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Possible reform of investor-State dispute settlement (ISDS)

Selection and appointment of ISDS tribunal members

Note by the Secretariat

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I. Introduction

1. At its resumed thirty-eighth session, in January 2020, the Working Group undertook a preliminary consideration of the selection and appointment of ISDS tribunal members (A/CN.9/1004/Add.1, paras. 95-133) and requested the Secretariat to undertake further preparatory work (A/CN.9/1004/Add.1, paras. 131-133).
2. Accordingly, this Note addresses the selection and appointment of ISDS tribunal members. It was prepared with reference to a broad range of published information,¹ and does not seek to express a view on the possible reform options, which is a matter for the Working Group to consider.

II. Selection and appointment of ISDS tribunal members

3. By way of background, at its thirty-sixth session, the Working Group concluded that the development of reforms was desirable to address concerns related to the lack or apparent lack of independence and impartiality of decision makers in ISDS (A/CN.9/964, para. 83); the question of the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules (A/CN.9/964, para. 90); the lack of appropriate diversity among decision makers in ISDS (A/CN.9/964, para. 98); and the mechanisms for constituting ISDS tribunals (A/CN.9/964, para. 108).
4. Suggestions for reforming the selection and appointment processes for ISDS tribunal members are contained in proposals submitted by Governments (“Submissions”).² On that basis, and on the basis of document A/CN.9/WG.III/WP.169, the Working Group undertook a preliminary consideration of the features regarding the qualifications and requirements of ISDS tribunal members, and the various selection and appointment models in the framework of ad hoc and standing mechanisms (A/CN.9/1004/Add.1, paras. 95-133).
5. Regarding the guiding principles, the Working Group considered that the selection and appointment methods of ISDS tribunal members should be such that they contribute to the quality and fairness of the justice rendered as well as the appearance thereof, and that they guarantee transparency, openness, neutrality, accountability and reflect high ethical standards, while also ensuring appropriate diversity (A/CN.9/964, para. 69 and 91–96).

A. Qualifications and other requirements

1. Draft code of conduct

6. Certain qualifications and requirements of ISDS tribunal members are addressed in the draft code of conduct prepared jointly with the International Centre for Settlement of Investment Disputes (ICSID), in accordance with the deliberations of the Working Group at its thirty-eighth (A/CN.9/1004, paras. 51-78) and resumed

¹This includes: the CIDS Supplemental Report on “The composition of a multilateral investment court and of an appeal mechanism for investment awards”, 15 November 2017, Gabrielle Kaufmann-Kohler and Michele Potestà (“CIDS Supplemental Report”) available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_supplemental_report.pdf, as well as the publications from members of the Academic Forum, available at <https://www.cids.ch/academic-forum-concept-papers..>

²A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States; A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission from the Government of Turkey; A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador; A/CN.9/WG.III/WP.177, Submission from the Government of China; A/CN.9/WG.III/WP.195, Submission from the Government of Morocco.

thirty-eighth (A/CN.9/1004/Add.1, paras. 96 and 99) sessions (see also A/CN.9/WG.III/WP.201).³

7. The Working Group may wish to consider whether requirements not addressed in the code could be made part of criteria for the selection process in the context of ad hoc (appointing authorities and rosters) and standing mechanisms (for instance, requirements that the ISDS tribunal members should be cognizant of international law and have an understanding of the different policies underlying investment). An alternative might be to introduce a learning mechanism in the functioning of the tribunals themselves, to achieve competence and inclusiveness over time, by systematically ensuring participation of a more “junior” person either as part of the ISDS tribunal or perhaps as a silent observer (though such a role would have to be specifically created as it is not contemplated in current mechanisms).

2. Independence, impartiality and accountability

8. The draft code addresses matters relating to independence, impartiality and accountability.⁴ The Working Group may wish to note the need for a balance between independence and accountability, and the role of appointment procedures in this respect.

9. It may be noted that other reform options could assist in achieving the desired balance, including, among others, the use by States of interpretative declarations (see A/CN.9/WG.III/WP.191). This would permit States to ensure that interpretation by ISDS tribunals would remain in line with their intentions when they concluded the treaty, thereby reducing interpretative autonomy of ISDS tribunals. This would also assist ISDS tribunal members to clarify the law independently from the interests of disputing parties.⁵

3. Diversity and balanced representation (inclusiveness)

10. In addition to the qualifications and other requirements, the Working Group indicated that appropriate diversity, such as geographical, gender and linguistic diversity as well as equitable representation of the different legal systems and cultures would be of essence in the ISDS system. It was highlighted that achieving diversity would enhance the quality of the ISDS process, as different perspectives, especially from different cultures and different levels of economic development could ensure a more balanced decision-making (A/CN.9/1004/Add.1, para. 101). Lack of diversity has been said to undermine the legitimacy of the ISDS regime.

11. The Working Group may wish to note that pursuing the objective of inclusiveness, rather than diversity, may help ensuring that no type of diversity would be viewed as exclusionary; it may also help addressing the tension between defining strict criteria of selection and ensuring participation of persons with different backgrounds.⁶ This goal may be achieved through various means in the different models below.

³ See the draft code of conduct available at <https://uncitral.un.org/en/codeofconduct>.

⁴ These requirements are commonly found in international adjudication, including arbitration (for instance, see article 11 of the UNCITRAL Arbitration rules). Regarding independence, impartiality and neutrality, see Article 2 of the International Court of Justice (ICJ) Statute; regarding linguistic competence, see, for instance, Rome Statute of the International Criminal Court (ICC), 1 July 2002, Article 36 (3)(c). Regarding accountability, high moral character and personal integrity/reputation, see ICSID Convention, Article 14(1); see Article 2 of the International Court of Justice (ICJ) Statute; ECHR, Article 21(1); International Tribunal for the Law of the Sea (ITLOS) Statute, Article 2(1); African Charter on Human and Peoples’ Rights, Article 31(1). Requirements may also include nationality of a contracting State, see the Court of Justice of the Cartagena Agreement, established under the Treaty Creating the Court of Justice of the Cartagena Agreement, which “shall be composed of five justices who shall be nationals of the member countries [...]” (Treaty Creating the Court of Justice of the Cartagena Agreement, 28 May 1979, Article 7); See also American Convention on Human Rights, 21 November 1969 (ACHR), Article 52(1); Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), Article 8.27.2.

⁵ See concept papers published by the Academic Forum, including *The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement*, Malcolm Langford, Daniel Behn and Mariachiara Malaguti.

⁶ See *Selection and Appointment in International Adjudication: Insights from Political Science*, Olof Larsson, Theresa Squatrito, Øyvind Stiansen, and Taylor St John.

12. For instance, regarding standing mechanisms, several existing statutes of international courts refer to “equitable geographical representation” or “distribution” for the selection of adjudicators,⁷ balanced representation between developed, developing and least developed countries,⁸ as well as between capital exporting and capital-importing countries.⁹ Constitutive instruments of courts and tribunals also commonly provide that the court composition as a whole must reflect a balance of different profiles and a representation of the world’s main legal systems or traditions.¹⁰ It may be noted that the Protocol on the African Court provides that when putting forward their nominations, States “shall give[.]” “[d]ue consideration to adequate gender representation in nomination process.”¹¹

13. The Arbitration Pledge for diversity, addressing gender diversity, can also be mentioned as an effort to pursue this goal in the field of international arbitration.¹²

14. The Working Group may wish to consider that ongoing training and continuous learning as a condition to become a possible member of an ISDS tribunal would constitute an effective means to ensure both competence and inclusiveness. It may wish to note that this matter might be addressed in the context of the reform option regarding the establishment of an advisory centre (see A/CN.9/1004, paras. 28-50).

4. Implementation

15. Elements in the methods of selection and appointment of ISDS tribunal members (see below) could contribute to the actual implementation of certain requirements. For instance, in permanent bodies, certain conditions of office are often seen as contributing to the independence and integrity of the process, such as long, non-renewable terms of offices, financial security, limitations on other professional activities and immunities.¹³ The procedural rules on the management of rosters would also be key in that respect, as placement on rosters could also be subject to requirements to ensure inclusiveness and adequate qualifications.

16. Core qualifications and requirements could also be implemented mainly through the adoption of a code of conduct (A/CN.9/1004/Add.1, para. 132). As indicated in the annotations to the draft code of conduct, several options might be considered for its implementation..

B. Methods of selection and appointment

17. At its resumed thirty-eighth session, the Working Group undertook a preliminary consideration of the reform options in relation to the selection and

⁷ See, for example, Rome Statute of the International Criminal Court (ICC), 1 July 2002, Article 36(8)(a); See also Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Article 17(3), third sentence.

⁸ At the WTO, developing countries may request that panels deciding disputes between developed and developing countries include panellists from developing countries (see Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Art. 8(10).

⁹ Although there is no reference in the ICSID Convention to such criterion among those that are to be taken into account by the Chairman in his or her selection of the members of the Panels of Conciliation and Arbitration, during the preparatory works of the Convention the Chairman’s power to designate Panel members was generally seen as desirable to ensure “fair representation on the Panels of qualified persons from both investing and receiving countries”. See the comment of the delegate from the Netherlands at the Geneva Consultative Meetings of Legal Experts held between 17–22 February 1964 in ICSID (1968), History of the ICSID Convention: Documents concerning the Origin and Formulation of the Convention, Vol. II-1 (“History of the ICSID Convention, Vol. II-1”), p. 382.

¹⁰ See, for example, the International Court of Justice (ICJ) Statute, Article 9; ITLOS, Article 2(2); Rome Statute of the International Criminal Court, 1 July 2002, Article 36(8)(a); Protocol on the African Court, Article 14(2); the Treaty on the Harmonization of Business Law in Africa, 17 October 2008, Common Court of Justice and Arbitration of the OHADA, Article 31; and ICSID Convention, Article 14(2).

¹¹ Protocol on the African Court, Art. 12(2).

¹² See the Arbitration Pledge, available at <http://www.arbitrationpledge.com/>. See also a reference to the Pledge in A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica.

¹³ See Supplemental CIDS Report, at paras. 68–104.

appointment of ISDS tribunal members, which included the establishment of a roster of qualified candidates and the setting up of a standing mechanism (also referred to as a “permanent body”) composed of full-time adjudicators.

18. With regard to the selection and appointment of ISDS tribunal members, the Secretariat was requested to further analyse different mechanisms and to develop them. It was stated that the specific features would largely depend on the broader design of how ISDS would be conducted, including whether the ad hoc nature would be preserved or whether a permanent structure would be sought (A/CN.9/1004/Add.1, para. 133).

1. Ad hoc mechanism

19. In the ISDS regime as it currently stands, the disputes are resolved by an ISDS tribunal constituted ad hoc for that particular dispute. The disputing parties play an important role in the selection of the members of the tribunal. Indeed, the rules applicable in investor-State arbitration allow disputing parties to agree on the method to select the arbitrators and to agree directly upon their identity (A/CN.9/1004/Add.1, para. 103). Such method has been described as ensuring the flexibility and attractiveness of arbitration.¹⁴ It has also raised concerns, in the context of ISDS, as mentioned above in para. 3.

20. The Working Group may wish to consider options for further regulating such selection and appointment method in the context of ad hoc mechanism (similar to the current ISDS regime, where ISDS tribunals are constituted for each case, after a dispute has arisen, as opposed to a standing mechanism). Possible options for further regulation include, among others (i) a selection and appointment method whereby tribunal members would be selected by a third party acting as an appointing authority, without any input or with limited input from the disputing parties;¹⁵ and (ii) the use of a pre-established list or roster of arbitrators.¹⁶

a. Appointing authorities

21. Regarding a possible role for appointing authorities in the regulation of party-appointment, it may be noted that appointing authorities already intervene in the ISDS regime as it currently stands in the appointment process, most frequently to appoint the presiding arbitrator in a three-person tribunal.¹⁷ The question for consideration is whether an enhanced role should be given to appointing authorities (A/CN.9/1004/Add.1, paras. 105).¹⁸ It may be noted at the outset that any such reform would require active participation of the appointing authorities and their agreement for implementing any such reform. The Working Group may wish to consider the following questions.

- *Whether the selection and appointment would be made fully or partially by the appointing authority and by whom within the appointing authority*

22. There are a variety of ways in which an appointing authority could select arbitrators. One possibility is to have a hybrid selection process whereby the parties to an ISDS dispute each select and appoint an arbitrator of their choosing (either from

¹⁴ A/CN.9/WG.III/WP.177, Submission from the Government of China.

¹⁵ See also proposals contained in submissions from governments: A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission from the Government of Turkey

¹⁶ See, for instance, the Dutch model BIT, which requires appointments to be made by institutions, rather than by the parties.

¹⁷ See also the OECD Consultation Paper on Appointing Authorities and the Selection of Arbitrators in ISDS, available at <http://www.oecd.org/investment/Consultation-ISDS-appointingauthorities-arbitration.htm>.

¹⁸ On this question, see Jan Paulsson, Moral Hazard in International Dispute Resolution, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law, 29 April 2010, available at https://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf

a roster or not) and then the relevant appointing authority selects and appoints the chairperson (either from a roster or not). Another possibility is to have all appointments (the two co-arbitrators and the chairperson) made by an appointing authority.

23. Further options include selection and appointment of ISDS tribunal members by the appointing authority, possibly in consultation with the disputing parties, it being understood that the ultimate decision would fall on the appointing authority. For example, the appointing authority could circulate a list of potential co-arbitrators to each of the disputing parties and the parties could then rank their preferences off of the list. Then a second list of potential chairpersons could be circulated to the disputing parties and both parties could individually rank their preferences for a chairperson from that list.¹⁹

24. A connected question is whether the selection and appointment would be made by an individual (as the Secretary-General or President of the institution(s) concerned) or by a special committee within the appointing authority tasked with making such selection and appointment. This last option would require determining the mode of functioning of such committee, such as composition of the committee and selection process (for instance, by vote, through qualified majority) and the timing for making such determination.

- *Whether the selection and appointment by the appointing authority would be made through a roster*

25. A question for consideration is whether a list or roster would be used by the appointing authorities. If so, the composition of such a roster would follow the same considerations as outlined below (see paras. 32-43). Further considerations include (i) whether the appointing authority would be compelled to select from the roster or whether it would use it as guidance only; and (ii) whether different rules would be needed for the selection of the co-arbitrators and for the chairperson: for instance, there could be a rule that for the selection of the co-arbitrators, use of the roster by the appointing authority would be voluntary; but for the selection of the chairperson, use of the roster would be mandatory.

- *Whether more than one institution would serve as appointing authority*

26. A further question is whether one or more institutions would serve as appointing authority. If more than one institution serves as appointing authority, questions for consideration include whether a list of such appointing authorities should be set-up to take account of geographical diversity and, if so, whether it would be a close or open list; and how such appointing authority would be designated by the disputing parties.

- *How to ensure transparency and accountability*

27. Measures to enhance transparency and availability of information on the selection and appointment process by the appointing authorities would need to be developed further. These include publication of applicable rules and criteria (for instance, information on nationality, gender, age group, legal system), degree of involvement of the parties in the process, as well as the costs involved. Appointing authorities could also be directed to make public the lists of possible ISDS arbitrators they circulate to the parties as nominees for appointment. This would provide evidence of the efforts made towards inclusiveness.²⁰

¹⁹ In its submission (available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/pca_mechanisms_for_selection_and_appointment.pdf), the PCA indicated that the list procedure is usually followed by the Secretary-General of the PCA as per the UNCITRAL Arbitration Rules (Article 8(2)) and the PCA Rules (Article 8(2)). It also presented alternative mechanisms.

²⁰ See, for instance the project Arbitrator Intelligence, which reports contain data and feedback about international arbitrators and arbitrations. This information and related analytics are meant to enable users to make better-informed decisions about arbitrator selection and case strategy, available at <https://arbitratorintelligence.com/>.

b. Pre-established lists or rosters

28. It was suggested in the Working Group that arbitral institutions active in the field of ISDS already managed rosters of arbitrators and could therefore assist in the establishment of a roster and be more involved in providing assistance to the disputing parties in their selection and appointment of tribunal members (A/CN.9/1004/Add.1, para. 112).²¹ The Working Group may wish to note that, currently, these lists are indicative, and there is no obligation to select ISDS tribunal members therefrom (with the exception of ICSID which is bound by its list for (a) the appointment of chairpersons if there is no agreement of the parties and (b) members of the annulment committees). It may also be noted that some investment treaties provide rosters – lists of pre-selected persons – from which ISDS tribunal members can be selected. They usually do not contain detailed provisions on the selection of persons on the roster.²² An analysis of rosters in investment agreements notes that disputing parties have not confined appointment to those who are listed on the existing rosters. The rosters have tended to serve a default function.²³

29. Establishment of a roster as a reform option on the selection and appointment of ISDS tribunal members would require determination of the following questions.

(i) *Types of roster: multiple or single roster*

30. A reform option may consist in considering whether (i) there should be a list of eligible rosters based on the existing ones;²⁴ and (ii) these existing rosters could be used differently, either on a voluntary or mandatory basis, to invite or require the disputing parties and the appointing authorities to select ISDS tribunal members therefrom (A/CN.9/1004/Add.1, para. 106). A question for consideration is whether the rosters in place at the various institutions administering ISDS cases would meet the criteria required in light of the objectives of the reform.

31. Another possibility would be to establish a new single roster that could be used either on a mandatory or voluntary basis by the disputing parties, the appointing authority or a standing mechanism established through the reform process (A/CN.9/1004/Add.1, para. 106). This last option, while departing from the ad hoc nature of the current ISDS regime, would still permit disputing parties' involvement in the selection and appointment of adjudicators (semi-permanent mechanism).²⁵

²¹ For instance, ICSID has both a roster of 10 Members of the Panel of Arbitrators and a List of Designations by its Member States, designated for a term of 5 years, renewable. A Member State may nominate up to 8 individuals who do not need to have the same citizenship as the State appointing them; The PCA maintains a roster called the Members of the Permanent Court of Arbitration, composed of designations by Member States of the PCA of up to 4 individuals, who do not need to have the same citizenship as the State appointing them.

²² See, for instance, US Mexico Canada Agreement (USMCA) in the State-to-State context (calling for the establishment of a roster of up to 30 individuals by the date of the entry into force of the agreement, to be selected by consensus and to serve for a minimum of three years or until the Parties constitute a new roster); the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (establishment by Parties of a roster of at least 15 individuals, in effect for a minimum of three years or until the parties constitute a new roster, to be used for the selection of panel chairs; each party can nominate up to two individuals for the roster, and may include up to one national of any party among its nominations; appointment on the roster is made by consensus); see also NAFTA, on the establishment “by consensus” of a roster of arbitrators from whom the appointing authority (the Secretary-General of ICSID) would appoint presiding arbitrators in the absence of party agreement; the roster envisaged by NAFTA Chapter 11 has never been constituted; in the WTO system, first-instance panels are formed on an ad hoc basis, there is an indicative roster of panellists composed of persons nominated by WTO Member States, but persons do not need to be selected from that list.

²³ Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform Andrea K. Bjorklund, Marc Bungenberg, Manjiao Chi, and Catharine Titi.

²⁴ A number of institutions in addition to ICSID and the PCA main rosters or list of arbitrators, such as the International Court of Arbitration at the International Chamber of Commerce (ICC), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC) and the Beijing International Arbitration Centre (BIAC).

²⁵ Ad hoc and permanent mechanisms can also co-exist within the same dispute settlement framework (see CIDS Supplemental Report, para. 12). For example, in the World Trade Organization (WTO), disputes are decided first by ad hoc panels and then, if there is an appeal, by the standing Appellate Body of the WTO (WTO AB). At Mercosur, a complaining

(ii) Composition of the roster

32. Various possibilities for composing a roster were mentioned in the Working Group and the Submissions. A suggestion was that a roster would not need to be extensive but should list names of established arbitrators specialized in ISDS while also including new candidates. Regarding this matter, a study notes that, based on current rosters established by arbitral institutions handling ISDS cases, a single roster based on the retention of a party-appointment system for the selection of arbitrators would likely need between 150 and 200 individuals.²⁶

33. If a new roster were to be established, this could be done either through institutional nomination, State-based nomination, or a mix of both.²⁷ It was suggested in the Working Group that in order to preserve the balance of the current system, both States and investors should be involved in the establishment of a roster, while another view was that only States should be involved in the establishment of a roster (A/CN.9/1004/Add.1, para. 108). The process could also include the participation of other interested stakeholders. Requiring consensus for the nomination on rosters could be problematic as this might create deadlocks.²⁸

34. Regarding the criteria to be used by those who would establish the single or multiple rosters (A/CN.9/1004/Add.1, para. 107), it may be noted that potential nominees would need to have relevant expertise and experience as outlined in paras. 7-15 above. It may be considered how gender and geographical balance would be mandated and implemented, in particular in case of multiple rosters. In addition, a question for consideration is whether and to what extent nationality should be taken into account. Taking as an illustration the rosters that are provided for in investment treaties, it may be noted that some rosters limit appointments of nationals of States or require that appointments of non-nationals be made.²⁹

(iii) Administering the roster

35. Administration of the roster would imply organizing the selection and appointment of persons to be listed on the roster as well as handling the renewal of persons in order to ensure flexibility and to address the concern of lack of diversity (A/CN.9/1004/Add.1, para. 109). It was suggested that there could be a limited duration for a person to be placed on a roster, and possibly a period after which that person would be de-listed (A/CN.9/1004/Add.1, para. 109). Members of the roster could be appointed for determined terms, not renewable or renewable once or twice. The appointments could also be staggered at regular intervals so as to ensure a turnover of new persons on the rosters. The procedures would all depend on whether one or multiple rosters would be in place. Multiple rosters could have each different rules of procedure.

36. It was suggested that the administration of a roster should include a procedure to remove an arbitrator (A/CN.9/1004/Add.1, para. 110). It might therefore be considered which institutional mechanisms would need to be established for evaluating and assessing the conduct of the adjudicator concerned.

State must first bring its grievances before an “ad hoc arbitral tribunal”, to be composed by the disputing parties from closed lists (Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (“MERCOSUR”), 26 March 1991).

²⁶ The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement, Malcolm Langford, Daniel Behn and Mariachiara Malaguti

²⁷ As an illustration, at ICSID, the ICSID Secretary-General nominates and selects 10 individuals to be on its Panel of Arbitrators (this list contains 5 women and 5 men, who have sat as an arbitrator in an ISDS case); and the Contracting States to ICSID nominate up to 8 individuals to be on a list or roster (not all Contracting States have made nominations and not all Contracting States have nominated the maximum number of individuals).

²⁸ See the NAFTA Chapter 11 experiences.

²⁹ See Selection and Appointment in International Adjudication: Insights from Political Science, Olof Larsson, Theresa Squatrito, Øyvind Stiansen, and Taylor St John.

(iv) Use of the roster in the selection and appointment of ISDS tribunal members

37. The selection of ISDS tribunal members from the roster could be either voluntary or mandatory. If voluntary only, it is less important that those on the roster have the relevant expertise or experience that disputing parties would demand.

38. An hybrid selection method could also be envisaged, whereby the selection and appointment of the two party-appointed arbitrators from the roster would be voluntary (meaning that the parties can select any individual they want regardless of whether that person is on the relevant list or roster) and the selection and appointment of the chairperson from the roster would be mandatory (meaning that that person must be selected from the roster, whether the appointment is made by the disputing parties, the co-arbitrators or an appointing authority).

(i) Implementation

39. The Working Group may wish to note that the reform options may require different instruments for their implementation. For instance, the establishment of a roster may require an amendment to arbitration rules as well as close cooperation with institutions administering ISDS cases should they become involved in administering such rosters.

c. Possible combinations

40. It should be noted that the option of creating a roster could be paired with either the current methods of selection and appointment of ISDS tribunal members based on party-appointment, or with different methods not based on party-appointment (and based, for instance, on appointment by an appointing authority) (A/CN.9/1004/Add.1, paras. 103 and 104).

2. Standing mechanism

41. At its resumed thirty-eighth session, the Working Group had a preliminary discussion on the selection and appointment of adjudicators in a permanent body (A/CN.9/1004/Add.1, paras. 115-129).³⁰ The consideration of a standing body is based on the suggestion that there is a need to revisit the party-appointment mechanism in ISDS and to limit the involvement of the disputing parties, as party autonomy need not be a key component of ISDS (A/CN.9/1004/Add.1, paras. 104).

42. In a standing mechanism, disputing parties would have no or little influence on the selection and appointment of adjudicators. This derives from the fact that a permanent body pre-exists the dispute (as opposed to the current ISDS system based on arbitration where the ISDS tribunal is constituted ad hoc for that particular dispute).

43. As an illustration, this reform option would be comparable to the selection and appointment mechanisms in existing international courts, where States as disputing parties have no say in the selection of the individuals who compose the standing body, although as treaty Parties they have participated in such a selection process.³¹

³⁰ See also proposal contained in a submission: A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States

³¹ See, for instance, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 15 April 1994, Articles 17(1) and 17(2); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, as amended by Protocol Nos. 11 and 14, as from its entry into force on 1 June 2010, Articles 20–23; it may be noted that at the International Court of Justice (ICJ), the composition of the Court may be influenced by disputing parties only in limited circumstances, namely through the appointment of a judge ad hoc and by the constitution of a chamber to decide particular

a. Composition of a permanent body

“Full representation” or “selective representation”

44. A first question to consider in the design of the composition of a standing dispute settlement mechanism is the number of adjudicators and, in this respect, whether States would wish to establish “full representation” or “selective representation” bodies.³² In full representation bodies, each State has an adjudicator on a permanent basis, usually a national of that State; in selective representation courts, there are fewer seats than the number of States parties to the court’s statute.³³

45. These design choices have important implications for the ability of each State to control the appointment of one or more judges and in this way influence decision-making on the court.

46. When it considered this question, the Working Group indicated that full representation might be difficult to achieve, in particular in light of the cost implications and connection between the number of adjudicators and the caseload (A/CN.9/1004/Add.1, para. 115). A permanent body with a high number of members may be expensive and complex to manage. An alternative approach that was suggested was to seek broad geographical representation as well as a balanced representation of genders, levels of development and legal systems, and to ensure that statutes would allow the number of the adjudicators to evolve over time, due to an increasing number of participating States.

47. Courts with a global reach are usually selective representation courts and often require that no two judges can be nationals of the same State. In the UN system, with its 193 member states, the International Court of Justice (ICJ) has 15 judges.³⁴ Under the United Nations Convention on the Law of the Sea (UNCLOS), with its 168 member States, ITLOS has 21 judges.³⁵ In the WTO, with its 164 member States, the Appellate Body has 7 members.

48. In general, a selective representation court is likely to increase the importance of collective decision-making by States at the election stage. The design of some selective representation courts allows States that do not have a national on the bench to appoint an ad hoc judge when they are party to a case in order to address concerns that there should be familiarity with all disputing parties’ legal systems.³⁶ Rotation among member States may be used to ensure that all States get the chance to have one of their own nationals appointed to the court.³⁷

49. It may be noted that the number of judges on a permanent body would likely need to be based primarily on the estimated number of cases brought before it. In case of a two-tier mechanism, it can be assumed that only a limited number of cases will

cases: Statute of the International Court of Justice (“ICJ Statute”), Articles 26(2) and 31(2).

³² See CIDS Supplemental Report, paras. 21–27; see also Selection and Appointment in International Adjudication: Insights from Political Science, Olof Larsson, Theresa Squatrito, Øyvind Stiansen, and Taylor St John.

³³ Examples of full representation include regional courts such as the Court of Justice of the European Union (CJEU) and the ECHR (Art. 20); examples of selective representation courts include the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human and Peoples’ Rights (“Protocol on the African Court”), Article 11; Agreement Establishing the Caribbean Court of Justice, 14 February 2001, Art. IV; American Convention on Human Rights (ACHR), 21 November 1969, Article 52; Statute of the Inter-American Court of Human Rights (“IACHR Statute”), October 1979, OAS Res No. 448, Article 4.

³⁴ See information on the activity of the court and caseload at <https://www.icj-cij.org/files/annual-reports/2017-2018-en.pdf>.

³⁵ For an average of 1,2 cases per year.

³⁶ Four full representation courts have ad hoc systems to ensure a national can preside over disputes for each respondent State: Andean Tribunal of Justice (ATJ), Central American Court of Justice (CACJ), Economic Court of the Commonwealth of Independent States (ECCIS), and European court of Human Rights (ECtHR); for a different approach, see the International Tribunal for the Law of the Sea (ITLOS) Statute providing that each party is able to appoint one member to the ad hoc chamber of the Seabed Dispute Chambers, while the third arbitrator is agreed upon by both parties; “Members of the ad hoc chamber must not be in the service of, or nationals of, any of the parties to the dispute” (Article 36(3) of the ITLOS Statute).

³⁷ See the Court of the Economic Community of West African States (ECOWAS), where the positions of the seven judges rotate among the 15 ECOWAS States.

be heard and decided by the second tier. Therefore, the number of judges in the second instance could be lower than in the first instance.

50. Finally, the number of adjudicators composing a permanent body may need to evolve over time, due to increasing membership of contracting Parties and/or increasing caseload. Existing international courts and tribunals provide illustrations of these possible adjustments.³⁸ More specifically, in a full representation body, the number of adjudicators will be adjusted each time a new contracting Party joins the mechanism. In a selective representation model, revision clauses may set out a procedure for the gradual increase in the number of adjudicators.³⁹

51. Another option would be to create a roster or list of court members that could be used by the permanent body in selecting panels of three judges for specific cases. This would permit the establishment of a much larger pool of judges to draw from. The same criteria and nomination procedures for a traditional standing court could be used to select judges on the list or roster.

b. Nomination of candidates

52. In the event that there would be a nomination phase, before selection and appointment, the options for nominating candidates (A/CN.9/1004/Add.1, para. 116) include: (i) nominations by participating States; (ii) nomination by an independent entity established within the permanent body; and (iii) declaration of interest by individuals themselves.

c. Selection and appointment process

53. Options for the selection and appointment process include the following (A/CN.9/1004/Add.1, para. 118): (i) direct appointments by each State in case of fully representative courts; (ii) member States nominate candidates who are subsequently voted on by an international body, usually comprised of States or their representatives;⁴⁰ or (iii) judges are appointed by an independent commission. The third option is only used for appointments to the Caribbean Court of Justice (CCJ) and the use of direct appointments is also relatively infrequent.⁴¹ For most international courts, judges are elected by an intergovernmental body voting from a list of nominated candidates.

(i) An election involving the participating States (through a vote or by consensus)

54. Elections through votes are favoured over elections by consensus, to avoid blocking the selection process. It should be noted that States are usually able to vote for more than one candidate, to ensure some balance and diversity. Qualified majority rules usually ensure that judges who are appointed are acceptable to most States.

(ii) A selection by a committee, possibly under the auspices of a body within the United Nations system

55. Selection and appointment through a committee might also be an option for consideration. Such a committee could establish a list of adjudicators, that could then be endorsed by States.

56. Another possible approach might consist in designating a body of States as the organ for selection and appointment of judges. There are several courts in which

³⁸ See, for example, the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981, Article III(1); Rome Statute of the International Criminal Court, 1 July 2002, Article 36(2).

³⁹ For revision clauses found in international courts, see for instance, Iran – United States Claims Tribunal, Claims Settlement Declaration, Art. III(1); Rome Statute, Art. 36(2); CETA, Art. 8.27.3; EU-Vietnam FTA, Art. 12(3).

⁴⁰ The most relevant types of international bodies are intergovernmental organs (such as the Assembly of State Parties for the ICC) or an international parliamentary assembly (such as the Council of Europe's Parliamentary Assembly for the ECtHR). ICJ judges require a majority in both the UN General Assembly and in the UN Security Council.

⁴¹ For example, direct appointment by States for four of the five judges on the Permanent Review Tribunal for Mercosur; as well as for the Economic Court of the Commonwealth of Independent States (ECCIS).

judges are selected by treaty Parties or by a collective body of States, even if that membership is larger than the group of States that accept the court's jurisdiction.⁴²

(iii) A multi-layered screening process

57. Screening committees and consultative appointment committees as well as appointment committees have been introduced in some international courts (A/CN.9/1004/Add.1, para. 118).

58. Screening committees assess candidate judges prior to their election to ensure that they meet the requirements, possess sufficient expertise and qualifications. They are expert-based, and their function is to filter out candidates that do not meet qualifications. Even if States retain control over appointments, this design feature is meant to lead to the appointment of more qualified and more independent judges. Their function is not to consult non-state entities.⁴³

59. Consultative appointment committees, by contrast, are one way of enabling non-State entities to participate during the selection process, while reserving the final decision for governments. The consultation stage may serve to enhance transparency in the selection process and endow a broader acceptance of the dispute mechanism - certain stakeholders could take part in the selection process (for example, representatives of investors and stakeholders, who have an interest in the interpretation and application of investment treaties and the outcome of the dispute, such as professional associations in the field of international law and civil society (A/CN.9/1004/Add.1, para. 121)).⁴⁴

d. Differentiated nomination and selection process between first and second tier

60. The selection and appointment methods for adjudicators at the appellate level might follow a pattern similar to that of the first instance ISDS tribunal or there might be different requirements and procedures applicable to the selection and appointment of adjudicators depending on the level of adjudication (A/CN.9/1004/Add.1, para. 122).⁴⁵ With respect to the selection of appellate body members in particular, there appear to be various possible approaches. A first would be to maintain the same list of candidates from which both first instance and appellate adjudicators could be appointed. A second would be to have a permanent appellate body composed of a fixed number of members.⁴⁶ These members could be required to meet certain specific qualifications, such as a significant degree of adjudicatory experience.

61. A further question would be whether the system of ad hoc judges similar to the ICJ should be provided for, to address the concerns that domestic, local, or regional interests would be duly understood and taken into account.⁴⁷ This may, for instance, entail having an ad-hoc judge of the nationality of the State and of the investor, either as member of the tribunal or formation of judges itself or of a reviewing plenary of the court, to ensure that while not looking into the facts of the case and formulating the decision, the correctness aspect under international law would be adequately

⁴² See, for instance, selection of judges for the African Court on Human and People's Rights by Member States of the African Union; election of ICJ judges by the UN General Assembly; judges at ITLOS are selected by the State Parties of the Convention of the Law of the Sea, even if they do not in general accept ITLOS as a forum for dispute settlement.

⁴³ For example, an "Article 255 Panel" was established to assess nominated candidates for the CJEU in 2010. The panel merely issues recommendations, and it is composed of "seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament" (Article 255 of the Treaty on the Functioning of the European Union).

⁴⁴ For most selection processes, the assumption has been that governments represent views from a broad range of stakeholders when they make appointment decisions; it is worth noting that even if non-state actors are not formally involved in the selection process, they may play informal roles (such as scrutinizing proposed candidates to make sure that they have the desired backgrounds and qualifications).

⁴⁵ The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement, Malcolm Langford, Daniel Behn and Mariachiara Malaguti, which discusses the effect of appellate body on the selection and appointment of adjudicators

⁴⁶ For instance, WTO AB, CETA.

⁴⁷ According to Article 31 of the International Court of Justice (ICJ) statute, any party to a case (if it does not have one of that party's nationals sitting on the court) may select one additional person to sit as a judge on that case only.

vetted and guaranteed. A further suggestion might be to provide for a judge of the ICJ to be involved into each formation of judges to ensure that the public international law aspect of the case is clearly understood and managed.

e. Terms of office terms and renewal

62. A number of options were mentioned in the Working Group regarding terms of office and renewal, including the possibility of longer terms on a non-renewable basis, which could ensure that the members would not be affected by undue influence. The need to ensure financial security, as well as the ability to attract high-quality candidates and the accumulation of experience and expertise on the court was noted (A/CN.9/1004/Add.1, para. 123).

63. Terms of office set by international courts vary from four,⁴⁸ six⁴⁹ or nine⁵⁰ years. A court does not provide for a time limitation.⁵¹ The appointments could also be staggered at three years intervals so that the turnover of new judges on the court would be gradual.⁵²

64. Terms could be renewable or not. Appointment for fixed single terms may increase independence but make the system potentially less accountable. Being unable to reappoint judges means that valuable experience is lost and there may be less continuity of leadership.⁵³ One way to limit the risk that non-renewable terms reduce the experience on the court and the pool of available candidates is to provide for relatively long and staggered judicial terms.⁵⁴

65. Renewable terms are relatively common for international courts.⁵⁵ Certain courts include limitations such as a term can be renewed once only.⁵⁶ Renewable terms can improve accountability as States can base reappointment decisions on the past performance of the judges. However, such accountability may come at the expense of judicial independence as judges wishing to be reappointed face incentives to satisfy those in control of reappointment decisions. Such concerns may be particularly strong on courts that are transparent about how individual judges voted, such as by allowing dissenting opinions, because such transparency increases the ability of member States to monitor how judges have adjudicated past cases.

f. Removal procedures

66. Most statutes for international courts refer to misconduct and inability to perform duties due to illness as grounds for removal. The draft code of conduct likewise contains provisions on these matters.

67. With respect to requests for and decisions on removal, systems vary from those that leave this authority with the judges to those where States are involved or control the removal process. Most frequently, international courts retain the capacity to remove judges from office, requiring either a unanimous decision of remaining judges

⁴⁸ See, for instance, International Criminal Tribunal for the Former Yugoslavia (ICTY) and the WTO AB.

⁴⁹ See, for instance, the African Court of Human and Peoples' Rights, the Inter-American Court of Human Rights (IACHR), as well as in the field of international arbitration, ICSID panels.

⁵⁰ See, the International Court of Justice (ICJ), European Court of Human Rights (ECtHR), International Tribunal for the Law of the Sea (ITLOS).

⁵¹ The Caribbean Court of Justice, which provides "until [a judge] attains the age of seventy-two years".

⁵² It may be noted that certain courts also provide for age limitations (see CIDS Supplemental Report, para. 164).

⁵³ Those with explicitly non-renewable terms of judicial office are: East African Court of Justice (EACJ), the European Court of Human Rights (ECtHR), the Economic Community of West Africa (ECOWAS) Court of Justice, the International Criminal Court (ICC), and the Organization for the Harmonization of Business Law in Africa Common Court of Justice and Arbitration (OHADA CCJA).

⁵⁴ For instance, when the judicial terms on the European Court of Human Rights (ECtHR) were made non-renewable in 2010, they were also extended from six to nine-years.

⁵⁵ Terms are renewable at the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), International Criminal Tribunal for the Former Yugoslavia (ICTY), the African Court of Human and Peoples' Rights, WTO AB.

⁵⁶ See, for instance, the Inter-American Court of Human Rights (IACHR), the African Court of Human and Peoples' Rights, the WTO AB.

or a majority or qualified majority decision.⁵⁷ In some instance, States have the capacity to override the decision of the courts by common accord. For some international courts, both States and courts are involved in the decision to remove a judge. Typically, this entails the court (or a specially constituted tribunal) reviewing a complaint against a judge, which then makes a recommendation, for final decision by an intergovernmental body.⁵⁸

g. Assignment of a case to members of a permanent body

68. Some questions were raised in the Working Group on the criteria to be applied in assigning the cases. It was suggested that the assignment method should take account of the specificities of the case, including whether a developing State was involved and the need for the tribunal to consider a number of other aspects (for example, environmental and social aspects or investment promotion). The need to assign the most appropriate member to handle the case was mentioned. With regard to a case where the assigned member might not have the specific expertise to handle some of the issues (for example, calculation of damages), the possibility of engaging with experts was mentioned. Questions were raised on how the assignment process could ensure diversity of the adjudicators (A/CN.9/1004/Add.1, para. 126).

69. Different models for assigning cases can be found in international courts.⁵⁹ In terms of selecting judges for specific cases, the process could be random or it could fall to the Secretary-General of the institution managing a list of adjudicators or there could be a single full-time president of the permanent body that is tasked with appointing judges to specific cases (A/CN.9/1004/Add.1, para. 125).

70. In a Submission on this reform option, it is suggested that adjudicators would be appointed to divisions of the standing mechanism on a randomized basis to a certain extent to ensure that the disputing parties would not be in a position to know in advance who will hear their case.

h. Other issues

71. This note focusses on the selection and appointment of ISDS tribunal members, and does not cover the wider range of procedural matters pertaining to each model. The Working Group may wish to note the following matters mentioned in relation to a permanent body at its resumed thirty-eighth session: (i) location, if any, of the permanent body; (ii) whether it would be hosted within an existing organization (possibly a body within the United Nations) or as a separate body; and (iii) the need to put in place a mechanism to rectify any problems that could arise after the body was set up.

i. Implementation

72. The establishment of a standing mechanism or body would require the preparation of statutes to determine the modalities of selection, nomination and functioning of tribunal. It would require the preparation of an opt-in convention for their application to existing investment treaties, as suggested in the submissions referred to above.

⁵⁷ For instance, in the ECtHR, any judge can request the removal of another judge and the decision on removal has to be taken by a two-third majority of the judges.

⁵⁸ The courts that features such removal procedure are the Central African Economic and Monetary Community Court of Justice (CEMAC CJ), the Economic Community of West Africa (ECOWAS) Court of Justice, the Inter-American Court of Human Rights (IACHR), and the International Criminal Court (ICC). The courts where States control the removal of judges include the Common Market for Eastern and Southern Africa (COMESA) Court of Justice, the East African Court of Justice (EACJ).

⁵⁹ See Supplemental CIDS Report, at paras. 183–198.

