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Selection and Appointment of International Adjudicators:

Structural Options for ISDS Reform

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Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform

Andrea K. Bjorklund, Marc Bungenberg, Manjiao Chi, Catharine Titi[1]

As a result of the meeting in New York of UNCITRAL Working Group III, states suggested focussing on a second workstream on structural reform options that would cover issues relating to, *inter alia,* amendments to the existing ISDS process and the establishment and composition of a Multilateral Investment Court or a stand-alone appellate mechanism, including methods for the selection of members, the types of qualifications they should have, and mechanisms to enhance diversity (A/CN.9/970, point 74). With respect to the selection and appointment of adjudicators, the Secretariat was requested to undertake preparatory work in cooperation with the Academic Forum on ISDS. It was specified that this work should include compiling, summarizing, and analysing relevant information (A/CN.9/970, point 84 et seq).

Members of international courts enjoy a high degree of legitimacy, but only if they have been chosen in accordance with a predetermined selection process that guarantees they possess the qualities necessary to exercise the judicial function, including expertise, independence and impartiality, and if they have been ultimately elected or confirmed by states.[2] For investment arbitration purposes, most often the discussion about an apparent lack of legitimacy has centred around normative legitimacy – whether arbitral tribunals are justified in exercising the authority they do – and sociological legitimacy – whether those receiving the decisions perceive them to be legitimate.[3] Many of these criticisms have focused on the selection and appointment of adjudicators; thus these two elements will be centerpieces of any future structure for the resolution of investment disputes.

The process by which selection and appointment takes place is the legitimizing factor for the authority as well as the integrity and credibility of every tribunal or court. The same is true for rule-of-law reasons; impartiality, independence and competence of adjudicators are essential criteria to uphold the rule of law and ensure effective access to justice.[4] Thus, the procedure for electing adjudicators has a direct impact on the quality of the entire court or tribunal,[5] as well

[1] The report reflects the contributions of all working group members, but does not necessarily reflect a consensus view on any particular issue.

[2] One description of legitimacy is that "the rule or institution has come into being and operates in accordance with generally accepted principels of right process." Thomas M Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990) p. 24.

[3] See generally Andrea K. Bjorklund, in Nienke Grossman et al. eds, Legitimacy and International Courts (Cambridge 2018) p. 234. 236.

[4] United Nations General Assembly, The Rule of Law at the National and International Levels, A/RES/69/123, 18 December 2014, paras 12-14.

[5] Cf. Institut de Droit International, Resolution on the Position of the International Judge, 6 RES EN FINAL of 9.9.2011, Art. 1 para. 1: "The quality of international courts and tribunals depends first of all on the intellectual and moral character of their judges. Therefore, the selection of judges must be carried out with the greatest care. Moreover, States shall ensure an adequate geographical representation within international courts and tribunals. They shall also ensure that judges possess the required competence and that the court or tribunal is in a position effectively to deal with issues of general international law. The ability to exercise high jurisdictional functions shall nonetheless remain the paramount criterion for the selection of judges, as pointed out by the Institute in its 1954 Resolution."

as on its functioning in an appropriate manner, on its effectiveness,[6] and possibly even on the degree to which its decisions are accepted and enforced. Acceptance requires independent and neutral adjudicators; effectiveness requires highly qualified adjudicators.

The report of this working group takes a comparative approach and summarizes different selection and appointment procedures in institutionalized international dispute settlement. After a brief introduction, it describes the process of selection and appointment in contemporary arbitration, in which arbitrators are selected for individual cases. Next, it considers selection and appointment procedures first for permanent and semi-permanent courts and then for rosters. Ultimately, the report sets out some options and makes observations about the pros and cons of various approaches, as well as the trade-offs that will likely have to be made as states consider how to structure a different kind of dispute settlement process.

I. Origins of Discussions on the Importance of Structured Appointment Procedures

The independence and impartiality of adjudicators go hand in hand with the selection and appointment procedure. In this context, it is important to define the way some commonly-used terms are used in this report.

"Selection" generally refers to how the candidates to be named adjudicators are chosen, with particular reference to why one (or one type of) candidate is preferred over another. It deals with the qualifications of candidates. Only qualified candidates should be chosen. In other words, there should be some kind of "screening" process to evaluate the qualifications as well as the integrity and independence of candidates. Selection further embodies the process of nomination and election, with the possibility of further assement of possible candidates with respect to their qualifications as well as their integrity and independence. One might thus have a screening process to identify qualified candidates, the number of which would then be winnowed down to a short list.

"Nomination" describes the designation of a person as an adjudicator in an international court or tribunal or the act of proposing a person as a candidate for such a position.

"Election" is the act of choosing, by voting or by consensus, one candidate to sit as an adjudicator from among a greater pool of nominated persons.

"Appointment" in general means the designation of a person by a person or persons with the authority to do so. It can refer specifically to the way that collective bodies decide whom to assign as an adjudicator to a specific case or chamber, or more generally to a court or tribunal.

Thus, selection and appointment are not synonyms; they are used in different contexts and with different meanings. In the following each will be addressed wherever appropriate.

[6] Mackenzie (2014), p. 738; De Baere et al. (2015), p. 51.

II. Appointment and selection procedures in contemporary commercial and investment arbitration

This section will provide an overview of procedures currently relevant to the selection and appointment of arbitrators in international arbitration, including investor-state arbitration, commercial arbitration, and interstate arbitration.

1) Selection of arbitrators

Various considerations have tended to be relevant for the selection of arbitrators in the first instance in international arbitration. Two primary considerations are nationality and the qualifications held by the arbitrator, including his or her ability to be independent and impartial.

i) Nationality

One of the benefits of arbitration is its capacity to afford neutral adjudication in cross-border disputes where two jurisdictions, at least, might be said to have an interest in the dispute. Neutrality insofar as nationality is concerned is thus a particularized consideration under certain arbitral rules. Under the ICSID Convention, a majority of arbitrators in an individual case will ordinarily be nationals of states other than the state party to the dispute and the home state of the claimant investor. In practice this means that for a three-person tribunal, often none of the tribunal members has the nationality of either disputing party. This rule does not apply when a case is heard by a sole arbitrator or when 'each individual member of the Tribunal' has been appointed by agreement of the parties.[7] Under other arbitration rules, the appointing authority must take into account 'the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties', but prohibitive nationality (or a-nationality) requirements are not included.[8]

ii) Qualifications

Qualifications for arbitrators relate to arbitrators' ability to be independent and impartial in any particular case and to particularized expertise.

a. Independence and impartiality

The *sina qua non* for an international arbitrator is that he or she be independent and impartial. 'Independence refers to the external characteristics of an adjudicator or tribunal that work to ensure the ultimate goal of impartiality, which in turn refers to a state of mind.'[9]

Under the ICSID Convention, arbitrators must be persons of 'high moral character …, who may be relied upon to exercise independent judgment'. The appointing authority may be required to

[7] Article 39 of the ICSID Convention; Rule 1(3) of the ICSID Arbitration Rules.
[8] Article 6(7) of the UNCITRAL Arbitration Rules; Article 6(3) of the PCA Arbitration Rules.
[9] Fabien Gélinas, Independence of International Arbitrators and Judges (2011) 24 New York International Law Review, p. 1, 5.

take into account elements that are likely to ensure the appointment of an 'independent and impartial arbitrator'.[10] When an arbitrator is approached in connection with his or her appointment, including throughout the arbitral proceeding, he or she will disclose 'any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence'.[11] The ICSID Convention does not have rules about the qualifications of annulment committee members that are specific to that process, yet as ICSID arbitrators they, too, must meet the same requirements set forth above.

b. Expertise

The arbitrator should also be competent to do the job entrusted to him or her. 'Recognized' competence in the "fields of law, commerce, industry or finance" is of particular importance.[12]

2) Appointment of arbitrators

Arbitrators are appointed in various ways. Because the disputing parties usually have the ability to come to agreement on the composition of the tribunal, institutions or institutional rules on the appointment of arbitrators are often not put to use. However, to ensure that an arbitration can go forward in the event that agreement is not forthcoming, appointing authorities can also designate arbitrators, *inter alia* to ensure the process will not be derailed by a reluctant party.

i) In 'first-instance' tribunals

Most procedures for the appointment of arbitrators are broadly similar. For example, under the ICSID Convention, a tribunal consists of 'a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree'; the default is a tribunal that consists of three arbitrators, where each party appoints one arbitrator and the third arbitrator, the president of the tribunal, is appointed by agreement of the parties.[13] If the tribunal has not been constituted within a given timeframe, the Chairman of the ICSID Administrative Council (the President of the World Bank) appoints from the ICSID Panel of Arbitrators[14] the arbitrator or arbitrators who have yet not been appointed.[15]

Before selecting from the ICSID Panel, ICSID follows a ballot procedure. This takes place as follows: ICSID provides the disputing parties with a ballot form with the names of several candidates. Parties then must return the ballot form, noting the candidates they accept or reject. If both parties agree on a candidate on the ballot form, the latter is deemed to be appointed by agreement of the parties. If the parties agree on more than one candidate, ICSID chooses one of them and informs the parties. If no agreement is reached through the ballot process, the

[10] Article 6(7) of the UNCITRAL Arbitration Rules.
[11] Articles 11 and 12 of the UNCITRAL Arbitration Rules; Article 6(3) of the PCA Arbitration Rules.
[12] Article 14(1) of the ICSID Convention.
[13] Article 37(2) of the ICSID Convention; Rule 3 of the ICSID Arbitration Rules.
[14] Each member state of ICSID is entitled to appoint four persons to the roster. Whether or not the member state nominates qualified people to the roster is up to the member state itself; there is no review of the qualifications of those whom the member states appoint.
[15] Article 38 of the ICSID Convention.

Chairman names a person from the ICSID Panel of Arbitrators. Before appointment from the Panel, the parties can raise any circumstances showing that the person lacks the required qualities.[16] The tribunal is deemed to be constituted when the Secretary-General notifies the parties that all arbitrators have accepted their appointment.[17]

Under the UNCITRAL Arbitration Rules, which are also frequently used in investment arbitrations, if the tribunal is to consist of three arbitrators (which is the default presumption), each party appoints one arbitrator; the two arbitrators thus appointed by the parties select in their turn the third arbitrator, who shall act as president. Where three arbitrators are to be appointed and there are multiple claimants or respondents, unless the parties agree otherwise, the multiple claimants or multiple respondents appoint an arbitrator jointly. If within 30 days after receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the appointment of an arbitrator, the former may request the appointing authority[18] to appoint the second arbitrator. If within 30 days after the appointment of the second arbitrator, the two arbitrators have not reached agreement on the choice of the president of the tribunal, the appointing authority appoints the president.[19]

If the parties agree that the tribunal is to be composed of a number of arbitrators other than three, the arbitrators are appointed according to the method agreed upon by the parties. If there is a failure to constitute an arbitral tribunal, at the request of a party, the appointing authority will constitute the tribunal and may revoke any appointment already made.[20]

In the event that the parties cannot agree on the structure of their arbitral tribunal and the applicable investment treaty or arbitration agreement does not specify the number of arbitrators in the event of non-agreement, the appointing authority (who shall be named by the Secretary-General of the Permanent Court of Arbitration, unless otherwise specified)[21], three arbitrators will be appointed. However, in the event one party has proposed appointing a sole arbitrator and the other fails to respond or to appoint a second arbitrator, the appointing authority may, at the request of a party, appoint a sole arbitrator.[22] If the parties have agreed to appoint a sole arbitrator but no agreement has been reached within a given timeframe, at the request of a party, the appointing authority will appoint the sole arbitrator.[23]

The procedure for the appointment of a sole arbitrator by the appointing authority involves a ballot procedure (sometimes called a list procedure), whereby the appointing authority communicates to the parties an identical list containing at least three names. Within 15 days of the receipt of this list, each party 'may' return the list to the appointing authority deleting the names to which it objects and numbering in order of preference the remaining names. After

[16] On this see, https://icsid.worldbank.org/en/Pages/process/Selection-and-Appointment-of-Tribunal-Members-Convention-Arbitration.aspx.
[17] Rule 6 of the ICSID Arbitration Rules.
[18] For the determination of the appointing authority, see Article 6 of the UNCITRAL Arbitration Rules.
[19] Article 9 of the UNCITRAL Arbitration Rules.
[20] Article 10 of the UNCITRAL Arbitration Rules
[21] Conider putting in a few examples.
[22] Article 7 of the UNCITRAL Arbitration Rules.
[23] Article 8(1) of the UNCITRAL Arbitration Rules.

expiration of the 15-day period, the appointing authority will appoint the sole arbitrator from among the names approved on the lists it has received, respecting the parties' order of preference. If the appointment cannot be made in accordance with this procedure, the appointing authority may exercise discretion in appointing the arbitrator.[24]

ii. In arbitral review mechanisms

Under the ICSID Convention,'review' is possible only on limited grounds. This review takes place before annulment committees. Annulment committee members are selected from the the ICSID panel of arbitrators.[25] When an annulment is sought, ICSID's Secretary-General requests the Chairman of the Administrative Council (the President of the World Bank) to appoint an *ad hoc* annulment committee. The Chairman must appoint a Committee of three persons from the Panel of Arbitrators upon receipt of the request for annulment. None of the members of the committee can have been a member of the tribunal which rendered the award, nor can they be of the same nationality as any such member. They also cannot have the same nationality as the state party to the dispute or of the state whose national is a party to the dispute, they shall not have been designated to the Panel of Arbitrators by either of those States, nor shall they have acted as a conciliator in the same dispute.[26]

Other arbitral rules do not provide for the possibility of annulment at the international level.[27] A very few arbitral instituions provide for the possibility of some kind of appellate review. For example, the 2019 Investment Arbitration Rules of the Beijing International Arbitration Center (draft) contains a set of specifically designed appeal rules in Appendix E (BIAC Appeal Rules),[28] as do the 2013 JAMS Optional Arbitration Appeal Procedure (JAMS Appeal Rules),[29] the Court of Arbitration for Sport,[30] and the 1999 International Institute for Conflict Prevention and Resolution Arbitration Appeal Procedure (CPR Appeal Rules).[31] A caveat: there have been no reported appellate investment cases on the basis of these rules.

The BIAC Appeal Rules provide that an appellate tribunal shall be composed of three members nominated or appointed from the BIAC Panel of Arbitrators for International Investment Disputes, and shall be different from the arbitrators of the arbitral tribunal that made the original award.[32] The JAMS Appeal Rules provide that the panel shall be composed of three members, unless the Parties agree that there will be one member.[33] The rules of the Court of Arbitration for Sport also provide for three arbitrators unless the appellant requests a sole arbitrator and the

[24] Article 8(2) of the UNCITRAL Arbitration Rules.
[25] ICSID Convention, Article 52 (3).
[26] Article 52(1) and (3) of the ICSID Convention, Article 52 (3).
[27] Set-aside proceedings in national courts are not examined in this report.
[28] BIAC, "Soliciting Public Comments on BIAC Investment Arbitration Rules", available at http://www.bjac.org.cn/news/view?id=3369 (10 June 2019).
[29] Available at https://www.jamsadr.com/appeal/ (10 June 2019).
[30] https://www.tas-cas.org/fileadmin/user_upload/Code_2019__en_.pdf. Court of Appeal for Sport arbitrations are subject to appeal if appeal has been expressly provided by the federation of sports body concerned.
[31] Available at https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure/_res/id=Attachments/index=0/CPRArbitrationAppealProcedure2015.pdf (10 June 2019).
[32] Rule 2 (1), Appendix E, BIAC Investment Arbitration Rules.
[33] JAMS Optional Arbitration Appeal Procedure, Rule (a).

parties agree as to the number of arbitrators.[34] The President of the Division also has the authority to decide to submit the appeal to a sole arbitrator in the absence of party agreement; this decision is to be taken in light of various considerations, including whether or not the Respondent has paid its share of the advance of costs within the requisite time.[35]

The BIAC Appeal Rules provide that, unless the parties have agreed otherwise, appointment is made in two steps. First, each party must nominate or entrust the Chairman (of BIAC) to appoint a member within 15 days of their receipt of the notice of commencement of the appeal proceedings. Second, the parties must jointly nominate or entrust the Chairman to appoint the third member of the tribunal within 30 days of the receipt by the appellee of the notice of commencement of the appeal proceedings, and the third member shall be the presiding member of the tribunal.[36] Essentially, the BIAC Rules adopt similar methods for selection and appointment of arbitrators in the first instance proceeding and those who serve as members of the appellate tribunal.

Under the JAMS Appeal Rules, unless the parties agree otherwise, the Case Manager will recommend to the Parties an Appeal Panel and will make any disclosures that are mandated by applicable law regarding the candidates for the Panel, and the Case Manager will seek the agreement of the Parties as to the selection of the Appeal Panel members. If the Parties do not agree on the composition of the Appeal Panel, the Case Manager will appoint an Appeal Panel.[37]

Similarly, under the CPR Appeal Rules, the CPR submits to the parties a list of not fewer than seven candidates from the Panel who have been screened for possible conflicts and availability, and the parties are to attempt to agree on the required number of candidates from the list and inform the CPR of any candidates on whom they have agreed. Failing complete agreement, the parties are to submit the list to the CPR, ranking in order the candidates on whom they did not agree. Thereupon, the required number of candidates receiving the lowest combined score will be identified by the CPR, which shall also break any tie. Any party failing without good cause to return a rank-ordered candidate list within the prescribed time shall be deemed to have assented to all candidates on the list.[38]

3) Assessment

The method of selection and appointment of arbitrators in investment arbitration has been the subject of a number of criticisms. These have included questions of independence and impartiality stemming from the fact that the arbitrators are appointed by the disputing parties themselves to hear a particular dispute, after the dispute has crystallized, and that selection might be made on the basis of a presumed predisposition in favour of the arguments that are likely to be made by the appointing party. A related critique assumes that arbitrators may have

[34] CAS R. 48. R. 50.
[35] CAS R. 50.
[36] Rule 2 (2), Appendix E, BIAC Investment Arbitration Rules.
[37] JAMS Optional Arbitration Appeal Procedure, Rule (a).
[38] CPR Appeal Rules, Rule 4.2.

an incentive to please the party that appointed him or her in order to secure reappointment. This criticism is especially discussed in the context of arbitrators seen as state-friendly or investor-friendly, rather than as neutral. The idea that these individuals have preconceived leanings leads to a perception of lack of legitimacy.

Relatedly, an assumption of lack of independence and impartiality arises from other presumed conflicts of interest, due among others to double-hatting (e.g. acting as arbitrator and counsel in different cases at the same or overlapping times).[39] The current arbitration rules do not contain particular provisions aimed to avoid such conflicts of interest.

Certain institutions, in particular the WTO regarding panel appointments and ICSID for its annulment procedure, have been criticized for exercising wide discretion over the appointment process in the absence of full transparency rules.

The criticisms canvassed here in relation to independence and impartiality are also related to the difficulty with which arbitrators can be disqualified, a topic that is not covered in the present report. Further criticisms include concerns that some arbitrators lack experience in public international law; this is sometimes seen in expressions of doubt as to whether the arbitrators respected the interpretation rule in Article 31 of the Vienna Convention on the Law of Treaties of 1969. Other critiques are grouped under the umbrella 'private justice', and relate to the concern that matters of significant public interest are decided in private arbitration by decisionmakers who are not accountable to the polity whose measures are being challenged.

In the case of ICSID, the annulment committees are formed by the institution. While there are negative criteria relating to nationality, and constraints related to selection only from the panel of arbitrators selected by states, there is little in the way of affirmative criteria assuring that the annulment committee will be better qualified than the initial tribunal. Further, the appointment process itself is not transparent, which may give rise to further legitimacy concerns. In the case of ICSID in particular, the manner in which states select those whom they appoint to the panel is often opaque, as is the manner in which individual committees are composed by the Chairman of the Administrative Council.

As previously mentioned, there have been no reported ISDS appeal cases using the appeals rules outlined above. These rules do not treat appellate adjudicators substantively differently from arbitrators with regard to their selection and appointment. Especially because disputing parties are entitled to 'select' appellate adjudicators from a large pool of candidates, these types of appellate bodies would not be able to improve consistency of decisions as their composition would be different in each individual case. They might improve the quality of decision making by taking a second look at the initial award and correcting any errors found therein. Even in that case, though, it is not necessarily clear that the second decision would be qualitatively better than the first decision.

[39] See e.g., Judith Levine, 'Dealing with Arbitrator "Issue Conflicts" in International Arbitration', 61 *Dispute Resolution Journal* 60 (2006); Philippe Sands, 'Developments in Geopolitics: The End(s) of Judicialization?', ESIL Conference Closing Speech, 12 September 2015, reprinted in EJIL Talk!; Malcolm Langford, Daniel Behn, and Runar Hilleren Lie, 'The Ethics and Empirics of Double Hatting', 6:7 ESIL Reflection (2017).

III. Appointment and selection procedures in permanent and semi-permanent international tribunals

In contrast to international arbitration, in international courts it is rare that every member selects and appoints 'its own' adjudicator.[40] In the UN system, with its 193 member states, the International Court of Justice (ICJ) has 15 judges. Under the United Nations Convention on the Law of the Sea (UNCLOS), with its 168 member states, ITLOS has 21 judges. In the WTO, with its 164 member states, the Appellate Body has 7 members.

As noted by UNCTAD, recent international investment agreement (IIAs) have begun to respond to calls for ISDS reform by incorporating one or more types of reform-oriented clauses.[41] Yet, up to the present, special rules designed for ISDS appeal are scarce in IIAs. Out of the existing 3300-plus IIAs,[42] only around two dozen contain clear language referring to an envisaged ISDS appeal mechanism.[43] Thus, CETA and the other recent EU investment agreements establishing an investment court system must still be viewed as exceptions. A few recent IIAs proposed by individual European countries, such as the 2018 Netherlands Model Investment Agreement, also envisage a multilateral investment court (MIC).[44] A MIC is likely to incorporate an appellate mechanism as the second instance of dispute settlement.[45] To date, no investment appellate mechanism has been established.[46]

1) Selection

i) General

In selection procedures relating to some courts, states are now advertising vacant posts to allow candidates to apply through a national pre-selection process.[47] The states then nominate out of

[40] For selection and appointment, the provisions in the Algiers Accords on the establishment of the Iran-US Claims Tribunal, in the CETA, in the EU-Vietnam IPA and in the EU-Singapore IPA are not suitable in a multilateral context, since in these bilateral agreements each of the two contracting parties appoints one third of the judges, while the final third are neutrals who do not share the nationality of the treaty parties.. Cf. Article 8.27 para. 2 CETA: "The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries."

[41] UNCTAD, "Taking Stock of IIA Reform: Recent Developments", *IIA Issues Note*, Issue 3, 2019, at 2-3.

[42] UNCTAD, available at https://investmentpolicy.unctad.org/international-investment-agreements (10 June 2019).

[43] See Albert van den Berg [Presentation at BIAC/ICCA Joint Meeting].

[44] Article 15 of the Dutch Model Investment Agreement (2018).

[45] See Marc Bungenberg & August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (Special Issue of the European Yearbook of International Law)(Switzerland: Springer, 2018), at 55-56.

[46] See Albert Jan van den Berg, "Appeal Mechanism for ISDS Awards: Interaction with New York and ICSID Conventions", available at http://isdsreform2019.aail.org/wp-content/uploads/2019/02/AM-Interaction-with-ICSID-and-NYC-AJB-Draft-06-02-2019.pdf (10 June 2019), at 7.

[47] Cf. Most recently when the EU wanted to fill the "EU" Appellate Body position it called for potential members to propose themselves: European Commission, EU Launches Selection of Candidates for the position of WTO Appellate Body member, Press release of 26.10.2016; Germany and Austria also initiated pubic tender processes for the appointment of their new ECtHR judges: Richter mit Ruf gesucht, Handelsblatt of 24.11.2009; Straßburger Richter: Sechs Bewerber, Die Presse of 3.11.2014.

those applicants their candidates. This nomination by home states is envisaged, for example, for the selection of candidates for the WTO Appellate Body,[48] for the International Criminal Court[49] and for ITLOS.[50] It is also foreseen for the International Law Commission (ILC).[51] A further alternative is provided by the Civil Service Tribunal of the EU, which allows direct application by potential candidates.[52]

A 'screening committee' exists for the CJEU[53] and the ECtHR.[54] This committee usually takes the form of a sub-committee of the Plenary Body (Screening Committee) and screens candidates for professional qualifications, ethical standards, independence and neutrality.[55] In other fields of law, only qualified candidates can be selected for later appointment. It may be advisable to foresee a screening mechanism that excludes unqualified candidates.

A relatively recent development is the aim for a balanced appointment of judges from a gender perspective.[56] For example, the Rome Statute requires "A fair representation of female and male judges."[57]

ii) Nationality

[48] Article 17 DSU; cf. thereto WTO, WTO receives seven nominations for Appellate Body post, News Items of 23.3.2016; European Commission, EU Launches Selection of Candidates for the position of WTO Appellate Body member, News archive of 26.10.2016.

[49] Article 36 para. 4 lit. a) Rome Statute: "Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either: (i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or (ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court […]."

[50] Cf. Article 4 para. 1 ITLOS Statute: "Each State Party may nominate not more than two persons having the qualifications prescribed in article 2 of this Annex. The members of the Tribunal shall be elected from the list of persons thus nominated."

[51] Article 3 ILC-Statute: "The members of the Commission shall be elected by the General Assembly from a list of candidates nominated by the Governments of States Members of the United Nations."

[52] Cf. Article 3 para. 2 Annex I to the Council decision of 2.11.2004 establishing the European Union Civil Service Tribunal, OJ L 333 of 9.11.2004, p. 7: "Any person who is a Union citizen and fulfils the conditions laid down in the fourth paragraph of Article 225a of the EC Treaty and the fourth paragraph of Article 140b of the EAEC Treaty may submit an application. The Council, acting by a qualified majority on a recommendation from the Court, shall determine the conditions and the arrangements governing the submission and processing of such applications."

[53] See thereto Art. 255 Treaty on the Functioning of the European Union (TFEU): "A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254. The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament." Cf. the subsequent Council decision of 11.2.2014 appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union (2014/76/EU), OJ L 41 of 12.2.2014, p. 18.

[54] Cf. Resolution on the Establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, CM/Res(2010)26 of 10.11.2010.

[55] Examples of unsuitable but elected judges of the ECtHR may be found in Engel (2012), p. 486 et seq.

[56] See Art. 12 para. 2 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (ACtHPR Protocol): "Due consideration shall be given to adequate gender representation in nomination process." Cf. with regard to ECHR Mowbray (2008), p. 549. For the MIC, following the example of Howse (2017b), p. 225, MIC Members could be required to nominate an equal number of men and women to fill the vacancies for MIC Judges. Even such an equal nomination process would not, however, guarantee equal representation as the elections might still favour men over women.

[57] Article 36 para. 8 lit. a) sublit. iii Rome Statute.

Nationality plays a role in the selection of judges for permanent or quasi-permanent bodies. A number of court statutes provide that judges shall be be elected irrespective of their nationality but also that no two judges of the same nationality shall sit on the bench.[58] Regional court statutes might stipulate the assignment of a fixed number of judges to specific states. Due to concerns about the size of the bench, this is not possible at the multilateral level. There, at least in the past, some states have been informally been guaranteed to always have a judge of their nationality on the bench. For example, the five permanent Members of the UN Security Council have always each appointed an ICJ Judge; an exception to this practice occurred in 2017 for the first time.[59] In addition, some court statutes permit a state party to a case before the court without a judge of its own nationality to appoint a judge ad hoc.[60] A judge ad hoc does not have to be a national of his or her appointing the state, and indeed very often judges ad hoc are not nationals of the state that appoints them.[61]

Since the founding of the WTO in 1995, the United States and the EU have always been "represented" on the Appellate Body, although the nomination and election procedure described above could conceivably lead to rejection of given nominees.[62]

In various international court systems the representation of different legal systems is achieved through the appointment of a certain number of judges per regional group.[63] This requirement of regional or geographical distribution exists in the statutes of numerous international judicial bodies[64] and is attained, for example, by allocating certain quotas to particular regional groups. Fair regional representation within ITLOS is ensured by ensuring representation of the five geographical groups of the UN General Assembly (African, Asian, Eastern European, Latin American and Caribbean and Western European and other countries).[65]

CETA calls for the establishment of both a first instance tribunal and an appellate body. For the first instance tribunal, the CETA Joint Committee shall appoint fifteen members. Five of the members of the tribunal are to be nationals of a member state of the EU, five are to be nationals of Canada, and five are to be nationals of third countries.[66] The number of members of the tribunal may be increased or decreased as decided by the CETA Joint Committee, as the

[58] E.g. Artiles 2 and 3 of the Statute of the ICJ.
[59] See https://www.theguardian.com/law/2017/nov/20/no-british-judge-on-world-court-for-first-time-in-its-71-year-history.
[60] Article 31(2) and (3) of the Statute of the ICJ.
[61] On nationality and the institution of judges ad hoc in international courts, see Catharine Titi, 'The Indentity Conundrum: Legitimacy and Doubt on the International Bench', in Freya Baetens (ed.), *Identity and Diversity on the International Bench*, Oxford University Press (forthcoming).
[62] Mackenzie (2014), p. 745.
[63] Mackenzie (2014), p. 744.
[64] Article 2 para. 2 ITLOS Statute: "In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured." Article 36 para. 8 lit. a) Rome Statute: "The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation […]". Article 9 ICJ Statute: "At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."
[65] See https://www.itlos.org/en/the-tribunal/members/ .
[66] Article 8.27(2) of CETA. The persons appointed do not have to be nationals of Canada or an EU country, but will be treated as nationals of the entity that appointed them.

case load warrants.[67] The term of members is to be five years, renewable once.[68]

The CETA first-instance tribunal will hear cases in divisions consisting of three members of the tribunal, of whom one shall be a national of an EU member state, one a national of Canada and one a national of a third country. The division will be chaired by the member of the tribunal who is a national of a third country.[69] The Appellate Body will hear appeals in division of three, with the members of each division chosen by lot.

iii) Qualifications

International courts, as well as the international arbitral tribunals described above, have qualification standards for their members. They are similarly concerned about independence and impartiality as well as substantive expertise.

a. Independence and Impartiality

Independence and impartiality are required of judges on international tribunals. Sometimes they are specifically outlined in the relevant qualifications for judges; other times they are viewed simply as qualities inherent in the judicial function. Just because one has an international court does not mean that concerns about independence and impartiality disappear. Direct appointment of a judge by a state, or even the presumption that a particular state will be represented on a court, triggers doubts regarding the adjudicators' independence, especially if a re-election or extension of the term of office is possible.[70]

b. Expertise

Insofar as knowledge of particular areas of law is concerned, some tribunals have specific requirements. By way of example, the DSU of the WTO requires that AB members be "of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally"; they also must be unaffiliated with any government.[71]

CETA requires that the members of the first-instance court and the appellate tribunal possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence. They are to have demonstrated expertise in public international law. The treaty further states that it is desirable that they have particular expertise in international investment law, in international trade law, and/or in the resolution of disputes arising under international investment or international trade agreements.[72]

[67] Article 8.27(3) of CETA.
[68] Article 8.27(5) of CETA.
[69] Article 8.27(6) of CETA.
[70] In a similar sense, European Commission (2017), p. 46ff recommends that an independent body be in charge of the appointment of judges for the proposed MIC.
[71] Article 17.3 DSU.
[72] Article 8.27(4) & 8.28(4) of CETA.

2) Appointment

To select adjudicators for most international courts, the members nominate a pool of candidates and an international body subsequently chooses and appoints the judges.[73] For example, for the ICJ: "The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration";[74] for ITLOS: "Each State Party may nominate not more than two persons having the qualifications prescribed in article 2 of this Annex. The members of the Tribunal shall be elected from the list of persons thus nominated."[75]

Therefore, in international courts the process of selection and appointment will usually involve a nomination as well as an an election. After the adjudicator has been nominated, he or she can be elected to serve on a specific body, court, or tribunal. In many contexts that election is not the final appointment mechanism; the adjudicator will be somehow chosen (either by appointment or by random lot) to hear a specific case or to be a member of a specific chamber. The decisive factor is that there be a sufficient number of qualified candidates from which to choose, even if the choice is a political decision.

Judges ad hoc are appointed directly by the disputing state parties when the latter do not have a judge of their nationality on the bench. As previously mentioned, judges ad hoc do not have to have the nationality of their appointing state.[76]

WTO AB members are appointed by the DSB by consensus.[77] A member serves on the AB for a four-year term, renewable once. The DSU also provides for the rotation of AB members and the appointment of an AB Chairman.[78] In practice, an appeal is heard by an AB division of three members, but the DSU does not provide clear rules of appointment of AB members to form a division. The members constituting a division are selected on the basis of rotation, while taking into account the principles of random selection, unpredictability, and the opportunity for all Members to serve regardless of their national origin.[79] In addition, each division has a presiding member, who is elected by the Members of that division.[80]

Details about the composition of the appellate body are not fully spelled out in the CETA text, but the body is to be established by the CETA Joint Committee, which will also decide such matters as what administrative support is neccesary; procedures for the initiation and conduct of the appeals; procedures for remand; procedures for filling a vacancy on the appellate tribunal; the appropriate level of remuneration of the members; provisions related to costs; the number of members of the appellate tribunal; and any other necessary matters.[81]

[73] Mackenzie (2014), p. 738; Abi-Saab (1997), pp. 176 and 178; Mackenzie et al. (2010), p. 100 et seq.
[74] Article 4(1) of the ICJ Statute.
[75] Article 4(1) of the ITLOS Statute.
[76] See above, 'Nationality'.
[77] Article 2.4, DSU.
[78] Article 17.2, DSU.
[79] Article 6 (2), Working Procedures for Appellate Review.
[80] Article 7 (1), Working Procedures for Appellate Review.
[81] Article 8.28 (7) of CETA.

3) Assessment

Several observations that might be salient for ISDS reform can be made about international tribunals.

First, the process by which potential jurors are nominated is increasingly subject to concerns about transparency and accountability. For the selection of ECtHR judges, the national pre-selection process must comply with a number of fundamental principles – democratic procedure, transparency, and non-discrimination.[82] The alternative is that members 'nominate' candidates, who would then be confirmed by the Plenary Body, without leaving a choice from a larger pool of proposed candidates. But such an approach has been repeatedly criticized for lacking transparency in terms of how the nominees are chosen.

Second, the process of selection and appointment raises concerns about political influence on adjudicators' decisions. This is especially true when nominees are subject to reappointment or are likely to receive further preferment from the state that appointed them.

Third, the WTO has been criticized for its strong institutional control over the appointment of the adjudicators, especially in the first instance (as has the ICSID annulment committee procedure).

Finally, the relationship between nationality and neutrality is not fully resolved. Many states want their "own" representatives available to hear cases against them, an idea that is potentially inconsistent with the idea that judges are neutral and are to come to a case fully independent from the countries that appointed them.

IV. Selection and appointment procedures for rosters

Some international agreements provide rosters – lists of pre-selected persons – from which adjudicators can be selected. Directives about selection and appointment procedures for rosters, particularly in the trade and investment treaty context, are remarkably sparse in their content. They sometimes detail qualifications that panelists should have, but do not outline precisely how the rosters will be constituted.

1) Selection and appointment

Most international agreements do not outline procedures by which states should select persons whom they will nominate to a roster. They often contain general wording about desired qualifications. For example, the roster members in both the US Mexico Canada Agreement (USMCA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

[82] Cf. In this sense one might also look at Council of Europe Assembly Resolution 1646 (2009), Nomination of candidates and election of judges to the European Court of Human Rights; Committee on the Election of Judges to the European Court of Human Rights, Procedure for electing judges to the European Court of Human Rights, AS/Cdh/Inf(2017)01rev4 of 27.4.2017.

(CPTPP) are to have "expertise or experience in international law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements"; they are to be selected on the basis of "objectivity, reliability, and sound judgment"; they are to be "independent of, and not be affiliated with or take instructions from, a Party"; and they are to comply with a Code of Conduct to be established by the Commission.

NAFTA calls for the establishment of a roster of arbitrators from whom the appointing authority (the Secretary-General of ICSID) would appoint presiding arbitrators in the absence of party agreement. Accordingly:

> 'On the date of entry into force of this Agreement, the Parties shall establish, and thereafter maintain, a roster of 45 presiding arbitrators meeting the qualifications of the Convention and rules referred to in Article 1120 and experienced in international law and investment matters. The roster members shall be appointed by consensus and without regard to nationality'.[83]

The roster envisaged by NAFTA Chapter 11 has never been constituted, even 25 years after the entry into force of the agreement. The roster is to be appointed "by consensus." The text also says that they shall be appointed without regard to nationality, though the Secretary-General is limited by Article 1124(3); she may not appoint a presiding arbitrator who is a national of either disputing party and without regard to nationality." While the mechanism for selecting the 45 people is not specified, in practice the first attempts to create the roster involved each NAFTA country proposing 15 people to its treaty counterparties. Because of the consensus requirement, the other parties had to agree to the proposed candidates. This consensus was never reached, and because NAFTA functions without the existence of the panel – the panel is only called upon if the parties do not agree on the presiding arbitrator, and if no panelists are available to serve, the Secretary-General would appoint from the ICSID panel – its absence has not impeded the functioning of Chapter 11 of NAFTA. The expertise requirements are rather general. Because the roster has not been constituted, their adequacy has not been called into question.

The USMCA does not call for the establishment of a roster for investment arbitration itself, nor does it constrain the appointing authority, again the ICSID Secretary-General, to appoint from the ICSID panel, though it does call for her not to appoint someone who is a national of either disputing party unless the parties agree otherwise.

In the state-state context, the USMCA calls for the establishment of a roster of up to 30 individuals by the date of the entry into force of the agreement. They are to be selected by consensus and to serve for a minimum of three years or until the Parties constitute a new roster. Members of the roster can be reappointed. The Free Trade Commission is supposed to establish a panel when a complaining party so requests and if the parties have failed to resolve their dispute after 30 days of seeking to do so by means of conciliation, mediation, and the like. Panelists are expected to be drawn from the envisaged roster of panelists, but are not required

[83] Article 1124(4) of NAFTA.

to be.[84] The process for composing the panel (unless the parties agree otherwise), found in Article 31.9, is of note. If there are two disputing parties, a panel is to comprise five members. The disputing parties are to decide on a chair within 15 days of the delivery of the request for the establishment of the panel. If they fail to agree, one disputing party, chosen by lot, shall select within five days as chair an individual who is not a citizen of that party. Within fifteen days of the selection of the Chair, each disputing party shall select two panelists who are citizens of the other disputing party. If a disputing party fails to select its panellists within that time period, those panelists shall be selected by lot from among the roster members who are citizens of the other disputing party. The panelists will normally be selected from the roster.[85] A disputing party may exercise a peremptory challenge against an individual not on the roster who is proposed as a panellist by a disputing party within 15 days after the individual has been proposed, unless no qualified and available individual on the roster possesses the necessary specialized expertise, in which case a disputing Party may not exercise a peremptory challenge but may raise concerns that the panellist does not meet the qualification requirements in Article 31.8(2).

The CPTPP too calls for the establishment by parties of a roster to be used for the selection of panel chairs within 120 days after the date of its entry into force for them. If the parties have not established the roster within that timeframe, the Commission is to convene to appoint individuals within 180 days after the entry into force of the Agreement. Those appointments are to be made taking into account the nominations made by individual parties and the desired qualifications, as described below. The CPTPP roster is to consist of at least 15 individuals, unless the Parties agree otherwise. Each party can nominate up to two individuals for the roster, and may include up to one national of any party among its nominations. Once those nominations are made, individuals are to be appointed to the roster by consensus. The roster may include up to one national of each party. Once established, or after it is reconstituted, the roster is to remain in effect for a minimum of three years or until the parties constitute a new roster. Members of the CPTPP roster also can be reappointed. Individual parties may also establish indicative lists of people willing and able to serve as panelists. These lists can include nationals or non-nationals, and can include any number of people.

The CPTPP entered into force on December 30, 2018. As of this date (23 August 2019) the time period for the establishment of the state-to-state roster has expired, but there have been no public indications showing that the parties have yet established the roster.

In the WTO system, first-instance panels are formed on an ad hoc basis. There is an indicative roster of panelists composed of persons nominated by WTO member states, but persons do not need to be selected from that list. To be a WTO panelist individuals must have 'experience with the WTO', as demonstrated by having presented cases to a panel, by having represented a WTO member or a contracting party to GATT 1947 state as a representative to the WTO Council or a Committee of any covered agreement, by having worked in the Secretariat, by having taught or published in the area of trade law, or by having served as a senior trade policy officer of a

[84] Article 31.8 of the USMCA.
[85] Article 31.9(3) of the USMCA.

WTO member.[86] They must also be independent.[87] The WTO Appellate Body process is described in part II, above.

None of the agreements described above detail how states are to select the roster members whom they propose. The same concerns, and possibilities to establish mechansims for self-nomination, screening committees to assess qualifications, with the eventual emergence of short lists, exist as were described in Part III, *supra*.

2) Assessment

This short overview of some recent practice regarding rosters illustrates several common themes.

First, agreement between the disputing parties precedes selection from rosters. To put it another way, state parties have not in the first instance confined appointment to those who are listed on the existing rosters. The rosters have tended to serve a default function.

Second, requiring that panelists on rosters be appointed by consensus can be problematic. The NAFTA Chapter 11 experience shows that consensus might not ever be achieved. It is as yet too early to determine whether the same is true of the CPTPP. This problem is likely partially linked to the default nature of panel selection – if panelists are not essential to the functioning of the tribunal, the incentive for states to achieve consensus is more limited. Yet even when the panelists are required for the tribunal to function, which is the case in the WTO Appellate Body, a lack of consensus on appointment can impede the functioning of the tribunal.

Third, while some rosters detail qualifications that panelists must have, these tend to be fairly general. There are no directives as to how qualifications should be vetted, thus leaving it to parties to determine whether a particular individual is qualified or not.

Fourth, the question of nationality arises repeatedly. Some rosters anticipate that members should be neutral and try to limit the number of nationals of states party to the treaty who can be appointed. Others accept that states are likely to want to appoint their nationals, though they tend to require that some appointments of non-nationals be made.

V. Further options

UNCITRAL Working Group III has the opportunity to consider many different options for reform of investor-state dispute settlement. Below we address several possibilities, and identify the considerations that states might especially want to take into account as they consider which option or options satisfy their needs best. Ensuring that adjudicators are qualified and unbiased, and chosen in a reasonable manner, will help to establish the legitimacy of the ISDS

[86] Article 8(1) DSU.
[87] Article 8(2) DSU.

mechanism(s) selected. The options below all address multilateral reform; bilateral or regional reform might also exist alongside multilateral changes.

1) Standing court (MIC) with appellate mechanism

One of the most talked-about options for reform is the establishment of a standing multilateral investment court (MIC) composed of both a first-instance tribunal and an appellate body.

The adjudicators' qualifications, the process by which they are elected, and, consequently, their independence should be considered the core of any future MIC. MIC judges will decide on matters of state interest. Thus, the election process should be subject to strict standards; only highly qualified judges ensure the necessary quality and thus acceptance of the new multilateral institution. Personal and professional standards will thus have to be taken into consideration during the election process.

A standing court could foresee in its statute all elements of selection of candidates, including nomination and screening, as well as the appointment to the court, or in other words election to the bench of judges. A similar process could also work for the appellate mechanism of a new standing court system.

In order to achieve broad-based acceptance of a MIC, the election process will likely need to ensure that the various legal systems are represented within the judiciary.[88] On emight expect the judges to reflect the legal systems and regions of the members and show gender balance—and at the same time have the highest professional qualifications.[89] The appointed judges will also need to reflect the membership of a MIC so that judges mirror the various legal and cultural backgrounds of MIC members. As a consequence, and taking into account the \ number of member states to which MIC proponents aspire, there should not be two judges of the same nationality.[90]

The commonly accepted election procedure for the ILC or the ICJ could be used as a model for an appointment procedure for MIC Judges. In those bodies candidates are assigned to specific regional groups.[91] From each regional group, the election body elects a certain number of

[88] Diversity is equally supported by European Union (2019), para. 50 and UNCITRAL Working Group III (2018a), p. 6.

[89] Cf. Article 8 ILC-Statute: "At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured." Article 36 para. 8 lit. a) Rome Statute: "The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation; and (iii) A fair representation of female and male judges." Article 9 ICJ Statute: "At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."

[90] See for instance Article 3 para. 1 ICJ Statute: "The Court shall consist of fifteen members, no two of whom may be nationals of the same state." Article 52 para. 2 American Convention on Human Rights (ACHR); Article 3 para. 1 sentence 1 ITLOS Statute.

[91] Cf. Article 3 para. 2 ILC-Statute: "There shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations." See also Article 3 para. 2 ITLOS Statute: "There

judges. The formation of regional groups of a MIC with judges in the first instance could follow the model of the ICJ.[92] At the ICJ, there are three judges from Africa, two from Latin America and the Caribbean, three from Asia, two from Western Europe and other countries, two from Eastern Europe, one from North America, one from Oceania, and one from Western Asia.[93]

The selection and appointment process could start with the nomination of candidates by the Members or direct application by the potential candidates. To comply with transparency the announcement of vacancies should be made public. The process designed would also likely need to ensure that a specific number of candidates is nominated for each regional group.

A committee could be established to vet the qualifications, including expertise and general suitability (independence, integrity and neutrality) of the candidates.[94] Only qualified candidates would then become eligible as 'judge candidates'. Such a preliminary screening would strengthen the legitimacy and acceptance of a MIC and would contribute to greater transparency and objectivity in the appointment procedure.[95] This would also ensure that member states set sufficiently high standards in their internal nomination procedures.[96] The election of the judges could then proceed from this pool of candidates determined by the selection committee.

It appears that it is feasible to apply the same or similar selection and appointment standards and methods for both first-instance adjudicators and appellate adjudicators. Yet an important consideration is whether and how the appellate body establishes itself to enable it to to issue decisions that command respect. To put it another way, if both the first-instance tribunal and the appellate body members have the same qualifications, why should the appellate body decisions be viewed as superior? One possibility is to have appellate body members meet certain 'extraordinary' qualifications, such as a significant degree of adjudicatory experience. Another is simply to rely on the structure of the process, and the general nature of issues on appeal, with the opportunity to learn from the decision of the first-instance tribunal.

With respect to the the selection of appellate body members in particular, there appear to be two primary options. Option I would be to maintain a same list of candidates from which both first instance and appellate adjudicators could be appointed (e.g. the lists of arbitrators under the ICSID Rules and the BIAC Investment Arbitration Rules). Option II would be to have a permanent appellate body composed of a fixed number of members (e.g. WTO AB, CETA

shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations."

[92] Nevertheless, it must be highlighted that even the elections of ICJ judges can be criticised as political. In this regard see Brower (2018), p. 793.

[93] Cf. http://www.icj-cij.org/court/index.php?p1=1&p2=2 .

[94] Cf. for instance Article 36 para. 4 lit. c) Rome Statute: "Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court." See hereto Resolution ICC-ASP/10/Res.5 of 21.12.2011, Strengthening the International Criminal Court and the Assembly of States Parties, para. 20.

[95] Cf. Hackspiel (2015), Art. 255 TFEU, para. 3 et seq.

[96] Cf. Hackspiel (2015), Art. 255 TFEU, para. 2; cf. the European Convention, which has already done this, CONV 734/03 of 2.5.2003, Art. 224a.

appeal tribunal). Depending on the underlying treaty, different methods could be used in drawing the list of adjudicators or selecting the members in each of the categories.

The number of judges sitting on a standing MIC would likely need to be limited for reasons of functionality as well as cost. Given the idea that a multilateral institution would be open to any state or REIO wishing to join, having a judge from every state is likely not feasible. Thus, the number of judges should likely not be based primarily on the number of MIC members, but rather on the number of cases brought before the MIC.[97] It can be assumed that only a limited number of cases will be heard and decided by the Appellate Body. Therefore, the number of judges in the second instance could be lower than in the first instance. A MIC could, for example, envisage 15 judges in the first and 9 judges in the second instance, as well as provide for the option and associated procedure to increase the numbers depending on the number of MIC members and/or the workload.

Another unresolved dilemma is whether it would be desirable to have a version of the judge ad hoc. On the one hand, to the extent there are concerns about representation of the interests of the affected state on the court, having a judge ad hoc from that state might satisfy concerns that the tribunal does not understand domestic, local, or regional interests. This might also help to garner agreement on having a smaller number of judges on the permanent tribunal. On the other hand, the adjudicatory body is meant to be neutral, with all adjudicators setting aside their nationality in order to give an independent, unbiased judgment. One would also likely need larger panels – five rather than three, for example – in order to avoid concerns that the state representative would somehow influence the result.

2) A multilateral appellate mechanism

A multilateral investment appellate mechanism (MIAM) could be established in the form of a self-governing, stand-alone international organization that would handle appeal of arbitral awards, be they ICSID awards or awards made by other arbitration institutions or *ad hoc* tribunals. It is also possible that an institutionalized MIAM could be included in an envisaged MIC as a court of second instance, with the possibility of hearing appeals from within and without a MIC ecosystem.[98]

Members of an MIAM would presumably be subject to the same requirements as those set out above for the judges of a two-tiered MIC, including the requirements as to the independence and ethical standards of the members.[99] As MIAM members will decide on matters of significant importance to states, high selection standards should be adopted, and both personal

[97] This approach is followed by European Commission (2017), p. 40 and discussed in UNCITRAL (2017), para. 35

[98] See in detail Marc Bungenberg & August Reinisch, at 189-205.

[99] *Id.*, at 189-190; Gabrielle Kaufmann-Kohler and 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?' June 2016, at 73.

and professional standards have to be taken into consideration during the election process.[100] The qualification requirements could be those of the judges of the envisaged bilateral investment court under CETA.[101] The member states of the MIAM should be charged with the task of selecting the members.[102]

3) A non-standing appellate body

Diverse options are possible regarding the appointment of appellate adjudicators for specific cases. Option I could involve the appointment of appellate adjudicators essentially based on the consent of the parties, with the parties are given the right and opportunity to appoint at least one adjudicator. An administering institution would need to serve as the appointing authority when the parties cannot reach an agreement within a given time limit (e.g. BIAC Appeal Rules). Option II could provide for appellate adjudicators appointed on the basis of the institution's recommendation. Once the institution offers a recommendation, the parties may reach an agreement on its basis; if no agreement is reached, the institution appoints the adjudicators (e.g. JAMS Appeal Rules and DSR Appeal Rules). Option III could be for the appointment of appellate adjudicators to be controlled by the institution with the parties only having a minimal or no role to play (e.g. the MIAM, WTO AB and the ICSID annulment procedure).

[100] Marc Bungenberg & August Reinisch, at 38-39; Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards', CIDS Supplemental Report, 15 November 2017, at 42 et seq.
[101] Marc Bungenberg & August Reinisch, at 40.
[102] *Id.,* at 190.