that question at its fifty-ninth session, it was said that logically one could not refer to an amendment or modification to investment treaties in the context of a subsequent treaty creating new obligations between Contracting Parties, but rather, that the transparency convention would amount to a successive agreement between Contracting Parties (see A/CN.9/794, paras. 17 to 22).

treaties are not identical to one another, they generally follow similar patterns with regard to their structure and are centred on a number of core principles. The broad similarities between investment treaties make it possible to speak of a "regime" of international investment protection, which is essentially based on two elements.

12. First, investment treaties provide substantive guarantees to investors in the form of international obligations placed upon Contracting States, whereby States undertake to respect certain standards of investment protection vis-à-vis foreign investors and their investments (such as fair and equitable treatment, protection from expropriation, and non-discrimination).

13. Second, most investment treaties allow foreign investors to enforce those substantive protections through a procedural dispute resolution mechanism. While ISDS provisions show variations across the different investment treaties, they normally provide for the following features: (i) the investor may bring a claim directly against the host State; (ii) the dispute is heard by an arbitral tribunal constituted ad hoc[11] to hear that particular dispute; (iii) both disputing parties, including the investor (as claimant) and the respondent State, play an important role in the selection of the arbitral tribunal.

14. The research paper briefly outlines the diverging opinions on the merits and demerits of the foreign investment protection regime and in particular ISDS, as reported in the following paragraphs.

15. Supporters of the system normally highlight that the foreign investment protection regime has generally proven beneficial and has positively contributed to the promotion of the rule of law at the international level, the functioning of the global market, the increase of foreign investment flows, as well as the economic growth and human development in capital-exporting and capital-importing States. The development of ISDS was part of an initiative to create an institutionalized and formalized procedure on the international plane, within a broader initiative which saw investment treaties (including their provisions on dispute settlement) as instruments to foster confidence in the stability of the investment environment of developing countries.

16. Proponents also stress the novelty of the ISDS system, which allows a private subject (whether an individual or a company) to bring an international claim directly against a sovereign State, in a significant break from traditional mechanisms which were essentially founded on the institution of diplomatic protection (or diplomatic espousal). Importantly, ISDS also led to a "de-politicization" of investment disputes and drastically reduced the risk that they escalated into inter-State conflicts.

17. Numerous empirical analyses have been conducted with a view to assessing the effective impact of investment treaties on foreign direct investments.[12] Those studies have come to diverging conclusions. According to a report of the United Nations Conference on Trade and Development (UNCTAD), the majority of those

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[11] "Ad hoc" here means that the dispute is not brought before a permanent body, but before a tribunal (whether or not under the auspices of an arbitral institution) constituted to hear that particular dispute (with no mandate beyond that dispute). It is not used to refer to non-institutional arbitration.

[12] UNCTAD (2014), *The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998-2014*, IIA Issues Note, Working draft.

studies concluded that there was indeed a positive correlation between investment treaties and foreign direct investment.[13] Others were more nuanced, and showed that this impact was dependent on the content of the investment treaties.[14] Finally, some researchers found no or insignificant investment increases due to investment treaties.[15]

18. The regime of investment treaties has also attracted strong and growing critical attention. Criticisms may be grouped into two main categories. A first series of criticism focuses on the decision makers in the ISDS system, i.e. the arbitrators (and, to a lesser extent, the arbitral institutions which may administer investor-State arbitrations). The second relates to the arbitral process, its outcome and its structural features. Concerns have been voiced regarding lack of consistency of awards issued by arbitral tribunals, length and cost of the proceedings, lack of appropriate control mechanisms, and lack of transparency.

19. Criticism of ISDS in essence reflects concerns about the democratic accountability and legitimacy of this dispute resolution process. While States themselves have established the mechanism and, therefore, their consent ensures its legitimacy under international law, this may not always be perceived as such by States and their constituencies.

20. The research paper highlights that the deficiency in terms of accountability and legitimacy calls for remediation, and that the remedies should avoid sacrificing the gains of ISDS, i.e., (i) neutrality or, in other words, distance of the decision makers from politics — the depoliticization for which investment arbitration was praised — and from business interests at the same time; (ii) finality and enforceability of the award; and (iii) the manageability and workability of the process.

3. Existing proposals for procedural reform

21. The last decade has evidenced strong debate on, and repeated calls for, the creation of permanent bodies within the investment treaty regime, both in the form of an appeal mechanism[16] and in the more radical replacement of ISDS with a permanent dispute settlement body.[17] Indeed, the creation of a permanent dispute settlement body or an appeal mechanism tailored for ISDS has been contemplated on several occasions during the last decade. The most significant of these proposals

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[13] Ibid.

[14] See, for instance, Axel Berger, Matthias Busse, Peter Nunnenkamp and Martin Roy (2010), *Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box*, World Trade Organization, Economic Research and Statistics Division, Working Paper, also published under the same title as Kiel Institute for the World Economy, Working Paper No. 1647.

[15] See, for instance, Mary Hallward-Driemeier (2003), *Do Bilateral Investment Treaties Attract FDI? Only a bit…and they could bite*, World Bank, Policy Research Paper WPS 3121.

[16] See generally UNCTAD (2014), *Investor-State Dispute Settlement: A Sequel, Series on Issues in IIA II*, p. 192; UNCTAD (2013), *Reform of Investor-State Dispute Settlement: In Search of a Roadmap, Special issue for the Multilateral Dialogue on Investment*, International Investment Agreement Issues Note, No. 2, p. 8.

[17] See generally UNCTAD (2014), *Investor-State Dispute Settlement: A Sequel, Series on Issues in IIAs II*, p. 194; UNCTAD (2013), *Reform of Investor-State Dispute Settlement: In Search of a Roadmap Special issue for the Multilateral Dialogue on Investment*, International Investment Agreement Issues Note, No. 2, p. 9.

include attempts by the International Centre for Settlement of Investment Disputes (ICSID)[18] and the Organization for Economic Co-operation and Development (OECD),[19] as well as the programmatic language contained in a number of investment treaties,[20] and the pioneering innovations towards the creation of permanent investment bodies in recent investment treaties.[21]

22. It is against this backdrop of debates and of incipient reform attempts that it can be asked whether the Mauritius Convention on Transparency can serve as a model for international investment law reform in connection with the introduction of a permanent dispute settlement body and an appeal mechanism.

B. Application of the "Mauritius Convention approach" to possible procedural reforms

1. Assessment of feasibility

23. The research paper provides an insight on the advantages of adopting the Mauritius Convention approach for the implementation of reforms to existing investment treaties in respect of the setting up of a permanent dispute settlement body or an appellate mechanism as briefly outlined below.

24. First, this approach would relieve States of the burden of pursuing potentially complex and long amendment procedures set forth in their numerous existing investment treaties. Indeed, a convention implementing new procedural reforms, modelled on the Mauritius Convention (referred to below as an opt-in convention), would render the innovations directly applicable to existing investment treaties for those States that wish to embrace such innovations.

25. Second, the Mauritius Convention approach could allow for the establishment of a multilateral permanent dispute settlement system. Indeed, it would lead to the creation of one single investment body potentially competent to resolve investment disputes concerning as many States as would opt into it, and/or to the creation of one single appeal mechanism potentially competent to serve as appellate body for ISDS awards across all investment treaties. This approach could help increase the consistency in international investment law, thereby avoiding a piecemeal and treaty-by-treaty approach.

26. Third, a reform based on the Mauritius Convention approach would generally focus on a certain discrete part of the investment treaties' critical issues, i.e. the dispute settlement part, and avoid engaging in the controversies surrounding the substantive standards. By so doing it is more likely to be successful, as an attempt to unify substantive provisions may well lead to years of discussions with no guarantee of consensus.

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[18] ICSID Secretariat (2004*)*, *Possible Improvements of the Framework for ICSID Arbitration*, Discussion Paper, p. 5.

[19] The OECD Investment Committee explored the feasibility and appropriateness of an appellate mechanism for investment disputes in 2006.

[20] See, for instance, the 2012 Model Bilateral Investment Treaty of the United States of America (Article 28(10)); or the Canada-Korea Free Trade Agreement, 1 January 2015, (Annex 8-E).

[21] See the EU-Canada Comprehensive Economic and Trade Agreement (CETA) (Chapter 8 Section F); or the European Union-Vietnam Free Trade Agreement (Chapter 8.II Section 3).

27. In concrete terms, the outcome of a reform based on the Mauritius Convention approach would entail that the myriad of underlying investment treaties will continue to deal with the substantive obligations, and the newly established permanent dispute settlement body and/or an appeal mechanism would have the mandate to apply these different underlying investment treaties. Admittedly, no absolute uniformity would be achieved, because the applicable law — the substantive treaty standards — would continue to be anchored in different investment treaties. However, consistency would be reached in the application of the same investment treaty and of different investment treaties with identical or nearly identical wordings. And even when applying differently worded investment treaties, it would be expected that the permanent dispute settlement body's and/or appeal mechanism's pursuit of consistency will be greater as a natural consequence of the in-built elements of tradition, continuity and collegiality, which are inherent in permanent bodies as opposed to ad hoc bodies.

28. Finally, an opt-in convention modelled on the Mauritius Convention approach could allow a reform project to begin as a plurilateral one, with the possibility for other States to join at a later stage, whenever they consider it appropriate. This, too, would strengthen the chances for success of such reform.

29. Following the Mauritius Convention approach, if such a reform project were to be implemented, the first task could consist in determining the "substantive" features of the permanent dispute settlement body and appeal mechanism. This would include devising their mandate, nature, structure, and their organization. This step would reflect what was done in respect of transparency, where the content of the new transparency provisions was first agreed in the Transparency Rules. The second, logically subsequent step, would consist in the drafting of an opt-in convention (as was done with the Mauritius Convention) which would accomplish the extension of the new rules on the permanent dispute settlement body and appeal mechanism to the existing investment treaties.

30. In so doing, it should be determined whether the opt-in convention would constitute a successive treaty creating new obligations pursuant to article 30 of the Vienna Convention, or whether it would constitute an amendment or modification pursuant to provisions of existing investment treaties and Chapter IV of the Vienna Convention to investment treaties.

31. The response to that question would depend on how the reform project would concretely be implemented, and how that project would articulate with existing ISDS mechanisms provided for in investment treaties. If a reform project were to be conceived as a modification of the existing ISDS mechanisms (as opposed to an amendment to ISDS provisions in investment treaties), that would not necessarily amount to an amendment to the investment treaties. In the same manner, if a reform project would aim at providing an additional ISDS mechanism, without replacing the existing ones, an opt-in convention introducing the additional ISDS system may be considered as a successive treaty creating new obligations pursuant to article 30 of the Vienna Convention.

32. A procedural reform of ISDS could also lead to an amendment/modification of the ISDS provisions in the existing investment treaties, in particular where a reform would aim at replacing existing ISDS mechanisms by a new one. In that case, attention should be given in the opt-in convention to provisions on

amendment/modification of investment treaties. If necessary, further information could be collected from States on domestic procedures that such reforms would trigger at the national level.

33. In the context of the questions of treaty law that the implementation of the opt-in convention would raise, the research paper also discusses possible "compatibility clauses" to address the relationship between the opt-in convention and existing investment treaties. In the same vein, another matter that would deserve consideration is the relationship between an opt-in convention referring to an appeal mechanism for arbitral awards and the ICSID Convention, which excludes any appeal or other remedy, except for those provided for in the Convention itself (Article 53).

34. Moreover, if such a reform were implemented, mechanisms could be envisaged to allow for a level of flexibility of the States' commitments. Within agreed boundaries, States Parties to the opt-in convention could thus modulate the degree of their involvement in the reforms by making appropriate reservations or opt-in/opt-out declarations. These possibilities would accommodate specific concerns or objectives of States, aiming for instance at excluding particular investment treaties from the scope of the reform or at adopting the new dispute resolution bodies in addition (rather than to the exclusion of) existing ISDS options.

35. In this respect, it should be noted that the Mauritius Convention also allows for a limited number of reservations and that a similar approach could be adopted with regard to the opt-in convention.

2. Outline of questions

36. As the question whether the Mauritius Convention approach could be used as a possible model for further reforms cannot be considered in a vacuum, the research paper analyses in detail the example of using the Mauritius Convention approach for designing a permanent dispute settlement body or an appeal mechanism.

37. It would be beyond the mandate given by the Commission to the Secretariat at this stage to provide the full analysis undertaken under the research paper. For the sake of providing an illustration only, the following sections are limited to outlining the main legal issues and questions in relation to setting up a permanent dispute settlement body, and an appeal mechanism. Those questions are thoroughly analysed in the research paper.

Options

38. The creation of a permanent body composed of tenured (or semi-tenured) members, tasked with resolving investment disputes between foreign investors and host States is one possibility (see below, paras. 39 to 45). Such a permanent body could either be based on a two-tier adjudicative system and thus be provided with a built-in appeal or without one. The presence of a built-in appeal in that scenario must not be confused with the setting up of an appeal mechanism mentioned below in paras. 46 to 49, which addresses the creation of an appeal mechanism for awards rendered in the traditional ISDS setting.

Legal issues and questions in relation to setting up a permanent dispute settlement body

39. The following questions in relation to the setting up of a permanent dispute resolution body would require consideration.

40. The *first question* relates to the determination of the legal nature of the permanent dispute resolution body: would it be in the nature of "arbitration" or of an "international court". The answer to this issue will impact on the determination of the law governing the proceedings before the permanent dispute resolution body, and is further of paramount significance for purposes of recognition and enforcement of decisions/awards rendered by the permanent dispute resolution body. In relation to that question, the research paper analyses the main features that a permanent dispute resolution body would need in order to be characterized as either arbitration or an international court. In short, for a permanent dispute resolution body to qualify as arbitration rather than a court-like dispute settlement method, the most important element is that recourse to that body is based on an agreement between the State and the investor. That consent encompasses the acceptance of the tribunal members' selection method provided in the constitutive instrument.

41. A further issue connected to that first question is that of the law governing the proceedings before the permanent dispute resolution body, which has important consequences for the possible supervisory competence of domestic courts, for annulment/appeal, and for enforcement. The research paper suggests that an option that would deserve consideration is to subject the proceedings only to international law. This solution would avoid the difficulties of choosing a priori a suitable domestic arbitration law (to which all States would be willing to agree) or of leaving the choice of the seat (and, as a consequence, of the procedural law) to the disputing parties or the permanent dispute resolution body, which could result in inconsistencies if different seats and arbitration laws are selected. By contrast, there is no reason to consider that a truly self-contained regime (as to the procedure) insulated from the supervision and control of any domestic court would pose any problem. The research paper suggests that whatever the choice, it should be clearly articulated.

42. The *second question* relates to the issue of the availability of systems of control in respect of the permanent dispute resolution body decisions/awards, in particular annulment and appeal, and the alternative options to an appeal, such as preliminary rulings, en banc determinations and consultations mechanisms. The research paper looks into the challenge of designing a framework that strikes a careful balance between conflicting demands: on the one hand, the need for an efficient and final dispute settlement mechanism and, on the other, the concern to protect the integrity of the process and the correctness of the decision-making. It further analyses the usual control options, annulment and built-in appeal (with all related questions, such as the appellate tribunal's composition, the grounds of appeal and standards of review, the effect of the appellate decision, the binding nature of the decision). The research paper also considers alternatives to a built-in appeal system, i.e., preliminary rulings, en banc determinations and consultation mechanisms.

43. A *third question* relates to enforcement of the decisions/awards of the permanent dispute resolution body, which is essential to ensure the ultimate effectiveness of the system, and is considered in the hypothesis that the permanent dispute resolution body would be characterized as arbitration (as opposed to court). The research paper considers that question in the situation where enforcement of the decisions/awards of the permanent dispute resolution body would need to be enforced in the territory of a State party to the opt-in convention, as well as the situation where enforcement would be sought in a State not party to the opt-in convention. It further considers enforcement issues under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention"), and in particular (i) whether the permanent dispute settlement body would qualify as a "permanent arbitral body" under the New York Convention, (ii) whether its decisions/awards would meet the territorial requirements of the New York Convention, and (iii) the issues related to the application of the New York Convention where a built-in appeal mechanism would be provided for.

44. A *fourth question* relates to the composition of the permanent dispute resolution body, which includes the method by which the members are to become part of the new adjudicative body, i.e. the election/selection process, and the way those elected members are appointed or assigned to a panel to decide a dispute.

45. A *fifth question* relates to the jurisdiction of the permanent dispute resolution body and the relationship with other dispute settlement mechanisms with which the body may interact (such as State-to-State arbitration and committees of the contracting States, which are empowered under investment treaties to provide interpretations of the investment treaties). The research paper provides some insight on the questions surrounding the delimitation of the body's jurisdiction.

Legal issues and questions in relation to setting up an appeal mechanism

46. The research paper underlines that several issues that would arise in the establishment of the permanent dispute settlement body would also arise in connection with the creation of an appeal mechanism.

47. The research paper considers the characterization of the appeal mechanism. It underlines that despite the fact that most arbitration regimes exclude the possibility of appeals from awards (and instead only afford dissatisfied parties the limited remedies of annulment and revision), there are nonetheless examples of institutional arbitration regimes which provide for internal appellate review of arbitral awards.[22] Under some national arbitration laws, parties may agree on a two-level arbitration process, and there is no suggestion that the presence of an appeal makes the process different from arbitration.

48. The research paper addresses a number of questions potentially raised by the introduction of an appeal mechanism in relation to ICSID and non-ICSID

[22] See, for instance, Arbitrators' and Mediators' Institute of New Zealand (AMINZ) (2009), Arbitration Appeal Rules (2009); American Arbitration Association (AAA) (2013), Optional Appellate Arbitration Rules; JAMS (2003), Optional Arbitration Appeal Procedure; International Institute for Conflict Prevention and Resolution (CPR) (2015), Arbitration Appeal Procedure; European Court of Arbitration (ECA) (2015), Arbitration Rules, Article 28; in the commodity sector, see the Grain and Feed Trade Association (GAFTA) (2014), Arbitration Rules No. 125, Articles 10-15.

arbitrations, such as the law governing the proceedings before the appeal mechanism, the interaction of an appeal mechanism with annulment remedies normally available against investor-State arbitral awards, and enforcement.

49. Further, the research paper considers specific legal issues to be taken into account in the design of an appeal mechanism, such as (i) the definition of the types of awards which are subject to appeal (ii) the grounds of appeal and the standard of review; (iii) the effect of the appellate decision; and (iv) the binding nature of the decision.

III. Concluding remarks

50. The Commission may wish to express its appreciation to G. Kaufmann-Kohler and M. Potestà for the study and the research paper, which provides a thorough analysis of the question.

51. The Commission may wish to consider whether the Secretariat should continue to conduct the study in conjunction with the CIDS as outlined above and, if so, which topics would require further consideration.

52. The Commission may also wish to decide whether the research paper should be made available for further consideration at a future session. Lastly, the Commission may wish to engage in a discussion on whether and how future work in this field, if any, should be pursued.