



Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview

Compilation of Initial Comments Received

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Context

This document presents a compilation of responses received between December 2017 and February 2018 from selected arbitration institutions, stakeholders and experts in response to a request for comments on an OECD Secretariat research paper by the OECD-hosted Freedom of Investment (FOI) Roundtable. The comments were made available to the FOI Roundtable for discussion in March 2018 and will be used by the Roundtable in its further consideration of appointing authorities in Investor-State Dispute Settlement (ISDS).

The FOI Roundtable, an intergovernmental forum hosted since 2006 by the OECD Investment Committee, brings together over 50 OECD, G20 and other governments from around the world to exchange information and experiences on investment policies. Participants in the Roundtable have been considering [investment treaty policy and investor-state dispute settlement \(ISDS\)](#) at [regular meetings](#) since 2011.

The consultation paper and comments received to date are available on the OECD website at www.oecd.org/investment/Consultation-ISDS-appointing-authorities-arbitration.htm in order to foster informed public and inter-governmental debate. The consultation paper is a draft and is under revision. Further work relating to the paper will include additional research, follow-up and revisions including to address comments received, and analysis of additional arbitration institutions. The Roundtable will further consider appointing authorities, comments and a revised version of the paper at a forthcoming meeting.

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1. Comments from Arbitration Institutions

1.1. International Centre for Settlement of Investment Disputes (ICSID)

Thank you for sharing your paper with us. It is very comprehensive and contains a great deal of useful information. I hope our comments will be equally useful.

General – The paper essentially looks at the role of the ICSID Chairman as Appointing Authority and the Secretary-General as quasi-appointing authority. While this represents the bulk of the cases, please note that in a number of cases the treaty or contract will specifically name the Secretary-General of ICSID as the appointing authority. Similarly, there are cases where the parties agree that the Secretary-General will appoint the missing arbitrator(s) in the case. As a result, the ICSID appointing authority function is not exclusively the Chairman or the Secretary-General through the ballot process. Perhaps you could make that correction up front and then say your comments are confined to where ICSID acts under Convention Art. 37-38.

Para. 7 – Currently ICSID has done more than 650 cases, and the number grows. We can give you exact numbers prior to publication of the paper so they are up to date.

Para. 7 – It is fair to say ICSID is based in Washington in that DC is its formal seat, however ICSID also has a facility in Paris which administers more cases than DC, so it might also be more accurate to say ICSID is based in Paris and DC.

FN 8 – The references to the ICSID Convention are 1965. The Convention came into effect in October 1966 after ratification by 20 States in 1966.

Para. 16 – Perhaps it is in the eye of the beholder, but I think the ICSID appointment system is relatively simple and that the Convention, the website, etc. certainly make it easy to understand. Our member States have not said they find the process difficult to understand. I think the challenge for government (and for investors) is making a decision about the individual they wish to appoint as an arbitrator, and not the process itself.

Para. 17 – I don't know if I would agree that appointment by appointing authorities is as substantial as the paper suggests. At ICSID, parties appoint in roughly 75% of the cases without assistance from the institution. Of course, the Convention requires the Chairman to appoint 100% of the ad hoc Committees, but overall, I think parties generally appoint their arbitrators.

Para. 19 – The ICSID practice on disclosure has been applicable since 1967 in the first set of rules, so I doubt the considerations mentioned were part of the equation. The ICSID web includes the names of arbitrators, their nationality, the method of their appointment, who made the appointment and the date of appointment. Para. 19 also says a “limited” range of information is available; what further information ought to be provided?

Para. 22 – The Chairman of ICSID/ World Bank President is usually someone with international banking and economic policy experience, and may have ISDS knowledge, although it is not a pre-requisite of the job. The Chairman prior to Dr Kim was Robert Zoellick, a former USTR and someone extremely

knowledgeable about ISDS, so the level of knowledge might vary depending on the incumbent's past experience.

Para. 22 – I am certain Brooks will give you the accurate number of staff for PCA, but I think the 75 quoted is high, certainly based on their website. You will note that 7 of their staff are ICCA employees and so not part of the PCA role. They are housed at PCA through an arrangement with ICCA and work on ICCA matters.

Para. 24 – While the Chairman of the Administrative Council/ WB President is traditionally US, you will note that the SG of ICSID is usually from different States. As you know, I am Canadian, my predecessor was Spanish, her predecessors were Japanese, Peruvian, and American. The first SG was Aron Broches (Dutch) and the longest serving was Ibrahim Shihata who was Egyptian. This seems relevant given the point made concerning nationality in the latter part of the paragraph.

Para. 26 – The ICSID process has been the same since its inception, so there has not been a trend of institutionalization, although clearly it is an institutionalized process and always has been.

Para. 28 – The ICSID amendment process is ongoing and website has further detail at <https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx>

Para. 32 – A theme in the paper is that private sector lawyers/ commercial arbitrators form the bulk of appointees. I don't know the exact statistics, but I believe a very significant number of ICSID arbitrators are not from this tradition, but rather are academics, international judges or former diplomats. More generally, is it worth noting the diversity of arbitrators and arbitrator candidates? For example, ICSID has appointed more than 500 different people in its cases to date, from over 85 States.

FN 28 – There are a few examples of serving government officials in the early days of ICSID jurisprudence, but you are correct that this is rare, if not unheard of, today. I suspect the reason is that a current government official would be likely to be challenged on the basis that they owe their current salary, and loyalty to the State, and hence a reasonable perception of bias exists. The same does not apply to former government officials and there are many instances of former officials acting as arbitrators.

Para. 34 – I wonder if the accountability mechanism for ICSID is the fact it reports publicly on operations (Annual Report) and to its Administrative Council.

Para. 37 – The paper distinguishes contract cases from investment cases. Investment cases at ICSID derive from contract, treaty, and investment laws, and a number of scholars believe that there will be increased use of investment contracts in the future. The [ICSID statistics](#) break down the number of contract, treaty, and law cases for ICSID.

Para. 46 – Contracts and other investment instruments may well appoint the SG rather than the Chair – the Chairman is not required to be named as the appointing authority.

Para. 50 – ICSID arbitrators make 3000 USD per day, equivalent to 375 USD per hour. I understand that arbitrators at some other centres make significantly more, for example up to 1000 USD per hour. As you know, some centres use an ad valorem calculation for fees so it is hard to compare these with hourly rates. Some new treaties require the ICSID rate (see CETA for example).

Para. 55 – Generally, the pool of arbitrators on the ICSID list is extensive. It contains 421 persons overall, who are designated by 116 States or the Chairman. Those 421 persons are nationals of 127

States. Roughly 20% of the list consists of females. ICSID has made extensive efforts in the last 5 years to have States appoint qualified persons to the list and to replenish their nominees. These efforts have been quite successful. We will publish a piece on our web in the next month that explains the qualities required and desired for Panel members and this may be of use to you. I note as well that the Chairman can appoint 10 arbitrators and 10 conciliators and these must be of different nationalities and regard must be had to the principal legal systems of the world and main forms of economic activity (Convention Art. 12-16). You should also look at the [ICSID statistics](#) on arbitrator nationality that shows the diversity of nationalities and also the efforts of the Centre in including persons from different States.

FN 58 – A number of negotiators have gone on to become ISDS arbitrators. For example, Dan Price (US), Hugo Perezcano Diaz (Mexico), Ricardo Ramirez Hernandez (Mexico) or Guillermo Aguilar Alvarez (Mexico) come to mind.

Para. 67 – ICSID has 153 States that have ratified the Convention with another 8 that have signed but not yet ratified.

Para. 76 – The Chairman's role has not changed, and I think it is hard to say its importance has diminished due to the ballot process (see info below re: ballot).

Para. 79 – The [list of Administrative Council members and alternates](#) is on the ICSID website. The resolutions for each Annual Meeting are also published in the [Annual Report](#).

Para. 80 – The ICSID Deputy Secretaries General are also elected. For further information on the current DSGs, see the ICSID website. They are Martina Polasek (Czech/Swedish) and Gonzalo Flores (Chilean).

Para. 82 – DSGs are subject to the same process as the SG.

Para. 83 – Profiles of the ICSID staff are also on the website under the [Secretariat](#) tab.

Para. 131 – While perhaps not on point, it would be useful if you could explain for your readers that no institution can administer the institutional rules of another institution, while any institution can administer cases under the UNCITRAL Rules. Thus, for example, the PCA could not administer an ICSID or ICC case, but all three of these institutions could administer an UNCITRAL case. While it may seem basic, it is a question that a number of States have asked about so it would be a useful addition if there is a place for it!

Para. 136 – The Chairman can appoint from outside the Panel if both parties agree, although this is unusual.

Para. 137 – I am not sure what the sentence saying the criteria predate ISDS means. The criteria are very close to the ICJ and a number of other international instruments.

Para. 138 – ICSID has played an active role encouraging States to appoint to ICSID Panels but we do not play a role in commenting on or suggesting candidates. Where States want to know if their nationals have been involved in cases, we point them to the search features of the ICSID website. As noted above, we will be posting a note on qualities to look for in an ICSID arbitrator which may be of general assistance.

Para. 140 – The consultation allows the disputing party to address any lack of qualities under Art. 14, and parties may bring up any other relevant factor they wish at this stage.

Para. 142 – The quote is out of context and was not an expression of dissatisfaction with the quality of appointees to the Panel. It was not a comment on ICSID Panel arbitrators in particular, but more generally that there are not enough people with all the criteria one would want for the number of ISDS cases pending. I have said this a few times, but it is applicable to ISDS in general. This may be why there are comments about “repeat arbitrators”. Counsel will often say that they choose arbitrators who have a track record of long experience and issued awards because they are more easily able to advise clients on how they think such an arbitrator would address any particular case. Others feel this should not be relevant and suggest that there should be a broader diversity of arbitrators in the system. I also think this is a bit “generational”, and that increasingly we are seeing new candidates take on cases. In our [Annual Report of 2017](#) (p. 35) we addressed the number of women and first- when discussing arbitrators), and I think this shows that new people are entering the field. More generally, most people I talk to feel that the ICSID Panel has most of the arbitrators you might expect, including all of the well-recognized and experienced persons, and that the issue is the more general one of finding enough highly qualified people (with languages, expertise, no conflict, availability, understanding of relevant law, etc.) to replenish and diversify the group of arbitrators doing ISDS cases. The ICSID Panels combined now have over 650 people on them, so there is a wide variety of potential candidates.

Para. 153 – The usual number of ballot candidates is 5, but we have done more where parties have asked for it. We have also done two rounds of ballots if requested by the parties.

Para. 157 – The success rate of the ballots has varied from year to year, but has averaged 27% in the last 4 years. This means 27% of the time the ballot results in a consensus candidate. Anecdotally, parties have advised ICSID that they appreciate the ballot process, even where it does not result in an appointment.

Para. 195 – States can and do initiate claims under investment contracts.

Para. 229 – The registers are now on the website (as procedural details for [each case](#)) and we no longer keep the old hard copy books for each case. As a result, all have access to it.

Para. 231 – This paragraph should be slightly rephrased. The ICSID ballot does not circumscribe choice; it adds the potential for choice where the parties have not agreed to a nomination. If the parties do not agree on a ballot candidate, the usual choice from the ICSID Panel will be applied. As a result, a ballot is an additional layer of choice rather than going straight to a direct appointment from the Panel.

Para. 252 – See [ICSID statistics](#) for bi-annual stats on arbitrators by nationality.

Para. 254 – ICSID’s web CV database includes CVs for all arbitrators sitting in ICSID cases, regardless of whether they are on the Panel, were chosen by ballot or were chosen by the parties. The CV project is not complete yet, but is being populated every day. Most current ICSID arbitrators are on the [CV database](#).

Para. 261 – The paper concludes that no other system has a similar level of damages at stake as ISDS. This ignores the economic significance of awards from other economic tribunals, although technically these might not be called damages awards. Take for example, awards in the WTO which routinely have an impact in the billions, and may address an entire sector of an economy. Another example are commercial disputes with governments or government entities that may be arbitrated or brought to domestic courts. These often use the same kind of assessment as investment tribunals (DCF etc.).

1.2. Permanent Court of Arbitration (PCA)

Thank you for the opportunity of reviewing a working draft of your research paper entitled “Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview” (“Research Paper”). I am pleased to note the OECD’s active interest in the topic. In the past years, the Permanent Court of Arbitration (“PCA”) has apprised the UNCITRAL membership of its activities in this field on an annual basis. We also intend to provide specific data about the PCA Secretary-General’s role as appointing authority to UNCITRAL Working Group III in the course of its upcoming session(s).

The PCA deals with a more varied group of dispute resolution proceedings, both procedurally and substantively, than most arbitral institutions. Accordingly, the PCA Secretary-General’s approach when designating an appointing authority or acting as appointing is highly flexible and adapted to the needs of each case. Among other considerations, the Secretary-General will take account of the following factors to determine the appropriate procedure in an appointing-authority matter:

- Applicable rules of procedure (e.g., PCA Rules, UNCITRAL Rules (1976/2010/2013), other *ad hoc* rules, etc.) as potentially modified by underlying agreement (BIT or FTA, *compromis*, contract, etc.);
- Nature of the parties (States, intergovernmental organizations, private parties);
- Nature of the dispute (treaty claim, commercial contract claim, environmental dispute, human rights dispute, etc.);
- Size of the claim (ranging from disputes worth several thousand euros to disputes worth several billion euros);
- Agreement by the disputing parties on procedural steps at the appointment stage.

The PCA is frequently questioned by counsel for disputing parties regarding the PCA’s appointing authority services. PCA Legal Counsel are pleased to provide specific explanations as to the PCA’s approach in a given case. Moreover, the PCA will communicate the procedure for the appointment of a presiding arbitrator in detail to the disputing parties once an appointment request has been received and analyzed.

Various aspects of the procedure commonly applied by the PCA Secretary-General in respect of appointing authority requests—including the role of the disputing parties in the process, the criteria applied by the Secretary-General in composing a list or making an appointment, and alternatives to the default list-procedure—are described in public sources, excerpts of which are attached to this letter.¹

Such substantive information about appointments made by the PCA could usefully complement the discussion in the Research Paper, which appears to be heavily focused on questions of transparency. The draft Research Paper indicates certain areas in which the OECD researchers appear to have been unable to find satisfactory information or data. The following comments are intended to point you and your team toward pertinent public sources and/or explain the PCA’s practice in further detail.

¹ Brooks W Daly, Evgeniya Goriatcheva, and Hugh A Meighen, *A Guide to the PCA Arbitration Rules* (Oxford University Press 2014); Sarah Grimmer, ‘The Expanded Role of the Appointing Authority under the UNCITRAL Arbitration Rules 2010’, 28(5) *Journal of International Arbitration* (2011) 501–517; Dirk Pulkowski, ‘Permanent Court of Arbitration’, in R.A. Schütze (ed.), *Institutional Arbitration: Article-by-Article Commentary* (forthcoming, 2nd ed., C.H. Beck/Hart/Nomos, 2018).

Paragraph 1

“Appointing authorities typically intervene primarily following each disputing party’s selection of its co-arbitrator. This is because the appointing authority’s most important role is to appoint the chair of a tribunal if the parties or co-arbitrators are unable to agree on one.”

Comment:

According to the PCA’s statistics, 47% of appointing authority matters between 2005 and 2017 involved the appointment of a second arbitrator, while 17.5 % involved the appointment of a presiding arbitrator. If only appointing authority matters between 2011 and 2017 are considered, 38% involved the appointment of a second arbitrator, while 16.5% involved the appointment of a presiding arbitrator.²

The remaining requests have notably concerned the appointment of a sole arbitrator, the appointment of two arbitrators or the constitution of the full tribunal, arbitrator challenges, the replacement of an appointing authority, the appointment of a conciliator, and the appointment of an expert. It is evident that each type of request raises different procedural considerations.

While the appointment of a presiding arbitrator is a significant aspect of the appointing authority’s role, I would hesitate to introduce a hierarchy between functions such as the appointment of the second arbitrator, the appointment of the presiding arbitrator, and decisions on arbitrator challenges. All these functions of the appointing authority together are significant for the fairness and integrity of the proceedings.

Paragraph 7

“The PCA makes less information available about the overall scope of its role in ISDS, but it is undoubtedly an important actor with a significant ISDS case load, in particular under the UNCITRAL Rules.”

Comment:

On the PCA’s web-based Case Repository (www.pcacases.com), members of the public may view the number of investor-State proceedings pending at the PCA at any given point in time. On the date of this letter, the website states: “The PCA acts as registry in eighty-four investor-state arbitrations under bilateral or multilateral investment treaties or investment laws”.

The PCA’s caseload in the area of investor-State arbitration is summarized on an annual basis in the PCA’s Annual Report. The 2016 Annual Report, for example, states that the PCA provided registry services during that year “86 investor-state arbitrations arising under bilateral/multilateral investment treaties and national investment laws” (p. 18).

The PCA further provides up-to-date case statistics on an annual basis to the United Nations Commission on International Trade Law (“UNCITRAL”). In addition, further statistics have been provided to UNCITRAL Working Group III, including those published by UNCITRAL as document No.

² For the period from 2005-2010, see Sarah Grimmer, ‘The Expanded Role of the Appointing Authority under the UNCITRAL Arbitration Rules 2010’, 28(5) *Journal of International Arbitration* (2011) 501–517 at 508 and note 19.

A/CN.9/WG.III/WP.143. The latter document states, *inter alia*: “In the past years, the PCA has consistently registered around 40 new [investment] cases per year. Around 60 per cent of these have concerned treaty-based investment arbitrations. This brings the total number of treaty-based UNCITRAL investment arbitrations administered by the PCA to over 170.”

Paragraph 19

“The two inter-governmental organisations in particular have different disclosure policies even though their government membership overlaps significantly. ICSID makes available a limited but largely systematic range of information about appointment activity in all cases including for example the identity of all sitting arbitrators; it also provides statistical information about its arbitral pool. In contrast, the PCA does not disclose its appointing action in particular cases and makes available only very limited information about its appointing authority-related activities in ISDS. The differences may reflect different historical development, types or intensity of government engagement with the issues at the two institutions, competitive considerations or other factors.”

Comment:

The PCA simply discloses what is agreed by the parties to the dispute, or what the tribunal decides should be disclosed. When disclosure is made, the PCA’s Case Repository enables the PCA to make a wide range of case-related information available to the public (including, in addition to information about the composition of the tribunal, the tribunal’s awards and orders, the parties’ written submissions, audiovisual records of hearings, and press releases). Case-related information is made public to the extent that the disputing parties consent to such disclosure, whether by choice of a particular set of procedural rules or on an *ad hoc* basis, or when the tribunal so directs.

The UNCITRAL Rules 1976 and 2010 place some express limitations on disclosure (hearings *in camera*, awards not public unless agreed) and are otherwise silent regarding transparency. It is only with the UNCITRAL Rules 2013 that UNCITRAL provided for comprehensive treatment of transparency in the context of disputes under investment treaties. Disclosures may thus be expected to increase in the coming years as a greater number of treaties will fall within the scope of the UNCITRAL Rules 2013 and as the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration will gather more ratifications.

Other institutions providing services in cases under the UNCITRAL Rules are also bound to follow the terms of those rules. ICSID’s practice when providing registry support to cases under the UNCITRAL Rules appears to be consistent with the PCA’s. ICSID discloses only eleven out of the apparently 64 UNCITRAL-based investor-State proceedings to which it has provided registry support in its “Cases” database. As regards appointing authority requests under the UNCITRAL Rules, I am not aware of any examples where ICSID has published an arbitral appointment that its Secretary-General has made (other than indirectly, by publishing an award recounting the procedural history of a case). Similarly to the PCA, ICSID publishes in its Annual Report statistical information regarding the number of appointments made in a given year.

Accordingly, it would seem more accurate to state, at the end of the paragraph, that “[t]he differences reflect different approaches in the rules of procedure applicable in ISDS proceedings.”

Paragraph 42

“The parties can be expected to form their expectations about the appointing authority in part from their knowledge about appointing authority appointing behaviour in prior cases. To take a hypothetical example, an appointing authority known to provide lists primarily composed of governmental officials from third countries would likely generate different agreed outcomes than one whose lists or appointments are composed primarily of commercial arbitrators. Neither side has an incentive to accept a chair by agreement who is significantly less attractive than the expected outcome from an appointing authority process. (Parties may agree to someone somewhat less attractive due to uncertainty in the appointing authority process.) Negotiated outcomes may be likely to reflect profiles that resemble appointing authority lists and appointments.”

Comment:

The paragraph appears to presume that, under the applicable procedural rules, the selection of a chair falls to the disputing parties, as is indeed the case under the ICSID Convention. To avoid or at least lessen the impact of the behavioral incentives described in paragraph 42, however, the UNCITRAL Rules have adopted a different approach to the selection of the presiding arbitrator. The selection of the presiding arbitrator by the co-arbitrators in the UNCITRAL system removes the selection process from the disputing parties.

While I appreciate the hypothetical character of the example, in practice the appointing authority is likely to consult the disputing parties in respect of the desired profile of the presiding arbitrator before composing a list (at least, this represents the standard practice at the PCA). The idea of an “appointing authority known to provide lists primarily composed of governmental officials from third countries” or “one whose lists or appointments are composed primarily of commercial arbitrators” therefore feels somewhat disconnected from practice.

Paragraph 89

“89. The PCA was established by treaties on the peaceful resolution of disputes dating from 1899 and 1907. It has 117 Member States and has its seat in The Hague in the Netherlands. Unlike ICSID which is part of the World Bank Group, the PCA is a free-standing IGO. Much smaller and less well known than the World Bank, it is subject to much less academic and media attention.”

Comment:

As rightly noted, the PCA was established by the Convention for the Pacific Settlement of International Disputes, concluded at The Hague in 1899 during the first Hague Peace Conference. The 1899 Convention was revised at the second Hague Peace Conference in 1907. At present the PCA has 121 Contracting Parties (not 117 as set out in the text). As an intergovernmental organisation with a broad mandate to facilitate the settlement of international disputes, the PCA provides administrative support in international proceedings involving various combinations of states, state entities, international organizations and private parties.

Paragraph 92

“The 1907 Convention establishes a quorum of 9 members being present; the quorum requirement has not been adjusted despite the growth in the PCA membership. PCA Council decisions are to be taken by majority vote. At a Dec. 2013 Council meeting, the acting president stated that “the Presidency understood Article VI to require “a majority of votes actually cast . . . [with] abstentions not to be counted.” This appears to mean that a very small number of votes can constitute a majority. Attendance or voting data is not made available”.

Comment:

Although the 1907 Convention establishes a quorum of nine members of the Administrative Council being present, both the growth in PCA membership and the increasing awareness of the work of the institution means that, in reality, attendance is consistently higher (in recent years averaging over 80 delegations present). At the election of the PCA Secretary-General in December 2016, 102 Contracting Parties were present and 101 voted (one abstained).

Also, I note that any voting system that discounts abstentions (as most do), creates the possibility that a small majority may determine a vote. The voting system used by the PCA’s Administrative Council appears to reflect the standard practice in intergovernmental organizations. In light of this practice, paragraph 92 seems likely to foment unfounded concerns rather than raise real issues.

Paragraph 93

“The PCA Council has created committees for specific issues. The existing committees appear to be administrative in nature such as a budget committee and a financial committee. A working group has been created and decisions have been taken about rules for elections to those committees. There does not appear to be any committee dedicated to oversight of dispute resolution matters or ISDS.”

Comment:

The PCA is small and concerned exclusively with dispute settlement, unlike, say, the United Nations or the World Bank. Its Administrative Council has thus far been considered the appropriate forum for any policy matters concerning dispute settlement, with no need to delegate its work in this field to a committee.

Paragraph 99

“99. PCA Secretariat staff increased by almost 100% between 2010-2015 to reach 75; growth since 2005 has been almost 500%.⁷⁵ These growth and size statistics are similar to those of the ICSID Secretariat.”

Comment:

While the PCA Secretariat has indeed grown between 2010 and 2017, it has not reached the number of 75 set out in the text. This may be a misunderstanding based on adding up all the names listed in the PCA’s Annual Reports, which lists include the names of any person who worked at the PCA during a given year (whether they left in January or arrived in December). A more representative figure for the total number of lawyers (Senior Legal Counsel, Legal Counsel, Assistant Legal Counsel), paralegals (Case Managers), and administrators at the PCA is around 60.

Paragraph 179

“The PCA has not adopted any particular procedures for its appointing authority services under the UNCITRAL Rules.”

Comment:

This statement does not seem accurate. The PCA sets forth a clear and simple procedure for handling appointing authority matters on the PCA website,³ which has been continually refined over the last 20 years. Additionally, the PCA Rules and UNCITRAL Rules provide the procedural framework for the work of the appointing authority, including time limits, standards of independence and impartiality, model disclosure statements, the power to request information, and the relevance of nationality in the context of sole and presiding arbitrator appointments.

The following public sources, excerpts of which are attached to this letter for your convenience, provide further information about the PCA’s practices and procedures as in investor-State cases:

- Brooks W. Daly, Evgeniya Goriatcheva, and Hugh A. Meighen, *A Guide to the PCA Arbitration Rules* (Oxford University Press 2014);
- Sarah Grimmer, ‘The Expanded Role of the Appointing Authority under the UNCITRAL Arbitration Rules 2010’, 28(5) *Journal of International Arbitration* (2011) 501–517;
- Dirk Pulkowski, ‘Permanent Court of Arbitration’, in R.A. Schütze (ed.), *Institutional Arbitration: Article-by-Article Commentary* (forthcoming, 2nd ed., C.H. Beck/Hart/Nomos, 2018).

In addition, the PCA clearly communicates to the disputing parties the procedure for the appointment of a presiding arbitrator that will be applicable in a given case, once an appointment request has been received and analyzed.

Paragraph 186

“Information has not been located about any treaties specifically referring to either set of rules for ISDS or about any ISDS cases under these rules although more research is necessary.”

Comment:

An indicative list of (a selection of) treaties referring to the PCA, including investment agreements, is publicly available on the PCA’s website, at <https://pca-cpa.org/en/documents/instruments-referring-to-the-pca/>.

Paragraphs 218 and 221

“Although there is only limited and anecdotal information from other sources, it may provide some indications about PCA practices as designating authority. Available information suggests that in recent

³ See <https://pca-cpa.org/en/services/appointing-authority/pca-secretary-general-as-appointing-authority/>

years the PCA has primarily designated individuals rather than institutions as appointing authorities in ISDS cases.”

“Some competitive factors and incentives may be perceived to be at issue in this context. For example, to the extent the PCA is perceived as seeing certain arbitration institutions as competitors for ISDS cases with whom it may compare statistics and market shares, it may be perceived to be disinclined to designate them as appointing authorities. A reciprocal relationship could be seen to exist between the PCA and individual arbitration market participants that does not exist between the PCA and other arbitration institutions active in ISDS. Individual lawyers or arbitrators designated as the appointing authority by the PCA may choose or influence the choice of arbitration institutions for ISDS cases in the future while other arbitration institutions with no institutional role as a designating authority will not.”

Comment:

The PCA takes into consideration the comments of the parties when selecting appointing authorities. In investor-state arbitration, parties frequently have strong views regarding the appropriateness of existing arbitral institutions as appointing authorities, be it based on their commercial or private law nature, or other factors. The PCA Secretary-General frequently designates eminent jurists, such as members of the international judiciary or former officials of intergovernmental organizations, as appointing authorities, such choices answering concerns commonly voiced in investor-state cases under the UNCITRAL Rules about the most appropriate profile for appointing authorities in proceedings involving States or intergovernmental organizations under international law (as compared to commercial claims between private parties under domestic law).

Paragraph 225

“However, tactical considerations may also enter into play if the PCA is seen by some as possibly also having additional interests in ISDS cases. For example, the PCA could be perceived as preferring to serve as appointing authority rather than designating authority in ISDS cases, as might be suggested to some by the PCA’s own arbitration rules or emphasis in some of its annual reports on its role in appointing rather than designating. Some disputing parties might consider that they might improve their position if they instigate a possible conversion perceived to be welcome for the PCA. If the same perceptions obtain, the other side would then be confronted with a choice between rejecting the conversion (leaving the PCA with discretion as designating authority to select the appointing authority) or accepting the PCA as appointing authority. These incentives, if relevant in practice, could favour a high rate of conversions. The PCA does not disclose how often its role is converted from designating authority to appointing authority in ISDS cases.”

Comment:

In the 1976 UNCITRAL Rules, there was only mention of the role of the PCA SG as designator of appointing authorities. This led to confusion among some States about whether the PCA Secretary-General was available to act in this capacity, leading UNCITRAL to make the addition to the 2010 UNCITRAL Rules clarifying that the PCA SG was also available to act as appointing authority where the parties so agree.

Paragraph 230

“ICSID currently discloses the composition of each arbitration tribunal on its website. Disclosure applies both to pending and completed cases. It notes the co-arbitrator appointed by each disputing

party and whether the chair was appointed by agreement of the parties or by the ICSID Chairman. The website reports on the status of all cases to date. Arbitrator names can link to biographical information on the ICISD website (supplied by the arbitrator).”

Comment:

It is my understanding that this disclosure standard applies only in arbitrations pursuant to ICSID’s own rules of procedure,⁴ and not in arbitrations pursuant to other rules of procedure. As noted in my comment on paragraph 19, the amount of information that an arbitral institution is permitted or required to disclose depends on the applicable rules of procedure, and ICSID’s practice when providing registry support to cases under the UNCITRAL Rules appears to be consistent with the PCA’s.

Paragraph 239

“The PCA website does not provide additional information about the policy. The legal basis and decision-maker are not identified. It is unclear if it results from decisions taken by governments in the PCA Board or by the Secretariat. The date of adoption of the policy is not disclosed. As noted above in Part VII, PCA disclosure has varied over the recent past.”

Comment:

Please see the PCA’s comment on paragraph 19, above.

Paragraph 241, note 220

“The PCA provides disclosure in some cases without disputing party consent. For example, it has disclosed information about two ISDS claims in which the respondent state has stated that it does not recognise the jurisdiction of the arbitral tribunal and has refused to participate. The disclosure includes information about the composition of the tribunal and how it was selected in part through apparent PCA action. It appears that this PCA disclosure in the absence of disputing party consent occurred because the PCA did so “under instructions from the arbitral tribunal”. See PCA Press Release, Two UNCITRAL Arbitrations Commenced under the Ukraine-Russia Bilateral Investment Treaty; Tribunal Comprised of the Same Members Constituted in Each Case; Russian Federation States that it Does Not Recognize the Jurisdiction of the Tribunal and Fails to Submit Statements of Defense; Hearing Scheduled for 11 July 2016 (2 May 2016). The basis or scope of arbitral tribunal power over the PCA in this regard is not clear.”

Comment:

As is correctly pointed out, the issuance by the PCA of press releases in the above-mentioned arbitrations occurred “under instructions from the arbitral tribunal”. In any matters in which the PCA acts as registry, it will perform its functions on the instructions of the tribunal, which under the applicable rules of procedure has the sole authority to “conduct the arbitration in such manner as it considers appropriate” (see Article 17(1) of the UNCITRAL Rules 2010). The terms of the PCA’s involvement are also recorded in each case in terms of appointment or a first procedural order, as the case may be. The

⁴ Regulation 23 entitled “The Registers” forms part of the Administrative and Financial Regulations, which were adopted by the ICSID Administrative Council pursuant to Article 6 of the ICSID Convention.

disclosure of case-related information is no exception in this regard, that is, it reflects a finding of an arbitral tribunal regarding appropriate disclosure under the applicable procedural regime rather than an action by the PCA.

I hope that the information provided in this letter and in the publications attached to it will assist you in clarifying the role of the appointing authority in ISDS proceedings pursuant to the UNCITRAL Rules and allow you to provide further detail in respect of the PCA's practice. I note that the Research Paper, once finalized, is intended "to facilitate an informed Roundtable dialogue with appointing authorities and others." The PCA will be pleased to participate in such a Roundtable discussion that may be hosted by the OECD in the future.

1.3. Arbitration Institute of the Stockholm Chamber of Commerce (AI-SCC)

On the participation of the SCC Board in the appointment process.

The SCC Board meets regularly once per month to take decisions as foreseen under the SCC Rules, and other instruments under which the SCC is appointed to act.

All board members are invited to participate in the meetings, which are held in person and through conference calls (for members not able to participate in person). Most board members regularly participate in the discussion and the decision-making.

A preliminary agenda for the meeting is circulated to all board members approx. 10 days before the meeting. Board members will then conduct a conflict check relating to parties listed on the agenda, and inform the Secretariat if there is any item of the agenda where they have a conflict. Typically this would be where a board member's firm is representing one of the parties, or where a colleague of the board member, or the board member him-/herself, has been appointed as co-arbitrator by one of the parties (board members can accept appointments as arbitrator in SCC cases from parties, but the SCC Board will not appoint board members in any SCC cases).

Documents relating to the meeting are uploaded at a virtual data room one week before the meeting. If a board member has a conflict regarding any of the cases on the agenda this board member will not have access to any documents relating to this case.

In the appointment process, the SCC Board applies the SCC Policy for Appointment of Arbitrators (encl.).

Par. 50 – an hourly fee of USD 700 is substantially higher than what we typically from counsel in SCC cases.

Par. 52 – what does this mean?

Par. 103 – the Board of Directors of the Stockholm Chamber of Commerce are elected at the General Meeting of the Stockholm Chamber of Commerce. The Stockholm Chamber of Commerce is a not-for-profit business organization consisting of approx. 2000 members in the Stockholm Capital Region.

Par. 106 – decisions on the appointment for the Board of the Arbitration Institute of the Stockholm Chamber of Commerce are prepared by the Arbitration Committee of the Board of Directors. The Arbitration Committee currently consist of the Vice Chair of the Board of Directors, the CEO of the Stockholm Chamber of Commerce and the Secretary General of the Arbitration Institute.

Additional materials:

SCC Policy on Appointment of Arbitrators, adopted 2006; amended 2017
SCC Practice Note, Emergency Arbitrator Decisions Rendered 2015-2016 (June 2017)

Links:

http://www.sccinstitute.com/media/62020/scc-practice-emergency-arbitrators-2014_final.pdf
http://www.sccinstitute.com/media/29995/scc-practice-2010-2013-emergency-arbitrator_final.pdf

1.4. International Chamber of Commerce (ICC)

The President and the Secretary-General of the ICC Court of Arbitration received an invitation to comment and an offer to supply the paper at the same time as the other four arbitration institutions. The ICC did not request a copy of the paper or provide comments.

1.5. Singapore International Arbitration Centre (SIAC)

We refer to the OECD Secretariat’s draft paper on “Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview”.

As a general comment on the statements in paragraphs 257, 259, 260 and footnote 217, whilst on the one hand, SIAC recognises the rationale for some level of transparency in ISDS cases, on the other hand, we are of the view that providing a certain level of confidentiality and privacy to disputing parties is necessary for the effective and efficient resolution of their disputes.

SIAC is of the view that the balance it has struck in the SIAC Investment Arbitration Rules (“SIAC IA Rules”), between protecting the confidentiality of the arbitral proceedings and the need for transparency in ISDS cases, is the correct one. The need for accountability is best met by the respondent host State and not by disclosure of more information in ISDS cases: The nationals of the respondent host State are ultimately the only non-parties that have a real interest in ensuring accountability of the ISDS process. The parliament or government of the respondent State in question would be in the best position to explain and disclose to their nationals their reasons for approval of the investments by the claimant investor in the first place, the rationale for the change in government policies or other government actions that had formed the subject of a ISDS claim, and also the extent of public funds that were spent in defending and compensating an investor in the ISDS claim.

SIAC’s discretion to limit publication to the core aspects of the dispute may actually distinguish SIAC from arbitration under other sets of Rules. This position would be appealing to many of SIAC’s potential users, particularly from the State-side. Individual arbitral tribunals, and the parties before them, should be

left to evaluate and agree on the issue of more extensive disclosure of information related to the arbitration in each case.

Please find below our specific comments on the portions that relate to SIAC:

The SIAC IA Rules are a bespoke set of rules that are designed to improve the time and costs efficiencies of investment arbitration. SIAC is also the first major institution to directly address the issue of third-party funding in the IA Rules.

- Paragraphs 8, 133 and 186 – SIAC had 4 ISDS cases in 2014 (see page 6 of SIAC’s 2014 Annual Report: http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2014.pdf). SIAC also had one case in 2015, and one case in 2016, involving a sovereign state and a provincial government, respectively, in primarily commercial disputes.
- Paragraph 20 – Please note that the identity and nationality of the arbitrators will be disclosed in cases under the SIAC IA Rules (Rule 38.2 of SIAC IA Rules).
- Paragraph 25 – The SIAC Court has no regional specificity. The SIAC Court members comprise 22 eminent arbitration practitioners from around the world, including Australia, Belgium, China, France, India, Japan, Korea, Singapore, UK and the USA.
- Paragraph 31 (footnote 23) – You may want to refer to WilmerHale’s article on the SIAC IA Rules: (https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/WH_Publications/Client_Alert_PDFs/2017-01-25-new-SIAC-investment-arbitration-rules.pdf.) The article currently cited in footnote 23 is outdated and reflects previous policies of SIAC.
- Paragraph 122 – We confirm transfer of ownership of SIAC to the Singapore Business Federation.
- Paragraph 124 (footnote 125) – The SIAC CEO is not an appointing authority under the SIAC Rules or SIAC IA Rules.
- Paragraph 128 – Under the SIAC IA Rules, ‘Committee of the Court’ means a committee consisting of not less than three members of the Court appointed by the President (which may include the President).
- Paragraph 130 – Please update the number of jurisdictions: “over 400 potential arbitrators from 42 jurisdictions”.
- Paragraph 130 – The term for the SIAC Panel of Arbitrators is for two years.
- Paragraph 158 (footnote 139) – The article cited in footnote 139 is outdated and reflects previous policies of SIAC. Since the SIAC article cited in footnote 139, SIAC had moved towards greater transparency. For instance, reasoned decisions on challenges are now released to the parties and may be published in redacted form (Rules 13.4 and 38.2 of SIAC IA Rules). SIAC has also entered into a cooperation agreement with Arbitrator Intelligence (AI), an entity affiliated with Penn State Law, to promote the use of the Arbitrator Intelligence Questionnaire that will collect objective information and professional

assessments of arbitrators' case management skills and decision-making from users following the conclusion of their arbitrations. The consolidated anonymized data will then be published by AI, with the arbitrators' consent, in reports which are made available to subscribers (see 1 June 2017 article, "SIAC Signs Cooperation Agreement with Arbitrator Intelligence" on the SIAC website).

- Paragraph 186 – Please note that the President of the Court of Arbitration of SIAC is the default appointing authority for ad hoc arbitrations seated in Singapore.
- Paragraph 192 (footnote 172) – The SIAC IA Rules are designed to facilitate the participation of amicus curiae. There would be no impact on the ability of parties to submit on issues of law given that Rule 29.1 is limited to submissions by Non-Disputing Contracting Parties on questions of treaty interpretation. Under Rule 29.2, both Non-Disputing Contracting Parties and Non-Disputing Parties may, by leave of the tribunal, submit on matters within the scope of the dispute, including issues of treaty interpretation.
- Paragraph 192 (footnote 173) – We confirm that the authors (who are no longer active staff at SIAC) were referring to article 33(1)(f) of the 2009 ASEAN Comprehensive Investment Agreement.
- Paragraph 197 – The SIAC IA Rules are specifically crafted to require an 'opt-in' procedure due to the diverse views on the interaction of emergency arbitrator provisions with cooling off periods and the potential jurisdictional implications thereon. An 'opt-in' procedure also neatly balances the interest of both investors and states.
- Paragraphs 235-236 (footnote 217) – The SIAC IA Rules retain some discretion on the publication of certain information relating to a dispute to cater for scenarios where the parties raise valid concerns on confidentiality. With respect to footnote 217 on the source of the apparent limits on consent to provide greater disclosure, we would respectfully take the view that the position is correctly set out at paragraph 235.

2. Comments from Stakeholders and Experts

2.1. Business and Industry Advisory Committee to the OECD (BIAC)

Business at OECD (BIAC) appreciates the opportunity to submit comments on the draft OECD paper on appointing authorities and the selection of arbitrators in ISDS. As seeing most of the changes in the new

version are minor ones, BIAC would like to reiterate the comments we submitted in October⁵ and offer a number of additional comments.

- Apart from invoking a lack of transparency in the selection process of arbitrators and the existence of different levels of disclosure by appointing authorities, the paper does not clearly identify the adverse consequences that these factors might have in practice, although it seems to link them with the lack of training or impartiality of the panel of arbitrators appointed by each arbitral institution. The underlying message of the paper appears to be that anything falling short of complete transparency to the public is inadequate. Not only is that point unsubstantiated by evidence, but it is also not put into the context of the purpose of certain existing rules on the issue.
- It should be kept in mind that transparency and training or impartiality are clearly differentiated issues, and that all procedural rules include measures designed to ensure the (technical) competence and impartiality of judgment of the arbitrators appointed by the parties, allowing the substitution and challenge of any member of the court.
- Although not expressly stated, the report appears to be inclined to replace the current system of appointment of arbitrators by a closed panel of arbitrators designated by the States (as in the case of the Investment Court System). We believe that this proposal, if implemented, would damage the defense of the investor, who would be forced to choose an arbitrator among those previously selected by the States (probably with a "pro-state profile"), impairing the neutrality of the process.
- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the "New York Convention") may enable investors to enforce in a third country arbitral awards won in the ISDS procedure. But in case arbitrators are designated only by the States, the award or ruling made by those arbitrators may not constitute a qualified award as enforceable in a third country under the New York Convention. This is a substantial disadvantage of the Investment Court System or any other model where arbitrators are designated by the States. If a host country is poor but they hold sufficient assets in a third country, this issue is more serious.
- At the same time, if the panel of arbitrators is configured exclusively with ex-officials, academics or ex-magistrates, one of the major benefits of arbitration against traditional judicial systems would be lost, i.e. the industry's expertise and knowledge expected from these professionals. To expect professionals to have expertise in the field in which they are practicing should not be an objectionable proposal.
- The very essence of the investment arbitration is to ensure a neutral forum for the settlement of disputes. It is therefore a priority to guarantee the legality and legal certainty of the procedure. The

⁵ [OECD Secretariat footnote: This refers to a stakeholder consultation by governments with BIAC, the Trade Union Advisory Committee (TUAC) and OECDWatch about investment policy issues held at the OECD in October 2017.]

paper highlights the reciprocal interests and relationships among a small group of arbitration institutions and arbitrators/lawyers. As stated in the paper, arbitration institutions seek to attract ISDS cases while private sector lawyer/arbitrators seek appointments as ISDS arbitrators. According to the report, this issue is even more accentuated in relation to private sector arbitration institutions, in which appointing authorities themselves are essentially composed of private sector lawyer/arbitrators. While agreeing that the investors' lawyers play a significant role with regard to the choice of an arbitration forum, law firms and lawyers usually propose to select a particular arbitration institution based on criteria of efficiency, agility of processes and costs, also taking into account the administrative services provided by the relevant institutions.

- As a general rule, no policies or statistics have been implemented with regard to geographical diversity in the composition of the appointing authorities. No information is available on whether there are any considerations of diversity in the composition of the collective bodies that serve as appointing authority. The appointing authorities should be collegiate bodies where diversity is guaranteed. Diversity is understood as a diversity of nationalities, gender and where both public official and private sector (lawyers) are represented. If this diversity is guaranteed, the system will be more reliable. In this sense, a system of appointment of arbitrators by a closed panel of arbitrators designated by the States should be avoided. Such a panel proposed by the States would probably be composed of public officials or arbitrators with a pro-state profile, impairing the diversity commitment and the neutrality of the process.
- Appointing authorities are a very important component of the ISDS system. They appoint arbitrators and, in particular, the chair in a significant proportion of ISDS cases. Some appointing authority representatives have reported that the direct appointing authority role in selecting arbitrators has increased in recent years. The role of the appointing authorities should be largely limited to the designation of the chair and only in those cases in which the co-arbitrators do not agree on that appointment. One of the principles of the arbitration system is the principle of the disputing party autonomy. Based on this principle, the appointing authorities should only be almost exclusively involved in the designation of the chair, and with certain limitations. The general rule should be that the chair is chosen by the disputing parties' appointed arbitrators if they reach an agreement and by the appointing authority if they do not. Systems where the appointing authority directly nominates the chair (as under the AI-SCC Rules, article 13.3) should be avoided. On the contrary, the appointing authority should tend toward mediation activity. Related with this consideration, the co-arbitrators should be authorized to consult and share with the disputing parties the short lists of potential chair arbitrator, in order to detect and prevent conflicts in this regard and to seek their comfort with the appointment. Likewise, the appointing authorities should be provided with the particular considerations set out by the disputing parties' arbitrators during the (unsuccessful) deliberations of the designation of the chair with regard to his/her desired characteristics and qualifications.
- Amendments to private-sector arbitration rules to introduce emergency arbitrator provisions have become frequent in recent years. However, arbitration rules developed by the inter-governmental

organizations (ICSID, PCA, UNCITRAL) do not incorporate emergency arbitrator provisions. The role of the emergency arbitrator is extremely important as a protection measure of the interests of the investors. Thus, the emergency arbitrator should be empowered to issue mandatory injunction measures as protection against decisions adopted by the government that may harm the investments or interests of the investor. Emergency arbitrator procedures raise many issues for governments and deserve close attention. Mainly, because the governments will question the role of the emergency arbitrators, not recognizing their decisions nor the legitimacy of the method of resolution.

- Following the general call for more transparency in the appointment process of institutional arbitration, currently the tendency is the implementation of new policies of disclosure of the arbitrators. Such policies should include the appointing authorities' commitment of disclosing the names of the chairs of the arbitral tribunals directly designated by said appointing authorities. This disclosure is interesting for the direct designation of the chair by the appointing authority. Not so for those cases in which the appointment authority only confirms the appointment previously agreed between the discussing parties. There appear to be limited mechanisms for public or internal accountability of appointing authorities. The revelation of the list of the arbitrators appointed by the appointing authorities would get and improve the accountability of such institutions.
- The paper seems to question the neutrality of the arbitrators in current ISDS mechanism. However, the evaluation should further be made based on the analysis of whether awards rendered were not fair or flawed as a result of selection of specific type of arbitrators or the selection process itself. ISDS is intended to protect foreign investors, by providing reliable dispute settlement mechanisms. This mechanism only gives investors compensation for the damage caused in case the host governments acts in a way which would be inconsistent with the investment treaties, and does not require to change any laws or regulations. This should be taken into consideration in order to discuss qualifications for arbitrators and the selection process, and more broadly, ISDS system itself.

2.2. Andrea Kay Bjorklund (Professor, McGill University Faculty of Law, Canada)

Thank you for giving me the opportunity to comment on the research paper addressing appointing authorities and their influence on the selection of arbitrators in investor-state dispute settlement. It is a timely topic that has not yet received much attention. Your paper is thus a welcome addition to the literature. You have raised several important issues in the paper, including the difficulties in working with a lack of data that you are trying to rectify. I offer these comments understanding that this is a work in progress and that more data will be forthcoming. My comments are offered as thoughts occurred to me as I read the paper.

The lack of data makes some items hard to quantify and hard to place in appropriate context. In para. 17, you say that a "significant" proportion of arbitrators are selected by appointing authorities. That could be true, but it would be useful to add some numbers. I realize that just now you only have ICSID, but as I recall it is in the neighbourhood of 30% of appointments. Whether that is "significant" or not is a little questionable. The actual numbers would do a better job reflecting the numbers of direct interventions. And it would indeed be interesting to look at it over time to see if it is getting bigger.

Your point that institutions might have hidden influence, whether as quasi-appointing authority or as an advice-giver, is good and I appreciate your development of it later in the paper. It is thus worth noting that formal activities undercount the influence of institutions.

In para 27, you talk about a “growing reporting of record total amounts at stake at some institutions, a focus that makes generally higher-value ISDS claims especially attractive.” I don’t agree that this is true (who is doing this reporting?), and I also suggest it is only one measure of reporting. In most institutions, especially at ICSID and the PCA, the emphasis is more on the number of cases so that they show their value to a broad range of constituents. I was also struck at the UNCITRAL meetings by the emphasis of the European Commission and others on making ISDS available to SMEs, which, if implemented, would lead to more but often smaller-dollar-value cases. These things are not mutually exclusive, of course – you can advertise yourself as having the most and the most high-value cases. For ICSID in particular, which is partly funded by the World Bank and which is dedicated to providing a service to all member states, having more cases, whether large or small-value would be appealing. Moreover, given that a small dollar-value case can be just as expensive to manage as a large-value case institutions that charge on a per-case basis (as opposed to on a percentage basis) likely want volume.

In para. 29, you mention that it is not clear how much institutions compete to serve as appointing authority. I think this is true, and there are systemic limits. It is hard to advertise on that basis because the activity is supposed to be impartial. There cannot be any suggestion that services are available to the highest bidder. There might be informal advertising in that the success of a chair’s services will strengthen the perception of the chair and of the institution that appointed the chair.

Another factor is that no institution has a monopoly on arbitrators. So in principle the same arbitrator could be appointed by each institution. The difference is when ICSID is appointing under the Convention and has to appoint from the roster, but all of those individuals could be appointed by another institution as well.

You often note the frequency with which “private-sector” lawyers are appointed, both as chair and as co-arbitrators. Mostly I think you are relying on your 2012 study. It might be useful to update those numbers and to look at other data as well. One question is how people are categorized. If someone has left the government and is now in private practice, then I believe he is categorized as a private-sector person. Yet he might have significant government expertise. A lot of others could be termed hybrid – where do you put Gabrielle Kaufmann-Kohler? Stanimir Alexandrov? Charlie Brower? In addition the most frequently appointed arbitrators – the top 30 have tended to be more public international lawyers (at least as I would categorize them). In addition, given that so many government hire private counsel, how do you categorize them? If a person is a lawyer at Dentons and represents states, is he classified as a private-sector lawyer? In other words, I think there is some tendency to over inflate “private sector” lawyers because those who are not currently in government tend to be placed in that category, and many governments hire outside counsel.

At paras. 43-44, I found the discussion a bit confusing. Because the parties don’t know who the presiding arbitrator will be prior to their appointment of the co-arbitrator, it isn’t really possible to choose the co-arbitrator in light of knowledge about the chair. In para. 44 you state that perhaps parties choose arbitrators who are like the chair or who share “chair” characteristics, yet earlier in the paper you mention that co-arbitrators are polarized so that the chair selection is increasingly important. It doesn’t seem that these two things can be true – if co-arbitrators are increasingly “chair-like” then the polarization would seem not to be true.

I also found paras. 45 and 46 a bit confusing. In para. 45 you mention that parties have to choose the appointing authority in their contract or risk losing that opportunity. Only in para. 46 do you say that their choice of rules effectively encompasses the choice of appointing authority. It sounds as if they would have no choice if they fail explicitly to name an appointing authority in the rules. I would reverse or re-order these paragraphs to remove this confusion. If they want to depart from the appointing authority that would be the default then their contract is likely the only way to do it, given that now that they have a dispute they probably would not agree on a new one.

The conversation in paras. 50-51 is a bit misleading, in my view. Considering what the rules will bring in terms of an appointing authority is only one consideration when parties are choosing an arbitral institution. Other factors, including the enforcement regime, the transparency rules, etc., will play a role as well. This discussion suggests that the identification of the appointing authority is the most important consideration. Also, a significant question that could be answered by your research is whether appointing authorities really appoint very different people. After all, they can consider all of the same people.

I found paras. 52 and 53 somewhat confusing as well – in para. 52 you seem to suggest a great deal of choice, whereas choice is effectively constrained by the treaty. So they can “change their arbitration institution preferences for ISDS immediately”, but they can do so only insofar as the treaty permits them to do it. You acknowledge this in paragraph 53, but not in paragraph 52. This might be a big hurdle for SIAC to get off the ground with respect to ISDS.

At paragraph 55 you mention that few sitting government officials are appointed. This is interesting, but I am not sure it is unusual. There is a lot of fear of challenge because of perceived lack of impartiality. I also query how many governments would permit a sitting official to act as an arbitrator – in many systems I would imagine you could not take on that role until you retire.

More generally I would like to see more discussion of similarities and differences between WTO dispute settlement and investment arbitration. The paper alludes with favourable overtones to the WTO practice of choosing government officials (both current and former) for panels. That might be worthwhile, but there are differences between investment arbitration and the state-state system, with dispute settlement covering one set of treaties to which all parties belong, that is the WTO. Also panel decisions attract a lot of criticism because they are technocratic, illogical, hard to read, and frequently overturned on appeal. Are they better than ISDS cases? Perhaps, but I am not sure that is necessarily the best model.

The institutions’ activities as “quasi-appointing” authority is extremely important and I am glad you covered it. Some of the discussion, however, leaves the implication that ICSID, and possibly others, intervene even when parties do not ask them to do so. That might be the case, but my understanding is that they only assist when they are asked. Also, in paragraph 64 you note the potential fear on the part of parties that their cooperation, or apparently lack of cooperation, might affect the appointing authorities’ eventual attitude towards them. I suppose that could be true, but ICSID at least tries to minimize those dangers by saying that no reasons need to be given – the parties rank the people on the list or cross out those who are unacceptable but do not give reasons.

One of the things that is hard to capture is the disparity between what parties, including states, say they want and what they actually want in a given case. Parties will say they want more women, more public international law experience, more diversity in background, etc., yet they often appoint and reappoint the same people. In other words, one might say that states want diversity, youth, etc., but when it comes to a particular case against them they don’t want to experiment with someone new and untried. It would be good to include data about state respondent appointments in particular. The reason I think this is

important for this paper is that the institutions, as you note, are trying to respond to their users. So when users want exceptionally experienced people the institutions will tend to appoint them.

In para 227 you discuss the importance of arbitral institutions being accountable for their appointment activity. I don't necessarily disagree with you, but why not hold states accountable as well? If institutions have to justify their choice of arbitrators, why don't states have to do so when they choose someone or acquiesce in the selection of the presiding arbitrator? Don't the same policy rationales apply? Or investors for that matter? I suspect that "negative" choices could be exceptionally difficult to justify. If an institution has to say, I considered these eight people, do they have to say how they chose the eight, and who was not included in the eight but was included in the initial 20, or 24, or 50, or 100? I am also thinking of difficulties now surrounding letters of reference, where negative comments can be the subject of complaints and even lawsuits. I favour greater transparency, but some judgments involve the exercise of discretion that might be difficult to quantify or justify. In short, it might be easier to require the justification of choice A without also requiring reasons as to why B, C, D, and E were rejected.

In para 255 you note the call for former national law or international law judges or other individuals with government experience. As to the former, and you discuss this a bit more later, how many have the knowledge or expertise to decide cases? This might be a matter that could be rectified by training – if one assumes they know how to try a case, then learning international law could be the subject of training sessions. As for international law judges, how many are there? For both of the former it would be interesting to know their demographics? How many are women? How old are they? How do these goals intersect with others about more representation and diversity?

More generally, you might want to note somewhere the difficulty the NAFTA Parties had with identifying the members of the roster called for in NAFTA Chapter 11. It is still not done after 23 years. This suggests to me that States do not all have similar goals and will not necessarily agree on the same arbitrators.

A few small things:

In fn. 6, it is odd that Beth Simmons groups UNCITRAL and ICSID as non-commercial, given that the UNCITRAL rules (aside from the Transparency Rules) were designed for commercial arbitrations.

In fn. 8, you might want to make clear that even if the UNCITRAL transparency rules apply (and they are limited unless/until more states sign on to the Mauritius Convention or agree in a particular dispute to apply them) they say nothing about appointing authority transparency.

In para 19, you say that ICSID provides a "limited but largely systematic range of information". I am not sure what this is intended to convey, but it seems rather grudging, whereas later in the paper you note that ICSID is the only institution that provides any information at all.

In para 207 you discuss the PCA's role as designating authority. I found it a bit confusing. I gather the gist is that the PCA acts as designating authority under the UNCITRAL rules, but does not administer commercial UNCITRAL cases, though it will, if the parties ask, administer ISDS cases?

In para 210 you appear to treat the Iran-US Claims Tribunal as an example of ISDS. I query whether this is really an accurate depiction.

2.3. Congyan Cai (professor, Xiamen University School of Law, China); Mingxin Zhu (assistant professor, Soochow University Kenneth Wang School of Law, China); Jie Liu (PhD candidate, Xiamen University School of Law, China)

Since the mid-1990s, investor-state investment disputes submitted to international arbitration mechanisms have increased sharply. However, it is accompanied by another trend that both foreign investors and respondent states are seriously concerned with, among others, the independence and impartiality firstly and then professional capability of arbitrators, which would influence their confidence on the investor-state dispute settlement (ISDS) mechanisms. As a matter of fact, foreign investors and respondent states have frequently raised motions to disqualify arbitrators, even though few succeeded. On the other hand, most newly concluded investment treaties include more provisions on the qualifications of arbitrators. Arbitrators have become a main source of legitimacy of the ISDS mechanism.

Of course, any disputing party has the right to appoint arbitrators including the chair on his own. However, there are at least two circumstances under which one or more arbitrators shall be appointed by an “appointing authority”: (1) a disputing party fails to exercise his right to appoint an arbitrator; or (2) disputing parties or arbitrators who disputing parties have appointed cannot reach an agreement on the appointment of a third arbitrator, or disputing parties agree to authorize an appointing authority to appoint a third arbitrator. Therefore, all appointing authorities shall be sensitive to the aforesaid concern toward independence, impartiality and capability of arbitrators. Otherwise, they may not appoint arbitrators qualified enough to handle investment disputes. Rather, they may intensify the concern of legitimacy of the ISDS mechanism.

Therefore, the *Appointing Authorities and the Selection of Arbitration in Investor-State Dispute Settlement: An Overview* prepared by the OECD Secretariat (hereinafter, “Appointing Authorities”) is really timely. Some brief comments are given as follows:

First, it has been widely recognized that the investor-state investment disputes are somewhat distinct from those commercial disputes happening between private parties and thus the ISDS mechanisms shall be designed and operated in a manner which should differ from that of the settlement of commercial disputes (*see also* Appointing Authorities, para.9). In short, we suggest that all appointing authorities should respect for some minimum requirements of disclosure.

Second, it should be stressed the fact that appointing authorities include both individual(s) and institutions; arbitration professionals and non-arbitration professionals; international law professionals and non-international law professionals. This diversity should be given special consideration in the design of the framework of appointing authorities. In short, some special requirements or mechanisms should be considered toward those appointing authorities if they are served by individual(s) or non-international law professionals, etc.

Third, as the Appointing Authorities suggests (*see* paras.2, 27 and 30), the appointment authorities have been considered as an important variable in the competition among arbitration institutions. We note that, in addition to the positive effect, the negative effect is also mentioned in the Appointing Authorities (*see* para.33). We agree that “a competitive context may make it valuable to adopt a system-wide perspective for thinking about certain issues” (*see* para.33), but we are also concerned whether arbitration institutions are likely to “race to the bottom” in order to compete for cases.

Fourth, we appreciate and support what the ICSID Secretariat has done to improve its appointing authority since 2009 in particular (*see* Part V.1). We have a high expectation that the ICSID, which insofar as have decided about 60 % disputes based on investment treaties, can and shall maintain its leading role in enhancing international rule of law on investment and further in providing public goods for international community. For instance, we suggest that the ICSID Secretariat can develop some “best practice” and share with other appointing authorities and disputing parties.

Fifth, we suggest that appointing authorities should be subject to both internal and external checks and balances. The former may include, for instance, some regulation of code of conduct. The latter include, for instance, the consultation with disputing parties. As a matter of fact, some investment treaties provide that the appointing authorities shall, in consultation with disputing parties, appoint the default arbitrators.

Sixth, we suggest that the OECD Secretariat should expand its survey. For instance, the President of the International Court of Justice (ICJ), under many investment treaties, is one of appointing authorities and under some investment treaties, the sole one. Unfortunately, the Appointing Authorities fails to mention how the President of the ICJ functions in this regard.

Additional materials:

Cai Congyan, Structure of Arbitrators and its Implications towards ICSID Mechanism: An Empirical Analysis, *The Journal of World Investment & Trade* (vol. 9., no. 3, 2008)

2.4. Center for International Environmental Law (CIEL)

Thank you for the opportunity to comment on OECD’s research paper *Appointing Authorities and the Selection of Arbitrators in Investor - State Dispute Settlement: An Overview*.

Since 1989, the Center for International Environmental Law (CIEL) has used the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. CIEL seeks a world where the law reflects the interconnection between humans and the environment, respects the limits of the planet, protects the dignity and equality of each person, and encourages all of earth’s inhabitants to live in balance with each other.

CIEL pursues its mission through legal research, advocacy, education, and training, with a focus on connecting global challenges to the experiences of communities on the ground. In the process, we build and maintain lasting partnerships with communities and nonprofit organizations around the world. CIEL has extensive experience related to ISDS and is particularly interested in the conclusions that can be drawn from the report with respect to ISDS as well as how these lessons can inform the EU’s proposal for a Multilateral Investment Court (MIC).

The paper reflects a careful and insightful analysis of important issues that until now have not been sufficiently analyzed or addressed. The issues discussed by the report are relevant not only to the EU’s Investor Court System, but also to the EU’s proposal for a MIC because they point to the fundamental importance of how decision-makers in disputes are selected. In addition, the report highlights how the

resolution of disputes with public policy implications raises issues such as competition and transparency that are particularly important.

1. The importance of the appointing authority

The report's extensive discussion about how appointing authorities are designated and how they exercise their authority highlights their centrality to the ultimate resolution of investor-state disputes. As the paper points out, appointing authorities are at the apex of the ISDS system, in part because they have the authority to choose the chair, who is a key element in investor-state arbitration cases. By analogy, in the context of the proposed MIC, how judges are appointed to the court, and how they are assigned to specific cases, are also likely to be central to the outcome of the dispute.

Appointing authorities also can have an impact on the overall pool of arbitrators, most of whom have commercial arbitration experience and no government backgrounds, are from OECD countries, and are men. Many of these arbitrators alternate between serving as panelists and representing corporate clients in other investment cases. These factors are likely to result in an implicit bias towards corporate perspectives.⁶ Existing arbitrators have repeatedly interpreted investment law expansively, prioritizing the protection of the property and economic interests of transnational corporations over the rights of states to regulate and people's right to self-determination.⁷ For example, in a study analyzing how arbitration panels have addressed the question of jurisdiction, i.e. whether the case is properly before them or not, the author found that the panels were likely to interpret their jurisdiction expansively, and allow the case to move forward.⁸ In a related study examining how panels interpreted substantive investor rights, the author also found that arbitrators were likely to interpret these rights broadly, in favor of the investor.⁹

The EU's proposed MIC purports to address the issues of legitimacy and bias in ISDS. However, if the pool of people considered for appointment to the court substantially overlaps with the same pool of people who are arbitrators in ISDS, these issues are likely to be unresolved.

The report notes that there is no public or internal accountability for appointing authority actions. The appointing authority can therefore wield significant power with little oversight. The same risk exists once judges have been appointed to the MIC. Although judicial independence is an important aspect of ensuring the legitimacy of a dispute resolution process, decisions by the proposed court would not be accountable to democratic oversight in the same way that domestic courts are.

2. Competition

⁶ "Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom, (Corporate Europe Observatory 2012).

⁷ Gus Van Harten. "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration". *Osgoode CLPE Research Paper*. 19 April 2012. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149207; Gus Van Harten. "Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration". *Osgoode Legal Studies Research Paper*. 25 January 2016.

⁸ Gus Van Harten. "Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration". *Osgoode Legal Studies Research Paper*. 25 January 2016, p. 558. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2721920.

⁹ Id.

As the report notes, ISDS is a highly competitive industry. This leads to rules that are designed to attract investors. For example, SIAC cites secrecy as an advantage it has as an ISDS forum. The report also notes that the threat of substitutes (for example, domestic courts or insurance) is an important competitive force. The proposed MIC would confront the same threats, and it is therefore important to consider how the proposed court's rules and decisions would not implicitly or explicitly be aimed at attracting investors to its forum.

3. Transparency

The report states that transparency is not an absolute good and that it can involve policy trade-offs. However, in ISDS cases, which often address important public policy objectives and issues of significant public interest, there are few valid reasons for withholding information in a case. The paper should be revised to reflect this reality.

The report highlights serious gaps in the transparency of ISDS. The paper notes that the degree of transparency is a factor parties consider in determining which rules such apply to an ISDS case. It is important to consider how the proposed MIC would avoid a race to the bottom in terms of transparency. While the EU's proposal suggest that transparency rules should apply, it is important to consider whether the creation of the proposed court would benefit from additional transparency requirements, as well. For example, the report identifies transparency concerns related to the appointment of arbitrators, the identity of sitting arbitrators, and the appointing action in particular cases. The same issues would arise for the proposed MIC.

A related concern that the report identifies is the structure of ISDS proceedings, including the scope of discovery, the establishment of a record for review, and many other procedural issues. How the proposed MIC would address these issues would significantly influence the overall legitimacy of this institution.

Conclusion

The report is extremely valuable for its analytical approach to uncovering a number of important issues related to ISDS that are not well understood or adequately discussed. Many of these concerns are relevant to the proposed MIC and should also be considered as governments assess the potential value of creating this institution.

2.5. Lise Johnson (Columbia Center on Sustainable Investment (CCSI))

Overall: This is an extremely useful paper discussing, in a thorough and detailed manner, issues that have not otherwise been adequately identified or explored. Given the appointing authority's potential power to shape outcomes in particular cases and influence development of the law more generally, these are matters that merit further attention, research and analysis. Some more specific comments are set forth below.

Para 17: The paper states that appointing authorities "appoint arbitrators and in particular the chair in a significant proportion of ISDS cases." It would be useful here to have information about the number/percentage of known cases in which the appointing authority plays this role. It becomes clear

later that this information is difficult/impossible to get at this point, so it might be useful to flag that limitation up front.

Para. 17. This paragraph suggests that the investor's power to choose the appointing authority might grant it additional power in terms of conducting/influencing negotiations over appointment of the chair. The paper then further elaborates upon this point. This issue seems to be a really important one, and one meriting further research and analysis.

Para 21. The final sentence states, "In some cases, apparent limits [to available information] may not exist if further public information is located." It is not clear what is meant by this last sentence. Is it that relevant information may be found if, e.g., reported on, or the award becomes public through a domestic enforcement/challenge proceeding? If so, having to rely on such channels for information seems unsatisfactory. Relatedly, it might be worthwhile to discuss how relevant transparency provisions under the UNCITRAL rules do/do not cover these issues.

Para. 27. The final sentence states that "there is growing reporting of record total amounts at stake at some institutions, a focus that makes generally higher-value ISDS claims especially attractive." It is not quite clear here why higher-value claims are especially attractive. Do they impact fees charged by the institutions?

Para 29. This para discusses whether/to what extent institutions publicly compete on the basis of their appointing authority power. To what extent do investors/investors' counsel think of these issues? Is this something that your research has looked into when selecting rules? It seems like an important issue to consider further.

Paras. 41-42. This is a very interesting discussion of how appointing authorities, even if not used, can impact parties' bargaining power regarding the choice of the chair. This is an important, and, to date, relatively under-addressed issue.

Para 119. It could be more clearly stated whether the appointment process in ISDS cases takes place at these meetings of the ICC Court.

Para. 122. It is unclear what is meant by the last clause in this sentence: The SBF website contains a link to the SIAC website, but does not appear to address SIAC.

Para. 155. It would be useful to know more about how this is done (here and in other institutions); I would imagine it would be relatively cursory and limited due to the limited amount of information that ICSID, at this point at least, might have about the parties, their affiliates, and the potential arbitrator and his/her firm. (One approach that might help address some of these questions is to have investors, at the time of submitting their requests for registration, disclose their ownership structures and beneficial owners). Relatedly, how frequently are institutionally appointed arbitrators challenged?

Para. 161. Similar to above, how thorough can these assessments of conflicts can be. In particular, they wouldn't address issues of systemic conflicts/interests, such as indirect financial interests in a broad interpretation of a particular standard or approach to jurisdiction. Would they also address issue conflicts, looking to how the arbitrator has decided particular potentially relevant issues in the past?

Para. 162. it would be very interesting to know more about the information that is presented to the board as being relevant, and how the board members evaluate that information or consider their own insights/experiences. Are there any minutes kept of these meetings?

Para. 171. This states “In government cases, the member of the Court proposed by the National Committee or Group of a state party to a case is deemed to be conflicted and must be absent from the ICC Court consideration of and decisions taken in the matter.” It is not clear whether the conflicted National Committee is the Committee of the home state, host state, or both?

Para. 174. The paper mentions that the ICC has described its policy with regard to nominations of a government’s co-arbitrator. It would be useful to include more information on this, if it can be easily summarized.

Para. 195. This power of emergency arbitrators is extremely problematic in ISDS. The role of the appointing authorities in this context is, as the paper shows, also extremely important. The paper’s discussion of these points is timely and merits special attention. ECT states in particular may want to consider how to address these issues.

Para 220. This paragraph discusses the PCA’s practice of appointing individuals as appointing authorities. This seems especially problematic for several reasons. In addition, for example, to the potential conflicts of interests/financial interests of the PCA in deciding whom to designate, it is unclear whether/how the PCA ensures that these individuals themselves do not have conflicts of interest. It also seems to give these individuals undue power to shape the law by, e.g., identifying individuals who may have particular views on the meaning of relevant issues or standards. That last point though is one relevant throughout – that through the power to appoint, the appointing authority can potentially shape development of the law, and has privileged access to information enabling it to understand how different individuals may approach a range of issues.

Para. 228. The paragraph begins with the clause, “Because there is no other institution in the field...” It is unclear what is meant by that. Is it that “Because there is no other institution in the field with similar designating authority under the UNCITRAL rules...”

Para. 232. In the final sentence, the paragraph lists factors that limit the ability to draw conclusions from the ICC’s disclosures. Another factor is the lack of information on the cases in which the appointments are made. It is important to be able to match appointments with cases to better understand and assess whether appointments are made based on how the arbitrator may address certain issues of law in the case. It is also useful for understanding how appointments may vary based on the respondent state (and, e.g., whether the respondent state has counsel that can help it access and process “insider” information regarding the profile of the appointed arbitrator).

Para. 241. This framing, which is also used elsewhere, is important. It indicates that the institutions are making important policy decisions with implications not only for disputing parties, but also other stakeholders such as states, investors, and the public. As such, they should also be setting forth their policy rationales, and explaining how they have evaluated competing considerations.

Para. 256. This first sentence is a key message. One slight suggested change would be to revise “the nature and scope of government input” and phrase it as “the nature and scope of input by governments and other stakeholders.”

Para. 257. This paragraph sets forth a clear and crucial message, and would be important to keep in future drafts.

Para. 259. The paragraph states “Non-disclosure may also make issues of comparative treatment of different governments by appointing authorities difficult to evaluate.” This raises an interesting and important issue meriting further investigation.

2.6. Joel Dahlquist Cullborg (PhD Candidate and Lecturer, International Investment and Trade Law, Uppsala University, Sweden)

I have gathered a few thoughts in bullet points. By and large, I think it is a tremendously well-researched paper. I did have many comments in my mind when reading through, but ultimately found almost all of them addressed as I kept reading. [...]

- One issue that is only marginally inside the scope of the paper, but not currently discussed in it, is the designation of the place of arbitration. I think this should be included in one of the introductory sections. In my research, I've found that both the ICC and the SCC very often designate the legal place of arbitration, simply because the state parties to the treaty did not and the disputing parties could not agree to one. Anecdotally I have also heard examples of appointing authorities in "pure ad hoc" cases doing the same. As you know, this has far-reaching implications in the sense that it gives the arbitration its procedural legal framework, which might also affect the appointment of the tribunal in several ways (knowledge of the law applicable is for example often a crucial factor when reviewing candidates). Furthermore, the place of arbitration of course also specifies the competent domestic court to hear any challenges at the post-award stage, including challenges against the arbitrators for improper conduct (which is then judged against, among other things, the domestic law of the place of arbitration). I am a bit biased here because I'm arguing in my dissertation that place of arbitration is an overlooked feature of non-ICSID arbitration, but I nonetheless think that this important function should at least be mentioned for the roundtable states' information. In ICSID arbitration, of course, none of this is an issue since there is no domestic place of arbitration in such cases.

- In connection with the prior point: in commercial arbitrations, it is not uncommon for domestic courts to act as appointing authorities. I personally don't think that is a good idea in the treaty-based sphere, for a number of reasons, but given the general call for larger involvement by domestic courts in ISDS, this might be something for you to at least mention. There are *at least* two known such treaty-based cases, both covered by Luke: one in *Telekom Malaysia v. Ghana* (District Court of The Hague) and the first *Eureko v. Poland* (Brussels). I don't think these courts had jurisdiction by virtue of party agreement but rather because they were at the place of arbitration and thus one party turned to them in attempts to challenge arbitrators. I'm also pursuing info on a strange ICC case against Argentina in which the state went to court in Buenos Aires to "appeal" the ICC Court's decision to reject the state's challenge against an arbitrator.

- In Section VII, I think the role of the PCA could be developed somewhat (I'm considering some sort of post doc project on this because, as you point out in the paper, there is not exactly a lot of information available). I'm thinking primarily about the designation of *individual AA* v. *institutional AA*. It seems from available data that, as a default, the PCA goes for an individual if the case is treaty-based, and for an institution if it is commercial. You touch upon the competition with other institutions a little bit but I think there is fruitful territory to be explored here: why this distinction? How is the decision-making affected when it is an individual making appointments v. a collective body? This latter question is especially relevant in the event of a challenge: why would a Kaufmann-Kohler or a Hwang be better placed to hear challenges against a colleague than would the ICC or SIAC? At ICSID, there is a general call to move away from the current system in which arbitrators rule on challenges against their colleagues - why would the PCA use it as a default when they don't have to?

- Another point that you might consider emphasizing is the role of the secretariats. You touch on it in bits and pieces but as a general point, I think you could be more comfortable in identifying these as informal decision-makers, or at least important influencers of the formal decision-makers. This is something I'm looking at in my research, although it is notoriously hard to demonstrate.

One final comment that struck me while on the train yesterday: with respect to emergency arbitration at the ICC, former SG Andrea Carlevaris voiced doubt that the Rules actually exclude investment arbitration from the use of emergency arbitration (which, as you point out in the paper, is the common assumption). I know he has done so in speeches, but also in moderate form in an article I co-wrote with him.¹⁰ He also argues along the same lines in a chapter in C Giorgetti, *Litigating International Investment Disputes*, (Brill) 2015, pp. 203-204. For another commentator making the same point, see P Pinsolle, "A Call to Open the ICC Emergency Arbitrator Procedure to Investment Treaty Cases", in A Carlevaris, L Lévy, A Mourre and E Schwartz (eds.), *International Arbitration Under Review: Essays in Honour of John Beechey*, (ICC 2015), p. 307.

This might be relevant information to states - there is arguably some margin to claim that emergency arbitration is available also for ISDS cases under the ICC Rules.

2.7. European Federation for Investment Law and Arbitration (EFILA)

EFILA, being world-wide the only non-governmental, non-profit, think tank that is exclusively focused on investment law and arbitration issues, welcomes the opportunity to comment on the excellent OECD paper on *Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview*. The analysis of this paper is comprehensive and very useful for deepening the debate on this topic.

EFILA would like to make the following comments:

1) It is not advisable to require appointing authorities to disclose technical details of their appointing activity, *e.g.*, how the pool of arbitrators/chairs to be appointed are created by each authority. As rightly observed in the paper, appointing authorities operate in a competitive setting and therefore the methodology followed by each authority when proposing a particular individual (*e.g.* nationality, experience etc.) is its unique strategic tool for attracting ISDS cases. EFILA is therefore of the opinion that, although disclosure of final results of the appointing activity (i.e. who was actually appointed) could potentially contribute to the perceived legitimacy issue of the ISDS system, it is less relevant as far as the methodology each authority follows when selecting and proposing individuals to be appointed is concerned.

2) EFILA is of the opinion that the nature of the appointing authority (inter-governmental (PCA and ISDS) vis-à-vis private (SCC, ICC and SIAC) might be potentially an important consideration for the legitimacy of the ISDS system.

¹⁰ Andrea Carlevaris and Joel Dahlquist Cullborg, *Investment Treaty Arbitration at ICC*, ICC Dispute Resolution Bulletin (2017, no. 1), p. 29.

3) EFILA also submits that the fact that the day-to-day activity of a particular appointing authority is not solely related to arbitration matters (as it is the case with the President of the World Bank as ICSID appointing authority) does not affect the quality and the legitimacy of its appointing activity as each institution is supported by a highly qualified secretariat, which can render relevant support.

4) Regarding rosters of potential arbitrators maintained by inter-governmental institutions for appointing purposes, EFILA would like to note the following. First, closed rosters increase state influence by allowing pre-selection of arbitrators with a (potentially) high understanding and sensitivity for and concerns of state sovereignty. However, the administration of rosters that require formal notification by states or even agreement could be counter-productive as it is making it difficult to adjust the roster in order to replace individuals who turn out to be too busy or otherwise fail to perform up to the expected standards. Second, it is beyond doubt that closed rosters increase barriers to access the pool of ISDS arbitrators and are likely to lead to less diversity, which is already a growing concern. Third, closed rosters are likely to aggravate the risk of issue conflict and other forms of conflicts of interest because it becomes more likely that an arbitrator would have taken a position on a comparable issue in a previous case, and repeat appointments by the same party would be difficult to avoid.

In sum, EFILA considers it important that appointing authorities continue to have significant freedom to select and appoint qualified arbitrators from a wide and diverse background. Any reduction of that freedom will necessarily lead to a limitation of the pool of available arbitrators. Also, it is of fundamental importance to avoid that states are able to pre-select arbitrators that are perceived to be pro-state biased.

EFILA is looking forward to contribute to this debate and stands ready to offer its expertise in these matters.

2.8. Rob Howse (Professor of International Law, New York University Law School, United States)

I enjoyed the paper very much - it is to my knowledge the first real effort to get a handle on what is at stake here, and how the various institutional actors actually perform this role.

A couple of comments. First, it seems to me that the meta-question that hovers in the air so to speak throughout the paper is that of accountability. To whom, to what community is or ought the appointing authority to be accountable? There is of course the narrow view that it is really the parties in the dispute, which is the commercial arbitration view. And of course in the case of ICSID there is formal accountability to the ICSID membership and the senior management of the World Bank (arguably). But as the discussion in the paper of the proposal for a judicial alternative to arbitration illustrates, for many including myself, it is hard not to see the appointing function as the exercise of a form of public authority, or through the lenses of what my colleagues call global administrative law, which supposes some broader community or community of communities that has a real stake. Again, this also goes to the very useful treatment in the paper of the issue of the qualifications of arbitrators. It might be worthwhile raising more explicitly or directly the accountability question, and who are the stakeholders to whom the appointing authority or designating authority should be accountable?

This goes to the more specific issue of the influences on the appointing or designating authority in case of ICSID vs. the PCA, for example. My anecdotal experience is that ICSID and particularly the current Secretary General is very heavily networked in the "community" of super-arbitrators, top counsel, senior developed country government officials, etc. The PCA, which has a range of functions far beyond supporting ISDS, is more distanced from the ISDS elite or insider network. Investment disputes are

treated as other kinds of international legal disputes, and decisions on designation or appointment seem to be more technocratic and professional in the narrow sense, as opposed to being influenced by the politics of a particular "network." One way of getting at this is through the lens of the "epistemic communities" concept from constructivist international relations theory.

I wonder whether it would be worthwhile giving some special attention to the issue of bias conflict of interest in the case of designating or appointing authority. I was involved in one case where the appointing authority had been an official of the responding government at the time at which the policies that were the basis for the claim of a BIT violation were being formulated by that government, even though the actual dispute arose later. Is that a clear case for recusal? And if the individual in question has to be recused then what are the rules that apply for replacing them?

Finally a random thought about arbitrator behavior. In many instances, of course, there is resort to an appointing authority when the party-appointed arbitrators can't agree on the President. I wonder whether how hard the party-appointed arbitrators will work to agree is influenced by their knowledge of who the appointing authority is-i.e. their impression of what kind of person they might choose as the President? One would think that the more the arbitrators are comfortable with the appointing authority, the less inclined they will be to resolve differences about the choice of President. As I say just a stray thought.

2.9. Mark Feldman (Professor of Law, Peking University School of Transnational Law, Shenzhen, China)

Thanks again for the opportunity to review. This is a timely, important topic. The level of detail and depth of analysis set out in the draft are impressive.

I would note a few points to consider.

First, I think the draft at times overstates the role of the President of the World Bank (ICSID Chairman) in making appointments. For example, the draft maintains that the ICSID Chairman is "assisted by" the ICSID Secretary General and the ICSID Secretariat in making appointments (para. 136). I do not know what level of "assistance" is actually provided in practice, but I would suspect that the ICSID Chairman, for a number of reasons, would rely to a very significant extent on the recommendations received by the ICSID Secretary General and ICSID Secretariat. With respect to the significance of appointing authorities generally, the draft asserts that appointing authorities appoint "the chair in a significant proportion of ISDS cases" (para. 17). Authority is needed to support this point, particularly given that the draft does not include ICSID's "ballot" practice within the category of "appointments" made by appointing authorities.

Second, I think the draft at times understates the degree of control that States ultimately have over the selection of appointing authorities. For example, in paragraph 14, the draft sets out the assumption that "the investor selects the appointing authority or designating authority when it chooses to file its claim under particular arbitration rules." A fundamental point that receives insufficient attention in the draft is that States have complete control over the options that are presented to claimants in investment treaties (including available arbitration rules). Many treaties (such as NAFTA and the TPP) pre-select an appointing or designating authority. With respect to options available to claimants under older treaties, the draft refers to "government lock-in" and the "long duration" of many treaties (para. 53), but then observes in the following paragraph that termination and renegotiation of investment treaties has become far more common in recent years.

Third, the draft includes a number of assertions regarding certain reciprocal relationships within the arbitration community. Those assertions require stronger supporting authority or, if such authority is not available, should be moderated in tone. On this point, I would note in particular assertions made in paragraphs 32, 51, and 221.

If it might be helpful, I would be happy to discuss any of the above points. Many thanks again for the opportunity to review.

2.10. Shotaro Hamamoto (Professor, Kyoto University Graduate School of Law, Japan)

I find the draft quite useful and informative. So far I have only a few trivial comments.

Para. 221: I do not understand what the final sentence means.

Para. 225:

- "Some disputing parties might consider..."

<- How is it possible for a party to improve its position by doing this?

- "If the same perceptions obtain, the other side would be confronted..."

<- Irrespective of whether the same perceptions obtain, the other party are confronted with the choice.

I may come up with more questions when I go through your draft again.

2.11. Nathalie Bernasconi (Group Director, Economic Law and Policy, International Institute for Sustainable Development (IISD))

I read about half the report very carefully and then read the rest quickly due to time constraints. I really don't have any comments, except that the paper is excellent. A paper with this information and the way it is structured will simply be invaluable for decision-makers. I particularly liked how the paper walks the reader through six preliminary observations and conclusions at the beginning of the paper. Many of the issues raised in the paper are well known but it is the structure of the paper and the details provided that make the paper particularly relevant, credible and useful.

One point that could be made a bit more explicitly in the overview section might be the interaction between the competitive nature of the arbitral institutions, the appointment of arbitrators or ad hoc committee members, and the fact that in (treaty-based) ISDS it is the investor that will largely decide on forum alone. It is therefore the investor who brings in the business (or not). Granted, this may change in the future if treaty parties begin to limit the choice to one institution or set of rules or risk: Institutions are also beginning to realize that they need to attract states too if they want to stay relevant. Nevertheless, the point raised here could be made a bit more explicitly.

The paper makes the point of the 'one-sided' nature of ISDS quite explicit in the section on emergency arbitration. That section is also very important and probably not well known in government circles - A very useful addition, as well.

2.12. Joshua Karton (Associate Dean for Graduate Studies and Research; Associate Professor, Queen's University Faculty of Law, Kingston, Canada)

Here are my thoughts on the paper.

I found it to be quite comprehensive and balanced. I don't have much in the way of comments on its content, especially since it seems to shy away from making broad prescriptions or assessments (which, incidentally, I agree is the right approach).

These are just in the order they occurred to me while reading the paper.

The passage on market competition between arbitral institutions and the role of market forces more generally is welcome and important—an often-neglected aspect of international arbitration practice. I think you could say even more about the position of arbitral institutions as gatekeepers to the profession of arbitrator. Most ISDS arbitrators, as the paper notes, come from a commercial arbitration background and develop their arbitral experience in commercial disputes. Arbitral institutions make a pretty significant share of appointments in small-scale commercial arbitrations, where there is usually a sole arbitrator. These positions are the “ground floor” of the arbitration profession, and play an important part in determining the pool of people who will later be appointed to arbitrate investor-state disputes. The paper therefore currently underrates the role of arbitral institutions in increasing the diversity of the pool of arbitrators and in guiding the overall composition of the profession. A whole section of a book I wrote a few years ago describes the role of market competitive forces in international arbitration; you may find it useful. See Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (2013), pp. 56-75, especially pp. 64-67 on competition between arbitral institutions. Also helpful might be Magdalene D'Silva, *Dealing in Power: Gatekeepers in Arbitrator Appointment in International Commercial Arbitration*, *Journal of International Dispute Settlement*, (vol. 5, 2014), pp. 605–634, doi: 10.1093/jnlids/idu013 (based on a very small qualitative empirical study) on the role of arbitral institutions as gatekeepers.

The section on appointing authority impact on the selection of tribunal chairs (I am thinking especially of para 40) and other passages on the tactical considerations at play in arbitral appointments might be enriched by reference to Todd Tucker's excellent article on intra-tribunal dynamics in investor-state arbitrations. See Todd Tucker, *Inside the Black Box: Collegial Patterns on Investment Tribunals*, *Journal of International Dispute Settlement*, (vol. 7, 2016), pp. 183–204, doi: 10.1093/jnlids/idv035.

The discussion of appointing authorities' impact on party selection of co-arbitrators (paras 43-44) is well taken but could use some mention of the converse phenomenon. In practice, the identities of the co-arbitrators significantly constrain the pool of acceptable chairs. For example, if the parties both choose very senior, well-known arbitrators, the appointing authority will normally appoint only chairs of a similar stature; appointing authorities will normally choose a chair of differing nationality from both co-arbitrators and both parties where possible; if both co-arbitrators are male the appointing authority might feel more incentivized to appoint a female chair, and so on.

The section on the ICSID Rosters, which begins at para 137, makes no reference to the roster of conciliators. While arbitration is, of course, the main focus of the paper, I think it could pay some attention to issues of appointment of mediators/conciliators. Many of the same structures and policy concerns apply on the mediation side, although the stakes are necessarily lower since a mediator cannot impose their decision on disputing parties.

To me, the section on the appointing procedure for the ICC (especially at para 164) underplays the role of national committees. Based on my experience with the Canadian ICC committee, the national committee's proposal is almost always accepted by the ICC Court. Of course, my experience may not be representative but the data the paper supplies corroborates it. The role of national committees greatly complicates getting a clear understanding of the factor that affect who is appointed because national committees may adopt different formal policies and will certainly be guided by different cultural assumptions, professional and social networks, competitive priorities, and the like. To the extent that data could be found on these matters, it would greatly improve this part of the paper. In particular, it would be interesting to compare the role of proposals from national committees in the ICC appointment system with that of state nominations to arbitrator rosters in the ICSID system.

I may have missed it, but I think the paper does not address the ICC's Pre-Arbitral Referee Procedure, which is provided under a separate set of rules but relates to ICC arbitrations. The referee procedure was an early attempt by the ICC to deal with some of the problems that are now addressed by appointments of emergency arbitrators. As the paper correctly points out, the ICC Rules exclude the appointment of emergency arbitrators in investor-state disputes, but as far as I know, no such limitation applies to the pre-arbitral referee. There was never much uptake of this option, and it has been largely superseded by the emergency arbitrators, but I believe that it is still on the books and potentially applicable in investor-state arbitrations.

When discussing tactical matters relating to appointment of emergency arbitrators (para 204), I think it's worth noting that some rule expressly provide for *ex parte* determination by the emergency arbitrator; this is a separate matter from governments simply not replying in time, a phenomenon noted in para 204.

I think it would be worth saying more about appointing authorities' role in deciding challenges to arbitrators. This comes up primarily under the UNCITRAL Rules Art. 13(4), but it may be possible under other rules as well. First, this power granted to appointing authorities is anomalous in a way, in that involves a very different exercise of judgment than selecting an arbitrator—specifically, it's an adjudicative process, requiring the identification of applicable rules defining relationships that give rise to a lack of independence or impartiality, factfinding about the nature of the arbitrator's relationships, and application of legal rules to the facts of the case. So it's notable even just in the abstract that appointing authorities may play this role. But in addition, I think it's worth exploring the role of an appointing authority in deciding a challenge to an arbitrator when the authority would then be in the position of selecting a replacement arbitrator. There are questions of proper role, the impact of market forces, even the possibility of corruption.

The discussion of tactical considerations when the PCA's role as a designating authority is converted into that of an appointing authority (para 225) confused me. Perhaps I'm missing something, but how would this affect who actually ends up being appointed as an arbitrator, which is what really matters in these cases? Is the implication that the PCA will appoint an arbitrator like to be sympathetic to the party that requests conversion of the PCA's role into that of an appointing authority? That seems like a pretty bold claim for which I would want to see some support beyond speculation, but if it's not that I'm not sure what the paragraph was saying.

Finally, the discussion of diversity in the pool of ISDS arbitrators (especially paras 256, 260) could say more about diversity beyond the gender factor. I find that this is a weakness of the discourse on diversity in investor-state arbitration generally—that it focuses on gender to the exclusion of other matters that might actually have more impact on actual decision-making, such as national origin, work background, race, religion, and the like. Largely for this reason—that progress does seem to have been made on gender (or at least there are very visible efforts on increasing the numbers of women in arbitration) but

that the pool of ISDS arbitrators remains almost entirely white and mostly from developed countries—the non-representativeness of ISDS arbitrators present a real problem for the legitimacy of the system as a whole. Of course ISDS is not a democratic institution, but people from all over the world do need to seem themselves reflected in the community of arbitrators in order to really accept the decisions of that community.

2.13. Joost Pauwelyn (Professor of International Law, Graduate Institute, Geneva, Switzerland)

It is a long read, also, but very instructive!

Just one comment:

footnote 27: In 63% of all WTO panels, DG makes, indeed, appointments. However, that does not mean that he each time appoints all 3 panelists; often parties can agree on one or two, and DG only appoints 1. So technically you cannot say "63% of panelists" ...

It would have been great in your analysis to actually look at the numbers, and see practices/ patterns of appointment authorities: are parties making different types of appointments than appointing authorities in terms of gender, diversity etc.; quid variation between appointing authorities (e.g WTO DG v. ICSID v. ...). I did some of that in my AJIL article and was surprised how ICSID appointments continued to reflect heavy party-bias for US/W.European arbitrators, for example. Technically ICSID could change this but they apparently do not.

But I understand that for other appointing authorities you do not necessarily have the data ...

2.14. Martins Paparinskis (Reader in Public International Law, University College London, Faculty of Laws, United Kingdom)

I write by reference to your email of 19 December 2017. I am grateful for the opportunity to comment on the OECD Secretariat's Research Paper 'Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview' (11 December 2017) ('**Research Paper**').

1. The role and function of appointing authorities is an important issue in international dispute settlement, both in general and in investor-State dispute settlement in particular. The OECD Secretariat is to be commended for addressing the topic in this very fine Research Paper. I will divide my observations into three parts, addressing in turn the following questions:

- (1) How does the practice of appointing authorities in investor-State dispute settlement compare with international dispute settlement more generally?
- (2) What is the function of appointing authorities in international dispute settlement?
- (3) Is the current practice of appointing authorities desirable, in light of their function? In particular, is the limited extent of disclosure and explicit guidance regarding relevant criteria for selection of arbitrators desirable?

The key point of my submission is that States and other stakeholders should reflect upon whether current practice of appointing authorities in investor-State dispute settlement fits within modern international dispute settlement at all; or fits only for some (particularly constituted) appointing authorities; or, finally,

perhaps the limited disclosure and the delegation of hard policy calls to appointing authorities is the best possible solution, accurately reflecting the lack of underlying political consensus among the stakeholders.

1. APPOINTING AUTHORITIES IN INVESTOR-STATE DISPUTE SETTLEMENT AND IN INTERNATIONAL DISPUTE SETTLEMENT

2. Investor-State dispute settlement is part of the field of dispute settlement in public international law. When particular procedural aspects of investor-State dispute settlement are discussed, it is often helpful to situate this practice against the broader background of international dispute settlement, so as to determine whether it goes with or against the grain of general consensus. Of course, it is perfectly possible for practice that is in line with general consensus to be nevertheless undesirable, either because general practice itself is problematic or because different policy considerations apply in investor-State dispute settlement. But at the very least the broader perspective provides parameters and materials for a more sophisticated discussion.

3. Section I of the Research Paper ('Preliminary observations and conclusions') notes, among certain preliminary characteristics of the field, that 'the system for the selection of arbitrators in investor-state arbitration is very complex. Many actors carry out the same or similar functions but in different ways. ... appointing authorities are a very important component of the ISDS system and are in some ways at its apex. ... there is no standardised disclosure of basic information by the different institutions; *a fortiori*, there is no system-wide disclosure. ... Disclosure still remains limited everywhere' ([16]-[18]). These characteristics, particularly the latter one, are not out of line with the general practice in international dispute settlement.

4. The approach of Presidents of the International Court of Justice ('ICJ') and the International Tribunal for Law of the Sea ('ITLOS') to appointments of arbitrators illustrates this proposition. In the ICJ, 'it is clear that many of [appointments] have occurred in very important and very difficult cases that proved important for both law-application and law-making'.¹¹ The ICJ Statute does not address appointments itself, but the *Yearbook of the International Court of Justice* notes, in a section on 'Occasional Functions Entrusted to the President of the Court', that '[t]here are many international instruments which provide that in certain eventualities the President of the Court may be requested by the contracting parties to appoint arbitrators, umpires, members of conciliation commissions, etc.'.¹² The extent of disclosure of appointments appears to have changed over the years: up to 1982, *Yearbooks* noted appointments made in the particular year¹³ (without further describing relevant considerations or procedural steps¹⁴). More recently, appointments are not noted in *Yearbooks*, even when they are made.¹⁵

¹¹ M Reisman, 'The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication' (1996) 258 Hague Recueil 9, 91.

¹² *Yearbook of the International Court of Justice 2014-2015* (Registry of the ICJ) 69.

¹³ *Yearbook of the International Court of Justice 1982-1983* (Registry of the ICJ) 127.

¹⁴ Ibid. ('Pursuant to an arbitration clause contained in a number of concession agreements between the Government of the Libyan Arab Jamahiriya and Mobil Oil Libya Ltd., President T. O. Elias designated a sole arbitrator to hear and determine a dispute between the parties. On 6 July 1983, the President appointed Mr. Pierre Bellet, former Senior President of the French *Cour de cassation*, and a former member of the Iran-United States Claims Tribunal.')

¹⁵ E.g. the appointment of a third arbitrator in 1996, *Arbitrator Tribunal for Dispute over Inter-Entity Boundary in Brcko Area (RS v FBH)* (Award) (1997) 36 ILM 399 [3].

Overall, as Shabtai Rosenne put it, ‘official publications ... are reticent about describing the manner in which these functions have been performed in individual cases’.¹⁶ In ITLOS, appointments of arbitrators by the President are addressed in Article 3(e) of Annex VII of UNCLOS.¹⁷ In practice, these appointments are very important. For example, China did not participate in *The South China Sea Arbitration*, therefore the President of ITLOS had to make the necessary appointment of four out of five arbitrators.¹⁸ Similarly to appointments by the ICJ President, relevant considerations and procedural steps are not further described (although it has been suggested that in practice the necessary appointments take the form of a meeting of the parties with the President¹⁹).

5. In short, the complexity and systemic importance of appointing authorities in investor-State dispute settlement, as well as varied but overall limited disclosure of information about their practice are not out of line with the general practice in international dispute settlement. Whether or not it is desirable – a point to be considered below – the practice described in the Research Paper is certainly not an atypical element at the international legal landscape, and would benefit from being discussed in that broader context.

2. THE FUNCTION OF APPOINTING AUTHORITIES IN INTERNATIONAL DISPUTE SETTLEMENT

6. The benchmark for evaluating the desirability of current practice is how satisfactorily it fulfils the function that appointing authorities have in international dispute settlement. It seems to me that the function of appointing authorities is best considered alongside other institutions and procedures for selecting adjudicators in international courts and tribunals (other than a choice by a single disputing party). Plainly, there are significant differences between procedures for selection of international adjudicators in various international courts and tribunals,²⁰ but the usual common denominator is a political choice by the relevant community, however constituted; sometimes exclusively so (for example,

¹⁶ S Rosenne, *The Law and Practice of the International Court, 1920-2005* (4th edn, Martinus Nijhoff Publishers 2006) 1649.

¹⁷ ‘Unless the parties agree that any appointment under subparagraphs (c) and (d) be made by a person or a third State chosen by the parties, the President of the International Tribunal for the Law of the Sea shall make the necessary appointments. If the President is unable to act under this subparagraph or is a national of one of the parties to the dispute, the appointment shall be made by the next senior member of the International Tribunal for the Law of the Sea who is available and is not a national of one of the parties. The appointments referred to in this subparagraph shall be made from the list referred to in article 2 of this Annex within a period of 30 days of the receipt of the request and in consultation with the parties. The members so appointed shall be of different nationalities and may not be in the service of, ordinarily resident in the territory of, or nationals of, any of the parties to the dispute’.

¹⁸ *Philippines v China*, PCA Case no 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015 [29]-[31].

¹⁹ See comments at <https://www.ejiltalk.org/self-appointment-in-international-arbitration/>.

²⁰ G Kaufmann-Kohler and M Potestà, ‘The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards’ CIDS Supplemental Report (15 November 2017) http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf III.C.

election of Judges of the International Court of Justice²¹), and sometimes in combination with further criteria and technocratic review procedures (for example, election of Judges of the International Criminal Court²²). The key point is that these are hard choices, implicating hard questions of principle and power – possibly the hardest in international dispute settlement -- and are mostly resolved through explicit engagement and resolution in a public forum, increasingly by reference to explicit criteria set out by the relevant community. In the next section, I will consider whether it is desirable for appointing authorities in investor-State dispute settlement to follow a different approach, as they apparently do in current practice, dealing in turn with the disclosure of information (Section 3.A) and criteria for appointment of arbitrators (Section 3.B).

3. DESIRABILITY OF CURRENT PRACTICE OF APPOINTING AUTHORITIES IN INVESTOR-STATE DISPUTE SETTLEMENT

A. DISCLOSURE OF INFORMATION

7. Is there a good reason for appointing authorities to exercise their function in a significantly less public manner than the – arguably – analogous institutions and procedures for selecting international adjudicators? It would be helpful for stakeholders to consider whether any of the following answers is reflective of their assumptions.

8. *First*, there is no good reason. The limited disclosure of appointing authorities is an unreflective adoption of archaic and outdated practices. Judge Muhammad Zafrulla Khan, a former President of the ICJ, found historical antecedents for appointing authorities in the 19th century practice of naming as arbitrators sovereigns or governments -- that would then in their own turn, first in practice and then formally, nominate further individual(s) to act as arbitrators.²³ (The *Beagle Channel* case is a recent example of this practice, where Her Majesty's Government was the arbitrator, and for the purpose of fulfilling their duties appointed a Court of Arbitration consisting of five Judges of the International Court of Justice.²⁴) If this reading is right, then the understatement with which appointing institutions operate fits perfectly within the classic practices of unreasoned decisions and nominations by the great and good of the 19th century-world, but much less so in the 21st century international dispute settlement.

9. *Secondly*, a distinction has to be drawn between different appointing authorities. Some appointing authorities are themselves selected through a public and contested procedure, perhaps obviating the necessity for further disclosure. For example, some investment protection treaties provide for the President of the International Court of Justice as the appointing authority, who would necessarily have

²¹ E.g. 'United Nations General Assembly and Security Council re-elect Judge Dalveer Bhandari as a Member of the Court' ICJ Press Release No. 2017/36 (21 November 2017) <http://www.icj-cij.org/files/press-releases/0/000-20171121-PRE-01-00-EN.pdf>.

²² E.g. 'Assembly of States Parties to the Rome Statute elects a new President and six judges' Press Release: ICC-ASP-20171207-PR1348 (8 December 2017) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1348>.

²³ MZ Khan, 'The Appointment of Arbitrators by the President of the International Court of Justice' 14 (1975) 14 *Comunicazioni e Studi* 1021, 1022-3.

²⁴ Dispute between Argentina and Chile Concerning the Beagle Channel (1977) 21 *RIAA* 53, 63-4.

been elected both in the United Nations as well as by their judicial peers.²⁵ The Research Paper describes the selection process of the World Bank president (the ICSID appointing authority) ([69]-[77]) and the PCA Secretary-General (the PCA appointing authority ([94]-[96]), and perhaps the contestation by the respective political communities is deemed to be rigorous enough to obviate further disclosure. Conversely, it is less obvious that the method of constitution of other appointment authorities is one that involves relevant actors in a manner that would justify limited disclosure (e.g. essentially commercial arbitration appointing institutions with no State involvement).

10. *Thirdly*, the current practice is entirely proper. It accurately reflects the thinness of institutions and the lack of underlying political community in investor-State dispute settlement -- unlike, say, United Nations, the World Trade Organization, or the International Criminal Court. States have (so far) not created either judicial or political institutions in the field of international investment law that could contain public engagement with selection of adjudicators; there is reasonable disagreement whether and how such institutions should be created; and agreement on appointing institutions, without more, is an accurate reflection of the furthest reach of current consensus. Disagreement reduced to an institution, as it were.²⁶

11. The Research Paper notes, rightly in my view, policy trade-offs involved in transparency ([21]). But to the extent that greater transparency is desirable – either because it is ‘valuable in itself or useful as in instrument to achieve other goals’ ([21]) – what information should be disclosed? One possible benchmark would be the function exercised by appointing authorities, which was suggested above to be analogous to institutions and procedures for selecting adjudicators in international courts and tribunals. At a rather high degree of abstraction, it would be plausible to expect information about (1) who has been selected, (2) by what procedure they have been selected (and, depending on the character of the procedure, by reference to what criteria), and, possibly, (3) who else has been considered for selection (whether individually or by identifying relevant characteristics)²⁷. Of course, demands for transparency will depend on the (perception of the) function exercised by authorities and by investor-State dispute settlement more generally, and information could be provided in various ways. But this a plausible starting point for discussing expectations of disclosure in modern international dispute settlement.

B. SELECTION OF ARBITRATORS

12. ICSID Newsletter published in January 2018 provides a note on designations to the ICSID Panels of Arbitrators and Conciliators. A section on ‘qualifications’ lists certain attributes as ‘highly desirable for designees given the mandate of Panel members’ (hinting, one imagines, at considerations that ICSID takes into account when it exercises its function of the appointing authority) as well as a section on ‘expanding diversity’.²⁸ The points made are sensible and it is not my intention to criticise them. But it is worth emphasising that criteria for the selection of international adjudicators do not reflect natural and inescapable technocratic consensus. These are hard political choices made by States and

²⁵ E.g. 1994 UK-India BIT <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1613> art 9(3)(c)(ii).

²⁶ Cf. P Allot, ‘The Concept of International Law’ (1999) 10 EJIL 31, 43.

²⁷ Cf. Research Paper [246].

²⁸ <https://icsid.worldbank.org/en/Documents/about/Considerations%20for%20States%20on%20Panel%20Designations-EN%20final.pdf> respectively 2, 3.

other relevant stakeholders, possibly the hardest choices in dispute settlement ([6]) (for example, a permanent international court was not created at the 1907 Hague Peace Conference because of lack of agreement on the choice of judges).²⁹

13. Choices of criteria for selection of adjudicators have been made differently for different international courts (and indeed differently for the same courts at different points in time). For example, Judges of the ICJ are elected by the General Assembly and the Security Council of the UN, reflecting an ‘understanding’ both as to the regional distribution and as to the (sometime) tradition of electing those candidates who come from the P5 countries.³⁰ Judges of the International Criminal Court are elected by the Assembly of States Parties, reflecting equitable geographical representation, fair representation of female and male judges, and expertise (List A judges have established competence in criminal law, while List B judges have competence in relevant areas of international law, such as international humanitarian law as well as human rights law), and great weight is attributed to recommendations of the Advisory Committee on Nomination of Judges.³¹ The European Court of Human Rights and the Court of Justice of the European Union provide further examples of the mixture of varied criteria, significantly changing alongside perceptions of judicial legitimacy, that may be taken into account in the appointment process.³²

14. Decisions on selection of arbitrators in investor-State dispute settlement call for an engagement with these policy questions, if not explicitly then by necessary implication.³³ What expertise is required or desirable for an adjudicator, and how can it be demonstrated? Is there a need for a regional representation of adjudicators; what is the definition of and weight given to regions (and does it vary in differently constituted appointing authorities); and is the number of disputes involving States from a particular region a relevant consideration for appointment of arbitrators of a particular region? Is gender diversity a relevant, desirable, or compulsory consideration; is it evaluated by reference to candidates considered or candidates appointed; and what is the benchmark for achieving it? These are only some of the hard policy questions that appointing authorities have to necessarily form an opinion on to exercise their functions, and they can be – and have been – answered in legitimately different ways by different regimes of international dispute settlement.

15. It would be helpful for stakeholders to consider whether appointing authorities, as currently constituted, are best placed to decide these questions. I set out possible answers to a similar question regarding limited disclosure of information in greater detail above ([7]-[10]), and the same considerations apply to selection of arbitrators. In summary form, perhaps these are functions that no appointing authorities should be exercising; perhaps some appointing authorities are better suited for engaging with these issues than others; or perhaps the delegation of hard policy calls to appointing authorities is entirely proper, accurately reflecting the underlying political disagreement among the stakeholders. (It is plainly very important to also discuss what the criteria for selection of arbitrators *should* be, and how they could

²⁹ <http://www.icj-cij.org/en/history>.

³⁰ R Higgins and ors, *Oppenheim’s International Law: United Nations* (Volume II, OUP 2017) 1139-41.

³¹ https://asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/PR1338.aspx. See further S Barriga, ‘Election Rules for ICC Judges: A Balanced Bench Through Quasi-Quotas’, <https://www.ejiltalk.org/election-rules-for-icc-judges-a-balanced-bench-through-quasi-quotas/>, and ‘Informal guide and commentary to the procedure for the nomination and election of judges to the International Criminal Court’ ICC-ASP/16/INF.2 (5 May 2017) https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-INF2-ENG.pdf.

³² M Bobek, *Selecting Europe’s Judges* (OUP 2015).

³³ Cf. Kaufmann-Kohler and Potestà (n 10) III.B.

be implemented in technical terms. But that is different from – or at least predicated upon a certain answer to – the question on whether these criteria should be formulated by appointing authorities or (other) stakeholders, which is addressed here).

2.15. Rodrigo Polanco (Assistant Professor of International Economic Law at the University of Chile, senior researcher/lecturer at World Trade Institute, Bern, Switzerland)

As always, your writing is impeccable, with a clear and detailed explanation of the appointing authorities for the selection of arbitrator in ISDS. If I can make only one comment, is that some more information about how many times these mechanisms are actually used it would be very helpful. For example, with respect to the use of the ICSID ballot procedure, you rightly mention (p. 41, § 157) that the lack of precise information on the use of this mechanisms inflates the actual role of disputing party choice of arbitrators. But I don't seem to find information on for example, how many times arbitrators have been appointed using the ICSID Roster. I understand that to get more information on this issue in the other institutions would be complicated – although some data is presented in your paper (e.g. only 3,6% of ICC appointments does not relies on proposals from national committees at p. 43; number of AI SCC emergency appointments at p. 52; and fragmented information on PCA appointments from p. 54 to 57), but it would be useful too (if it's possible!). Probably it would enough material for another paper, but it will be useful to know who are these people (what's their nationality and previous experience? Have they been appointed in ISDS before?)

Bottom line, my point is that looking at the cases, maybe the actual use of appointing authorities it is not as common as it appears. I am under the impression that in the majority of cases there is no need to resort to this appointment mechanism – unless that impression comes from an expansive use of the ICSID ballot procedure.

2.16. David W. Rivkin (Partner, Debevoise & Plimpton, New York, United States; Immediate Past President, International Bar Association)

Thank you for giving me an opportunity to review the paper. It is very interesting and quite thorough.

As a general comment, I understand the concern of the governments and the reason why the question was asked. However, I think it is important to consider the issue in the overall context of results in ISDS cases. Statistics demonstrate that governments win (either on jurisdiction or on the merits) a substantial majority of the cases, and where investors are successful they often receive a portion of the damages sought. The paper as a whole frames legitimate questions about how appointing authorities operate and particularly whether they should be more transparent – with which I completely agree. However, there are implied and sometimes expressed suspicions that the institutions seek to curry favor from investors and private arbitration lawyers, which I think is unfair. My own experience with the institutions shows that they bend over backwards to be as fair and neutral as possible. While the paper points out that bodies like the SCC and ICC are composed of lawyers with commercial arbitration experience, it ignores the fact that many of those lawyers act in investment treaty cases for governments as well as for investor parties. Some, like myself, act for both. Thus, the concern that they want to curry favor with private arbitration lawyers in order to attract commercial cases seems misplaced.

Similarly, parties and their counsel choose arbitration institutions for a wide variety of reasons. The quality of the arbitrators they appoint is a primary, but no means not sole, reason for that choice, and quality implies a wide variety of factors: experience in public international law and dispute resolution generally, intelligence, efficiency, and of course fairness and neutrality. Differences in institutional rules (for example, the pros and cons of ICSID's annulment procedure) also play an important role. These factors should not get lost in the overall context of the question you are considering.

A few specific comments:

Paragraph 4: I question the validity of the conclusion drawn from the study referenced in footnote 6. Even if it is statistically correct, it is a very small sample size. More importantly, most of the SCC's ISDS cases derive from the Energy Charter Treaty. Because those cases involve energy issues, by definition they would naturally involve disputes with more at stake. Moreover, the sentence refers to ISDS case "outcomes" but the study refers to the size of awards. It does not reflect whether governments are more or less successful in cases brought at different institutions.

Paragraph 8: A small matter, but the Arbitration Institute of the Stockholm Chamber of Commerce is generally referred to as the SCC. While I understand the purpose in distinguishing the Institute from the broader Chamber of Commerce, that is mentioned only once later on. It would be more consistent with general practice to refer to the arbitration body as the SCC and perhaps refer to the broader institution as the Chamber of Commerce or Stockholm Chamber.

Paragraph 19: The differences you note are due to the different confidentiality provisions in the ICSID and UNCITRAL Rules. More generally, the paper does not consider the impact going forward of the Mauritius Convention, which should increase transparency across the board in all ISDS cases.

Paragraph 22: While technically correct that the World Bank President is the ICSID Chairman and formally responsible for appointments, I think that formality is overstressed in the paper. As the paper demonstrates, in fact ICSID's Secretary General is the one truly responsible for the appointment process. While the paper eventually makes that point clear, I think the paper would be more accurate if it stressed the Chairman's role "in name only" earlier in the paper and deemphasized the formal designation.

Paragraph 29: It seems odd to distinguish between arbitration institutions and appointing authorities. Parties consider them to be one and the same, and the institution's role as an appointing authority is an important part of one's view of that institution.

Paragraph 32: As noted, I think the implied concern about reciprocal relationships is overstated. As noted, among other reasons, many of the private sector lawyers to which you refer act for governments in ISDS cases or in other capacities.

Paragraph 110: I believe that the SCC is beginning to publish some of its decisions.

Paragraph 111: The Board of the SCC, on which I sat for 12 years until about a month ago, does not delegate decisions to smaller groups of its members. Your description of the SCC process is quite accurate. If you would like to discuss it in any greater detail with me, please just let me know.

Paragraph 145: A major problem with the ICSID panel of arbitrators is that many governments make their appointments based on internal political considerations and not on the basis of perceived expertise. As the report properly notes, that expertise could come from a variety of sources. Parties – investors and governments alike – want to appoint people who understand the process and the relevant public

international law and can run the case effectively and efficiently. It would be useful to remind governments of the need to consider these factors in making these appointments. Indeed, before appointing someone to the panel, they should ask the question who would they like to chair one of their cases. That will often be someone from outside their own country. I also think that this discussion ignores the fact that many of those on the ICSID panel are professors, specialists in public international law or former judges. The ballot process initiated by ICSID is itself a recognition that the panel does not contain a sufficient number of qualified appointees for the number of cases now brought to ICSID and is an attempt to broaden the number of experienced arbitrators. Meg Kinnear has done an excellent job of bringing new people into the process through the use of the ballot process, and many of those new people are former judges or have prior experience in the public sector.

Paragraph 225: Again, I think the suspicions raised here are unfounded.

Paragraph 249: Institutional appointment of all the arbitrators would eliminate a major advantage to international arbitration, whether commercial arbitration or ISDS: the ability of both parties to name a person to the panel in whom it has confidence. While this proposal has been very publicly discussed by Jan Paulsson and others, the fact that it has not attained traction shows the preference for the party-appointed process.

Paragraph 255: A major criticism of the proposed investment court, which I share, is the concern that governments who are parties to the cases become the sole appointers of the deciders of those cases. This creates an inherent conflict of interest, and I believe it would greatly lessen confidence in the process.

Paragraph 257: As noted, I agree with the overall approach that there should be more transparency and that each institution should identify the arbitrators it has appointed, as ICSID and the ICC now do. This is important for many reasons, including the ones mentioned in the paper. Equally importantly, it is important to parties to understand how busy certain arbitrators are, as arbitrators with full schedules are a major cause of delays and inefficiencies in the ISDS arbitration process.

I hope that you find these comments to be helpful. Please let me know if you would like to discuss at any time.

2.17. Stephan Schill (Professor of International and Economic Law and Governance, Amsterdam Center for International Law, Faculty of Law, University of Amsterdam, Netherlands)

Thanks a lot for giving me the opportunity to read, and comment on, the draft of your paper on appointing authorities in ISDS proceedings.

I have read it with great interest and think it is a detailed and highly useful overview over the practices of different appointing authorities in ISDS. I have no comments on Parts III-IX. There are others, who are more intimately familiar with each institution, and perhaps even their inner functioning, who can provide more targeted comments on those Parts. I do have a number of comments on Part II though:

1. Overall, Part II in my reading seems to carry the message that appointing authorities are principally a source of concern because of the powers they have in the design of the investment treaty or more generally ISDS regime. What is not mentioned, however, is the structural problem why they exist and why somebody has to fulfill the function they fulfill. The problem is of course the lack of a standing adjudicatory body for investment disputes and the choice of states for arbitration for these disputes, as is also customary in many other areas of public international law. Hence, in such a system somebody has to fulfill the function of designating a chairman if the parties, or party-appointed arbitrators, depending on the appointment modus for the chair, do not agree. Without an appointing authority, the respondent could block the entire process of administering international justice. To avoid this is the reason for the existence of the powers of appointing authorities and explains why they are necessary. This aspect should be stressed in Part II, thus putting the concerns that arise into perspective. They also give rise to the more important point, that is, not whether appointing authorities should at all exist, but rather who should exercise that function and according to what procedure.

2. Reading Part II, I get the impression that the power of appointing authorities and their influence on the substance of how ISDS cases are decided is somewhat overdrawn, even exaggerated. At the moment, despite mentioning various limitations to your analysis, Part II reads as if appointing authorities had among the greatest authority in the entire investment treaty system in steering the development of international investment law and ISDS. I agree that from the perspective of institutional economics the analysis of incentives you provide is convincing in showing that the role of appointing authorities is important and should therefore be looked at critically. Yet, there is a difference between making the point that the activities of appointing authorities are an important aspect to consider and spend time on in debating the design of ISDS, and the conclusion that they have the overall systemic impact Part II of the draft suggests. For this second conclusion, the stronger claim, a number of aspects would need to be taken into account, and I wonder whether the strong claim Part II makes (or at least suggests) can really be made when taking these factors into account.

3. One aspect is to be clearer on the percentage of cases in which decisions by appointing authorities actually come in. Statistics could be helpful here, but the paper only speaks of a 'significant proportion' (para 17). The reason why I stress this is that my feeling is that there is a large number of ISDS cases where the parties, or the party-appointed arbitrators, if they were tasked to do so (an aspect that is largely overseen), were able to agree on a chair. Of course, in such cases the alternative of having the appointing authority make a decision is always there, but whether this allows the conclusion that the appointing authority has an influence on how cases with agreed chairs get settled is a long stretch. In other words, the actual involvement of appointing authorities may be more limited than at least it sounds in Part II. Similarly, it would be helpful to have a clearer idea about the extent of competition between different

appointing institutions. Many BITs do not provide a choice; others modify who the appointing authority is supposed to be (eg the ICSID Secretary-General instead of the Chairman). So, statistically how widespread is the choice and resulting competition and may it not be influenced also by other factors that appointing practices (eg the enforcement and review benefits the ICSID Conventions grants may be much more important than the appointing practice of either ICSID or its competitors).

4. Part II makes the claim, based on a law and economics analysis of incentives, that also parties when appointing their arbitrators are doing so in light of what the appointing authority may do. Theoretically this may be true. But is there any grounding in practice to show that this influences parties in making their appointment decisions in practice? Can this be shown by interviewing counsel on their considerations in suggesting or making appointments? After all, when appointing an arbitrator, it is impossible for the party to know what choices the appointing authority may make in the future. I wonder thus whether, taking into account the insights of behavioral economics, namely that actors in practice do not always behave according to theory, one would not come to conclude that the Damokles sword of an appointing authority appointing a chair in the future has fairly little impact on the appointment of the party-appointed arbitrators. Instead, I think the appointment decision of parties is driven mainly by the extent to which parties believe the arbitrator in question to be favorable to their position and by the standing the arbitrator has among peers in convincing the tribunal of that position.

5. Another aspect that seems important to stress more than is currently the case in Part II, is the fact that appointing authorities are not unconstrained in appointing the chair (yet the paper says that 'unlimited discretion' exists - para 18 and that the choice is 'essentially unconstrained as a legal matter' - para 43). Instead, there are several factors that constrain that choice, and constrain them in a way that at least makes it difficult to claim that appointing authority choices allow the authority to influence the direction of the resolution of the case and eventually of the whole investment treaty regime. One are, of course, rosters, as in the case of ICSID arbitrations, and sometimes IIAs. Another important factor, applicable to all cases, are qualifications that the appointed arbitrator has to have. Sometimes these encompass a certain expertise in international law or international investment law, as provided for in some IIAs, but most importantly they encompass the need for the individual to be independent and impartial. Judicial/arbitral independence makes it difficult to substantiate the claim that appointing authorities are able to steer the substance of ISDS decision-making (even if paras 30 ff suggest that the existence of appointing authorities would somehow compromise the independence of arbitrators because they have an interest in catering to the appointing authority's interest - a very difficult claim to make, and here it is not substantiated). Similarly, the choice of the chair by an appointing authority may also be influenced by who the arbitrators already appointed by the parties are. Finally, the outcome of ISDS cases depends on so many other variables (applicable law, facts of the case, strength of party counsel, etc) that it is difficult to show what influence appointing authorities have on outcome.

6. Para 24 would suggest that the two individuals (WB president and PCA Secretary-General) actually make the choice, whereas they probably just rubber-stamp what is done by those actually in charge of ISDS in the respective institutions.

7. All in all, Part II currently reads as overly critical of appointing authorities in influencing the investment treaty regime and influencing it because of the competition that exists among institutions in favor of investors who can make the choice, in many cases, which institution to have recourse to. Structurally, this follows Gus Van Harten's arguments about arbitrators crafting the system in line with investor preferences, and it faces the same counter-arguments, namely that reality and a statistical analysis of it do not really match theory, likely because the theory is too crude (not taking account of many other relevant variables that influence outcome and constrain decisions) and does not take into account the behavioral aspects which motivate and constrain party and appointing authority behavior.

I hope these comments are helpful in making the tone of Part II more balanced and thus a more neutral basis for ongoing policy discussions. At the moment, it may risk suggesting an overly quick conclusion that appointing authorities are a problem in themselves, rather than part of a solution.

I am happy to clarify anything that may have remained unclear.

2.18. Engela Schlemmer (Professor, University of the Witwatersrand, Johannesburg, South Africa)

I have read the document with interest. It is quite comprehensive and provides a good overview of the different systems of appointing authorities. The one thing that I found very interesting is the fact that in essence, by doing this kind of study, it is being suggested or at least the inference is created that the ISDS arbitrators are not objective. If this is the starting point or the hypotheses, then it does not really make any sense to continue with a system which is perceived to be subjective. I am not convinced that the system is subjective or that there is a conflict of interest arising in almost each and every instance of ISDS. This would then invariably also apply to court cases and commercial arbitration where judges used to be counsel and often arbitrators either are or were counsel or judges. But I guess this is the flavour of the month but it does serve to colour one's perceptions even more and without any solid and tested grounds for its existence.

The next aspect is the whole issue of transforming the "look" of ISDS by having more women arbitrators and arbitrators from developing countries or whatever the case may be. If one wants to have an adjudicative system (or an arbitral system) that has legitimacy, the arbitrators are to be appointed based on merit and this includes their specific knowledge of the subject area involved and quota systems etc were to be considered and not merit, the system is going to run into even more trouble. It is all fine and good to say that we need to diversify and transform but if this is not done on merit, the whole system may collapse especially if the outcomes of the arbitrations are not going to be acceptable to the parties and that may be as a result of appointing arbitrators of the right kind but not necessarily with the correct credentials and knowledge. Without a system of appeal this will be the total downfall of the system. And even if a system of appeal were to exist that could potentially curb and contain the previous sentiment, why then should the parties be exposed to an arbitration which will most probably be appealed? Does the answer not lie in building capacity amongst potential arbitrators?

The last aspect relates to the role of the appointing authorities and the fact that it is suggested that they should be more transparent etc. The crux of the matter for me lies in the decision to give the power to the appointing authority to appoint an arbitrator or chair for a particular hearing. If this appointing authority is not given directions as to what it is supposed to be taking into account, no one can really complain afterwards about the authority not acting appropriately or not taking x, y or z into account. When it comes to ISDS, the decision to make use of an appointing authority takes place at the time the treaty is negotiated (yes subject to a number of things happening or not happening) and if there are specific guidelines that need to be given to such an authority, it should be written into the treaty and if at this stage it is becoming a problem, then there should be no reason why the treaty cannot be amended to include such guidance or directions.

2.19. Hi-Taek Shin (Professor of International Investment Law, Seoul National University School of Law, Korea)

I found the paper very informative and comprehensive. Overall, the paper very accurately explains the current status, rules and actual practice of the selection of arbitrators by appointing authorities in ISDS.

A few minor comments for your considerations:

Para. 138: The phrase “if carried out by all 161 members of ICSID” sounds a bit confusing. Currently, ICSID has 162 Contracting States and Signatory States (those which have signed, but not ratified it). Only the Contracting States can nominate appointments to the roster. Mexico very recently signed ICSID Convention, thus the number is now 162.

In connection with Para 138, you may wish to consider an ICSID Document on its website entitled “Considerations for States in Designating Arbitrators and Conciliators to the ICSID Panels” . While it is true that ICSID does not play an active role beyond calling for qualified candidates, the document mentioned above appears to be an effort of ICSID to communicate to the Contracting States what the proper qualifications from ICSID perspective would be.

Para. 144: It is true that the applicable procedures need to be established in each case, and the procedures can vary significantly. In my experience, there seems to be a conscientious effort on the part of ICSID Secretariat to standardize the procedure by developing a template for procedural order 1 which set forth rules for procedure.

Para. 230: ICSID has developed a practice of sending e-mail update to subscribers entitled “ICSID Daily Updates” which include information on recently constituted cases. This e-mail updates link ICSID website on a particular website so that the readers could easily identify who the arbitrators are in the recently constituted cases. I think it as a part of ICSID efforts to improve overall transparency in the proceedings.

My final comment relates to the challenges/removal of arbitrators. While the focus of the research paper is on the selection of arbitrators, an important related issue could be what the system of addressing challenges is.

I hope that you find the foregoing comments responsive and helpful.

2.20. Catharine Titi (Research Scientist at the French National Centre for Scientific Research (CNRS) and Member of the CREDIMI, Law Faculty of the University of Burgundy, France)

I have read the paper with great interest. Fascinating topic, very well researched, thorough, and excellently written report, I don't have any substantive comments.

Four very minor observations relating mainly to style and not content (so that I feel that I've given you at least something by way of comments!):

Para. 5. “The investment court system (ICS) proposal has generated debate about the relative merits of government appointment of judges and the current system of appointments by disputing party/counsel and appointing authorities.” This is directly linked with the topic of the report. However, as this paragraph discusses expressions of dissatisfaction with the current ISDS system more generally, it may be relevant to add that the debate also turned around another issue: judges are appointed for 4+ year terms (renewable or not), arbitrators are appointed ad hoc. Or to add that the proposal generated debate “*among others*” about the government appointment of judges, etc.

Para. 31. “Selection as the chair in an important case brings significant additional benefits including the power to decide on important issues of public policy.” This could be interpreted as implying that each of the co-arbitrators will take the side of his or her appointing party and therefore the decision lies solely with the President. Consider rephrasing?

Para. 148: Penultimate line of the paragraph: I think there may be some issue with the phrase, something missing.

Para. 261: Conclusion. After such a long paper, maybe consider a longer conclusion/summary.

2.21. Gus Van Harten (Professor, Osgoode Hall Law School, Canada)

It is an excellent paper: well-researched (where information is publicly available), thorough, and coherent. I gave it a close read and found only two points where I was unclear on the meaning:

-para 227: what is "Ais"?

-note 291: what is "IC"?

I felt the paper contains important information and would like to see it become public in time. It will make an important contribution to scholarly research and informed public debate. I am also glad to see it will receive attention at the intergovernmental round table. Its description of bargaining dynamics and the potential influence of claimant counsel in the choice of arbitration rules, in a fiercely and inappropriately competitive market for appointment services, was excellent. The paper also provided an excellent analysis of the importance of list processes.

The paper reaffirmed for me a deep concern that appointing authority in ISDS cases needs to be assigned to a body that has a line of accountability to states and through them to the public. Some information in the paper was especially eye-opening. The information that stood out most was (1) the role of ICC national committees in nominating arbitrators, (2) the development and use of emergency arbitration proceedings at the SCC (which I found shocking), and (3) the declining openness of the PCA on its role in designating organizations and individuals as appointing authorities (for all a perplexed member of the public could know, the PCA may have designated the Nazi Party of Wyoming as an appointing authority!).

It is disturbing in each respect to see how the vital roles delegated by states to these appointing bodies are being fulfilled.

While I understand you sought to avoid evaluative comments, I felt the discussion at the end of the paper, on the value of a consistent approach to disclosure, moved hesitantly into that terrain. I encourage more such evaluation, if not in this paper then in future work.

Thank you for sending me the draft paper. I learned a lot from its detailed information.

2.22. Jason Yackee (Professor of Law, University of Wisconsin-Madison, United States)

The draft was very interesting. I am not sure I have a whole lot to say, in large part because, as you note, there is so little public information on institutional appointment processes. The PCA's lack of transparency was especially surprising to me.

In any event, here are my thoughts; please excuse any randomness or misunderstandings. The report's subject-matter is outside of my normal area of focus, and so my comments may be naïve or off-base.

1. As an overall observation, I am not sure I entirely understand why greater transparency about the appointment process matters so much as an issue of public policy. The beginning of the report mentions a few reasons why the reader might consider the issue an important one (a short paragraph about the emergency-arbitrator mechanism; a short paragraph about public suspicion of ISDS and the infamous "gender gap", which I wonder whether is really such a problem—are we saying that women would decide ISDS cases differently than men will?), but I didn't think the paper really made the link as to why greater transparency of selection methodologies would be expected to solve these problems (or other potentially important problems). My sense is that the "asymmetry of information" point made in the last few paragraphs of the report are the main reason supporting the sense greater transparency on AI appointment procedures is desirable. If I am right on that point, then I wonder if you might expand the discussion of the asymmetry point and move some of that discussion up to the front of the report.
2. Paragraph 31, noting that arbitrators make a lot of money. I found myself thinking that the arbitrators themselves sometimes complain that they actually *don't* get paid very much, by their own standards, and compared with the law firms litigating the cases, especially in ICSID, with its low daily rate of, what is it now, \$1500? I am also not sure why as a matter of public policy we care about the distribution of such benefits. Are you suggesting that there is an underlying fairness concern, in that Arbitrator X is given the opportunity to make money, but Arbitrator Y is not?
3. You note the "scratch my back, I'll scratch yours" aspects of the current system, in paragraph 32. I think this is a very important point, and a very important aspect of the system that explains how it has developed, that explains resistance to change, and that justifies public concern. I take it from the qualifying footnote that this is a very sensitive point. But I think that this point starts to

get at why we care about appointment procedures. It is really a concern with self-dealing or even a kind of institutionalized corruption...

4. Section II.A. on “the importance of appointing authorities” struck me as the most interesting part of the paper, and I especially found enlightening your discussion of negotiation theory/BATNA. I wonder if this aspect of the report might be expanded.
5. I found myself wondering why Section II.B (Appointing authorities in international commercial arbitration...) didn’t mention the UNCITRAL Rules (2010) with their complicated process for determining an appointing authority. You mention the UNCITRAL rules later on, but I think that they perhaps should be mentioned here too.
6. Section IV.A, especially p.24- 25, on ICSID. I wasn’t sure why you spend so much time talking about the IBRD president. I assume that he doesn’t actually ever perform his official duties related to arbitral selection in particular arbitrations, but rather always delegates it. I think you could shrink this section significantly, and mostly jump into the discussion of the institutional structure of ICSID.
7. Have there been any studies that you can cite (or that have been performed in-house) that give us a sense of how often members of the ICSID “roster” have been appointed as arbitrators (e.g. p. 37)?
8. I thought that the quotations/discussions of Rob Howse’s comments at the earlier meeting were a very important counterweight to the claims of business groups that ISDS is so highly “technical” that only international investment law experts are qualified to serve. I would encourage you to maintain the recitation of Howse’s remarks in the final draft.