



**United Nations Commission on
 International Trade Law**
**Working Group III (Investor-State
 Dispute Settlement Reform)**
Thirty-eighth session
 Vienna, 14–18 October 2019

Possible reform of investor-State dispute settlement (ISDS)

Selection and appointment of ISDS tribunal members

Note by the Secretariat

Contents

	<i>Page</i>
I. Introduction	2
II. Selection and appointment of ISDS tribunal members	2
A. General remarks	2
B. Outline of reform options and their variants	5
1. Factors to be considered	5
2. Regulation of party-appointment mechanism	5
3. Pre-established list (roster)	6
4. Standing mechanism	9
C. Remarks on implementation of reform options	15



I. Introduction

1. At its thirty-fourth to thirty-seventh sessions, the Working Group undertook work on the possible reform of ISDS, based on the mandate given to it by the Commission at its fiftieth session, in 2017.¹ The deliberations and decisions of the Working Group at the thirty-fourth to thirty-seventh sessions are set out in documents [A/CN.9/930/Rev.1](#) and its Addendum, [A/CN.9/935](#), [A/CN.9/964](#), and [A/CN.9/970](#), respectively. At those sessions, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.

2. At its thirty-seventh session, the Working Group agreed that it would discuss, elaborate and develop multiple potential reform solutions simultaneously ([A/CN.9/970](#), para. 81).² In that light, the Secretariat was requested to undertake preparatory work on a number of topics, including on the selection and appointment of ISDS tribunal members. It was said that this could include compiling, summarizing and analysing relevant information as one of the important topics for structural reform, in cooperation with the Academic Forum ([A/CN.9/970](#), para. 84).

3. Accordingly, this Note aims at providing further information to assist the Working Group with respect to the question of selection and appointment of ISDS tribunal members, on the basis of submissions received from Governments.³ As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic,⁴ and does not seek to express a view on the possible reform options, which is a matter for the Working Group to consider.

II. Selection and appointment of ISDS tribunal members

A. General remarks

Features of the existing regime

4. By way of background, the selection and appointment of members of ISDS tribunals under the existing ISDS regime are governed by the applicable treaty provisions or specific contractual provisions and, if none, under the default rules of any relevant arbitral institution (such as those of the International Centre for

¹ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 263 and 264.

² The Working Group may wish to note that document [A/CN.9/WG.III/WP.166](#) provides an overview of reform options.

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.

⁴ This Note was prepared with reference to a broad range of published information on the topic, including 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, as well as the publications from members of the Academic Forum, available at <https://www.cids.ch/academic-forum-concept-papers>. Publications from members of the Academic Forum include *Selection and Appointment in International Adjudication: Insights from Political Science*, Olof Larsson, Theresa Squatrito, Øyvind Stiansen, and Taylor St John; *The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement*, Malcolm Langford, Daniel Behn and Mariachiara Malaguti; and *Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform* Andrea K. Bjorklund, Marc Bungenberg, Manjiao Chi, and Catharine Titi.

Settlement of Investment Disputes (ICSID)) or the applicable ad hoc rules (such as those of UNCITRAL).⁵

5. While ISDS provisions in investment treaties vary, they generally provide for dispute settlement through arbitration, which implies that: (i) the dispute shall be resolved by an ISDS tribunal constituted ad hoc for that particular dispute; and (ii) the disputing parties (the claimant-investor and the respondent-State) play an important role in the selection of the members of the tribunal.

6. In general, members of ISDS tribunals are selected and appointed by a disputing party, by the parties jointly, by an arbitral institution or by an appointing authority as a default mechanism. The existing mechanisms for constituting ISDS tribunals are based on party autonomy. Therefore, the selection and appointment are most commonly made by the disputing parties and, to a much lesser extent, by appointing authorities, including arbitral institutions, tasked with assisting in the process. The Working Group may wish to note the information submitted by ICSID and the Permanent Court of Arbitration at The Hague (PCA) on the selection and appointment mechanisms as contained in document [A/CN.9/WG.III/WP.146](#).⁶

Decisions by the Working Group

7. At its thirty-sixth session, after having considered the selection, appointment and functioning of ISDS tribunals,⁷ the Working Group concluded that the development of reforms by UNCITRAL was desirable to address concerns related to the lack or apparent lack of independence and impartiality of decision makers in ISDS⁸ ([A/CN.9/964](#), para. 83); the question of adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules ([A/CN.9/964](#), para. 90); the lack of appropriate diversity among decision makers in ISDS ([A/CN.9/964](#), para. 98); and the mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules ([A/CN.9/964](#), para. 108).

8. After having undertaken such consideration, there was consensus in the Working Group with regard to the need for reform, while differing views about the extent of reform were duly noted ([A/CN.9/964](#), para. 106).

Remarks on a reform of the methods for the selection and appointment of tribunal members

9. In considering reform options, the Working Group may wish to note that the selection and appointment of tribunal members is part of a wider dispute settlement framework. To date, there are two main models, with variants, for the settlement of international disputes, with either (i) the adjudicatory body being established by the disputing parties for a specific dispute, after the dispute has arisen (this model corresponds to the current ISDS regime based on international arbitration); or (ii) the adjudicatory body pre-existing the dispute (which would correspond to a standing mechanism).

10. The selection and appointment of tribunal members are organized differently in each system. In the current ISDS regime based on international arbitration, the selection and appointment of arbitrators is flexible; it is not strictly regulated; and it

⁵ See *The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement*, Malcolm Langford, Daniel Behn and Mariachiara Malaguti.

⁶ See also information on ICSID statistics, available at <https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx> and on the Permanent Court of Arbitration at <https://pca-cpa.org/en/documents/publications/annual-reports/>.

⁷ The Working Group undertook consideration of the matter on the basis of documents [A/CN.9/WG.III/WP.149](#) (paras. 11 to 13), [A/CN.9/WG.III/WP.151](#) and [A/CN.9/WG.III/WP.152](#) ([A/CN.9/964](#), paras. 64–106).

⁸ This topic is also addressed under document [A/CN.9/WG.III/WP.167](#) (Code of conduct).

varies depending on the case and the disputing parties. In a standing mechanism, the rules for selecting and appointing adjudicators are formal and regulated.

11. However, other forms of organization are possible. These include, for example, a selection and appointment method whereby tribunal members would be selected on the basis of a pre-established list or roster by a third party acting as appointing authority, without any input or with limited input from the disputing parties.⁹ This option, while departing from party-appointment, would preserve the ad hoc nature of the current ISDS regime, where ISDS tribunals are constituted for each case, after a dispute has arisen (as opposed to a standing mechanism). As another example, it would also be conceivable in a standing mechanism to allow disputing parties to choose their adjudicators through a system of roster (this model is referred to as a semi-permanent body). This option, while departing from the ad hoc nature of the current ISDS regime, would still permit disputing parties' involvement in the selection and appointment of adjudicators.¹⁰

12. The Working Group may therefore wish to note that each model may include a number of variants. An additional element that would also have an impact on the overall framework of ISDS reform as well as on the design of the selection and appointment of ISDS tribunals would be the creation of an appellate mechanism.¹¹ The selection and appointment methods for adjudicators at the appellate level might follow a pattern similar to that of the first instance ISDS tribunal or there might be different requirements and procedures applicable to the selection and appointment of adjudicators depending on the level of adjudication.¹²

Possible mechanisms for a reform of selection and appointment of ISDS tribunal members

13. In that light, the sections below focus on mechanisms that could be set up for reforming the selection and appointment of ISDS tribunal members, including (i) regulation of party-appointment mechanisms;¹³ (ii) a pre-established list or roster, either in the current arbitration framework, possibly involving institutions (appointing

⁹ See CIDS Supplemental Report, at paras. 6–19.

¹⁰ Ad hoc and permanent mechanisms can also co-exist within the same dispute settlement framework (see CIDS Supplemental Report, para. 12). For example, in the World Trade Organization (WTO), disputes are decided first by ad hoc panels and then, if there is an appeal, by the standing Appellate Body of the WTO (WTO AB). At Mercosur, a complaining State must first bring its grievances before an “ad hoc arbitral tribunal”, to be composed by the disputing parties from closed lists (Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (“MERCOSUR”), 26 March 1991, 30 ILM 1041 (1991); Olivos Protocol for the Settlement of Disputes in MERCOSUR (“Olivos Protocol”), 18 February 2002, 42 ILM 2 (2003), Arts. 10–11. Disputes may then be brought to the “Permanent Review Court” by way of appeal.

¹¹ [A/CN.9/WG.III/WP.159/Add.1](#), Submissions from the European Union and its Member States (standing mechanism with a first instance and appellate mechanism); [A/CN.9/WG.III/WP.161](#), Submission from the Government of Morocco (appellate mechanism); [A/CN.9/WG.III/WP.163](#), Submissions from the Governments of Chile, Israel and Japan (treaty specific appellate review mechanism); [A/CN.9/WG.III/WP.175](#), Submission from the Government of Ecuador (appellate mechanism) [A/CN.9/WG.III/WP.177](#), Submission from the Government of China (appellate mechanism).

¹² *The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement*, Malcolm Langford, Daniel Behn and Mariachiara Malaguti, which discusses the effect of appellate body on the selection and appointment of adjudicators.

¹³ See also proposals contained in submissions from governments: [A/CN.9/WG.III/WP.162](#), Submission from the Government of Thailand; [A/CN.9/WG.III/WP.163](#), Submission from the Governments of Chile, Israel and Japan; [A/CN.9/WG.III/WP.164](#) and [A/CN.9/WG.III/WP.178](#), Submissions from the Government of Costa Rica; [A/CN.9/WG.III/WP.174](#), Submission from the Government of Turkey; [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.

authorities),¹⁴ or as part of a semi-permanent adjudicative body; and (iii) creation of standing mechanisms.¹⁵

14. The Working Group may wish to note that in the possible reform options below, a distinction is made, where relevant, between two different phases: first, the selection of members of ISDS tribunals, second their selection and appointment for a specific case, in other words, the modalities by which a case would be assigned, and the role of the disputing parties in that phase.

B. Outline of reform options and their variants

1. Factors to be considered

15. The selection and appointment methods under any reform options should guarantee transparency and openness. The criteria in all options should be such that they ensure the selection of members of ISDS tribunals that are independent, impartial, competent, with the expertise and experience necessary to discharge their functions. The method for selecting and appointing members of ISDS tribunals, including the composition of a roster, or of a permanent adjudicative body, as a whole, should reflect high standards of diversity (both geographical and gender)¹⁶ and should ensure neutrality and accountability (A/CN.9/964, para. 69 and 91–96).

16. These qualities are required in order for the reform options to usefully address the identified concerns and for ensuring the credibility, integrity, and legitimacy of any ISDS regime that would result from the reform process. As a general principle, the selection and appointment methods should be such that they contribute to the quality and fairness of the justice rendered, as well as the appearance thereof.

17. The Working Group may wish to also consider the issues that a reform of the selection and appointment mechanisms would seek to address include the following: repeat appointments; instances of conflict of interest and/or so-called issue conflicts; and the practice of individuals switching roles as arbitrator, counsel and expert in different ISDS proceedings (A/CN.9/964, para. 70). In so doing, the Working Group may wish to consider that the question of selection and appointment of ISDS tribunal members may also have an impact on other identified issues, such as the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules, as considered by the Working Group at its thirty-sixth session (A/CN.9/964, paras. 84–88). Other identified concerns that might be impacted include correctness, consistency and predictability of decisions by ISDS tribunals (see A/CN.9/964, para. 33) as well as cost and duration of ISDS proceedings (see A/CN.9/964, para. 114).

2. Regulation of party-appointment mechanism

18. The Working Group may wish to consider the option of providing safeguards to the current methods of selection and appointment of ISDS tribunals, which rely on party-appointment. In the ISDS regime as it currently stands, disputing parties normally enjoy broad powers in the selection of arbitrators. Indeed, the rules applicable in investor-State arbitration allow disputing parties to agree on the method to select the arbitrators and to agree directly upon their identity.

¹⁴ See also proposals contained in submissions from governments: A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica; A/CN.9/WG.III/WP.174, Submission from the Government of Turkey.

¹⁵ See also proposal contained in a submission: A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States.

¹⁶ See also, A/CN.9/WG.III/WP.161, Submission from the Government of Morocco, Annex 2, para. 9; A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica (referring to a “pledge for diversity”).

19. As indicated above (see para. 6), arbitrators may also be appointed by appointing authorities. Appointing authorities, which usually intervene in the appointment process to appoint the presiding arbitrator in a three-person tribunal, are playing a broader role in ISDS, as highlighted by the Working Group at its thirty-sixth session.¹⁷ Comments commonly expressed regarding the appointing authorities' role concern the lack of available information on the selection and appointment process, and the limited mechanism for public accountability of appointing authorities.

20. The Working Group may wish to note that, in submissions received from Governments, it is suggested that the mechanism to appoint members of ISDS tribunals should include inter alia an independent appointing authority (i.e., to appoint tribunal chair),¹⁸ as well as improvements to the current system of appointment of arbitrators, including pledge for diversity.¹⁹ It is also outlined that the mechanism for constituting arbitral tribunals allows parties to choose the arbitrators that they consider most qualified for solving their disputes and that such feature ensures the flexibility and attractiveness of arbitration.²⁰

21. Possible approaches to regulate the method for selecting and appointing arbitrators include the establishment of a pre-established list or roster of arbitrators (see below, paras. 22–34) as well as consideration of the role of the appointing authorities (see below, paras. 35 and 36).

3. Pre-established list (roster)

(a) Reform option

22. In a submission from a Government, it is suggested that the selection of the members of ISDS tribunals could be linked to a pre-established list or roster.²¹

23. A roster could be used as part of either the current ISDS regime, or the establishment of a semi-permanent mechanism (as opposed to a permanent mechanism, where cases would be assigned to adjudicators with no involvement of the disputing parties).²²

24. It may be noted that rosters already exist and are established in various manners, such as by disputing parties in their contract, by treaty-parties in the underlying investment treaty, or by arbitral institutions. This section focusses on the establishment of a roster in a multilateral reform context. It does not focus on such existing rosters.

(b) Characteristics of the establishment and use of a roster

25. The sections below distinguish the phase of the selection of the persons to be placed on a roster from the phase of their selection and appointment to hear a specific case.

¹⁷ See also the OECD Consultation Paper on Appointing Authorities and the Selection of Arbitrators in ISDS, available at <http://www.oecd.org/investment/Consultation-ISDS-appointing-authorities-arbitration.htm>.

¹⁸ A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Japan and Israel.

¹⁹ A/CN.9/WG.III/WP.164 and A/CN.9/WG.III/WP.178, Submissions from the Government of Costa Rica.

²⁰ A/CN.9/WG.III/WP.177, Submission from the Government of China.

²¹ 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.174, Submission from the Government of Turkey.

²² See *The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement*, Malcolm Langford, Daniel Behn and Mariachiara Malaguti, which provides an overview on types of rosters.

Phase 1 – Selection*(i) Selection criteria*

26. The relevant criteria regarding the selection of the persons to be placed on a roster may include a variety of aspects. In a submission from a Government, it is suggested that a roster would not need to be extensive but should focus on names of established arbitrators specialized in ISDS while helping to bring new lawyers into the already established circle of arbitrators. Overall, a roster should take into account the gender balance, geographical distribution, and balancing between arbitrators from developing and developed countries.²³ In another submission from a Government, it is suggested to provide for special expertise requirements for arbitrators for certain claims (e.g., financial services).²⁴

(ii) Possible mechanisms for the selection

27. The Working Group may wish to consider the possible mechanisms that could be used for the selection of persons to be placed on a roster. In so doing, it may wish to consider whether both States and investors would be involved in the selection process. In the current ISDS regime, for arbitral institutions which have a roster or list of arbitrators, members are normally directly designated or appointed to those rosters by States or other entities.²⁵

28. The setting up of a roster could entail establishing more transparent procedures regarding the selection and appointment as limited information about selection and appointment methods may result in limited accountability in the system (A/CN.9/935, para. 66). Examples of such a procedure could include the publication of the selection criteria along with explanation of the selection procedures.

(iii) The manner in which a roster would be renewed

29. The question of renewal of arbitrators/adjudicators on a roster is an important one in light of the need to address the concern of lack of diversity in the ISDS regime. In addition to individual qualities, the roster should be representative of the diversity of those involved in ISDS. As mentioned above, this includes adequate geographical distribution, representativeness of the various legal systems, nationalities, and gender, among other factors.²⁶ In that context, the Working Group may wish to consider how a roster would be managed, and whether there would be limited durations for a person to be placed on a roster.

(iv) One or multiple rosters

30. A related question for consideration in this reform option is whether there would be one roster managed by one institution, either existing or to be created, or whether there would be decentralized rosters managed, for instance, by institutions currently handling ISDS.

²³ A/CN.9/WG.III/WP.162, Submission from the Government of Thailand, para. 20.

²⁴ A/CN.9/WG.III/WP.163, Submissions from the Governments of Chile, Israel and Japan, Annex 1.

²⁵ For example, with regard to the Panel of Arbitrators and Conciliators that is maintained by ICSID, each Contracting State unilaterally appoints four persons to each Panel, and the ICSID Chairman designates 10 persons to each Panel (see ICSID Convention, article 13). Similarly, each Member State of the PCA is entitled to elect four persons, who “are inscribed, as Members of the Court, in a list” maintained by the International Bureau of the PCA. The persons on such list in turn form a panel of potential arbitrators (see 1907 Hague Convention, article. 44). In a different field, the Court of Arbitration for Sport (CAS), arbitrators are appointed to the list by the International Council of Arbitration for Sport, on the basis of names “brought to [its] attention” by a number of other entities (see CAS Code, article S14).

²⁶ See A/CN.9/WG.III/WP.162, Submission from the Government of Thailand, where it is suggested that there could be innovative ideas presented to address existing concerns on arbitrator selection, such as obligatory rotation of individuals in the roster.

Phase 2 – Selection and appointment for a specific case

31. The selection and appointment of arbitrators/adjudicators to a specific case raise the question of the involvement of the disputing parties in such selection and appointment process.

32. An option may consist in setting up a roster in a system where the disputing parties would remain in control of the selection and appointment of ISDS tribunals, and where some limitations would be included, such as they would be allowed to choose arbitrators from a pre-established list only, or to choose one member of the ISDS tribunal each, with the president of the tribunal being systematically selected and appointed through a different mechanism (for instance, by an institution). As indicated in a submission from a Government, the major difference vis-à-vis the present situation would lie in the fact that disputing parties would be restricted in their choice as they could only choose from a list.²⁷

33. It may also be conceivable to envisage a roster model as part of the establishment of a semi-permanent mechanism where the disputing parties would participate in the formation of the ISDS tribunal.²⁸ Whether a roster model can be qualified as ad hoc or a permanent dispute settlement system would depend essentially on the institutional framework, and whether its members perform other institutional functions or tasks beyond adjudicating specific disputes.²⁹

34. A different option would be to envisage a system in which adjudicators are selected and appointed from a roster by a third party without any input or with limited input (for instance, consultation or agreement on criteria) from the disputing parties.

(c) Role for appointing authorities

35. A system where institutions administering ISDS cases would play a greater role in the selection and appointment of members of ISDS tribunals is an option for reform that could be considered in conjunction with the creation of a roster. Such involvement is suggested in a submission from Governments.³⁰ Institutions may include the existing arbitral institutions active in the field of ISDS as they already manage rosters of arbitrators that assist the parties in their selection and appointment process.

36. It may be noted that this would entail ensuring the independence and impartiality of the appointing authorities. It may also be noted that a reform option relying mainly on appointing authorities would require consideration of the impact on existing rules and procedures applicable to the appointing authorities.

(d) Impact on identified issues

37. The Working Group may wish to consider whether the establishment of a roster might help address the question of qualifications and competence of ISDS tribunal members, including professional experience and expertise, and understanding of State policies. It may wish to further consider whether it would help address the concerns

²⁷ A/CN.9/WG.III/WP.162, Submission from the Government of Thailand.

²⁸ By way of comparison, in the area of trade disputes, the constitution of panels at the World Trade Organization (WTO) is mainly driven by the disputing parties, although arguably to a different extent than in investor-State arbitration. Under the WTO Dispute Settlement Understanding, “[t]he Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons”. Panellists may, but need not, be drawn from “an indicative list of governmental and non-governmental individuals”, maintained by the Secretariat “[t]o assist in the selection of panellists” (See Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 15 April 1994, Art. 8). If successful, the panel’s composition will reflect the complete or partial agreement of the parties. At the WTO, the appointment process at the panel level is designed to facilitate disputing party agreement over the composition of the panel.

²⁹ See CIDS Supplemental Report, para. 7.

³⁰ A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Japan and Israel, Annex I.

of neutrality and accountability. A system with a pre-established list or roster may not necessarily address the question of repeat appointments, unless a roster would be coupled with greater institutional involvement, and institutions would be tasked with ensuring that diversity in the selection and appointment is respected, and repeat appointments avoided.

38. Regarding the impact of the reform options on other identified concerns, it may be noted that additional measures would need to be designed to address the concerns pertaining to the question of the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under existing treaties and arbitration rules. The same would apply regarding the practice of individuals switching roles as adjudicator, counsel and expert in different ISDS proceedings.

39. The Working Group may wish to consider whether this reform option would have any impact on questions of consistency and predictability of decisions by ISDS tribunals. Matters for consideration include the impact of the size of the roster, and whether, to address those concerns, a roster would need to be coupled with other mechanisms, such as consultation among those placed on the roster.³¹

4. Standing mechanism

(a) Reform option

40. In a submission received from a regional economic integration organization and its member States, it is proposed to establish a standing mechanism for the settlement of international investment disputes, including a system of full-time adjudicators.³² In short, under that proposal, the selection and appointment of adjudicators would take place within the framework of a standing mechanism. The adjudicators would be employed full-time and would not have any outside professional activities. They would be paid salaries comparable to those paid to adjudicators in other international courts and be subject to ethical requirements. It is suggested to use comparable qualification requirements as for other international courts to ensure neutrality, as well as geographical and gender diversity. Independence from governments would be ensured through a long-term non-renewable term of office, combined with a robust and transparent appointment process.³³

41. In such a reform option, disputing parties would have no or little influence on the selection and appointment of adjudicators. This derives from the fact that a permanent body pre-exists the dispute (as opposed to the current ISDS system based on arbitration where the ISDS tribunal is constituted ad hoc for that particular dispute).

42. As an illustration, this reform option would be comparable to the selection and appointment mechanisms in existing international courts:

- States as disputing parties have no say in the selection of the individuals who compose the World Trade Organization Appellate Body (WTO AB), although as treaty parties they have participated in such a selection process;³⁴
- Disputing parties at the European Court of Human Rights (ECHR) play no role in its composition;³⁵

³¹ See *The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement*, Malcolm Langford, Daniel Behn and Mariachiara Malaguti, which evaluates and partly predicts the effect of institutional reform models.

³² A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States.

³³ A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States, paras. 16 to 19.

³⁴ Dispute Settlement Rules: 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).

³⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, 213 UNTS 221, as amended by Protocol Nos. 11 and 14, as from its entry into force on 1 June 2010, Articles 20–23.

- 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.³⁶

(b) Characteristics of the establishment of a standing mechanism

43. Two phases would need to be distinguished, the selection of the adjudicators to be part of the standing mechanism, and the assignment of a specific case to them.

Phase 1 – Selection of adjudicators

(i) “Full representation” or “selective representation”

44. A first question to consider in the design of the composition of a standing dispute settlement mechanism would be the number of adjudicators and, in this respect, whether States would wish to establish “full representation” or “selective representation” bodies.³⁷ In full representation bodies, each State has an adjudicator 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. Some international courts and tribunals on a universal scale, the ICJ, the International Tribunal for the Law of the Sea (ITLOS), the International Criminal Court (ICC), and the WTO AB, all comprise a lower number of adjudicators than contracting Parties.³⁸

45. For the creation of an ISDS standing mechanism, it may be noted that the larger the multilateral basis, the more difficult it would be to ensure that each State can appoint one member. Indeed, a permanent body with a high number of members may be expensive and complex to manage.

46. Finally, the number of adjudicators composing the permanent body may need to evolve over time, due to increasing membership of contracting Parties and/or increasing caseload. Existing international courts and tribunals provide illustrations of these possible adjustments.³⁹ More specifically, in a full representation body, the number of adjudicators will be adjusted each time a new contracting Party joins the mechanism. In a selective representation model, revision clauses may set out a procedure for the gradual increase in the number of adjudicators.

³⁶ Statute of the International Court of Justice (“ICJ Statute”), Article 31(2) (“If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge”); Article 26(2) (“The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties”).

³⁷ 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.

³⁸ Examples of full representation include regional courts such as the Court of Justice of the European Union (CJEU) and the ECHR (Art. 20); examples of selective representation courts include the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human and Peoples’ Rights (“Protocol on the African Court”), Article 11; Agreement Establishing the Caribbean Court of Justice, 14 February 2001, Art. IV; American Convention on Human Rights (ACHR), 21 November 1969, Article 52; Statute of the Inter-American Court of Human Rights (“IACHR Statute”), October 1979, OAS Res No. 448, Article 4.

³⁹ 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), first sentence (“The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously”); Rome Statute of the International Criminal Court, 1 July 2002, Article 36(2) (“The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1 [i.e., 18 judges], indicating the reasons why this is considered necessary and appropriate”).

(ii) *Diversity and balanced representation*

47. Ensuring that an adjudicative body reflects broad geographical representation appears to be an important concern for many States when setting up a standing mechanism. This is shown in several existing statutes of international courts that refer to “equitable geographical representation” or “distribution” for the selection of adjudicators.⁴⁰ Issues for consideration would include whether a standing adjudicative body should achieve a balance of representation between developed, developing and least developed countries,⁴¹ as well as between capital exporting and capital-importing countries.⁴²

48. 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.⁴³ 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”.⁴⁴

⁴⁰ See, for example, Rome Statute of the International Criminal Court, 1 July 2002, Article 36(8)(a) (“The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: [...] (ii) Equitable geographical representation [...]”); See also Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Article 17(3), third sentence (“The Appellate Body membership shall be broadly representative of membership in the WTO”). See also ITLOS Statute, Arts. 2(2) and 3(2), which requires that “[i]n the Tribunal as a whole [...] equitable geographical distribution shall be assured” and that “[t]here shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations”.

⁴¹ At the WTO, developing countries may request that panels deciding disputes between developed and developing countries include panellists from developing countries (see Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Art. 8(10), providing that: “When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panellist from a developing country Member”).

⁴² Although there is no reference in the ICSID Convention to such criterion among those that are to be taken into account by the Chairman in his or her selection of the members of the Panels of Conciliation and Arbitration, during the preparatory works of the Convention the Chairman’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.

⁴³ See, for example, the ICJ Statute, Article 9 (“At every election, the electors shall bear in mind [...] that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured”); ITLOS, Article 2(2) (“In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured”); Rome Statute of the International Criminal Court, 1 July 2002, Article 36(8)(a) (“The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world [...]”); Protocol on the African Court, Article 14(2) (“representation of the main regions of Africa and of their principal legal traditions”); 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) (“The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity”).

⁴⁴ Protocol on the African Court, Art. 12(2).

(iii) *Selection and nomination models*

49. In certain courts and tribunals, members are appointed directly by the treaty Parties, either unilaterally⁴⁵ or through a joint committee,⁴⁶ without any prior formal nomination process. By contrast, a nomination phase does exist in other courts and tribunals, such as the ECHR, ICJ, or ITLOS.⁴⁷

50. There are various options for the selection and nomination of adjudicators. A first option would be that each treaty Party puts forward one or more nominees.⁴⁸ As a second option, nominations may be carried out by a nominating entity.⁴⁹ A third possibility would be to allow any interested individual with the necessary qualification requirements to put forward her or his own candidature for review by an appointing entity or a screening panel. This last possibility would avoid any involvement of the treaty Parties or other entities.

51. The phase could include consultations in the selection of adjudicators, which are usual in international courts and tribunals.⁵⁰ Providing for a consultation mechanism for the selection of adjudicators in a permanent body allow possible involvement of investors. In this respect, consultations of business associations (e.g. chambers of commerce) or industry-specific associations could be envisaged. Consultations may also extend beyond these groups, to hear the views of other stakeholders who may have an interest in the interpretation and application of investment treaties and the outcomes of possible disputes. One may also envisage a consultation of arbitral institutions, as they have valuable insight into the performance of decision-makers, and of professional associations in the field of international law and international dispute settlement. Usually, consultations with stakeholders are useful to strengthen a broader acceptance of the dispute resolution mechanism and thus foster its ultimate credibility and legitimacy.⁵¹

52. The procedure for selection of adjudicators may also include a “screening” phase, along the models provided in a number of international courts and tribunals.⁵²

⁴⁵ See e.g. Claims Settlement Declaration, Art. III (1) (whereby the contracting parties each appoint directly one third of the tribunal’s members).

⁴⁶ See e.g. CETA, Art. 8.27.2 (“The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries.”); EU-Vietnam FTA, Art. 12(2) (“[T]he Trade Committee shall, upon the entry into force of this Agreement, appoint nine Members of the Tribunal [established pursuant to Art. 12.1]. Three of the Members shall be nationals of a Member State of the European Union, three shall be nationals of Vietnam and three shall be nationals of third countries”).

⁴⁷ See *Selection and Appointment in International Adjudication: Insights from Political Science*, Olof Larsson, Theresa Squatrito, Øyvind Stiansen, and Taylor St John.

⁴⁸ See, for example, the ITLOS Statute, Article 4(1) “Each State Party may nominate not more than two persons having the qualifications prescribed in article 2 of this Annex. The members of the Tribunal shall be elected from the list of persons thus nominated” (ITLOS Statute,). Nominations are also put forward by treaty parties for the election of judges at the CJEU (TFEU, Arts. 253–255), the ECtHR, (Art. 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”); the African Court, (Protocol on the African Court, Art. 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”) and the Arab Investment Court (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, Art. 28(2)).

⁴⁹ See ICJ Statute, Art. 4(1).

⁵⁰ See for instance, Article 6 of the ICJ Statutes; See also the guidelines enacted by the African Union for the election of judges of the African Court which recommend that “State Parties should encourage the participation of civil society, including Judicial and other State bodies, bar associations, academic and human rights organizations and women’s groups, in the process of selection of nominees” (see Commission of the African Union, Note Verbale, Reference BC/OLC/66.5/8/Vol. V (5 April 2004), para. 5).

⁵¹ CIDS Supplemental Report, paras. 126–134.

⁵² At the ICC, for instance, States parties to the Court have made use of the possibility envisaged in the Rome Statute (Art. 36(4)(c)) to establish an “Advisory Committee on nomination” of judges.

During such phase, a screening or advisory panel would review candidacies proposed by the nominating entities (normally the treaty parties) and ascertain that candidates fulfil the applicable requirements, such as professional qualifications, expertise or language. The presence of expert screening mechanisms by independent bodies may contribute to a rigorous, transparent, and meritocratic selection.⁵³

(iv) *Appointment to permanent adjudicative body*

53. Adjudicators of the permanent body would then need to be appointed. Appointment is usually done by electoral bodies normally composed of State government representatives, acting in bodies such as the United Nations General Assembly and Security Council (for election of judges at the ICJ and the International Criminal Tribunal for the Former Yugoslavia (ICTY)),⁵⁴ or other bodies constituted under specific treaty regimes, such as the WTO Dispute Settlement Body (for appointment of AB members),⁵⁵ or an assembly (ICC; IACHR; African Court),⁵⁶ meeting (ITLOS),⁵⁷ or joint committee (CETA, EU-Vietnam)⁵⁸ of State Parties.

(v) *Individual criteria and term of office*

54. The relevant criteria for adjudicators would include “independence” and “impartiality”,⁵⁹ linguistic competence,⁶⁰ and personal integrity/reputation,⁶¹ as well

See also Council of Europe (2010), *Establishment of an Advisory Panel of Experts on Candidates for Election as Judges to the European Court of Human Rights*, 10 November 2010, Committee of Ministers, CM/Res(2010)26, Art. 5 (setting up an advisory panel tasked with giving an opinion on candidates nominated by the Contracting States for the ECtHR); TFEU, Arts. 253–255 (providing that judges of the Court of Justice and the General Court “shall be appointed by common accord of the governments of the Member States [...], after consultation of the panel provided for in Article 255”).

⁵³ See Supplemental CIDS Report, paras. 135–155.

⁵⁴ ICJ Statute, Art. 8, which provides that: “the General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court” (); ICTY Statute, Art. 13 bis, chapeau, which provides that: “the permanent judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council”.

⁵⁵ See Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 15 April 1994, Article 17 (1) and (2).

⁵⁶ See Rome Statute, Art. 6(a) (Assembly of States Parties); the American Convention on Human Rights, 21 November 1969 (with respect to the Court), Article 53 (“The judges of the Court shall be elected by an absolute majority vote of the State Parties to the Convention, in the General Assembly of the Organization”); Protocol on the African Court, Article 14 (“The Judges of the Court shall be elected by [the Assembly of Heads of State and Government of the OAU]”).

⁵⁷ ITLOS Statute, Article 4(4) (“[...] Elections shall be held at a meeting of the States Parties convened by the Secretary-General of the United Nations in the case of the first election and by a procedure agreed to by the States Parties in the case of subsequent elections. [...]”).

⁵⁸ Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), Article 8.27(2) (“The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal”); EU-Vietnam Free Trade Agreement (FTA), Article 12(2) (“Pursuant to Article 34(2)(a), the Trade Committee shall, upon the entry into force of this Agreement, appoint nine Members of the Tribunal [...]”).

⁵⁹ Article 2 of the ICJ Statute, for instance, provides that: “The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.”

⁶⁰ For instance, Rome Statute of the International Criminal Court, 1 July 2002, Article 36(3)(c); such requirements may also be inferred from provisions on the working languages of the court: see for example, ICJ Statute, Article 39; ITLOS Rules of the Tribunal, 28 October 1997, Article 43.

⁶¹ See ICJ Statute, Article 2 (“persons of high moral character”); ECHR, Article 21(1) (“judges shall be of high moral character”); ITLOS Statute, Article 2(1) (“persons enjoying the highest reputation for fairness and integrity”); ACHR, Art. 52(1) and IACHR Statute, Article 4(1) (“jurists of the highest moral authority”); African Charter on Human and Peoples’ Rights, Article 31(1) (“personalities of the highest reputation, known for their high morality, integrity, impartiality”); ICTY Statute, Article 13 (“persons of high moral character, impartiality and

as experience and expertise. They may also include nationality of a contracting State.⁶²

55. Certain conditions of office are usually seen as contributing to the independence and integrity of the process, such as long, non-renewable terms of offices, financial security, limitations on other professional activities and immunities. Structural independence should be ensured in light precisely of the permanence of the institution.⁶³

Phase 2 – Assignment of a case to adjudicators

56. The method to assign cases to individual members is another factor promoting independence if it is properly designed. In a Submission on this reform option, it is suggested that adjudicators would be appointed to divisions of the standing mechanism on a randomized basis to a certain extent to ensure that the disputing parties would not be in a position to know in advance who will hear their case.⁶⁴

57. In a standing tribunal model, disputing parties have no power to influence the composition of the chambers (subject only to their right to challenge a member for lack of impartiality/independence which should always exist), and a different method must thus be devised to assign disputes to a chamber. Clear, pre-defined methods for assigning cases seek to avoid assigning disputes to any 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. Different models for assigning cases can be found in international courts.⁶⁵

(c) Impact on identified issues

58. Establishing a standing adjudicative mechanism would entail the transition from a disputing party framework to a treaty or contracting Party framework, and thus disputing parties would lose control on the selection of adjudicators: the respondent State might retain a diluted control over the appointment of the judges, however, disputing parties would have no control on the composition of panels to hear a particular case.

59. A standing adjudicative mechanism would come very close to an international court system, where the issues identified by the Working Group are generally addressed through strict rules on the selection and appointment of adjudicators. The shift to a permanent system would imply a more structured selection process, where more diversity could also be required.⁶⁶ The methods for selecting members would

integrity”); Rome Statute, Article 36(3)(a) (“persons of high moral character, impartiality and integrity”); ICSID Convention, Article 14(1) (“persons of high moral character”).

⁶² Statutes of certain courts and tribunal require their members to be nationals of a contracting Party. See, for example, the Court of Justice of the Cartagena Agreement, established under the Treaty Creating the Court of Justice of the Cartagena Agreement, which “shall be composed of five justices who shall be nationals of the member countries [...]” (Treaty Creating the Court of Justice of the Cartagena Agreement, 28 May 1979, Article 7); See also American Convention on Human Rights, 21 November 1969 (ACHR), Article 52(1) (“The Court shall consist of seven judges, nationals of the member states of the Organization [...]”); Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), Article 8.27.2 (“Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada [...]”).

⁶³ See Supplemental CIDS Report, at paras. 68–104.

⁶⁴ A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States, para. 24.

⁶⁵ See Supplemental CIDS Report, at paras. 183–198.

⁶⁶ The possible pressure for diversity can manifest itself both at the stage of institutional design, i.e. when States have to consider whether to insert diversity requirements in the constitutive instrument of the dispute settlement body, and at the stage of selecting the adjudicators. For an example of the former, see the efforts of women right NGOs campaigning in favour of gender representation requirements during the negotiation of the Rome Statute. See CIDS Supplemental Report, fn. 104.

also largely alleviate the current concerns about “repeat appointments” of one individual by a disputing party or counsel.

60. In the submission from the regional economic integration organization and its Member States that presents this reform option, it is indicated that such approach would solve various interconnected issues as, for instance, “the concern as regards the costs of the system is linked to the concern as regards the lack of predictability which is in turn linked to the concerns with the methods of arbitrator appointments which is in turn linked to the concerns with arbitrators’ independence and impartiality”.⁶⁷ It is also foreseeable that this reform option would impact questions of consistency and predictability of decisions by ISDS tribunals.⁶⁸

C. Remarks on implementation of reform options

61. In submissions from Governments, it is suggested to implement reform options following the model of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.⁶⁹ It is considered in this submission that the model offers a large degree of flexibility on the implementation of various reform options in parallel. A similar mechanism is also established by the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (also known as the “Mauritius Convention on Transparency”).

62. The Working Group may wish to note that the reform options may require different instruments for their implementation. For instance, the establishment of a roster may require an amendment to arbitration rules (as suggested in a submission from a Government),⁷⁰ as well as close cooperation with institutions handling ISDS cases. The establishment of a standing mechanism or body would require the preparation of statutes to determine the modalities of selection, nomination and functioning of tribunal.⁷¹ Both options would require the preparation of an opt-in convention for their application to existing investment treaties, as suggested in the submissions referred to above (see para. 61).⁷²

⁶⁷ A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States, para. 10.

⁶⁸ See *The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement*, Malcolm Langford, Daniel Behn and Mariachiara Malaguti, which evaluates and partly predicts the effect of institutional reform models.

⁶⁹ A/CN.9/WG.III/WP.173, Submission from the Government of Colombia; A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador.

⁷⁰ A/CN.9/WG.III/WP.161, Submission from the Government of Thailand.

⁷¹ A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States

⁷² The proposal for an opt-in convention has also been analysed in the CIDS research paper on whether the Mauritius Convention can serve as a model for further reforms. See 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”, 3 June 2016, Section VII, pp. 75–93, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_research_paper_mauritius.pdf