CAN INVESTMENT DISPUTE SETTLEMENT EVER BE DEPOLITICIZED?

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ABSTRACT

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

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I. INVESTMENT ARBITRATION: POLITICS AS USUAL?

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

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

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


11 Odumosu, supra note 6, at 272.


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

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

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

\begin{footnotesize}
\begin{enumerate}
\item Titi, \textit{supra} note 9, at 262, 265, 278-87. \textit{See also} Bjorklund, \textit{supra} note 7, at 214.
\item Thomas Wälde, \textit{The Specific Nature of Investment Arbitration, in New Aspects of International Investment Law} 42, 92 (Philippe Kahn & Thomas Wälde, eds., 2007); Salacuse, \textit{supra} note 8, at 141, 149. In the words of Kaufmann-Kohler and Potestà, “[w]hat began as a rather academic or at least discrete controversy has recently gained substantial media interest and public scrutiny and, in some instances, has spilled over into general politics.” \textit{Analysis and Roadmap, supra} note 9, at 9-10.
\end{enumerate}
\end{footnotesize}
importation of the traditional principle of party autonomy, where disputing parties play a direct role in the composition of the tribunal, places arbitrators under relentless censure. Unlike judges, an arbitrator’s jurisdiction is predicated on them being chosen by certain parties. This is perceived as a tool of control over the arbitrators’ interpretative space. Because parties select arbitrators in view of their seeming propensities regarding the matters under discussion, the latter may be exposed to unjustified pressure, including that of a political nature.

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

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


27 Pauwelyn & Elsig, supra note 23, at 464 (arguing this places additional pressure on the chair arbitrator, who is normally not appointed by the parties); EUROPEAN COMMISSION, THE IDENTIFICATION AND CONSIDERATION OF CONCERNS AS REGARDS INVESTOR TO STATE DISPUTE SETTLEMENT 11 (Nov. 20, 2017),
Some ‘arbitration celebrities’ are persistently labelled as being either “pro-state” or “pro-investor.”

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

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

https://www.asktheeu.org/en/request/5793/response/19495/attach/17/Docu-
Session, supra note 16, ¶ 54; Wälde, supra note 17, at 51 (arguing chair arbitrators
will most likely try to develop an image of neutrality or command empathy from
both sides).

28 Thomas Wälde, Interpreting Investment Treaties: Experiences and Examples,
in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR
OF CHRISTOPH SCHREUER 724, 731 (Christina Binder et al. eds., 2009). Sergio Puig,
Settlement Reform, on the Work of its Thirty-sixth Session, U.N. DOC. A/CN.9/964
(Vienna, Oct. 29 – 2 Nov. 2, 2018) ¶ 71 [hereinafter Rep. Thirty-Sixth Session]. A
study released in 2012 labelled Brigitte Stern as “[t]he states’ favoured choice,” adding
that “[g]overnments have appointed her as arbitrator in 79% of her known in-
vestment-treaty cases.” Differently, Charles Brower is depicted as “[a] favourite of
investors. Companies have appointed him as arbitrator in 94% of the known invest-
ment-treaty cases with which he has been involved.” Pia Eberhardt & Cecilia Olivet,
Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling
https://www.tni.org/files/download/profitingfrominjustice.pdf (last visited Oct. 21,
2020).

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

30 Puig, supra note 28, at 403-04. Joost Pauwelyn, The Rule of Law without the
Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators

31 Puig, supra note 28, at 422. See also Gus Van Harten, Leaders in the Expansive
and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS

32 U.N. Comm’n on Int’l Trade L., Possible Reform of Investor-State Dispute
Settlement (ISDS): Arbitrators and Decision Makers: Appointment Mechanisms and
appointment of private lawyers, who often have a pro-business approach and tends to overlook the broader legal, political, and social ramifications of these disputes, and who disregard the public’s interests, which are frequently at play.\(^3\) The professional background and personal inclinations of investment adjudicators, are subject to increasing scrutiny, calling into question their suitability to deliver justice in an unbiased, impartial, and independent fashion. When governments had agreed to incorporate the party-appointment paradigm into the investment arbitration mechanism, they may have discounted the possibility that arbitrators themselves could be politically driven.\(^4\)

Proposals for a reform of the system have proliferated, and all share the ambition of reassessing states’ control over the selection of adjudicators. The United Nations Commission on International Trade Law (“UNCITRAL”), Working Group III: Investor-State Dispute Settlement Reform, is currently considering different models for reshaping the way adjudicators are selected and appointed.\(^5\) They range from the creation of a pre-established list or roster, to the establishment of a standing mechanism with a permanent adjudicatory body.\(^6\) Each model may include a number of variants and has to be considered in light of the other options that are being discussed, for instance, the

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

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

II. A PERMANENT INVESTMENT COURT: STACKING THE BENCH?

The proposal that has received more attention is the creation of a permanent investment court.\textsuperscript{43} The idea has been brewing for several

\textsuperscript{37} Id. ¶ 12.


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


\textsuperscript{42} Id.

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

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

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45 World Investment Report 2013: Reforming International Investment Governance, United Nations Conference on Trade and Development at xii,
47 Investment Policy Framework for Sustainable Development, United Nations Conference on Trade and Development at 108,
49 VAN HARTEN, INVESTMENT TREATY ARBITRATION, supra note 25, at 180-184;
53 ISDS: Selection an Appointment of Tribunal Members, supra note 36, ¶40.
54 Id. at 14. Namely, a long, non-renewable term of office, financial security, and immunities.
55 Id. ¶ 40.
56 Id. ¶ 15, ¶ 40, ¶¶ 47-48, ¶59; Rep. Thirty-Sixth Session, supra note 28, ¶¶ 91-98.
57 ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶¶ 44-46.
58 Id. ¶ 59.
59 Id. ¶ 43.
The court model is the most dramatic solution for the ills of the system, as it would replace the current regime—where every arbitral panel is purposefully established by the parties, after the dispute emerges—with a system where the adjudicatory body is already in place when the proceedings are initiated.\textsuperscript{54} The main goal is to “break the link”\textsuperscript{55} between the parties and the adjudicators, which seems to be at the root of many of the system’s perceived shortcomings.

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

\textsuperscript{54} Id. ¶ 41.


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

\textsuperscript{59} ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶ 58. See also ¶ 42 (noting that a parallel may be drawn with the World Trade Organization’s Appellate Body: “States as disputing parties have no say in the selection of the individuals who compose the World Trade Organization Appellate Body (WTO AB), although as treaty parties they have participated in such a selection process.”).
to hear a particular case\textsuperscript{60} seems to be enough to break the direct link that currently connects parties with arbitrators.

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

\textsuperscript{60} ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶ 58.

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

\textsuperscript{62} Kaufmann-Kohler and Potestà, supra note 57, at 5, 14.


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

\textsuperscript{65} Kaufmann-Kohler and Potestà, supra note 57, at 5, 14 (“The situation is different from a permanent inter-State framework where the categories of disputing and
torrent of scholarship cautioned that seats on the bench of the investment court may consequentially be filled with people who share the appointing state’s preferences and priorities.66

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

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


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

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

69 Roberts, supra note 57. Submission from the European Union and its Member States, supra note 43, ¶ 23. ANDRÉ VON WALTER & MARIA LUISA ANDRISANI, FOREIGN INVESTMENT UNDER THE COMPREHENSIVE ECONOMIC AND TRADE
lean towards their interests and preferences may exist, this does not necessarily mean that they will have a pro-government (or defendant) approach. Actually, some capital-exporting countries might prefer to select adjudicators who are pro-industry, so as to protect their investors abroad. Other may decide to appoint adjudicators who they perceive as neutral.

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

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

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70 Dickson, supra note 66, at 459.


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


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

76 Zuleta, supra note 66, at 422. It would be especially “troubling to rely upon the judgment of individuals who are accountable to the very Sovereigns whose conduct is being evaluated.” Franck, supra note 41, at 1608.
confidence in the neutrality of the tribunal and of the dispute settlement mechanism as a whole. This paves the way for accusations of partiality and favoritism in the composition of the tribunal, potentially (re)politicizing investment disputes.

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

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81 Philippe Sands, *The Independence of the International Judiciary: Some Introductory Thoughts*, in *LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR*
Kaufmann-Kohler contends that the current regime has created a “distance from politics, from state interests and equally a distance from business interests” that might be “entirely gone” with the new model.\textsuperscript{82} Brower and Rosenberg add that “[t]he politicization of the appointment process inevitably would result, in a not insignificant degree, in the ‘distancing of the community of arbitrators from the community of users,’ adversely affecting to that extent the perceived legitimacy of the arbitral proceedings.”\textsuperscript{83} The authors see the current regime as “the highest form of a merit system” because appointments “are depoliticized, as potential arbitrators effectively ‘stand for election’ by parties every time a new case is brought.”\textsuperscript{84}

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


\textsuperscript{84} Brower & Rosenberg, supra note 73, at 24.

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

\textsuperscript{86} Howse, supra note 26, at 226.
flaws that allegedly affect the current system and furthermore create new types of biases.

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

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

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

III. TOOLS TO PREVENT POLITICAL CONTAMINATION

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

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88 Bienvenu, supra note 74; Dickson, supra note 66, at 459.
89 Appleton & Stephenson, supra note 66, at 13.
governmental influence through a “robust and transparent appointment process.”

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

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

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92 ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶ 40; Possible Reform of Investor-State Dispute Settlement, supra note 43, ¶¶ 19, 22.
93 ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶ 55.
96 ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶ 53.
97 Id. at 49.
98 Kaufmann-Kohler & Potestà, supra note 57, at 64.
A. Transparency

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

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

Transparency is a key ingredient to avoid the perception that adjudicators are appointed based on political considerations.

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

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

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

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


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

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

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

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

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

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

110 Analysis and Roadmap, supra note 9, at 167.
confidence in the new system, the selection mechanism should be as transparent as possible.111

B. Screening Mechanisms

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

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

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

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111 Appleton & Stephenson, supra note 66, at 13.
113 Kaufmann-Kohler & Potestà, supra note 57, at 64; Bjorklund et al., supra note 25, at 19; Olof Larsson et al., supra note 112, at 22.
114 Andrea Bjorklund et al., supra note 25, at 19.
115 Kaufmann-Kohler & Potestà, supra note 57 at 78; Possible Reform of Investor-State Dispute Settlement, supra note 43, ¶¶ 5–6.
116 Kaufmann-Kohler & Potestà, supra note 57, at 144.
117 Id. at 145-48.
118 Kaufmann-Kohler & Potestà, supra note 57, at 149.
119 Id. at 153-54.
they are going to screen.\textsuperscript{120} Again, we enter the discussion about who chooses (or, in the case of non-binding decisions, ‘filters’ or ‘reviews’) the decisionmakers, and how. In the abstract, a screening mechanism could render the selection process more objective and merit-based, and therefore less politicized.\textsuperscript{121} However, the advantages of such a mechanism should not be overstated. The very creation, over the last few years, of this type of mechanism is an indirect acknowledgment, that sometimes states do not appoint the most qualified candidates.\textsuperscript{122} Their contribution to depoliticize nomination and appointment processes in other international courts and tribunals, is debatable.\textsuperscript{123}

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

C. Consultation of Different Stakeholders

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

\textsuperscript{120} \textit{Id.} at 141.
\textsuperscript{121} \textit{Id.} at 155; ISDS: Selection and Appointment of Tribunal Members, \textit{supra} note 36, ¶ 52.
\textsuperscript{122} Ruth Mackenzie, \textit{The Selection of International Judges, in The Oxford Handbook of International Adjudication} 737, 752 (Cesare Romano, Karen Alter & Yuval Shany eds., 2014).
\textsuperscript{123} \textit{Id.} at 753.
\textsuperscript{125} ISDS: Selection and Appointment of Tribunal Members, \textit{supra} note 36, ¶ 51; Kaufmann-Kohler & Potestá, \textit{supra} note 57, at 27-11.
\textsuperscript{126} ISDS, Arbitrators and Decision Makers, \textit{supra} note 32, ¶ 37.
\textsuperscript{127} ISDS: Selection and Appointment of Tribunal Members, \textit{supra} note 36, ¶ 51; Kaufmann-Kohler & Potestá, \textit{supra} note 57, at 133.
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disputes.” The question ultimately is: what external entities should be included in this circle?129

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

The trickiest question is whether the consultation process should also be open to investors. UNCITRAL seems to be open to the possibility of listening to business and industry-affiliated associations.133 Without returning to the now infamous party-appointment system, this would give investors an opportunity to voice their concerns regarding the composition of the adjudicatory body134 and therefore attenuate the transition, from a disputing party system of appointment, to a regime where that power rests exclusively with the treaty parties.135 Just because investors are no longer allowed to appoint one arbitrator, it does not mean that their opinion cannot be heard whatsoever.136

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

128 ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶ 51. See also Kaufmann-Kohler & Potestà, supra note 57, at 133.
129 Kaufmann-Kohler & Potestà, supra note 57, at 114 (suggesting the inclusion of national parliaments of state parties in the consultation phase, although it is quite likely that such process would turn into an exercise of political influence).
130 ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶ 51; Analysis and Roadmap, supra note 9, at 168, 315; see also Kaufmann-Kohler & Potestà, supra note 57, at 34.
131 ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶ 51; Kaufmann-Kohler & Potestà, supra note 57, at 134. The Societies of International Law are a good example, see Analysis and Roadmap, supra note 9, at 168, 315.
132 Kaufmann-Kohler & Potestà, supra note 57, at 133.
133 ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶ 51. See also Appleton & Stephenson, supra note 66, at 13; Analysis and Roadmap, supra note 9, at 99, 133.
134 Analysis and Roadmap supra note 9, at 68, 99.
135 Id. at 133.
136 Id.
mitigate the perception that the court is unilaterally set up by states, thus reducing potential accusations of politicization.

D. Random Assignment of Cases

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

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

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

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137 See Kaufmann-Kohler & Potestà, supra note 57, at 92, 167-213.
138 Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS, supra note 94, ¶ 76.
139 See generally ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶ 43; ISDS, Arbitrators and Decision Makers, supra note 32, ¶ 15; Kaufmann-Kohler & Potestà, supra note 57, at 180.
140 Id. at 180.
141 Possible Reform of Investor-State Dispute Settlement, supra note 43, ¶ 24; ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶¶ 56-57.
142 ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶ 57; Kaufmann-Kohler & Potestà, supra note 57, at 80.
143 Kaufmann-Kohler & Potestà, supra note 57, at 194-95.
144 ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶ 57; Kaufmann-Kohler & Potestà, supra note 57, at 81.
145 ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶¶ 56-57; Kaufmann-Kohler & Potestà, supra note 57, at 2, 81; see also Robert Schwieder, TIP and the Investment Court System: A New (and Improved?) Paradigm for Investor-State Adjudication, 55 COLUMBIA J. OF TRANSNATIONAL L. 178, 196 (2016).
as a whole, might be biased, considering states still have the power to nominate (although in advance of any specific dispute) the adjudicators who will sit on the bench. Just because a panel of arbitrators was not hand-picked for a specific dispute, *ex post*, does not mean that the whole court will be perceived as unbiased, *ex ante*. The random allocation of cases creates some distance between appointers and appointees, but that relationship exists, nevertheless. In this regard, we move from the traditional relationship between disputing parties and the arbitral panel to a connection between appointing states and the whole court. Again, a move toward a permanent adjudicatory body entails a greater emphasis on institutional independence.

E. Restrictions on Nationality

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

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

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146 Bienvenu, *supra* note 74; see also Li, *supra* note 63, at 953 n. 51.
147 *Analysis and Roadmap, supra* note 9, at 173; Kaufmann-Kohler & Potestà, *supra* note 57, at 205.
149 *Analysis and Roadmap, supra* note 9, at 174.
150 *Id.* at 174. See also Bjorklund et al., *supra* note 25, at 14.
F. Roster of Arbitrators

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

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


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

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


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

UNCITRAL’s Working Group III is still discussing whether investors should also be involved in the selection process.\footnote{158}{ISDS: Selection and Appointment of Tribunal Members, \textit{supra} note 36, ¶ 27.} If that were to happen, both disputing parties, including the investor, could have a say in the composition of the tribunal and therefore their freedom of choice would not be entirely curtailed.\footnote{159}{\textit{Id.} at 11; \textit{Analysis and Roadmap}, \textit{supra} note 9, at 96, 170.} This option may sound appealing to disputing parties who cherish the opportunity—which exists in the current system—to directly appoint one of the adjudicators and influence the choice of the chair.\footnote{160}{Kaufmann-Kohler and Potestà, \textit{supra} note 57, at 170.} Investors in particular would feel that their voice in the tribunal’s selection process is heard,\footnote{161}{\textit{Id.} at 171; Kaufmann-Kohler and Potestà, \textit{supra} note 57, at 170, 171.} but some states may also value this opportunity,\footnote{162}{Kaufmann-Kohler and Potestà, \textit{supra} note 57, at 171.} especially when compared to a scenario of a representative court with limited seats, which would entail a competitive electoral process.\footnote{163}{ISDS: Selection and Appointment of Tribunal Members, \textit{supra} note 36, ¶ 32; Kaufmann-Kohler and Potestà, \textit{supra} note 57, at 177.}

The creation of a roster would be less of a radical change than the establishment of a permanent court. The most significant difference regarding the current system, would be that disputing parties would see their freedom of choice circumscribed to the members of the list.\footnote{164}{\textit{Analysis and Roadmap}, \textit{supra} note 9, at 99.} However, because disputing parties would still have the power to choose ‘their’ adjudicators, the potential of rosters to curb the criticism regarding the current party-appointment model is doubtful.\footnote{165}{\textit{Id.} at 171; Kaufmann-Kohler and Potestà, \textit{supra} note 57, at 173-75.} In fact, concerns about the choice of biased adjudicators would persist.\footnote{166}{Kaufmann-Kohler and Potestà, \textit{supra} note 57, at 173.} Both disputing parties would most likely appoint those members of
the list whom they believe are closer to representing their interests within the tribunal.\textsuperscript{167}

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

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

\textbf{G. Involvement of an Appointing Authority}

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

\textsuperscript{167} Analysis and Roadmap, supra note 9, at 171; Garnuszek and Orzel, supra note 87, at 66.

\textsuperscript{168} Analysis and Roadmap, supra note 9, at 171; Kaufmann-Kohler and Potestà, supra note 57, at 174.

\textsuperscript{169} Kaufmann-Kohler and Potestà, supra note 57, at 174.

\textsuperscript{170} ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶ 37.

\textsuperscript{171} Id. ¶ 28.

\textsuperscript{172} Kaufmann-Kohler and Potestà, supra note 71, at 1.

\textsuperscript{173} Kaufmann-Kohler and Potestà, supra note 57, at 96.

\textsuperscript{174} Id. at 97.

\textsuperscript{175} Innerenner, supra note 66, at 150.

\textsuperscript{176} ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶¶ 37, 50. See also Rep. Thirty-Fifth Session, supra note 16, ¶¶ 65-66; Possible Reform of Investor-State Dispute Settlement, supra note 43, at 53; Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS, supra note 94, ¶ 72; Li, supra note 63, at 961; Baetens, supra note 155, at 384. See also Langford, Behn and Malaguti, supra note 152.
Appointing authorities, including arbitral institutions, sometimes play a role in the composition of arbitral tribunals.\textsuperscript{177} One of the problems identified during discussions by the Working Group III, is the lack of transparency and information regarding selection processes conducted by appointing authorities.\textsuperscript{178} Appointing authorities and arbitral institutions have also been accused of lacking independence and impartiality.\textsuperscript{179} Some argue that they tend to appoint pro-state or pro-investor adjudicators.\textsuperscript{180} In particular, there may be the perception that, to receive business, institutions have an incentive to present themselves as appointing pro-investor arbitrators.\textsuperscript{181} The ICSID, in particular, is perceived by some commentators as structurally biased towards investors, as it is affiliated with the World Bank.\textsuperscript{182} The opposite perception may also be created—because it is operated by states, the ICSID may lean towards the interests of its members, particularly the most powerful ones.\textsuperscript{183} Appointing authorities of a private nature—such as the International Chamber of Commerce—also face criticism, being perceived as too close to the business interests of investors.\textsuperscript{184}

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

\textsuperscript{177} ISDS, Arbitrators and Decision Makers, \textit{supra} note 32, ¶¶ 5, 10.

\textsuperscript{178} \textit{Id.} ¶¶ 12-14, 40; Rep. Thirty-Fifth Session, \textit{supra} note 16, ¶ 66.


\textsuperscript{180} William Park, \textit{Arbitrator Integrity, in The Backlash Against Investment Arbitration: Perceptions and Reality} 189, 207 (Michael Waibel, Asha Kaushal, Kyo-Hwa Chung and Claire Balchin eds., 2010); Wäde, \textit{supra} note 28, at 731.

\textsuperscript{181} Dunoff et al., \textit{supra} note 66, at 11, 12.

\textsuperscript{182} See \textit{Van Harten, Investment Treaty Arbitration, supra} note 25, at 169, 170; Wittayawarakul, \textit{supra} note 26, at 54.

\textsuperscript{183} Wäde, \textit{supra} note 17, at 66, 67. See also \textit{Van Harten, Investment Treaty Arbitration, supra} note 25, at 169-71.

\textsuperscript{184} \textit{Perceived Bias, supra} note 179, at 444, 445; Van Harten, \textit{supra} note 44, at 19; Innerebner, \textit{supra} note 66, at 149.

\textsuperscript{185} ISDS: Selection and Appointment of Tribunal Members, \textit{supra} note 36, ¶ 36.
broadly, for instance, the United Nations General Assembly. However, Brower and Ahmad argue that the United Nations General Assembly or any other international organization, like states, would not be totally free from political influence.

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

IV. CONCLUDING REMARKS: WINDS OF CHANGE?

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

186 Analysis and Roadmap, supra note 9, at 166.
187 Brower and Ahmad, supra note 81, at 1182.
188 Id. at 34. See also Bernardi, supra note 63, at 57 (Bernardini argues that it is preferable to leave the full composition of the tribunal to the appointing authority).
189 ISDS: Selection and Appointment of Tribunal Members, supra note 36, ¶ 32.
politics: “as a rule, every international dispute is of a political character.”

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

While parties’ ability to choose their adjudicators has been described as the “historical keystone” of arbitration, the truth is that this feature contributes to a system that is increasingly perceived as politically polarized and therefore incapable of offering an exclusively legal, objective adjudicatory process. Still, concerns about the fittingness of a selection processes to retain independent and impartial adjudicators also exist in domestic, and even international courts.

There is no irrefutable evidence that international judges are somehow

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194 Wälde, supra note 28, at 729.
195 Bjorklund, supra note 7, at 240.
196 Ginsburg, supra note 5, at 484.
197 Titi, supra note 9, at 265.
200 Katselas, supra note 193, at 320.
more independent and impartial than arbitrators.\textsuperscript{204} The selection and appointment of arbitrators raises some problems, but the same can also be said about other adjudicatory bodies.\textsuperscript{205} Choosing adjudicators is a process that “always seems to have sprinkles of political flavour.”\textsuperscript{206} That is not to say that there are not valuable lessons to be learned from the experiences of other adjudicatory bodies. Knowing more about how appointment mechanisms have a bearing on the conduct of international courts and tribunals, is a matter of increased scholarly and practical relevance.\textsuperscript{207} Franck suggests delving into data to depoliticize investment dispute settlement and adopting an evidence-based approach to policy design.\textsuperscript{208} Indeed, empirical studies place the discussion about the present and future of investment adjudication at a more rational level.\textsuperscript{209} Still, due to the highly politicized nature of the field, there is always the risk that empirical findings are used to support pre-existing beliefs.\textsuperscript{210}

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

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

\textsuperscript{205} Franklin Berman, \textit{Evolution or Revolution?}, in \textit{EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION} 658, 671 (Chester Brown and Kate Miles eds., 2011).
\textsuperscript{207} Ginsburg, \textit{supra} note 5, at 501.
\textsuperscript{208} See Franck, \textit{supra} note 190, at 142, 143.
\textsuperscript{209} Rogers, \textit{supra} note 22, at 233.
\textsuperscript{210} \textit{Id.}
\textsuperscript{211} Mackenzie, \textit{supra} note 122, at 739, 740.
\textsuperscript{212} Kaufman-Kohler and Potestà, \textit{supra} note 57, at 61, 62.
\textsuperscript{213} \textit{Id.} at 61.
and tribunals demonstrates that such measures do not fully eradicate political preferences from the process, but at least mitigate their impact by filtering candidates through a stringent set of checks and balances.\textsuperscript{214} No filter is one hundred percent effective. Similarly to what happens with air quality scales—ranging from good, moderate, unhealthy, to hazardous—what a reform of the selection process in investment adjudication can at most achieve, is ensuring that “political contamination” is kept within reasonable, acceptable levels, which do not pose a threat to the well-being of the overall dispute resolution system.

\textsuperscript{214} Georges Abi-Saab, \textit{Ensuring the Best Bench: Ways of Selecting Judges, in Increasing the Effectiveness of the International Court of Justice} 166, 184 (Connie Peck and Roy Lee eds.,1997). \textit{See also} Peter Russell, \textit{Conclusion, in Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World} 420 (Kate Malleson & Peter Russell eds., 2006).