CAN INVESTMENT DISPUTE SETTLEMENT EVER BE DEPOLITICIZED?

Fernando Dias Simões[†]

ABSTRACT

Investor-state arbitration was created with the hope of depoliticizing investment disputes. However, the adoption of the traditional party-appointment system, in which disputing parties play a direct role in the composition of the tribunal, is increasingly criticized. Many believe that party appointment is a tool of political influence over the arbitrators' interpretative space. Suggestions for reform of the system have proliferated. The most radical proposal currently on the table—the creation of a permanent investment court—would cause a paradigm shift in the selection of adjudicators, moving from a disputing party framework, to a treaty party context. This article analyzes different options to reduce political influence in the selection process and discusses their potential effectiveness. It concludes that proposed alternatives to the party-appointed regime can only help to mitigate, but never completely dispel, the risk of political contamination of the process through which investment adjudicators are selected.

TABLE OF CONTENTS

I. INVESTMENT ARBITRATION: POLITICS AS USUAL?

Scholarship on the advent and evolution of investor-state arbitration, routinely asserts that this dispute settlement mechanism was formulated to depoliticize disputes.[1] The Convention of the International Centre for Settlement of Investment Disputes ("ICSID Convention") was created with the aspiration of "insulat[ing] such disputes from the realm of politics and diplomacy."[2] In general terms, depoliticization is defined as "the action of causing something or someone to have no political connections."[3] While in the realm of international dispute settlement, this term allows for diverse readings,[4] it is however frequently employed to convey the idea that adjudication should be "autonomous" and "immune from political considerations."[5] The goal is to detach the "politics" from the "law."[6] As such, the creation of investment arbitration was also a move towards the "legalization" or "judicialization" of these kinds of disputes.[7]

---

† Associate Professor, Faculty of Law of the Chinese University of Hong Kong.

1 *See, e.g.*, Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, 1 ICSID Rev. FOREIGN INV. L. J. 1, 1 (1986); Martins Paparinskis, *The Limits of Depoliticisation in Contemporary Investor-State Arbitration*, *in* 3 SELECTED PROCEEDINGS OF THE EUR. SOCIETY OF INT'L L. 271 (James Crawford & Sarah Nouwen, ed., 2012).

2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formulation of the Convention (History of the Convention), Vol. II, Part 1, at 464.

3 CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/depoliticization (last visited Oct. 21, 2020).

4 Paparinskis, *supra* note 1, at 273. *See also* Geoffrey Gertz, Srividya Jandhyala & Lauge Poulsen, *Legalization, Diplomacy, and Development: Do Investment Treaties De-politicize Investment Disputes?*, 107 WORLD DEVELOPMENT 239, 240-41 (2018).

5 Tom Ginsburg, *Political Constraints on International Courts*, THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 483, 484 (Cesare P.R. Romano, Karen J. Alter, and Yuval Shany, ed., 2014).

6 Ibironke T. Odumosu, *The Law and Politics of Engaging Resistance in Investment Dispute Settlement,* 26 PA. ST. INT'L. L. REV. 251, 271-72 (2007). CHRISTOPH SCHREUER ET AL, THE ICSID CONVENTION: A COMMENTARY 416 (2009) ("The dispute settlement process is depoliticized and subjected to objective legal criteria.").

7 Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-state Arbitral Awards: The Re-politicization of International Investment Disputes*, 21 AM. REV. INT'L. ARB. 211, 214 (2010); Sergio Puig, *No Right without a Remedy: Foundations of Investor-State Arbitration,* 35 U. PA. J. INT'L. L. 829, 834 (2014); Alec Stone Sweet and Florian Grisel, *The Evolution of International*

The hope was that investment disputes would be removed from political territory by locating them near the well-known land of commercial arbitration. The reality, however, is that this change of habitat, was not entirely successful. Because the disputes being adjudicated have an intrinsically political nature,[8] the process is inescapably subject to political influence. Arbitral tribunals are recurrently required to dissect governmental policies addressing issues such as: economic and financial crises, regulating services of public interest, promoting environmental protection, and safeguarding public health, among others.[9] Such matters are of great political sensitivity to host states.[10] While arbitrators perform a technical-legal task, they cannot totally avoid being dragged into an examination that has a clear political scent.[11]

Though investment arbitration was designed to depoliticize investment controversies, it is now at the forefront of political debate at both the national[12] and international[13] level. Contrary to expectations,

---

Arbitration: Delegation, Judicialization, Governance, *in* INT'L ARBI. AND GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE 22 (Walter Mattli & Thomas Dietz ed., 2014).

8 *See* Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 FORDHAM INT'L L. REV. 138, 141 (2007); Charles H. Brower II, *Politics, Reason, and the Trajectory of Investor-State Dispute Settlement*, 49 LOY. UNIV. CHI. L. J. 271, 302 (2017).

9 *See* Paparinskis, *supra* note 1, at 272. *See also* Catharine Titi, *Are Investment Tribunals Adjudicating Political Disputes?*, 32 J. of Int'l Arb. 261, 267-278; Gabrielle Kaufmann-Kohler & Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap*, U.N. COMM'N ON INT'L TRADE L., CTR. FOR INT'L DISP. SETTLEMENT (June 3, 2016), https://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf [hereinafter *Analysis and Roadmap*].

10 *See* Philippe Sands QC, *Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel*, *in* CONTEMPORARY ISSUES IN INT'L ARB. AND MEDIATION: THE FORDHAM PAPERS 2012 19, 24 (Arthur Rovine ed., 2013); *see also Analysis and Roadmap*, *supra* note 9, ¶ 174.

11 Odumosu, *supra* note 6, at 272.

12 *See* U.N. Comm'n on Int'l Trade L., Working Group III, Possible Reform of Investor-State Dispute Settlement (ISDS). Note by the Secretariat, ¶ 46, U.N. DOC A/CN.9/WG.III/WP.142 (2017) [hereinafter Possible Reform of ISDS: Note by the Secretariat]; Miriam Sapiro, *Transatlantic trade and investment negotiations: Reaching a consensus on investor-state dispute settlement*, BROOKINGS INST. (Friday, Oct. 16, 2015), https://www.brookings.edu/wp-content/uploads/2016/07/GlobalViews5Oct2015_FINAL.pdf.

13 *See* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 3 (2005); Lauge N. Skovgaard Poulsen, *The Politics of Investment Treaty Arbitration*, in OXFORD HANDBOOK OF INT'L ARB. 740 (Thomas Schultz & Federico Ortino ed., 2020).

states did not back away from the resolution of these disputes;[14] instead, there remains an ongoing drive towards re-politicization, which is evidenced by the use of new strategies, which interfere with investment arbitrations, the parallel use of dispute settlement mechanisms at the World Trade Organization, and the initiation of state-to-state proceedings in relation to investor-state disputes.[15]

Because of the arbitral award potential bearing on governmental budgets and public interest, investment arbitration also elicits the interest of the community at large.[16] People from all walks of life, seem to have a strong opinion about the merits and shortcomings of the system, making the issue a top priority for the media, while also politicizing the discussion.[17] The internet offers a continuous platform for lively debate. In the space of two decades, investor-state arbitration has gone from a "specialized, almost obscure area of international law"[18] to a "blogosphere term."[19]

The risk of moving toward a more politicized environment is particularly critical at a time when investor-state dispute settlement is facing severe backlash.[20] Investment arbitration has purposely been modelled after the international commercial arbitration paradigm.[21] The

---

14 David Schneiderman, *Revisiting the Depoliticization of Investment Disputes, in* YEARBOOK ON INT'L INV. L. AND POL'Y. 2010-2011 693 (Karl Sauvant ed., 2012).

15 Titi, *supra* note 9, at 262, 265, 278-87. *See also* Bjorklund, *supra* note 7, at 214.

16 Possible Reform of ISDS: Note by the Secretariat, *supra* note 12, ¶¶ 45-46. *See also* U.N. Comm'n on Int'l Trade L., Rep. of Working Group III, Investor-State Dispute Settlement Reform, on the Work of its Thirty-Fifth Session, U.N. Doc. A/CN.9/935, ¶ 94 (2018) [hereinafter Rep. Thirty-Fifth Session].

17 Thomas Wälde, *The Specific Nature of Investment Arbitration*, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 42, 92 (Philippe Kahn & Thomas Wälde, eds., 2007); Salacuse, *supra* note 8, at 141, 149. In the words of Kaufmann-Kohler and Potestà, "[w]hat began as a rather academic or at least discrete controversy has recently gained substantial media interest and public scrutiny and, in some instances, has spilled over into general politics." *Analysis and Roadmap*, *supra* note 9, at 9-10.

18 Tim R. Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56 AM. BUS. L. REV. 115, 116 (2019).

19 *Id.* (quoting Gary Clyde Hufbauer, *ISDS Controversy*, TRADE & INVESTMENT POLICY WATCH—PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (May 13, 2015, 10:00 AM), https://www.piie.com/blogs/trade-investment-policy-watch/isds-controversy).

20 *See generally* MICHAEL WAIBEL ET AL., THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel, Asha Kaushal, Kyo-Hwa Chung & Claire Balchin eds., 2010); Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50(2) HARV. INT'L L. J. 491 (2009).

21 Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151, 224 (2004).

importation of the traditional principle of party autonomy, where disputing parties play a direct role in the composition of the tribunal, places arbitrators under relentless censure.[22] Unlike judges, an arbitrator's jurisdiction is predicated on them being chosen by certain parties. This is perceived as a tool of control over the arbitrators' interpretative space.[23] Because parties select arbitrators in view of their seeming propensities regarding the matters under discussion,[24] the latter may be exposed to unjustified pressure, including that of a political nature.[25]

Even worse, it might be that arbitrators do not need to be pressured and are actually willing to lean towards the proclivities of certain parties. Some authors believe that arbitrators' decision-making processes are tainted by their political and ideological beliefs.[26] Party-appointed arbitrators are frequently portrayed as "hired guns" who replicate the political divide between host states and foreign investors.[27]

---

22 Catherine Rogers, *The Politics of International Investment Arbitrators*, 12 SANTA CLARA J. OF INT'L L. 223 (2013). For a summary of the major critiques *see* Carlos Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16(2) FLA. J. OF INT'L L. 301, 352-354 (2004); Jan Paulsson, *Moral Hazard in International Dispute Resolution,* 25(2) ICSID REV. 339 (2010); David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* 43-51 OECD PUBLISHING, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT 2012/2013, http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf (last accessed Oct. 21, 2020).

23 Joost Pauwelyn & Manfred Elsig, *The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals, in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 445, 463 (Jeffrey Dunoff & Mark Pollack eds., 2012).

24 Wälde, *supra* note 17, at 51; Jan Wouters & Nicolas Hachez, *The Institutionalization of Investment Arbitration and Sustainable Development, in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 615, 628 (Marie-Claire Cordonier Segger, Markus Gehring, & Andrew Newcombe eds., 2011).

25 GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 172 (2008) [hereinafter VAN HARTEN, INVESTMENT TREATY ARBITRATION]; Andrea Bjorklund et al., *Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform,* ACADEMIC FORUM ON ISDS 14 (2019), https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/11-bjorklund-et-al-selection-and-appointment-isds-af-11-2019.pdf (last accessed Oct. 21, 2020).

26 Chotika Wittayawarakul, *Institutional Aspects of International Trade and Investment Dispute Settlement Systems and the Integration of External Norms,* 42(2) MANCHESTER J. OF INT'L ECON. L. 42, 48 (2010); Rob Howse, *Designing a Multilateral Investment Court: Issues and Options,* 36(1) Y.B OF EUR. L. 209, 226 (2017).

27 Pauwelyn & Elsig, *supra* note 23, at 464 (arguing this places additional pressure on the chair arbitrator, who is normally not appointed by the parties); EUROPEAN COMMISSION, THE IDENTIFICATION AND CONSIDERATION OF CONCERNS AS REGARDS INVESTOR TO STATE DISPUTE SETTLEMENT 11 (Nov. 20, 2017),

Some 'arbitration celebrities' are persistently labelled as being either "pro-state" or "pro-investor."[28]

Newcomers, but also veterans who have not yet developed an overt reputation for leaning toward any one of the sides, may have an incentive for strategically signaling their political preferences, in order to improve their chances of being appointed.[29] Such inclinations may also explain the repeated appointments of some seasoned arbitrators.[30] As the market for arbitration services is still dominated by a small circle of elites, this increases the risks of the prevailing doctrines being dependent on the political preferences of a few leading adjudicators.[31]

The emulation of the commercial arbitration paradigm for the adjudication of disputes involving states and frequently touching upon public interests is seen as problematic.[32] In particular, it results in the

---

https://www.asktheeu.org/en/request/5793/response/19495/attach/17/Document%2019%20Annex%201.pdf (last accessed Jan. 6 2020). *See* Rep. Thirty-Fifth Session, *supra* note 16, ¶ 54; Wälde, *supra* note 17, at 51 (arguing chair arbitrators will most likely try to develop an image of neutrality or command empathy from both sides).

28 Thomas Wälde, *Interpreting Investment Treaties: Experiences and Examples*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 724, 731 (Christina Binder et al. eds., 2009). Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387, 413 (2014); U.N. Comm'n on Int'l Trade L., Report of Working Group III, Investor-State Dispute Settlement Reform, on the Work of its Thirty-sixth Session, U.N. DOC. A/CN.9/964 (Vienna, Oct. 29 – 2 Nov. 2, 2018) ¶ 71 [hereinafter Rep. Thirty-Sixth Session]. A study released in 2012 labelled Brigitte Stern as "[t]he states' favoured choice," adding that "[g]overnments have appointed her as arbitrator in 79% of her known investment-treaty cases." Differently, Charles Brower is depicted as "[a] favourite of investors. Companies have appointed him as arbitrator in 94% of the known investment-treaty cases with which he has been involved." Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom*, CORPORATE EUROPE OBSERVATORY 38-39 (2012), https://www.tni.org/files/download/profitingfrominjustice.pdf (last visited Oct. 21, 2020).

29 Nicolas Hachez & Jan Wouters, *International Investment Dispute Settlement in the Twenty-first Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 417, 427 (Freya Baetens ed., 2013). Sergio Puig & Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, 46 J. LEGAL STUD. 371, 393 (2017).

30 Puig, *supra* note 28, at 403-04. Joost Pauwelyn, *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators Are from Venus*, 109 AM. J. INT'L L. 761, 781-82 (2015).

31 Puig, *supra* note 28, at 422. *See also* Gus Van Harten, *Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010*, 29 EUR. J. INT'L L. 507 (2018).

32 U.N. Comm'n on Int'l Trade Law, Possible Reform of Investor-State Dispute Settlement (ISDS): Arbitrators and Decision Makers: Appointment Mechanisms and

appointment of private lawyers, who often have a pro-business approach and tends to overlook the broader legal, political, and social ramifications of these disputes, and who disregard the public's interests, which are frequently at play.[33] The professional background and personal inclinations of investment adjudicators, are subject to increasing scrutiny, calling into question their suitability to deliver justice in an unbiased, impartial, and independent fashion. When governments had agreed to incorporate the party-appointment paradigm into the investment arbitration mechanism, they may have discounted the possibility that arbitrators themselves could be politically driven.[34]

Proposals for a reform of the system have proliferated, and all share the ambition of reassessing states' control over the selection of adjudicators. The United Nations Commission on International Trade Law ("UNCITRAL"), Working Group III: Investor-State Dispute Settlement Reform, is currently considering different models for reshaping the way adjudicators are selected and appointed.[35] They range from the creation of a pre-established list or roster, to the establishment of a standing mechanism with a permanent adjudicatory body.[36] Each model may include a number of variants and has to be considered in light of the other options that are being discussed, for instance, the

---

Related Issues, U.N. Doc. A/CN.9/WG.III/WP.152, ¶ 9 [hereinafter ISDS, Arbitrators and Decision Makers].

33 Muthucumaraswamy Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, *in* APPEALS MECHANISM IN INVESTMENT DISPUTES 39, 42 (Karl Sauvant ed., 2008). David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes,* 30 NW. J. INT'L L. & BUS. 383, 411-12 (2010). William Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 323 (2010). Benedict Kingsbury & Stephan Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest–the Concept of Proportionality*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 75, 76-77 (Stephan Schill ed., 2010).

34 Muthucumaraswamy Sornarajah, *Towards Normlessness: The Ravage and Retreat of Neo-liberalism in International Investment Law*, *in* YEARBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 2009-2010 595, 601 (Karl Sauvant ed., 2010).

35 *See Working Group III: Investor-State Dispute Settlement Reform*, UNITED NATIONS COMMISSION ON INT'L TRADE L., https://uncitral.un.org/en/working_groups/3/investor-state (last visited Oct. 21, 2020).

36 *See* Secretariat of the U.N. Comm'n on Int'l Trade Law, Working Group III, Possible Reform of Investor-State Dispute Settlement (ISDS): Selection and Appointment of ISDS Tribunal Members, Note by the Secretariat, ¶ 9–11, U.N. Doc. A/CN.9/WG.III/WP.169 (July 31, 2019) [hereinafter ISDS: Selection and Appointment of Tribunal Members].

creation of an appellate mechanism.[37] While there seems to be a famished "appetite for change,"[38] UNCITRAL is aware that such enthusiasm based on reform, should not lead to the adoption of an apparatus that further promotes (re)politicization of investment disputes.[39]

Investor-state arbitration has been described as still being in its adolescence[40] or even infancy.[41] Regardless of its precise age range, it is fairly obvious that the system has not matured enough and is going through debilitating "growing pains."[42] Prescriptions to adopt a healthier method of selection and appointment are on the table for consideration. The investment arbitration crisis is essentially a crisis of trust in the men and women who decide these disputes. This article analyzes different options to address these concerns and discusses their potential effectiveness. It concludes that the proposed alternatives to the party-appointed mechanisms can only mitigate, but never completely dispel the risk of political contamination of the process through which investment adjudicators are selected.

II. A PERMANENT INVESTMENT COURT: STACKING THE BENCH?

The proposal that has recived more attention is the creation of a permanent investment court.[43] The idea has been brewing for several

---

37 *Id.* ¶ 12.

38 Cecilia Malmstrom, European Comm'r for Trade, European Comm'n, A Multilateral Investment Court: A Contribution to the Conversation About Reform of Investment Dispute Settlement (Nov. 22, 2018) (transcript available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1943).

39 Rep. Thirty-Fifth Session, *supra* note 16, ¶ 63; ISDS, Arbitrators and Decision Makers, *supra* note 32, ¶ 37; *Analysis and Roadmap*, *supra* note 9, ¶ 23.

40 Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 49 (2013); Rogers, *supra* note 22, at 240.

41 Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1523 (2005).

42 *Id.*

43 Possible Reform of ISDS: Note by the Secretariat, *supra* note 12, ¶ 52; ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶¶ 40; Secretariat of the U.N. Comm'n on Int. Trade Law, Possible Reform of Investor-State Dispute Settlement (ISDS), U.N. Doc. A/CN.9/WG.III/WP.149, ¶¶ 44, (Sept. 5, 2018) [hereinafter Possible Reform of Investor-State Dispute Settlement]; Secretariat of the U.N. Comm'n on Int. Trade Law, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union and its Member States, U.N. Doc. A/CN.9/WG.III/WP.159/Add.1 (Jan. 24, 2019) [hereinafter Submission from the European Union and its Member States].

years,[44] and both the EU-Canada Comprehensive Economic Trade Agreement ("CETA")[45] and the EU-Vietnam Investment Protection Agreement[46] already incorporates some features of a "court system."

The proposal seeks to address concerns pertaining to the way in which arbitrators are selected through the creation of a new, and much stricter regime. In a nutshell, decisionmakers would be employed full-time (without the possibility of engaging in any outside professional activities),[47] the conditions of their office life would resemble those normally associated with the courts,[48] and they would be subject to strict ethical requirements.[49] The method for selection and appointment of members of the court would also promote diversity in terms of gender and geographic provenience.[50] The ultimate design of the court depends on whether it will be a "full representation" or a "selective representation" body—that is, whether each state gets to appoint an adjudicator, or if there will be fewer seats on the bench than member states.[51] Finally, a permanent court would require a more structured selection process,[52] which would be divided into two different phases: the selection of adjudicators that would be part of the bench, and the assignment of specific cases to them.[53]

---

44 *See* European Commission, *The Multilateral Investment Court Project,* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 (last visited Oct. 21, 2020); *World Investment Report 2015: Reforming International Investment Governance*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT at xii, https://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (last visited Oct. 21, 2020); *Investment Policy Framework for Sustainable Development*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT at 108, https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf (last visited Oct. 21 2020); VAN HARTEN, INVESTMENT TREATY ARBITRATION, *supra* note 25, at 180-184; Gus Van Harten, *A Case for an International Investment Court*, SOCIETY OF INTERNATIONAL ECONOMIC LAW (2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424.

45 European Commission, *Comprehensive and Economic Trade Agreement* (Oct. 30, 2016), https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter.

46 European Commission, *Free Trade Agreement Between the European Union and the Socialist Republic of Viet Nam* at ch. 3, 3 (Sept. 24, 2018), https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437.

47 ISDS: Selection an Appointment of Tribunal Members, *supra* note 36, ¶40.

48 *Id.* at 14. Namely, a long, non-renewable term of office, financial security, and immunities.

49 *Id.*¶ 40.

50 *Id.* ¶ 15, ¶ 40, ¶¶ 47-48, ¶59; Rep. Thirty-Sixth Session, *supra* note 28, ¶¶ 91-98.

51 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶¶ 44-46.

52 *Id.* ¶ 59.

53 *Id.* ¶ 43.

The court model is the most dramatic solution for the ills of the system, as it would replace the current regime—where every arbitral panel is purposefully established by the parties, after the dispute emerges—with a system where the adjudicatory body is already in place when the proceedings are initiated.[54] The main goal is to "break the link"[55] between the parties and the adjudicators, which seems to be at the root of many of the system's perceived shortcomings.

Despite its professed good intentions, this bold proposal has raised many eyebrows. The problem is that the new model turns states into the exclusive gatekeepers for the composition of the adjudicatory body.[56] The new model requires a paradigm shift regarding the selection of adjudicators, moving from a disputing party framework to a treaty or contracting party context.[57] While stating that in the court model "disputing parties would have *no or little influence* on the selection and appointment of adjudicators,"[58] UNCITRAL's Working Group III, nevertheless admits that "the respondent State might retain a diluted control over the appointment of the judges."[59] The fact that "disputing parties would have no control on the composition of panels

---

54 *Id*. ¶ 41.

55 Stefanie Schacherer, *Independence and Impartiality of Arbitrators – A Rule of Law Analysis*, at 2, 17 & 22 (U. of Geneva, 2018), https://archive-ouverte.unige.ch/unige:107171 (last visited Oct. 21, 2020).

56 Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 695, 768-769 (2014); *see also* Charles N. Brower & Jawad Ahmad, *From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court*, 41 FORDHAM INT'L L. J. 791, 793 (2018).

57 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 58; Anthea Roberts, *Would a Multilateral Investment Court be Biased? Shifting to a Treaty Party Framework of Analysis*, EUR. J. INT'L. L.: TALK! (Apr. 28 2017), https://www.ejiltalk.org/would-a-multilateral-investment-court-be-biased-shifting-to-a-treaty-party-framework-of-analysis; Gabrielle Kaufmann-Kohler & Michele Potestà, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards*, CTR. FOR INT'L. DISP. SETTLEMENT, 14 (2017), https://www.uncitral.org/pdf/english/working-groups/wg_3/CIDS_Supplemental_Report.pdf. *See* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States*, 104 AM. J. INT'L L. 179, 182, (2010) (noting the dual role of States as treaty parties and respondents).

58 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 41 (emphasis added).

59 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 58. *See also* ¶ 42 (noting that a parallel may be drawn with the World Trade Organization's Appellate Body: "States as disputing parties have no say in the selection of the individuals who compose the World Trade Organization Appellate Body (WTO AB), although as treaty parties they have participated in such a selection process.").

to hear a particular case"[60] seems to be enough to break the direct link that currently connects parties with arbitrators.

The magnitude of this transformation should not be understated. In the current regime, disputing parties have complete control over the composition of the tribunal.[61] The new framework would shrink the influence of disputing parties while increasing the influence of a state's party to the system.[62] This would be a radical departure from the time honored tradition of giving both disputing parties—including the investor—a similar opportunity to influence the composition of the tribunal.[63] While claimants and respondents alike would lose the possibility of directly influencing the composition of the panel, states would be less affected, as they would still be able to influence the overall composition of the court as treaty parties.[64] This introduces a significant asymmetry between disputing parties as one of them (the investors) has no say in the selection process, while the other (the states) retains such power in its capacity as a party to a treaty.[65] A

60 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 58.

61 Kaufmann-Kohler & Michele Potestà, *supra* note 57, at 9, 14; Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. INT'L. AND COMP. L. 499, 509 (2006); Roberts, *supra* note 57, at 182 n.13 ("The treaty parties do not have exclusive power to select the arbitrators because, while the treaty parties consent to investor-state arbitration in general, investor-state tribunals are ad hoc bodies whose members are selected by the disputing parties (which includes one treaty party) and/or appointing institutions. This procedure reduces the treaty parties' control over the selection of arbitrators and increases the possibility that arbitrators will see their principals only as the disputing parties rather than also as the treaty parties.").

62 Kaufmann-Kohler and Potestà, *supra* note 57, at 5, 14.

63 Brower II, *supra* note 8, at 296; Howse, *supra* note 26, at 226; Chi-Chung Kao, *The Inclusion of Investment Court System into the EU-China BIT: Innovations, Prospects and Problems* 247, 264, *in* CHINA-EUROPEAN UNION INVESTMENT RELATIONSHIPS (Julien Chaisse ed., 2018); James Crawford, *The Ideal Arbitrator: Does One Size Fit All?,* 32 AM. U. INT'L L. REV. 1003, 1019-1020 (2017); Ian Laird, *TPP and ISDS: The Challenge from Europe and the Proposed TTIP Investment Court,* 40(1) CAN.-U.S. L. J. 106, 120 (2016); Piero Bernardini, *Reforming Investor-State Dispute Settlement: The Need to Balance Both Parties' Interests*, 32(1) ICSID REV. 38, 47-48 (2017); Catherine Li, *The EU's Proposal Regarding the Establishment of the Investment Court System and the Response from Asia,* 52(6) J. OF WORLD TRADE 943, 953 (2018).

64 Kaufmann-Kohler and Potestà, *supra* note 57, at 14. Disputing parties would only be able to influence the selection of panel members by challenging them after their appointment, a possibility that should still exist in the new regime. *Id.* at 172. Bernardini believes this would be 'a limited guarantee, far from satisfying the basic premise of arbitration, that the parties' mutual confidence in the tribunal is enhanced by the opportunity offered to both of them to have a say in its constitution. Bernardini, *supra* note 63, at 48.

65 Kaufmann-Kohler and Potestà, *supra* note 57, at 5, 14 ("The situation is different from a permanent inter-State framework where the categories of disputing and

torrent of scholarship cautioned that seats on the bench of the investment court may consequentially be filled with people who share the appointing state's preferences and priorities.[66]

The perception of bias might not be eliminated if members of the court only represent the viewpoints of the specific governments appointing them.[67] The problem may be amplified with regard to disputes in highly politically sensitive sectors.[68] Instead of appointing adjudicators for a particular dispute where they are respondents, states will have to consider, in advance and in abstract, their long-term defensive (as respondents) and offensive interests (as the home state of investors).[69] Though risks such as states appointing adjudicators who

---

treaty parties coincide, and thus all potential disputing parties participate in the composition of the permanent body in their capacity as treaty parties.").

66 Stephan Wilske, Raeesa Rawal and Geetanjali Sharma, *The Emperor's New Clothes: Should India Marvel at the EU's New Proposed Investment Court System?*, 6(2) INDIAN J. OF ARB. L. 79, 90 (2018); Crawford, *supra* note 63, at 1020; Bernardini, *supra* note 63, at 48; Christian Tams, *An Appealing Option? The Debate about an ICSID Appellate Structure,* 57 ESSAYS IN TRANSNATIONAL ECONOMIC LAW 36, 47 (2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1413694 (last visited Oct. 21, 2020); Lukas Innerebner, *Politicization of a Future International Investment Tribunal's Appointment and How to Avoid It*, 1(1) TRENTO STUDENT LAW REVIEW 137, 144-145 (2019); Brower and Blanchard, *supra* note 56, at 768; Brower II, *supra* note 8, at 296-298; Laird*, supra* note 63, at 120; JAN Paulsson, Denial of Justice in International Law 245 (2005); Li, *supra* note 63, at 953; Eduardo Zuleta, *The Challenges of Creating a Standing International Investment Court*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 403, 441, 422 (Jean Kalicki and Anna Joubin-Bret eds., 2015); Barry Appleton and Sean Stephenson, *The Investment Treaty Working Group Task Force on the Investment Court System Proposal,* 13 AM. BAR ASSOC. SEC. ON INT'L L. (2016), https://shop.americanbar.org/PersonifyImages/ProductFiles/262739281/6-Proposed%20EU%20Investment%20Court.pdf (last visited Oct. 21, 2020); *Task Force Paper regarding the Proposed International Court System (ICS)*, EUROPEAN FEDERATION FOR INVESTMENT LAW AND ARBITRATION 60 (2016), https://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf (last visited Oct. 21, 2020); Luis González García, *Making Impossible Investor-State Reform Possible in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 424, 432 (Jean Kalicki and Anna Joubin-Bret eds., 2015); Moses Dickson, *Rebalancing International Investment Agreements in Favour of Host States: Is it Time for a Regional Investment Court?,* 60(2) INT'L J. OF L. AND MGMT 452, 459 (2018); Jeffrey Dunoff et. al., *Lack of Independence and Impartiality of Arbitrators,* ACADEMIC FORUM ON ISDS, WORKING GROUP 6, 16 (Mar. 2019), https://www.cids.ch/images/Documents/Academic-Forum/6_Independence_-_WG6.pdf (last visited Oct. 21, 2020).

67 Laird, *supra* note 63, at 120; Crawford, *supra* note 63, at 1021, n. 63.

68 Brower II, *supra* note 8, at 298-99.

69 Roberts, *supra* note 57. Submission from the European Union and its Member States, *supra* note 43, ¶ 23. ANDRÉ VON WALTER & MARIA LUISA ANDRISANI, FOREIGN INVESTMENT UNDER THE COMPREHENSIVE ECONOMIC AND TRADE

lean towards their interests and preferences may exist, this does not necessarily mean that they will have a pro-government (or defendant) approach. Actually, some capital-exporting countries might prefer to select adjudicators who are pro-industry, so as to protect their investors abroad.[70] Others may decide to appoint adjudicators who they perceive as neutral.[71]

Either way the problem remains—appointees may be perceived to represent the specific political and ideological strategies of the state's appointing them. Brower and Ahmad point to the risk of the appointment process involving a "political scrum."[72] If political preferences speak louder, the technical expertise and experience of adjudicators may be overlooked.[73] Even if states do not approach the selection process in such a strategic way, adjudicators themselves may feel (even if subconsciously) compelled to favor the positions of the state who appointed them, and who decide on a potential extension of their mandate.[74] Prospective adjudicators may start pulling strings in political circles, with the hope of being appointed.[75] After all, members of the permanent court will likely become aware that the court itself is the creation of governments.[76]

By radically changing the philosophy underpinning the appointment of adjudicators and breaking the link of trust between disputing parties and arbitrators, the new system may reduce investor's

---

AGREEMENT (CETA), RESOLUTION OF INVESTMENT DISPUTES 185, 196 (Makane Mbengue & Stefanie Schacherer eds., 2019). Colin M. Brown, *A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches,* 32(3) ICSID REV., 673, 686 (2017). Rep. Thirty-Fifth Session, *supra* note 16, ¶ 68. Dunoff et al, *supra* note 66, at 16.

70 Dickson, *supra* note 66, at 459.

71 Dunoff et al., *supra* note 66, at 16. Gabrielle Kaufmann-Kohler & Michele Potestà, *Challenges on the Road toward a Multilateral Investment Court,* CCSI (2017), http://ccsi.columbia.edu/files/2016/10/No-201-Kaufmann-Kohler-and-Potesta-FINAL.pdf.

72 Brower & Ahmad, *supra* note 56, at 793.

73 Brower II, *supra* note 8, at 296. Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded,* 29(1) ARB. INT'L, 7, 23 (2013). Brower & Ahmad, *supra* note 56, at 795.

74 Laird, *supra* note 63, at 120. Innerebner, *supra* note 66, at 144 & 152. Emma R. Bienvenu, *The EC's Proposal for a Permanent Investment Court System: Politics, Pitfalls, and Perils,* J. OF INT'L L. U. OF PA. (2017), http://pennjil.com/the-ecs-proposal-for-a-permanent-investment-court-system-politics-pitfalls-and-perils/ (last visited Oct. 21, 2020).

75 Brower & Rosenberg, *supra* note 73, at 22.

76 Zuleta, *supra* note 66, at 422. It would be especially "troubling to rely upon the judgment of individuals who are accountable to the very Sovereigns whose conduct is being evaluated." Franck, *supra* note 41, at 1608.

confidence in the neutrality of the tribunal and of the dispute settlement mechanism as a whole.[77] This paves the way for accusations of partiality and favoritism in the composition of the tribunal, potentially (re)politicizing investment disputes.[78]

When states agree to participate in international courts, they are particularly attentive to who the adjudicators will be. Governments can select judges whom they expect to make decisions matching their perceived interests.[79] The appointment process can be used as a particularly powerful tool of political control over adjudicators.[80] Experience demonstrates that election processes in several international courts are highly politicized.[81]

---

77 Charles Brower and Sadie Blanchard, *From "Dealing in Virtue" to "Profiting from Injustice": The Case Against "Re-Statification" of Investment Dispute Settlement*, 55 HAR. INT'L L. J. ONLINE 45, 50 (2014); Li, *supra* note 63, at 953; Kao, *supra* note 63, at 264; Bernardini, *supra* note 63, at 48; *European Union's Proposed Investment Chapter for TTIP: Towards the End of Investment Treaties as We Know Them?*, ALLEN & OVERY (Nov. 26, 2015), https://www.allenovery.com/en-gb/global/news-and-insights/publications/european-unions-proposed-investment-chapter-for-ttip-towards-the-end-of-investment-treaties-as-we-kn.

78 Kao, *supra* note 63, at 264-66; Jan Paulsson, *Avoiding Unintended Consequences*, *in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 241, 258 (Karl Sauvant ed., 2008); Brower & Rosenberg, *supra* note 73, at 23; Gabrielle Kaufmann-Kohler, *in Search of Transparency and Consistency: ICSID Reform Proposal*, 2(5) TRANSNAT'L DISP. MGMT 1, 5-6 (2005); Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361, 400 (2018); Innerebner, *supra* note 66, at 143; Jonathan Klett, *National Interest vs. Foreign Investment: Protecting Parties Through ISDS*, 25 TUL. J. INT'L COMP L. 213, 231 (2016); Nguyen Linh, Dinh Anh & Chu Giang, *Vietnam's Recognition and Enforcement of Foreign Arbitral Awards and Preparation for EVFTA*, 37 WORLD TRADE INSTITUTE, WORKING PAPER NO. 18/2017 (2017), https://www.wti.org/research/publications/1135/vietnams-recognition-and-enforcement-of-foreign-arbitral-awards-and-preparation-for-evfta; Yang Hyoeun, *The EU's Investment Court System and Prospects for a New Multilateral Investment Dispute Settlement System* 52 KOREA INSTITUTE FOR INT'L ECON. POLICY, POLICY REFERENCES (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063843 (last visited Oct. 21, 2020); *Analysis and Roadmap*, *supra* note 9, at 167.

79 Erik Voeten, *International Judicial Independence*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 421, 431 (Jeffrey Dunoff & Mark Pollack eds., 2012); Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L. J. 271, 278 (2003).

80 Ginsburg, *supra* note 5, at 490; Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 665 (2004); Richard Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 264 (2004). *But see* Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 428 (2008) (arguing that States cannot effectively control courts through appointments).

81 Philippe Sands, *The Independence of the International Judiciary: Some Introductory Thoughts*, *in* LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR

Kaufmann-Kohler contends that the current regime has created a "distance from politics, from state interests and equally a distance from business interests" that might be "entirely gone" with the new model.[82] Brower and Rosenberg add that "[t]he politicization of the appointment process inevitably would result, in a not insignificant degree, in the 'distancing of the community of arbitrators from the community of users,' adversely affecting to that extent the perceived legitimacy of the arbitral proceedings."[83] The authors see the current regime as "the highest form of a merit system" because appointments "are depoliticized, as potential arbitrators effectively 'stand for election' by parties every time a new case is brought."[84]

While the new appointment model seeks to address accusations of bias, it will not automatically remove the risk of politically predisposed decisions.[85] Even worse, as adjudicators would be in office for a certain period of time, there is a risk that their perceived political preferences would become "locked in."[86] The selection process for members of the investment court might be plagued by the very same

---

OF FLORENTINO FELICIANO 313, 319 (Steve Charnovitz, Debra Steger & Peter Van den Bossche eds., 2005); Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Law and Politics of WTO Dispute Settlement*, *in* RESEARCH HANDBOOK ON THE POLITICS OF INTERNATIONAL LAW 269, 276-277 (Wayne Sandholtz & Christopher Whytock eds., 2017); Zuleta, *supra* note 66, at 422; Karen Alter, *Agents or Trustees? International Courts in their Political Context*, 14(1) EUR. J. INT'L REL. 33, 46 (2008); Brower & Ahmad, *supra* note 56, at 793; Charles Brower & Jawad Ahmad, *Why the "Demolition Derby" that Seeks to Destroy Investor-state Arbitration?*, 91 S. CAL. L. REV. 1139, 1156 (2018); Mackenzie & Sands, *supra* note 79, at 277-278; Eric Posner & Miguel de Figueiredo, *Is the International Court of Justice Biased?*, 34(2) J. LEGAL STUD. 599 (2005); Steinberg, *supra* note 80, at 264; Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT'L ORG. 669, 695 (2007).

82 Gabrielle Kaufmann-Kohler, Fourth Annual Charles N. Brower Lecture on International Dispute Resolution: Accountability in International Investment Arbitration (Mar. 31, 2016), *in* 110 ASIL PROC. 142, 148 (2017).

83 Brower & Rosenberg, *supra* note 73, at 23 (quoting Alison Ross, *London: Party-appointed Arbitrators – Love Them or Loathe Them,* GLOB. ARB. REV. (Jan. 19, 2011), https://globalarbitrationreview.com/article/1029887/london-party-appointed-arbitrators-love-them-or-loathe-them.

84 Brower & Rosenberg, *supra* note 73, at 24.

85 Rogers, *supra* note 22, at 250; Innerebner, *supra* note 66, at 144-45; Laird, *supra* note 63, at 120; Wolfgang Koeth, *Can the Investment Court System (ICS) Save TTIP and CETA,* 13 EUROPEAN UNION OF PUBLIC ADMINISTRATION, WORKING PAPER (2016); Franck, *supra* note 41, at 1600; Klett, *supra* note 78, at 231-32.

86 Howse, *supra* note 26, at 226.

flaws that allegedly affect the current system[87] and furthermore create new types of biases.[88]

Colin Brown (Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, Directorate-General for Trade of the European Commission) downplays such risks:

> From a government perspective, it would be counterintuitive to push for state biased tribunal members. (…) Purely pro-state tribunal members will not be appointed because governments will be anticipating such scenarios. The selection process of tribunal members will be highly scrutinized, thus making the risk that overtly pro-state individuals – or overtly pro investor for that matter – are appointed rather unlikely.[89]

On balance, it can be said that similar to how much of the criticism targeted at the current regime is based on the perceived, there is a risk that in the new system, there will be a similar perception of bias on the part of adjudicators because they are exclusively appointed by states. The reality is that it is extremely difficult—if not impossible—to dispel the appearance of politicization of the process, when states are the only sources of appointment.[90]

III. TOOLS TO PREVENT POLITICAL CONTAMINATION

The court model seeks to address concerns regarding the independence and impartiality of adjudicators by implementing a radically different method for their selection and appointment. Members of the court "should not be influenced by self-interest, outside pressure, and political considerations."[91] The idea is to shield them from

---

87 Li, *supra* note 63, at 956, 961; Anita Garnuszek and Aleksandra Orzel, *EU Proposals to Reform the Investor-to-State Dispute Settlement System—A Critical Analysis of Selected Issues addressed in the Concept Paper "Investment in TTIP and Beyond—the Path for Reform,"* 5 WROCLAW REV. L., ADMIN. & ECON. 52, 67 (2015).

88 Bienvenu, *supra* note 74; Dickson, *supra* note 66, at 459.

89 Appleton & Stephenson, *supra* note 66, at 13.

90 Brower & Ahmad, *supra* note 56, at 793–94; Charles N. Brower, *ISDS at a Crossroads*, 112 PROC. ASIL ANN. MEETING 191, 192 (2018).

91 United Nations Commission on International Trade Law, Possible Reform of Investor-State Dispute Settlement (ISDS): Background Information on a Code of Conduct. Note by the Secretariat, U.N. Doc A/CN.9/WG.III/WP.167 (Oct. 14-18, 2019).

governmental influence through a "robust and transparent appointment process."[92]

The creation of a permanent adjudicatory body requires the assurance of individual independence, but also devoting greater attention to institutional or structural independence.[93] While the former refers to the "absence of connection between a party and the decision maker," the latter designates the "absence of external influence on a dispute settlement body."[94] Because only one of the disputing parties will have the chance to influence the composition of the tribunal (states, in their capacity as treaty parties), a higher measure of institutional independence is necessary, as the other disputing party is not given a similar chance. [95] A permanent court entails the creation of additional safeguards to ensure that not only individual adjudicators, but also the institution as a whole, offers guarantees of independence.

Appointment processes in permanent adjudicatory bodies are normally conducted by an electoral body composed of state parties.[96] In some courts and tribunals, members are appointed directly by the treaty parties, either unilaterally or through a joint committee; in others, a nomination phase precedes the formal appointment by governments.[97] As discussed above, having members of a permanent court all be appointed by states creates the risk that this process becomes tainted by political interests. It is therefore necessary to deploy special tools to reduce the discretion of states and implement some type of system of checks and balances to deal with the merit of appointed adjudicators.[98] This section examines several mechanisms that might help to prevent a politicization of the appointment process.

---

92 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 40; Possible Reform of Investor-State Dispute Settlement, *supra* note 43, ¶¶ 19, 22.

93 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 55.

94 United Nations Comm'n on Int'l Trade L., Possible Reform of Investor-State Dispute Settlement (ISDS): Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS, Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.151 (Oct. 29–Nov. 2, 2018) [hereinafter Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS]; Kaufman-Kohler & Potestà, *supra* note 57, at 71.

95 Kaufman-Kohler & Potestà, *supra* note 57, at 33, 79, 84–93.

96 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 53.

97 *Id.* at 49.

98 Kaufmann-Kohler & Potestà, *supra* note 57, at 64.

A. Transparency

The current selection process is accused of not being transparent regarding the manner in which adjudicators are selected.[99] Any reform should therefore ensure that the selection and appointment mechanism is more transparent and open.[100] This would help to promote the independence and impartiality of adjudicators,[101] diminishing the choice of individuals for reasons other than merit[102] such that it would increase the legitimacy[103] and accountability[104] of the system. Several tools can be used to increase the visibility of the process, such as the advertisement of openings,[105] consultation with stakeholders, publication of candidates' resumes, public hearings, and debates in national parliaments.[106]

The process should welcome direct applications by potential candidates,[107] thus extending the selection phase beyond the circle of names already being considered by government officials.[108] In this case, the system should include a screening mechanism to be conducted by a body different from the one making the final appointment.[109]

Transparency is a key ingredient to avoid the perception that adjudicators are appointed based on political considerations.[110] To build

---

99 Possible Reform of ISDS: Note by the Secretariat, *supra* note 12, ¶ 44; *see* Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS, *supra* note 94, ¶ 76; *see also* Bjorklund et al., *supra* note 25, at 8, 14.

100 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 15; *see* Rep. Thirty-Fifth Session, *supra* note 16, ¶ 66; *see also Analysis and Roadmap*, *supra* note 9, at 167.

101 Possible Reform of Investor-State Dispute Settlement, *supra* note 43, ¶ 22.

102 Kaufmann-Kohler & Potestà, *supra* note 57, at 115.

103 *Id.*; Rep. Thirty-Fifth Session, *supra* note 16, ¶ 77.

104 Kaufmann-Kohler & Potestà, *supra* note 57, at 60. S*ee also* Rep. Thirty-Fifth Session, *supra* note 16, ¶ 66.

105 *See* Kaufmann-Kohler & Potestà, *supra* note 57, at 65, 68; s*ee also* Bjorklund et al., *supra* note 25, at 19; Rep. Thirty-Fifth Session, *supra* note 16, ¶ 66 (arguing that the selection criteria and an explanation about how the process is conducted should also be included).

106 Kaufmann-Kohler & Potestà, *supra* note 57, at 65.

107 Possible Reform of Investor-State Dispute Settlement, *supra* note 43, ¶ 6 (pondering opening the process to non-nationals of the contracting parties). *See also* Kaufmann-Kohler & Potestà, *supra* note 57, at 69.

108 Kaufmann-Kohler &Potestà, *supra* note 57, at 125.

109 *Id.* at 124; ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 50.

110 *Analysis and Roadmap*, s*upra* note 9, at 167.

confidence in the new system, the selection mechanism should be as transparent as possible.[111]

B. Screening Mechanisms

Another tool that can be built into the selection process—which also promotes transparency—is a screening phase. Advisory panels or appointment committees have been employed in different international courts and tribunals to guarantee that candidates fulfill the necessary requirements to perform the job.[112] The existence of a screening mechanism would prompt government officials to put forward better candidates,[113] rendering the selection process more objective, while increasing the legitimacy of the system.[114]

If states decide to include this feature in the new system, there are several questions that need to be considered: Who should be a member of these screening mechanisms and how to ensure their independence?[115] Should its intervention be mandatory or optional?[116] What should be the scope of its mandate and procedural powers?[117] Would their decisions be binding on the elector states, or mere recommendations, and would they be final or open to challenge?[118] Finally, what level of transparency should apply to the screening mechanism?[119]

The thorniest issue seems to be the composition of such a screening body. Indeed, in their illuminating study on the matter, Kaufmann-Kohler and Potestà underline that the selection of members for this panel will probably raise as many eyebrows as the adjudicators that

111 Appleton & Stephenson, *supra* note 66, at 13.

112 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 52; Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS, *supra* note 94, ¶¶ 12–13; Submission from the European Union and its Member States, *supra* note 43, ¶ 22; Kaufmann-Kohler & Potestà, s*upra* note 57, at 64, 74–77; Andrea Bjorklund et al., s*upra* note 25, at 2, 19; Olof Larsson et al., S*election and Appointment in International Adjudication: Insights from Political Science,* 22–24 ACAD. F. ON ISDS CONCEPT PAPER 2019/10 (2019), https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/larsson-selection-and-appointment-isds-af-10-2019.pdf.

113 Kaufmann-Kohler & Potestà, s*upra* note 57, at 64; Bjorklund et al., s*upra n*ote 25, at 19; Olof Larsson et al., s*upra* note 112, at 22.

114 Andrea Bjorklund et al., *supra* note 25, at 19.

115 Kaufmann-Kohler & Potestà, *supra* note 57 at 78; Possible Reform of Investor-State Dispute Settlement*,* s*upra* note 43, ¶¶ 5–6.

116 Kaufmann-Kohler & Potestà, *supra* note 57, at 144.

117 *Id.* at 145-48.

118 Kaufmann-Kohler & Potestà, s*upra n*ote 57, at 149.

119 *Id.* at 153-54.

they are going to screen.[120] Again, we enter the discussion about who chooses (or, in the case of non-binding decisions, 'filters' or 'reviews') the decisionmakers, and how. In the abstract, a screening mechanism could render the selection process more objective and merit-based, and therefore less politicized.[121] However, the advantages of such a mechanism should not be overstated. The very creation, over the last few years, of this type of mechanism is an indirect acknowledgment, that sometimes states do not appoint the most qualified candidates.[122] Their contribution to depoliticize nomination and appointment processes in other international courts and tribunals, is debatable.[123]

In addition, even if the selection process is rendered more objective and merit-based, this does not mean that it will automatically eradicate bias, as even the most qualified of candidates may exhibit loyalty towards the appointing state. Still, it has the advantage of weeding out candidates, who clearly lack the necessary qualifications and are suggested merely on the basis of their political trustworthiness.[124] Therefore, the existence of some kind of screening mechanism is a necessary, but not sufficient, condition to depoliticize the selection process.

C. Consultation of Different Stakeholders

A mechanism that has also been featured in the selection process in different international courts and tribunals, is a consultation phase.[125] Working Group III is aware that any reform process should take into account and ensure a balance of interests of different stakeholders.[126] Consultations are a useful tool to enhance acceptance of the system and therefore promote its credibility and legitimacy.[127] The entities to be consulted are the ones with an "interest in the interpretation and application of investment treaties and the outcomes of possible

120 *Id.* at 141.

121 *Id.* at 155; ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 52.

122 Ruth Mackenzie, *The Selection of International Judges, in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 737, 752 (Cesare Romano, Karen Alter &Yuval Shany eds., 2014).

123 *Id.* at 753.

124 Aida Torres Pérez, C*an Judicial Selection Secure Judicial Independence? Constraining State Governments in Selecting International Judges, in* SELECTING EUROPE'S JUDGES 181, 194 (Michal Bobek ed., 2015).

125 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 51; Kaufmann-Kohler & Potestà, *supra* note 57, at 27-11.

126 ISDS, Arbitrators and Decision Makers, *supra* note 32, ¶ 37.

127 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 51; Kaufmann-Kohler & Potestà, *supra* note 57, at 133.

disputes."[128] The question ultimately is: what external entities should be included in this circle?[129]

The most evident stakeholders to be consulted, are arbitral institutions, who over the years have collected valuable information on the performance of suitable candidates.[130] Professional associations in the field of international law and international dispute settlement, could also offer useful insights. [131] Because many disputes touch upon topics of public interest, it also makes sense to welcome input from non-governmental organizations operating in a variety of domains, such as the protection of human rights, the rights of indigenous peoples, public health, or environmental protection.[132]

The trickiest question is whether the consultation process should also be open to investors. UNCITRAL seems to be open to the possibility of listening to business and industry-affiliated associations.[133] Without returning to the now infamous party-appointment system, this would give investors an opportunity to voice their concerns regarding the composition of the adjudicatory body[134] and therefore attenuate the transition, from a disputing party system of appointment, to a regime where that power rests exclusively with the treaty parties.[135] Just because investors are no longer allowed to appoint one arbitrator, it does not mean that their opinion cannot be heard whatsoever.[136]

Consultation with all interested stakeholders—including investors—on the membership of the investment court may help to reinforce the legitimacy and independence of the new system. Affording investors, the opportunity to contribute to the process may also help

128 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 51. *See also* Kaufmann-Kohler & Potestà, *supra* note 57, at 133.

129 Kaufmann-Kohler & Potestà, *supra* note 57, at 114 (suggesting the inclusion of national parliaments of state parties in the consultation phase, although it is quite likely that such process would turn into an exercise of political influence).

130 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 51; *Analysis and Roadmap*, *supra* note 9, at 168, 315; *see also* Kaufmann-Kohler & Potestà, *supra* note 57, at 34.

131 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 51; Kaufmann-Kohler & Potestà, *supra* note 57, *at* 134. The Societies of International Law are a good example, *see Analysis and Roadmap*, *supra* note 9, at 168, 315.

132 Kaufmann-Kohler & Potestà, *supra* note 57, at 133.

133 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 51. *See also* Appleton & Stephenson, *supra* note 66, at 13; *Analysis and Roadmap*, *supra* note 9, at 99, 133.

134 *Analysis and Roadmap supra* note 9, at 68, 99.

135 *Id.* at 133.

136 *Id.*

mitigate the perception that the court is unilaterally set up by states, thus reducing potential accusations of politicization.

D. Random Assignment of Cases

Another mechanism that should be implemented, as it is typical of permanent courts, is the random assignment of cases.[137] Case assignment rules are a typical safeguard of institutional independence that does not exist in the current *ad hoc* regime.[138] The move towards a permanent adjudicatory body makes it necessary to then differentiate assignment of specific cases from the appointment of members of the bench,[139] denoting a more complex and formalized system.[140]

The idea behind case assignment rules is that parties will not be able to determine the specific adjudicator who decides a particular dispute.[141] They will only have the possibility of challenging a member of the "chamber" or "division" (after the case is assigned) based on an alleged lack of impartiality or independence of the adjudicator.[142] A case assignment system based on a random, objective method (a computer algorithm, for instance) would be preferable to placing the decision in the hands of the president of the court, as the latter option leaves room for subjective and discretionary interference.[143]

A clear and objective method of case assignment prevents the allocation of cases based on outside influence (including political considerations)[144] and thereby helps to foster individual and institutional independence.[145] This tool helps to weaken the direct connection between the appointers and the adjudicators in charge of a particular case; however, it does not necessarily dispel the image that the court,

---

137 *See* Kaufmann-Kohler & Potestà, *supra* note 57, at 92, 167-213.

138 Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS, *supra* note 94, ¶ 76.

139 *See generally* ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 43; ISDS, Arbitrators and Decision Makers, *supra* note 32, ¶ 15; Kaufmann-Kohler & Potestà, *supra* note 57, at 180.

140 *Id.* at 180.

141 Possible Reform of Investor-State Dispute Settlement, *supra* note 43, ¶ 24; ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶¶ 56-57.

142 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 57; Kaufmann-Kohler & Potestà, *supra* note 57, at 80.

143 Kaufmann-Kohler & Potestà, *supra* note 57, at 194-95.

144 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 57; Kaufmann-Kohler & Potestà, *supra* note 57, at 81.

145 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶¶ 56-57; Kaufmann-Kohler & Potestà, *supra* note 57, at 2, 81; s*ee also* Robert Schwieder, *TIP and the Investment Court System: A New (and Improved?) Paradigm for Investor-State Adjudication,* 55 COLUMBIA J. OF TRANSNATIONAL L. 178, 196 (2016).

as a whole, might be biased, considering states still have the power to nominate (although in advance of any specific dispute) the adjudicators who will sit on the bench.[146] Just because a panel of arbitrators was not hand-picked for a specific dispute, *ex post*, does not mean that the whole court will be perceived as unbiased, *ex ante*. The random allocation of cases creates some distance between appointers and appointees, but that relationship exists, nevertheless. In this regard, we move from the traditional relationship between disputing parties and the arbitral panel to a connection between appointing states and the whole court. Again, a move toward a permanent adjudicatory body entails a greater emphasis on institutional independence.

E. Restrictions on Nationality

Nationality restrictions can also be used as a safeguard of individual and institutional independence.[147] Members of the court should not be allowed to hear disputes in which one of the disputing parties is either his/her state or a national thereof.[148] Because many investment disputes touch upon public interests and are politically sensitive, adjudicators who are nationals of the respondent states may be subject to political influence.[149] While some states might prefer having a national hear the case against them, this would create the wrong perception and put additional pressure on the neutral chair.[150]

Still, one should not expect strict nationality restrictions to completely dispel the perception of bias. Most of the existing criticism about party-appointed arbitrators, focuses on the perception that they are either pro-state or pro-investor, rather than on the idea that they are partial because they have the same nationality as the party appointing them.[151] If states wish to stack the bench, they can always identify ideologically driven arbitrators, even if they hold foreign passports.

---

146 Bienvenu, *supra* note 74; *see also* Li, *supra* note 63, at 953 n. 51.

147 *Analysis and Roadmap*, *supra* note 9, at 173; Kaufmann-Kohler & Potestà, *supra* note 57, at 205.

148 *Analysis and Roadmap*, *supra* note 9, at 173-14; Kaufmann-Kohler & Potestà, *supra* note 57, at 205.

149 *Analysis and Roadmap*, *supra* note 9, at 174.

150 *Id.* at 174. *See also* Bjorklund et al., *supra* note 25, at 14.

151 Heather L. Bray, *Understanding Change: Evolution from International Claims Commissions to Investment Treaty Arbitration*, *in* INTERNATIONAL INVESTMENT LAW AND HISTORY 102, 131,134 (Stephan W. Schill, et al. eds., 2018).

F. Roster of Arbitrators

A direct alternative to the establishment of a fully-fledged, permanent court is the creation of a pre-set list or roster of arbitrators.[152] The roster could be used as part of either the current regime or the establishment of a semi-permanent mechanism.[153] Either way, the composition of the roster should reflect high standards of diversity (both geographical and gender) and ensure neutrality and accountability.[154]

Some believe that the current *ad hoc* system does not need to be abandoned and can be improved by circumscribing disputing parties' choice to a roster of adjudicators.[155] Rosters already exist in the current regime.[156] Pursuant to Article 13 of the ICSID Convention, each contracting state may designate four persons, while the chairman may designate ten persons to the panel of arbitrators. However, several authors have argued that many of the individuals listed, do not have sufficient

---

152 Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS, *supra* note 94, ¶ 72; Possible Reform of Investor-State Dispute Settlement, supra note 43, ¶¶ 53, 56; Rep. Thirty-Fifth Session, *supra* note 16, ¶ 65. *See also* Bjorklund et al., *supra* note 25, at 14; *See also* Malcolm Langford et al., *The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement*, ACAD. F. ON ISDS CONCEPT PAPER 2019/12 (2019), https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/langford-behn-malaguti-models-trade-offs-isds-af-isds-paper-12-draft-14-october-2019.pdf.

153 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶¶ 11, 13, 23. On the distinction between 'ad hoc,' 'semi-permanent' and 'permanent' mechanisms, *see* Kaufmann-Kohler and Potestà, *supra* note 57, at 7. The roster solution "could be more independent and flexible than creating a court-type system, and less ad hoc than present arrangements." Sapiro, *supra* note 12, at 13. While Working Group III is not considering incorporating the roster model into a permanent court, Kaufmann-Kohler and Potestà caution against that option—"if States prefer to pursue the establishment of a permanent body, which departs from the existing ad hoc system, a roster model is unlikely to adequately address the current critical features, but would rather replicate the existing problems," *see id.* at 175.

154 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 15.

155 Li *supra* note 63, at 961; Freya Baetens, *The European Union's Proposed Investment Court System: Addressing Criticisms of Investor-State Arbitration While Raising New Challenges*, 43(4) LEGAL ISSUES OF ECONOMIC INTEGRATION 367-84 (2016); *see also* Possible Reform of Investor-State Dispute Settlement (ISDS). Submission from the Government of Thailand, U.N. Doc. A/CN.9/WG.III/WP.162 (proposing the use of a roster in the framework of a review of the UNCITRAL Rules).

156 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 27; Kaufmann-Kohler and Potestà *supra* note 57, at 118.

experience in investment arbitration and are appointed based on political considerations.[157]

UNCITRAL's Working Group III is still discussing whether investors should also be involved in the selection process.[158] If that were to happen, both disputing parties, including the investor, could have a say in the composition of the tribunal and therefore their freedom of choice would not be entirely curtailed.[159] This option may sound appealing to disputing parties who cherish the opportunity—which exists in the current system—to directly appoint one of the adjudicators and influence the choice of the chair.[160] Investors in particular would feel that their voice in the tribunal's selection process is heard,[161] but some states may also value this opportunity,[162] especially when compared to a scenario of a representative court with limited seats, which would entail a competitive electoral process.[163]

The creation of a roster would be less of a radical change than the establishment of a permanent court. The most significant difference regarding the current system, would be that disputing parties would see their freedom of choice circumscribed to the members of the list.[164] However, because disputing parties would still have the power to choose 'their' adjudicators, the potential of rosters to curb the criticism regarding the current party-appointment model is doubtful.[165] In fact, concerns about the choice of biased adjudicators would persist.[166] Both disputing parties would most likely appoint those members of

157 Jan Paulsson, *ICSID's Achievements and Prospects*, 6 ICSID REV. – FOREIGN INV. L. J. 380, 394 (1991); Laird, *supra* note 63, at 120; August Reinisch, *The Future of Investment Arbitration, in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 894, 908, 909 (Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich eds. 2009); Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different are they Today?: The Lalive Lecture 2012*, 28 ARB. INT'L J. LONDON CT. INT'L ARB. 577, 582 (2012).

158 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 27.

159 *Id.* at 11; *Analysis and Roadmap, supra* note 9, at 96, 170.

160 Kaufmann-Kohler and Potestà, *supra* note 57, at 170.

161 *Analysis and Roadmap*, *supra* note 9, at 99.

162 *Id.* at 171; Kaufmann-Kohler and Potestà, s*upra* note 57, at 170, 171.

163 Kaufmann-Kohler and Potestà, *supra* note 57, at 171.

164 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 32; Kaufmann-Kohler and Potestà, *supra* note 57, at 177.

165 *Analysis and Roadmap*, *supra* note 9, at 171; Kaufmann-Kohler and Potestà, *supra* note 57, at 173-75.

166 Kaufmann-Kohler and Potestà, *supra* note 57, at 173.

the list whom they believe are closer to representing their interests within the tribunal.[167]

Similar to a permanent court, members of the roster could also voluntarily 'position' themselves to be chosen by disputing parties by hinting about their pro-state or pro-investor inclinations.[168] As a matter of fact, the roster system could aggravate the current problems by limiting the pool of available adjudicators.[169] Working Group III is aware that the establishment of a roster might not fully address the concerns of neutrality and accountability.[170] Potential solutions for this problem would include the imposition of transparent procedures for the selection process[171] or the implementation of a screening mechanism to ensure the transparency of the process and the quality of the members of the list.[172]

Furthermore, since parties would still be able to choose adjudicators, concerns about repeated appointments would not be addressed and could worsen, since the pool of adjudicators that parties could choose from would be restricted.[173] In addition, as members of the roster would not have any guarantee of being allocated any cases, they would in principle still be able to pursue external activities.[174] This would require the creation of restrictions on the members' professional activities if they are not hearing a case.[175]

G. Involvement of an Appointing Authority

Working Group III is aware that a system with a pre-established roster may not address some of the current concerns and is therefore discussing the involvement of external institutions in the selection process.[176]

---

167 *Analysis and Roadmap*, *supra* note 9, at 171; Garnuszek and Orzel, s*upra* note 87, at 66.

168 *Analysis and Roadmap*, *supra* note 9, at 171; Kaufmann-Kohler and Potestà, *supra* note 57, at 174.

169 Kaufmann-Kohler and Potestà, s*upra* note 57, at 174.

170 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 37.

171 *Id.* ¶ 28.

172 Kaufmann-Kohler and Potestà, *supra* note 71, at 1.

173 Kaufmann-Kohler and Potestà, *supra* note 57, at 96.

174 *Id.* at 97.

175 Innerebner, *supra* note 66, at 150.

176 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶¶ 37, 50. *See also* Rep. Thirty-Fifth Session, *supra* note 16, ¶¶ 65-66; Possible Reform of Investor-State Dispute Settlement, *supra* note 43, at 53; Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS, *supra* note 94, ¶ 72; Li, *supra* note 63, at 961; Baetens, *supra* note 155, at 384. *See also* Langford, Behn and Malaguti, *supra* note 152.

Appointing authorities, including arbitral institutions, sometimes play a role in the composition of arbitral tribunals.[177] One of the problems identified during discussions by the Working Group III, is the lack of transparency and information regarding selection processes conducted by appointing authorities.[178] Appointing authorities and arbitral institutions have also been accused of lacking independence and impartiality.[179] Some argue that they tend to appoint pro-state or pro-investor adjudicators.[180] In particular, there may be the perception that, to receive business, institutions have an incentive to present themselves as appointing pro-investor arbitrators.[181] The ICSID, in particular, is perceived by some commentators as structurally biased towards investors, as it is affiliated with the World Bank.[182] The opposite perception may also be created—because it is operated by states, the ICSID may lean towards the interests of its members, particularly the most powerful ones.[183] Appointing authorities of a private nature—such as the International Chamber of Commerce—also face criticism, being perceived as too close to the business interests of investors.[184]

Working Group III is aware that the independence and impartiality of the institution chosen to act as appointing authorities is of the essence.[185] An alternative would be to put the selection process in the hands of a body representing the international community more

177 ISDS, Arbitrators and Decision Makers, *supra* note 32, ¶¶ 5, 10.

178 *Id.* ¶¶ 12-14, 40; Rep. Thirty-Fifth Session, *supra* note 16, ¶ 66.

179 *See, e.g.*, Gus Van Harten, *Perceived Bias in Investment Treaty Arbitration*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTION AND REALITY 433, 441–45 (Michael Waibel, Asha Kaushal, Kyo-Hwa Chung and Claire Balchin eds., 2010) [hereinafter *Perceived Bias*]; Sarah Anderson & Sara Grusky, *Challenging Corporate Investor Rule: How the World Bank's Investment Court, Free Trade Agreements, and Bilateral Investment Treaties have Unleashed a New Era of Corporate Power and What to Do About It*, IPS AND FOOD AND WATER WATCH 8 (2007); *Leaders In the Expansive and Restrictive Interpretation of Investment Treaties*, *supra* note 31, at 523– 25; Van Harten, *supra* note 44, at 17, 18.

180 William Park, *Arbitrator Integrity*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 189, 207 (Michael Waibel, Asha Kaushal, Kyo-Hwa Chung and Claire Balchin eds., 2010); Wälde, *supra* note 28, at 731.

181 Dunoff et al., *supra* note 66, at 11, 12.

182 *See* VAN HARTEN, INVESTMENT TREATY ARBITRATION, *supra* note 25, at 169, 170; Wittayawarakul, *supra* note 26, at 54.

183 Wälde, *supra* note 17, at 66, 67. *See also* VAN HARTEN, INVESTMENT TREATY ARBITRATION, *supra* note 25, at 169-71.

184 *Perceived Bias*, *supra* note 179, at 444, 445; Van Harten, *supra* note 44, at 19; Innerebner, *supra* note 66, at 149.

185 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 36.

broadly, for instance, the United Nations General Assembly.[186] However, Brower and Ahmad argue that the United Nations General Assembly or any other international organization, like states, would not be totally free from political influence.[187]

There are also several options available in regard to the level of contributions of the disputing parties to the composition of the tribunal. Adjudicators could be appointed by the institution without any input, or with limited input from the parties, for instance, consultation or agreement on criteria;[188] or parties could be allowed to choose one member each, with the president of the tribunal being systematically appointed by the institution.[189]

IV. CONCLUDING REMARKS: WINDS OF CHANGE?

The traditional process of selection and appointment of adjudicators in investment disputes has become a lightning rod in the ongoing backlash against investor-state arbitration, leading to the growing repoliticization of this type of dispute. The truth, however, is that investment dispute settlements can never be fully depoliticized.[190] Because these disputes are intrinsically political, their settlement arguably always takes place in a politically charged environment.[191] It is impossible to ensure an aseptic boundary between the realms of law and

---

186 *Analysis and Roadmap*, *supra* note 9, at 166.

187 Brower and Ahmad, *supra* note 81, at 1182.

188 *Id.* at 34. *See also* Bernardi, *supra* note 63, at 57 (Bernardini argues that it is preferable to leave the full composition of the tribunal to the appointing authority).

189 ISDS: Selection and Appointment of Tribunal Members, *supra* note 36, ¶ 32.

190 Susan D. Franck, *Crafting Appropriate Dispute Settlement: The Politics of International Investment Disputes*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2015, 134, 140-41 (Arthur W. Rovine ed., 2017); Bjorklund, *supra* note 7, at 214; Ibironke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT'L L. J. 345, 371 (2007); Andreas Kulick, *Narrating Narratives of International Investment Law: History and Epistemic Forces*, *in* INTERNATIONAL INVESTMENT LAW AND HISTORY 41, 57 (Stephan Schill, Christian Tams & Rainer Hofmann eds., 2018); Paparinskis, *supra* note 1, at 275.

191 Ginsburg, *supra* note 5, at 484; Salacuse, *supra* note 8, at 149; Rogers, *supra* note 22, at 240; Jan Kleinheisterkamp & Lauge Poulsen, *Investment Protection in TTIP: Three Feasible Proposals*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 2016 527, 539 (Marc Bungenberg, Christoph Herrmann, Markus Krajewski & Jörg Philipp Terhechte eds., 2016); Sergio Puig, *Blinding International Justice*, 56 Va. J. Int'l L. 647, 692 (2016). Naturally, certain types of business activities are almost always more politicized than others, *see* Julie Maupin, *Differentiating Among International Investment Disputes*, *in* THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 467, 478 (Zachary Douglas, Joost Pauwelyn & Jorge Viñuales eds., 2014).

politics: "as a rule, every international dispute is of a political character."[192]

The 'depoliticization' of international investment disputes has meant that "law [was] to supplant politics";[193] looking back, the adjudication process is indeed much more juridified than before—but not completely.[194] In the end, the goal of de-politicizing disputes has been somewhat "aspirational" or "chimerical,"[195] or even a dream,[196] as it involves an oxymoron.[197] Regardless of the forum chosen, there seems to be an inevitable political element associated with any dispute that involves public policy.[198] In this regard investment arbitration is not any different from other types of international adjudication.[199] Complete "depoliticization" of investment disputes is as impossible as total depoliticization of any other international legal controversy.[200]

While parties' ability to choose their adjudicators has been described as the "historical keystone" of arbitration,[201] the truth is that this feature contributes to a system that is increasingly perceived as politically polarized and therefore incapable of offering an exclusively legal, objective adjudicatory process. Still, concerns about the fittingness of a selection processes to retain independent and impartial adjudicators also exist in domestic,[202] and even international courts.[203] There is no irrefutable evidence that international judges are somehow

---

192 HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 161 (2011).

193 Anna T. Katselas, *Exit, Voice, and Loyalty in Investment Treaty Arbitration*, 93 Neb. L. Rev. 313, 317 (2014).

194 Wälde, *supra* note 28, at 729.

195 Bjorklund, *supra* note 7, at 240.

196 Ginsburg, *supra* note 5, at 484.

197 Titi, *supra* note 9, at 265.

198 David Collins, *The UK Should Include ISDS in Its Post-Brexit International Investment Agreements,* 14 MANCHESTER J. OF INT'L ECONOMIC L. 301, 305 (2017).

199 Nathalie Bernasconi-Osterwalder, *State-State Dispute Settlement in Investment* Treaties, 1 INT'L INSTITUTE FOR SUSTAINABLE DEVELOPMENT (2014), https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf (last accessed Jan. 7, 2020).

200 Katselas, *supra* note 193, at 320.

201 Van Vechten Veeder, *The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator - From Miami to Geneva, in* PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 128 (David D. Caron, Stephan W. Schill, Abby Cohen Smutny, Epaminontas E. Triantafilou eds., 2015).

202 Alexis Blane, *Sovereign Immunity as a Bar to the Execution of International Arbitral* Awards, 41(2) N.Y.U. J. INT'L L. & POL.
453, 489-490 (2009).

203 Charles Brower and Stephen Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHIC. J. OF INT'L L. 471, 495 (2009).

more independent and impartial than arbitrators.[204] The selection and appointment of arbitrators raises some problems, but the same can also be said about other adjudicatory bodies.[205] Choosing adjudicators is a process that "always seems to have sprinkles of political flavour."[206]

That is not to say that there are not valuable lessons to be learned from the experiences of other adjudicatory bodies. Knowing more about how appointment mechanisms have a bearing on the conduct of international courts and tribunals, is a matter of increased scholarly and practical relevance.[207] Franck suggests delving into data to depoliticize investment dispute settlement and adopting an evidence-based approach to policy design.[208] Indeed, empirical studies place the discussion about the present and future of investment adjudication at a more rational level.[209] Still, due to the highly politicized nature of the field, there is always the risk that empirical findings are used to support pre-existing beliefs.[210]

The process of selection and appointment of investment adjudicators should be based on the expertise and experience of candidates and not on their political preferences or loyalties. However, because international courts are set up by states and function in a politically charged milieu,[211] political considerations may influence and even lead to outright politicization of the process.[212] This risk is especially high in a system where states have exclusive control over the screening and the appointment of the candidates.[213]

Winds of change seem to be blowing in investment adjudication, but their direction is yet unclear. A revamped system should incorporate a combination of the tools discussed in the previous section to ensure that candidates are above all, chosen because of their professional skills and merit. The experience of other international courts

---

204 José Alvarez, *To Court or Not to Court?*, 3 INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE, N.Y.U. SCH. OF L. (2016); MegaReg Forum Paper 2016/2, http://iilj.org/wp-content/uploads/2016/08/Alvarez_IILJ-MegaRegForumPaper_2016-2.pdf; Wälde, *supra* note 17, at 86.

205 Franklin Berman, *Evolution or Revolution?*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 658, 671 (Chester Brown and Kate Miles eds., 2011).

206 Marike Paulsson, *Conflict Resolution in a Changing World Order,* 10(1) TRADE, L. & DEVELOPMENT 1, 15 (2018).

207 Ginsburg, *supra* note 5, at 501.

208 *See* Franck, *supra* note 190, at 142, 143.

209 Rogers, *supra* note 22, at 233.

210 *Id.*

211 Mackenzie, *supra* note 122, at 739, 740.

212 Kaufmann-Kohler and Potestà, *supra* note 57, at 61, 62.

213 *Id.* at 61.

and tribunals demonstrates that such measures do not fully eradicate political preferences from the process, but at least mitigate their impact by filtering candidates through a stringent set of checks and balances.[214] No filter is one hundred percent effective. Similarly to what happens with air quality scales—ranging from good, moderate, unhealthy, to hazardous—what a reform of the selection process in investment adjudication can at most achieve, is ensuring that "political contamination" is kept within reasonable, acceptable levels, which do not pose a threat to the well-being of the overall dispute resolution system.

214 Georges Abi-Saab, *Ensuring the Best Bench: Ways of Selecting Judges*, *in* INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE 166, 184 (Connie Peck and Roy Lee eds.,1997). *See also* Peter Russell, *Conclusion*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 420 (Kate Malleson & Peter Russell eds., 2006).