

**This is an initial draft for comments until 30 June 2022. All comments on this initial draft should be communicated to the UNCITRAL Secretariat with the subject “Comments on Pertinent elements initial draft”. Email addresses: [corentin.basle@un.org](mailto:corentin.basle@un.org); [nikola.kovacikova@un.org](mailto:nikola.kovacikova@un.org)**

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## **Possible reform of investor-State dispute settlement (ISDS)**

### **Pertinent elements of selected permanent international courts and tribunals**

**Note by the Secretariat**

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## I. Introduction

1. This Note aims to provide background information regarding selected permanent international courts and other dispute settlement bodies. It is structured as a comparative analysis of key issues relevant in the context of further discussions regarding the establishment of a multilateral investment tribunal. It is the intention to update this note on a regular basis as work on this topic would progress. Delegations are invited to provide to the Secretariat further pertinent elements.

2. This Note was prepared with reference to a broad range of published information on the topic,<sup>1</sup> and does not seek to express a view on the possible reform solutions, which is a matter for the Working Group to consider.

## II. Pertinent elements of selected permanent international courts and tribunals

### A. Background information

3. The Working Group may wish to consider document [A/CN.9/WG.III/WP.213](#) regarding the establishment of a multilateral investment tribunal and related issues. It may also wish to note that the establishment of such a tribunal would require the preparation of a statute for adoption by States and regional economic integration organizations. The statute would be supplemented by rules or regulations addressing more detailed procedural matters. The Working Group may wish to consider that various models could be considered for preparing the statutes as well as rules or regulations, as evidenced by international courts and tribunals, regional courts, and other dispute settlement bodies.

4. As a preliminary remark, it could be noted that international dispute settlement bodies can be very different in nature. More specifically, each body bears specific operational characteristics that are inherently linked with their object, purpose and mode of establishment. Thus, a crucial distinction must be made between dispute settlement bodies that were established under a treaty in order to adjudicate disputes between its members over substantive rules provided in that treaty, and other dispute settlement bodies which do not adjudicate on substantive provisions of one particular treaty among its members. While this Note addresses both types of dispute settlement bodies for the purpose of a mere informative exposé on common operational aspects, the Working Group may wish to note that a multilateral investment tribunal would most probably follow the second approach. Indeed, in light of the current legal framework, a multilateral investment tribunal would adjudicate over the relevant underlying international investment instruments, rather than one sole investment treaty with a unified set of substantive standards and provisions.

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<sup>1</sup> This includes: the CIDS Research Paper (referred to as the “CIDS report”), entitled *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap*, by Gabrielle Kaufmann-Kohler and Michele Potestà, available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids\\_research\\_paper\\_mauritius.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_research_paper_mauritius.pdf); the OECD Working Papers on International Investment No 2012/3, OECD Investment Division 2012, *Investor-state dispute settlement: A scoping paper for the investment policy community*, by David Gaukrodger et al.; the Policy Options Paper, E15 Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 2016, *The Evolving International Investment Law and Policy Regime: Ways Forward*, by Karl Sauvant; *Reshaping the Investor-State Dispute Settlement System, Journeys for the 21st Century*, edited by Jean E. Kalicki and Anna Joubin-Bret, Nijhoff International Investment Law Series, Volume: 4; *Appeals Mechanisms in International Investment Disputes*, edited by Karl Sauvant, Oxford University Press; *Appeal mechanism for ISDS Awards, Interaction with New York and ICSID Conventions, Conference on Mapping the Way Forward for the Reform of ISDS*, Albert Jan van den Berg; *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, Options regarding the Institutionalization of Investor-State Dispute Settlement, and Standalone Appeal Mechanism: Multilateral Investment Appeals Mechanisms*, by Marc Bungenberg and August Reinisch, European Yearbook of International Economic Law; see also bibliographic references published by the Academic Forum, available under “Additional resources” at [https://uncitral.un.org/en/library/online\\_resources/investor-state\\_dispute](https://uncitral.un.org/en/library/online_resources/investor-state_dispute) and [www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/](http://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/).

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5. Particular consideration is given in this Note to the WTO Dispute Settlement Body (the “DSB”), the International Court of Justice (the “ICJ”), the Arab Investment Court (the “AIC”), the International Islamic Court of Justice (the “IICJ”), the ECOWAS Court of Justice, the Intra-Mercosur Dispute Settlement Mechanism (the “IMDSM”), the Caribbean Court of Justice (the “CCJ”), the Court of Justice of the Andean Community, the OHADA Common Court of Justice and Arbitration (the “CCJA”) the Iran-United States Claims Tribunal (the “IUSCT”) and the United Nations Compensation Commission (the “UNCC”), but other examples that are not specifically covered in the Note may also provide useful precedent and illustration

6. Specifically, this Note develops a number of aspects related to the establishment of international courts and tribunals (**Section B**). It further identifies common and specific features on the functioning and governance of these courts, either in the context of existing institutions or as separate bodies (**Section C**). It further highlights examples of how these courts have articulated their jurisdiction (**Section D**), how they have dealt with issues of representation among adjudicators (**Section E**) as well as specific rules of nomination, selection and appointment (**Section F**), the terms of office and renewal of adjudicators (**Section G**), specific requirements related to their competence and expertise (**Section H**), and other ethical rules applicable to them (**Section I**). This Note further explores aspects of case assignment among international adjudicators (**Section J**), the appeal structures and conditions of appeal of these courts (**Section K**), the law they apply (**Section L**) and the way their decisions are enforced in order to ensure their effectiveness (**Section M**).

## **B. Establishment**

7. With regards to the establishment of a multilateral investment tribunal, the Working Group may wish to consider various options, including whether such tribunal would be created under the auspices of an existing organization, as a dispute settlement mechanism in a multilateral treaty or as a separate and independent body. A standing multilateral body would enjoy legal personality under international and national law, which would allow it to conclude treaties such as a seat agreement establishing the necessary privileges and immunities.<sup>2</sup> The Secretariat was requested to further analyze the different options to assist the Working Group in its deliberations

### *i. International Courts and Tribunals*

8. The Understanding on Rules and Procedures Governing the Settlement of Disputes (the “DSU”) was agreed upon in 1994 as a part of the Uruguay Round of Multilateral Trade Negotiations and is included in Annex 2 to the Marrakesh Agreement establishing the World Trade Organization. The DSU provides a forum for WTO Members to resolve disputes arising under WTO agreements (referred in DSU as “covered agreements”). The WTO Dispute Settlement Body was established with a view to administer disputes under the rules and procedures referred to in the DSU, in particular the dispute settlement provisions of the agreements listed in Appendix 1 to the DSU. Pursuant to the DSU, WTO Members must first attempt to settle their dispute through consultations. If consultations among disputing WTO members fail, the dispute is brought before an *ad hoc* dispute panel. The decisions made by the *ad hoc* dispute panel may be subject to appeal before the WTO Appellate Body.<sup>3</sup>

9. The International Court of Justice was established by the UN Charter as the principal judicial organ of the United Nations. The role of the Court is to adjudicate legal disputes submitted to it by States, and issue advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.<sup>4</sup>

### *ii. Regional Courts*

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<sup>2</sup> A/CN.9/WG.III/WP.213, para. 68.

<sup>3</sup> WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 15 April 1994) available at: [https://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf)

<sup>4</sup> ICJ Statute, Article 1 available at: <https://www.icj-cij.org/en/statute>

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10. The Arab Investment Court was established under the auspices of the League of Arab States (the “LAS”) and is competent to hear investment disputes pursuant to the Arab Investment Agreement (the “AIA”). The Unified Agreement for the Investment of Arab Capital in the Arab States was the first investment treaty to establish a permanent forum for the settlement of investor-State disputes.<sup>5</sup>

11. The Charter of the Organization of Islamic Cooperation (the “OIC”) envisaged the creation of the International Islamic Court of Justice as the OIC’s principal judicial organ. However, Article 49 of the IICJ Statute stipulates that the Statute shall only come into force upon ratification by two-thirds of OIC Member States. As this threshold has not been met, the IICJ has not been established yet.<sup>6</sup>

12. The principal legal organ of the Economic Community of West African States (the “ECOWAS”)<sup>7</sup> is the Community Court of Justice.<sup>8</sup> The Court’s mandate is to resolve disputes related to the Community’s treaty, protocols, and conventions.

13. Regarding the Intra-MERCOSUR Dispute Settlement Mechanism (the “IMDSM”), the Protocol of Olivos (“PO”) put in place the Tribunal Permanente de Revisión (“TPR”), which seeks to resolve disputes concerning the interpretation, application and infringement of MERCOSUR law, which comprises the Treaty of Asunción (the treaty by which MERCOSUR was established), its protocols and the agreements concluded, as well as the disputes arising in connection with decisions, resolutions and directives adopted by MERCOSUR bodies having decision-making competence. In December 2010 the Parlasur (the parliamentary assembly of MERCOSUR) expressed its support for the establishment of a Court of Justice for MERCOSUR. After a year of assessment and parliamentary approval, the draft protocol was submitted to the Consejo del Mercado Común (“CMC” - the supreme political body of MERCOSUR) on 14 December 2010 for its consideration and final approval. All MERCOSUR State Parties<sup>9</sup> are parties to the TPR. The TPR was established in order to solve disputes arising between States parties concerning the interpretation and application of, or non-compliance with, the Treaty of Asunción (the treaty establishing MERCOSUR), the protocols and agreements within the framework of the Treaty of Asunción, decisions of the Common Market Council,<sup>10</sup> Resolutions of the Market Group and the Joint Guidelines Committee of Commerce of MERCOSUR.<sup>11</sup>

14. The Caribbean Court of Justice was established under the Agreement Establishing the Caribbean Court of Justice (2001). The Court has a dual function as it serves as a jurisdictional organ of the Caribbean Community (“CARICOM”) as the court of last instance in a number of CARICOM member States that accepted its jurisdiction. Currently twelve CARICOM members are Contracting Parties to the Agreement.<sup>12</sup>

15. The Andean Community Court of Justice was established by the Treaty creating the Court of Justice of the Andean Community (1979) as the jurisdictional organ of the Andean Community. The Andean Community is an international organization established by the Agreement of Cartagena that aims to promote comprehensive economic and social development in the Andean region. All four members of the Andean Community are State Parties to the Court.<sup>13</sup>

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<sup>5</sup> See: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2394/download>

<sup>6</sup> Charter of the Organization of Islamic Cooperation, Article 14 available at: [https://www.oic-oci.org/upload/documents/charter/en/oic\\_charter\\_2018\\_en.pdf](https://www.oic-oci.org/upload/documents/charter/en/oic_charter_2018_en.pdf)

<sup>7</sup> ECOWAS comprises of 15 West African countries: Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo

<sup>8</sup> The ECOWAS Community Court of Justice was established under Article 15(1) of the [ECOWAS Revised Treaty](#); Article 2 Protocol A/P.I/7/91

<sup>9</sup> Namely Argentina, Brazil, Paraguay, and Uruguay.

<sup>10</sup> The Common Market Group is the executive organ of MERCOSUR. It consists of five members and five alternates that are appointed by the Member States. See: <https://www.mercosur.int/quienes-somos/organigrama-mercosur/>

<sup>11</sup> Protocol of Olivos, Article 1.1 available at: [http://www.sice.oas.org/trade/mrcsr/olivos/polivostext\\_s.asp](http://www.sice.oas.org/trade/mrcsr/olivos/polivostext_s.asp)

<sup>12</sup> Namely Antigua and Barbuda, Barbados, Dominica, Grenada, Guyana, Belize, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago.

<sup>13</sup> Namely Colombia, Ecuador, Peru and Bolivia.

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16. The CCJA was created by the Treaty establishing the Organization for the Harmonization of Business Law in Africa (“OHADA”).<sup>14</sup> The CCJA was established with a dual function: (i) acting as a supranational court of last resort for OHADA Member States in unified commercial law matters, and (ii) administering OHADA arbitration proceedings. There are currently 17 OHADA Member States.

*iii. Other Dispute Settlement Bodies*

17. The Iran-United States Claims Tribunal<sup>15</sup> was set up by an inter-governmental agreement as an international arbitral tribunal to decide on claims arising out of US nationals against Iran and claims of Iranian nationals against the US.<sup>16</sup> It was established by an Agreement (the Algiers Declarations) of 19 January 1981.

18. The United Nations Compensation Commission (the “UNCC”) was established in 1991 as a subsidiary organ of the UN Security Council pursuant to Article 18 of the [Security Council Resolution 687 \(1991\)](#). The Commission is expected to conclude its mandate in early 2022.

## C. Functioning and governance

19. In the context of the Working Group discussions, it was noted that several aspects of governance of a multilateral investment tribunal would require further consideration. Effective governance provides consistency and predictability of decision making and increases transparency and accountability. The Working Group may therefore wish to consider a number of features related to the governance structure that are generally found in international courts and tribunals.

*i. International Courts and Tribunals*

20. For instance, the DSB is composed of government representatives of all WTO Members. The DSB has the authority to establish panels, adopt panel and Appellate Body reports, monitor the implementation of rulings and recommendations, and authorize the suspension of obligations under the covered agreements. Panels are in charge of adjudicating disputes between WTO Member States in the first instance. They are established on an ad hoc basis for each dispute. They are usually composed of three, and exceptionally five, experts. The Appellate Body is a standing body of seven members which hears appeals from reports issued by panels. The Appellate Body can uphold, modify or reverse the legal findings and conclusions of a panel. The Appellate Body reports are then adopted by the DSB by consensus. As such, the DSB is thus responsible for overseeing the entire dispute settlement process. It meets as often as necessary, has its own Chairperson and takes decisions by consensus.<sup>17</sup> With respect to operational aspects of its work, the DSB’s Rules of Procedure for Meetings provide that the Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council shall apply,<sup>18</sup> subject to a few special rules on the Chairperson.

21. The ICJ is composed of fifteen permanent judges with a President and a Vice-President. The President and Vice-President are elected by the members of the Court. The President presides at all meetings of the Court, directs its work, and supervises its administration, with the assistance of a Budgetary and Administrative Committee and

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<sup>14</sup> OHADA currently comprises 17 Member States: Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Cote d’Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, RDC, Senegal, Chad, Togo.

<sup>15</sup> The Iran-United States Claims Tribunal came into existence as one of the measures to resolve the crisis between the Islamic Republic of Iran and the United States of America arising out of the November 1979 hostage crisis at the United States Embassy in Tehran and the subsequent freezing of Iranian assets by the United States. The Government of the Democratic and Popular Republic of Algeria served as intermediary in the search for a mutually acceptable solution and recorded commitments from both countries in two Declarations made on 19 January 1981: the (1) “[General Declaration](#)”; and (2) “[Claims Settlement Declaration](#)” (collectively the “Algiers Declarations”).

<sup>16</sup> Claims Settlement Declaration, Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981, Article 2(1) available at: <https://iusct.com/fa/wp-content/uploads/2018/10/2-Claims-Settlement-Declaration.pdf>

<sup>17</sup> WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Articles 1-8.

<sup>18</sup> Rules of Procedure for Meetings of the Dispute Settlement Body adopted by the DSB on 10 February and 25 April 1995 (WT/DSB/9), Article 1.

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various other committees, all composed of members of the Court. The Registry is the permanent administrative secretariat of the Court.<sup>19</sup> Every year the ICJ submits a report on its activities to the United Nations General Assembly, which considers it in accordance with Article 15, para. 2 of the UN Charter. The court is funded from the regular budget of the UN, which is included in annual budget resolutions subject to approval by the UN General Assembly.

*ii. Regional Courts*

22. The General Assembly of the AIC comprises at least five judges and several reserve members and be chaired by the President of the Court.<sup>20</sup> The Council appoints the Chairman of the AIC from amongst the members of the Court.<sup>21</sup>

23. The IICJ is composed of a group of seven judges, each elected for a four-year term. The Court is administered by a President and a Vice-President who are elected by the members.<sup>22</sup>

24. The ECOWAS Court of Justice is comprised of five judges, including the President and the Vice-President. The President and the Vice-President are responsible for the strategic orientation of the Court. The President issues summons to the parties to appear before the court, determine the roll of the Court and preside over its sittings. All operational expenses of the Court are charged to the budget of the Executive Secretariat of the Community. The Community also appoints and provide the Court with the necessary officers and officials to enable it carry out its functions.<sup>23</sup>

25. The MERCOSUR TPR consists of four arbitrators and alternate arbitrator who are appointed by the MERCOSUR State Parties.<sup>24</sup> These arbitrators are nationals of MERCOSUR State parties. The TPR has a permanent Secretariat which fulfils administrative functions and serves as the Registrar of the Tribunal.<sup>25</sup> The Rules of Procedure are approved by the Council of the Common Market.

26. The CCJ consists of one President and a maximum of nine judges.<sup>26</sup> The Regional Judicial and Legal Services Commission (“Commission”) is the governing body of the CCJ and is composed of the President and several legal experts from CARICOM members. It appoints the judges of the CCJ other than the President.<sup>27</sup> The President shall be appointed or removed by the qualified majority vote of three-quarters of the Contracting Parties on the recommendation of the Commission.<sup>28</sup> The Court has a Registrar, which serves as Secretary of the Commission and as the Chief administrative officer.<sup>29</sup>

27. The Court of Justice of the Andean Community is composed of four judges, including a President. All members are nationals of the Member States.<sup>30</sup> Each judge has two alternates. At the request of the Court, and by a unanimous vote, the Commission of the Cartagena Agreement is authorized to change the number of judges. The Court appoints its Secretary and the essential staff required to fulfil its duties. The Secretary assists in organizational and administrative matters and functions as Registrar.<sup>31</sup> Each year, the Commission approves the Court’s annual budget.

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<sup>19</sup> ICJ Statute, Article 3.

<sup>20</sup> AIC Statute, Article 6(1).

<sup>21</sup> Unified Agreement for the Investment of Arab Capital in the Arab States, Article 28 (2) available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2394/download>

<sup>22</sup> IICJ Statute, Article 3(a).

<sup>23</sup> Protocol A/P.1/7/91 on the Community Court of Justice, Articles 14(1), 29(3) and 30 available at: [http://www.courtecowas.org/wp-content/uploads/2018/11/Protocol\\_AP1791\\_ENG.pdf](http://www.courtecowas.org/wp-content/uploads/2018/11/Protocol_AP1791_ENG.pdf)

<sup>24</sup> Protocol of Olivos, Article 18, Additional Protocol, Article 1.

<sup>25</sup> Protocol of Olivos Rules, Article 35(1) & 35(2).

<sup>26</sup> Agreement Establishing the Caribbean Court of Justice (2001), Article IV.

<sup>27</sup> *Ibid.*, Article V.1 and V.3.

<sup>28</sup> *Ibid.*, Article IV. 6.

<sup>29</sup> *Ibid.*, Article XXVII.

<sup>30</sup> Treaty Creating the Court of Justice of the Cartagena Agreement, Articles 6, 9 and 16.

<sup>31</sup> Statute of the Court of Justice of the Andean Community, Article 14 and Article 17-19 available at: <https://www.tribunalandino.org.ec/transparencia/normatividad/EstatutoTJCA.pdf>

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28. The CCJA is the sole judicial body of OHADA and is integrated into a regional system that comprises two political bodies – the Conference of Heads of States and the Council of Ministers, an executive body – the Secretariat, and a specialized judicial academy – the Regional Higher School for the Judiciary. The CCJA was originally established with seven judges and is now composed of thirteen judges due to increased workload. It has a President and two Vice-Presidents. Judges are elected by the OHADA Council of Ministers, from a list issued by the Member States. The Court’s Registrar is appointed by the President of the Court.<sup>32</sup>

*iii. Other Dispute Settlement Bodies*

29. The Iran-United States Claims Tribunal is composed of nine members (or larger multiples of three as Iran and the U.S. may agree). One third of the arbitrators are appointed by Iran and one third by the U.S. The government-appointed arbitrators select by mutual agreement the remaining third of the members and appoint among the remaining third the President of the Tribunal.<sup>33</sup> Where the government-appointed arbitrators are unable to agree, the remaining third is selected by the appointing authority as foreseen in the UNCITRAL Arbitration Rules (1976).<sup>34</sup> Each government designates an Agent at the seat of the Tribunal to represent it before the Tribunal. The expenses of the Tribunal are shared equally by the two governments. The Secretary-General of the Tribunal transmits financial statements to the Full Tribunal and to the Agents. After the termination of the work of the Tribunal, and after a final audit, the Secretary-General renders an accounting to the two Governments of the deposits received and returns any unexpended balance to the two Governments.<sup>35</sup>

30. The UNCC functions under the authority of the Governing Council, which itself reports to the UN Security Council. The Governing Council is composed of the current members of the UN Security Council at any given time,<sup>36</sup> and reports periodically on behalf of the Commission to the UN Security Council.<sup>37</sup> As a result, the UNCC has a three-tier structure: (i) the Governing Council presided by a President and two Vice-Presidents; (ii) the Commissioners presided by a Chairperson; and (iii) the Secretariat led by an Executive Secretary. The Executive Secretary transmits to the Governing Council the nominations for Commissioners proposed by the UN Secretary-General. The Commissioners are experts appointed by the Governing Council for the verification and evaluation of claims.<sup>38</sup> The Executive Secretary and the staff of the Secretariat provide administrative, technical and legal support to the Commissioners.<sup>39</sup> The Executive Secretary makes periodic reports to the Governing Council concerning the claims received. They are promptly circulated to the Government of Iraq as well as to all Governments and international organizations that have submitted the claims.<sup>40</sup> The Commissioners when performing their functions possess the status of experts on mission within the meaning of Article VI of the Convention on the Privileges and Immunities of the UN.<sup>41</sup> The Convention applies also to the Commission Secretariat. The Fund out of which the compensation for the damages is paid was established pursuant to Article 18 of the [Security Council Resolution 687 \(1991\)](#) and is operated in accordance with the UN Financial

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<sup>32</sup> OHADA Treaty, Articles 31-39.

<sup>33</sup> Claims Settlement Declaration, Article 3(1).

<sup>34</sup> UNCITRAL Arbitration Rules (1976), Article 6 available at:

<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf>

<sup>35</sup> Tribunal Rules of Procedure, 3 May 1983, Article 41(4) and (5) available at: <https://iusct.com/wp-content/uploads/2018/10/5-TRIBUNAL-RULES-OF-PROCEDURE.pdf>

<sup>36</sup> Report of the Secretary-General pursuant to paragraph 19 of the Security Council Resolution 687 (1991), paras. 4 and 5 available at: [https://uncc.ch/sites/default/files/attachments/S-22559%20%5B1991%5D\\_0.pdf](https://uncc.ch/sites/default/files/attachments/S-22559%20%5B1991%5D_0.pdf)

<sup>37</sup> *Ibid.*, para. 10.

<sup>38</sup> Decision taken by the Governing Council of the United Nations Compensation Commission at the 27<sup>th</sup> meeting, Sixth session held on 26 June 1992, S/AC.26/1992/10 (1992), Article 18 available at: <https://uncc.ch/sites/default/files/attachments/S-AC.26-DEC%2010%20%5B1992%5D.pdf>

<sup>39</sup> *Ibid.*, Article 34(1).

<sup>40</sup> *Ibid.*, Article 16.

<sup>41</sup> *Ibid.*, Article 26.

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Regulations and Rules. The Working Group may wish to note that the expenses of the Commission are also borne by the Fund.

## **D. Jurisdiction**

31. Jurisdictional aspects will likely play an important role in the Working Group discussions related to the establishment of a multilateral investment court. In that light, it may be informative for the Working Group to note how international and regional courts and tribunals as well as other dispute settlement bodies articulate their jurisdiction in accordance with their object, purpose and underlying founding instrument.

### *i. International Courts and Tribunals*

32. Pursuant to Article 1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the DSB has jurisdiction over disputes arising not only from the Agreement Establishing the World Trade Organization, but also from a number of multilateral trade agreements and plurilateral trade agreements that are listed in Appendix 1 to the DSU.<sup>42</sup> This particularity means that potential grounds for dispute before the DSB are to be found within these agreements, rather than in the DSU itself. In other words, the legal basis for bringing a dispute before the DSB as well as the type of dispute can differ, depending on the relevant provisions of each covered agreement. Things are different with regard to the WTO Appellate Body, as this standing body hears appeals from reports issued by panels in disputes directly brought by WTO Members. The Appellate Body issues in turn reports that can uphold, modify or reverse the legal findings and conclusions of a panel.

33. The jurisdiction of the ICJ covers all cases which State parties refer to it and all matters specially provided for in the UN Charter or in treaties and conventions in force. State parties to the ICJ Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement the jurisdiction of the ICJ in all legal disputes concerning:

- (i) The interpretation of a treaty;
- (ii) Any question of international law;
- (iii) The existence of any fact which would constitute a breach of an international obligation; and
- (iv) The nature or extent of the reparation to be made for the breach of an international obligation.<sup>43</sup>

### *ii. Regional Courts*

34. The Arab Investment Court is intended to have broad jurisdiction over State-to-State and Investor-State disputes that relate to or arise from the application of the provisions of the AIA. More specifically, it is competent to hear such disputes arising either between (i) any State Party and another State Party, or between a State Party and a public entity of the other Parties, or between two public entities of more than one State Party; (ii) a State party, public institution or organization of a Party and an Arab investor, and (iii) a State, a public entity or an Arab investor and the State agencies providing investment guarantees in accordance with the Arab Investment Agreement. The disputing parties can alternatively choose to submit their AIA-related dispute to the national courts of the host State, in which case a fork-in-the-road rule applies or choose an alternative mode of dispute resolution through conciliation, mediation or arbitration. If the parties' chosen alternative method to resolve the dispute fails or if the arbitral tribunal fails to render its award in the prescribed time limits, the parties can then refer the dispute to the AIC.<sup>44</sup> In addition, subject to agreement by the disputing parties, the AIC is competent to hear disputes arising from any other Arab

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<sup>42</sup> Namely, the Multilateral Agreements on Trade in Goods; the General Agreement on Trade in Services; the Agreement on Trade-Related Aspects of Intellectual Property Rights; the Understanding on Rules and Procedures Governing the Settlement of Disputes; the Agreement on Trade in Civil Aircraft; the Agreement on Government Procurement; the International Dairy Agreement, and the International Bovine Meat Agreement.

<sup>43</sup> ICJ Statute, Article 36.

<sup>44</sup> AIA, Articles 21-27.



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investment agreement which stipulates that disputes shall be referred to international arbitration or an “international court”.<sup>45</sup> The AIC can further hear disputes referred to it directly by the LAS Economic and Social Council.<sup>46</sup>

35. The IICJ’s jurisdiction encompasses<sup>47</sup>:
- (i) Cases referred to the IICJ by OIC Member States;
  - (ii) Cases referring to the IICJ in any treaties or conventions in force;
  - (iii) Interpretation of a bilateral or multilateral treaty;
  - (iv) Any question of international law;
  - (v) The existence of any fact which, if established, would constitute breach of an international obligation; and
  - (vi) The nature or extent of reparation to be made for breach of an international obligation.
36. The ECOWAS Court of Justice is competent to adjudicate on any dispute relating to:
- (i) The interpretation and application of the ECOWAS Revised Treaty; the ECOWAS Conventions, Protocols and regulations, directives, decisions, and other subsidiary legal instruments adopted by ECOWAS;
  - (ii) The legality of regulations, directives, decisions, and other subsidiary legal instruments adopted by ECOWAS;
  - (iii) Failures of Member States to honor their obligations under the ECOWAS Revised Treaty and ECOWAS Conventions, Protocols, regulations, directives, or decisions;
  - (iv) ECOWAS and its officials; and
  - (v) Actions for damages against ECOWAS institutions or ECOWAS officials for any action or omission in the exercise of official functions<sup>48</sup>.
37. The MERCOSUR TPR is an inter-State dispute resolution body that is open solely to State parties. It can hear disputes in first instance and at appellate level, and also renders advisory opinions. In first instance, parties can resort to the TPR only after a preliminary negotiations phase (fifteen days unless the parties agree otherwise) has been concluded without success.<sup>49</sup> After that, parties can decide either to refer the dispute to diplomatic mediation within the MERCOSUR Group, submit the dispute to *ad hoc* arbitration, or submit the dispute directly to the TPR. If they opt for the TPR, a fork-in-the-road rule applies,<sup>50</sup> and the decision rendered is deemed to be final, i.e., cannot be subject to appeal. At the appellate level, the TPR reviews awards issued by the *ad hoc* arbitration tribunal established under Chapter VII of the PO, when parties had opted for such forum. Its review only covers questions of law and other issues of interpretation of the arbitral award. In addition, the TPR can hear disputes under the Procedure for Exceptional Cases of Urgency, a special procedure intended to solve exceptional cases of emergency that may cause irreparable property damages to State parties. Outside contentious matters, the TPR can also issue non-binding advisory opinions by joint request from the MERCOSUR State Parties, MERCOSUR Executive bodies and Supreme Court of Justices of State Parties,<sup>51</sup> or from national tribunals of the MERCOSUR State parties.<sup>52</sup>

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<sup>45</sup> AIA, Article 30.

<sup>46</sup> AIC Statute, Article 21; Agreement to Facilitate and Develop Trade Among Arab Countries, Article 13.

<sup>47</sup> IICJ Statute, Article 25.

<sup>48</sup> The Community Court of Justice, Supplementary Protocol, Article 3 Amending Article 9(1) of the Protocol.

<sup>49</sup> Protocol of Olivos (“PO”), Chapter IV.

<sup>50</sup> PO, Article 1.2; Protocol of Olivos Rules, Article 1; Protocol of Olivos Procedural Rules, Article 2.

<sup>51</sup> PO, Article 3 and Protocol of Olivos Rules, Article 2.

<sup>52</sup> MERCOSUR/CMC/DEC.37/03, Articles 3 and 7.

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38. The CCJ is a hybrid institution, that acts both as a municipal court of last resort<sup>53</sup> and as an international court that hears disputes with respect to the interpretation and application of the Treaty of Chaguaramas (the “CARICOM Treaty”). As an international court, the CCJ can hear and deliver judgment on (i) disputes arising between Contracting Parties to the Agreement or between CARICOM and Contracting Parties; (ii) referrals from national courts of the CARICOM Members that are parties to the Agreement, or (iii) applications by certain nationals of the Contracting Parties with a special leave from the Court.<sup>54</sup> In addition, the international court can deliver advisory opinions concerning the interpretation and application of the CARICOM Treaty, upon request of State parties or the Caribbean Community.

39. The Andean Court of Justice is competent to hear claims arising from State Parties, Andean Community organs, other institutions of the Andean System of Integration and in some circumstances private parties (natural and legal entities). In particular, private parties, can resort to the Court either through actions of non-compliance of a State party with the Community norms (also available to Community organs and State parties), or through actions of nullity against decisions taken by the organs of the Andean Community (also available to State parties), if they can bring evidence that their rights have been affected by the said measures or actions.<sup>55</sup> In addition, the Court has jurisdiction to hear claims of omission or inactivity against the Commission of the Andean Community or the General Secretariat,<sup>56</sup> and can arbitrate disputes concerning the application or interpretation of contracts or other agreements among institutions of the Andean System of Integration or between these institutions and third parties.<sup>57</sup> Further, the Court can make preliminary rulings on the interpretation of Community norms, on the request from national courts.

40. The CCJA acts both as a court of last resort for OHADA Member States and as an administering institution for OHADA arbitration. As a court of last resort, the CCJA has jurisdiction to hear claims related to the interpretation or application of OHADA treaty law, including OHADA uniform acts and regulations, in the field of unified commercial law. It can only decide on the law and does not decide on the specific facts of a case. In this respect, the Court can also issue advisory opinions by request of domestic courts, Member States or the Council of Ministers.<sup>58</sup> When acting as an administering institution for OHADA arbitration, the Court is competent to issue administrative decisions, such as the removal or replacement of arbitrators.<sup>59</sup> Since the 2017 arbitration law reform, the CCJA is also competent to issue administrative decisions in investor-State arbitration. The CCJA is further competent to hear disputes in annulment and enforcement proceedings.<sup>60</sup>

### *iii. Other Dispute Settlement Bodies*

41. The example of the Iran-United States Claims Tribunal is also relevant. The IUSCT functions as an international arbitral body with limited jurisdiction, which covers (i) claims arising out of debts, contracts, expropriations, or other measures affecting property rights, brought either by US nationals (both natural and juridical persons) against Iran, or by Iranian nationals (both natural and juridical persons)

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<sup>53</sup> The Court’s specific appellate jurisdiction in such circumstances differs depending on the Contracting Party’s domestic law (Article XXV of the Agreement Establishing the Caribbean Court of Justice).

<sup>54</sup> Agreement Establishing the Caribbean Court of Justice (2001), Article XII; CARICOM Treaty, Article 211. In accordance with Article XXIV of this Agreement, nationals from one of the Contracting Parties can bring a claim before the CCJ only if the following four cumulative criteria are met: (a) The CCJ has established in a particular case that the CARICOM Treaty directly confers rights to individuals of a Contracting Party; (b) The individuals have proven that their rights conferred by the CARICOM Treaty have been prejudiced; (c) The Contracting Party that is entitled to espouse a claim has denied or omitted to do so or has expressly agreed that an individual should present a claim; and (d) The CCJ has found that in the interest of justice an individual should be allowed to bring a claim.

<sup>55</sup> Treaty Creating the Court of Justice of the Cartagena Agreement, Articles 17-22, and Articles 23-31, respectively.

<sup>56</sup> *Ibid.*, Articles 32-37.

<sup>57</sup> *Ibid.*, Articles 38-39 and 44.

<sup>58</sup> OHADA Treaty, Article 14 (2008 amendment); CCJA Rules of Procedure, Articles 53-58.

<sup>59</sup> CCJA Arbitration Rules (2017), Article 4.

<sup>60</sup> CCJA Arbitration Rules (2017), Articles 29-30.

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against the United States; (ii) disputes between Iran and the U.S. concerning the interpretation or performance of the Algiers Declarations, and (iii) “official claims” between Iran and the United States arising out of contractual arrangements between them and relating to the purchase and sale of goods and services.<sup>61</sup> While the IUSCT can only hear claims filed with the tribunal by 19 January 1982, disputes between the two Governments concerning the interpretation of the Algiers Declarations are not subject to any time limit. The IUSCT rules of procedure are based on the 1976 UNCITRAL Arbitration Rules,<sup>62</sup> and its decisions have been considered by certain national courts as “arbitral awards” enforceable under the New York Convention.<sup>63</sup>

42. The UNCC is competent to hear claims for direct losses and damage suffered as a direct result of Iraq’s invasion and occupation of Kuwait from 1990-1991.<sup>64</sup> As such, it is considered to be a claims commission rather than an international court or tribunal, hence its original features. For instance, claims before the UNCC are brought directly by private parties (both individuals and corporations). In addition, the jurisdiction of the UNCC covers a large range of damages for which compensation can be sought. This includes compensation claims for death, injury, loss of or damage to property, commercial loss, and environmental damage.

## E. Representation

43. A question to consider in the design of the composition of a multilateral investment tribunal is the number of adjudicators and, in this respect, whether States would wish to establish “full representation” or “selective representation” bodies. When it considered this question, the Working Group indicated that full representation might be difficult to achieve, in particular in light of the cost implications and connection between the number of adjudicators and the caseload (*A/CN.9/1004/Add.1*, para. 115). Key elements in this respect are to ensure broad geographical representation as well as a balanced representation of genders, levels of development and legal systems, and to ensure that the agreement establishing the tribunal would allow the number of tribunal members to evolve over time, following any variation in the number of participating States, as well as in caseload.

### *i. International Courts and Tribunals*

44. The founding instruments of international courts and tribunals usually provide that the composition of their judges must reflect a balance of different profiles and represent the main global legal systems. For instance, several existing statutes of international courts refer to “equitable geographical representation” or “distribution” for the selection of adjudicators.<sup>65</sup>

45. In particular, the DSU indicates that WTO Panels shall be composed of well-qualified governmental and/or non-governmental individuals. Panels usually include three panelists, unless the disputing parties agree to have five panelists. The selection of panelists must respect a certain number of parameters. These include, for instance, ensuring the independence of the members, a sufficiently diverse background, and a wide spectrum of experience. Members whose governments are parties to the dispute or third parties<sup>66</sup> shall not serve on a panel concerned with that dispute unless the parties to the dispute agree otherwise. The Appellate Body is for its part composed of seven members, three of whom serve on any one case and are persons of recognized authority, with demonstrated expertise in law, international trade, and the subject matter of the covered agreements. They

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<sup>61</sup> Claims Settlement Declaration, Article 2.

<sup>62</sup> Article III (1) of the Claims Settlement Declaration states that the Tribunal “shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the parties or by the Tribunal”.

<sup>63</sup> See below, para. 102.

<sup>64</sup> Security Council Resolution 687, Articles 16-19.

<sup>65</sup> See, for example, Rome Statute of the International Criminal Court (ICC), 1 July 2002, Article 36(8)(a); See also Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Article 17(3), third sentence.

<sup>66</sup> Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB.

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shall be broadly representative of membership in the WTO. Members of the Appellate Body must not be unaffiliated with any government.<sup>67</sup>

46. The ICJ Statute indicates in a similar manner that its judges, in addition to possessing the required qualifications, shall represent the main forms of civilization and the principal legal systems of the world.<sup>68</sup>

*ii. Regional Courts*

47. Regional courts have also adopted selective representation. For instance, the AIC Statute provides that the five judges and reserve members of the Court must be of a different nationality.<sup>69</sup> A similar rule applies to the seven IICJ judges whose election, including that of the President and Vice-President, and judges, must be made in light of geographical and linguistic distribution requirements among Member States.<sup>70</sup> The CCJ also has selective representation, consisting of a maximum of 9 judges.<sup>71</sup>

48. Another example of selective representation is the ECOWAS Court of Justice. The court used to be composed of seven judges drawn from the judiciary academia and legal practitioners. The number was subsequently reduced from seven to five judges, with each judge having to be a national of a different ECOWAS Member State.<sup>72</sup>

49. In the Intra-MERCOSUR Dispute Settlement Mechanisms, where the State Parties can choose between two types of proceedings – *ad hoc* arbitration and TPR – both proceedings ensure full representation among its members of all the Member States involved in the dispute. In the same vein, in the Court of Justice of the Andean Community each Member State is represented by one judge.<sup>73</sup>

50. The composition of the CCJA also obeys to a number of representation rules. For instance, the OHADA Treaty provides that a third of CCJA judges must be former practicing counsels or academic professors of law with at least fifteen years of experience. Similarly, the Treaty provides that the Court cannot comprise more than one national of the same Member State.<sup>74</sup> As there are now thirteen judges sitting at the CCJA, this means that thirteen out of seventeen OHADA Member States have a national sitting at the CCJA.

*iii. Other Dispute Settlement Bodies*

51. The Algiers Declarations establishing the Iran-United States Claims Tribunal follow a recognized practice whereby two states, in exercising their diplomatic protection, establish a mixed arbitral tribunal to settle the claims of their nationals against each other. Indeed, at the IUSCT three arbitrators are appointed by Iran, three are appointed by the U.S., and a further three – who must be nationals from third-party countries – are appointed by the previous six arbitrators. The President of the Tribunal is elected among these three non-government-appointed arbitrators.

52. The UNCC Commissioners work in panels of three members, each of whom must be of a different nationality. In addition, the nomination and appointment of Commissioners are made in light of geographical representation, professional qualifications, experience, and integrity.<sup>75</sup>

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<sup>67</sup> WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 4(2) and (3), Article 8(2) and (5) Article, Article 17(1) and (3).

<sup>68</sup> ICJ Statute, Article 9.

<sup>69</sup> AIC Statute, Article 2(1)-(2) and Article 3(5).

<sup>70</sup> IICJ Statute, Article 3(a), 3(b) and Article 5(e).

<sup>71</sup> Agreement Establishing the Caribbean Court of Justice (2001), Article IV.

<sup>72</sup> Protocol A/P.1/7/91 on the Community Court of Justice, Article 3(2).

<sup>73</sup> Treaty Creating the Court of Justice of the Cartagena Agreement, Articles 6 and 7.

<sup>74</sup> OHADA Treaty, Article 31.

<sup>75</sup> Decision taken by the Governing Council of the United Nations Compensation Commission S/AC.26/1992/10 (1992) Provisional Rules for Claims Procedure, Articles 19(1) and 28(1) available at: <https://uncc.ch/decisions-governing-council>

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## F. Procedure for nomination, selection and appointment

53. At its resumed thirty-eighth session, in January 2020, and at its fortieth session, in February 2021, the Working Group undertook a preliminary consideration of the selection and appointment of ISDS tribunal members, with a focus on their selection and appointment in the context of a standing multilateral mechanism (A/CN.9/1004/Add.1, paras. 95–133; A/CN.9/1050, paras. 17–56). The Working Group considered that, as a matter of principle, the selection and appointment methods of ISDS tribunal members should be such that they contribute to the quality and fairness of the justice rendered as well as to the appearance thereof, and that they guarantee transparency, openness, neutrality, accountability and reflect high ethical standards, while also ensuring appropriate diversity (A/CN.9/964, paras. 91–96). In addition to the qualifications and other requirements, appropriate diversity, such as geographical, gender, and linguistic diversity, as well as equitable representation of the different legal systems and cultures was said to be of essence in the ISDS system.

### *i. International Courts and Tribunals*

54. With respect to the WTO DSB, the Secretariat maintains an indicative list of governmental and non-governmental individuals to serve as panelists. WTO Members may also periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, upon approval by the DSB. Based on this list, the Secretariat proposes nominations for the panel to the parties of the dispute. Parties can only oppose these nominations for compelling reasons.<sup>76</sup> The Appellate Body is composed of seven permanent members who are appointed by the DSB for a four-year term, and each member may be reappointed once.<sup>77</sup> Vacancies are filled as they arise. At the ICJ, candidate judges are nominated by the national groups in the Permanent Court of Arbitration (the “PCA”).<sup>78</sup> For those UN Members not represented in the PCA, candidates shall be nominated by ad hoc national groups appointed for this purpose. The Secretary-General addresses a written request to the national groups (both PCA and ad hoc) inviting them to nominate candidates at least three months before the date of election. National groups cannot nominate more than four candidates, not more than two of whom shall be of their own nationality. The UN Secretary-General then subsequently prepares a list of nominated candidates in alphabetical order, from which ICJ judges are elected by absolute majority of votes in both the General Assembly and Security Council.<sup>79</sup>

### *ii. Regional Courts*

55. The AIC judges are elected through secret ballot by the LAS Economic and Social Council at a special council meeting from a list of nominees prepared by the AIC Secretariat. The State Parties present candidates (a main candidate and an alternate) from among its citizens at least one month before the election date. Candidates are elected based on simple majority in the secret ballot.<sup>80</sup>

56. IICJ judges are for their part elected by the OIC Conference of Foreign Ministers at a special session meeting, from list of nominees prepared by the OIC Secretary General. States may present candidates who meet the conditions delineated in Article 4 of the IICJ Statute within a two-month period following written invitation from the OIC Secretary General at least three months prior to the election date. States may nominate a maximum of three candidates, only one of whom may be one of their own nationals. Candidates are elected based on the absolute majority of votes.<sup>81</sup>

57. Judges of the ECOWAS Court of Justice are appointed by the ECOWAS Authority of Heads of State and Government, from a short list of fourteen candidates

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<sup>76</sup> WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 8(4) and (6).

<sup>77</sup> *Ibid.*, Article 17(1) and (2).

<sup>78</sup> According to Article 44 of the 1907 Convention for the Pacific Settlement of International Disputes, each contracting party may select a group of up to four persons to be members of the PCA; each group of persons designated in this way constitutes a “national group” for the purpose of the ICJ Statute and the election of its judges.

<sup>79</sup> ICJ Statute, Articles 4 (1), 5(1) and 5(2), 7(1), 10(1).

<sup>80</sup> AIC Statute, Article 3(2)-(4) and Article 8(1).

<sup>81</sup> IICJ Statute, Article 4, Article 5(b)-5(d).

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proposed by the ECOWAS Judicial Council. This list is itself based on a larger list prepared in alphabetical order by the ECOWAS Executive Secretary. Nominations are made by the ECOWAS Member States (two nominations maximum per Member State). Candidates are elected by secret ballot, on absolute majority.<sup>82</sup>

58. Regarding the MERCOSUR Dispute Settlement Mechanism, in ad hoc arbitration, each State Party nominates a list of twelve arbitrators that is sent to the MERCOSUR Secretariat.<sup>83</sup> In addition, each State Party provides the MERCOSUR Secretariat with four candidates for an additional list of third arbitrators. One of the four candidates must be a non-MERCOSUR national. Both lists are made publicly available. The process is slightly different for the TPR, which is composed of five arbitrators: each MERCOSUR Party appoints one arbitrator and its deputy; for the fifth arbitrator, each MERCOSUR Party may propose two candidates, and the MERCOSUR Administrative Secretariat selects by unanimity if possible or by lot. However, State Parties can alter the rules for the fifth by mutual agreement<sup>84</sup>.

59. The CCJ does not have any specific selection procedure. However, judges must fulfil certain requirements to be eligible for nomination and appointment. For instance, they must have at least five years of experience as a judge in a court of one of the CARICOM Member States, the Commonwealth or in a State that exercises civil law jurisprudence that is common to Contracting Parties or must have practiced or taught law for fifteen years in any of these jurisdictions. Furthermore, in appointing judges, the Commission must consider the person's high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society. Additionally, at least three of the judges of the CCJ must possess expertise in international law, including international trade law. The President of the CCJ is appointed or removed by the qualified majority vote of three-quarters of the Contracting Parties upon recommendation of the Commission. Judges are appointed or removed by a majority vote of all the members of the Commission.<sup>85</sup>

60. Regarding the Court of Justice of the Andean Community, each Member State provides a list of three candidates for the selection of the four judges and their alternates. The four judges and their alternates (two per judge) are elected from the lists provided by each Member State and by unanimity of the plenipotentiaries that are accredited for this function. In order to qualify for the office, they must be nationals from Member States, enjoy a high moral consideration and meet the conditions that are required to sit in the highest judicial instances in their respective States or be a jurisconsult with recognized competence. The final list is published on the website of the Tribunal.<sup>86</sup>

61. Judges of the CCJA are elected by the OHADA Council of Ministers, from a list issued by the Member States. The President and the two Vice-Presidents of the CCJA are elected by the Court sitting in plenary session. The election of the Vice-Presidents is conducted under the direction of the President.<sup>87</sup> The Court's Registrar is appointed by the President of the Court.<sup>88</sup>

### *iii. Other Dispute Settlement Bodies*

62. With respect to other dispute settlement bodies, the procedure for nomination, selection and appointment of tribunal members (in the case of the IUSCT) and members to the Governing Council and Commissioners (in the case of the UNCC) has been described above.<sup>89</sup> (see paras. 29-30, 51-52).<sup>90</sup>

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<sup>82</sup> Protocol A/P.1/7/91 on the Community Court of Justice, Article 3(6), Article 3(5) and Article 3(4) and Rules of the Court of Justice of the Economic Community of West African States (ECOWAS) 2002 Article 6(1) and Article 6(3).

<sup>83</sup> Protocol of Olivos, Article 11(1).

<sup>84</sup> Protocol of Olivos, Article 18 modified, Additional Protocol, Article 1.

<sup>85</sup> Agreement Establishing the Caribbean Court of Justice (2001), Article IV. 10-11., Article IV.1 and Article IV.6-7.

<sup>86</sup> Treaty Creating the Court of Justice of the Cartagena Agreement, Articles 6 and 7.

<sup>87</sup> CCJA Rules of Procedure, Article 6.

<sup>88</sup> OHADA Treaty, Articles 31-39.

<sup>89</sup> See above, paras. 29-30, 51-52.

<sup>90</sup> Decision taken by the Governing Council of the United Nations Compensation Commission S/AC.26/1992/10 (1992) Provisional Rules for Claims Procedure, Article 18(1), Article 19(3), and Article 20(1).

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## G. Terms of office

63. The Working Group considered a number of possible avenues regarding the terms of office and renewal for members of a multilateral investment tribunal. Various elements to be taken into account for the determination of the appropriate term were mentioned, including the duration required to resolve ISDS cases, the workload balance among the adjudicators, the ability to attract high-quality candidates and the accumulation of experience and expertise on the court. As a result, some views suggested that the term of office could range from six to nine years, with staggered replacements to achieve stability in the operation of the standing body and of the jurisprudence (A/CN.9/1050, para. 39; see also document A/CN.9/WG.III/WP.213).

64. As can be inferred from the findings in this Section, the views expressed in the Working Group are generally reflective of the practice of international and regional courts and tribunals as well as other dispute settlement bodies.

### *i. International Courts and Tribunals*

65. The WTO DSB establishes panels in charge of adjudicating disputes between WTO Members in first instance. These panels have no permanent basis, as they are selected on an *ad hoc* basis for each dispute. Panels are usually composed of three (exceptionally five) independent and well-qualified experts, selected by the disputing parties from an indicative list of names maintained by the WTO Secretariat.<sup>91</sup> Importantly, panelists serve as independent individuals and do not represent the interests of any government or organization.<sup>92</sup> By contrast, the seven members of the Appellate Body sit on a permanent basis. They serve for terms of four years and can be reappointed by the DSB for another four years.

66. The fifteen judges of the ICJ serve on a permanent basis for terms of nine years, which can be renewed. Special elections take place in case a judge resigns or dies during the course of his/her term of office. Judges *ad hoc* who might be appointed in a case by a disputing party whose nationality is not already represented in the bench only serve for the duration of the case. The President and Vice-President serve a three-year renewable term.<sup>93</sup>

### *ii. Regional Courts*

67. The majority of the regional courts under consideration envisage the possibility of renewable terms for judges. For instance, the following table summarizes these courts' practice with regard to judges' terms of office:

AIC	Judges and Commissioners elected for 3 years	Renewable for Judges and Commissioners <sup>94</sup>
IICJ	Judges elected for 4 years	Renewable once <sup>95</sup>
TPR	Arbitrators and alternate arbitrators elected for 2 years	Renewable for a maximum of 2 consecutive terms <sup>96</sup>
CCJ	President elected for 7 years, age limit of 72. Judges hold	No renewable term but age limit of 72 <sup>97</sup>

<sup>91</sup> DSU, Article 8.

<sup>92</sup> DSU, Article 8.9.

<sup>93</sup> ICJ Statute, Article 13(1), and 21(1).

<sup>94</sup> AIC Statute, Article 2(3) and Article 8(1).

<sup>95</sup> IICJ Statute, Article 3(a).

<sup>96</sup> Protocol of Olivos (2002), Article 18 PO (modified)/Article 1 Additional Protocol.

<sup>97</sup> Agreement Establishing the Caribbean Court of Justice (2001), Article IX.

	office until they reach 72.	
Court of Justice of the Andean Community	Judges are elected for 6 years	Renewable once <sup>98</sup>
ECOWAS Court of Justice	Judges are elected for 4 years.	No renewable term
CCJA	Judges are elected for 7 years; President and the two Vice-Presidents are elected for 3½ years	No renewable term <sup>99</sup>

### *iii. Other Dispute Settlement Bodies*

68. UNCC Commissioners are appointed by the Governing Council and sit in panels of three, with nineteen panels in total. They are appointed for fixed terms. Their specific tasks and terms are determined by the Governing Council.<sup>100</sup> Commissioners shall not represent or advise any party or claimant concerning the preparation or presentation of their claims to the Commission during their service as Commissioner or for two years thereafter.<sup>101</sup> The Governing Council has ten non-permanent members that serve for two-year terms, five of which are replaced every year. The President and the co-Presidents serve two-year terms.

69. Members of the IUSCT are appointed by the U.S. and Iranian Governments to the extent of one-third each, with the remaining third being selected by the six Government-appointed members, who also appoint among the remaining third the President of the tribunal. They normally serve until they retire or resign.

## **H. Conditions of service**

70. As indicated by the Working Group when considering qualifications and requirements to be met by individuals serving as ISDS tribunal members, success of any adjudication process largely depends on the professional competence of adjudicators ([A/CN.9/1004/Add.1](#), paras 96-100). As can be seen below, most courts and tribunals contain in their statutes general or specific requirements regarding necessary qualifications and attributes of adjudicators.

### *i. International Courts and Tribunals*

71. For instance, the qualifications of adjudicators in both the WTO panels and the Appellate Body are carefully defined. Panels are to be composed of well-qualified governmental and/or non-governmental individuals, including persons who have (i) served on or presented a case to a panel; (ii) served as a representative of a Member or contracting party to the General Agreement on Tariffs and Trade (GATT) 1947, as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat; (iii) taught or published on international trade law or policy; or (iv) served as a senior trade policy official of a Member. Appellate Body members must have recognized authority with demonstrated

<sup>98</sup> Treaty Creating the Court of Justice of the Cartagena Agreement, Article 8.

<sup>99</sup> OHADA Treaty, Articles 31 and 37.

<sup>100</sup> Decision taken by the Governing Council of the United Nations Compensation Commission at the 27<sup>th</sup> meeting, Sixth session held on 26 June 1992, Article 18.

<sup>101</sup> *Ibid.*, Article 21.



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expertise in law, international trade, and in the subject matter of the covered agreements in general.<sup>102</sup>

72. ICJ judges must have high moral character and possess the qualifications required in their respective countries for appointment to the highest judicial offices or are jurisconsults of recognized competence in international law.<sup>103</sup>

*ii. Regional Courts*

73. Requirements for adjudicators occupying the highest judicial positions to have high moral character and recognized competence in international law are included in a number of regional courts' statutes, including the AIC,<sup>104</sup> IICJ,<sup>105</sup> and ECOWAS Court of Justice.<sup>106</sup> Some statutes indicate that judges shall have at least fifteen years of relevant practical experience as a judge, practicing lawyer or law professor.<sup>107</sup> Similarly, the AIC Statute provides that Commissioners shall possess high moral character and distinguished professional competence.<sup>108</sup> Further, the IICJ requires members to be no younger than forty and to be an authority in Sharia law.<sup>109</sup> The ECOWAS Court of Justice requires judges to be aged between forty and sixty,<sup>110</sup> and have at least twenty years of professional experience.<sup>111</sup>

74. The IMDSM provides that arbitrators must be available to serve on a permanent basis.<sup>112</sup> In the same vein, the Andean Court of Justice provides that judges shall not carry out any other professional activity except academic duties and requires them to be fully independent in exercising their functions.<sup>113</sup>

*iii. Other Dispute Settlement Bodies*

75. UNCC Commissioners' conditions of service have been tailored to meet the specific mandate of the institution. As a result, Commissioners are required to be experts in the fields of finance, law, accounting, insurance, environmental damage assessment, oil, trade, and engineering. In addition, the nomination and appointment of Commissioners is made in light of their professional qualifications, experience, and integrity.<sup>114</sup>

76. The IUSCT does not contain specific rules pertaining to the competence or expertise of its members. Nonetheless, its rules of procedure, based on the 1976 UNCITRAL Arbitration Rules, provide that the appointing authorities shall ensure that arbitrators are independent and impartial.<sup>115</sup>

## **I. Code of conduct**

77. The Working Group considered, at its forty-first session, a draft code of conduct for adjudicators in IIDs prepared jointly by the UNCITRAL and ICSID Secretariats (A/CN.9/WG.III/WP.208 and A/CN.9/WG.III/WP.209). The Working Group may wish to note the brief overview below regarding how various international courts and tribunals regulate the conduct of adjudicators.<sup>116</sup>

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<sup>102</sup> WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 8(1), and Article 17(3).

<sup>103</sup> ICJ Statute, Article 2.

<sup>104</sup> AIC Statute, Article 2(1).

<sup>105</sup> IICJ Statute, Article 4.

<sup>106</sup> Protocol A/P.1/7/91 on the Community Court of Justice, Article 3(1).

<sup>107</sup> See e.g., OHADA Treaty, Article 31. See also AIC Statute, Article 2(3).

<sup>108</sup> AIC Statute, Article 3(1) and 8(1).

<sup>109</sup> IICJ Statute, Article 4.

<sup>110</sup> Protocol A/P.1/7/91 on the Community Court of Justice, Article 3(7).

<sup>111</sup> Available at: [www.courtecowas.org](http://www.courtecowas.org)

<sup>112</sup> Protocol of Olivos (2002), Article 19.

<sup>113</sup> Treaty Creating the Court of Justice of the Cartagena Agreement, Article 6.

<sup>114</sup> Decision taken by the Governing Council of the United Nations Compensation Commission S/AC.26/1992/10 (1992) Provisional Rules for Claims Procedure, Article 19(1) and 19(2).

<sup>115</sup> 1976 UNCITRAL Arbitration Rules, Article 6.

<sup>116</sup> A compilation of code of conducts of arbitral institutions and courts and tribunal is available at : [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/icsid\\_code\\_of\\_codes\\_and\\_ethics\\_part\\_1.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/icsid_code_of_codes_and_ethics_part_1.pdf) and <https://uncitral.un.org/sites/uncitral.un.org/files/media->

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*i. International Courts and Tribunals*

78. The Rules of Conduct of the WTO DSB provide that each person (e.g., panelists, Appellate Body members, arbitrators) shall (i) be independent and impartial; (ii) avoid direct or indirect conflicts of interest; and (iii) respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism.<sup>117</sup> Similar duties are applicable to ICJ judges, who declare that they shall perform their duties and exercise their powers honorably, faithfully, impartially, and conscientiously.<sup>118</sup>

*ii. Regional Courts*

79. While some regional courts have adopted an identical language to that of the ICJ in their ethical rules,<sup>119</sup> others have adopted a more extensive approach in regulating the conduct of adjudicators. For instance, the AIC Statute provides that judges and Commissioners must respect the duties and integrity of their office and must in particular abstain from (i) activities that contravene established requirements of office; and (ii) taking part in disputes in which the judge has previously (a) acted as an agent, consultant, lawyer, or expert to one of the parties of the dispute or in relation to a dispute that he/she has previously encountered as a member of a national court, international court, or arbitral tribunal, (b) acted as a mediator or investigator, or (c) to which he/she has opined on in any other capacity with respect to the dispute. The AIC Statute further indicates that it is impermissible for judges to work for a party that was involved in a proceeding in which they have acted, within a period of two years following the end of their term of office. In case of contravention of these rules, the matter shall be submitted to the General Assembly, which takes appropriate action and refers the matter to LAS Economic and Social Council.<sup>120</sup>

80. IICJ judges may not (i) exercise political or administrative function nor perform activities contravening the IICJ's dignity and independence; (ii) act as counsel, agent, advocate, or arbitrator in any case or engage in any other work of a professional nature that may conflict with his/her membership of the Court; nor (iii) participate in any case in which the judge has previously taken part as a member of a national court, international court, commission of enquiry, or in any other capacity. Any doubt regarding the interpretation of these rules shall be settled by decision of the Court.<sup>121</sup>

81. Other regional courts regulate their adjudicators' conduct in a detailed manner using dedicated codes of conduct. For example, the CCJ Judicial Code of Conduct (2020) serves as a guideline containing several principles that the judges of the Court commit to uphold.

82. The OHADA Treaty indicates that CCJA members shall not exercise political or administrative functions and shall seek approval from the Court in order to conduct any other remunerated activity.<sup>122</sup> Further, the CCJA Arbitral Rules provide that arbitrators, in arbitration proceedings administered by the CCJA, shall remain independent and impartial, and act diligently and in a timely manner.<sup>123</sup>

83. The MERCOSUR Code of Conduct for Arbitrators, Experts and Staff contains in Article 2 a list of duties and obligations for arbitrators, experts and staff.<sup>124</sup> It provides that such persons must, *inter alia*: retain their independence and impartiality; exercise their functions with equity and due diligence; avoid conflict of interests of a direct or indirect manner; keep in secrecy information that relates to the actions and deliberations concerning a proceeding, even after the conclusion of the latter; and not

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[documents/uncitral/en/icsid\\_code\\_of\\_codes\\_and\\_ethics\\_part\\_1.pdf](#)

<sup>117</sup> WTO, Rules of conduct for the understanding on rules and procedures governing the settlement of disputes, Article II (1).

<sup>118</sup> ICJ Statute, Article 20; Rules of Court, Article 4.

<sup>119</sup> See e.g., the ECOWAS Court of Justice, Protocol A/P.1/7/91 on the Community Court of Justice, Article 5, Rules of Procedure, Article 3.

<sup>120</sup> AIC Statute, Article 12(1), Article 12(2), and Article 12(3).

<sup>121</sup> IICJ Statute, Article 8.

<sup>122</sup> OHADA Treaty, Article 37.

<sup>123</sup> CCJA Arbitral Rules, Article 4.

<sup>124</sup> MERCOSUR/CMC/DEC. N° 31/11 ("Code of Conduct").

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use such aforementioned information for personal or third-party benefits. The breach of any of these duties may lead to the investigation and removal of individual by the Common Market Group.<sup>125</sup>

84. The Andean Court also foresees the possibility to remove a judge from the Court in case of misbehavior, actions that are incompatible with the position and violation of the conditions of service. The request for removal must emanate from a Member State.<sup>126</sup> The Commission of the CCJ, has also developed disciplinary rules for judges and has the power to remove judges, except for the President, by a majority vote of all members of the Commission.<sup>127</sup>

### *iii. Other Dispute Settlement Bodies*

85. While the IUSCT does not have any code of conduct, its statute provides that arbitrators shall disclose circumstances that may rise justifiable doubts as to their impartiality and independence. As a result, an arbitrator may be challenged in case there are circumstances giving rise to such justifiable doubts.<sup>128</sup>

86. With respect to the UNCC, Commissioners ought to act in their personal capacities and declare to perform their duties and exercise their position honorably, faithfully, independently, impartially, and conscientiously. They are further subject to a disclosure obligation.<sup>129</sup>

## **J. Case assignment**

87. The Working Group noted that case assignment method should ensure balanced representation, diversity, independence and impartiality, which could include randomized appointments with oversight, appointments by the president of the tribunal, or appointments by some other independent committee ([A/CN.9/1050](#), para. 56; [A/CN.9/WG.III/WP.213](#)). Clear pre-defined methods for assignment of cases are aimed at avoiding that disputes are attributed to one or the other tribunal member based on political considerations or outside influence. In that sense, far from being an issue of mere internal judicial organization, case assignment methods are a key factor guaranteeing structural independence. Different models for assigning cases can be found in international courts.

### *i. International Courts and Tribunals*

88. In order to handle particular categories of cases, the ICJ forms one or more chambers composed of three or more judges.<sup>130</sup> It shall also annually form a chamber composed of five judges including the President and Vice-President who may hear and determine cases by summary procedure at the request of the parties with a view to the expeditious dispatch of business.<sup>131</sup>

89. The WTO uses two different methods of assignment for cases adjudicated by the Panels in first instance, or the Appellate Body. Panels are composed of three panelists (or five if the parties so agree) nominated by the Secretariat for each case.<sup>132</sup> At the Appellate Body, each case is decided by three members, assigned by rotation.<sup>133</sup>

### *ii. Regional Courts*

84. Regional courts usually sit in chambers or divisions. The IICJ sits in one or more chambers composed of three or more judges, depending on the particular

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<sup>125</sup> MERCOSUR/CMC/DEC. N° 31/11 (“Code of Conduct”), Articles 4-6.

<sup>126</sup> Treaty Creating the Court of Justice of the Cartagena Agreement, Article 10 and Statute, Articles 11 and 12.

<sup>127</sup> Agreement Establishing the Caribbean Court of Justice (2001), Article V.3 (2), Article V.14, Article IV.7.

<sup>128</sup> Iran-United States Claims Tribunal, Tribunal Rules of Procedure, Articles 9 and 10.

<sup>129</sup> Decision taken by the Governing Council of the United Nations Compensation Commission S/AC.26/1992/10 (1992) Provisional Rules for Claims Procedure, Articles 21 and 22.

<sup>130</sup> ICJ Statute, Article 26 (1).

<sup>131</sup> *Ibid.*, Article 29; Rules of Court, Article 15.

<sup>132</sup> WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 8(5-6).

<sup>133</sup> WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 17(1), and Dispute Settlement: Appeals Procedures WT/AB/WP/6 (16 August 2010), Rule 6(2).

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categories of cases.<sup>134</sup> In some courts, the President of the court determines case assignment, for example, the CCJ, whereby the President of the Court is free to determine the number of divisions in which the CCJ may seat. Every judge can sit in any division. In cases referring to the interpretation of the treaties, the CCJ must seat with at least three judges or more, but always with an uneven number.<sup>135</sup> With respect to the CCJA, judges sit in plenary session, or in chambers of three or five judges constituted by order of the President of the Court. Chambers are presided by the President or one of the Vice-Presidents of the Court.<sup>136</sup>

*iii. Other Dispute Settlement Bodies*

85. Both the IUSCT and the UNCC refer to the President and Chairperson respectively concerning the case assignment. In the former, the Composition of Chambers, assignment of cases to Chambers, transfer of cases among Chambers, and relinquishment of certain cases by Chambers is to be delineated in orders issued by the President pursuant to their powers.<sup>137</sup> In the latter, Commissioners should work in panels of three members. The claims are organized and allotted to panels by the Chairperson.<sup>138</sup>

## **K. Appeals and conditions of appeals**

86. At its resumed thirty-eighth session, in January 2020, the Working Group had noted that the various components of an appellate mechanism were interrelated and would need to be considered, whatever form such mechanism might take – ad hoc appeal mechanism, a permanent stand-alone appellate body, or an appeal mechanism as the second tier of a standing court (A/CN.9/1004/Add.1, paras. 16 and 25). It had also indicated that the objectives of avoiding duplication of review proceedings and further fragmentation as well as of finding an appropriate balance between the possible benefits of an appellate mechanism and any potential costs should guide the work (A/CN.9/1004/Add.1, para. 24). At its fortieth session, in February 2021, the Working Group continued its deliberations on the matter and requested the Secretariat to undertake further preparatory work (A/CN.9/1050, para. 113).<sup>139</sup> The findings below are aimed at providing the Working Group with a broad overview of how appeal mechanisms operate in the international and regional judicial system.

*i. International Courts and Tribunals*

87. The WTO appellate mechanism is the Appellate Body. It hears appeals from panel reports. Only parties to the dispute may appeal a panel report and appeals are limited to issues of law covered in the panel report and legal interpretations of the panel report.<sup>140</sup> Appellate Body reports are adopted by the DSB and accepted by the parties to the dispute. Conversely, the DSB can decide by consensus not to adopt the Appellate Body reports, within thirty days following its circulation to the WTO Members.<sup>141</sup>

88. The ICJ does not permit appeal as its judgments are deemed to be final. However, it admits applications for revision of a judgment when such application is based upon the discovery of a fact that is considered a decisive factor unknown to the Court at the time of the judgment. The application for revision cannot be made later than six months after discovery of the fact and must be made within ten years after the judgment is rendered.<sup>142</sup>

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<sup>134</sup> IICJ Statute, Article 15.

<sup>135</sup> Agreement Establishing the Caribbean Court of Justice (2001), Article IV.3.

<sup>136</sup> CCJA Rules of Procedure, Article 9.

<sup>137</sup> Claims Settlement Declaration, Article 3(1) and Rules of Procedure, Article 5.

<sup>138</sup> Decision taken by the Governing Council of the United Nations Compensation Commission S/AC.26/1992/10 (1992) Provisional Rules for Claims Procedure, Articles 28(1) and Article 29.

<sup>139</sup> Initial draft by the UNCITRAL Secretariat on Appellate Mechanisms and enforcement issues, available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral\\_wp\\_-\\_appeal\\_14\\_december\\_.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_wp_-_appeal_14_december_.pdf).

<sup>140</sup> WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 17(1), Article 17(4) and Article 17(6).

<sup>141</sup> Ibid., Article 17(14).

<sup>142</sup> ICJ Statute, Article 60 and Article 61.

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*ii. Regional Courts*

89. Some regional courts envisage an appellate mechanism. For example, the ECOWAS Court of Justice has an Appeals Division of Registry Department that was created in 2018 in preparation for the establishment of an appellate chamber.<sup>143</sup> The conditions of appeal are to be determined upon the establishment of the Appellate Chamber. In the Andean Community, unless parties agree otherwise, appeals are possible in disputes between individuals that concern the interpretation or application of private contracts governed by Andean Community laws.<sup>144</sup> In the MERCOSUR system, appeal is also permissible. More specifically, the TPR can review awards of the *ad hoc* arbitral tribunals, and its review is then limited on questions of law or legal interpretations developed by the *ad hoc* arbitral tribunal. The TPR can confirm, modify, or revoke the award including the legal basis of these decisions. Awards that were rendered on the basis of *ex aequo et bono* cannot be reviewed. On the other hand, the TPR decisions are final and cannot be appealed.<sup>145</sup>

90. The statutes of the AIC,<sup>146</sup> IICJ<sup>147</sup> and CCJ<sup>148</sup> provide that their judgments are final, and thus cannot be appealed. However, revision mechanisms are available within a certain period. For instance, the AIC Statutes stipulate that the court, either at the request of one of the parties or on its own initiative, may correct errors in judgment, either written or arithmetic.<sup>149</sup> The Court of the Andean Community may amend or expand the judgment either at its own initiative or at the request of one of the parties.<sup>150</sup> The IICJ also allows applications for revision of a judgment when it is based upon the discovery of a fact that is considered a decisive factor unknown to the Court at the time of the judgment.<sup>151</sup> The period available for an application for revision differs among the different regional courts, for instance: the ECOWAS provides for five years;<sup>152</sup> the CCJ provides for an application within six months and at the latest five years from the date of the judgement, while a request for revision in an action for non-compliance must be submitted within 90 days of discovery of the fact and maximum one year after the judgment was delivered.<sup>153</sup> In the OHADA system, the CCJA also provides that its judgments can be revised, interpreted and corrected by application of the disputing parties.<sup>154</sup>

*iii. Other Dispute Settlement Bodies*

91. According to the Claims Settlement Declaration, the decisions of the Iran-United States Claims Tribunal are “final and binding”.<sup>155</sup> Awards are therefore not appealable. However, the Rules of Procedure provide that parties can request the Tribunal to give an interpretation or correction of the award, or to render an additional award if certain claims have been omitted from the original award.<sup>156</sup>

92. Decisions by the panels of Commissioners at the UNCC are subject to the approval of the Governing Council, which may, at its discretion, return a claim or claims for further review by the Commissioners. Decisions of the Governing Council are however final and not subject to appeal or review.<sup>157</sup>

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<sup>143</sup> Available at: [www.courtecowas.org](http://www.courtecowas.org)

<sup>144</sup> Protocol of Cochabamba Amending the Treaty Creating the Court of Justice, Article 39.

<sup>145</sup> Protocol of Olivos (2002), Articles 17, 21 and 22.

<sup>146</sup> AIC Statute, Article 23.

<sup>147</sup> IICJ Statute, Article 39.

<sup>148</sup> Agreement Establishing the Caribbean Court of Justice (2001), Article XXV (5) and Article XX (1). To be noted that the CCJ may serve as the Court of last instance for several Caribbean States.

<sup>149</sup> AIC Statute, Article 24.

<sup>150</sup> Decision 184, Bylaws of the Court of Justice of the Cartagena Agreement, Article 59.

<sup>151</sup> ICJ Statute, Article 40.

<sup>152</sup> Protocol A/P.1/7/91 on the Community Court of Justice, Article 25.

<sup>153</sup> Agreement Establishing the Caribbean Court of Justice (2001), Article XX.14-5.

<sup>154</sup> CCJA Rules of Procedure, Article 45 bis; Articles 47-50.

<sup>155</sup> Claims Settlement Declaration, Article 4(1).

<sup>156</sup> Iran-United States Claims Tribunal, Rules of Procedure, Articles 35-37.

<sup>157</sup> Decision taken by the Governing Council of the United Nations Compensation Commission S/AC.26/1992/10 (1992) Provisional Rules for Claims Procedure, Article 40(4) and Provisional Rules for Claims Procedure annexed to Governing

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## L. Applicable law

93. The Working Group may wish to consider the different approaches of international courts and tribunals, regional courts, and other dispute settlement bodies with respect to applicable law. As noted above, a multilateral investment tribunal would likely not apply a unified set of substantive standards and provisions of one sole investment treaty, but rather different rules depending on the underlying international investment instrument.<sup>158</sup>

### *i. International Courts and Tribunals*

94. The Statute of the ICJ provides that the Court shall apply (i) international conventions establishing rules expressly recognized by contesting States; (ii) international custom as evidence of general practice accepted as law; (iii) the general principles of law recognized by civilized nations; and (iv) judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.<sup>159</sup> In the context of the WTO DSB, each dispute is to be decided based on the covered agreement as interpreted in accordance with the customary rules of interpretation of public international law.<sup>160</sup>

### *ii. Regional Courts*

95. A distinctive feature of the applicable law of the IICJ is Sharia Law which is the main source on which the IICJ bases its judgments, with the guidance of international law, bilateral or multilateral conventions, international practice accepted as law, general principles of law, judgments rendered by international law, and the teachings of the most qualified publicists of various States.<sup>161</sup> In MERCOSUR, the *ad hoc* arbitral tribunals and the TPR shall decide based on the Treaty of Asunción, the Protocol of Ouro Preto, the protocols and agreements concluded within the framework of the Treaty of Asunción, the decisions of the Common Market Council, the resolutions of the Common Market Group, the Directives of the Trade Commission of MERCOSUR, as well as international law.<sup>162</sup> In cases involving the interpretation of CARICOM treaties, the CCJ shall apply such rules of international law as may be applicable.<sup>163</sup> The Andean Court of Justice on the other hand does not refer to international law expressly. Instead, it refers to specific instruments of the Andean Community.<sup>164</sup> With respect to the CCJA, the Court can only be seized on matters pertaining to the interpretation and application of the OHADA Treaty, uniform acts and regulations.<sup>165</sup>

### *iii. Other Dispute Settlement Bodies*

96. In the framework of the Iran-United States Claims Tribunal, the Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions, and changed circumstances.<sup>166</sup> In the framework of the UNCC, Commissioners shall apply

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Council decision 10 (1992), Article 41.

<sup>158</sup> See above, para. 4.

<sup>159</sup> ICJ Statute, Article 38(1).

<sup>160</sup> WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 3(2).

<sup>161</sup> IICJ Statute, Articles 1, Article 27(a), and Article 27(b).

<sup>162</sup> Protocol of Olivos (2002), Articles 1 and 34.

<sup>163</sup> Agreement Establishing the Caribbean Court of Justice (2001), Article XVII (1).

<sup>164</sup> Treaty Creating the Court of Justice of the Cartagena Agreement, Article 1, namely, the Agreement of Cartagena, its protocols and additional instruments as well as the Treaty and its protocols and modifications, decisions of the Andean Council of Ministers for Foreign Affairs and the Commission of the Andean Community, resolutions of the General Secretariat of the Andean Community, agreements on Industrial Complementarity and other such texts adopted among the Member States and within the framework of Andean subregional integration.

<sup>165</sup> The ten OHADA uniform acts currently in force include the uniform act on arbitration, the uniform act on mediation, the uniform act on accounting law and financial reporting, the uniform act on the organization of collective procedures for the discharge of liabilities, the uniform act on commercial companies and the economic interest group, the uniform act on security interests, the uniform act on cooperatives, the uniform act on general commercial law, the uniform act on road freight agreements, and the uniform act on simplified debt collection procedures and enforcement proceedings.

<sup>166</sup> Claims Settlement Declaration, Article 5 and Rules of Procedure Article 33(1).

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the [Security Council Resolution 687 \(1991\)](#), other relevant Security Council Resolutions, the criteria and pertinent decisions of the Governing Council and other relevant rules of international law where necessary.<sup>167</sup>

## M. Enforcement of decisions

97. The Working Group undertook a preliminary consideration of issues related to the enforcement of decisions rendered through a permanent appellate mechanism or a multilateral tribunal. In this context, it was emphasized that enforcement was a key feature of any system of justice and was essential to ensure its effectiveness ([A/CN.9/1004/Add.1](#), para. 62). Accordingly, the Working Group requested the Secretariat to undertake thorough research and further report issues relating to enforcement ([A/CN.9/1050](#), para. 112).<sup>168</sup>

### *i. International Courts and Tribunals*

98. With respect to the ICJ, each UN Member State undertakes to comply with the Court's decisions in any case to which it is a party. If a party fails to comply with such decisions, the other party may have recourse to the Security Council, which may make recommendations or decide upon measures to give effect to the judgment.<sup>169</sup>

99. At the WTO, compliance with DSB recommendations or rulings should be exercised promptly by the WTO Members involved in the dispute. In case a party does not comply with such decisions within a reasonable time, the aggrieved party may seek compensation as well as the suspension of concessions or other obligations.<sup>170</sup> However, if the Member concerned objects the level of suspension or claims that the respective procedures were not followed, the matter shall be referred to arbitration, conducted by the original panel or by an arbitrator appointed by the WTO Director-General.<sup>171</sup>

### *ii. Regional Courts*

100. Most regional courts under study refer to execution or enforcement pursuant to the domestic regulation of the State where enforcement is sought. The ECOWAS rules refer to enforcement through writ of execution, which is submitted to the relevant Member State for execution in accordance with the civil procedure rules of that Member State.<sup>172</sup> The Enforcement Division of Registry Department is responsible for enforcing decisions and coordinating with national authorities. Judgements of the AIC are deemed immediately enforceable in the same manner as a final enforceable judgement delivered by the courts of the Member States.<sup>173</sup> In the case of the Court of Justice of the Andean Community, it is clarified that judgements are enforceable in the Member States without homologation or exequatur.<sup>174</sup> For other courts such as the CCJ, decisions must be treated as a decision of a domestic superior court.<sup>175</sup> In the dispute-settlement framework of MERCOSUR, both awards of the *ad hoc* tribunals (if revision is not timely requested) and awards of the TPR are compulsory for the disputing Member States.<sup>176</sup> If a State Party fails to comply, either fully or partially, with the arbitral award, the State that is benefiting from the award is entitled to execute compensatory measures for the duration of one year starting from the lapse of the enforcement date.<sup>177</sup> With regards to OHADA, judgments of the CCJA are also considered directly enforceable in the territory of any OHADA Member State, as if they were a final judgment of their domestic courts. If a domestic court renders a decision in the

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<sup>167</sup> Decision taken by the Governing Council of the United Nations Compensation Commission S/AC.26/1992/10 (1992) Provisional Rules for Claims Procedure, Article 31.

<sup>168</sup> This paper is currently under preparation.

<sup>169</sup> Charter of the United Nations, Article 94(1) and 94(2).

<sup>170</sup> These temporary measures are also sometimes commonly referred to as "trade sanctions" or "retaliation".

<sup>171</sup> WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 21(1), Article 22(1), and Article 22(6).

<sup>172</sup> Supplementary Protocol, Article 6 amending Protocol Article 24(2).

<sup>173</sup> AIC Statute, Article 34(3).

<sup>174</sup> Statute of the Court of Justice of the Cartagena Agreement, Article 91.

<sup>175</sup> Agreement Establishing the Caribbean Court of Justice (2001), Article XXVI(a).

<sup>176</sup> Protocol of Olivos (2002), Article 26.

<sup>177</sup> Protocol of Olivos (2002), Article 31.

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same subject-matter that is not consistent with the ruling of the CCJA, the decision cannot be enforced in the territory of OHADA Member States.<sup>178</sup>

*iii. Other Dispute Settlement Bodies*

101. Awards rendered by the Iran-United States Tribunal are enforceable in the courts of any nation in accordance with that nation's laws.<sup>179</sup> In practice, domestic courts faced with the enforcement of those awards have considered whether the New York Convention may be applicable for enforcement, but those court decisions do not reflect uniform case law on this issue. Some early decisions found that the New York Convention could not be applied to awards of the IUSCT since there was no written submission agreement from the parties to refer their dispute to the IUSCT.<sup>180</sup> However, other domestic courts found that awards of the IUSCT fulfilled the requirements of the New York Convention, namely, that they were final and binding arbitral awards rendered by a permanent arbitral body within the meaning of the New York Convention.<sup>181</sup>

102. With regard to the UNCC, compensation payments that have been approved by the Governing Council are made to the relevant government depending on the order of priority of the claim. The relevant government is then responsible to distribute the compensation to the successful claimants.<sup>182</sup> Governments are to distribute the funds to the claimants within six months of receiving payment from the UNCC; after the period for payment has elapsed, each government must provide a report on the payments and the reasons for non-payment to claimants within three months.<sup>183</sup>

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<sup>178</sup> OHADA Treaty, Article 20.

<sup>179</sup> Claims Settlement Declaration, Article 4(3).

<sup>180</sup> *Mark Dallal v. Bank Mellat*, UK High Court of Justice, Queen's Bench Division (Commercial Court), 26 July 1985.

<sup>181</sup> For instance, *Ministry of Defence of the Islamic Republic of Iran v. Gould Inc. and others*, United States District Court, Central District of California, Not Indicated, 14 January 1988 [United States]; *Gould Inc., Gould Marketing, Inc. v. Hoffman Export Corporation, Gould International, Inc. v. Ministry of Defence of the Islamic Republic of Iran*, United States Court of Appeals for the Ninth Circuit, Not Indicated, 23 October 1989 [United States].

<sup>182</sup> Governing Council: Decision 17 (1994) Priority of Payment and Payment Mechanism (Guiding Principles), para. 1; Governing Council: Decision 17 (1994) Priority of Payment and Payment Mechanism (Guiding Principles) and Decision 18 (1994) Distribution of Payments and Transparency, para 1.

<sup>183</sup> Governing Council: Decision 17 (1994) Priority of Payment and Payment Mechanism (Guiding Principles) and Decision 18 (1994) Distribution of Payments and Transparency, paras. 3ff.