

Draft Working Paper on the Selection and Appointment of ISDS Tribunal Members: Comments by the United Kingdom on the proposed investor state dispute settlement reforms

1. The UK welcomes the work of the UNCITRAL Secretariat on the paper which sets out options for reform to the selection and appointment of ISDS tribunal members process. The UK would like to express its continued support of this work and thanks the Secretariat for their work on the current working paper and its consideration of the issues and challenges raised.
2. As the UK has noted during previous discussions at Working Group III, we support reform of the process for the selection and appointment of ISDS tribunal members. We believe any reforms should maintain flexibility to ensure that the rules can evolve over time and that the most qualified candidates are not made ineligible by strict double hatting requirements, while supporting the need for greater diversity of arbitrators.
3. The UK is also committed to ensuring that tribunals can be constituted promptly, while still allowing for proper consideration of appointees by both parties and believes that any reform options should not unduly delay the constitution of tribunals.

Qualifications and other requirements

4. The UK believes that qualification requirements on knowledge of international investment or international trade rules, or the resolution of disputes arising under international investment or international trade agreements would be beneficial to the arbitral selection process. We welcome continued discussion on how these qualifying criteria could be implemented without overly limiting the pool of arbitrators, ensuring the promotion of diversity while limiting the likelihood of the appointment of a corrupt or ineffective arbitrator.
5. It is also important to ensure the presiding arbitrator is not a national of the investors home state, reducing the likelihood of bias.

Independence, impartiality and accountability

6. We welcome the work so far to help improve the perceived legitimacy of the system and ensure independence, impartiality and efficiency of arbitrators.
7. We are of the view that when appointing arbitrators, broad disclosure requirements should be in place around the circumstances which may give justifiable doubts as to an arbitrator's impartiality or independence. We support the aim of the code of conduct in seeking to address these issues. We also welcome the work so far on the governance of conflicts of interest and to improve diversity of arbitrators.
8. We also recognise that it is necessary to maintain enough flexibility to make sure that unforeseen scenarios can be captured, while not opening scope for frivolous challenges against the chosen arbitrators that unduly delay cases. We support a broad and flexible approach to the selection of arbitrators which provides increased confidence in the independence, impartiality and accountability of arbitrators, without creating unnecessary extra burdens or barriers to arbitrators.

Diversity, balanced representation and inclusiveness

9. The UK believes that promoting diversity and inclusiveness within the arbitrator community and ISDS proceedings is an important step and will help to improve the legitimacy of the ISDS process and the quality of the decisions made. We do not believe that there should be

any strict diversity criteria for the selection of arbitrators, but that an approach to appointments that values inclusion and diversity, and promotes this at its core would be desirable.

10. For example, in conducting our recent appointments to ICSID's Panel of Arbitrators and Conciliators, the UK took the decision to run an open, robust, and meritocratic competition. In March of this year the UK launched a public campaign, with a subsequent assessment process that was carefully designed to adhere to the highest standards of integrity. Every effort was made to eliminate selection bias and to attract as wide an applicant base as possible. We believe this was the UK's first open competition to these panels, and the result of that process is clear. These are the most diverse appointments that the UK has made to ICSID. The UK welcomes and encourages efforts within Working Group III to increase diversity within the arbitral community through the selection of arbitrators process.

Implementation

11. The UK welcomes the use of a robust system to flexibly implement these changes. Any implementation option should also recognise that treaties can contain specific provisions governing the appointment of arbitrators which take precedence over UNCITRAL rules.

Methods of selection and appointment

12. The UK believes that under an ad-hoc system parties should still have a role in the selection of tribunal members with appointing authorities only intervening to select the third arbitrator in instances where agreement cannot be reached.