

Possible reform of investor-State dispute settlement (ISDS)

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

Singapore would first like to express our appreciation to the Secretariat for the excellent initial draft on the selection and appointment of ISDS tribunal members and matters related to a standing mechanism. Singapore supports discussions on the standing mechanism in Working Group III, and our detailed comments on possible drafting suggestions to be included in the Working Paper are set out below. Singapore has no objections to the publication of these comments.

Draft provision 1 – Establishment of the Tribunal

A Multilateral Investment Tribunal is hereby established (referred to as “the Tribunal”). It shall function on a permanent basis.

Draft provision 2 – Jurisdiction

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

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

Singapore: First, there is a difference between the scope of the jurisdiction of the Tribunal and the exercise of jurisdiction. Singapore has suggested edits to draft provision 2(1), which are based on Article 25(1) of the ICSID Convention. Second, we welcome the suggestion by the Secretariat in paragraph 10 for the Working Group to discuss a mechanism which deals with consent in existing investment treaties, and have included paragraph 2 for the Working Group’s consideration.

Draft provision 3 – Governance structure

1. There shall be a Committee of the Parties composed of representatives of all the Parties to this Agreement establishing

the Tribunal (referred to as “the Committee of the Parties”). The Committee of the Parties shall meet regularly and as appropriate to ensure the functioning of the Tribunal.

2. The Committee of the Parties shall carry out the functions assigned to it by this Agreement. It shall establish its own rules of procedure and adopt or modify the rules of procedure for the first instance and the appellate levels, [the Advisory Centre], and the Secretariat.

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

Draft provision 4 – Number of tribunal members and adjustments

1. The Tribunal shall be composed of a body of [--] independent members in [full][part] time office, [elected regardless of their nationality][nationals of Parties to the Tribunal, elected][nationals of Parties and of non-Parties, elected] from among persons of high moral character, ~~[who possess the qualifications required in their respective countries for appointment to the highest judicial offices,]~~who have experience working in or consulting for 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. In addition, the members of the Tribunal [serving on the appellate level] shall possess the qualifications required in their respective countries for appointment to the highest judicial offices.

2. Option 1: The number of members of the Tribunal may be amended by a [two-thirds] majority of the representatives in the Committee of the Parties[.]

Variante 1:[, based on the case load of the Tribunal as follows: (to be completed)]

Variante 2: [, based on the increase or decrease of the Parties to this Agreement, as follows: (to be completed)]

Variante 3: [based on the evolution of case load and of membership, as follows: (to be completed)]

Option 2: The Presidency of the Committee of the Parties, acting on behalf of the Tribunal, may propose an increase in the number of members of the Tribunal indicated in paragraph

1, giving the reasons why this is considered necessary and appropriate. The Secretariat shall promptly circulate any such proposal to all Parties. The number of members of the Tribunal may then be amended by a [two-thirds] majority of the representatives in the Committee of the Parties.

3. No two members of the Tribunal shall be nationals of the same State. A member who is considered a national of more than one State shall be deemed to be a national of the State in which he or she ordinarily exercises civil and political rights. [\[The Committee of the Parties shall review this paragraph if the number of members of the Tribunal exceeds \[x\].\]](#)

Singapore: (1) For paragraph 1, Singapore is of the view that nationals of a non-Party should be able to be elected to the Tribunal, if they fulfil the requirements in paragraph 1, and have included a further option in the text which reads: “[*nationals of Parties and of non-Parties, elected*]”. We prefer this phrasing to “...*elected regardless of their nationality*...” as the Working Group has acknowledged that diversity, including geographical diversity, is relevant to the appointment of Tribunal members (see draft provision 8 below). Singapore looks forward to discussing the numerical thresholds further in the Working Group. The members of the Tribunal should also serve on a full-time basis, to ensure that there are no conflicts of interests.

(2) In terms of the qualifications of Tribunal members, Singapore is of the view that it is useful for Tribunal members to have had experience working in or consulting for governments including as part of the judiciary. One of the factors contributing to the criticisms of the ISDS system is the perceived unfamiliarity of adjudicators with issues of public policy. Therefore, it is important for adjudicators to be sensitised to issues and considerations underlying public policy making. Separately, Singapore considers that the requirement to “possess the qualifications required in their respective countries for appointment to the highest judicial offices” should only apply to members serving on the appellate level. This would avoid inadvertently precluding otherwise fully competent candidates from being nominated or appointed as first instance tribunal members.

(3) For paragraph 2, Singapore supports Option 1, variant 1. In our view, the case load of the Tribunal should be the key factor relevant to determining the appropriate number of members of the Tribunal. Singapore is also inclined towards a simple majority for amending the number of Tribunal Members, which would allow the Committee of Parties to react more nimbly to changes in caseload.

(4) Paragraph 3 is an acceptable starting point in supporting geographical diversity, at least in the initial period after the establishment of the Tribunal. However, if the case load of the Tribunal increases, resulting in the increase of

Tribunal members, there might come a time when it would no longer be practical to continue requiring that no two members shall be nationals of the same State. Thus, this paragraph might have to be reviewed if the Tribunal has more than a certain number of members.

Draft provision 5 – Ad hoc tribunal members

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.

Singapore: (1) Singapore welcomes discussions in Working Group III on the utility of having *ad hoc* tribunal members, as such utility is not entirely clear at the moment.

(2) First, unlike the International Court of Justice which hears dispute as an entire bench, this Tribunal would typically hear cases with one or three members. To ensure confidence in the independence and impartiality of a Tribunal assigned to a specific case, Singapore is of the view that the Tribunal members assigned to hear a particular dispute should not be nationals of either disputing party, and have added a new paragraph 2 in draft provision 11 to this effect. Thus, nationality should not be a ground for the appointment of *ad hoc* Tribunal members.

(3) Second, Singapore does not think that the circumstances set out in paragraph 27 of A/CN.9/1050 should be grounds for the appointment of *ad hoc* Tribunal members. In our view, issues on domestic law are questions of fact that ought to be addressed by experts who should not have any decision-making role.

(4) Having said that, Singapore is not entirely closed to the idea of the possibility of *ad hoc* Tribunal members, if the Working Group is able to identify good reasons for their appointment.

Draft provision 6 – Nomination of candidates

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] candidates for any given election [who need not necessarily be a national of that Party]. The tribunal members shall be elected from the list of persons thus nominated.

2. Before making these nominations, each Party shall encourage the participation of, and is recommended to consult, representatives of the civil society, including judicial and other State bodies, bar associations, academic and 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 ~~following an open call for candidacies to be issued in accordance with a decision of the Committee of the Parties.~~

(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.

Singapore: (1) Singapore has suggested drafting edits in Option 2 paragraph (b) to provide for the possibility of stakeholder nomination.

(2) Singapore supports both options 1 and 2. As set out in our intervention at the Working Group's 40th session, there should be a diversity of avenues for nomination, such as nomination by participating States, self-nomination or even nominations by stakeholders like the investing community. For option 1, to ensure a diverse pool of nominations, each Party should only be able to propose one candidate for any given election, at least in the initial period after the establishment of the Tribunal. Such a candidate need not necessarily be a national of that Party. If the number of Tribunal members subsequently increase, Parties could then propose two or more candidates. Thus, Singapore's preference for the various options in the third sentence of paragraph 1 is as underlined:

Each Party may propose [one][two] candidates for any given election [who need not necessarily be a national of that Party].

Draft provision 7 – Selection panel

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, civil society, bar associations, academic and relevant organizations in the investing community. 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 article 6].

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 Tribunal, 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 shall not participate as candidates in any selection procedure to become tribunal members of 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 Tribunal.

c. Term 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 [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 pursuant to article 6, paragraph 1 or have applied pursuant to article 6, paragraph 2.

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; and (iii) provide an opinion on whether candidates meet the requirements referred to in subparagraph (ii) and, on that basis, establish a list of suitable candidates.

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 suitable candidates shall be made public.

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

Singapore: Singapore thanks the Secretariat for drawing up a thorough process for the selection of Panel members. Singapore's preliminary comment is that it may be better for the screening panel to be larger than 5 persons, in order to accommodate the intended diversity. We would suggest possibly having 10 or so on the panel. Further, the 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 is critical to promote greater actual, and perceived, legitimacy by all users of such a body.

Draft provision 8 – Appointment (election)

1. The panel shall publish the names of the candidates who are eligible for election as members of the Tribunal by classifying

them in one of the following regional groups based on [the nationality of the country which nominated them for the election][[their nationality](#)]: 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; Eastern Europe: [--] members.

4. The Committee of the Parties shall only appoint members of the first instance and appellate level Tribunal 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, and equitable geographical distribution as well as equal gender representation in the Tribunal as a whole.

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

Singapore: (1) In relation to paragraph 1, to ensure actual geographical diversity of the members, the regional groupings should be based on the nationality of the candidate, and not the Party nominating them. Otherwise, there could be an overconcentration of members from a particular regional group depending on who is nominated.

(2) For paragraph 3, we do not think that voting should be restricted within each geographical group. To promote diversity, States should be able to vote for candidates from other geographical regions, and not just their own. This would ensure that candidates elected to the permanent body are those who enjoy not only support from their own respective region but on a wider basis. This also moves away from a consensus-based system that may be prone to paralysis if a few States

block consensus. Thus, we have placed the words “from their regional group” in square brackets.

(3) On the allocation of seats in paragraph 3, as a starting point, one option could be based on the respective percentages allocated to the different regional groups for UNCITRAL Membership pursuant to the decision to enlarge UNCITRAL’s Membership at the 54th Commission Session, as follows: Asia: 22.86%, Africa: 22.86%; Latin America and the Caribbean: 17.14%; Western Europe and others: 22.86%; Eastern Europe: 14.29%.

(4) Singapore thanks the Secretariat for preparing, in paragraph 40 of the initial draft, three options to allocate a member to the first-instance and appellate levels. Preliminarily, Singapore prefers option (ii) (sequential elections). However, it might be better to schedule the election for the appellate members first, so that eligible candidates that are not elected to the appellate level may still have a chance to be elected to the first instance level. Singapore looks forward to discussing these options further in Working Group III.

Draft provision 9 – Terms of office, renewal and removal

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~~}{additional terms}~~].

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

1. A member may be removed from office in case of substantial misconduct or failure to perform his or her duties by a unanimous decision of all 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 article 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 article 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.

Singapore: In terms of drafting suggestions, Singapore has suggested providing a further option that tribunal members may be re-elected to serve additional terms for the Working Group’s consideration. Singapore thinks it would be ideal for each term to be 9 years so that there is stability in the jurisprudence. The terms, in our view, should also be renewable at least once for practical concerns. If the workload of the permanent structure increases over time, more and more tribunal members are required especially in a two-tiered court, we do see for a real possibility of “talent shortage”. It does not seem desirable that the best qualified candidates with broad support cannot serve more than one term, if they in fact are willing and able to. This would also ensure that the initial members whose terms expire at the end of three and six years through the drawing of lots would not be unduly prejudiced as they would be able to serve a further term if re-elected. For the States that value diversity more, they should be free to vote in favour of new candidates, or not, according to their sovereign prerogative. Thus, Singapore’s preference for the various options in paragraph 1 is as underlined:

*“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}{additional terms}.”*

Draft provision 10 – Conditions of services

1. 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 or engage in any occupation of a professional nature during his or her tenure at the Tribunal unless exemption is granted by the Committee of the Parties, acting by [a simple majority][a two-thirds majority].

2. All persons serving as members at the Tribunal shall be available at all times and on short notice.

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

Singapore: Singapore has included an option for exemption to be granted on an exceptional basis, *ie* a two-thirds majority. This would signal the importance of complying with the Code of Conduct and ensuring that full-time Tribunal Members are independent, impartial, and available at all times.

Draft provision 11 – case assignment

1.

Option 1a

The President 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. 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 on~~ assigning the Tribunal members to the chambers of the Tribunal.

Option 1b

The President 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, 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.

Option 2

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.]

Singapore: (1) Singapore prefers Option 1. Singapore thinks that the president of the Tribunal should decide assignment. This is preferable to completely randomised assignment, as the specific domain expertise of each tribunal member, if any, should be taken into consideration, in order to suit the technical needs of particular cases.

(2) We suggest including option 1b for the Working Group's consideration. Our draft option 1b is similar to option 1, save that the criteria that the President should take into consideration are not set out in this document, but in the guidelines to the Rules of Procedure. This ensures that the guidelines remain flexible and can be continually updated to keep abreast with developments.

(3) The possibility for the President to assign individual members to the chambers of the first instance and appellate levels should be square bracketed for now, as this depends on the option chosen by the Working Group to allocate a member to the first-instance and appellate levels.

(4) To the extent that this multilateral standing mechanism will replace existing *ad hoc* ISDS arbitrations, it might be useful to state that none of the members hearing a dispute is a national of either party. Singapore has suggested including a new paragraph 2 for the Working Group's consideration, which should be read together with our external comments on draft provision 5 on appointment of *ad hoc* members.