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Selection and Appointment of Members to a Standing Multilateral Investment Tribunal: An Update

Claudia Annacker, Hayk Kupelyants (Dechert LLP) · Thursday, March 23rd, 2023

In preparation for the 42nd session of the UNCITRAL Working Group III ("Working Group") in February 2022, the UNCITRAL Secretariat issued a note on "Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters" ("Note"), dated December 8, 2021. The Note builds on several Working Group reports that addressed the selection and appointment of members of a standing multilateral body with jurisdiction over international investment disputes ("Tribunal") (discussed *inter alia* here) and incorporates two rounds of comments from States (see here).

The Note attempts to tackle four concerns perceived to require reform: 1) the lack of independence and impartiality of investment arbitrators, 2) the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms, 3) the lack of diversity among and high number of repeat appointments of investment arbitrators, and 4) the need to ensure that arbitrators possess requisite qualifications and comprehension of public policy issues arising in investment arbitrations.

The options set forth in the Note are based on the suggestion that there is a need to revisit the basic principle of party appointment currently applicable in investment arbitration. Instead, party autonomy would be replaced by selection and appointment mechanisms comparable to those in place for international courts. To preserve some degree of party autonomy, the Note sets out the option of allowing each disputing party to appoint one *ad hoc* member.

The draft provisions for the selection and appointment of Tribunal members outlined in the Note were discussed during the 42nd session of the Working Group, with delegations having voiced diverging views on key issues, such as the eligibility criteria for Tribunal members and the appointment process.

Establishment of the Tribunal and its Structure

As a preliminary matter, the Note contemplates the establishment of the Tribunal under a statute, to be adopted through a multilateral treaty, either under the auspices of an existing international organization, such as the United Nations, or as a newly created international organization. The Note confirms that ratification of the statute would not by itself constitute consent to submit to the jurisdiction of the Tribunal. Such consent would have to be incorporated in existing or future

investment treaties and accepted by qualifying investors.

The Tribunal would be composed of a first instance and an appellate level, have a President and Vice-President, elected by the Tribunal itself, and a Registrar. The highest governing body of the Tribunal would be the Committee of the Contracting Parties, empowered to adopt the rules of procedure for the Tribunal and appoint a selection panel (which, as discussed below, would screen the candidates for the appointment as Tribunal members).

Eligibility Criteria

The Note reflects the preference of the Working Group for "*selective rather than full representation,*" meaning that the number of Tribunal members would be lower than the number of Contracting States and accordingly, not all Contracting States would have a Tribunal member. This preference is based on the fact that an international tribunal with a large number of members would be expensive and complex to operate. Instead, Tribunal members will be appointed selectively to represent geographies, legal systems, levels of development, as well as gender. The principle of selective representation accords with the composition of global international adjudicatory bodies, such as the International Court of Justice, the World Trade Organization Appellate Body, and the International Tribunal for the Law of the Sea.

With respect to the eligibility criteria for Tribunal members, the Note requires them to be independent and have recognised competence in public international law, including international investment law and international dispute settlement. Further, it is specified that no two members of the Tribunal shall be nationals of the same State. The Note leaves open for consideration by the Working Group whether Tribunal members would be employed on a full or part time basis, must be nationals of a Contracting State, and must have experience working in or advising governments or have held a judicial office. Some States have opposed the requirement of work experience in national governments or the judiciary (see here), whereas others are in favour of requiring Tribunal members to possess the qualifications for appointment to the highest judicial offices in their respective jurisdictions (see here). Since the eligibility requirements as set out in the Note are cumulative, the pool of candidates who could satisfy all requirements would be quite small. In the 42nd session of the Working Group views continued to diverge on most of the eligibility requirements, including nationality and requisite qualifications.

Appointment Process

Under the draft provisions set out in the Note, Tribunal members are appointed in a three-step process. The process is designed to maximize transparency and inclusiveness of appointment, diversity, and professionalism, while avoiding political appointments.

First, a Tribunal member candidate needs to be nominated in a transparent and inclusive manner. The Note offers two options: 1) nomination by the Contracting States: any Contracting State may nominate a candidate, upon consultation with the "*civil society, judicial and other State bodies, bar associations, business associations, and academic and other relevant organizations*," and/or 2) stakeholder nomination: following an open call for candidates, any person with requisite

qualifications may directly apply, and "*civil society, bar associations, academic and relevant organizations in the investing community*" may nominate such persons. The Working Group supported a combination of the two options at its 42nd session.

Second, upon nomination, a selection panel would opine on whether nominated candidates satisfy the eligibility criteria. The selection panel will be appointed by the Committee of the Contracting Parties and will be composed of a yet-to-be-determined number of eminent lawyers (former Tribunal members, current or former members of international or national supreme courts, and lawyers or academics of high standing and recognised competence), selected to reflect geographical diversity, gender, and the different legal systems/regional groups of the Contracting States. The Note invites the Working Group to consider the possibility of including in the selection panel representatives of the investing community to increase legitimacy in the eyes of all users of the Tribunal.

Upon review of candidates, the selection panel is tasked to prepare and publish a list of the candidates eligible for election as Tribunal members, by classifying them into one of the following regional groups based on their nationality (Option 1) or the nationality of the nominating State (Option 2): Asia, Africa, Latin America and the Caribbean, Western Europe and others (including the United States, Canada, Australia, and New Zealand), and Eastern Europe, in accordance with the five UN Regional Groups. It is questionable whether reliance on the UN Regional Groups is appropriate for selecting the Tribunal members. Indeed, the Note invites the Working Group to consider possible alternatives reflecting the geographical distribution of the Contracting States and the diversity of their legal systems.

Third, the Contracting States of a particular regional group in the Committee of the Contracting Parties will vote on the candidates (Option 1) or each regional group will only vote on its regional candidates (Option 2). Each regional group will be assigned a quota of Tribunal members, again to ensure geographical diversity of Tribunal members.

Operation of the Tribunal

The Tribunal members shall serve for a certain period of time (the Note proposes nine years), with or without the possibility of re-election. A Tribunal member may be removed if he/she does not comply with the Code of Conduct of Adjudicators in International Investment Disputes or fails to perform his/her duties, by a decision of the Tribunal members except the member under scrutiny, ensuring that Contracting States would not be able to intervene in the removal process.

The Note sets out various options for the assignment of cases, to exclude political considerations in the assignment process. Under Option 1, Tribunal members are assigned to a chamber by the President of the Tribunal or a committee, composed of the President and a representative number of Tribunal members, and cases are distributed to the various chambers either by the President or a distribution committee. Under Option 2, cases are assigned on a randomized basis.

The Note further invites the Working Group to consider whether the Tribunal should be allowed to decide in broader or full composition when an issue of systemic relevance is at stake (*i.e.*, an issue the resolution of which may have repercussions for the investment treaty regime as a whole; a new legal question; a divergence of interpretations in the case law of the different chambers; or the

intention to depart from an established line of cases).

In conclusion, the Note advances the controversial debate on the composition and operation of the Tribunal, but the Working Group still needs to make policy choices regarding many critical issues. In deciding the open policy issues regarding the selection process and the eligibility criteria for Tribunal members, the Working Group will have to strike a delicate balance between diversity and requisite qualifications of Tribunal members, on the one hand, and legitimacy in the eyes of private users of the Tribunal, on the other.

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