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Rebalancing the Scales: Diversity and Reform of Investor-State Dispute Settlement

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Appointments of adjudicators in investor-State dispute settlement ("ISDS") have recently come under spotlight of the UNCITRAL Working Group III on ISDS Reform ("WGIII"). Recently, at its 51st session in April 2025, the WGIII discussed the draft statute establishing a standing mechanism to resolve international investment disputes ("Draft Statute"). In particular, the Draft Statute contains provisions on selection and appointment of members of the dispute tribunals aimed at enhancing diversity in ISDS and fundamentally reforming the process of selection and appointment of adjudicators.

The existing system of adjudicators' appointment has long been driven by a *laissez-faire* ideal of party autonomy. The most popular sets of procedural rules provide for almost unlimited liberty of parties to appoint arbitrators – as long as these arbitrators remain impartial and independent. For example, Article 14 of the ICSID Convention requires arbitrators to be "persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment," while the UNCITRAL Arbitration Rules do not provide for any such requirements. The parties are expected to choose and appoint the most experienced and well-suited arbitrators for their own case – perfectly in line with the liberal features of arbitration, distinguishing it from more rigid modes of dispute resolution.

But does this meritocratic model work in reality? Or has it incentivised the parties to stick to a very narrow list of well-known "usual suspects"? Concerns over the lack of diversity in ISDS have become very vocal in recent years, in particular around gender and geography. For instance, the 2024 ICSID data shows that women constituted only 15% of all appointments in the ICSID cases to that date. In a similar vein, arbitrators living and practicing in the Global North account for 75% of appointments. Even this figure may not adequately reflect the true degree of the lack of geographic diversity, as many Global South appointees are still often trained in developed countries in the Global North – and thus are very much influenced by the relevant discourses.

The lack of diversity in ISDS extends beyond measurable characteristics of certain groups and manifests itself on a more "personal" level. A heavily cited 2017 study identified "an inner core of influential arbitrators followed by a second ring of arbitrators," which account for a lion's share of appointments in ISDS. The existence of this "core" further amplifies the problem of the lack of diversity in sometimes unpredictable ways. For instance, two women from this narrow circle (Brigitte Stern and Gabrielle Kaufmann-Kohler) account for a whopping 57% of all appointments

of female arbitrators as of 2018.

This situation can be explained by multiple factors, not least – by common biases which plague any decision-making process. In the case of ISDS, these biases mostly materialise in the form of strong preferences given to "predictable" candidates perceived as pro-State or pro-investor (depending on the side appointing the relevant arbitrator) and familiar to counsel.

Regardless of its roots, this lack of diversity creates serious concerns about the legitimacy of the entire ISDS mechanism. An image of a closed circle of elite arbitrators from Western countries scrutinising legislation of developing States (such as environmental laws or emergency economic measures) in the interest of transnational corporations and awarding billions of dollars in damages to these corporations has become a powerful visualisation widely utilised by the critics of the ISDS.

A Standing Mechanism for ISDS – a Sensible Mean of Improving Diversity?

During the WGIII discussions, it was explicitly recognised that party autonomy does not need to be "a key component of ISDS," in particular because it is believed that "party appointment was the main reason leading to concerns about the lack or apparent lack of independence and impartiality of decision makers in ISDS." In this context, some States acknowledge that the existence of the narrow pool of arbitrators is the responsibility of States who repeatedly appoint them. The WGIII suggested that proposed standing mechanism for resolution of investment disputes could be less party-driven than the existing system.

As a starting point, the Draft Statute adheres to the existing model emphasising the "merit" of prospective candidates. Under Article 7, the tribunal members "shall be persons of high moral character, enjoying the highest reputation for fairness and integrity" and should have recognised competence in public international law, private international law, international investment law or the resolution of international investment disputes. While some participants opined that tribunal members should, for example, "have an understanding of the different policies underlying investment, of issues of sustainable development" or have specific expertise, such as industry-specific knowledge or calculation of damages, these proposals did not advance. The WGIII agreed that establishing such strict requirements may potentially have an opposite effect and reduce the pool of qualified candidates.

The Draft Statute, however, goes beyond the purely "meritocratic" model and explicitly recognises that diversity factors shall be considered in the process of appointing adjudicators. The WGIII agreed that diversity is essential as it would enhance the quality of the ISDS process: tribunal members from different legal systems, cultures and countries with different levels of economic development could "ensure more balanced decision-making" in ISDS. Article 8 of the Draft Statute thus sets out "equitable geographical distribution, the representation of the principle legal systems and equal gender representation" as a factor directly relevant to the appointment process.

Draft Statute: Real Impact or Declaratory Commitment?

The suggested reform may bring the selection and appointment mechanism in ISDS closer to the

one existing in international courts, such as the International Court of Justice.

Throughout its work, the WGIII examined various options for selecting and appointing adjudicators, including establishing a roster of qualified candidates or a permanent body with full-time adjudicators. The WGIII also considered different nomination mechanisms: by States; by an independent entity established within the permanent body; or by interested individuals themselves. Further discussions addressed the selection process, including a selection by the participating States (by a vote or by consensus) or by a committee. The possibility of incorporating a screening process and/or consultation stage with stakeholders (e.g., representatives of investors) was also discussed.

The Draft Statute suggests that Contracting Parties shall nominate a to-be-determined number of candidates (not limited to its nationals) for potential appointment as tribunal members. They shall serve as full-time salaried adjudicators and, in general, shall not be eligible for reappointment. Additionally, candidates may be selected through an open call.

During the nomination process, the Contracting Parties are expected to provide an explanation on how the candidates fulfil the qualifications and requirements set out by Article 7 of the Draft Statute and to "take into <account> gender representation" (Article 9).

A selection committee is then to review and verify whether candidates meet the necessary qualifications and requirements and form a list of suitable candidates for appointment to the Tribunal. Notably, Article 7 of the Draft Statute does not contain any requirements on geographical diversity. One possible explanation is that the Contracting Parties are expected to nominate their own nationals or candidates from a similar cultural and legal background. Gender diversity is mentioned, but the relevant provisions do not clarify how exactly equal representation of genders is to be ensured at the nomination stage. It may mean that the selection process is expected to remain driven by general requirements of qualifications and good character of the candidates.

However, the provisions regarding later stages of forming dispute resolution panels shed some light on how WGIII expects the diversity requirements to be enforced.

According to the Draft Statute, once the selection committee approves candidates, the Conference of the Contracting Parties is to appoint the Tribunal members, taking into account the requirements on geographical distribution and equal gender representation. The Draft Statute appears to entrust the Conference with the task of ensuring that the final composition of the Tribunal is sufficiently diverse. The viability of this mechanism will likely depend on the number of candidates nominated compared to the number appointed to the Tribunal. If the latter is large enough to include candidates nominated by multiple countries representing both the Global North and the Global South, the proposed procedure can become an efficient means of addressing the diversity deficit.

Further, upon constitution of the Tribunal, three-member panels shall be formed by the President and Vice-President, who in turn are elected by a majority of votes of the members of the Tribunal. In constituting panels, the presidency is again expected to take into account the diversity elements referred to in Article 8. However, it remains unclear how this mechanism is expected to work on the level of specific panels consisting of only three members.

Finally, once a dispute is initiated, a panel will be assigned for its resolution on a random basis. Although this procedure can have a significant effect on improving diversity, it may be more problematic rather than problem-solving. It can reasonably be argued that a more tailored approach

– where a panel of arbitrators who have relevant expertise for a particular dispute (e.g., experience of dealing with complex regulation concerning the mining sector) is assigned – could enhance the credibility and legitimacy of ISDS (see discussion here).

Conclusion

The WGIII's proposal marks a major shift from a party-driven "*meritocratic*" model of appointments in ISDS, which has created a diversity deficit. This issue needs to be tackled promptly to ensure the legitimacy of ISDS.

The Draft Statute correctly emphasizes the need to ensure geographic and gender diversity of candidates as an independent factor alongside qualifications and expertise. While at this stage it is not entirely clear if the proposed mechanism will fully address existing imbalances, the reform proposal recognises the vital role of diversity considerations, which can be considered a step in the right direction.

Notwithstanding that, the Draft Statute seems to at times lose sight of other important aspects of the selection and appointment of arbitrators. In particular, the Draft Statute focuses on the most visible areas of diversity deficit and ignores potential "views" of arbitrators (the "pro-State" or "pro-investor" bias), despite concerns raised by some States during WGIII discussions. This means that the existing biases can still be a driving force behind the nomination process.

Relatedly, the current proposal appears to be too State centric. While the notion of ISDS refers to a resolution of disputes between foreign investors and States, the reform proposal grants States the primary role in the nomination process, depriving investors of their right to participate in the formation of a tribunal. At the same time, States – albeit indirectly – preserve this role. This can lead to new imbalances in the system and create a shortage of candidates who are not openly pro-State. A fine balance needs to be struck for ISDS to regain its role as a neutral and depoliticised system serving the interests of the international community.

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