

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
(UNCITRAL)

Working Group III: Investor-State Dispute Settlement Reform

Possible reform of investor-State dispute settlement (ISDS)

**COLOMBIA'S COMMENTS ON THE DRAFT PROVISIONS ON
A STANDING MULTILATERAL MECHANISM: SELECTION AND APPOINTMENT
OF ISDS TRIBUNAL MEMBERS AND RELATED MATTERS**

November 15th, 2021

1. Colombia hereby thanks the Secretariat for preparing the draft provisions on a *Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters*; and submits its comments to such draft.
2. The mere fact of submitting these comments does not prejudice Colombia's position regarding the establishment of a standing multilateral mechanism nor signals it is in favor or against such mechanism. Colombia is conducting internal assessments in order to determine the convenience and impact of this reform option, from a holistic perspective.
3. Colombia reserves its right to modify, withdraw or make further comments or state a specific position on this and any other issues in the course of discussions taking place within the Working Group III on a possible reform of Investor-State dispute settlement (ISDS).

SPECIFIC COMMENTS TO THE DRAFT PROVISIONS

II. Selection and appointment of ISDS tribunal members

Draft provision 1 – Establishment of the Tribunal

4. It is not clear from the drafting whether the Tribunal encompasses a First Level Tribunal and also an Appellate Tribunal. In other models, like CETA, separate provisions are set out for each body.



5. There should be a clear distinction between the functions and jurisdiction of a First Level Tribunal and an Appellate Tribunal, the selection and appointment of their members, as well as case assignment, among other issues.

Draft provision 2 – Jurisdiction

6. Taking into account the multilateral nature of the Tribunal, it would be assumable that the mechanism to be established would deal, in principle, with the resolution of investment disputes arising from an investment treaty or a contract.

Draft provision 3 – Governance structure

7. There seems to be a clash between paragraphs 2 and 3 of this draft provision. Indeed, both provisions address the purpose of entitling the Committee of the Parties, on the one hand, and the Tribunal, on the other hand, to establish the rules of procedures of the Tribunal / Appellate Tribunal. It may be convenient to make a distinction between functions and working procedures for both bodies, as mentioned before.
8. It is noted that, with this structure in force, the risk that the Tribunal eventually introduces procedural reforms to which States do not agree is patent. Thus, it is necessary to provide the Committee of the Parties with a mechanism to tackle any event of excess of powers by the Tribunal when deciding on its procedural rules.
9. Colombia agrees with the concerns raised by members of the Working Group during its intersessional meetings on this particular issue. The decision-making mechanism behind the Multilateral Investment Tribunal (MIT) should be comprehensive enough to include the requirement of consensus for some of the most relevant matters, and to allow decisions with a simple majority vote on others.

Draft provision 4 – Number of tribunal members and adjustments

10. As mentioned in document A/CN.9/WG.III/WP.--- (Selection and appointment of ISDS tribunal members - Note by the Secretariat) full representation might be difficult to achieve, in particular in light of the cost implications and connection between the number of adjudicators and the caseload. A permanent body with a high number of members may be expensive and complex to manage. Instead, options like seeking broad geographical representation as well as a balanced representation of genders, levels of development and legal systems should be considered. Courts with a global reach, including an eventual MIT, are usually selective representation courts and often allow to appoint only one or two judges that are nationals of the same State. This type of selective representation may allow States that do not have a national on the bench to appoint an ad hoc judge when they are party to a case in order to address concerns that there should be familiarity with all disputing parties' legal systems.
11. The Tribunal should be composed of full-time office Members, for both mechanisms. When draft provision 1 indicates that a MIT shall function on a



permanent basis, it should mean that its members would serve on a permanent basis as well.

12. It may be worth recalling the low percentage of arbitrators who are experts in public international law (around 25%), which results in a low percentage of decisions (around 20%) containing a real application of the customary rules on the interpretation of treaties. This demonstrates the need to make expertise in public international law a requirement, on which cannot be replaced with experience in ISDS. On the other hand, experience in ISDS could be a plus, but should not be a sole requirement.
13. Regarding the factors backing the adjustment of the number of members on the MIT, the most relevant criterion is the evolution of caseload (option 1). Indeed, a high and significant caseload could enervate the appropriate functioning of any standing mechanism if the availability of members to hear claims is limited. Nevertheless, the decision on the adjustment of the number of Tribunal members should also bear in mind the recommendations of the institution itself (which could be, indeed, backed by the fact that caseload has significantly risen). Therefore, it may be convenient to consider option 2 as well.

Draft provision 6 – Nomination of candidates

14. Colombia considers that participation of non-State actors (either private enterprises or organized civil society) in this process should not be envisaged.
15. Moreover, on the issue of nomination, it is necessary for this provision to clarify and address a series of concerns that were acutely raised during the intersessional meeting. The first one is regarding the nomination process. Colombia considers that this process should be structured with a special emphasis on the necessity of States. If the provision were to establish that every party has the possibility to nominate a candidate (following the nationality criterion), many questions arise on the issue of geographic representation. For example, whether or not certain countries would be barred from nominating once there is a vacancy if current members duly cover their quota. The nomination process should prevent over-representation and favor diversity.

Draft provision 7 - Selection Panel

16. Assuming that a court with selective representation would be the formula to be followed, it is likely that collective decision-making by States at the election stage will increase. Therefore, a selection panel may be an approach to follow, in order for it to assess whether a candidate meets the eligibility criteria stipulated in the eventual Agreement establishing the Tribunal before the Committee of the Parties makes an appointments. However, caution should be taken. The establishment and composition of the Selection Panel must not end up being a more complex and controversial issue than the composition of the Tribunal itself, nor an additional bureaucracy.
17. As it was mentioned in the discussions held by States at the resumed thirty-eighth session of the Working Group III, the Selection Panel could be seen as a sort of



“screening” body, assessing the candidate judges prior to their election to ensure that they meet the requirements, possess sufficient expertise and qualifications. The Selection Panel should be expert-based, and its function should be to filter out candidates that do not meet qualifications. Therefore, this sort of body may in principle lead to the appointment of more qualified and more independent judges, which rules out any possibility to consult non-state entities.

18. The selection and appointment methods for adjudicators at the appellate level should follow specific requirements and procedures applicable to the selection and appointment of adjudicators of the first level, as mentioned in the comments provided for draft provision 1. Should the objective be to have a MIT that may encompass a permanent appellate body composed of a fixed number of members, they should be required to meet specific qualifications, such as a significant degree of adjudicatory experience, among others.
19. Moreover, it is necessary to recall the importance of clarifying the status of the members of the selection panel, particularly regarding salaries, their terms of office and their relation with other bodies of the MIT.

Draft provision 8 - Appointment (election)

20. As it has been shown in past discussions, the current prevalence of arbitrators from certain regions may be evident. Therefore, introducing the UN principle of equitable geographical distribution to any eventual multilateral standing body should be a minimum.
21. As mentioned before, Colombia does not consider that participation of non-State actors (either private enterprises or organized civil society) in this process should be envisaged nor deems the argument that States would designate biased adjudicators to be valid. Such reasoning could only make sense in the current system of case-based party appointed arbitrators where there are significant concerns regarding the neutrality of party-appointed arbitrators. This is precisely one of the deficiencies that such an institutional reform should in principle seek to resolve.
22. An eventual standing mechanism should be fully capable of designating neutral adjudicators through appointments determined randomly and/or based on caseload to hear claims or appeals raised by the parties.
23. Additionally, in this context it is important to ideate mechanisms to address situations where one State or a few States gain the ability to block the designation of new adjudicators, an issue that the WTO’s Appellate Body has been facing.
24. As mentioned before, the goal should be to seek broad geographical representation, as well as a balanced representation of genders, levels of development and legal systems.

Draft provision 9 - Terms of office, renewal and removal



25. It would be worth drawing on the experience of existing adjudicating bodies in international law and discuss length alternatives which have proven to be the most reasonable and whether the possibility of renewal is desirable. Appointment for fixed single terms may increase independence but make the system potentially less accountable. On the other hand, banning the possibility of reappointment may imply the loss of experience.
26. The possibility of longer terms on a non-renewable basis may ensure that the members would not be affected by undue influence. All in all, the need to ensure financial security, as well as the ability to attract high-quality candidates and the accumulation of experience and expertise on an eventual body should be taken into account, as it was noted by Members at the resumed thirty-eighth session of the Working Group III.
27. It is also important to consider the possibility of renewable terms, which are common in international adjudicatory bodies. Some of them, for example, include limitations on reappointment, allowing it only once. In this regard, renewable terms may improve accountability, as States can justify reappointment decisions on the judge's previous performance.
28. The current draft does not include any procedure for the removal of a member. The wording only refers to "*substantial misconduct or failure to perform his or her duties*". Furthermore, the provision requires a unanimous decision of all members for a removal. To fill this void, the draft should factor in the failure to disclose conflicts of interest and similar ethical concerns as grounds for the removal of Tribunal members. It may be appropriate to have more clarity on that regard. For instance, considering models envisaged in instruments related to international adjudicating bodies, such as the WTO's "Rules of conduct for the understanding on rules and procedures governing the settlement of disputes". CETA provisions on this issue could also be considered.

Draft provision 10 – Conditions of services

29. Members of the Tribunal should indeed comply with the Code of Conduct. Moreover, he or she shall not exercise any political or administrative function or engage in any occupation of a professional nature during his or her tenure at the Tribunal. As mentioned by Colombia in the comments made to draft provision 4, should be necessary for members of the Tribunal to be in full time office. However, the wording proposed, particularly the reference to "engage in any occupation of a professional nature" may leave the door open to, for instance, permitting the member to act as counsel or expert witness in cases outside of the MIT. Therefore, it is convenient to include a condition setting out that members shall dedicate exclusively to Tribunal-related duties and are banned from acting as arbitrators, counsels or experts in cases dealt with outside the Tribunal.
30. If there is a shared understanding on having full time members of the First Level Tribunal and/or the Appellate Tribunal, a provision requiring them to be available at all times may sound, in principle, redundant. However, and linked to the previous comment, it does not necessarily imply just that. Therefore, such reference should be kept.

31. Issues related to salaries should be addressed within the main issue of financing the standing multilateral mechanism, as announced by the Secretariat at the beginning of its Note.

Draft provision 11 on case assignment

32. As mentioned by Colombia in its comments to draft provision 1, there should be a clear distinction between the functions and jurisdiction of a First Level Tribunal and those of an Appellate Tribunal regarding factors like the duration of the proceedings, the selection and appointment of its members, as well as their terms in office, minimum/necessary qualifications, case assignment and salaries, among others.
33. Leaving aside such factors, the Standing Appellate Body of the WTO could serve as a basis to explore the features of an eventual appellate mechanism, including its composition, terms in office and case assignment, among other features. In particular, it is important to highlight the relevance of having divisions to handle cases, their structure (composed by certain number of members, selected randomly).

III. Other matters related to a standing multilateral mechanism

Supporting body

34. Any hypothetical future body should have an official and regulated supporting institution, with similar infrastructure to the WTO's Appellate Body Secretariat. In that system, the duties of such supporting body, as well as their conditions of impartiality, are well regulated by the DSU's Rules of Conduct. It seems that not providing adjudicators with supporting body entails the risk of that support being supplied by outsiders that should have no involvement at all in the Tribunal's tasks.

Applicable law and treaty interpretation

35. In international law, the interpretation to be done by adjudicators is not a creative process and their role is not one of being wise administrators of the international legal order. Article 3.2 of the WTO's DSU is extremely valuable in making this clear. Any eventual multilateral body should follow suit: *"The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."*