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CENTRE FOR INTERNATIONAL LAW
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Comment

Draft Working Paper on "Selection and Appointment of Tribunal Members of a Standing Mechanism"

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1. This submission provides comments on the September 2023 Draft Working Paper on "Selection and Appointment of Tribunal Members of a Standing Mechanism" (hereinafter, the "Draft WP"), prepared by the UNCITRAL Secretariat for the sixth intersessional meeting of Working Group III (Singapore, 7 and 8 September 2023), which is in turn based on document A/CN.9/WG.III/WP.213 discussed by the Working Group at its 42nd and 43rd sessions. The Draft WP in question is appended in this submission.

2. At the outset, we note that discussions on the process for selecting and appointing adjudicators to a standing mechanism remain at an early stage. That said, having read the Draft WP, it appears that the prevailing model currently under consideration is that of a fixed-number bench composed of members selected by a subset of the parties to the standing mechanism: a system of "selective representation".

3. Our comment pertains to the objective of achieving diverse representation among the members of a future multilateral standing mechanism. Our aim is to offer a note of caution with respect to designing the composition model of a standing mechanism and drafting its constituent statute, so as to mitigate the risk of inadvertently perpetuating practices that may undercut the objective pursued.

I. Designing effective approaches to achieve representation goals

4. According to paragraph 18 of the Draft WP, a key objective of establishing procedures for composing the membership of a standing mechanism is to achieve broad geographic representation as well as a balanced representation of genders, levels of development and legal systems. We support this goal. In so doing, we would emphasise, however, that, given the multifaceted nature of this goal, approaches that may be effective to improve one aspect of representation and diversity may not be equally effective to improve another.

5. Notwithstanding that the statutes of international courts and tribunals with selective representation often identify geographic and legal-system representation as separate objectives,[1] in practice, equitable geographic representation is often used as a proxy for equitable representation of legal systems.[2] But geographic representation and legal-system representation are not necessarily synonymous concepts, as there may be striking diversity of legal systems within the same geographical group (e.g., the Asia-Pacific UN Regional Group comprises countries following several legal traditions including those of Islamic law, civil law, the common law and various permutations in between), or there may be countries within a geographical group whose legal systems stand outside the main legal traditions (e.g., Nordic law) or are mixed (e.g., Philippine law; South African law). In short, equitable geographic representation cannot be regarded as a proxy for the equitable representation of legal systems. The composition model chosen for a standing mechanism should therefore be able to adequately account for both.

6. By contrast, equitable representation in terms of levels of economic development could in principle follow from a composition model that ensures equitable geographic representation. As mentioned in paragraph 24 of the Draft WP, a practice of rotation among the member states to a standing mechanism could facilitate that goal, at least in regions with the capacity to coordinate appointments.

7. With respect to achieving the objective of gender balance, there are promising examples for the Working Group to consider building upon in designing a standing mechanism.[3] That said, achieving gender balance through institutional rules may appear more straightforward in principle than it is in practice, as reflected for example by the experience

[1] E.g., see Article 9 ICJ Statute; Article 2(2) ITLOS Statute; Article 17(3) WTO Dispute Settlement Understanding (read with WT/DSB/1 (19 June 1995), para 6); Article 36(8)(a) Statute of the International Criminal Court; Article 14(2) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

[2] R. Mackenzie, K. Malleson, P. Martin, and P. Sands, *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press, 2010), 41.

[3] E.g., Article 36(8)(a) of the Statute of the International Criminal Court; Articles 12(2) and 14(3) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights; Parliamentary Assembly of the Council of Europe, "Candidates to the European Court of Human Rights", Resolution 1366 (30 January 2004), para 2(2).

of the European Court of Human Rights.[4] Accordingly, we would encourage the Working Group to learn from the experience of other international judicial bodies when drafting rules on gender balance for a standing mechanism.

II. Taking into account the UN Regional Groups system and unwritten practices

8. We offer an additional comment in connection with the Secretariat's suggestion in paragraph 45 of the Draft WP that "[t]he Working Group may wish to consider possible alternatives to the United Nations Regional Groups …". Without underestimating the "stickiness" of the UN Regional Groups system,[5] our sense is that the Secretariat's proposal should be the way forward since strict adherence to the UN Regional Groups could result in less-than-adequate representation of certain regions in a standing mechanism with selective representation and a fixed-number bench of adjudicators.

9. In addition to considering alternatives to the UN Regional Groups system, we would emphasise that seat availability is often further limited by unwritten UN practices whereby certain countries should always or almost always secure representation. To take the ICJ as example, although the Asia-Pacific Regional Group is allocated three seats on the Court's bench, the prevalence of unwritten practices regarding appointments to the Court practically means that there is frequently only one available seat for which all remaining countries of the Asia-Pacific group must compete.

10. Such unwritten practices, or perhaps the expectation that such practices should be followed, have spilled over to other international judicial bodies and institutions, such as the International Law Commission.[6] Accordingly, we see a risk that such practices may develop in the context of a standing mechanism for investor-state disputes as well. In our view, the Working Group's choice of composition model for a standing mechanism should make every effort to foreclose or at least minimise such practices. This is all the more so

[4] F. Tulkens, "More Women – But Which Women? A Reply to Stéphanie Hennette Vauchez" (2015) 26 *European Journal of International Law* 223.

[5] See UNCITRAL, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Forty-third Session (Vienna, 5–16 September 2022)", UN Doc A/CN.9/1124 (7 October 2022), para 16; also Mackenzie and others (n. 2), 30, in the context of an attempt at renegotiating the UN regional groups during the International Criminal Court negotiations.

[6] Mackenzie and others (n. 2), 33, 39–40.

if the Working Group adopts the proposal made in earlier meetings that nationals of non-parties to the standing mechanism should also be eligible for appointment.[7]

III. Suggestions

11. In light of the above, we would urge the Working Group not to foreclose the possibility that alternative composition models may be more aligned with the objective of ensuring representation and diversity. In particular, a roster system of appointments, similar to the WTO Panels system,[8] could have a number of benefits, such as: nullifying the transposition and development of unwritten UN practices as to representation; ensuring that each country-member, either individually or acting as part of a regional grouping, has an effective ability to nominate individuals to the standing mechanism; and providing better opportunities for equitable representation of geographical regions, legal systems, levels of development (provided the membership is large enough), and gender. Such a model could easily be combined with other features of the composition of a standing mechanism mentioned in the Draft WP, such as that appointments of adjudicators to cases should be done institutionally or at random and not by the disputing parties.[9]

12. Finally, even if the current fixed-number bench approach is to be followed, we would still urge the Working Group to explore ways to address the concerns we express here. The practice of other international courts and tribunals once again may prove useful to consider. In this respect, we note the practice of the International Criminal Court which uses a mixed system of strict geographical quotas according to the UN Regional Groups system, coupled with a reserved number of so-called "floating" seats that in principle may be allocated among all regional groups after the minimum quotas per group have been filled.[10] Adapted to the context of a standing mechanism for investor-state disputes, and coupled with the clear goal of wide, multifaceted representation and diversity, a "floating"

[7] See UNCITRAL, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Forty-second Session (New York, 14–18 February 2022)", UN Doc A/CN.9/1092 (23 March 2022), para 47.

[8] Article 8 WTO Dispute Settlement Understanding.

[9] Elsewhere we have described such a model as "modified WTO". See N.J. Calamita and C. Giannakopoulos, *ASEAN and the Reform of Investor-State Dispute Settlement: Global Challenges and Regional Options* (Edward Elgar, 2022), 153–157.

[10] Assembly of States Parties, "Procedure for the Nomination and Election of Judges of the International Criminal Court", ICC-ASP/3/Res.6. To note, the minimum quotas can change over time depending on the composition of the International Criminal Court's membership.

seats mechanism may be useful for addressing circumstances in which there is less than adequate representation of geographical regions, systems of law, levels of development or gender.

13. This concludes the submission by the Centre for International Law, National University of Singapore.

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This is a draft working paper prepared by the UNCITRAL secretariat for the sixth intersessional meeting of Working Group III (Singapore, 7 and 8 September 2023). The draft has been prepared to facilitate the informal discussions at the meeting and reflects work in progress. This is based on document A/CN.9/WG.III/WP.213, which was discussed by the Working Group at its 42nd and 43rd sessions. Excerpts of the relevant reports are reproduced for reference purposes. It does not pertain to reflect the views of the Working Group or the secretariat. Any comments on this draft should be communicated to the secretariat (jaesung.lee@un.org; corentin.basle@un.org) by 30 September 2023.

Selection and appointment of tribunal members of a standing mechanism

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 mechanism (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. For the forty-second session, the Secretariat prepared document A/CN.9/WG.III/WP.213 which contained draft provisions covering the selection and appointment of ISDS tribunal members. The Working Group consider the document at its forty-second and forty-third session. This paper contains excerpts from the respective reports A/CN.9/1092 and A/CN.9/1124.

3. This Note 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

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

[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 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 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.

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 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 (see initial draft of the Statute). 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 (see draft statute of standing mechanism)

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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).[5] Questions such as how to ensure a balanced

[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/.

[5] 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

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.*
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> *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.*
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> *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.[6] 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.[7] 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

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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).

[6] See information on the activity of the Court and caseload at www.icj-cij.org/files/annual-reports/2017-2018-en.pdf.

[7] For an average of 1,2 cases per year.

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.[8]

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.[9]

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.[10] 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).[11] 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).[12] 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.

[8] 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.

[9] 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 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).

[10] 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.

[11] Articles 2 and 3 of the Statute of the ICJ.

[12] 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.

Report of the forty-second session (New York, 14–18 February 2022), document A/CN.9/1092**:**

35. It was said that draft provision 4 reflected the preference expressed in the Working Group for selective rather than full representation on the basis that the latter might be costly and complex to manage if the number of Tribunal members were to be high.

Paragraph 1

Number of tribunal members

36. It was generally felt that it would be premature to determine the number of Tribunal members at the current stage. Nevertheless, it was also stated that the number of Tribunal members was a fundamental question that should be resolved at the current stage of discussing "the architecture" of the permanent mechanism. It was suggested that there could be a transitional provision which would provide flexibility whereby the number of the Tribunal members could evolve over time, following any variation in the number of participating States as well as the evolution of the caseload (see below, para. 48).

37. While a suggestion was made that the number of Tribunal members should be sufficiently high, similar, for instance, to that of the International Tribunal on the Law of the Sea (ITLOS), concerns were expressed about the financial resources that would be required. It was also said that it would be wrong to use such international courts like International Court of Justice (ICJ) or ITLOS as a reference, since many more cases would need to be expected, considering the current number of ISDS cases.

Employment on a full-time – part-time basis

38. Regarding whether the Tribunal members should be employed on a full-time or part-time basis, support was expressed for full-time employment to ensure the independence and impartiality of Tribunal members and to avoid the risk of any outside influence. It was further said that full-time employment would reduce the required number of members and would limit the risk of conflicts of interest. It was suggested that if part-time employment were to be provided for, a rule would need to be adopted regarding external activities that would be prohibited or permitted.

39. It was said that a transitional provision could be explored to allow for part-time employment for a limited period at the earlier stages of the Tribunal's operation, also taking into account the financial resources. Concerns were expressed about the prolongation of any such part-time appointments.

Qualifications

40. It was noted that paragraph 1 provided the requirements that the Tribunal members should be cognizant of international law and have an understanding of the different policy considerations relating to foreign investment. In that context, doubts were expressed about retaining the phrase "experience in or consulting governments including as part of the judiciary" as such requirements might create an appearance of bias. It was suggested that experience advising investors was similarly relevant. In response, it was said that the purpose of that requirement was to underline the need for Tribunal members to be cognizant of, and to have experience in, dealing with policies of governments as that constituted an important aspect of investment disputes.

41. It was suggested that, considering the potential scope of jurisdiction of the Tribunal, qualifications should be broad, and include competence in public law, international trade/economic law and administrative law. It was further said that diversity of qualifications should be considered when composing the Tribunal, possibly taking into account the existing legal systems. Views were expressed that expertise in domestic law might also be required.

42. Reference was made to the requirements found in the statute of international courts that judges should be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices or [be] jurisconsults of recognized competence". Some doubts were expressed about including the reference to the "appointment to the highest judicial offices" as the competence required of the Tribunal members would be more specialized than that required of judges in a domestic context. As a drafting suggestion, preference was expressed for referring to "jurists of recognized competence," which would be more inclusive and also cover individuals qualified for "highest judicial offices".

43. It was cautioned that the qualifications required of the Tribunal members should not unduly limit the pool of candidates that could be appointed as members of the Tribunal. Concerns were expressed that there would be a very shallow pool of candidates who could meet all the requirements in paragraph 1, particularly if the requirements were understood to be cumulative.

44. Regarding linguistic requirements, it was said that the working languages of the Tribunal should first be determined and that Tribunal members should be fluent in at least two working languages of the Tribunal to ensure language diversity. It was also said that that could limit the pool of candidates. It was questioned whether such requirements ought to be provided for in the rules of procedure of the Tribunal instead of in the statute.

Diversity

45. Regarding the reference to "diversity and gender equality" in paragraph 1, it was underlined that there were many different aspects of diversity that ought to be reflected in the statute (including geographical representation, a balanced representation of gender, levels of development and legal systems). It was also said that while such principles should be stressed, both notions were abstract, could be understood differently, could cause complications in implementation. If included, their meaning should be expressed more clearly. It was underlined that geographical/regional distribution among contracting Parties should also be considered.

Nationality

46. The Working Group considered whether nationality should play a role in the composition of the Tribunal. Views were expressed that the criterion of nationality remained crucial when assessing the impartiality of a decision maker and that it could not be neglected as it was a decisive factor. Another view was that Tribunal members should be elected irrespective of their nationality, therefore focusing mainly on their competence and other qualifications, following the approach in the statute of the ICJ.

47. The Working Group considered whether nationals of a State that was not a Party to the statute of the Tribunal should be eligible to become a Tribunal member. While concerns were expressed, it was also said that inclusion of such nationals could enhance diversity and geographical representation.

Paragraph 2

48. It was observed that there should be a mechanism to adjust the number of Tribunal members (see para. 36 above). While it was noted that existing international courts and tribunals provided examples of such a mechanism, it was also cautioned that adjustments in the number of Tribunal members could have procedural, administrative as well as budgetary consequences on the operation of the Tribunal, including potential increases in contributions to be made by contracting Parties. While it was suggested that the evolution of the caseload or the number of contracting Parties could justify the adjustment, it was mentioned that there might be other reasons, which should be clearly set forth.

49. It was suggested that the authority to request the adjustment should not be limited to the Presidency of the Committee of the Parties but that any member of the Committee or the Committee as a whole should be able to make the request, upon which the number would be amended on the basis of a qualified majority of the representatives of the Committee of the Parties. Some preference was expressed for requiring a two-thirds majority.

Paragraph 3

50. The Working Group considered whether no two Tribunal members should be of the nationality of the same State as proposed under paragraph 3. Views diverged on the question whether nationality should play a role in the selection, and on whether, in order to achieve geographical diversity, no two members of the Tribunal should be of the same nationality, in particular if only a small number of judges were to be appointed. It was also suggested that nationals of a contracting State should not be assigned a case involving that State or one if its nationals. In that context, views diverged on whether the square-bracketed text at the end of paragraph 3 should be retained, and it was stated that paragraph 3 could only be considered in full after the issue of the number of Tribunal members had been decided.

51. A question was raised with regard to the meaning of the word a "national", particularly in relation to persons who had a permanent residence in a State yet with a different nationality. In response, it was suggested that whether to treat such a person as a national of the State where he or she had permanent residence might be a question of domestic law and that it need not be dealt in the draft provision. With regard to dual nationality, it was generally felt that the reference to the habitual residence and/or main centre of interest provided a solution.

[…]

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).[13] 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

[13] 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".

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.[14] A judge ad hoc does not have to be a national of the appointing State, and often they are not nationals of the State that appoints them (see also above, para. 24).[15]

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).[16]

Report of the forty-second session (New York, 14–18 February 2022), document A/CN.9/1092**:**

52. It was noted that the issue of whether a person could be appointed as an ad hoc member of the Tribunal should be distinguished from the issue of the formation of a chamber within the Tribunal which would address specific cases. It was stated that the latter required a more detailed analysis of how the Tribunal would handle its cases.

53. With regard to the appointment of ad hoc Tribunal members by parties, it was explained that draft provision 5 would allow disputing parties to appoint a person external to the Tribunal to sit as a member of the Tribunal on a temporary basis to handle that specific dispute. Reference was made to similar mechanisms in the ICJ. It was suggested that whether to allow for ad hoc Tribunal members could onl y be discussed in detail once the mechanism for appointing the permanent members of the Tribunal was fixed.

54. Views diverged on the desirability of parties appointing ad hoc Tribunal members.

55. Concerns were expressed that allowing party-appointed "ad hoc" members would run contrary to the establishment of a "standing" mechanism, one of its aims being to ensure the independence and impartiality of the Tribunal members. It was stated that concerns raised about the current ISDS system would persist even in the standing mechanism should party-appointed arbitrators be allowed. It was said that party-appointed arbitrators as well as ad hoc judges were found to favour the parties that had appointed them, and the potential bias of such members would be particularly problematic.

56. It was stated that, pursuant to the current formulation of draft provision 5, it was not clear who could appoint an ad hoc judge – each party or only a State party or whether each party would have to agree to such appointment. It was also noted that if only the respondent State as a contracting Party were to be able to appoint an ad hoc member, it would lead to inequality as investors would not have the same right. In response, it was stated that one possible solution would be to require that Tribunal members could not hear cases involving their State of nationality as the respondent

[14] Article 31(2) and (3) of the Statute of the ICJ.

[15] 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.

[16] 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.

State, and that nationals of the respondent State could not be appointed as ad hoc members of the Tribunal.

57. Some practical issues that could arise with regard to ad hoc Tribunal members were raised, for example, the procedural rules applicable to their nomination and appointment (including whether the agreement of the disputing parties would be required) as well as the applicable standards (including whether they would be different from those applicable to permanent members). As an example, a question was raised on how the limitation on multiple roles as provided for in the draft code of conduct would apply to ad hoc Tribunal members. Suggestions were made that the same standard should apply regardless of whether they were appointed on an ad hoc or permanent basis. Questions were also raised on how the standing mechanism would deal with instances where a case would be remanded to a first-instance tribunal that was composed of ad hoc members. The potential increase in cost and possible delays to the proceedings deriving from appointment of ad hoc members were also cautioned.

58. On the other hand, views were expressed in favour of providing for ad hoc Tribunal members mainly on the basis that it would preserve the party autonomy and the related legitimacy existing in the current ISDS system. It was said that ad hoc Tribunal members could be particularly beneficial where specific expertise not possessed by full-time Tribunal members would be necessary to resolve a dispute, even though it was stated that experts appointed by the Tribunal would be able to assist in such circumstances. It was said that members appointed ad hoc would not necessarily favour the parties that appointed them. It was also said that ad hoc members could improve the overall functioning of the standing mechanism, also improving diversity and contributing to capacity building of potential candidates.

59. To address some of the concerns expressed about ad hoc Tribunal members, proposals were made that their appointment should only be allowed under limited circumstances. Furthermore, it was suggested that they could be chosen from a roster of qualified candidates and that there could be a two-stage appointment, similar to existing mechanisms in ICSID and the European Court of Human Rights, whereby the appointment would be made by a third-party and not the disputing parties themselves.

60. Some support was expressed for allowing “junior” persons to participate or observe the case handled by the Tribunal as a way of enhancing inclusiveness and of building the capacity of potential candidates. At the same time, reservations were expressed on the role that they could play in the dispute resolution process, particularly with regard to decision-making.

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, paras. 91–96). In addition to the qualifications and other requirements, appropriate diversity, such as geographical, gender, and linguistic diversity,[17] 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

[17] 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.

decision-making (A/CN.9/1004/Add.1, para. 101). Lack of diversity has been said to undermine the legitimacy of the ISDS regime.[18]

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.

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.[19] 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.[20]

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[18] 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)).

[19] 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.

[20] 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.

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 appointed directly by the treaty Parties, either unilaterally or through a joint committee, without any prior formal nomination process. [21]

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. [22] 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. [23] 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.

[21] See CIDS Supplemental Report, para. 118.

[22] 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.").

[23] See CIDS Supplemental Report, para. 123.

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.[24] 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).[25]

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.

Report of the forty-second session (New York, 14–18 February 2022), document A/CN.9/1092**:**

62. While support was expressed for including a nomination stage, doubts were also expressed. It was said that in certain courts and tribunals, tribunal members were appointed directly by the treaty Parties, without any prior formal nomination stage.

63. Regarding the options in draft provision 6, differing views were expressed in favour of option 1, option 2 and a combination thereof. It was observed that the two options were not exclusive and could complement each other.

Option 1

64. With regard to option 1, it was said that the nomination process should be in the hands of States, which could have the effect of achieving a balance between respondent State- and investor-oriented candidates. Furthermore, it was said that there should be a mechanism to allow representatives of investors to also be involved in the nomination stage, while concerns were expressed about such a mechanism.

65. While it was suggested that each State should nominate one candidate, it was said that that could be revisited depending on the structure of the standing mechanism, including the number of States Parties to the statute. It was also suggested that States should nominate two candidates of different gender to foster gender balance. Another suggestion was that there should be no limitation on the number of candidates nominated. However, a concern was raised that nomination of two or more candidates by a State could lead to a large pool of candidates, which might complicate the selection and appointment process.

66. Differing views were expressed on whether a candidate would need to be a national of the nominating State. Some views underlined the importance of nationality, and how such a requirement would ensure geographical diversity, whereas others suggested that the candidate need not necessarily be a national of the

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

[25] 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).

nominating State. It was suggested that candidates should be nationals of a contracting Party. It was also suggested that co-nomination should be possible, where a State expressed support for a candidate nominated by another State.

67. Views diverged on whether States should be obliged to follow the process in paragraph 2. In favour, it was said that States should be encouraged to adopt an open, inclusive, and transparent nomination process and that various stakeholders, including civil society and business communities ought to be consulted. It was suggested that an express reference to business association should be included in subparagraph (b). Another view was that more flexibility should be provided to reflect the different circumstances of States and a suggestion was that paragraph 2 could be deleted. Questions were raised on the possible consequences of non-compliance with paragraph 2 and the meaning of the phrase "civil society" therein. A suggestion was made to provide that States should give evidence that consultations had been carried out in accordance with paragraph 2.

Option 2

68. With regard to option 2, it was said that a self-nomination process would ensure openness and transparency, which could also enhance the independence and diversity of the Tribunal members and avoid undue politicization. While the benefits of self-nomination or application by individuals were noted, certain drawbacks were mentioned, including the need for additional screening or filtering prior to the selection process, which might result in additional costs. It was suggested that, to prevent self-nomination by individuals that did not possess the minimal qualifications, option 2 could be revised to clearly set forth the eligibility criteria and require individuals to provide a detailed statement specifying how they fulfilled the requirements. It was suggested that the open call for candidates should take place at the level of a contracting State. In that context, it was said that the criteria for nomination should not be unified so as to account for specificities of different regional groups.

69. While the benefits of an inclusive process were highlighted, some caution was expressed for subparagraph (b) as the process could easily become politicized. It was suggested that the reference to "the investment community" should be deleted in subparagraph (b), which should refer more broadly to "relevant organizations" like paragraph 2 of option 1.

Merging options 1 and 2

70. Overall, it was generally felt that a combination of options 1 and 2 could bring the benefits of both options and significantly contribute to increase the legitimacy of the nomination process. In addition, it was suggested that in case a hybrid option would be introduced, the nomination by States and the self-nomination process should be balanced to avoid the situation where certain candidates would be subject to more stringent selection and nomination requirements than others. The secretariat was asked to prepare a new draft of that provision combining options 1 and 2 for further review by the Working Group.

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

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).[26]

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.[27] 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.[28]

[26] See: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/selection_and_appointment_eu_and_ms_comments.pdf.

[27] 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.

[28] 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.

Report of the forty-second session (New York, 14–18 February 2022), document A/CN.9/1092**:**

71. It was noted that draft provision 7 provided for the operation of selection panels or committees, including their role in the appointment process, how they would be constituted and how to ensure the independence of panel members.

72. It was said that an independent selection panel could guarantee the nomination of suitable candidates and promote inclusiveness and representation of all stakeholders. It was noted that such selection panels already existed in a number of international courts and tribunals.

73. On the other hand, a number of concerns were raised, and views diverged as to the practical operation of such a screening mechanism. One concern was over the accountability and legitimacy of such a panel. It was pointed out that it might be difficult for a selection panel to maintain independence and avoid potential conflicts of interest among its members. It was also pointed out that the selection of the members of such a panel would potentially be politicized. Another concern was that the selection process could lie entirely in the hands of States to the detriment of other stakeholders and might therefore not reflect proper representation. Furthermore, it was said that a selection panel could lead to multiple assessments of candidates, which could increase the overall costs for the entire appointment process.

74. In that light, suggestions were made that there could be less complex and expedited procedures to screen candidates. It was suggested that prior screening by a registrar, or a similar administrative body tasked with a review of candidates could be sought. It was also suggested that a selection panel should be established on an ad hoc rather than a permanent basis to reduce costs. It was suggested that an external body could confirm the independence of a candidate.

75. Regarding the mandate of the selection panel, it was said that the panel should be able to open a call for further nominations if needed as provided for in draft provision 7(f).

76. With regard to the composition of the selection panel, it was generally felt that, regardless of the definitive number of members, it should reflect gender balance, geographical representation and representation of the different legal systems, as well as diversity of professional and educational backgrounds. In that respect, it was suggested to retain the language in brackets in the last sentence of draft provision 7(b)(1). A suggestion was made that a maximum of five panel members could strike a right balance between efficiency, costs and resources, while another view was expressed that geographical representation would only be fulfilled with at least five panel members. Another view was that the number of panel members should not be less than ten, in order to reflect broad representation.

77. With regard to the individuals to be appointed as selection panel members, it was suggested that they could be former judges of international courts or of the Tribunal itself or be appointed ex officio. A view was expressed that members of the selection panel should also comprise persons who represented the views of other non-State stakeholders, such as the investors or associations or other organizations representing them.

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 3, 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).[29] 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

[29] 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.

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.

Report of the forty-third session (Vienna, 5-16 September 2022), document A/CN.9/1124:

15. With regard to paragraph 1, it was generally felt that the classification of candidates into regional groups should be based on their nationality rather than on the State or States nominating them. It was stated that this would be in line with the suggestion made at the previous session that nominated individuals need not be nationals of the nominating State and that co-nomination should be possible (see A/CN.9/1092, para. 66).

16. As to the regional groups, it was suggested that the grouping in the United Nations could be a starting point for discussion, while another suggestion was that the grouping could be determined on the basis of contracting States to the Tribunal. Yet another suggestion was that it should be a combination of the two.

17. With regard to instances where a candidate had more than one nationality, it was suggested that the predominant one be used. The Working Group requested the Secretariat to develop some options including the test to be applied in, and the body responsible for, the determination.

18. Views were expressed that the criterion for recommending members to serve on the appellate level of the Tribunal in paragraph 2 ("extensive adjudicatory experience") was too limited and should be expanded to reflect other types of qualifications or experience. In support, it was explained that the current wording might unduly restrict the number of recommended candidates, possibly frustrating the goal of achieving diversity and gender equality. In that respect, a suggestion was made to align paragraph 2 with draft provision 4(1), which outlined a number of characteristics that Tribunal members should possess. A question was raised whether it would be appropriate for the Selection Panel to make such a recommendation and the effect that the recommendation would have on the eventual appointment by the Committee of the Parties. After discussion, the Secretariat was requested to include alternative criteria to be assessed when recommending or appointing members to the appellate level to ensure that qualified candidates would be appointed also in light of paragraph 5.

19. With respect to paragraph 3, it was generally felt that the members of the Committee of the Parties should be entitled to vote on all identified candidates and not limited to those that fall within their regional group. It was said that such an approach could ensure diversity and flexibility.

20. However, it was felt that it was premature to determine the number of initial members and their allocation among the regional groups as the composition of the Committee of the Parties was yet to be known. Consequently, it was suggested that paragraph 3 should be drafted to empower the Committee to subsequently determine how the votes would be cast and how the candidates would be elected. It was said that such an approach would make it possible to adjust to any increase in membership.

21. With respect to paragraph 4, different views were expressed on the method for appointing Tribunal members at the first instance and the appellate level and the

specificity to be provided (see A/CN.9/WG.III/WP.213, para. 47). However, it was generally considered that the detailed process would largely depend on the structure of the Tribunal, including whether or not the appellate level was to be part of the Tribunal.

22. There was broad support for enhancing the principles outlined in paragraph 5 in the appointment process. It was said that reference could be further made to diversity in backgrounds, expertise and language. It was said that the practice in other international courts and tribunals might provide guidance. However, it was also expressed that such guidance should take into account the current context of ISDS, in the sense that not all international courts and tribunals could act as an example for the Tribunal. A question was raised on how the principles laid down in paragraph 5 would be fulfilled and who would make the assessment. Questions were also raised whether equitable geographical representation should be determined on the basis of the members of the Committee of the Parties (which may differ for the first instance and the appellate level) or be broader.

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.[30] 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.[31]

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

[30] 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.

[31] 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,[32] six[33] to nine[34] years. One court does not provide for a time limitation.[35] The appointments could also be staggered at three-year intervals so that the turnover of new tribunal members on the court would be gradual.[36]

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.[37]

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.[38] Provisions on removal seek to

[32] See, for instance, the ICTY and the WTO AB.

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

[34] See, the ICJ, the ECtHR, and the ITLOS.

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

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

[37] 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).

[38] 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).

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.[39]

Report of the forty-third session (Vienna, 5-16 September 2022), document A/CN.9/1124:

23. With regard to draft provision 9(a), diverging views were expressed as to the term of office and whether that term should be renewable.

24. Preference was expressed for long (for example, 9 years) non-renewable terms to ensure independence and impartiality of the members and protect them from undue external influence, were they to seek re-election. It was also stated that longer terms could contribute to collegiality among members and promote consistency in case law.

25. Another view was that a shorter term of, for example, 6 or 7 years with the possibility of renewal might better guarantee diversity and rotation within the regional groups and promote dynamism. It was said that foreclosing re-election could lead to a shortage of qualified members, who might have attained valuable experience.

26. Support was expressed for a staggered term of members as provided in draft provision 9(a)(2) to ensure continuity of the Tribunal members. In that context, it was generally felt that Tribunal members that were given shorter terms should be able to be re-elected as with members that were appointed to replace a member for the remainder of their term (see draft provision 9(b)(2)).

27. The Working Group considered that it was premature to determine whether the terms of the members of the first instance and those of the appellate level should be the same, as that would largely depend on the structure of the Tribunal, including whether or not the appellate level was to be part of the Tribunal.

28. While support was expressed for Tribunal members to continue in office beyond their term to complete any case under their consideration, doubts were expressed as this could unduly burden the Tribunal and result in undue prolongation of their terms.

29. With respect to removal of a Tribunal member addressed in draft provision 9(b), support was expressed that non-compliance with the Code of Conduct should form a ground for removal. However, it was suggested that removal should be limited to instances of a serious breach or repeated failures to comply with the Code. It was further suggested that a clear threshold for removal would need to be developed.

30. A further suggestion was that the process of removing a member from the Tribunal should be clearly spelled out, including who could request removal, how the views of the members in scrutiny would be heard, who would make the decision and whether that decision could be challenged. Doubts were expressed about other

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).

[39] See, for instance, CETA Article 8.30.

members of the Tribunal making the decision as members might be hesitant to remove a colleague, which could also lead to tensions. If the members of the Tribunal were to decide on the removal, preference was expressed for a decision by a qualified majority. On the other hand, it was said that a unanimous decision would increase the legitimacy of the removal.

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).

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 UNCITRAL Code of Conduct for Judges 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.

Report of the forty-third session (Vienna, 5-16 September 2022), document A/CN.9/1124:

31. With regard to draft provision 10(1), there was general support for including a reference to the Code of Conduct currently being prepared by the Working Group. A suggestion was made that the paragraph should envisage the possibility of subsequent amendments to the Code.

32. A suggestion was made that draft provision 10 or a separate provision should address sanctions to be imposed on former members of the Tribunal, including when they were in breach of any applicable articles of the Code of Conduct.

33. With regard to draft provision 10(2), it was suggested that remuneration should be dealt with in a separate provision, also taking into account that the Tribunal might have ad hoc judges. Views were expressed that salaries, allowances, and other benefits would need to be considered in light of the practice in other international adjudicatory bodies and the financing structure of the Tribunal.

G. Assignment of cases

1. General remarks

59. Different models for assigning cases can be found in international courts.[40] 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.[41]

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

[40] See CIDS Supplemental Report, paras. 183–198.
[41] CIDS Supplemental Report, para. 181.

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] 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.[42] 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.[43]

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 even to the full adjudicatory body for final determination, as is provided in certain courts and tribunals (both domestic and international).[44]

Report of the forty-third session (Vienna, 5-16 September 2022), document A/CN.9/1124:

34. With regard to the assignment of cases addressed in draft provision 11, diverging views were expressed in support of option 1 (including the two variants therein) as well as option 2. General support was expressed that the assignment process should: (i) ensure neutrality, impartiality and independence as well as the diversity of the members assigned to a case; (ii) be flexible to adjust to the circumstances of the case; and (iii) be transparent. It was also mentioned that the assignment process would largely depend on the total number of Tribunal members as well as other aspects of the Tribunal that the Working Group had yet to reach consensus on.

35. Support was expressed for developing clear criteria, which would guide the President of the Tribunal in assigning the cases. However, doubts were also expressed about the President, or any other body composed of the members of the Tribunal, performing such function, which might lead to bureaucracy within the Tribunal and incur additional costs. Thus, support was also expressed for a random assignment process. It was stated that a randomized process would ensure that assignments were not predictable avoiding any influence by the disputing parties. On the other hand, it was mentioned that safeguards should be in place to ensure that the capacity (including specialized knowledge and languages skills) and diversity of the members were taken into account when composing a chamber. In that regard, the role of the President in overseeing the assignment process as well as consulting the Tribunal members in that process was highlighted.

36. After discussion, it was generally felt that the positive aspects of options 1 and 2 as well as the two variants in option 1 should be captured so that, for example, disputes would be initially assigned to Tribunal members on a random basis with the President or the Presidency of the Tribunal being able to adjust or vary that assignment based on pre-established and publicly available criteria. It was generally felt that the elements mentioned in variant 2 of option 1 could be a starting point when developing the criteria.

37. With regard to whether Tribunal members who are nationals of a respondent State should be restricted from being assigned a case involving that State, some support was expressed for that limitation, while others stated that nationality should not be a proxy for bias and should not be a criterion.

[42] See Iran-United States Claims Tribunal.

[43] CIDS Supplemental Report, para. 185.

[44] 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.

38. With regard to whether chambers of the Tribunal should be pre-determined with certain members assigned for a fixed term, some support was expressed for setting up chambers with special expertise, while the composition of chambers generally should be done ad hoc. The Secretariat was asked to conduct research on the practice of other international adjudicatory bodies, particularly those that have incorporated a mixture of ad hoc and specialized chambers.

39. Interest was expressed for the formulation of grand chambers (see A/CN.9/WG.III/WP.213, para. 65), while calls were also made for more clarity on when the grand chamber would be called upon (for example, issues of significant relevance, divergent interpretations by different chambers, or departure from a precedent) and upon request by whom.

40. With regard to a possible change in composition after assignment of a case, it was suggested that a mechanism akin to a challenge of arbitrators should be developed, which would allow a member to be replaced by another member under certain circumstances, for example, in case of a conflict of interest. It was suggested that such a mechanism (which should be distinct from the removal from the Tribunal addressed in draft provision 9) should not be too prescriptive and could be included in the rules of procedure of the Tribunal.