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Possible reform of Investor-State dispute settlement (ISDS)

Submission from the Government of Bahrain

Note by the Secretariat

This note reproduces a submission received on 29 August 2019 from the Government of Bahrain in preparation for the thirty-eighth session of Working Group III. The submission is reproduced as an annex to this Note in the form in which it was received. A longer version of the submission was received by the Secretariat on 5 August 2019, and is available in English only.

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Annex

1. Introduction

1. The paper has six sections. The paper first highlights some of the positive aspects of ISDS for both States and investors (section 2). It then identifies concerns raised by ISDS in relation to conflicts of interest, diversity, costs and duration, and the consistency of arbitral awards and decisions (section 3). The paper further advises caution in moving to a system of one or more standing international investment courts (section 4). It then analyses alternative proposals for ISDS reform (section 5). The paper also explains why Working Group III's mandate, which is confined to procedural aspects of ISDS,[1] misses the opportunity to consider substantive reform of international investment agreements (section 6). Finally, in the light of Working Group III's decision at its thirty-sixth session to develop a workplan for addressing matters on which it considers reform by UNCITRAL to be desirable,[2] Bahrain provides its preliminary views on the proposed workplan (section 7).

2. Benefits of the current ISDS system for States and investors

2. Although ISDS has certain flaws, it is worth emphasizing the many advantages of the current system for both States and investors. As observed in a report by the Center for International Dispute Settlement ("CIDS"), the "many gains" for investor-State arbitration include:

- Neutrality. The "distance of the decision-makers from politics – the depoliticization for which investment arbitration was praised – and from business interests at the same time."
- Finality and enforceability of ISDS awards. The "former saves time and costs and the latter ensures the ultimate effectiveness of the system."
- Manageability or workability of ISDS. ISDS is "light" compared to "heavier" permanent adjudicatory bodies "requiring significant resources," such as the World Trade Organization (WTO).[3]

3. Reform should not only maintain the advantages of ISDS, it must substantially improve upon them. Most importantly, any reform that is implemented by UNCITRAL should not risk further fragmentation of ISDS.

3. Concerns regarding ISDS

3.1 Conflicts of interest

4. The independence and impartiality of a tribunal are fundamental to the rule of law. It is essential for the tribunal not only to be independent and impartial, but also to be perceived as such.[4]

5. When addressing independence and impartiality, there are cogent reasons for even greater rigor in the context of ISDS than elsewhere. In ISDS disputes, there is a far greater chance of encountering overlapping and recurring legal issues and fact patterns. ISDS frequently turns on the interpretation of bilateral investment treaties

[1] UNCITRAL, *Report of Working Group III on the work of its thirty-fourth session, Part 1*, A/CN.9/930/Rev.1, Dec. 19, 2017, ¶ 20 ("it was clarified that the mandate given to the Working Group focused on the procedural aspects of dispute settlement rather than on the substantive provisions").

[2] See UNCITRAL, *Report of Working Group III on the work of its thirty-sixth session*, A/CN.9/964, Nov. 6, 2018, paras. 135–141.

[3] Gabrielle Kaufmann-Kohler & 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* para. 23 (CIDS – Geneva Center for International Dispute Settlement 2016), http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf [hereinafter *CIDS Report*].

[4] *R v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, 1 KB 256, [1923] All ER Rep 233 ("Not only must justice be done; it must also be seen to be done.").

that contain similarly worded substantive provisions, where the same legal concepts often arise.[5] This, combined with the fact that ISDS disputes are generally decided by arbitrators appointed from a relatively small pool, creates a real risk of conflicts of interests. Moreover, some arbitration practitioners wear several hats in their professional lives as arbitrators, counsel, and experts, and regularly appoint each other as a matter of routine, which heightens that risk.[6] The problem is further exacerbated by the fact that specialized arbitration institutions have tended to refrain from issuing guidelines on conflicts of interest.[7]

Arbitrator challenges and conflicts of interest

6. While many of the challenge decisions in investment arbitration are publicly available, entire categories of decisions relating to certain aspects of conflicts of interest, such as issue conflicts, remain largely uncovered. Commenting on the dearth of reported decisions, the joint ASIL-ICCA report on issue conflict stated that "the limited number of reasoned challenge decisions that are publicly available is a significant obstacle to further analysis" and that "the contours of what is inappropriate prejudgment remains elusive in important respects."[8]

7. A further area of concern regarding the legitimacy of the ISDS system is the handling of arbitrator challenges and conflicts of interest. Challenges against arbitrators in investment disputes are most commonly determined through one of two systems. The power to decide the challenge is conferred on either an appointing authority (for example, under the arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce or UNCITRAL) or the remaining unchallenged members of the tribunal (as is the case under the ICSID system). Under both systems, however, decisions are taken without the benefit of detailed guidelines in the form of codes of conduct. This increases the risk that the individuals deciding such challenges draw exclusively on their personal experiences and subjective views, thereby undermining the transparency and consistency of challenge decisions.[9] It is also problematic that an appointing authority alone decides a challenge application, as this leaves the unconscious bias of the decision maker unchecked.

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[5] Nassib G. Ziadé, *How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?* 24 ICSID Review – Foreign Investment Law Journal 49, 50 (2009).

[6] UNCITRAL, Working Group III, *Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS, Note by the Secretariat*, A/CN.9/WG.III/WP.151, Aug. 30, 2018, para. 25 (the UNCITRAL Secretariat warns that "a counsel may agree to appoint a particular arbitrator in one case, and this arbitrator, when acting as counsel in another case, agrees to appoint the appointing counsel as arbitrator in that second case."). See Ziadé, *supra* note 5, at 59–60.

[7] Nassib G. Ziadé, *Do we need a permanent investment court?* Global Arbitration Review (Feb. 13, 2019), https://globalarbitrationreview.com/article/1180209/do-we-need-a-permanent-investment-court.

[8] Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration para. 185 (ICCA Reports No. 3, Mar. 17, 2016), www.arbitration-icca.org/media/6/81372711507986/asil-icca_report_final_5_april_final_for_ridderprint.pdf. The ASIL-ICCA Report states that "issue conflict" concerns "an allegation that an arbitrator is biased towards a particular view of certain issues or has already prejudged them. The alleged predisposition or prejudgment involves an arbitrator's purported adherence to his or her pre-existing views on legal and factual questions, developed through experience as an arbitrator, as counsel, writing scholarly articles, and giving interviews or other public expressions of views."). Ibid. para. 2.

[9] See Nassib G. Ziadé, *Is ICSID heading in the wrong direction?* Global Arbitration Review (Feb. 24, 2015), https://globalarbitrationreview.com/article/1034244/is-icsid-heading-in-the-wrong-direction ("The deciding arbitrators should have the benefit of detailed guidelines so that they do not have to resort to drawing mainly on their own subjective views and experiences. Such unguided efforts may, when repeated using different decision-makers, produce incoherent jurisprudence on challenges or, even worse, a decision that does not show sufficient respect for fairness and due process.").

Annulment committees and conflicts of interest

8. It is a curious feature of recent ICSID practice with respect to annulment decisions that arbitrators whose awards are or have been subject to annulment proceedings not infrequently sit on annulment committees in other cases.[10] This creates "at least a perception that annulment committee members may be tempted to develop case law that would benefit their pending or potential arbitration cases."[11] The problems raised by such a practice are obvious and have been criticized.[12]

The limitations of the soft law IBA Guidelines on Conflicts of Interest in International Arbitration

9. International arbitration has greatly benefited from the IBA Guidelines on Party Representation in International Arbitration (2013) and the IBA Guidelines on Conflicts of Interest in International Arbitration (as amended in 2014). They are founded on the premise that disclosure by arbitrators should be voluntary. The guidelines provide helpful directions for the regulation of conduct by both arbitrators and counsel and are regularly referred to by ISDS tribunals when ruling on challenge applications.

10. However, they have their limitations. The guidelines are soft law and therefore non-binding. As the UNCITRAL Secretariat has observed, "double-hatting" is "not addressed in the IBA Guidelines."[13] Furthermore, as noted by one commentator: [T]he vast majority of the subcommittee members who drafted the Guidelines are themselves none other than arbitration practitioners who are to be regulated. In other words, the IBA Guidelines represent best practices, as these are perceived from the established practitioners' point of view, meaning that they are more enabling than restricting.[14]

3.2 ISDS's diversity crisis

11. The debate concerning diversity – or rather the lack of diversity – in the composition of arbitral tribunals in ISDS is far from new. The UNCITRAL Secretariat has previously noted the concerns of the Working Group regarding diversity.[15] Bahrain shares this sentiment.

12. It is crucial that the debate on diversity should be based on accurate and complete data and statistics. However, the available data are unfortunately far from

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[10] Ibid.

[11] Ibid.

[12] See Hamid Gharavi, *ICSID annulment committees: the elephant in the room*, Global Arbitration Review (Nov. 24, 2014), https://globalarbitrationreview.com/article/1033891/icsid-annulment-committees-the-elephant-in-the-room (noting that "[t]here have also been worrying occasions where ad hoc committees appointed by the secretary general [of ICSID] have included members of tribunals whose awards are the subject of annulment applications," which the author argues "simply should not be permitted," especially given the "exclusive nature of the ICSID annulment regime as a means of challenging awards, [and] the absence of any recourses against annulment decisions").

[13] UNCITRAL, Working Group III, *Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS, Note by the Secretariat*, A/CN.9/WG.III/WP.151, Aug. 30, 2018, para. 29.

[14] Nassib G. Ziadé, *How Should Arbitral Institutions Address Issues of Conflicts of Interest?*, in *Festschrift Ahmed Sadek El-Kosheri: From the Arab World to the Globalization of International Law and Arbitration* 211–223, at 215 (Mohamed Abdel Raouf, Philippe Leboulanger & Nassib G. Ziadé eds., Wolters Kluwer 2015).

[15] UNCITRAL, Working Group III, *Arbitrators and decision makers: appointment mechanisms and related issues, Note by the Secretariat*, A/CN.9/WG.III/WP.152, Aug. 30, 2018, para. 20 (noting that "there was a limited number of individuals that were repeatedly appointed as arbitrators, and consequently that were repeatedly taking decisions, in ISDS cases. The Working Group has also noted a lack of diversity in terms of gender, geographical distribution, ethnicity and age" (internal citations omitted)). See also UNCITRAL, *Report of Working Group III on the work of its thirty-fifth session*, A/CN.9/935, May 14, 2018, para. 70 (noting that "[t]he lack of diversity was said to be exemplified by a concentration of arbitrators from a certain region, a limited age group, one gender and limited ethnicity").

exhaustive when it comes to the nationality of arbitrators. First, institutions generally publish information relating to investment arbitration cases only when the parties agree to such publication.[16] Second, not all sources of data on investment arbitration provide statistics relating to arbitrators' nationalities.[17] Third, while certain arbitral institutions publish a breakdown of arbitrators by region or nationality, they do not distinguish between ISDS and non-ISDS cases.[18] The incompleteness of this data prevents an informed discussion on the extent of the ISDS diversity crisis.

13. That said, ICSID's statistics may nonetheless serve as a useful guide, especially as, according to its annual reports and other data available from well-trusted sources, ICSID appears to administer between 60 and 75 per cent of all known international investment proceedings.[19] ICSID's statistics on diversity are produced below and are not encouraging.

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[16] For example, according to the Permanent Court of Arbitration (PCA)'s website, the PCA only publishes "[a] list of [the] cases in which the parties have agreed to release public information about the case." See https://pca-cpa.org/en/cases/. Likewise, according to the rules of arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), awards rendered under the auspices of the SCC remain confidential "unless otherwise agreed between the parties." See Art. 3 of the SCC Arbitration Rules, https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf. Similarly, the PluriCourts website records 434 cases decided on the basis of substantive investment treaties. However, 26.9 per cent of the final awards in those cases have not been made public, which "limits the amount of information [PluriCourts] can input [in its database] on those cases." See www.jus.uio.no/pluricourts/english/topics/investment/research-projects/database.html.

[17] For example, while the SCC publishes statistics on the investment disputes administered by it, those statistics do not provide any information on the nationalities of arbitrators appointed to those cases. For SCC's 2018 investment disputes data, see https://sccinstitute.com/statistics/investment-disputes-2018/.

[18] For example, SCC, the London Court of International Arbitration (LCIA), and the International Chamber of Commerce (ICC) publish statistics on their respective caseloads, including on arbitrators' nationalities, without distinguishing between ISDS and non-ISDS cases. The breakdown of arbitrators by region for each institution is as follows: SCC 2018 statistics: Europe 251 appointments (94 per cent of all arbitral appointments), with the remaining 6 per cent from South America (1 appointment), Africa (2 appointments), Asia (3 appointments), North America (5 appointments), and Australasia (5 appointments); see https://sccinstitute.com/statistics/. LCIA 2018 statistics: Western Europe 338 appointments (83 per cent of all appointments), with the remaining 17 per cent from the Middle East (7 appointments), Eastern Europe (8 appointments), sub-Saharan Africa (9 appointments), South America (9 appointments) and South and East Asia and the Pacific (29 appointments); see www.lcia.org/News/2018-annual-casework-report.aspx. ICC 2017 statistics: North and Western Europe 53.6 per cent, sub-Saharan Africa 1.6 per cent, North Africa 2.3 per cent, Central and West Asia 4.2 per cent, North America 9.3 per cent, South & East Asia and Pacific 9.5 per cent, and Latin America & the Caribbean 13.5 per cent; see https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf. Although these statistics do not reflect the status of diversity in investment arbitration per se, they demonstrate that international arbitration in general, and not just ISDS, suffers from a diversity problem.

[19] See, e.g., ICSID 2017 Annual Report, p. 3 (stating that ICSID "has administered more than 70% of all known international investment proceedings"). See also UNCITRAL, Working Group III, *Possible reform of investor-state dispute settlement (ISDS), Note by the Secretariat*, A/CN.9/WG.III/WP.149, Sept. 5, 2018, para. 7 (UNCITRAL Secretariat noting that ICSID is "considered to represent 75 per cent of investment treaty cases") (internal citations omitted). Moreover, according to data compiled by the Investment Policy Hub – a website operated by the United Nations Conference on Trade and Development (UNCTAD) – as of July 27, 2019, ICSID had administered 73 per cent of all known treaty-based ISDS cases for which data is available, or 62 per cent if one includes cases for which the administering institution is not specified or UNCTAD otherwise lacks sufficient information. According to UNCTAD, there have been 942 known treaty-based ISDS cases, administered by the following arbitral institutions: ICSID (568 cases), PCA (136 cases), SCC (47 cases), ICC (17 cases), LCIA (5 cases), Moscow Chamber of Commerce and Industry (3 cases), Cairo Regional Center for International Commercial Arbitration (2 cases), Hong Kong International Arbitration Centre (1 case). Additionally, there have been 67 ISDS without an administering institution and 70 cases for which UNCTAD lacked the relevant information. See https://investmentpolicy.unctad.org/investment-dispute-settlement (under "Institutions").

Arbitrators, conciliators, and ad hoc committee members appointed in cases registered under the ICSID Convention and Additional Facility Rules (2011–2018), by region:[20]

Geographical location	2011	2012	2013	2014	2015	2016	2017	2018
Sub-Saharan Africa	3%	1%	1%	1%	1%	3%	5%	1%
Middle East & North Africa	3%	1%	2%	3%	4%	2%	5%	4%
Central America & the Caribbean	2%	3%	3%	3%	5%	2%	5%	2%
Eastern Europe & Central Asia	2%	2%	1%	5%	3%	1%	3%	6%
South & East Asia & the Pacific	15%	14%	13%	14%	13%	19%	14%	9%
South America	21%	13%	10%	10%	5%	13%	7%	15%
North America	19%	24%	14%	15%	19%	18%	14%	16%
Western Europe	35%	42%	56%	49%	50%	42%	47%	47%

Geographical distribution of cases registered against States under the ICSID Convention and Additional Facility Rules (2011–2018):[21]

Geographical location	2011	2012	2013	2014	2015	2016	2017	2018
Sub-Saharan Africa	11%	14%	15%	21%	15%	6%	15%	11%
Middle East & North Africa	13%	10%	20%	5%	11%	11%	15%	16%
Central America & the Caribbean	0	4%	7%	8%	2%	6%	4%	4%
Eastern Europe & Central Asia	29%	26%	33%	32%	23%	31%	36%	32%

14. These statistics suggest a severe underrepresentation of entire regions of the world and "indicate a neat division of labour at ICSID: cases are brought against Arab, African, Central Asian and Eastern European States, and Western Europeans and North Americans get to decide them and determine the jurisprudence."[22]

15. Bahrain believes that diversity is one of the most pressing concerns facing ISDS today. There is a serious lack of diversity, in terms of both gender and geographical origins. Much more needs to be done to correct a system of imbalanced appointments. Urgent reform – and real change – is needed.

3.3 Costs and duration of ISDS disputes

16. Bahrain agrees with the concerns raised by the UNCITRAL Secretariat[23] and the Government of Thailand[24] with respect to the costs and the duration of arbitral proceedings for both investors – particularly small and medium-sized businesses – and States. The Queen Mary/White & Case surveys on international arbitration have consistently identified costs as international arbitration's worst feature.[25]

17. Once engaged in a substantial and high-value ISDS dispute, States tend to rely on the assistance of international law firms. It is the fees of counsel and experts – not

[20] ICSID Caseload Statistics (2011–2018), https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx (for 2011: Issue 2012-1 at p. 25; 2012: Issue 2013-1 at p. 18; 2013: Issue 2014-1 at p. 30; 2014: Issue 2015-1 at p. 24; 2015: Issue 2016-1 at p. 30; 2016: Issue 2017-1 at p. 32; 2017: Issue 2018-1 at p. 33; 2018: Issue 2019-1 at p. 33).

[21] Ibid. (for 2011: Issue 2012-1 at p. 22; 2012: Issue 2013-1 at p. 24; 2013: Issue 2014-1 at p. 24; 2014: Issue 2015-1 at p. 30; 2015: Issue 2016-1 at p. 24; 2016: Issue 2017-1 at p. 25; 2017: Issue 2018-1 at p. 26; 2018: Issue 2019-1 at p. 26).

[22] See Ziadé, *supra* note 9.

[23] See generally UNCITRAL, Working Group III, *Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat*, A/CN.9/WG.III/WP.149, Sept. 5, 2018.

[24] See UNCITRAL, Working Group III, *Possible reform of Investor-State dispute settlement (ISDS), Comments by the Government of Thailand*, A/CN.9/WG.III/WP.147, Apr. 11, 2018, paras. 15–16, 19–21.

[25] Queen Mary School of International Arbitration and White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration* para. 7, www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-18.pdf ("Respondents were also questioned about what they see as the worst characteristics of arbitration. Previous surveys by the School dating as far back as 2006 have shown that users are most discontent with the 'cost' of arbitration. The current survey continues this trend as 'cost' is yet again the most selected option, and by a significant margin.").

of arbitrators or arbitral institutions – that are the true cause of escalating costs. The costs associated with securing the best legal representation are indeed high, and they are made even higher by the duration of proceedings, which can last for several years.

3.4 Consistency and coherence of ISDS jurisprudence

18. Bahrain notes the observations of the UNCITRAL Secretariat in its informed paper on consistency in ISDS.[26] Bahrain agrees with the Secretariat that consistency and coherence are not "objectives in themselves" and that "caution should be taken" in trying to "achieve uniform interpretation" of provisions across the "wide range of investment treaties," given that the ISDS treaty regime "itself [is] not uniform."[27]

19. Additionally, Bahrain notes the concerns expressed in the UNCITRAL Secretariat's paper over divergent interpretations of substantive standards.[28]

20. It would be most unfortunate, however, if Working Group III were to think that such inconsistency concerns ISDS jurisprudence in general. On the contrary, it is worth pointing out that there are many instances of consistency in ISDS jurisprudence. Therefore, discussions on inconsistency should be kept in proportion.

21. With regard to dissenting opinions in arbitral awards, Bahrain notes the concern over the fact that they "were overwhelmingly issued"[29] by the arbitrators appointed by the losing party, which "contributed to the overall perception of possible bias."[30] However, dissenting opinions can play an important role in the annulment context.

4. The challenges of a permanent multilateral investment court system

4.1 The arguments in favour of an investment court system

22. In response to the criticisms levelled against ISDS, one proposal is to replace the existing system with a permanent investment court system.

23. The European Commission is the most prominent supporter of this proposal. Recent treaties that the European Union (EU) has concluded with Canada, Viet Nam, and Singapore all make the parties to those agreements subject to an investment court system.[31] The EU's proposal on investment in Chapter II of the Transatlantic Trade and Investment Partnership (TTIP) also includes a model for an investment court system.[32] Furthermore, each of the aforementioned instruments obliges the contracting States to work together to establish a multilateral investment court system.[33]

24. The CIDS (commissioned by UNCITRAL) conducted a study on whether the United Nations Convention on Transparency in Treaty-based Investor-State

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[26] UNCITRAL, Working Group III, *Consistency and related matters, Note by the Secretariat*, A/CN.9/WG.III/WP.150, Aug. 28, 2018.

[27] Ibid. para. 8.

[28] Ibid. paras. 16–18 and the awards and decisions of investment tribunals mentioned under fn. 8–40.

[29] UNCITRAL, Working Group III, *Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS, Note by the Secretariat*, A/CN.9/WG.III/WP.151, Aug. 30, 2018, para. 42 (citing A/CN.9/935, para. 58).

[30] Ibid.

[31] Comprehensive Economic and Trade Agreement (CETA) between Canada and EU, Chapter 8 (Investment); EU-Viet Nam Investment Protection Agreement, Chapter Three (Dispute Settlement); EU-Singapore Investment Protection Agreement, Chapter Three (Dispute Settlement).

[32] See EU's draft textual proposal of the Transatlantic Trade and Investment Partnership (TTIP), Chapter II (Investment).

[33] See Art. 8.29 CETA ("The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes."); Art. 3.41 EU-Viet Nam FTA (same); Art. 3.12 EU-Singapore FTA (same); Art. 12 (draft) TTIP (same). The CIDS Report, commenting on CETA and the EU-Viet Nam FTA, observed that "the new multilateral body would have jurisdiction and replace the bilateral permanent body and/or the appellate tribunal in place under the two treaties." See *CIDS Report*, *supra* note 3, para. 54.

Arbitration ("Mauritius Convention") could provide a useful model for broader reform of procedural aspects of ISDS. In its first report ("CIDS Report"), CIDS envisages "a truly multilateral dispute settlement system"[34] in the form of a permanent multilateral investment court (referred to as the "International Tribunal for Investments" or "ITI") and/or an appeal mechanism ("AM") for investor-State arbitral awards. The CIDS Report suggests that an opt-in convention, similar to the Mauritius Convention, is a possible way to create such a multilateral investment court system.[35] The CIDS then prepared a supplementary report to UNCITRAL on the composition of a multilateral investment court, which, inter alia, discussed the criteria and procedure for selecting judges ("CIDS Supplementary Report").[36]

25. Supporters of a permanent investment court system view it as a solution to the main concerns over ISDS. For example:

- Judges appointed to a permanent court would serve on a permanent rather than ad hoc basis, which, proponents argue, would help guarantee their independence and impartiality. Additionally, a binding code of conduct and a roster of judges would ensure that all candidates would have the opportunity to hear cases.[37]
- A permanent investment court could lead to more consistent interpretations of substantive protections of international investment agreements, while appeals on issues of fact and law could remedy incorrect decisions and increase predictability.[38]
- The duration of proceedings would be subject to time limits, and extensions of time would be granted only in exceptional circumstances.[39]
- "Multiple-hatting" would eventually be excluded.[40]

4.2 Concerns regarding a permanent investment court system

26. While Bahrain endorses many of the criticisms of ISDS, it has reservations as to whether a permanent investment court system would adequately address the main flaws of the system. A permanent court might even create new problems.

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[34] *CIDS Report*, *supra* note 3, at 4.

[35] Ibid. paras. 75–78. In particular, the *CIDS Report* suggests that the opt-in convention would be the "instrument by which the Parties" to international investment agreements would "express their consent" to submit investor-State disputes to a permanent investment court. See *CIDS Report supra* note 3, para. 212. The *CIDS Report* proposes the following "roadmap" for consideration by UNCITRAL: (i) determining the substantive features of the International Tribunal for Investments (ITI) and appeal mechanism (AM); and (ii) drafting an opt-in convention which would extend international investment agreements to the ITI and AM. With respect to the legal instruments creating the ITI and AM (as "statutes"), the CIDS Report expresses two possibilities: they could be either soft law, like the UNCITRAL Arbitration Rules, to be drafted by Working Group II, or, alternatively, treaties.

[36] See generally Gabrielle Kaufmann-Kohler & Michele Potestà, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards: CIDS Supplemental Report* (CIDS – Geneva Center for International Dispute Settlement 2017), www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf [hereinafter *CIDS Supplemental Report*]. This report undertook a comparative analysis of international courts and tribunals and sought to draw lessons from the comparisons.

[37] See Bahrain Chamber for Dispute Resolution and the Arbitration Institute of the Stockholm Chamber of Commerce, *Salient Issues in Investment Arbitration, Report on Panel 1: Should investment disputes be submitted to international arbitration or to a permanent investment court?* Comments by Markus Burgstaller (noting that "the EU's proposals sought to address the main concerns of Working Group III"), www.bcdr-aaa.org/report-on-panel-1-should-investment-disputes-be-submitted-to-international-arbitration-or-to-a-permanent-investment-court/.

[38] Ibid.

[39] Ibid. Comments by Marc Bungenberg.

[40] The EU-led treaties relating to the creation of an investment court system contemplate that a judge's remuneration could be transformed into a regular salary, at which stage the judge "shall not be permitted to engage in any occupation," unless exemption is granted in "exceptional circumstances." See Art. 9(15) (draft) TTIP; Art. 3.38(17) EU-Viet Nam FTA (same); Art. 3.10(13) EU-Singapore FTA (same). CETA does not contain a similar provision.

4.2.1 Risk of politicization of appointments of judges

27. At this stage, it is difficult not to have the impression that an investment court system, as currently envisaged, would be slanted in favour of States, most notably with respect to the appointment of judges.[41] In the present system of ISDS, each disputing party participates on an equal footing in the composition of the tribunal. However, under the system described in the EU-led treaties, the power to appoint judges would be conferred exclusively on States. As a result, a State party to a dispute adjudicated by a permanent investment court will have played a central role in the appointment process in its capacity as a contracting party to the treaty. Investors, on the other hand, will have had no such role.[42] The predominant role States will have in the selection of judges is a feature to which the CIDS Supplemental Report also draws attention.[43]

28. Proponents of an investment court system argue in relation to the appointment of judges that: [w]hen 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 internalize 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.[44]

29. Yet, replacing the entire scheme of arbitrators appointed by the parties to a dispute with one in which judges are appointed by the States party to the treaty establishing the permanent investment court creates a risk of judicial appointments becoming politicized. Indeed, this is a concern that has been expressed by commentators[45] and would undo one of the hallmarks of the existing ISDS regime, which has so far been rather successful in depoliticizing the appointment process.[46]

30. Additionally, should the investment court system require, like the EU-led model, that a portion of judges be appointed from "third country" nationals, then this may create the greatest pressure for the politicization of judicial appointments to an investment court system. In the (draft) TTIP, only a "third country" national can be

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[41] Ziadé, *supra* note 7.

[42] Ibid.

[43] *CIDS Supplemental Report*, *supra* note 36, para. 107 ("States will be in control of the selection process as a result of the shift from an ad hoc to a permanent dispute resolution framework"). Ibid. at 3 ("adjudicators would no longer be appointed by disputing parties but would essentially (though nor [*sic*] necessarily exclusively) be chosen by the parties to the instrument establishing the new adjudicatory bodies"). Ibid. para. 14 ("States will be able to contribute to the composition of the body in their capacity of treaty parties" and "the shift from an ad hoc to a permanent setting means that one category of disputing parties loses control over the selection process, which remains entirely in the hands of the other because the latter is at the same time a treaty party").

[44] UNCITRAL, Working Group III, *Possible reform of investor-State dispute settlement (ISDS), Submission from the European Union*, A/CN.9/WG.III/WP.159/Add.1, Jan. 24, 2019, para. 23.

[45] CIDS Report, *supra* note 3, para. 34 ("Experience shows that political factors have been 'important variable' in the election of judges in international courts. Creating a permanent body could mean reintroducing politics into investor-State dispute settlement and would be contrary to the fundamental purpose of the regime, which, in turn, may affect its legitimacy.") (internal citations omitted). See also American Bar Association Section of International Law, *Investment Treaty Working Group Task Force: Report on the Investment Court System Proposal* 24 (Oct. 14, 2016) [hereinafter ABA Report] ("[C]ommentators have raised concerns that the selection of judges will be carried out in a political fashion and carries the risk of the treaty parties appointing individuals, who, whilst independent, are more likely to be sympathetic to the interests of the State Respondents. This may lead to the perception that the Investment Court is biased for the State Respondent.") (internal citations omitted).

[46] The *CIDS Supplemental Report* also acknowledges the risks of the politicization of judicial appointments to a permanent body. See *CIDS Supplemental Report*, *supra* note 36, para. 108 ("As the practice at existing permanent international courts and tribunals shows, the involvement of States (and, within the State apparatus, in particular of State *governments*) may lead to risks of politicization of the selection process.") (internal citations omitted).

the president of the Tribunal of First Instance or the Appeal Tribunal. The presidents of both tribunals have considerable powers. They determine challenges against judges,[47] chair their respective tribunals,[48] and appoint individual judges to disputes.[49] It is unclear whether this approach would be followed in a multilateral investment court. When discussing appointments to a multilateral court system, the CIDS Supplemental Report likewise acknowledges the risks caused by the way in which cases are allocated among judges.[50]

31. Moreover, as one commentator has observed "the fact that judges' retainers would be paid by the states alone would make the judges economically dependent on the states, which could prevent them from being perceived as independent and impartial."[51]

32. Furthermore, if judicial terms are renewable, some States may be tempted to oppose the reappointment of judges who are perceived to have acted against the States' interests.

33. The existing proposals for a permanent investment court system are based in large measure on the WTO model of dispute resolution. One important feature is notably absent, however. Under the WTO system, parties to a dispute can select panel members from a roster of judges, whereas the existing proposals for a permanent investment court do not offer a similar choice. This amounts to the complete removal of party autonomy from the process of appointing members of an arbitral tribunal – a point emphasized by the American Bar Association Section of International Law.[52]

34. To allay such concerns over the complete loss of party-appointed tribunals, it has been suggested that judicial appointments "could involve some consultation of organizations representative of investor interests."[53] However, this begs two immediate

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[47] See Art. 11(2)–(3) (draft) TTIP. See also Art. 3.4011(2)–(3) EU-Viet Nam FTA; Art. 3.1140(2)–(3) EU-Singapore FTA (same). Under CETA, the President of the International Court of Justice determines a challenge application. See Art. 8.30(2) CETA.

[48] See Art. 9(6) (draft) TTIP ("The division shall be chaired by the Judge who is a national of a third country."). See also Art. 8.27(6) CETA (same).

[49] See Art. 9(7) (draft) TTIP (providing that the president of the tribunal "shall appoint" judges to disputes "on a rotation basis" to ensure that the composition of divisions is "random and unpredictable, while giving equal opportunity" for all judges to serve). See also Art. 8.27(7) CETA (same); Art. 3.38(7) EU-Viet Nam FTA (same); Art. 3.9(8) EU-Singapore FTA (same).

[50] Discussing the possible introduction of a "roster" for allocating cases to judges, the *CIDS Supplemental Report*, while noting certain advantages, expresses concerns over such a system. See *CIDS Supplemental Report*, *supra* note 36, para. 173 ("The roster system would perpetuate concerns over adjudicator bias in favour of the appointing disputing party and over the resulting excessive power placed in the hands of the chair of the chamber."); ibid. para. 174 ("[O]ne can anticipate that in a roster model, [International Tribunal for Investments] ITI members may be tempted to profile themselves as either pro-investor or pro-State in order to secure appointments, with an ensuing risk of polarization").

[51] Burgstaller, *supra* note 37. See also *CIDS Report*, *supra* note 3, para. 34 ("[T]he appointment of tenured judges by States could raise issues of impartiality. There may be an inherent risk that only or mainly 'pro-State' individuals be selected, especially if they were to be paid by the States alone. It would be especially 'troubling to rely upon the judgment of individuals who are accountable to the very Sovereigns whose conduct is being evaluated.'" (internal citations omitted).

[52] See ABA Report, *supra* note 45, at 30 ("The Investment Court has been modelled on WTO dispute settlement. The Investment Court will not consider any views of the disputing parties upon the composition of the members of the particular panel on the Investment Court that will hear a case. This differs greatly from what takes place under the WTO dispute settlement process where the disputing parties to a dispute select the members of their panels based on proposals put forward by the WTO Secretariat.").

[53] *CIDS Report*, *supra* note 3, para. 99. See also *CIDS Supplemental Report*, *supra* note 36, para. 113 ("[t]he process [for the selection of candidates] should be *open* to the consideration of views of multiple stakeholders. One step in the process should thus make sure that the views of stakeholders other than States are heard in respect of the selection of candidates.") (internal citations omitted). Ibid. para. 211 ("any selection that will be devised by States should be seen as legitimate by all stakeholders"). See also UNCITRAL Working Group III, *Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS), Note by the*

questions; First, who would identify and appoint the business organizations? Second, unless there is an obligation on contracting States to follow the recommendations of such organizations, their degree of influence would be limited and of persuasive force only.[54]

4.2.2 Conflicts of interest

35. As stated above, conflicts of interest are a real cause for concern in ISDS.[55] Far from allaying such concerns, the current proposals would likely result in questionable practices continuing. At the moment, it is the president of the Tribunal of First Instance or the Appeal Tribunal who, alone, determines challenges against judges.[56] This creates similar risks to those pointed out in relation to conferring the power to decide a challenge on an appointing authority.[57]

4.2.3 Diversity

36. This paper has already noted the severe underrepresentation of entire regions of the world in the composition of ISDS tribunals.[58] Any reform proposal must rectify this situation.

37. The existing proposal for a permanent investment court system, in one sense, creates a potential for improving diversity. For example, under the EU-led model, a proportion of judges are to be selected from nationals of a "third country," that is, who are nationals of neither an EU country nor the other contracting State.[59]

38. It is unfortunate, however, that, under the current proposals, the investment court system fails to include any diversity factors in the recruitment of judges. Commenting on the (draft) TTIP, the American Bar Association Section of International Law noted that the investment court "does not address diversity" and that "[t]here are no express guidelines that members comprise diverse persons," and observed that "[t]he Investment Court is not large enough to ensure there is a representative from each of the members of the EU."[60] At this stage, it is unclear how a multilateral investment court system would ensure diversity of gender and geographical origins, or a balance between capital-exporting and capital-importing countries or between advanced economies on the one hand and emerging market and developing countries on the other.

Secretariat, A/CN.9/917, Apr. 20, 2017, para. 36 ("Questions were raised whether only States would participate in the selection process or whether a consultation with business organizations, i.e. organizations representing the interest of the investors should be considered in order to avoid that only or mainly 'pro-State' adjudicators are selected, in particular if the system were to be funded by States entirely.").

[54] Ziadé, *supra* note 7.

[55] Paragraphs 4–10 of this paper.

[56] See Art. 9(6) (draft) TTIP ("The division shall be chaired by the Judge who is a national of a third country."). See also Art. 8.27(6) CETA (same).

[57] See paragraph 7 of this paper.

[58] Paragraphs 11–15 of this paper.

[59] See, e.g., Art. 8.27(6) CETA ("The Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of whom one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country.") See also Art. 3.39(8) EU-Viet Nam FTA ("The Appeal Tribunal shall hear appeals in divisions consisting of three Members of whom one shall be a national of a Member State of the Union, one a national of Viet Nam and one a national of a third country. The division shall be chaired by the Member who is a national of a third country.")

[60] ABA Report, *supra* note 45, at 27–28.

4.2.4 Costs

39. As mentioned earlier in this paper, the fees of lawyers and experts constitute the bulk of costs.[61] Such costs will not only continue to exist under a permanent investment court,[62] but may also increase as a result of introducing an appeal mechanism. There are also many unanswered questions as to how States are to share and contribute to the costs of a multilateral investment court:

- How will the funding of the court's budget be shared among the founding States of the investment court system? And how are States that join later to contribute and in what proportions?
- The experience of other international courts and tribunals, including the International Criminal Court and other specialized international criminal tribunals, show that all too often huge, unanticipated costs are incurred. This ought to serve as a salutary warning that the creation of permanent judicial bodies brings with it the likelihood of considerable expenditure.[63]

4.2.5 Capacity to foster consistency in ISDS jurisprudence

40. There is presently no doctrine of stare decisis or strict legal precedent in ISDS. One of the criticisms levelled at the existing ISDS regime is its lack of a corrective appeals mechanism to foster substantive consistency in its jurisprudence. The annulment procedure in ICSID disputes provides limited grounds for review. Advocates of an investment court system, such as the EU, have argued that decisions of "standing bodies" that "are subject to review via appeal" ensure correctness and "greater predictability."[64]

41. However, there are practical limits to the capacity of a permanent body to foster greater coherence in ISDS jurisprudence. Unless a majority of States "opt in" to a multilateral investment court and amend all of their existing BIT portfolios to permit appellate review by such a court, divergent interpretations of substantive treaty standards will continue. This is inevitable with a body of approximately 3,000 international investment agreements composed of diversely drafted bilateral and multilateral treaties. As one commentator has observed: [T]he idea that an investment court would increase consistency was premised on the assumption that the court would be ruling on the basis of a common investment treaty. The opposite was true, however, and no matter how great the court's efforts to be consistent in its decision-making, it would inevitably be frustrated by the large number of different international investment treaties it would have to apply and the diverse substantive standards laid down in those treaties. Any attempt to achieve widespread consistency would thus first require a convergence of procedural and substantive rules, which was unlikely in the short term as the international community had divergent views on the subject.[65]

4.2.6 Adverse consequences of introducing appeal proceedings into ISDS

42. Apart from the significant challenge of extending an appellate mechanism to approximately 3,000 existing international investment agreements, the introduction of an appeal process into ISDS would increase the duration and costs of proceedings. In its recent report on consistency, the International Bar Association cautioned that: [T]he existence of an appeal mechanism will likely result in a greater number of

[61] Paragraph 17 of this paper.
[62] See Ziadé, *supra* note 7.
[63] Ibid.
[64] UNCITRAL, Working Group III, *Possible reform of investor-State dispute settlement (ISDS), Submission from the European Union*, A/CN.9/WG.III/WP.145, Dec. 12, 2017, para. 8. See also UNCITRAL, Working Group III, *Possible reform of investor-State dispute settlement (ISDS), Submission from the European Union and its Member States*, A/CN.9/WG.III/WP.159/Add.1, Jan. 24, 2019, para. 41 ("Predictability and consistency can only be effectively developed through the establishment of a standing mechanism with permanent, full-time adjudicators.").
[65] Burgstaller, *supra* note 37.

challenges brought against arbitral awards, which would cause additional costs and delays in the dispute resolution process. As a result, States will be forced to increase the resources they allocate to defending investment-treaty claims, to the detriment of their domestic expenditures.[66]

43. Additionally, opening the door to appeals will allow investors – not just States – to appeal. There is a danger that, once introduced, appeals would quickly become the norm in ISDS disputes. How would States view a system where losing investors can routinely and systematically appeal awards that are in their favour?[67]

4.2.7 Enforceability of awards in third-party States

44. It is vital to the success of a permanent investment court system that awards rendered by the court should be capable of being enforced. As the CIDS Report acknowledges: Enforcement of [International Tribunal for Investments] Awards is crucial for the overall effectiveness of the system and largely depends on the characterization of the [International Tribunal for Investments] as arbitration or court. If the [International Tribunal for Investments's] decisions cannot be deemed as arbitral in nature because of the body's predominant court-like features, the chances of enforcement would be significantly reduced.[68]

45. It is not enough that the awards of a permanent investment court are recognized by and enforced between the States party to the opt-in multilateral treaty that establishes such a court. Until such time as a majority of States opt in to a permanent investment court, the effectiveness of an investment court will be measured by the enforceability of its awards in third-party States that have not adhered to the treaty.

46. Crucially, it must be emphasized that there are significant differences between the enforceability of arbitral awards and that of international court judgments. The former is far-reaching, including in third-party States; the latter is not.

47. Unlike arbitral awards, there is no international system for the recognition and enforcement of international court judgments, meaning that their recognition and enforcement on the international plane is much less extensive than that of arbitral awards. As the CIDS Report confirms: [U]nlike for arbitral awards, there is no uniform international regime for the enforcement of judgments of international courts. Such an international decision would only be enforceable under the specific rules provided in the instrument establishing the court. That means that States which have not consented to that instrument are under no obligation to enforce decisions emanating from that court. In fact, in most States there is currently no statutory basis nor judicial mechanism for enforcing international judgments. This is the main reason why it would be essential to design the new body in the nature of arbitration, as the risk is otherwise to establish a dispute resolution system which would be highly ineffective.[69]

48. Accordingly, the characterization of awards rendered by a permanent investment court system as "arbitral" is crucial from the perspective of enforcing awards in third-party States.[70]

49. Bahrain emphasizes that this paper is not the place to resolve what is an important and difficult question. Rather, Bahrain simply brings to the attention of

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[66] International Bar Association, *Consistency, efficiency and transparency in investment treaty arbitration*: *A report by the IBA Arbitration Subcommittee on Investment Treaty Arbitration* (Nov. 2018), https://uncitral.un.org/sites/uncitral.un.org/files/investment_treaty_report_2018_full.pdf.

[67] See Ziadé, *supra* note 7.

[68] *CIDS Report*, *supra* note 3, para. 138.

[69] *CIDS Report*, *supra* note 3, para. 138.

[70] The *CIDS Report* acknowledges that a permanent court's "characterization as arbitration or court is not straightforward, as the new dispute resolution body would represent a significant 'break' from past models, including investor-State arbitration and State-to-State adjudication, and its place within traditional categories of international dispute settlement appears uncertain." Ibid. para. 82.

Working Group III that enforceability of awards by a permanent investment court is one of the most important – and as yet unresolved – matters requiring clarification before the Working Group can sensibly decide upon the feasibility of a multilateral investment court as a serious alternative to ISDS.

50. It must be acknowledged that there remain significant differences of opinion among legal scholars as to whether awards rendered by an investment court are arbitral awards enjoying the benefit of the enforcement mechanisms of the ICSID and New York Conventions.

5. Alternative proposals for reform of the procedural aspects of ISDS

5.1 Working Group III should consider whether ICSID's proposed amendments to its rules and regulations address the criticisms made against ISDS

51. Since ICSID currently administers the majority of ISDS disputes,[71] it would be sensible for Working Group III to consider whether the proposed amendments to the ICSID rules answer the criticisms levelled against ISDS more generally. In August 2018, ICSID published its proposals for amendments to its rules.[72] More recently (in January and March 2019), ICSID published a compendium of comments it had received from States, international and regional organizations, international law firms, academics, and arbitrators, as well as the second draft of its proposed amendments to its rules.[73]

52. The amendments proposed by ICSID seek to address the criticisms levelled against ISDS with respect to the duration of proceedings, costs, efficiency and transparency.[74]

5.2 ISDS reform is preferable to establishing a permanent investment court system

53. Given the concerns expressed above with respect to the establishment of a permanent investment court, Working Group III might understandably take the view that any proposal for a permanent investment court would be premature at this stage. Notwithstanding certain flaws, the ISDS system has the benefit of being a tried-and-tested mechanism for the resolution of investment disputes. Doubts over the effectiveness of a permanent investment court create a risk that, in the words of one commentator, "investors may become reluctant to make investments in countries that have joined the court, or may make their investments conditional on the insertion of arbitration clauses in investment contracts, or may negotiate a much higher rate of return for their investment to compensate for the perceived increase in risk."[75] If investors were to disengage, this might have a negative impact on the ability of States to attract foreign direct investment.

54. For all of these reasons, Bahrain believes that careful and considered ISDS reform would be preferable to the many uncertainties associated with the establishment of a permanent investment court. As has been observed, "reformed"

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[71] See paragraph 13 of this paper.

[72] See ICSID, *Proposals for Amendment of the ICSID Rules – Synopsis* (Aug. 2, 2018), https://icsid.worldbank.org/en/Documents/Amendments_Vol_One.pdf; ICSID, *Proposals for Amendment of the ICSID Rules – Consolidated Draft Rules* (Aug. 2, 2018), https://icsid.worldbank.org/en/Documents/Amendments_Vol_Two.pdf.

[73] States and international and regional organizations that provided comments on the amendments proposed by ICSID include: the African Union, Algeria, Argentina, Armenia, Austria, Canada, Colombia, Costa Rica, the Democratic Republic of the Congo, the European Union and its member States, France, Georgia, Guatemala, the Hellenic Republic, Hungary, Indonesia, Israel, Italy, Japan, Malta, Mauritius, Morocco, the Netherlands, Nigeria, Oman, Panama, the People's Republic of China, Qatar, Singapore, Slovak Republic, Spain, Togo, Tunisia, Turkey, Ukraine, and the United Arab Emirates. See https://icsid.worldbank.org/en/Documents/State_Public_Comments_Rule_Amendment_Project_1.17.19.pdf. For the second draft of ICSID's proposed amendments to its rules, see ICSID, *Proposals for Amendment of the ICSID Rules* (Mar. 2019), https://icsid.worldbank.org/en/Documents/Vol_1.pdf.

[74] See generally the ICSID documents cited *supra* notes 72 and 73.

[75] See Ziadé, *supra* note 7.

investment arbitration "must be given a chance to prove itself."[76] Bahrain's proposals for ISDS reform are set out below.

5.3 Bahrain's proposals for reforming procedural aspects of ISDS

A code of conduct for conflicts of interest

55. As neutral bodies, arbitral institutions should take the lead in creating binding codes of conduct. Such codes should address all aspects of conflicts of interest, including the selection of arbitrators, arbitrators' ethical duties, arbitrator challenges, and the ethical conduct of counsel and institutional staff.

56. When it comes to challenges, the code of conduct should contain clear and enforceable guidelines on what is and what is not permissible behaviour. The various "multiple-hatting" scenarios should be covered. Consideration should also be given to creating a truly independent body within an arbitral institution specifically to handle challenge applications. This would put an end to the ICSID practice of a challenged arbitrator's fate being decided by the other members of the tribunal or, if those arbitrators take different positions, by the President of the World Bank.

57. The Working Group may indeed wish to consider whether arbitral institutions should be given a more prominent role in the selection of arbitrators for arbitral appointments. This was a view put forward in a recent ICSID case by a dissenting arbitrator,[77] who suggested that ICSID should provide a preselected roster of arbitrators.[78]

58. Additionally, in complicated and sensitive ISDS disputes it may be prudent to increase the number of tribunal members to five or seven, which would not only create an opportunity for greater diversity, but also avoid a concentration of power in the hands of a few individuals.[79]

Widening the pool of arbitrators to include more women and members from developing countries

59. Bahrain commends recent efforts to ensure the appointment of more women to arbitral tribunals including, for example, the equal representation in arbitration pledge,[80] which seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators with a view to achieving gender parity. Efforts to ensure greater diversity must also focus on widening the pool of arbitrators to include members from developing countries, so that "all legal systems of the world are fairly

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[76] Ibid.

[77] See *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, dissenting opinion of arbitrator Joseph P. Klock, Jan. 18, 2017, at 13–14 ("[T]he arrangement whereby two of the panel members are selected by the parties to the agreement creates an uncomfortable aura of conflict which permeates, in my view, the proceedings. It creates a true ethical burden on these other two parties to separate themselves from the interest of those who have selected them to serve.").

[78] Ibid. at 14 ("[T]he dignity and integrity of an ICSID proceeding would be much better served by the selection of panellists from lists where the selection is made wholly by ICSID and where careful screening is done to make sure that any selective panellists do not have conflicts, not only real conflicts which should be identified in the screening process done, but perceived conflicts as well, either by issue or relationship. It ill-behooves ICSID to have anyone unfairly suggest that it is a club where the result can be influenced by relationships that exist by those who serve variously as advocates or arbitrators.").

[79] See Gabrielle Kaufmann-Kohler, *Accountability in International Investment Arbitration,* Charles N. Brower Lecture, American Society of International Law, 8 (Mar. 31, 2016) ("It may be worthwhile exploring whether the number of decision-makers should not be increased (at least for certain cases), to optimize the decision-making process and avoid too strong a concentration of power in individual members.").

[80] See generally www.arbitrationpledge.com/. See also www.gqualcampaign.org/home/, which seeks to increase gender parity in international representation.

and inclusively represented on the arbitration tribunals that shape [ISDS] jurisprudence."[81]

60. It should be pointed out that the promotion of greater diversity among the arbitrators appointed to panels is not dependent on ISDS reform. The system of party-appointed arbitrators already allows States to nominate and appoint more women and members from developing countries. It simply depends on their having the will to do so.

61. Bahrain would be in favour of recommending to UNCITRAL that diversity considerations be formally added to the criteria to be applied when selecting arbitral panel members, and that arbitral institutions regularly publish statistics on diversity in the composition of their arbitral tribunals.

Joint interpretative committees

62. Rather than an appeals mechanism, joint interpretative committees existing alongside arbitral tribunals might be a better way to harmonize the interpretation of treaty provisions. Arbitral tribunals would continue to determine issues of fact and consider matters of law, while a parallel permanent interpretative body would provide guidance on jurisprudence. Authoritative joint interpretative committees would provide much-needed clarity for investors and States.[82] Such a solution would also be less cumbersome than an appeals procedure.

A pool of arbitrators specifically for annulment decisions

63. The idea is that ICSID should create a diverse pool of arbitrators dedicated to handling annulment proceedings. This would help to ensure consistency in the application of the ICSID Convention and Rules by annulment committees.[83]

Addition of new grounds for annulment in international investment agreements

64. The Working Group may wish to consider drafting model clauses providing additional grounds for annulment, which would be available for States to insert in new or existing international investment treaties. This would answer the criticism that the ICSID system permits annulment only on limited grounds.[84]

6. The Working Group's procedural focus is a missed opportunity

65. Bahrain shares the views expressed by the governments of Thailand and Indonesia in their remarks to Working Group III that restricting consideration of ISDS reform to procedural aspects alone – without considering reform of substantive treaty protections – is a missed opportunity.[85]

66. Why is substantive reform of ISDS so necessary? Bahrain is grateful to the United Nations Conference on Trade and Development (UNCTAD) for the substantial work it has done on this topic, including the publication of several reports. Bahrain wishes to make three brief observations on the subject.

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[81] See Ziadé, *supra* note 9.

[82] Comments by Nassib Ziadé, *supra* note 37.

[83] Ibid.

[84] Ibid.

[85] See *Comments from the Government of Thailand*, *supra* note 24, para. 1 ("discussions on ISDS reform should focus not only on procedural but also substantive matters, taking into account the substantive divergences among international investment agreements"). See also UNCITRAL, Working Group III, *Possible reform of Investor-State dispute settlement (ISDS), Comments by the Government of Indonesia*, A/CN.9/WG.III/WP.156, Nov. 9, 2018, para. 1 ("The proposed ISDS reform discussion under UNCITRAL is built upon a substance–procedure dichotomy. In light of this dichotomy, Indonesia sees that it may actually defeat the purpose of having a meaningful ISDS mechanism as it is difficult to separate between substance and procedure.").

- First, more than 2,500 international investment treaties in force today (95 per cent of all treaties in force) were concluded before 2010.[86] Most of these treaties were negotiated in the 1990s.[87] These first-generation treaties generally contain similar, broadly worded substantive provisions, but "few safeguards."[88] First-generation international investment treaties lead to divergent interpretation of treaty standards.[89]

- Second, unlike first-generation international investment treaties, modern treaties increasingly offer greater clarity regarding substantive protections, focusing particularly on a State's right to regulate.[90]

- Third, according to UNCTAD, by the end of 2016 over 1,000 bilateral investment treaties had reached the stage at which they could be unilaterally terminated by a contracting party and many more will reach that stage in the future.[91] Such termination offers an opportunity for reform by revision, amendment, or complete replacement of old treaties with newer and more modern treaties. However, if a State fails to trigger termination of an "end-of-life" international investment agreement, the agreement continues for whatever period of time is specified in a survival clause.[92] UNCTAD has observed that "[a]llowing an old-generation (unreformed) treaty to apply for a long time after termination … undermine[s] reform efforts […]."[93]

67. Some States have exercised their sovereign right to draft and negotiate more modern international investment agreements that provide greater clarity on substantive protections under ISDS and a more balanced approach to the obligations of investors and States, in particular with respect to a State's right to regulate. However, considerably more work is needed in this area. It is most unfortunate and regrettable that Working Group III's mandate does not allow it to consider reforms of a substantive nature. It would be immensely valuable to the international community if Working Group III were also to consider substantive reforms, especially as the

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[86] UNCTAD, *World Investment Report 2017: Investment and the Digital Economy*, https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

[87] Ibid.

[88] Ibid.

[89] UNCTAD, World Investment Report 2015, *Reforming International Investment Governance*, https://unctad.org/en/PublicationsLibrary/wir2015_en.pdf at 137 ("first-generation [international investment agreements] typically included an unqualified FET standard"); ibid. at 139 ("Historically, [international investment agreements] have not contained any criteria for distinguishing between state action amounting to an indirect expropriation and state action of a more regulatory nature for which no compensation is due."); ibid. at 140 ("traditional [international investment agreements] typically do not contain express public policy exceptions […]"); ibid. at 143 ("A traditional, open-ended definition of investment grants protection to all types of assets. Although such an approach may be aimed at promoting an investment-attraction effect, it can also cover economic transactions not contemplated by the parties or expose states to unexpected liabilities […]."); ibid. at 144 ("Traditional [international investment agreements] do not specify the type of legal remedies a tribunal can order against a State.").

[90] *Supra* n. 86, at 120: UNCTAD noting that "[a] number of other treaty elements found in 2016 [International Investment agreements] aim more broadly at preserving regulatory space and/or at minimizing exposure to investment arbitration. These element include clauses that (i) limit the treaty scope (for example, by excluding certain types of assets from the definition of investment); (ii) clarify obligations (for example, by including more detailed clauses on [fair and equitable treatment] and/or indirect expropriation); (iii) contain exceptions to transfer-of-funds obligations or carve-outs for prudential measures; and (iv) carefully regulate ISDS (for example, by specifying treaty provisions that are subject to ISDS, excluding certain policy areas from ISDS, setting out a special mechanism for taxation and prudential measures, and/or restricting the allotted time period within which claims can be submitted). Notably 13 of the treaties reviewed limit access to ISDS; and 16 omit the so-called umbrella clause (thus also reducing access to ISDS) […]."

[91] Ibid. at 127.

[92] Survival clauses are included in most international investment agreements and are designed to extend the treaty for a further period after termination (some for five years, but most frequently for ten, fifteen, or even twenty years). Ibid. at 132.

[93] Ibid.

Secretariat has already acknowledged that "second-generation treaties have brought more clarity in substantive protection standards and in procedural provisions."[94]

7. Preliminary views on the workplan for Working Group III

68. Bahrain believes that the fundamental task at hand is to build a consensus around a set of reform proposals that has the best chance of obtaining the Working Group's unanimous support. Bahrain believes that in subsequent discussions conflicts of interest, diversity, costs, and the duration of proceedings should be prioritized.

69. One of the proposals made at the last session was to have two workstreams. The first would focus, inter alia, on preparing a code of conduct for arbitrators and developing solutions to address issues relating to costs and the duration of proceedings. The second would focus on structural reform options, namely the jurisdiction of a multilateral investment court, its composition, the establishment of an appeal mechanism, and the enforcement of decisions.[95]

70. At this stage of the deliberations, Bahrain believes, however, that it would be premature to formally divide the work of Working Group III. Rather, Bahrain believes that Working Group III should remain united in addressing all relevant concerns and the formulation of any proposals should not be prejudged. Indeed, Bahrain has doubts over the claim that the workstreams might "reduce the burden on States as they would be able to decide on which workstream to participate."[96] To the contrary, workstreams are likely to increase that burden as delegations would most probably wish to actively participate in both workstreams given that the future of ISDS is at stake.

71. In the circumstances, Bahrain agrees that the Working Group "could focus on the substance of reform and set aside the issue of the form of any solution until a later stage."[97] Given the Working Group's anticipated workload, Bahrain would not object to the scheduling of an additional week of conference time in 2019 or 2020 should it become necessary.

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[94] UNCITRAL, Working Group III, *Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters*, A/CN.9/WG.III/WP.150, Aug. 28, 2018 para. 34.

[95] UNCITRAL, Report of Working Group III on the work of its thirty-seventh session, A/CN.9/970, Apr. 9, 2019, para. 74.

[96] Ibid. para. 75.

[97] Ibid. para. 78.