

**Comments from the Government of Armenia
on the draft of the Working Paper on the selection and appointment of the
ISDS tribunal members**

After reviewing the proposed reforms and taking into account our experience with international arbitration, Armenia is in more favour of preserving the *ad hoc* nature of ISDS. We are of the opinion that even when a permanent investment court is established, it should not operate in exclusion of the *ad hoc* mechanism, but rather in parallel.

For the improvement of the *ad hoc* mechanism, the reforms propose a selection and appointment mechanism whereby tribunal members would be selected by a third party acting as an appointing authority. It is our position that one of the key advantages of arbitration as a dispute resolution mechanism is the substantial discretion granted to the disputing parties to select the arbitrators who will resolve their dispute. This increases the legitimacy of the tribunal in the eyes of the parties as well as the likelihood of subsequent compliance with the award rendered by the tribunal formed by the parties themselves. Against this background, the parties may not wish to rely on a third party to make the selection on their behalf, but rather preserve their right of selecting the arbitrators. However, we do understand that a third party acting as an appointing authority may conduct the appointment of arbitrators in a way to ensure gender, geographical, cultural diversity, and diversity in other respects of the tribunal.

It should be noted that the existing arbitration rules of different arbitral institutions already provide for appointing authorities in case the parties fail to appoint an arbitrator. We believe that the role of an appointing authority should be limited to cases where the parties do not exercise their right of appointment or have a disagreement in this respect. On the other hand, the parties take into consideration a lot of factors when selecting arbitrators. Moreover, based on our experience, the parties perform a thorough background check and select arbitrators who have deep understanding of international law and policies in addition to dispute-specific issues, in response to the raised concern that ISDS tribunal members may not be knowledgeable enough to resolve complex investment disputes. Moreover, arbitrators who are too busy often reject appointment offers which opens the door to other, less busy candidates to get appointments.

Another proposition at issue is the use of pre-established list or roster of arbitrators. ICSID and some other institutions already have such a list. The problem with such pre-established lists is that they do not guarantee the appointment of all the members included in them unless the parties to arbitration select them as arbitrators. Here also, if a third party performed the appointment function, it might make sure that everyone on the list gets appointments. However, the parties might disagree with the appointment of that particular arbitrator, which might create even more complications.

Our overall position is that the rationale behind unbalanced/not diversified appointments is the restricted number of candidates specialized in international arbitration. International arbitration is not equally developed in all the countries, which may be the reason that people from some geographical locations are not substantially

represented. The issue may gradually be self-regulated once there are qualified candidates in many jurisdictions who will be apt to act as arbitrators.