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Analyses of the European Union and its member states' proposals on reforming the ISDS system under the UNCITRAL working group III

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The European Union and its member states back the formation of a permanent investment tribunal and a Committee of the Parties that would handle different tasks, including the selection of adjudicators. According to the European Union and its member states, the members of the investment tribunal should work on a full-time basis, and the selection criteria should prioritize the most qualified and unbiased individuals, regardless of their nationality. To expand the pool of potential adjudicators and promote diversity, they suggest adopting the entire language of Article 2 of the ICJ Statute for the qualifications requirements. The European Union and its member states do not support the idea of tribunal members being appointed by States that do not recognize the tribunal's authority.

This paper delves into the European Union and its member States' positions on certain fundamental issues related to ISDS reform, along with a comprehensive analysis of varying positions held by other stakeholders, including some members of UNCITRAL working group III who share similar viewpoints with the European Union and its member states on some matters and have differing opinions on others.

Keywords: ISDS, Reform, the European Union, UNCITRAL working group III

1. Introduction

The United Nations Commission on International Trade Law (UNCITRAL) Working Group III (hereinafter the WGIII) was given a broad authority to work on the possible reform of investor-state dispute settlement (hereinafter ISDS) in 2017. The WGIII identified concerns regarding ISDS and found reform desirable. From its thirty-eighth to forty-third session, the WGIII discussed potential solutions for ISDS reform. The European Union and its member States were among the participants in these discussions (UNCITRAL, 2023).

The WGIII has been considering the selection and appointment of tribunal members for a standing multilateral mechanism. At its fortieth session, the WGIII requested the Secretariat to develop draft provisions on this matter, as well as on the establishment and functioning of the mechanism (UNCITRAL, 2023). At its fifty-fifth session in 2022, expressing satisfaction with the progress made by the WGIII, the Commission encouraged the WGIII to submit a code of conduct with commentary and texts on alternative dispute resolution mechanisms for consideration (UNCITRAL, 2023). Moreover, in different sessions, the WGIII discussed the possibility of establishing an appellate mechanism for investor-state dispute settlement (ISDS) based on various documents, including A/CN.9/WG.III/WP.185, A/CN.9/WG.III/WP.202, and A/CN.9/WG.III/WP.224. The Working Group recognized that there was a general interest in having an appeal mechanism, as it could

improve the coherence, consistency, and predictability of decisions made in ISDS proceedings. However, concerns were also raised about the additional costs and time that an appellate mechanism could entail for disputing parties (Waihenya, 2021). The Working Group also examined the experience of the WTO Appellate Body and raised questions about the financing of an appellate mechanism and the risk of further fragmentation (Muigua, 2021). The European Union and its member States participated in the discussions and expressed their positions (UNCITRAL, 2022a).

The establishment of a standing multilateral mechanism would require the preparation of a statute and rules or regulations, and various models could be considered for preparing the latter (Ngotho, 2021). The draft provisions related to "standing multilateral mechanism: selection and appointment of ISDS tribunal members and related matters" (UNCITRAL, 2021b) would need to be adjusted and completed to form part of such framework. Moreover, there are differences related to some of the key issues that are under consideration. Despite these differences, UNCITRAL Working Group III has made progress on developing a multilateral reform of ISDS, including the establishment of a code of conduct for arbitrators and the development of a framework for the selection of arbitrators. The Working Group is expected to continue its work in the coming years.

The European Union and its member states have been playing an active role in the WGIII discussions on ISDS reform, pushing for measures to enhance the accountability, transparency, and predictability of the ISDS system (Víg–Hajdu, 2020). The main position they have taken is that full-time, qualified, and independent individuals should make up the tribunal, regardless of their nationality, as opposed to the practice of some countries of nominating party-appointed arbitrators, which raises questions about impartiality and independence (European Commission, 2019). They have embraced this position due to several underlying factors. Among these, the presence of tensions arising from an uncoordinated investment policy between the EU's internal and external actions, coupled with the reluctance of EU Member States to release their investment agreements, has played a pivotal role in shaping this development. Above all, the paramount concern is to uphold the "autonomy of the EU legal framework," the ability to regulate public policy objectives, and the avoidance of jurisdictional conflicts (Finckenberg-Broman, 2022).

Although the European Union and its member states are actively involved in the WGIII and support ISDS reform, they have different positions than other stakeholders on some issues (Guillaume, 2023). Specifically, during discussions on the establishment of an appellate mechanism, the European Union and its member states expressed general interest in the idea but raised concerns about the additional costs and time that disputing parties would incur. They also highlighted the potential precedential effect of appellate decisions, which could impact similar provisions in other treaties and affect the control of states over the interpretation of investment treaties, particularly for those that did not participate in the appellate mechanism. Overall, the European Union and its member states have played an active role in the discussions of the WGIII, where they have been advocating for ISDS reforms aimed at enhancing transparency, accountability, and predictability (European Parliament, 2020).

In this paper, the author analyzes the works of the WGIII on standing multilateral mechanism and evaluate the positions of different stakeholders including the European Union and its member States. The author intends to employ the legal analysis methodology to examine the issues at hand.

2. The establishment of an investment tribunal and committee of the parties

The WGIII must take into account fundamental issues regarding the creation of a multilateral investment tribunal and its governing system. The draft provisions 1 to 3 related to "standing multilateral mechanism: selection and appointment of ISDS tribunal members and related matters" provide a basic structure for establishing the tribunal and governance, there are other matters that the WGIII must address in the future (UNCITRAL, 2021b). The draft provisions 1 to 3 read as follows:

> "Draft provision 1 – Establishment of the Tribunal
> A Multilateral Investment Tribunal is hereby established […] It shall function on a permanent basis.
> Draft provision 2 – Jurisdiction
> The Tribunal shall exercise jurisdiction over any dispute arising out of an investment […], which the parties consent to submit to the Tribunal.
> Draft provision 3 – Governance structure
> 1. There shall be a committee of the Parties composed of representatives of all the Parties to this Agreement establishing the Tribunal...
> 2. The Committee of the Parties […] establish its own rules of procedure and adopt or modify the rules of procedure for the first instance and the appellate level, [the Advisory Centre], and the Secretariat.
> 3. The Tribunal shall determine the relevant rules for carrying out its functions. In particular it shall lay down regulations necessary for its routine functioning." (UNCITRAL, 2021b; 3)."

Draft provision 1 establishes the tribunal as a permanent institution, while draft provision 2 specifies that it will exercise jurisdiction over any investment dispute between contracting states and nationals of other contracting states, subject to consent. Future investment treaties could contain provisions related to consenting to the jurisdiction of the multilateral investment tribunal. The WGIII could also explore incorporating a mechanism in the multilateral instrument on ISDS reform that would facilitate the inclusion of consent-related provisions related to the tribunal in current investment treaties. The Committee of the Parties, composed of representatives of all parties to the agreement, is introduced in draft provision 3 as the governing body responsible for carrying out various functions, including establishing rules of procedure for the tribunal. The tribunal itself will develop rules for its routine functioning. The provisions may be further clarified in future investment treaties, and

the term "parties" may refer to either states or disputing parties depending on the situation (UNCITRAL, 2021b).

The WGIII needs to work on the matters associated with the procedural framework of a permanent multilateral body. Although the agreement creating the tribunal could set out general procedural rules, the group should also consider whether detailed procedures should be defined in secondary legislation. This secondary legislation could be developed and amended by the Committee of the Parties and, when necessary, the tribunal itself. By defining procedures in secondary legislation, it will allow for future modifications and updates to the procedural rules. This method would be similar to other international organizations such as the ICJ, ITLOS, and ECHR (UNCITRAL, 2021b).

The European Union (EU) and its member states as active participants in UNCITRAL Working Group III on Investor-State Dispute Settlement (ISDS) Reform, have been working on developing a multilateral reform of ISDS. The EU has been advocating for the establishment of a multilateral investment court, which would replace the existing ISDS system with a permanent court to resolve investment disputes (European Commission, 2019). In March 2020, the EU and its member states submitted a joint paper to UNCITRAL Working Group III outlining their proposal for a multilateral investment court. The paper emphasized the need for a court system that is independent, impartial, and of high quality, and suggested several mechanisms to enhance the accountability and transparency of the court. The EU and its member states have argued that a multilateral investment court would provide greater transparency, accountability, and consistency in resolving investment disputes, and would also address some of the concerns raised by civil society groups and trade unions regarding the potential for ISDS to undermine the ability of governments to regulate in the public interest (European Parliament, 2020).

The European Union and its Member States have expressed their preference for a modified version of provision 2. They prefer covering state-state disputes (UNCITRAL, 2021c). This might be a unique and useful innovation to the investment-related arbitration. Several countries are not interested in an investor-state dispute settlement system. This might create an acceptable option for them to mitigate their dispute through state-state dispute settlement system.

Moreover, the EU suggested avoiding the term "investment" to prevent probable double "investment test" under the relevant agreements. They maintain that the focus should be on the element of consent to jurisdiction, regardless of the type of consent instrument used (UNCITRAL, 2021c). They propose the following text for provision 2:

> "The Tribunal shall exercise jurisdiction over any dispute which the parties have consented to submit to the Tribunal." (UNCITRAL 2021c:4)."

Regarding draft provision 3, The EU and its member states support the creation of a Committee of the Parties and suggest that decisions should be made by qualified majority, e.g. the specific nature of a decision may determine the required majority, which could be a 3/4 majority or distinct majority (UNCITRAL, 2021c).

Canada also supported the proposal for a governance structure composed of a Committee of the Contracting Parties but suggested further guidance on its role and relationship with the Tribunal (UNCITRAL, 2021d). Colombia thinks that the decision-making process should strike a balance between requiring consensus for critical matters and allowing for decisions to be made by a simple majority vote for less significant issues (UNCITRAL, 2021e). The author is of the view that requiring consensus should be avoided as it created difficulties in the WTO system, rather two-third majority should be required for critical matters and simple majority on others. Moreover, regarding the selection of arbitrators, simple majority should be the decider to fasten the process.

3. The selection and appointment of members of the tribunal

3.1. Selective representation and number of tribunal members

3.1.1. Number *of tribunal members and adjustments*

The WGIII has expressed a preference for selective representation on the international investment tribunal, instead of having a full representation. This is because a high number of members could be expensive and complex to manage. The approach they suggest is to have a broad geographical representation and a balance of genders, levels of development, and legal systems. The agreement establishing the tribunal should be flexible enough to adjust the number of tribunal members as the number of participating states and caseload changes over time. To ensure balanced representation over time, draft provision 8 will address the necessary considerations. Draft provision 4 reads as follows:

> "1. The Tribunal shall be composed of a body of [--] independent members in [full][part] time office, [elected regardless of their nationality][nationals of Parties to this Agreement, elected] [...]
> 2. Option 1: The number of members of the Tribunal may be amended by a [two-thirds] majority of the representatives in the Committee of the Parties[.]
> Variant 1:[, based on the case load of the Tribunal as follows: (to be completed)]
> Variant 2: [, based on the increase or decrease of the Parties to this Agreement, as follows: (to be completed)]
> Variant 3: [, based on the evolution of case load and of the Parties to this Agreement, as follows: (to be completed)
> Option 2: The Presidency of the Committee of the Parties, […] may propose an increase in the number of members of the Tribunal indicated in paragraph 1, [...] The number of members of the Tribunal may then be amended by a [two-thirds] majority of the representatives in the Committee of the Parties.
> 3. No two members of the Tribunal shall be nationals of the same State [...]" (UNCITRAL, 2021b: 5)"

The question of whether tribunal members should work full-time or part-time depends on the number of members and the tribunal's workload. If there are many members to increase diversity, part-time employment may be considered, which could require rules prohibiting parallel activities.

Paragraph 2 addresses the matter of adjusting the number of tribunal members over time. The Working Group recommends determining the number of members based on a projected caseload, and then making changes as the number of States parties changes. If there is a two-tier mechanism, it is anticipated that fewer cases will be heard in the second tier, and thus fewer tribunal members may be required there than in the first tier. Paragraph 2 presents two alternatives for modifying the number of tribunal members. The first option entails having fewer members that correspond to the projected caseload, with the possibility of adjusting the number as needed. The second option involves having a greater number of members, including some who may work part-time, in order to promote greater diversity (UNCITRAL, 2021b).

In paragraph 3, it is suggested that the Working Group should deliberate on whether nationality should be a factor in determining the makeup of the tribunal. Additionally, the possibility of implementing a provision that would prohibit two tribunal members from sharing the same nationality is suggested. This provision is reminiscent of some court statutes that permit the selection of judges without regard to nationality but prohibit two judges from the same state from serving simultaneously. If the composition of the tribunal were to be influenced by nationality, it could be guaranteed that each member State has the chance to have one of its own nationals appointed to the tribunal by instituting a system of rotation among the member States (UNCITRAL, 2021b).

According to the European Union and its Member States, the impartiality and independence of tribunal members can only be ensured through full-time employment (UNCITRAL, 2021c). Canada also supports appointment on a full-time basis (UNCITRAL, 2021d). However, according to the EU, they may allow part-time employment as a transitional measure initially. The adjudicators' nationality is not a determining factor; instead, their competence and independence should be the primary consideration, following the ICJ Statute's Article 2. The qualifications required for the highest judicial positions in their respective countries and expertise in international law should both be considered when selecting potential adjudicators, expanding the pool and enhancing diversity (UNCITRAL, 2021c). On the other hand, Colombia suggested that the parties without a representative judge in the Tribunal may be able to appoint an ad hoc judge in cases where they are involved in order to ensure that all parties' legal systems are comprehended. However, the EU do not support appointing ad hoc judges (UNCITRAL, 2021e). The author is of the view that tribunal members should be primarily full-time employed based on geographical diversity.

The European Union and its Member States recommend selecting option 2 due to its clear procedural framework, and variant 3 of option 1 regarding its substance. As a result, they propose the following provision:

> "2. The Presidency of the Committee of the Parties, acting on behalf of the Tribunal, may propose an amendment in the number of

> members of the Tribunal indicated in paragraph 1 based on the evolution of case load and of the Parties to this Agreement, giving the reasons why this is considered necessary and appropriate. The Secretariat shall promptly circulate any such proposal to all Parties. The number of members of the Tribunal may then be amended by a [two-thirds] majority of the representatives in the Committee of the Parties" (UNCITRAL 2021c:8)."

The European Union and its Member States have concerns that the provision outlined in paragraph 3 of the draft provision may be inflexible if there is a need to adjust the number of adjudicators, such as due to an increase in caseload or the need for additional adjudicators (UNCITRAL, 2021c).

3.1.2. Ad hoc tribunal members

Draft provision 5 addresses the need to propose options for the participation of ad hoc tribunal members with some flexibility in forming chambers for specific cases with parties' consent. This flexibility is present in the statutes of international courts, for instance, the International Court of Justice. Different methods for appointing ad hoc tribunal members are also suggested, including direct appointment by parties or selection from a defined roster (UNCITRAL, 2021b). The draft provision 5 reads as follows:

> "1. The parties to a dispute may choose a person to sit as Tribunal member, […] composed of three or more members as the Tribunal may determine, for dealing with particular categories of cases in accordance with article (--); for example, (to be completed).
> 2. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in article 6." (UNCITRAL 2021b:5).

It is important to note that the WGIII needs to consider whether to retain paragraph 2 and should note that the ad hoc judge system may have disadvantages in the inter-State context, and it may not be suitable for the investor-State context. Draft provision 5 brings up the matter of nationality, and it is important to note that in some court statutes, a State involved in a case can appoint an ad hoc judge, even if they do not have a judge of their own nationality on the tribunal. An ad hoc judge can be chosen from any country, and they are usually not a national of the State that appoints them (UNCITRAL, 2021b).

The Working Group could explore the possibility of involving a less senior person in the ISDS tribunal or as an observer to promote competence and inclusivity over time. However, as this role is not currently provided for in existing mechanisms, it would need to be created specifically for this purpose.

The European Union and its Member States hold reservations about the appointment of ad hoc judges and are considering alternative options to ensure that adjudicators have a comprehensive understanding of respondents' legal systems.

These alternatives include appointing experts and translators, as well as gathering evidence on domestic law's interpretation. In addition, legal counsel representing the case could provide further assurance in this regard. The appointment of ad hoc judges raises several concerns as research indicates that such judges, like those in the ICJ and IACtHR, often favor the state that appointed them. This similarity to party-appointed arbitrators in ISDS has been noted in Larsson et al. (2022:8-9). Moreover, enabling only the host state to appoint an ad hoc adjudicator may raise concerns about due process. This may prompt the investor to also request the appointment of an ad hoc adjudicator, resulting in the presence of two ad hoc adjudicators alongside the permanent body. This would be counterproductive and could compromise the permanent body's efforts to establish consistency, predictability, and legitimacy. Ad hoc adjudicators are more prone to ethical issues than permanently appointed adjudicators (UNCITRAL, 2021c). However, Colombia suggested appointment of ad hoc judges to ensure that the laws and legal system are understood (UNCITRAL, 2021e).

3.2. Nomination, selection and appointment of candidates

3.2.1. Nomination of candidates

The Working Group has emphasized that the appointment methods of tribunal members in ISDS should prioritize fairness, quality, transparency, neutrality, accountability, and high ethical standards. The diversity in gender, geographic, linguistic, and legal systems is essential in the ISDS system, as it can ensure a more balanced decision-making process and enhance the quality of justice. The Working Group has highlighted that lack of diversity can threaten the legitimacy of the ISDS regime.

To prioritize expertise and integrity over political considerations in ISDS tribunal member appointments, the Working Group recommended a multi-layered, transparent, and stakeholder-inclusive selection process. They suggested that selection panels and consultative committees should conduct candidate screenings before the appointment is made by the States Parties to the agreement establishing the tribunal.

The Working Group should take note that draft provisions 6 to 8 propose the common method of selecting tribunal members by an intergovernmental body from a list of nominated candidates. The group should explore if draft provision 8, which proposes seat allocation to geographically defined groups of States, can create a selective representation tribunal that ensures fair regional and legal system representation. This approach may be an effective means of achieving representation in the tribunal.

To avoid the selection process from becoming blocked, it is preferred to conduct elections through voting rather than consensus. States can cast their vote for multiple candidates to ensure diversity and balance. Generally, a qualified majority rule is applied to ensure that the appointed tribunal members are acceptable to most States. If no qualified majority is reached, less demanding majorities are often provided to avoid a deadlock in the election. Some courts use a system where tribunal members are chosen by treaty parties or a collective body of States, even if the

membership is greater than the group of States that accept the court's jurisdiction (UNCITRAL, 2021b). The draft provision 6 reads as follows:

> "Option 1:
> 1. Nomination of candidates for election to the Tribunal may be made by any Party to the Agreement establishing the Tribunal. […] The Tribunal members shall be elected from the list of persons thus nominated.
> 2. Before making these nominations, each Party shall encourage the participation of, and is recommended to consult […] in the process of selection of nominees.
> Option 2:
> Any person who possesses the qualifications required under article 4, paragraph 1 may apply to the selection process following an open call for candidacies to be issued in accordance with a decision of the Committee of the Parties." (UNCITRAL, 2021b:9)"

Option 1 for choosing tribunal members involves the Parties nominating individuals, like in some courts. However, this approach has been criticized for its uneven national processes, lack of transparency in selecting candidates, and political influence in nominations. The WGIII thinks that this option might ensure gender balance in the makeup of the tribunal. Under this option each party would be asked to propose submit two nominations. Option 2 proposes to remove the nomination process from the parties. Instead, it suggests self-nomination by any eligible individual after an open call. However, it is necessary to have a separate body for screening and filtering candidates to ensure fairness of the selection process (UNCITRAL, 2021b).

The European Union and its Member States oppose the selection of tribunal members by states that do not accept the tribunal's jurisdiction. Such a scenario could cause issues if those states were allowed to influence the tribunal's operations (UNCITRAL, 2021c). Canada is also has similar views (UNCITRAL, 2021d). The author is of the view that all states should be given power to participate in all of the matters as the system will likely influence all and the stakeholders will ensure that their positions are counted through the process.

The European Union and its Member States advocate for a robust nomination and appointment system that prioritizes qualified and independent candidates and ensures diversity in geography and gender. Their proposal involves a combination of open calls for direct applications and a transparent nomination process that involves stakeholders. This approach combines the first two options of draft provision 6. Direct application appointments would prevent political nominations. To ensure gender balance in the tribunal's composition, the EU suggests each party should nominate more than just one or two candidates (UNCITRAL, 2021c).

3.2.2. Selection process

The guidelines for the use of selection panels or committees in the appointment process is provided in the draft provision 7. The provision outlines the establishment and function of a selection panel based on a submission received (A/CN.9/1050, para. 33). It is noteworthy that some international courts have utilized screening committees, consultative appointment committees, and appointment committees (A/CN.9/1004/Add.1, para. 118) (UNCITRAL, 2021b). The draft provision 7 reads as follows:

> "Draft provision 7 - Selection Panel
> a. Mandate
> A selection panel (hereinafter referred to as "Panel") is hereby established. Its function is to give an opinion on whether the candidates meet the eligibility criteria stipulated in this Agreement…
> b. Composition
> 1. The Panel shall comprise [five] persons chosen from among former members of the Tribunal, current or former members of international or national supreme courts and lawyers or academics of high standing and recognised competence. […] The composition of the Panel shall reflect in a balanced manner the geographical diversity, gender and [the different legal systems of the Parties] [the regional groups referred to in article 8].
> 2. The members of the Panel shall be appointed by the Committee of the Parties by [qualified][simple] majority from applications [submitted by a Party][received through the open call referred to in paragraph 3].
> 3. Vacancies for members of the Panel shall be advertised through an open call for applications published by the Tribunal.
> 4. Applicants shall disclose any circumstances that could give rise to a conflict of interest...
> 5. Members of the Panel shall not participate as candidates in any selection procedure to become members of the Tribunal during their membership of the panel and for a period of three years thereafter.
> 6. The composition of the Panel shall be made public by the Tribunal.
> […]
> f. Tasks
> 1. The Panel shall act at the request of the secretariat, once candidates have been nominated by the Parties pursuant to article 6, paragraph 1 or have applied pursuant to article 6, paragraph 2.
> 2. The Panel shall: (i) review the nominations or applications received […] (ii) verify that the candidates meet the requirements for appointment as members of the Tribunal; […] and, on that basis, establish a list of candidates meeting the requirements.
> 3. The Panel shall complete its work in a timely fashion.

> 4. The chair of the Panel may present the opinion of the Panel to the Committee of the Parties.
> 5. The list of candidates meeting the requirements shall be made public.
> 6. The Panel shall publish regular reports of its activities." (UNCITRAL, 2021b:10).

Screening committees evaluate potential tribunal members before their selection to confirm their qualifications, expertise, and eligibility. They are responsible for eliminating candidates who do not meet the requirements, resulting in the appointment of more qualified and independent tribunal members, even if the States are responsible for appointing them. Generally, screening committees do not consult with non-state entities (UNCITRAL, 2021b).

The European Union and its member states strongly advocate for a screening process to select qualified and independent adjudicators to prevent the politicization of state nominations. The selection panel should consist of independent individuals, including former tribunal judges, current or former members of supreme courts, and highly competent lawyers or academics who can apply directly through an open call. The panel's independence should be ensured by an external entity, like the President of the International Court of Justice, who confirms that the members meet necessary requirements. The committee of the parties must guarantee geographical diversity, gender balance, and different legal systems when appointing members to the selection panel. The panel's appointment should be by a qualified majority to prevent politicization but should remain independent from the committee. The panel must screen all candidacies to ensure only vetted and approved adjudicators are appointed. The author is of the view that chairman of the committee of parties should oversee the activities of the panel and handing responsibility to other international body will complicate the matter (UNCITRAL, 2021c).

3.2.3. Appointment process

The appointment process is provided in the draft provision 8, which reads as follows:

> "Draft provision 8 - Appointment (election)
> 1. The Panel shall publish the names of the candidates who are eligible for election […] based on the nationality of the country which nominated them for the election: Asia, Africa, Latin America and the Caribbean, Western Europe and others, and Eastern Europe.
> 2. The Panel shall recommend [--]members to serve on the appellate level of the Tribunal based on the extensive adjudicatory experience of such candidates.
> 3. The Members of a particular regional group in the Committee of the Parties will vote on the candidates eligible for election from their regional […]

> 4. The Committee of the Parties shall only appoint members of the first instance and appellate level Tribunal […]
> 5. At every election, the Committee of the Parties shall ensure the representation of the principal legal systems of the world, and equitable geographical distribution as well as equal gender representation in the Tribunal as a whole.
> 6. The members shall elect a President of the Tribunal by a confidential internal voting procedure with each member having one vote. The President shall be elected for a term of three years with the possibility of one re-election." (UNCITRAL, 2021b:12)"

Paragraph 1 outlines a strategy for promoting diversity in the selection of tribunal. The proposition is that each regional group would exclusively vote for their regional candidates to appointment the candidates against their regional quota but not for the candidates from other regions (UNCITRAL, 2021b).

The WGIII should clarify the election or allocation of tribunal members to the first-instance and appellate level. If necessary, the WGIII can choose from three options: (i) establish a common pool of nominees who are qualified for both levels and hold a single election, (ii) conduct a separate election for the first-instance and appellate members, or (iii) have the Committee of the Parties elect all judges without distinction, and then let the tribunal organize itself based on the recommendation of the selection panel into first-tier and appellate levels.

The European Union and its Member States support the goal of achieving equitable geographical and gender representation in the tribunal. However, they suggest that the specific details regarding this matter, such as formulas, should be determined by the Committee of the Parties rather than included in the statute, allowing for more flexibility. They also propose separate tracks for nomination, selection, and appointment of members for the first instance and appellate level, with the committee deciding on appointments for each level through separate elections. In addition, they suggest that the qualification criteria for appellate-level adjudicators should be expanded beyond adjudicatory experience to include seniority in other relevant areas (UNCITRAL, 2021c). Finally, they recommend some clarifications to the draft text:

> "The Panel shall publish the list of candidates established pursuant to [Article 7(f)(2)(iii)] who are eligible for election as members of the Tribunal by classifying them in one of the following regional groups based on the nationality of the country which nominated them for the election or, in case of direct applications, based on the nationality of the candidates: Asia, Africa, Latin America and the Caribbean, Western Europe and others, and Eastern Europe" (UNCITRAL, 2021c:17).

The author is of the view that primary and only concern of the tribunal should be to ensure geographical diversity, other type of representation should be left to the

stakeholders to keep in mind. Because, not every stakeholder is in the same developmental stage to nominate as such.

4. Terms of office, renewal and removal

4.1. Terms of office and renewal

The Working Group should take into account that longer terms for tribunal members that are non-renewable may prevent them from being influenced unduly. However, not having reappointment opportunity, may result in a loss of valuable experience. This might be mitigated by appointing for longer and staggered judicial terms. The draft provision 9(a) discusses about terms of office and renewal. It reads as follows:

> "a. Terms of office and renewal
> 1. The Tribunal members shall be elected for a period of [nine years] [without the possibility of re-election][and may be re-elected to serve a maximum of one additional term].
> 2. Of the members elected at the first election, the terms of [--] members shall expire at the end of [three] years and the terms of [--] more members shall expire at the end of [six] years…
> They will, however, continue in office to complete any disputes that were under their consideration prior to their replacement unless they have been removed in accordance with section (b) below" (UNCITRAL, 2021b:14).

The WGIII was advised to consider the duration of resolving ISDS cases and balancing the workload among tribunal members when deciding on appropriate term lengths. Some proposed a term of 6 to 9 years with staggered replacements to ensure stability and jurisprudential continuity. Other international courts have set terms from 4 to 9 years, with one court having no term limit. A gradual turnover of new members could be achieved by staggering appointments at three-year intervals (UNCITRAL, 2021b).

The European Union and its Member States support the idea of appointing adjudicators for long, non-renewable, and staggered terms of office. They favor the option of "without the possibility of re-election" and support the current drafting of paragraphs 1 and 2 of draft provision 9(a). Non-renewable terms of office protect adjudicators from pressure to secure re-election, thereby enhancing their independence and impartiality. Longer terms of office decrease worries about job security and foster independence. Finally, long and staggered terms help establish institutional memory, expertise, and collegiality, leading to a more consistent development of case law (UNCITRAL, 2021c). The author is of the view that the terms of office should be renewable and it is up to the stakeholders to decide if the adjudicators are independent or not. All the members should trust the democratic nature of the selection process.

4.2. Resignation, removal, and replacement

The draft provision 9(b) discusses about resignation, removal and replacement. It reads as follows:

> "b. Resignation, removal, and replacement
> 1. A member may be removed from office in case of substantial misconduct or failure to perform his or her duties by a unanimous decision of all members except the member under scrutiny. A member may resign from his or her position through a letter addressed to the President of the Tribunal. The resignation shall become effective upon acceptance by the President […]
> 2. A member who has been appointed as a replacement of another member under this article shall remain in office for a duration of [nine] years except for members who are appointed as replacements for members elected with a shorter period of [three] years or [six] years after the first election. Members who are appointed as a replacement for a member with a shorter-term period will be eligible for reelection for a full term" (UNCITRAL, 2021b:14).

Majority of international court statutes establish misconduct and inability to perform duties as the grounds for removal of tribunal members. These provisions are intended to maintain the independence of tribunal members by preventing States Parties from interfering with the removal process. The suggestion was made that the president of the tribunal, with the involvement of other members, should be responsible for making decisions regarding removal. It was also recommended that the threshold for removal should be high. This was discussed in paragraphs 41 and 42 of document A/CN.9/1050 (UNCITRAL, 2021b).

The European Union and its member States' proposal is to add more details about the removal process of permanent adjudicators in paragraph 1 of draft provision 9(b). The suggestion is that other adjudicators can remove them based on a recommendation from the President, or the Vice President if the President is the one being scrutinized. It is suggested that a qualified majority (e.g., three-fourths) should be required instead of unanimous agreement for the decision to remove a permanent adjudicator. This change would prevent a single adjudicator from blocking removal in cases where it is necessary. The author is of the view that stakeholders also should be able to recommend for removal. The requirement might be getting signature of one-tenth of the members States (UNCITRAL, 2021c).

5. Conclusion

The draft provisions and explanations related to "standing multilateral mechanism: selection and appointment of ISDS tribunal members and related matters" and comments of different stakeholders provide insights into the ongoing discussions and debates surrounding the establishment of a multilateral investment tribunal or court. While there is support for the establishment of a permanent multilateral body to

resolve investment disputes, there are still concerns and issues that need to be addressed, such as the procedural framework, governance structure, and potential impact on sovereignty and the ability to regulate in the public interest. Moreover, these matters may include whether the tribunal should be established under an existing international organization such as the United Nations or as an independent body. As a recognized international organization, the tribunal would have legal standing under both national and international law, making it possible for it to enter into agreements such as seat agreements, granting the necessary privileges and immunities. Furthermore, the WGIII should consider the governance structure of the tribunal and which organs should be created under the agreement establishing the tribunal.

The creation of a Committee of the Parties has been supported by the EU and its member states, as well as other stakeholders. However, there are differences of opinion on the method of decision making. The EU and its member states have advocated for a qualified majority decision-making process, while Colombia has suggested a balance between requiring consensus for critical matters and allowing simple majority votes for less significant issues. The author recommends avoiding consensus as it has created difficulties in the past and suggests requiring a two-thirds majority for critical matters and a simple majority for others. The author also proposes that the selection of arbitrators be decided by a simple majority to expedite the process.

The WGIII should enfranchise every State and provide voting rights so that balance and trust can be intertwined from the beginning. Ensuring diversity would be another key steps to eliminate discrimination towards the developing countries, and to achieve this, representation based on geographical regions would be most productive. This would ensure that every region has a voice in the decision-making process, and that the interests of the developing countries are adequately represented. The voting of the geographical region can only be given to members of the same geographical region only. This way, the selection would be prompt, and there would be scope for less influence by the bigger players.

The EU and Canada hold the position that allowing states outside of the tribunal's jurisdiction to influence its operations could lead to conflicts and other issues that may undermine the tribunal's effectiveness. However, in line with the views of other stakeholders, the author believes that it is important to ensure that all states have a voice in the decision-making process to guarantee inclusivity and fairness. This approach can help ensure that all relevant perspectives are considered, which could ultimately strengthen the legitimacy of the tribunal's decisions.

The impartiality and independence of tribunal members are of utmost importance, and the EU and Canada believe that this can be ensured by appointing them on a full-time basis. However, the EU has suggested that part-time employment may be allowed as a transitional measure initially. The selection process should prioritize the potential adjudicators' competence and independence, along with their qualifications and expertise in international law, rather than their nationality. While Colombia proposed appointing ad hoc judges in cases where parties do not have a representative judge, the EU does not support this idea. The author maintains that tribunal members should primarily be full-time employees selected based on geographical diversity. Moreover, the representation of the countries is an important

element to make the arbitration more acceptable and sustainable. Regarding the appointment of ad hoc judges, Colombia's suggestion can be taken seriously and find ways to adopt this. Because, it is ultimately the countries who should be represented in the dispute settlement system and not the investor. In addition, the understanding of the legal system and constitutional law principles of the defending countries are crucial not to insert unwanted interpretations and to respect their positions. Furthermore, the author is of the opinion that the selection of tribunal members should prioritize geographical diversity. Although other types of diversity, such as gender and cultural representation, are important, stakeholders should nominate candidates based on their respective developmental stages.

In addition to geographical representation, the qualifications of the adjudicators should be uniform and transparent. All the qualifications, such as age, educational background, experience, etc., should be mentioned explicitly so that every candidate is evaluated on the same criteria. This would ensure that the selection process is fair, objective, and merit-based, rather than being influenced by factors such as political affiliations, personal connections, or biases.

Regarding terms of office, the EU and its Member States advocate for long, non-renewable, and staggered terms of office for tribunal members to enhance their independence and impartiality. The author, however, suggests that terms should be renewable and that the trust in the democratic selection process should be the primary factor in determining adjudicators' independence. Regarding the removal from office, the European Union and its member States suggest changes to the removal process of permanent adjudicators, including the possibility for other adjudicators to recommend removal based on a qualified majority. The author believes that stakeholders should also have the ability to recommend removal, with the requirement of obtaining signatures from a certain percentage of member States. In addition, there might be an option to held voting by the committee of parties to remove an adjudicators with qualified majority.

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