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Possible reform of investor-State dispute settlement (ISDS)

Submission from the European Union and its Member States

This note reproduces a submission received on 18 January 2019 from the European Union and its Member States in preparation for the thirty-seventh session of Working Group III. The submission is reproduced as an annex to this note in the form in which it was received by the Secretariat. The submission included as its annex document A/CN.9/WG.III/WP.145, a submission from the European Union on 20 November 2017 in preparation for the thirty-fifth session of Working Group III. That document is also made available to the Working Group for discussion at this session.

Annex

Establishing a standing mechanism for the settlement of international investment disputes

1. INTRODUCTION

1. This submission sets out the views of the European Union (EU) and its Member States on the possible establishment of a standing mechanism for the settlement of international investment disputes. This submission is relevant to the initial work of the Working Group in phase three of its work. It sketches the outline of a reform option, which it is submitted the Working Group should pursue.

2. It should be clear that this submission is intended to contribute to a multilateral reflection on the best methods to reform investor-state dispute settlement (ISDS). It sets out preliminary ideas, for discussion in the Working Group, which could provide responses to the concerns which have been identified by the Working Group as requiring reform. It is the outcome of considerable reflection of the EU and its Member States on possible multilateral reform over the last years, which the EU and its Member States looks forward to discussing further on a multilateral basis within UNCITRAL.

3. After recalling the concerns already identified by the Working Group in respect of which reform is considered desirable (part 2), this submission elaborates on what a standing mechanism to resolve disputes could look like (part 3), and then expands on how such a mechanism, bringing about systemic structural change, is the only type of reform which can effectively respond to all the concerns identified (part 4).

2. CONCERNS IN RESPECT OF WHICH REFORM IS DESIRABLE

2.1 Introduction

4. The EU and its Member States recall the views expressed by the G77 and China "that private international capital flows, particularly foreign direct investment, along with a stable international financial system, are vital complements to national development efforts, and that foreign direct investment can help create skill-intensive and better-paid jobs, promote the transfer of knowledge, raise productivity and add value to exports".1

5. The EU and its Member States support this view, considering that foreign direct investment is an important element in encouraging sustainable development and achieving the Sustainable Development Goals and that it is important therefore to put investment dispute settlement on a stable footing in the medium-to-long term given the concerns which have been expressed in the Working Group.

2.2 Concerns in respect of which a conclusion has been reached on the desirability of reform

6. This submission takes as its starting point the concerns identified by the Working Group in respect of which reform is considered desirable. These can be summarised as follows.

(i) Concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals:

- concerns related to unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law by ISDS tribunals;[2]

[1] Statement of the Group of G77 and China delivered by Ecuador at the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) 36th session, 29 October – 2 November 2018.

[2] A/CN.9/964 – Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth

- concerns related to the lack of a framework for multiple proceedings that were brought pursuant to investment treaties, laws, instruments and agreements that provided access to ISDS mechanisms;[3] and

- concerns related to the fact that many existing treaties have limited or no mechanisms at all that could address inconsistency and incorrectness of decisions.[4]

(ii) Concerns pertaining to arbitrators and decision makers:

- concerns related to the lack or apparent lack of independence and impartiality of decision makers in ISDS;[5]

- concerns relating to the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules;[6]

- concerns about the lack of appropriate diversity amongst decision makers in ISDS;[7] and

- concerns with respect to the mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules.[8]

(iii) Concerns pertaining to cost and duration of ISDS cases:

- concerns with respect to cost and duration of ISDS proceedings;[9]

- concerns with respect to allocation of costs by arbitral tribunals in ISDS;[10] and

- concerns with respect to security for cost.[11]

2.3 Other concerns

7. It is noted that the Working Group has not entirely finished its consideration of concerns in respect of which reform is desirable. The EU and its Member States are open to including, in the option outlined below, solutions to issues related to third party funding should the Working Group decide that reform is desirable.[12]

8. It is also noted that several delegations have referred to the importance of considering means of amicable settlement of disputes. Elements related to this issue have been included in this submission and the EU and its Member States remain ready to examine further ideas in this respect.

9. To the extent that other concerns are identified and reform is considered desirable, the EU and its Member States are prepared to examine how they could be included in the options set out in this submission.

2.4 Systemic nature of the concerns

10. The EU and its Member States have consistently taken the view that these different concerns are intertwined and are systemic. Addressing one specific concern would leave other concerns unaddressed. For example, the concerns

session (advance copy), 6 November 2018, para. 40, https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf.

[3] Ibid. para. 53.
[4] Ibid. para. 63.
[5] Ibid. para. 83.
[6] Ibid. para. 90.
[7] Ibid. para. 98.
[8] Ibid. para. 108.
[9] Ibid. para. 123.
[10] Ibid. para. 127.
[11] Ibid. para. 133.
[12] Ibid. para. 134.

relating to costs and duration are related to the concerns with the lack of predictability. Costs are increased when the interpretation of the law is unstable, because different ad hoc tribunals may always potentially come up with divergent interpretations, and hence diligent disputing parties will put forward every plausible argument, including some which would not be entertained if the interpretation of the relevant norm was stable. Thus, the concern as regards the costs of the system is linked to the concern as regards the lack of predictability which is in turn linked to the concerns with the methods of arbitrator appointments which is in turn linked to the concerns with arbitrators' independence and impartiality. These have been outlined in the submission already made by the EU to Working Group III in which it argued that the nature of the concerns is systemic.[13] That submission is annexed to this submission for ease of reference.

3. SYSTEMIC RESPONSE TO THE IDENTIFIED CONCERNS – STANDING MECHANISM FOR DISPUTE SETTLEMENT

11. This section sets out ideas in respect of the possible establishment of a standing mechanism for the settlement of investment disputes.

3.1 Dispute avoidance mechanisms

12. It is desirable that disputes be decided amicably. Mechanisms should be provided to encourage such amicable settlements. These could include, for instance, conciliation and mediation. Particular value–added could be brought through the provision of institutional support, for example through maintaining a list of conciliators or mediators and above all providing support in efforts to bring about amicable settlements.

3.2 First instance

13. A standing mechanism should have two levels of adjudication. A first instance tribunal would hear disputes. It would conduct, as arbitral tribunals do today, fact finding and then apply the applicable law to the facts. It would also deal with cases remanded back to it by the appellate tribunal where the appellate tribunal could not dispose of the case. It would have its own rules of procedure.

3.3 Appellate tribunal

14. An appellate tribunal would hear appeals from the tribunal of first instance. Grounds of appeal should be error of law (including serious procedural shortcomings) or manifest errors in the appreciation of the facts. It should not undertake a de novo review of the facts.

15. Mechanisms for ensuring that the possibility to appeal is not abused should be included. These may include, for example, requiring security for cost to be paid.

3.4 Full-time adjudicators

16. Adjudicators would be employed full-time. They would not have any outside activities.[14] The number of adjudicators should be based on projections of the workload of the permanent body.

17. They would be paid salaries comparable to those paid to adjudicators in other international courts.

[13] See A/CN.9/WG.III/WP.145 – Possible reform of investor-State dispute settlement (ISDS) – Submission from the European Union, http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html reproduced in Annex 1 for ease of reference.

[14] It is noted that most domestic and international courts allow full-time adjudicators to engage in teaching: this could be permitted.

3.5 Ethical requirements

18. Adjudicators would be subject to strict ethical requirements. High ethical standards would be ensured in part through the adjudicators being full-time and prohibited from having other activities, in particular other remunerated or political activities. Adjudicators would be required to ensure that there is no risk of conflict of interest in particular cases. To this end, adjudicators should disclose past interests, relationships or matters that could affect their independence or impartiality and, after the end of their term, they should remain subject to obligations to ensure that their independence and impartiality in office are not called into question.

19. Independence from governments would be ensured through a long-term non-renewable term of office (many international tribunals provide for nine year terms, for example), combined with a robust and transparent appointment process.

3.6 Qualifications

20. It is suggested to use comparable qualification requirements as for other international courts. That would imply that adjudicators have the qualifications required in their respective countries for appointment to the highest judicial offices or are jurisconsults of recognised competence in international law (see for example, Article 2 of the Statute of the International Court of Justice). Specific criteria could be set out on required expertise in certain areas of law, and it would be desirable to have persons with judicial experience and case-management skills.

3.7 Diversity

21. Mechanisms should be used to ensure that both geographical and gender diversity is ensured. Article 36(8) of the Rome Statute of the International Criminal Court provides an example of the types of rules which can be set for adjudicators in a permanent body.15

3.8 Appointment process

22. It is vital to ensure the neutrality of adjudicators. A robust and transparent appointment process would be necessary to ensure the independence and impartiality of the adjudicators. All ideas to ensure neutrality should be considered, but inspiration can be drawn, inter alia, from recently created international or regional courts which have screening mechanisms to ensure that the adjudicators appointed do in fact meet the necessary standards of judicial independence.16 The persons appointed to the screening mechanisms should be independent. These could, for example, be ex officio appointments (for example, the President of the International Court of Justice, other senior or recently retired judges from international or domestic supreme courts). Candidates for the standing mechanism could be both proposed by the contracting parties and apply directly for appointment. Consideration should be given to allowing non-nationals of contracting parties to be appointed. They would be subject to a vote requiring a significant majority of votes of the contracting parties.

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[15] The Assembly of States Parties, that elects the International Criminal Court (ICC) judges, is required to "take into account the need for the representation of the principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges." (Art. 36(4)(8)(a)). For the election of ICC judges, regional and gender voting requirements have been established. According to those requirements, at least six judges should be female and at least six male. There are currently 6 female judges out of 18 at the ICC. Additionally, each regional group of the United Nations has at least two judges. If a regional group has more than sixteen states parties this leads to a minimum voting requirement of three judges from this regional group, see Resolution of the Assembly of the State Parties, *Procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court (ICC-ASP/3/Res.6)*, paras. 20(b) and (c), available at: https://asp.icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/Resolution-ElectionJudges-ENG.pdf.

[16] Examples include the International Criminal Court, the European Court of Human Rights, the Caribbean Court of Justice and the Court of Justice of the European Union.

23. When appointing adjudicators to the standing mechanism, the contracting parties would be expected to appoint objective adjudicators, rather than ones that are perceived to lean too heavily in favour of investors or states, because they are expected to internalise not only their defensive interests, as potential respondents in investment disputes, but also their offensive interests, i.e. the necessity to ensure an adequate level of protection to their investors. They will therefore take a longer term perspective.[17]

24. To hear each particular case, adjudicators would be appointed to divisions of the standing mechanism on a randomised basis to ensure that the disputing parties would not be in a position to know in advance who will hear their case.[18]

3.9 State-to-state dispute settlement

25. Most investment treaties provide for investor-state dispute settlement and state-to-state dispute settlement. Some investment treaties, like other treaties, provide only for state-to-state dispute settlement. It should also be possible to use the standing mechanism for state-to-state dispute settlement.

3.10 Mechanisms for dialogue with treaty parties

26. Many modern treaties provide for the ability of the treaty parties to adopt binding interpretations of the underlying obligations. This is provided, for example, in Article IX.2 of the WTO Agreement. It is also common that recent investment protection treaties or chapters provide for the possibility of binding interpretations. Such binding interpretations are provided in order to give guidance to dispute settlement tribunals. It would be necessary to ensure that this possibility is maintained and indeed expanded to cover treaties that do not explicitly provide for it. In a multilateral standing mechanism covering multiple bilateral agreements it would be necessary to ensure that the parties to a bilateral agreement would retain control over the interpretation of their agreement by being able to adopt binding interpretations.

27. The non-disputing party to the treaty in question should also be able to participate in the dispute. In addition, it should be considered whether and, if so, under what conditions other governments that are party to the instrument establishing the standing mechanism should be able to intervene in disputes on questions of interpretation of systemic importance under treaties to which they are not contracting parties, while ensuring at the same time that this does not compromise the ability of the parties to an agreement to retain control over its interpretation.

3.11 Transparency and third parties.

28. A high level of transparency of the proceedings should be ensured. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration would be a good example of a minimum standard which could be applied.

29. It should also be provided that third parties, for example representatives of communities affected by the dispute, be permitted to participate in investment disputes.

3.12 Enforcement

30. Effective enforcement of awards of a standing mechanism is vital. Given that it would feature an appeal mechanism, there is no need for review of awards at the

[17] See Anthea Roberts, *Would a Multilateral Investment Court be Biased? Shifting To a Treaty Party Framework of Analysis*, *EJIL: Talk!*, 27 April 2017, https://www.ejiltalk.org/would-a-multilateral-investment-court-be-biased-shifting-to-a-treaty-party-framework-of-analysis/, and Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States*, American Journal of International Law, 2010, 104 (4), pp. 179, 180, 182-195.

[18] This idea draws on Rule 6(2) of the Working procedures for appellate review of the Appellate Body of the WTO, https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm.

domestic level or through ad hoc international mechanisms (i.e. the function of annulment or set-aside currently exercised by national courts and ICSID annulment committees would be exercised by the broader review provided by the appeal mechanism). Therefore, there should not be review of such awards at domestic level.

31. It is suggested that the instrument creating a standing mechanism should create its own enforcement regime, which would not provide for review at domestic level.

32. It would also be the case that awards under a future standing mechanism could additionally be capable of enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Enforcement is possible for awards made by "permanent arbitral bodies" (see Article 1(2) of the Convention). There is no reason to consider that awards of a standing mechanism could not be regarded as such of a "permanent arbitral body" and hence enforceable, provided of course that the disputing parties had given their consent, which by definition they would have done.[19] It might be necessary to include mechanisms to prevent the disputing parties activating set-aside procedures at a later stage.[20]

3.13 Financing

33. Contributions to the financing of a standing mechanism would be made, in principle, by the contracting parties. These would be weighted in accordance with their respective level of development, so that developing or least developed countries would bear a lesser burden than developed countries. The weighting mechanism adopted could be derived from or based on the weighting applied in other international organisations. Consideration should also be given to requiring that users of the standing mechanism pay certain fees, although care should be taken not to tie these fees directly to the remuneration of the adjudicators and should not be so high as to become a hurdle for small and medium sized enterprises to bring a case.

34. Contributions could be managed through a trust fund, as for the Caribbean Court of Justice. This would ensure that the standing mechanism could effectively operate on a medium-to-long term perspective.

[19] See also 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? Analysis and Roadmap*, CIDS, 2016: "154. In the authors' view, there would be good reason to qualify the ITI [International Tribunal for Investments, with a built-in appeal] as a "permanent arbitral body" under the Convention, both under the "ordinary meaning" of Article I(2), and under an "evolutionary interpretation" of the phrase which would take account of developments in international law and arbitration since 1958. However, this does not seem of primary importance. What matters – as it clearly results also from the travaux – is the consensual basis of the adjudicator's jurisdiction, which would be clearly met for the ITI (see supra at V.B). 155. That said, while not strictly needed, UNCITRAL may, after the adoption of the ITI Statute, consider issuing a "recommendation", similar to the one it made in connection with the interpretation of Article II(2) and Article VII(1) of the NYC. Such a recommendation would be aimed at clarifying that the ITI falls within the ambit of the NYC, as a "permanent arbitral body" under Article I(2) or otherwise. It would certainly provide comfort to domestic courts faced with the enforcement of ITI awards and would likely improve consistency in the interpretation by courts.", pp. 56-57, http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf. Awards by the Iran-US Claims Tribunal have been regarded as being enforceable under the New York Convention, *cfr*. also Kaufmann-Kohler and Potestà (CIDS 2016), p. 56, fn. 294.

[20] For an example of such a mechanism, see the *Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part* which provides in Article 3.22 that "Final awards issued pursuant to this Section by the Tribunal shall be binding between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy," and in Article 3.7(1)(f)(iii) that requires a declaration that the claimant "will not seek to appeal, review, set aside, annul, revise or initiate any other similar procedure before an international or domestic court or tribunal, as regards an award pursuant to this Section" (see http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156731.pdf). See also the *Comprehensive Economic and Trade Agreement between Canada and the EU and its Member States* (Article 8.28(9)(b)) and the *Investment Protection Agreement between Viet Nam and the EU and its Member States* (Articles 3.36(3)(b) and 3.57(1)(b)).

3.14 Application to existing treaties, opt-in mechanism and jurisdiction

35. It is vital that a standing mechanism be able to rule on disputes under the large stock of existing and future agreements. This would be done through a combination of 1) accession to the instrument establishing the standing mechanism and 2) a specific notification ("opt-in") that a particular existing or future agreement would be subject to the jurisdiction of the standing mechanism. Once the contracting parties to an agreement that are also parties to the instrument establishing the standing mechanism have made a notification concerning a particular agreement, then the standing mechanism would decide disputes arising under that agreement. For agreements concluded after the establishment of the standing mechanism, a reference could be made in the agreement conferring jurisdiction on the standing mechanism, or it could be added later as described above. It should be explored whether the instrument establishing the standing mechanism could also be utilised if only the respondent state is party to the instrument.

36. This model would provide for flexibility and has already been utilised in the Mauritius Convention on Transparency in ISDS and in the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the "BEPS Convention").21 The notion of transferring jurisdiction from one body (here ad hoc tribunals) to another is also well established in public international law.22

37. This would imply that the precise scope of jurisdiction of the standing mechanism and the substantive rules that it would apply are determined by the underlying treaties. This implies that the substantive rules that the standing mechanism would apply may evolve with the underlying treaty rules.

3.15 Assistance mechanism

38. A mechanism should be foreseen to ensure that all disputing parties can operate effectively in the investment dispute settlement regime. Such mechanism could aid least developed and developing countries in litigation in international investment disputes and possibly in other aspects of the application of international investment law. Such an initiative may form part of the process of establishing a standing mechanism. A scoping and feasibility study, involving input from developing countries and experts, on ways to ensure adequate legal of defence in proceedings under international investment agreements, is currently being prepared.

3.16 Open architecture

39. The EU and its Member States consider, as it is set out in the next section, that only a two-tier permanent structure can remedy all the identified structural concerns in the current system. A certain level of flexibility would, nevertheless, need to be built into a standing mechanism. This would be necessary, for example, for countries that might want to use the standing mechanism for state-to-state dispute settlement, but which do not use investor-state dispute settlement in their agreements. It may also be the case that some countries may like to retain the flexibility to utilise only an appeal mechanism even if, in the view of the EU and its Member States, such an approach would not effectively resolve a number of the concerns which have been identified. If that is indeed the case, the open architecture

[21] For more information, see http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm. For the possible use of the Mauritius Convention approach to the establishment of a standing mechanism see 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? Analysis and roadmap*, CIDS, 2016, http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf.

[22] See Article 36(5) of the Statute of the International Court of Justice, by reference to declarations submitting to the jurisdiction of the Permanent Court of International Justice.

of the standing mechanism could be a way of providing for such flexibility for those countries.23

4. CREATING SUCH A STANDING MECHANISM RESPONDS TO THE IDENTIFIED CONCERNS

40. It is submitted that establishing a standing two-tier mechanism is the only available option that effectively responds to all the concerns identified in the Working Group. In addition, it is the only option that captures the intertwined nature of those concerns.

4.1 Consistency and correctness

Predictability and consistency

41. Predictability and consistency can only be effectively developed through the establishment of a standing mechanism with permanent, full-time adjudicators. This is the key problem of the existing system. Under the current system, stakeholders cannot have reasonable expectations that a ruling in one dispute will be followed in another due to the ad hoc nature of the tribunals. In a standing mechanism a sense of "continuous collegiality" will build up.24

42. Greater predictability of legal interpretation will in turn make decision-making more efficient, and hence more cost-effective, and likely reduce the amount of cases overall. Consistent case-law both at the first and appeal level will allow a stable understanding of provisions to develop and hence reduce "adventurous" claims. A diligent investor will not bring a claim based on a legal argument that has been rejected by a standing mechanism, whilst it is more likely to consider this to be worth the effort as regards an ad hoc tribunal established afresh for each dispute.

Correctness – an appeal mechanism can correct errors of law and egregious factual errors

43. An appeal mechanism will ensure correctness. It will do this by reviewing the legal correctness of the decisions taken at first instance and by correcting any legal errors. This procedural correctness is in itself an important feature of domestic legal systems, since it ensures a check on those who would otherwise be independent decision-makers. In addition, given the hierarchical status of the appeal mechanism, it will gradually bring about greater consistency.

44. A two-tier mechanism is the most effective structure for ensuring predictability and consistency. In the same institution there will be a greater degree of deference towards an appeal mechanism as compared to that likely to be displayed by ad hoc tribunals. This is important to keep in mind given that not every case will go on appeal.

45. Remand is a common feature of domestic legal systems. It allows appeal courts to send cases back to lower courts in order to complete the resolution of the dispute. It is particularly used when the factual record is incomplete and so the appeal court cannot dispose of the case by itself. Providing for such a facility is a desirable feature of an effective appeal mechanism, otherwise the litigants need to start the litigation all over again. However, it is problematic to operate remand with

[23] See Anthea Roberts, *UNCITRAL and ISDS Reforms: Moving to Reform Options … the Politics*, EJIL Talk, 8 November 2018, https://www.ejiltalk.org/uncitral-and-isds-reforms-moving-to-reform-options-the-politics/#more-16628, and Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, American Journal of International Law, 2018, 112, pp. 410, 431-432.

[24] "The ICSID system is based on institutionally supported arbitral tribunals and annulment committees. It operates with a large number of arbitrators on the same hierarchical level who work in varying compositions in each case. Accordingly, over time, different arbitrators decide on the same or at least very similar interpretative legal issues. This absence of a permanent tribunal and the corresponding personnel discontinuity result in a relatively low level of internal pressure towards "continuous collegiality" [footnote omitted] and stand in contrast to permanent judicial institutions such as the ICJ or the CJEU [footnote omitted].", see Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration*, Brill Nijhoff, Leiden and Boston, 2017, p. 164.

ad hoc first instance tribunals because they will already be disbanded after they have delivered their award and the appeal will be rendered sometime after that.

Deliberative process and relationship with other areas of law

46. A standing mechanism will also be better positioned to gradually develop a more coherent approach to the relationship between investment law and other domains, in particular domestic law and other fields of international law. For instance, the WTO Appellate Body has made a number of pronouncements on the relationship of WTO law with other fields of international law, which have been helpful in elaborating the interactions between different fields of law.[25]

4.2 Decision makers

Addressing ethics concerns, eliminating double hatting, removing incentives flowing from the current system

47. A system of full-time adjudicators will be better able to ensure independence and impartiality. In fact, it is only by moving away from appointment by the disputing parties to a system of adjudicators on long, non-renewable terms that the concerns on independence and impartiality can be definitively addressed. This will bring double-hatting (i.e. acting as counsel and arbitrator) to an end.[26] Furthermore, it will remove incentives flowing from the phenomenon of repeat appointments. It will remove the link between arbitrators (or candidates to be arbitrators) and counsel for investors and states who are the gate-keepers to appointment. The very existence of these perceived incentives plays a large role in raising concerns around the legitimacy of the regime.[27] An appeal mechanism alone cannot remedy the lack of independence and impartiality since the main factor driving the concern is the ad hoc party-appointment system.

48. This thinking is in line with the practice of international courts not to allow their judges to have other external activities. For example, the International Court of Justice has recently decided that its sitting Members would not act as arbitrators in investor-state dispute settlement or in commercial arbitration.[28]

Expertise – stronger background in public international law

49. Requiring expertise in public international law will remedy a concern that a significant number of adjudicators in the current system have limited expertise in public international law. Such expertise is necessary given the public international law foundations of the regime. Expertise in judging, given the public law nature of the regime, and in detailed fact-finding would also bring benefits.

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[25] See, for instance, Appellate Body Report, *US — Gasoline*, p. 17: "[T]he Appellate Body has been directed, by Article 3(2) of the DSU, to apply ["customary rules of interpretation of public international law"] in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"). That direction reflects a measure of recognition that the *General Agreement is not to be read in clinical isolation from public international law*." (emphasis added).

[26] See Malcolm Langford, Daniel Behn and Runar Hilleren Lie, *The Revolving Door In International Investment Arbitration*, Journal of International Economic Law, 2017, 20 (2), p. 328, https://doi.org/10.1093/jiel/jgx018.

[27] "Judges in courts in advanced economies appear to be rarely subject to challenge in public debate or to disqualification on the basis that they are structurally subject to financial incentives affecting outcomes. As a matter of institutional design, permanent appointments and salaries are generally seen as important elements in achieving public confidence on these issues. Beyond institutional matters, domestic legal systems also apply rules to the individual pecuniary interests of particular judges. Like the provision of salaries, these rules are generally seen as contributing to judicial independence and public confidence in the justice system.", see David Gaukrodger, *Adjudicator Compensation Systems and Investor-State Dispute Settlement*, OECD Working Papers on International Investment, 2017/05, OECD Publishing, Paris, p. 20, https://doi.org/10.1787/c2890bd5-en.

[28] As announced by President Yusuf on 25 October, in his annual address to the General Assembly, see https://www.icj-cij.org/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf. "Cumulating the roles of ICJ judge and arbitrator (or, as the report called it, "moonlighting") could potentially impact, or be perceived to impact, the judge's independence and impartiality", see Marie Davoise, *Can't Fight the Moonlight? Actually, You Can: ICJ Judges to Stop Acting as Arbitrators in Investor-State Disputes*, *EJIL: Talk!*, 5 November 2018, https://www.ejiltalk.org/cant-fight-the-moonlight-actually-you-can-icj-judges-to-stop-acting-as-arbitrators-in-investor-state-disputes/.

Diversity – geographical and gender. Impossibility to address this in the current system

50. A permanent two-tier system provides more opportunities for the appointment of adjudicators from underrepresented regions and to seek gender balance. This is because selection criteria could be built-in which would ensure geographical and gender diversity. This will not happen without moving away from the system of party-appointment because in such a system the disputing parties will naturally default to arbitrators with a known profile.[29] An appeal mechanism alone will provide fewer opportunities for bringing about diversity.

4.3 Duration and costs

51. A standing mechanism will lead to a reduction of the costs and duration of proceedings in a number of ways, which would contribute to ensure effective access for small and medium-sized enterprises to the standing mechanism.

52. First, time will not be spent choosing arbitrators. ICSID estimates that on average it takes 6-8 months to appoint arbitrators.[30] The appointment of arbitrators also implies a cost, as counsel spend time considering which arbitrators would best suit the interests of their client. The time spent appointing tribunal members is considered to be one of the three most time consuming elements of ISDS proceedings and hence will involve significant counsel costs.[31]

53. Second, significantly less time and money would be spent on challenges. Under the current ICSID rules, proceedings are suspended whilst challenges are resolved. A permanent mechanism would remove entirely, or in very large part, the need for and frequency of challenges. Instead, adjudicators would be considered independent and impartial on account of their tenure and it would only be in very specific limited cases that a potential conflict of interest might arise and would need to be dealt with.

54. Third, adjudicators in a standing mechanism will not have incentives that may impact on costs and duration. For example, the fact that their remuneration would not be linked to the time spent on a particular case would remove perceived incentives to prolong the time of proceedings in terms of management of the case. It is more likely to lead to better case management. For example, permanent adjudicators would have no interest in longer pleadings or longer hearings than strictly necessary. It has been argued that arbitrators are loath to disagree with appointing counsel for example on the length of hearings or on the utility of post-hearing briefs.[32]

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[29] See Taylor St. John, Daniel Behn, Malcolm Langford and Runar Lie, *Glass Ceilings And Arbitral Dealings: Explaining The Gender Gap In International Investment Arbitration*, forthcoming publication, 1 January 2019, explaining the structural flaw regarding gender parity in the existing ISDS system: "[W]e articulate an informal norm of "previous experience" within the appointment process and why this norm serves as a barrier for increasing the proportion of females appointed as arbitrators. The informal norm is that parties—counsel and their clients—seek to appoint someone they consider a known, predictable quantity. [...] An informal norm of appointing only known quantities leads to a system with very few new entrants. [...] Once you are in the club, you are in, but there are very few opportunities for getting the first appointment. [...] In theory, party appointment is not related to gender. Yet in practice, party appointment may reinforce existing patterns of gender disparity, in particular because this strong norm of 'previous experience' militates against new entrants, who likely have a higher proportion of females than the existing club.", pp. 10-11, and "If we assume that current trends continue, women will receive 25% of arbitral appointments only in the year 2100. Thus, our results lead us to be pessimistic about the likelihood of change in the gender diversity of investment arbitration without the elimination of party appointment.", p. 21.

[30] "Average duration from registration to constitution of the Tribunal: 6 to 8 month", see Gonzalo Flores (Deputy Secretary-General of ICSID), *Duration of ICSID proceedings*, Presentation, Inter-sessional Regional Meeting on ISDS Reform, Incheon, Korea, 10 September 2018.

[31] See A/CN.9/930/Rev.1 - Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session - Part I (Vienna, 27 November–1 December 2017), 19 December 2017, para. 65, http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html.

[32] See Philipe Sands, *What I Have Learned – Ten Years as an Investor-State Arbitrator*, Presentation, Columbia Law School, New York, United States, 15 October 2018, http://ccsi.columbia.edu/2018/10/11/fall-2018-international-investment-law-and-

55. Fourth, predictability will impact on costs and duration. Once a particular interpretation of a norm is established (e.g. by consistent rulings of first instance tribunals or by an appeal mechanism), then it will not be relitigated. Conversely, the current system encourages relitigation because there is no guarantee that one ad hoc tribunal will follow an interpretation, however well-reasoned, of another ad hoc tribunal. Removing this lack of predictability will therefore also reduce the costs and duration of proceedings.

56. A standing mechanism will also bring a significant advantage in the management of multiple claims. The more treaties are subject to the jurisdiction of the standing mechanism, the more effective the standing mechanism will be in handling related cases brought under different treaties (e.g. in avoiding or better handling a CME/Lauder situation [33]). This may happen, for example, through joinder of cases, consolidation, stay of proceedings or even dismissal of cases.

5. CONCLUSION

57. This submission has set out why a permanent standing two-tier mechanism with full-time adjudicators responds effectively to the concerns identified in the Working Group. In fact, it is the only suggested option that can successfully respond to all of the concerns identified. It is suggested, therefore, that this option be further developed by the Working Group, as a matter of priority.

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Annex

See Document A/CN.9/WG.III/WP.145

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[33] See *Lauder v. Czech Republic* (under the United States–Czech Republic Bilateral Investment Treaty (BIT)) and *CME v. Czech Republic* (under the Netherlands–Czech Republic BIT) concerning the same underlying measure.