UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

COMMISSION DES NATIONS UNIES POUR LE DROIT COMMERCIAL INTERNATIONAL

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23 September 2021

Re: Short summary of the informal meetings held on 13-14 September 2021 on the establishment of a multilateral permanent investment tribunal

Dear Delegates to Working Group III,

It is my pleasure to share with you a summary, prepared by the Rapporteur and me with the assistance of the Secretariat, of the main points discussed during the informal meetings held on 13-14 September 2021 on the establishment of a multilateral permanent investment tribunal ("Tribunal"). The purpose of the meetings was to consider informally the draft provisions presented in the initial draft on a "standing multilateral mechanism: selection and appointment of ISDS tribunal members and related matters", prepared by the Secretariat ("Initial Draft"; available here).

No decisions were taken at these meetings. The discussions were helpful in providing feedback to the Secretariat tasked with the preparation of a revised version of the document. Delegations are encouraged to submit written comments on the Initial Draft by 15 November 2021.

The meetings were attended by up to 135 delegates, including representatives from up to 28 developing countries. Interpretation into French was provided with the financial support of the German Federal Ministry for Economic Cooperation and Development (BMZ).

Topics considered included:

- The establishment and jurisdiction of a Tribunal;
- The selective representation and its impact on the number of tribunal members;
- The nomination, selection, and appointment processes, as well as other matters such as the terms of office, conditions of service, and assignment of cases; and
- Other issues relevant to the establishment of a Tribunal.

Introduction

At the opening of the session, delegations were reminded of the informal character of the session and that no decision would be taken. It was emphasized that the focus shall be on a technical discussion of the draft provisions rather than a general discussion on a Tribunal.

Gratitude was expressed to the German Federal Ministry for Economic Cooperation and Development (BMZ) for the financial contributions which allowed for the interpretation of the session into French.

Finally, the participants' attention was drawn to preparatory work undertaken by the Secretariat on the costs and financing of international tribunals as well as on enforcement of decisions by permanent bodies, to be presented to the Working Group at a later stage.

The establishment and jurisdiction of a Tribunal

A number of comments and suggestions were made by participants on the draft provisions concerning the establishment, jurisdiction and governance of a Tribunal (see paragraphs 7 to 11 of the Initial Draft).

On draft provision 2 on jurisdiction:

- Participants discussed the proposed scope of the draft jurisdiction provision, which extends to disputes arising out of an investment between and investor and a State, regardless of the underlying instrument (investment treaty, investment law or contract). It was said that certainty should be provided as to when a dispute should be submitted to the Tribunal and when to a local court. It was also suggested that the Tribunal could hear different types of disputes, including State-to-State disputes. It was said that the Tribunal should remain a truly multialteral body hearing international cases.
- Participants commented on the draft consent mechanism and suggested that it should encompass the consent of investors as parties to the disputes (and that it should not be limited to the consent by treaty Parties, for instance). It was clarified that nothing in the provision was meant to limit the possibility for disputing parties to submit their dispute to the Tribunal.
- It was further suggested to clarify whether the Tribunal should have jurisdiction over counterclaims by States, as the current wording of the draft provision allowed for this interpretation. It was questionned whether, in the rare case where a State would bring a claim against an investor, the consent of the investor would be required for the tribunal to have jurisdiction.
- It was said that a default rule could be estalished to determine the dispute settlement regime that would apply (international arbitration or the Tribunal mechanism) where needed.
- It was also said that the use of the notion of "investment" in the draft provision may result in a "double key-hole" test, as many investment treaties already contain the requirement of "investment", and that this should be avoided.

On draft provision 3 on governance structure:

- Participants considered it useful to determine which rules of procedure should be adopted by the Committee of the Parties (as provided in draft provision 3) and which ones should be delegated to the Tribunal.
- It was said that a balance should be found, as on one hand, the development of detailed procedural rules in the Committee of the Parties could result in paralyzing the body, and on the other hand, it might be problematic to delegate the determination of important issues to the Tribunal without providing for a control mechanism. It was said that flexibility should be provided to the Tribunal regarding organizational matters.
- Reference was made to the advisory centre, and whether it should have its own structure or should be included into the governance structure.
- The question of decision-making requirements was raised, in particular whether a decision of the Committee of the Parties would require a simple majority, two-thirds majority or consensus and if this might need to be already specified in the draft provision. In that respect, it was said that it would be useful to expand on the meaning of the word "adopt" in article 3, paragraph 2.
- It was said that it would be useful to strengthen the provisions on the governance structure and, for instance, to group all provisions regarding the president of the Tribunal under one article.

Selective representation and its impact on the number of Tribunal members

On selective representation and its impact on the number of Tribunal members, as described in paragraphs 12 to 22 of the Initial Draft, the following comments and suggestions were made by participants:

On draft provision 4 on the number of Tribunal members:

- Participants discussed the options in the draft provision. It was said that draft option 1, variant 3 would be a good way forward, but that it should be combined with option 2 (proposal of the presidency).
- The criteria for the adjustment of the number of members of the Tribunal over time were discussed and the question was raised if a formula should or could be defined.
- Participants discussed the qualifications and other requirements to be met by judges, and it was suggested to carefully consider the different facets of diversity, particularly regional and national diversity and especially in the initial period of establishment of the Tribunal.
- The question was raised how the requirements for tribunal members in this provision would relate to the draft code of conduct for adjudicators.
- Participants also discussed the requirement that tribunal members "possess the qualifications required in their respective countries for appointment to the highest judicial office", a condition also found in the ICJ Statutes.
- It was said that, while a high standard should be applied to the appointment of tribunal members, if the threshold for the qualification of tribunal members was set too high, this might create entry barriers for younger members of the arbitral community and have negative consequences for diversity in the long term.
- It was said that the requirements for tribunal members take into account the experience practitioners of public international law practitioners, which may not follow a judicial office track. It was suggested to also refer to "jurisconsults of recognized competence in international law" as a requirement, a criterion also found in the ICJ Statute, in order to expand the scope of persons who could qualify to become a tribunal member.
- It was suggested that, in the event of a two-tier tribunal, different requirements could be developed for the first-instance and appellate levels.
- It was said that having full-time tribunal members was the only way to ensure complete impartiality and independence, although provisional part-time arrangements could be considered in the initial phase of operation of the Tribunal to provide for flexibility to adapt to the case load of the Tribunal.

On draft provision 5 on ad hoc tribunal members:

- It was said that the participation by junior professionals and ad hoc judges could be further considered.
- However, it was said that this may not go far enough to address concerns regarding diversity and inclusiveness, including in the long run. Questions were raised over how junior professionals could be meaningfully involved.
- Participants discussed the potential impact of ad hoc Tribunal members, raising questions of party autonomy, duration and the related costs.
- Concerns were expressed that allowing for the participation of ad hoc members could lead to the development of the Tribunal towards a "hybrid model" rather than a permanent mechanism.

The nomination, selection, and appointment of Tribunal members

Participants expressed a number of views regarding the nomination, selection, and appointment of Tribunal members, consideration of which can be found in paragraphs 23 to 41 of the Initial Draft.

On draft provision 6 on the nomination of candidates:

- Comments were made on the general impact of a permanent Tribunal and the limitation of party autonomy on investor-State dispute settlement.
- It was said that a robust appointment system was crucial and that the introduction of an open and transparent mechanism for nomination and an independent selection panel could discourage a politicization of the process. It was suggested that for the nomination phase, options 1 and 2 could be combined so that States would maintain the possibility to nominate Tribunal members, but individuals could also apply directly.

- It was said that the self-nomination process envisaged in option 2 may lack accountability and it was questioned whether it should be instead discussed as an option available for States only in their own selection process.
- The participants further discussed the role of regional groups in the nomination process and it was suggested to consider further the development of a mechanism to ensure diversity.
- It was suggested to indicate that the States "shall" consult representatives of the civil society and other stakeholders, instead of merely having hortatory language.

On draft provision 7 on a selection panel:

- It was said that the introduction of an independent selection panel process could help to ensure a high level of qualification of adjudicators. However, it was also said that such a process may not be sufficient to ensure the diversity of Tribunal members, especially if there was only a small number of Parties to the Tribunal.
- It was suggested that an external entity e.g. the president of the ICJ, also could be involved to confirm that members on panels meet the requirements. It was said that private stakeholders should be included in the process and it was suggested that reference could be made to ICSID/PCA in the selection of panellists in light of their expertise in this regard. It was said that diversity also in the selection panel was important.
- Questions were raised with regard to the status of and a potential remuneration for members of the selection panel. It was suggested that the Committee of Parties could be tasked with drafting further rules and financial provisions regarding the panel and that the related costs could be attributed to the general budget of the Tribunal.

On draft provision 8 on appointment (election):

- It was said that the provisions or rules governing the appointment process would have to ensure the diversity of Tribunal members and that diversity referred to gender, geography and legal systems. Some delegations also referred to age and language as additional criteria.
- It was said that the current wording of draft provision 8 might not suffice to ensure diversity, as States might appoint candidates that are not their nationals.
- It was suggested to develop further ideas to ensure fair geographical representation in the Tribunal. A question arose relating to dual nationals as potential appointees if reference were to be made to nationality.
- It was further suggested to develop separate appointment mechanisms for first instance and appeal mechanisms. It was said that the criteria for members of the appeal mechanism could go beyond the requirement of adjudicatory experience.

Terms of office, conditions of service, and assignment for cases

Participants discussed the terms of office, conditions of service, and assignment for cases, on the basis of paragraphs 42 to 58 of the Initial Draft.

On draft provision 9 on the terms of office, renewal, and removal:

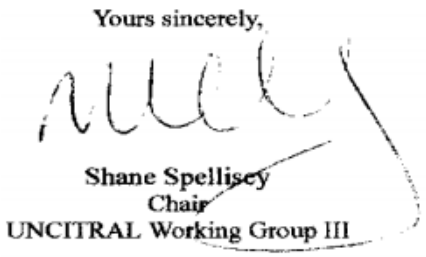
- It was said that renewable terms are not considered anymore as a viable option in international courts and that long non-renewable term models are preferable. It was also said that the non-renewable term would avoid outside pressure from the appointing entities on the Tribunal members.
- The length of the term was discussed. A staggered term model was suggested, as was the idea of "junior" observers of the Tribunal, taking into account the issue of institutional memory.
- It was said that it was not clear what substantial misconduct would mean, and the question was raised whether, in this regard, there should be an explicit link to draft provision 10.

On draft provision 10 on the conditions of service, it was said that, for reasons of judicial independence, the president or vice-president of the Tribunal, and not the Committee of the Parties, should decide on exemptions from the prohibition of incompatible parallel professional activities.

On draft provision 11 on the assignment of cases, it was suggested to make sure that it is determined in advance which adjudicator or chamber will decide which disputes, but not let disputing parties know at that stage who would be their adjudicators.

This is a brief account of the points raised at the informal discussions. I would like to seize this opportunity to thank you again for your active participation. The comments and suggestions made will be very helpful to further develop the draft provisions on the establishment of a multilateral permanent investment tribunal. I also look forward to the written comments on this topic, to be submitted by 15 November 2021.

Yours sincerely,



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