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Ensuring a Balanced Approach for the Global South in UNCITRAL Working Group III

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ABSTRACT

This paper examines the ongoing efforts of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WG III) to reform the Investor-State Dispute Settlement (ISDS) system. It argues that the current approach prioritises the concerns of developed countries over those of the Global South. The document highlights the disproportionate focus on the Permanent Multilateral Investment Court (MIC) and related issues, while neglecting procedural and cross-cutting concerns crucial for developing nations. The paper proposes concrete actions to rebalance the discussions, including prioritising procedural reforms and ensuring equitable representation in the MIC's structure and appointment process. It emphasises the need for transparency, depoliticisation, and genuine consideration of the Global South's concerns to achieve a genuinely legitimate and balanced ISDS reform.

KEYWORDS: *United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WG III), Investor-State Dispute Settlement (ISDS), Global South, Permanent Multilateral Investment Court (MIC), Procedural Reforms and Cross-cutting Issues*

KEY MESSAGES

- The majority of delegations from developing countries emphasized on the expansive mandate of the WG III and resisted proposals to carve out specific provisions from the negotiations, particularly those grappling with a disproportionate burden of ISDS claims; they argued that such categorization would limit the reach of the reform of ISDS resulting from WG III.
- The coordination of countries of the Global South will be necessary to ensure that procedural and cross-cutting issues are included in the agendas of the 50th session in January 2025 and the 51st session in April 2025, until a satisfactory text is reached that represents real progress that addresses their concerns about the current ISDS system.
- In this final stretch before September 2025, when the mandate of WG III is expected to end, efforts must be made to submit proposals that allow the WG III to produce an outcome that actually overcomes the criticisms of the current ISDS system. This could be achieved if the statute of the permanent MIC and the two-tier system are balanced, impartial, clear, and truly address the legitimacy issues..."

Le présent document examine les efforts déployés par le Groupe de travail III de la Commission des Nations unies pour le droit commercial international (CNUDCI) en vue de réformer le système de règlement des différends entre investisseurs et États. Il insiste sur le fait que l'approche actuelle donne la priorité aux préoccupations des pays développés plutôt qu'à celles des pays du Sud et qu'une attention disproportionnée est accordée à la Cour permanente multilatérale d'investissement et aux questions connexes, au détriment des règles de procédure et des questions transversales, qui revêtent une importance cruciale pour les pays en développement. Il recense des actions concrètes afin de rééquilibrer les discussions, qui consistent notamment à donner la priorité à la réforme des règles de procédure et à garantir une meilleure représentativité dans la structure et le processus de nomination de la Cour. Il souligne la nécessité d'une plus grande transparence, d'une dépolitisation des débats et d'une véritable prise en compte des préoccupations du Sud pour parvenir à une réforme concrète et équilibrée du dispositif de règlement des différends entre investisseurs et États.

MOTS-CLÉS: *le Groupe de travail III de la Commission des Nations unies pour le droit commercial international (CNUDCI) , le système de règlement des différends entre investisseurs et États, la Cour permanente multilatérale d'investissement, la réforme des règles de procédure et les questions transversales*

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Este documento examina los esfuerzos en curso del Grupo de Trabajo III (GT III) de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI) con el objetivo de reformar el sistema de solución de controversias entre inversionistas y Estados (ISDS). Se argumenta que el enfoque actual prioriza las preocupaciones de los países desarrollados sobre las de los países del Sur Global. El documento destaca la desproporcionada atención que se presta al Tribunal Multilateral Permanente de Inversiones (TMI) y a las cuestiones conexas, mientras que se descuidan las preocupaciones procesales y transversales cruciales para las naciones en desarrollo. En el documento se proponen acciones concretas para reequilibrar los debates, entre ellas dar prioridad a las reformas procedimentales y garantizar una representación equitativa en la estructura y el proceso de nombramiento del TMI. Se enfatiza la necesidad de transparencia, despolitización y una consideración genuina de las preocupaciones del Sur Global para que se logre una reforma del ISDS verdaderamente legítima y equilibrada.

PALABRAS CLAVES: *el Grupo de Trabajo III (GT III) de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI), el sistema de solución de controversias entre inversionistas y Estados (ISDS), el Tribunal Multilateral Permanente de Inversiones (TMI), las reformas procedimentales y los transversales cruciales*

I. The way forward

In the sessions of the United Nations Commission on International Trade Law (UNCITRAL) UNCITRAL Working Group III (WG III) regarding the reform of the investor–state dispute settlement system (ISDS), it has been observed that the time so far devoted to discussing issues of interest to developed countries has not been balanced with the time devoted to matters of interest to the Global South. Indeed, a high percentage of discussion time has been devoted to issues related to the constitution of the Permanent Multilateral Investment Court (MIC), the Appellate Mechanism, the selection of judges, the Advisory Centre and the Multilateral Instrument, compared to the issues of interest to countries from the Global South related to procedural and cross-cutting issues.

The planning of the sessions from September 2025 to April 2025 was published by the WG III secretariat. The exclusion of topics on procedural and cross-cutting issues shows the unbalanced approach in the treatment of issues of interest to the Global South. In fact, according to the updated Secretariat's note, considering the workplan to implement ISDS reform and resource requirements,[1] there would only be one more reading on procedural and cross-cutting issues before the final outcome is submitted to the Commission. In addition, four sessions, two intersessional and one informal are planned from September 2024 to April 2025, showing the predominant place given to the discussion of the MIC, the Appeals Mechanism, the Multilateral Instrument for Reform and the Advisory Centre (four topics), as opposed to the procedural and cross-cutting issues of interest to the Global South (one topic) in the first two sessions (see table below).

1 See: UNCITRAL , Workplan to implement investor-State dispute settlement (ISDS) reform and resource requirements, UN Doc. A/CN.9/WG.III/WP.206 (17 March 2021) in https://documents.un.org/doc/undoc/ltd/v21/016/72/pdf/v2101672.pdf (accessed 28.08.2024).

Meetings from September 2024 to April 2025

23-27 September 2024 **Vienna**	Forty-ninth session	Permanent Mechanism, Procedural and Cross-cutting Issues and Multilateral Instrument on ISDS reform
24-25 October 2024 **Chengdu, China**	Intersessional meeting	Appeals Mechanism, Multilateral Instrument on ISDS reform
2 - 4 December 2024 **Bangkok, Thailand**	Informal meeting	Operationalisation of the Advisory Centre
20-24 January 2025 **Vienna**	Fiftieth session	
March (early) 2025 **Seoul**	Intersessional meeting	
7-11 April 2025 **New York**	Fifty-first session	
22-26 September 2025. **Vienna (tentative)**		

For the forty-ninth session, to be held in Vienna from September 23 to 27, 2024, the Secretariat has proposed to discuss i) the draft standing mechanism in document A/CN.9/WG.III/WP.239; ii) the draft provisions on procedural and cross-cutting issues in document A/CN.9/WG.III/WP.244; iii) the draft multilateral instrument on ISDS reform in document A/CN.9/WG.III/WP.246.

The 8th intersessional meeting, to be held in Chengdu, China, on October 24-25, 2024, will discuss i) the Appellate Mechanism and, again, ii) the draft multilateral instrument on ISDS reform contained in document A/CN.9/WG.III/WP.246.

The lack of resources, the distance, the difficulty of getting to Chengdu, and the agenda to be developed in just two days can make it difficult for many countries from the Global South to participate effectively. Chengdu is located in the center of China, 2,000 km from Shanghai and 1,800 km from Beijing. It takes an average of 32 hours to reach the city from developing countries in the Western Hemisphere and costs almost twice as much as meetings in Vienna or New York.

Despite the distance and cost, it is important to have the active participation of as many countries of the Global South as possible to defend the positions of interest to these countries. This is to avoid, as far as possible, a repetition of the Belgian report A/CN.9/WG.III/WP.242, where the important positions of the Global South are barely mentioned in the meeting summary. The Brussels meeting was promoted under the title *Access to Justice for All* (https://belgian-presidency.consilium.europa.eu/en/events/7thintersessionaluncitralwgiii/). The position regarding the concept of 'access to justice' has been presented by developed countries and some stakeholders representing private interests as key to allow small and medium-sized enterprises (SMEs) to benefit from the system, including the services provided by the Advisory Centre[2].A position that to some extent seems to run counter to the concerns expressed by the coun-

2 See: A/CN.9/1160, https://documents.un.org/doc/undoc/gen/v23/083/30/pdf/v2308330.pdf, para. 59.

tries of the Global South.[3]

II. Actions that could be taken

For the remaining sessions of WG III, given the limited resources of WG III and the Secretariat, there is a need to prioritize among the identified issues,[4] so that action can be taken on (i) the general agendas and (ii) the topics to be discussed at each session.

i) General agendas

To date, WG III has advanced the adoption of texts on codes of conduct for arbitrators and judges of the MIC, the Multilateral Advisory Center and guidelines on the prevention and mitigation of international investment disputes. In the remaining period until September 2025, when the mandate of WG III expires, the forthcoming sessions should discuss (a) reforms of the Rules of Procedure and cross-cutting issues; (b) the structure, functions and appointment of the judges of the MIC; (c) the Appellate Mechanism; and (d) the multilateral instrument to implement the reforms.

Discussing and adopting these four instruments in their entirety in four sessions while achieving a balance, will be a task that will require flexibility, creativity and understanding of all the concerns of WG III members, given the complexity of many issues and the entrenched positions of some countries on many of them. For example, it will have to overcome the position of several developed countries that want to exclude several issues from the discussion of procedural and cross-cutting reforms of interest to countries in the Global South through the classification of issues.[5]

In addition to the above, the general agenda proposed for the next two sessions shows the risk that a slow and a fast track discussion would be pushed for different issues:[6] the slow track for cross-cutting and procedural issues, and the fast track for other issues, contrary to the consensus reached at the 37th session on the principle of a balanced allocation of time and two concurrent tracks.[7]

Accordingly, discussions would need to begin with a change in the order of discussion of the proposed agenda for the 49th session in Vienna in September 2024, so that procedural and cross-cutting issues would be the first items to be dealt with from Monday afternoon until at least late Wednesday afternoon. To this end, **it will be necessary for the developing countries of the Western Hemisphere, Africa and Asia to coordinate their interventions to modify the agenda proposed by the Secretariat.**

Similarly, the coordination of countries of the Global South will be necessary to ensure that procedural and cross-cutting issues are included in the agendas of the 50th session in January 2025 and the 51st session in April 2025, until a satisfactory text is reached that represents real progress that addresses their concerns about the current ISDS system.

ii) Topics of each session

Progress in the three sessions to be held from September 2024 to April 2025 will determine whether and to what extent another session in September 2025 will be necessary, and what issues will be discussed.

Regarding the forthcoming 49th session in September 2024, it will be crucial to start the debate with those issues that have a positive and tangible impact on developing countries. This will help to achieve a better balance and address the concerns of the Global South in a timely and proactive manner. In this way, it would be possible to start discussing the most complex issues so as to avoid leaving them until the last minute when there is usually pressure to conclude discussions, with the risk that important concerns are left out of the agreements.

What happened with the adoption of the Code of Conduct and Ethical Requirements for Arbitrators is a clear example of this situation. On that occasion, the adopted rules on "double hatting", among other necessary reforms, fell far short of the original ambitions of WG III, as the practice was not restricted in a way that would represent a substantial change to effectively avoid its negative effects. This left a sense of frustration about the final outcome, despite the fact that WG III delegates had generally agreed on the importance of the issue. For example, article 4 of the Code only provided for a partial ban on double hatting, rather than a total ban, as hoped for by several delegations, including Argentina, Canada, Chile, the European Union (EU), Sierra Leone, Spain, Zimbabwe and included in the draft submitted by the African Continental Free Trade Area (AfCFTA) Secretariat.

As negotiations continue, it will be important to limit the arbitrators' discretion on several issues, including the determination of damages. Linked to this is the determination of whether an expropriation is unlawful or not, and its effect on the quantum of compensation. In fact, where loopholes exist, tribunals exercise unlimited power to make interpretations that lead, for instance, to broad substantive protections[8] or large monetary compensations.

3 *Ibid.*, para. 58.
4 A/CN.9/1124, para. 95.
5 Columbia Center on Sustainable Investment (CCSI), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), and South Centre, "Prioritization of the Draft Provisions on Procedural and Cross-Cutting Issues", Submission to UNCITRAL Working Group III.
6 Jose Manuel Alvarez Zarate, "On the Forty-eight Session of UNCITRAL Working Group III", *SouthViews* No. 265, 31 May 2024. Available from https://www.southcentre.int/southviews-no-265-31-may-2024/.
7 Report, 37th Session, A/CN.9/970, para. 83.
8 Lorenzo Cotula and Thierry Berger (IIED), Lise Johnson, Brooke Güven and Jesse Coleman (CCSI), "UNCITRAL Working Group III on ISDS Reform: How Cross-Cutting Issues Reshape Reform Options" (15 July 2019). Available from https://ccsi.columbia.edu/sites/default/files/content/pics/our_focus/uncitral-submission-cross-cutting-issues-en.pdf; Lea Di Salvatore and Ladan Mehranvar, "Unlocking Expectations: UNCITRAL Working Group III Finalized its First Drafts - Does it Deliver?", CCSI, 31 May 2023,Available from https://ccsi.columbia.edu/news/unlocking-expectations-uncitral-working-group-iii-finalized-its-first-drafts-does-it-deliver.

A. Procedural reforms and cross-cutting issues

The discussion at the forty-ninth session will be based on the provisions of the second draft A/CN.9/WG.III/WP.244 and its annotations A/CN.9/WG.III/WP.245. First, the countries of the Global South will need to clarify that they have not accepted the classification of issues into the three categories in a manner that effectively excludes some of them from discussion. Among other reasons, because this classification was discussed by WG III with the only purpose of achieving efficiency in the negotiations, not to "exclude any of the provisions in the draft" (A/CN.9/1161, para. 116). The majority of delegations from developing countries emphasized on the expansive mandate of the WG III and resisted proposals to carve out specific provisions from the negotiations, particularly those grappling with a disproportionate burden of ISDS claims; they argued that such categorization would limit the reach of the reform of ISDS resulting from WG III.[9]

In fact, on July 8, the Secretariat circulated document A/CN.9/WG.III/WP.244 with the new draft rules of procedure and cross-cutting issues, which contains several inaccuracies that need to be clarified so that corrections can be made in time. These inaccuracies may also be identified during interventions in the sessions. For example, the description in paragraphs 2 and 3 of Working Paper 244 regarding the classification of topics is not complete.[10] This description implies that there was a general agreement to exclude provisions from the first Draft on procedural and cross-cutting issues, which was not the case.

It should be clarified in this regard that: i) the three categories are only for prioritizing work "without excluding possible work on any draft provisions" as stated in report A/CN.9/1161; (ii) the summary of the Belgian intersessional meeting (A/CN.9/WG.III/WP.242, paras. 60-65) cannot be considered as the basis for any agreement by WG III or as a starting point for future discussions, *inter alia*, because paragraphs 62-65 reflect only the position of several developed countries in an informal panel during that intersessional meeting; iii) the positions presented as a summary attempt to exclude from the discussion several issues of concern to the Global South on procedural and cross-cutting issues that they have repeatedly and forcefully submitted; and, iv) the summary report provided by Belgium cannot be considered a formal decision taken by WG III, as decisions can only be taken during formal meetings of the WG.

The issues to be addressed in the discussion as a matter of priority would be: (i) methods of damage assessment and compensation; (ii) calculation and determination of interest; (iii) factors limiting compensation; (iv) causation of damage; (v) evidence; (vi) security and allocation of costs; and (vii) third party funding. The other issues in the document could be discussed after satisfactory agreements on these issues have been reached.

9 See: South Centre, IISD, IIED and CCSI, "Prioritization of the Draft Provisions on Procedural and Cross-Cutting Issues" in https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/ccsi_iied_iisd_sc_submission_50624.pdf (accessed 28.08.2024).
10 *Cf.* A/CN.9/WG.III/WP.244, paras. 2 and 3.

B. Permanent Multilateral Investment Court (MIC)

The establishment of a MIC to resolve several of the perceived problems of the current ISDS system, such as the flaws in a considerable number of awards issued by investment tribunals, the lack of neutrality and interpretative balance and the cost and length of the processes, still raises many substantive questions. Concerns have also been raised about the prevailing dynamics of the discussions on the subject, because "the mechanism would only reflect the interests of a minority of states".[11]

On the other hand, seeking predictability and consistency of decisions should not overlook the fact that not all International Investment Agreements (IIAs) have the same wording, which should naturally lead to different interpretations, but should at least guarantee consistent interpretation when the same or similar treaty provisions are being interpreted[12]. As noted, gaps in treaty language have led tribunals to assume non-agreed powers, leading to interpretations unintended by the treaty parties.[13] Indeed, a misused standard of coherence can go against what the States have actually agreed upon in their IIAs, and "effectively reform the treaty through a judicial decision" as the Singapore intersessional meeting put it.[14] Thus, precedents that may emerge from a permanent tribunal may change the will of the parties. Pointing out that the "standing mechanism should be cautious in its interpretation and seek to take such differences into account"[15] and considering the joint interpretative statements as safeguards may not be sufficient. The duty of caution and the interpretative declarations of States have not prevented tribunals from making interpretations that go beyond what the IIAs signatories have agreed upon.

It is worth noting that only four countries from the Global South have so far submitted comments on some of the relevant elements of the initial drafts of the MIC, the selection and appointment of ISDS tribunal members and related matters,[16] while four developed comments and explanations on each of the draft provisions.[17]

The outcomes of the WG III discussions indicate that an agreement on the establishment of a MIC and a two-tier system with appeal is imminent,[18] although there are still questions on its implementation as an optional protocol to a multilateral investment agreement or an independent international instrument.[19]

11 See, A/CN.9/WG.III/WP.233, para. 12.
12 See: Chester Brown, Federico Ortino, and Julian Arato, "Parsing and Managing Inconsistency in Investor-State Dispute Settlement", Academic Forum on ISDS Concept Paper (2019) in https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1214&context=other (accessed 28.08.2024).
13 The case of the non-treaty definition of "unlawful expropriation" is a clear example of this situation. Through constructive interpretations, a considerable number of tribunals have decided to change the date for the determination of the value of the expropriated asset provided for in the treaties.
14 See, A/CN.9/WG.III/WP.233, para. 57.
15 *Ibidem.*
16 Colombia, 15 November 2021, Mali, Panama, 16 November 2021, and Uganda. Undated comments were not included in the document sent to the Secretariat.
17 Canada, 21 November 2021, the Republic of Korea, Singapore, Switzerland, 19 November 2021, the European Union and its Member States, until 15 November 2021.
18 Document A/CN.9/WG.III/WP.239 circulated on 8 February 2024 open for comments and discussion.
19 See: A/CN.9/WG.III/WP.246.

In this final stretch before September 2025, when the mandate of WG III is expected to end, efforts must be made to submit proposals that allow the WG III to produce an outcome that actually overcomes the criticisms of the current ISDS system. This could be achieved if the statute of the permanent MIC and the two-tier system are balanced, impartial, clear, and truly address the legitimacy issues that led the EU to promote negotiations to change the ISDS system. The legitimacy of the reform is largely conditional on the final texts of all instruments actually taking into account the concerns expressed by the Global South.

In the draft statute of the MIC,[20] negotiating States could consider addressing the following issues in order of importance:

i) Determine the type of court (whether the MIC will be an appellate or a two-tier court, or whether it will have an appeals mechanism or not) that best addresses the concerns expressed at the WG III and, in the absence of agreement between the Global South and developed countries, the possible alternatives.

ii) Article 2.2. of the draft statute of a standing mechanism[21] deserves discussion in order to further develop the provision at least with regard to the conditions of impartiality and independence to be met by the members of the tribunals. In any case, in order to ensure impartiality and independence, it is at least necessary that the manner in which judges are appointed is free from political interference, that the majority who will decide the case do not come from a single region, and that the members of the Court of Appeal are not at the same time members of the Court of First Instance.

Additionally, clear principles are required to be set out in the regulations on conduct and ethical obligations in Article 4.2 (g) to guide the Conference of the Contracting Parties. These should be set out in the agreement establishing the MIC.

iii) Article 3.3. and 3.4. on the determination of the number of members of the tribunals.

iv) In line with the above, Article 4.2(b) on the appointment of tribunal members, and Article 4.2(c) on adjustments to the number of tribunal members.

In view of the gap on how to make adjustments, the Secretariat suggests that the procedure for making the adjustment can be established by regulations adopted by the Conference of the Parties, including who can propose the adjustment and the circumstances justifying the adjustment.[22]

If the establishment of criteria for adjustments to the number of tribunal members is postponed, at the very least general principles and criteria should be established to guide the Conference of the Contracting Parties in developing Article 4.2(c).

On the majorities required to adopt decisions (Article 4.8), four-fifths of those present does not seem to be a legitimate majority, when barely half plus one of the contracting parties attend the meeting.

v) Selection and appointment of members of the tribunals

The selection and appointment of judges to decide investment disputes remains one of the issues[23] of greatest concern to States and investors.[24] As a justification for undertaking reforms, the EU has insisted that compliance with guarantees of impartiality and independence of MIC judges is vital to the legitimacy of the system.[25] As with local courts, independence and impartiality play an important role for the international rule of law and for the parties to disputes.[26] In that vein, the supporting set of rules leading to the enforcement of these guarantees should be sufficiently clear in the Statute of the MIC from its inception. The experience of the creation of the World Trade Organization (WTO), where issues of concern to the Global South were left open for further definition, taught several things: that subsequent negotiations can be more frustrating, as they do not include the concerns of the Global South, and the failure to keep promises to agree in the future to close the negotiations. In a multilateral negotiation such as the one conducted by WG III, the same mistakes must not be made, so the MIC Statute must ensure utmost clarity on the core issues.

The manner of selection and appointment of court members is important, but not the only point to ensure impartiality and independence. In addition, there should be a solid and comprehensive Code of Conduct for judges, effective control over their conduct and clear procedural rules, among other rules.

A review of the general structure of the proposed articles for the MIC, together with articles 7 to 11 on the selection and appointment of judges, shows that the proposal is still far from resolving the main concerns about (i) impartiality and independence; (ii) politicisation in the appointment of MIC judges; (iii) transparency in the process of choosing the

20 A/CN.9/WG.III/WP.239
21 *Ibid.*
22 A/CN.9/WG.III/WP.240, para. 10.

23 During the discussions, views were expressed in support of the current methods of selection and appointment of members of ISDS tribunals, which were based on appointment by the parties. See, A/CN.9/1004/Add.1, para. 103.
24 Within WG III, "concerns were expressed that the role of investors in the appointment of decision-makers would diminish or disappear in a permanent mechanism, raising serious concerns about the legitimacy of the system. See, A/CN.9/1050, para. 18.
25 For example, A/CN.9/1004/Add.1, para. 104. "In support of that view, it was noted that the system of appointment by the parties was the main reason for concern about the lack or apparent lack of independence and impartiality of ISDS decision-makers."
26 Preliminary discussions in WG III reiterated the need for independent, impartial, accountable and impartial judges. See, A/CN.9/1004/Add.1, paras. 96-101.

members of the court; and (iv) transparency in the appointment of the judges who will hear particular disputes.[27] As the proposals stand, there are no objective requirements to ensure that MIC judges are independent and impartial, free from any bias towards the development conditions of Northern countries versus those of the Global South, or towards investors' interests. It is also noted that the role and power of the Conference is diluted by the power granted to the Selection Committee.

Accordingly, the proposed articles 7 to 11 for the Statute of the MIC must guarantee an adequate regulatory framework for the selection of candidates and appointment of judges that ensures the independence of the MIC's members. This requires that the Parties' obligations regarding their selection of candidates and their subsequent appointment by the Commission be drafted in unambiguous terms, promote transparency and prevent arbitrary, political or trade associations interference throughout the process.[28]

a. Article 7 on qualifications and requirements could include other more objective criteria that would allow a more rigorous assessment of the candidates' competence, such as a minimum number of years of experience in public international law (not private law, since the disputes are of a public law nature),[29] the candidate's personality and independence of judgement.

b. Article 8 on the composition of the tribunals establishes criteria of geographical equity, representation of the main legal systems and equal gender representation.

Article 8 could clarify how the principal legal systems are to be determined. This question should not be taken for granted, nor should it be assumed to follow the approach to sources of law set out in Article 38 of the Statute of the International Court of Justice.

Gender parity would also imply that 50% of judges should be women, but Article 9 makes no provision to ensure that nominations meet this ratio.

c. Article 9 on the nomination of candidates by the Contracting Parties.

Gender equity. Paragraph 1 does not guarantee that there will ultimately be equal gender representation, even though the text proposes that "the Party shall take into account gender representation". This is because there is no coordination mechanism among the Contracting Parties on how to make nominations to ensure gender equity in the final selection. Once the number of nominations that the Contracting Parties may make in accordance with the number of judges provided for in Articles 3.3 and 3.4 is known, a system of coordination by the Contracting Parties may be considered. The present text may be maintained, however, provided that the number of candidates that the Contracting Parties may nominate is an even number.

Lack of guarantee of transparency and depoliticisation of the process. As currently drafted, the process of proposing candidates, verifying qualifications and electing judges is not transparent, nor does it guarantee that it will be free from political or other unwanted influences. The wording of Articles 9, 10 and 11 has several flaws and loopholes that potentially open the door for powerful organisations or countries to influence the process of selecting judges through various types of pressure, including political pressure.

Firstly, there is a lack of transparency in the proposed paragraph 1, because it only asks the Contracting Party to "make all efforts to consult…" a range of public and private entities to nominate candidates. The generality of the rule does not oblige the State to enact and comply with rules containing objective and transparent procedures for selecting its candidates. Although the decision to select a candidate will depend on State Parties, it would be important that the Statute of the MIC establish rules or formalities that clearly define the expertise and suitability of the candidate, including transparency and democratic participation in such selection.

The proposed Articles 7 to 11 of the statute of the MIC must ensure an appropriate regulatory framework for the selection of candidates and the appointment of judges that guarantees their independence. This requires that the domestic obligations of the parties regarding the process of selecting candidates and their subsequent appointment by the Commission be clearly established so as to prevent and deter arbitrary, political or private associations' interference throughout the process. Through a procedure that complies with all of the above, the Contracting Parties will become the first bastion of defense of the principles and rules that seek to guarantee the impartiality and independence of the MIC.

If WG III is serious about ensuring the transparency, independence, and depoliticization of the nomination process and subsequent appointment of MIC judges, the MIC's statute must include a set of clear principles and rules that each Contracting Party should abide by. The WG III should not defer their adoption to later negotiations or provide for their delegation to committees.

The principles and rules to be followed by each Contracting Party in a procedure shall, as a minimum, require that it be

27 The previous remarks regarding the importance of the independence of the decision-makers being ensured primarily (but not solely) by and in respect of the Contracting Parties in the statutes of the standing mechanism are relevant, particularly because the authority for the selection and appointment of the judges of the MIC would shift from the litigating parties to the contracting states, introducing an element of politics in the process. See, A/CN.9/1050, para. 21.

28 Document A/CN.9/WG.III/WP.213, circulated on 8 December 2021, presented the first draft on the selection and appointment of tribunal members in ISDS cases. The 2024 draft (A/CN.9/WG.III/WP.239) reflected comments on the establishment of the MIC.

29 Competence of members of the Tribunal in private international law should be eliminated, given that ISDS considers matters in dispute that are of a public interest and therefore apply public law.

objective, regulated, open to the public, democratic, transparent and guarantee general conditions of equality among candidates.[30] Consequently, these principles and rules would be respected and guaranteed when the criteria and procedures for appointment are objective and transparent and do not discriminate between persons and/or countries. In the words of the Inter-American Court of Human Rights (IACHR) on the United Nations (UN) Basic Principles on the Independence of the Judiciary, "any method used for the selection of judicial personnel must ensure that they are not appointed for improper motives".[31]

In application of the principle of transparency, Contracting Parties should ensure that during the process of selecting candidates to be proposed to the Conference for appointment as members of the tribunals, the curricula vitae of all candidates are published and made available for public comment; that those who meet the objective requirements make a public presentation before their election, to learn more about their vision, proposals and initiatives if elected. One example is the procedure conducted under the rules of the Organization of American States (OAS).

The General Assembly of the OAS decided that in the process of selecting judges for the Inter-American Court of Human Rights (IACHR), the States should nominate and elect "persons who ensure a balanced gender composition, with representation from the different regions, population groups and legal systems of the Hemisphere, guaranteeing that they meet the requirements of independence, impartiality and recognised competence in the field of human rights". It also instructed the Permanent Council, prior to the election of the judges, to invite the candidates for those positions to make a public presentation to the Permanent Council before their election, in order to make their vision, proposals and initiatives better known, should they be elected.[32]

Therefore, WG III members may consider including other requirements, such as merit, minimum age, personality of the candidate, or different views on the ISDS system. In addition, the democratic principle should be guaranteed during the internal selection process by the Contracting Parties.

The proposal in Article 9.2, of the Working Paper 239 concerns the role of the Conference to issue an open call to propose other candidates to the tribunal, and to decide which organisations may propose them. It also requests the Conference of the Parties to adopt regulations governing such nomination.

This proposal is not only inconsistent with the principles mentioned above, but also unjustified. The open call by the Conference has the potential to dismantle the system created on the basis of appointments resulting from processes conducted by the Contracting Parties. This article carries a greater risk of undue interference in the selection process. Through this mechanism, candidates to be proposed by the Conference may be promoted by groups of powerful countries to the detriment of candidates proposed by other Contracting Parties. This could lead to an imbalance in the composition of the MIC but, most importantly, to a potential lack of impartiality of the judges. The impartiality of judges may manifest itself in different ways, for example pro-state, pro-investor or pro-developed states.

In addition, Article 9.2 is superfluous, because if more candidates were required, it would be sufficient to increase the number of candidates proposed by the Contracting Parties as set out in Article 9.1.

The selection committee proposed in Article 10 to "examine and verify that candidates" meet the requirements may act as an unnecessary filter that detracts from the transparency of the process. This is in addition to the authority provided in paragraph 5 to recommend that the Conference issues an open call for additional candidates. This proposal suffers from the same shortcomings as those noted for the call by the Conference provided for in Article 9.2. Consequently, this provision is superfluous and less democratic and transparent than the one mentioned in Article 9.2., among other things because the selection committee appointed by the Conference (consisting of a small number of people) can propose additional candidates at will, deviating from the obligations and procedures laid down for the States.

The sole function of the selection committee should be to review and consider compliance with the requirements of Article 7. The list of candidates to be considered by the Committee should be public, with no exceptions as proposed in Article 10.6. The title of Article 10 should therefore be amended accordingly and renamed as the 'Verification Committee'.

vi) The chairperson, vice-chairpersons and secretary must also be subject to the independence and impartiality requirements.

vii) The discussion and subsequent determination of the legal instruments that would give life to the MIC and the appeals system will only make sense once the texts on the issues of major concern to the countries of the Global South have been satisfactorily clarified.

viii) The location of the seat of the MIC should be determi-

30 The European Court of Human Rights and the Inter-American Court of Human Rights have pronounced on the "proper appointment process" of high court judges. *Cf.* European Court of Human Rights, *Campbell and Fell v. United Kingdom*, Judgment of 28 June 1984, para. 78; European Court of Human Rights, *Case of Langborger v. Sweden*, Judgment of 22 January 1989, para. 32; Principle 10 of the UN Basic Principles; IACHR, *Case of the Constitutional Tribunal v. Peru*, para. 75; and IACHR, *Case of Chocrón Chocrón v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 1 July 2011, Series C No. 227, para. 98.

31 *Cf. Case of Chocrón Chocrón v. Venezuela*, para. 104.

32 See, OAS General Assembly, adoption of Resolution 2887 for the Promotion and Protection of Human Rights, 14 June 2016, resolutions 1 and 2, pp. 12 and 13.

ned prior to the conclusion of the negotiations.

III. Final remarks

There are several issues still to be discussed in WG III, all of them of utmost importance. With so little time left to discuss them all, prioritizing some of them seems to be the reasonable way forward. If real progress is to be made, damage assessment, third party funding and costs should be some of the key issues that cannot be left without discussion and agreement.

There are also many issues related to the discussion of the statute of the MIC that are important for the Global South. Because of the impact it will have on the adjudication of future cases, it is necessary to begin now to clarify the procedures for proposing candidates for judges and for their selection, the way in which cases will be assigned, the jurisdiction of the tribunals, the costs, the financing of the tribunals, and its relationship with the International Centre for Settlement of Investment Disputes (ICSID).

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