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Possible reform of investor-State dispute settlement (ISDS)

Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters

Note by the Secretariat

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I. Introduction

1. At its resumed thirty-eighth session, in January 2020, and at its fortieth session, in February 2021, the Working Group undertook a preliminary consideration of the selection and appointment of ISDS tribunal members, with a focus on their selection and appointment in the context of a standing multilateral mechanism (also referred to below as a “multilateral investment tribunal” or “tribunal”) (A/CN.9/1004/Add.1, paras. 95-133; A/CN.9/1050, paras. 17-56). At its fortieth session, the Working Group requested the Secretariat to conduct further preparatory work on the matter, including the development of draft provisions (A/CN.9/1050, paras. 55 and 56).
2. Accordingly, this Note contains draft provisions covering the selection and appointment of ISDS tribunal members as well as interrelated topics on the establishment and functioning of a standing multilateral mechanism. The question of recognition and enforcement of decisions made under such a mechanism is addressed in document A/CN.9/WG.III/WP.214.
3. This Note was prepared with reference to a broad range of published information¹ 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

A. Background information

4. 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: (i) the lack or apparent lack of independence and impartiality of ISDS tribunal members (A/CN.9/964, para. 83); (ii) 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); (iii) the lack of appropriate diversity among persons appointed to serve as ISDS tribunal members (A/CN.9/964, para. 98); and (iv) the mechanisms for constituting ISDS tribunals (A/CN.9/964, para. 108). On the basis of proposals submitted by Governments,² and on the basis of document A/CN.9/WG.III/WP.169, the Working Group undertook, at its resumed thirty-eighth session, a preliminary consideration of the features regarding the qualifications and requirements of ISDS tribunal members, as well as the various selection and appointment models in the framework of ad hoc and standing mechanisms (A/CN.9/1004/Add.1, paras. 95-130).
5. At that session, the Working Group had a preliminary discussion on the selection and appointment procedures in a standing multilateral mechanism (A/CN.9/1004/Add.1, paras. 114-130). This reform element is based, inter alia, on the suggestion that there is a need to revisit the party-appointment method 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, para. 104). As an illustration, this reform would result in selection and appointment mechanisms comparable to those in existing international courts, where States, in their capacity as disputing parties, have no say in the selection of the individuals who decide the case, although as treaty

¹ This includes review of existing international and regional courts statutes and commentaries thereon as well as: 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; Draft Statute of the Multilateral Investment Court, by Marc Bungenberg and August Reinisch, 2021, available at <https://www.nomos-shop.de/nomos/titel/draft-statute-of-the-multilateral-investment-court-id-98918/>; and publications from members of the Academic Forum, available at <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/>.

² See Submissions available at https://uncitral.un.org/en/working_groups/3/investor-state.

parties they have participated in the selection process of the individuals who compose the standing body.³

6. The Working Group may wish to note that the establishment of a standing multilateral mechanism would require the preparation of a statute (also referred to below as “agreement establishing the tribunal”) for adoption by States and possibly regional economic integration organizations. The statute would be supplemented by rules or regulations addressing more detailed procedural matters. The draft provisions below would therefore need to be adjusted and completed to form part of such a framework. The Working Group may wish to consider that various models could be considered for preparing rules or regulations on detailed procedural matters, including the rules or regulations of international courts or international arbitral tribunals such as, for instance, the Iran-United States Claims Tribunal.⁴

B. Framework: establishment, jurisdiction and governance

1. General remarks

7. As a general remark, the Working Group may wish to note that the notion of “international investment dispute” would need further consideration so as to be clearly defined and to apply to all relevant reform elements in a uniform manner. Draft provisions 1 to 3 below aim at providing the general framework within which the selection and appointment of tribunal members would take place (see paras. 68-71 below for related questions). With respect to draft provision 3, should the tribunal be developed with an “open architecture” that would allow contracting States with the flexibility to determine which elements they would like to adopt, consideration may need to be given to how the roles and responsibilities of States within the Committee of the Parties may vary.

2. Establishment of the tribunal

8. Draft provision 1 – “Establishment of the Tribunal” reads as follows:

A Multilateral Investment Tribunal composed of a first instance and an appellate level is hereby established (referred to as “the Tribunal”).

9. Draft provision 1 provides for the establishment of a multilateral investment tribunal.

3. Jurisdiction

10. Draft provision 2 – “Jurisdiction” reads as follows:

1. [Option 1: The jurisdiction of the Tribunal shall extend to any dispute, between Contracting States as well as between a Contracting State and a national of another Contracting State, arising out of an investment [under an international investment agreement], which the parties consent to submit to the Tribunal.]

[Option 2: The Tribunal shall exercise jurisdiction over any dispute which the parties have consented to submit to the Tribunal.]

2. Consent to submit a dispute to a tribunal established under an international investment agreement shall be deemed to be a consent to submit the dispute to the Tribunal under paragraph 1.

11. Paragraph 1, option 1, provides that jurisdiction extends to disputes arising out of an investment, whereas option 2 does not refer to the notion of “investment” to

³ See, for instance, 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 and Article 26; it may be noted that at the International Court of Justice (the “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 cases: Statute of the ICJ, Articles 26(2) and 31(2).

⁴ Founding documents as well as rules and regulations of the Iran-United States Claims Tribunal are available at <https://iusct.com/documents/>.

avoid a double test regarding the notion of “investment” under the applicable treaty and the statute establishing the tribunal. The bracketed text in option 1, if retained, would mean that jurisdiction would be limited to treaty-based disputes.

12. The emphasis of the provision is on the requirement of consent rather than on the particular type of instrument of consent. It may be noted that membership in the agreement establishing the tribunal would not automatically entail that the State in question consents to the adjudication of a given dispute before that tribunal. The tribunal would exercise jurisdiction over disputes arising out of an investment which the parties agreed to submit to the tribunal through offer and acceptance. Provisions on the consent to the jurisdiction of the multilateral investment tribunal could be included in future investment treaties. In addition, the multilateral instrument on ISDS reform to be further considered by the Working Group may provide for a mechanism to incorporate a provision on consent to the jurisdiction of the multilateral investment tribunal in existing investment treaties.⁵

13. The Working Group may wish to note that the term “parties” in paragraph 1 could refer either to the State parties to an investment treaty or to the disputing parties, depending on the situation. The Working Group may wish to consider whether this should be further clarified.

14. Paragraph 2 aims to address the question of consent in investment treaties.

4. Governance structure

15. Draft provision 3 – “Governance structure” reads as follows:

a. Committee of the Parties

1. *There shall be a committee of the Parties composed of representatives of all the Parties to this Agreement establishing the Tribunal (referred to as “the Committee of the Parties”). The Committee of the Parties shall meet regularly and as appropriate to address matters concerning the functioning of the Tribunal.*

2. *The Committee of the Parties shall establish its own rules of procedure and shall carry out the functions assigned to it by this Agreement.*

3. *It shall establish the rules of procedure for the Selection Panel, the first instance and the appellate level, [the Advisory Centre], and the Secretariat. It may review and, if needed, modify these rules on a regular basis.*

4. *It shall determine the financial rules for the costs to be attributed to the general budget of the Tribunal. This includes rules on the operational costs of the Selection Panel and any reasonable expenses incurred by its members in the exercise of their function.*

5. *Decisions of the Committee of the Parties shall be adopted by [a simple] [two-thirds] majority.*

b. Tribunal and its President

1. *The Tribunal shall determine the relevant rules for carrying out its functions. In particular, it shall lay down regulations necessary for its routine functioning.*

2. *The Tribunal shall elect its President and Vice-President by a confidential internal voting procedure with each member having one vote. The President and Vice-President shall be elected for a term of three years with the possibility of one re-election.*

3. *The Tribunal shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.*

⁵ Submission by the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, p. 8, point 3.14.

16. Draft provision 3(a) introduces the concept of a committee of the parties which would be responsible for carrying out various functions, including the establishment of rules of procedure for the tribunal and for developments and adjustments, such as on the number of tribunal members. The Working Group may wish to consider whether the decision-making process at the committee of the parties ought to be defined at this stage.

17. The committee of the parties would delegate to the tribunal the determination of rules of procedure pertaining to its routine functioning. Draft provision 3(b) therefore clarifies that the tribunal itself shall develop its own rules of functioning, as is customarily provided in international courts and tribunals.⁶ It provides for the election of the president and vice-president of the tribunal by vote from other tribunal members. The Working Group may wish to consider whether, in a standing body having both a first-instance and an appellate level, the president of the tribunal is the president of the entire dispute settlement body or whether there should be one president for the first-instance and another one for the appellate level.

C. Selective representation and tribunal members

1. General remarks

18. Regarding draft provision 4, the Working Group may wish to note that it reflects the preference for selective rather than full representation on the basis that an international investment tribunal with a high number of members may be expensive and complex to manage. The preferred approach was therefore to seek broad geographical representation as well as a balanced representation of genders, levels of development and legal systems, and to ensure that the agreement establishing the tribunal would allow the number of tribunal members to evolve over time, following any variation in the number of participating States, as well as in caseload (A/CN.9/1050, paras. 23 and 24).⁷ Questions such as how to ensure a balanced representation over time would need careful consideration and are addressed under draft provision 8 (see below, paras. 44-47).

2. Tribunal members

19. Draft provision 4 – “Tribunal members” reads as follows:

1. The Tribunal shall be composed of a body of [--] independent members in [full][part] time office, reflecting the principles of diversity and gender equality, [elected regardless of their nationality][nationals of Parties to the Tribunal, elected][nationals of Parties and of non-Parties to the Tribunal, elected] from among persons of high moral character, [who are jurists of recognized competence,][who have experience working in or consulting governments including as part of the judiciary,] enjoying the highest reputation for fairness and integrity with recognised competence in the fields of public international law, including international investment law and international dispute settlement. The members of the Tribunal shall also be fluent in at least one of the working languages of the Tribunal.

⁶ See, for example, ICJ Statute, Article 30(1) (“The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure”); and ITLOS Statute, Article 16 (“The Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure”). See also Articles 51-52 Rome Statute of the International Criminal Court (ICC) (articulating a distinction between the Rules of Procedure and Evidence, to be adopted by the Assembly of States Parties, and the Regulations of the Court “necessary for its routine functioning”, to be adopted by the Court).

⁷ In full representation bodies, each State has a judge 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 (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); examples of full representation include regional courts such as the Court of Justice of the European Union (the “CJEU”) and the ECHR (Article 20); examples of selective representation courts include the African Court on Human and Peoples’ Rights (see Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (the “Protocol on the African Court”), Article 11; the Caribbean Court of Justice (see Agreement Establishing the Caribbean Court of Justice, 14 February 2001, Article IV); as well as the Interamerican Court of Human Rights (see American Convention on Human Rights (ACHR), 22 November 1969, Article 52; Statute of the Inter-American Court of Human Rights (the “IACHR Statute”), October 1979, OAS Res No. 448, Article 4).

2. *The [Presidency of the] Committee of the Parties may propose an amendment in the number of members of the Tribunal indicated in paragraph 1, based on the evolution of caseload and of the Parties to this Agreement, giving the reasons why this is considered necessary and appropriate. The Secretariat shall promptly circulate any such proposal to all Parties. The number of members of the Tribunal may then be amended by a [two-thirds] majority of the representatives in the Committee of the Parties.*

3. *No two members of the Tribunal shall be nationals of the same State. A member who is a national of more than one State shall be deemed to be a national of the State in which he or she has his or her habitual residence, if applicable, and/or main centre of interests. [This provision shall cease to apply if the number of members of the Tribunal exceeds [x].]*

20. Paragraph 1 covers the question of the number of tribunal members upon the setting up of the tribunal. It may be noted that in the UN system, with its 193 member States, the International Court of Justice (the “ICJ”) has 15 judges.⁸ Under the United Nations Convention on the Law of the Sea (the “UNCLOS”), with its 168 member States, the International Tribunal for the Law of the Sea (the “ITLOS”) has 21 judges.⁹ In the World Trade Organization (the “WTO”), with its 164 member States, the Appellate Body has 7 members. The Working Group may wish to note that issues concerning the number of tribunal members would depend on various factors, such as the number and composition of contracting States to the tribunal, caseload of the tribunal, costs, and resources available. The Working Group may wish to consider whether to include transitional provisions, with further reflection given to the appropriate timing and methodology for deciding such issues at a later stage.

21. The question as to whether the tribunal members should be employed on a full time or part time basis is connected to the number of members who would sit in the tribunal and the workload of the tribunal. For instance, where there is a high number of members for the sake of greater diversity, part-time employment could be considered, in which case a rule may need to be adopted regarding parallel activities that would be prohibited.

22. Paragraph 1 also refers to the requirements that the tribunal members should be cognizant of international law and have an understanding of the different policies underlying investment, to address the criticisms of the perceived unfamiliarity of adjudicators with issues of public policy. The Working Group may wish to consider that ongoing training and continuous learning 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 regarding the establishment of an advisory centre (see A/CN.9/1004, paras. 28-50). Paragraph 1 also include a reference linguistic competence (fluency in at least one of the working languages of the standing body), as is the case in number of international courts and tribunals.¹⁰

23. Paragraph 2 covers the question of the adjustment to the number of tribunal members over time. On this matter, the Working Group considered that the number should be based on a projected caseload, with subsequent adjustments as the number of States parties evolves. Existing international courts and tribunals provide illustrations of these possible adjustment mechanisms.¹¹

⁸ See information on the activity of the Court and caseload at <https://www.icj-cij.org/files/annual-reports/2017-2018-en.pdf>.

⁹ For an average of 1,2 cases per year.

¹⁰ For instance, ICC judges shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court, i.e., French or English (Rome Statute, Art. 36(3)(c)). Even where it is not expressly set out in the constitutive instrument, linguistic competence requirements may be inferred from provisions on the working languages of the court: see for instance ICJ Statute, Art. 39; ITLOS Rules of the Tribunal, 28 October 1997, Art. 43.

¹¹ 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). For revision clauses

24. The Working Group may wish to consider whether nationality should play a role in the composition of the tribunal and whether it should be provided that no two tribunal members shall be of the nationality of the same State as proposed under paragraph 3.¹² A number of court statutes indeed provide that judges shall be elected irrespective of their nationality but also that no two judges of the same nationality shall sit on the bench (see also below, para. 27).¹³ If nationality were to play a role, it may be noted that 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 tribunal (see draft provision 8 below on appointment).¹⁴ The Working Group may wish to consider whether, in the instance of increase of tribunal members, it would or not be practical to continue requiring that no two members shall be nationals of the same State.

3. Ad hoc tribunal members

25. Draft provision 5 – “Ad hoc tribunal members” reads as follows

1. The parties to a dispute may choose a person to sit as Tribunal member, in the following circumstances where the Tribunal decides to form one or more chambers, composed of three or more members as the Tribunal may determine, for dealing with particular categories of cases in accordance with article (-); for example, (to be completed).

2. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in article 6.

26. Draft provision 5 seeks to reflect the request that options be proposed on participation of ad hoc tribunal members, including some flexibility in forming, with the consent of the parties, particular chambers for specific cases (A/CN.9/1050, paras. 26 and 27). Such flexibility is found in the statutes of international courts such as the Statute of the ICJ. Possible methods for the appointment of an ad hoc tribunal member could include direct appointment by parties and appointment from a roster (A/CN.9/1050, para. 56).¹⁵ In that light, the Working Group may wish to consider whether paragraph 2 should be retained. It may also wish to note that the system of ad hoc judges is not without drawbacks in the inter-State context, and it may wish to consider further the appropriateness of transposing such system to the investor-State context.

27. Regarding the question of nationality, it may be noted that some court statutes permit a State party to a case before the court without a judge of its own nationality to appoint a judge ad hoc.¹⁶ A judge ad hoc does not have to be a national of the

found in international courts, see for instance, Iran – United States Claims Tribunal, Claims Settlement Declaration, Article III(1); Rome Statute, Article 36(2); and Comprehensive Economic and Trade Agreement between the EU and Canada (“CETA”), Article 8.27.3; EU-Vietnam FTA, Article 12(3).

¹² Nationality may or not be a requirement; examples where it is a requirement include the Court of Justice of the Cartagena Agreement, established under the Treaty Creating the Court of Justice of the Cartagena Agreement, which “shall consist of five magistrates who must be natives of Member Countries [...]” (Treaty Creating the Court of Justice of the Cartagena Agreement, 28 May 1979, Article 7(1)); See also American Convention on Human Rights, 21 November 1969 (ACHR), Article 52(1); CETA, Article 8.27.2. Counterexample includes the International Court of Justice, Article 2 of the Statute; Courts with a global reach often require that no two judges can be nationals of the same State; with regard to the European Court of Human Rights (the “ECtHR”), note that in 1994 the rule providing that “no two judges [of the ECtHR] may be nationals of the same State” was deleted from the European Convention on Human Rights. See Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, para. 59, 11 May 1994.

¹³ Articles 2 and 3 of the Statute of the ICJ.

¹⁴ See the Economic Community of West African States (the “ECOWAS”) Court of Justice, where the positions of the seven judges rotate among the 15 ECOWAS States.

¹⁵ Four full representation courts have ad hoc systems to ensure a national can preside over disputes for each respondent State: the Court of Justice of the Andean Community (the “ATJ”), the Central American Court of Justice (the “CACJ”), the Economic Court of the Commonwealth of Independent States (the “ECCIS”), and the ECtHR; for a different approach, see the 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. Regarding nationality, Article 36(3) of the ITLOS Statute states that “Members of the ad hoc chamber must not be in the service of, or nationals of, any of the parties to the dispute”.

¹⁶ Article 31(2) and (3) of the Statute of the ICJ.

appointing State, and often they are not nationals of the State that appoints them (see also above, para. 24).¹⁷

28. The Working Group may also wish to consider whether, to achieve competence and inclusiveness over time, participation of a more “junior” person, either as part of the ISDS tribunal or perhaps as a silent observer, could be provided for (though such a role would have to be specifically defined as it is not contemplated in current mechanisms).¹⁸

D. Nomination, selection and appointment of candidates

1. General remarks

29. The Working Group considered that, as a matter of principle, the selection and appointment methods of ISDS tribunal members should be such that they contribute to the quality and fairness of the justice rendered as well as to the appearance thereof, and that they guarantee transparency, openness, neutrality, accountability and reflect high ethical standards, while also ensuring appropriate diversity (A/CN.9/964, para s. 91–96). In addition to the qualifications and other requirements, appropriate diversity, such as geographical, gender, and linguistic diversity,¹⁹ as well as equitable representation of the different legal systems and cultures was said to 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 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.²⁰

30. It was pointed out that appointments on the basis of expertise and integrity rather than on political consideration would be more likely if the selection process were to be: (i) multi-layered; (ii) open to stakeholders; and (iii) transparent. In that context, it was suggested that selection panels and consultative committees should first screen the candidates before they would be appointed by a vote of the Parties to the agreement establishing the tribunal.

¹⁷ See Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform, by Andrea Bjorklund, Marc Bungenberg, Manjiao Chi, Catharine Titi, Academic Forum on ISDS Concept Paper 2019/11.

¹⁸ In that context, initiatives to increase diversity might be taken into account, like for example those developed by UN Women or other United Nation bodies, for which the issue of gender and geographical diversity is high on the agenda. The Early Career Initiative for Women at UNOV and UNODC, which has been developed by the Human Resources Management Service under the UNOV/UNODC Strategy for Gender Equality and the Empowerment of Women (2018-2021) contains for example possible approaches on recruitment and talent development, which might be utilised for the purpose of this discussion.

¹⁹ Article 5 (e) of the Statute of the Islamic Court of Justice (the “IICJ”). It is worth noting that the IICJ did not come into operation due to non-fulfilment of the required ratifications.

²⁰ Several existing statutes of international courts refer to: (i) “equitable geographical representation” for the selection of tribunal members (see, for example, Rome Statute of the ICC, 1 July 2002, Article 36(8)(a)(ii); see also Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Article 17(3), third sentence; (ii) balanced representation between developed, developing and least developed countries (at the WTO, developing countries may request that a panel deciding a dispute between developed and developing countries include at least one panellist from a developing country Member - see Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Article 8(10)); and (iii) balanced representation between capital exporting and capital-importing countries (although there is no reference in the ICSID Convention to such criterion among those that are to be taken into account by the Chair in his or her selection of the members of the Panels of Conciliation and Arbitration, during the preparatory works of the Convention the Chair’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). 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 (see, for example, the ICJ Statute, Article 9; ITLOS, Article 2(2); Rome Statute of the ICC, 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 Organization for the Harmonization of Business Law in Africa (the “OHADA CCJA), Article 31; and ICSID Convention, Article 14(2)). 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.” (Protocol on the African Court, Article 12(2)).

31. In that light, the Working Group may wish to note that draft provisions 6 to 8 reflect the most commonly found procedures whereby tribunal members are elected by an intergovernmental body voting from a list of nominated candidates.²¹ It may wish to consider whether allocating seats to different geographically defined groups of States, as proposed under draft provision 8, may constitute an efficient means for the establishment of a selective representation tribunal aimed at ensuring a balanced regional representation and representation of the various legal systems.

32. Elections through votes are favoured over elections by consensus so as 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 tribunal members who are appointed are acceptable to most States. Furthermore, less demanding majorities are often provided in case no qualified majority is reached in order to avoid deadlock in the election. It may be noted that there are several courts in which tribunal members 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.²²

2. Nomination of candidates

33. Draft provision 6 – “Nomination of candidates” reads as follows:

Option 1:

1. Nomination of candidates for election to the Tribunal may be made by any Party to the Agreement establishing the Tribunal. Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of article 4, paragraph 1. Each Party may propose [one][two] candidate[s] for any given election [who need not necessarily be a national of that Party], keeping in mind the need to ensure equal representation of genders. The Tribunal members shall be elected from the list of persons thus nominated.

2. Before making these nominations, each Party shall consult representatives of the civil society, judicial and other State bodies, bar associations, business association, and academic and other relevant organizations, in the process of selection of nominees.

Option 2:

Following an open call for candidacies to be issued in accordance with a decision of the Committee of the Parties:

(a) Any person who possesses the qualifications required under article 4, paragraph 1 may apply to the selection process; and

(b) Civil society, bar associations, academic and relevant organizations in the investing community may nominate any person who possesses the qualifications required under article 4, paragraph 1 to the selection process.]

34. Draft provision 6 reflects the request of the Working Group to offer options for nomination procedures that are open, transparent and provide means for non-State entities, such as investors, civil society and individuals to be informed, consulted and to participate in the process (A/CN.9/1050, para. 56). It should be read in conjunction with draft provision 7 which provides for a selection mechanism.

35. It may be noted that this phase is not present in the selection procedures of all courts and tribunals. Thus, in certain courts and tribunals, tribunal members are

²¹ 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.

²² 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.

appointed directly by the treaty Parties, either unilaterally or through a joint committee, without any prior formal nomination process.²³

36. Option 1 reflects nomination by the Parties to the agreement establishing the tribunal, as is done for the election of tribunal members in certain courts.²⁴ The nomination process under this model has been subject to criticism, in particular regarding the (i) un-evenness and lack of uniformity of the processes at the national levels; (ii) lack of transparency as to how candidates are identified and put forward; and (iii) politicization of the nominations.²⁵ The Working Group may wish to consider that, if this option is chosen, gender balance in the composition of the tribunal would be better guaranteed where each Party would be required to propose two candidates. In addition, it may wish to consider whether the phrase “[*who need not necessarily be a national of that Party*]” would or not run contrary to the objective of ensuring diversity.

37. Paragraph 2 seeks to ensure openness and transparency in the nomination process by providing for the possibility of stakeholder nomination.²⁶ This approach 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, including 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).²⁷

38. Option 2 would eliminate the nomination process from the hands of the Parties to the agreement establishing the tribunal as it provides for self-nomination, allowing any interested individual with the necessary qualification requirements to put forward his or her own candidature following an open call. A screening and filtering phase by a body different from the one making the final appointment would seem indispensable if the selection process is to allow self-candidatures (see below, draft provision 7).

39. The Working Group may wish to consider that options 1 and 2 could also be combined and applied together, so that States would maintain the possibility to appoint tribunal members, but individuals could also apply directly.

3. Selection process

40. Draft provision 7 – “Selection Panel” reads as follows:

a. Mandate

A selection panel (hereinafter referred to as “Panel”) is hereby established. Its function is to give an opinion on whether the candidates meet the eligibility criteria stipulated in this Agreement before the Committee of the Parties makes the appointments referred to in Article 8.

b. Composition

²³ See CIDS Supplemental Report, para. 118.

²⁴ ECHR, Article 22 (“The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party”); Protocol on the African Court, Article 12(1) (“States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State”); Unified Agreement for the Investment of Arab Capital in the Arab States (“Unified Agreement”), 26 November 1980, League of Arab States Economic Documents No. 3, Article 28(2) (“The Court shall be composed of at least five judges and several reserve members, each having a different Arab nationality, who shall be chosen by the Council from a list of Arab legal specialists drawn up specifically for such purpose, two of whom are to be nominated by each State Party from amongst those having the academic and moral qualifications to assume high-ranking legal positions. The Council shall appoint the chairman of the Court from amongst the members of the Court.”).

²⁵ See CIDS Supplemental Report, para. 123.

²⁶ See Statute of the Caribbean Court, Articles IV(12) and V(1).

²⁷ 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).

1. The Panel shall comprise [five][ten or more] persons chosen from among former members of the Tribunal, current or former members of international or national supreme courts and lawyers or academics of high standing and recognised competence. Members of the Panel shall be free of conflicts of interest, serve in their personal capacity, act independently and in the public interest, and not take instructions from any Party or any other State, organisation, or person. The composition of the Panel shall reflect in a balanced manner the geographical diversity, gender, and [the different legal systems of the Parties] [the regional groups referred to in article 8].

2. The members of the Panel shall be appointed by the Committee of the Parties by [qualified][simple] majority from applications [submitted by a Party][received through the open call referred to in paragraph 3].

3. Vacancies for members of the Panel shall be advertised through an open call for applications published by the Tribunal.

4. Applicants shall disclose any circumstances that could give rise to a conflict of interest. In particular, they shall submit a declaration of interest on the basis of a standard form to be published by the Committee of the Parties, together with an updated curriculum vitae. Members of the Panel shall at all times continue to make all efforts to become aware of and disclose any conflict of interest throughout the performance of their duties at the earliest time they become aware of it.

5. Members of the Panel are not eligible to the Tribunal during their membership of the panel and for a period of [three] years thereafter.

6. The composition of the Panel shall be made public by the Committee of the Parties.

c. Terms of office

1. Members of the Panel shall be appointed for a non-renewable period of [six] years. However, the terms of [three] of the [five] members first appointed, to be determined by lot, shall be of [nine] years.

2. A person appointed to replace a member before the expiry of his or her term of office shall be appointed for the remainder of his or her predecessor's term.

3. A member of the Panel wishing to resign shall notify the Chair of the Panel, who shall inform the Committee of the Parties. The Committee of the Parties shall initiate the replacement procedure.

4. Should a member of the Panel fail to respect the obligations incumbent on him or her, including after the end of his or her term, the President of the Tribunal may remove the member from the Panel or take other appropriate measures.

5. Pending the replacement procedure, a person who ceases to be a member of the Panel may, with the authorisation of the chair of the Panel, complete any ongoing selection procedure and shall, for that purpose only, be deemed to continue to be a member of the Panel.

d. Chair and secretariat

1. The Panel shall elect its own chair. The Chair of the Panel shall serve for a period of [three] years.

2. The secretariat of the Committee of the Parties shall serve as the secretariat of the Panel.

e. Deliberations

1. *The Panel may convene in person or through any other means of communication. The procedures and deliberations of the Panel shall be confidential.*

2. *In carrying out its tasks, the Panel shall ensure protection of confidential information and personal data.*

3. *The Panel shall endeavour to act by consensus. In the absence of consensus, the Panel shall act by a [qualified] majority of three out of five.*

f. Tasks

1. *The Panel shall act at the request of the secretariat once candidates have been nominated by the Parties [or have applied] pursuant to article 6.*

2. *The Panel shall: (i) review the nominations or applications received including, where appropriate, by hearing the candidates or by requesting the candidate to send additional information or other material which the Panel considers necessary for its deliberations; (ii) verify that the candidates meet the requirements for appointment as members of the Tribunal; (iii) call for more nominations if the Panel finds that there is an insufficient number of candidates who meet the eligibility criteria; (iv) provide an opinion on whether candidates meet the requirements referred to in subparagraph (ii); and (v) establish a list of candidates meeting the requirements.*

3. *The Panel shall complete its work in a timely fashion.*

4. *The Chair of the Panel may present the opinion of the Panel to the Committee of the Parties.*

5. *The list of candidates meeting the requirements shall be made public.*

6. *The Panel shall publish regular reports of its activities.*

g. Working procedures

The Panel may adopt its own working procedures which shall be consistent with this provision.

41. Draft provision 7 reflects the request of the Working Group that formulations on the use of selection panels or committees should be provided for, including their role in the appointment process, how the members of those panels would be chosen and how to ensure their independence. It details the establishment and functioning of a selection panel, based on a submission received (A/CN.9/1050, para. 33).²⁸

42. It may be noted that screening committees, consultative appointment committees, and appointment committees have been introduced in some international courts (A/CN.9/1004/Add.1, para. 118). They are meant to be expert-based, and their function is to filter out candidates that do not meet qualifications.²⁹ Even if States retain control over appointments, this design feature is meant to lead to the appointment of more qualified and more independent tribunal members. Their function usually does not include consultation with non-state entities.³⁰

²⁸

See:

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/selection_and_appointment_eu_and_ms_comments.pdf.

²⁹ Draft provision 7(a) refers to the eligibility criteria, as done for instance in the ECtHR context (where the screening panel “shall advise the High Contracting Parties whether candidates for election as judges of the European Court of Human Rights meet the criteria stipulated in Article 21§1 of the European Convention on Human Rights”); see also discussion in CIDS Supplemental Report, paras. 145-146.

³⁰ 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).

43. Regarding composition, the Working Group may wish to consider that a larger screening panel would accommodate the intended diversity. Further, the Working Group may wish to consider whether members of the selection panel should also comprise persons who represent the views of other non-State stakeholders, such as the investing community, as this may be critical to promote greater actual and perceived legitimacy by all users of such a body.

4. Appointment process

44. Draft provision 8 – “Appointment (election)” reads as follows:

1. The Panel shall publish the list of the candidates established pursuant to article 7(f)(2) who are eligible for election as members of the Tribunal by classifying them in one of the following regional groups based on [their nationality][the nationality of the country which nominated them for the election or, in case of direct applications, based on the nationality of the candidates]: Asia, Africa, Latin America and the Caribbean, Western Europe and others, and Eastern Europe.

2. The Panel shall recommend [--]members to serve on the appellate level of the Tribunal based on the extensive adjudicatory experience of such candidates.

3. The Members of a particular regional group in the Committee of the Parties will vote on the candidates eligible for election [from their regional group] with the aim to select an initial number of [--] members, of which the following number of members shall be chosen from each regional group: Asia: [--]members Africa: [--]members; Latin America and the Caribbean: [--]members; Western Europe and others: [--]members; and Eastern Europe: [--] members.

4. The Committee of the Parties shall only appoint members of the first instance and appellate level from the list of suitable candidates established by the selection panel pursuant to Article 7(f)(2).

5. At every election, the Committee of the Parties shall ensure the representation of the principal legal systems of the world, equitable geographical distribution, as well as equal gender representation in the Tribunal as a whole.

45. Draft provision 8 provides for a methodology for classifying tribunal members into regional groups. The Working Group may wish to consider possible alternatives to the United Nations Regional Groups proposed in paragraph 1, such as an approach designed to ensure that the regional representation of tribunal members would reflect the geographical distribution of the contracting States and the diversity of their legal systems.

46. Paragraph 1 provides for a method to ensure diversity in the appointment of tribunal members (see general comments above, under para. 26). The proposal would be that each regional group would only vote for its regional candidates without any voice on the other candidates. Regarding paragraph 2, the words “from their regional group” has been placed within brackets to consider whether voting should be restricted within each geographical group or whether States should be able to vote for candidates from other geographical regions and not just their own. The Working Group may wish to consider whether the regional groupings should be based on the nationality of the candidate or on that of the Party nominating them.

47. For the sake of simplicity, it is suggested in paragraph 2 that a similar method for appointing tribunal members at the first instance and appellate level would be applied. However, in recommending candidates, the selection panel would make specific recommendations for tribunal members at the appellate level in light of the significant degree of adjudicatory experience of such candidates (A/CN.9/1050, para.

46).³¹ The Working Group may wish to consider whether the election/allocation of a member to the first-instance and appellate level would need to be further specified, and, if so, which of the following options would be preferable: (i) a common pool of nominees would be established by the panel who would indicate members having the adequate experience also for the appellate level, and there would then be one single election; (ii) there would be two separate tracks for nomination, selection and appointment for the first instance and the appellate level, and Parties would nominate candidates for the first instance and for the appellate level and the selection panel would separately screen such separate nominations; the Committee of the Parties would decide on appointments for the two different instances with separate elections; (iii) the Committee of the Parties would elect all the judges (without distinction between first-instance and appellate) and then the tribunal would organize itself between first-tier and appellate levels, also based on the recommendation of the selection panel.

E. Terms of office

1. General remarks

48. Longer terms of office for tribunal members on a non-renewable basis could ensure that the members would not be affected by undue influence. However, being unable to reappoint tribunal members means that valuable experience is lost.³² The Working Group may wish to consider whether one way of limiting the risk that non-renewable terms reduce the experience of the tribunal and the pool of available candidates is to provide for relatively long and staggered judicial terms.³³

49. Regarding removal procedures, the Working Group may wish to consider whether the procedure proposed under draft provision 9(b) below contains the necessary safeguards and is sufficiently transparent.

2. Terms of office, renewal and removal

50. Draft provision 9 – “Terms of office, renewal and removal” reads as follows:

a. Terms of office and renewal

1. The Tribunal members shall be elected for a period of [nine] years [without the possibility of re-election][and may be re-elected to serve a maximum of [one] additional term].

2. Of the members elected at the first election, the terms of [--] members shall expire at the end of [three] years and the terms of [--] more members shall expire at the end of [six] years. The members whose terms are to expire at the end of [three] and [six] years shall be determined through a draw of lots to be conducted by the Chairperson of the Committee of the Parties immediately after the end of the first election. The members shall continue to hold office until they are replaced. They will, however, continue in office to complete any disputes that were under their consideration prior to their replacement unless they have been removed in accordance with section (b) below.

b. Resignation, removal, and replacement

³¹ See, for instance, World Trade Organization Appellate Body (“WTO AB”), CETA; The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement, Malcolm Langford, Daniel Behn and Maria Chiara Malaguti, Academic Forum on ISDS Concept Paper 2019/12, Version 2, which discusses the effect of an appellate body on the selection and appointment of tribunal members.

³² Those with explicitly non-renewable terms of judicial office are: the East African Court of Justice (the “EACJ”), the ECtHR, the ECOWAS Court of Justice, the ICC, and the OHADA CCJA..

³³ For instance, when the judicial terms on ECtHR were made non-renewable in 2010, they were also extended from six to nine-years; Renewable terms are relatively common for international courts (terms are renewable at the ICJ, the ITLOS”, the International Criminal Tribunal for the Former Yugoslavia (the “ICTY”), the African Court of Human and Peoples’ Rights, the WTO AB; Certain courts include limitations such as that a term can be renewed once only (see, for instance, the “IACHR”, the African Court of Human and Peoples’ Rights, and the WTO AB).

1. A member may be removed from office in case of non-compliance with [draft provision 10] or failure to perform his or her duties by a [unanimous decision][qualified majority of two-thirds] of the members except the member under scrutiny. A member may resign from his or her position through a letter addressed to the President of the Tribunal. The resignation shall become effective upon acceptance by the President. In case of a judicial vacancy, the process of reappointment of members will be conducted in the manner specified in provision 8 above, subject to the modification that only the group which elected the outgoing member will be able to vote and elect a replacement in a special ad-hoc election.

2. A member who has been appointed as a replacement of another member under this provision shall remain in office for a duration of [nine] years except for members who are appointed as replacements for members elected with a shorter period of [three] years or [six] years after the first election. Members who are appointed as a replacement for a member with a shorter-term period will be eligible for re-election for a full term.

51. Draft provision 9(a) contains options regarding the terms of office of the tribunal members and aims to reflect the deliberations of the Working Group (A/CN.9/1050, para. 56). It was mentioned that, in determining the appropriate term, the average duration required to resolve ISDS cases and the need to ensure a workload balance among the tribunal members would need to be taken into account. Suggestions were made that the term of office could range from 6 to 9 years, with staged replacements to achieve stability in the operation of the tribunal and of the jurisprudence (A/CN.9/1050, para. 39).

52. The Working Group may wish to note that terms of office set by international courts vary from four,³⁴ six³⁵ to nine³⁶ years. One court does not provide for a time limitation.³⁷ The appointments could also be staggered at three-year intervals so that the turnover of new tribunal members on the court would be gradual.³⁸

53. The Working Group may wish to consider whether the duration of the terms of the tribunal members of first and second instance should differ.³⁹

54. The Working Group requested that the draft text provides language on early removal of an adjudicator from the tribunal, including the circumstances that would justify the removal, the procedure as well as the possible involvement of the contracting States, an independent body or the standing body itself in that process (A/CN.9/1050, para. 56).

55. It may be noted that most statutes of international courts refer to misconduct and inability to perform duties as grounds for removal.⁴⁰ Provisions on removal seek

³⁴ See, for instance, the ICTY and the WTO AB.

³⁵ See, for instance, the African Court of Human and Peoples' Rights, the IACHR, as well as in the field of international arbitration, ICSID panels.

³⁶ See, the ICJ, the ECtHR, and the ITLOS.

³⁷ The Caribbean Court of Justice, which provides "until [a judge] attains the age of seventy-two years".

³⁸ It may be noted that certain courts also provide for age limitations (see CIDS Supplemental Report, para. 164).

³⁹ For example, in CETA, Tribunal Members are appointed for a five-year term, renewable once (CETA Article 8.27.5); in contrast, Appellate Tribunal Members are appointed for a nine-year non-renewable term (Decision No 001/2021 of the CETA Joint Committee of January 29, 2021 setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal, Article 2.3).

⁴⁰ With respect to requests for and decisions on removal, systems vary from those that leave this authority with the tribunal members to those where States are involved or control the removal process. Most frequently, international courts retain the capacity to remove tribunal members from office, requiring either a unanimous decision of remaining tribunal members or a majority or qualified majority decision (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). 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 an adjudicator. Typically, this entails the court (or a specially constituted tribunal) reviewing a complaint against an adjudicator, which then makes a recommendation, for final decision by an intergovernmental body ((the courts that features such removal procedure are the Central African Economic and Monetary Community Court of Justice (the "CEMAC CJ"), the ECOWAS Court of Justice, the IACHR, and the ICC. The courts where States control the removal of judges include the Common Market for Eastern and Southern Africa (the "COMESA") Court of Justice, and the EACJ).

to ensure that State Parties would not be allowed to intervene in that process to ensure the independence of the tribunal members. They also reflect the suggestion that the president of the tribunal could be tasked with decisions on that matter, which would also be based on a collegial consultation mechanism involving other tribunal members. It was said that the threshold for removing a tribunal member ought to be high (A/CN.9/1050, paras. 41 and 42). The Working Group may wish to consider whether a process for reviewing contested challenges of a member conducted by an independent person/body should be established.⁴¹

F. Conditions of service

1. General remarks

56. The Working Group may wish to recall its consideration of cross-cutting issues in relation to the selection and appointment of tribunal members (A/CN.9/1050, paras. 48-54). Certain issues 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 thirty-eighth (A/CN.9/1004/Add.1, paras. 96 and 99) sessions (see also A/CN.9/WG.III/WP.201).⁴² In that light, draft provision 10 below is simplified to refer to the draft code of conduct.

2. Conditions of services and compliance with the Code of Conduct

57. Draft provision 10 – “Conditions of services” reads as follows:

1. A member of the Tribunal shall comply with the Code of Conduct for Adjudicators in International Investment Disputes.

2. Members shall receive an annual salary. In addition, the President shall receive a special annual allowance. These salaries, allowances, and compensation shall be fixed by the Committee of the Parties.

58. The Working Group may wish to consider whether draft provision 10 should address topics in addition to those covered under the draft code of conduct.

G. Assignment of cases

1. General remarks

59. Different models for assigning cases can be found in international courts.⁴³ Clear pre-defined methods for assignment of cases are aimed at avoiding that disputes are attributed to one or the other tribunal member based on political considerations or outside influence. In that sense, far from being an issue of mere internal judicial organization, case assignment methods are a key factor guaranteeing structural independence.⁴⁴

60. The Working Group requested that the draft provision on assignment of a case provide options on how tribunal members would be assigned to hear cases, which should ensure balanced representation, diversity, independence and impartiality, which could include randomized appointments with oversight, appointments by the president of the tribunal, or appointments by some other independent committee (A/CN.9/1050, para. 56).

2. Allocation of cases among the chambers

61. Draft provision 11 – “Assignment of cases” reads as follows:

Option 1 (for paragraph 1)

1. [The President of the Tribunal]][A Committee composed of the President of the Tribunal and a representative number of the members of the Tribunal]

⁴¹ See, for instance, CETA Article 8.30.

⁴² See the draft code of conduct available at <https://uncitral.un.org/en/codeofconduct>.

⁴³ See CIDS Supplemental Report, paras. 183–198.

⁴⁴ CIDS Supplemental Report, para. 181.

shall assign individual members to the chambers of the first instance and appellate levels and assign disputes to the chambers of the Tribunal

Variant 1:

[in accordance with the Rules of Procedure adopted by the Committee of the Parties on assigning the Tribunal members to the chambers of the Tribunal. The Rules of Procedure may set out guidelines on relevant criteria that the President should consider in making an assignment.]

Variant 2:

[. The assignment of members to the chambers of the Tribunal and the assignment of disputes to the members shall be governed by Rules of Procedure to be adopted by the Committee of the Parties. The President shall consider criteria such as gender and regional diversity as well as diversity of expertise of legal systems, language requirements, [nationality restrictions] and subject area in addition to the guidelines provided under the Rules of Procedure adopted by the Committee of the Parties while assigning the Tribunal members to the chambers of the Tribunal.]

Option 2 (for paragraph 1)

1. Disputes shall be assigned to the chambers of the Tribunal on a randomized basis. The [assignment of members to the chambers of the Tribunal and] the assignment of disputes to the members shall be governed by Rules of Procedure to be adopted by the Committee of the Parties. The President of the Tribunal may decide to assign two or more cases to the same chamber if the preliminary or main issues in two or more cases before different chambers are similar.

2. [A member shall not be assigned to a particular dispute if he or she is a national of either the State party to the dispute or the State whose national is a party to the dispute.]

62. Option 1 reflects the common approach whereby the task of allocating tribunal members to the permanent formations or sections normally falls on the president of the tribunal. Variant 1 leaves details to be provided for in the applicable rules and regulations of the tribunal, while variant 2 also contains pre-determined criteria to guide the president. The Working Group may wish to consider whether the distribution of cases to the various chambers should be made by the president of the tribunal or by a committee composed of the president and some members of the tribunal. The appointment of the members of this distribution committee should be representative of the composition of the tribunal and should be based on a principle of rotation.

63. Option 2 provides for a randomized appointment mechanism, leaving questions of oversight to the rules and regulations of the tribunal. It also provides for the possibility for the president to transfer a case from one chamber to another so as to provide for flexibility and to ensure consistency where the tribunal is to rule on several non-consolidated cases dealing with the same host State measures or on an identical preliminary issue that applies in a number of disputes.⁴⁵ The Working Group may wish to consider whether additional safeguards should be provided for to prevent abuses.

64. The Working Group may also wish to consider the question whether the chamber would be pre-determined with members assigned to it for a fixed term or constituted ad hoc after a case is filed with compositions that vary.⁴⁶

65. Furthermore, the Working Group may wish to consider whether provisions should be added to the effect that, in certain circumstances, a dispute could be transferred to a different chamber with a broader composition (a “grand chamber”) or

⁴⁵ See Iran-United States Claims Tribunal.

⁴⁶ CIDS Supplemental Report, para. 185.

even to the full adjudicatory body for final determination, as is provided in certain courts and tribunals (both domestic and international).⁴⁷

III. Other matters related to a standing multilateral mechanism

66. In addition to the draft provisions on selection and appointment of ISDS tribunal members, the Working Group may wish to consider the following policy issues pertaining to the establishment and functioning of a standing multilateral body. These may serve to contextualize the draft provisions above and provide the Working Group with a basis for further consideration of this reform (A/CN.9/1050, para. 55).

67. The suggestions below are based on the comment made in the Working Group that a reformed system should remain flexible so as to take account of both State-State and investor-State dispute settlement as well, as possibly disputes involving local communities affected by investments and investments made by small and medium-sized enterprises (A/CN.9/1050, para. 22).

A. Means of establishment

68. Regarding the establishment of a multilateral investment tribunal, the Working Group may wish to consider general questions, including whether the tribunal would be created under the auspices of an existing international organisation such as the United Nations, or be established as a separate, independent international organisation.⁴⁸ As an international organization, the standing multilateral body would enjoy legal personality under international and national law, which would allow it to conclude treaties such as a seat agreement establishing the necessary privileges and immunities.⁴⁹

69. Regarding the governance structure, the Working Group may wish to consider which organs might be set up under the agreement establishing the tribunal.

70. In addition to the committee of the parties, the Working Group may wish to note that usually a permanent administrative secretariat (or registrar) would be set up, either as a separate and stand-alone secretariat or as part of an existing institution, in which case the services of such an existing institution could be used. Its tasks would include the administration of pending cases, translation services and other support services.

71. Furthermore, the Working Group may wish to consider whether a standing multilateral mechanism would also be used to host an advisory centre on international investment law.⁵⁰ Such a facility could provide capacity building and act as a forum to share experience and technical assistance to member States with a view to building in-house capacity to deal with ISDS cases.

⁴⁷ For instance, the procedural rules of the Iran-U.S. Claims Tribunal provide that a chamber may “relinquish jurisdiction” to the full tribunal, *inter alia* “where a case pending before a Chamber raises an important issue” and “when the resolution of an issue might result in inconsistent decisions or awards by the Tribunal” (IUSCT Presidential Order, para. 6); similarly, at the ECtHR, a chamber to which a case is assigned may, before rendering its judgment, “relinquish” the case to the Grand Chamber if it raises a serious question affecting the interpretation of the Convention or if there is a risk of inconsistency with a previous judgment of the Court (ECHR, Art. 30). See CIDS Supplemental Report, paras. 200-204.

⁴⁸ See Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, Options Regarding the Institutionalization of Investor-State Dispute Settlement*, Second Edition (2020), available at <https://link.springer.com/book/10.1007/978-3-662-59732-3>, p. 175-182.

⁴⁹ Legal personality could also be expressly foreseen in the treaty establishing the organization, see for example Article 4 of the Rome Statute of the International Criminal Court.

⁵⁰ For more information on the reform element of an advisory centre, see UNCITRAL webpage under <https://uncitral.un.org/en/multilateraladvisorycentre>.

B. Procedural questions

72. The Working Group may wish to consider issues related to the procedural framework of a standing multilateral body.

73. While the general rules of procedure could be provided in the agreement establishing the tribunal, the Working Group may wish to consider whether the detailed procedure should be defined in secondary law, which could be developed and updated by the Committee of the Parties and, as necessary, by the Tribunal itself (see draft provision 3).⁵¹ A definition of the procedure in secondary law would facilitate later modifications and updates of the procedural rules. Secondary law with a detailed procedure has been developed for example for the ICJ,⁵² ITLOS,⁵³ and ECHR.⁵⁴

74. The Working Group may wish to consider incorporating the following reform solutions into the procedural framework of a standing multilateral mechanism, which are being discussed as procedural rules reform: means to address frivolous claims; multiple proceedings; reflective loss; counterclaims; security for costs; and regulation of third-party funding. It has also been suggested to provide for the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and to provide for the possibility of third parties participation, for example, representatives of communities affected by the dispute, to participate in the proceedings.⁵⁵

C. Applicable law and treaty interpretation

75. The Working Group may wish to consider issues related to the law to be applied by the tribunal. Many investment treaties contain a clause on the applicable law. These clauses generally refer to the treaty itself and international law. However, the agreement establishing the tribunal could provide for a rule on the applicable law in case of absence of a choice of law in the underlying treaty, investment law or contract.⁵⁶

76. In order to develop a more consistent practice of the interpretation of investment treaties, the multilateral investment tribunal could provide for treaty interpretation tools, in particular for joint interpretative statements, which could be binding for the tribunal.⁵⁷ It may be noted that treaty interpretation is discussed by the Working Group as a separate reform solution.⁵⁸

77. The Working Group may wish to consider whether it should be provided expressly that the interpretation to be made by tribunal members is done in accordance with customary rules of interpretation of public international law, following the example of article 3.2 of the Dispute Settlement Understanding of the WTO.

78. The Working Group may wish to consider whether a provision should be added (possibly under draft provision 11) to allow the tribunal to decide in broader or full composition when presented with an issue of systemic relevance, that is, an issue the resolution of which may have repercussions for the investment treaty regime as a whole; a new legal question never addressed before; a divergence of interpretations

⁵¹ See for example the reference in Article III (2) of the US-Iran Claims Settlement Declaration to the UNCITRAL Arbitration Rules and the option for modification by the Tribunal or the Parties.

⁵² See Article 30 ILC Statute and Rules of Court, (1978) adopted on 14 April 1978, available at <https://www.icj-cij.org/en/rules>.

⁵³ See Article 16 of the Statute of the International Tribunal for the Law of the Sea, Annex VI to the United Nations Convention on the Law of the Sea and Rules of the Tribunal (ITLOS/8), available at https://www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf.

⁵⁴ See Article 5 European Convention and Rules of Court 2 June 2021, available at <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules&c=>.

⁵⁵ Submission by the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, p. 7.

⁵⁶ See for example ICSID Convention, Article 42: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

⁵⁷ See document A/CN.9/WG.III/WP.191.

⁵⁸ See UNCITRAL webpage under <https://uncitral.un.org/en/treatyparties>.

in the case law of the different chambers; or the intention to depart from an established line of cases.⁵⁹

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⁵⁹ See CIDS Supplemental Report, para. 203.