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**The Composition of a Multilateral Investment Court
and of an Appeal Mechanism for Investment Awards**

CIDS Supplemental Report

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EXECUTIVE SUMMARY

This report is a supplement to the report by the same authors entitled “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” (“CIDS Report”). It analyzes in more depth one aspect already addressed in the CIDS Report, namely the composition of a multilateral investment court (or ITI) and of an appeal mechanism for investor-State awards (or AM).

For that purpose, it carries out a comparative analysis of the composition of existing international adjudicatory bodies and in part also arbitral institutions, and seeks to chart the main options for the composition of a prospective ITI and AM. If States were to pursue a reform initiative aimed at institutionalizing investor-State dispute settlement through the creation of these types of adjudicatory bodies, adjudicators would no longer be appointed by disputing parties but would essentially (though not necessarily exclusively) be chosen by the parties to the instrument establishing the new adjudicatory bodies (section II). This fundamental shift poses a myriad of questions, which the paper seeks to examine.

One consequence of the shift is that what is currently achieved in one step, namely the selection of the decision-makers and the assignment of a specific case to them, would give rise to two phases, which the paper reviews in sequence.

Under the heading “selection” of ITI/AM members (section III), the paper explores four questions:

- First, how many members should there be on the ITI and AM? This question calls for States to decide whether they wish a larger “one-State-one-judge” court or rather a smaller selective representation court.
- Second, the paper examines the selection criteria. In brief, (i) the ITI/AM should be comprised of *competent* members, having the expertise and experience to discharge their functions; (ii) their composition as a whole should reflect high standards of *diversity*, representative of those for whom these bodies renders justice; and (iii) the ITI/AM should be endowed with strong guarantees of *independence* both institutionally (or structurally) and individually for the concrete exercise of each member’s adjudicatory functions. These requirements must be circumscribed in such a manner that they best contribute to the quality and fairness of the justice rendered and the legitimacy of the adjudicatory body.
- Third, the paper reviews the selection procedure. The design of the process for selecting ITI and AM members is a key factor in ensuring their independence and building the credibility, authority and integrity of the

adjudicatory bodies. To that end, the paper describes the main steps that could be envisaged in selecting prospective adjudicators, so as to ensure that individuals are chosen based on merit. Bearing in mind the asymmetric nature of investor-State dispute settlement, States should make certain that selection of the adjudicators is carried out through a procedure that is multi-layered, transparent, and open to stakeholders. In this context, the paper explores avenues aimed at minimizing risks of political considerations in the appointment and at ensuring that the choice of the adjudicators can be made from among a large number of highly qualified candidates.

- Fourth, certain conditions of office contribute to the independence and integrity of the process, such as long, non-renewable terms of offices, financial security, incompatibilities and immunities.

On the second topic, the paper addresses the possible methods whereby disputes could be assigned to individual sub-divisions (or “chambers”) of the adjudicatory bodies, which is important for the safeguard of the ITI’s/AM’s structural independence (section IV).

The analysis is largely the same for an ITI or AM, which is why the paper generally does not distinguish between the two. By contrast, it does make a distinction throughout between a permanent body and a semi-permanent one in the form of a roster.

The paper concludes that the ITI and AM composition will be instrumental in determining the success and legitimacy of these institutions, as States, investors and other stakeholders will evaluate whether the composition of these bodies affords sufficient guarantees that they will perform their functions fairly, impartially, and in accordance with the mandate conferred upon them (section V).

FREQUENTLY USED ABBREVIATIONS

1899 Hague Convention	1899 Convention for the Pacific Settlement of International Disputes, 29 July 1899, 1 AJIL 103 (1907)
1907 Hague Convention	1907 Convention for the Pacific Settlement of International Disputes, 18 October 1907, 2 AJIL Supp. 43 (1908)
ACHR	American Convention on Human Rights, 21 November 1969, 1144 UNTS 123
African Court	African Court of Human and Peoples' Rights
AM	Appeal Mechanism for investor-State arbitral awards, discussed in the CIDS Report
ASIL	American Society of International Law
ASIL-ICCA Report 2016	ASIL-ICCA (2016), <i>Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration</i> (17 March 2016)
Caribbean Court	Caribbean Court of Justice
CAS	Court of Arbitration for Sport
CAS Statute	Statutes of the Bodies working for the Settlement of Sport-Related Disputes (as in force from 1 March 2013)
CETA	Comprehensive Economic and Trade Agreement between the EU and Canada
CIDS Report	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", CIDS Report, 3 June 2016
CJEU	Court of Justice of the European Union
CJEU Advisory Panel	Advisory Panel constituted pursuant to Article 255 of the TFEU provided in Article 255
Claims Settlement Declaration	Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981, 20 ILM 223, 230 (1981)
DSU	Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 15 April 1994, 1869 UNTS 401
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221
ECtHR	European Court of Human Rights
ECtHR Advisory Panel	Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights
IACtHR	Inter-American Court of Human Rights

IACtHR Statute	Statute of the Inter-American Court of Human Rights, October 1979, OAS Res No. 448
IBA Guidelines	International Bar Association Guidelines on Conflicts of Interest in International Arbitration, 23 October 2014
ICC	International Criminal Court
ICC Advisory Committee	Advisory Committee on nominations of judges of the International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court, 1 July 2002, 2187 UNTS 90 (also referred to as "Rome Statute")
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice, 26 June 1945, 39 AJIL Supp. 215 (1945)
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTY Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia, as amended by GA Res 1877, 7 July 2009
IDI Resolution	Institut de droit International (2011), <i>The Position of the International Judge</i> , Sixth Commission, Rhodes Session (9 September 2011), 6 RES FR FINAL
ITI	International Tribunal for Investments, discussed in the CIDS Report
ITLOS	International Tribunal for the Law of the Sea established under UNCLOS, Annex VI
ITLOS Statute	Statute of the International Tribunal for the Law of the Sea, UNCLOS, Annex VI
IUSCT	Iran-United States Claims Tribunal
MERCOSUR	Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, 26 March 1991, 30 ILM 1041
NAFTA	North American Free Trade Agreement, 17 December 1992, 32 ILM 289, 605 (1993)
PACE	Parliamentary Assembly of the Council of Europe
PCIJ Statute	Statute of the Permanent Court of International Justice, 16 December 1920, 17 AJIL Supp. 115 (1923)
Protocol on the African Court	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997),
RJLSC	Regional Judicial and Legal Services Commission tasked with appointing judges of the Caribbean Court
Rome Statute	Rome Statute of the International Criminal Court, 1 July 2002, 2187 UNTS 90 (also referred to as "ICC Statute")
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm

2017	Chamber of Commerce in force as of 1 January 2017
Statute of the Caribbean Court	Agreement Establishing the Caribbean Court of Justice
TFEU	Treaty on the Functioning of the European Union as amended by the Treaty of Lisbon (2007), 2008 OJ C 115/47
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules 1976	UNCITRAL Arbitration Rules, 15 December 1976, GA Res 31/98
UNCITRAL Rules 2010	UNCITRAL Arbitration Rules, 6 December 2010, GA/Res 65/22
UNCLOS	The United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3
Unified Agreement	Unified Agreement for the Investment of Arab Capital in the Arab States, 26 November 1980, League of Arab States Economic Documents No.3,
WTO	World Trade Organization
WTO AB	World Trade Organization Appellate Body

I. SCOPE AND OBJECTIVE OF THIS REPORT

1. This research paper (the “CIDS Supplemental Report”) is prepared for the United Nations Commission on International Trade Law (“UNCITRAL”) within the framework of an ongoing project of the Geneva Center for International Dispute Settlement (“CIDS”), a joint research center of the Graduate Institute of International and Development Studies and the University of Geneva.¹ It is intended to supplement the research paper entitled “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” (the “CIDS Report”), which the authors prepared for UNCITRAL in June 2016.² The CIDS Report examined whether the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the “Mauritius Convention”)³ could provide a useful model for broader reform on procedural aspects of the investor-State dispute settlement framework. To that end, it proposed a roadmap that could be followed if States were to pursue a reform initiative at a multilateral level.

2. The CIDS Report analyzed the questions to be considered in connection with two possible reform options, namely a permanent multilateral investment court (referred to as the “International Tribunal for Investments” or “ITI”) and/or an appeal mechanism (“AM”) for investor-State arbitral awards. Among other issues, the CIDS Report addressed the composition of such dispute resolution bodies.⁴ The objective of the present report is to provide further analysis on the composition of the ITI and AM, charting the main options to determine the methods and criteria by which individuals could be selected to become members of these bodies, and the modalities by which disputes would be assigned to them. Selection requirements and processes as well as case assignment are

¹ See UN (2015a), *Report of the United Nations Commission on International Trade Law Forty-eighth session (29 June - 16 July 2015)*, Official Records of the General Assembly, Seventieth Session, Supplement No. 17, UN Doc. A/70/17, para. 268. The authors of this paper thank Brian McGarry and Josef Ostřanský, MIDS lecturers and CIDS researchers, for their contribution to research. The authors are also grateful to Facundo Pérez-Aznar, CIDS researcher, for research assistance; to Ankita Godbole, Lévy Kaufmann-Kohler, for assistance in finalizing the footnotes; and to Erika Hasler and Juliette Platania, Lévy Kaufmann-Kohler, for continuous support in locating bibliographic resources.

² See Gabrielle Kaufmann-Kohler, Michele Potestà (2016), “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”, (“CIDS Report”), 3 June 2016, available at http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf and www.cids.ch.

³ United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted on 10 December 2014, entered into force on 18 October 2017).

⁴ See CIDS Report, sections V.F and VI.G.

critical issues in the design of a dispute settlement system where the decision-makers are no longer appointed by the disputing parties. Composition is not merely a technical question. It has a direct impact on the quality of the decision-makers and, hence, on the quality of international justice.⁵ Therefore, the analysis in this report would remain relevant to any reform endeavor of the current investor-State dispute settlement system that would address the question of composition of adjudicative bodies.

3. To present the different options, this report draws on a comparative analysis of the most important international courts and tribunals. It describes the existing law and practice in the selection of international judges and arbitrators, examines strengths and weaknesses of various possibilities available to policy-makers, evaluates the relevance to a prospective ITI or AM of the solutions adopted in these other frameworks, and, when pertinent, comments on how a particular rule or practice may be applied or adjusted in the context of a prospective reform.

4. The report will map out the available options by focusing primarily on a first-instance ITI.⁶ This focus is chosen to avoid repetitions, as similar options apply *mutatis mutandis* to the composition of a second-tier body within the ITI entrusted with the control over first-instance decisions (i.e., built-in appeal, built-in annulment, or chamber giving preliminary rulings)⁷ and of an AM for investor-State arbitral awards.⁸ Therefore, this paper will generally discuss the issues having in mind the first scenario (first-instance within ITI). Wherever appropriate, it will note specificities arising in relation to the second and third scenarios (second-instance within ITI, and AM).

5. The paper starts by explaining the structural shift from the current *ad hoc* system of investor-State arbitration to the permanent dispute settlement models envisaged in the CIDS Report, and describes the impact of such a shift on the composition of the future dispute resolution body. While in the current system the parties to the dispute play a significant role in the selection of the adjudicators, their influence on the composition of a permanent body is bound to diminish (section II). The paper then delves into the two main issues that would arise in the design of a permanent investment body, namely (i) the “selection” of individuals as members of the permanent body (to whom we will generally refer

⁵ Institut de droit International (2011a), *The Position of the International Judge*, Sixth Commission, Rhodes Session, 6 RES FR FINAL (9 September 2011) (“IDI Resolution”), Art. 1(1).

⁶ See CIDS Report, section V.F, paras. 165-176.

⁷ See CIDS Report, section V.D, paras. 105-137.

⁸ See CIDS Report, section VI.G, paras. 203-206. For the difference between the ITI and the AM options, see CIDS Report, paras. 2, 217, and sections V and VI (dealing with the ITI scenario and the AM scenario respectively).

as “ITI members”), and (ii) the modalities by which cases are assigned to ITI members (sections III and IV). In respect of the first issue, the paper reviews the number of ITI members (section III.A); the general and individual criteria to select them, as well as the fundamental requirement of independence (section III.B); the procedures and stages in the selection process (section III.C); and the members’ term and conditions of office (section III.D). The paper goes on to discuss the methods whereby individual cases are assigned to the ITI members who have been so selected (section III.D.1). The paper closes with a summary of the main conclusions (section V).

II. SHIFTING FROM *AD HOC* TO PERMANENT BODIES

6. The possible reform initiatives discussed in the CIDS Report presuppose the creation of multilateral permanent adjudicatory bodies, the ITI and/or the AM, whereby the former would provide an alternative to the current *ad hoc* system of investor-State arbitration and the latter would supplement it.⁹

7. When discussing composition of adjudicative bodies, one must distinguish between an *ad hoc* body and a standing/permanent body. We use the term “*ad hoc*” to refer to a dispute resolution body which is constituted on a case-by-case basis for the purposes of a single dispute. *Ad hoc* bodies do not pre-exist the dispute submitted to them and disband once they have issued their decision.¹⁰ By contrast, we use “standing” or “permanent” to designate a dispute resolution body composed of members who form part of a pre-constituted “bench” and serve fixed terms of office, and to whom cases may be assigned once they are filed. While most of the existing international dispute resolution systems are easily categorized in one or the other type (e.g., investor-State arbitral tribunals fall in the former category, and the European Court of Human Rights (“ECtHR”) in the latter), the dividing lines are blurred in institutional settings such as a pre-established roster of adjudicators from which the disputing parties may choose the individuals for the resolution of a specific dispute. Depending on its design, one could refer to this last arrangement as a “semi-standing” or “semi-permanent” dispute resolution system.¹¹

⁹ As explained in the CIDS Report, States could decide whether the new dispute resolution options (ITI or AM) would entirely replace the ones present in existing and future IIAs, or complement them, in the sense that a claimant-investor would have a choice between the existing investor-State arbitration option(s) provided in the IIA and the new ITI/AM. See CIDS Report, section VII.D.2.

¹⁰ Thus, this paper does not use the term “*ad hoc*” in the sense that is sometimes used in international arbitration to denote non-institutional arbitration.

¹¹ Whether a roster or closed list model tilts toward an *ad hoc* or a permanent dispute settlement system depends essentially on whether its members perform other institutional functions beyond adjudicating specific disputes. For example, the authors have little hesitation to characterize dispute settlement before the Court of Arbitration for Sport

8. In *ad hoc* dispute resolution bodies, disputing parties are normally entrusted with broad powers in the selection of the adjudicators. The ability to influence the composition of these types of bodies has historically been most significant in international arbitration, be it inter-State¹² or commercial arbitration.¹³ Likewise, in the current investor-State arbitration system, IIAs and

(“CAS”) as *ad hoc* (in the sense defined above), even in the presence of a closed list from which disputing parties must select the panelists. By contrast, if disputing parties are able to pick individuals from a roster, whose members draw up the institution’s rules of procedure, approve the budgets, are subject to the same disciplinary authority, consult on changes in case law or other matters of interest to the dispute resolution body as a whole, and perform other institutional tasks on a continuous or at least semi-continuous basis, that body would rather be assimilated to a standing body.

¹² For historical examples of inter-State arbitrations, see e.g. the Jay Treaty, which established commissions to decide various matters between the US and Great Britain. Each party appointed one or two commissioners, and these commissioners were to agree on the choice of the final commissioner. Failing agreement, the final commissioner was to be drawn by lot from names proposed by the party-appointed commissioners. *The Jay Treaty. Treaty of Amity, Commerce, and Navigation, between His Britannic Majesty; and the United States of America, by Their President, with the advice and consent of Their Senate*, 19 November 1794, Arts. 5-7. Similarly, to settle the so-called Alabama claims, the US President and the British Queen each appointed one member of the arbitral tribunal, while the remaining three members were appointed respectively by the King of Italy, the Swiss President, and the Emperor of Brazil. *The Treaty of Washington*, 8 May 1871, Art. 1. In line with that tradition, modern inter-State arbitration frameworks grant broad powers to disputing parties in the selection of the adjudicators. See e.g. The United Nations Convention on the Law of the Sea (“UNCLOS”), 10 December 1982, 1833 UNTS 3, Annex VII, Art. 3, according to which each party appoints one member of a five-member tribunal, and the parties agree on the remaining three arbitrators or on the method for their appointment, failing which the President of the International Tribunal for the Law of the Sea (“ITLOS”) makes the necessary appointments. See also *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA Case No. 2011-1, in which, according to Annexure G to the Indus Water Treaty 1960, each party appointed two members of a Court of Arbitration, and three umpires were appointed by three different appointing authorities. Further, in the context of inter-State arbitration under international investment agreements (“IIAs”), disputing parties generally appoint one arbitrator each and seek to agree on the appointment of the chair, failing which agreement an appointing authority (normally the President of the International Court of Justice (“ICJ”) or the Secretary General of the International Centre for Settlement of Investment Disputes (“ICSID”)) may make the appointment. See, e.g., German Model BIT (2008), Art. 9(3); U.K. Model BIT (2008), Art. 9(3); U.S. Model BIT (2012), Art. 37.

¹³ See, e.g., Section 5 of the U.S. Federal Arbitration Act, 1925 pursuant to which parties are first and foremost required to appoint arbitrators in accordance with the method agreed in the arbitration agreement. *The US Federal Arbitration Act, 1925*, 9 U.S.C. § 5. See further, in lieu of many others as an expression of transnational consensus, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Art. 11(2) (“The parties are free to agree on a procedure of appointing the arbitrator or arbitrators [...]”) and 11(3) (“Failing such an agreement, (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator [...]”). The principle of party autonomy in the constitution of the tribunal is not only codified in national arbitration acts, it was also provided very early in institutional arbitration rules. So in their version of 1927, the Rules of Arbitration of the International Chamber of

conventions (e.g., the ICSID Convention), national laws on arbitration (applicable in non-ICSID arbitrations), and rules for institutional and non-institutional arbitration, such as the UNCITRAL Arbitration Rules, give the disputing parties significant control over the constitution of the arbitral tribunal. In particular, the rules applicable in investor-State arbitration allow disputing parties to agree on the method to select the arbitrators¹⁴ and to agree directly upon the identities of such arbitrators. Typically, parties to the dispute may directly appoint “their” arbitrator (generally referred to as the “party-appointed” arbitrator) and influence, directly or indirectly, the selection of the chair of the arbitral tribunal.¹⁵

9. Similarly, in the area of trade disputes, the constitution of panels at the World Trade Organization (“WTO”) is mainly driven by the disputing parties,¹⁶ although arguably to a different extent than in investor-State arbitration.¹⁷

Commerce provided for the disputing parties’ right to appoint one arbitrator. See Alfonso Gomez-Acebo (2016), *Party-Appointed Arbitrators in International Commercial Arbitration*, Kluwer Law International, pp. 5-38, esp. at 27. For a historical overview, see also Gary B. Born (2014), *International Commercial Arbitration 2nd Edition*, Kluwer Law International, pp. 1654-1659.

¹⁴ See the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”), 18 March 1965, 575 UNTS 159, Arts. 37-40; UNCITRAL Arbitration Rules (“UNCITRAL Rules 1976”), Arts. 5-8; UNCITRAL Arbitration Rules (“UNCITRAL Rules 2010”), Arts. 7-10; Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC Rules 2017”), Arts. 16-17.

¹⁵ See ICSID Convention, Art. 37(2)(b); UNCITRAL Rules 1976, Art. 7(1); UNCITRAL Rules 2010, Art. 9(1); SCC Rules 2017, Art. 17(4).

¹⁶ Under the WTO Dispute Settlement Understanding, “[t]he Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons”. See Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 15 April 1994, Art. 8(6). Panelists *may*, but need not, be drawn from “an indicative list of governmental and non-governmental individuals”, maintained by the Secretariat “[t]o assist in the selection of panelists” (DSU, Art. 8(4)). However, “[a]lthough not explicitly set out in the DSU, it is generally understood that the parties are free to agree on the composition of a panel without asking the Secretariat for any assistance in identifying candidates. It is highly exceptional for parties to embark on and succeed in such an endeavor. However, even when the Secretariat is involved, the parties can commence or continue a parallel bilateral process. If successful, the panel’s composition will reflect the complete or partial agreement of the parties”. Reto Malacrida (2015), *WTO Panel Composition: Searching Far and Wide for Administrators of World Trade Justice*, in Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, Cambridge University Press, pp. 311-333, 312. If no agreement is reached within 20 days, the Director-General makes the appointment in consultation with the parties (DSU, Art. 8(7)). See Malacrida (2015), pp. 313-315.

¹⁷ At the WTO, the appointment process at the panel level is designed to facilitate disputing party agreement over the composition of the panel. See Malacrida (2015), p.

10. That said, while in *ad hoc* bodies disputing parties *normally* enjoy wide freedom in the selection of the adjudicators, one could imagine an *ad hoc* system in which adjudicators are selected by a third party acting as appointing authority without any input from the disputing parties.¹⁸ Thus, although they often do, the *ad hoc* nature and the disputing parties' control over the selection process need not necessarily co-exist. Nevertheless, when an adjudicatory body is put in place for a specific dispute it seems natural to give the disputing parties control over the composition of that body.

11. By contrast to *ad hoc* adjudicative bodies, the freedom of disputing parties to influence the composition of a permanent body is normally either entirely curtailed or greatly reduced. This is a logical consequence of the fact that a permanent body pre-exists the dispute. Thus, for example, at the WTO appellate level, States as disputing parties have no say in selecting the individuals who compose the Appellate Body ("WTO AB"), although *as treaty parties* they have participated in such a selection process *ex ante*.¹⁹ In the same vein, disputing parties at the ECtHR play no role in the composition of the Court.²⁰ At the ICJ, the composition of the Court may be influenced by disputing parties only in limited circumstances, namely through the appointment of a judge *ad hoc* and by the constitution of a chamber to decide particular cases.²¹

12. *Ad hoc* and standing bodies can co-exist within the same dispute settlement framework. For example, in the WTO context, disputes are decided first by *ad hoc* panels and then, if there is an appeal, by the standing WTO AB. At Mercosur, a complaining State must first bring its grievances before an "*ad hoc*

314. Failing such agreement, the disputing parties enjoy no "right" to appoint "their" panelists, unlike in investor-State arbitration.

¹⁸ For example, an IIA could provide that investor-State disputes under the treaty shall be resolved by an arbitral tribunal of three members appointed by the Permanent Court of Arbitration ("PCA"). Another illustration is found within the ICSID framework, where the three-member annulment committees (called "*ad hoc* Committees") are appointed by the Chairman of the Administrative Council from individuals listed on the Panel of Arbitrators. See ICSID Convention, Art. 52(3).

¹⁹ DSU, Arts. 17(1) and 17(2).

²⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), 4 November 1950, 213 UNTS 221, as amended by Protocol Nos. 11 and 14, as from its entry into force on 1 June 2010, Arts. 20-23.

²¹ Statute of the International Court of Justice ("ICJ Statute"), Art. 31(2) ("If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge"); Art. 26(2) ("The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties"). See Serena Forlati (2014), *The International Court of Justice: An Arbitral Tribunal or a Judicial Body?*, Springer, pp. 31-49.

arbitral tribunal”, to be composed by the disputing parties from closed lists.²² Disputes may then be brought to the “Permanent Review Court” by way of appeal.²³ Turning to the investment framework, if the AM reform option were pursued, disputes would first be subject to investor-State arbitral tribunals in their current *ad hoc* formation and then to appellate review by a standing AM. By contrast, in the ITI reform option, the standing or semi-standing body would entirely replace the *ad hoc* system for disputes subject to the reform.

13. Keeping these distinctions in mind, what consequences would a transition from the current *ad hoc* system to a permanent or semi-permanent dispute settlement body entail for the selection process? There are essentially three consequences.

14. The first consequence is the transition from a disputing party framework to a treaty or contracting party framework.²⁴ Transitioning from an *ad hoc* system that allows virtually complete control over composition by the disputing parties to a permanent or semi-permanent system necessarily reduces the role for disputing parties and conversely increases that of treaty parties. As the dispute resolution body must exist before the investment dispute arises, it must necessarily be established *ex ante* by the treaty parties.²⁵ This entails moving beyond the “historical keystone” of arbitration,²⁶ namely disputing party appointment,²⁷ to a different selection method placed entirely or predominantly in the hands of the parties to the instrument establishing the new adjudicatory bodies. Such dilution of powers concerns all disputing parties, including respondent States who lose the “right” to influence the composition of the body

²² Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (“MERCOSUR”), 26 March 1991, 30 ILM 1041 (1991); Olivos Protocol for the Settlement of Disputes in MERCOSUR (“Olivos Protocol”), 18 February 2002, 42 ILM 2 (2003), Arts. 10-11.

²³ Olivos Protocol, Chapter VII.

²⁴ See Anthea Roberts (2017), *Would a Multilateral Investment Court be Biased? Shifting to a treaty party framework of analysis*, EJIL:Talk!, 28 April 2017 available at <https://www.ejiltalk.org/would-a-multilateral-investment-court-be-biased-shifting-to-a-treaty-party-framework-of-analysis/>.

²⁵ This observation is without prejudice to the fact that procedures may be put in place whereby the interests of stakeholders other than treaty parties can be taken into account in the selection process. See *infra* section III.C.3.

²⁶ Van Vechten Veeder (2015), *The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator - From Miami to Geneva*, in David D. Caron, Stephan W. Schill, Abby Cohen Smutny, Epaminontas E. Triantafyllou (eds.), *Practising Virtue: Inside International Arbitration*, Oxford University Press, pp. 128-149.

²⁷ For purposes of terminological clarity, this paper refers to the method of appointment followed in the existing system as “*disputing party appointment*”, to distinguish it from the procedures whereby appointments are made by *contracting parties*, i.e. States adhering to the instrument establishing a court or tribunal.

as disputing parties. However, in practice, it will be perceived as affecting the investor-party more heavily, as States will be able to contribute to the composition of the body in their capacity of treaty parties. In other words, in an asymmetric setting such as investor-State dispute settlement, the shift from an *ad hoc* to a permanent setting means that one category of disputing parties loses control over the selection process, which remains entirely in the hands of the other because the latter is at the same time a treaty party.²⁸ The situation is different from a permanent inter-State framework where the categories of disputing and treaty parties coincide, and thus all potential disputing parties participate in the composition of the permanent body in their capacity as treaty parties.

15. A second consequence deriving from the shift described above is an increase in complexity in the process for the selection of the adjudicators. In the current system, the act of “appointing” an arbitral tribunal kills two birds with one stone: it constitutes the dispute resolution body and, at the same time, assigns the dispute to it.²⁹ By contrast, in a system of permanent or semi-permanent bodies, these two actions must be distinguished. One step is the *selection* of members of the permanent body. Another distinct step is the *assignment of a case* to such members after a case is filed, unless every case is assigned to the full body.

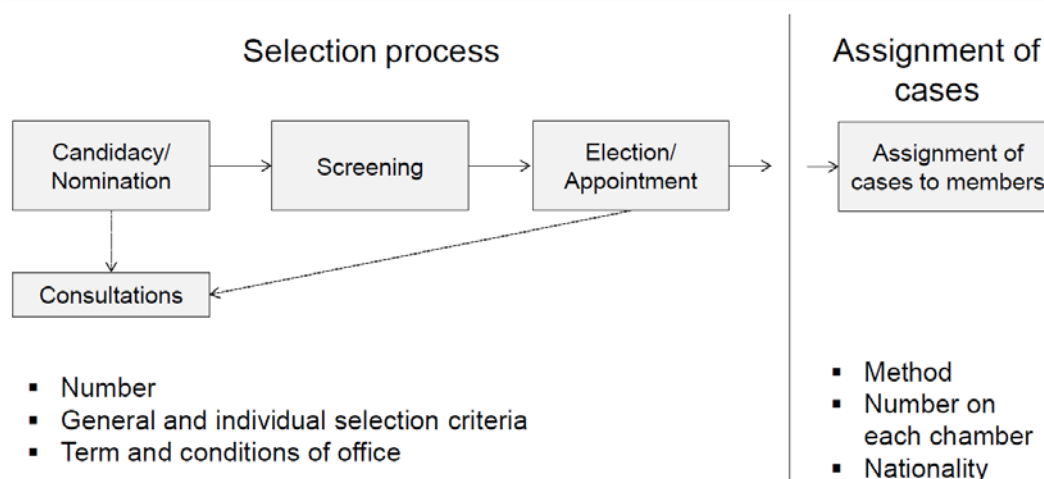
16. A third consequence, linked to the greater complexity just described, is the increased formalization of the composition process. The constitution of any dispute settlement body, be it *ad hoc* or permanent, implies identifying the most suitable candidates. In the current system, disputing parties screen potential candidates for appointment to an arbitral tribunal, reviewing their qualifications, drawing up short lists, checking availability and conflicts of interest, and at times conducting interviews. That screening process is informal; it is not regulated; and it varies depending on the case and the disputing parties. The same informal process would be wholly inadequate for the constitution of a (semi-) permanent body. The latter will by necessity be more formal and subject to detailed rules. It

²⁸ The future ITI or AM is likely to be primarily concerned with investor-State disputes, although it can also be envisaged that it may adjudicate State-to-State disputes under IIAs. See CIDS Report, paras. 177-183.

²⁹ More precisely, selection and case assignment coincide in *ad hoc* bodies (whether institutional or non-institutional) if disputing parties or the appointing authority are not bound to a list (e.g. constitution of arbitral tribunals by disputing parties at ICSID or under the UNCITRAL Rules). By contrast, where closed lists either bind disputing parties (e.g. before CAS) or an appointing authority (e.g. the Chairman of the Administrative Council as regards the appointment of ICSID *ad hoc* committee members and arbitrators not appointed by the disputing parties), the designation or appointment to a panel of arbitrators or closed list is conceptually equivalent to the selection phase in permanent courts, while the appointment to a particular tribunal or *ad hoc* committee effects the assignment of the case to the dispute resolution body.

will also typically comprise distinct phases, including a screening phase.³⁰ The increased formalization is also present with regard to the assignment of cases to chambers, which will require specific rule-based procedures, by comparison to the investor-State arbitral framework where this phase has no independent existence as it coincides with the selection phase.

17. The following flow chart shows the two main steps in the composition of the ITI and identifies the main questions to be addressed at each phase.



18. Before dealing in greater detail with each of the aspects depicted in the chart, two general observations are in order. First, in the analysis of the options available to policy-makers, the report will look to *permanent* international courts and tribunals as comparators to identify issues and solutions for the design of permanent dispute settlement bodies. In so doing, the report examines courts handling interstate disputes, such as the ICJ or the ITLOS, as well as courts resolving disputes between a private person and a State, such as the regional human rights courts. The following discussion will often start with the Statute of the ICJ, because the latter is the only universal court with general jurisdiction, and because its Statute has inspired the constitutive instruments of several subsequent courts; it is thus an inescapable point of departure in the study of the composition of an international court. That said, certain characteristics of the Court's composition reflect a somewhat outdated model and have been subject to considerable criticism. The paper will note these critical aspects and place the emphasis on more recent courts which often provide more effective solutions.

19. Second, in addition to reviewing existing permanent courts, the report will look to the international arbitration system for rules and practices that could prove useful in a reformed setting. Indeed, shifting from an *ad hoc* arbitration system to a permanent system does not necessarily mean abandoning all current positive

³⁰ See *infra* section III.C.4.

features; some could be imported *mutatis mutandis* in a reformed system. For instance, to draw up individual selection criteria for ITI members, both the qualification requirements in permanent bodies and those established in the ICSID Convention for panelists may be considered. Furthermore, while the analysis of the so-called structural independence of the new dispute resolution bodies (on which see *infra* section III.B.4.b) will be influenced by the existing examples of permanent courts and tribunals, the jurisprudence on the independence of arbitration as an institution will also be taken into account.

III. SELECTION OF MEMBERS OF THE INTERNATIONAL TRIBUNAL FOR INVESTMENTS (ITI) AND THE APPEAL MECHANISM (AM)

20. This section reviews the criteria and methods whereby individuals may be selected to be part of a prospective ITI or AM. In this context, States will essentially have to consider the following main questions: How many? Who? How? For how long? Or, put in more words, how many members will sit on the permanent body (A)? Which general and individual requirements must a candidate meet in order to be selected (B)?; Pursuant to which procedure(s) will an individual be selected (C)?; And what will their term and conditions of office be (D)?.

A. HOW MANY OR THE NUMBER OF MEMBERS: FULL REPRESENTATION V. SELECTIVE REPRESENTATION BODIES

21. A threshold issue in the design of the composition of a permanent dispute settlement body is the number of members and, in this respect, whether States wish to establish “full representation” or “selective representation” bodies. In full representation bodies, each State has an adjudicator on a permanent basis, usually a national of that State; in selective representation courts, there are fewer seats than the number of States parties to the court’s statute.³¹ It is convenient to treat this distinction first, as it impacts other considerations, such as the identification of the requirements (section III.B) and the procedure for the selection of the members (section III.C).

22. This distinction is only relevant for multilateral, rather than bilateral, standing bodies. In permanent courts or tribunals with two contracting parties

³¹ For this distinction, see generally, Ruth Mackenzie, Kate Malleson, Penny Martin, Philippe Sands (2010), *Selecting International Judges: Principle, Process, and Politics*, Oxford University Press, pp. 7-10. For the avoidance of doubt, it should be stressed that in none of these two models are the adjudicators viewed as “representatives” of a contracting party, as in the modern conception of the international adjudicatory function, international judges and arbitrators do not “represent” their home country, but act in their personal capacity and must be independent and impartial. See *infra* at III.B.4.

only, each contracting party will normally be entitled to appoint an equal number of members. Thus, at the Iran-U.S. Claims Tribunal (“IUSCT”), the two contracting parties each appoint one third of the tribunal’s members, and these members appoint the remaining third, including the tribunal’s president.³² For these purposes, the standing bodies provided in the Canada-EU Comprehensive Economic and Trade Agreement (“CETA”) and the EU-Vietnam Free Trade Agreement (“EU-Vietnam FTA”) may be classified as bilateral, because there are essentially two sides in the appointment process (although they of course include all of the EU Member States, in addition to the EU and the non-EU trade partners).³³

23. With regard to multilateral adjudicatory bodies, examples of full representation or “one-State-one-judge courts” include regional courts such as the Court of Justice of the European Union (“CJEU”)³⁴ and the ECtHR.³⁵ Tellingly, no global court or tribunal follows this composition model. By contrast, there are a number of selective representation courts on both the regional³⁶ and global level. The most important international courts and tribunals on a universal scale, the ICJ, the ITLOS, the International Criminal Court (“ICC”), and the WTO AB, all comprise a lower number of adjudicators than contracting parties. In those

³² See Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (“Claims Settlement Declaration”), 19 January 1981, 20 ILM 223, 230 (1981), Art. III(1). If no agreement is reached between the contracting party-appointed members, the appointment is made by an appointing authority. See IUSCT Rules of Procedure, 3 May 1983, Section II.

³³ Thus, in the CETA, appointments are made by a Joint Committee (which, pursuant to Art. 26.1, comprises “representatives of the European Union and representatives of Canada”). The Joint Committee appoints fifteen tribunal members, of whom five shall be nationals of a Member State of the EU, five shall be nationals of Canada, and five shall be nationals of third countries (Art. 8.27.2). The Joint Committee also appoints members of the appellate tribunal, in a number to be later established by the Joint Committee. See Art. 8.28.3). Similarly, in the EU-Vietnam FTA, Chapter 8.II, Section 3, Art. 12(3) and Art. 13(2). Unless indicated otherwise, all references to the EU-Vietnam FTA should hereinafter be understood as references to Section 3 on Dispute Resolution under Chapter II of Chapter 8 of the EU-Vietnam FTA.

³⁴ Treaty on the Functioning of the European Union (“TFEU”), as amended by the Treaty of Lisbon (2007), 2008 OJ C 115/47, Art. 253.

³⁵ ECHR, Art. 20.

³⁶ See Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human and Peoples’ Rights (“Protocol on the African Court”), OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997), Art. 11; Agreement Establishing the Caribbean Court of Justice, 14 February 2001, Art. IV; American Convention on Human Rights (“ACHR”), 21 November 1969, 1144 UNTS 123, Art. 52; Statute of the Inter-American Court of Human Rights (“IACtHR Statute”), October 1979, OAS Res No. 448, Art. 4.

courts and tribunals, the number of members composing the body varies between 7 and 21.³⁷

24. For the ITI, the choice between full or selective representation and, if the latter is adopted, the determination of the number of adjudicators, will mainly depend on the following factors. First, the larger the multilateral basis, the more difficult it is to ensure that each State has “its” ITI member. Indeed, a permanent body with a high number of members is expensive and complex to manage. It is thus not a surprise that global international courts and tribunals show a preference for selective representation.³⁸ This said, fully representative courts with large membership do exist too, although not at the global level.³⁹ Second, the choice between a permanent and semi-permanent (roster) model may impact the number of ITI members. Indeed, in a roster system in which the disputing parties may choose the decision-makers for specific disputes from a list of pre-selected ITI members, a one-State-one-judge model is easier to implement than in a permanent setting. Moreover, whether it is conceived as fully representative or not, the number of members in a roster model is likely to be higher than on a permanent body. Indeed, the purpose of a roster is precisely to offer disputing parties *some* choices. Furthermore, a higher number is more easily accommodated, in terms of costs and manageability, in a roster than in a permanent body, as in the former the extent of the ITI members’ institutional functions will necessarily be more limited than in the latter.

25. Second, within the ITI option, the first-instance level body is likely to comprise a higher number of members than any second level (appeal, annulment or other). This is the consequence of the fact that appeals would not be filed in all cases and, thus, fewer cases would be adjudicated at the second-level. It would be in line with existing international courts and tribunals comprised of two instances, in which the total number of members on the appellate body is lower than on the full first-instance bench.⁴⁰ For the ITI option, one could even design a

³⁷ The WTO AB is composed of seven members (see DSU, Art. 17(1)); the ICJ is composed of 15 judges (see ICJ Statute, Art. 3(1)); the ICC of 18, divided in three divisions – Pre-Trial, Trial, and Appeals (see Rome Statute of the International Criminal Court (“Rome Statute”), 1 July 2002, 2187 UNTS 90, Art. 36); and the ITLOS of 21, (see Statute of the International Tribunal for the Law of the Sea (“ITLOS Statute”), UNCLOS, Annex VI, Art. 2(1)).

³⁸ See, e.g., WTO AB; ICJ; ITLOS; ICC.

³⁹ For example, 47 States are contracting parties to the ECHR and the ECtHR, established under that Convention, is a one-State-one-judge court.

⁴⁰ See the ICC, in which the pre-trial and trial divisions include no less than six judges, whereas the appeals Division is composed of the President and four other judges. Rome Statute, Art. 39(1); the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), in which three trial chambers are composed of nine judges each (three permanent, six *ad litem*), and the appeals chamber consists of seven judges. Statute of the International Criminal Tribunal for the Former Yugoslavia, as amended by GA Res 1877, (“ICTY

“blended” system, in which the first-instance level is fully representative and the second-level body is selectively representative.

26. Finally, the number of adjudicators composing the ITI may need to evolve over time, due to increasing membership of contracting parties and/or increasing caseload. The latter aspect is in turn likely to depend on the former. As more States join the ITI Statute and incorporate the new dispute resolution options into new IIAs or opt into them for existing IIAs, more disputes will become subject to the jurisdiction of the ITI. The ITI Statute may thus foresee the possibility of an increase in the number of adjudicators. Existing international courts and tribunals provide illustrations of these sorts of adjustments.⁴¹

27. More specifically, in a full representation ITI, the number of adjudicators will be adjusted each time a new contracting party joins the Statute. In a selective representation model, revision clauses may set out a procedure for the gradual increase in the number of adjudicators. For example, a procedure to increase the adjudicators may be triggered once a certain level of State membership is reached (without this implying full representation)⁴² or, irrespective of any growth in treaty membership, once an upsurge of cases makes an increase of ITI members necessary or appropriate.⁴³

Statute”) 7 July 2009, 32 ILM 1159 (1993), Arts. 11-13 *ter*; the EU-Vietnam FTA, in which the first instance tribunal consists of nine members (Art. 12(1)), whereas the appeal tribunal is composed of six members (Art. 13(2)). However, once a case is *assigned* to the appellate body, the latter normally decides in a larger composition than the first-instance tribunal, which in turn may be motivated by the greater importance attached to the second-level decision. For instance, three judges are assigned to hear a case at the ICTY trial chamber, while the appeals chamber hears each appeal by a bench of five judges, ICTY Statute, Arts. 12(2), 12(3).

⁴¹ See e.g. Claims Settlement Declaration, Art. III(1), first sentence (“The Tribunal shall consist of nine members *or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously*”, emphasis added); Rome Statute, Art. 36(2) (“The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1 [i.e., 18 judges], indicating the reasons why this is considered necessary and appropriate”); CETA, Art. 8.27.3 (“The CETA Joint Committee may decide to increase or to decrease the number of the Members of the Tribunal by multiples of three. [...]”); EU-Vietnam FTA, Art. 12(3) (“The Trade Committee may decide to increase or decrease the number of the Members of the Tribunal by multiples of three. [...]”).

⁴² For instance, once the ITI Statute enters into force with X ratifications, the ITI may be composed of Y members; if the State membership were to increase to X + 10, the total number of judges would increase by Z; and so on.

⁴³ See examples cited in fn. 41 above.

B. WHO OR THREE KEY REQUIREMENTS: COMPETENCE, DIVERSITY AND INDEPENDENCE

1. Introductory remarks

28. Who will sit on the ITI? What type of profile should each individual ITI member possess? What characteristics will the “bench” have as a whole? These are some of the questions which this section III.B will discuss.

29. Looking at existing international courts and tribunals, it is common for their constitutive instruments to first set out the requirements for the election of each individual candidate. This type of requirements are sometimes referred to as “individual” selection criteria.⁴⁴ Article 2 of the ICJ Statute, for instance, provides that:

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among *persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.*⁴⁵

30. In addition, constitutive instruments of courts and tribunals also commonly provide that the court composition *as a whole* must reflect a balance of different profiles. Referring again to the ICJ, the Statute provides that:

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.*⁴⁶

31. The requirements of this second type are sometimes referred to as “general” selection criteria.⁴⁷ Formulated as either mandatory⁴⁸ or non-binding,⁴⁹

⁴⁴ See generally Mackenzie, Malleson, Martin, Sands (2010), pp. 24-62.

⁴⁵ ICJ Statute, Art. 2 (emphasis added).

⁴⁶ ICJ Statute, Art. 9 (emphasis added).

⁴⁷ See generally Mackenzie, Malleson, Martin, Sands (2010), pp. 24-62.

⁴⁸ See Agreement Establishing the Caribbean Court of Justice, Art. IV(1) (“at least three [judges] *shall possess* expertise in international law including international trade law” [emphasis added]); Rome Statute, Art. 36(5) (“At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists”).

⁴⁹ ICJ Statute, Art. 9 (“shall bear in mind”). With regard to the similarly phrased PCIJ Statute, Art. 9, the obligation for the electors to “bear in mind” the general criteria for selection of the judges was seen as a moral one (“*une obligation morale*”). See Bardo Fassbender (2012), *Article 9*, in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, Christian J. Tams (eds.), *The Statute of the International Court of Justice*:

general selection criteria guide those entrusted with the appointment of the individuals (to whom we will refer as the “electors”), in such a manner that the alchemy of profiles envisaged by the treaty parties is appropriately reflected in the overall composition of the court.

32. Whether a certain requirement is individual or general may depend on the constitutive instrument of a given court. For example, specific expertise may be required either for each individual member⁵⁰ or for the body as a whole.⁵¹ General criteria can in particular be used to ensure experience or expertise that cannot realistically be expected from every member but that would be valuable to the dispute settlement body as a whole.⁵²

33. Finally, the constitutive instruments of courts and tribunals usually require “independence”.⁵³ In the words of some of these instruments, the adjudicators must be “independent”,⁵⁴ or chosen from “persons [...] who may be relied upon to

A Commentary, 2nd Edition, Oxford University Press, p. 298. See also Rome Statute, Art. 36(8)(a) (requiring that “[t]he States Parties shall, in the selection of judges, *take into account*” certain criteria or concerns, emphasis added); DSU, Art. 17(3) (“The Appellate Body Membership shall be broadly representative of membership in the WTO”).

⁵⁰ See e.g. ICJ Statute, Art. 2 (“[...] independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law”); DSU, Art. 17(3) (“The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. [...]”).

⁵¹ See e.g. Agreement Establishing the Caribbean Court of Justice (“Statute of the Caribbean Court”), Art. IV(1), requiring that with respect to the judges of the Court (“Caribbean Court”), “at least three shall possess expertise in international law including international trade law”; Rome Statute, Art. 36(5) (setting out two lists from which judges must be drawn. At least nine judges must be elected with experience in the following areas: “criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings” (List A); and at least five judges with experience from the following domains: “relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court” (List B)); also *ibid.* Art. 36(8)(b) (“States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children”).

⁵² See Mackenzie, Malleon, Martin, Sands (2010), p. 46. For example, if the new dispute resolution bodies are to work in more than one official language, the Statute may require that the body include a certain number of adjudicators possessing sufficient competence in each official language, rather than requiring that each individual member be fluent in all of such languages (which would unnecessarily restrict the pool of eligible candidates).

⁵³ For a detailed discussion and examples, see *infra* III.B.4.

⁵⁴ ICJ Statute, Art. 2 reproduced *supra* at para. 29.

exercise independent judgment”,⁵⁵ or “whose independence is beyond doubt”.⁵⁶ In addition to independence, statutes often also demand “impartiality”.⁵⁷ The requirements for independence and impartiality are also present in the current system. However, the shift from the existing *ad hoc* system to a permanent one affects the articulation of these principles. As will be seen,⁵⁸ in a permanent dispute settlement body greater emphasis is put on the *structural* guarantees for independence to ensure that the institution collectively and the judges individually are shielded from potential external influences.

34. Bearing these distinctions in mind, the next sections will analyze the individual and general requirements, as well as the principle of independence in a prospective ITI. In short, we submit that (i) the ITI should be comprised of *competent* members, having the relevant expertise and experience to discharge their functions (*infra* at section III.B.2); (ii) its composition as a whole should reflect high standards of *diversity* representative of those for whom it renders justice (*infra* at section III.B.3); and (iii) the ITI should be endowed with strong guarantees of *independence* both structurally and for the members’ concrete exercise of their adjudicatory functions (*infra* at section III.B.4.).

2. Competence

35. The constitutive instruments of existing international courts and tribunals require each adjudicator to possess a variety of individual qualities. In this context, individual selection criteria such as nationality of a contracting State,⁵⁹ linguistic competence,⁶⁰ and personal integrity/reputation⁶¹ do not pose particular

⁵⁵ ICSID Convention, Art. 14(1) (“Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment”).

⁵⁶ TFEU, Art. 253 (“The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence”).

⁵⁷ See e.g. Rome Statute, Art. 41(2)(a); ICTY Statute, Art. 13.

⁵⁸ See *infra* section III.B.4.a.

⁵⁹ Statutes of certain courts and tribunal require their members to be nationals of a contracting party. See e.g. the Court of Justice of the Cartagena Agreement, established under the Treaty Creating the Court of Justice of the Cartagena Agreement, which “shall be composed of five justices who shall be nationals of the member countries [...]” (Treaty Creating the Court of Justice of the Cartagena Agreement, 28 May 1979, 18 I.L.M. 1023 (1979), Art. 7). ACHR, Art. 52(1) (“The Court shall consist of seven judges, nationals of the member states of the Organization [...]”); CETA, Art. 8.27.2 (“Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada [...]”).

⁶⁰ For instance, ICC judges shall have an excellent knowledge of and be fluent in at least one of the working languages of the court, i.e. French or English. Rome Statute, Art.

problems in practice. The most important individual selection criterion which deserves close examination for a prospective ITI concerns professional experience and expertise.

36. A number of statutes of international courts and tribunals follow the model of Article 2 of the ICJ Statute quoted above,⁶² which essentially envisages two alternative professional profiles for the Court's judges reflecting "the distinction between the theory and practice of law".⁶³ In the first alternative, ICJ judges may be chosen from individuals eligible to the highest courts in their respective countries. As Abi-Saab notes, the ICJ Statute looks here at a "practitioner with long experience in municipal law, to the point of being eligible to the highest judicial office", who needs to have "familiarity with judicial techniques rather than with the substance of applicable law".⁶⁴ Expressing similar requirements, other courts and tribunals call for their judges to be elected from amongst individuals eligible for appointment to a "high"⁶⁵ or "the highest"⁶⁶ judicial offices in their respective countries.⁶⁷

36(3)(c). Even where it is not expressly set out in the constitutive instrument, linguistic competence requirements may be inferred from provisions on the working languages of the court. See e.g. ICJ Statute, Art. 39; ITLOS Rules of the Tribunal, 28 October 1997, Art. 43.

⁶¹ See ICJ Statute, Art. 2 ("persons of high moral character"); ECHR, Art. 21(1) ("judges shall be of high moral character"); ITLOS Statute, Art. 2(1) ("persons enjoying the highest reputation for fairness and integrity"); ACHR, Art. 52(1) and IACtHR Statute, Art. 4(1) ("jurists of the highest moral authority"); African Charter on Human and Peoples' Rights, Art. 31(1) ("personalities of the highest reputation, known for their high morality, integrity, impartiality"); ICTY Statute, Art. 13 ("persons of high moral character, impartiality and integrity"); Rome Statute, Art. 36(3)(a) ("persons of high moral character, impartiality and integrity"); ICSID Convention, Art. 14(1) ("persons of high moral character").

⁶² See *supra* para. 29.

⁶³ Georges Abi-Saab (1997), *Ensuring the best bench: ways of selecting judges*, in Connie Peck, Roy S. Lee (eds.), *Increasing the Effectiveness of the International Court of Justice*, Martinus Nijhoff, pp. 166-188, 167.

⁶⁴ Abi-Saab (1997), p. 167.

⁶⁵ ECHR, 21(1) (Judges of the ECtHR must "possess the qualifications required for appointment to high judicial office"). Compare this to the requirements for judges and advocates-general of the CJEU ("The Judges and Advocates-General of the Court of Justice shall be chosen from persons [...] who possess the qualifications required for appointment to the *highest* judicial offices in their respective countries [...]", emphasis added) with those of the members of the General Court ("The members of the General Court shall be chosen from persons [...] who possess the ability required for appointment to *high* judicial office", emphasis added).

⁶⁶ See e.g. ICJ Statute, Art. 2 ("The judges shall be chosen from among persons [...] who possess the qualifications required in their respective States for appointment to the highest judicial offices"); ICTY Statute, Art. 13 ("judges shall be persons [...] who possess the qualifications required in their respective countries for appointment to the highest judicial offices"); Rome Statute, Art. 36(3)(a) ("The judges shall be chosen from among persons [...] who possess the qualifications required in their respective States for appointment to the highest judicial offices"); ACHR, Art. 52(1) and IACtHR Statute, Art.

37. As second alternative of eligible judges, the statutes of the ICJ and other international judicial bodies mention “jurisconsults”, which in essence refers to scholars and academics. In some cases, statutes simply require individuals to be jurists of “recognized competence” without indication of a specific legal area.⁶⁸ So for instance at the ICJ, judges need to be of recognized competence in “international law”.⁶⁹ For judges appointed on specialized courts, however, the subject-matter jurisdiction may call for more specific qualifications.⁷⁰ Judges at the Inter-American Court of Human Rights (“IACtHR”), for example, must be experts “in the field of human rights”,⁷¹ while ITLOS judges must have expertise in the law of the sea.⁷² Members of the tribunals under CETA and the EU-Vietnam FTA, for their part, “shall have demonstrated expertise in public international law”, whereby “[i]t is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements”.⁷³

38. The ICSID Convention, in the context of the individual requirements for designation to the ICSID Panels of Arbitrators and Conciliators by the Contracting States and the Chairman of the Administrative Council,⁷⁴ requires that “[p]ersons

4(1) (“seven judges [...] who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates”).

⁶⁷ The CETA and the EU-Vietnam FTA provide that tribunal members shall “possess the qualifications required in their respective countries for appointment to judicial office”. See CETA, Art. 8.27.4; EU-Vietnam FTA, Art. 12(4).

⁶⁸ CJEU, TFEU, Art. 253 (“jurisconsults of recognised competence”); ECtHR Statute, Art. 21(1) (“jurisconsults of recognized competence”).

⁶⁹ ICJ Statute, Art. 2.

⁷⁰ See e.g. requirements for WTO AB members under the DSU (“demonstrated expertise in law, international trade and the subject matter of the covered agreements generally”); see the detailed requirements for the ICC, *supra* fn. 51.

⁷¹ ACHR, Art. 52(1) and IACtHR Statute, Art. 4(1) (“jurists [...] of recognized competence in the field of human rights”).

⁷² ITLOS Statute, Art. 2(1) (“members [...] of recognized competence in the field of the law of the sea”).

⁷³ CETA, Art. 8.27.4 (“Members of the Tribunal [...] shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements”); EU-Vietnam FTA, Art. 12(4) (“Members of the Tribunal [...] shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements”).

⁷⁴ ICSID disputing parties (but not the Chairman) may appoint arbitrators from outside the Panels to arbitral tribunals. However, ICSID arbitrators appointed by the disputing parties from outside the Panels must also possess the qualities stated in Art. 14(1) of the ICSID Convention. See ICSID Convention, Arts. 40(1) and 40(2).

designated to serve on the Panels shall be persons of [...] recognized competence in the fields of law, commerce, industry or finance". It further specifies that "[c]ompetence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators".⁷⁵

39. Looking at a prospective ITI, it appears essential that a candidate have expertise and experience in international law and international investment law and/or familiarity with international dispute settlement – i.e. be *competent* in the ITI's subject-matter. When formulating individual selection criteria relating to expertise, the emphasis should thus be placed on the candidates' competence rather than on a specific prior professional activity. In that sense, reference to the rigid dual judge-scholar track envisaged for many of the courts and tribunals mentioned above appears unhelpful. Expertise and experience in international law and international investment law and/or familiarity with international dispute settlement are skills that may be acquired in a variety of ways beyond the judicial and academic paths, including through the practice of law, service as government officials (e.g., State officials active in the defense of investment claims or in the negotiation of IIAs), and work in international organizations active in dispute settlement. Provided competence in the ITI's relevant subject-matter is ensured, diversity in professional backgrounds can only be beneficial to the bench as a whole.

3. Diversity

40. As already mentioned, in addition to delineating the individual qualities required from each adjudicator, constitutive instruments of international courts and tribunals normally require that the bench as a whole abide by standards of "representativeness". In other words, States may wish the composition of the adjudicatory institution to reflect a certain balance with respect to geographical distribution, legal systems, nationalities, or gender, among other factors. We will refer to these factors as "diversity".⁷⁶ Generally speaking, diversity means the inclusion in a given context of individuals of varied backgrounds, which include

⁷⁵ ICSID Convention, Art. 14(1). Note further that the 1899 and 1907 Hague Conventions require the Permanent Court of Arbitration panelists to have "known competency in questions of international law". See 1899 Convention for the Pacific Settlement of International Disputes ("1899 Hague Convention"), 29 July 1899, 1 AJIL 103 (1907), Art. 23(1); 1907 Convention for the Pacific Settlement of International Disputes ("1907 Hague Convention"), 18 October 1907, 2 AJIL Supp. 43 (1908), Art. 44.

⁷⁶ Although this term is not normally used in the legal texts establishing international courts and tribunals. See, however, DSU, Art. 8(2) (requiring in respect of panels that "Panel members should be selected with a view to ensuring the independence of the members, a sufficiently *diverse* background and a wide spectrum of experience" (emphasis added)).

nationality, ethnicity, race, geographical provenance, gender, sexual orientation, presence of disabilities, and age.

41. The following paragraphs will first address why diversity in adjudicatory bodies matters (*infra* at section III.B.3.a) and then examine two specific areas of diversity to be considered in a prospective ITI, namely geographical diversity *lato sensu* (*infra* at section III.B.3.b) and gender diversity (*infra* at section III.B.3.c).

a. Why does diversity in adjudicatory bodies matter?

42. The need for diversity is nowadays accepted in most circles as a value in itself. Literature has put forward two main rationales to justify the presence of a diverse group in decision-making bodies (adjudicatory bodies and others). First, diversity is considered to improve the quality of decision-making. Second, diversity is essential for reasons of legitimacy.⁷⁷

43. Starting with the first rationale, certain behavioral studies suggest that a group of people of different ethnicities, gender and social backgrounds integrates diverse viewpoints in its reasoning and decision-making, and thus produces better quality decisions by reason of diversity alone.⁷⁸ With specific regard to diversity in adjudicatory bodies, research carried out in the United States⁷⁹ and focusing on the courts' gender, ethnic and ideological composition,⁸⁰ finds that

⁷⁷ See generally Cheryl Thomas (2005), *Judicial Diversity in the United Kingdom and other Jurisdictions: A Review of Research, Policies and Practices*, Report for the Commission for Judicial Appointments, pp. 55-60, available at http://www.cnmd.ac.uk/laws/judicial-institute/files/Judicial_Diversity_in_the_UK_and_other_jurisdictions.pdf. On the justifications for gender equality in the judiciary, see, e.g., Kate Malleson (2003), *Justifying Gender Equality on the Bench: Why Difference Won't Do*, *Feminist Legal Studies*, Vol. 11, pp.1-24

⁷⁸ See e.g. Anthony Antonio, Mitchell Chang, Kenji Hakuta, David Kenny, Shana Levin, Jeffrey Milem (2004), *Effects of Racial Diversity on Complex Thinking in College Students*, *Psychological Science*, Vol. 15(8), pp. 507-510; Donald R. Songer, Kelley A. Crews-Meyer (2000), *Does Judge Gender Matter? Decision-Making in State Supreme Courts*, *Social Science Quarterly*, Vol. 81(3), pp. 750-762. See also, Samaa A. F. Haridi (2015), *Towards Greater Gender and Ethnic Diversity in International Arbitration*, *BCDR International Arbitration Review*, Vol. 2(2), pp. 305-316, 309-310 discussing studies which show the benefits of diversity on team-work and productivity.

⁷⁹ See generally Thomas (2005), pp. 57-60. These studies discuss whether and in what ways adjudicators with diverse backgrounds decide cases distinctly ("individual effects") and whether and in what ways the presence on a collegiate body of an adjudicator with a diverse background causes the other adjudicators to decide differently ("panel effects"). See, in relation to gender and judging, Christina Boyd, Lee Epstein, Andrew Martin (2010), *Untangling the Causal Effects of Sex on Judging*, *American Journal of Political Science*, Vol. 54(2), pp. 389-411.

⁸⁰ See amongst many, Chang, Hakuta, Kenny, Levin, Milem (2004); Songer, Crews-Meyer (2000). See also the summary of studies in Rosemary Hunter (2015), *More than Just a Different Face? Judicial Diversity and Decision-making*, *Current Legal Problems*,

diversity will improve the quality of justice dispensed. For instance, studies on appellate courts have shown that panels with judges from diverse backgrounds were more likely to debate a wider range of considerations in reaching their judgments than homogeneous groups of judges.⁸¹ These findings are, however, not uncontroverted⁸² and other studies reach opposing results or find that effects of diversity on judicial decision-making are limited to specific areas of the law.⁸³

44. Studies on the impact of diversity on decision-making in international dispute settlement are more sparse. There is, however, an emerging empirical literature aimed at identifying the effects of external considerations on adjudicatory decision-making.⁸⁴ With regard to voting patterns at the ICJ, for instance, Posner and de Figueiredo have shown that factors that affect the judges' voting include national or appointment bias (i.e., judges tend to favor their national State or, in the case of *ad hoc* judges, the appointing State) and development status (i.e., judges tend to vote in favor of States with similar levels of development to their own).⁸⁵ In the context of the ECtHR, studies have found

Vol. 68, pp. 119-141; Dermot Feenan (2009), *Editorial Introduction: Women and Judging*, *Feminist Legal Studies*, Vol. 17, pp. 1-9; Malleson (2003).

⁸¹ See Thomas (2005), pp. 56-60. This argument has also been taken up by courts. In the words of the Supreme Court of Canada, “[i]t is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. *The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.*” See *R. v. S. (R.D.)*, Supreme Court of Canada, Decision of 26 September 1997, [1997] 118 CCC (3d), para. 119 (emphasis added). This point was endorsed by the South African Constitutional Court in *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, South African Constitutional Court, Judgment on Recusal Application of 4 June 1999, [1999] (4) SA 147, para. 42.

⁸² See e.g. in relation to gender and decision-making, Hunter (2015), p. 126 (noting, in relation to quantitative empirical literature which has sought to establish whether or not women judges make a difference, that “[t]he results of these quantitative studies are equivocal, with many producing no gender difference or finding that gender difference disappears when other factors are controlled for, particularly judicial political affiliation [...]”); Feenan (2009), pp. 3-7 (reviewing the research evidence); Malleson (2003), pp. 5-9 (reviewing research on gender and judging, and concluding, that “[t]he empirical picture of gender differences amongst judges is [...] contradictory and inconclusive”).

⁸³ See e.g. Boyd, Epstein, Martin (2010), pp. 400-407 (observing consistent gender effects in only one area of the law, i.e., sex discrimination in employment, but not in others).

⁸⁴ See generally Erik Voeten (2015), *International Judicial Behavior*, in Karen Alter, Cesare Romano, Yuval Shany (eds.), *The Oxford Handbook of International Adjudication*, pp. 550-568.

⁸⁵ Eric A Posner, Miguel F.P.de Figueiredo (2004), *Is the International Court of Justice Biased?*, John M. Olin Program in Law and Economics, Working Paper No.234, pp. 2-36 (finding strong evidence that ICJ judges (1) favor the States that appoint them and (2) favor States whose wealth level is close to that of the judges' own State; and weaker evidence that they (3) favor States whose political system is similar to that of the judges'

evidence of national bias, especially in politically sensitive cases and to a greater extent by judges *ad hoc* than by elected judges.⁸⁶ One study by Voeten also concluded that ECtHR judges who had previous careers as diplomats exhibit more national bias than other judges,⁸⁷ and that judges from former communist countries in Eastern Europe show more ideological commitment to rectifying human rights abuses in their home countries than judges from Western European States.⁸⁸ With regard to gender, the studies of the possible “female” effect of judging on international courts are limited,⁸⁹ which can be explained at least in part with the paucity of women on such courts.⁹⁰

45. In investor-State dispute settlement, some empirical work aimed at assessing the potential influence of external factors (such as policy preferences or a State’s level of development) has been performed over the last years. The findings are far from univocal. Focusing on ICSID tribunal presidents, Franck has found little evidence of a relationship between development status and arbitral outcomes.⁹¹ By contrast, Waibel and Wu have concluded that developing status appears to affect decision-making, finding that nationals of developing countries are significantly less likely to affirm jurisdiction and liability.⁹² Furthermore, a study by van den Berg on dissenting opinions in investment arbitration shows that party-appointed arbitrators almost always dissent in favor of the party who appointed them, which has prompted a lively discussion on the impact of appointment by the disputing parties on arbitral decision-making and whether it

own State and (4) (more weakly) favor States whose culture (language and religion) is similar to that of the judges’ own State).

⁸⁶ See Erik Voeten (2008), *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, *American Political Science Review*, Vol. 102(4), pp. 417-433; Fred J. Brurinsma (2008), *The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)*, *Ancilla Iuris*, pp. 32-43 (finding that national bias occurs to a greater extent among *ad hoc* judges than among elected judges).

⁸⁷ See Voeten (2008), p. 428.

⁸⁸ See Voeten (2008), p. 428.

⁸⁹ See studies cited in Nienke Grossman (2016), *Shattering the Glass Ceiling in International Adjudication*, *Virginia Journal of International Law*, Vol. 56(2), pp. 339-406, 344.

⁹⁰ Nienke Grossman (2012), *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, *Chicago Journal of International Law*, Vol. 12(2), pp. 647-684, 656-660. In similar terms in respect of investment treaty arbitration, see Susan D. Franck (2007), *Empirically Evaluating Claims about Investment Treaty Arbitration*, *North Carolina Law Review*, Vol. 86, pp. 1-88, 83. For figures on gender representation on international courts and tribunals see *infra* next section.

⁹¹ Susan D. Franck (2009), *Development and Outcomes of Investment Treaty Arbitration*, *Harvard International Law Journal*, Vol. 50(2), pp. 435-490, 459.

⁹² Michael Waibel and Yanhui Wu (2017), *Are Arbitrators Political? Evidence from International Investment Arbitration*, January 2017, pp. 1-34, 17-23, available at <http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf>; Grossman (2016), p. 344.

should therefore be limited or eliminated.⁹³ The recent surge of empirical research in investment arbitration has also prompted warnings that this type of research must be relied upon with a full understanding of its limitations.⁹⁴ Rogers has shown that empirical studies seeking to prove the effect of external factors on adjudicatory decision-making face significant methodological challenges.⁹⁵

46. This brief overview shows that there are some indications of the impact of diversity on decision-making, the main factor being the origin of the adjudicator. At the same time, no clear pattern emerges from research so far and one cannot affirm with certainty that there is clear scientific evidence of the influence of diversity on decision-making. Neither is there clear empirical evidence that diversity improves the quality of decisions. There seems to be some indication that a diverse group takes diverse viewpoints into account in its decision-making process, which is bound to produce more informed outcomes. Considering the current state of empirical research, States may thus wish to accept that diversity in international dispute settlement is a desirable objective in and of itself, like in other areas, even if there is no hard proof available that it improves decision-making.

47. Before moving on to the legitimacy rationale of diversity, let us assume for the sake of discussion that diversity does matter for the outcome of the dispute. By making this assumption, one impliedly recognizes two facts of life. First, case

⁹³ See Albert Jan van den Berg (2010), *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in Mahnouch H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane, Siegfried Wiessner (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, Brill Nijhoff, pp. 821-843, 834. For the debate regarding party-appointed arbitrators that was generated as a result, see Jan Paulsson (2013), *The Idea of Arbitration*, Oxford University Press, p. 162; Charles N. Brower, Charles B. Rosenberg (2013), *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded*, *Arbitration International*, Vol. 29(1), pp. 7-44, esp. 8 et seq.; Van Vechten Veeder (2013), *The Historical Keystone to International Arbitration: The Party Appointed Arbitrator – From Miami to Geneva*, *American Society of International Law, Proceedings of the Annual Meeting*, Vol. 107, pp. 387-405, 402.

⁹⁴ See in particular, Catherine A. Rogers (2013), *The Politics of International Investment Arbitrators*, *Santa Clara International Law Review*, Vol. 12, pp. 223-262, at 233-241. See also Chiara Giorgetti (2014a), *Is the Truth in the Eyes of the Beholder? The Perils and Benefits of Empirical Research in International Investment Arbitration*, *Santa Clara Journal of International Law*, Vol. 12(1), pp. 263-275.

⁹⁵ As Rogers explains, “[o]ne of the most fundamental difficulties with empirical research regarding legal decision-making is that it seeks (often only implicitly) to measure whether and to what extent extra-legal factors have affected the outcome of adjudicatory decisions. It cannot, however, isolate what legal outcome would otherwise have resulted in the absence of any hypothesized influences. In other words, it is impossible to control for the most essential variable (implicitly or explicitly) being tested—the ‘correct’ legal outcome in a particular case”. Rogers (2013), p. 234. Furthermore, Rogers also points out that the effect of the decision-makers’ political ideologies and/or policy preferences is equally nearly impossible to measure directly. Rogers (2013), pp. 238-239.

outcomes are not strictly mandated by the application of the law, and the law often leaves a margin of discretion to the decision-maker. Second, adjudicators are human beings. Even if they are perfectly impartial as they must be for the proper exercise of their office, their judgment will inevitably be informed by who they are, to put in simple terms (by their origin, education, professional background, and more). If this is true, then diversity may play a role in counterbalancing too uniform perspectives deriving from identical or similar backgrounds.

48. In what ways would these possible implications of diversity affect investor-State dispute settlement when shifting from an *ad hoc* to a permanent system? If it is true that the resolution of investment disputes is impacted by the adjudicators' personalities, then this fact will not fundamentally change in a permanent setting. In other words, any impact that the adjudicators' life experience, ideology, and worldview may have in investment arbitration is likely to play out in a similar fashion in a (semi-) permanent ITI. What will lose significance, if not disappear altogether in terms of possible external influence on decision-making, is the inclination in favor of the appointing disputing party (as shown in van den Berg's study referred to earlier) and the related reappointment incentive, at least in a permanent model ITI with non-renewable terms.⁹⁶ The constraints and dynamics of permanent collegiality as well as the membership in an institution, as opposed to one-time cooperation on *ad hoc* tribunals, may also somehow level out the effect of external considerations on decision-making.

49. Whether diversity on an adjudicatory body will improve the quality of justice remains thus to be seen. Be that as it may, - and this brings us to the second rationale - diversity on adjudicatory bodies is necessary in its own right to enhance the legitimacy of a dispute settlement system in the public perception. In the authors' view, this rationale for broader representativeness is stronger than the arguments discussed above, as here the justification of diversity does not depend on showing that the quality of the outcomes is enhanced. This rationale is also important because the lack of legitimacy is the main criticism put forward against the current system of investor-State arbitration.

50. Studies on judicial diversity in the domestic context have aptly explained that diversity "is an element of the delivery of justice that is increasingly vital for the judiciary's legitimacy in a diverse society".⁹⁷ Transposed to the ITI context, this means that diversity is vital for the ITI's legitimacy in a diverse world. Thus, like any adjudicatory system, the ITI should provide a "fair representation" or a

⁹⁶ On non-renewable terms of office and independence and impartiality, see *infra* paras. 87 and 161-163.

⁹⁷ Thomas (2005), p. 30. For the discussion on diversity and perception of courts, see in particular Thomas (2005), pp. 55-57, with further references.

“fair reflection” of those who may be affected by its decisions. These include investors and economic operators more generally, as well as States, civil societies, and populations. Studies of the perception of courts in the domestic context demonstrate that judicial diversity can be a powerful tool to promote public confidence in the fairness of courts.⁹⁸ In the same vein, the degree of diversity on a prospective ITI is likely to influence the perception of the fairness and legitimacy of the ITI among all those affected by its decisions or who may one day be affected, because their potential disputes would fall within the ITI’s jurisdiction.⁹⁹

51. If confidence is likely to be higher in institutions which appear representative of those over whom they exercise power, then the legitimacy rationale for diversity also dispels the arguments sometimes aired in relation to certain diversity factors, according to which the lack of diversity is of greater concern where it relates to the dispute resolution body’s subject matter jurisdiction. For example, it is occasionally argued that the need for gender parity is more forceful when the court’s subject matter includes “women’s issues”, such as sex-related war crimes before international criminal tribunals. This view is misplaced because any area of international law concerns both men and women alike.

52. Before reviewing the areas of diversity which appear relevant for a prospective ITI, one last observation of a general nature is in order in relation to the way in which diversity goals can be pursued in the prospective as opposed to the current framework. As previously noted,¹⁰⁰ in the current de-centralized *ad hoc* framework, the power to appoint the adjudicators lies largely with the disputing parties (and only marginally with appointing authorities, including arbitral institutions, tasked with assisting in the process). As a result, those in charge of selecting arbitrators are subject to little or no pressure to diversify appointments. This feature, coupled with the lack of transparency of the appointment process,¹⁰¹ entails that efforts to advance diversity depend exclusively on the goodwill and self-regulation of the actors involved in the arbitral process. The initiative entitled “Pledge – Equal Representation in

⁹⁸ See Thomas (2005), pp. 55-56.

⁹⁹ Legitimacy as a matter of perception asks whether the authority from which an order emanates is considered justified by those against whom the order is directed with the result that they comply voluntarily. Thomas (2005), pp. 61-62. Thomas Franck defined legitimacy as those “factors that affect our willingness to comply voluntarily with commands”. See Thomas Franck (1990), *The Power of Legitimacy Among Nations*, Oxford University Press, p. 150.

¹⁰⁰ See *supra* section II.

¹⁰¹ See *infra* paras. 153-154 (discussing transparency in the selection process in the new framework).

Arbitration” is an example of such a self-regulation.¹⁰² By contrast, the shift to a permanent system would imply a more structured selection process,¹⁰³ where, in more or less mandatory terms, applicable criteria may shape the composition of the body as a whole, with the result that the political actors principally in charge of the selection (i.e., States) are bound to face increasing pressure for diversity.¹⁰⁴ For these reasons, the potential to achieve diversity goals appears more promising in the new system than in the current one.

53. This being so, which elements of diversity would need to be considered when establishing general criteria for the selection of the ITI? Two elements have attracted special importance in the discourse in recent years, namely geographical diversity *lato sensu* (discussed *infra* at section III.B.3.b) and gender diversity (dealt with *infra* at section III.B.3.c). In addition to these two, other diversity elements are worth mentioning here. One is age, which may be important for the mix of viewpoints on the ITI, in light of the widespread criticism that the existing arbitral pool is predominately “pale, male and stale”.¹⁰⁵ Some age limitation will necessarily be captured by the inclusion of a retirement age,¹⁰⁶ which does not exist in the present system. Beyond that, provided of course the condition of sufficient experience, which is part of the criteria of competence, is

¹⁰² The “Pledge – Equal Representation in Arbitration” is an initiative whereby signatories commit to “take the steps reasonably available” to them to ensure that women enjoy equal opportunities in, *inter alia*, arbitral appointments (“The Pledge”). See <http://www.arbitrationpledge.com/>. Also as a result of The Pledge, arbitral institutions are making visible efforts at increasing diversity in appointment. See *infra* para. 62, fn. 132. See also Chiara Giorgetti (2014b), *Who Decides Who Decides in International Investment Arbitration*, University of Pennsylvania Journal of International Law, Vol. 35(2) pp. 431-486, 482-484 (discussing the role that arbitral institutions administering investment disputes may play in fostering diversity in appointment).

¹⁰³ See *supra* section II.

¹⁰⁴ The possible pressure for diversity can manifest itself both at the stage of institutional design, i.e. when States have to consider whether to insert diversity requirements in the composition of the dispute settlement body, and at the stage of selecting the adjudicators. For an example of the former, see the efforts of women right NGOs campaigning in favor of gender representation requirements during the negotiation of the Rome Statute. See Grossmann (2012), pp. 663-664. For an example of the latter, see the pressure exerted by various political organs of the Council of Europe (*in primis* the Parliamentary Assembly) on a number of States that were “recalcitrant” in implementing the gender requirements on their list of candidates for election as judges to the ECtHR. See, e.g., Grossmann (2016), pp. 369-374; Stéphanie Hennette Vauchez (2015), *More Women – But Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights*, European Journal of International Law, Vol. 26(1) pp. 195-221, 202-209.

¹⁰⁵ This phrase has concisely captured the lack of diversity in arbitration for the past decade and more. See, e.g., Michael D. Goldhaber (2004), *Madame La Présidente – A Woman Who Sits As President of a Major Arbitral Tribunal Is a Rare Creature. Why?*, Transnational Dispute Management, Vol. 1(3), pp. 2-3.

¹⁰⁶ See *infra* section III.D.1.

met, age diversity could indeed be required for the selection of the ITI as a whole. By contrast, it may be more difficult to ensure equal representation opportunities to “invisible minorities”, whose status does not ensue from “passport data” but, for instance, pertains to the individual’s private sphere (so for example sexual orientation) or to a disability not affecting the capacity to perform the envisaged adjudicatory functions. This said, the greater difficulty should not mean that these invisible minorities should be ignored in the diversity debate (as they often are).

b. Geographical diversity *lato sensu*

54. We use “geographical diversity *lato sensu*”, i.e. diversity in a broad sense, to include essentially the fact of belonging to a State or region of the world. Beyond strict geographical provenance and nationality, this notion extends to related elements, such as ethnicity, legal system, culture, religion, tradition, and – especially relevant in an investment context - a State’s level of development. These factors are all largely inter-connected as an individual’s geographical provenance normally carries with it certain associated characteristics.

55. Ensuring that an adjudicative body reflects broad geographical representation appears to be an important concern for many States.¹⁰⁷ This is shown in several existing statutes that refer expressly to “equitable geographical representation” or “distribution” as a relevant selection consideration.¹⁰⁸ Thus, for example, the ITLOS Statute requires that “[i]n the Tribunal as a whole [...] equitable geographical distribution shall be assured” and that “[t]here shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations”.¹⁰⁹ Similarly, when electing judges at the African Court of Human and Peoples’ Rights (“African Court”), “representation of the main regions of Africa” must be ensured.¹¹⁰ At the ICJ, some consider regional representation to be “the single most important understanding regarding the selection process”,¹¹¹ even though the Statute only refers to “the

¹⁰⁷ Mackenzie, Malleson, Martin, Sands (2010), pp. 27-37.

¹⁰⁸ In addition to the statutes of international courts and tribunals mentioned *infra* in the text, see also Rome Statute, Art. 36(8)(a) (“The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: [...] (ii) Equitable geographical representation [...]”); DSU, Art. 17(3), third sentence (“The Appellate Body membership shall be broadly representative of membership in the WTO”).

¹⁰⁹ ITLOS Statute, Arts. 2(2) and 3(2).

¹¹⁰ Protocol on the African Court, Art. 14(2).

¹¹¹ Patricia Georget, Vladimir Golitsyn, Ralph Zacklin (2012a), *Article 4*, in Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, Christian J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary, 2nd Edition*, Oxford University Press, p. 266.

representation of the main forms of civilization and of the principal legal systems of the world”.¹¹²

56. As noted by commentators, “[t]he development of accepted means of allocating seats to different geographically defined groups of states has been a key to the establishment of selective representation courts”.¹¹³ The implementation of geographical diversity often occurs on the basis of unwritten practices,¹¹⁴ although written rules have been adopted in certain courts.¹¹⁵ The presence of these practices or rules is able to ensure that geographical diversity is effectively implemented in permanent courts and tribunals. By contrast, due to the structural differences described above,¹¹⁶ arbitration (both commercial and investment) is lagging behind on geographical diversity, as is shown by recent statistics on the arbitrators’ origins released by arbitral institutions.¹¹⁷ In a prospective ITI, States may consider adopting the general criteria on geographical diversity present in the statutes of international courts and tribunals,

¹¹² ICJ Statute, Art. 9.

¹¹³ Mackenzie, Malleson, Martin, Sands (2010), p. 26.

¹¹⁴ See, for the ICJ and the ICC, Mackenzie, Malleson, Martin, Sands (2010), pp. 31-37; Benjamin N. Schiff (2008), *Building the International Criminal Court*, Cambridge University Press, p. 107.

¹¹⁵ At the ICC, the resolutions of the Assembly of States Parties bind State Parties to elect a bench containing at least three judges from each of Group of Western European and others States, Group of African States, and Group of Latin American and Caribbean Group of States, and two from each of the Group of Eastern European States and the Group of Asian States. See ICC (2004), *Procedure for the Nomination and Election of Judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court*, Assembly of States Parties, Third Session, 6th Plenary Meeting, ICC-ASP/3/Res.6 (10 September 2004). These act as minimum quota requirements leaving some free or floating seats to be allocated amongst the regional groups. Mackenzie, Malleson, Martin, Sands (2010), p. 30.

¹¹⁶ See *supra* III.B.3.a (noting that efforts to advance diversity depend exclusively on the goodwill and self-regulation of the actors involved in the arbitral process).

¹¹⁷ See ICSID (2017), *The ICSID Caseload-Statistics Issue 2017-1*, pp. 19-21 (47% of the arbitrators, conciliators and *ad hoc* Committee Members appointed (appointments by parties and by ICSID) in cases for the period ending 31 December 2016 were from Western Europe and 21% were from North America. In comparison the Middle East and North Africa, Sub-Saharan Africa and Asia Pacific accounted for 17% of the appointments cumulatively). Although they must be viewed taking into account the geographical origin of the disputes handled by an institution, similar trends are visible from the statistics of arbitrator appointments published by the ICC Court of Arbitration (In 2016, 57% of all arbitrators originated from Europe, whereas 13% originated from Asia and the Pacific and 2% from Africa. See, ICC Court of Arbitration (2017), *ICC Dispute Resolution Bulletin Issue 2*, pp. 109-110), and the London Court of International Arbitration (In 2016, of the 496 arbitrators that were appointed, around 386 were from UK and Western Europe, while 28 were from the Asia Pacific region and from Africa. See London Court of International Arbitration (2016), *LCIA 2016: A Robust Caseload*, p. 12).

possibly by reference to the regional breakdown of the World Bank or the International Monetary Fund.¹¹⁸

57. Strictly linked to geographical provenance are the nationality requirements contained in constitutive instruments. The ICJ Statute provides for example that “[t]he Court shall consist of fifteen members, no two of whom may be nationals of the same state”.¹¹⁹ The existence of similar restrictions in respect of other courts and tribunals¹²⁰ appears to suggest that (negative) nationality requirements are still an important concern for many States.

58. One additional criterion which many constitutive instruments spell out as a separate selection requirement for the body as a whole is the representation of the world’s main legal systems or traditions.¹²¹ Whether or not expressly specified, this factor will normally ensue from the criterion of geographical diversity. Thus, a geographically balanced ITI is likely to have members trained in the main legal systems. In a similar way, fair regional representation on the ITI is likely to result in ethnic diversity, although ethnicity has a more complex

¹¹⁸ See e.g. World Bank (2017), *World Bank Country Classification 2018*, available at <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>, or the International Monetary Fund (2017), *World Economic Outlook April 2017: Gaining Momentum?*, pp. 176-177, available at <http://www.imf.org/en/Publications/WEO/Issues/2017/04/04/world-economic-outlook-april-2017>.

¹¹⁹ ICJ Statute, Art. 3(1). Further, Art. 3(2) provides that “[a] person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights”.

¹²⁰ See e.g. Protocol on the African Court, Art. 11(2) (“No two judges shall be nationals of the same State”); IACtHR Statute, Art. 4.2; Treaty establishing the Common Market for Eastern & Southern Africa, 5 November 1994, 33 ILM 1067 (1994), The Court of Justice of the COMESA, Art. 20.2; Treaty on the Harmonization of Business Law in Africa, 17 October 2008, Common Court of Justice and Arbitration of the OHADA, Art. 31 *in fine*; ITLOS Statute, Art. 31.1; Rome Statute, Art. 36(7); ICTY Statute, Art. 12(1); Statute of the International Criminal Tribunal for Rwanda (“ICTR Statute”), 8 November 1994, 33 ILM 1598 (1994), Art. 11(1); ICSID Convention, Art. 12(2) (providing that the persons designated by the Chairman to the Panels of Conciliators and Arbitrators “shall each have a different nationality”).

¹²¹ ICJ Statute, Art. 9 (“At every election, the electors shall bear in mind [...] 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”); ITLOS, Art. 2(2) (“In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured”); Rome Statute, Art. 36(8)(a) (“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 [...]”); Protocol on the African Court, Art. 14(2) (“representation of the main regions of Africa and of their principal legal traditions”); ICSID Convention, Art. 14(2) (“The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity”).

dimension as different races and ethnicities may be present within one same State (let alone one region of the world).

59. Finally, the issue arises whether a prospective ITI should achieve a balance between advanced economies on the one hand, and emerging market and developing economies (to use the classification of the International Monetary Fund).¹²² Similarly, one can ask whether the balance should be between capital-exporting and capital-importing countries.¹²³ This latter distinction will often overlap with the previous one, but is less clear-cut as many States are nowadays both capital-exporting and capital-importing. In the context of investment disputes, these aspects of diversity appear particularly relevant. If States were to take them into account, they would likely ensure considerations of economic, business, and private interests, on the one hand, and public, political, and general interest on the other. If a State is both capital-exporting and capital-importing, then it will be more prone to select individuals that would likely be able to guarantee consideration of both types of concerns.¹²⁴

c. Gender diversity

60. Gender representation on adjudicatory bodies has been the subject of multiple studies, especially in the domestic context and more recently also in the international context.¹²⁵ While women make up almost half of the world's population, they continue to be severely under-represented on international courts and tribunals, including on arbitral tribunals.¹²⁶

¹²² At the WTO, developing countries may request that panels deciding disputes between developed and developing countries include panelists from developing countries. See DSU, Art. 8(10) (“When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member”).

¹²³ Although there is no reference in the ICSID Convention to such criterion among those that are to be taken into account by the Chairman in his or her selection of the members of the Panels of Conciliation and Arbitration, during the preparatory works of the Convention the Chairman's power to designate Panel members was generally seen as desirable to ensure “fair representation on the Panels of qualified persons *from both investing and receiving countries*”. See the comment of the delegate from the Netherlands at the Geneva Consultative Meetings of Legal Experts held between 17-22 February 1964 in ICSID (1968), *History of the ICSID Convention: Documents concerning the Origin and Formulation of the Convention*, Vol. II-1 (“History of the ICSID Convention, Vol. II-1”), p. 382 (emphasis added).

¹²⁴ See also Anthea Roberts (2017) (noting that “[j]oint capital importers and exporters [...] will need to select adjudicators that they would be happy to live with on either side of the equation, i.e., that they would be content to have hear a case brought by either their investors suing foreign states or foreign investors suing them as host states”).

¹²⁵ See Grossman (2012), pp. 656-659; Grossman (2016), pp. 340-343.

¹²⁶ See generally, Grossman (2016), pp. 348-357. Gender equality is one of the “sustainable development goals” set out in the “2030 Agenda for Sustainable

61. Starting with international arbitration, statistical data on gender balance show that men greatly outnumber women on arbitral panels both in commercial and investment arbitration. Women sitting on tribunals under the rules of the International Chamber of Commerce for instance totaled 14.8% in 2016,¹²⁷ and 20% in tribunals under the rules of the London Court of International Arbitration.¹²⁸ Percentages of gender diversity in tribunals constituted under other commercial rules are broadly similar.¹²⁹ In the field of investment arbitration, the picture appears even more unbalanced. Empirical studies carried out over the last decade on the basis of varying data samples (e.g., some taking into account only ICSID arbitrations, others investment treaty arbitrations more generally) all come to the conclusion that female appointments to arbitral tribunals have been lower than 10%.¹³⁰

Development". See UN (2015b), *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, UN Doc. A/RES/70/1, Goal 5.

¹²⁷ See ICC Court of Arbitration (2017), p. 111. For a detailed representation of ICC's gender statistics, see Mirèze Philippe (2017, forthcoming), *Diversity & Transparency – ICC Gender Statistics*, Transnational Dispute Management, available at <https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1658>.

¹²⁸ London Court of International Arbitration (2016), p. 13.

¹²⁹ Statistics published by the ICC Court of Arbitration for 2016 reveal that of the 1,411 arbitrators appointed or confirmed by the ICC Court in 2016, 209 (15%) were women. See International Chamber of Commerce (2017), *ICC Dispute Resolution Bulletin Issue 2*, p. 111. Likewise, in the Milan Chamber of Arbitration, of the 245 arbitrators nominated during 2016, 34, i.e. 14%, were women. See Milan Chamber of Arbitration (2016), *Camera Arbitrale di Milano - Statistiche Arbitrato 2016*, p. 2. See also London Court of International Arbitration (2016), p. 12 (out of 496 appointments, 102 or 20.6% were women); Stockholm Chamber of Commerce (2017), *SCC Statistics 2016*, p. 15 (Of the 250 arbitrators appointed in 2016, 16% were women); Singapore International Arbitration Center (2017), *Annual Report 2016*, p. 16 (of 341 arbitrators appointed in 2016 44 or 12.7% were female arbitrators).

¹³⁰ See Franck (2007), pp. 75-82 (finding that 102 investment treaty arbitration awards rendered before 2007 identified a pool of 145 arbitrators, of which 3.5% percent were women); Franck, Freda, Lavin, Lehmann, Aaken (2015), p. 439 (finding that "[e]xpanded research from 252 [investment treaty arbitration] awards rendered by January 2012 identified a pool of 247 different arbitrators wherein [...] 3.6% were women"); Lucy Greenwood, C. Mark Baker (2012), *Getting a Better Balance on International Arbitration Tribunals*, *Arbitration International* Vol. 28, pp. 653-668, 656, 663-665 (analyzing ICSID cases and identifying that 5.6% of all arbitrator appointments were women); Waibel and Wu (2017), p. 15 ("In less than 10% of the [ICSID] cases, a female arbitrator is appointed as an arbitrator", p. 15); Gus van Harten (2012), *The (lack of) Women Arbitrators in Investment Treaty Arbitration*, in Karl P. Sauvant, Jennifer Reimer (eds.), *Columbia FDI Perspectives*, Vol. 59, available at http://ccsi.columbia.edu/files/2014/01/FDI_59.pdf (finding that as of May 2010, in 249 known investment arbitration cases, only 6.5% of all appointments were female appointments); Robert Kovacs and Alex Fawkes (2015), *An Empirical Analysis of Diversity in Investment Arbitration: the Good, the Bad and the Ugly*, *Transnational Dispute Management*, Vol. 12(4), pp. 1-27, at 11-13 (who use a database

62. The level of concern over such imbalance has brought the gender parity debate in international arbitration to the forefront and triggered a number of initiatives, of which The Pledge is the most important one so far.¹³¹ As a result of such initiatives and of the increased awareness, arbitral institutions have taken the lead to push for diversity in appointments and now appoint more diverse candidates than the disputing parties.¹³² Likewise, the most recent designations to each of the ICSID Panels of Arbitrators and Conciliators made by ICSID (the so-called “Chairman’s list”) was marked by complete gender parity,¹³³ which is in stark contrast to the number of appointments to arbitral tribunals referred to above, and to the number of female individuals designated to the ICSID Panel of Arbitrators by ICSID Contracting States.¹³⁴

63. With regard to gender balance on permanent international courts and tribunals, a recent study by Grossman shows that, as of mid-2015, the percentage of women amounted to 20% on the ICJ, 5% for ITLOS (with only one female judge out of 21), 14% of the WTO AB (with only one female member out of 7) and 18% on the CJEU.¹³⁵ Scoring somewhat better were the ECtHR (33%) and the ICC (39%).¹³⁶ Importantly, the study concluded that only 15% of the adjudicators were women on the eight international courts surveyed with no representativeness requirements built into their selection procedures, while on courts with either aspirational representativeness language or mandatory targets, such as the ECtHR and the ICC, 33% on average were women.¹³⁷ This last finding shows that mandatory targets (quotas) or aspirational language may be

of 499 arbitrators appointed in 667 investment treaty arbitrations as of December 2014, and find that out of those 499 arbitrators only 25, i.e. 5%, were women).

¹³¹ On The Pledge, see *supra* para. 52.

¹³² See International Chamber of Commerce (2017), p. 111 (of the total number of female arbitrators appointed in 2016, 46% were appointed by the ICC Court, while 41% were appointed by the disputing parties and the remaining by the co-arbitrators as presidents or by another appointing authority); LCIA (2016), p. 13 (in 2016, of the 496 arbitrator appointments, 102 were of female arbitrators and a majority, i.e. 78.4%, were selected by the LCIA Court. In contrast only 22 of the appointments came from the parties themselves or their nominee arbitrators); Stockholm Chamber of Commerce (2017), p. 15 (in 2016, when the arbitrator appointments were to be made by the SCC, women made up 22.5% of the appointments, as compared to the parties where they made up only 11% of the appointments).

¹³³ See Tom Jones (2017), *ICSID Chairman makes his pick of Arbitrators*, Global Arbitration Review, 18 September 2017, quoting ICSID Secretary General Meg Kinnear for the observation that “the list is gender diverse, with female candidates representing half of each list”.

¹³⁴ As of 2012, less than 15% of the ICSID panelists designated by Contracting States on the Panels of Arbitrators were women. See Greenwood and Baker (2012), at p. 665.

¹³⁵ See Grossman (2016), Table 1 at p. 350.

¹³⁶ Grossman (2016), p. 350. See also the figures provided by the GQUAL-Campaign for Gender Parity in International Representation at <http://www.gqualcampaign.org/>.

¹³⁷ Grossman (2016), p. 342.

the most effective if not the only way to achieve more balanced gender representation on international courts and tribunals.

64. Looking at most recent experiences of international courts and tribunals, consideration of gender diversity may be built in at different phases of the selection process.¹³⁸ One possibility is to provide guidance to States in the *nomination* phase, if such a phase is part of the selection process.¹³⁹ Thus, at the ECtHR, starting from 2004, the Parliamentary Assembly of the Council of Europe (“PACE”) asserted that it would no longer consider lists of candidates put forward by Contracting States if the three-person list did not contain candidates of both sexes.¹⁴⁰ Following opposition from a Contracting Party and an advisory opinion by the Court,¹⁴¹ the PACE now considers unisex lists of candidates only “in exceptional circumstances, where a Contracting Party has taken all the necessary and appropriate steps to ensure that the list contains a candidate of the under-represented sex, but has not been able to find a candidate of that sex who satisfies the requirements of Article 21 § 1 of the European Convention on Human Rights”.¹⁴²

¹³⁸ See generally Grossman (2016), pp. 363-392.

¹³⁹ See *infra* at III.C.2.

¹⁴⁰ See PACE (2004), *Candidates for the European Court of Human Rights*, 30 January 2004, Resolution 1366 (2004), para. 3(ii). See also, amending para. 3(ii) of Resolution 1366 (2004), PACE (2005), *Candidates for the European Court of Human Rights*, 18 March 2005, Resolution 1426 (2005).

¹⁴¹ Despite the PACE Resolution 1426 (2005), Malta submitted an all-male list. The ECtHR was eventually asked to render an advisory opinion on whether the PACE was authorized under the ECHR to require gender balanced lists. In its advisory opinion, the Court held that “although the aim of ensuring a certain mix in the composition of the lists of candidates is legitimate and generally accepted, it may not be pursued without provision being made for some exceptions designed to enable each Contracting Party to choose national candidates who satisfy all the requirements of Article 21 § 1. [...] in not allowing any exceptions to the rule that the under-represented sex must be represented, the current practice of the Parliamentary Assembly is not compatible with the Convention: where a Contracting Party has taken all the necessary and appropriate steps with a view to ensuring that the list contains a candidate of the under-represented sex, but without success, and especially where it has followed the Assembly’s recommendations advocating an open and transparent procedure involving a call for candidatures [...], the Assembly may not reject the list in question on the sole ground that no such candidate features on it”. See *Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights*, European Court of Human Rights, Advisory Opinion of 12 February 2008, available at <http://hudoc.echr.coe.int/eng?i=003-2268009-2419060>.

¹⁴² See PACE (2008a), *Candidates for the European Court of Human Rights*, 30 September 2008, Resolution 1627 (2008) amending Resolution 1366 (2004), para. 4. In its most recent formulation, the provision, amended by Resolution 1841 (2011), adopted on 7 October 2011, now reads as follows: “The Assembly decides to consider single-sex lists of candidates when the candidates belong to the sex which is under-represented in the Court (i.e. the sex to which under 40% of the total number of judges belong), or in exceptional circumstances where a Contracting Party has taken all the necessary and

65. In a similar fashion, the Protocol on the African Court provides that when putting forward their nominations, States “shall give[]” “[d]ue consideration to adequate gender representation in nomination process”.¹⁴³ In correspondence with States in advance of elections taking place in June 2014, the African Union Commission asserted that it was “mandatory” that States propose at least one female candidate each, given the low number of women on the bench.¹⁴⁴ Furthermore, the Statute of the ICTY provides that, in nominating individuals for the posts of *ad litem* judges (but not of permanent judges), “each State may nominate up to four candidates meeting the qualifications set out in article 13 of the Statute, taking into account the importance of a fair representation of female and male candidates”.¹⁴⁵

66. Another possibility is to provide for mandatory or aspirational language in the *election* phase.¹⁴⁶ In addition to the language just seen in respect of nominations, and thus with a remarkable emphasis on gender representation, the Protocol on the African Court also provides that “[i]n the election of the judges, the Assembly shall ensure that there is adequate gender representation”.¹⁴⁷ The ICC, on its part, stands out as “the most advanced articulation ever of gender justice in international law”.¹⁴⁸ The Rome Statute directs the electors at the Assembly of States Parties to take into account, *inter alia*, fair representation of female and male judges.¹⁴⁹ Furthermore, the Assembly of States Parties has established minimum voting requirements so that the bench have at least six judges of each gender.¹⁵⁰ Following the 2013 elections, 57% per cent of the

appropriate steps to ensure that the list contains candidates of both sexes meeting the requirements of paragraph 1 of Article 21 of the European Convention on Human Rights. Such exceptional circumstances must be duly so considered by a two-thirds majority of the votes cast by members of the Sub-Committee on the Election of Judges to the European Court of Human Rights. This position shall be endorsed by the Assembly in the framework of the Progress Report of the Bureau of the Assembly”. For an examination of the history of gender balance requirements at the ECtHR, see Vauchez (2015), pp. 202-209.

¹⁴³ Protocol on the African Court, Art. 12(2).

¹⁴⁴ Grossmann (2016), p. 366.

¹⁴⁵ ICTY Statute, Art. 13 *ter* (1)(b). The U.N. Security Council inserted this provision in the Statute of the ICTY following the conclusion of the Rome Statute, which provides for advanced gender parity requirements. See UN (2000), *Resolution 1329 (2000)*, Security Council, 4240th Meeting, S/Res/1329(2000) (5 December 2000), Annex I.

¹⁴⁶ On the election phase, see *infra* section III.C.5.

¹⁴⁷ Protocol on the African Court, Art. 14(3).

¹⁴⁸ Louise Chappell (2016), *The Politics of Gender Justice at the ICC: Legacies and Legitimacy*, EJIL:Talk!, 19 December 2016 available at <http://www.ejiltalk.org/the-politics-of-gender-justice-at-the-icc-legacies-and-legitimacy/>.

¹⁴⁹ Rome Statute, Art. 36(8)(a)(iii) (“The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: [...] (iii) A fair representation of female and male judges”).

¹⁵⁰ ICC (2004), para. 20(c).

bench was comprised of women,¹⁵¹ which made the ICC the only international court to exceed 50% female participation.¹⁵²

67. Following these more recent examples, States may consider inserting aspirational language or quantitative targets into the ITI Statute, with a view to ensuring gender diversity at least for a transitional period until such time when gender balance is achieved naturally.

4. Independence and impartiality

a. Introductory remarks

68. Besides the individual requirements and general criteria discussed above, the statutes of most international courts and tribunals require “independent” judges or members.¹⁵³ The ICJ Statute, for example, provides that “[t]he Court shall be composed of a body of independent judges”.¹⁵⁴ Similarly, judges of the CJEU are to be “chosen from persons whose independence is beyond doubt”.¹⁵⁵ In addition to independence, constitutive instruments of a number of courts and tribunals also provide for the requirement of “impartiality”. Under the Rome Statute, for instance, ICC judges “shall be chosen from among persons of high moral character, impartiality and integrity [...]”.¹⁵⁶

¹⁵¹ Chappell (2016).

¹⁵² Grossman (2012), p. 654.

¹⁵³ See generally Dinah Shelton (2003), *Legal Norms to Promote the Independence and Impartiality of International Tribunals*, *The Law and Practice of International Courts and Tribunals*, Vol. 2, pp. 27-62.

¹⁵⁴ ICJ Statute, Art. 2. See also Statute of the Permanent Court of International Justice (“PCIJ Statute”), 16 December 1920, 17 AJIL Supp. 115 (1923), Art. 2 which contained similar language.

¹⁵⁵ TFEU, Art. 253. Constitutive instruments of other courts and tribunals use similar wordings. See, e.g., ITLOS Statute, Art. 2 (“The Tribunal shall be composed of a body of 21 independent members”); ECHR, Art. 21(3) (“During their term of office the judges shall not engage in any activity which is incompatible with their independence, [...]”); Rome Statute, Art. 40(1) (“The judges shall be independent in the performance of their functions”); ICTY Statute, Art. 12 (“The Chambers shall be composed of sixteen permanent independent judges”); Protocol on the African Court, Art. 17(1) (“The independence of the judges shall be fully ensured in accordance with international law”).

¹⁵⁶ See Rome Statute, Art. 36(3)(a). Art. 40(1) of the Rome Statute addresses independence. See also, in similar terms, ICTY Statute, Art. 13 (“The permanent and ad litem judges shall be persons of [...] impartiality [...]”). At the IACtHR, the requirements for independence and impartiality are spelled out indirectly in the rule on incompatibilities. See ACHR, Art. 71 (“The position of judge of the [IACtHR] [...] is incompatible with any other activity that might affect the independence or impartiality of such judge [...]”). At the ICJ, the requirement for impartiality was not included in Art. 2, which only refers to “independent” judges. On the reasons for this, see Mariano Aznar Gómez (2012), *Article 2*, in Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, and Christian J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary*, 2nd

69. Independence and impartiality in adjudication are closely intertwined requirements.¹⁵⁷ Impartiality or more precisely the exercise of an impartial judgment, that is a judgment free of influences deriving from factors or circumstances other than the record before the court or tribunal and free of bias towards a disputing party, is the overall goal for the legitimate administration of justice. In that sense, independence, understood broadly as the (objective) distance from possible sources of external influence, is a *means* to achieve that goal. At the same time, independence is also fundamental in its own right to ensure that all stakeholders – beyond the disputing parties – have confidence in the dispute resolution body.¹⁵⁸ In other words, while interconnected and sometimes overlapping, independence and impartiality are separate concepts and requirements, which must both be fulfilled.

70. The requirements of independence and impartiality apply to any judicial or judicial-like dispute settlement process. They apply to domestic courts, to international commercial arbitration, to investment arbitration, to inter-State arbitration, and to the international judiciary.¹⁵⁹ They are also essential

Edition, Oxford University Press, p. 238, fn. 33. However, Art. 20 provides that “Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously”). See also International Court of Justice Rules of the Court, 14 April 1978, Art. 4.

¹⁵⁷ In the words of the ICSID Chairman of the Administrative Council, deciding upon a challenge of two members of an ICSID tribunal, “[i]mpartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both ‘protect parties against arbitrators being influenced by factors other than those related to the merits of the case.’” See *Abaclat and others v. Argentine Republic*, Decision on the Proposal to Disqualify a Majority of the Tribunal of 4 February 2014, ICSID Case No. ARB/07/5, para. 75.

¹⁵⁸ See Council of Europe (2001), *Opinion on the Standards concerning the Independence of the Judiciary and the Irremovability of Judges*, Consultative Counsel of European Judges, 23 November 2001, Opinion N° 1 (2001), para. 12 (“Not merely the parties to any particular dispute, but society as a whole must be able to trust the judiciary. A judge must thus not merely be free in fact from any inappropriate connection, bias or influence, he or she must also appear to a reasonable observer [to] be free therefrom. Otherwise, confidence in the independence of the judiciary may be undermined”).

¹⁵⁹ See e.g. The Burgh House Principles on the Independence of the International Judiciary of 2004 (“The Burgh House Principles”), Principle 1.1 (“The court and the judges shall exercise their functions free from direct or indirect interference or influence by any person or entity”). These Principles were drawn up by the study group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, together with the Project on International Courts and Tribunals. See generally, Philippe Sands, Campbell McLachlan, Ruth Mackenzie (2005), *The Burgh House Principles on the Independence of the International Judiciary*, *The Law and Practice of International Courts and Tribunals*, Vol. 4(2), pp. 247-260. See also UN (1985), *Basic Principles on the Independence of the Judiciary*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan Session of 26 August to 6 September 1985, A/Res/40/32 (29 November 1985) and A/Res/40/146 (13 December 1985) (“U.N. Basic Principles”). These principles are concerned with independence of domestic judiciaries, but some of their principles are equally applicable *mutatis mutandis*

requirements for a fair trial and a fundamental aspect of the right to access to justice.¹⁶⁰ With respect to the international judiciary, in the words of Crawford and McIntyre, “the critical issue is not *whether* the principles of judicial independence and impartiality apply to the international judiciary, but rather *what* those principles demand”.¹⁶¹ What is thus the content of these principles in respect of international dispute settlement bodies?

71. Within the requirement of independence, one generally distinguishes between institutional or structural independence, on the one hand, and individual independence, on the other.¹⁶² The latter denotes the absence of connections

to international adjudicatory bodies. See esp. Principle 2 (“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason”).

¹⁶⁰ See e.g. Universal Declaration of Human Rights, 10 December 1948, UN Doc A/810 at 71 (1948), Art. 10 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”); International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art. 14(1) (“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]”); ECHR, Art. 6(1) (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”); ACHR, Art. 8(1) (“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, [...] for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature”).

¹⁶¹ James Crawford, Joe McIntyre (2011), *The Independence and Impartiality of the International Judiciary*, in Shimon Shetreet, Christopher Forsyth (eds.), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*, Martinus Nijhoff, pp. 189-214, 191.

¹⁶² These are not the only distinctions that can be made in respect of judicial independence. Other authors distinguish between *institutional* or *collective* v. *individual* or *personal* independence to denote, respectively, requirements for the collective adjudicatory body and for the individual judge. See e.g. Shimon Shetreet (2011), *Creating a Culture of Judicial Independence: The Practical Challenge and the Conceptual and Constitutional Infrastructure*, in Shimon Shetreet and Christopher Forsyth (eds.), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*, Martinus Nijhoff, pp. 15-68, esp. 44-47, distinguishing between the independence of the individual judges and the collective or institutional independence of the judiciary as a body. More specifically, in respect of the former (individual independence), the author further distinguishes between *substantive* or *decisional* independence (which entails that “in making judicial decisions and exercising other official duties, individual judges are subject to no other authority but the law”) and *personal* independence (which comprises *inter alia* the following aspects: security of tenure; judicial remuneration; case assignment rules). See also Dominik Zimmermann (2014), *The Independence of International Courts: The Adherence of the International Judiciary to a Fundamental Value of the Administration of Justice*, Hart, pp. 75-77 (who classifies under the institutional aspect of independence “concerns such as how a court is financed, who is competent to adopt

between a disputing party (or another actor in or close to the dispute) and an adjudicator. The former refers to the absence of external influence on the institution or dispute settlement body.

72. More specifically, structural independence requires that members of adjudicative bodies be protected, both collectively as an institution and individually, from potential threats to the proper discharge of their adjudicatory functions that may exist irrespective of a particular dispute. These threats or concerns “may crystalli[z]e with regards to a discrete case, though they are generally considered at the stage of system design”.¹⁶³ Structural independence refers to the ability of the dispute settlement body as a whole and of its individual members to exercise their adjudicatory functions “free from direct or indirect interference or influence by any person or entity”.¹⁶⁴ Independence in this sense is closely linked to the essence of the adjudicatory function of courts and tribunals. Indeed, a body cannot be regarded as a “court” or “tribunal” unless it satisfies that requirement, as held consistently by the ECtHR.¹⁶⁵ The point was also made by the ICJ when it held that, as a *court*, it had to act

[...] only on the basis of the law, independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and by its Statute. *A court functioning as a court of law can act in no other way.*¹⁶⁶

73. By contrast, as mentioned, individual independence requires that an adjudicator have no relationship either with a disputing party¹⁶⁷ – be it financial,

rules of procedure or rules of evidence of a court, how the adjudicative function is detached from e.g. executive functions, the competences relating to the employment and dismissal of personnel such as Registrars and Registry staff, or the internal structure of the court (in particular the competence to assign cases)”, and, under individual or personal independence, aspects such as freedom from instructions in particular cases, potential disciplinary measures, tenure, the regulation of possible outside activities). One other common distinction looks at the source of potential interferences and distinguishes between external independence (from outside actors) and internal independence (from other members or organs of the adjudicatory body).

¹⁶³ Crawford and McIntyre (2011), p. 201.

¹⁶⁴ See The Burgh House Principles, Principle 1.1.

¹⁶⁵ See, amongst many, *Le Compte, Van Leuven and De Meyere v. Belgium*, ECtHR, Decision of 23 June 1981, Series A Vol. 43, para. 55; *Bentham v. Netherlands*, ECtHR, Decision of 23 October 1985, Series A Vol. 97, para. 43; *Belilos v. Switzerland*, ECtHR, Decision of 28 April 1988, Series A Vol. 132, para. 64. See generally Paul Mahoney (2008), *The International Judiciary – Independence and Accountability*, The Law and Practice of International Courts and Tribunals, Vol. 7(3), pp. 313-349.

¹⁶⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Advisory Opinion, 21 June 1971, 1971 ICJ Reports 16, para. 29 (emphasis added).

¹⁶⁷ In *ad hoc* bodies, any relationships between the adjudicator and non-disputing *treaty* parties (for instance, the investor’s home State or other non-disputing States in

professional, employment based, personal – or with the dispute.¹⁶⁸ The obvious risk is that the existence of a relationship impair the adjudicator's impartial judgment. Here, the requirement for independence appears intimately connected to "impartiality" which connotes the absence of bias in favor or against a disputing party or in respect of the dispute. While independence looks at objective links with the disputing parties or the dispute, impartiality is concerned with the adjudicator's subjective mental status and could thus be described as "independence of mind".¹⁶⁹

74. Before reviewing the content of these principles and following the approach adopted in this report, it may be helpful to identify how the shift from an *ad hoc* system to a (semi-) permanent one affects the requirements of independence and impartiality. The requirement of impartiality undergoes no fundamental change in the transition from one framework to the other, as in both the adjudicator must exercise judgment that is unencumbered with biases and preconceived views in favor of one disputing party. By contrast, independence plays out somewhat differently in *ad hoc* and permanent bodies in two principal respects.

75. First, although both structural and individual independence are required for *ad hoc* as well as permanent bodies, the weight of these two facets of independence is different in each system. In relation to *ad hoc* mechanisms, most concerns of practical relevance turn on the individual independence of an arbitrator in a given case. This is only natural since *ad hoc* bodies are constituted for a specific dispute and are dissolved once that dispute is resolved. Furthermore, one-off adjudicators have other activities which can give rise to connections with the disputing parties and the dispute and may threaten individual independence.

76. That stronger focus on individual independence does not mean, however, that the requirement of structural independence is absent in *ad hoc* bodies. In institutional arbitration, for example, the institutional set up must guarantee structural independence if the product of the process is to be regarded as a true arbitral award equivalent to a domestic court judgment.¹⁷⁰ Thus, for instance, the structural independence of sports arbitration within the CAS framework was

multilateral IIAs) are normally of no relevance for the proper constitution of an arbitral tribunal.

¹⁶⁸ See generally Born (2014), pp. 1760-1775.

¹⁶⁹ Gabrielle Kaufmann-Kohler, Antonio Rigozzi (2015), *International Arbitration: Law and Practice in Switzerland*, Oxford University Press, pp. 187-189.

¹⁷⁰ See generally, Kaufmann-Kohler and Rigozzi (2015), pp. 73-83; Dominique Hascher (2007), *A Comparison between the Independence of State Justice and the Independence of Arbitration*, ICC International Court of Arbitration Bulletin–Special Supplement, Vol. 18, pp. 77–89.

scrutinized by the Swiss¹⁷¹ and German courts¹⁷² and is currently being reviewed by the ECtHR,¹⁷³ due to the preponderant role of sports-governing bodies in the

¹⁷¹ See *Elmar Gundel v. FEI*, Swiss Supreme Court, Decision of 15 March 1993, 4P.217/1992, ATF 119 II 271 (excerpts of this decision are reproduced in Kaufmann-Kohler and Rigozzi (2015), pp. 75-79). The Swiss Supreme Court was confronted with the question whether a CAS award was an “arbitral award” susceptible to annulment under Chapter 12 of the Swiss Private International Law Act (“PILA”). While recognizing that “the CAS does offer the guarantees of independence that are required under Swiss law in order for the jurisdiction of the courts to be validly excluded”, the Court held that “[n]evertheless, some objections with regard to the independence of the CAS cannot be dismissed without further analysis, in particular those based on its organizational and economic ties with the IOC [International Olympic Committee]”. The Supreme Court concluded that “it would be desirable to reinforce its [CAS’s] independence vis-à-vis the IOC” (p. 79). The decision led to a reform of the institutional structure of CAS, in particular through the creation of the International Council for Sports Arbitration (ICAS) in order to sever the close institutional ties with the IOC.) See Andrew Vaitiekunas (2014), *The Court of Arbitration for Sport: Law-Making and the Question of Independence*, Stämpfli Publishers, pp. 139-159. Ten years after the decision in *Gundel*, the Swiss Supreme Court had a further opportunity to examine the structural independence of CAS in the *Lazutina* case. See *Lazutina & Danilova v. IOC, FIS, & CAS*, Swiss Supreme Court, Decision of 27 May 2003, 4P.267-270/2002, ATF 129 III 445 (excerpts of which are reproduced in Kaufmann-Kohler and Rigozzi (2015), pp. 80-83). In *Lazutina*, the Court considered that “the applicants are wrong to suggest that the ICAS organs are structurally dependent on the IOC because they belong to the Olympic Movement” and that “[f]ollowing the changes introduced [in its rules] with the 1994 reforms, the [CAS’s recourse to] a list of arbitrators is now in keeping with the constitutional requirements of independence and impartiality which [also] apply to arbitral tribunals” (pp. 82-83).

¹⁷² See the “*Pechstein saga*” before the German courts: *Claudia Pechstein v. International Skating Union (ISU)*, *Landesgericht* Munich, Decision of 26 February 2014, Az. 37 O 28331/12 and *Oberlandesgericht* Munich, Decision of 15 January 2015, OLG München U 1110/14 Kart. In particular, the Munich *Oberlandesgericht* concluded that, through their influence on the composition of the ICAS, the sports federations exercise a considerable influence on the composition of the list of CAS arbitrators, resulting in an “abuse of dominant position” and in the structural imbalance of CAS arbitration in favor of the sports federations and to the detriment of athletes. Focusing on the method of nomination of arbitrators to the CAS’s closed list and the nomination process of the president of the panel in appeal cases, the *Oberlandesgericht* concluded that a “balanced influence of the parties on the composition of the arbitral tribunal that would be needed to safeguard its independence is [...] not provided” and this “structural deficiency threatens the neutrality of the arbitral tribunal” regardless of the fact that a person included on the CAS list may or may not be personally connected to a sports-governing body. See Antoine Duval and Ben Van Rompuy (2015), *The Compatibility of Forced CAS Arbitration with EU Competition Law: Pechstein Reloaded*, 23 June 2015 available at <https://ssrn.com/abstract=2621983>, p. 24. The German Federal Supreme Court (*Bundesgerichtshof*) reversed the *Oberlandesgericht*’s decision, holding *inter alia* that the CAS is “an independent and neutral body” and “[n]o structural imbalance can be derived from the procedure for drawing up the list of arbitrators in the CAS which would adversely affect the independence and neutrality of the CAS to such a degree that its position as a ‘genuine’ arbitral tribunal would be called into question”. See *Pechstein v. International Skating Union*, Federal Supreme Court (BGH), Judgment of 7 June 2016, KZR 6/15, English translation by Annett Rombach (2016), *SchiedsVZ*, Vol. 5, pp. 271-279.

¹⁷³ *Pechstein v. Switzerland*, ECtHR, Request 67474/10 of 11 November 2010, in which Pechstein essentially submits, under Article 6(1) ECHR, that the CAS is not an

establishment of the list of arbitrators and, as a result, in the composition of the tribunals. In essence, the CAS closed list of arbitrators has passed muster so far, because it includes a large number of individuals,¹⁷⁴ which are designated by ICAS, an administrative body whose members are appointed by the various components of the sports community.¹⁷⁵ This being so, one cannot rule out that a forthcoming ECtHR decision may reach a different conclusion, especially because top level athletes have no choice but to arbitrate before CAS.

77. In general terms, the more significant the role of the arbitral institution in an *ad hoc* system,¹⁷⁶ the more demanding the requirement for structural independence.¹⁷⁷ As arbitral institutions in *ad hoc* systems do not generally interfere in the adjudication of the dispute, the guarantees for independence in international arbitration rely primarily on the individual independence of the adjudicators from the disputing parties and the subject-matter of the dispute.

78. By contrast, in permanent bodies the need to ensure guarantees of structural independence comes to the forefront due precisely to the permanence of the institution. In addition, permanent members of a standing body are by nature less exposed (though not entirely immune) to individual conflicts of interests. It is thus natural that there is less emphasis on individual independence than in *ad hoc* bodies.

79. The same difference can be viewed from another perspective, which seeks to locate the vulnerabilities or fragilities of each system when it comes to rendering impartial justice. In investor-State arbitration, the vulnerabilities lie in the risk that individual arbitrators have connections or predispositions that may unduly impact their judgment. In a permanent body, the vulnerabilities lie elsewhere: they mainly turn on the risk of undue influence or interference of the constituting States which collectively control the composition process. If they were to consider the creation of a permanent body, States may wish to devote

independent and impartial arbitral tribunal, because (i) the IOC exercises control over it and is the primary financier; and (ii) the CAS Secretary General may influence the award, all of which is allegedly particularly open to criticism as CAS arbitration is not voluntary.

¹⁷⁴ Currently 367 members and, according to the CAS Statute, the number cannot fall below 150 (Statutes of the Bodies working for the Settlement of Sport-Related Disputes ("CAS Statute"), (as in force from 1 March 2013), Art. S13(2).

¹⁷⁵ Four members by international federations; four members by national Olympic committees; four by the IOC; four by the preceding twelve "after appropriate consultation with a view to safeguarding the interests of the athletes"; and four by the preceding sixteen "from among personalities independent of the bodies designating the other members of the ICAS" (CAS Statute, Art. S4).

¹⁷⁶ For the use of these terms, see *supra* para. 7.

¹⁷⁷ On the other hand, in non-institutional arbitration governed solely by the *lex arbitri*, the emphasis is almost exclusively on individual independence *in concreto*, provided of course the *lex arbitri* itself provides the necessary guarantees for the dispute resolution process to be deemed independent.

particular attention to this shift in vulnerabilities, knowing that this fragility is common to all international courts¹⁷⁸ but may be particularly critical in an asymmetric settlement mechanism such as that of investment disputes.

80. The second difference stemming from the shift from an *ad hoc* system to a permanent one relates to the methods for implementing structural independence or, differently put, the content of that requirement. In an *ad hoc* setting, structural independence is largely achieved through equal influence of the disputing parties on the constitution of the arbitral tribunal. In a permanent setting, however, that implementation method does not work anymore, because only the disputing respondent will influence the composition of the adjudicative body as Contracting State (to a greater extent in a permanent system than in a semi-permanent roster system). Hence, structural independence must be implemented through other means, such as security of tenure, financial security, and other guarantees discussed below.¹⁷⁹

81. The following sections address in greater detail the guarantees that would need to be built into a prospective ITI in respect of structural (*infra* section III.B.4.b) and individual independence (*infra* section III.B.4.c), as well as impartiality (*ibid.*). Finally, it adds a comment on accountability, a concept often considered together with independence (*infra* section III.B.4.d).

b. Structural independence

82. Structural independence aims at protecting the adjudicatory body from external interferences, threats, or pressures of any nature. To achieve structural independence, one must thus identify the possible sources of interference. In other words, *from whom* must the new dispute resolution body be structurally independent? The first actors from whom the ITI's independence needs to be ensured are obviously States. On the one hand, they are the entities establishing the dispute resolution body and exercising primary control over the selection of its members; on the other hand, they are at the same time subject to the ITI's jurisdiction as potential respondents and thus interested in the outcome of disputes.¹⁸⁰ Beyond States, if the ITI is to be placed under the aegis of an

¹⁷⁸ Crawford and McIntyre (2011), p. 191, in relation to the fragility of international institutions.

¹⁷⁹ See *infra* section III.B.4.b

¹⁸⁰ On the question of why States establish independent courts and tribunals, see the debate between Posner & Yoo on the one hand and Helfer & Slaughter on the other. See Eric A Posner and John C. Yoo (2005a), *Judicial Independence in International Tribunals*, California Law Review, Vol. 93(1), pp. 1-74; Laurence R. Helfer and Anne-Marie Slaughter (2005), *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, California Law Review, Vol. 93, pp. 899-956; Eric A Posner and John C. Yoo (2005b), *Reply to Helfer and Slaughter*, California Law Review, Vol. 93, pp. 957-974.

international organization, independence will also have to be guaranteed vis-à-vis the organs of such organization.¹⁸¹ Furthermore, the ITI will have to be independent from non-State actors, including business organizations, civil society groups and other NGOs, which, depending on their *de facto* power, may also be potential sources of pressure on the adjudicators.¹⁸²

83. The sources of potential interferences being identified, what safeguards could States put in place in order to guarantee the ITI's structural independence? The ECtHR has identified the most important of these guarantees in respect of adjudicatory bodies as follows:

In order to establish whether a [dispute resolution] body can be considered "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence [...].¹⁸³

84. Looking at the aspects considered by the ECtHR as well as those identified by literature on judicial independence on the national and international level,¹⁸⁴ the following main factors appear essential to guarantee structural independence.

¹⁸¹ See The Burgh House Principles, Principle 1.2 ("Where a court is established as an organ or under the auspices of an international organisation, the court and judges shall exercise their judicial functions free from interference from other organs or authorities of that organization"). See also Aida Torres Pérez (2015), *Can Judicial Selection Secure Judicial Independence? Constraining State Governments in Selecting International Judges*, in Michal Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Court*, Oxford University Press, p. 185.

¹⁸² See Torres Pérez (2015), p. 185.

¹⁸³ *Langborger v. Sweden*, ECHR, Decision of 22 June 1989, Series A Vol. 155, para. 32. While this decision refers to a domestic court, there is no reason not to apply the principles set out therein also to international adjudicatory bodies.

¹⁸⁴ See amongst many Shelton (2003), pp. 27-62; Ruth Mckenzie, Philippe Sands (2003), *International Courts and Tribunals and the Independence of the International Judge*, Harvard International Law Journal, Vol. 44(1), pp. 271-285; Theodor Meron (2005), *Judicial Independence and Impartiality in International Criminal Tribunals*, American Journal of International Law, Vol. 99, pp. 359-369; Mahoney (2008), pp. 313-349; Roberto Toniatti (2010), *L'indipendenza dei giudici sovranazionali ed internazionali*, Diritto Pubblico Comparato ed Europeo, Vol. IV, pp. 1733-1753; Institut de droit International (2011b), *Report on the Position of the International Judge* ("IDI Report"), Sixth Commission, Session at Rhodes (9 September 2011), Yearbook of Institute of International Law, Vol. 74, pp. 1-130; David D. Caron (2011), *The Independence and Impartiality of Legal Systems*, World Arbitration & Mediation Review, Vol. 5(3), pp. 255-270; Crawford and McIntyre (2011), pp. 189-214; Zimmerman (2014), pp. 512-523; Aida Torres Pérez (2014), *La independencia de la Corte Interamericana de Derechos Humanos desde una perspectiva institucional*, in M. Iglesias et al., *Derechos humanos: posibilidades teóricas y desafíos prácticos*, Librería, pp. 66-88.

85. *Selection method.* As highlighted by the PACE in the context of the ECtHR, selection procedures “have a direct impact on the independence and impartiality of the judges, which is required in order to ensure public confidence in the independence of any judicial institution. Nomination procedures must be and be seen to be in conformity with international standards guaranteeing judicial independence”.¹⁸⁵ This means, in particular, that the procedure for selection of the members must ensure that individuals are selected for their personal qualities rather than for political or other considerations.¹⁸⁶ In other words, the selection process should, to the extent possible, be removed from the realm of politics.¹⁸⁷ The link between independence and the process of selection is evident in many of the statutes of existing courts and tribunals. The ICJ Statute, for instance, requires that the Court be composed of “independent judges, elected regardless of their nationality”, which thus emphasizes the need “[t]hat the election of a judge be based solely on his personal qualities, not on nationality”.¹⁸⁸

86. *Security of tenure.* It is indispensable for the decision-maker’s independence that his or her tenure be secure against interference by those entities that have elected or appointed him or her. This entails in particular putting in place guarantees against the removability from office, whereby adjudicators may only be dismissed from office upon specified grounds and in accordance with pre-determined procedures.¹⁸⁹

¹⁸⁵ PACE (2008b), *Report on Nomination of Candidates and Election of Judges to the European Court of Human Rights*, Committee on Legal Affairs and Human Rights, 1 December 2008, Doc. 11767, para. 3.

¹⁸⁶ See The Burgh House Principles, Principle 2.3 (“Procedures for the nomination, election and appointment of judges should be transparent and provide appropriate safeguards against nominations, elections and appointments motivated by improper considerations”). See also U.N. Basic Principles, Principle 10 (“Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives”).

¹⁸⁷ See *infra* section III.C, esp. section III.C.1.

¹⁸⁸ Abi-Saab (1997), p. 166.

¹⁸⁹ See The Burgh House Principles, Principle 3.1 (“Judges shall have security of tenure in relation to their term of office. They may only be removed from office upon specified grounds and in accordance with appropriate procedures specified in advance”); IDI Resolution, Art. 2(2) (“During their entire term of office, judges shall enjoy irremovability. Judges may be removed from office only if they cease to meet the required conditions for the performance of the judicial function, and following a decision adopted by their peers in accordance with due process. Such a decision could be preceded, if necessary, by a suspension of the judge concerned. In addition, these decisions should be taken by qualified majority voting, for example a three-quarters majority”).

87. *Term of office.* In the same vein, the determination of the members' terms of office can significantly enhance independence. Longer, non-renewable terms are likely to better protect members from interference.¹⁹⁰

88. *Financial security.* The guarantee of an appropriate compensation ensures that adjudicators can exercise their functions with serenity and protects them against attempts at exercising undue influence on their decision-making. Governing instruments of courts and tribunals thus normally contain rules on remuneration and pensions for their judges or members, as well as provisions against reductions in remuneration during the period in office.¹⁹¹

89. *Adequate resources.* What is true of individual members also applies to the body as a whole. An adjudicatory body must have adequate resources, both human and financial, in order to function properly¹⁹² and budgets should not be used as a means of undermining judicial independence.¹⁹³

90. *Incompatibilities.* Rules on incompatibilities may vary depending on whether members sit on a full-time or part-time basis. They help to ensure that the decision-makers' independence is not jeopardized by the performance of external activities.¹⁹⁴ Thus, the ICJ Statute provides that "[n]o member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature".¹⁹⁵ The ICC Statute succinctly bars judges from engaging "in any activity which is likely to interfere with their judicial

¹⁹⁰ See *infra* section III.D.

¹⁹¹ See IDI Resolution, Art. 4(1) ("International judges should receive remuneration allowing them to perform their functions in the best possible conditions. Such remuneration shall not be reduced during their term of office. Therefore, it should be regularly adapted to the cost of living in the country where the seat of the court or tribunal is located. An appropriate retirement scheme shall be provided for full time judges of international courts or tribunals")

¹⁹² See IDI Resolution, Art. 4(2) ("Judges should be provided with adequate assistance in order to perform their functions satisfactorily"). In addition, it is important that the adjudicatory body itself, rather than the political body electing the court or tribunal members, have control over the appointment and dismissal of staff. See IDI Resolution, Art. 5 ("The independence of courts and tribunals depends not only on the procedures of selection of judges and their status, but also on the way in which the court or tribunal is organized and operates. In this respect, the registries of international courts and tribunals, while enjoying the independence necessary to carry out their tasks, should remain under the ultimate authority of the court or tribunal itself. The international court or tribunal shall have exclusive responsibility to submit proposals to the relevant budgetary authorities, and shall be in a position to defend those proposals directly before such authorities. The latter may not substitute their appreciation to that of the court or tribunal in the management of its staff"). See also Shelton (2003), p. 46.

¹⁹³ Shelton (2003), p. 40.

¹⁹⁴ See generally IDI Report, pp. 22-30.

¹⁹⁵ ICJ Statute, Art. 16.

functions or to affect confidence in their independence”.¹⁹⁶ A general rule of this nature would probably require that more specific guidelines be drawn up.

91. *Privileges and immunities.* Rules on privileges and immunities contained in constitutive instruments and agreements with the State hosting the institution are a further critical guarantee for structural independence.¹⁹⁷ They are designed to ensure that the decision-makers are not inappropriately influenced by concerns for their personal safety and financial security when performing their adjudicatory function.¹⁹⁸

92. *Case assignment rules.* Finally, the method to assign cases to individual members is another factor promoting independence if it is well designed.¹⁹⁹

93. If States choose to engage in the creation of a permanent body for the resolution of investment disputes, they may wish to design the elements just listed in such a manner as to protect structural independence. The concrete articulation of these elements will depend on the specific normative, institutional and political context in which the ITI is established. To the extent that these safeguards are linked to specific aspects of the composition of a prospective ITI, they will be examined in the relevant sections of this report.²⁰⁰

c. Individual independence and impartiality

94. While issues of individual independence are less likely to arise, adjudicators in a permanent setting will need to be independent in respect of a dispute brought before them in the same fashion as in an *ad hoc* system. Therefore, an ITI member may not adjudicate a specific dispute if circumstances exist that give rise to reasonable or justifiable doubts as to his or her impartiality or independence. In that connection, rules on challenges or recusal of members assigned to an individual case will constitute the main bulwark against violations of independence and impartiality. The standard for disqualification based on “justifiable doubts”, which reflects a transnational consensus, could provide an appropriate benchmark in the new setting.²⁰¹ In addition, States may wish to

¹⁹⁶ Rome Statute, Art. 40(2). See also ECHR, Art. 21(3) (“During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; [...]”).

¹⁹⁷ IDI Resolution, Art. 6 (“The main purpose of immunities and privileges is to ensure the independence of judges”); Shelton (2003), p. 41.

¹⁹⁸ Crawford and McIntyre (2011), p. 211.

¹⁹⁹ See *infra* section IV on case assignment.

²⁰⁰ See esp. *infra* sections III.C (procedure for selection of ITI members); III.D (terms and conditions of office); IV (case assignment rules).

²⁰¹ The “justifiable doubts” test is expressly included in the UNCITRAL Rules. See UNCITRAL Rules 1976, Art. 9; UNCITRAL Rules 2010, Art. 11. The ICSID Convention, by contrast, does not refer to this standard, but to the “manifest lack of qualities”,

consider the adoption of more detailed ethical rules than those applicable in the current framework to address any specific concerns.²⁰² In that perspective, some recent IIAs either include a code of conduct for the adjudicators or envisage the adoption of one in the future.²⁰³

95. On the other hand, the transition from an *ad hoc* to a permanent or semi-permanent framework will entail that certain categories of circumstances which give rise to recurrent challenges and criticism in respect of the independence and impartiality of arbitrators in the current system are bound to lose relevance or take on a different shape in the reformed setting. The main ones are addressed in the following paragraphs.

96. *Repeat appointments.* In a prospective ITI, the methods for selecting members will largely alleviate the current concerns about “repeat appointments”²⁰⁴ of one individual by a disputing party or counsel. This observation is subject, however, to two caveats, one about appointments internal to the ITI and one about external appointments. First, disputing parties will entirely lose their power to select the adjudicators only in a permanent ITI. In a semi-permanent model, they will maintain the prerogative of appointing

including independence and impartiality. Nevertheless, some, although not all, ICSID tribunals have applied tests similar to the justifiable doubts standard. See e.g. *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, Decision on the Challenge to the President of the Committee of 3 October 2001, ICSID Case No. ARB/97/3, paras. 20-21. *Urbaser S.A. and others v. Argentine Republic*, Decision on Claimant’s Proposal to Disqualify Professor Campbell McLachlan, Arbitrator of 12 August 2010, ICSID Case No. ARB/07/26, paras. 43-44; *Caratube International Oil Company LLP & Mr. Devincti Salah Hourani v. Republic of Kazakhstan*, Decision on the Proposal for Disqualification of Mr. Bruno Boesch of 20 March 2014, ICSID Case No. ARB/13/13, para. 54. On the application of the (various) disqualification standards by ICSID tribunal, see generally Maria Nicole Cleis (2017), *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions*, Brill Nijhoff, pp. 32-53; Karel Daele (2012), *Challenge and Disqualification of Arbitrators in International Arbitration*, Kluwer Law International, pp. 219-240. The “justifiable doubts” test has also been applied in inter-State arbitration cases. See, e.g., *Chagos Marine Protected Areas Arbitration (Mauritius v. United Kingdom of Great Britain and Northern Ireland)*, Reasoned Decision on Challenge of 30 November 2011, PCA Case No. 2011-03, para. 166 (where the tribunal held that “a party challenging an arbitrator must demonstrate and prove that, applying the standards applicable to inter-State cases, there are justifiable grounds for doubting the independence and impartiality of that arbitrator in a particular case”).

²⁰² See in this respect UNCITRAL (2017), *Possible future work in the field of dispute settlement: Ethics in international arbitration. Note by the Secretariat*, Records of the UNCITRAL, 50th Session, U.N. Doc. A/CN.9/916 (13 April 2017), pp. 1-10, 6-9.

²⁰³ See CETA, Art. 8.30 together with Annex 29-B; EU Vietnam FTA, Art. 14 together with Chapter 13, Annex II.

²⁰⁴ See IBA Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”), 23 October 2014, pp. 18-19, esp. Orange List 3.1.3, 3.1.5. On repeat appointments, see generally Fatima-Zahra Slaoui (2009), *The Rising Issue of ‘Repeat Arbitrators’: A Call for Clarification*, Arbitration International, Vol. 25(1), pp. 103-120.

adjudicators from the roster. Thus, in a roster model concerns over repeat appointments are bound to continue, if not even become more acute due to the limited pool of adjudicators from which disputing parties will be able to choose.

97. Second, regardless of whether States would opt for a permanent or semi-permanent ITI, a concern remains about “external” repeat appointments if ITI members were allowed to sit in commercial and investment arbitrations during their tenure. Provisions on incompatibilities will determine the scope of permissible external activities. Rules and practices vary across international courts and tribunals.²⁰⁵ For instance, ICJ judges have been allowed to sit in both inter-State and investor-State tribunals,²⁰⁶ while ICC judges are bound to stricter incompatibility rules.²⁰⁷ In a prospective ITI, the treatment is once again likely to be different in a permanent as opposed to a semi-permanent constellation. In the former, stricter rules on incompatibilities would appear desirable, while in the latter, room would have to be made for the adjudicators’ external activities, as a member of the roster would have no assurance of ever being appointed to a panel.

98. *Issue conflicts.* A further category of circumstances potentially affecting the adjudicators’ individual independence and impartiality are so-called “issue conflicts”. An issue conflict refers to the situation of “alleged predisposition or prejudgment involv[ing] an arbitrator’s purported adherence to his or her pre-existing views on legal and factual questions, developed through experience as an arbitrator, as counsel, writing scholarly articles, and giving interviews or other public expressions of views”.²⁰⁸ There are essentially three main types of alleged pre-disposition within issue conflicts: (i) the so-called “double hat” situation, i.e. the adjudicator’s prior or concurrent service as counsel or expert in other proceedings involving the same or similar legal issues as those which may arise

²⁰⁵ See generally Shimon Shetreet (2003), *Standards of Conduct of International Judges: Outside Activities*, The Law and Practice of International Courts and Tribunals, Vol. 2, pp. 127-161; See IDI Report, pp. 22-30.

²⁰⁶ See IDI Report, pp. 24-26; Philippe Couvreur (2012), *Article 16*, in Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, and Christian J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary, 2nd Edition*, Oxford University Press, pp. 991-1004.

²⁰⁷ See Rome Statute, Art. 40(3) (“Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature”).

²⁰⁸ ASIL-ICCA (2016), *Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration* (“ASIL-ICCA Report 2016”), ICCA Reports No. 3 (17 March 2016), para. 2 (“Arbitral institutions face a growing number of challenges to disqualify arbitrators on the ground of ‘issue conflict,’ an allegation that an arbitrator is biased towards a particular view of certain issues or has already prejudged them. The alleged predisposition or prejudgment involves an arbitrator’s purported adherence to his or her pre-existing views on legal and factual questions, developed through experience as an arbitrator, as counsel, writing scholarly articles, and giving interviews or other public expressions of views”).

in the dispute at stake; (ii) the adjudicator having rendered a prior decision on the same or similar legal issues; and (iii) the adjudicator having published scholarly or professional writings dealing with the same or similar issues. What scope will there be for these three categories in a prospective ITI?

99. (i) *Prior or current service as counsel or expert.* Concerns are sometimes voiced about inappropriate predispositions on issues relevant in a specific case, which are alleged to result from an arbitrator's service as counsel or expert, either at an earlier time or concurrently with the appointment at issue.²⁰⁹ Different constellations may arise depending on whether the ITI is permanent or semi-permanent and whether the potentially conflicting service is performed within or outside the ITI. It seems evident that within a permanent ITI, adjudicators could not at the same time be counsel or expert.²¹⁰ The same appears desirable in a semi-permanent roster system, meaning that individuals listed on the roster may not act as counsel or expert before an ITI panel composed of other members of the roster. What about ITI members acting as counsel or experts in investor-State disputes subject to dispute settlement mechanisms other than the ITI? States will have to consider how strict incompatibility rules should be, whereby a distinction should probably be drawn between adjudicators in a permanent as opposed to a semi-permanent ITI. With proper incompatibility rules in place, concerns about double hatting are bound to diminish, if not disappear.

100. (ii) *Decision on the same or similar legal issue.* The alleged risk here is that an adjudicator will not approach a legal issue arising in the dispute concerned with an open mind because he or she has already ruled on that issue in another case.²¹¹ Like in the present system, the resolution of the disputes before the ITI will inevitably hinge on recurrent issues. Even if the wording of the treaties may vary, there are a number of principled issues that arise again and again, for instance the definition of investment, the scope of the MFN clause, the meaning of the umbrella clause, the content of fair and equitable treatment, the interpretation of essential security interests and necessity, to name just these. In the current system, the fact that an arbitrator has previously ruled on certain issues is generally not considered to affect his or her impartiality.²¹² If prior decisions are nevertheless sometimes perceived as a conflict, it is primarily linked to disputing party-appointment. The perception of a conflict and predisposition arises because a party selects an arbitrator based on these prior decisions. With the shift from investment arbitration to the ITI, concerns about this

²⁰⁹ See ASIL-ICCA (2016), paras. 125-133; Malcolm Langford, Daniel Behn, Runar Hilleren Lie (2017), *The Revolving Door in International Investment Arbitration*, Journal of International Economic Law, Vol. 20, pp. 301–331.

²¹⁰ For example, before another chamber of the ITI.

²¹¹ See ASIL-ICCA (2016), paras. 143-150.

²¹² See ASIL-ICCA (2016), paras. 143-150.

type of issue conflict, to the extent they are justified at all, should vanish.²¹³ Moreover, consistency and coherence under the same IIA and across different treaties with the same or similar language is precisely one of the goals pursued through the institution of a standing body.²¹⁴ With time, one would expect a *jurisprudence constante* or precedents to emerge,²¹⁵ meaning that adjudicators will indeed follow earlier decisions (which does not mean that they would be barred from overruling the holding of prior cases). Finally, concerns about issue conflicts could also arise in connection with future decisions that an adjudicator may be called to render in dispute settlement fora other than the ITI. A similar risk would be particularly acute in an AM reform option where the prospect of an AM member ruling on the same legal issue at both first-tier (arbitration) and second-tier (appeal) levels would need to be avoided.

101. (iii) *Scholarly writings*. In theory, concerns could also be voiced about predispositions of an ITI member resulting from his or her scholarly writings and other expressions of opinion.²¹⁶ In practice, however, the ITI environment seems much less conducive to this type of possible conflict than the present system. First of all, like for prior decisions, scholarly opinions unrelated to the case at issue are generally not considered to affect an arbitrator's impartiality.²¹⁷ In spite of this, some regard such opinions as a threat to impartiality, again because the alleged predisposition may guide the party's choice of the arbitrator. By contrast, in a permanent ITI, given the restrictions placed on the disputing parties' power to select the adjudicators, the situation of an "issue-conflicted" adjudicator is less likely to occur and will in any event cause less concerns as it will not result from a

²¹³ Subject to the exception of the semi-permanent roster scenario.

²¹⁴ See CIDS Report, paras. 69-74. Thus, the warning by the ICSID Chairman of the Administrative Council in *Universal Compression International Holdings, S.L.U. v. Venezuela*, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators of 20 May 2011, ICSID Case No. ARB/10/9, paras. 83–84, that "the international investment arbitration framework would cease to be viable if an arbitrator was disqualified simply for having faced similar factual or legal issues in other arbitrations" will resound with even more force in the reformed setting.

²¹⁵ This is to be expected as a matter of practice even if there is no strict rule of *stare decisis*. On precedent in international arbitration, see, among others, Gabrielle Kaufmann-Kohler (2007), *Arbitral Precedent: Dream, Necessity or Excuse?*, *The 2006 Freshfields Lecture*, Arbitration International, Vol. 23(3), pp. 357–378; Jan Paulsson (2010), *The Role of Precedent in Investment Arbitration*, in Katia Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues*, Oxford University Press, pp. 699-718; Giorgio Sacerdoti (2011), *Precedent in the Settlement of International Economic Disputes: The WTO and Investment Arbitration Models*, in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2010)*, pp. 225-246.

²¹⁶ See ASIL-ICCA (2016), paras. 108-124.

²¹⁷ IBA Guidelines, Art. 4.1.1 Green List ("The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case)")

deliberate choice by a disputing party (subject to the limited exception of a semi-permanent roster).

102. Furthermore, it should not be overlooked that any concerns over preconceived views will have to be balanced against the need to fulfil the selection requirements centered on competence described above.²¹⁸ In other words, an ITI member should not be recused due to qualifications that play “an integral role in satisfying the eligibility requirements” to sit on the ITI,²¹⁹ which qualifications may precisely derive *inter alia* from previous publications on the very subject matter of the ITI’s mission. As rightly put by the Appeals Chamber of the ICTY, “[t]he possession of [experience in an area of international law relevant for the Court’s subject matter jurisdiction] is a statutory requirement for Judges to be elected to this Tribunal. It would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias”.²²⁰

103. Contrary to the categories of alleged conflicts of interest just referred to, those revolving around other types of relationships between an ITI member and a disputing party, counsel, or the dispute would not be substantively impacted by a possible reform. As a result, the same facts and circumstances will continue to raise doubts and potentially disqualify an adjudicator as presently. This is for example the case of situations in which an ITI member (i) is “judge in his or her own cause”,²²¹ (ii) has a financial or personal interest in the dispute or in one of the disputing parties,²²² (iii) had a prior involvement in the dispute,²²³ (iv) had (nontrivial) business dealings with a disputing party,²²⁴ (v) has a personal or

²¹⁸ See *supra* section III.B.2.

²¹⁹ *Prosecutor v. Furundzija*, ICTY Appeals Chamber, Judgment of 21 July 2000, Case No. IT-95-17/I-A, para. 205.

²²⁰ *Id.*

²²¹ See, e.g., IBA Guidelines, Explanation to General Standard 2(d); Art. 1.1 Non-Waivable Red List (“There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.”); Art. 2.3 (Waivable Red List) which provides various instances where the nature of an arbitrator’s relationship with the parties or counsel could raise a conflict of interest.

²²² IBA Guidelines, Explanation to General Standard 2(d); Art. 1.3 Non-Waivable Red List (“The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case”).

²²³ IBA Guidelines, Art. 2.1 (Waivable Red List).

²²⁴ IBA Guidelines, Art. 1.3 Non-Waivable Red List (“The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case”); Art. 2.3.4 Waivable Red List (“The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence in an affiliate of one of the parties, if the affiliate is directly involved in the matters in dispute in the arbitration”); Art. 2.3.6 Waivable Red List (“The arbitrator’s law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties”); Art. 3.5.4 Orange List (“The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on

family relationship with a disputing party or its counsel;²²⁵ and (vi) has shown bias vis-à-vis a disputing party or the dispute prior to or during the proceedings in such a manner that he or she cannot be expected to keep an open mind and render an impartial judgment.²²⁶

104. Finally, as already mentioned, the main bulwark to safeguard individual independence and impartiality is the provision for the disputing party's power to request a disqualification of an adjudicator.²²⁷ In this connection, one question in the ITI institutional design is who is to decide upon a challenge of an ITI member. One option would be to leave the decision to the ITI (whether sitting in its full composition or a special chamber). However, entrusting the unchallenged ITI members with the power to disqualify one of their colleagues may place them in an uneasy position, which may affect their own impartiality. The similar procedure existing within the ICSID framework has often been criticized for this reason,²²⁸ and the criticism may be even more pertinent in a situation of permanent collegiality. An alternative may be to confer the power to decide on disqualification to an external authority, for instance the PCA Secretary-General,²²⁹ the ICSID Secretary-General,²³⁰ or the ICJ President.²³¹

an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration”).

²²⁵ See IBA Guidelines, Arts. 2.2.2, 2.2.3, 2.3.8, 2.3.9 (Waivable Red List); Arts. 3.3.6, 3.4.3 (Orange List).

²²⁶ See e.g. Born (2014), pp. 1879-1880; Kaufmann-Kohler and Rigozzi (2015), pp. 196-197.

²²⁷ See *supra* para. 94.

²²⁸ See e.g. Lars Markert (2010), *Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines*, Contemporary Asia Arbitration Journal, Vol. 3(2), pp. 237-282, 248-49; Loretta Malintoppi (2012), *Independence, Impartiality, and Duty of Disclosure of Arbitrators*, in Peter Muchlinski, Federico Ortino, Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law*, p. 828.

²²⁹ The UNCITRAL Rules provide that, absent contrary agreement, the Secretary-General of the PCA may designate an appointing authority to rule on challenges. See, e.g., UNCITRAL Rules 1976, Art. 6(2) (“[...] If no appointing authority has been agreed upon by the parties, [...], either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority”); UNCITRAL Rules 2010, Art. 6(2) (“If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority”); Art. 6(4) (“[...] [I]f the appointing authority refuses to act, [...] or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Secretary General of the PCA to designate a substitute appointing authority”).

²³⁰ Some IIAs designate the Secretary-General as appointing authority for arbitrations that are outside the ICSID Convention and the ICSID Additional Facility and are governed by the UNCITRAL Rules. See, e.g., North American Free Trade Agreement (“NAFTA”), 17 December 1992, 32 ILM 289, 605 (1993), Art. 1124.

d. Accountability

105. In this context, it may be worthwhile to mention the relationship between independence and accountability. Critics of the current system point to its lack of accountability, a complaint which was addressed in the CIDS Report.²³² Although accountability is conceptually in conflict with independence, it is a “necessary counterpoint to judicial independence”.²³³ In other terms, accountability is intended to constrain any excesses of independence. Ultimately, it is meant to ensure that the dispute resolution process and the authority resolving the dispute are perceived as legitimate.²³⁴ The shift from an *ad hoc* setting to a permanent institution is likely to improve the accountability of the system. This consequence would mainly be due to the changed method of selection of the adjudicators, to the permanence of their appointment, and to their incorporation into an institution. Accountability may further be enhanced by the transparency of the selection procedure. In addition to the possibility to disqualify adjudicators lacking independence and impartiality,²³⁵ the provision for disciplinary power over adjudicators and related sanctions may also increase the accountability of the adjudicatory body.

C. HOW OR THE PROCEDURE FOR SELECTION

1. A multi-layered, open, and transparent selection process

106. This section reviews the procedures for selecting judges and members in international courts and tribunals. We use the term “selection” to describe the combination of phases and activities that are necessary for an individual to become a judge or member of a given adjudicative body. In existing courts and tribunals the process for selection is normally comprised of several distinct phases.²³⁶ Not all of them, however, are present in the selection mechanisms of each court and tribunal, as States have developed different models depending on the specific context and circumstances in which a court was created and has

²³¹ CETA, Arts. 8.30.2, 8.30.3 provide for instance that any challenge to the members of the tribunal shall be resolved by the President of the ICJ.

²³² CIDS Report, paras. 20-21.

²³³ Crawford and McIntyre (2011), p. 199.

²³⁴ See Gabrielle Kaufmann-Kohler (2016), *Accountability in International Investment Arbitration, Charles N. Brower Lecture*, Proceedings of the American Society of International Law Annual Meeting 2016, Erin Lovall ed., forthcoming 2017; initial version published in *Cahiers de l'arbitrage* 2016, pp. 581-589.

²³⁵ See *supra* para. 104.

²³⁶ See also the flow chart *supra* para. 17, showing the main phases of the selection process.

evolved.²³⁷ Courts established in recent decades, such as the ICC or the Caribbean Court, as well as those whose selection procedures have undergone significant modifications, such as the CJEU and the ECtHR, provide interesting examples that may be relevant for a prospective ITI.

107. Before we turn to the analysis of each of the main phases that lead an individual to be selected to an international adjudicative institution, a few observations on the objectives and characteristics of the process are in order. As was already noted,²³⁸ the method for selecting judges is regarded as crucial from the perspective of structural independence at both the national and the international level.²³⁹ In this context, independence will have to be guaranteed mostly (though not only)²⁴⁰ by and vis-à-vis the treaty parties, i.e. the contracting States to the ITI Statute,²⁴¹ since States will be in control of the selection process as a result of the shift from an *ad hoc* to a permanent dispute resolution framework.²⁴² The guarantees for judicial independence in existing courts provide helpful starting points in this respect. However, they may not be sufficient or at least not entirely transposable as such to investor-State dispute settlement, in which the asymmetric nature is such that only one type of the future disputing parties controls the selection process.²⁴³ Designing an appropriate selection process that, *inter alia*, ensures the requisite independence of the adjudicators thus appears to be of even greater concern in a setting of this kind.

108. As the practice at existing permanent international courts and tribunals shows, the involvement of States (and, within the State apparatus, in particular of State governments)²⁴⁴ may lead to risks of politicization of the selection

²³⁷ Mackenzie, Malleson, Martin, Sands (2010), p. 7.

²³⁸ See *supra* section III.B.4.b.

²³⁹ See, in the context of international courts and tribunals, Mackenzie, Malleson, Martin, Sands (2010), pp. 144-152; Mahoney (2008), pp. 324-330; Daniel Terris, Cesare P. Romano, Leigh Swigart (2007), *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*, Oxford University Press, pp. 154-155; Jutta Limbach, Pedro Cruz Villalón, Roger Errera, Lord Lester of Herne Hill Q.C., Tamara Morschtschakowa, Lord Justice Sedley, Andrzej Zoll (2003), *Judicial Independence: Law and Practice of Appointment to the European Court of Human Rights*, Interights Report, May 2003, p. 5 available at <http://www.corteidh.or.cr/tablas/32795.pdf>.

²⁴⁰ See *supra* section III.B.4.b.

²⁴¹ For simplicity, we refer to treaty parties as States, although it is noted that treaty parties may also include organizations of States (e.g., the European Union).

²⁴² See *supra* para. 14.

²⁴³ As already noted *supra* at fn. 28, the future ITI or AM is likely to be primarily concerned with investor-State disputes, although it can also be envisaged that it may adjudicate State-to-State disputes under IIAs. See CIDS Report, paras. 177-183.

²⁴⁴ See Torres Pérez (2015), pp. 189-190.

process.²⁴⁵ This is true in both full representation and selective representation courts, although politics may come into play in different ways and at different levels in the two models.²⁴⁶ Appointment on the basis of political considerations rather than competence and merit may undermine the quality of the decisions and, ultimately, the perception of the adjudicatory body's independence, credibility and legitimacy.²⁴⁷

109. It is true that, as noted by several authors, some degree of politics in the selection process is unavoidable,²⁴⁸ if only because the final appointment or election will likely be made by an organ of State representatives (such as an Assembly of State Parties), which is political by definition.²⁴⁹ While a completely de-politicized selection process may thus not be conceivable,²⁵⁰ the process should provide incentives for States to appoint the most suitable candidates in terms of merit and impose checks and balances on the States' choices.²⁵¹ A

²⁴⁵ See, among the extensive literature on this issue, Mackenzie, Malleson, Martin, Sands (2010), esp. pp. 63-99 (describing the nomination process), pp. 100-136 (discussing campaigning, political bargaining and vote-trading in the election process), and pp. 144-152 (discussing independence and non-politicization); Davis R. Robinson (2003), *The Role of Politics in the Election and the Work of Judges of the International Court of Justice*, ASIL Proc. Vol. 97, pp. 277–282; Edward McWhinney (1986), *Law, Politics and "Regionalism" in the Nomination and Election of World Court Judges*, Syracuse Journal of International Law & Commerce, Vol. 13, pp. 1-28. For a candid account of his own election as ICJ judge and the possible role of politics in the process, see Kenneth J. Keith (2017), *Challenges to the Independence of the International Judiciary: Reflections on the International Court of Justice*, Leiden Journal of International Law, Vol. 30, pp. 137–154, esp. at 146-47.

²⁴⁶ As explained by Torres Pérez, in selective representation courts and tribunals, politicization occurs at the international level, as "State governments will seek the support of other member states for election of the candidate in question" and "campaigning and vote-trading are central to candidates' success" (see Torres Pérez (2015), p. 190, with further references). By contrast, in full representation courts "state governments do not need to engage in campaigning and vote-trading, since each state may appoint a judge. This leaves, however, no incentives for states to vet or second-guess candidates from other member states, or to seek support for their own candidates. The selection process is thus less constrained by the need to gain the support of others, and governments enjoy wider discretion. The politics of selection are mainly relegated to the national level" (*Ibid.*, p. 190, internal footnotes omitted).

²⁴⁷ See Torres Pérez (2015), p. 190.

²⁴⁸ As noted for instance by Abi-Saab, "[w]hat counts is not to eliminate politics from elections, which is a contradiction in terms, but to improve and widen the range of nominations so that political choice can be exercised from among a sufficient number of highly qualified candidates". Abi-Saab (1997), p. 184.

²⁴⁹ See *infra* section III.C.5.

²⁵⁰ According to some, it is not even desirable, see for instance, R. Daniel Kelemen (2015), *Selection, Appointment, and Legitimacy. A Political Perspective*, in Michal Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedure to the European Court*, Oxford University Press, pp. 245-259.

²⁵¹ See in particular Torres Pérez (2015), p. 185.

process that guarantees selection on the basis of expertise and integrity, rather than of mere political considerations, will best ensure that elected judges will serve “in their individual capacity”,²⁵² and not as representatives of a given country or of certain views and interests.²⁵³

110. To be clear, this is not to say that an individual’s prior connection with a treaty party (even if political in nature) would deprive him or her of the possibility of becoming a member of an adjudicatory body.²⁵⁴ Diplomats or other individuals formerly²⁵⁵ holding governmental functions are often elected to international courts and tribunals,²⁵⁶ in the same way that they sometimes serve on investor-State arbitral tribunals.²⁵⁷ The point made here is that the selection must ensure

²⁵² See, e.g., ECHR, Art. 21(2) (“The judges shall sit on the Court in their individual capacity”); ACHR, Art. 52(1) (“The Court shall consist of seven judges, [...] elected in an individual capacity”).

²⁵³ As explained *supra* in section III.B.3 on diversity, nationality bias is not the only concern in investment disputes. Other concerns include for instance “ideological” biases (including “pro-State” or “pro-investor”, and development status).

²⁵⁴ The WTO DSU provides that AB members “shall be unaffiliated with any government” (see Art. 17(3)). This criterion is understood to apply during the term and not during the selection process, as is shown by the background of several AB members, who have included former ministers and numerous former WTO ambassadors. See Arthur E. Appleton (2016), *Judging the Judges or Judging the Members? Pathways and Pitfalls in the Appellate Body Appointment Process*, in L. Choukroune (ed.), *Judging the State in International Trade and Investment Law*, Springer, pp. 11-32, 14 et seq.

²⁵⁵ For a case involving a judge holding at the same time a political office, see *Prosecutor v. Delalić* (“Čelebici case”), in which the ICTY Appeals Chamber rejected the appellants’ request to overturn the Trial Judgment on the ground that Judge Odio Benito should have been disqualified because, following her appointment as Vice-President of Costa Rica, she did not possess the necessary judicial independence required by international law. *Prosecutor v. Zejnil Delalić and others*, ICTY Appeals Chamber, Judgment of 20 February 2001, No. IT-96-21-A, paras. 651-693.

²⁵⁶ See Mackenzie, Malleson, Martin, Sands (2010), pp. 57-60; Aznar-Gómez (2012), pp. 245-247; Eric Voeten (2009), *The Politics of International Judicial Appointments*, Chicago Journal of International Law, Vol. 9(2), pp. 387-405, 390 (with reference to the ECtHR and international criminal tribunals). For the WTO AB, see Manfred Elsig, Mark A. Pollack (2014), *Agents, trustees, and international courts: The politics of judicial appointment at the World Trade Organization*, European Journal of International Relations, Vol. 20(2), pp. 391–415 (noting the increasing politicization of the appointment process of WTO AB members over time); Appleton (2016), pp. 11-32 (providing the backgrounds for AB members until 2016, and arguing that appointment of former ambassadors as opposed to individuals with stronger legal experience is a “worrying trend” and may also reflect the progressive politicization of the selection process).

²⁵⁷ See generally Kovacs and Fawke (2015), pp. 20-22 (analyzing professional backgrounds of arbitrators sitting in investment disputes and finding that the majority of them have had careers spanning some combination of commercial law firms, academia, government, and the judiciary); Joost Pauwelyn (2015), *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus*, American Journal of International Law, Vol. 109, pp. 761-805, 772-774 (comparing professional backgrounds of ICSID arbitrators and finding that, compared to WTO panelists, ICSID arbitrators with a government background are fewer).

that, like any other candidate for the position, these individuals will be selected for no other consideration than their personal qualities and qualifications.²⁵⁸

111. The objectives of the process being circumscribed, the next task is to identify the characteristics of a selection process for ITI members designed to achieve these objectives. On the basis of recent experiences with international courts and tribunals, the authors submit that these objectives are more likely to be fulfilled if the selection process is (i) multi-layered; (ii) open to stakeholders; and (iii) transparent.

112. First, the selection of the “best” candidates is more likely to be ensured by a *multi-layered* process, where a number of phases constrain the potentially wide discretion which States enjoy in selecting the adjudicators. Indeed, individual criteria established by the constitutive instruments, such as “high moral character” or eligibility to a high judicial office,²⁵⁹ leave broad discretion in the choice of the candidates. Procedures that provide checks and balances make certain that such discretion is not misused. For instance, in a number of courts and tribunals, an expert advisory panel has been created to screen the qualifications of candidates put forward by the treaty parties.²⁶⁰ The presence of such a screening panel creates an incentive for States to propose and ultimately elect the most qualified candidates.

113. Second, the process should be *open* to the consideration of views of multiple stakeholders. One step in the process should thus make sure that the views of stakeholders other than States are heard in respect of the selection of candidates.²⁶¹

114. In the perspective of an open process, one could also consider the consultation of national parliaments of State parties to the ITI Statute.²⁶² National parliaments in themselves express the various constituencies and sensitivities in

²⁵⁸ See The Burgh House Principles, Principle 2.3 (“Procedures for the nomination, election and appointment of judges should be transparent and provide appropriate safeguards against nominations, elections and appointments *motivated by improper considerations*”, emphasis added). In respect of domestic judiciaries, see U.N. Basic Principles, Principle 10 (“Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments *for improper motives*. [...]”, emphasis added).

²⁵⁹ See *supra* paras. 35-36.

²⁶⁰ See *infra* section III.C.4.

²⁶¹ See *infra* section III.C.3 and esp. paras. 133-134.

²⁶² Within the ECtHR framework, for instance, the Committee of Ministers recommends that States consult their national parliaments when drawing up the lists of nominees. See PACE (1999a), *National Procedures for nominating candidates for election to the European Court of Human Rights*, 24 September 1999, Recommendation 1429 (1999), para. 7.

a society. Going one step further, one could entrust the election or appointment to a supra-national body, e.g. an assembly of State Parties, whose representatives are chosen not by State governments but by the national parliaments.²⁶³ Involving national parliaments in the selection would reinforce the democratic element in the process and is likely to make the selection process more deliberative, participative, and transparent.

115. Third, the process should be *transparent*. Subjecting procedures to scrutiny from the public is likely to reduce the selection of candidates based on improper motives.²⁶⁴ It can also serve the purpose of widening the potential pool of candidates²⁶⁵ and, like the consultations referred to above, is ultimately key to improving the legitimacy of the institution. Recent reforms in other frameworks²⁶⁶ show that several means can increase transparency in the selection process, including the advertisement of openings;²⁶⁷ consultation with stakeholders;²⁶⁸ publication of CVs of candidates (preferably in a standard form so as to allow easier comparability of their qualifications);²⁶⁹ and public hearings of candidates.²⁷⁰ Debates in national parliaments, which were addressed in the preceding paragraph, also can give visibility to the process.

²⁶³ The most important instance of involvement of national parliaments at the election phase occurs in the context of the selection of ECtHR judges, who are appointed by the PACE, composed of national parliamentarians from the 47 member State of the Council of Europe.

²⁶⁴ See Torres Pérez (2015), p. 196; Mackenzie, Malleson, Martin, Sands (2010), p. 138.

²⁶⁵ Provided transparency is linked to a call for candidacies, see *infra* section III.C.2. See also Mackenzie, Malleson, Martin, Sands (2010), p. 138.

²⁶⁶ Reforms carried out over the last 10-15 years in the context of the Council of Europe and the ECtHR have greatly enhanced transparency in the selection process. See in particular PACE (2009), *Nomination of candidates and election of judges to the European Court of Human Rights*, 27 January 2009, Resolution 1646 (2009), esp. para. 4; Council of Europe (2012a), *Guidelines of the Committee of Ministers on the Selection of Candidates for the post of Judge at the European Court of Human Rights*, Committee of Ministers, 29 March 2012, CM (2012) 40-final, as amended by Council of Europe (2012b), *Guidelines of the Committee of Ministers on the Selection of Candidates for the post of Judge at the European Court of Human Rights*, Committee of Ministers, 29 March 2012, CM(2012)40-add.

²⁶⁷ See *infra* section III.C.2.

²⁶⁸ See *infra* section III.C.3.

²⁶⁹ As is required now at the ICC (see ICC (2013a), *Report of the Advisory Committee on Nominations of Judges on the work of its second meeting*, Assembly of States Parties, 12th Session, ICC-ASP/12/47 (29 October 2013), Annex III); and at the ECtHR (see PACE (1996), *Procedure for examining candidatures for the election of judges to the European Court of Human Rights*, 22 April 1996, Resolution 1082 (1996), para. 4 and Appendix).

²⁷⁰ Other than *in camera* hearings before certain political bodies (such as Committee on the Election of Judges to the ECtHR) or advisory panels (on which see *infra* III.C.4), there

116. With those considerations in mind, the next sections provide further details of each phase in the selection process.

2. Candidacy or nomination

117. The selection of adjudicators may start with a “nomination” or “candidacy”. With these terms we refer to the step or phase by which an individual’s name is formally put forward in the selection process. Once “nominated”, the individual officially becomes a candidate in the process which may (or may not) lead to his or her election.

118. This phase is not present in the selection procedures of all courts and tribunals. Thus, in certain courts and tribunals, members are appointed directly by the treaty parties, either unilaterally²⁷¹ or through a joint committee,²⁷² without any prior formal nomination process. In arbitral institutions which have a roster or list of adjudicators, members are normally directly designated or appointed to those rosters by States or other entities without any nomination or other pre-appointment phases.²⁷³ By contrast, a nomination phase does exist in other courts and tribunals, such as the ECtHR, ICJ, or ITLOS.

appear to be no examples of public hearings of candidates to international adjudicatory bodies.

²⁷¹ See e.g. Claims Settlement Declaration, Art. III (1) (whereby the contracting parties each appoint directly one third of the tribunal’s members).

²⁷² See e.g. CETA, Art. 8.27.2 (“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.”); EU-Vietnam FTA, Art. 12(2) (“[T]he Trade Committee shall, upon the entry into force of this Agreement, appoint nine Members of the Tribunal [established pursuant to Art. 12.1]. Three of the Members shall be nationals of a Member State of the European Union, three shall be nationals of Vietnam and three shall be nationals of third countries”).

²⁷³ For example, with regard to the Panel of Arbitrators and Conciliators that is maintained by ICSID, each Contracting State unilaterally appoints four persons to each Panel, and the ICSID Chairman designates 10 persons to each Panel. See ICSID Convention, Art. 13. In similar fashion, each member State of the PCA is entitled to elect four persons, who “are inscribed, as Members of the Court, in a list” maintained by the International Bureau of the PCA. The persons on such list in turn form a panel of potential arbitrators (1907 Hague Convention, Art. 44). In CAS, arbitrators are appointed to the list by the International Council of Arbitration for Sport, on the basis of names “brought to [its] attention” by a number of other entities. See CAS Code, Art. S14 (“The ICAS [International Council of Arbitration for Sport] shall appoint personalities to the list of CAS arbitrators with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC [International Olympic Committee], the IFs [International Federations], the NOCs [National Olympic Committees] and by the athletes’ commissions of the IOC, IFs and NOCs).

119. If States were to consider a nomination phase, they would have to resolve the following main questions: (i) Who nominates?; (ii) Must the nomination phase provide for a mandatory consultation phase?; (iii) Is the nomination subject to some form of screening or vetting by an external supranational body? This section reviews the first question, while the other two are dealt with in sections III.C.3 and III.C.4 respectively.

120. Who is to put forward a candidacy or nomination? Based on the rules and practices in existing courts and tribunals, three main options may be discerned.

121. The first option is that each treaty party puts forward one or more nominees. Under the ITLOS Statute, for instance,

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.²⁷⁴

Nominations are also put forward by treaty parties for the election of judges at the CJEU,²⁷⁵ the ECtHR,²⁷⁶ the African Court,²⁷⁷ and the Arab Investment Court.²⁷⁸

122. As a second option, nominations may be placed in the hands of a different entity. This is notably the case for the selection of ICJ judges, where the PCA national groups, i.e. the groups of four persons designated by their respective governments pursuant to the 1907 Hague Convention, may advance up to four nominees, not more than two of whom shall be of the group's own nationality.²⁷⁹ In the institutional design of the ICJ Statute, nominations were placed "at one

²⁷⁴ ITLOS Statute, Art. 4(1).

²⁷⁵ TFEU, Arts. 253-255.

²⁷⁶ ECHR, Art. 22 ("The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party").

²⁷⁷ Protocol on the African Court, Art. 12(1) ("States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State").

²⁷⁸ Unified Agreement for the Investment of Arab Capital in the Arab States ("Unified Agreement"), 26 November 1980, League of Arab States Economic Documents No. 3, Art. 28(2) ("The Court shall be composed of at least five judges and several reserve members, each having a different Arab nationality, who shall be chosen by the Council from a list of Arab legal specialists drawn up specifically for such purpose, two of whom are to be nominated by each State Party from amongst those having the academic and moral qualifications to assume high-ranking legal positions. The Council shall appoint the chairman of the Court from amongst the members of the Court.").

²⁷⁹ See ICJ Statute, Art. 4(1). The membership of national groups is published in the annual reports of the PCA. See Permanent Court of Arbitration, *Annual Report 2016*, Annex 1 pp. 79-81 available at <https://pca-cpa.org/wp-content/uploads/sites/175/2017/03/ONLINE-PCA-Annual-Report-2016-28.02.2017.pdf>.

remove” from governments with a view to enhancing the professional caliber and independence of the judges of the Court.²⁸⁰

123. The nomination process under both of these models has been subject to considerable discussions. Criticism has in particular focused on the un-evenness and lack of uniformity of the processes at the national levels; the lack of transparency as to how candidates are identified and put forward; and the politicization of the nominations.²⁸¹ With particular regard to the procedures within the PCA national groups tasked with nominating candidates for ICJ judges, it has been highlighted that procedures vary considerably across national groups (from formalized to *ad hoc*) and that each State follows its own preferences.²⁸² In addition, there is no requirement that national groups be independent from their governments. According to some, the national groups are in fact “extensions of their governments” and generally “follow the directions of their political masters”.²⁸³ Nevertheless, some States, such as the U.K., Germany, France, and the U.S., have implemented more formalized, open, and transparent procedures for the nomination of candidates.²⁸⁴ In particular, some of these States have issued open calls for candidacies for the selection of their nominees to international courts and tribunals.²⁸⁵ Within the ECtHR system, the PACE, who elects judges to the ECtHR, has imposed a requirement that States “issue public and open calls for candidatures” when selecting and nominating candidates,²⁸⁶ and the Committee of Ministers has enacted specific guidelines in this respect.²⁸⁷

²⁸⁰ Abi-Saab (1997), pp. 175-176, 180-181; Lori F. Damrosch (1997), *Commentary*, in Connie Peck, Roy S. Lee (eds.), *Increasing the Effectiveness of the International Court of Justice*, Martinus Nijhoff, pp. 188-200; Lori F. Damrosch (2000), *The Election of Thomas Buergenthal to the International Court of Justice*, *American Journal of International Law*, Vol. 94, pp. 579-582, at 579.

²⁸¹ See esp. Mackenzie, Malleson, Martin, Sands (2010), pp. 63-99, and the literature cited above in fn. 245.

²⁸² See Mackenzie, Malleson, Martin, Sands (2010), pp. 84-95.

²⁸³ Robinson (2003), p. 279.

²⁸⁴ See e.g. in respect of the U.K. practice, Michael Wood (2007), *The Selection of Candidates for International Judicial Office: Recent Practice*, in Tafsir M. Ndiaye, Rüdiger Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Brill Nijhoff, pp. 357-368, esp. 366-368; IDI Report, para. 24, in respect of the U.K., Germany, and France.

²⁸⁵ See, e.g., for the UK, Michael Wood (2007), pp. 366-368; and, in respect of the U.K., Germany, and France, IDI Report, para. 24.

²⁸⁶ PACE (2009), para. 4.1 (“states should, when selecting and subsequently nominating candidates to the Court, [...] issue public and open calls for candidatures”).

²⁸⁷ See Council of Europe (2012a) (requiring, among other things that “[t]he call for applications should be made widely available to the public, in such a manner that it could reasonably be expected to come to the attention of all or most of the potentially suitable candidates”, that “States should, if necessary, consider taking additional appropriate measures in order to ensure that a sufficient number of good applicants present

Under the ICC framework, States are also expected to issue a statement on how the selected nominees meet the required criteria for office.²⁸⁸ These procedures seek to make nominations by States or national groups less secretive and open to a wider pool of candidates.

124. Going one step further, a third, more radical possibility would be to allow any interested individual with the necessary qualification requirements to put forward his or her own candidature. The nominating phase in the hands of treaty parties or other entities would thus be eliminated. Under this option, a self-candidature by the interested individual, to follow an open call for candidatures, would be sufficient for the individual to become a “nominee” or “candidate” and proceed to the next step, i.e. screening (see *infra* section III.C.4) or appointment/election (*infra* section III.C.5). One example can be seen at the Caribbean Court. When the first batch of judges was elected, the Regional Judicial and Legal Services Commission (“RJLSC”), tasked with appointing the judges, proceeded to examine the candidatures received directly through an open call for candidates.²⁸⁹ At the European Union Civil Service Tribunal (which has now ceased to exist), a screening committee used to review the candidatures received through an open call, and the Council of the European Union appointed the judges by picking from the candidates that had passed the screening of the advisory panel.²⁹⁰ A screening and filtering phase by a body different from the one making the final appointment would seem indispensable if the selection process is to allow self-candidatures.

themselves to allow the selection body to propose a satisfactory list of candidates”, and that “[a] reasonable period of time should be given for the submission of applications”.

²⁸⁸ See ICC (2004), para. 6; Rome Statute, Art. 36(4)(a), *in fine* (“Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements” of the Rome Statute).

²⁸⁹ Kate Malleson (2009), *Promoting Judicial Independence in the International Courts: Lessons from the Caribbean*, International and Comparative Law Quarterly, Vol. 58, pp. 671-687, 681 (noting that “[i]n the application round used to appoint the first cohort of judges, the RJLSC sent out an open call for candidates with advertisements for the posts being placed throughout the region and internationally. Approximately 90 applications were received and a shortlist of 30 was drawn up from which 12 were interviewed and seven were chosen”).

²⁹⁰ Council of the European Union (2004), *Decision establishing the European Union Civil Service Tribunal*, 2 November 2004, 2004/752/EC Euratom, Annex 1, Art. 3(3), subsequently re-enacted as TFEU as amended by the Lisbon Treaty (2007), 30 March 2010, OJ 2010/C 83/01, Protocol No. 3, Annex 1; See also Georges Vandensanden (2015), *The Real Test – How to Contribute to a Better Justice, The Experience of the Civil Service Tribunal*, in Michal Bobek (ed.), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Court*, Oxford University Press, pp. 87-96; Hazel Cameron (2006), *Establishment of the European Union Civil Service Tribunal*, The Law and Practice of International Courts and Tribunals, Vol. 5, pp. 273-284.

125. The advantages of providing for an open call for candidacies cannot be overstated. As observed by a former principal Legal Adviser to the Foreign and Commonwealth Office when describing the U.K. government's procedures in the nomination of candidates for international courts and tribunals, "if good candidates are not put forward, or do not come forward, the election procedure cannot lead to good results".²⁹¹ A call for candidatures opens up the pool of candidates beyond those individuals that are already under their governments' radar and gives more opportunities of choice. Designing selection procedures that effectively allow candidates to be chosen from a wide pool appears particularly important given the criticism voiced against politicized and non-transparent selection methods in certain international courts. Moreover, the existing system allows for the widest possible choice of arbitrators as the disputing parties enjoy virtually unlimited freedom in the appointment (whether the disputing parties make use of this freedom or not is another question).²⁹² This makes the need to enlarge the pool of potential candidates when shifting to a (semi-) permanent model all the more important.

3. Consultations

126. As mentioned earlier, in the interest of an open process for selection of ITI members,²⁹³ it appears important to provide for consultations with stakeholders. Structurally, consultations could be envisaged as a preliminary sub-phase either within the nomination phase or within the appointment/election phase, if there is no nomination phase (for example because it is entirely eliminated or only self-candidacies are provided). In the first possibility, the consultations would occur at the national level (the State or national group would have to consult the stakeholders before putting forward the nominee(s)), while in the second scenario (consultations within appointment/election phase), they would be carried out supra-nationally (i.e., the body entrusted with the election or appointment would have to incorporate the outcome of the consultation process in its decision).

127. Consultations in the selection of adjudicators are by no means a novelty in international courts and tribunals. To the contrary, they are often provided in constitutive instruments, although not always followed in practice. Article 6 of the

²⁹¹ Wood (2007), pp. 357-358.

²⁹² One of the criticisms of the current system is that arbitrators are appointed from a restricted "pool" or "club" of repeat appointees. See Langford, Behn, Lie (2017), esp. 309-314 and Sergio Puig (2014), *Social Capital in the Arbitration Market*, European Journal of International Law, Vol. 25(2), pp. 387-424 (providing data on the appointees in the current system).

²⁹³ See *supra* at section III.C.1.

ICJ Statute, modelled on a substantively identical provision in the PCIJ Statute,²⁹⁴ provides for instance as follows:

Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

128. Consultations within the ICJ Statute are framed merely as a recommendation for national groups. In the U.S. and Canada, judicial, professional and academic bodies are generally consulted during the nomination process.²⁹⁵ Outside of these examples, little is known about the actual practice of these groups,²⁹⁶ and the scarce implementation of this provision by national groups is generally lamented.²⁹⁷

²⁹⁴ PCIJ Statute, Art. 6 (“Before making these nominations, each national group is recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law”).

²⁹⁵ In the U.S., the national group has consulted with various organizations such as the American Society of International Law (“ASIL”), the American Bar Association, the American Arbitration Association, the US branch of the International Law Association, and leading law school deans since 1960. See Richard R. Baxter (1961), *The Procedures Employed in Connection with the United States Nominations for the International Court in 1960*, American Journal of International Law, Vol. 55, pp. 425–446, 445 (reporting that, with a view to the 1961 elections of ICJ judges, the U.S. national group “sent a circular letter soliciting ‘advice and suggestions’ to the Chief Justice of the United States; the President of the American Society of International Law; the Chairman of the Section of International and Comparative Law of the American Bar Association; the President of the American Law Institute; the President of the American Branch of the International Law Association; the President of the Association of the Bar of the City of New York; the President of the Bar Association of the District of Columbia; the President of the American Arbitration Association; and to the Deans of sixteen principal American law schools”); Damrosch (1997), pp. 192-94; Damrosch (2000), pp. 580-81. In 1996, the American Society of International Law produced a set of guidelines for advising on international judicial nominations and elections and set up a committee to carry out this function. See Damrosch (1997), p. 194, fn. 48; Damrosch (2000), p. 581. For Canadian practice, see Edward Lee, Edward McWhinney (1988), *The 1987 Elections to the International Court of Justice*, Canadian Yearbook of International Law 1987, Vol. 25, pp. 379-388, 380-381, reporting that with a view to the 1987 elections to the Court the Canadian national group consulted “judicial, professional, and academic bodies. It also received some unsolicited suggestions and comments from interest groups as well as individuals”.

²⁹⁶ See generally Patricia Georget, Vladimir Golitsyn, Ralph Zacklin (2012b), *Article 6*, in Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, and Christian J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary, 2nd Edition*, Oxford University Press, pp. 280-283; Mackenzie, Malleson, Martin, Sands (2010), p. 92 (reporting that certain PCA national groups have consulted domestic constitutional or appeals courts in the course of the nomination process).

²⁹⁷ See e.g. IDI Resolution (2011), Art. 1(3), third sentence (“[...] it is important that, before nominating, fully independently, candidates for the International Court of Justice or

129. Within the ECtHR framework, the PACE also recommends that States consult their national parliaments when drawing up the lists of nominees “so as to ensure the transparency of the national selection procedure”.²⁹⁸

130. The guidelines enacted by the African Union for the election of judges of the African Court recommend that “State Parties should encourage the participation of civil society, including Judicial and other State bodies, bar associations, academic and human rights organizations and women’s groups, in the process of selection of nominees”.²⁹⁹

131. At the Caribbean Court, the commission entrusted with appointment of judges, the RJLSC, “may, prior to appointing a Judge of the Court, consult with associations representative of the legal profession and with other bodies and individuals that it considers appropriate in selecting a Judge of the Court”.³⁰⁰ Significantly, the composition of the RJLSC already reflects a wide range of constituencies and interests, as it is formed by the President of the Court as Chair; two persons nominated from two regional bar associations; two persons from civil society; two academics; two persons nominated by the national bar or law associations; and two chairs of the public service commissions and judicial services commissions of the Member States.³⁰¹ Thus, the possibility for an already widely representative body to consult relevant associations and individuals opens up the selection process even further.

132. In the ICSID context, during the preparatory works of the ICSID Convention, Aron Broches suggested a similar consultation mechanism for the designations of the individuals to serve on the Panels of Conciliators and of Arbitrators. In Broches’ proposal, Contracting States would be required, before making their designations, to “seek such advice as they may deem appropriate from their highest courts of justice, schools of law, bar associations and such commercial, industrial and financial organizations and shall be considered representative of the professions they embrace”.³⁰² Eventually, Broches’ proposal was considered superfluous and was therefore not retained.³⁰³

the International Criminal Court, national groups carry out consultations with judicial and academic authorities as provided by Article 6 of the Statute of the International Court of Justice. Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of candidacy”); IDI Report (2011), para. 21; Mackenzie, Malleson, Martin, Sands (2010), pp. 88-92, 142-144.

²⁹⁸ See PACE (1999a), para. 7.

²⁹⁹ Commission of the African Union, *Note Verbale*, Reference BC/OLC/66.5/8/Vol. V (5 April 2004), para. 5, quoted in Mackenzie, Malleson, Martin, Sands (2010), at p. 142.

³⁰⁰ Statute of the Caribbean Court, Art. IV(12).

³⁰¹ See Statute of the Caribbean Court, Art. V(1).

³⁰² See Aron Broches, *Working Paper in the Form of a Draft Convention for the Resolution of Disputes between States and Nationals of Other States dated 5 June 1962*, in Antonio R. Parra (2012), *The History of the ICSID Convention*, Oxford University

133. Providing for a consultation mechanism for the selection of ITI members would have several advantages. First, it would take account of the asymmetry of investor-State dispute settlement. In fact, shifting from a system of disputing party appointment to treaty party appointment does not mean that it is not possible to take into consideration the views of that category of disputing parties that is not in the driving seat when it comes to the selection of the adjudicators. The opportunity to hear stakeholders' views applies primarily to investors, who with the States are the only disputing parties. In this respect, consultations of business associations (e.g. chambers of commerce) or industry-specific associations can be envisaged. Consultations should, however, extend beyond these groups, to hear the views of other stakeholders who may have an interest in the interpretation and application of IIAs and the outcomes of possible disputes. Indeed, investment disputes often potentially affect communities at large and a number of stakeholders may have an interest in providing their views, as the now rich and varied practice of *amicus curiae* participation shows. In the ITI members' selection process, it may thus be sensible to also consult international governmental and non-governmental organizations active in such fields as protection of human rights, indigenous peoples, public health, or the environment. Ultimately, consultations with stakeholders are likely to strengthen a broader acceptance of the dispute resolution mechanism and thus foster its ultimate credibility and legitimacy.

134. One may also envisage a consultation of arbitral institutions, as they have valuable insight into the performance of decision-makers,³⁰⁴ and of professional associations in the field of international law and international dispute settlement.³⁰⁵ Consultations of the latter type would primarily serve the purpose of ensuring expertise rather than giving a say to entities with an interest in the interpretation and application of IIAs. Possible objections about difficulties to

Press, Appendix I, Article II, Section 17(1). See also ICSID (1970), *History of the ICSID Convention: Documents concerning the Origin and Formulation of the Convention*, Vol. I, pp. 72, 74.

³⁰³ Although Broches explained that his proposal "imposed no obligation upon States to seek such advi[c]e" from appropriate institutions in their countries (*History of the ICSID Convention*, Vol. II-1, p. 385), it was met with resistance by some States (see e.g., the comments by the French delegation with which the U.K. was in agreement, that the proposed language "seemed a little peremptory: surely governments had the right to consult whomsoever they wished", *Ibid.*, p. 386; see also the comment in similar terms by the delegate from Nigeria, *ibid.*, p. 253). The provision was then considered "superfluous" and thus deleted. *Ibid.*, pp. 485-486, 562.

³⁰⁴ In respect of investment disputes, this applies primarily to ICSID, the PCA and the SCC.

³⁰⁵ One can think, for instance, of the various "societies of international law" (American, European, Asian, African) or the International Law Association. As noted *supra* in fn. 295, ASIL has produced guidelines with advice to the U.S. national group on nominations for ICJ judges.

identify “constituencies” for some of these actors (which business or investors associations would need to be heard? How to identify “civil society”?) are not persuasive. The examples provided above of consultations in existing courts and tribunals refer to a variety of non-State actors which have no defined institutional identity (e.g. “associations representative of the legal profession”, “human rights organizations and women’s groups”).³⁰⁶ If a process of consultation is provided, interested constituencies are likely to identify themselves. It will then be for the nominating or electing body to weigh the advice received based, *inter alia*, on the actual representativeness of the organizations that have come forward.

4. Screening

135. To ensure that only suitable candidates reach the election or appointment phase, States have established screening or advisory panels for a number of recent international courts and tribunals.³⁰⁷ The main function of these panels is to review candidacies proposed by the nominating entities (normally the treaty parties) and to ascertain that candidates fulfil the applicable requirements, such as professional qualifications, expertise or language. By introducing these screening mechanisms, States remove the election and appointment of adjudicators from their exclusive power and provide checks and balances to their own discretion. Given the possible consequences of a negative assessment on a candidate and the entity proposing him or her,³⁰⁸ the existence of an advisory panel may in itself deter States from putting forward weak candidates³⁰⁹ and strengthen judicial independence.³¹⁰

136. There are three main examples of advisory panels that could provide inspiration for the ITI, i.e. those for the selection of judges at the CJEU, ECtHR, and ICC.³¹¹ By contrast, the “Selection Committee” that screens candidates to the

³⁰⁶ See *supra* paras. 130-131.

³⁰⁷ See Torres Pérez (2015), pp. 194-196; Mackenzie, Malleson, Martin, Sands (2010), pp. 156-160; and the further references provided *infra* in relation to each specific advisory panel. According to one commentator, “the existence of such mechanisms seems implicitly to acknowledge that states sometimes nominate candidates who do not fulfill the minimum requirements”. See Ruth Mackenzie (2015), *The Selection of International Judges*, in Karen Alter, Cesare Romano, Yuval Shany (eds.), *The Oxford Handbook of International Adjudication*, p. 752.

³⁰⁸ See *infra* paras. 149-152.

³⁰⁹ See Torres Pérez (2015), p. 196.

³¹⁰ As noted by Torres Pérez, the presence of screening mechanisms cannot ensure independence *per se*, as “highly competent candidates might also demonstrate loyalty to the government that appointed them, but at least candidates nominated on the basis of loyalty who lack minimum credentials will encounter an obstacle to their appointment”, *Id.*, p. 195.

³¹¹ Other courts, e.g. the ICJ, ITLOS, and the Arab Investment Court, do not provide for any screening procedure. Within the ICSID context, during the preparatory works of the

WTO AB is less interesting for present purposes, as it essentially serves as a communication channel for the political bargaining between Member States and takes an “overly political role in consensus building”.³¹² Given this section’s focus on independent committees screening candidates for competence and merit, we will only refer to the advisory panels at the ICC, ECtHR, and CJEU as possible models.³¹³ While these panels perform the same function of vetting candidates nominated by the State parties, their specific mandates and procedures vary from one another and depend on the particular institutional setting of the court.³¹⁴

137. At the CJEU, following the entry into force of the Treaty of Lisbon, judges of the Court of Justice and the General Court “shall be appointed by common accord of the governments of the Member States [...], after consultation of the panel provided for in Article 255”.³¹⁵ Before the governments of the Member States make the appointments, the panel provided in Article 255 (the “CJEU

ICSID Convention, suggestions were made to introduce a screening by the Administrative Council over States’ designations to the Panels, but did not succeed. See History of the ICSID Convention, Vol. II-1, pp. 253, 562.

³¹² Mackenzie, Malleson, Martin, Sands (2010), pp. 157-158. The Selection Committee is composed of the WTO Director-General, the Chairperson of the DSB, and the Chairpersons of the Goods, Services, TRIPS and General Councils. While its presence is not foreseen in the DSU, the Selection Committee was instituted for the very first election of WTO AB members and the procedure was followed since. See WTO (1995), *Establishment of the Appellate Body. Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995*, 19 June 1995, WTO/DSB/1, para. 13. The Selection Committee interviews candidates “suggested” by States and asks them to meet with delegations interested in hearing their views. Upon the completion of the interviews, the Committee recommends the appointment of specific candidates to the DSB, and candidates are then appointed by the DSB by consensus. The most powerful WTO members are able to exercise *de facto* veto powers on certain candidates already at the Selection Committee level. See Richard H. Steinberg (2004), *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, American Journal of International Law, Vol. 98(2), pp. 247-275, 264 (“The European Communities and the United States have enjoyed ‘special privileges’ at this stage of the process, enabling them to object to some candidates, which has amounted to a veto power”).

³¹³ Another interesting model, closer to the three mentioned *supra* in the text, but with its own distinct features, has been implemented at the ECOWAS Community Court of Justice, where a “Judicial Council” comprised of the chief justices of Member States that at the relevant time are not represented on the seven-member Court, screens applications, interviews candidates, and, for each vacancy, forwards three names to the Member States’ political body charged with electing a judge. See Karen J. Alter, Laurence R. Helfer, Jacqueline R McAllister, *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, American Journal of International Law, Vol. 107, pp. 737-779, 760. Information on the activities of the ECOWAS Judicial Council are, however, scarce.

³¹⁴ As shown by the three examples, advisory panel procedures can be built in full representation (CJEU, ECtHR) as well as selective representation (ICC) courts.

³¹⁵ TFEU, Arts. 253-254.

Advisory Panel”)³¹⁶ gives an “opinion on candidates’ suitability to perform the duties of” CJEU judge.³¹⁷ That opinion is only made available to the Member States and the Council of the EU.³¹⁸

138. In the ECtHR’s selection process as it stands since 2010, Member States must submit a list of three candidates to the “Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights” (the “ECtHR Advisory Panel”) prior to presenting the list to the PACE.³¹⁹ The ECtHR Advisory Panel gives a confidential opinion to the nominating State and the PACE prior to the State’s submission of the list to the PACE.³²⁰ A special PACE committee of parliamentarians with legal experience (the Committee for the

³¹⁶ On the CJEU Advisory Panel, see generally Tomáš Dumbrovský, Bilyana Petkova, Marijn van der Sluis (2014), *Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States*, *Common Market Law Review*, Vol. 51, pp. 455-482; Aida Torres Pérez (2011), *La designación de jueces del Tribunal de justicia de la Unión Europea: el Comité del artículo 255 TFUE*, *Revista Unión Europea Aranzadi*, pp. 8-9; Henri de Waele (2015), *Not Quite the Bed that Procrustes Built: Dissecting the System for Selecting Judges at the Court of Justice of the European Union*, in Michal Bobek (ed.), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedure to the European Court*, pp. 25-51; Jean-Marc Sauvé (2015), *Selecting the European Union’s Judges: The Practice of the Article 255 Panel*, in Michal Bobek (ed.), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedure to the European Court*, pp. 79-86. Some of the members of the CJEU Advisory Panel, notably Jean-Marc Sauvé (its president) and Lord Mance, have written on the panel’s role and activities. In addition to Sauvé’s work just cited, see the list of publications by members of the panel relating to the panel’s work, at Council of the European Union (2017), *Fourth Activity Report of the Panel provided for by Article 255 of the TFEU* (“Fourth Activity Report”), 10 February 2017, Annex 7.

³¹⁷ TFEU, Art. 255.

³¹⁸ See e.g. Fourth Activity Report, pp. 20-21. Although the content of the opinions is not publicly known, the CJEU Advisory Panel produces activity reports, which shed some light on its working procedures as well as on the criteria it applies in the screening of candidates. See Council of the European Union (2011), *First Activity Report of the Panel provided for by Article 255 of the TFEU* (“First Activity Report”), 11 February 2011, Report No.6509/11; Council of the European Union (2012), *Second Activity Report of the Panel provided for by Article 255 of the TFEU* (“Second Activity Report”), 26 December 2012, Report No. 5091/13; Council of the European Union (2013), *Third Activity Report of the Panel provided for by Article 255 of the TFEU* (“Third Activity Report”), 13 December 2013, Report No. SN 1118/2014.

³¹⁹ See Council of Europe (2010), *Establishment of an Advisory Panel of Experts on Candidates for Election as Judges to the European Court of Human Rights*, 10 November 2010, Committee of Ministers, CM/Res(2010)26, Art. 5. On the ECtHR Advisory Panel, see Koen Lemmens (2015), *(S)electing Judges for Strasbourg*, in Michal Bobek (ed.), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedure to the European Court*, pp. 96-120; David Kosař (2015), *Selecting Strasbourg Judges*, in Michal Bobek (ed.), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedure to the European Court*, pp. 121-162.

³²⁰ Council of Europe (2010), Art. 5.

Election of Judges to the European Court of Human Rights)³²¹ then interviews the candidates in person and may recommend to accept the list or ask States to submit a fresh list.³²² On the basis of the Committee's recommendations, the PACE finally elects candidates by secret ballot and in plenary sessions.

139. Finally, in 2012, States parties to the ICC made use of the possibility envisaged in the Rome Statute³²³ to establish an "Advisory Committee on nomination" of judges (the "ICC Advisory Committee").³²⁴ The purpose was to introduce "an independent organism in the very structure of the Assembly [of States Parties] in order to facilitate the process of election of the judges".³²⁵ Following the 2012 reform, States submit a nomination for screening purposes to the ICC Advisory Committee. The Committee's advice is then forwarded to the

³²¹ PACE (2017), *Procedure for electing judges to the European Court of Human Rights*, Committee on the Election of Judges to the European Court of Human Rights, AS/Cdh/Inf (2017) 01 rev 6 (11 October 2017).

³²² PACE (2014), *Evaluation of the implementation of the reform of the Parliamentary Assembly*, 24 June 2014, Resolution 2002 (2014), Appendix (Terms of Reference of the Committee on the Election of Judges to the European Court of Human Rights), Art. 2. This Resolution amended the Rules of Procedure of the PACE to introduce the Committee on the Election of Judges to the ECtHR and its Terms of Reference. See PACE (1999b), *Rules of Procedure of the Assembly*, 4 November 1999, Resolution 1202 (1999), as amended by PACE (2014), Complementary Texts, Part V.B.VIII.

³²³ See Rome Statute, Art. 36(4)(c) ("The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties"). During the preparatory works of the Statute, in response to concerns of politicization of the electoral process, "the United Kingdom delegation proposed the formation of a screening committee consisting of Chief Justices of each State Party, which would examine nominations of all candidates and, where necessary, seek further information from them. [...] The notion of a screening process, albeit a non-binding one, was received with suspicion and reservation by many delegations. [...] Largely due to the suggestion of the French delegation, it was finally agreed that an Advisory Committee on nominations should be set up by the Assembly of States Parties when and if the assembly found it necessary to do so". See John R.W.D. Jones (2002), *Composition of the Court*, in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1, Oxford University Press, pp. 253-254, fn. 90, quoting Medard R. Rwelamira (1999), *Chapter 5: Composition and administration of the Court*, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations and Results*, Kluwer Law International, pp. 163-164. See also Frank Jarasch (1998), *Establishment, Organization and Financing of the International Criminal Court*, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 6(4), pp. 9-28, 21.

³²⁴ ICC (2011a), *Strengthening the International Criminal Court and the Assembly of States Parties*, Assembly of States Parties, 10th Session, ICC-ASP/10/Res.5 (21 December 2011), para. 19.

³²⁵ ICC (2011b), *Report of the Bureau on the establishment of an Advisory Committee on Nominations of Judges of the International Criminal Court*, Bureau of the Assembly of States Parties, ICC-ASP/10/36 (30 Nov 2011), para. 10. According to the working group proposing the establishment of the ICC Advisory Committee, such new body "would enjoy legitimacy, which is not to be found in any other organism with similar functions". *Ibid.*

Assembly of States Parties for the latter's consideration when proceeding to the election.³²⁶ The Committee's reports containing the opinions on the individual candidates are also made publicly available.³²⁷

140. Keeping in mind the examples just mentioned, what issues would States need to consider if they were to set up a screening process over nominations (or self-candidacies) within the ITI (the "ITI Advisory Panel")? The following paragraphs review the main questions involved in the institutional design and discuss where appropriate the strengths and weaknesses of the existing models.

141. *Composition.* How will the members of the ITI Advisory Panel be selected and by whom, and what kind of qualifications should they possess? The selection of the members of the ITI Advisory Panel is likely to face similar questions as those arising in respect of the selection of adjudicators meant to be screened.³²⁸ In the existing models, the advisory panel members are essentially drawn from former national chief judges, former international judges (often of the international court in question), and eminent lawyers.

142. More specifically, the CJEU Advisory 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".³²⁹ The members are appointed by the Council of the EU upon the initiative of the President of the Court of Justice.³³⁰ The ECtHR Advisory Panel, in turn, is composed "of seven members, chosen from among members of the highest national courts, former judges of international courts, including the European Court of Human Rights and other lawyers of recognised competence",³³¹ who are appointed by the Committee of Ministers following consultations with the President of the ECtHR.³³² Proposals for appointment may be submitted by the Contracting Parties.³³³ Finally, the nine members of the ICC Advisory Committee are "drawn from eminent interested and willing persons of a high moral character,

³²⁶ ICC (2011b), Annex (*Terms of Reference for the establishment of an Advisory Committee on Nominations of Judges of the International Criminal Court*), Art. 11.

³²⁷ See https://asp.icc-cpi.int/en_menus/asp/ACN/Pages/default.aspx.

³²⁸ See, e.g., ICC (2015b), *Report of the Bureau Working Group on the Advisory Committee on Nominations*, Assembly of States Parties, 14th session, ICC-ASP/14/42 (16 November 2015) (providing detailed "recommendations" as to composition of ICC Advisory Committee and envisaging individual and general criteria for selection for its members which are similar to those for ICC judges).

³²⁹ TFEU, Art. 255(2), first sentence.

³³⁰ TFEU, Art. 255(2), second sentence.

³³¹ Council of Europe (2010), para. 2, first sentence.

³³² Council of Europe (2010), para. 3, first sentence.

³³³ Council of Europe (2010), para. 3, second sentence.

who have established competence and experience in criminal or international law".³³⁴ They are designated by the Assembly of States Parties by consensus.³³⁵ The composition of all three panels must reflect diversity criteria such as geographic and gender balance.³³⁶ Moreover, panel members must act in their personal capacity and be independent from States and other entities.³³⁷

143. Similar composition criteria could be established for the ITI Advisory Panel. To avoid conflicts of interests or an appearance of bias, States may wish to consider providing that a former panel member is only eligible to the ITI after a certain waiting period.³³⁸

144. *Compulsory or optional step.* One threshold question for consideration is whether recourse to the ITI Advisory Panel is a mandatory phase or whether it is simply an option offered to States. In the CJEU, ICC, and ECtHR frameworks, recourse to the advisory panels is framed as a mandatory step which must be completed to proceed to the next one.³³⁹ In spite of this, at the ECtHR, States

³³⁴ ICC (2011b), Annex, para. 2.

³³⁵ Upon recommendation of the Bureau of the Assembly, made by consensus. See ICC (2011b), Annex, para. 1.

³³⁶ The composition of the ECtHR Advisory Panel must be "geographically and gender balanced" (See Council of Europe (2010), para. 2). In appointing the CJEU Advisory Panel, "[a]ccount should be taken of a balanced membership of the panel, both in geographical terms and in terms of representation of the legal systems of the Member States" (Council of the European Union (2014), *Decision appointing the members of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union*, 11 February 2014, 2014/76/EU, para. 3). Finally, the ICC Advisory Committee must "reflect[] the principal legal systems of the world and an equitable geographical representation, as well as a fair representation of both genders, based on the number of States Parties to the Rome Statute" (ICC (2011b), Annex, para. 1). In the ICC context, the Assembly's working group tasked with evaluating candidatures to the ICC Advisory Committee, considered that equitable geographic representation, diversity in the principal legal systems of the world, and gender balance were "fundamental component[s] of the terms of reference and would ensure not only the legitimacy of the Advisory Committee, but also that its determinations are based on the most diverse and representative set of opinions possible".

³³⁷ See, in respect of the ICC Advisory Committee, ICC (2011b), Annex, para. 3 ("Members of the Committee would not be the representatives of States or other organizations. They would serve in their personal capacity, and would not take instructions from States Parties, States or any other organizations or persons"); in respect of the ECtHR Advisory Panel, see Council of Europe (2010), para. 2 ("[panel members] shall serve in their personal capacity").

³³⁸ See e.g. in respect of the ICC Advisory Committee, Terms of Reference (ICC (2011b), Annex), as amended by ICC (2014a), *Strengthening the International Criminal Court and the Assembly of States Parties*, Assembly of States Parties, 13th Plenary Meeting, ICC-ASP/13/Res.5, Annex III, p. 51, para. 6bis (stipulating that "[f]or a period of three years after the end of the mandate or after the resignation of a member of the Committee, that person shall not be nominated as a candidate for election to the Court").

³³⁹ See, e.g., in respect of the CJEU Advisory Panel, Arts. 253-254 (providing that CJEU "shall be appointed [...] after consultation of the panel provided for in Article 255");

have on occasion by-passed the ECtHR Advisory Panel by submitting their lists directly to the PACE or, when they had sent the list to the panel, by not awaiting the latter's opinion.³⁴⁰ For the ITI screening procedure to be effective, the constitutive instruments should clarify that the screening is a mandatory stage of the process.

145. *Mandate and scope of review.* Another important question is the scope of the ITI Advisory Panel's mandate. Looking at the existing models, the CJEU Advisory Panel's role is defined as "giv[ing] an opinion on candidates' suitability to perform the duties" of judges at the CJEU.³⁴¹ The ECtHR Advisory Panel, in turn, "shall advise the High Contracting Parties whether candidates for election as judges of the European Court of Human Rights meet the criteria stipulated in Article 21§1 of the European Convention on Human Rights".³⁴² Finally, under its terms of reference, the ICC Advisory Committee "is mandated to facilitate that the highest-qualified individuals are appointed as judges of the International Criminal Court",³⁴³ "prepare[s] information and analysis, of a technical character, strictly on

and, in respect of the ECtHR Advisory Panel, see Council of Europe (2010), para. 5, first sentence ("Before submitting a list to the Parliamentary Assembly as provided for in Article 22 of the Convention, each High Contracting Party *will* forward to the Panel, via its secretariat, the names and curricula vitae of the intended candidates", emphasis added). See also, in arguably less peremptory terms, Council of Europe (2012a), VI(1) ("The High Contracting Parties *should* submit [in French: *devraient transmettre*] their list of candidates to the Parliamentary Assembly after having obtained the Advisory Panel's opinion on the candidates' suitability to fulfil the requirements under the Convention").

³⁴⁰ See Council of Europe (2013), *CDDH Report on the review of the functioning of the Advisory Panel of experts on candidates for election as judge to the European Court of Human Rights* ("Steering Committee Report"), Steering Committee for Human Rights, 79th Meeting, CDDH(2013)R79 (29 November 2013), Addendum II, para. 33 ("There have been instances in which State Parties have submitted lists of candidates to the Parliamentary Assembly and the Advisory Panel simultaneously, or only to the Parliamentary Assembly, without awaiting the Advisory Panel's opinion and despite the Advisory Panel having requested additional time for examination of the curricula vitae concerned. In two instances, the Advisory Panel requested the Parliamentary Assembly not to proceed with the election process before it had been able to issue an opinion"). See also the ECtHR's observations in its *Opinion on the CDDH report on the Advisory Panel* ("ECtHR CCDH Opinion"), ECtHR, 15 April 2014, para. 6, available at http://www.echr.coe.int/Documents/2014_Advisory_panel_opinion_CDDH.pdf. These practices are not only incompatible with the *raison d'être* (as noted in the Steering Committee Report, para. 34; and in the Court's Opinion just mentioned) but also with the letter of Resolution CM/Res(2010)26, para. 5 (Council of Europe (2010), as quoted in preceding footnote). For criticism on the practice under the ECtHR, see in particular Lemmens (2015), pp. 96-120.

³⁴¹ TFEU, Art. 255.

³⁴² Council of Europe (2010), para. 1.

³⁴³ ICC (2011b), Annex, para. 5.

the suitability of the candidates”,³⁴⁴ which information and analysis “is to inform the decision-making of States Parties”.³⁴⁵

146. With a view to an ITI Advisory Panel, a definition of the mandate in terms of review of the fulfilment of the eligibility criteria appears preferable. Such a scope would indeed be more precise than the broader reference to a candidate’s suitability. To this effect, the criteria against which ITI candidates will be evaluated should be contained in the constitutive instrument or in the terms of reference of the ITI Advisory Panel members. They should not be left to be determined by the panel itself.³⁴⁶ Similarly, the criteria should be spelled out with clarity and precision to avoid entrusting the panel with excessive discretion. The CJEU Advisory Panel has been criticized for devising itself a number of criteria³⁴⁷ that arguably go beyond those contained in the constitutive instrument.³⁴⁸

³⁴⁴ See ICC (2011b), Annex, paras. 5, 7 and 11.

³⁴⁵ See ICC (2011b), Annex, para. 12.

³⁴⁶ So for example, in the ICC framework. See ICC (2011b), Annex, para. 7 (which prescribes that “[t]he work of the [ICC Advisory] Committee is based on the applicable provisions of the Rome Statu[t]e and its assessment of the candidates will be based strictly on the requirements of article 36, paragraphs (3) (a), (b) and (c)”).

³⁴⁷ In its first activity report, the CJEU Advisory Panel stated that “[a]lthough the criteria established by the Treaty on the Functioning of the European Union are exhaustive, the panel nevertheless considers that they could be more clearly and precisely explained”. In that vein, it held that it would apply “six considerations” to assess whether a candidate meets the criteria established by the treaty: the candidate’s (1) legal expertise; (2) professional experience; (3) ability to perform the duties of a judge; (4) assurance of independence and impartiality; (5) language skills; and (6) aptitude to work as part of a team in an international environment in which several legal systems are represented. See First Activity Report, pp. 8-9. In an interesting example of cross-fertilization, it appears that the ECtHR Advisory Panel has adopted the criteria formulated by the CJEU Advisory Panel for its own review. See Steering Committee’s Report, para. 19 (“The Advisory Panel carries out its task of assessing the proposed candidates in the light of the fundamental criteria stipulated in Article 21 § 1 of the Convention. During its meetings, the Advisory Panel has discussed substantive and reliable interpretation of these criteria for the evaluation of the candidates’ qualifications. The Panel has chosen to make reference to Article 255 of the Treaty on the functioning of the European Union, which evokes the following criteria: [criteria referred to above]”).

³⁴⁸ See Michal Bobek (2015), *Epilogue: Searching for the European Hercules*, in Michal Bobek (ed.), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedure to the European Court*, pp. 289-295; Dumbrovský, Petkova, van der Sluis (2014), at 461-466. For example, while the TFEU only speaks of “the qualifications required for appointment to the highest judicial offices in their respective countries” for judges of the Court of Justice (Art. 253) and “the ability required for appointment to high judicial office” for those of the General Court (Art. 254), the CJEU Advisory Panel is of the opinion that “[w]ith regard to length of professional experience, [...] the panel considers that less than twenty years’ experience of high-level duties for candidates for the office of Judge or Advocate-General of the Court of Justice, and less than twelve or even fifteen years’ experience of similar duties for candidates for the office of Judge at the General Court, is unlikely to be deemed sufficient, unless the candidate demonstrates exceptional legal expertise”. See First Activity Report, p. 9.

147. *Procedural powers.* Which procedural powers could the ITI Advisory Panel enjoy in discharging its mandate? Although the operating rules of the ECtHR Advisory Panel foresee a process that is essentially done in writing, with members transmitting their views to the chair and meetings only being held where necessary,³⁴⁹ in practice in-person meetings of panel members have become the rule.³⁵⁰ The ECtHR Advisory Panel does not, however, interview candidates.³⁵¹ By contrast, both the CJEU Advisory Panel and the ICC Advisory Committee combine documentary evaluation of the candidates' profiles and an in-person, *in camera*, interview with the candidate that lasts approximately one hour.³⁵² The ICC Advisory Committee appears to place particular weight on the interviews.³⁵³

148. Based on the experience with these bodies, a combination of review of a candidate's CV and documentary materials with an in-person interview seems best suited to ensure a thorough examination of candidates. This said, if the ITI

³⁴⁹ See Council of Europe (2010), Operating Rules (iii) ("The Panel's procedure shall be a written one. Members shall transmit their views on candidates to the chair in writing") and (iv) ("The Panel may hold a meeting where it deems this necessary to the performance of its function").

³⁵⁰ See Steering Committee's Report, paras. 20-22.

³⁵¹ See Steering Committee's Report, para. 20.

³⁵² For the CJEU Advisory Panel, see Council of the European Union (2010), *Decision relating to operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union*, 25 February 2010, 2010/124/EU, Annex, Operating Rule 6 para. 2 ("The panel may ask the government making the proposal to send additional information or other material which the panel considers necessary for its deliberations") and Operating Rule 7 ("Except where a proposal relates to the reappointment of a Judge or Advocate-General, the panel shall hear the candidate; the hearing shall take place in private"), and for their application in practice see, e.g., Second Activity Report). In application of rule 6 para. 2 just quoted, the CJEU Advisory Panel not only asks the government for additional information or materials on the candidate, but also inquires about the procedure followed by the government, including whether there was a public call for applications and whether a national selection committee was set up for that purpose. See e.g. First Activity Report, p. 6. In respect of the ICC Advisory Committee see ICC (2011b), Annex, para. 9 ("The Committee may proceed to communicate with all candidates, including by interviewing, both orally and in writing, with regard to their qualification in accordance with the Rome Statute") and for its practical application see, ICC (2014b), *Report of the Advisory Committee on Nomination of Judges on the work of its Third Meeting*, Assembly of States Parties, ICC-ASP/13/22 (29 September 2014), paras. 8-17.

³⁵³ See ICC (2017), *Report of the Advisory Committee on Nomination of Judges on the work of its Sixth Meeting*, Assembly of States Parties, ICC-ASP/16/7 (10 October 2017), para. 7 ("The Committee's consistent experience has been that the interviews with candidates have revealed important elements relating to how they fulfill the requirements of article 36 of the Rome Statute and to the relevance of their professional experience to the work of the Court, elements which were not otherwise detected in the written submissions"). See also ICC (2016), *Strengthening the International Criminal Court and the Assembly of States Parties*, Assembly of States Parties, 11th Plenary Meeting, ICC-ASP/15/Res.5 (24 November 2016), para. 59.

Advisory Panel conducts interviews, questions aimed at testing the candidates' decisional propensities should be avoided, as they exceed the scope of the fulfilment of the statutory requirements.³⁵⁴

149. *Outcome.* What effect would the ITI Advisory Panel's opinion have? The main question in this context is whether it would be binding on the electors (in the sense that only candidates who passed the screening would be eligible) or whether it would merely constitute a recommendation. In all three models under review here, the panel report is framed as a mere recommendation.³⁵⁵ In principle, the electors are thus free to disregard it. Yet, even though it lacks binding force, the panel's advice is expected to carry a strong "moral" weight, as it may be difficult for States to elect or appoint a candidate that the advisory panel has found to lack the requirements for office. In spite of this, the practice under the three models shows mixed results.

150. On the positive side, one finds the experiences of the CJEU Advisory Panel and the ICC Advisory Committee. The CJEU Advisory Panel has issued several unfavorable opinions on candidates over the past years,³⁵⁶ and none of

³⁵⁴ Compare the memories of Claus-Dieter Ehlermann, former WTO AB member, who recalls being asked by the WTO Selection Committee the following question: "would I feel entitled to adjudicate matters falling under the responsibilities of the International Labour Organization?" and recalling that "other sensitive issues were certainly raised" (See Claus-Dieter Ehlermann (2015), *Revisiting the Appellate Body: The First Six Years*, in Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in Multilateral Trading Systems*, Cambridge University Press, pp. 482-506, 487). The practice of the CJEU Advisory Panel, in turn, has been as follows: "[the panel] does not require or expect specific and firm answers when inviting a candidate to comment on the current state of legislation or case-law, or on issues that have yet to be resolved or decided. In such cases, its only concern is the candidate's ability to engage, in a thoughtful way, with the conditions and mechanisms of application of EU law and on the current issues in this field of law. The panel is also open to diverse views, provided they are properly reasoned and are not founded on erroneous knowledge". (Second Activity Report, p. 13). In a prospective ITI Advisory Panel, asking questions on "issues that have yet to be resolved or decided" appears fraught with risks, given that many investment law issues are subject to debate and doctrinal divisions, and it may not always be easy to draw a clear line between legitimate divergences of opinions between members of the ITI Advisory Panel and ITI candidates, on the one hand, and "[im]proper reason[ing]" and "erroneous knowledge", on the other.

³⁵⁵ See, in respect of the CJEU Advisory Panel, TFEU, Art. 255 (which provides for "consultation" of the CJEU Advisory Panel); in respect of the ECtHR Advisory Panel, Steering Committee's Report, para. 32 ("While the opinion of the Advisory Panel is non-binding, it may be assumed that the [...] Parliamentary Assembly gives due consideration to an opinion of the Advisory Panel on a particular list of candidates"); and in respect of the ICC Advisory Committee, ICC (2011b), Annex, para. 12 ("Information and analysis presented by the Committee is to inform the decision-making of States Parties and is not in any way binding on them or on the Assembly of States Parties").

³⁵⁶ In the period 2010-2013, 7 out of 32 (22%) of the panel's opinions on candidatures for a first term of office (thus excluding those for the renewal of a term of office) were unfavorable. See Third Activity Report, p. 9. In the period 2014-16, 6 out of 36 (16.6%) of

these candidates was appointed.³⁵⁷ The effect of the panel's opinion is no doubt also linked to the rules of appointment at the CJEU, which require unanimity of all Member States to appoint an individual despite a negative panel opinion.³⁵⁸ As a result of this rule, some authors view the panel's recommendation as "de facto binding".³⁵⁹ Similarly, no candidate on which the ICC Advisory Committee expressed reservations was elected to the ICC.³⁶⁰ These examples show the panels' strong authority even if their opinions are mere recommendations. In addition to the impact on actual elections, the advisory panels' opinions may also indirectly affect the types of nominations that States submit.³⁶¹ By contrast to the CJEU and ICC examples, the record of the ECtHR Advisory Panel is less convincing. On some occasions, an unfavorable panel opinion was ignored and the candidate elected.³⁶²

151. Linked to the outcome of the screening process is the question whether the panel may only give a favorable/unfavorable opinion or also rank candidates. The answer depends on how the preceding nominating phase is structured (i.e., whether States submit only one candidate or a list; whether self-candidacies are

the panel's opinions on candidatures for a first term of office were unfavorable. Fourth Activity Report, p. 11. See also de Waele (2015), p. 46. Furthermore, the current practice contrasts with the practice of selection of CJEU judges *prior* to introduction of the screening mechanism, as no candidate for appointment to any of the EU courts had ever been rejected. See de Waele (2015), p. 50.

³⁵⁷ The CJEU Advisory Panel has noted that its opinions have so far always been followed by the governments of the Member States. See e.g. Forth Activity Report, p. 13.

³⁵⁸ Sauvé (2015), pp. 82-83.

³⁵⁹ Dumbrovský, Petkova, van der Sluis (2014), p. 458; Sauvé (2015), pp. 82-83.

³⁶⁰ Candidates on which the ICC Advisory Committee had expressed reservations either withdrew their candidature (see, e.g., ICC (2013b), *Election of a judge to fill a judicial vacancy of the International Criminal Court, Addendum: Withdrawal of Candidature*, Assembly of States Parties, 12th Session, ICC-ASP/12/45/Add.1 (21 November 2013) or were finally not elected. See, e.g., "2014 - Election of six judges – Results", at https://asp.icc-cpi.int/en_menus/asp/elections/judges/2014/Nominations/Pages/2014-JE-results.aspx. However, it should be noted that some of the candidates on whom the Committee had expressed reservations regarding experience advanced as far as the seventh round of balloting, and the candidate on whom the Committee had expressed reservations regarding language fluency advanced as far as the final twenty-second round of balloting.

³⁶¹ As noted in respect of the CJEU Advisory Panel, "by repetitively rejecting certain types of candidates and formulating certain sets of criteria, the 255 Panel can exert considerable indirect influence over the type of nominations made". (Michal Bobek (2015), *Prologue: The Changing Nature of Selection Procedures to the European Courts*, in Michal Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Court*, Oxford University Press, pp. 1-24, 9).

³⁶² See Steering Committee's Report, paras. 30-34; See also Lemmens (2015), pp. 107-108.

allowed,³⁶³ etc.). In none of the existing examples do the advisory panels provide an actual ranking of the candidates.³⁶⁴ The ICC Advisory Committee initially interpreted its mandate rather narrowly.³⁶⁵ After a few years, however, it noted that “some States would wish it to develop further its observations concerning candidates for election as judges, essentially by giving additional guidance to States, *such as a form of ranking among candidates*, or an evaluation going beyond the candidates’ strict qualifications under the relevant provisions of the Rome Statute”.³⁶⁶ Despite its admonition that “any form of ranking or other evaluation of the candidates not strictly based on the [Rome Statute’s] provisions could go beyond its mandate and depart from the intention of the Assembly of States Parties in establishing the Committee”, the Committee now makes a distinction between “formally qualified” and “particularly well qualified” candidates.³⁶⁷

152. In this context, one should also consider whether the opinion of the ITI Advisory Panel (be it binding or not) would be final, i.e. non-reviewable. This is indeed so for all advisory panel opinions analyzed here. Rather than allowing disappointed candidates to challenge an unfavorable panel opinion, which would make the selection process difficult to manage, the transparency of the procedure appears the best guarantee against abuses and injustices.

153. *Transparency.* Finally, what degree of transparency should apply to the activities of the ITI Advisory Panel? There are conflicting rationales in this respect. Some have stressed the need for confidentiality to protect the

³⁶³ If self-candidacies are allowed (see *supra* paras. 124-125, it will have to be considered whether the ITI Advisory Panel should only approve/reject candidates that meet/do not meet the formal requirements, or should also draw up a short list of those that it considers best qualified for election. One possible model in this respect is the EU Civil Service Tribunal Selection Committee (which has now ceased to exist), on which see *supra* para. 124 and the references provided in fn. 290.

³⁶⁴ See Council of Europe (2010), para. 5, and esp. para. 5(2) (“Where the Panel finds that all of the persons put forward by a High Contracting Party are suitable candidates, it shall so inform the High Contracting Party without further comment”). At the CJEU, the practice is for a Member State to put forward only one candidate for consideration at a time. Thus, the CJEU Advisory Panel lacks any choice between candidates. See Lord Mance (2011), *The Composition of the European Court of Justice*, 19 October 2011, para. 27, available at https://www.supremecourt.uk/docs/speech_111019.pdf.

³⁶⁵ In its first opinions, the ICC Advisory Committee reviewed in rather neutral terms the profiles of candidates and, where requirements were not fulfilled, “question[ed]” whether certain candidates met the standards prescribed by the Rome Statute. See, e.g., ICC (2013a), para. 18.

³⁶⁶ ICC (2015a), *Report of the Advisory Committee on Nomination of Judges on the work of its fourth meeting*, Assembly of States Parties, 13th Session, ICC-ASP/13/46 (24 April 2015), para. 15 (emphasis added).

³⁶⁷ Compare the evaluations of the candidates made in 6th meeting, ICC (2017), Annex I.

candidates' reputation and to avoid discouraging individuals from applying.³⁶⁸ Others have highlighted that confidentiality may lead to arbitrariness and shed a secrecy cloud on the selection process.³⁶⁹ Opinions of the CJEU Advisory Panel and the ECtHR Advisory Panel are confidential; they are only made available to the Member States and, in the case of the ECtHR, to the PACE. The ICC Advisory Committee provides a much higher level of transparency, as its opinions on candidates, including the reasons, are made available to the public.

154. Transparency concerns a number of aspects of the screening process spanning from the identity of the candidates, the progress of the procedure, the outcome of the opinion (favorable/unfavorable), to the reasons for approval or rejection. While transparency is certainly desirable for some aspects, it may not be for others, for instance for the reasons of a (positive or) negative assessment. At the same time, it is true that the ICC Advisory Committee reports show that a very high level of transparency can be achieved without endangering the candidates' reputation. Indeed, in these reports, the reasons for unfavorable opinions are normally phrased in neutral, anodyne terms pointing to objective deficiencies, such as lack of fluency in an official language or lack of relevant professional experience. It may also be possible to diversify confidentiality levels depending on the recipients (for instance, concise reasons could be made available to the public, while full motivations may be communicated to the candidate and the Contracting States).

155. In conclusion, providing for a screening panel or committee within the selection process is likely to improve the chances of choosing qualified and independent ITI members, through the combination of expert scrutiny and, if a certain degree of transparency is provided, public opinion. In addition, the existence of a screening phase in the multi-layered process may temper the politicization inherent in the elections and avoid that unsuitable candidates are put forward in the first place. To achieve these goals, the tasks of the ITI Advisory

³⁶⁸ See e.g. Lord Mance (2011), para. 41 ("The panel's operating rules were framed on the basis that its proceedings are confidential and private. It would deter and be unfair to candidates, if they were to be public"); Sauvé (2015), pp. 81-82. The ECtHR appears to be of the same opinion. See ECtHR CDDH Opinion, para. 9 ("The Court considers that the confidentiality of the proceedings before the Panel is of the utmost importance given the need to avoid harming any candidate's reputation. With that in mind, the Court is concerned about the fact that confidential information stemming from the Panel's proceedings has in fact been disclosed to the media recently. This is not only detrimental to the candidates and the Panel but also to the Court itself").

³⁶⁹ See esp. Alberto Alemanno (2015), *How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selections*, in Michal Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Court*, Oxford University Press, pp. 203-222, who also notes (at p. 222) that in any event the names of candidates are known, so not knowing reasons for rejections would lead to worse rumors and speculations.

Panel should be defined with precision. It should be clear that (i) States as constituting parties draw up the applicable criteria for office; (ii) the panel's role is limited to applying pre-determined criteria and weeding out unfit candidates; and (iii) with the benefit of the panel's advice, the ultimate responsibility for the election/appointment of ITI members, including the determination of the ITI's composition to reflect the diversity requirements, lies with the electors.³⁷⁰

5. Election/appointment

156. After a candidate has been nominated and/or screened by an expert panel, by which procedure will he or she be elected or appointed to the ITI, and by whom? Election or appointment is the final phase in the process which leads a candidate to become an ITI member.³⁷¹ With this understanding, we will make no distinction here between "election" and "appointment".³⁷²

157. Whether the adjudicative bodies follow the selective or full representation model,³⁷³ the electors of the ITI are likely to be a collegiate body of representatives of State Parties.³⁷⁴ Looking at existing standing courts and

³⁷⁰ As also observed by the CJEU Advisory Panel, "it is not the panel's job to take part in determining the composition of the [CJEU]. It therefore does not give preference to any particular professional path nor any one field of legal competence more than another, in its assessment of the suitability of the candidatures for the duties for which they are proposed" (First Activity Report, p. 4).

³⁷¹ On the election phase in international courts and tribunals, see generally Mackenzie, Malleson, Martin, Sands (2010), pp. 100-136, with further references.

³⁷² Constitutive instruments of international courts and tribunals use different terms. Compare e.g. the ICJ Statute, Art. 4 ("members of the Court shall be elected"); Rome Statute, Art. 36(6)(a) ("judges shall be elected"), with DSU, Art. 17(2) ("The DSB shall appoint persons to serve on the Appellate Body"); TFEU, Art. 255 ("[...] before the governments of the Member States make the appointments referred to in Articles 253 [Court of Justice] and 254 [General Court]").

³⁷³ Even in full representation courts, it is normally a collegiate body that appoints or elects the judges. See e.g. the PACE that elects the ECtHR judges (ECHR, Art. 22). At the CJEU, judges are appointed "by common accord of all Member States" (TFEU, Art. 253). By contrast, at the IUSCT, each State appoints three arbitrators, and the three "neutrals" are appointed by the party-appointed arbitrators or, failing agreement, by the appointing authority. See Claims Settlement Declaration, Art. III(1); IUSCT Rules of Procedure, 3 May 1983, Section II.

³⁷⁴ Those participating in the electoral process will be the States parties to the ITI Statute, i.e. those that, by ratifying the treaty, contribute to the ITI's machinery, budget, etc., regardless of whether they have consented to submit disputes to it in an IIA or by way of the Opt-In Convention. For these distinctions, see CIDS Report, paras. 77, 214-216. For a discussion, in the context of ICJ elections, as to whether States' "revealed inclination to resort to [the Court], particularly by accepting its compulsory jurisdiction" should play a role in the election of judges, see *Abi-Saab* (1997), pp. 174-175. See also *Damrosch* (1997), pp. 195-196.

tribunals,³⁷⁵ electoral bodies are normally composed of State *government* representatives, acting in bodies such as the U.N. General Assembly and Security Council (for election of ICJ and ICTY judges),³⁷⁶ or other bodies constituted under specific treaty regimes, such as the WTO Dispute Settlement Body (for appointment of AB members),³⁷⁷ or an assembly (ICC; IACtHR; African Court),³⁷⁸ meeting (ITLOS),³⁷⁹ or joint committee (CETA, EU-Vietnam)³⁸⁰ of State Parties. The ECtHR model which entrusts the election to a supra-national parliamentary (rather than governmental)³⁸¹ body is the exception in the international arena.

158. Whether composed by governmental or parliamentary representatives, the role played by the electoral bodies involves a degree of political actions.³⁸²

³⁷⁵ In rosters or panels of arbitrators, panelists are either appointed directly by State Parties (e.g., the Panels of Arbitrators and Conciliators at ICSID pursuant to Art. 13(1) of the ICSID Convention; the “members of the Court” at the PCA, pursuant to Art. 23 of the 1899 Hague Convention and Art. 44 of the 1907 Hague Convention; or by the arbitral institution or other entities. See, e.g., the 10 individuals composing each of the Chairman’s lists of Arbitrators and Conciliators designated by the Chairman of the Administrative Council of ICSID pursuant to Art. 13(2) of the ICSID Convention; the CAS list, where arbitrators are appointed by the International Council of Arbitration for Sport pursuant to Art S6(3) of the CAS Code).

³⁷⁶ At the ICJ, “the General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court” (ICJ Statute, Art. 8). For ICTY judges, “the permanent judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council” (ICTY Statute, Art. 13 *bis, chapeau*).

³⁷⁷ See DSU, Arts. 17 (1) and (2), which stipulates that the WTO AB shall be established by the DSB and persons serving on the WTO AB shall be appointed by the DSB. The DSB, in turn, is the General Council of the WTO, which convenes as the DSB to address disputes between WTO member States. The General Council is the WTO’s core and “highest-level decision-making body” with representatives from all member governments. See https://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm.

³⁷⁸ See Rome Statute, Art. 6(a) (Assembly of States Parties); ACHR (with respect to the IACtHR), Art. 53 (“The judges of the Court shall be elected by an absolute majority vote of the State Parties to the Convention, in the General Assembly of the Organization”); Protocol on the African Court, Art. 14 (“The Judges of the Court shall be elected by [the Assembly of Heads of State and Government of the OAU]”).

³⁷⁹ ITLOS Statute, Art. 4(4) (“[...] Elections shall be held at a meeting of the States Parties convened by the Secretary-General of the United Nations in the case of the first election and by a procedure agreed to by the States Parties in the case of subsequent elections. [...]”).

³⁸⁰ CETA, Art. 8.23 (“The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal”); EU-Vietnam FTA, Art. 12(2) (“Pursuant to Article 34(2)(a), the Trade Committee shall, upon the entry into force of this Agreement, appoint nine Members of the Tribunal [...]”).

³⁸¹ See ECHR, Art. 22 (“The judges shall be elected by the Parliamentary Assembly [...]”); The PACE is composed of representatives appointed by the national parliaments of member States.

³⁸² See *supra* paras. 108-110 and literature cited *supra* at fns. 245 and 250.

The literature on selection of international judges has described the complex and long processes involving campaigning, lobbying for candidates, and meetings between candidates and diplomatic representatives in order to secure or facilitate an election. These activities are seen as necessary, because, as Sands explains, “in the context of the ICJ, ITLOS, and WTO Appellate Body, without the support of some of the more powerful states the electoral prospects for any candidate will be slim”.³⁸³ A practice that is particularly deplored is vote-trading, whereby a State agrees to support the candidate of another State in return for the support of its own candidate, often to *other* positions in international institutions.³⁸⁴ As noted by Rosenne in respect of ICJ elections, “there is little doubt that at times a delegation is instructed to vote for a given candidate in return for promises of support on another matter of close concern to it, whether its own candidature in another election or a matter of substantive concern”.³⁸⁵

159. To attempt to insulate the appointment process from political influence, different models have been conceived. For example, at the Caribbean Court, judges are elected by an independent commission, whose members do not act as State representatives and which, by Statute, reflects wide constituencies.³⁸⁶ Models of this kind presuppose, however, that treaty parties are willing to relinquish control over the election phase. Moreover, one cannot exclude that political influence will shift and impact the appointment of the members of the independent commission.

160. Be that as it may, as already noted, the presence of political considerations in the selection process, especially at the election phase, is likely unavoidable.³⁸⁷ As explained in the previous sections, the presence of multiple

³⁸³ Philippe Sands (2005), *The Independence of the International Judiciary: Some Introductory Thoughts*, in Steve Charnovitz, Debra P. Steger, Peter Van den Bossche (eds.), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano*, Cambridge University Press, pp. 313-322, 319.

³⁸⁴ See esp. Ofer Eldar (2008), *Vote-trading in International Institutions*, *European Journal of International Law*, Vol. 19(1), pp. 3-41, esp. 22-24.

³⁸⁵ Shabtai Rosenne (2003), *The World Court: What It Is and How It Works 6th edition*, Brill Nijhoff, p. 53.

³⁸⁶ See Statute of the Caribbean Court, Art. V.3.1(a) (The RJLSC shall be responsible for “making appointments to the office of Judge of the Court”), Art. V.1 specifying the composition of the RJLSC, which comprises the President of the Caribbean Court, members appointed by among others, the Judicial Service Commissions of Contracting Parties, the Chairman of the Public Service Commission of a Contracting Party, law professors and deans of law schools, and the Bar or Law Associations of the Contracting Parties. See also *supra* para. 131 and esp. Malleon (2009), p. 679 (noting that “the normal method for selecting judges to regional and international courts to date has been a process of governmental nomination and/or election. The decision to break with this tradition in the [Caribbean Court] was [...] driven by a desire to insulate the appointments process from political influence”).

³⁸⁷ See *supra* para. 109 with further references.

checks and balances, comprising open and transparent calls for candidacies, expert/technical assessment, and a final “political” determination, appears to increase the likelihood that the most qualified candidates are elected. In other words, once individuals are put forward to the final election phase, what matters is that the electors’ “political choice can be exercised from among a sufficient number of highly qualified candidates”.³⁸⁸

D. FOR HOW LONG OR THE TERM OF OFFICE AND OTHER CONDITIONS

1. Term of office

161. A key element in the design of an adjudicative body is the members’ term of office, i.e., the period of time during which members serve in office. The following chart provides a summary of the terms of office in the main international courts and tribunals discussed in this report, specifying whether the terms are renewable and whether any age limitations are provided.

<u>Court or tribunal</u>	<u>Term of office</u>	<u>Renewability</u>	<u>Age limitations</u>
ICJ	9 years	Yes	None
ECtHR	9 years	No	Term expires at 70
ITLOS	9 years	Yes	None
ICC	9 years	No	None
ICTY	4 years	Yes	None
CJEU	6 years	Yes	None
Caribbean Court	“until [a judge] attains the age of seventy-two years”	N/A	Term expires at 72
IACtHR	6 years	Yes, once	None
African Court	6 years	Yes, once	None
WTO AB	4 years	Yes, once	None
ICSID Panels	6 years	Yes	None
CAS List of Arbitrators	4 years	Yes	None
CETA	5 years	Yes, once	None
EU-Vietnam FTA	4 years	Yes, once	None

³⁸⁸ Abi-Saab (1997), p. 184.

162. Longer, non-renewable, terms present several advantages. A non-renewable term is important for purposes of judicial independence. It shields members from the possible conscious or sub-conscious pressure deriving from the desire to be re-elected.³⁸⁹ At the WTO, for instance, the four-year renewable term for AB members has been criticized, including by former AB members, for the risk of making members vulnerable to pressure from Member States.³⁹⁰ With a view to strengthening judicial independence, the ECtHR moved from a renewable six-year term to a non-renewable nine-year term in 2010.³⁹¹

163. Further, non-renewability should be combined with an extended duration. A longer term reduces a judge's concern over having to secure another job after a short tenure.³⁹² In this perspective, life tenure, as it exists in certain domestic judicial systems, would in theory secure judicial independence to the greatest extent.³⁹³ It is, however, difficult to transpose in an international setting, as it may stand in the way of the principle of rotation of seats between States, which appears to be a key consideration in the composition of adjudicatory bodies,³⁹⁴ and may in any event present disadvantages in relation to the reduced

³⁸⁹ See generally Mackenzie, Malleson, Martin, Sands (2010), pp. 120-122; Terris, Romano, Swigart (2007), pp. 154-159, esp. 155-156; IDI Resolution, paras. 35-41. The concern over re-appointment in relation to short renewable terms may be greater where judges are allowed to manifest their vote by separate and dissenting opinions.

³⁹⁰ See David Unterhalter (2015), *The authority of an institution: The Appellate Body under review*, in Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in Multilateral Trading Systems*, Cambridge University Press, pp. 466-475, 469 (noting that the four-year renewable term for AB members "renders an incumbent seeking re-appointment vulnerable to the favour of the membership or particular members of the WTO"); Debra P. Steger (2015), *The Founding of the Appellate Body*, in Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in Multilateral Trading Systems*, Cambridge University Press, pp. 447-465, 463 (noting that the term of office at the AB "is too short to guarantee independence and impartiality. An Appellate Body member should not, in the third year of his or her term, have to worry about whether or not he/she will be reappointed when he/she is hearing an appeal"). See also Appleton (2016), pp. 30-31.

³⁹¹ Upon entry into force of Protocol No. 14. See Council of Europe (2004), *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention Strasbourg*, CETS No. 194, para. 50 ("The judges' terms of office have been changed and increased to nine years. Judges may not, however, be re-elected. These changes are intended to reinforce their independence and impartiality [...]").

³⁹² In this context, one could also consider whether rules should be put in place prohibiting ITI members to take up a position after the end of their tenure, whether in the government or private sector, that may affect confidence in their independence. Any cooling-off period of this kind should, however, be reasonable, in order not to deter good candidates from the ITI, especially those for whom membership in the ITI would not be their end-career position.

³⁹³ IDI Report, para. 38.

³⁹⁴ IDI Report, para. 38.

capabilities often associated with age.³⁹⁵ Instead, one observes a trend towards a term of nine years in many international courts and tribunals.³⁹⁶ In addition to strengthening independence, terms of this length contribute to the continuity of jurisprudence and allow the adjudicatory body to benefit from the members' greater experience, knowledge and institutional memory which is naturally acquired with time.³⁹⁷

164. Finally, although this issue is rarely addressed in statutes of international courts and tribunals, States may consider age limits for judges,³⁹⁸ in light of the fact that the capability to deal with a heavy workload naturally diminishes with age. In the ECtHR context, Protocol no. 11 of 1994 introduced, a requirement that “[t]he terms of office of judges shall expire when they reach the age of 70”.³⁹⁹ At the Caribbean Court, the retirement age is fixed at 72.⁴⁰⁰ In 1954, the *Institut de droit international* suggested a mandatory retirement age of 75 years for ICJ judges.⁴⁰¹

³⁹⁵ The idea of a life tenure had been suggested in the course of the drafting of the PCIJ Statute (see PCIJ (1920), *Proceedings of the Committee, Advisory Committee of Jurists*, 8th Meeting (24 June 1920), pp. 190-197), but the Advisory Committee of Jurists did not retain it, considering the risk that “incapacitated judges [would continue] to exercise their functions” (*Ibid.*, p. 190, comment by Lord Phillimore).

³⁹⁶ In 1954, the *Institut de droit international* proposed an amendment of the ICJ Statute, as follows: “With a view to reinforcing the independence of the judges, it is suggested that members of the Court should be elected for fifteen years and should not be re-eligible. In this event an age-limit should be laid down; it might be fixed at seventy-five years”. See Institut de Droit International (1954), *Etude des amendements à apporter au Statut de la Cour internationale de Justice*, Session d’ Aix-en-Provence (26 Avril 1954), Art. 4 para. 1.

³⁹⁷ See also Steger (2015), pp. 463 (noting the “learning curve” associated with the adjudicatory function).

³⁹⁸ On age limits of judges of international courts and tribunals, see Jiří Malenovský (2011), *L’indépendance des juges Internationaux*, Recueil des cours de l’Académie de droit international de la Haye, Martinus Nijhoff, pp. 184-187. According to Arsanjani, “[t]hroughout the preparatory phase of negotiations [of the Rome Statute of the ICC], there was support for placing an age limit on the nominees. The age requirement was dropped at the Rome Conference”. See Mahnouch H. Arsanjani (1999), *The Rome Statute of the International Criminal Court*, American Journal of International Law, Vol. 93(1), pp. 22-43, 37.

³⁹⁹ See ECHR, Art. 23(2). According to the Explanatory Report to Protocol no. 11, “[s]ince the Court will function on a permanent basis, it was deemed appropriate to introduce an age limit, as exists in most domestic legal systems”. See Council of Europe (1994a), *Explanatory Report to Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby*, ETS No. 155, para. 63. Protocol no. 11 effected a major reform of the Strasbourg system, *inter alia* by creating a single permanent ECtHR to replace the then existing Commission and Court.

⁴⁰⁰ See Statute of the Caribbean Court, Art. IX(3) (“[...] a Judge of the Court shall hold office until he attains the age of seventy-two years [...]”).

⁴⁰¹ See Institut de Droit International (1954) (quoted *supra* at fn. 396).

2. Conditions of office

165. Other issues related to judicial office (*statut du juge*) comprise the regime of incompatibilities, the adjudicator's remuneration, and security of tenure during the term of office. These are key guarantees for structural independence, which we have addressed in that context and which need not be repeated here.⁴⁰²

IV. ASSIGNMENT OF CASES TO CHAMBERS

166. This section reviews the methods and rules whereby disputes are assigned to ITI chambers or divisions, hereinafter simply called "chambers". The paper will first address the method for assignment of cases to a chamber (*infra* at section IV.A); then examine the number of members in a chamber (*infra* at section IV.B); and finally review any rules on nationality in the composition of chambers (*infra* at section IV.C).⁴⁰³

A. CASE ASSIGNMENT METHODS

167. By which method are disputes assigned to ITI members who have been selected through the procedures reviewed in section III.C? The distinction between a semi-permanent adjudicatory body (or roster) and a permanent or standing institution essentially impacts the manner in which disputes are assigned to the pre-selected members.⁴⁰⁴ After discussing the main advantages and drawbacks of each of the two models (*infra* at section IV.A.1), we will analyze possible case assignment methods in the two settings (*infra* at section IV.A.2).

1. Roster v. standing body

168. Earlier in this report we have already addressed the distinction between a (i) semi-standing or roster model, in which disputing parties participate in the constitution of the chamber; and (ii) a standing or permanent tribunal model, in which disputing parties play no role in such constitution. In the first option, the assignment of an actual case coincides with the constitution of the chamber. In

⁴⁰² See *supra* paras. 90, 97 (on incompatibilities); para. 88 (on salary and financial security); and para. 86 (on security of tenure).

⁴⁰³ By contrast, this section does not deal with internal decision-making procedures (including conduct of deliberations, drafting of the award/decision, and dissenting opinions, if allowed). Although these are important questions that will need to be addressed, they do not relate to composition. They are matters for a different study and, at least as far as deliberations and drafting procedures are concerned, will most likely be addressed in the Rules of the ITI rather than in its Statute.

⁴⁰⁴ See *supra* para. 7 and references.

the second, other methods must be devised to assign a pending case to a chamber. The assumption in the second constellation is that the standing body will decide at least some disputes in chambers rather than in full court. Indeed, if all the disputes were decided in full court, no case assignment issues would arise and the adjudicatory institution would simply rule in the composition that would result from the selection process discussed in section III.C.

169. The choice between a roster and a permanent adjudicatory body is a policy choice that is for States to make. Looking at the big picture, one can highlight the following main advantages and drawbacks of the two models, each of which will have supporters and detractors.

170. A roster model would most likely encounter the favor of those potential disputing parties who value the ability to appoint “their” adjudicator and to influence the choice of the chair. This may apply primarily to investor-claimants, although certain respondent-States may similarly be attached to the “sense of ownership” over the composition process that derives from the disputing parties’ participation in the formation of the adjudicative body.⁴⁰⁵ In this perspective, a roster model would allow disputing parties to select ITI members, among a restricted pool, based on past performance, specific expertise, skills and background, in a way that is similar to arbitration which is often said to favor meritocracy and competence.⁴⁰⁶

171. Furthermore, States favoring a one-State-one-judge model may find a roster preferable to a permanent court or tribunal. As noted earlier, full

⁴⁰⁵ See generally Veeder (2015), p. 402. In international commercial arbitration, certain empirical studies would appear to confirm that the ability to participate in the selection of the arbitrators remains a key attraction for users. See Born (2014), p. 1639, discussing Christian Bühring-Uhle (2005), *A Survey on Arbitration and Settlement in International Business Disputes*, in Christopher Drahozal, Richard Naimark (eds.), *Towards A Science of International Arbitration: Collected Empirical Research*, Kluwer Law International, pp. 25, 33 and the Queen Mary, University of London (2012), *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, pp. 5-6.

⁴⁰⁶ See e.g. Charles N. Brower (2013), *Remarks at the Leading Figures in International Dispute Resolution Series - The Future Of International Arbitration: Is The Past Prologue?*, Interest Group on International Courts and Tribunals, ASIL, 17 January 2013, available at <https://www.asil.org/conversation-judge-charles-n-brower-future-international-arbitration> quoted in Giorgetti (2014b), p. 472 (opining that disputing party appointment is the “ultimate meritocracy” because an arbitrator’s behavior is continuously scrutinized for potential appointments and “he is somewhere in the world always up for re-election”). See also Filippo Fontanelli, Koorosh Ameli, Ilias Bantekas, Horia Ciurtin, Nikos Lavranos, Mauro Rubino-Sammartano (2016), *Lights and Shadows of the WTO-Inspired International Court System of Investor-State Dispute Settlement*, *European Investment Law and Arbitration Review*, Vol. 1, pp. 191-266, 253-254; Susan Franck (2005), *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, *Fordham Law Review*, Vol. 73(4), pp. 1521–1625, 1597; Thomas W. Wälde (2006), *Investment Arbitration and Sustainable Development: Good Intentions - or Effective Results?*, *Transnational Dispute Management*, Vol. 3(5), p. 6.

representation can be accommodated more easily in a roster than in a permanent court.⁴⁰⁷ States who wish to secure “their” ITI member on the bench without having to compete with more powerful sovereigns in an election battle for limited seats may thus find a roster more attractive.

172. Finally, a roster may strengthen the idea that the process should be viewed as “arbitration”, especially for enforcement purposes, if that were to be the States’ preference.⁴⁰⁸

173. This notwithstanding, a roster presents several drawbacks, which may be viewed as corresponding advantages of a permanent model. First, a roster model would not address the existing criticism of disputing party-appointment which is regarded by many as one of the most critical features of the current system.⁴⁰⁹ The roster system would perpetuate concerns over adjudicator bias in favor of the appointing disputing party and over the resulting excessive power placed in the hands of the chair of the chamber. These concerns were already considered by Broches in the course of the drafting of the ICSID Convention⁴¹⁰ and have resurfaced recently.⁴¹¹

174. Furthermore, one can anticipate that in a roster model, ITI members may be tempted to profile themselves as either pro-investor or pro-State in order to secure appointments, with an ensuing risk of polarization. Compared to the current system, these risks could worsen when shifting to a model where choice is restricted to a limited pool of adjudicators.

175. States may consider these pros and cons when opting for either model. If States wish to make only some adjustments to the existing system, rather than more radical changes, then a roster may be an option. By contrast, if States prefer to pursue the establishment of a permanent body, which departs from the

⁴⁰⁷ See *supra* paras. 23-24.

⁴⁰⁸ See CIDS Report, para. 171.

⁴⁰⁹ See CIDS Report, para. 171, sections II.D and III.B.

⁴¹⁰ See History of the ICSID Convention, Vol. II-1, p. 40 (where Broches noted that the proposed draft convention adopted “what is probably the most usual method for the constitution of an arbitral tribunal”, although it could “be argued that it is the least desirable method because of the danger that each party will look upon the arbitrator to be appointed by it as an advocate. Under this pessimistic assumption the umpire would be the only true arbitrator”).

⁴¹¹ In connection with the debate pertaining to dissenting opinions by party-appointed arbitrators see the sources *supra* at fn. 93. In a recent ICSID case, a dissenting arbitrator reflected on the role of party-appointed arbitrators within the ICSID system, describing the “true ethical burden” placed on party-appointed arbitrators “to separate themselves from the interest of those who have selected them to serve”, and concluding that the “appointment by a party of a judge to rule on the party’s claim creates an unnecessary barrier to pure objectivity” and “an uncomfortable aura of conflict which permeates [...] the proceedings”. See *Supervision y Control S.A. v. Republic of Costa Rica*, Dissenting Opinion by Joseph P. Klock of 18 January 2017, ICSID Case No. ARB/12/4, pp. 13-14.

existing *ad hoc* system, a roster model is unlikely to adequately address the current critical features, but would rather replicate the existing problems.

2. Case assignment in the two models

176. This being said in general terms, how would cases be assigned if the ITI were to be designed (a) as a roster or (b) as a permanent adjudicatory body?

a. Roster

177. In a roster model, the composition of the chamber would be in the hands of the disputing parties and case assignment would resemble the methods for constituting arbitral tribunals in the current system. The major difference vis-à-vis the present situation would lie in the fact that disputing parties would be restricted in their choice to the adjudicators elected to the roster according to the methods reviewed previously. A roster-like ITI would essentially resemble those (rare) arbitral systems where disputing parties are bound to lists of arbitrators.⁴¹²

178. The main aspects that would need to be regulated include the procedure for appointment of an ITI member to a chamber (timing of appointment; possible need for confirmation by president; etc.); appointment in case of default of a disputing party; and appointment of the chair of the chamber. Here, the UNCITRAL and ICSID Rules on the constitution of arbitral tribunals could provide inspiration. One could also look to the rules of *ad hoc* chambers in permanent international courts and tribunals, being, however, noted that these adjudicatory bodies normally function as permanent institutions (and not as rosters).⁴¹³

⁴¹² See e.g. CAS Code *supra* fn. 275; or inter-State arbitration under MERCOSUR, *supra* fn. 22.

⁴¹³ At the ICJ, chambers may be established for a specific case, and are available to disputing parties at their request (ICJ Statute, Art 26(3)). The number of judges in the chamber is “determined by the Court with the approval of the parties” (ICJ Statute, Art. 26(2)). While the rule is that the judges who sit in that Chamber are elected solely by the Court, in practice the Court respects any wish expressed by the parties. See Hugh Thirlway (2014), *The International Court of Justice*, in Malcolm D. Evans, *International Law 4th edition*, Oxford University Press, p. 592; Shigeru Oda (1988), *Further Thoughts on the Chambers Procedure of the International Court of Justice*, *American Journal of International Law*, Vol. 82 (3), pp. 556-562. Indeed, the process for constitution of an *ad hoc* chamber begins with the President of the ICJ transmitting to the full Court the views of the parties regarding its composition (Art 17(2) of Rules of Court). The manner in which the Court has allowed itself to be pressured by disputing parties regarding the appointment of certain members to chambers - and the potential systemic concerns this raises regarding the Court’s adherence to its UN mandate - has received criticism from judges and commentators. See, reviewing these dissents and commentaries in respect of the *Gulf of Maine* case, Rudolf Ostrihansky (1988), *Chambers of the International Court of Justice*, *International and Comparative Law Quarterly*, Vol. 37, pp. 30-52, 42-44. At ITLOS, see ITLOS Statute, Art. 15; ITLOS Rules of Tribunal, Arts. 28-31.

179. One possibility for discussion in this context would be whether some ITI members could be earmarked as presidents. This would contribute to fostering consistency in the jurisprudence. It would, however, inevitably increase polarization and may give rise to availability issues (which could be resolved by enlarging the roster).

b. Standing tribunal

i. Framing the questions

180. In a standing tribunal model, disputing parties have no power to influence the composition of the chambers (subject only to their right to challenge a member for lack of impartiality/independence which should always exist), and a different method must thus be devised to assign disputes to a chamber. The greater complexity and formalization that ensue from the shift from an *ad hoc* to a permanent system of adjudication are particularly visible in this context.⁴¹⁴

181. Clear pre-defined methods for assignment of cases are aimed at avoiding that disputes are attributed to one or the other member based on political considerations or outside influence. In that sense, far from being an issue of mere internal judicial organization, case assignment methods are a key factor guaranteeing structural independence.⁴¹⁵ It is therefore surprising that this topic has attracted so little attention in connection with international courts and tribunals. One may add that case assignment methods are not always readily apparent from the legal texts regulating the courts. That said, the main questions of institutional design that States would wish to examine in this context are the following:

- Question 1: Are chambers pre-established (e.g., ITI Chamber 1 composed permanently of members A, B, and C; ITI Chamber 2 composed of X, Y, and Z) or constituted on an *ad hoc* basis with variable compositions (e.g., a chamber is composed once a case is filed?)
- Question 2: By which methods are the specific chambers composed and cases assigned to a chamber? In particular, is it through a random selection, a mathematical formula, or a decision of an organ of the body (e.g., the president), and which criteria are considered?

⁴¹⁴ See *supra* paras. 14-16.

⁴¹⁵ See Kate Malleson (2002), *Safeguarding Judicial Impartiality*, Legal Studies, Vol. 22, pp. 53-70, 67-69. See also *supra* para. 92.

- Question 3: Are there circumstances in which a dispute should be transferred from one chamber to another sitting in a broader composition (which we will call “grand chamber”) or to the full court?

182. The next paragraphs review a few examples from courts and tribunals to show how questions (1) and (2) find application in practice. Question (3) is addressed *infra* at section IV.B when reviewing the number of adjudicators on a panel. From the analysis of existing models (*infra* at section IV.A.2.ii), we then will draw some recommendations (*infra* at section IV.A.2.iii).

ii. *Case assignment methods in international courts and tribunals*

183. In this section we review case assignment methods in the main international courts and tribunals, as well as certain arbitral bodies in which disputing parties have no say in the composition of a panel deciding the case.

184. Question 1: Is the chamber pre-determined or constituted *ad hoc* after a case is filed? Certain courts act in pre-composed chambers, with members assigned to it for a fixed term (e.g., the IUSCT),⁴¹⁶ while others have chambers with compositions that vary (e.g., the “divisions” at the WTO AB).

185. Furthermore, in certain courts the organization is more complex. The court may be arranged in formations to which adjudicators are assigned permanently (sections, divisions) and, within those, a sub-formation is constituted once a case is filed. The task of allocating adjudicators to the permanent formations or sections normally falls on the head of the court,⁴¹⁷ although in theory this could also be done through a random method. It is normally guided by criteria aimed at ensuring diversity in terms of expertise, gender and legal systems (similar to the criteria for the selection of adjudicators). Thus, for example, the ECtHR is divided in at least four, currently five, “sections”, permanently constituted for a fixed term,

⁴¹⁶ See IUSCT, Presidential Order No. 1 (“IUSCT Presidential Order”), 19 October 1981, in Pieter Sanders (ed.) (1982), *Yearbook Commercial Arbitration 1982*, Vol. 7, Kluwer Law International, pp. 261–262 (establishing three Chambers of three members each). As Judge Brower explains, “Although three members are permanently assigned to each Chamber, the composition of the Chambers in practice has been rather fluid, with members assigned to Chambers other than their normal one for one reason or another and for limited purposes. In effect, therefore, the Tribunal is composed of not merely three Chambers; rather, at any given time, it may consist of over a dozen, each defined by the composition of its panel”. Charles N. Brower (1990), *The Iran-United States Claims Tribunal*, in The Hague Academy of International Law, *Collected Courses of the Hague Academy of International Law*, Brill Nijhoff, pp. 183-184.

⁴¹⁷ It could also fall on the judges sitting in plenary session, as was the case at the ICC before the Rules of Procedure and Evidence were modified in 2011. With the 2011 modification, the power was transferred to the Presidency in consultation with the judges. See Hirad Abtahi, Odo Ogwuma, Rebecca Young (2013), *The Composition of Judicial Benches, Disqualification and Excusal of Judges at the International Criminal Court: A Survey*, *Journal of International Criminal Justice*, Vol. 11, pp. 379-398, 382.

whose composition “shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties”.⁴¹⁸ At the ICC, judges are assigned to three divisions (Appeals, Trial, and Pre-Trial) taking into account the “nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law”.⁴¹⁹

186. Question 2: By which methods are (i) chambers composed and (ii) cases assigned to a specific chamber? Looking at existing examples, one finds essentially two methods. The first one could be called “random” or “impersonal” assignment. For present purposes, we subsume under this method systems that are based on pure randomness (e.g., drawing lots) as well as algorithms or mathematical formula which may build in certain pre-defined criteria, but at the same time ensure unpredictability. The second method consists in assignments by decision of an organ of the adjudicatory body (e.g., the president of the court), who may or may not be guided by pre-defined criteria. More specifically, the following combinations appear possible:

- If chambers are established before a dispute arises:
 - chamber composed by the president and case assigned at random;
 - chamber composed at random and case assigned by the president;
 - composition and case assignment by decision of the president; or
 - composition and case assignment at random.
- If chambers are composed *ad hoc* once a claim is initiated and disbanded once the case ends, chamber composition and case assignment coincide, and these can be effected according to either modality (by decision of an organ or randomly).

187. Existing courts and tribunals provide examples of some of these constellations. For instance, the seven-member WTO AB hears appeals from panel reports in three-member formations known as “divisions”. According to the WTO AB Working Procedures, “[t]he Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve

⁴¹⁸ ECHR Rules of Court, 14 November 2016, Rule 25(2).

⁴¹⁹ Rome Statute, Art. 39(1). The same article adds that “[t]he Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience”.

regardless of their national origin”.⁴²⁰ The assignment to each division occurs on the basis of a mathematical formula which is kept strictly confidential to avoid that Member States can time their appeals to pick or avoid a certain division.⁴²¹

188. The 15-member CETA tribunal will hear cases in divisions of three members.⁴²² Within 90 days of the submission of a claim, the president of the tribunal will constitute a division to hear the case by appointing three Members of the tribunal on a rotation basis, “ensuring that the composition of the divisions is random and unpredictable”.⁴²³ Alternatively, the parties may agree to have the case heard by a sole Member of the tribunal, to be appointed at random from the third-country nationals.⁴²⁴ The appellate tribunal established under CETA follows

⁴²⁰ WTO AB Working Procedures, Art 6(2).

⁴²¹ The former Director of the WTO AB Secretariat, Debra Steger, described the practice as follows: “In order to ensure that the selection process would meet all of these requirements and be completely secret and unpredictable, an Appellate Body member devised a mathematical formula that allowed the members to select a certain number of divisions at once. These meetings were held in secret, with only the Appellate Body members in the room, and each of them only drew specific numbers, telling him or her what appeals he or she would be on, not by case name (because it was not predictable whether or not an appeal would be filed) but by the order in which the appeals were filed. Each Appellate Body member only knew his or her own numbers, he or she did not know anyone else’s, and the Secretariat was not given any information. When an appeal was filed, the three members who were on that appeal would contact the director of the Secretariat to advise him or her that they were on that division. They only drew so many numbers at one time, because mathematically if too many were drawn, the sequence would become predictable”. See Steger (2015), pp. 456-457. Former AB member Julio Lacarte-Muró explains that among the first tasks with which the first AB members had to grapple, “we had to focus on the creation of a mechanism to ensure a proper rotation of the Appellate Body members in the composition of the three-person divisions that would decide the appeals. We did not think it at all advisable that WTO delegations could feel tempted to time their notices of appeal according to the probable composition and membership of a division, and so we established a procedure that remains strictly confidential to this day and fulfils the requirements of Article 17 of the DSU”. See Julio Lacarte-Muró (2015), *Launching the Appellate Body*, in Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, Cambridge University Press, pp. 476-481, 478. According to Ganesan, another former AB member, “an indirect and unnoticed contribution of this mechanism [...] is that it helps the larger cause of consensus building in the decision-making process of Appellate Body divisions. The reason is that the same or similar issues arising in appeals get decided, not by the same set of members but by a different combination of them. This helps avoid rigidity in views and makes it easier for Appellate Body members to follow the jurisprudence developed in earlier Appellate Body reports”. A.V. Ganesan (2015), *The Appellate Body in its formative years: a personal perspective*, in Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System*, Cambridge University Press, pp. 517-546, fn. 12.

⁴²² CETA, Art. 8.27.6. One member shall be a national of the EU, the other a national of Canada, and the presiding member a third country national.

⁴²³ CETA, Art. 8.27.7.

⁴²⁴ CETA, 8.27.9.

a similar method, whereby the president of the appellate tribunal assigns divisions of three randomly appointed members to specific appeals.⁴²⁵ The EU-Vietnam tribunal and appeals mechanism work in a similar fashion.⁴²⁶

189. At the IUSCT, although the legal instruments governing the operations of the tribunal gave its president broad discretion in the composition of the chambers as well as in the assignment of cases to chambers,⁴²⁷ the first chambers were formed by the president by lot and most claims (except for some reserved to the full tribunal) were distributed to each chamber by lot.⁴²⁸

190. Statutes of other courts and tribunals, by contrast, entrust case assignment powers to the president (or other organ), possibly providing criteria to guide their choices. At the ECtHR, the Court may sit in different formations, i.e. in a single-judge formation, in committees of three judges, in chambers of seven judges, and in a Grand Chamber of seventeen judges.⁴²⁹ Cases that are not declared inadmissible by either a single judge or a committee of three judges⁴³⁰ are assigned by the president of the Court to a section (see above for the notion). In so doing, the president “shall endeavour to ensure a fair distribution of cases between the Sections”.⁴³¹ The president of the section will then constitute a 7-

⁴²⁵ CETA, Arts. 8.28.5.

⁴²⁶ The EU-Vietnam FTA similarly provides for tribunal comprising three-member divisions chaired by third-country nationals (EU-Vietnam FTA, Art. 12(6) and Art. 13(8)). As with CETA, this FTA requires “random and unpredictable” rotational appointment to divisions. EU-Vietnam FTA, Art. 12(7). The appeal tribunal established under the FTA follows a similar method, whereby divisions of three randomly appointed members of the appellate tribunal are assigned by the president of the Appeal tribunal to hear specific appeals. See EU-Vietnam FTA, Arts. 13(8) and 13(9).

⁴²⁷ See Claims Settlement Declaration, Art. III(1) (“Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal *as the President shall determine*. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three set forth above”, emphasis added); IUSCT Rules of Procedure, 3 May 1983, Art. 5 (“The composition of Chambers, the assignment of cases to various Chambers, the transfer of cases among Chambers and the relinquishment by Chambers of certain cases to the Full Tribunal will be provided for in orders issued by the President pursuant to his powers under Article III, paragraph 1 of the Claims Settlement Declaration”).

⁴²⁸ See Brower (1990), p. 138.

⁴²⁹ ECHR, Art. 26.

⁴³⁰ With regard to the assignment of cases to single-judge formations, the Rules of the Court provide that the President of the Court shall draw up in advance the list of Contracting Parties in respect of which each judge shall examine applications. See ECHR Rules of Court, Rule 27(A).

⁴³¹ By contrast, no similar criterion is set out for inter-State cases under Article 33 of the Convention. Rule 51(1) provides that “[w]hen an application is made under Article 33 of the Convention, the President of the Court shall immediately give notice of the application to the respondent Contracting Party and shall assign the application to one of the Sections”. ECHR Rules of Court, Rule 51(1).

member chamber, whose members “shall be designated by the President of the Section in rotation from among the members of the relevant Section”,⁴³² and always includes the “national judge” (i.e., the judge elected in respect of the State against which the application was lodged).⁴³³ Other than the criteria of rotation and the rule on nationality, the presidents of the Sections enjoy broad discretion in the composition of chambers.

191. At the ICC, the Presidency (composed of the President and the First and Second Vice-Presidents) has broad powers in composing divisions and chambers of the Court.⁴³⁴ In particular, in consultation with the judges, the Presidency assigns judges to the Appeals, Trial, and Pre-trial Divisions,⁴³⁵ and composes chambers within divisions for specific cases.⁴³⁶ In exercising its power to compose chambers, the Presidency enjoys wide discretion and, except for basic rules to prevent a judge from sitting in the same case in different phases of the process,⁴³⁷ its choice is not guided by any specific criteria,⁴³⁸ but is reportedly

⁴³² ECHR Rules of Court, Rule 26(1)(b).

⁴³³ ECHR Rules of Court, Rule 26(1)(a).

⁴³⁴ See generally Abtahi, Ogwuma, Young (2013), esp. 382-88.

⁴³⁵ See ICC Rules of Procedure and Evidence, 9 September 2002, Rule 4*bis* (2) (“As soon as possible following its establishment, the Presidency shall, after consultation with the judges, decide on the assignment of judges to divisions in accordance with article 39, paragraph 1”).

⁴³⁶ See ICC Statute, Art. 61(11) and ICC Rules of Procedure and Evidence, Rule 130, in respect of the trial chambers; and ICC Regulations of the Court, 26 May 2004, ICC-BD/01-01-04, Regulation 46(1), in respect of pre-trial chambers. In addition to its power to compose chambers, the Presidency also enjoys powers that may result in the alteration of the composition of a chamber, e.g. the power to excuse a judge upon request, or the power to replace a judge for objective and justified reasons, including resignation, accepted excuse, disqualification, removal from office or death. See ICC Statute, Art. 41; ICC Rules of Procedure and Evidence, Rules 33-38; ICC Regulations of the Court, Regulation 15.

⁴³⁷ See ICC Statute, Art. 39(4) (“[...] under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case”) and ICC Regulations of the Court, Regulation 12 (“[...] Under no circumstances shall a judge who has participated in the pre-trial or trial phase of a case be eligible to sit on the Appeals Chamber hearing that case; nor shall a judge who has participated in the appeal phase of a case be eligible to sit on the pre-trial or trial phase of that case”).

⁴³⁸ See also *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, The Presidency, Decision concerning the Request of Germain Katanga of 14 November 2008 for re-composition of the bench of Trial Chamber II, Decision of 21 November 2008, ICC-01/04-01/07-757 (in which the Presidency noted that the legal text governing the functioning of the Court (the ICC Statute, the ICC Rules on Procedure and Evidence, and the ICC Regulations of the Court) “do not provide criteria for the constitution of Chambers” (para. 6) and dismissed a request to reconsider the composition of the chamber). Regulation 15 specifies that when the Presidency is *replacing* a judge in chamber, it “shall also take into account, to the extent possible, gender and equitable geographical representation”. See also *infra* fn. 460.

determined by “factors such as the availability of judges, the prospective long-term needs of the Court in relation to the case or situation in question and relative judicial workload”.⁴³⁹

192. Similarly broad discretionary powers in the composition of chambers were vested in the presidents of the ICTY and the International Criminal Tribunal for Rwanda (ICTR). At the ICTY, for instance, the president’s power to compose chambers (including at the appeals level) was not restricted by any objective criteria. Reflecting on such broad discretion, former ICTY president Theodor Meron explained that “in making those assignments [the president] does not act according to his arbitrary discretion or in response to any lobbying by judges”, by is guided by “practical considerations” – what he called “a sort of controlled randomness”.⁴⁴⁰

193. Similarly, at arbitral bodies whose members are pre-selected on a list without the input of the disputing parties (such as the Basketball Arbitral Tribunal (BAT), CAS *ad hoc* proceedings at the Olympic Games, or ICSID for *ad hoc* committees), the decision to constitute the specific formation that adjudicates the dispute is vested in the president or institution who enjoy broad discretionary powers.⁴⁴¹

⁴³⁹ Abtahi, Ogwuma, Young (2013), pp. 383-384.

⁴⁴⁰ Meron (2005), pp. 363-364. But see for a critical view, Zimmermann (2014), pp. 320-321.

⁴⁴¹ At the Basketball Arbitral Tribunal (“BAT”), the BAT president appoints arbitrators to a dispute “on a rotational basis” from the list of (now 7) arbitrators composing the BAT (see BAT Arbitration Rules, 1 April 2011, Article 8.1). In making such appointments, the president takes into account the following main factors: any potential for an appearance of bias (in particular taking care to avoid appointing the same arbitrator repeatedly in respect of the same parties or counsel, or an arbitrator with the same nationality as a party), the arbitrators’ caseload, special expertise, and language skills (*E-mail from BAT Secretariat (Dr. Heiner Kahlert) to Michele Potestà, 22 August 2017, on file with authors*). In CAS *ad hoc* proceedings, the president appoints the panel members in his or her discretion, seeking to avoid potential challenges, including by choosing arbitrators of nationalities other than those of the parties (see Reeb (2007), *Le modèle de la Chambre ad hoc du TAS aux Jeux Olympiques - Aspects pratique*, in Antonio Rigozzi, Michele Bernasconi (eds.), *The Proceedings before the Court of Arbitration for Sport*, Weblaw, pp. 177-186, esp. 181). At ICSID, pursuant to Article 52(3) of the ICSID Convention, “the Chairman [of the Administrative Council] shall [...] appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons”. Only the following (negative) criteria guide the Chairman’s selection: “None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute”. On the composition of *ad hoc* committees, see generally Christoph H. Schreuer (2009), *The ICSID Convention: A Commentary*, 2nd ed., Cambridge University Press, pp. 1027-1035; and, for a critical view, David Collins (2013), *ICSID Annulment Committee Appointments:*

iii. *Recommendations for the ITI*

194. Looking at the preceding examples, States may consider the following aspects in connection with a prospective ITI. First, in the perspective of judicial independence, a case assignment method based on a random or impersonal decision (such as through an algorithm, computer-based, or by lot) would better guarantee structural independence, because it eliminates risks of outside and internal interference. Randomization in case assignment is used for the same reason in domestic contexts as well.⁴⁴² The Committee of Ministers of the Council of Europe, for instance, recommends that in national judicial systems cases be allocated by drawing lots or through some other system of automatic distribution such as alphabetical order.⁴⁴³

195. By contrast, placing case assignment powers within the discretionary powers of the ITI president or another ITI organ poses several risks: (i) lobbying from an ITI member to be assigned (or not) to a specific case; (ii) pressures from powerful disputing parties (be they Contracting States or investors) to end up with some members or avoid others; and (iii) assignment based of purely subjective preferences of the person entrusted with such power.⁴⁴⁴

196. This is not to say that impersonal or random methods do not have their own drawbacks. Unless tempered by corrective mechanisms, they do not cater for certain organizational constraints, such as a fair allocation of workload between chambers, availability of the adjudicators, or, more generally, the need to ensure flexibility and the ability to react swiftly for purposes of efficiency.⁴⁴⁵

197. A balance should thus be struck between the need to ensure objective randomness with efficiency and flexibility in the administration of justice.⁴⁴⁶

Too Much Discretion for the Chairman?, Journal of International Arbitration, Vol. 30(4), pp. 333-343.

⁴⁴² See, Marco Fabri, Philip M. Langbroek (2007), *Is there a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries*, European Journal of Legal Studies, Vol. 1(2), pp. 292-315; Adam M. Samaha (2009), *Randomization in Adjudication*, William and Mary Law Review, Vol. 51(1), pp. 1-86.

⁴⁴³ See Council of Europe (1994b) *Recommendation of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges*, Committee of Ministers, 13 October 1994, Recommendation No. R (94) 12, Principle I para. 2(e) (“The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order or some similar system”).

⁴⁴⁴ See also Zimmermann (2014), p. 320 (noting that “the risk of a judge lobbying for participation in a particular case or the President’s tendency to appoint certain judges taking into account subjective considerations does arise when no system of random assignment of cases to judges or benches is used”).

⁴⁴⁵ See generally for some of these considerations, Meron (2005), p. 364.

⁴⁴⁶ See Zimmermann (2014), pp. 320-321.

Leaving aside a method by lot, which absent any guiding factors would not secure an appropriate selection, what matters is that, be it based on algorithm or the decision of an organ, the assignment system factor in pre-determined, objective and transparent criteria (e.g., availability of adjudicators; workload balance; language requirements; nationality restrictions, etc.). This would allow both disputing parties and the public to understand the overall process whereby a case is assigned to one or the other chamber. At the same time, the technicalities of the assignment must remain unpredictable (also for ITI members except for those who are in charge of the assignment system). In particular, disputing parties must not be able to anticipate to which chamber a case will be assigned depending on the filing date or other factors, including language.

198. In the perspective of assuring the necessary flexibility in case assignment rules, thought may further be given to granting the head of the adjudicatory body the power to transfer a case from one chamber to another, provided safeguards are built in to prevent abuses. An example may be found at the IUSCT, where the president can assign two or more cases to the same chamber “[i]f the preliminary or main issues in two or more cases before different Chambers are similar”.⁴⁴⁷ This may enhance consistency for example where the ITI is to decide several non-consolidated cases dealing with the same host State measures or where it is to rule on an identical preliminary issue that applies in a number of disputes (e.g., the applicability of an IIA to a contested territory).

B. NUMBER OF MEMBERS ON A CHAMBER

199. States may further give thought to the ideal number of ITI members in a chamber. The current investor-State arbitration practice is for three-member tribunals, while many international courts and tribunals as well as domestic judiciaries decide in larger formations.⁴⁴⁸ The CIDS Report discusses possible options in this respect, to which the reader is referred.⁴⁴⁹

200. Whatever the number of members of an ITI chamber, it should also be considered whether the ITI Statute should provide for the possibility to escalate disputes to a different chamber with a broader composition (a “grand chamber”) or even to the full adjudicatory body (Question 3 *supra* para. 181), as is envisaged in several courts and tribunals.

201. At the IUSCT, for instance, a chamber may “relinquish jurisdiction” to the full tribunal, *inter alia* “where a case pending before a Chamber raises an

⁴⁴⁷ IUSCT Presidential Order, Art. 5(a). Art. 5(d) provides that “[i]f a Chamber affected by a transfer objects to the President’s action, the question of the transfer shall be decided by the Plenary Tribunal”.

⁴⁴⁸ See CIDS Report, para. 175.

⁴⁴⁹ See CIDS Report, para. 175.

important issue” and “when the resolution of an issue might result in inconsistent decisions or awards by the Tribunal”.⁴⁵⁰ The CJEU, for its part, normally sits in formations of 3 or 5 judges. It may sit in “grand chamber” (15 judges) “when a Member State or an institution of the Union that is party to the proceedings so requests”.⁴⁵¹ The Court is required to sit as a full Court (28 judges) only in specific cases concerning the alleged misconduct of high-ranking EU officials.⁴⁵² It may further sit as a full Court in its own discretion “where it considers that a case before it is of exceptional importance”.⁴⁵³

202. At the ECtHR, a seven-member chamber may either (i) “refer” or (ii) “relinquish” a case to the Grand Chamber, composed of 17 judges.⁴⁵⁴ In the first case, after a chamber judgment has been delivered, the parties may request that the case be referred to the Grand Chamber, which is accepted on an exceptional basis only.⁴⁵⁵ A panel of judges of the Grand Chamber decides whether or not the case should be referred to the Grand Chamber for fresh consideration. In the second case, a chamber to which a case is assigned may, before rendering its judgment, relinquish the case to the Grand Chamber if it raises a serious question affecting the interpretation of the Convention or if there is a risk of inconsistency with a previous judgment of the Court.⁴⁵⁶ As noted in the CIDS

⁴⁵⁰ IUSCT Presidential Order, para. 6.

⁴⁵¹ CJEU Statute, Art. 16 para. 3.

⁴⁵² See CJEU Statute, Art. 16 para. 4 read together with TFEU, Arts. 228(2), 245(2), 247 and 286(6).

⁴⁵³ CJEU Statute, Art. 16. For instance, the Court of Justice sat in full court when it delivered its Opinion on the accession of the EU to the ECHR (*Accession of the European Union to the ECHR*, CJEU Full Court, Opinion of 18 December 2014, Opinion C-2/13) and its Opinion on the EU-Singapore FTA (*Competence of the EU to conclude the EU-Singapore FTA*, CJEU Full Court, Opinion of 16 May 2017, Opinion C-2/15). Similar procedures are laid out for proceedings of the CJEU’s General Court. See CJEU Statute, Art. 50. See generally on the various formations at CJEU, Sacha Prechal (2016), *The Many Formations of the Court of Justice: 15 Years After Nice*, Fordham International Law Journal, Vol. 39, pp. 1273-1288.

⁴⁵⁴ The Grand Chamber includes the Court’s President and Vice-Presidents, the Section Presidents and the national judge, together with other judges selected by drawing lots. ECHR, Art. 26(5), ECHR Rules of Court, Rule 24.

⁴⁵⁵ ECHR, Art. 43 (“1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber. 2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance. 3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment”).

⁴⁵⁶ ECHR, Art. 30 (“Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has

Report, mechanisms for *en banc* determinations are also known in domestic legal systems.⁴⁵⁷

203. In a prospective ITI, similar mechanisms for “grand chamber” or full tribunal determinations could be envisaged, for example where the ITI is presented with an issue of systemic relevance, i.e. an issue the resolution of which may have repercussions for the investment treaty system as a whole; or a new legal question never addressed before; or a divergence of interpretations in the case law of the different ITI chambers; or the intention to depart from an established line of cases.

204. These types of grand chamber or full tribunal determinations appear especially important for an ITI without an in-built appeal. For reasons of efficient management of resources, the referral should be done at the early stage of the process and not lead to a hearing *de novo* (unless this is in lieu of appeal). To safeguard consistency, the decision to escalate the case should not depend exclusively on the disputing parties or the initially competent chamber (unless possibly where that chamber has a duty to refer to the grand chamber in specific circumstances, e.g. when it wishes to depart from established case law).

C. NATIONALITY

205. Finally, in designing assignment rules, positive or negative nationality restrictions should also be considered. The CIDS Report has already noted the diversity of solutions in this respect across international courts and tribunals.⁴⁵⁸ In that context, the authors have also expressed their view as to the possible wisdom of including rules prohibiting ITI members to sit on cases involving their State of nationality (or an investor of the same nationality as the ITI member).⁴⁵⁹

206. States may further wish to consider whether the chamber’s composition should reflect broader geographical diversity beyond nationality, in line with examples of existing international courts and tribunals.⁴⁶⁰

rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects”).

⁴⁵⁷ See CIDS Report, para. 132.

⁴⁵⁸ CIDS Report, paras. 173-175.

⁴⁵⁹ *Ibid.* See also *supra* para. 44, fn. 84-86 for the discussion of studies showing “national bias” of adjudicators in certain international courts and tribunals.

⁴⁶⁰ See e.g. ECtHR Rules of the Court, Rule 25(2) (“[...] The composition of the Sections shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties”); ICC Regulations of the Court, Regulation 15 (“The Presidency shall be responsible for the replacement of a judge [...] and shall also take into account, to the extent possible, gender and equitable geographical representation”). In the context of the ICC, see *Prosecutor v. Katanga* cited *supra* at fn. 438. In this case, the applicant had requested the Presidency to reconsider the

V. CONCLUSIVE REMARKS

207. If States were to engage in a multilateral reform of the investor-State arbitration system aimed at institutionalizing dispute settlement through the creation of a multilateral investment court (or ITI) and/or an AM mechanism for investor-State awards, one key question would be the composition of these new adjudicatory bodies. This research paper has sought to supplement the CIDS Report by providing further information and analysis on the composition of existing international adjudicatory bodies, and by charting the main options for the composition of a prospective ITI or AM.

208. The lens through which this paper has examined composition is the shift from a system centered on *disputing* party appointment to a framework based on *treaty* party appointment, seeking to identify the main consequences that would flow from this shift.⁴⁶¹ This transition poses important theoretical and policy questions, as well as technical issues, as the procedure to select adjudicators in a permanent or semi-permanent body is by far more complex than leaving the selection in the hands of the disputing parties. With a view to identifying the options available to devise the ITI and AM composition, we have carried out a comparative analysis of the most important international courts and tribunals that adjudicate both State-to-State and individual-to-State disputes,⁴⁶² and sought to draw lessons from these examples.

209. The main pillars of this research paper may be summarized as follows. First, we have looked at the “selection” of adjudicators in a prospective ITI or AM. To that end, we have sought to answer the following questions: Who?⁴⁶³ How?⁴⁶⁴

composition of a Chamber on the ground that it did not include any judge with a common law background. The Presidency denied the application. It noted that the neither the Statute, nor the Rules of Procedure and Evidence, nor the Regulations of the Court provide any criteria for the composition of Chambers (para. 6); that “representation of principal legal systems of the world” is a criterion which only States Parties are required to take into account in the election of judges and not a criterion required in the composition of Chambers (para. 8); and that Regulation 15 on the replacement of judges, requires the Presidency to take into account, to the extent possible, only gender and equitable geographical representation (para. 9). This notwithstanding, “in constituting Chambers, the Presidency endeavours to take into account the criteria set out in articles 36(8) and 39(1) [of the Rome Statute] and regulation 15 [of the Regulations of the Court], including the representation of the major legal systems of the world”.

⁴⁶¹ See *supra* section II.

⁴⁶² We have also looked at relevant strengths in the existing arbitral framework, where those features could provide inspiration despite the fundamental change in the appointment mechanism (so for example for definition of the qualifications of the adjudicators or the guarantees for individual independence).

⁴⁶³ See *supra* section III.B (on the requirements of ITI and AM members).

⁴⁶⁴ See *supra* section III.C (on the procedure for selecting ITI and AM members).

How many?⁴⁶⁵ For how long?⁴⁶⁶ Each of these questions gives rise to a number of possibilities and challenges for States in the design of the adjudicatory body, which the research paper has explored.

210. In particular, the definition of the individual requirements for ITI and AM members and of the criteria for the composition of these bodies as a whole appears crucial. In this respect, we have emphasized the need that the ITI and AM be comprised of members possessing certain individual qualities and qualifications, among which the expertise and experience to discharge their functions, i.e. their *competence*, appear fundamental.⁴⁶⁷ The composition of the adjudicatory bodies as a whole should further reflect high standards of *diversity*. Diversity is essential because it ensures that judicial thinking is not dominated by a single perspective. Diversity also enhances legitimacy provided the composition is a reflection of those for whom the adjudicatory body renders justice.⁴⁶⁸ Finally, the ITI and AM must be endowed with strong guarantees of *independence* both structurally and for the concrete exercise of the members' adjudicatory functions. The paper has sought to identify and analyze the mechanisms that could be put in place to shield the institution collectively and the judges individually from external influences.⁴⁶⁹

211. Furthermore, the design of the process for selecting ITI and AM members is a key factor in ensuring their independence and building the credibility, authority and integrity of the adjudicatory body. On the basis of the experience of recent international courts and tribunals, this paper has explored the ways in which ITI members can be selected through a procedure which is multi-layered, transparent, and open to stakeholders. Keeping in mind the peculiar structure of investor-State dispute settlement, in which one of the disputing parties is a private person, any selection process that will be devised by States should be seen as legitimate by all stakeholders. In this context, we have identified ways aimed at minimizing risks of political considerations in the appointment and at ensuring that the choice of the adjudicators can be made from a large number of highly qualified candidates. Mechanisms such as the use of consultations and expert screening by independent supra-national bodies may contribute to a rigorous, transparent, and meritocratic selection.⁴⁷⁰

⁴⁶⁵ See *supra* section III.A (on full and selective representation adjudicatory bodies).

⁴⁶⁶ See *supra* section III.D (on the term and conditions of office of ITI and AM members).

⁴⁶⁷ See *supra* section III.B.2.

⁴⁶⁸ See *supra* section III.B.3.

⁴⁶⁹ See *supra* section III.B.4.

⁴⁷⁰ See *supra* section III.C.

212. Finally, the paper has reviewed ways in which disputes could be assigned to individual sub-divisions (or “chambers”) of the adjudicatory bodies, once a case is filed. Far from being an issue of mere internal organization, case assignment methods contribute to the safeguard of structural independence.⁴⁷¹

213. In conclusion, the composition of a prospective ITI or AM is a critical aspect of the possible reform of investor-State dispute settlement, both from an objective and a subjective point of view. Objectively, the quality of the justice rendered will largely depend on the people who compose the new bodies, and thus on the requirements and the process leading to their selection. Subjectively, the composition will also significantly impact the perception of the new dispute settlement mechanism as fair and legitimate by States, investors, and the public. In other words, the design of the composition of the ITI and AM may well be instrumental in their success.

⁴⁷¹ See *supra* section IV.

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