

**POSSIBLE REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) -  
SELECTION AND APPOINTMENT OF ISDS TRIBUNAL MEMBERS**

*Submission of comments from the Government of Uganda*

**A. INTRODUCTION**

1. As a result of the meeting of Working Group III in New York, States suggested focusing on structural reform options that would cover issues including methods for the selection of members, the types of qualifications they should have, and mechanisms to enhance diversity (A/CN.9/970).

**B. QUALIFICATIONS AND OTHER REQUIREMENTS**

**a. Substantive qualifications**

2. It is crucial that an international arbitrator is independent and impartial. The external characteristics of an adjudicator or tribunal work to ensure the ultimate goal of impartiality.<sup>1</sup>Under the ICSID Convention, arbitrators must be persons of high moral character ..., who may be relied upon to exercise independent judgment'. The appointing authority may be required to take into account elements that are likely to ensure the appointment of an 'independent and impartial arbitrator.'<sup>2</sup> When an arbitrator is approached in connection with his or her appointment, including throughout the arbitral proceeding, he or she will disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.<sup>3</sup>
3. The Working Group III meeting of the thirty-eighth session in Vienna, 14–18 October 2019 (A/CN.9/WG.III/WP.169)indicated that consideration should be given to qualifications required including that ISDS tribunal members should among others:

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<sup>1</sup>Fabien Gélinas, Independence of International Arbitrators and Judges (2011) 24 New York International LawReview, p. 1, 5.

<sup>2</sup> Article 6(7) of the UNCITRAL Arbitration Rules.

<sup>3</sup> Articles 11 and 12 of the UNCITRAL Arbitration Rules; Article 6(3) of the PCA Arbitration Rules.

- a) be cognizant of public international law, international trade and investment law, as well as private international law;
- b) have an understanding of the different policies underlying investment, of issues of sustainable development, of how to handle ISDS cases and of how governments operate; and
- c) have specific knowledge relevant to the dispute at hand, for example, industry-specific knowledge, knowledge of the relevant domestic legal system and calculation of damages.

The above substantive qualifications are important for an effective and efficient ISDS system and in this regard have Uganda's support. We would add that any reform regarding substantive qualifications should also address the following concern:

- (i) the limited financial resources that prohibit the possibility of specialized training in international investment law and in particular matters of ISDS, constrain the participation of developing countries. Any reforms regarding substantive qualifications should have a financial component to enable developing countries narrow the knowledge gap, this could be in the form of scholarships.
- (ii) the proposal for reform in selection and appointment of adjudicators and tribunal members should include pillars on technical assistance and capacity building, in order to ensure that Uganda and other developing countries can benefit appropriately from its implementation.<sup>4</sup>The proposal to establish a mechanism for support in form of technical assistance will enable developing countries appreciate public international law, equip them with an understanding of the different policies underlying investment and develop their specific knowledge relevant to investment disputes so as to enable them better prepare for, handle and manage

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<sup>4</sup>The International Court of Justice and the International Tribunal on the Law of the Sea have set up a trust fund for financial assistance to help ensure that a country's level of development does not hamper its ability to participate effectively in the system.

disputes relating to international investment. UNCITRAL has a technical assistance component that must now be refocused to those in most need.

(iii) the proposal that an alternative option such as a learning mechanism in the functioning of the tribunals themselves to achieve competence and inclusiveness over time by systematically ensuring participation of a more “junior” person either as part of the ISDS tribunal or perhaps as a silent observer should be introduced for developing countries.

(iv) the selection criteria must be cognizant of and include, in addition to the above substantive qualifications, diversity including regional representation, gender and different legal systems of the world.

4. Uganda would therefore like to draw the attention of Working Group III and the Secretariat in particular to, in the context of international trade law, the Advisory Centre on World Trade Organization Law that has had a remarkable impact on the ability of developing countries to participate in World Trade Organisation (WTO) cases. A similar approach could be followed for international investment law cases that involve developing countries. Such a facility could provide capacity building and act as a forum to share experience and technical assistance to member States with a view to building in-house capacity to deal with ISDS cases. This aspect has also been emphasised in the UNCITRAL Working Group III process.

#### **b. Independence, impartiality and accountability**

5. Party appointments have over the years received a lot of criticism. The assumption of lack of independence and impartiality arises from presumed conflicts of interest due to, among others, double-hatting (acting as arbitrator and counsel in different cases at the same or overlapping times).<sup>5</sup> The current

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<sup>5</sup>Andrea Bjorklund, Marc Bungenberg, Manjiao Chi and Catharine Titi, ‘Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform’, Academic Forum on ISDS Concept Paper 2019/11, 17 September 2019.

arbitration rules do not contain particular provisions aimed to avoid such conflicts of interest.

6. The practice of double-hatting has led to the assumption that arbitrators may have an incentive to please the party that appointed them in order to secure reappointment. This assumption/criticism is especially discussed in the context of arbitrators seen as state-friendly or investor-friendly, rather than as neutral. The idea that these individuals have pre-conceived leanings leads to a perception of lack of legitimacy.
7. Further criticisms include concerns that some arbitrators lack experience in public international law; as sometimes seen in expressions of doubt as to whether the arbitrators respected the interpretation rule in Article 31 of the Vienna Convention on the Law of Treaties of 1969.

Uganda would wish to propose that any reform aimed at the lack of or perceived lack of independence, impartiality and accountability could embrace the following:

a) *secure the tenure of office of the tribunals or judges*

Security of tenure is a core safeguard for judicial independence in Uganda and most jurisdictions.<sup>6</sup> It insulates the judge from the appearance of inappropriate pressure on his or her decision-making and, by extension, allows the courts/tribunal to provide a credible foundation for the rule of law. The lack of security of tenure leaves members of the tribunal vulnerable and as such subject to control or interference by any person or party. The present mechanisms for constitution of members of the tribunal do not guarantee security of tenure; each member of the tribunal moves on once they have made decisions on that matter.

Therefore, the appointment mechanism as suggested by the EU that involves

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<sup>6</sup> Article 128 (1) of the Constitution of the Republic of Uganda 1995 provides that in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.

appointment for a specified period on contract renewable once under Multilateral Investment Court (MIC) might secure independence of the members of the tribunals and this is supported by Uganda.

The appointment of members of the tribunals for ISDS cases should therefore reflect mechanisms employed at an international, regional, or domestic forum that incorporate the usual safe guards of judicial independence and impartiality. It has been said, by the international community, that there are serious problems with courts in some countries. It will not be logical to replace them with an adjudicative process that omits judicial safeguards as this could give rise to new and credible doubts about fairness.

*b) party appointments influence the lack of independence and impartiality*

Party appointment of members of a tribunal is an important principle in international arbitration or arbitration generally. However, the process of selection and appointment raises concerns about political/counsel influence on adjudicators' decisions. This is especially true when nominees are subject to reappointment or are likely to receive further preferment from the State or counsel that appointed them. Uganda wishes to propose that members of the tribunal or in case of the MIC, judges, be appointed by an independent authority. Parties should not be involved directly in appointment.

*c) make public, the lists of possible ISDS arbitrators*

For transparency purposes, the appointing authorities should be required to make public the lists of possible ISDS arbitrators they circulate to the parties as nominees for appointment. This is intended to provide evidence of efforts made towards inclusiveness but above all, information could be provided by the public as to the characters of the persons being appointed. This could help sieve out those who are viewed as not independent, impartial or accountable.

**c. Diversity and balanced representation (inclusiveness)**

8. The ongoing training and continuous learning as a condition to become a possible member of an ISDS tribunal should continue. We note that a special consideration and emphasis should be focused on developing countries with the aim to provide technical support. This would constitute an effective means to ensure both competence and inclusiveness. Uganda would therefore support the suggestion that this matter should be addressed in the context of the reform option regarding the establishment of an advisory center.

**d. Implementation of qualifications and other requirements**

9. Core qualifications and requirements could also be implemented mainly through the adoption of a code of conduct (A/CN.9/1004/Add.1, para. 132). As indicated in the annotations to the draft code of conduct, several options might be considered for its implementation. The most likely options would be to:

- (i) incorporate the code into investment treaties and other instruments of consent;
- (ii) have disputing parties agree to its application at the inception of each case;
- (iii) append it to the disclosure declaration that adjudicators must file upon acceptance of nomination; or
- (iv) incorporate the code into applicable procedural rules or statutes of a permanent body. The code could also be made part of a multilateral instrument on ISDS reform, if such instrument were to be developed (see A/CN.9/WG.III/WP.194). In this instance, the applicability of the code would be determined by such instrument.

10. Uganda supports the above proposal for implementation of qualifications and other requirements suggested by UNCITRAL Secretariat. However, we add that the code of conduct proposed above is only for neutrals. As first raised by Uganda at the 35<sup>th</sup> session of Working Group III in New York, a code of conduct for counsel should form part of the reform to make it comprehensive. As Uganda

noted in that meeting, it is a common and an unfortunate feature in high value claims in arbitration seeing counsel inclined to behave in bad faith. This bad faith poses a serious systemic risk to the arbitral process especially in States with less robust institutions, particularly those on enforcement.

11. The proposal in the draft code that suggests that counsel are subject to or will be left to be regulated by their domestic codes on professional ethics in their jurisdictions disregards criticism about domestic laws not being internationally acceptable in matters of ISDS.

### **C. METHODS OF SELECTION AND APPOINTMENT**

12. The method of selection and appointment of arbitrators in investment arbitration has been the subject of a number of criticisms. These have included questions of independence and impartiality stemming from the fact that the arbitrators are appointed by the disputing parties themselves to hear a particular dispute, after the dispute has crystallized, and that selection might be made on the basis of a presumed predisposition in favour of the arguments that are likely to be made by the appointing party.<sup>7</sup>

#### **a. Ad hoc mechanism**

13. In the ISDS regime as it currently stands, the disputes are resolved by an ISDS tribunal constituted ad hoc for that particular dispute. The disputing parties play an important role in the selection of the members of the tribunal. Such method allows parties to choose the arbitrators that they consider most qualified for solving their disputes and has been described as ensuring the flexibility and attractiveness of arbitration.<sup>8</sup> It has also raised concerns, in the context of ISDS:

*Whether the selection and appointment would be made fully or partially by the appointing authority and by whom within the appointing authority.*

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<sup>7</sup>Andrea Bjorklund, Marc Bungenberg, Manjiao Chi and Catharine Titi, 'Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform', Academic Forum on ISDS Concept Paper 2019/11, 17 September 2019.

<sup>8</sup> A/CN.9/WG.III/WP.177, Submission from the Government of China.

14. Uganda is of the strong view that to avoid double-hatting and its associated problems such as lack of independence and impartiality, the appointment of members of the tribunals be done by an independent authority. If this view were to be modified, Uganda will accept the proposal to make the option for appointment hybrid in nature bearing in mind that the ultimate decision lies with the appointing authority.
15. The selection and appointment by the appointing authority should largely be made through a roster. Even where a roster is involved, the appointing authority should maintain the authority to appoint both co-arbitrators and chairperson. The appointing authority may not restrict itself to only the roster, especially where there is need in that particular case to consider inclusivity relating to region, gender and different legal systems.

**b. Standing court with appellate mechanism**

16. One of the most discussed options for reform is the establishment of a standing multilateral investment court (MIC) composed of both a first-instance tribunal and an appellate body.
17. Under a standing court with appellate mechanism, Uganda would support a reform option that foresees in its statute all elements of selection of candidates, including nomination and screening, as well as the appointment to the court, or in other words election to the bench of judges. A similar process could also work for the appellate mechanism of a new standing court system that has been proposed by the EU.
18. In order to achieve broad-based acceptance of a MIC, the election process will likely need to ensure that the various legal systems are represented within the judiciary.<sup>9</sup> One might expect the judges to reflect the legal systems and regions of

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<sup>9</sup> Diversity is equally supported by European Union (2019), para. 50 and UNCITRAL Working Group III (2018a),

the members and show gender balance and at the same time have the highest professional qualifications.<sup>10</sup>

19. The appointed judges will also need to reflect the membership of a MIC so that judges mirror the various legal and cultural backgrounds of MIC members. As a consequence, and taking into account the number of member States to which MIC proponents aspire, there should not be two judges of the same nationality.<sup>11</sup>

20. The commonly accepted election procedure for the ILC or the ICJ could be used as a model for an appointment procedure for MIC Judges.<sup>12</sup> In those bodies candidates are assigned to specific regional groups.<sup>13</sup> From each regional group, the election body elects a certain number of judges. The formation of regional groups of a MIC with judges in the first instance could follow the model of the ICJ.

21. At the ICJ, there are three judges from Africa, two from Latin America and the Caribbean, three from Asia, two from Western Europe and other countries, two

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p. 6.

<sup>10</sup>Article 8 ILC-Statute: "At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured."

Article 36 para. 8 lit. a) Rome Statute: "The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and (iii) A fair representation of female and male judges."

Article 9 ICJ Statute: "At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."

<sup>11</sup>Article 3 para. 1 ICJ Statute: "The Court shall consist of fifteen members, no two of whom may be nationals of the same state."

<sup>12</sup>Andrea Bjorklund, Marc Bungenberg, Manjiao Chi and Catharine Titi, 'Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform', Academic Forum on ISDS Concept Paper 2019/11, 17 September 2019.

<sup>13</sup>Article 3 para. 2 ILC-Statute: "There shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations." Article 3 para. 2 ITLOS Statute: "There shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations."

from Eastern Europe, one from North America, one from Oceania, and one from Western Asia.<sup>14</sup>

22. The selection and appointment process could start with the nomination of candidates by the members or direct application by the potential candidates. To comply with transparency, the announcement of vacancies should be made public. The process designed should also ensure that a specific number of candidates is nominated for each regional group.

23. A committee could be established to vet the qualifications, including expertise and general suitability (independence, integrity and neutrality) of the candidates.<sup>15</sup> Only qualified candidates would then become eligible as 'judge candidates'. Such a preliminary screening would strengthen the legitimacy and acceptance of a MIC and would contribute to greater transparency and objectivity in the appointment procedure.

The election of the judges could then proceed by an independent authority from this pool of candidates determined by the selection committee.

### **c. Standing mechanism**

24. Members of a multilateral investment appellate body should presumably be subject to the same requirements as those set out above for the judges of a two-tiered MIC, including the requirements as to the independence and ethical standards of the members.<sup>16</sup> As multilateral investment appellate body members will decide on matters of significant importance to States, high selection

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<sup>14</sup> *ibid*, (n 12).

<sup>15</sup> For instance Article 36 para. 4 lit. c) Rome Statute: "Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court." See hereto Resolution ICC-ASP/10/Res.5 of 21.12.2011, Strengthening the International Criminal Court and the Assembly of States Parties, para. 20.

<sup>16</sup> Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?' June 2016, at 73.

standards should be adopted, and both personal and professional standards have to be taken into consideration during the election process.<sup>17</sup>

25. The qualification requirements could be those of the judges of the envisaged bilateral investment court under The Comprehensive Economic and Trade Agreement (CETA). The member States of the multilateral investment appellate body should be charged with the task of selecting the members.

26. Uganda supports the options below to ensure independence, impartiality and accountability:

- a) A system where institutions administering ISDS cases would play a greater role in the selection and appointment of members of ISDS tribunals is an option for reform that could be considered in conjunction with the creation of a roster. Such involvement is suggested in submissions from different governments.<sup>18</sup>
- b) A system with a pre-established list or roster may not necessarily address the question of repeat appointments, unless a roster would be coupled with greater institutional involvement, and institutions would be tasked with ensuring that diversity in the selection and appointment is respected, and repeat appointments avoided.
- c) In various international court systems, the representation of different legal systems is achieved through the appointment of a certain number of judges per regional group. This requirement of regional or geographical distribution exists in

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<sup>17</sup>Marc Bungenberg & August Reinisch, at 38-39; Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards', CIDS

Supplemental Report, 15 November 2017, at 42 et seq.

<sup>18</sup> Proposals contained in submissions from governments: A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission from the Government of Turkey.

the statutes of numerous international judicial bodies<sup>19</sup> and is attained, for example, by allocating certain quotas to particular regional groups.<sup>20</sup> Fair regional representation within the International Tribunal for the Law of the Sea (ITLOS) is ensured by representation of the five geographical groups of the UN General Assembly (African, Asian, Eastern European, Latin American and Caribbean and Western European and other countries).<sup>21</sup>

- d) The Comprehensive Economic and Trade Agreement (CETA) calls for the establishment of both a first instance tribunal and an appellate body. For the first instance tribunal, the CETA Joint Committee shall appoint fifteen members. Five of the members of the tribunal are to be nationals of a member state of the EU, five are to be nationals of Canada, and five are to be nationals of third countries.<sup>22</sup> The number of members of the tribunal may be increased or decreased as decided by the CETA Joint Committee, as the case load warrants.<sup>23</sup> The term of members is to be five years, renewable once.<sup>24</sup>
- e) In short, under that proposal, the selection and appointment of adjudicators would take place within the framework of a standing mechanism. The adjudicators should be employed full-time and would not have any outside professional activities. They should be paid salaries comparable to those paid to

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<sup>19</sup> Article 2 para. 2 ITLOS Statute: "In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured." Article 36 para. 8 lit. a) Rome Statute: "The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation [...]"

Article 9 ICJ Statute: "At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."

<sup>20</sup> Andrea Bjorklund, Marc Bungenberg, Manjiao Chi and Catharine Titi, 'Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform', Academic Forum on ISDS Concept Paper 2019/11, 17 September 2019.

<sup>21</sup> See <https://www.itlos.org/en/the-tribunal/members/>.

<sup>22</sup> Article 8.27(2) of CETA. The persons appointed do not have to be nationals of Canada or an EU country, but will be treated as nationals of the entity that appointed them.

<sup>23</sup> Article 8.27(3) of CETA.

<sup>24</sup> Article 8.27(5) of CETA.

adjudicators in other international courts and be subject to ethical requirements. Comparable qualification requirements to those for other international courts to ensure neutrality, as well as geographical and gender diversity should be used.

- f) Independence from governments would be ensured through a long-term non-renewable term of office, combined with a robust and transparent appointment process. In such a reform option, disputing parties would have no or little influence on the selection and appointment of adjudicators. This derives from the fact that a permanent body pre-exists the dispute (as opposed to the current ISDS system based on arbitration where the ISDS tribunal is constituted ad hoc for that particular dispute).

#### **d. A non-standing appellate body**

27. It has been suggested that appointment of adjudicators in a non-standing appellate body could essentially be based on the consent of the parties, with the parties given the right and opportunity to appoint at least one adjudicator. An administering institution would then need to serve as the appointing authority when the parties cannot reach an agreement within a given time limit.<sup>25</sup>

28. Uganda's view on appointment of adjudicators is that parties should not be involved or if the Working Group were to think differently, then very minimal involvement should be acceptable. Diverse options should be possible regarding the appointment of appellate adjudicators for specific cases. Option I, appellate adjudicators should be appointed on the basis of a recommendation from an institution. Once the institution offers a recommendation, the parties may reach an agreement on its basis; where no agreement is reached, the institution appoints the adjudicators.

29. Uganda proposes that option II should involve appointment of adjudicators by an independent institution; parties should only have a minimal or no role to play at

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<sup>25</sup> *ibid* (n 12).

all. This option is a practical one now being used by WTO Appellate Body and the ICSID annulment procedure.

#### **D. CONCLUSION**

30. Party selection of members of tribunals has been considered as contributing to the lack of independence, impartiality and accountability. The absence of these, among others, has resulted into illegitimacy of arbitral decisions. Due to the desire for reform generally in the ISDS systemic, several options for reform have been suggested including but not limited to appointment of members of the tribunal by an independent authority, a selection committee and the use of rosters. Whatever the options for reform that will be adopted by the Working Group, it is important to bear in mind the option that will eventually bring about independence, impartiality and accountability in ISDS system. Key to any final reform option, diversity in regional, gender and legal system consideration must be taken care of. It must be noted that to achieve diversity, developing countries must be helped to reach the same professional and technical level in ISDS matters.