

## **Submission of the European Union and its Member States on certain aspects concerning the jurisdiction of the Standing Mechanism**

1. The European Union and its Member States are pleased to submit the present paper on certain issues concerning the jurisdiction of the Standing Mechanism for consideration of Working Group III, based on the latest working papers prepared by the Secretariat (namely the draft statute of a Standing Mechanism contained in document A/CN.9/WG.III/WP.239 and annotations thereto contained in document A/CN.9/WG.III/WP.240).<sup>1</sup> The goal of this submission is to further assist in the discussions on this highly technical matter. It is the hope of the European Union and its Member States that this paper will serve as a useful support to such discussions and reflections.

### **I. Background**

2. Since the beginning of the mandate of UNCITRAL Working Group III in 2017, the European Union and its Member States have engaged in favour of substantial reform of investor-State dispute settlement (ISDS). As Working Group III progressed through its mandate on ISDS reform, the European Union and its Member States tabled written submissions to assist.<sup>2</sup> These ideas, as well as the contributions to the discussions in the Working Group III sessions, are the result of internal reflections, the experiences of the European Union and its Member States and academic insights (including from the UNCITRAL Academic Forum)<sup>3</sup> and they intend to contribute to the collective exercise undertaken at UNCITRAL.
3. Now that the important and complex issue of jurisdiction of the Standing Mechanism is, in line with the Workplan,<sup>4</sup> on the table of the Working Group, the European Union and its Member States wish to elaborate on their approach on these matters. While an outline of this thinking was set out in previous papers,<sup>5</sup> this submission includes a more developed approach based on the most recent discussions within the Working Group.

### **II. The jurisdiction of the Standing Mechanism**

4. Articles 14 and 18 of the draft statute of the Standing Mechanism as laid down in document A/CN.9/WG.III/WP.239 provide for the jurisdiction of the Dispute Tribunal and the Appeals Tribunal respectively. The European Union and its Member States suggest a number of changes to Articles 14 and 18.

#### **A. Article 14: Jurisdiction of the Dispute Tribunal**

5. The European Union and its Member States propose that Article 14 be reformulated as follows:

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<sup>1</sup> For purposes of this submission, reference is made to the jurisdiction of the Standing Mechanism while the submission focuses on the jurisdiction of the Dispute Tribunal at first instance. This approach and this submission are without prejudice to the position of the European Union and its Member States in future discussions, including on the jurisdiction of the Appeal Tribunal.

<sup>2</sup> See Annexes, *The identification and consideration of concerns as regards investor to state dispute settlement*, A/CN.9/WG.III/WP.145 available at <https://docs.un.org/en/A/CN.9/WG.III/WP.145>; *Possible workplan for Working Group III*, A/CN.9/WG.III/WP.159 available at <https://docs.un.org/en/A/CN.9/WG.III/WP.159>; *Establishing a standing mechanism for the settlement of international investment disputes*, A/CN.9/WG.III/WP.159/Add.1 available at <https://docs.un.org/en/A/CN.9/WG.III/WP.159/Add.1>.

<sup>3</sup> See <https://www.jus.uio.no/ior/english/research/projects/copiid/academic-forum/papers/>.

<sup>4</sup> See Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed fortieth session (Vienna, 4 and 5 May 2021) available at [https://documents.un.org/symbol-explorer?s=A/CN.9/1054&i=A/CN.9/1054\\_2924433](https://documents.un.org/symbol-explorer?s=A/CN.9/1054&i=A/CN.9/1054_2924433).

<sup>5</sup> See A/CN.9/WG.III/WP.159/Add.1.

#### **Article 14**

1. *The Dispute Tribunal shall have exclusive jurisdiction in relation to any international investment dispute when:*
  - a) *such dispute is brought under a treaty listed under paragraph 4, and*
  - b) *both Contracting Parties or, in the case of a dispute under a plurilateral or multilateral treaty, the relevant Contracting Parties have listed that treaty.*
2. *The Dispute Tribunal shall also have exclusive jurisdiction in relation to any international investment dispute brought against a Contracting Party under a treaty that was listed only by that Contracting Party under paragraph 4, and:*
  - a) *the other relevant Contracting Party does not object in writing to the [Executive Director] to such listing within six months thereof, or*
  - b) *the other relevant party to that treaty is not a Contracting Party to the present statute, and such party expressly agrees and such agreement is notified by the Contracting Party to the [Executive Director].*
3. *If the conditions in paragraphs 1 and 2 are not met, the parties to an instrument or the disputing parties may jointly agree in writing to the jurisdiction of the Dispute Tribunal to resolve a dispute, subject to regulations adopted by the Conference of the Parties. When consent is given to the jurisdiction of the Dispute Tribunal, no party may withdraw its consent unilaterally.*
4. *A Contracting Party may consent to the jurisdiction of the Dispute Tribunal by providing a list of instruments, including:*
  - a) *treaties providing for the protection of investments or investors to which it is a party, or*
  - b) *legislation governing foreign investments which it has enacted and which gives jurisdiction to the Dispute Tribunal.*

*The list may be provided when depositing the instrument of ratification or accession or by subsequently notifying the [Executive Director] and the depositary of the Protocol in writing. The list may be amended through the same process.*

5. *The [Executive Director] shall be responsible for maintaining the list of instruments pursuant to paragraphs 1 to 4, and making it publicly available.*
6. The suggested changes to Article 14 are explained below.

#### *Jurisdiction ratione personae*

7. First and foremost, the jurisdiction *ratione personae* of the Standing Mechanism should not be limited to investor-State disputes understood as only investors bringing claims against States. The European Union and its Member States support opening the jurisdiction of the Standing Mechanism

to the following disputes if provided in the relevant treaty: (i) States bringing counterclaims against investors; (ii) claims brought by States against investors; and (iii) State-to-State dispute settlement.

8. Furthermore, the European Union and its Member States support opening the jurisdiction of the Standing Mechanism to claimants and respondents which are not or not from Contracting Parties to the Standing Mechanism. This possibility is provided for in paragraph 2, which provides for unilateral exclusive jurisdiction in the case where the other party to the treaty is not a Contracting Party, and in paragraph 3, which provides for the extension of the jurisdiction to situations not falling under paragraphs 1 or 2, i.e. covering also non-Contracting Parties. This approach would encourage the use of the Standing Mechanism and allow those entities to benefit from the high standard of adjudication expected from the Standing Mechanism.
9. Nevertheless, opening the jurisdiction of the Standing Mechanism to non-Contracting Parties has cost implications. Therefore, the European Union and its Member States suggest to allow this flexibility provided that fees will be due, with the understanding that these fees will have to be higher than those paid by claimants and respondents which are or are from Contracting Parties, if applicable, and may be based on cost recovery. The regulation of the fees to be paid depending on the different specific situations involving Contracting Parties and/or non-Contracting Parties will have to be developed by the Conference of the Parties.

#### *Jurisdiction ratione materiae*

10. As a first point, the European Union and its Member States suggest that the situations covered by paragraphs 1 and 2 which provide for a mechanism to allow exclusive jurisdiction (see below section on “exclusive jurisdiction”) would only cover treaties. The reference to “instrument” in paragraphs 3, 4 and 5 aims to cover different types of instruments: treaties, legislation governing foreign investments or investment contracts.
11. As explained above, the European Union and its Member States have been generally in favour of a flexible and open jurisdiction for the Standing Mechanism in order to cover future disputes (including ensuring that the statute does not have to be amended should States permit claims (not just counterclaims) against investors) and agreements that the Contracting Parties may wish to subject to it. Yet, it is clear from previous discussions within the Working Group that the reference to “international investment dispute” raises questions as to its definition and whether it covers only investor-State disputes or also other forms of disputes (e.g. State-to-State dispute settlement, counterclaims, possible future claims from States against investors). Furthermore, the reference to “international investment dispute” could bring into play the application of the so-called “double-keyhole” or “twofold” test under article 25 of the ICSID Convention and the underlying instrument of consent, as explained in the annotations to the draft statute.<sup>6</sup>
12. Nevertheless, the European Union and its Member States understand the need to clarify in the statute the scope of jurisdiction by referring to “international investment dispute”, as long as its meaning is kept broad, not linked to other reform deliverables, and left to the Conference of the Contracting Parties of the Standing Mechanism to refine over time.
13. Furthermore, the European Union and its Member States suggest an additional paragraph 3 to keep flexibility and give the power to the Conference of the Contracting Parties to extend the jurisdiction of the Standing Mechanism to other disputes not covered by paragraphs 1 and 2, or other matters specifically provided for in any other instrument which confers jurisdiction to the Standing

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<sup>6</sup> See A/CN.9/WG.III/WP.240, para. 38, available at <https://docs.un.org/en/A/CN.9/WG.III/WP.240>.

Mechanism.<sup>7</sup> The reference to “subject to regulations adopted by the Conference of the Parties” provides sufficient safeguards that the jurisdiction is limited to “international investment disputes” and the understanding that will be given to it by the Conference of the Contracting Parties, but paragraph 3 will allow the Conference to develop in the future a regulation to extend the scope of jurisdiction within certain limits (for instance, to disputes brought by States against investors, if this is not covered by the definition of “international investment dispute”, or any other type of dispute that treaty parties or disputing parties wish to submit to the Standing Mechanism (e.g. Claims Commissions<sup>8</sup>)).

14. Paragraph 3 will also allow disputes under other instruments than treaties to fall under the jurisdiction of the Standing Mechanism, such as investment contracts and legislation governing foreign investments. Again, it will be for the Conference of the Parties to develop regulations to govern the submission of these types of disputes to the Standing Mechanism, including by setting fees to maintain the financial sustainability of the Standing Mechanism.

#### *Exclusive jurisdiction*

15. The European Union and its Member States are in favour of exclusive jurisdiction of the Standing Mechanism in two instances concerning international investment disputes brought under treaties, as provided under paragraphs 1 and 2.
16. **First, in case of a “perfect match”, as provided in paragraph 1, when both or all relevant Contracting Parties have included the treaty in their listing.** Exclusive jurisdiction is desirable, among others, because it secures a harmonised approach to the covered disputes, i.e. that they all be dealt with by the Standing Mechanism. The benefit of having a Standing Mechanism is to have a consistent interpretation of treaties, both the specific treaty concerned and then other similar or identically worded treaties, which cannot be achieved if the disputing parties have the option to resort to *ad hoc* arbitration. Leaving it to disputing parties to choose between *ad hoc* arbitration and the Standing Mechanism would undermine the effort of reforming the existing system. States will, acting as sovereigns, make the choice as to which form of dispute settlement is suitable for them and for their nationals. Setting up and securing the operation over time of the Standing Mechanism, as desirable as it is for interested States and Regional Economic Integration Organisations (REIOs), will also have cost implications for them (i.e. the greater the use the more spread out the costs will be), hence in the design choices resort thereto should be encouraged.
17. Therefore, as a minimum, the listing of treaties by both or all relevant Contracting Parties should reflect their willingness to subject all disputes arising from the listed treaties to the jurisdiction of the Standing Mechanism and to discard the existing dispute resolution offers in such treaties. It should be clarified that in the case of a plurilateral or multilateral treaty,<sup>9</sup> all parties to that treaty do not have to list the instrument because they all form a network of bilateral relations taken individually. A plurilateral treaty between eight countries will materialise in practice with disputes only involving two parties, e.g. claimants from country A against country B, or claimants from country B against country C, etc. By providing a mechanism similar to the Mauritius Convention

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<sup>7</sup> Paragraph 3 was inspired by Article 47 of the 1907 Convention for the Pacific Settlement of International Disputes: “*The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between non-Contracting Powers or between Contracting Powers and non-Contracting Powers, if the parties are agreed on recourse to this Tribunal.*”

<sup>8</sup> See “*The Future of International Claims Commissions: conceptualizing the EU’s proposed multilateral investment court as an international claims tribunal*”, Jeremy K. Sharpe, ASIL Proceedings, 2017, p.102.

<sup>9</sup> A plurilateral treaty is a treaty between a limited number of States with a particular interest in the subject of the treaty, while a multilateral treaty will generally be open to broader membership.

on Transparency<sup>10</sup> in the statute of a Standing Mechanism or in the Multilateral instrument on investor-State dispute settlement reform,<sup>11</sup> Contracting Parties that list common treaties would thus modify the offer under these underlying treaties by providing for exclusive jurisdiction, in accordance with customary international law, as codified by the Vienna Convention on the Law of Treaties (VCLT).

18. **Second, if not accepted by both relevant Contracting Parties, the jurisdiction of the Standing Mechanism could be exclusive only vis-à-vis the notifying Contracting Party, as provided in paragraph 2(a).** The European Union and its Member States would favour giving the possibility to one Contracting Party to benefit from exclusive jurisdiction for the treaties it has listed, and new disputes submitted against it under these treaties, even if the other party to the treaty, which is also a Contracting Party to the Standing Mechanism, has not listed it. As the proposed drafting in paragraph 2(a) suggests, where both parties to a treaty are Contracting Parties to the Standing Mechanism, if only one of them lists that treaty, some flexibility should be allowed to provide for exclusive jurisdiction through a presumption of consent, while of course providing a reasonable opportunity to the other party to object within a short timeframe, starting from the date the instrument was listed.
19. **The jurisdiction of the Standing Mechanism could also be exclusive for disputes where one of the relevant parties to the treaty is not a Contracting Party to the Standing Mechanism, as provided in paragraph 2(b).** In such a scenario, when one Contracting Party lists a treaty concluded with a non-Contracting Party to the Standing Mechanism, the other relevant party to that treaty, after being asked by the Contracting Party, would have to give its express agreement to that Contracting Party to apply the unilateral exclusive jurisdiction, and that agreement would have to be notified by the Contracting Party to the relevant authority of the Standing Mechanism. If this agreement is given, all new disputes brought by the investors of this other relevant party would have to be brought under the Standing Mechanism against the respondent that has listed the relevant treaty and sought exclusive jurisdiction.
20. Therefore, the exclusive jurisdiction of the Standing Mechanism would be on a non-reciprocal basis, i.e. only in respect of claims made against the notifying Contracting Party. By not objecting under paragraph 2(a) or by providing a positive agreement to the unilateral request for exclusive jurisdiction under paragraph 2(b), the parties to the underlying treaty would consent to modify it, in conformity with customary international law as codified by the VCLT.
21. The European Union and its Member States have consistently taken the view that the different concerns identified by Working Group III are intertwined and are systemic. A standing two-tier mechanism is the only available option that effectively responds to all the concerns identified and the only option that captures the intertwined nature of those concerns.<sup>12</sup> Therefore, the possibility for a Contracting Party to provide for exclusive jurisdiction of the Standing Mechanism over its listed treaties should be kept open, with sufficient guarantees for the other relevant treaty parties that they would have the possibility to object (where they are already parties to the Standing Mechanism) or agree (where they are not parties to the Standing Mechanism).

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<sup>10</sup> United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention on Transparency"). The Mauritius Convention on Transparency provides States with an efficient mechanism to apply the Transparency Rules to investment agreements concluded before the entry into force of the Transparency Rules. Investment agreements concluded afterwards often include a reference to the Transparency Rules.

<sup>11</sup> See the *Draft Multilateral instrument on ISDS reform*, A/CN.9/WG.III/WP.246 available at <https://docs.un.org/en/A/CN.9/WG.III/WP.246>.

<sup>12</sup> For further details, see *Establishing a standing mechanism for the settlement of international investment disputes*, A/CN.9/WG.III/WP.159/Add.1 available at <https://docs.un.org/en/A/CN.9/WG.III/WP.159/Add.1>.

22. Outside of the above options, if not exclusive, the jurisdiction of the Standing Mechanism would be optional. In the absence of a “perfect match” or in case the notification of exclusive jurisdiction for an investment treaty listed by one Contracting Party is objected or not agreed to by the other relevant party, the jurisdiction of the Standing Mechanism cannot be considered exclusive, neither on a reciprocal basis nor in a non-reciprocal way. In such a case, the Standing Mechanism could still have jurisdiction over a dispute under this treaty under paragraph 3. Optional jurisdiction means that parties to a dispute have the choice of submitting their dispute to the Standing Mechanism or to another competent jurisdiction. However, once a dispute has been submitted to the Standing Mechanism by special agreement, such jurisdiction becomes exclusive in the sense that parties to the case cannot subsequently elect to submit their case to another forum.

#### *Listing of the instruments of consent*

23. As provided in paragraphs 4 and 5, the consent to the jurisdiction of the Dispute Tribunal will have to be carefully managed through listing and by the relevant authority of the Standing Mechanism (referred as “Executive Director” in the current draft, although during discussions in the Working Group preference was also expressed for other terms such as “Secretary”<sup>13</sup>).
24. Paragraph 4 uses the drafting of the statute prepared by the UNCITRAL Secretariat (A/CN.9/WG.III/WP.239) in Article 14 paragraph 2, where a Contracting Party may consent to the jurisdiction of the Dispute Tribunal by providing a list of instruments such as treaties providing for the protection of investments or investors to which it is a party or legislation governing foreign investments.
25. Finally, paragraph 5 confers the power to maintain and update the list of instruments of consent to the relevant authority of the Standing Mechanism, including after the statute has entered into force for the relevant Contracting Party, and also to make it publicly available. This concerns not only the treaties listed by Contracting Parties and covering disputes falling under paragraphs 1 and 2, but also any *ad hoc* consent and other instruments that would give jurisdiction to the Standing Mechanism under paragraph 3.

### **B. Article 18: Jurisdiction of the Appeals Tribunal**

26. The European Union and its Member States propose that Article 18 be reformulated as follows:

#### ***Article 18***

1. *The Appeals Tribunal shall have exclusive jurisdiction in relation to an award or decision rendered by an arbitral tribunal or any other adjudicatory body (referred to in this section and Section F as the “first-tier tribunal”) when:*
  - a) *a dispute is brought under a treaty listed under paragraph 4, and*
  - b) *both Contracting Parties or, in the case of a dispute under a plurilateral or multilateral treaty, the relevant Contracting Parties have listed that treaty.*

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<sup>13</sup> See Report of Working Group III (Investor-State Dispute Settlement Reform), on the work of its forty-eighth session (New York, 1-5 April 2024), A/CN.9/1167, paragraph 92; available at <https://docs.un.org/en/A/CN.9/1167>.

2. *The Appeals Tribunal shall also have exclusive jurisdiction in relation to an award or decision rendered by a first-tier tribunal against a Contracting Party under a treaty that was listed only by that Contracting Party under paragraph 4, and:*
  - a) *the other relevant Contracting Party does not object in writing to the [Executive Director] to such listing within six months thereof, or*
  - b) *the other relevant party to that treaty is not a Contracting Party to the present statute, and such party expressly agrees and such agreement is notified by the Contracting Party to the [Executive Director].*
3. *If the conditions in paragraphs 1 and 2 are not met, the parties to an instrument or the disputing parties may jointly agree in writing to the jurisdiction of the Appeals Tribunal to resolve a dispute, subject to regulations adopted by the Conference of the Parties. When consent is given to the jurisdiction of the Appeals Tribunal, no party may withdraw its consent unilaterally.*
4. *A Contracting Party may consent to the jurisdiction of the Appeals Tribunal by providing a list of instruments pursuant to which an award or decision may have been or may be made by an arbitral tribunal or any other adjudicatory body, including:*
  - a) *treaties providing for the protection of investments or investors to which it is a party, or*
  - b) *legislation governing foreign investments which it has enacted and which gives jurisdiction to the Appeals Tribunal.*

*The list may be provided when depositing the instrument of ratification or accession or by subsequently notifying the [Executive Director] and the depositary of the Protocol in writing. The list may be amended through the same process.*

5. *The [Executive Director] shall be responsible for maintaining the list of instruments pursuant to paragraphs 1 to 4, and making it publicly available.*

27. The changes to Article 18 follow the same reasoning as the changes to Article 14, subject to specific considerations regarding the relationship between the first-instance tribunal and the appellate mechanism.

28. The European Union and its Member States also restate their views on paragraph 5 of Article 18 as drafted in A/CN.9/WG.III/WP.239 which provides “*The jurisdiction of the Appeals Tribunal is subject to any limitation in the law(s) applicable to the proceedings of the first-tier tribunal and article \*\*.*” It is the view of the European Union and its Member States that the relevant provisions of this statute or protocol and rules which may be adopted pursuant to this statute or protocol should be deemed as an *inter se* modification of the ICSID Convention in the sense of Article 41 of the VCLT. Therefore, the jurisdiction of the Appeals Tribunal should not be limited by Article 53 of the ICSID Convention or any other limitation as long as the disputing parties or Contracting Parties have consented to the jurisdiction of the Appeals Tribunal. This *inter se* modification should be expressly stated in the statute of a Standing Mechanism.

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29. The European Union and its Member States wish to emphasise that this submission paper concerns exclusively Articles 14 and 18 of the draft statute of the Standing Mechanism on the jurisdiction of the Standing Mechanism and does not prejudice a position on the rest of the draft statute in A/CN.9/WG.III/WP.239 as currently discussed by Working Group III.



# ANNEXES



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

### **Submission from the European Union**

This note reproduces a submission received from the European Union in preparation for the thirty-fifth session of Working Group III. The submission is reproduced as an annex to this note in the form in which it was received by the Secretariat (in Arabic, Chinese, English, French, Russian and Spanish).

#### **Annex**

20 November 2017

#### **The identification and consideration of concerns as regards investor to state dispute settlement**

##### **1. Introduction**

1. This paper is intended as a contribution to the discussions in Working Group III of the United Nations Commission on International Trade (UNCITRAL). The aim of the paper is to identify and consider concerns as regards the current system of investor to state dispute settlement (ISDS) in line with the first stage of the mandate given to Working Group III by the UNCITRAL Commission. Consideration of what reforms might be desirable is for the second stage of discussions and is not addressed in this paper.
2. The Note by the UNCITRAL Secretariat, "Possible reform of investor-State dispute settlement (ISDS)" of 18 September 2017<sup>14</sup> lists a number of concerns which have been identified regarding ISDS (para 19 et seq.). The present paper builds on and responds to that paper. In particular, it suggests that a further and complementary way of thinking about the concerns with the ISDS system is to consider the framework in which the current system of ISDS operates. Considering

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<sup>14</sup> A/CN.9/WG.III/WP.142.

the system as a whole provides a way of identifying concerns because it permits the existing system of dispute settlement to be compared and contrasted to other systems with similar attributes. Consequently, this paper first examines the key attributes and characteristics of the investment treaty regime (section 2). It then briefly looks, in a comparative manner, at how disputes in regimes with comparable characteristics to the investment regime are managed (section 3). Thereafter, it looks at the factors influencing the design of the current system of ISDS (section 4) before turning, on the basis of the analysis in these previous sections, to identify a number of concerns which merit further consideration (section 5).

## 2. Key attributes of the investment treaty regime

3. The key attributes of the current investment regime stem from two fundamental features. First, the regime is a **public international law** regime. Second, it resembles **public law** in that it is largely concerned with the treatment of investors and hence the relationship between individual actors and the state.
4. The international investment regime is made up of a large number of international treaties. These are **instruments of public international law**, concluded between public international law actors acting in their sovereign capacity.<sup>15</sup> In these agreements, states grant the power to bring claims to enforce these international treaties to natural or legal persons (investors). However, that does not take away the public international law nature of these agreements, agreed, as they are, between two sovereigns. As treaties, these agreements are also meant to be interpreted in accordance with public international law. This includes the rules on interpreting treaties and other rules, such as the rules on state responsibility.
5. These public international law treaties deal with the **sovereign capacity of states to regulate**, by providing certain protections which are enforceable by investors.<sup>16</sup> This creates a situation similar to public or constitutional law, in which individuals are protected from acts of the state and can act to enforce those protections.<sup>17</sup> It is important to recall that the state is acting in its sovereign capacity, both in approving these treaties and as regards the acts challenged. Investment treaty obligations apply to any acts that can be attributed to a state, be it legislation passed by a parliament or an individual decision taken by a local council. In the event that a state is found not to have respected these obligations it must make reparations. Such reparations typically take the form of monetary compensation, implying a charge on the budget of a state.
6. Framed by these two key features, i.e. the public international law basis of the treaties and the public law nature of the relationship, one can identify a number of characteristics of the

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<sup>15</sup> Roberts, Anthea "Clash of paradigms: actors and analogies shaping the investment treaty system" (2013) *American Journal of International Law*, 107 (1) 45-94, 58-63.

<sup>16</sup> *Ibid*, at 63-68.

<sup>17</sup> See, amongst others, the works of Van Harten, Gus & Loughlin, Martin "Investment Treaty Arbitration as a Species of Global Administrative Law", 17 *European Journal of International Law* 121 (2006); Van Harten, "Investment Treaty Arbitration and Public Law" (2007); Schneiderman; David, "Constitutionalizing Economic Globalization: Investment Rules And Democracy's Promise" (2008); Schill, Stephan W. "International Investment Law and Comparative Public Law—An Introduction", in "International Investment Law and Comparative Public Law" 3 (Stephan W. Schill ed., 2010); Montt, Santiago "State Liability in Investment Treaty Arbitration: Global Constitutional And Administrative Law in the BIT Generation" (2009).

international investment regime which are relevant for thinking about the present system and assessing concerns. These can be enumerated as follows:

- a) A constitutional/administrative law component: the obligations set down in the investment treaties are intended to protect investors from certain (limited) state conduct. Hence applying the obligations implies striking a balance between the right to exercise sovereign authority and the duty to protect individuals, typical of constitutional/administrative law determinations;
- b) A unidirectional system: the investor initiates the case against the state because the investor accepts the standing offer to arbitrate provided in the treaties;
- c) A vertical relationship: disputes predominantly concern foreign investors bringing cases against host states that arise from the vertical, regulatory relationship between those actors due to the fact that the investor enters into the host state territory and its economic and legal order;
- d) A repeat function: the treaties in question potentially will give rise to multiple disputes over a potentially extended period of time. This is to be distinguished from legal instruments establishing one-off contractual arrangements;
- e) A determinacy component: the substantive obligations are indeterminate in the sense that they set down general, high level standards intended to apply in multiple different fact patterns, much like constitutional law provisions; and,
- f) A predictability/consistency function: given the general formulation of investment protection standards and conscious of the repeat function stakeholders (governments, investors, civil society) look at precedents in order to understand how obligations in the treaties are being or should be interpreted. This occurs both within the same treaty and across treaties, given the relatively high degree of homogeneity of the treaties. This means the adjudicative role is key in elaborating and further refining the precise meaning of the substantive obligations.

### **3. Comparative analysis**

- 7. Disputes flowing from systems with the characteristics identified above frequently lead to the creation of permanent bodies with full-time and tenured adjudicators to adjudicate disputes. Permanent adjudicatory bodies offer a number of advantages for adjudicating disputes in regimes which display these characteristics. These advantages operate in multiple and overlapping ways. Permanent bodies, by their very permanency, deliver predictability and consistency and manage the fact that multiple disputes arise, since they can elaborate and refine the understanding of a particular set of norms over time and ensure their effective and consistent application. This is particularly relevant when the norms are relatively indeterminate. When appointing adjudicators in a permanent setting, thought is given to a long-term approach. States have an interest that public actions can be taken and at the same time individual interests protected and they know that the balance between these interests is to be maintained in the long term. Permanent bodies with full-time adjudicators also free the adjudicators from the need to be remunerated from other sources and typically provide some form of tenure. This prevents the

adjudicators from coming under pressure to take short-term considerations into account and ensures that there are no concerns as to their impartiality.

8. It can be observed, both on the international and domestic level, that disputes in other regimes involving the characteristics enumerated above for the investment regime are normally settled before standing bodies. The members of these adjudicative bodies are composed of full time adjudicators who are appointed by states, associated with a high degree of independence and impartiality. Frequently, decisions of these standing bodies are subject to review via appeal in order to ensure correctness and greater predictability.
9. At the international level, examples include the European Convention on Human Rights with the European Court of Human Rights and the Inter-American Convention on Human Rights with the Inter-American Court of Human Rights. The legal regimes applied by these courts share many of the characteristics identified above as regards the investment regime.<sup>18</sup> Both of these bodies have permanent, standing courts with full time adjudicators appointed by the treaty parties. Although it does not have jurisdiction on claims advanced by individuals, the WTO also deals with the review of state action. These claims are heard within a structure that permits for appellate review by adjudicators appointed by the treaty parties.
10. At the domestic level, legal regimes with similar characteristics to the investment regime are also typically provided with permanent bodies for adjudication. It is a recognisable feature in domestic legal systems throughout the world that public or administrative law disputes are dealt with by standing permanent courts with independent judges that are positioned within a hierarchy that permits appellate review.
11. These examples are useful, not necessarily in all their details and features, but in showing that when creating or developing regimes with comparable characteristics to the investment regime, countries have consistently created permanent standing bodies. The next section briefly recalls the nature of the existing regime before the paper turns to consider the concerns arising within the existing regime in the light of the characteristics enumerated in section 2.

#### **4. The current dispute settlement mechanisms for the investment regime**

12. As of the 1960s the overall approach to the regulation of foreign investment has been characterised by 1) the emergence of international arbitration as a common means of settling investment disputes and 2) the increasing recognition by treaty law of the ability of investors to enforce the treaties directly against host states. The ICSID Convention, concluded in 1965 and currently binding for 161 States, represented and continues to represent a significant advance in the development of international investment law.
13. The ICSID Convention uses a model of dispute settlement based on arbitration. Tribunals are appointed by disputing parties and composed on an ad hoc basis to hear a particular dispute. Awards can be annulled on certain limited grounds by an ad hoc annulment committee. Other ISDS takes place on the basis of rules originally created for commercial arbitration, such as the UNCITRAL Arbitration Rules.

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<sup>18</sup> There are of course also significant differences, such as the nature of the remedies or the relationship to domestic litigation.

14. The ICSID Convention was conceived before the large body of investment treaties came into existence. Of the 2667 currently in force only 63 were in place in 1970<sup>19</sup> (the ICSID Convention entered into force on 14 October 1966). The drafters therefore did not have in mind that the system of dispute settlement contained in the ICSID Convention would be used, as it currently is, primarily for treaty dispute settlement. Indeed, they envisaged it would primarily be used for investment contract dispute settlement. The drafters of ICSID estimated that around 90% of cases would be under investment contracts and concessions and not under investment treaties.<sup>20</sup> This can be understood to have motivated the key design choices made in the ICSID Convention.<sup>21</sup>
15. Indeed, it was only from the 1970s onwards that states started to include provisions permitting investors to themselves enforce the treaties, in part at least on the suggestion of ICSID. This reflected the deliberate choice of states to remove treaty disputes from the state-to-state level, permitting the investor to enforce the agreement without the need to persuade its home state to espouse the claim.
16. The first cases brought at ICSID were based on arbitral clauses in investment contracts or domestic legislation on the promotion and protection of foreign investments. The AAPL dispute from 1990 was the first case where foreign investor's treaty claims were permitted on the understanding that the parties' consent to ICSID arbitration was "perfected" by the investor accepting the host state's offer to arbitrate in the treaty.<sup>22</sup>
17. The AAPL dispute initiated an increase in treaty based cases, buttressed by the changing practice of states in inserting ISDS clauses. More than 70% of ICSID cases have in fact been brought under investment treaties and only 1% exclusively under investment contracts, as illustrated in Graph 1. below.

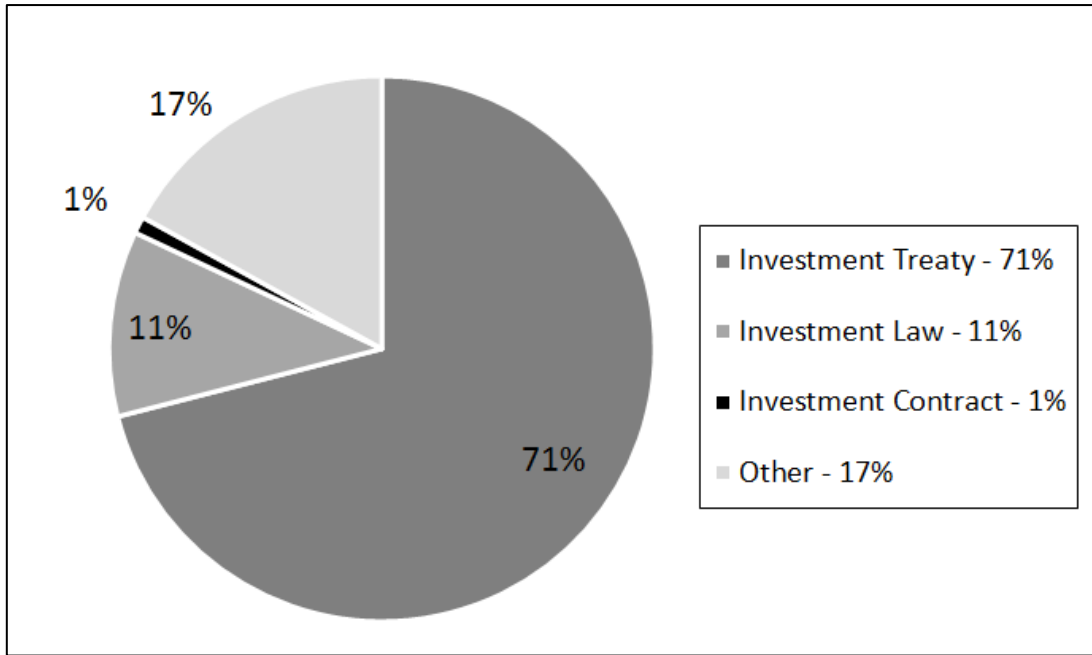
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<sup>19</sup> Source: UNCTAD Investment Policy Hub.

<sup>20</sup> See, J.C. Thomas and H.K. Dhillon "The Foundations of Investment treaty Arbitration, The ICSID Convention, Investment Treaties and the review of Arbitration Awards" (2017) 32(3) ICSID Review.

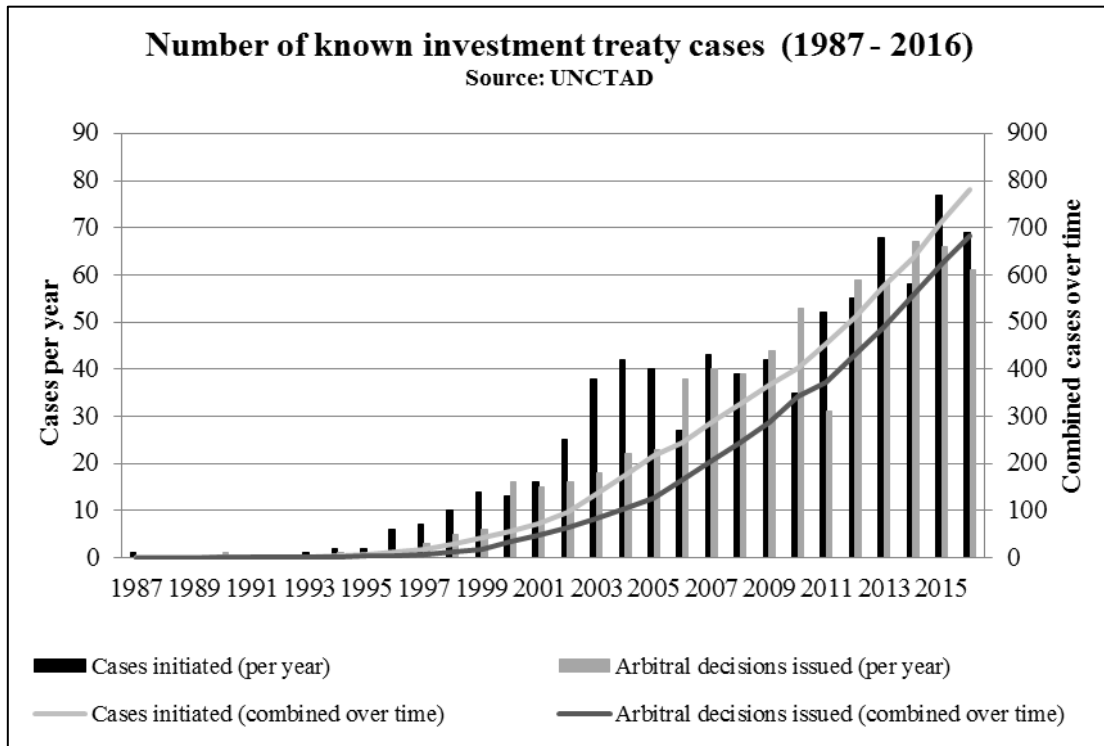
<sup>21</sup> See, J Pauwelyn, "At the Edge of Chaos ? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed," ICSID Review, Vol. 29, No. 2 (2014) pp. 372-418, in particular pp 401-402 quoting Professor Lowenfeld (a member of the US Delegation negotiating ICSID) who wrote: "None of the discussions at the consultative meetings [in preparation of the ICSID Convention], or so far as I know in the contemporary writing and legislative consideration, addressed the possibility that a host state in a bilateral treaty could give its consent to arbitrate with investors from the other state without reference to a particular investment agreement or dispute. I know that I did not mention that possibility in my testimony before the US Congress, and neither did anyone else."

<sup>22</sup> *Asian Agricultural Products Ltd (AAPL) v Democratic Socialist Republic of Sri Lanka*, ICISD Case No. ARB/87/3, Award (27 June 1990). See also J. Paulsson, "Arbitration without Privity" ICSID Review, Vol. 10, No. 2 (1995) pp. 232-257.



Graph 1. Instruments of consent in ICSID arbitrations (1976-2016).<sup>23</sup>

18. The growth of cases has come in the 1990s and in particular in the last two decades, as demonstrated in Graph 2. below.



Graph 2. Known investment treaty cases (1987 – 2016).

<sup>23</sup> Jonathan Bonnitcha, Lauge Poulsen and Michael Waibel *"The Political Economy of the Investment Treaty Regime"* Oxford University Press, 2017 P. 61 Source: Author compilation from the ICSID website, based on 573 ICSID Cases, as of August 2016.

19. The extensive network of investment treaties has given rise to a substantial and ever-growing investment arbitration case-law. The rising number of investment treaty-based cases has led to questioning of the current system of investment dispute settlement.

## **5. Concerns with the current dispute settlement mechanisms for the investment regime**

20. When the main attributes of the investment treaty regime are set against the structure of the system of arbitration for investment disputes, a number of concerns can be identified within the existing system. These concerns coincide with those identified in the Secretariat paper but also arise at a systemic level or result from the nature of the system. These concerns take on heightened significance with the knowledge of the relatively high and sustained level of cases. These concerns can be identified as follows:

### **a) The ad hoc system impacts consistency and predictability**

21. The ad hoc nature of the system impacts consistency and predictability. The ad hoc constitution of arbitral tribunals potentially influences outcomes, inasmuch as arbitrators are repeat players, or are seeking to be repeat players, in a system where the adjudicators need to be appointed afresh for each dispute. When considered at a systemic level, this can be considered as likely to lead to more fact-specific outcomes.<sup>24</sup> This does not enhance the stability and consistency of the system and hence the ability of stakeholders, be they businesses, governments or civil society actors to seek guidance on previous cases to try to determine how the rules will be applied in a particular set of circumstances.
22. There are a number of examples of inconsistent arbitral decisions on core aspects of the traditional investment protection provisions. The questions raised in those conflicting cases concern general concepts and functions of the substantive investment rules that are repeatedly raised in many disputes where consistent responses would be desirable.
23. One example is the ongoing saga on the applicability of the most-favoured nation (MFN) clauses to procedural matters (i.e. dispute resolution). While some tribunals have held that the MFN clause extends to dispute settlement provisions contained in treaties between the respondent State and third States,<sup>25</sup> other tribunals have reached the opposite conclusion.<sup>26</sup> This issue continues to be raised in many cases. An example is *APR Energy and others v. Australia* where

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<sup>24</sup> See Todd Tucker, "Inside the Black Box: Collegial Patterns on Investment Tribunals" (2016) 7(1) J Intl Disp Settlement 183–204.

<sup>25</sup> See for instance *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, para. 64; *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 103; *Gas Natural v. Argentina*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, paras. 31 and 49; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, paras. 53-66.

<sup>26</sup> See for instance *Plama Consortium Ltd v. Republic of Bulgaria* ICSID Case No. ARB/03/24, Decision on Jurisdiction, paras. 184, 223, 227; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, para. 119; *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, paras. 90-100.



the claimants are seeking to import a dispute resolution clause into a treaty that contains no consent to arbitration.<sup>27</sup>

24. In relation to the interpretation of the scope and effect of the umbrella clause, some tribunals have held that the clause would have the effect that breaches of certain contractual commitments would amount to breaches of the investment treaty,<sup>28</sup> whereas others have denied this effect for ordinary commercial contracts.<sup>29</sup>
25. Other examples include several arbitral decisions taken in the aftermath of the Argentine financial and economic crisis of 2001-2002 in relation to the necessity defence under Article XI of the US-Argentina BIT. For instance, while the *Enron* tribunal interpreted this provision by reference to the very strict test for "necessity" as a circumstance precluding wrongfulness,<sup>30</sup> the *Continental Casualty* tribunal interpreted the rule by reference to the less stringent test for "necessary" state measures developed under the law of the World Trade Organization.<sup>31</sup>
26. Counsel would not be acting with due diligence if they did not exploit every possibility to bring an argument which might be of aid to their clients. The ad hoc system creates incentives to run these arguments given there is no structure creating and enforcing consistency. The system therefore in and of itself creates additional costs. This is in addition to the obvious difficulty which arises in terms of consistency and predictability. The repeat nature of the regime and the relative indeterminate nature of obligations heighten the importance of these consistency and predictability concerns.

#### **b) Significant concerns of perception**

27. It is a core feature of the domestic and international adjudicative systems mentioned earlier, that, in the words of a Chief Justice of the English Courts, "justice should not only be done, but should manifestly and undoubtedly be seen to be done."<sup>32</sup> That statement is an expression of the decisive move away from ad hoc systems for public matters in all legal systems, led by the thinking of Jeremy Bentham, Voltaire and Alexander Hamilton.<sup>33</sup> The ad hoc nature of the investor-state arbitration wherein the arbitrators, by definition, have other activities creates significant perception problems. These perception problems derive from the fact that the professional and/or personal interests of the persons involved in the system might be perceived to have an effect on the outcomes of the disputes. Whilst the detailed reality and the complex interactions between arbitrators themselves and the actors which appoint them undoubtedly paints a more complex picture, the combination of the unidirectional nature of the system and the importance of perception, of justice being seen to be done, raises concerns.

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<sup>27</sup> *Power Rental Asset Co Two LLC (AssetCo), Power Rental Op Co Australia LLC (OpCo), APR Energy LLC v. the Government of Australia*, UNCITRAL.

<sup>28</sup> *SGS Société Générale de Surveillance s.a. (SGS) v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, para. 128.

<sup>29</sup> *SGS Société Générale de Surveillance s.a. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, para. 166.

<sup>30</sup> *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, paras. 322-345.

<sup>31</sup> *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, paras. 189-230.

<sup>32</sup> Lord Chief Justice Gordon Hewart in *R v Sussex Justices, Ex Parte McCarty* [1924] 1KB 256.

<sup>33</sup> Gaukrodger, D. (2017), "Adjudicator Compensation Systems and Investor-State Dispute Settlement", OECD Working Papers on International Investment, No. 2017/05, OECD Publishing, Paris.

**c) The limited systemic checks on correctness and consistency**

28. Another concern regarding the existing system is the limited possibility for a systemic check for correctness and consistency. Under the ICSID system, annulment is only available to correct a very limited set of errors. Article 52 of the ICSID Convention only provides for annulment in limited circumstances.<sup>34</sup> These do not touch upon the substantive correctness of the award. Similarly, domestic arbitration laws or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards limit the grounds on which recognition and enforcement of an award can be refused.
29. This means that awards can be legally incorrect but the system does not allow for them to be corrected. In *CMS v Argentina*, for example, the Annulment Committee said:

"Throughout its consideration of the Award, the Committee has identified a series of errors and defects. The Award contained manifest errors of law. It suffered from lacunae and elisions. All this has been identified and underlined by the Committee. However the Committee is conscious that it exercises its jurisdiction under a narrow and limited mandate conferred by Article 52 of the ICSID Convention. The scope of this mandate allows annulment as an option only when certain specific conditions exist. As stated already (paragraph 136 above), in these circumstances the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal."<sup>35</sup>

30. This problem of ensuring correctness compounds the other features of the existing regime leading to lack of consistency and predictability mentioned above. The significance of this is again linked to the repeat function of potential disputes and the relative level of determinacy. It is notable that constitutional and supreme courts function to interpret general and relatively indeterminate norms, fleshing them out and clarifying them over time. These often have important effects on legitimising and stabilising understandings of the underlying substantive rules. An example of this is the WTO Appellate Body, which with a number of foundational reports in the late 1990s and early 2000s effectively calibrated the balance between the free trade obligations of the WTO Agreements and the ability of WTO Members to regulate.<sup>36</sup>

**d) Nature of appointment of adjudicators**

31. When states appoint adjudicators *ex ante* (before particular disputes arise), they act in their capacity as treaty parties and have an incentive to balance their interests, ensuring the selection of fair and balanced adjudicators that they would be happy to live with whether a future case is

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<sup>34</sup> See Article 52(1) ICSID-Convention ("Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:(a) that the Tribunal was not properly constituted;(b) that the Tribunal has manifestly exceeded its powers;(c) that there was corruption on the part of a member of the Tribunal;(d) that there has been a serious departure from a fundamental rule of procedure; or(e) that the award has failed to state the reasons on which it is based.").

<sup>35</sup> *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Annulment Decision, para. 158.

<sup>36</sup> Wagner, Markus, *Regulatory Space in International Trade Law and International Investment Law* (March 16, 2014). *University of Pennsylvania Journal of International Law*, Vol. 36, No. 1, 2014-2015; *University of Miami Legal Studies Research Paper No. 2014-10*.

brought by their investors or against them as respondents. In arbitration, however, the choice of arbitrator is made not in advance but *ex post* (i.e. at the time a dispute has arisen), which means that investors and state respondents make decisions about arbitrators with a view to best serving their interests in that particular case. This leads them to focus on arbitrators who are already known in the system and who are considered as having a predisposition towards one or other side (being perceived as investor or state-friendly). On the one hand, that is a natural reaction to the paradigm in which the disputing parties operate as that represents the safest option in the circumstances.<sup>37</sup> On the other, however, it means that parties are looking at appointment to the dispute primarily in their capacity as disputing party and not in their capacity as sovereigns, where their long term interests lies in providing for adjudicative bodies that faithfully interpret and apply the underlying substantive provisions. This is heightened by the repeat nature of potential disputes, the relative indeterminacy, the vertical relationship and both the public international law and public law features of the system.

32. In addition to encouraging the appointment of predisposed (i.e. perceived as investor or state friendly) arbitrators and a small number of repeat players, one of the problems with this approach is that it leads to a continued high concentration of persons who have gained their experience as arbitrators primarily in the field of commercial arbitration involving disputes of "private law" rather than public international law disputes. Such persons often are professionally less familiar with public international law (investment treaties are of course a field of public international law) and public law (which is important because the cases concern the actions of states in their sovereign capacity). Finally, the ad hoc appointment system also impacts on the regional and gender diversity of the individuals chosen to sit as arbitrators, with the system leading to relatively limited diversity on both fronts.

**e) Significant costs**

33. As already noted, a problem with the system is the manner in which it generates costs.<sup>38</sup> This comes from the lack of consistency and predictability inherent in the system where diligent counsel will run arguments which might have been dismissed in another case because it is always possible that another tribunal will accept them. Costs are also generated by the need to identify and then appoint arbitrators. Moreover, the disputing parties themselves bear the burden of the costs of the arbitrator's fees and the fees of the arbitral institutions.
34. These elements combine with the already significant costs of litigating a dispute, in particular in hiring specialised counsel, and the lengthy nature of litigation to make the overall costs of bringing a claim under the existing system potentially prohibitive for a significant number of smaller and medium sized investors.

**f) Lack of transparency**

35. The existing system, being largely based on or derived from commercial arbitration has historically not regarded transparency as being a necessary component of dispute settlement.

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<sup>37</sup> Roberts, Anthea *"Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States"* (2010) *American Journal of International Law*, 104 (4) 179-225.

<sup>38</sup> See, Gaukrodger, D. and K. Gordon (2012), *"Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community"*, OECD Working Papers on International Investment, 2012/03, OECD Publishing, p. 19 et seq.

This has meant that information is not always provided to the public on investment disputes. Whilst significant steps have been taken to improve this situation, through the amendments of the ICSID Arbitration Rules to provide for certain levels of transparency, to the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency") to more regular acceptance by disputing parties of the desirability of transparency, this remains a problem with the existing system.

## 6. Conclusion

36. There are significant concerns with the existing ISDS system. These can be identified as:
- the lack of consistency and predictability flowing from the ad-hoc nature of the system;
  - significant concerns arising from the perception generated by the system;
  - limited systemic checks on correctness and consistency in the absence of an effective appeal mechanism;
  - the nature of the appointment process impacting the outputs of the adjudicative process;
  - significant costs; and,
  - a lack of transparency.
37. These concerns are systemic in nature. That is they derive from the interplay of multiple elements of the current system, but above all the ad hoc nature of the tribunals and the lack of appellate review. As demonstrated above, the contemporary investment regime is strongly characterised by repeat disputes, relative indeterminacy and vertical relationships in a context of public international law and public law situations. A comparison shows that the international community and states individually have typically chosen to create or develop permanent standing bodies to adjudicate disputes in the context of such regimes.

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## General Assembly

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

#### Submission from the European Union and its Member States

This note reproduces a submission received on 18 January 2019 from the European Union and its Member States in preparation for the thirty-seventh session of Working Group III. The submission is reproduced as an annex to this note in the form in which it was received by the Secretariat. The submission included as its annex document [A/CN.9/WG.III/WP.145](#), a submission from the European Union on 20 November 2017 in preparation for the thirty-fifth session of Working Group III. That document is also made available to the Working Group for discussion at this session.

## **Establishing a standing mechanism for the settlement of international investment disputes**

### **1. Introduction**

1. This submission sets out the views of the European Union (EU) and its Member States on the possible establishment of a standing mechanism for the settlement of international investment disputes. This submission is relevant to the initial work of the Working Group in phase three of its work. It sketches the outline of a reform option, which it is submitted the Working Group should pursue.

2. It should be clear that this submission is intended to contribute to a multilateral reflection on the best methods to reform investor-state dispute settlement (ISDS). It sets out preliminary ideas, for discussion in the Working Group, which could provide responses to the concerns which have been identified by the Working Group as requiring reform. It is the outcome of considerable reflection of the EU and its Member States on possible multilateral reform over the last years, which the EU and its Member States looks forward to discussing further on a multilateral basis within UNCITRAL.

3. After recalling the concerns already identified by the Working Group in respect of which reform is considered desirable (part 2), this submission elaborates on what a standing mechanism to resolve disputes could look like (part 3), and then expands on how such a mechanism, bringing about systemic structural change, is the only type of reform which can effectively respond to all the concerns identified (part 4).

### **2. Concerns in respect of which reform is desirable**

#### **2.1 Introduction**

4. The EU and its Member States recall the views expressed by the G77 and China “that private international capital flows, particularly foreign direct investment, along with a stable international financial system, are vital complements to national development efforts, and that foreign direct investment can help create skill-intensive and better-paid jobs, promote the transfer of knowledge, raise productivity and add value to exports”.<sup>39</sup>

5. The EU and its Member States support this view, considering that foreign direct investment is an important element in encouraging sustainable development and achieving the Sustainable Development Goals and that it is important therefore to put investment dispute

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<sup>39</sup> Statement of the Group of G77 and China delivered by Ecuador at the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) 36th session, 29 October–2 November 2018.

settlement on a stable footing in the medium-to-long term given the concerns which have been expressed in the Working Group.

## 2.2 Concerns in respect of which a conclusion has been reached on the desirability of reform

6. This submission takes as its starting point the concerns identified by the Working Group in respect of which reform is considered desirable. These can be summarized as follows.

(i) Concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals:

- concerns related to unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law by ISDS tribunals;<sup>40</sup>
- concerns related to the lack of a framework for multiple proceedings that were brought pursuant to investment treaties, laws, instruments and agreements that provided access to ISDS mechanisms;<sup>41</sup> and
- concerns related to the fact that many existing treaties have limited or no mechanisms at all that could address inconsistency and incorrectness of decisions.<sup>42</sup>

(ii) Concerns pertaining to arbitrators and decision makers:

- concerns related to the lack or apparent lack of independence and impartiality of decision makers in ISDS;<sup>43</sup>
- concerns relating to the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules;<sup>44</sup>
- concerns about the lack of appropriate diversity amongst decision makers in ISDS;<sup>45</sup> and
- concerns with respect to the mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules.<sup>46</sup>

(iii) Concerns pertaining to cost and duration of ISDS cases:

- concerns with respect to cost and duration of ISDS proceedings;<sup>47</sup>

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<sup>40</sup> [A/CN.9/964](https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf) – Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (advance copy), 6 November 2018, para. 40, [https://uncitral.un.org/sites/uncitral.un.org/files/draft\\_report\\_of\\_wg\\_iii\\_for\\_the\\_website.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf).

<sup>41</sup> Ibid., para. 53.

<sup>42</sup> Ibid., para. 63.

<sup>43</sup> Ibid., para. 83.

<sup>44</sup> Ibid., para. 90.

<sup>45</sup> Ibid., para. 98.

<sup>46</sup> Ibid., para. 108.

<sup>47</sup> Ibid., para. 123.

- concerns with respect to allocation of costs by arbitral tribunals in ISDS;<sup>48</sup> and
- concerns with respect to security for cost.<sup>49</sup>

### 2.3 Other concerns

7. It is noted that the Working Group has not entirely finished its consideration of concerns in respect of which reform is desirable. The EU and its Member States are open to including, in the option outlined below, solutions to issues related to third party funding should the Working Group decide that reform is desirable.<sup>50</sup>

8. It is also noted that several delegations have referred to the importance of considering means of amicable settlement of disputes. Elements related to this issue have been included in this submission and the EU and its Member States remain ready to examine further ideas in this respect.

9. To the extent that other concerns are identified and reform is considered desirable, the EU and its Member States are prepared to examine how they could be included in the options set out in this submission.

### 2.4 Systemic nature of the concerns

10. The EU and its Member States have consistently taken the view that these different concerns are intertwined and are systemic. Addressing one specific concern would leave other concerns unaddressed. For example, the concerns relating to costs and duration are related to the concerns with the lack of predictability. Costs are increased when the interpretation of the law is unstable, because different ad hoc tribunals may always potentially come up with divergent interpretations, and hence diligent disputing parties will put forward every plausible argument, including some which would not be entertained if the interpretation of the relevant norm was stable. Thus, the concern as regards the costs of the system is linked to the concern as regards the lack of predictability which is in turn linked to the concerns with the methods of arbitrator appointments which is in turn linked to the concerns with arbitrators' independence and impartiality. These have been outlined in the submission already made by the EU to Working Group III in which it argued that the nature of the concerns is systemic.<sup>51</sup> That submission is annexed to this submission for ease of reference.

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<sup>48</sup> Ibid., para. 127.

<sup>49</sup> Ibid., para. 133.

<sup>50</sup> Ibid., para. 134.

<sup>51</sup> See [A/CN.9/WG.III/WP.145](http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State_settlement_(ISDS)_-Submission_from_the_European_Union,_http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html) – Possible reform of investor-State dispute settlement (ISDS) – Submission from the European Union, [http://www.uncitral.org/uncitral/en/commission/working\\_groups/3Investor\\_State.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html) reproduced in Annex 1 for ease of reference.



### **3. Systemic response to the identified concerns – standing mechanism for dispute settlement**

11. This section sets out ideas in respect of the possible establishment of a standing mechanism for the settlement of investment disputes.

#### **3.1 Dispute avoidance mechanisms**

12. It is desirable that disputes be decided amicably. Mechanisms should be provided to encourage such amicable settlements. These could include, for instance, conciliation and mediation. Particular value-added could be brought through the provision of institutional support, for example through maintaining a list of conciliators or mediators and above all providing support in efforts to bring about amicable settlements.

#### **3.2 First instance**

13. A standing mechanism should have two levels of adjudication. A first instance tribunal would hear disputes. It would conduct, as arbitral tribunals do today, fact finding and then apply the applicable law to the facts. It would also deal with cases remanded back to it by the appellate tribunal where the appellate tribunal could not dispose of the case. It would have its own rules of procedure.

#### **3.3 Appellate tribunal**

14. An appellate tribunal would hear appeals from the tribunal of first instance. Grounds of appeal should be error of law (including serious procedural shortcomings) or manifest errors in the appreciation of the facts. It should not undertake a de novo review of the facts.

15. Mechanisms for ensuring that the possibility to appeal is not abused should be included. These may include, for example, requiring security for cost to be paid.

#### **3.4 Full-time adjudicators**

16. Adjudicators would be employed full-time. They would not have any outside activities.<sup>52</sup> The number of adjudicators should be based on projections of the workload of the permanent body.

17. They would be paid salaries comparable to those paid to adjudicators in other international courts.

#### **3.5 Ethical requirements**

18. Adjudicators would be subject to strict ethical requirements. High ethical standards would be ensured in part through the

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<sup>52</sup> It is noted that most domestic and international courts allow full-time adjudicators to engage in teaching: this could be permitted.

adjudicators being full-time and prohibited from having other activities, in particular other remunerated or political activities. Adjudicators would be required to ensure that there is no risk of conflict of interest in particular cases. To this end, adjudicators should disclose past interests, relationships or matters that could affect their independence or impartiality and, after the end of their term, they should remain subject to obligations to ensure that their independence and impartiality in office are not called into question.

19. Independence from governments would be ensured through a long-term non-renewable term of office (many international tribunals provide for nine year terms, for example), combined with a robust and transparent appointment process.

### **3.6 Qualifications**

20. It is suggested to use comparable qualification requirements as for other international courts. That would imply that adjudicators have the qualifications required in their respective countries for appointment to the highest judicial offices or are jurisconsults of recognised competence in international law (see for example, Article 2 of the Statute of the International Court of Justice). Specific criteria could be set out on required expertise in certain areas of law, and it would be desirable to have persons with judicial experience and case-management skills.

### **3.7 Diversity**

21. Mechanisms should be used to ensure that both geographical and gender diversity is ensured. Article 36(8) of the Rome Statute of the International Criminal Court provides an example of the types of rules which can be set for adjudicators in a permanent body.<sup>53</sup>

### **3.8 Appointment process**

22. It is vital to ensure the neutrality of adjudicators. A robust and transparent appointment process would be necessary to ensure the independence and impartiality of the adjudicators. All ideas to ensure

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<sup>53</sup> The Assembly of States Parties, that elects the International Criminal Court (ICC) judges, is required to “take into account the need for the representation of the principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges.” (Art. 36(4)(8)(a)). For the election of ICC judges, regional and gender voting requirements have been established. According to those requirements, at least six judges should be female and at least six male. There are currently 6 female judges out of 18 at the ICC. Additionally, each regional group of the United Nations has at least two judges. If a regional group has more than sixteen states parties this leads to a minimum voting requirement of three judges from this regional group, see Resolution of the Assembly of the State Parties, *Procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court (ICC-ASP/3/Res.6)*, paras. 20(b) and (c), available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Publications/Compendium/Resolution-ElectionJudges-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/Resolution-ElectionJudges-ENG.pdf).

neutrality should be considered, but inspiration can be drawn, *inter alia*, from recently created international or regional courts which have screening mechanisms to ensure that the adjudicators appointed do in fact meet the necessary standards of judicial independence.<sup>54</sup> The persons appointed to the screening mechanisms should be independent. These could, for example, be *ex officio* appointments (for example, the President of the International Court of Justice, other senior or recently retired judges from international or domestic supreme courts). Candidates for the standing mechanism could be both proposed by the contracting parties and apply directly for appointment. Consideration should be given to allowing non-nationals of contracting parties to be appointed. They would be subject to a vote requiring a significant majority of votes of the contracting parties.

23. When appointing adjudicators to the standing mechanism, the contracting parties would be expected to appoint objective adjudicators, rather than ones that are perceived to lean too heavily in favour of investors or states, because they are expected to internalize not only their defensive interests, as potential respondents in investment disputes, but also their offensive interests, i.e. the necessity to ensure an adequate level of protection to their investors. They will therefore take a longer term perspective.<sup>55</sup>

24. To hear each particular case, adjudicators would be appointed to divisions of the standing mechanism on a randomised basis to ensure that the disputing parties would not be in a position to know in advance who will hear their case.<sup>56</sup>

### 3.9 State-to-state dispute settlement

25. Most investment treaties provide for investor-state dispute settlement and state-to-state dispute settlement. Some investment treaties, like other treaties, provide only for state-to-state dispute settlement. It should also be possible to use the standing mechanism for state-to-state dispute settlement.

### 3.10 Mechanisms for dialogue with treaty parties

26. Many modern treaties provide for the ability of the treaty parties to adopt binding interpretations of the underlying obligations. This is provided, for example, in Article IX.2 of the WTO Agreement. It is

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<sup>54</sup> Examples include the International Criminal Court, the European Court of Human Rights, the Caribbean Court of Justice and the Court of Justice of the European Union.

<sup>55</sup> See Anthea Roberts, *Would a Multilateral Investment Court be Biased? Shifting To a Treaty Party Framework of Analysis*, *EJIL: Talk!*, 27 April 2017, <https://www.ejiltalk.org/would-a-multilateral-investment-court-be-biased-shifting-to-a-treaty-party-framework-of-analysis/>, and Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States*, *American Journal of International Law*, 2010, 104 (4), pp. 179, 180, 182–195.

<sup>56</sup> This idea draws on Rule 6(2) of the Working procedures for appellate review of the Appellate Body of the WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm).

also common that recent investment protection treaties or chapters provide for the possibility of binding interpretations. Such binding interpretations are provided in order to give guidance to dispute settlement tribunals. It would be necessary to ensure that this possibility is maintained and indeed expanded to cover treaties that do not explicitly provide for it. In a multilateral standing mechanism covering multiple bilateral agreements it would be necessary to ensure that the parties to a bilateral agreement would retain control over the interpretation of their agreement by being able to adopt binding interpretations.

27. The non-disputing party to the treaty in question should also be able to participate in the dispute. In addition, it should be considered whether and, if so, under what conditions other governments that are party to the instrument establishing the standing mechanism should be able to intervene in disputes on questions of interpretation of systemic importance under treaties to which they are not contracting parties, while ensuring at the same time that this does not compromise the ability of the parties to an agreement to retain control over its interpretation.

### **3.11 Transparency and third parties.**

28. A high level of transparency of the proceedings should be ensured. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration would be a good example of a minimum standard which could be applied.

29. It should also be provided that third parties, for example representatives of communities affected by the dispute, be permitted to participate in investment disputes.

### **3.12 Enforcement**

30. Effective enforcement of awards of a standing mechanism is vital. Given that it would feature an appeal mechanism, there is no need for review of awards at the domestic level or through ad hoc international mechanisms (i.e. the function of annulment or set-aside currently exercised by national courts and ICSID annulment committees would be exercised by the broader review provided by the appeal mechanism). Therefore, there should not be review of such awards at domestic level.

31. It is suggested that the instrument creating a standing mechanism should create its own enforcement regime, which would not provide for review at domestic level.

32. It would also be the case that awards under a future standing mechanism could additionally be capable of enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Enforcement is possible for awards made by “permanent arbitral bodies” (see Article 1(2) of the Convention). There is no reason to consider that awards of a standing mechanism could not be regarded as such of a “permanent arbitral body” and hence enforceable, provided of course that the disputing parties had

given their consent, which by definition they would have done.<sup>57</sup> It might be necessary to include mechanisms to prevent the disputing parties activating set-aside procedures at a later stage.<sup>58</sup>

### 3.13 Financing

33. Contributions to the financing of a standing mechanism would be made, in principle, by the contracting parties. These would be weighted in accordance with their respective level of development, so that developing or least developed countries would bear a lesser burden than developed countries. The weighting mechanism adopted could be derived from or based on the weighting applied in other international organizations. Consideration should also be given to requiring that users of the standing mechanism pay certain fees, although care should be taken not to tie these fees directly to the remuneration of the adjudicators and should not be so high as to become a hurdle for small and medium sized enterprises to bring a case.

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<sup>57</sup> See also Gabrielle Kaufmann-Kohler and Michele Potestà, *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*, CIDS, 2016: “154. In the authors’ view, there would be good reason to qualify the ITI [International Tribunal for Investments, with a built-in appeal] as a “permanent arbitral body” under the Convention, both under the “ordinary meaning” of Article I(2), and under an “evolutionary interpretation” of the phrase which would take account of developments in international law and arbitration since 1958. However, this does not seem of primary importance. What matters – as it clearly results also from the travaux – is the consensual basis of the adjudicator’s jurisdiction, which would be clearly met for the ITI (see supra at V.B). 155. That said, while not strictly needed, UNCITRAL may, after the adoption of the ITI Statute, consider issuing a “recommendation”, similar to the one it made in connection with the interpretation of Article II(2) and Article VII(1) of the NYC. Such a recommendation would be aimed at clarifying that the ITI falls within the ambit of the NYC, as a “permanent arbitral body” under Article I(2) or otherwise. It would certainly provide comfort to domestic courts faced with the enforcement of ITI awards and would likely improve consistency in the interpretation by courts.”, pp. 56–57, [http://www.uncitral.org/pdf/english/CIDS\\_Research\\_Paper\\_Mauritius.pdf](http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf).

Awards by the Iran-US Claims Tribunal have been regarded as being enforceable under the New York Convention, *cfr.* also Kaufmann-Kohler and Potestà (CIDS 2016), p. 56, fn. 294.

<sup>58</sup> For an example of such a mechanism, see the *Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part* which provides in Article 3.22 that “Final awards issued pursuant to this Section by the Tribunal shall be binding between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy,” and in Article 3.7(1)(f)(iii) that requires a declaration that the claimant “will not seek to appeal, review, set aside, annul, revise or initiate any other similar procedure before an international or domestic court or tribunal, as regards an award pursuant to this Section” (see [http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc\\_156731.pdf](http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156731.pdf)). See also the *Comprehensive Economic and Trade Agreement between Canada and the EU and its Member States* (Article 8.28(9)(b)) and the *Investment Protection Agreement between Viet Nam and the EU and its Member States* (Articles 3.36(3)(b) and 3.57(1)(b)).

34. Contributions could be managed through a trust fund, as for the Caribbean Court of Justice. This would ensure that the standing mechanism could effectively operate on a medium-to-long term perspective.

### **3.14 Application to existing treaties, opt-in mechanism and jurisdiction**

35. It is vital that a standing mechanism be able to rule on disputes under the large stock of existing and future agreements. This would be done through a combination of (1) accession to the instrument establishing the standing mechanism and (2) a specific notification (“opt-in”) that a particular existing or future agreement would be subject to the jurisdiction of the standing mechanism. Once the contracting parties to an agreement that are also parties to the instrument establishing the standing mechanism have made a notification concerning a particular agreement, then the standing mechanism would decide disputes arising under that agreement. For agreements concluded after the establishment of the standing mechanism, a reference could be made in the agreement conferring jurisdiction on the standing mechanism, or it could be added later as described above. It should be explored whether the instrument establishing the standing mechanism could also be utilized if only the respondent state is party to the instrument.

36. This model would provide for flexibility and has already been utilized in the Mauritius Convention on Transparency in ISDS and in the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the “BEPS Convention”).<sup>59</sup> The notion of transferring jurisdiction from one body (here ad hoc tribunals) to another is also well established in public international law.<sup>60</sup>

37. This would imply that the precise scope of jurisdiction of the standing mechanism and the substantive rules that it would apply are determined by the underlying treaties. This implies that the substantive rules that the standing mechanism would apply may evolve with the underlying treaty rules.

### **3.15 Assistance mechanism**

38. A mechanism should be foreseen to ensure that all disputing parties can operate effectively in the investment dispute settlement regime. Such mechanism could aid least developed and developing

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<sup>59</sup> For more information, see <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm>. For the possible use of the Mauritius Convention approach to the establishment of a standing mechanism see Gabrielle Kaufmann-Kohler and Michele Potestà, *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*, CIDS, 2016, [http://www.uncitral.org/pdf/english/CIDS\\_Research\\_Paper\\_Mauritius.pdf](http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf).

<sup>60</sup> See Article 36(5) of the Statute of the International Court of Justice, by reference to declarations submitting to the jurisdiction of the Permanent Court of International Justice.

countries in litigation in international investment disputes and possibly in other aspects of the application of international investment law. Such an initiative may form part of the process of establishing a standing mechanism. A scoping and feasibility study, involving input from developing countries and experts, on ways to ensure adequate legal of defence in proceedings under international investment agreements, is currently being prepared.

### **3.16 Open architecture**

39. The EU and its Member States consider, as it is set out in the next section, that only a two-tier permanent structure can remedy all the identified structural concerns in the current system. A certain level of flexibility would, nevertheless, need to be built into a standing mechanism. This would be necessary, for example, for countries that might want to use the standing mechanism for state-to-state dispute settlement, but which do not use investor-state dispute settlement in their agreements. It may also be the case that some countries may like to retain the flexibility to utilize only an appeal mechanism even if, in the view of the EU and its Member States, such an approach would not effectively resolve a number of the concerns which have been identified. If that is indeed the case, the open architecture of the standing mechanism could be a way of providing for such flexibility for those countries.<sup>61</sup>

## **4. Creating such a standing mechanism responds to the identified concerns**

40. It is submitted that establishing a standing two-tier mechanism is the only available option that effectively responds to all the concerns identified in the Working Group. In addition, it is the only option that captures the intertwined nature of those concerns.

### **4.1 Consistency and correctness**

#### *Predictability and consistency*

41. Predictability and consistency can only be effectively developed through the establishment of a standing mechanism with permanent, full-time adjudicators. This is the key problem of the existing system. Under the current system, stakeholders cannot have reasonable expectations that a ruling in one dispute will be followed in another due to the ad hoc nature of the tribunals. In a standing mechanism a sense of “continuous collegiality” will build up.<sup>62</sup>

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<sup>61</sup> See Anthea Roberts, *UNCITRAL and ISDS Reforms: Moving to Reform Options ... the Politics*, EJIL Talk, 8 November 2018, <https://www.ejiltalk.org/uncitral-and-isds-reforms-moving-to-reform-options-the-politics/#more-16628>, and Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, *American Journal of International Law*, 2018, 112, pp. 410, 431–432.

<sup>62</sup> “The ICSID system is based on institutionally supported arbitral tribunals and annulment committees. It operates with a large number of arbitrators on the same

42. Greater predictability of legal interpretation will in turn make decision-making more efficient, and hence more cost-effective, and likely reduce the amount of cases overall. Consistent case-law both at the first and appeal level will allow a stable understanding of provisions to develop and hence reduce “adventurous” claims. A diligent investor will not bring a claim based on a legal argument that has been rejected by a standing mechanism, whilst it is more likely to consider this to be worth the effort as regards an ad hoc tribunal established afresh for each dispute.

*Correctness – an appeal mechanism can correct errors of law and egregious factual errors*

43. An appeal mechanism will ensure correctness. It will do this by reviewing the legal correctness of the decisions taken at first instance and by correcting any legal errors. This procedural correctness is in itself an important feature of domestic legal systems, since it ensures a check on those who would otherwise be independent decision-makers. In addition, given the hierarchical status of the appeal mechanism, it will gradually bring about greater consistency.

44. A two-tier mechanism is the most effective structure for ensuring predictability and consistency. In the same institution there will be a greater degree of deference towards an appeal mechanism as compared to that likely to be displayed by ad hoc tribunals. This is important to keep in mind given that not every case will go on appeal.

45. Remand is a common feature of domestic legal systems. It allows appeal courts to send cases back to lower courts in order to complete the resolution of the dispute. It is particularly used when the factual record is incomplete and so the appeal court cannot dispose of the case by itself. Providing for such a facility is a desirable feature of an effective appeal mechanism, otherwise the litigants need to start the litigation all over again. However, it is problematic to operate remand with ad hoc first instance tribunals because they will already be disbanded after they have delivered their award and the appeal will be rendered sometime after that.

*Deliberative process and relationship with other areas of law*

46. A standing mechanism will also be better positioned to gradually develop a more coherent approach to the relationship between investment law and other domains, in particular domestic law and other fields of international law. For instance, the WTO Appellate Body has made a number of pronouncements on the relationship of WTO law with other fields of international law, which have been

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hierarchical level who work in varying compositions in each case. Accordingly, over time, different arbitrators decide on the same or at least very similar interpretative legal issues. This absence of a permanent tribunal and the corresponding personnel discontinuity result in a relatively low level of internal pressure towards “continuous collegiality” [footnote omitted] and stand in contrast to permanent judicial institutions such as the ICJ or the CJEU [footnote omitted].”, see Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration*, Brill Nijhoff, Leiden and Boston, 2017, p. 164.



helpful in elaborating the interactions between different fields of law.<sup>63</sup>

## 4.2 Decision makers

*Addressing ethics concerns, eliminating double-hatting, removing incentives flowing from the current system*

47. A system of full-time adjudicators will be better able to ensure independence and impartiality. In fact, it is only by moving away from appointment by the disputing parties to a system of adjudicators on long, non-renewable terms that the concerns on independence and impartiality can be definitively addressed. This will bring double-hatting (i.e. acting as counsel and arbitrator) to an end.<sup>64</sup> Furthermore, it will remove incentives flowing from the phenomenon of repeat appointments. It will remove the link between arbitrators (or candidates to be arbitrators) and counsel for investors and states who are the gate-keepers to appointment. The very existence of these perceived incentives plays a large role in raising concerns around the legitimacy of the regime.<sup>65</sup> An appeal mechanism alone cannot remedy the lack of independence and impartiality since the main factor driving the concern is the ad hoc party-appointment system.

48. This thinking is in line with the practice of international courts not to allow their judges to have other external activities. For example, the International Court of Justice has recently decided that its sitting Members would not act as arbitrators in investor-state dispute settlement or in commercial arbitration.<sup>66</sup>

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<sup>63</sup> See, for instance, Appellate Body Report, *US – Gasoline*, p. 17: “[T]he Appellate Body has been directed, by Article 3(2) of the DSU, to apply [“customary rules of interpretation of public international law”] in seeking to clarify the provisions of the General Agreement and the other “covered agreements” of the Marrakesh Agreement Establishing the World Trade Organization (the “WTO Agreement”). That direction reflects a measure of recognition that the *General Agreement is not to be read in clinical isolation from public international law.*” (emphasis added).

<sup>64</sup> See Malcolm Langford, Daniel Behn and Runar Hilleren Lie, *The Revolving Door In International Investment Arbitration*, *Journal of International Economic Law*, 2017, 20 (2), p. 328, <https://doi.org/10.1093/jiel/jgx018>.

<sup>65</sup> “Judges in courts in advanced economies appear to be rarely subject to challenge in public debate or to disqualification on the basis that they are structurally subject to financial incentives affecting outcomes. As a matter of institutional design, permanent appointments and salaries are generally seen as important elements in achieving public confidence on these issues. Beyond institutional matters, domestic legal systems also apply rules to the individual pecuniary interests of particular judges. Like the provision of salaries, these rules are generally seen as contributing to judicial independence and public confidence in the justice system.”, see David Gaukrodger, *Adjudicator Compensation Systems and Investor-State Dispute Settlement*, OECD Working Papers on International Investment, 2017/05, OECD Publishing, Paris, p. 20, <https://doi.org/10.1787/c2890bd5-en>.

<sup>66</sup> As announced by President Yusuf on 25 October, in his annual address to the General Assembly, see <https://www.icj-cij.org/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf>. “Cumulating the roles of ICJ judge and arbitrator

*Expertise – stronger background in public international law*

49. Requiring expertise in public international law will remedy a concern that a significant number of adjudicators in the current system have limited expertise in public international law. Such expertise is necessary given the public international law foundations of the regime. Expertise in judging, given the public law nature of the regime, and in detailed fact-finding would also bring benefits.

*Diversity – geographical and gender. Impossibility to address this in the current system*

50. A permanent two-tier system provides more opportunities for the appointment of adjudicators from underrepresented regions and to seek gender balance. This is because selection criteria could be built-in which would ensure geographical and gender diversity. This will not happen without moving away from the system of party-appointment because in such a system the disputing parties will naturally default to arbitrators with a known profile.<sup>67</sup> An appeal mechanism alone will provide fewer opportunities for bringing about diversity.

#### **4.3 Duration and costs**

51. A standing mechanism will lead to a reduction of the costs and duration of proceedings in a number of ways, which would contribute to ensure effective access for small and medium-sized enterprises to the standing mechanism.

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(or, as the report called it, “moonlighting”) could potentially impact, or be perceived to impact, the judge’s independence and impartiality”, see Marie Davoise, *Can’t Fight the Moonlight? Actually, You Can: ICJ Judges to Stop Acting as Arbitrators in Investor-State Disputes*, *EJIL: Talk!*, 5 November 2018, <https://www.ejiltalk.org/cant-fight-the-moonlight-actually-you-can-icj-judges-to-stop-acting-as-arbitrators-in-investor-state-disputes/>.

<sup>67</sup> See Taylor St. John, Daniel Behn, Malcolm Langford and Runar Lie, *Glass Ceilings And Arbitral Dealings: Explaining The Gender Gap In International Investment Arbitration*, forthcoming publication, 1 January 2019, explaining the structural flaw regarding gender parity in the existing ISDS system: “[W]e articulate an informal norm of “previous experience” within the appointment process and why this norm serves as a barrier for increasing the proportion of females appointed as arbitrators. The informal norm is that parties—counsel and their clients—seek to appoint someone they consider a known, predictable quantity. [...] An informal norm of appointing only known quantities leads to a system with very few new entrants. [...] Once you are in the club, you are in, but there are very few opportunities for getting the first appointment. [...] In theory, party appointment is not related to gender. Yet in practice, party appointment may reinforce existing patterns of gender disparity, in particular because this strong norm of ‘previous experience’ militates against new entrants, who likely have a higher proportion of females than the existing club.”, pp. 10–11, and “If we assume that current trends continue, women will receive 25% of arbitral appointments only in the year 2100. Thus, our results lead us to be pessimistic about the likelihood of change in the gender diversity of investment arbitration without the elimination of party appointment.”, p. 21.

52. First, time will not be spent choosing arbitrators. ICSID estimates that on average it takes 6–8 months to appoint arbitrators.<sup>68</sup> The appointment of arbitrators also implies a cost, as counsel spend time considering which arbitrators would best suit the interests of their client. The time spent appointing tribunal members is considered to be one of the three most time consuming elements of ISDS proceedings and hence will involve significant counsel costs.<sup>69</sup>

53. Second, significantly less time and money would be spent on challenges. Under the current ICSID rules, proceedings are suspended whilst challenges are resolved. A permanent mechanism would remove entirely, or in very large part, the need for and frequency of challenges. Instead, adjudicators would be considered independent and impartial on account of their tenure and it would only be in very specific limited cases that a potential conflict of interest might arise and would need to be dealt with.

54. Third, adjudicators in a standing mechanism will not have incentives that may impact on costs and duration. For example, the fact that their remuneration would not be linked to the time spent on a particular case would remove perceived incentives to prolong the time of proceedings in terms of management of the case. It is more likely to lead to better case management. For example, permanent adjudicators would have no interest in longer pleadings or longer hearings than strictly necessary. It has been argued that arbitrators are loath to disagree with appointing counsel for example on the length of hearings or on the utility of post-hearing briefs.<sup>70</sup>

55. Fourth, predictability will impact on costs and duration. Once a particular interpretation of a norm is established (e.g. by consistent rulings of first instance tribunals or by an appeal mechanism), then it will not be relitigated. Conversely, the current system encourages relitigation because there is no guarantee that one ad hoc tribunal will follow an interpretation, however well-reasoned, of another ad hoc tribunal. Removing this lack of predictability will therefore also reduce the costs and duration of proceedings.

56. A standing mechanism will also bring a significant advantage in the management of multiple claims. The more treaties are subject to the jurisdiction of the standing mechanism, the more effective the standing mechanism will be in handling related cases brought under different treaties (e.g. in avoiding or better handling a CME/Lauder

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<sup>68</sup> “Average duration from registration to constitution of the Tribunal: 6 to 8 month”, see Gonzalo Flores (Deputy Secretary-General of ICSID), *Duration of ICSID proceedings*, Presentation, Inter-sessional Regional Meeting on ISDS Reform, Incheon, Korea, 10 September 2018.

<sup>69</sup> See [A/CN.9/930/Rev.1](http://www.uncitral.org/uncitral/en/working_groups/3Investor_State.html) - Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session - Part I (Vienna, 27 November–1 December 2017), 19 December 2017, para. 65, [http://www.uncitral.org/uncitral/en/working\\_groups/3Investor\\_State.html](http://www.uncitral.org/uncitral/en/working_groups/3Investor_State.html).

<sup>70</sup> See Philippe Sands, *What I Have Learned – Ten Years as an Investor-State Arbitrator*, Presentation, Columbia Law School, New York, United States, 15 October 2018, <http://ccsi.columbia.edu/2018/10/11/fall-2018-international-investment-law-and-policy-speaker-series-2/>.

situation<sup>71</sup>). This may happen, for example, through joinder of cases, consolidation, stay of proceedings or even dismissal of cases.

## 5. Conclusion

57. This submission has set out why a permanent standing two-tier mechanism with full-time adjudicators responds effectively to the concerns identified in the Working Group. In fact, it is the only suggested option that can successfully respond to all of the concerns identified. It is suggested, therefore, that this option be further developed by the Working Group, as a matter of priority.

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Annex

See Document [A/CN.9/WG.III/WP.145](#)

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<sup>71</sup> See *Lauder v. Czech Republic* (under the United States–Czech Republic Bilateral Investment Treaty (BIT)) and *CME v. Czech Republic* (under the Netherlands–Czech Republic BIT) concerning the same underlying measure.