



# Comments submitted by Switzerland on UNCITRAL's Initial Draft on Standing Mul- tilateral Mechanism

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## I. Introduction

0. Switzerland would like to thank the UNCITRAL Secretariat for the important work, which allows to substantively advance the discussion. In Switzerland's view, this Initial Draft provides a very good basis on which to work. However, a few areas of concern remain, which are commented below.

## II. Framework: establishment, jurisdiction and governance

1. Draft provisions 1 to 3, which address the general framework regarding the establishment of a standing mechanism, its jurisdiction and governance structure, raise no issues, in our view. In particular, **draft provision 2**, which sets out the outer limits of the standing body's jurisdiction and is therefore of particular importance, is formulated appropriately. The explanatory comments at § 10 also helpfully clarify the main aspects underlying this provision. With regard to the term "parties" used in draft provision 2, the explanatory comment rightly notes that the term may refer to a contracting party to an investment treaty or a disputing party, depending on the context. In particular, the new standing mechanism would have jurisdiction in the typical situation of "arbitration without privity" (here: "dispute settlement without privity"), i.e. consent would be perfected when a qualifying investor institutes proceedings and thereby accepts an offer made by a treaty party in an investment treaty.
2. With regard to **draft provision 3**, we suggest specifying more precisely the division of competences of the Committee of the Parties (hereinafter, the "COP") and the Tribunal in respect of the enactment and modification of rules of procedure/rules for carrying out the Tribunal's functioning. To that end, it might be useful to indicate what are the "more fundamental rules of procedure" referred to in the explanatory comment at § 11, which the COP, rather than the Tribunal, is expected to enact.



3. Still with regard to rules of procedure, we agree with the explanatory comment at § 66 regarding the need to achieve an appropriate balance between general rules of procedure to be contained in the agreement establishing the Tribunal and more specific rules to be developed/updated by the COP or the Tribunal itself. This would ensure more flexibility in case the existing rules need to be adapted.

### III. Selective representation and number of Tribunal members

4. Draft provisions 4 and 5 deal with the number and qualification of Tribunal members and so-called “ad hoc” Tribunal members.
5. Although **draft provision 4** is entitled “Number of tribunal members and adjustments”, it also addresses qualifications of Tribunal members, which is a key aspect.
6. Regarding **draft provision 4(1)**, there is no doubt that members should be “independent”. Furthermore, the requirement that they are chosen “from among persons of high moral character” and “enjoy[ing] the highest reputation for fairness and integrity” are often found in constituent instruments of international courts and tribunals and raise no particular issues. Moreover, the individual selection criterion concerning competence is formulated appropriately (“recognized competence in the fields of public international law, including international investment law and international dispute settlement”).
7. By contrast, the text in bracket whereby members should “possess the qualifications required in their respective countries for appointment to the highest judicial offices” raises concerns. It is true that this requirement is at times included in constituent instruments of international courts and tribunals, notably in Article 2 of the Statute of the ICJ (as well as in the Statute of its predecessor, the PCIJ). However, as noted in the explanatory comment at § 16, states vary widely in their criteria for eligibility to the highest courts and transposing this requirement into an international setting may be problematic.<sup>1</sup> To make an example, it may be the case that in state A, only persons who have served twenty years as a judge may be appointed to its Supreme Court; in state B, by contrast, 10 years may be sufficient. An individual having served eighteen years would be eligible to the new Tribunal if he/she stems from B, but not from A, a result that has been rightly viewed as “illogical and inequitable”.<sup>2</sup>
8. What is more, in the ICJ context, the requirement for eligibility to highest judicial offices is one of two *alternative* selection criteria, the other being that of “jurisconsult of recognized competence in international law”.<sup>3</sup> In fact, it appears that the first alternative requirement (eligibility to highest judicial offices) is almost never used when selecting ICJ

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<sup>1</sup> See also Ruth Mackenzie, Kate Malleson, Penny Martin, Philippe Sands (2010), *Selecting International Judges: Principle, Process, and Politics*, Oxford University Press, p. 50 (noting that “[i]n practice, states vary widely in their criteria for membership of their highest courts, and some do not require any legal background”).

<sup>2</sup> See, with reference to the PCIJ-ICJ context, A. Bustamante, *The World Court* 115 (1925), cited in Jeffrey B. Golden, “The World Court: The Qualifications of the Judges”, *Columbia Journal of Law and Social Problems* 14, no. 1 (1978): 1-46, p. 35, fn. 141 (“If the reference in Article 2 to the qualifications required in their respective countries for appointment to the highest judicial offices implies the adoption of conditions imposed by the national laws, the result would be illogical and inequitable. In one nation, A, only persons who have served twenty years as a judge may be appointed to its Supreme Court: then a judge who had served only eighteen years could not become a judge of the Permanent Court; but in another country, B, where only ten years of service may be required, a person who had been a judge for eleven years would be eligible”).

<sup>3</sup> See Art. 2 ICJ Statute: “The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law” (emphasis added).

judges and, according to some commentators, this is so for good reasons.<sup>4</sup> In draft provision 4(1), by contrast, eligibility to highest judicial officers appears to be one of the *cumulative* requirements for membership in the new standing body. This appears inappropriate, in our view, as it would unduly restrict the pool of eligible candidates.

9. In sum the bracketed text whereby members must “possess the qualifications required in their respective countries for appointment to the highest judicial offices” should in our view be eliminated.
10. Finally, eligibility requirements to the new Tribunal could include 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.<sup>5</sup>
11. **Draft provision 4(2)** concerns the adjustment over time in the number of judges. If Option 1 is selected, “Variant 3” would seem the most appropriate, in our view, as it takes into account both the evolution of case load and the potentially growing state membership to the standing body. Option 2 leaves it to the Presidency of the COP to propose an increase and indicate the reason why this is considered necessary and appropriate. However, it does not specify what happens in case the Presidency of the COP is against an increase and/or fails to act. In both Option 1 and Option 2, the decision ultimately rests with the COP by a 2/3 majority. **On balance, Option 1, Variant 3 would seem preferable.** If Option 2 is retained, we suggest that the formulation “acting on behalf of the Tribunal” be removed as the Presidency of the COP is not acting on behalf of the Tribunal (but, at most, on behalf of the COP).
12. **Draft provision 4(3)** closely reflects Article 3 of the ICJ Statute.<sup>6</sup> The first sentence of draft provision 4(3) prohibits the election of two members of the same nationality. Its second sentence addresses the situation where a member has multiple nationalities and seeks to identify a judge’s “predominant” or “effective” nationality.<sup>7</sup> As the WP notes, some international courts and tribunals include similar rules on nationality of judges. We support this approach to ensure broad geographic representation.
13. With respect to the “no two judges of the same nationality” rule, the second sentence on dual (or multiple) nationalities should be reformulated. Draft provision 4(3) *in fine* refers to the “exercise of civil and political rights” as the factor to identify a member’s predominant or effective nationality. However, reference to the exercise of civil and polit-

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<sup>4</sup> See Chittharanjan F. Amerasinghe, *Judges of the International Court of Justice: Election and Qualifications*, 14 LEIDEN J. INT’L L 335 (2001), pp. 399-400 (noting that “[i]t is highly doubtful whether mere service in the highest national court or eligibility to do so because of practical professional or other experience in the national legal system, however brilliant and suitable for the highest national judicial offices the candidate may be, makes him or her suitable for service on the ICJ” and that the requirement that judges possess the qualifications required for highest judicial offices “either has fallen into disuse or is rarely used. Clearly, it is in the interest of the international community that the first alternative be so treated, because, as already implied, mere expertise in national law and eligibility for high national judicial office, is not sufficient to discharge satisfactorily an international judicial function on the ICJ [...]”, emphasis added).

<sup>5</sup> 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 e.g. ICJ Statute, Art. 39; ITLOS Rules of the Tribunal, 28 October 1997, Art. 43.

<sup>6</sup> See ICJ Statute, Art. 3: “1. The Court shall consist of fifteen members, no two of whom may be nationals of the same state. 2. A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights”.

<sup>7</sup> See, in the ICJ context, Aznar-Gómez, *Article 3*, in Zimmermann, Tomuschat, Oellers-Frahm, Tams (eds.), *The Statute of the International Court of Justice. A Commentary* (2<sup>nd</sup> ed. OUP), p. 250 (noting that Article 3(2) of the ICJ Statute adopts “the principle of ‘effective’ nationality laid down both by arbitral jurisprudence and doctrine and later confirmed by the ICJ itself in the *Nottebohm* case”, internal footnotes omitted).

ical rights is not only anachronistic,<sup>8</sup> but, more fundamentally, may lead to confusion and uncertainty as an individual with multiple nationalities may exercise civil and political rights (e.g. vote) in more than one state. Preferable connecting factors would be, in our view, “habitual residence”, if applicable, and/or “main center of interests” which would leave less room for uncertainty. Hence, draft provision 4(3), second sentence could be reformulated as follows: “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 center of interests”.

14. **Draft provision 5** is entitled “*Ad hoc* tribunal members”. Although the formulation is not entirely clear, we understand that in certain circumstances and “particular categories of cases” which are still to be set out, the Tribunal may decide to form “chambers” composed of three or more members. In those cases, disputing parties “may choose a person to sit as Tribunal member” “preferably from among those persons who have been nominated as candidates” (but have not been elected, so we understand). In short, in certain circumstances disputing parties would be able to appoint an *ad hoc* judge from outside the pool of elected judges.
15. This provision is, from our point of view, problematic and should be deleted.
16. First, while the possibility to form special chambers within a given dispute settlement body is present in certain international courts and tribunals, its use in practice has been limited. In the ICJ context, for instance, use of “chambers” “remains exceptional” and was resorted to in only six cases.<sup>9</sup>
17. Second, and more fundamentally, draft provision 5 seeks to reintroduce disputing party appointment within a system in which one of the main purposes is precisely to do away with disputing party appointment (as the WP notes in the introductory remarks at § 5). In other words, disputing party appointment would be reintroduced by the back door (although it would be limited to particular cases and a restricted pool).
18. Third, the practice of “*ad hoc*” judges presents clear drawbacks (as noted by the WP in the explanatory comment at § 20). In the inter-state context, empirical studies on voting patterns have demonstrated that *ad hoc* judges tend to favor the state that has appointed them to sit on that specific dispute.<sup>10</sup>
19. For all these reasons, we are of the view that draft provision 5 should be deleted as its drawbacks appear far greater than any potential advantages that may come with it.
20. In this context, it is worth mentioning that, rather than a provision *on ad hoc* judges, it would be more appropriate, in our view, to introduce nationality restrictions of members

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<sup>8</sup> See Adam M. Smith, *Judicial Nationalism in International Law: National Identity and Judicial Autonomy at the ICJ*, 40 TEX. INT’L L.J. 197 (2005), p. 223 (noting that “[t]he ICJ’s determination that citizenship of judges be defined as of the state in which they ‘ordinarily exercise[] civil and political rights’ is somewhat anachronistic, given the expanding civil and political rights accorded to noncitizens in many states”).

<sup>9</sup> See ICJ website at <https://www.icj-cij.org/en/chambers-and-committees> (noting that “under the terms of the Statute [the chambers’] use remains exceptional. Their formation requires the consent of the parties. While, to date, no case has been heard by either of the first two types of chamber [chambers for “summary procedure” (Art. 29 ICJ Statute) and for “particular categories of cases” (Art. 26)], by contrast six cases have been dealt with by *ad hoc* chambers”).

<sup>10</sup> See Adam M. Smith, *Judicial Nationalism in International Law: National Identity and Judicial Autonomy at the ICJ*, 40 TEX. INT’L L.J. 197 (2005), p. 218, finding that “*ad hoc* judges often vote for the states that appoint them”, that “[e]ighty percent of the time in which they were able to do so, national judges voted with their countries when they were party to a case” and that this percentage was 89% in case of *ad hoc* judges. See also Eric A Posner, Miguel F.P.de Figueiredo (2004), *Is the International Court of Justice Biased?*, John M. Olin Program in Law and Economics, Working Paper No. 234; Fred J. Brurinsma (2008), *The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR* (1998-2006), *Ancilla Iuris*, pp. 32-43 (finding that national bias occurs to a greater extent among *ad hoc* judges than among elected judges).

in relation to disputes in which one of the disputing parties is either his/her state or a national thereof. This is an aspect that will need to be addressed when regulating assignment to cases (see below **draft provision 11**). For example, the ICSID Convention contains certain restrictions on nationality of arbitrators as well as of *ad hoc* committee members.<sup>11</sup> Because many investment disputes involve issues of public interest and sometimes of high political sensitivity, an adjudicator who is a national of the respondent state may find him/herself under a certain psychological, if not actual political, pressure, when making decisions. It thus appears preferable to remove a possible obstacle to the perception of the dispute resolution process as truly independent and impartial from all interests at stake and provide that any chamber or division deciding on a given dispute shall *not* include a Tribunal member who is national of the investor or the respondent state. Such a prohibition would also do away with the need to have *ad hoc* judges, as neither disputing party would have a national sitting on the chamber.

#### IV. Nomination, selection and appointment of candidates

21. We agree with the general remarks at § 24 of the WP that the selection process must be (i) multi-layered; (ii) open to stakeholders; and (iii) transparent (see also Comments submitted by Switzerland on two UNCITRAL Draft Working Papers, 19 November 2020, paras. 48 ff.). We also agree that elections through votes should be favored over elections by consensus to avoid blocking the selection process (WP, § 26).
22. **Draft provision 6** deals with nomination of candidates. Option 1 provides for nomination by states, whereas Option 2 envisages a call for candidatures to which interested candidates with the required qualifications may respond. There may be certain drawbacks in Option 1, as stated in explanatory comment § 30, which make Option 2 preferable. However, as the WP notes at § 33, both options could also be combined, i.e. states would maintain the possibility of direct nominations and individuals could also apply directly.
23. If Option 1 is maintained, it may be appropriate to envisage that each Party may propose *two* candidates which should necessarily be of *different gender*. Such prescriptive language is more likely to ensure that the objectives of general balance on the bench are achieved (see explanatory comment at § 30). Second, the bracketed text “who need not necessarily be a national of that Party” could be left in, as there is no reason to limit states to the choice of their nationals (it being understood that states would be free of course to nominate their nationals). That said, keeping in mind that it is important to ensure an adequate regional diversity on the bench, it may be appropriate to provide that a state’s nominee must have the nationality of one of the states of the regional group to which the nominating state belongs. This would help to ensure that at the moment of appointment (see below) there is a sufficiently diverse group of candidates in terms of geographical representation, from which group the appointment can be made. Third, in Option 1 it is in our view appropriate to maintain paragraph 2, whereby state parties are

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<sup>11</sup> See ICSID Convention, Articles 38, 39 and 52(3).

encouraged to consult with a number of organizations when making the nominations, for the reasons recalled in the explanatory comment at § 31.

24. **Draft provision 7** deals with the so-called selection panel. The presence of such a panel in the selection process is important to ensure that only suitable candidates reach the election or appointment phase.<sup>12</sup> We have the following comments in respect of the specific provisions that regulate the functioning of the panel.
25. We agree with the formulation of the mandate of the panel which is to “give an opinion on whether the candidates meet the eligibility criteria” (**draft provision 7(a)**). It could also be considered whether the panel should also have the power to call for more nominations if it finds that there is an insufficient number of candidates who meet the eligibility criteria.
26. The composition of the panel (**draft provision 7(b)**) also reflects the practice in other international courts and tribunals. We would, however, suggest the following improvements:
  - In paragraph 4, the “standard form” on the basis of which applicants to the selection panel must apply should be published “by the Committee of the Parties”, and not by the Tribunal, as this step concerns a pre-selection stage and the Tribunal will not be in place at the first election.
  - In paragraph 5, “shall not participate as candidates in any selection procedure to become members of the Tribunal” could be replaced with “are not eligible to the Tribunal”.
  - In paragraph 6, the composition of the Panel shall be made public “by the Committee of the Parties” and not “by the Tribunal” (for the same reasons indicated for paragraph 4).
27. Regarding **draft provision 7(c)(4)**, it does not appear appropriate for the “President of the Tribunal” to have the authority to remove a member of the selection panel. If such power is envisaged, it should rest with the chair of the panel itself, acting by a qualified majority of the members. In that case, a rule should be foreseen for the event that the chair of the panel fails to respect his or her obligations. In the alternative, the power to remove a panel member could be entrusted to a neutral appointing authority, such as the President of the ICJ, the Secretary General of the PCA or of ICSID. In any event, States, through the COP or otherwise, should have no say in the removal of panel members. This will reinforce the panel’s structural independence.
28. In **draft provision 7(e)(3)**, the bracketed text “qualified” should, in our view, be removed, as it is sufficient in that context to provide for a simple majority of three out of five members.
29. **Draft provision 7(f)(1)** should, in our view and at this stage of the drafting, refer to “Option 1” (instead of “paragraph 1”) and “Option 2” (instead of “paragraph 2”).

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<sup>12</sup> See generally G. Kaufmann-Kohler & M. Potestà, “The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards”, CIDS Supplemental Report, paras. 135 ff. (hereinafter, “CIDS Supplemental Report”).

30. As mentioned above, the tasks of the panel set out in **Draft provision 7(f)2** could also include the power to call for more nominations if the panel finds that there is an insufficient number of candidates who meet the eligibility criteria.
31. **Draft provision 8** deals with the appointment or election process. As such, it is likely to be one of the most important provisions in the constituent instrument of the new standing body or bodies. In our view, the complexity of the matter requires substantively more work to be done and further details to be specified, in particular on the voting procedures. We look forward to contributing further once more details are offered by the Secretariat for discussion. For the time being, we would like to offer the following preliminary comments.
32. **Draft provision 8(1)** envisages “classification” of candidates in regional groups “based on the nationality of the country which nominated them for the election”. As currently formulated, this rule works only in combination with draft provision 6, Option 1 (nomination by states). It would need to be adjusted in order to be compatible with draft provision 6, Option 2 (self-nomination by interested individuals). In that case, the allocation to a regional group could be based on the candidate’s nationality (or predominant nationality, in case the individual possesses nationalities of two or more states belonging to different regional groups). As already mentioned above, it is of particular importance that the composition of the Tribunal is geographically balanced (as the insufficient geographic diversity was highlighted as one of the concerns with the existing system in the Working Group’s discussions). To that end, we are of the view that more thought needs to be put into nomination and appointment procedures to make sure that there are adequate and clear rules on geographic diversity and ways to enforce such rules.
33. **Draft provision 8(2)** envisages that the selection panel makes a recommendation that some of the elected members serve on the appellate tribunal. It is doubtful, in our view, whether this task should be part of the mandate of a technical body such as the selection panel (whose task is only to screen eligibility requirements). A better system would be to leave the allocation of judges to the first-instance or appellate level to the Tribunal itself once members have been elected. The ICC, for instance, adopts the latter model, i.e. the Court itself organizes itself into the relevant divisions, including an appeals division, and “[t]he assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court”.<sup>13</sup> Hence, option (iii) spelled out in the explanatory comment at § 40 appears as a suitable option (without however the recommendation by the selection panel). That said, more specific rules would need to be devised to test its applicability in practice.
34. **Draft provision 8(4)** should be moved up as it concerns eligibility, which is preliminary to the other steps (e.g., voting).

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<sup>13</sup> See Art. 39(1) ICC Statute (“As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b) [i.e., Appeals Division, Trial Division and Pre-Trial Division]. The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience”).

35. **Draft provision 8(5)** provides for the COP's obligation to ensure representativeness of legal systems, geographical distribution and gender. We are of the view that more specific provision need to be included in order to ensure that these goals do not remain aspirational but are actually implemented in the voting procedures. Once again, the most recent constituent instruments of certain courts and tribunals, such as the ICC, may provide helpful guidance to the Secretariat, including on requirements for gender balance.
36. **Draft provision 8(6)** deals with the "President of the Tribunal" and his/her election. It should be clarified whether, in a standing body having both a first-instance and an appellate level, the President of the Tribunal is the president of the entire dispute settlement body or whether there should be one president for the first-instance and another for the appellate level.

## V. Terms of office, renewal and removal

37. Draft provision 9 covers terms of office, renewal and removal of Tribunal members.
38. Regarding **draft provision 9(a)(1)**, we are of the view that terms of office should be relatively long and non-renewable. Indeed, a longer, non-renewable term is important for purposes of judicial independence. It shields members from the possible conscious or sub-conscious pressure deriving from the desire to be re-elected.<sup>14</sup> Hence, it is preferable to retain the language "without the possibility of re-election".
39. Regarding **draft provision 9(b)(2)**, it would seem preferable that a replacement member be elected for the end of the term of the replaced member, rather than for a full term.
40. With regard to resignation, removal and replacement, it should be carefully considered whether it would not be more appropriate for the removal of a member according to **draft provision 9(b)(1)** to be subject to a qualified majority (e.g., two thirds) rather than unanimity.

## VI. Conditions of service

41. As a preliminary matter, the scope of prohibitions set out in **draft provision 10** will, in our view, depend on whether members will be full or part time (see draft provision 4(1)). Assuming a Tribunal composed of full time members, other judicial or judicial-like functions in investor-state disputing settlement should also be excluded during a term of office. By the same token, during his/her term of office, a Tribunal member should not be allowed to sit in national judiciaries or other standing international courts and tribunals as these types of occupations would be incompatible with membership in the Tribunal. However, the prohibition to "engage in any occupation of a professional nature" during a member's tenure appears uselessly broad. For instance, a Tribunal member should be allowed to perform occasional activities, such as teaching, lectures, presentation at

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<sup>14</sup> See CIDS Supplemental Report, para. 162, with further references. For instance, with a view to strengthening judicial independence, the ECtHR moved from a renewable six-year term to a non-renewable nine-year term in 2010. See Council of Europe (2004), Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention Strasbourg, CETS No. 194, para. 50 ("The judges' terms of office have been changed and increased to nine years. Judges may not, however, be re-elected. These changes are intended to reinforce their independence and impartiality [...]").



conferences, etc. without having to request an exemption from the COP. Therefore, assuming a Tribunal composed of full time members, we would suggest to reformulate the rule as follows:

42. “A member of the Tribunal shall comply with the Code of Conduct for Adjudicators in International Investment Disputes. He or she shall not exercise any political or administrative function, **perform any judicial or judicial-like function in national courts, permanent international courts and tribunals, or investor-state dispute settlement bodies**, or engage in any occupation of a professional nature **professional activity on a continuous basis** during his or her tenure at the Tribunal unless exemption is granted by the Committee of the Parties, acting by a simple majority.”
43. **Draft provision 10(3)** could be clarified to the effect that “*Each member* shall receive an annual salary” and “*In addition*, the President shall receive a special annual allowance” (to avoid the impression that the President only receives the special allowance, but not the regular salary).

## VII. Assignment of cases

44. We agree that case assignment is a key guarantee to structural independence (WP, explanatory comment at § 53).
45. **Draft provision 11** provides for two options. We are of the view that nationality restrictions should be implemented in case assignment methods under both options (see our comment above).
46. Furthermore, we note that under Option 2, “[t]he President of the Tribunal may 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”. By contrast, this possibility is not contemplated in Option 1. We understand that such power is implied in the President’s discretion and/or will be specified in the Rules of Procedure to which Option 1 refers.
47. A further possibility to be considered is whether 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).<sup>15</sup> 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”.<sup>16</sup> 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.<sup>17</sup>

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<sup>15</sup> See CIDS Supplemental Report, paras. 200-204.

<sup>16</sup> IUSCT Presidential Order, para. 6.

<sup>17</sup> See ECHR, Art. 30.

48. In the same vein, a provision should be added to allow the Tribunal to decide in broader or full composition when presented with an issue of systemic relevance, i.e. an issue the resolution of which may have repercussions for the investment treaty system as a whole; or a new legal question never addressed before; or a divergence of interpretations in the case law of the different chambers; or the intention to depart from an established line of cases.<sup>18</sup>

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<sup>18</sup> See CIDS Supplemental Report, para. 203.