Possible reform of investor-State dispute settlement (ISDS)

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

Note by the Secretariat

Contents

I. Introduction

1. At its resumed thirty-eighth session, in January 2020, and at its fortieth session, in February 2021, the Working Group undertook a preliminary consideration of the selection and appointment of ISDS tribunal members, with a focus on their selection and appointment in the context of a standing multilateral mechanism (also referred to below as a "multilateral investment tribunal" or "tribunal") (A/CN.9/1004/Add.1, paras. 95-133; A/CN.9/1050, paras. 17-56). At its fortieth session, the Working Group requested the Secretariat to conduct further preparatory work on the matter, including the development of draft provisions (A/CN.9/1050, paras. 55 and 56).

2. Accordingly, this Note contains draft provisions covering the selection and appointment of ISDS tribunal members as well as interrelated topics on establishment and functioning of a standing multilateral mechanism. The question of financing such mechanism is addressed in document [*reference to be included*] and the question of recognition and enforcement of decisions made under such mechanism is addressed in document [*reference to be included*]. [1]

3. This Note was prepared with reference to a broad range of published information,[2] and does not seek to express a view on the possible reform options, which is a matter for the Working Group to consider.

General comment from the European Union and its Member States on this Note:

The European Union and its Member States express their gratitude to the Secretariat of UNCITRAL for their excellent work on preparing these draft provisions on selection and appointment of investment adjudicators The European Union and its Member States would like to take this opportunity to make some comments and text proposals.

II. Selection and appointment of ISDS tribunal members

A. Background information

4. By way of background, at its thirty-sixth session, the Working Group concluded that the development of reforms was desirable to address concerns related to: (i) The lack or apparent lack of independence and impartiality of ISDS tribunal members (A/CN.9/964, para. 83); (ii) The adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules (A/CN.9/964, para. 90); (iii) The lack of appropriate diversity among persons appointed to serve as ISDS tribunal members (A/CN.9/964, para. 98); and (iv) The mechanisms for constituting ISDS tribunals (A/CN.9/964, para. 108). On the basis of proposals submitted by Governments, [3] and on the basis of document A/CN.9/WG.III/WP.169, the Working Group undertook, at its resumed thirty-eighth

[1] Initial drafts on these issues will be posted on the UNCITRAL website under https://uncitral.un.org/en/draftworkingpapers.

[2] This includes: (*to be completed*) the CIDS Supplemental Report on "The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards", 15 November 2017, Gabrielle Kaufmann-Kohler and Michele Potestà ("CIDS Supplemental Report") available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_supplemental_report.pdf; Draft Statute of the Multilateral Investment Court, by Marc Bungenberg and August Reinisch, 2021, available at https://www.nomos-shop.de/nomos/titel/draft-statute-of-the-multilateral-investment-court-id-98918/; as well as the publications from members of the Academic Forum, available at https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/

[3] A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States; 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; A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador; A/CN.9/WG.III/WP.177, Submission from the Government of China; A/CN.9/WG.III/WP.195, Submission from the Government of Morocco.

session, a preliminary consideration of the features regarding the qualifications and requirements of ISDS tribunal members, and the various selection and appointment models in the framework of ad hoc and standing mechanisms (A/CN.91004/Add.1, paras. 95-129).

5. At that session, the Working Group had a preliminary discussion on the selection and appointment procedures in a standing multilateral mechanism (A/CN.9/1004/Add.1, paras. 114-129). This reform element is based, inter alia, on the suggestion that there is a need to revisit the party-appointment method in ISDS and to limit the involvement of the disputing parties, as party autonomy need not be a key component of ISDS (A/CN.9/1004/Add.1, para. 104). As an illustration, this reform would result in selection and appointment mechanisms comparable to those in existing international courts, where States as disputing parties have no say in the selection of the individuals who decide the case, although as treaty parties they have participated in the selection process of the individuals who compose the standing body.[4]

6. The Working Group may wish to note that the establishment of a standing multilateral mechanism would require the preparation of a statute (also referred to below as "agreement establishing the tribunal"), for adoption by States and possibly regional economic integration organizations. The statute would be supplemented by rules or regulations addressing more detailed procedural matters. The draft provisions below would therefore need to be adjusted and completed to form part of such framework. The Working Group may wish to consider that various models could be considered for preparing rules or regulations on detailed procedural matters, including rules or regulations as found in international courts or as found in international arbitration, following the model of, for instance, the Iran-United States Claims Tribunal.[5]

B. Framework: establishment, jurisdiction and governance

1. General remarks

7. The Working Group may wish to consider some general questions that would need to be addressed in due course regarding the possible ways to establish the multilateral investment tribunal and the possible governance structure, as outlined in paragraphs 61-64 below. Draft provisions 1 to 3 below only aim at providing the general framework within which the selection and appointment of tribunal members would take place.

2. Draft provisions 1 to 3

8. The Working Group may wish to consider the draft provisions below regarding the establishment of a standing mechanism, its jurisdiction and governance structure.

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

[4] See, for instance, Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 15 April 1994, Articles 17(1) and 17(2); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, as amended by Protocol Nos. 11 and 14, as from its entry into force on 1 June 2010, Articles 20–23 and Article 26; it may be noted that at the International Court of Justice (ICJ), the composition of the Court may be influenced by disputing parties only in limited circumstances, namely through the appointment of a judge ad hoc and by the constitution of a chamber to decide particular cases: Statute of the International Court of Justice ("ICJ Statute"), Articles 26(2) and 31(2).

[5] Founding documents as well as rules and regulations of the Iran-United States Claims Tribunal are available at https://iusct.com/documents/.

The Tribunal shall exercise jurisdiction over any dispute arising out of an investment, between a Contracting State and a national of another Contracting State, which the parties consent to submit to the Tribunal.

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 level, [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.

3. Comments on draft provisions 1 to 3

9. Draft provision 1 provides for the establishment of an investment tribunal functioning on a permanent basis.

10. Draft provision 2 provides that jurisdiction extends to disputes arising out of an investment, regardless of the underlying instrument (investment treaty, investment law or contract). The emphasis of the provision is on the requirement of consent, rather than of the particular type of instrument of consent. It may be noted that membership in the agreement establishing the tribunal would not automatically entail that the State in question consents to the adjudication of a given dispute before the tribunal. The tribunal would exercise jurisdiction over disputes arising out of an investment which the parties agreed to submit to the tribunal through offer and acceptance in a foreign investment law or in an investment contract. Provisions on the consent to the jurisdiction of the multilateral investment tribunal could be included in future investment treaties.[6] In addition, the multilateral instrument on ISDS reform to be further considered by the Working Group may provide for a mechanism to incorporate a provision on consent to the jurisdiction of the multilateral investment tribunal in existing investment treaties.[7] The Working Group may wish to note that the term "parties" in draft provision 2 could refer either to the States parties to an investment treaty or to the disputing parties, depending on the situation. It may wish to consider whether this should be further clarified in the draft provision.

Comments from the European Union and its Member States on draft provision 2:

The European Union and its Member States would prefer a drafting of provision 2 that does not refer to "investment", to avoid a double "investment test" under the applicable treaty and the statute establishing the Tribunal, and that covers also State-to-State disputes. We agree that the draft provision should focus on the element of consent of jurisdiction, rather than of the particular type of instrument of consent. In our view, the Tribunal should be able to hear claims brought pursuant to the treaties that the Contracting Parties of the Tribunal agree to submit to its jurisdiction (at the moment they become Parties or later, through notifications), or claims brought pursuant to contract or foreign investment laws. For transparency, a list of such treaties and instruments could be annexed to the instrument establishing the tribunal.

On the basis of these considerations, we would suggest the following changes in red:

"The Tribunal shall exercise jurisdiction over any dispute ~~arising out of an investment, between a Contracting State and a national of another Contracting State,~~ which the parties have consented to submit to the Tribunal."

[6] Submission by the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, p. 8.

[7] See Submission by the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, p. 8.

11. Draft provision 3 introduces the concept of a Committee of the Parties, responsible for carrying out various functions, including the establishment of rules of procedure for the tribunal, and for developments and adjustments, such as on the number of tribunal members. It clarifies that the tribunal itself shall develop its own rules of functioning, as customarily provided in international courts and tribunals.[8] Accordingly, more fundamental rules of procedure would be adopted by the Committee of the Parties under paragraph 2, whereas the rules for the tribunal's routine functioning would be adopted by the tribunal itself under paragraph 3 (see below, paras. 69-71).

Comments from the European Union and its Member States on draft provision 3:

The European Union and its Member States support the creation of a Committee of the Parties, responsible for carrying various functions, including those related to the appointment of adjudicators as detailed in the draft provisions below. We believe that the Committee of the Parties should adopt decisions by qualified majority (e.g. a 3/4 majority or a different majority, depending on the nature of the specific decision).

C. Selective representation and number of tribunal members

1. General remarks

12. Regarding draft provision 4 on the number of tribunal members and adjustments, the Working Group may wish to note that it reflects the preference expressed in the Working Group for a selective rather than full representation on the basis that an international investment tribunal with a high number of members may be expensive and complex to manage. The preferred approach was therefore to seek broad geographical representation as well as a balanced representation of genders, levels of development and legal systems, and to ensure that the agreement establishing the tribunal would allow the number of tribunal members to evolve over time, following any increase in the number of participating States, as well as in the caseload (A/CN.9/1050, paras. 23 and 24).[9] Questions such as how to ensure a balanced representation over time would need careful consideration and are addressed under draft provision 8 (see below, paras. 39-41).

2. Draft provisions 4 and 5

13. The Working Group may wish to consider the draft provisions below regarding the number of tribunal members and adjustments as well as ad hoc tribunal members.

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

[8] See, e.g., ICJ Statute, Article 30(1) ("The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure"); ITLOS Statute, Article 16 ("The Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure"). See also Articles 51-52 ICC Rome Statute (articulating distinction between Rules of Procedure and Evidence, to be adopted by the Assembly of States Parties, and the Regulations of the Court "necessary for its routine functioning", to be adopted by the Court).

[9] In full representation bodies, each State has a judge on a permanent basis, usually a national of that State; in selective representation courts, there are fewer seats than the number of States parties to the court's statute (See CIDS Supplemental Report, paras. 21–27; see also Selection and Appointment in International Adjudication: Insights from Political Science, Olof Larsson, Theresa Squatrito, Øyvind Stiansen, and Taylor St John); examples of full representation include regional courts such as the Court of Justice of the European Union (CJEU) and the ECHR (Article 20); examples of selective representation courts include the African Court on Human and Peoples' Rights, see Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ("Protocol on the African Court"), Article 11; Agreement Establishing the Caribbean Court of Justice, 14 February 2001, Article IV; American Convention on Human Rights (ACHR), 22 November 1969, Article 52; Statute of the Inter-American Court of Human Rights ("IACHR Statute"), October 1979, OAS Res No. 448, Article 4.

to this Agreement, elected] from among persons of high moral character, [who possess the qualifications required in their respective countries for appointment to the highest judicial offices,] 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.

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[.]*

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

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

Variant 3*: [, based on the evolution of case load and of the Parties to this Agreement, 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.

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.

3. Comments on draft provisions 4 and 5

- *Draft provision 4*

14. Paragraph 1 covers the question of the number of tribunal members upon the setting up of the tribunal. It may be noted that in the UN system, with its 193 member States, the International Court of Justice (ICJ) has 15 judges.[10] Under the United Nations Convention on the Law of the Sea (UNCLOS), with its 168 member States, ITLOS has 21 judges.[11] In the WTO, with its 164 member States, the Appellate Body has 7 members.

15. The question whether the tribunal members should be employed on a full time or part time basis is connected to the number of members who would sit in the tribunal and to the workload of the tribunal. For instance, where there is a high number of members for the sake of greater diversity, part-time employment could be considered, in which case a rule may need to be adopted regarding parallel activities that would be prohibited.

16. Paragraph 1 also refers to the requirements that the tribunal members should be cognizant of international law and have an understanding of the different policies underlying investment. The Working Group may wish to consider that ongoing

[10] See information on the activity of the court and caseload at https://www.icj-cij.org/files/annual-reports/2017-2018-en.pdf.
[11] For an average of 1,2 cases per year.

training and continuous learning would constitute an effective means to ensure both competence and inclusiveness. It may wish to note that this matter might be addressed in the context of the reform regarding the establishment of an advisory centre (see A/CN.9/1004, paras. 28-50). The reference to "the qualifications required in their respective countries for appointment to the highest judicial office" is a criterion often found in constitutive instruments of international courts and tribunals. However, it may be noted that qualifications to be appointed to the highest judicial offices vary from country to country and may present problems when transposed in an international setting (for instance, in certain jurisdictions only career judges with certain years of tenure within the judiciary may be eligible to such appointments).

Comments from the European Union and its Member States on draft provision 4, paragraph 1:

The European Union and its Member States' view is that members of the tribunal should be employed full time. This is the only way to ensure the full impartiality and independence of the adjudicators. We may be open to explore some transitional provisions at the beginning of the operation of the Tribunal allowing for part time employment, but the definitive status of employment of the adjudicators should be full-time.

On the question of nationality, we would suggest drawing inspiration from the ICJ Statute (Article 2) and retain the option "elected regardless of their nationality". We believe that the objective should be to appoint the most qualified and independent individuals irrespective of their nationality.

On the question of qualifications requirements, we would suggest to take the full language of Article 2 of the ICJ Statute and refer not only to "persons […] who possess the qualifications required in their respective countries for appointment to the highest judicial offices", but also to "jurisconsults of recognized competence in international law", which would allow to enlarge the pool of potential adjudicators and its diversity.

17. Paragraph 2 covers the question of the adjustment to the number of tribunal members over time. On this matter, the Working Group considered that the number should be based on a projected caseload, with subsequent adjustments as the number of States parties evolves. In case of a two-tier mechanism, it can be assumed that only a limited number of cases would be heard and decided by the second tier. Therefore, the number of tribunal members in the second tier could be lower than in the first one.

18. Paragraph 2 provides for mainly two options regarding the adjustment of the number of tribunal members: (i) a smaller number of tribunal members based on the anticipated caseload, with a formula that could see the number increase or decrease as needed; and (ii) a larger number of tribunal members (with the possibility of serving part-time) for greater diversity and inclusiveness (A/CN.9/1050, para. 56). Option 1 contains three variants reflecting that the number of tribunal members composing a standing mechanism may need to evolve over time, following an increase in membership of States parties and/or in caseload. Option 2 provides more discretion regarding proposals to increase or decrease the number of tribunal members. Existing international courts and tribunals provide illustrations of these possible adjustment mechanisms.[12]

Comments from the European Union and its Member States on draft provision 4, paragraph 2:

[12] See, for example, the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981, Article III(1)); Rome Statute of the International Criminal Court, 1 July 2002, Article 36(2). For revision clauses found in international courts, see for instance, Iran – United States Claims Tribunal, Claims Settlement Declaration, Article III(1); Rome Statute, Article 36(2); CETA, Article 8.27.3; EU-Vietnam FTA, Article 12(3).

The European Union and its Member States prefer option 2 from a procedural point of view, because it clarifies how the mechanism would work in practice, and variant 3 of option 1 on substance. We would therefore suggest the following provision:

"2. The Presidency of the Committee of the Parties, acting on behalf of the Tribunal, may propose an amendment in the number of members of the Tribunal indicated in paragraph 1 based on the evolution of case load and of the Parties to this Agreement, 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."

19. The Working Group may wish to consider whether nationality should play a role in the composition of the tribunal, and whether it should be provided that no two tribunal members shall be of the nationality of the same State as proposed under paragraph 3.[13] A number of court statutes indeed provide that judges shall be elected irrespective of their nationality but also that no two judges of the same nationality shall sit on the bench (see also below, para. 21).[14] If nationality were to play a role, it may be noted that rotation among member States may be used to ensure that all States get the chance to have one of their own nationals appointed to the tribunal (see draft provision 8 below on appointment).[15]

Comments from the European Union and its Member States on draft provision 4, paragraph 3:

The European Union and its Member States believe that the rule in paragraph 3 could be too rigid in case the number of adjudicators needs to be modified, for instance due to an increase of the caseload or the number of adjudicators.

- *Draft provision 5*

20. Draft provision 5 seeks to reflect the request that options be proposed on participation of ad hoc tribunal members, including some flexibility in forming, with the consent of the parties, particular chambers for specific cases (A/CN.9/1050, paras. 26 and 27). Such flexibility is found in the statutes of international courts such as the Statute of the International Court of Justice. Possible methods for the appointment of an ad hoc tribunal member could include direct appointment by parties and appointment from a defined roster (A/CN.9/1050, para. 56). [16] In that light, the Working Group may wish to consider whether paragraph 2 should be retained. It may also wish to note that the system of ad hoc judges is not without drawbacks in the

[13] Nationality may or not be a requirement; examples where it is a requirement include the Court of Justice of the Cartagena Agreement, established under the Treaty Creating the Court of Justice of the Cartagena Agreement , which "shall consist of five magistrates who must be natives of Member Countries […]" (Treaty Creating the Court of Justice of the Cartagena Agreement, 28 May 1979, Article 7(1)); See also American Convention on Human Rights, 21 November 1969 (ACHR), Article 52(1); Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), Article 8.27.2. Counterexample includes the International Court of Justice, Article 2 of the Statute); Courts with a global reach often require that no two judges can be nationals of the same State; with regard to the European Court of Human Rights, note that in 1994 the rule providing that "no two judges [of the ECtHR] may be nationals of the same State" was deleted from the European Convention on Human Rights. See Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, para. 59 59, 11 May 1994.

[14] Articles 2 and 3 of the Statute of the ICJ.

[15] See the Court of Justice of the Economic Community of West African States (ECOWAS), where the positions of the seven judges rotate among the 15 ECOWAS States.

[16] Four full representation courts have ad hoc systems to ensure a national can preside over disputes for each respondent State: the Court of Justice of the Andean Community (ATJ), the Central American Court of Justice (CACJ), the Economic Court of the Commonwealth of Independent States (ECCIS), and the European Court of Human Rights (ECtHR); for a different approach, see the International Tribunal for the Law of the Sea (ITLOS) Statute providing that each party is able to appoint one member to the ad hoc chamber of the Seabed Dispute Chambers, while the third arbitrator is agreed upon by both parties. Regarding nationality, Article 36(3) of the ITLOS Statute states that "Members of the ad hoc chamber must not be in the service of, or nationals of, any of the parties to the dispute".

inter-State context, and it may wish to consider further the appropriateness of transposing such system to the investor-State context.

21. Regarding the question of nationality under draft provision 5, it may be noted that some court statutes permit a State party to a case before the court without a judge of its own nationality to appoint a judge ad hoc.[17] A judge ad hoc does not have to be a national of the appointing State, and often they are not nationals of the State that appoints them (see also above, para. 19).[18]

22. The Working Group may also wish to consider whether, to achieve competence and inclusiveness over time, participation of a more "junior" person either as part of the ISDS tribunal or perhaps as a silent observer could be provided for (though such a role would have to be specifically created as it is not contemplated in current mechanisms).

Comments from the European Union and its Member States on draft provision 5:

The European Union and its Member States have reservations regarding the possibility to appoint *ad hoc* judges.

We are open to explore ways to ensure that the legal systems of respondents are well understood by the adjudicators. A standing mechanism could always have the possibility to appoint experts and translators and take evidence on the meaning of domestic law. Likewise, legal counsel litigating the case can provide an added guarantee in that respect. However, a number of concerns arise with respect to *ad hoc* judges.

For instance, analysis of voting patterns on courts such as the ICJ and the Inter-American Court of Human Rights (IACtHR) suggest that *ad hoc* judges have a strong tendency to favour the state that appointed them. The behaviour of *ad hoc* judges appointed to ensure representation from the respondent State appears thus to be similar to party-appointed arbitrators in ISDS (see Larsson, Squatrito, Stiansen, and St John, pp. 8-9).

It is noted too that it will be difficult, in due process terms, to allow only one of the disputing parties (the host state) to appoint an *ad hoc* adjudicator. This would imply that the investor will also ask for the ability to appoint an *ad hoc* adjudicator. Having two ad hoc adjudicators where a permanent body would be established would be wasteful and would undermine the efforts of a permanent body to establish consistency and predictability and to ensure legitimacy (it is likely that ethical issues would arise more frequently with ad hoc adjudicators as compared to permanently appointed adjudicators).

D. Nomination, selection and appointment of candidates

1. General remarks

23. The Working Group considered that, as a matter of principle, the selection and appointment methods of ISDS tribunal members should be such that they contribute to the quality and fairness of the justice rendered as well as the appearance thereof, and that they guarantee transparency, openness, neutrality, accountability and reflect high ethical standards, while also ensuring appropriate diversity (A/CN.9/964, paras. 91–96). In addition to the qualifications and other requirements, appropriate diversity, such as geographical, gender and linguistic diversity as well as equitable representation of the different legal systems and cultures was said to be of essence in the ISDS system. It was highlighted that achieving diversity would enhance the quality of the ISDS process, as different perspectives, especially from different cultures and different levels of economic development could ensure a more balanced decision-making (A/CN.9/1004/Add.1, para. 101). Lack of diversity has been said to undermine the legitimacy of the ISDS regime.[19]

[17] Article 31(2) and (3) of the Statute of the ICJ.

[18] See Selection and Appointment of International Adjudicators : Structural Options for ISDS Reform, by Andrea Bjorklund, Marc Bungenberg, Manjiao Chi, Catharine Titi, Academic Forum on ISDS Concept Paper 2019/11.

[19] Several existing statutes of international courts refer to: (i) "equitable geographical representation" for the selection of tribunal members (see, for example, Rome Statute of the International Criminal Court (ICC), 1 July 2002, Article 36(8)(a)(ii); see also

24. It was pointed out that appointments on the basis of expertise and integrity rather than on political consideration would be more likely if the selection process were to be: (i) multi-layered; (ii) open to stakeholders; and (iii) transparent. In that context, it was suggested that selection panels and consultative committees should first screen the candidates before they would be appointed by a vote of the States Parties to the agreement establishing the tribunal.

25. In that light, the Working Group may wish to note that draft provisions 6 to 8 reflect the most commonly found system whereby tribunal members are elected by an intergovernmental body voting from a list of nominated candidates.[20] It may wish to consider whether allocating seats to different geographically defined groups of States, as proposed under draft provision 8, may constitute an efficient means for the establishment of a selective representation tribunal, aiming at ensuring a balanced regional representation as well as a representation of the various legal systems.

26. Elections through votes are favoured over elections by consensus, to avoid blocking the selection process. It should be noted that States are usually able to vote for more than one candidate, to ensure some balance and diversity. Qualified majority rules usually ensure that tribunal members who are appointed are acceptable to most States. Furthermore, less demanding majorities are often provided in case no qualified majority is reached, in order to avoid deadlock in the election. It may be noted that there are several courts in which tribunal members are selected by treaty parties or by a collective body of States, even if that membership is larger than the group of States that accept the court's jurisdiction.[21]

Comments from the European Union and its Member States on the last sentence of para. 26 above:

The European Union and its Member States are against the possibility that tribunal members are selected by States other than those that accept the tribunal's jurisdiction. This could potentially lead to problems if those other States were to be given the possibility to impact on the tribunal's functioning.

2. Nomination of candidates

Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Article 17(3), third sentence; (ii) balanced representation between developed, developing and least developed countries (at the WTO, developing countries may request that a panel deciding a dispute between developed and developing countries include at least one panellist from a developing country Member - see Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Article 8(10)); and (iii) balanced representation between capital exporting and capital-importing countries (although there is no reference in the ICSID Convention to such criterion among those that are to be taken into account by the Chair in his or her selection of the members of the Panels of Conciliation and Arbitration, during the preparatory works of the Convention the Char's power to designate Panel members was generally seen as desirable to ensure "fair representation on the Panels of qualified persons from both investing and receiving countries "- see the comment of the delegate from the Netherlands at the Geneva Consultative Meetings of Legal Experts held between 17–22 February 1964 in ICSID (1968), History of the ICSID Convention: Documents concerning the Origin and Formulation of the Convention, Vol. II-1 ("History of the ICSID Convention, Vol. II-1"), p. 382). Constitutive instruments of courts and tribunals also commonly provide that the court composition as a whole must reflect a balance of different profiles and a representation of the world's main legal systems or traditions (see, for example, the International Court of Justice (ICJ) Statute, Article 9; ITLOS, Article 2(2); Rome Statute of the International Criminal Court, 1 July 2002, Article 36(8)(a); Protocol on the African Court, Article 14(2); the Treaty on the Harmonization of Business Law in Africa, 17 October 2008, Common Court of Justice and Arbitration of the OHADA, Article 31; and ICSID Convention, Article 14(2)). It may be noted that the Protocol on the African Court provides that when putting forward their nominations, States "shall give[]" "[d]ue consideration to adequate gender representation in nomination process." (Protocol on the African Court, Article 12(2)).

[20] The most relevant types of international bodies are intergovernmental organs (such as the Assembly of State Parties for the ICC) or an international parliamentary assembly (such as the Council of Europe's Parliamentary Assembly for the ECtHR). ICJ judges require a majority in both the UN General Assembly and in the UN Security Council.

[21] See, for instance, selection of judges for the African Court on Human and People's Rights by Member States of the African Union; election of ICJ judges by the UN General Assembly; judges at ITLOS are selected by the State Parties of the Convention of the Law of the Sea, even if they do not in general accept ITLOS as a forum for dispute settlement.

27. The Working Group may wish to consider draft provision 6 below on the nomination of candidates.

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] candidate[s] for any given election [who need not necessarily be a national of that Party], keeping in mind the need to ensure equal representation of genders. 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, judicial and other State bodies, bar associations, business association, academic and other relevant organizations, in the process of selection of nominees.

Option 2:

Any person who possesses the qualifications required under article 4, paragraph 1 may apply to the selection process following an open call for candidacies to be issued in accordance with a decision of the Committee of the Parties.

3. Comments on draft provision 6

28. Draft provision 6 reflects the request of the Working Group to offer options for nomination procedures, which should be open and transparent and provide means for non-State entities (for example, investors, civil society and individuals) to be informed and consulted (A/CN.9/1050, para. 56). It should be read in conjunction with draft provision 7 which provides for a selection mechanism.

29. It may be noted that this phase is not present in the selection procedures of all courts and tribunals. Thus, in certain courts and tribunals, tribunal members are appointed directly by the treaty Parties, either unilaterally or through a joint committee, without any prior formal nomination process. [22]

30. Option 1 reflects nomination by the Parties to the agreement establishing the tribunal, as is done for the election of tribunal members at certain courts.[23] The nomination process under this model has been subject to criticism, in particular regarding the un-evenness and lack of uniformity of the processes at the national levels; the lack of transparency as to how candidates are identified and put forward; and the politicization of the nominations.[24] The Working Group may wish to consider that if that option is chosen, gender balance in the composition of the tribunal would be better guaranteed where each Party would be required to propose two candidates.

31. Paragraph 2 seeks to ensure openness and transparency in the nomination process by providing for the consultation of stakeholders as is provided for in the statues of various courts.[25] The consultation stage may serve to enhance transparency in the selection process and endow a broader acceptance of the dispute mechanism -

[22] See CIDS Supplemental Report, para. 118.

[23] ECHR, Article 22 ("The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party"); Protocol on the African Court, Article 12(1) ("States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State"); Unified Agreement for the Investment of Arab Capital in the Arab States ("Unified Agreement"), 26 November 1980, League of Arab States Economic Documents No. 3, Article 28(2) ("The Court shall be composed of at least five judges and several reserve members, each having a different Arab nationality, who shall be chosen by the Council from a list of Arab legal specialists drawn up specifically for such purpose, two of whom are to be nominated by each State Party from amongst those having the academic and moral qualifications to assume high-ranking legal positions. The Council shall appoint the chairman of the Court from amongst the members of the Court.").

[24] See CIDS Supplemental Report, para. 123.

[25] See Statute of the Caribbean Court, Articles IV(12) and V(1).

certain stakeholders could take part in the selection process (for example, representatives of investors and stakeholders, who have an interest in the interpretation and application of investment treaties and the outcome of the dispute, such as professional associations in the field of international law and civil society (A/CN.9/1004/Add.1, para. 121).[26]

32. Option 2 would eliminate the nomination process from the hands of the Parties to the agreement establishing the tribunal as it provides for self-nomination, allowing any interested individual with the necessary qualification requirements to put forward his or her own candidature, following an open call for this. A screening and filtering phase by a body different from the one making the final appointment would seem indispensable if the selection process is to allow self-candidatures (see below, draft provision 7).

33. The Working Group may wish to consider that options 1 and 2 could also be combined and applied together, so that States would maintain the possibility to appoint tribunal members, but individuals could also apply directly.

Comments from the European Union and its Member States on draft provision 6:

The European Union and its Member States believe that the main goal should be to design a robust nomination and appointment system that leads to appointments of the most qualified and independent candidates and that guarantees geographical and gender diversity.

We believe that this objective can be achieved in the nomination phase through (i) open calls for direct applications to the post of adjudicators and (ii) a nomination process that is open to stakeholders and transparent.

For this reason, we think that the nomination system should combine options 1 and 2 of draft provision 6, as suggested in paragraph 33 above, so that candidates for the tribunal could be both nominated by the Parties to the agreement establishing the tribunal but also apply directly for appointment following open and transparent calls for direct applications to the post of adjudicators:

- **When nominating adjudicators to the tribunal, States are expected to take a long-term perspective and nominate objective adjudicators, rather than ones that are perceived to lean too heavily in favour of either 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 (see Roberts).**
- **Allowing individuals to apply directly for appointment would also discourage nominations for political reasons.**

With respect to the number of candidates that each Party may propose, we believe that this should not be limited to one or two candidates, as suggested in paragraph 1 of draft provision 6. Each Party should be encouraged to propose more candidates also to better guarantee gender balance in the composition of the tribunal.

4. Selection process

34. The Working Group may wish to consider draft provision 7 below on the setting up of a selection panel.

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

[26] For most selection processes, the assumption has been that governments represent views from a broad range of stakeholders when they make appointment decisions; it is worth noting that even if non-state actors are not formally involved in the selection process, they may play informal roles (such as scrutinizing proposed candidates to make sure that they have the desired backgrounds and qualifications).

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] 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. 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 paragraph 3].

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 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 of [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 candidates meeting the requirements.

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 candidates meeting the requirements shall be made public.

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

5. Comments on draft provision 7

35. Draft provision 7 reflects the request of the Working Group that formulations on the use of selection panels or committees should be provided for, including their role in the appointment process, how the members of those panels would be chosen and how to ensure their independence. It details the establishment and functioning of a selection panel, based on a submission received (A/CN.9/1050, para. 33). [27]

36. It may be noted that screening committees and consultative appointment committees as well as appointment committees have been introduced in some international courts (A/CN.9/1004/Add.1, para. 118).

37. Screening committees assess candidate tribunal members prior to their election to ensure that they meet the requirements, possess sufficient expertise and qualifications. Their function is to filter out candidates that do not meet qualifications.[28] Even if States retain control over appointments, this design feature is meant to lead to the appointment of more qualified and more independent tribunal members. Their function usually does not include consultation with non-state entities.[29]

[27] See: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/selection_and_appointment_eu_and_ms_comments.pdf.

[28] Draft provision 7(a) refers to the eligibility criteria, as done for instance in the ECtHR context (where the screening panel "shall advise the High Contracting Parties whether candidates for election as judges of the European Court of Human Rights meet the criteria stipulated in Article 21§1 of the European Convention on Human Rights"); see also discussion in CIDS Supplemental Report, paras. 145-146.

[29] For example, an "Article 255 Panel" was established to assess nominated candidates for the CJEU in 2010. The panel merely issues recommendations, and it is composed of "seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament" (Article 255 of the Treaty on the Functioning of the European Union).

Comments from the European Union and its Member States on draft provision 7:

The European Union and its Member States fully support the inclusion of a screening phase of nominations by an independent selection panel to ensure that the most qualified and objective candidates are appointed, that the adjudicators appointed do in fact meet the necessary standards of judicial independence and, thus, to further avoid any risk of politicisation of States' nominations.

On the composition of the panel, the persons appointed to the selection panel should be independent. We agree with draft provision 7 that these could, for example, be former judges of the tribunal, current or former members of international or national supreme courts or lawyers or academics of high standing and recognised competence and they should also be able to apply directly following an open call for applications. In order to enhance the independence of the panel, it could be also provided that an external entity (for instance the President of the International Court of Justice) confirms that the members of the panel meet the necessary requirements.

On diversity, we also agree that when appointing the members of the panel, the Committee of the Parties *"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]"*

We think that members of the Panel should be appointed by qualified majority of the Committee of the Parties, such as a two thirds majority (paragraph 2 under letter (b) on composition). Although being appointed by the Committee of the Parties, we believe that the selection panel should be independent from the Committee, in particular, it should not take instructions from the Committee, to avoid any risk of politicisation of the appointments.

Regarding the tasks of the panel, we agree that the selection panel should screen candidacies so that adjudicators can then only be appointed if they have been vetted approved by the selection panel.

We believe it would be useful to also include provisions on working procedures and financial provisions. The European Union and its Member States would suggest the following provisions:

Working procedures
The panel may adopt its own working procedures which shall be consistent with this [Draft provision 7].

Financial Provisions
The [Committee of the Parties] shall adopt rules on the operational costs of the panel and of any reasonable expenses incurred by its members in the exercise of their function, Those costs and expenses shall be borne by the [general budget of the organisation].

6. *Appointment process*

38. The Working Group may wish to consider draft provision 8 below on the appointment process.

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: 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.*

7. Comments on draft provision 8

39. Paragraph 1 provides for a method to ensure diversity in the appointment of tribunal members (see general comments above, under para. 23). The proposal would be that each regional group would only vote for its regional candidates, without any voice on the other candidates.

40. For the sake of simplicity, it is suggested in paragraph 2 that a similar method for appointing tribunal members at the first instance and appellate level would be applied. However, in recommending candidates, the selection panel would make specific recommendations for tribunal members at the appellate level, in light of the significant degree of adjudicatory experience of such candidates (A/CN.9/1050, para. 46).[30] The Working Group may wish to consider whether the election/allocation of a member to the first-instance and appellate level would need to be further specified, and if so, which of the following options would be preferable: (i) A common pool of nominees would be established by the panel who would indicate members having the adequate experience also for the appellate level, and there would be then one single election; (ii) There would first be an election for the first-instance members and a second one for appellate members; or (iii) The Committee of the Parties would elect all the judges (without distinction between first-instance and appellate) and then the tribunal would organize itself between first-tier and appellate levels, also based on the recommendation of the selection panel.

41. Draft paragraph 6 provides for the election of the president of the tribunal, by vote from other tribunal members.

Comments from the European Union and its Member States on draft provision 8:

The European Union and its Member States appreciate the efforts made by the Secretariat in draft provision 8 to try and find models that would guarantee an equitable geographical distribution as well as equal gender representation in the tribunal. We are strongly in favour of these objectives.

We wonder whether certain details of this provision (such as exact formulas) should be provided in the statute of the tribunal itself or whether they should rather be decided by the Committee of the Parties, to allow that such more detailed rules could more easily be adapted and changed, for instance in light of an evolving membership of the tribunal.

On the appointment of tribunal members at first instance and appellate level, we think that:

- **it would be easier to have separate tracks for nomination, selection and appointment for the first instance and the appellate level. Therefore, since the very beginning, Parties should nominate candidates for the first instance and for the appellate level and the selection panel should separately screen such separate nominations.**
- **the Committee of the Parties should decide on appointments for the two different instances with separate elections.**

[30] See, for instance, WTO AB, CETA; The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement, Malcolm Langford, Daniel Behn and Maria Chiara Malaguti, Academic Forum on ISDS Concept Paper 2019/12, Version 2, which discusses the effect of an appellate body on the selection and appointment of tribunal members.

- **for the qualification criteria of adjudicators at the appellate level, paragraph 2 of draft provision 8 above refers only to "*the extensive adjudicatory experience*" of candidates, however we think that these criteria should be broader and capture seniority in other types of experiences, not necessarily only in adjudication.**

Finally, we would suggest making the following clarifications in the draft text:

"The Panel shall publish the ~~names~~ list of candidates established pursuant to [Article 7(f)(2)(iii)] 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 or, in case of direct applications, based on the nationality of the candidates: Asia, Africa, Latin America and the Caribbean, Western Europe and others, and Eastern Europe."

E. Terms of office, renewal and removal

1. General remarks

42. The Working Group may wish to note that longer terms of office for tribunal members on a non-renewable basis could ensure that the members would not be affected by undue influence. However, being unable to reappoint tribunal members means that valuable experience is lost.[31] The Working Group may wish to consider whether one way of limiting the risk that non-renewable terms reduce the experience on the tribunal and the pool of available candidates is to provide for relatively long and staggered judicial terms.[32]

43. Regarding removal procedures, the Working Group may wish to consider whether the procedure proposed under draft provision 9(b) below contains the necessary safeguards and is transparent enough.

2. Draft provision

44. The Working Group may wish to consider the following draft provision regarding the terms of office, renewal of terms and removal from office of tribunal members.

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].

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

[31] Those with explicitly non-renewable terms of judicial office are: the East African Court of Justice (EACJ), the European Court of Human Rights (ECtHR), the Economic Community of West Africa (ECOWAS) Court of Justice, the International Criminal Court (ICC), and the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa (OHADA CCJA).

[32] For instance, when the judicial terms on the European Court of Human Rights (ECtHR) were made non-renewable in 2010, they were also extended from six to nine-years; Renewable terms are relatively common for international courts (terms are renewable at the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the International Criminal Tribunal for the Former Yugoslavia (ICTY), the African Court of Human and Peoples' Rights, the WTO AB); Certain courts include limitations such as a term can be renewed once only (see, for instance, the Inter-American Court of Human Rights (IACHR), the African Court of Human and Peoples' Rights, the WTO AB).

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.

3. Comments on draft provision 9

- *Terms of office and renewal*

45. The Working Group requested that the draft should suggest options for the term of the tribunal members, including that the terms would be renewable once (A/CN.9/1050, para. 56). Draft paragraph 1 contains options in this regard and aims to reflect the deliberations of the Working Group.

46. It was also mentioned that in determining the appropriate term, the average duration required to resolve ISDS cases as well as the need to ensure a workload balance among the tribunal members would need to be taken into account. Suggestions were made that the term of office could range from 6 to 9 years, with staged replacements to achieve stability in the operation of the standing body and of the jurisprudence (A/CN.9/1050, para. 39).

47. The Working Group may wish to note that terms of office set by international courts vary from four,[33] six[34] to nine[35] years. One court does not provide for a time limitation.[36] The appointments could also be staggered at three-year intervals so that the turnover of new tribunal members on the court would be gradual.[37]

Comments from the European Union and its Member States on draft provision 9(a):

The European Union and its Member State support the view that adjudicators should be appointed for long, non-renewable and staggered (or staged replacements) terms of office and, therefore, in paragraph 1 prefer the option "*without the possibility of re-election*" and otherwise support the current drafting of paragraphs 1 and 2 of draft provision 9(a) above.

Non-renewable terms of office enhance the independence and impartiality of adjudicators since they protect members from pressure from appointing entities deriving from the desire to be re-elected.

Longer terms of office enhance the independence and impartiality of adjudicators since they reduce a judge's concern over having to secure another job after a short tenure.

[33] See, for instance, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the WTO AB.
[34] See, for instance, the African Court of Human and Peoples' Rights, the Inter-American Court of Human Rights (IACHR), as well as in the field of international arbitration, ICSID panels.
[35] See, the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), and the International Tribunal for the Law of the Sea (ITLOS).
[36] The Caribbean Court of Justice, which provides "until [a judge] attains the age of seventy-two years".
[37] It may be noted that certain courts also provide for age limitations (see CIDS Supplemental Report, para. 164).

Finally, long and staggered terms contribute to the creation of the continuous collegiality and institutional memory necessary to retain expertise and develop a more consistent case law.

- *Removal procedures*

48. The Working Group requested that the draft text provides language on early removal of an adjudicator from the tribunal, including the circumstances that would justify the removal, the procedure as well as the possible involvement of the contracting States, an independent body or the standing body itself in that process (A/CN.9/1050, para. 56).

49. It may be noted that most statutes of international courts refer to misconduct and inability to perform duties as grounds for removal.[38] Provisions on removal seek to ensure that States Parties would not be allowed to intervene in that process to ensure the independence of the tribunal members. They also reflect the suggestion that the president of the tribunal could be tasked with decisions on that matter, also based on a collegial consultation mechanism involving other tribunal members. It was said that the threshold for removing a tribunal member ought to be high (A/CN.9/1050, paras. 41 and 42).

Comments from the European Union and its Member States on draft provision 9(b):

We think that paragraph 1 should further clarify how the removal procedure would work in practice. We suggest that permanent adjudicators may be removed from office by decision of the other adjudicators upon a reasoned recommendation of the President, or Vice-President if the President is the adjudicator under scrutiny.

In addition, we believe that it would be preferable that the decision to remove a permanent adjudicator is taken by a high-qualified majority (for instance of three fourth), rather than a unanimous decision, of the to avoid a situation of even just one other adjudicator siding with the one under scrutiny and hence blocking removal in a case where it would otherwise be justified.

F. Conditions of service

1. General remarks

50. The Working Group may wish to recall its consideration of cross-cutting issues in relation to the selection and appointment of tribunal members (A/CN.9/1050, paras. 48-54). Certain issues are addressed in the draft code of conduct prepared jointly with the International Centre for Settlement of Investment Disputes (ICSID), in accordance with the deliberations of the Working Group at its thirty-eighth (A/CN.9/1004, paras. 51-78) and resumed thirty-eighth (A/CN.9/1004/Add.1, paras. 96 and 99) sessions (see also A/CN.9/WG.III/WP.201).[39] In that light, draft provision 10 below is simplified to refer to the draft code of conduct.

[38] With respect to requests for and decisions on removal, systems vary from those that leave this authority with the tribunal members to those where States are involved or control the removal process. Most frequently, international courts retain the capacity to remove tribunal members from office, requiring either a unanimous decision of remaining tribunal members or a majority or qualified majority decision (for instance, in the ECtHR, any judge can request the removal of another judge and the decision on removal has to be taken by a two-third majority of the judges). In some instance, States have the capacity to override the decision of the courts by common accord. For some international courts, both States and courts are involved in the decision to remove an adjudicator. Typically, this entails the court (or a specially constituted tribunal) reviewing a complaint against a adjudicator, which then makes a recommendation, for final decision by an intergovernmental body ((the courts that features such removal procedure are the Central African Economic and Monetary Community Court of Justice (CEMAC CJ), the Economic Community of West Africa (ECOWAS) Court of Justice, the Inter-American Court of Human Rights (IACHR), and the International Criminal Court (ICC). The courts where States control the removal of judges include the Common Market for Eastern and Southern Africa (COMESA) Court of Justice, and the East African Court of Justice (EACJ)).

[39] See the draft code of conduct available at https://uncitral.un.org/en/codeofconduct.

2. Draft provision

51. The Working Group may wish to consider the draft provisions below which addresses the conditions of service.

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.

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.

3. Comments on draft provision 10

52. The Working Group may wish to consider whether draft provision 10 should address topics in addition to those covered under the draft code of conduct.

Comments from the European Union and its Member States on draft provision 10:

It should be further discussed whether specific rules on limitations of outside activities for permanent adjudicators should be included in the statute establishing the permanent mechanism or in the code of conduct.

On substance, our delegations support draft provision 10 above with the following comments:

- **We think that any exemption should be granted by the President (or the Vice President) of the permanent mechanism, not by the Committee of the Parties, to ensure the judicial independence of the Tribunal.**

- **We would suggest adding a provision clarifying that any question on the application of this paragraph shall be settled by the decision of the permanent mechanism (see Article 16(2) of the ICJ Statute, Article 7(3) of the ITLOS Statute, Article 21(3) of the ECHR).**

- **We think it will be important to provide for specific rules on limitations of outside activities also for former permanent adjudicators, i.e. after the expiry of their term of office. In particular, we would suggest the following drafting:**

  "Former Members shall not become involved in any manner whatsoever in proceedings before the standing mechanism relating to a dispute [before the Tribunal] which was pending, or which they have dealt with, before the end of their term of office. As regards disputes [before the Tribunal] initiated subsequently, former Members shall not represent a party or third party in any capacity in proceedings before the standing mechanism until a period of [three] years after the end of their term of office."

- **We think that a revised version of this draft provision should include sanctions on adjudicators and on former adjudicators for breaches of these rules and other rules on ethics (e.g. of the code of conduct). With respect to sanctions on former Members, inspiration could be drawn from the EU's recent treaty practice:**

  "If the President of the Tribunal is informed or otherwise becomes aware that a former Member is alleged to have acted inconsistently with the obligations set out in Articles [xxx], he or she shall examine the matter, provide an opportunity to the former Member to be heard, and, after verification, inform thereof:

(a) the professional body or other such institution with which that former Member is affiliated;
(b) the Committee of the Parties;
(c) if it involves a specific dispute, the disputing parties; and
(d) the President of any other relevant international court or tribunal in view of the initiation of appropriate measures.

The President of the Tribunal shall make public his or her decision to take the actions referred to in subparagraphs (a) to (d) above, together with the reasons therefor."

- **With respect to paragraph 2, we believe that the adjudicators should be employed full time, like in most international courts, and we would therefore suggest drawing from the ICC Statute (e.g. "All members shall be elected as *full-time* members of the Tribunal and shall be *available to serve on that basis* from the commencement of their terms of office.") or the ICJ Statute (e.g. "All persons serving as members of the Tribunal shall be bound to hold themselves permanently at the disposal of the Tribunal, unless exception is granted by the [President of the Tribunal].").**

G. Assignment of a case to members of a permanent body

1. General remarks

53. Different models for assigning cases can be found in international courts.[40] Clear pre-defined methods for assignment of cases are aimed at avoiding that disputes are attributed to one or the other tribunal member based on political considerations or outside influence. In that sense, far from being an issue of mere internal judicial organization, case assignment methods are a key factor guaranteeing structural independence.[41]

54. The Working Group requested that the draft provision on assignment of a case provides options on how tribunal members would be assigned to hear cases, which should ensure balanced representation, diversity, independence and impartiality, which could include randomized appointments with oversight, appointments by the president of the tribunal, or appointments by some other independent committee (A/CN.9/1050, para. 56).

2. Draft provision 11 on case assignment

55. The Working Group may wish to consider draft provision 11 on the assignment of cases to the chambers of the tribunal.

Draft provision 11 the assignment of cases

Option 1

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 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 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 assigning the Tribunal members to the chambers of the Tribunal.

[40] See CIDS Supplemental Report, at paras. 183–198.
[41] CIDS Supplemental Report, para. 181.

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.

3. Comments on draft provision 11

56. Option 1 reflects the common approach whereby the task of allocating tribunal members to the permanent formations or sections normally falls on the president of the tribunal. While it leaves details to be provided for in the applicable rules and regulations of the tribunal, it also contains pre-determined criteria to guide the president. This might help disputing parties and the public to understand the overall process whereby a case is assigned to one or the other chamber.

57. Option 2 provides for a randomized appointment mechanism, leaving questions of oversight to the rules and regulations of the tribunal. It also provides for the possibility for the president to transfer a case from one chamber to another so as to provide for flexibility and to ensure consistency where the tribunal is to rule on several non-consolidated cases dealing with the same host State measures or on an identical preliminary issue that applies in a number of disputes.[42] The Working Group may wish to consider whether additional safeguards should be provided for to prevent abuses.

58. The Working Group may also wish to consider the question whether the chamber would be pre-determined with members assigned to it for a fixed term, or constituted ad hoc after a case is filed with compositions that vary.[43]

Comments from the European Union and its Member States on draft provision 11:

The European Union and its Member States are open to further explore and discuss both options of draft provision 11 above. We support option 2, according to which disputes would be assigned to chambers on a randomised basis, in line with EU bilateral treaties. If option 1 of having chambers specialised either in specific subject matters or disputes from particular regions were retained, we would need to make sure that the disputing parties do not predict in advance who precisely is going to be adjudicating their specific case. These matters could also be left to the permanent mechanism itself to decide (as is often the case in domestic or other international systems), in which case it would be enough to say that the relevant rules adopted by the permanent mechanism could address such issues.

III. Other matters related to a standing multilateral mechanism

59. In addition to the draft provisions on selection and appointment of ISDS tribunal members, the Working Group may wish to consider the following policy issues pertaining to the establishment and functioning of a standing multilateral body. These may serve to contextualize the draft provisions above and provide the Working Group with a basis for further consideration of this reform (A/CN.9/1050, para. 55).

60. The suggestions below are based on the comment made in the Working Group that a reformed system should remain flexible so as to take account of both State-to-State and investor-State dispute settlement as well as possibly disputes involving local

[42] See Iran-Unites States Claims Tribunal.

[43] CIDS Supplemental Report, para. 185.

communities affected by investments and investments made by small and medium-sized enterprises (A/CN.9/1050, para. 22).

A. Means of establishment

61. Regarding the establishment of a multilateral investment tribunal, the Working Group may wish to consider general questions, including whether the tribunal would be created under the auspices of an existing international organisation such as the United Nations, or be established as a separate, independent international organisation. [44] As an international organization, the standing multilateral body would enjoy legal personality under international and national law, which would allow it to conclude treaties such as a seat agreement establishing the necessary privileges and immunities.[45]

62. Regarding the governance structure, the Working Group may wish to consider which organs might be set up under the agreement establishing the tribunal.

63. In addition to the Committee of the Parties, the Working Group may wish to note that usually a permanent administrative secretariat (or registrar) would be set up, either as a separate and stand-alone secretariat or as part of an existing institution, in which case the services of such an existing institution could be used. Its tasks would include the administration of pending cases, translation services and other support services.

64. Furthermore, the Working Group may wish to consider whether a standing multilateral mechanism would also be used to host an advisory centre on international investment law and mediation related services.[46]

B. Procedural questions

65. The Working Group may wish to consider issues related to the procedural framework of a standing multilateral body.

66. While the general rules of procedure could be provided in the agreement establishing the tribunal, the Working Group may wish to consider whether the detailed procedure should be defined in secondary law, which could be developed and updated by the Committee of the Parties and, as necessary, by the Tribunal itself (see draft provision 3 and para. 11 above).[47] A definition of the procedure in secondary law would facilitate later modifications and updates of the procedural rules. Secondary law with a detailed procedure has been developed for example for the ICJ[48], the ITLOS[49] and the ECHR[50].

67. The Working Group may wish to consider incorporating the following reform solutions into the procedural framework of a standing multilateral body, which are being discussed as procedural rules reform: means to address frivolous claims; multiple proceedings; reflective loss; counterclaims; security for costs; regulation of third-party funding. It has also been suggested to provide for the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and to

[44] See Marc Bungenberg and August Reinisch, From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, Options Regarding the Institutionalization of Investor-State Dispute Settlement, Second Edition (2020), available at https://link.springer.com/book/10.1007/978-3-662-59732-3, p. 175-182.

[45] Legal personality could also be expressly foreseen in the treaty establishing the organization, see for example Article 4 of the Rome Statute of the International Criminal Court.

[46] For more information on the reform element of an advisory centre, see UNCITRAL webpage under https://uncitral.un.org/en/multilateraladvisorycentre.

[47] See for example the reference in Article III (2) of the US-Iran Claims Settlement Declaration to the UNCITRAL Arbitration Rules and the option for modification by the Tribunal or the Parties.

[48] See Article 30 ILC Statute and Rules of Court, (1978) adopted on 14 April 1978, available at https://www.icj-cij.org/en/rules.

[49] See Article 16 of the Statute of the International Tribunal for the Law of the Sea, Annex VI to the United Nations Convention on the Law of the Sea and Rules of the Tribunal (ITLOS/8), available at https://www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf.

[50] See Article 5 European Convention and Rules of Court 2 June 2021, available at https://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules&c=.

provide for the possibility of third parties participation, for example representatives of communities affected by the dispute, to participate in the proceedings.[51]

Comments from the European Union and its Member States on paragraph 67 of this Note:

The European Union and its Member States agree with the suggestion in paragraph 67 above that other procedural rules being discussed in Working Group III can of course be incorporated into the procedural framework of a standing multilateral body, including means to address frivolous claims, multiple proceedings, reflective loss, counterclaims, security for costs, regulation of third-party funding and UNCITRAL Transparency Rules.

C. Applicable law and treaty interpretation

68. The Working Group may wish to consider issues related to the law to be applied by the tribunal. Many investment treaties contain a clause on the applicable law. These clauses generally refer to the treaty itself and international law. However, the agreement establishing the tribunal could provide for a rule on the applicable law in case of absence of a choice of law in the underlying treaty, investment law or contract.[52]

69. In order to develop a more consistent practice of the interpretation of investment treaties, the multilateral investment tribunal could provide for treaty interpretation tools, in particular for joint interpretative statements, which could be binding for the tribunal.[53] It may be noted that treaty interpretation is discussed by the Working Group as a separate reform solution. [54]

[51] Submission by the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1, p. 7.

[52] See for example ICSID Convention, Article 42: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

[53] See document A/CN.9/WG.III/WP.191.

[54] See UNCITRAL webpage under https://uncitral.un.org/en/treatyparties.