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Possible reform of investor-State dispute settlement

Submission from the Government of Switzerland

Note by the Secretariat

In preparation for the forty-eighth session of Working Group III, the Government of Switzerland submitted a note to the Secretariat on 1 March 2024 with regard to the draft statute of a standing mechanism for the resolution of international investment disputes (A/CN.9/WG.III/WP.239). The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

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Annex

Proposal of the Swiss Confederation on select aspects concerning the Appeals Tribunal

1. The Swiss Confederation ("Switzerland") is pleased to submit the present proposal on select aspects concerning the Appeals Tribunal for consideration of Working Group III.

2. Switzerland has reviewed the latest working papers prepared by the Secretariat in connection with the standing mechanism for the resolution of international investment disputes (the draft statute of a standing mechanism contained in document A/CN.9/WG.III/WP.239 and annotations thereto contained in document A/CN.9/WG.III/WP.240). In this paper, Switzerland sets out its proposals on the formulation of draft provisions concerning four aspects which, in its view, are crucial for the correct functioning of the Appeals Tribunal, i.e.: (i) the decisions and awards subject to appeal; (ii) the grounds for appeal; (iii) the powers of the Appeals Tribunal; and (iv) the relationship between future appeal remedies and existing annulment remedies. [1] Switzerland's proposed revisions to the draft articles in document A/CN.9/WG.III/WP.239 are accompanied by short explanatory comments.

I. Decisions and awards subject to appeal

3. Switzerland proposes that article 27 be reformulated as follows:

> **Article 27 – Decision or awards subject to appeal**
>
> 1. Either party may appeal from a final decision or a final award rendered by the first-tier tribunal within [*a period of time to be specified*] days from the date of that decision or award.
>
> 2. A final decision or a final award rendered by the first-tier tribunal which has not been appealed within the time limit indicated in the previous paragraph shall be final and binding on the disputing parties.

Explanatory comments

4. Switzerland's proposed draft provision seeks to achieve clarity and simplicity, by providing that only final decisions (in case of a two-tier standing body) and final awards (in case of appeal to arbitral awards) be subject to appeal. This solution entails in particular that positive[2] decisions on jurisdiction will be appealable only together with the final decision or award on the merits. As set out in Switzerland's prior written comments before this Working Group, [3] there are both benefits and drawbacks in postponing the appeal of jurisdictional rulings until the final decision on the merits is rendered. That said, in light of the complexities that the procedure of the Appeals Tribunal is likely to entail, and in order to limit the possibility of several appeals in the same case which would result in undue delays, Switzerland is of the view that – on balance – the advantages of limiting appeals to final decisions/awards outweigh the potential disadvantages. The proposal is also consistent with the ICSID Convention

[1] Switzerland reserves to provide its comments and proposals on the other aspects covered by A/CN.9/WG.III/WP.239 and A/CN.9/WG.III/WP.240 in future written and oral submissions.

[2] A decision declining jurisdiction (negative jurisdictional decision) is a final decision or final award, which is thus also appealable.

[3] See Comments submitted by Switzerland on two UNCITRAL Draft Working Papers, 19 November 2020, para. 11, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/switzerland_comments_on_two_uncitral_draft_working_papers.pdf; Comments submitted by Switzerland on UNCITRAL Draft Working Paper on Appellate Mechanism, 13 May 2022, paras. 4–9, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_0.pdf.

annulment framework,[4] which has not given rise to particular difficulties or concerns in this respect. The proposed approach also eliminates the potential complexities and uncertainties associated with the combination of a (non-exhaustive) positive list and a negative list (as contemplated in article 27(1) and (2) in A/CN.9/WG.III/WP.239).

5. In any event, with regard to article 27(1) in A/CN.9/WG.III/WP.239, Switzerland is of the view that interim measures granted by the first-instance tribunal should not be appealable before the Appeals Tribunal, as they are by definition not final and can be revised at any time by the tribunal who has issued them depending on the circumstances.

II. Grounds of appeal

6. Switzerland proposes to reformulate article 29 as follows:

Article 29 – Grounds of appeal

A party may appeal an award or decision referred to in article 27 on the ground that:

(a) The first-tier tribunal made an error in the application or interpretation of the law[, in respect of jurisdiction, admissibility, liability or quantification of damages];

(b) The first-tier tribunal made a manifest error in the assessment of the facts, including domestic law[, in respect of jurisdiction, admissibility, liability or quantification of damages];

(c) Any of the first-tier tribunal members lacked impartiality or independence or the first-tier tribunal was improperly appointed or constituted;

(d) The first-tier tribunal ruled beyond the claims submitted to it;

(e) There has been a serious departure from a fundamental rule of procedure.

Explanatory comments

7. The articulation of the grounds of appeal is central to the functioning of the Appeals Tribunal. Switzerland's proposed grounds of appeal will allow the Appeals Tribunal to carry out its review both on the integrity of the proceedings and the award (e.g. lack of severe procedural defects) and on the substantive correctness of the decision under review. Switzerland's proposal is thus consistent with the Working Group's previous deliberations that the new grounds of appeal should include both appeal-type (e.g. errors of law and manifest errors of fact) and annulment-type grounds (e.g. lack of impartiality of the adjudicators and due process violations). Further, Switzerland's proposed grounds are crafted from a transnational viewpoint and seek to reflect the specificities of investor-State dispute settlement (ISDS).

8. Moreover, with regard to errors of law and manifest errors of fact (revised article 29(a) and (b)), Switzerland is of the view that a reference to "errors" is sufficiently broad to cover all errors that could be made by a first-tier tribunal, whether they occurred in respect of the tribunal's decision on jurisdiction, admissibility, liability or quantum. Switzerland would thus see no need to add the bracketed text "in respect of jurisdiction, admissibility, liability or quantification of damages" in the formulation of revised article 29(a) and (b), as it goes without saying that an error in any of those areas may be reviewable. However, it proposes the bracketed text in case State delegations were to consider that ambiguities may nevertheless arise.

[4] See ICSID Convention, Article 52 (allowing annulment only in respect of (final) awards).

9. Switzerland wishes to stress the importance that the grounds for appeal be drafted so as to minimize uncertainties as to their scope and overlaps between the various grounds. It respectfully considers that draft article 29 in A/CN.9/WG.III/WP.239 is likely to give rise to significant uncertainties and interpretive disputes before the Appeals Tribunal, which would be an undesirable outcome. First, a number of grounds listed therein are borrowed from the UNCITRAL Model Law on International Commercial Arbitration; they typically concern arbitrations based on contract and are therefore not relevant, or at least manifestly ill-suited, to ISDS proceedings based on an investment treaty. This is the case for instance of the "invalidity" of the arbitration agreement "under the law to which the parties have subjected it" (draft article 29(2)(b) in A/CN.9/WG.III/WP.239). In Switzerland's view, it is preferable not to include these formulations which will have limited application, if any, in the framework in which the Appeals Tribunal is to operate and in addition are somewhat outdated. As set out above, with respect to the validity of the arbitration agreement, the broad formulation of "error" in article 29(a) and (b) as proposed by Switzerland will cover any jurisdictional error. Second, the two grounds of manifest excess of powers (article 29(2)(c) in A/CN.9/WG.III/WP.239) and failure to state reasons (article 29(2)(f) in A/CN.9/WG.III/WP.239), which are inspired by the equivalent annulment grounds found in the ICSID Convention, have given rise to interpretive difficulties. Thus, there appears to be no reason to import them in the present context only to see those interpretive disputes re-surface before the Appeals Tribunal. Third, the grounds listed in article 29 in A/CN.9/WG.III/WP.239 overlap with one another in significant respects. For instance, if the first-tier tribunal makes an error of law in its jurisdictional findings, this may potentially be reviewed under all of the following grounds listed in A/CN.9/WG.III/WP.239: paragraph 1(a) ([manifest] error of law); paragraph 2(b) (invalidity of the arbitration agreement, to the extent it is applicable at all in investment treaty dispute settlement); and paragraph 2(c) (manifest excess of powers). These overlaps are unnecessary and undesirable, especially if the threshold were to be different across the various grounds (compare "simple" error with "manifest" excess of powers), which will prompt disputing parties to argue as to which ground applies in a given case. Finally, the bracketed ground included in article 29(2)(h) in A/CN.9/WG.III/WP.239 ("new or newly discovered facts") is a typical revision-type ground (compare, for example, article 51 of the ICSID Convention). In Switzerland's view, revision grounds should not be mixed with appeal and annulment grounds, if only because revision grounds may arise much later than the expiration of the time limit for appeal.

III. Powers of the Appeals Tribunal and effect of its decisions

10. Switzerland proposes to reformulate article 33(3) to (5)[5] and article 34 as follows:

Article 33 Decisions by the Chamber

1. (…)

2. (…)

3. The Chamber may uphold, modify, or reverse the award or decision of the first-tier tribunal in whole or in part.

[5] Switzerland's reformulated article 33 only covers the main aspects of the power of the Appeals Tribunal and does not address other aspects currently included in draft article 33 in A/CN.9/WG.III/WP.239, such as the majority required for a decision, formal aspects of a decision, and other post-award remedies such as interpretation, correction and supplementary decisions. These aspects would need to be addressed by separate provisions.

Modification without remand

4. If the Chamber does not uphold the award or decision, it shall in principle modify the award or decision on the basis of the facts established by the first-tier tribunal or, if the Chamber deems this useful and appropriate, through its own fact-finding.

Reversal with remand to first-instance tribunal

5. If the Chamber does not uphold the award or decision and is unable to modify it in accordance with paragraph 4, it shall reverse it and remand the dispute to the first-tier tribunal with instructions.

6. In that case, the dispute shall, if possible, be remanded to the first-instance tribunal which rendered the decision or award. If one or more members of the original first-tier tribunal are no longer willing, available, or otherwise able to serve, any such member shall be replaced by a new member appointed in accordance with the rules applicable to the constitution of the first-tier tribunal.

Reversal with resubmission to new tribunal

7. If the Chamber determines that a remand pursuant to paragraph 5 of this article would be inappropriate, the dispute shall be resubmitted, at the request of either party, to a new first-instance tribunal constituted in accordance with the rules applicable to the constitution of the first-tier tribunal.

8. If the Chamber reverse the award or decision on the basis of article 29, paragraph (c), the dispute shall in any event be resubmitted, at the request of either party, to a new first-instance tribunal constituted in accordance with the rules applicable to the constitution of the first-tier tribunal.

9. (…)

Article 34 – Effect of the decision

1. An award or decision of the first-tier tribunal upheld by the Chamber shall be final and binding on the disputing parties.

2. An award or decision of the first-tier tribunal modified by the Chamber shall be final and binding on the disputing parties as modified.

3. An award or decision of the first-tier tribunal which was reversed in full with remand by the Chamber shall have no effect.

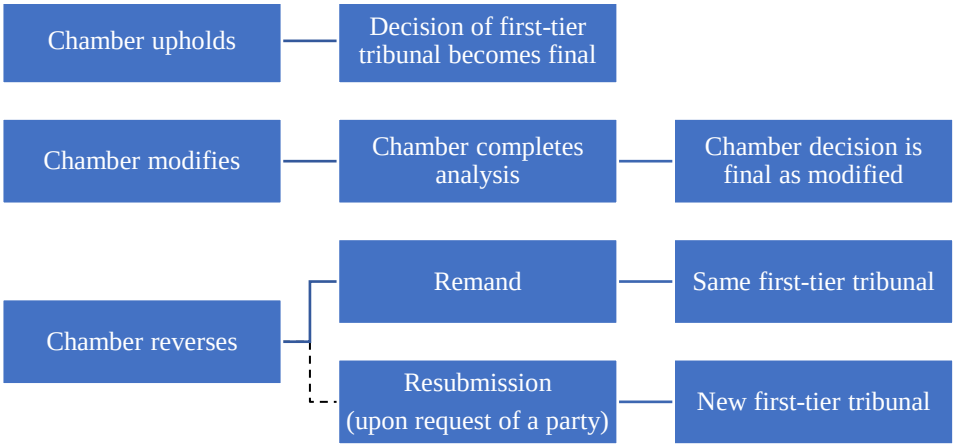
4. An award or decision of the first-tier tribunal which was reversed in part with remand by the Chamber shall have no effect with respect to the part that was reversed.

5. An award or decision made by the first-tier tribunal upon remand shall be subject to appeal on the ground that the first-tier tribunal on remand did not comply with the instructions of the Chamber and, for any new findings that were not subject to the first appeal, on all grounds under article 29.

6. An award or decision reversed in accordance with article 33, paragraphs 7 and 8 shall have no effect. The final decision or final award rendered in the resubmission proceeding shall be subject to appeal pursuant to article 29.

Explanatory comments

11. The Swiss proposals seeks to streamline and simplify the powers of the Appeals Tribunal, the possible outcomes of the appeal, and the coordination between appeal and first-tier tribunals. The following graph seeks to summarize the process outlined in revised articles 33 and 34.



12. In case an appeal is granted (in whole or in part), in Switzerland's view, the Appeals Tribunal should be allowed, to the extent possible, to complete itself the analysis and issue the final decision or award. This will avoid excessively prolonging the proceedings. At the same time, there may be situations in which the Appeals Tribunal cannot complete the analysis and the dispute must be referred back ("remanded") to the first-tier tribunal. Such may be the case if the Chamber considers that the factual record established by the first-tier tribunal is insufficient and that the Chamber itself is not well-placed to engage in the necessary fact-finding, or if a certain point of fact or law was not assessed by the first-tier tribunal for reasons of judicial economy.

13. The presumption, in case of remand, is that – to the extent possible – the same members of the original first-tier tribunal will also adjudicate on the case upon remand. This is cost-effective as they will already be familiar with the issues in dispute. In other cases, however, the ground affecting the decision or award may be so serious (for example, lack of impartiality of a first-tier adjudicator) as to taint the entire first-tier process. In those circumstances, the dispute must be wholly "resubmitted" to a fresh tribunal.

14. The Swiss proposals seeks to articulate in as clear terms as possible the various scenarios that may arise in practice depending on the grounds for appeal that will be invoked, which may result in differences both in the decisions from the Appeals Tribunal and in the subsequent proceeding (remand/resubmission).

IV. Relationship with existing annulment remedies

15. Switzerland proposes that the relationship between the appeal remedies available before the Appeals Tribunal and the existing annulment remedies in the current framework be coordinated in a clearer way than is currently provided in A/CN.9/WG.III/WP.239. To this end, it proposes to delete article 28 altogether to the extent it relates to the "waiver" (for the reasons explained below) and to address the relationship with other remedies in a new self-standing provision, which should replace article 31 and could read as follows:

> **Article 31 – Exclusion of other remedies**
>
> 1. Where a decision or award is subject to appeal in accordance with article 18, it shall not be subject to any other remedy, including annulment, set aside or any other review before any forums other than those set out in this Statute.
>
> 2. For the avoidance of doubt, by initiating a proceeding before the first-tier tribunal, the investor is deemed to have consented to the exclusion of any such other remedies.

3. [*In a two-tier system in which the first-tier tribunal is an ICSID arbitral tribunal*] In arbitrations governed by the ICSID Convention and which are subject to the jurisdiction of the Appeals Tribunal pursuant to article 18, Article 52 of the ICSID Convention shall not apply.

4. [*In a two-tier system in which the first-tier tribunal is a non-ICSID arbitral tribunal*] In arbitrations that are not governed by the ICSID Convention and which are subject to the jurisdiction of the Appeals Tribunal pursuant to article 18, the seat of the arbitration shall be fixed in one of the Contracting Parties to this Statute and there shall be no recourse to any remedies against decisions or awards that would have otherwise been available under national law. The Contracting Parties undertake to enact legislation to ensure that investor-State arbitrations seated in their jurisdictions and which are subject to the jurisdiction of the Appeals Tribunals pursuant to article 18 shall not be subject to any post-award remedy under their national laws.

Explanatory comments

16. As already observed in prior comments before this Working Group, [6] Switzerland is of the view that if an Appeals Tribunal is created, it should replace the existing annulment or set aside mechanisms for the States parties to the Statute governing the Appeals Tribunal (and the investors of their nationality). In other words, in a future arbitration plus appeal two-tier system, the existing annulment remedies must be "disabled" in both the ICSID and non-ICSID frameworks. This is consistent with the new grounds of appeal in article 29 encompassing both appeal-type and annulment-type grounds (see above) and is also in line with the discussions in the Working Group to avoid parallel proceedings and duplication of remedies.

17. To achieve those goals, in Switzerland's view, the Statute should provide for a clear exclusion of existing annulment remedies. This exclusion should be automatic (for those States that are parties to the Statute) and not be conditioned to a "waiver" from the appellant (as currently provided for in article 28 of A/CN.9/WG.III/WP.239). The waiver required in article 28 of A/CN.9/WG.III/WP.239 should be deleted as it wrongly conveys the idea that a party somehow has the choice between the "new" appeal system and the "old" annulment system. The same idea also appears from article 31 in A/CN.9/WG.III/WP.239, which states that the award or decision of the first-tier tribunal shall "no longer be the subject of annulment" "[w]hen the request for appeal is registered". Thus, it would appear that under the framework envisaged in A/CN.9/WG.III/WP.239, until a request for appeal has been registered, the disputing parties retain an option between various remedies, for instance the new Appeals Tribunal and the annulment courts at the seat. It is unclear what would happen if one party were to file an annulment application before the existing annulment bodies and thereafter the other party were to file an appeal before the Appeals Tribunal.

18. Switzerland's proposed reformulation of article 31 seeks to eliminate these uncertainties. Thus, paragraph 1 of Switzerland's proposal lays down the principle of automatic exclusion of any other remedy (for those States that decide to opt into the new appellate system). Paragraph 2 makes it clear that an investor is deemed to have accepted the exclusion of other remedies if it initiates a first-tier proceeding that is subject to the new appellate framework. Paragraphs 3 and 4 take into account the distinction between ICSID and non-ICSID arbitrations. In a two-tier system in which the first-tier tribunal is a tribunal constituted under the ICSID Convention, paragraph 3 excludes the application of Article 52 of the ICSID Convention. For

[6] See Comments submitted by Switzerland on 19 November 2020, para. 3 available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/switzerland_comments_on_two_uncitral_draft_working_papers.pdf; and on 13 May 2022, para. 15 available at available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_0.pdf.

States that are both parties to the ICSID Convention and the new treaty providing for the Appeals Tribunal, this will constitute an *inter se* modification of the ICSID Convention under Article 41 of the Vienna Convention on the Law of Treaties. In a two-tier system in which the first-tier tribunal is a non-ICSID arbitral tribunal, paragraph serves to exclude any role of domestic courts for the purposes of annulment of awards. In order to reinforce the exclusion of parallel annulment remedies at the seat and for greater certainty, Switzerland proposes to specify that Contracting Parties to the Statute should enact legislation to confirm that judicial review under their domestic laws is excluded in respect of awards that are subject to the jurisdiction of the Appeals Tribunal. As a corollary to these rules, paragraph 4 also sets forth that the first-tier arbitration proceeding must be seated in a State that is a party to the Statute.[7] Otherwise, in circumstances where the seat is situated in a third State, there is a risk that such State would not recognize the exclusion of judicial review as valid.

[7] A separate question is whether, in a non-ICSID arbitration plus appeal scenario, the proceeding before the Appeals Tribunal should be wholly de-localized or subject to a national lex arbitri like the first-tier proceeding. In Switzerland's view, this point should also be expressly regulated in the Statute. If the choice is that there be a "legal seat" also for the Appeals Tribunal, then the rule contained in paragraph 4 of the Swiss proposal that the seat must be fixed in a Contracting Party to the Statute should also apply for the Appeals Tribunal.