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Possible reform of investor-State dispute settlement (ISDS)

Submission from the Government of Morocco

Note by the Secretariat

The present note transmits a submission received from the Government of Morocco on 11 February 2020. The submission is reproduced in the annex in the form in which it was received by the Secretariat.

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Annex

The Moroccan delegation would like, at the outset, to commend the United Nations Commission on International Trade Law (UNCITRAL) for the colossal amount of work it has carried out in relation to reform of the investor-State dispute settlement (ISDS) regime by providing the delegations of those countries participating in the work of Working Group III with extensive and wide-ranging documentation on that reform in order to enable them to understand the issues and challenges concerned.

As part of its work to reform its model bilateral investment treaty, Morocco has developed an innovative appellate tribunal model that draws on international best practices in the field.

Pending the establishment of an appellate body at the multilateral level, Morocco intends to propose the appellate tribunal model to those of its partners who are in favour of concluding a bilateral investment treaty with an appellate mechanism for arbitral awards made in the context of ISDS.

The new Moroccan model bilateral investment treaty provides for the possibility of recourse to the national courts for the review or setting aside of awards made under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes (ICSID) or the UNCITRAL Arbitration Rules and requires the winning party to stay the enforcement of the award until the losing party has had an opportunity to initiate such recourse, which the latter must do within 90 days.

In its submission to the UNCITRAL secretariat in March 2019, Morocco emphasized the importance of establishing an appellate mechanism for arbitral awards that would:

(i) Ensure the credibility of the ISDS regime by preventing the enforcement of incorrect awards that would have a significant impact on public funds;

(ii) Harmonize arbitral case law on investment protection standards in investment treaties and thereby promote the development of more consistent international investment law that would provide legal certainty and enhance the legitimacy of investment arbitration;

(iii) Ensure that arbitral awards were reviewed not by the national courts but exclusively by a neutral and specialized tribunal that would base its decisions on internationally agreed procedures and standards;

(iv) Promote a common understanding among States of provisions on investment protection when those States drafted and negotiated their investment treaties.

The importance of investment appeals is also highlighted by the fact that, unlike in commercial arbitration, it is very difficult to accept the risk of mistakes given that investment arbitration awards are final, since those awards concern matters of public interest.

The creation of an appellate mechanism for investment disputes was first discussed in the 1990s, specifically in the context of negotiation of the draft multilateral agreement on investment, which was abandoned in 1998.

Since the 2000s, a number of countries have decided to include provisions on an appellate mechanism for investment disputes in their bilateral investment treaties. However, no appellate mechanism has been formally established in relation to those bilateral investment treaties, which have merely provided for the possibility of the establishment of such a body.

In 2004, ICSID examined the possibility of establishing and administering an international appellate mechanism for awards made in the context of investor-State arbitration. Although the initiative did not come to fruition, the experience gained by the Centre in that area could play a significant role in ongoing efforts within Working Group III to establish an appellate mechanism.

In the light of the above, and with a view to enriching the debate on the issue, the Moroccan delegation wishes to share with participants in the work of Working Group III the following vision for the establishment of an appellate mechanism.

1. Appellate tribunal: a single institutional standing mechanism affiliated with a United Nations body

The Moroccan delegation is of the view that the appellate tribunal should be a single, multilateral standing body affiliated with a United Nations body (either ICSID or the International Court of Justice).

The appeal tribunal would be regarded as a higher judicial authority that rendered decisions with greater precedential value.

The United Nations body would provide the appellate tribunal with the necessary assistance in the exercise of its functions.

The Moroccan delegation is not in favour of an ad hoc approach to the constitution of the appellate tribunal, since that would increase the duration and costs of arbitration, particularly in respect of the appointment of arbitrators and the potential challenging of those arbitrators by the parties to a dispute. Furthermore, an ad hoc approach would encourage the proliferation of appeal courts, which would likely lead to the fragmentation of the ISDS system and negatively affect the consistency and uniformity of the law on the settlement of investment disputes.

2. Appointment of arbitrators: equitable representation of developing countries on the appellate tribunal

In order to ensure the impartiality and independence of members of the appellate tribunal in respect of States and parties to a dispute, it is proposed that those members be appointed by the Secretary-General or President of the United Nations body with which the appellate tribunal is affiliated for a term of six years, renewable once. The tribunal should be composed of five to seven arbitrators or judges.

The appointment criteria should, besides taking into account gender, ensure the balanced representation of the different regions and main legal systems of the world.

In order to ensure the equitable representation of developing countries on the appellate tribunal, appropriate training should be provided for judges from those countries.

Members of the appellate tribunal should have comprehensive knowledge of public international law and international investment law and a thorough understanding of public administration and public interest issues so that they are able to make informed decisions on measures taken by the State in the public interest.

Members of the appellate tribunal should meet competency and ethical requirements and refrain from acting as advisers, experts or witnesses in ISDS cases in the course of the exercise of their functions.

3. Funding of the appellate tribunal’s budget: avoiding States’ having to pay two contributions

The Moroccan delegation proposes that the appellate mechanism be funded by users of the mechanism (parties to disputes, namely, investors and States), rather than by States, to avoid States’ having to pay two contributions, one as a member of the appellate mechanism and the other as the country party to the dispute.

A user-funded appellate mechanism is likely to deter users from making frequent use of that mechanism.

4. Scope of the appeal: towards a symmetrical and balanced system

The State and the investor should both have the right to appeal an award.

The appeal may be initiated only once the award made by the arbitral tribunal becomes final.

The appeal request should be submitted to the secretariat of the arbitral tribunal that made the original award within 90 days of the date of notification of that award.

An appeal may be initiated only on one of the following grounds:

(a) Errors in the application or interpretation of the applicable law;

(b) Serious errors in the assessment of the facts;

(c) Errors in the assessment of damages.

The revision or annulment of an award may also be requested in the circumstances set out in article 51 and article 52, paragraph (1) (a), (b), (c), (d) and (e), of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

The appeal should relate to (i) decisions made in ISDS cases; or (ii) preliminary issues submitted as objections by the respondent (frivolous claims).

The appellate tribunal may review the awards or decisions of arbitral tribunals constituted under bilateral, regional or multilateral investment agreements.

In the view of the Moroccan delegation, the appeal should not relate to final judgments handed down by the national courts of the host State, including judgments rendered in respect of disputes arising from investment contracts or the application of national law. Final judgments of national courts have the force of res judicata and therefore cannot be appealed since all national remedies have been exhausted, including the right of appeal.

In order to reduce the frequency of appeals against arbitral awards by parties to a dispute, a procedure for the preliminary review of arbitral awards should be established, as proposed in the submission from Morocco of March 2019, similar to the procedure used in proceedings of the International Court of Arbitration of the International Chamber of Commerce. Such a procedure would be an additional means of ensuring the quality of the award.

Disincentives to prevent the systematic use of appeals, such as the requirement for a deposit covering the amount of the award or the cost of the proceedings, could also be considered.

Rules of appeal: for greater transparency and efficiency in terms of cost and duration

Procedures should be transparent in accordance with the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

The appellate tribunal and the parties to a dispute should make every effort to conduct the appeals process expeditiously and efficiently, including in terms of cost and duration.

In the event of an appeal, the appellate tribunal should stay the enforcement of the arbitral tribunal’s decision pending the outcome of the appeal proceedings.

The appellate tribunal may dismiss an appeal that it determines it to be unfounded. It may also dismiss an appeal on an expedited basis if it determines that the appeal is manifestly unfounded.

The rules and procedures of appeal should be established by the United Nations body with which the standing appellate tribunal is affiliated. Those rules and procedures should be approved by the countries that have acceded to the agreement establishing a standing appellate mechanism in the area of investment.

The secretariat of the appellate tribunal should assist the parties to the dispute in completing any formalities that may be necessary in connection with the appeal process.

Applicable law

The applicable law should be international law and the national law of the host State.

The appellate tribunal should be bound by the interpretation of domestic laws made by the competent courts of the host State. However, any interpretation of domestic laws made by the appellate tribunal should not be binding on the courts of the host State.

The appellate tribunal should give the States parties to the investment treaty the opportunity to jointly interpret the provisions of the treaty that are invoked in a dispute. That interpretation should be binding on the appellate tribunal in its final award.

Decision of the appellate tribunal: towards enshrinement of the principle of non-referral

The appellate tribunal should hand down a final decision on the dispute that supersedes the decision of the arbitral tribunal, without referring the dispute back to the latter for reconsideration on the basis of its instructions.

Referral of the dispute back to the arbitral tribunal is likely to prolong the appeal proceedings and increase costs. Moreover, referral poses the risk that the arbitral tribunal may reject the findings of the appellate tribunal, which would undermine the objective of creating an appellate tribunal, especially if the latter had no authority over the body that rendered the original award.

The appellate tribunal should ensure the homogeneous interpretation of the provisions of the various investment treaties by the arbitral tribunals constituted under those treaties.

The arbitral tribunal should provide the appellate tribunal with all the documents that the latter needs in order to issue an award.

The appellate tribunal should make its final award within a reasonable period of time not exceeding 180 days from the date of submission of the appeal request.

If the appellate tribunal needs more time to make its final award, it should inform the parties to the dispute in writing of the reasons for the delay and propose a deadline by which it will make its final award. Under no circumstances should the procedure exceed 300 days.

The appellate tribunal may uphold, modify or reject, in whole or in part, the findings set out in the arbitral tribunal's award and make a final and binding award with the force of res judicata.

The appellate tribunal should provide the reasons for which it has decided to uphold, modify or reject the findings of the arbitral tribunal.

The appellate tribunal should ensure that its decisions are made by consensus. If a decision cannot be reached by consensus, the appellate tribunal should issue its decision on the basis of a majority vote of all its members.

The final award made by the appellate tribunal should be binding on the parties to the dispute, who should undertake to enforce that award without delay.

None of the parties to the dispute should seek the review, annulment or revision of a final award or initiate any other similar proceedings against the appellate tribunal's final award.

A final award rendered by the appellate tribunal should constitute a precedent and a case law reference source to which arbitral tribunals should refer when considering

similar issues raised in relation to bilateral investment treaties. The aim is to ensure consistency in the awards made by arbitral tribunals and to encourage States to develop similar and consistent standards of protection with regard to their bilateral investment treaties.

Enforcement of the award

Awards should be enforced in accordance with the applicable treaties and the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention), in particular article V thereof, and the United Nations Convention on Jurisdictional Immunities of States and Their Property, in particular articles 18, 19 and 21 thereof, which contain provisions on State immunity from measures of constraint in connection with proceedings before a court.

Article V, paragraph 2, of the 1958 New York Convention states that recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country;

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article 21 of the United Nations Convention on Jurisdictional Immunities of States and Their Property lists the categories of State property that may not be subject to pre- or post-judgment measures of constraint, such as attachment, arrest or execution.

In addition, a procedure for the settlement of disputes between States may be provided for in the event of problems encountered in the implementation of the final award, including financial difficulties that the respondent State may face if required to pay damages immediately or if a dispute arises between the respondent State and the investor during proceedings relating to the enforcement of the arbitral award.