



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

Consultation Paper

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Context

The Freedom of Investment 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.

In October 2017, Roundtable participants considered a Secretariat paper on appointing authorities and the selection of arbitrators in ISDS, essentially the same as this consultation paper. Following discussion of the paper, the Roundtable requested the Secretariat to seek comments on the paper including from the five arbitration institutions considered in the paper, and from selected stakeholders and participants in ISDS. Invited commentators were informed that the consultation paper and comments could be made public. The consultation paper and comments received were considered by governments at the March 2018 FOI Roundtable.

This 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 consider appointing authorities and a revised version of the paper at a forthcoming meeting.

The consultation paper does not necessarily reflect the views of the OECD or of governments that participate in OECD-hosted dialogue on international investment policy. It cannot be construed as prejudging ongoing or future negotiations or disputes arising under investment treaties. This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

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Introduction¹

1. The Roundtable has requested the Secretariat to prepare materials on arbitrators, adjudicators and appointing authorities, and a first paper in this area was discussed in October 2016. It provided general background and considered among other things the role and importance of appointing authorities in investor-state dispute settlement (ISDS) in generic terms. 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.

2. Roundtable participants highlighted a number of issues in their initial discussion about appointing authorities.² The importance of the identity of arbitrators and especially the chair to the outcome of disputes was emphasised. Competition between arbitration institutions, its impact and the related incentives were seen as important themes that deserved further attention. A participant pointed to her government's general policy to identify a single appointing authority in each investment treaty to avoid uncertainty; such treaty designations of an appointing authority are increasing but remain exceptional in the overall treaty pool. The Roundtable requested the Secretariat to revise the paper and continue its work including by initiating a broader dialogue with appointing authorities.

3. This revised and substantially expanded paper provides more background information for a Roundtable dialogue with arbitration institutions that incorporate appointing authorities active in ISDS.³ In addition to considering the role of appointing authorities in general terms, it describes five arbitration institutions that are active in ISDS. It remains a work in progress as research and analysis are continuing.

4. Interest in the role of appointing authorities in ISDS is growing for several reasons. Amendments to arbitration rules and practices – now frequent – have given appointing authorities a broader role in arbitral selection and other aspects of ISDS.⁴ A prominent example involves the adoption of new “emergency arbitrator” rules which can allow those that can initiate claims to obtain an appointing

¹ This note does not necessarily reflect the views of the OECD or of the governments that participate in the Freedom of Investment (FOI) Roundtable, and it should not be construed as prejudging ongoing or future negotiations or disputes pertaining to international investment agreements. The opinions expressed and arguments employed are those of the author. The research assistance of Jonas Dereje during an internship in the Secretariat is gratefully acknowledged.

The following economies are invited to participate in the Roundtable: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, People's Republic of China, Colombia, Costa Rica, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, United States, and the European Union.

² [Summary of discussions at Roundtable 25](#) (17 Oct. 2016).

³ Appointing authorities active in ISDS generally form part of larger institutions that provide broader support services for arbitration. For convenience, the term “arbitration institution” will be used herein to refer to these combined functions and institutions.

⁴ See, e.g., Justice Clyde Croft (Supreme Court of Victoria, Australia), [The Revised UNCITRAL Arbitration Rules of 2010: A Commentary](#), p. 7 (“the revised [UNCITRAL Arbitration] Rules also grant much wider powers to appointing authorities. Thus, the decision of how this appointing authority is designated becomes more practically important.”) As discussed below, all three private-sector arbitration institutions addressed here released new or amended arbitration rules in 2017; the pace of new amendments has increased markedly.

authority appointment of an emergency arbitrator in one day and an “order” or “award” against a respondent government in less than a week. Decisions relating to the designation of appointing authorities in ISDS have involved significant treaty interpretation, have drawn public comment, or are expected to have a significant impact on the number of ISDS cases.⁵ Some have found a correlation between the choice of arbitral rules and arbitration institution on the one hand, and ISDS case outcomes on the other hand.⁶ Greater transparency from arbitration institutions has been advanced by some as an incremental solution to address the issue of public confidence in ISDS.⁷

5. Public expressions of dissatisfaction with an ISDS arbitral pool seen as dominated by commercial arbitrators, men, people from the upper reaches of the top 1% of incomes or individuals from developed countries have also generated increased interest in selection procedures for arbitrators including by appointing authorities. 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. The Roundtable has emphasised the general need for better information and explanations to the public.

6. Arbitration institutions are also evolving including to respond to an expanding number of ISDS cases, market pressures or specific concerns. They are adopting new rules, including rules designed to attract cases involving governments and/or investment. They are modifying their disclosure of their activities relating to arbitrator appointment, with some now disclosing more and others less. The most-used

⁵ See Luke Eric Peterson, Investment Arbitration Reporter, [After Organisation For Islamic Cooperation Fails to Nominate an Arbitrator to Sit in Investor-State Case, PCA Breaks Stalemate by Designating an Appointing Authority](#) (31 Mar. 2017) (reporting on case where PCA interpreted MFN clause in treaty to give investor access to 1976 UNCITRAL Rules in a different treaty and applied those rules to find that the PCA Secretary-General could designate a new appointing authority in certain circumstances; suggesting that “[t]he decision this week by the PCA to designate a replacement appointing authority could mean that investors will hasten to the PCA’s doorstep in any cases where the OIC Secretary-General fails to perform the role set out in the OIC investment treaty.”).

⁶ See Beth A. Simmons, Bargaining over BITs, *Arbitrating Awards: The Regime for Protection and Promotion of International Investment*, World Politics vol. 66, no. 1 (January 2014), pp. 12–46, at p. 37:

The choice of commercial rules — those of business groups such as the ICC or the SCC — is also associated with larger awards [in ISDS]. Indeed, investors were about 60 percent less likely to receive an award of less than \$1 million and 80 percent more likely to get an award over \$500 million when commercial venues, such as the ICC or SCC, were used (for example, compared to the ICSID or UNCITRAL). While causal inference is difficult to assign in this case—the choice of tribunal itself is likely to be quite strategic—it is an interesting finding in light of the fact that in almost all international investment agreements, it is the investor who has the right to choose the rules that govern the case.

No attempt has been made at this stage to evaluate the basis or accuracy of this finding. It is reported at this stage as an indication of growing interest and analysis of the role and impact of arbitration institutions.

⁷ See, e.g., Armand de Mestral, *Investor State Arbitration between Developed Democracies*, in Armand De Mestral, ed., *Second Thoughts: Investor State Arbitration between Developed Democracies* (2017), ch. 1 (noting that “much could be done ... to increase transparency” by administering agencies in ISDS and that movement towards greater transparency by all administering agencies should assist in promoting public confidence); 33rd Joint Colloquium on International Arbitration (AAA-ICC-ICSID) [Commercial and Investor-State Arbitration: Towards Convergence?](#) (focus on topic of “Transparency of institutional decision-making”).

The issue extends beyond ISDS although considerations may differ. The Vienna International Arbitral Centre (VIAC) announced in Sept. 2017 a new policy of disclosure of all of its appointments of arbitrators in all cases “[f]ollowing the call for more transparency in the appointment process of institutional arbitration”. See [VIAC Arbitral Tribunals](#), VIAC website. The VIAC is not otherwise addressed herein due to its apparently limited role in investment arbitration.

arbitration institutions in ISDS have greatly expanded their staff to handle the increased ISDS case load and are engaging in more outreach; others are seeking to expand their currently-small share of ISDS cases.

7. Five appointing authorities have been selected for initial analysis based on several criteria. The analysis addresses the two principal inter-governmental organisations that provide arbitration institution services in ISDS: the International Centre for Settlement of Investment Disputes (ICSID); and the Permanent Court of Arbitration (PCA).⁸ In addition to their inter-governmental nature, they are both important in the current system: ICSID is the market leader in terms of number of ISDS cases overall and by year, with approximately 440 ISDS cases registered under the ICSID Convention and Additional Facility Rules⁹, plus 64 UNCITRAL investor-state arbitration claims over the last ten years.¹⁰ 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. Both institutions are based on international treaties and have supreme governance bodies with government representatives. ICSID is based in Washington D.C. in the United States while the PCA is based in The Hague in the Netherlands.

8. The initial review also includes three private-sector arbitration institutions. In order of number of known ISDS cases administered to date, they are the Arbitration Institute of the Stockholm Chamber of Commerce (AI-SCC); the International Chamber of Commerce (ICC); and the Singapore International Arbitration Centre (SIAC).¹¹ All three are primarily commercial arbitration institutions. Their rules are included as options for covered investors in far fewer treaties than ICSID. The three private-sector arbitration institutions have had different levels of activity in ISDS. The AI-SCC has recently reported that it administered 82 ISDS disputes over the period from 1993 to 2016.¹² It reports inclusion of the AI-SCC Rules in approximately 60 bilateral treaties and it has a role in particular as an option for claimant investors under the multilateral Energy Charter Treaty, the most-used treaty for investor claims. The Paris-based ICC is the most-used institution for international commercial arbitration; it reports inclusion as an option in 18% of BITs and has been engaged in various efforts in recent years to attract more ISDS cases, resulting in an increased ISDS case load.¹³ SIAC is a more recent arbitration institution that has rapidly emerged as a major international commercial arbitration institution. It has reported involvement in two ISDS cases to date.¹⁴ However, it adopted specialised arbitration rules for investment cases in 2017 and is seeking to

⁸ The principal arbitration rules from these institutions are contained in the 1965 ICSID Convention and 2006 ICSID Arbitration Rules, and the 2012 PCA Arbitration Rules. The ICSID Convention and Rules are widely included in investment treaties. Information has not been located about inclusion of the PCA Rules in the ISDS provisions in investment treaties but it appears to be rare.

All five arbitration institutions can serve as appointing authorities in cases under the UNCITRAL Rules which are referred to in many investment treaties. For the PCA, this is its principal source of work as an appointing authority in ISDS. The UNCITRAL Rules were updated in 2010 and further amended in 2013 to include the UNCITRAL Transparency Rules.

⁹ See ICSID, [ICSID Caseload – Statistics \(Issue 2017-01\)](#), pp. 7, 10 (74% treaty-based cases out of 597).

¹⁰ *Id.*, p. 9.

¹¹ The three principal sets of arbitration rules at issue from these institutions are the AI-SCC 2017 Arbitration Rules, the 2017 ICC Arbitration Rules and the 2017 SIAC Investment Arbitration Rules (SIAC IA Rules).

¹² See Celeste E. Salinas Quero, [Investor-State Disputes at the SCC](#) (2017), p.2 (referring to 89% of 92 investor-state cases, or 82 cases, arising from investment treaties).

¹³ See ICC Commission Report: [States, State Entities and ICC Arbitration](#) (2012), § 11 (“At the present time, approximately 18 per cent of BITs allow for the possibility of using the ICC Rules.”). The number of ISDS cases at the ICC is not entirely clear. A 2014 article refers to 31 administered cases as of October 2014. Rocío Digón & Marek Krasula, *The ICC’s Role in Administering Investment Arbitration Disputes*, in Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Brill 2015, p. 58. Recent annual reports have referred to 6-7 new ISDS cases a year.

¹⁴ See Vivekananda N. & Jagdish John Menezes, [Singapore as a Seat for Investor-State Disputes](#) (undated article on SIAC website by SIAC staff members, written prior to introduction of 2017 SIAC investment arbitration

attract ISDS cases. In addition to being a new entrant as an arbitration institution in investment arbitration, SIAC is based in Singapore and thus provides an important and possibly different regional perspective.¹⁵

9. The remainder of the paper is organised as follows. Although work is ongoing in several areas, part I sets out some preliminary general observations and conclusions suggested by the work so far. Part II outlines the general importance of appointing authorities to the selection of arbitrators and the overall pool of arbitrators in investor-state arbitration. It also addresses differences between ISDS and international commercial arbitration relating to arbitration institutions. Part III sets out a rough typology of the nature and modes of intervention of appointing authority-related actors, including informal as well as formal processes.

10. Part IV examines the institutional structure of each of the five arbitration institutions. It focuses in particular on how, as an institutional matter, the appointing authority is designated and by whom.¹⁶ Part V turns to the practice of the five arbitration institutions in selecting arbitrators in individual cases. It describes the operation of (i) the three arbitration institutions that have primarily operated as appointing authorities in ISDS under their own rules, as they act under those rules; (ii) the operation of all five arbitration institutions under the UNCITRAL Rules; and (iii) some potential new entry methods or new entrants into the ISDS market.

11. Part VI addresses the expanded role of the appointing authority under certain amendments to arbitration rules to introduce “emergency arbitration” provisions. The five arbitration institutions have adopted different approaches to emergency arbitrator rules in ISDS, with the AI-SCC being the sole arbitration institution to provide for their general application in ISDS. The rules illustrate the potential impact of investment treaty party delegation of power to amend appointment processes to outside entities.

12. Part VII addresses a unique role in ISDS, the role of the PCA as the designator of appointing authorities under the UNCITRAL Rules. In addition to the importance of this role in itself, some tactical considerations may arise due to the power of the disputing parties to convert the PCA into the appointing authority in individual cases. Part VIII addresses the different policies of the five appointing authorities on disclosure of their appointments in individual ISDS cases.

13. To simplify the presentation and facilitate comparisons, the discussion below focuses principally on the selection of the chair of the three-person tribunals that dominate in ISDS. Appointment of the chair is widely seen as the most important function of an appointing authority – and the one involving the broadest exercise of discretion – but has attracted less analysis than more visible functions such as taking decisions on challenges to individual arbitrators. Mechanisms for selection of the chair are also of most relevance to broader debates about the selection of neutral adjudicators. The focus on appointing authorities follows ISDS scoping paper analysis of the debate over disputing party appointment of

rules) (“SIAC currently provides peripheral services to two investor-state treaty arbitrations, having been called upon to appoint an arbitrator in one of the two.”)

¹⁵ The initial review is limited to five arbitration institutions in order to allow for a manageable presentation while providing for a significant range of different actors. Other arbitration institutions can be added to the analysis in future. Selection of a limited number of arbitration institutions for initial review herein is for analytical purposes; no view is expressed with regard to quality or suitability for ISDS. The order of treatment varies by subject area and is based primarily on ease of presentation.

¹⁶ For clarity, the term “designation” is generally used herein to refer to the selection of the appointing authority (whether by election, appointment or otherwise). “Appointment” is used for the selection of arbitrators by the appointing authority.

arbitrators in ISDS.¹⁷ It has been noted that disputing party appointments are influenced by past and expected appointments by appointing authorities.

14. In addition to the focus on the selection of the chair, several assumptions are made to simplify the presentation. It is generally assumed that (i) the claimant investor has access to treaty coverage under one or more investment treaties that provide it with a choice of appointing authorities or designating authority; (ii) the investor selects the appointing authority or designating authority when it chooses to file its claim under particular arbitration rules; and (iii) neither the treaty parties nor the disputing parties have agreed to vary the arbitration rules applicable to appointing authority issues. This appears to correspond to a frequent scenario. Many if not most of the rules described herein can be varied if the treaty parties or disputing parties so agree – the point is not made in each case in order to simplify the presentation.

15. Academic study of ISDS frequently notes and laments the limits and differences in access to information about ISDS, and then proceeds to analyse ISDS based only on ICSID data. Given the comparative nature of analysis here and its primary audience, evaluation of data available only from one source will generally be postponed until the other arbitration institutions are given an opportunity to provide information or explanations.

¹⁷ David Gaukrodger & Kathryn Gordon (2012), “[Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community](#)”, OECD Working Papers on International Investment, 2012/03 (“ISDS scoping paper”), pp. 45-47.

I. Preliminary observations and conclusions

16. Conclusions in many areas will require further information, analysis and dialogue with arbitration institutions and others. However, some preliminary characteristics can be identified. First, 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. Considerable time and effort is required to understand how different actors can and do intervene in the process of arbitral selection in different institutions, the nature of those actors and how they themselves are selected. There is limited information about many of these issues. The complexity and limited available information may make it unrealistic to expect general journalists or the public to understand the current system. Limited disclosure in an adjudication system also puts insider knowledge at a premium.¹⁸

17. Second, appointing authorities are a very important component of the ISDS system and are in some ways at its apex. They appoint arbitrators and in particular the chair in a significant proportion of ISDS cases. Some appointing authority representatives have reported that in an increasingly polarised ISDS field – where each side harbours suspicions about anyone suggested by the other side – the direct appointing authority role in selecting arbitrators has increased in recent years. The influence of appointing authorities on arbitral selections also extends beyond their direct interventions. Expectations about likely appointing authority choices with regard to the chair influence both disputing party negotiations over an agreed chair and disputing party selections of co-arbitrators. More broadly, listing and appointing practices by appointing authorities may significantly affect the nature of the pool of investor-state arbitration adjudicators.

18. Third, there is no standardised disclosure of basic information by the different institutions; *a fortiori*, there is no system-wide disclosure. Arbitration institutions apply contrasting policies to disclosure about the ISDS appointments by their appointing authorities with some generally disclosing all their appointments while others do not. Disclosure still remains limited everywhere: for example, although appointing authorities generally have unlimited discretion in selecting individuals for the short lists of potential arbitrators that they submit to the disputing parties, there is no disclosure of lists either individually or in aggregate.

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.

20. Disclosure of appointing authority-related activity at the three private-sector arbitration institutions also varies. There has been significant recent movement at one institution (ICC) toward greater systematic disclosure of the identity of sitting arbitrators and the selection method in all new cases starting in 2016, albeit subject to a disputing party veto and without identification of ISDS cases. SIAC has the

¹⁸ At least for defensive purposes, the system is somewhat simpler for certain governments with tightly-controlled treaty policies that generally involve selection of a single appointing authority. Nonetheless, an understanding of the place of that single appointing authority in the broader system, including in contexts where it may be subject to greater competition from other arbitration institutions, may provide insights. In addition, access for investors (including those from the relevant states) to other treaties and appointing authorities through treaty shopping may limit the practical effect of some treaties that designate a single appointing authority.

power to disclose the identity of arbitrators in all tribunals under its new 2017 Investment Arbitration Rules, but the approach to disclosing appointments by its appointing authority is unclear and there is no experience with the rules to date. AI-SCC does not disclose its individual arbitral appointments.

21. Limits on transparency are noted here and in the paper because the Roundtable – including both participants favouring a new system and those favouring the existing one with incremental improvements – has expressed the need for better information about the current system. Transparency, however, is not an absolute good. In the arbitration institution context as elsewhere, it can involve policy trade-offs. In some contexts, it may be valuable in itself or useful as an instrument to achieve other goals; it may also have drawbacks. References to unavailable information herein do not prejudice the appropriate balance, but should allow a more informed discussion based on a better understanding of current practices. In some cases, apparent limits may not exist if further public information is located.

22. Fourth, appointing authorities differ markedly between the five arbitration institutions. At the two inter-governmental organisations, government representatives select the appointing authorities. The appointing authorities are individuals and generally former senior national government officials. They are selected to serve both appointing authority and other functions as the senior executive of the IGO. The ICSID appointing authority is the president of the entire World Bank, with over 10,000 employees and many functions unrelated to arbitration. The PCA is solely dedicated to dispute resolution. Its appointing authority is its Secretary-General who oversees roughly 75 staff dedicated to dispute resolution issues. Both of these appointing authority positions pre-date ISDS and neither position has been held by a person with ISDS experience. Since 2009, a full-time ICSID Secretary General has been an important informal appointing authority-type actor (for all cases at ICSID) and appointing authority (for certain non-ICSID cases); the current ICSID Secretary General is a former government official with extensive ISDS experience as respondent government counsel. Although governments may consult various constituencies about some of these positions, there is no formal role for investors, business or civil society in the nomination or election of these authorities.

23. Private-sector institutional appointing authorities differ from those at the inter-governmental organisation in several ways. They are collective bodies. Their members are selected by business organisations. They are composed primarily of arbitration lawyers with a commercial arbitration background. They have a much larger case load of commercial arbitration cases than of ISDS cases. There is no or very limited government representation in the appointing authorities and no role for governments or government representatives in their designation. There has been no public indication of consideration of providing for government input into appointing authority decisions at any of these institutions, even by major committees created to consider how government cases could be better attracted and addressed.

24. The appointing authorities also differ on the issue of nationality. The two original inter-governmental organisation appointing authorities have had consistent nationality over the course of many individual appointments – the PCA Secretary General has been Dutch without interruption since 1899; the president of the World Bank has been a United States national since 1947.¹⁹ The consistent nationality of the appointing authorities at the inter-governmental organisation arbitration institutions began at both institutions before the advent of ISDS; it is not mandated by any rule, but exists as part of inter-governmental practice. In the case of the World Bank, it reflects much broader practices in which ISDS is at most a minor consideration. However, the consistent nationality of the appointing authorities at these inter-governmental organisations co-exists with great sensitivity to nationality issues in investment treaties and ISDS: the former provide protections expressly based on foreign nationality due at least in large part to concerns about national bias; the latter contains many rules, for example, on the nationality of ISDS

¹⁹ The sole occupant to date of the full-time ICSID Secretary General position established in 2009 is Canadian. Previous ICSID Secretary Generals, who were also concurrently the General Counsel of the Bank, had different nationalities.

tribunal chairs. Both the United States and the Netherlands are also distinguished by distinctive, high-profile and influential investment treaty policies and practice.²⁰

25. The collective bodies that serve as appointing authority in private-sector arbitration institutions are formed of different nationalities, but with some regional specificities. For example, the AI-SCC appointing authority has a large proportion of Swedish members. Some private-sector institutions have recently publicised new appointments that achieve more diversity of nationalities in their appointing authority membership although active participation in appointing authority work may present challenges.

26. There are also some similarities between the five arbitration institutions. For example, all five reflect a trend towards institutionalisation of appointing authority processes. Other than the World Bank President, the appointing authorities are practically all engaged full-time in arbitration-related activities. All five have permanent secretariats that assist the appointing authorities in preparing the selection of arbitrators in what has become an institutional process everywhere. Although further information is needed, government investment treaty policy makers or negotiators do not appear to have a regular institutional role at any of the five institutions.

27. Fifth, there is evidence of significant competition between arbitration institutions for ISDS cases. It is widely recognised that competition between arbitration institutions for commercial arbitration cases is intense. Arbitration institutions closely follow the size, nature and value of their caseloads. They frequently attend or sponsor arbitration events where staff present recent developments to an audience of arbitration professionals and others. Their actions can resemble the marketing activity of law firms in this context. ISDS cases appear to be a market segment in this broader market; there are few reasons to believe that intense competition for commercial cases is accompanied by an absence of competition for ISDS cases.²¹ Arbitration institutions active in ISDS regularly report on numbers of cases and emphasise increases and new records; there is growing reporting of record total amounts at stake at some institutions, a focus that makes generally higher-value ISDS claims especially attractive.

28. Competition is also reflected in considerable innovation and dissemination of innovations seen to attract cases. Recent innovations have focused in particular on attracting cases involving governments including ISDS cases. Several new sets of rules have been released by the three private-sector arbitration institutions recently including rules specifically targeted at investment arbitration. ICSID is also engaged in a possible update of its 2006 rules with government and other participation, as discussed at a recent Roundtable. Major recent innovations, such as “emergency arbitrator” provisions, have rapidly proliferated in private-sector commercial arbitration rules but with different approaches taken with regard to their application to ISDS.

29. While there appears to be little doubt that arbitration institutions compete for ISDS cases, the situation with regard to appointing authorities is less clear. The five appointing authorities at issue here all form an integral part of larger arbitration institutions. Their appointing authority services are generally offered and often purchased together with their other arbitration institution services (provision of tribunal secretaries, case administration, etc.). Appointing authority selection of chairs can also be seen as the most important function of an arbitration institution given its importance for case outcomes. However, in

²⁰ The United States and the Netherlands have been the two most frequent home states of ISDS claimants. See UNCTAD, [World Investment Report 2017](#), p. 116 (accounting for 148 and 92 claims respectively between 1987-2016). As respondents, the Netherlands has not faced any known claim and the United States has successfully defended all claims brought against it.

²¹ Arbitration law firms quickly pick up on and publicise the changes. See, e.g., Herbert Smith Freehills, [The New ICC Arbitration Rules: Promoting a Modern View of International Arbitration](#) (10 Oct. 2011) (in section on “Promoting ICC arbitration involving states and state entities”, noting that the “ICC has long dealt with disputes involving states and state entities but the 2012 Rules make a particular effort to promote its ability to administer such disputes”); Herbert Smith Freehills, [SIAC Investment Arbitration Rules](#) (in section entitled “carefully tailored to the realities of investment arbitration”, underlining various rules designed to accelerate procedures).

contrast to rule changes, fee structures, speed of cases or administrative features, there is less visible competitive behaviour. Appointing authority action in selecting arbitrators is rarely put forward by arbitration institutions as a competitive factor in public statements or marketing materials. Descriptions by actors in the appointing authority process also do not refer to competitive considerations as a factor taken into account in designation or appointment decisions, other than general references to seeking to satisfy disputing party interests.

30. Analysis of competition among arbitration institutions is ongoing and will be informed in part by the background materials on institutional structures and procedures collected in this paper. In addition to competition between existing institutions active in ISDS, a number of other competitive forces widely recognised as important appear likely to be at play: the power of customers (investor claimants, lawyers and lawyer/arbitrators, governments); the threat of new entrants (e.g., other commercial arbitration institutions); the threat of substitutes (the ICS, domestic courts, insurance, commercial arbitration); the power of suppliers (potential arbitrators, staff).²²

31. Appointing authorities bestow a valuable benefit on the arbitrator that they select as chair. Based on the limited publicly-available information, the Roundtable has noted that average arbitrator compensation per ISDS case can be conservatively estimated as in excess of USD 400 000 (less expenses). Selection as the chair in an important case brings significant additional benefits including the power to decide on important issues of public policy. It can also bring greater visibility in the profession as a perceived neutral. Growth and size affect the volume of valuable benefits that an arbitration institution can bestow in the form of appointments; greater size and appointing authority activity may thus increase its attractiveness for further cases from those potentially competing for such appointments. There are fewer arbitration institution participants in ISDS than in commercial arbitration, but the number actively seeking ISDS work appears to be growing.²³

32. The market is characterised by reciprocal relationships among a small group of arbitration institutions and arbitrators/lawyers. For example, arbitration institutions select or have an influential role in selection of ISDS arbitrators who are often private sector lawyers while private sector lawyer/arbitrators have an influential role in the selection of arbitration institutions for ISDS cases; arbitration institutions

²² These examples of competitive forces are taken from a well-known article by Michael Porter. Michael E. Porter, ["How Competitive Forces Shape Strategy"](#), Harvard Business Review 57, no. 2 (March-April 1979), pp. 137–145 (revised and reprinted as *The Five Competitive Forces that Shape Strategy*, Harvard Business Review (Jan. 2008)).

The 2012 ISDS scoping paper also noted some issues arising out of competition. See, e.g., ISDS scoping paper, p. 54 (noting that clauses in investment treaties allowing investor forum shopping “may serve to protect investors from the risk that States or groups of States may ‘capture’ a particular forum. However, such clauses also arguably complicate efforts to reform ISDS – if arbitration fora have to compete actively for investors’ filings of cases, their ability to implement reforms (at least on matters that are not attractive to investors) may be constrained.”).

²³ See, e.g., Vivekananda N. & Jagdish John Menezes, [Singapore as a Seat for Investor-State Disputes](#) (undated article on SIAC website by SIAC staff members, written prior to introduction of 2017 SIAC investment arbitration rules) (“With a multi-national Secretariat conversant with investor-state arbitration, SIAC is competent to manage the entire range of administrative and logistical aspects of such an arbitration – from appointing arbitrators, determining costs and facilitating logistics. With all the requisites in place including a reputed international institution and world class facilities, Singapore is today poised as an ideal option for investor-state arbitrations both as a seat for ad hoc investor state arbitrations and as a venue for arbitrations administered by ICSID”; stating that “a number of concerns have been expressed on [the] efficacy [of ICSID arbitration in ISDS]. The most evident advantage of ad hoc arbitration is flexibility since it can be “tailor-made” to suit the nature of the dispute, and make the arbitration process cost and time efficient. Ad hoc arbitrations allow for the option that such proceedings remain confidential unlike the ICSID system where the Secretary-General of ICSID is under an obligation to publish information about the existence and progress of pending disputes. ICSID arbitrations are also often plagued by challenges concerning consent to the proceedings, leading to delays.”)

seek to attract ISDS cases while private sector lawyer/arbitrators seek appointments as ISDS arbitrators.²⁴ At the three private sector arbitration institutions, the appointing authorities themselves are essentially composed of private sector lawyer/arbitrators which further increases the reciprocal relationships between those arbitration institutions and private sector lawyer/arbitrators in the ISDS field.

33. While work in this area is continuing, some incentives possibly applicable in the arbitration institution context are briefly identified at this stage for purposes of initial discussion and in light of long-standing Roundtable interest in incentives in ISDS. The focus is on perceived incentives; no view is expressed about whether any particular incentives have any actual impact on appointing authority action. As elsewhere, however, perceptions about incentives can be important facts to be considered by policy makers in adjudication systems. As suggested in the Roundtable discussion, attention will focus on possible positive and negative impacts of competition in this context. A competitive context may make it valuable to adopt a system-wide perspective for thinking about certain issues.

34. Sixth, there appear to be limited mechanisms for public or internal accountability of appointing authorities. As noted, disclosure of appointing authority action is often minimal although it varies. No reasons are provided for appointment decisions. The availability of internal and external recourse against appointing authority decisions appears to be rarely specified. No national or other parliaments have engaged in inquiries about the operation of arbitration institutions in ISDS. Although it now increasingly reports on ISDS issues, the generalist press rarely if ever reports on the detail of how arbitration institutions operate or how ISDS tribunals are constituted. A primary mechanism allowing for a degree of accountability appears to be the market for cases which increases the importance of market analysis and incentives.

35. In the two inter-governmental organisations, the individuals who serve as appointing authorities among their other functions have been recently re-elected by government officials which reflects approval of their action over the preceding mandate. The individuals have broad executive responsibilities in addition their role as appointing authority. No information is available about the scope of government review of their action as appointing authorities in this context; as noted, in the case of the PCA, little information in that area may be available for review. The approval of their action as individuals in their different institutional contexts co-exists with sharp criticism and broad rejection of investor-state arbitration as a dispute settlement system for investment treaties by a significant number of government members of those institutions with active treaty policies.

36. These initial and preliminary observations and conclusions are set forth for purposes of discussion and identify possible issues and characteristics of interest. They are subject to revisions, corrections and refinement in light of discussions, additional analysis and further information.

²⁴ Reciprocal relationships can be analysed as reciprocal trading relationships, but analysis of reciprocal relationships is not limited to self-interested motivations. Scholars have noted the importance of reciprocity in human relations including where defined to exclude self-interested motivations. See, e.g., Ernst Fehr & Simon Gächter, [Fairness and Retaliation: The Economics of Reciprocity](#), *Journal of Economic Perspectives*, 2000 (14); 159-181 (“There is considerable evidence that a substantial fraction of people ... repay gifts and take revenge even in interactions with complete strangers and even if it is costly for them *and yields neither present nor future material rewards*. Our notion of reciprocity is thus very different from kind or hostile responses in repeated interactions that are solely motivated by future material gains.”) (emphasis in original).

II. The importance of appointing authorities in investor-state arbitration

37. This section first considers the general role and importance of appointing authorities in the composition of investor-state arbitration tribunals. Most appointing authorities in investor-state arbitration also act as appointing authorities in contract-based or commercial arbitration (and have done so for longer). A second part explores some significant differences between the context for appointing authorities in the two systems. A third part addresses the impact of appointing authorities on the overall pool of ISDS arbitrators.

A. The role and impact of appointing authorities in the composition of arbitral tribunals

38. Investor-state arbitration is characterised by ad hoc selection of arbitrators in each case. The Roundtable has noted in its earlier work that the identity of the arbitrators and in particular the chair are seen as key elements in investor-state arbitration cases. As the backdrop against which the disputing parties negotiate over the chair of the tribunal following their selection of their co-arbitrators, appointing authorities appear to be likely to have a substantial impact on the composition of investor-state arbitration tribunals.

1. Appointing authority impact on the selection of tribunal chairs

39. Once the investor has filed a claim in investor-state arbitration and each disputing party has chosen its co-arbitrator, the first major issue of negotiation between the parties is often over the chair of the tribunal. The chair is generally chosen by the disputing parties if they reach an agreement and by the appointing authority if they do not.²⁵ As a general matter, where an appointing authority is asked to appoint a chair, it provides the parties with some form of list of potential candidates. The appointing authority generally has broad discretion in selecting candidates for their lists. In some cases, rosters of state appointees play some role, but appointing authorities can often develop lists without being limited to such rosters.

40. Students of negotiation recognise that the expected consequences of the failure to achieve agreement affect the negotiations themselves. Each disputing party will consider the consequences of non-agreement and in particular its so-called BATNA (best alternative to a negotiated agreement). Those expected consequences affect the parties' relative bargaining power:

[R]elative bargaining power stems entirely from the negotiator's ability to, explicitly or implicitly, make a single threat credibly: "I will walk away from the negotiating table without agreeing to a deal if you do not give me what I demand." The source of the ability to make such a threat, and therefore the source of bargaining power, is the ability to project that he has a desirable alternative to reaching an agreement, often referred to as a "BATNA" [Best Alternative to a Negotiated Agreement]. ...

In litigation bargaining, a plaintiff and defendant who fail to reach agreement do not have the option of settling with different parties. Instead, both have the BATNA of submitting to adjudication of the dispute.

²⁵ In some cases, the appointing authority directly nominates the chair, as under the AI-SCC Rules (art. 13(3)). The importance of the appointing authority for the selection of arbitrators is further strengthened under that rule.

Bargaining power depends on whether that BATNA is more desirable for the plaintiff or the defendant.²⁶

41. In the case of negotiations over a chair in investor-state arbitration, the BATNA of both disputing parties is selection of the chair by the appointing authority. As the parties negotiate, they know that the appointing authority will make or largely determine the choice in the event of a failure to agree. If a disputing party thinks that the appointing authority will be more receptive to its selection criteria than the opposing disputing party, it may hold out for concessions from that party prior to requesting the intervention of the appointing authority. The expected appointing authority action and views about its desirability may thus affect the parties' bargaining position over an agreed chair and their ability to credibly make the threat to walk away from negotiations over an agreed choice.

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.²⁷ 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.²⁸ 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.

2. *The impact of appointing authorities on disputing party selection of co-arbitrators*

43. Prior to the selection of a chair, each disputing party generally chooses a co-arbitrator. Experienced counsel will approach the selection of a co-arbitrator with the future negotiations over a chair in mind. Each disputing party's choice, while essentially unconstrained as a legal matter under existing rules, may be affected by its expectations about the likely nature of the chair. An affinity with the chair is often seen as a desirable quality for a co-arbitrator because a party can prevail 2-1 if it can convince its co-arbitrator and the chair. Expectations about appointing authority choices with regard to the chair thus would appear like to exercise significant influence over the entire composition of the panel.

44. Various hypotheses can be made in this area. For example, parties may consider that a co-arbitrator with a similar background to the chair may be more likely to be influential. The backgrounds and

²⁶ Russell Korobkin, Symposium: Bargaining Power as Threat of Impasse, 87 *Marquette Law Rev.* 867, 867-869 (2004) (footnote omitted).

²⁷ A counsellor in the Legal Affairs Division at the WTO has suggested that negotiations about WTO panel composition may be influenced by expected appointments by the WTO appointing authority (WTO Director-General). He suggests parties may be unlikely to agree to a panel member who is seen as significantly less desirable than an expected Director-General choice. See Reto Malacrida, WTO Panel Composition, in Gabrielle Z. Marceau, ed., *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (2015), at p. 316 ("a party may hold out for concessions from the other party at the [pre-Director-General] stage until it believes the Director-General's benchmark standard has been met or exceeded".)

At the WTO, the disputing parties do not individually appoint any panel member. However, they have the opportunity to agree on one or more of the three panellists. The WTO Director-General appoints as necessary where the parties do not agree after a relatively short period. The Director-General appoints about 63% of panellists. *Id.* at p. 316.

²⁸ This dichotomy is hypothetical for illustrative purposes. The first branch roughly corresponds to WTO practice in selections of panel members by the WTO Secretary-General. See WTO Dispute Settlement Understanding (DSU) art. 8 (calling for panels to be composed of "well-qualified governmental and/or non-governmental individuals"). As noted, there do not appear to have been any selections of serving third-country government officials by appointing authorities in Investor-State arbitration. Cf. ISDS scoping paper, p. 44 (noting absence of government treaty negotiators).

profiles of co-arbitrators may tend to increasingly resemble those of chairs. Risk-averse lawyers or others responsible for disputing party selections may prefer a frequently-selected co-arbitrator in order to minimise exposure to criticism about the choice if the future outcome is poor.

B. Appointing authorities in international commercial arbitration and investor-state arbitration

45. Most appointing authorities are senior members or bodies in broader arbitration institutions that also provide administrative and other services to support arbitration. Appointing authorities active in investor-state arbitration also generally act as appointing authorities in contract-based or commercial arbitration. However, there are significant differences in how appointing authorities themselves are selected between the two systems. Where parties agree to arbitration in a contract, they generally provide for a single agreed set of arbitration rules that in turn provides for a single appointing authority.²⁹ Thus, for example, contracting parties can agree to arbitration under the AI-SCC Arbitration Rules. Those rules provide that the AI-SCC Board will act as the appointing authority.³⁰ A contract subject to the ICSID Arbitration Rules selects the Chairman of the Administrative Council (president of the World Bank) as appointing authority.³¹

46. In a contract, both contracting parties must agree to the appointing authority. At the time the appointing authority is selected in a contract, neither side knows whether in a future dispute it may be claimant or respondent or both. Contracts create both rights and obligations for each contract party. At the later time when a claimant in contract-based arbitration wants to file a claim, it generally does not have a choice of appointing authority; a single choice has been made earlier in the contract. What is true for the contracting party is equally true for the commercial arbitration lawyer – at the time the dispute arises and the lawyer is consulted, the choice of appointing authority has generally already been made and the lawyer has no role in that regard.

47. It is widely recognised that arbitration institutions compete to make themselves attractive for commercial arbitration cases. As noted by Lord Goldsmith, former Attorney-General in the UK and a leading arbitration practitioner, "[t]he [arbitration] institutions operate in a competitive market place and therefore all seek to accommodate the parties' (and their counsels') preferences."³² The president of a major international commercial arbitration institution recently described a "fiercely competitive market" between arbitration institutions for arbitration cases.³³

48. Arbitration institutions that seek to attract the inclusion of their arbitration rules in contracts must appeal to both contracting parties and their counsel; they must appeal to both future claimants and respondents. At the time they conclude their contract with an arbitration clause, both contracting parties normally can be expected to share an interest in the appointment by both the parties and the appointing authorities of arbitrators knowledgeable about contract law and with a balanced view about issues of contract liability and damages.

²⁹ Contracting parties are free to specify a particular appointing authority. The discussion here is based on the more usual approach of choosing a set of arbitration rules that incorporate the choice of an appointing authority.

³⁰ AI-SCC Arbitration Rules 2010, art. 13(3).

³¹ ICSID Arbitration Rules, art. 4. The UNCITRAL Arbitration Rules differ in this regard and are addressed below in parts V. B and VII.

³² Lord Goldsmith, [The Privatisation of Law: Has a World Court finally been created by modern international arbitration?](#) (transcript of speech on 27 June 2013).

³³ United States Council for International Business, [ICC Arbitration Posts Strong Growth in 2015](#) (description of a "fiercely competitive market" for arbitration cases by Alexis Mourre, president of the ICC Court of Arbitration – the ICC appointing authority).

49. The competitive situation for arbitration institutions is different in investor-state arbitration. As noted in earlier Roundtable discussions of forum shopping in ISDS, many investment treaties provide for more than one potential appointing authority by giving investor claimants the option of two or more sets of arbitration rules.³⁴ Treaty shopping can provide additional options. Typically, the investor claimant and its counsel only need to make a choice of appointing authority when they choose to file a notice of arbitration with a particular forum or under particular rules. Given the recognised importance of arbitrator selection and the similarity of the different arbitration rules on many issues, the appointing authority that goes with particular arbitration rules may be a significant factor in the choice of rules. Beyond the appointing authority, however, there are other differences for the claimant to consider such as the regime for enforcement, the nature and role of the secretariat or the degree of transparency.

50. Arbitration expertise, which includes knowledge about and experience with arbitration institutions, is very highly valued, at USD 700 and above an hour. The views of arbitration counsel with regard to a choice of arbitration forum are likely influential with investors who have little experience with ISDS. Even for repeat players, their degree of interaction with arbitration institutions will be far less than that of a leading investment arbitration law firm.

51. Lawyers for investors in ISDS cases – unlike lawyers in commercial arbitration cases – likely play a significant role, post-dispute, in directing investor filings towards different arbitration institutions. Given the scope for post-dispute investor choice in ISDS, leading ISDS counsel for investors may influence the choice of arbitration institution in many of the disputes they work on. The frequent post-dispute role of ISDS investor counsel in selecting appointing authorities may also give rise to some differences in the reciprocal relationships between appointing authorities and arbitration counsel/arbitrators in ISDS as opposed to commercial arbitration.

52. Choices between appointing authorities by claimant investors and their counsel take place frequently in ISDS. They depend on the number of claims, which has increased in recent years, and treaties used. There is no lock-in to arbitration institutions for investors or lawyers representing investors. They can change their arbitration institution preferences for ISDS immediately including in response to appointing authority nominating practices.

53. In order to be available for selection by an investor claimant, an appointing authority must be included as an option in an applicable treaty by the relevant governments. There is usually a high degree of government lock-in to the selection of arbitration institutions in existing investment treaties. The treaties typically have a long duration. The arbitration and arbitration institution options made available to investors generally apply for the duration of the treaty, and may be subject to further extensions under sunset clauses.³⁵

54. Until recently, investment treaty practice was very stable. Termination of investment treaties was practically unknown. With few changes in treaty practice affecting arbitration institutions other than an increase in the number of treaties, the impact of treaties on arbitration institution behaviour may have been

³⁴ Some treaties name a single appointing authority who acts as appointing authority even if an investor has a choice of arbitration rules. See NAFTA, art. 1124(1) (ICSID Secretary-General as sole appointing authority regardless of arbitration rules selected). However, most investment treaties provide for investor power to select among more than one appointing authority and the trend in bilateral treaties in 2012 was toward greater choice. See ISDS treaty survey, p. 22 (“States have gradually made an increasing number of fora available to investors: while bilateral treaties concluded in the 1970s typically referred to one single forum, treaties concluded in 2010 offer investors a choice between three fora on average.”)

³⁵ Lock-in for governments could be reduced for example if treaties selected an appointing authority for investor claims with a continuing government power to change it during the term of the treaty for a different (defined) one for any future investor filings.

limited.³⁶ Recent changes to the investment treaty landscape include significantly more treaty terminations and renegotiations in addition to new models. In addition, new arbitration institution entrants to ISDS or existing ones with relatively few treaty mentions, may have a greater need to persuade governments as well as investors of their merits.

C. The impact of appointing authorities on the overall pool of investment arbitrators

55. The impact of appointing authorities on the arbitrators selected in individual cases give rise to broader impact on the overall pool of ISDS arbitrators. The Roundtable has noted the general characteristics of the pool of investment arbitrators in earlier work. Noted characteristics from the information reviewed in the 2012 ISDS scoping paper analysis included elite status in the legal profession, very high levels of compensation, a high representation of private lawyers with commercial arbitration experience, less representation of government backgrounds, very few if any serving government officials, a high representation of OECD country nationals and a 95%/5% gender distribution.³⁷ It appeared that over 50% of ISDS arbitrators had acted as legal counsel for investor claimants in other cases, while approximately 10% had done so for respondent states.³⁸

56. Appointing authority practices, both directly and in their effect on disputing party choices, likely play an important role in the composition of the overall pool. Recently, some arbitration institutions authorities have publicly stated an intent to modify their appointing practices to address certain disparities. These initiatives merit attention. (See Part VIII.C below)

³⁶ Three governments (Bolivia, Ecuador and Venezuela) withdrew from the ICSID Convention in the late 2000s and early 2010s which can affect the availability of ICSID arbitration under those governments' investment treaties. Non-ICSID arbitration in investment treaties, such as arbitration under the UNCITRAL Rules or private-sector arbitration rules, generally does not depend on government membership in a separate treaty. Under most investment treaties, an offer to arbitrate under such rules cannot be unilaterally modified during the term of the treaty.

³⁷ David Gaukrodger & Kathryn Gordon, ISDS scoping paper, pp. 43-45.

³⁸ Id. One aspect noted by the Roundtable has been the absence of any appointment of a third-country government official such as a treaty negotiator as a chair or arbitrator in ISDS. A number of governments have appointed government officials to the ICSID roster. As the Roundtable has noted, government officials such as trade diplomats in Geneva frequently serve as WTO panel members. The considerations involved in having government officials from third states regularly adjudicate, on the one hand, trade disputes between two governments at the WTO, while they have been in effect excluded from adjudicating investment disputes between a government and a private investor from a different state, appear to have rarely been explored in detail, but the issue is attracting interest. See Joost Pauwelyn, [The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus](#), 109 AJIL 761 (2015); Donald McRae, [Introduction to Symposium on Joost Pauwelyn, "The Rule of Law without Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus"](#), 109 AJIL Unbound 277 (2016); Giorgio Sacerdoti, [Panelists, Arbitrators, Judges: A Response to Joost Pauwelyn](#), 109 AJIL Unbound 283 (2016); Gabrielle Marceau, Catherine Quinn, and Juan Pablo Moya Hoyos, [Judging from Venus: A Response to Joost Pauwelyn](#), 109 AJIL Unbound 288 (2016); Catherine A. Rogers, [Apparent Dichotomies, Covert Similarities: A Response to Joost Pauwelyn](#), 109 AJIL Unbound 294 (2016); Freya Baetens, [The Rule of Law or the Perception of the Beholder? Why Investment Arbitrators are under Fire and Trade Adjudicators are not: A Response to Joost Pauwelyn](#), 109 AJIL Unbound 302 (2016); Robert Howse, [Venus, Mars, and Brussels: Legitimacy and Dispute Settlement Culture in Investment Law and WTO Law: A Response to Joost Pauwelyn](#), 109 AJIL Unbound 309 (2016).

III. Typology of appointing authority-related functions relating to appointment of the chairperson of arbitral tribunals

57. In order to facilitate analysis and comparisons, this section sets out a rough typology of different modes of intervention of appointing authority and appointing authority-type actors in arbitrator selection. Three broad types of appointing authority-related interventions can be distinguished.

A. Appointing authorities: power to select the chair

58. As used herein, an appointing authority refers to a person or entity that has the power to choose a particular chair without joint disputing party consent to that individual. In some cases, the appointing authority chooses directly. In others, it develops and provides a list and allows for disputing party input with regard to the listed individuals. Appointing authority selections can be constrained by a binding roster or entirely discretionary.

B. Quasi-appointing authorities: discretionary power to propose possible chairs for voluntary acceptance, back-stopped by an appointing authority process

59. Alongside binding appointing authority functions, arbitration institutions can also intervene in the negotiations between the disputing parties and their counsel over a chair, but without a binding effect. For example, an arbitration institution could suggest one or more possible names of arbitrators to the disputing parties for possible consideration without any selection outcome being required. For convenience, these types of informal interventions will be referred to as quasi-appointing authority interventions. Quasi-appointing authority functions can be carried out by the appointing authority itself or by another individual or body.

60. Quasi-appointing authority interventions are a grey area. Other than the quasi-appointing authority ballot procedure disclosed by ICSID (discussed below), little is known about arbitration institution practice in this area in ISDS. But the importance of such procedures in adjudicator selection may be substantial. A well-known arbitration practitioner (and current president of the SIAC appointing authority) has underlined the prevalence and importance of informal approaches by arbitration institutions in the context of selecting arbitrators in commercial arbitration:

Different arbitral institutions take different approaches – both formally and informally – towards fulfilling their roles as appointing authority. ... [T]hese different approaches can produce significantly different selections of sole and presiding arbitrators.³⁹

61. While they appear to exist as important elements including to selection outcomes, little or nothing is publicly known about such processes. Insider knowledge may be valuable and carefully guarded. Issues could include whether ex parte contacts are permitted relating to possible or actual quasi-appointing authority interventions. Some quasi-appointing authorities may see themselves as mediators, alternating between communications with both parties and separate discussions with each side about possible choices or interests. Some may have internal rules, while others may leave procedures to the discretion of the appointing authority or quasi-appointing authority. Much may depend on the quality and nature of the relationship between the quasi-appointing authority and counsel.

62. It does not appear that any investment treaties include express provisions for a quasi-appointing authority process for arbitrator selection. Nor do they appear to include provisions precluding arbitration

³⁹ Gary Born, *International Commercial Arbitration* (2d ed. 2009), p. 1409.

institutions from quasi-appointing authority action. Applicable arbitration rules may leave some flexibility for both appointing authority and quasi-appointing authority functions.

63. Quasi-appointing authority processes can be subject to different rules. For example, the WTO has an express provision governing practice in this area in its rules for composition of its first-instance panels. The WTO DSU art. 8.6 provides that “[t]he Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.” This rule identifies the Secretariat as the quasi-appointing authority. It also supplies a demanding standard for rejections of quasi-appointing authority proposals. The text arguably comes close to an appointing authority procedure. In practice, according to a recent description by a former WTO Secretariat member, the WTO Secretariat reportedly takes flexible approach to the standard for refusals in this area. It requests parties to offer an explanation if they oppose a proposed candidate, so as to fully understand what particular background or attribute to avoid in proposing alternate names. But, in practice, it does not insist on candidates in the face of a party's considered opposition. The quasi-appointing authority process at the WTO is backstopped – and thus influenced – by a binding process that operates in the event the quasi-appointing authority process is not successful. In the WTO case, the WTO Secretary General is the appointing authority: he/she chooses any of the three panel members that the parties have not agreed on.⁴⁰

64. As defined here, quasi-appointing authority interventions take place against the backdrop of a binding appointing authority process if the quasi-appointing authority process is not successful. Various factors may come into play. For example, the nature of quasi-appointing authority proposals may be seen to pre-figure likely appointing authority decisions. Some disputing parties or counsel may see cooperation with quasi-appointing authority procedures as possibly affecting the attitude of the appointing authority towards its binding choice. They might fear that an appointing authority would not want to “reward” a disputing party seen as unreasonable in a quasi-appointment process with a favourable appointment at the appointing authority stage. These and other factors may affect disputing party views about how to respond to quasi-appointing authority proposals.⁴¹

C. Designating authority: discretionary power to select the appointing authority.

65. A designating authority is a person or entity that designates an appointing authority without joint disputing party consent to the designation. A designating authority thus bestows appointing authority work among a variety of interested institutions and individuals. Because the designating authority role is unique to the PCA in ISDS and differs from the appointing authority role, it is addressed separately below in part VII.

⁴⁰ Reto Malacrida, *WTO Panel Composition*, in Gabrielle Z. Marceau, ed., *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (2015).

The ground rules for WTO panel selections require both disputing parties to agree to any selections; unlike in investor-state arbitration, there are no unilaterally selected panellists. WTO dominance of international trade dispute resolution is of course not replicated in an ISDS system characterized by multiple competing arbitration institutions. WTO procedures also involve governments as both claimants and respondents, and do not involve damages claims, in contrast to ISDS. Nonetheless, the treaty-defined quasi-appointing authority and appointing authority system for panels at the WTO may be instructive as a reference.

⁴¹ In addition to quasi-appointing authority functions as defined, third parties – unrelated to the appointing authority for the particular case – could suggest possible arbitrators to both disputing parties and their counsel. The function would be more akin to mediation and is not addressed here.

IV. Institutional structure and nomination of the appointing authorities at five arbitration institutions

66. This part provides background information about each of the five arbitration institutions. It focuses first on the institutional structure. Each of the five constitutes a permanent administrative framework for *ad hoc* arbitral tribunals. The framework includes an appointing authority, arbitration rules that provide for that appointing authority serving as such, senior officials or executives, and a secretariat.⁴² The section focuses in particular on the nature of the appointing authorities, how they are selected and by whom. Although there are significant differences between each of the arbitration institutions, there are some similarities in this area between, on the one hand, the two inter-governmental organisations, and, on the other hand, the three private-sector organisations. The two inter-governmental organisations are accordingly addressed first, followed by the private-sector organisations.

A. Inter-governmental institutions

1. ICSID

67. ICSID was established by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). As of 1 December 2016, 161 countries had ratified the ICSID Convention. ICSID is one of the five organisations of the World Bank Group.⁴³

68. The ICSID Convention provides for an appointing authority who is not primarily engaged in arbitration matters. The president of the World Bank is the appointing authority under the ICSID Convention, in his/her capacity as *ex officio* Chairman of the ICSID Administrative Council. The president of the Bank has many responsibilities unrelated to ICSID and is not selected within ICSID. He/she is selected by the Executive Board of the IBRD. This section first briefly describes the selection process for the World Bank President/ICSID appointing authority. It then describes the institutional structure of ICSID including its Secretary General, who has important appointing authority-type functions.

a. Selection of World Bank president (ICSID appointing authority)

69. All powers of the World Bank are vested in the Boards of Governors, the Bank's senior decision-making body. The Boards of Governors of the different World Bank Group entities consist of one Governor and one Alternate Governor appointed by each member country for five year terms, renewable. The office is usually held by the country's Minister of Finance, Governor of its central bank, or a senior official of similar rank.⁴⁴

70. The Governors appoint or elect Executive Directors.⁴⁵ The Boards of Governors have delegated the power to select the Bank's president to the 25 Executive Directors of the IBRD.

⁴² The occasional and varying use of the term "court" in this context, including some references to cases being "before a court", may be confusing to some. It can result for example in inaccurate media reporting of decisions by *ad hoc* arbitral tribunals. None of the five arbitration institutions is or comprises a court in the usual sense. All have permanent mechanisms to select arbitrators for *ad hoc* arbitration tribunals and all also provide other services for arbitration. None has permanent judges or decides cases.

⁴³ The others are the International Bank for Reconstruction and Development (IBRD or World Bank), the International Development Association, the International Finance Corporation, and the Multilateral Investment Guarantee Agency (MIGA).

⁴⁴ See World Bank, [Boards of Governors](#).

⁴⁵ World Bank, [Boards of Directors](#).

71. The 25 IBRD Executive Director seats reflect 25 constituencies.⁴⁶ Seven constituencies are made up of one member (US, Japan, China, Germany, France, UK and Saudi Arabia). The other 18 are multi-country constituencies. The five largest shareholders (currently US, Japan, China, Germany, France and UK (equal)) appoint their own Executive Director. The other Executive Directors are elected by the governors of the countries in its constituency (with the voting weighted by shares).

72. Shares are distributed in a complex process. A small percentage of shares (5.5% overall, known as “basic shares”) are distributed on a per member basis. The remaining shares are distributed based on several criteria including GDP, level of development and other factors. An ongoing process is leading to regular adjustments of members’ allocations of shares every five years, with the most recent dating from 2015. The allocations and adjustments thereto are the subject of intense negotiations and are frequently contentious.⁴⁷

73. The five nominated and 20 elected Executive Directors on the IBRD Board of Directors are the electors eligible to participate in the selection of the President. Each Executive Director can vote the collective amount of shares of the members that it represents. The range of voting power of the current Executive Directors ranges from 16.3% for the largest shareholder to 1.67% for the Executive Director with the smallest collective shareholding.⁴⁸ In practice, however, most decisions are taken by consensus.

74. The president has always been a United States national since the founding of the Bank in 1944. As described by the Bank, the first contested election for the position took place in 2012 under new procedures agreed by the Executive Directors in 2011: the “Executive Directors followed the new selection process agreed in 2011 which, for the first time in the Bank’s history, yielded multiple nominees. This process included an open nomination where any national of the Bank’s membership could be proposed by any Executive Director or Governor, publication of the names of the candidates, interviews of the candidates by the Executive Directors, and final selection of the President.”⁴⁹

75. Jim Yong Kim, an American, was selected as the new president in 2012. He was president of Dartmouth College, a co-founder of Partners in Health (PIH) and a former director of the Department of HIV/AIDS at the World Health Organization (WHO). Before assuming the Dartmouth presidency, Dr. Kim held professorships at Harvard. The other candidates were Ngozi Okonjo-Iweala, the Nigerian finance minister, and José Antonio Ocampo, former finance minister of Colombia (who withdrew his candidacy). The Bank has indicated that “the final nominees received support from different member countries, which reflected the high calibre of the candidates”.⁵⁰ The Bank reported in September 2016 that Mr. Kim had been unanimously re-appointed in the post by the Executive Directors for a second five-year term.

⁴⁶ See World Bank, [International Bank for Reconstruction and Development, Voting Power of Executive Directors](#) (4 Dec. 2017) (list of the 25 Executive director constituencies, their country composition and voting power based on their shareholdings in the IBRD); World Bank, [IBRD Articles of Agreement, Art. V \(Organization and Management\)](#).

⁴⁷ For a report by the World Bank Group presenting background and identifying factors at issue with regard to shareholdings prior to the most recent 2015 adjustment, see World Bank Group, [2015 Shareholding Review Report to Governors](#), DC2015-0007 (28 Sept. 2015) (report to the Development Committee, a Joint Ministerial Committee of the Boards of Governors of the Bank and the Fund on the Transfer of Real Resources to Developing Countries).

⁴⁸ See World Bank, [International Bank for Reconstruction and Development, Voting Power of Executive Directors](#) (4 Dec. 2017).

⁴⁹ World Bank, [World Bank’s Executive Directors Select Dr. Jim Yong Kim 12th President of the World Bank Group](#) (16 April 2012).

⁵⁰ World Bank, [World Bank’s Executive Directors Select Dr. Jim Yong Kim 12th President of the World Bank Group](#) (16 April 2012).

76. As noted, the ICSID Chairman is the appointing authority under the ICSID Convention and ICSID Rules. As discussed below in part V.A.1, the importance the ICSID Chairman's role as an appointing authority has been somewhat reduced in practice due to an informal "ballot procedure" introduced in 2009. (As described further below, the ballot procedure involves provision of a list of proposed arbitrators to the disputing parties, acceptance or rejection of each proposal by each disputing party, and determination of whether there is joint acceptance of any proposal. Joint acceptance of a ballot proposal eliminates the need for recourse to the appointing authority.) The ballot procedure is now used prior to any recourse to the appointing authority procedure involving the ICSID Chairman; the latter is used only if the ballot procedure is unsuccessful.

77. Other than as the background actor in the event the ballot procedure is not successful, the ICSID Chairman plays no role in the ballot procedure. The ICSID Secretary-General plays the main role as a quasi-appointing authority under the ballot procedure; he/she also serves as an appointing authority under some procedures at ICSID.⁵¹ The next section describes the institutional structure of ICSID itself with a focus on the selection of its quasi-appointing authority, the ICSID Secretary General.

b. Institutional structure of ICSID

i. ICSID Administrative Council

78. ICSID is governed by an Administrative Council (ICSID Council). Each ICSID Member State has one seat and one vote on the ICSID Council; shareholdings in the Bank do not affect voting weight. The ICSID Chairman convenes and presides over the meetings of the ICSID Council, but has no vote. Under the direction of the ICSID Chairman, the ICSID Secretary General prepares an agenda for each meeting of the ICSID Council. Additional subjects may be placed on the agenda by any member within specified time-frames.⁵²

79. The ICSID Council must meet at least once a year. It usually meets during the autumn meetings of the World Bank Group. The ICSID Council may convene in person more often if necessary; the actual frequency of meetings has not been ascertained. It may also vote on issues by correspondence. In the absence of a contrary designation, each government is represented on the ICSID Council by its governor for the World Bank (Article 4 ICSID Convention). No information is publicly available on the participants on the ICSID Council, voting on Council matters, or on the degree of participation of government investment treaty or ISDS experts in ICSID Council meetings. The Roundtable recently welcomed an ICSID representative who presented the reform process and status to Roundtable participants.

80. The main functions of the ICSID Council relating to arbitration are (i) electing the ICSID Secretary-General (ICSID Secretary General) (by a two-thirds majority); (ii) adopting rules of arbitration for ICSID cases (by a two-thirds majority); (iii) adopting administrative and financial regulations for ICSID; and (iv) approving the annual reports and budget of ICSID (Article 6 ICSID Convention). The ICSID Council does not play a role in the administration of individual cases.

ii. Selection of ICSID Secretary-General (ICSID quasi-appointing authority and appointing authority)

81. The ICSID Chairman has the sole nominating power for the position of ICSID Secretary General. The ICSID Chairman proposes one or more candidates for ICSID Secretary General after consulting the

⁵¹ The ICSID Secretary General is the appointing authority where ICSID serves as appointing authority under the UNCITRAL Rules. The importance of the ICSID Secretary General as an appointing authority (in addition to his/her quasi-appointing authority role) also results from the designation of the ICSID Secretary General as the sole appointing authority by the treaty Parties in a number of multilateral treaties including NAFTA, CETA, the TPP and the Protocol to the Pacific Alliance.

⁵² ICSID, Administrative and Financial Regulation 3.

members of the ICSID Council. ICSID Convention, art. 10(1). This nominating power under the 1965 Convention contrasts with the 2011 procedures for the nomination of World Bank President/ICSID Chairman candidates, which, as noted above, provide that candidates can be nominated by any Governor or Executive Director.

82. The ICSID Council elects the ICSID Secretary General from among the candidate or candidates proposed by the ICSID Chairman by a majority of two-thirds of its members. The ICSID Secretary General has a six-year term and is eligible for re-election (Article 10(1) ICSID Convention). ICSID now has two deputy Secretary-Generals; they are generally subject to the same nomination processes and election processes as the ICSID Secretary General.

83. The ICSID Secretary General is the legal representative of ICSID. He or she appoints the staff in accordance with the terms of the Convention and rules adopted by the ICSID Council (Article 11 ICSID Convention). It consists of about 70 staff, who administer arbitration and conciliation cases at ICSID and support other ICSID activities. The staff has grown by 350% since 2004 and by almost 100% since 2010.⁵³ The World Bank Group has a commitment to diversity and inclusion, and regional statistics for overall WB staff are disclosed.⁵⁴ ICSID reported high levels of diversity in its 42 staff in 2011.⁵⁵

84. Until 2009, the General Counsel to the World Bank generally also served as the ICSID Secretary General. In 2008, World Bank President Robert B. Zoellick wrote to the members of the ICSID Council to propose a full-time Secretary General for ICSID in light of its caseload and policy issues:

I believe the posts of General Counsel [of the World Bank] and Secretary-General of ICSID should be held by two individuals. This step will ensure ICSID receives the full-time attention it warrants. Given both the caseload and the many policy issues related to ICSID, it needs a full-time leader and executive.⁵⁶

85. He further explained that after an extensive search, he had selected Meg Kinnear as an outstanding candidate for the position.⁵⁷ She was Senior General Counsel and Director General of the Trade Law Bureau of Canada with responsibility for the conduct of all international investment and trade litigation involving Canada, including defending ISDS claims. It is unclear whether consideration was given to proposing more than one candidate to the ICSID Council.

86. The search involved the establishment earlier in 2008 of a search committee to find suitable candidates for the ICSID Secretary-General position. The committee was chaired by the Vice-President, Human Resources, of the World Bank and included as members the General Counsel of the IFC, a former Deputy General Counsel of the Bank, the Executive Secretary of the Bank's Administrative Tribunal and ICSID's first Deputy Secretary-General.⁵⁸ The following month, Mr. Zoellick formally nominated Ms.

⁵³ 2004: 20 staff members (ICSID, Annual Report 2004, p. 2); 2010: 35 staff members (ICSID, Annual Report 2010, p. 2); 2012: 45 staff members (ICSID, Annual Report 2012, p. 2); 2016: 67 staff members (ICSID, Annual Report 2016, p. 52).

⁵⁴ See The World Bank, [World Bank Group Statement of Commitment to Diversity and Inclusion](#); The World Bank, [Where is our Staff From?](#).

⁵⁵ See The World Bank Group, The Junction, "[ICSID: Leveraging Diversity](#)" (27 Nov. 2011).

⁵⁶ Letter of the Chairman to the Representatives on the Administrative Council, December 12, 2008, quoted in Antonio Parra, History of ICSID (2012), p. 242.

⁵⁷ Letter of the Chairman to the Representatives on the Administrative Council, December 12, 2008, quoted in Parra, p. 242.

⁵⁸ Antonio Parra, History of ICSID (2012), p. 242.

Kinnear for election as ICSID Secretary General. She was elected by the ICSID Council in February 2009 and was re-elected in 2015.⁵⁹

iii. The ICSID Secretariat

87. The Secretariat carries out the daily operations of ICSID and deals with individual cases. The Secretariat acts as registrar in proceedings; assists in the constitution of tribunals; assists parties and tribunals with case procedure; organizes and assists at hearings and administers the finances of each case.⁶⁰

iv. The ICSID roster of potential arbitrators

88. ICSID maintains a list of potential arbitrators known as the Panel of Arbitrators. They are appointed by governments and the ICSID Chairman. The ICSID roster is addressed below in part V.A.1.

2. *Permanent Court of Arbitration (PCA)*

89. The PCA was established by treaties on the peaceful resolution of disputes dating from 1899 and 1907.⁶¹ 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.

90. The PCA is not a court in the usual sense, but rather an inter-governmental organisation. The PCA has an Administrative Council (PCA Council) and budget and finance committees that are composed of government representatives. The PCA Council selects the PCA appointing authority – the PCA Secretary-General (PCA Secretary General). The PCA also has a Secretariat headed by the PCA Secretary General; a deputy Secretary General is the Principal Legal Officer and senior lawyer in the Secretariat. The PCA also maintains an indicative roster of potential arbitrators appointed by governments (known as Members of the Court).

a. *PCA Administrative Council*

91. The PCA Council operates under rules of procedure adopted in 1900 and apparently unamended.⁶² Under the rules, the Netherlands Minister for Foreign Affairs is the president of the PCA Council.⁶³ The PCA Council is in principle composed of Member states' Ambassadors to the Netherlands.⁶⁴ The extent to which the Minister or Ambassadors are represented by other representatives, or in particular persons with dispute settlement or ISDS expertise, is not known. The president presents all proposals concerning the PCA to the PCA Council; it is unclear if this involves a gatekeeper role or whether all proposals received must be transmitted to the Council.

92. The PCA Council appears to meet twice a year.⁶⁵ The 1907 Convention establishes a quorum of nine members being present⁶⁶; the quorum requirement has not been adjusted despite the growth in the

⁵⁹ ICSID, [Secretariat](#).

⁶⁰ ICSID, Administrative and Financial Regulations 23-28.

⁶¹ 1899 Convention for the Pacific Settlement of International Disputes, as revised by the 1907 Convention for the Pacific Settlement of International Disputes.

⁶² Rules of Procedure of the Administrative Council of the Permanent Court of Arbitration (1900) (“1900 Rules”). It is not clear which entity adopted the rules or has power to amend them.

⁶³ 1900 Rules, preamble.

⁶⁴ Article 49 of the 1907 Convention (“diplomatic representatives accredited to the Netherlands”).

⁶⁵ Two “Editorial Notes” to the 1900 Rules refer to the 184th meeting in December 2011 and the 188th meeting in December 2013; overall, 188 meetings since 1900 would suggest a roughly similar frequency of two meetings a year.

PCA membership. PCA Council decisions are to be taken by majority vote.⁶⁷ 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.”⁶⁸ This appears to mean that a very small number of votes can constitute a majority. Attendance or voting data is not made available.

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.⁶⁹ There does not appear to be any committee dedicated to oversight of dispute resolution matters or ISDS.

b. Selection of the PCA appointing authority – the PCA Secretary General

94. The PCA Council appoints the PCA Secretary General (the appointing authority at the PCA for ISDS cases) for a five-year term. The Rules do not specify any required qualifications for the PCA Secretary General other than residence in The Hague.⁷⁰ The Rules do not address renewals and in practice PCA Secretary Generals have been renewed in their functions. In addition to serving as the appointing authority, the PCA Secretary General is responsible for the budget and staff of the Secretariat.⁷¹ The president gives instructions to the PCA Secretary General on behalf of the Administrative Council. Information about the exercise of this power in practice has not been located.

95. A senior Dutch diplomat has always occupied the position of PCA Secretary General.⁷² The current PCA SG, Hugo Hans Siblesz, served as Ambassador of the Netherlands to France, Monaco and Andorra prior to assuming his position in 2012. In December 2016, the first contested election of the PCA Secretary General in the PCA’s history took place. The current PCA Secretary General was re-elected to a second term by a majority at the 196th meeting of the PCA Council. There does not appear to have been any public information about the candidates, nature of the election or procedures. There do not appear to be any procedures for nominations or election of the PCA Secretary General.

96. Following the election, the PCA reported on it.⁷³ It stated that the PCA Secretary General had been re-elected by a majority of the Member State delegations present and voting, and that the contested character of the election reflected the growing relevance of the PCA. It did not provide additional information. A post-election news report indicates that Alvaro Moerzinger, Uruguay’s ambassador to the Netherlands, was the other candidate.⁷⁴ No other press reports or information about the election or outcome have been located.

⁶⁶ 1907 Convention, art. 49.

⁶⁷ Art. VI, 1900 Rules.

⁶⁸ Information disclosed in an “Editorial Note” to the 1900 Rules.

⁶⁹ In 2011, the PCA Council adopted Financial Regulations and Rules (“FRR”) which, *inter alia*, set out the procedure for the election of the members of the Financial Committee. The FRR do not appear to be publicly available. A “Working Group on Election Procedure” developed election procedures for the Budget Committee at the PCA. Information about the composition of the working group, its duration or the election procedures adopted has not been located. There is a Decision of the Administrative Council on Procedures for the election of the Chair of the Budget Committee; it has not been located.

⁷⁰ Art. VIII, 1900 Rules.

⁷¹ Article IX of the Rules of Procedure of the Administrative Council; Article I of the Rules Concerning the Organization and Internal Working of the International Bureau of the Permanent Court of Arbitration.

⁷² A list of secretaries-general is available on the PCA [website](#).

⁷³ PCA, [Election of the Secretary-General of the Permanent Court of Arbitration](#) (16 Dec. 2016).

⁷⁴ Caroline Simpson, [PCA can adapt to changing arbitration landscape, SG says](#), Law.360.com (4 Jan. 2017).

c. Deputy Secretary General and Principal Legal Officer, and Secretariat

97. The senior legal official in the PCA Secretariat is the Deputy Secretary General and Principal Legal Officer. The Deputy Secretary General is appointed by the PCA Secretary General. The Deputy Secretary General advises on appointing authority selections. The current PCA Deputy Secretary General is Brooks Daly, a US citizen. Prior to joining the PCA, he worked as a corporate lawyer with major law firms and in the Secretariat of the ICC Court of Arbitration.

98. The PCA Secretariat consists of legal and administrative staff of various nationalities. The Secretariat is in principle governed by Rules adopted in 1900 and unamended. The Rules are contained on a single page and appear out of date; they call for example for only 5 staff. The Secretariat assists in the appointing authority process and provides administrative and technical support to tribunals and commissions. No policies or statistics have been located with regard to geographical or diversity requirements for PCA staff.

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.

d. Non-exclusive PCA roster of potential arbitrators

100. Each PCA Member State can designate up to four persons for the PCA roster of arbitrators. Governments appoint these potential arbitrators for a renewable period of six years (Article 44 of the 1907 Convention). The criteria in the 1907 Convention predate ISDS and are very general. They should be “of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrator” (Article 44 of the Hague Convention of 1907). The potential arbitrators on the roster are known as Members of the PCA. There is no PCA Secretariat power to name potential arbitrators to the roster analogous to the Chairman’s list at ICSID. However, the PCA roster is always non-exclusive and does not constrain the scope of discretion of the PCA as appointing authority.

B. Private-sector institutions

1. The Stockholm Chamber of Commerce (SCC) and the Arbitration Institute of the Stockholm Chamber of Commerce (AI-SCC)

101. For clarity of exposition of relationships, it is important to distinguish between the Stockholm Chamber of Commerce (SCC) and the Arbitration Institute of the Stockholm Chamber of Commerce (hereafter AI-SCC).⁷⁶

a. Overall Stockholm Chamber of Commerce (SCC) structure

102. The SCC describes itself as the leading business organization for companies in the Stockholm Capital Region since 1902. It has 2 000 member companies with over half a million employees. The core business of the SCC is described as “to develop policy and to influence decision-makers on major issues affecting businesses ... and [to] advocate[] for pro-business political decisions in the region”. The SCC also encompasses the AI-SCC.

103. The SCC Board of Directors is constituted of 12 representatives from Swedish companies. Information about how SCC board members are selected has not been located.⁷⁷ The current chair is Urban

⁷⁵ PCA, Annual Report 2015, p. 40 et seq. In 2010, the number of staff was 37, see PCA, Annual Report 2010, p. 19. In 2005, the number of staff was 16, see PCA, Annual Report 2005, p. 19.

⁷⁶ The AI-SCC is sometimes referred to in other materials, including by the AI-SCC itself, as the SCC Institute or SCC.

Edenström, from Stronghold Invest AB.⁷⁸ As described below, the SCC Board selects the members of the AI-SCC appointing authority.

b. Structures dedicated to arbitration (AI-SCC)

104. The AI-SCC was established in 1917 as part of the SCC.⁷⁹ The AI-SCC Rules state that the AI-SCC is part of the SCC but is independent in exercising its functions in the administration of disputes.⁸⁰ The AI-SCC does not itself decide disputes but rather provides appointing authority and administrative services for arbitration. The AI-SCC consists of a Board and a Secretariat.⁸¹

i. Selection of members of the AI-SCC appointing authority – The AI-SCC Board

105. The AI-SCC Board is the AI-SCC appointing authority. It is composed of one chairperson, two or three vice chairpersons (currently three) and a maximum of 12 additional members (currently 12).⁸² The Board must consist of both Swedish and non-Swedish nationals (Article 3 Appendix I of the AI-SCC Rules 2017).

106. The SCC Board of Directors appoints all of the members of the AI-SCC Board.⁸³ No information has been located about the rules or procedures for appointments. Announcements of new members state only that they have been appointed by the SCC Board of Directors. No criteria have been located for Board membership other than the general nationality criterion noted above.

107. In practice, the SCC Board of Directors primarily appoints practitioners and experts in international commercial arbitration to the AI-SCC Board. There is no government representation. AI-SCC Board members serve for a period of three years renewable once by the SCC Board of Directors.⁸⁴

108. The SCC Board of Directors also appoints the Chair of the AI-SCC Board. The current Chair is Kaj Hobér, former partner at Mannheimer Swartling in Stockholm, Associate Member of 3VB Chambers in London and professor at Uppsala University. Mr. Hobér has extensive experience as counsel and arbitrator in commercial and investment arbitration.

109. The AI-SCC Board selects arbitrators and in particular the chair of tribunals as required under the AI-SCC Rules. The Board meets once a month, with some members attending the meetings via phone.

110. Two members of the AI-SCC Board form a quorum. If a majority is not attained, the chairperson has the casting vote. The chairperson or a vice chairperson can take decisions on behalf of the Board in urgent matters.⁸⁵ Decisions of the Board are not published.⁸⁶

⁷⁷ The SCC also has a Chief Executive Officer. SCC website, [Maria Rankka, CEO](#). It is not clear if the CEO has any role in selecting the members of the appointing authority.

⁷⁸ See Stockholm Chamber of Commerce, [Board of Directors](#).

⁷⁹ Article 1 Appendix I of the AI-SCC Rules 2017.

⁸⁰ AI-SCC 2017 Rules, App. I, art. 1.

⁸¹ Article 1 of the AI-SCC Rules 2017.

⁸² Art. 3, App. I, AI-SCC Rules 2017. The website has a [list of the current members of the AI-SCC Board](#) with biographical information.

⁸³ AI-SCC, About the SCC.

⁸⁴ Article 4 Appendix I of the AI-SCC Rules 2017.

⁸⁵ Article 7 Appendix I of the AI-SCC Rules 2017.

⁸⁶ cf. Article 3 of the AI-SCC Rules 2017.

111. The Board has considerable powers of delegation. It can appoint a committee to take certain decisions on its behalf. There do not appear to be any limits to the types of decisions that can be delegated to a committee. The Board can also delegate decisions to the Secretariat. The Rules contain an illustrative list of delegable issues, which does not include arbitrator appointment. (Article 7 Appendix I of the AI-SCC Rules 2017). Information about use of these delegation possibilities, including in relation to appointing authority appointments, has not been located.

ii. AI-SCC Secretariat

112. The AI-SCC Secretariat is headed by the AI-SCC Secretary-General.⁸⁷ No information is available on the appointment procedure of the AI-SCC Secretary General. The Secretariat currently consists of 11 further staff members. The AI-SCC Secretariat handles the daily case management, organization of events, producing publications, etc.

2. *The International Chamber of Commerce (ICC)*

113. The ICC The International Chamber of Commerce (ICC, also known as the "World Business Organisation", see Article 1.1 of the ICC Constitution) is a non-profit, private⁸⁸ association, founded in 1919. Its seat and the International Headquarters are located in Paris (cf. Article 1.3 of the ICC Constitution), where close to 200 staff members are employed.

114. This section first briefly describes the overall ICC structure, with a focus on entities that play a role in the arbitration work and selection of the appointing authority. It then examines in more detail the structure of the ICC dedicated to arbitration.

a. *Overall ICC Structure*

115. The ICC has more than 6 million members, all private-sector entities, in more than 100 countries. Members can be either business associations, individual companies or persons involved in international business.⁸⁹ In general, all members belong to one of approximately 90 National Committees or Groups.

116. National committees are intended represent the main economic sectors of their respective country. They are approved by and sign a Charter with the ICC World Council (Article 3 of the ICC Constitution). The National Committees are empowered by their ICC members to select a delegation to represent them at the ICC World Council (Article 4.5.a of the ICC Constitution).

117. The ICC World Council is the supreme authority of the ICC (Article 5.1 of the ICC Constitution). It is constituted from delegations of the members of the ICC as well as six *ex officio* members without voting rights.⁹⁰ (Articles 5.1 and 5.6 of the ICC Constitution). No government employees or other public officials are represented. Decisions of the ICC World Council generally require a simple majority of the

⁸⁷ Article 8 Appendix I of the AI-SCC Rules 2017. According to a legal industry website, the current Secretary-General, Annette Magnusson, joined the AI-SCC in 2010 after working at two major law firms, and earlier work at the AI-SCC. She is also the General Counsel of the SCC. See Global Legal Insights, [Annette Magnusson](#).

⁸⁸ The ICC was founded as a French "association" under the law of 1901 governing non-profit associations, see Yves Derains & Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration* (2d ed. 2005), p.1.

⁸⁹ Article 2.2a. of the ICC Constitution specifies that "national and local organizations which are truly representative of the business and professional interests of their members and which are not conducted primarily for political purposes" or "corporations, companies, firms and other legal entities as well as individuals involved in international business activities."

⁹⁰ The *ex officio* members are the ICC Chairman, the Vice-Chairmen, the Honorary Chairman, the Chairmen of the Committees of the Executive Board, the President of the International Court of Arbitration and the Chairman of the ICC World Chambers Federation.

votes cast. Voting is by National Committee. Voting weight ranges from one to three votes per National Committee depending on the size of contributions to the ICC budget.⁹¹

b. Structures dedicated to arbitration

i. Selection of members of the ICC appointing authority (ICC “International Court of Arbitration”)

118. The ICC World Council elects or appoints all of the members of the ICC appointing authority, the ICC “International Court of Arbitration” (ICC Court). Each National Committee or Group proposes a member which the World Council appoints.⁹² The World Council elects the president and vice-presidents. Terms last three years. The ICC Court is not a court in the usual sense, but rather an appointing authority and body with oversight over ad hoc arbitration proceedings.

119. Business representatives select all the members of the ICC appointing authority. Currently the ICC appointing authority has over 140 members, including alternate members. They are commonly private lawyers with a background in international commercial arbitration.⁹³ The ICC Court as a whole meets monthly in Paris, but attendance is limited. Except for the president who chairs the monthly meetings, all ICC Court members attend the sessions on a *pro bono* basis and bear their own costs.⁹⁴ Quorum requires six members to be present; it appears that in practice there are usually around 25-40 members present.⁹⁵ It is unclear if members can vote at a distance or by proxy.

120. The ICC Rules state that (i) the ICC Court is an autonomous body that is independent from the ICC in carrying out its application of the ICC Rules; and (ii) members of the ICC Court are independent from the ICC National Committees and Groups that propose them.⁹⁶

ii. ICC Court Secretary-General and ICC Court Secretariat

121. The ICC Court is assisted in its work by the Secretariat of the ICC Court (ICC Secretariat) under the direction of its Secretary-General (ICC Court Secretary General). The ICC Court Secretariat handles the day-to-day management of cases. It is not accountable to the ICC World Council for decisions made with respect to specific arbitration cases.⁹⁷ The ICC Secretariat also prepares documents for the ICC Court (and its Committee) in order to take its decisions. The ICC Court Secretariat currently has a staff of almost 100 with 30 different nationalities.⁹⁸

⁹¹ Art, 5.4, ICC Constitution.

⁹² Article 3.3 of Appendix I to the ICC Rules; Article 5.3 of the ICC Constitution.

⁹³ ICC Commission Report: [States, State Entities and ICC Arbitration](#) (2012), § 57; List of members available at ICC, [Court members](#).

⁹⁴ Article 4 of Appendix I to the ICC Rules; Jacob Grierson & Annet van Hooft, *Arbitrating under the 2012 ICC Rules* (2012), p. 45; Yves Derains & Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration* (2d ed. 2005), p. 12.

⁹⁵ Derains/Schwartz, *op cit.*, p. 13; Grierson/van Hooft, *op cit.*, p. 47.

⁹⁶ Art. 1, App. I, ICC Rules; Art. 3.1, App. II, ICC Rules. In 2008 the then-president of the ICC Court, Pierre Tercier, resigned, reportedly because of concerns that the ICC Court was not sufficiently independent of the ICC Secretariat. See Goswami, “ICC left reeling as arbitration court chairman Tercier resigns”, *The Lawyer* (31 March 2008).

⁹⁷ Derains/Schwartz, *A Guide to the ICC Rules of Arbitration* (Second Edition), Kluwer Law International 2005, p. 15.

⁹⁸ Herman Verbist & Eric Schäfer et al., *ICC Arbitration in Practice* (2d ed. 2015), p. 19.

3. *Singapore International Arbitration Centre (SIAC)*

a. *Overall SIAC structure*

122. The Singapore International Arbitration Centre (SIAC) was established in 1990 as a non-profit public company limited by guarantee under the control of the Singapore Ministry of Trade and Industry.⁹⁹ Its shares were held by the Economic Development Board and the Trade Development Board.¹⁰⁰ In 1999 the Singapore Academy of Law took over responsibility for SIAC from the two shareholders.¹⁰¹ In 2003, ownership of SIAC was again reportedly transferred, this time to the Singapore Business Federation (SBF).¹⁰² The SBF website states that it is “the apex business chamber championing the interests of the Singapore business community in the areas of trade, investment and industrial relations”. It represents 24,200 companies, as well as key local and foreign business chambers. The SBF website contains a link to the SIAC website, but does not appear to address SIAC.

123. SIAC has a Board of Directors (SIAC Board). It currently consists of nine arbitration lawyers, corporate lawyers and corporate leaders, all male.¹⁰³ They are appointed for two-year terms.¹⁰⁴ No government officials or other public employees are currently members of the SIAC Board.

124. The SIAC Board is responsible for overseeing SIAC’s operations, business strategy and development, as well as corporate governance matters. No information has been located about how SIAC Board members are selected. The announcement of new appointments states only the persons appointed and those ending their terms.¹⁰⁵

125. Until 2013, the SIAC Board served as the SIAC appointing authority. In 2013, this role was transferred to a new entity, the SIAC “Court of Arbitration” (SIAC Court).

b. *Selection of members of the SIAC appointing authority (the SIAC “Court of Arbitration”)*

126. The SIAC Court is the appointing authority. Like “courts” in other arbitration institutions, it is not a court in the normal sense. In addition to being the appointing authority, it supervises case administration at SIAC.¹⁰⁶

127. Information has not been located about how the appointing authority is constituted or about the relationship between it and the entities that appoint its members. It is composed of 22 private arbitration

⁹⁹ A company limited by guarantee in Singapore is a separate legal entity with legal personality. The liability of its members is limited by the Memorandum of Association to the amount that the members undertake to contribute to the assets of the company in the event of its winding up. This amount is stated in the memorandum and is usually nominal. Companies limited by guarantee are primarily used for non-profit groups that require corporate status.

¹⁰⁰ Mark Mangan, Lucy Reed et al, ‘A Guide to the SIAC Arbitration Rules’, OUP 2014, p. 44.

¹⁰¹ Mangan/Reed, op. cit., p. 44.

¹⁰² See Michael J. Moser, ed. *Arbitration in Asia* (2d ed. 2008) § 9.4 n.375.

¹⁰³ SIAC, [Board of Directors](#).

¹⁰⁴ Mangan/Reed, op. cit., p. 58.

¹⁰⁵ See, e.g., SIAC, [SIAC Announces Appointment of New Board and Court Members](#) (15 May 2017).

SIAC also has a chief executive officer (CEO). He/she is responsible for the overall management and operation of SIAC, including business development. He or she reports to the SIAC Chairman. See SIAC, [CEO and Secretariat](#); Mangan/Reed, op. cit., p. 60. It is not clear how the CEO is appointed; it is also unclear whether he/she has a role in selecting SIAC appointing authority members or arbitrators. The current CEO is Lim Seok Hui, formerly a lawyer with international law firms.

¹⁰⁶ SIAC, [About us](#).

practitioners from different countries. There are no government representatives. Members are appointed for a two-year term.¹⁰⁷ The current president is Gary Born, a partner at a large law firm and a well-known commercial and investment arbitration practitioner as counsel and arbitrator.

128. The SIAC Court has an Executive Committee comprising the president and the two vice-presidents.¹⁰⁸ Information has not been located about selection procedures for the members of its Executive Committee. The Executive Committee's functions relate in part to the roster of arbitrators (see below). Some of the SIAC Court's functions are carried out by special committees comprising two or more members appointed by the President.¹⁰⁹

c. Secretariat

129. A permanent Secretariat, headed by a registrar and a deputy registrar, is responsible for the day-to-day operations of SIAC, including administration of arbitration proceedings. The registrar adopts practice notes which include rules for SIAC proceedings. It is not clear how the registrar is appointed. The Secretariat further consists of counsel, associate counsel and case management officers.¹¹⁰

d. SIAC roster of arbitrators

130. The SIAC maintains an international roster of over 400 potential arbitrators from 40 jurisdictions (SIAC roster).¹¹¹ Admission to the SIAC roster is by invitation from the SIAC Court as advised by its Executive Committee; candidates can also apply to SIAC for acceptance.¹¹² Criteria for admission are inter alia, the qualifications, experience and standing of an applicant as well as to the number of arbitrators currently on the SIAC roster from the country in which the applicant is resident.¹¹³ Admission to the SIAC roster is for a fixed term; the term is not specified in the rules.¹¹⁴ As discussed below, the SIAC appointing authority is generally required to appoint from the SIAC roster in cases under SIAC's general arbitration rules, but is not constrained by the roster under SIAC's new investment arbitration rules.

¹⁰⁷ Mangan/Reed, op. cit., p. 58.

¹⁰⁸ Id., p. 60.

¹⁰⁹ Article 1.5 of the SIAC IA Rules 2017; Mangan/Reed, op. cit., p. 59.

¹¹⁰ SIAC, [CEO and Secretariat](#).

¹¹¹ SIAC, [SIAC Panel](#) (list of potential arbitrators on roster).

¹¹² Art. 1, Standards for Admission to SIAC Panel.

¹¹³ Id., art. 4.

¹¹⁴ Id., art.6.

V. Appointing authority action in composing individual arbitration tribunals

131. This part addresses how the five appointing authorities operate as appointing authorities in individual cases to the extent information has been located. This action takes place in different contexts. For three of the five appointing authorities (ICSID; AI-SCC; ICC), most of their work as appointing authorities in ISDS occurs in cases under the arbitration rules of their arbitration institution. A first section addresses these three appointing authorities as they operate under their own rules.

132. A second section addresses how all five arbitration institutions operate as appointing authorities in ISDS under the UNCITRAL Rules. The UNCITRAL Rules differ from other arbitration rules – they do not provide for a single appointing authority.¹¹⁵ The UNCITRAL Rules do give a unique role to the PCA as the designating authority that chooses appointing authorities; it is addressed separately below in part VII.

133. A third section addresses possible new forms of entry and entrants into the provision of appointing authority services in ISDS. The PCA has operated primarily as an appointing authority in ISDS under the UNCITRAL Rules rather than under its own rules adopted in 2012, but the PCA rules are potentially applicable if available and used by claimant investors. SIAC is a new entrant. Its one active intervention as appointing authority to date in ISDS appears to have arisen under the UNCITRAL Rules. However, its 2017 investment arbitration rules, if available to investors and used in ISDS cases, would generate appointing authority work for SIAC.

A. Three appointing authorities as they operate under the arbitration rules of their arbitration institution

1. ICSID as appointing authority under its own arbitration rules

134. This section addresses (a) the role of the ICSID Chairman as the appointing authority in ICSID Convention cases; (b) the role of the ICSID Chairman as appointing authority in ICSID AF cases; and (c) the role of the ICSID Secretary General as a quasi-appointing authority under the informal ballot procedure which now precedes recourse to appointing authority procedures at ICSID.

a. *The ICSID Chairman as appointing authority in ICSID Convention cases*

135. The ICSID Convention system is the only one whose appointing authority must choose from a compulsory and binding roster of potential arbitrators.¹¹⁶ ICSID is also the only system with a self-contained system of review of ICSID Convention awards. The review is carried out by ad hoc annulment committees composed of three individuals.

136. When acting as appointing authority in cases under the ICSID Convention, the ICSID Chairman must always select from the ICSID roster and in particular in two circumstances: (i) for appointments of arbitrators, including the chair, in ICSID Convention cases; (ii) for appointments of all three members of *ad hoc* committees for annulment proceedings (who are always appointed by the ICSID Chairman).¹¹⁷ The ICSID Chairman is assisted by the ICSID Secretary General and ICSID Secretariat in carrying out these

¹¹⁵ Unlike arbitration institutions, UNCITRAL itself does not have an appointing authority and does not play any role in individual cases.

¹¹⁶ Arts. 38 and 40(1), ICSID Convention.

¹¹⁷ Art. 52(3), ICSID Convention.

appointing authority functions.¹¹⁸ The functions of the ICSID Chairman also include designating ten individuals (known as the “Chairman’s List”) to the ICSID roster alongside the government nominees.

i. The ICSID roster of arbitrators (the ICSID “Panel of Arbitrators”)

137. The roster is composed of government appointees (up to four per member government) plus 10 selected by the ICSID Chairman (known as the Chairman's list). The criteria for arbitrator qualifications in art. 14 of the 1965 ICSID Convention predate ISDS and are very general: “Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.”

(a) Government appointments to the ICSID roster

138. Government appointments to the roster, if carried out by all 161 members of ICSID, would create a roster of over 600 individuals. Governments can nominate persons of any nationality. ICSID has encouraged member states to name qualified candidates where nominations have expired or the ICSID roster is otherwise incomplete.¹¹⁹ It is not clear how active a role, if any, that ICSID has taken in this regard beyond calling for qualified candidates. (e.g. whether it comments or responds to requests for comments on proposals/nominations made by governments or suggests potential candidates if requested or directly). Government appointments to the ICSID roster have not been reviewed at this stage. The experiences of governments can supply important information. Some general considerations about possible specificities of the ICSID roster are set out below.

(b) Chairman’s List appointments to the ICSID roster

139. As noted, the ICSID Chairman (World Bank President) can select 10 members of the roster. When making selections for the Chairman's list, the ICSID Chairman receives recommendations from the ICSID Secretariat. Recommendations are not disclosed. The ICSID Chairman must ensure representation of the principal legal systems of the world and of the main forms of economic activity (Articles 13-14 ICSID Convention). Analysis of the Chairman’s list may give some sense of ICSID’s own preferences for its roster (or views about weaknesses in the rest of the roster).

ii. ICSID’s selection criteria for its choices from the roster

140. Where the ICSID Chairman appoints an arbitrator from the ICSID roster pursuant to Article 38(1) ICSID Convention, it has been stated by the ICSID Secretary General, who, as noted above, makes recommendations to the ICSID Chairman regarding potential appointees,¹²⁰ that as to the factors that are considered when making the appointment “we probably consider many of the same factors that parties consider, when they make appointments. Most important factors include, first of all, the nationality of the arbitrators, so that we respect the requirements under the ICSID Convention with respect to nationality [i.e. that none of the arbitrators appointed by the ICSID Chairman may be of the same nationality as either of the parties]. Next, we consider whether there are possible conflicts of interests. We also consider the potential arbitrators knowledge of the relevant laws and their experience in arbitration. Another important factor is language proficiency, depending on the requirements both of the documents and the oral hearings in the case. We also look to the availability of the arbitrator and in particular the manageability of their current caseload, so that we can make sure that we have a timely and expeditious procedure. Finally, we’ll look to the cohesiveness of the tribunal and in some cases where a particular expertise is needed, we will

¹¹⁸ Art. 9, ICSID Convention.

¹¹⁹ See ICSID, Annual Report 2016, p. 21; ICSID, Annual Report 2012, p. 6; David Caron, ICSID in the Twenty-First Century: An Interview with Meg Kinnear, 104 Am. Soc’y Int’l L. Proc. (2010), p. 422.

¹²⁰ Christoph Schreuer et. al., The ICSID Convention: A Commentary, 2. Edition 2009, p. 494.

try to ensure that there is that kind of expertise on the tribunal.”¹²¹ Before the arbitrator is appointed, the parties are given the opportunity to raise any circumstance showing that the person lacks the required qualities under the very general criteria in Article 14(1) ICSID Convention, set forth above.

iii. Specificities of ICSID roster in ISDS

141. As noted, ICSID is the only appointing authority in ISDS with a compulsory and binding roster of potential arbitrator appointees from which the appointing authority must choose under its formal appointing authority procedures. There is no equivalent at other arbitration institutions that also seek to attract ISDS cases. A number of preliminary considerations may be raised.

142. A first issue is the qualifications of appointees. The ICSID Secretariat and members of the arbitration bar have expressed dissatisfaction with the quality of government appointees to the ICSID roster. ICSID has reported difficulties to “find suitable candidates to chair who can still accept another case beyond their already existing caseload”.¹²² The case load falls on a small number of appointees. In some areas, the problem has been flagrant: government panel appointments have not been made at all or have not been renewed after the death of an appointee.

143. Broader issues about appropriate qualifications for ISDS may also be at issue. Recent Roundtable-hosted discussions have generated sharp disagreements between different constituencies about the appropriate qualifications for ISDS adjudicators, as have discussions about the ICS. The strong debate over appropriate qualifications reflects varying views between different constituencies.¹²³

144. Issues of qualifications are also related to the rules governing ISDS procedure as well as the principal substantive law issues. With regard to procedure, investment treaties and applicable arbitration rules provide little or no guidance at present as to the structure of ISDS proceedings: there are no rules on the scope of document discovery, if any, establishment of the record for review, nature of hearings, role of witnesses, preparation of witnesses by counsel, or myriad other issues. Consequently those issues are left to the arbitrators (or disputing parties if they can agree). The applicable procedures need to be established in each case.¹²⁴ Most ISDS cases are non-public, but it appears that procedures can vary significantly. The arbitration bar strives to develop some common standards in commercial arbitration and ISDS. The absence of a defined procedural structure for ISDS is coupled with limited institutional support for ISDS

¹²¹ ICSID, Video presentation “[Arbitrator Appointment by ICSID](#)” by Meg Kinnear, minute 3:12; see also Claire Lipman, [Interview with Meg Kinnear Part 2 of 4](#), Practical Law Arbitration blog, Thomsen Reuters (3 Feb. 2016).

¹²² David Caron, ICSID in the Twenty-First Century: An Interview with Meg Kinnear, 104 Am. Soc’y Int’l L. Proc. (2010), p. 421 et. seq (quoting Meg Kinnear: “Frankly, with the explosion of cases, it’s awfully difficult to find enough qualified arbitrators who are available, who are not conflicted, and are all of the things you would need in an arbitrator.”)

¹²³ For a summary of discussions at the 2016 OECD Investment Treaty Conference about adjudicator qualifications in ISDS, see Annex 1 hereto.

¹²⁴ As domestic models in terms of courts and proceedings on similar issues of regulatory policy are examined more closely, important issues for adjudicator qualifications may usefully attract attention. For example, judicial review procedures in some advanced economies generally occur on the basis of the record established by the agency under review. They do not involve new trials with cross-examination of government and other witnesses, or opportunities to supplement the original record with additional material. If more information is required, the reviewing court may instruct the agency to develop and provide it. The extent to which governments wish to provide for de novo adjudications in ISDS and make political or administrative officials available for hearings and cross-examination (or wish to have access to investor or other witnesses for the same procedures) may affect the qualifications needed by ISDS adjudicators.

chairs and tribunals, especially in comparison with the WTO where the Secretariat plays a significant role in addressing cases.¹²⁵

145. At ICSID as at other arbitration institutions, efforts to obtain good procedural management of cases in a system with unspecified procedures likely dissuade appointments of chairs without arbitration experience. The current overall pool of ISDS arbitrators suggests that experience as an arbitrator, overwhelmingly obtained in the first instance in the very active field of international commercial arbitration, may be the most important criterion for an appointing authority. To the extent a government considers experience with government or regulatory issues to be an important qualification, its appointees might be considered as unqualified or political (by some) given the perceived and actual need for arbitration expertise in the current system.

146. Second, competitive considerations may also come into play. The decision by governments to subject ICSID but not other appointing authorities active in ISDS to a restrictive roster may place ICSID at competitive disadvantage vis a vis investor filings if governments name few arbitrators perceived as investor-friendly to the roster. Governments can limit investor options to the ICSID Convention in their investor treaties, but only a minority of treaties do so.¹²⁶ If for example some other appointing authorities are predominantly or exclusively selecting private-sector chairs with a commercial arbitration background in ISDS, competitive pressures to remain attractive to investors and their counsel could be a factor in dissuading the selection by ICSID of certain profiles from the roster. Such selections could be seen by some as “pro-state” behaviour by ICSID compared with the appointing practices of other appointing authorities. Perhaps understandably at least from a competition perspective given the uniqueness of the roster constraint, some measures that loosen the roster constraint have been taken at ICSID.¹²⁷

147. In a competitive system, government action with regard to the arbitral pool may need to take account of competitive aspects. Appointments to the ICSID roster could be made with a realistic assessment of how they fit into a broader system, including its competitive structure. Other measures with broader effect could be used as appropriate to re-balance the arbitral pool if desired.

148. A third consideration is the impact of providing ICSID with discretion to select from the roster (which can be compared for example with a system of random nomination). Part III above noted that the expectations of parties and their counsel about appointing authority action – which can be based on prior appointing authority action – affect disputing party appointments of co-arbitrators and negotiations over a chair. Somewhat similar considerations may apply albeit probably more weakly to the roster. If certain profiles on the roster are never chosen by ICSID, it may affect how governments treat the roster in different ways. Some governments may not favour those profiles for ISDS adjudication and be largely unaffected. Some may see competitive considerations at play and see it as desirable for ICSID to remain competitive with other institutions that may predominantly appoint private-sector chairs. For governments that would prefer at least some government officials as arbitrators or chairs, ICSID decisions not to select

¹²⁵ The appointment and scope of the role of tribunal secretaries in ISDS is drawing increasing attention notably following controversy over the extent of work by a tribunal secretary in certain Yukos-related cases.

¹²⁶ As noted in earlier Roundtable discussions, reliance solely on the ICSID Convention for ISDS may allow a government to block covered investor access to ISDS entirely by withdrawing from the ICSID Convention during the term of an investment treaty. Issues in this area are in dispute in a number of cases.

¹²⁷ A recent news report states that the ICSID’s “Chairman’s List” appointments “to the [ICSID roster] often find their way on to ad hoc committees” whose three members are also appointed by the ICSID Chairman. See Luke Eric Peterson, [Ten Are Designated to the ICSID Panel of Arbitrators by the ICSID’s Leadership](#) (17 September 2017). This affirmation has not been analysed here. Some arbitration practitioners have suggested that the purpose of the introduction of the ballot procedure was to meet the challenges ICSID has faced in appointing qualified, experienced and available arbitrators who are not conflicted, from the ICSID roster. See Reed/Paulsson/Blackaby, *Guide to ICSID Arbitration* (2010), p. 12; Chiara Giorgetti, *The Arbitral Tribunal: Selection and Replacement of Arbitrators in Chiara Giorgetti, ed., Litigating International Investment Disputes: A Practitioner’s Guide* (2014), pp. 143-172.

them could reduce the incentive to name them. A tendency to use the list as a prestige appointment for government officials not qualified to chair ISDS cases may be encouraged if it is perceived there is no chance of appointment. Other may desist from appointments to the roster.

b. The ICSID Chairman as appointing authority under the ICSID Additional Facility Rules

149. The ICSID Convention applies only to cases between an investor from one Contracting State and another Contracting State arising out of an investment. The ICSID Additional Facility Rules allows ICSID to provide arbitration-related services in additional cases not covered by the ICSID Convention. The Additional Facility Rules can be used for arbitration of investment disputes between a State and a foreign national, one of which is not an ICSID Member State or a national of an ICSID Member State; or arbitration of disputes that do not arise directly out of an investment between a State and a foreign national, at least one of which is an ICSID Member State or a national of an ICSID Member State.

150. The ICSID Chairman is the appointing authority in Additional Facility cases as in ICSID cases. However, he/she is not limited to the roster. ICSID Additional Facility Rules cases fall outside the self-contained review mechanism for awards and there are accordingly no ad hoc committees.

c. The ICSID Secretary General as a quasi-appointing authority: a first-stage “ballot” procedure

151. In September 2009, the ICSID Secretariat informally adopted a new appointment process that precedes recourse to an appointing authority for institutional appointment of a chair.¹²⁸

i. Nature of ballot procedure

152. The ballot procedure differs from the ICSID appointing authority procedure in three respects: (i) ICSID Secretary General provides a list without being constrained by the roster; (ii) there is no role for the ICSID Chairman; and (iii) the procedure can fail to generate a chair, in which case the applicable appointing authority procedure is applied to select a chair.

153. Under the ballot procedure, the ICSID Secretary General first provide the parties with a list of potential arbitrators. The lists appear to vary in length from three,¹²⁹ three to seven¹³⁰ or five or more¹³¹ candidates.¹³² The ICSID Secretary General freely selects the proposed arbitrators and is not limited to ICSID roster members. The parties have short period to separately communicate to the secretariat their acceptance or rejection of each proposed person on the list.¹³³ If one of the proposed arbitrators is jointly accepted, he/she is nominated; if more than one is jointly accepted, ICSID selects one of them.

¹²⁸ ICSID, Annual Report 2010, p. 27; Eloise Obadia & Frauke Nitscheke, Institutional Arbitration and the Role of the Secretariat, in: *Litigating International Investment Disputes*, Brill 2014, p. 112. The procedure does not apply to appointments to ad hoc annulment committees.

¹²⁹ ICSID, Annual Report 2010, p. 27; Eloise Obadia, Remarks, in *ASIL Proceedings 2011*, p. 75; Caron, ICSID in the Twenty-First Century: An Interview with Meg Kinnear, 104 *Am. Soc'y Int'l L. Proc.* (2010), p. 422; Lucy Reed, Jan Paulsson & Nigel Blackaby, *Guide to ICSID Arbitration* (2010), p. 132.

¹³⁰ Obadia & Nitscheke, *op. cit.*, p. 112.

¹³¹ Meg Kinnear, Appointment to Arbitral Tribunals at ICSID, *ABA SIL International Arbitration Committee Newsletter*, American Bar Association, Vol. 1, No. 1 (2013), p. 37.

¹³² It is unclear which person/institutional organ decides or which factors determine the length of ICSID's list or whether the conflicting numbers regarding the proposals made on the list are just a result of evolution over time.

¹³³ Meg Kinnear, Appointment to Arbitral Tribunals at ICSID, *ABA SIL International Arbitration Committee Newsletter*, American Bar Association, Vol. 1, No. 1 (2013), p. 37.

154. ICSID has described most aspects of the ballot system on a number of occasions and a description is provided on the website.¹³⁴ The ICSID Secretary General has described the rationale, emphasising both the ability for the Secretariat to go “off-roster” and the greater degree of disputing party consent than under the formal procedure:

Under the Convention, you're basically meant to go to the roster for appointments. Where the ICSID Secretary is asked to appoint, we didn't have the ability to appoint what we would call ‘off roster’ or ‘off panel’. So we thought about it, and we have a part of the ICSID Convention that says that if there's consent by the parties, any arbitrator can be named. So we developed a system where, because both parties consented to a non-panel name, we would have the legal authority to appoint. We thought there was a lot to commend this approach, because at the end of the day, having a consensually appointed nominee, even if it's from a smaller list provided by the Secretariat, is probably a better thing than just imposing an arbitrator on the candidates.¹³⁵

155. Describing the procedure of finding ballot candidates, the ICSID Secretary General stated in 2010 that “[w]e look to see what the parties need, whether it's a Spanish or Bulgarian speaker, or even immediate availability—all of the things that you might need. And then you say, ‘Who are the people out there who might be able and willing to meet those qualifications?’ We'll contact them and say, ‘Would you be willing to have us propose your name to the parties?’ And we always ask specifically, ‘Are you immediately available?’ Because this is one of those time concerns, so this is a very particular issue that we check.”¹³⁶ A conflicts check will be done before arbitrators are proposed in the ballot-procedure.¹³⁷ The ICSID Secretary General has stated that whenever possible ICSID tries to include at least one female arbitrator on the ballot and to ensure regional diversity.¹³⁸

ii. Reporting and statistics on the ballot procedure

156. Appointments under the ballot system are described and counted as consent appointments by ICSID and in arbitration awards. As consent appointments, they are not subject to the formal ICSID Convention provisions on non-consensual appointments.

157. Cases where the ICSID Secretary General action as a quasi-appointing authority avoids recourse to the appointing authority procedures are counted together with freely-agreed selections by the parties as a single category of consent appointments in available statistics. Aggregating disputing party and quasi-appointing authority-assisted appointments in a single category obscures the frequency of recourse to the ballot procedure in which ICSID provides and limits the options. It also limits information about the success rate of the ballot procedure in generating agreement although ICSID has provided occasional information about this issue. More generally, the role of the appointing authority in arbitrator selection appears as less than it is, and the apparent role of disputing party choice is correspondingly inflated.

¹³⁴ The ballot procedure is described on the ICSID website. See ICSID, [Selection and Appointment of Tribunal Members - ICSID Convention Arbitration](#). Sample forms are also available.

¹³⁵ David Caron, ICSID in the Twenty-First Century: An Interview with Meg Kinnear, 104 Am. Soc'y Int'l L. Proc. (2010), p. 421 et. seq.

¹³⁶ Id., p. 422

¹³⁷ Meg Kinnear, Appointment to Arbitral Tribunals at ICSID, ABA SIL International Arbitration Committee Newsletter, American Bar Association, Vol. 1, No. 1 (2013), p. 37.

¹³⁸ ICSID, Video presentation “[Arbitrator Appointment by ICSID](#)” by Meg Kinnear, minute 1:55 (undated, but listed in Oct. 2017 as being posted two years ago).

158. The ballot procedure was developed following the appointment of the first full-time ICSID Secretary General in 2009. The 2009 introduction of the full-time ICSID Secretary General and ballot procedure followed a 2006-2009 period characterised by a lesser degree of ICSID dominance in attracting new ISDS cases following changes in 2006 to the ICSID arbitration rules to provide for somewhat more transparency, and considerably more than under some other competing rules.¹³⁹

2. *Arbitration Institute of the Stockholm Chamber of Commerce (AI-SCC) as appointing authority under its own rules*

159. The AI-SCC Board has broad discretion in appointing arbitrators. There are no general restrictions. The AI-SCC does not maintain a public roster of arbitrators. The only limitation is that unless the parties have agreed otherwise or the Board otherwise deems it appropriate, the presiding arbitrator has to be of a different nationality than the parties (if the parties are of different nationalities).¹⁴⁰

160. The appointment of arbitrators by the AI-SCC has been reported by an AI-SCC legal counsel as a two-step procedure. The matter is first discussed by the Secretariat which then presents a proposal for the appointment before the AI-SCC Board. Usually the Secretariat proposes at least three names for each appointment by the Board. These three names are drawn up at the Secretariat meetings in a collective decision making process. Each counsel presents to the rest of the Secretariat the cases that are to be taken to the Board for appointment and the proposed names of arbitrators and the rest of the team shares their expertise and opinions on the proposals made by each counsel. Ultimately the Secretariat can approve or amend the list of names proposed by counsel. Once the Secretariat agrees on the proposed names the case will be presented before the SCC Board at its next meeting.¹⁴¹ It is not clear whether the names are proposed in a random order or whether there are preferences expressed by the Secretariat.

161. Before the Board meeting, the Secretariat considers potential conflicts between any of the Board members and the parties in dispute or their counsel. When a Board member has a conflict of interest, he/she does not participate in the decision making process to appoint the arbitrator in the dispute. At the Board meeting, after the presentation of each case the Board discusses the names presented by the respective counsel. In the decision making process, each Board member is invited to share their views. In case of disagreement, the Board members may change the order of preference of the names, or may agree on new names for the list.¹⁴² As noted above, two Board members form a quorum.

162. The AI-SCC Rules 2017 state that when appointing arbitrators, “the Board shall consider the nature and circumstances of the dispute, the applicable law, the seat and language of the arbitration and the nationality of the parties.”¹⁴³ The Secretariat considers similar factors in deciding who to propose to the Board for appointment.¹⁴⁴

¹³⁹ ICSID’s greater transparency has occasionally been used in marketing materials of other arbitration institutions. See, e.g., Vivekananda N. & Jagdish John Menezes, [Singapore as a Seat for Investor-State Disputes](#) (undated article on SIAC website by SIAC staff members, written prior to introduction of 2017 SIAC investment arbitration rules) (promoting SIAC as a venue for ISDS and stating that “a number of concerns have been expressed on [the] efficacy [of ICSID arbitration in ISDS] ... [including] the obligation ... to publish information about the existence and progress of pending disputes”, in contrast to non-ICSID proceedings that can remain confidential.)

¹⁴⁰ Article 17.6, AI-SCC Rules 2017.

¹⁴¹ Celeste E. Salinas Quero, ‘Appointment of arbitrators under the SCC Rules’, ABA SIL International Arbitration Committee Newsletter, American Bar Association, Vol. 1, No. 1 (2013), pp. 53, 55.

¹⁴² Id. p. 56.

¹⁴³ Art. 17.7, 2017 AI-SCC Rules.

¹⁴⁴ Celeste E. Salinas Quero, ‘Appointment of arbitrators under the SCC Rules’, op. cit. p. 55, 56.

3. *International Chamber of Commerce (ICC) as appointing authority under its own rules*

163. The ICC Court has general procedures which are addressed first. As part of its particular interest in attracting cases involving governments, a number of modified appointing authority procedures are possible but not required in such cases, including ISDS cases; they are addressed second. The ICC appointment criteria are then noted.

a. *General appointing authority procedure*

164. The general ICC appointing authority procedure involves input from a National Committee that the ICC Court considers relevant. This provides direct business input to the appointing authority from a local jurisdiction. The appointing authority appears to frequently defer to National Committee proposals: the ICC Court's rate of non-appointment of proposals from National Committees from 2008-2013 was 3.6%.¹⁴⁵

165. The general procedure also involves frequent delegation by the ICC of appointment decisions to ad hoc committees that meet several times a month. An ad hoc Committee consists of a president (by default the president of the ICC Court) and at least two other members of the ICC Court appointed by the ICC Court at each plenary session for the coming month. The decisions of the ad hoc Committee have to be taken unanimously, or else they are transferred to the next plenary session of the ICC Court (Article 4 of Appendix II to the ICC Rules). It is unclear how ad hoc committees are selected. No information is available on whether there are any considerations of diversity in the composition of ad hoc committees. It was reported in 2005 that "those Court members that reside in Western Europe bear the brunt of the Committee's work."¹⁴⁶

166. The ICC Court generally bases its decisions in the plenary sessions on (i) a written report drawn up by a member of the ICC Court as rapporteur with a recommendation as to the decisions to be made; and (ii) a report by the ICC Court Secretariat.¹⁴⁷ It is not clear how the rapporteur is chosen or if this method is used for appointing authority appointments.

167. Decisions are taken by a majority vote, with the president having a casting vote in the event of a tie. In practice, virtually all decisions are taken by consensus.¹⁴⁸ The president of the ICC Court has the power to make urgent decisions on behalf of the ICC Court (Article 1.3 of the ICC Rules). Disputing parties, arbitrators and the public are not entitled to attend ICC Court meetings.(cf. Article 1.2 of Appendix I of the ICC Rules). When a member of the ICC Court, including the president or the ICC Court Secretariat, is involved in proceedings pending before the ICC Court, this person must be absent from the ICC Court consideration of and decisions in the matter (Articles 2.3 and 2.4 of Appendix II to the ICC Rules).¹⁴⁹

b. *Discretionary application of special rules for ICC cases involving governments including ISDS cases*

168. A Task Force was established by the ICC in March 2009 "to study and identify the essential and distinctive features of arbitrations involving states or state entities and determine whether there are special

¹⁴⁵ Victoria Orlowski & Ashleigh Masson, 'Your Way or the ICC Way: Constituting An Arbitral Tribunal Under the ICC Rules of Arbitration', in ABA SIL International Arbitration Committee Newsletter, American Bar Association, Vol. 1, No. 1 (2013), p. 29.

¹⁴⁶ Derains/Schwartz, op cit., p.23.

¹⁴⁷ Grierson/van Hooft, op cit., p. 17.

¹⁴⁸ Id., p. 47; Verbist/Schäfer et al., op cit., p. 17.

¹⁴⁹ Such involvement is for example assumed when the respective member was proposed by the ICC National Committee of a state involved in the case, see ICC Commission Report: [States, State Entities and ICC Arbitration](#) (2012), § 58.

procedural considerations that should apply to such proceedings..." Close to 200 people participated over the three years of work of the Task Force leading to changes in the ICC Rules in 2012 and a 2012 report on "States, State Entities and ICC Arbitration".¹⁵⁰ A number of recommendations proposed by the Task Force were adopted in the revised 2012 ICC Rules. The option of a separate set of rules for government cases was rejected.

169. The 2012 report describes the efforts to make the ICC more attractive for cases involving governments including ISDS cases and to use the report format to publicise its advantages:

The Task Force was created in recognition of the fact that ICC arbitration, although a powerful dispute resolution tool, was underused in disputes involving states and state entities and that some explanation was required on the advantages it offers and on how the ICC Rules of Arbitration (the "ICC Rules") operate in this context. That explanation is better given in a report than by way of a separate set of rules for state and state entity arbitration. The recent revision of the ICC Rules has made a separate set of rules applicable to cases involving states or state entities unnecessary. The 2012 ICC Rules contain new provisions that reflect the work of the Task Force and are intended to facilitate and further the participation of state parties in ICC arbitration.¹⁵¹

170. The reference to the rules applying to "business disputes" in Article 1 was replaced by a more general reference to "disputes". An additional change allows the ICC Court to appoint a chair in government cases without involving a National Committee. In its 2012 report, the ICC stated that this change addressed the concerns by states that the National Committees may lack neutrality due to their composition, especially in cases involving states: "One of the concerns expressed by states was the role played by ICC National Committees in the appointment of a sole arbitrator or the president of an arbitral tribunal. There was a perception that ICC National Committees lacked neutrality owing to the fact that they are often composed of leading companies and business associations in their respective countries."¹⁵² No statistics have been located about how often National Committees have been excluded from the appointing authority process in ICC ISDS cases.

171. Commentary about the ICC suggests that a decision by the full ICC Court rather than an ad hoc committee is more likely in government cases.¹⁵³ 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

¹⁵⁰ See ICC Commission Report: [States, State Entities and ICC Arbitration](#) (2012), penultimate page (unnumbered).

¹⁵¹ ICC Commission Report: [States, State Entities and ICC Arbitration](#) (2012), §§ 2-3.

¹⁵² ICC Commission Report: [States, State Entities and ICC Arbitration](#) (2012), §§ 2-3. See also Verbist/Schäfer et al., op cit., p. 86.

It is unclear if concerns were expressed to or in the Task Force by governments or others about the selection of arbitrators in ISDS cases by an appointing authority selected by business representatives or by an appointing authority primarily composed of private-sector commercial arbitrators and counsel. The issues are not addressed in the final report. For well-known expressions of concern about this structure for ISDS, see, e.g. Gus van Harten, *Investment Treaty Arbitration and Public Law* (2008), ch. 7, "The Businessman's Court"; Gus van Harten, "[A total lack of transparency: Why responsible companies and governments should avoid the revised ICC Rules in arbitrations involving states](#)", *Canadian Lawyer* (24 Oct. 2011) ("for institutional reasons, ICC arbitrations involving states are open to an unfortunate perception of bias in favour of business interests. Under the rules, appointing authority is allocated to the ICC International Court of Arbitration, members of which include lawyers and arbitrators nominated by the ICC world council of business on the recommendation of the ICC's executive board."). There is also no public indication of attention to or explanation of this aspect at the AI-SCC or SIAC.

¹⁵³ Derains/Schwartz, op cit., p. 14, 23; Grierson/van Hooff, op cit., p. 48.

absent from the ICC Court consideration of and decisions in the matter. Information has not been located about how the ICC Court takes decisions in this area.

c. Appointment criteria

172. Pursuant to Article 13.1 of the ICC Rules, the ICC Court considers a number of criteria in appointing or confirming arbitrators including “nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals”. Article 13.5 of the ICC Rules provides that the president of the tribunal shall be of a nationality different to those of the parties except in certain circumstances. The president of the ICC Court and members of the ICC Secretariat are not allowed to act as arbitrators in ICC cases (Article 2.1 of Appendix II to the ICC Rules). For institutional appointments, the ICC Court also cannot appoint the vice-presidents or members of the ICC Court (Article 2.2 of Appendix II to the ICC Rules).

173. The ICC has stated that “[t]here is no doubt that the quality and experience of the arbitrators will significantly impact the quality of the process and its outcome. It can be important, or at least desirable, that arbitrators possess certain skills and/or even expertise, whether linguistic, technical or legal. They should also be able to dedicate sufficient time to the case and be available for hearings and meetings. Finally, all arbitrators must be, and remain, independent from the parties and impartial in deciding the case. Appointing the right default arbitrators (where the parties are not able to agree on the arbitrators) is a core function for any arbitral institution.”¹⁵⁴

174. With regard to arbitrations involving governments, the ICC has described its policy with regard to nominations of a government’s co-arbitrator where it has failed to nominate one. It has not identified any special considerations for chairs in government cases or in ISDS cases.¹⁵⁵

B. The five arbitration institutions as they operate as appointing authorities under the UNCITRAL Rules

175. All five arbitration institutions seek to provide services as the appointing authority under the UNCITRAL Rules. This section examines the provisions of the UNCITRAL Rules on the role of the appointing authority in selecting the chair. It then addresses how each of the five arbitration institutions operate as an appointing authority under the UNCITRAL Rules.

1. UNCITRAL Rules governing the appointing authority and arbitrator selection

176. Although the UNCITRAL Rules do not specify an appointing authority, they set out an appointing authority procedure. When acting as appointing authority and requested to appoint a chair, the appointing authority will generally follow a list procedure set out in the rules unless he/she determines in his discretion that it is not appropriate for the case.¹⁵⁶ There is no requirement to provide reasons for the change of procedure or for appointing decisions.

177. Under the list approach as set forth in the UNCITRAL Rules, the appointing authority communicates to each of the disputing parties an identical list containing at least three potential arbitrators. Each disputing party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in its order of preference. After 15 days the appointing authority appoints the arbitrator from among the names approved on the lists returned to it and in accordance with the orders of preference indicated by the parties. If the appointment cannot be made

¹⁵⁴ ICC, [Arbitration](#).

¹⁵⁵ On appointing authority appointment of a government’s co-arbitrator, see ICC Commission Report: [States, State Entities and ICC Arbitration](#) (2012), §§ 65 et seq.

¹⁵⁶ Article 8(2) and 9(3), UNCITRAL Arbitration Rules 2010/2013.

according to this procedure, the appointing authority may appoint an arbitrator.¹⁵⁷ The appointing authority has unlimited discretion in its choice of arbitrators for the list procedure or direct appointments; there is no roster.

2. All five appointing authorities offer to provide appointing authority services in ISDS cases under the UNCITRAL Rules

a. ICSID as appointing authority in UNCITRAL cases

178. The ICSID Secretary General can be designated as appointing authority in proceedings not conducted under the ICSID Convention or the ICSID Additional Facility Rules.¹⁵⁸ No roster applies. If the instrument designating the ICSID Secretary General as appointing authority establishes a method for the appointment, or the disputing parties agree on one, ICSID will follow that method. If no agreement exists, ICSID will first follow the ballot procedure described above, when appointing a presiding arbitrator or a sole arbitrator. If the procedure is unsuccessful, the ICSID Secretary General will either select an arbitrator who was not on the ballot or have recourse to a list ranking procedure.

b. PCA as appointing authority in UNCITRAL cases

179. The PCA has not adopted any particular procedures for its appointing authority services under the UNCITRAL Rules. Where it acts as an appointing authority, it acts under the general UNCITRAL procedures.

c. AI-SCC as appointing authority in UNCITRAL cases

180. The AI-SCC has published a special set of rules that apply where the AI-SCC is the appointing authority in an UNCITRAL case.¹⁵⁹ When appointing a sole or presiding arbitrator in UNCITRAL cases, the AI-SCC will follow the list procedure provided for in Article 8(2) of the UNCITRAL Arbitration Rules 2010. The AI-SCC Secretary General described AI-SCC nomination practice under the UNCITRAL Rules at an arbitration conference in the following terms:

The [AI-SCC] confirms receipt of the request for appointment (“Request”) and reviews the underlying BIT or investment agreement empowering the SCC to act as appointing authority. The Request is communicated to the Respondent. In the communication the Respondent is usually given time (usually 2 weeks) to submit comments to the Request. Each party is given an opportunity to present its case. Parties are always notified of each other’s submission and always given an opportunity to submit comments on the other party’s submissions. The [AI-SCC] takes note of the arguments of the parties when considering candidates for the appointment.

After the parties have submitted their comments, the [AI-SCC] is prepared to make the appointment. The Secretariat presents case to the SCC Board, suggesting at least three candidates to be appointed as arbitrators. In case of appointment of chairperson the list may be longer, up to 5 or 6 candidates.

¹⁵⁷ Article 8(2), UNCITRAL Arbitration Rules 2010/2013.

¹⁵⁸ See ICSID, [Appointing Authority](#).

¹⁵⁹ AI-SCC Procedures as Appointing Authority under the 2010 UNCITRAL Arbitration Rules, in force as of January 2015. The AI-SCC has also adopted Procedures for the Administration of Cases under the 2010 UNCITRAL Arbitration Rules.

In deciding on the appointment of arbitrators, the Secretariat and the [AI-SCC] Board pay attention to a number of relevant factors (not listed here in any order or priority): the applicable law, the nationality of the parties, the nationality of the co-arbitrators, the language of the proceedings, the seat of the arbitration, the substance of the dispute.

Once the list of candidates is approved by the [AI-SCC] Board, the Secretariat will contact the proposed arbitrator. A confirmation form with a statement of independence and impartiality is sent to the arbitrator upon acceptance. Once the [AI-SCC] receives back the confirmation from the arbitrator, the parties are informed of the appointment and the [appointing authority appointment] case is closed.¹⁶⁰

181. This process appears to involve competing submissions by the parties on the appointment issue, followed by an AI-SCC Board appointment. It is unclear if the disputing parties can propose possible chairs in their submissions. The approach described differs from the list approach set forth in the UNCITRAL Rules (which the appointing authority can determine in its discretion is not appropriate for the case). When appointing a chair, the AI-SCC will, in so far as possible, designate a person of a nationality other than the nationalities of the parties, unless otherwise agreed by the parties (Article 2 SCC Procedures as appointing authority).¹⁶¹

d. ICC as appointing authority in UNCITRAL cases

182. The ICC applies a special set of rules for proceedings where it or an ICC authority serves as appointing authority under the UNCITRAL Arbitration Rules.¹⁶² All decisions pertaining to these appointing authority functions are made by a Special Committee of the ICC Court, consisting of the president of the ICC Court and two other members of the ICC Court. The Special Committee's decisions have to be unanimous and, otherwise they are referred to the ICC Court sitting as a special plenary session.¹⁶³ It is unclear how the members of the Special Committee are appointed.

183. The National Committees play no role in non-ICC appointments. In making its appointment, the ICC will generally act in accordance with the UNCITRAL Arbitration Rules and its list procedure, but can proceed otherwise. No statistics regarding UNCITRAL ISDS cases are available in this respect. In 2015, the ICC established a Task Force on the Revision of the Rules of ICC as Appointing Authority in UNCITRAL or other Ad Hoc Arbitration Proceedings.¹⁶⁴ No further information about the task force is available.

e. SIAC as appointing authority in UNCITRAL cases.

184. The SIAC registrar has issued a Practice Note governing its work as appointing authority and arbitration institution under the UNCITRAL Rules, most recently revised in 2014.¹⁶⁵ In UNCITRAL proceedings, the president (not the whole Court) acts as appointing authority. The president has the option to consult two members of the SIAC Court. The president and two members of the SIAC Court can further seek the assistance of the Secretariat (UNCITRAL Practice Note 6 and 8).

¹⁶⁰ Magnusson, *The SCC Experience of Investment Arbitration under the UNCITRAL Rules*, p. 9.

¹⁶¹ *Id.*, p. 9.

¹⁶² Rules of ICC as Appointing Authority in UNCITRAL or other Ad Hoc Arbitration Proceedings (ICC Appointing Authority Rules), in force as from 1 January 2004.

¹⁶³ Article 1.3 ICC Appointing Authority Rules.

¹⁶⁴ See ICC, [Task Force on the Revision of the Rules of ICC as Appointing Authority in UNCITRAL or other Ad Hoc Arbitration Proceedings](#) (last consulted Dec. 2016); Mayer Brown, [International Arbitration Update](#) (Dec. 2015). The task force is no longer referred to on the ICC website.

¹⁶⁵ SIAC Practice Note on Case Administration, Appointment of Arbitrators & Financial Management for Cases Under the UNCITRAL Rules 2010 (2014) ("SIAC UNCITRAL Practice Note").

185. When appointing a chair, the president will follow the list procedure provided for in Article 8(2) of the UNCITRAL Rules insofar as it is practicable and deemed appropriate.¹⁶⁶ The Practice Note provides that when making appointments in UNCITRAL cases, the president generally has to appoint an arbitrator from the SIAC roster. Only in exceptional cases, for example where there are no suitable candidates on the SIAC roster for a particular dispute, can he/she appoint an arbitrator who is not on the roster.¹⁶⁷

C. Potential new entry methods and new entrants as appointing authorities in ISDS: The PCA and SIAC as appointing authorities under their own arbitration rules.

186. As noted above, the PCA has been active as an arbitration institution in ISDS principally under the UNCITRAL Rules; SIAC's very limited ISDS experience has also apparently involved the UNCITRAL Rules. However, both the PCA and SIAC also seek to provide appointing authority services in ISDS cases under their own rules. 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. Both sets of rules represent significant potential new entry methods for or new entrants as arbitration institutions in ISDS.

1. The 2012 PCA Rules

187. The PCA has issued a number of sets of arbitration rules, and a consolidated version of four sets of pre-existing rules was issued in 2012. They are designed for use "in arbitrating disputes involving at least one State, State-controlled entity, or intergovernmental organization".¹⁶⁸ An Annex to the PCA Rules contains a model treaty clause to incorporate the PCA Rules into a treaty.

188. The PCA Rules are expressly based on the UNCITRAL Rules. But they differ in some respects including by providing for the PCA Secretary General to serve as the appointing authority. The PCA Secretary General is free to appoint arbitrators from outside the PCA roster under the PCA Rules. The PCA Rules note the special interest of the PCA in government cases and its limited interest in purely private cases, in similar terms as for cases under the UNCITRAL Rules.¹⁶⁹

2. SIAC, ISDS and treaty-related claims under SIAC Rules

189. As noted, the SIAC IA Rules became available for use in January 2017. They are designed primarily to be applied in government-related disputes (involving States, State-controlled entities or international organisations).¹⁷⁰ Treaty-based claims are specifically mentioned. SIAC also has regular commercial arbitration rules, most recently amended in 2016 (SIAC 2016 Rules). The SIAC IA Rules have not been expressly included in any known investment treaty. However, SIAC has identified some possible scenarios for their application relating to existing treaties.

a. SIAC suggestions about application of the SIAC Investment Arbitration Rules to claims relating to existing investment treaties

190. The SIAC IA Rules suggest that SIAC would accept and serve as the appointing authority for an investor claim relating to an investment treaty not providing for SIAC arbitration. The stated requirements for acceptance of the claim and SIAC role are (i) government consent in the investment treaty to arbitration

¹⁶⁶ SIAC UNCITRAL Practice Note 7 and 8.

¹⁶⁷ SIAC UNCITRAL Practice Note 10.

¹⁶⁸ PCA Rules, Introduction.

¹⁶⁹ See art. 1(4), PCA Rules (noting that private parties can agree to use the PCA Rules in the absence of any government-related party, but the PCA Secretary General can limit PCA involvement in such cases to serving as the appointing authority without providing any administrative support).

¹⁷⁰ Introduction no. I, SIAC IA Rules 2017.

in accordance with “rules of arbitration”; and (ii) subsequent consent by that government and an investor to a SIAC IA Rules arbitration for “such dispute”. No consent is required from the other treaty parties:

Where ... a party has previously offered to consent, to arbitration in accordance with rules of arbitration other than the SIAC Investment Arbitration Rules, whether in a ... treaty, statute or other instrument, the dispute may be referred instead to arbitration in accordance with the [SIAC IA Rules] if the parties have subsequently consented to refer such dispute to arbitration in accordance with the [SIAC IA Rules].¹⁷¹

191. Some investment treaties contemplate the power for the disputing parties in ISDS to agree to additional arbitration rules beyond those specified. These clauses can allow agreement by both disputing parties, after the dispute has arisen, to any arbitration institution. For example, article 33(1)(f) of the 2009 ASEAN Comprehensive Investment Agreement (ACIA) provides that “if the disputing parties agree”, the disputing investor can choose any arbitration institution. Disputing party agreement to SIAC arbitration or any other form of arbitration is thus contemplated under such treaties.

192. The SIAC policy would appear also to encompass acceptance of investor claims relating to investment treaties that provide for arbitration only under a defined arbitration procedure or a defined set of arbitration options without providing for the possibility of disputing party agreement to other rules such as the SIAC Rules. The situation in such cases would be more uncertain.¹⁷² It is unclear if the SIAC IA Rules contemplate acceptance of claims that include additional changes to the relevant treaty accepted by the respondent government and the investor. No view is expressed about whether a decision by one treaty party to subject a claim against it based on certain investment treaty provisions to arbitration rules, an arbitration institution or an arbitrator selection mechanism not contemplated in an investment treaty would be in conformity with the treaty or about the legal status of such proceedings or their outcomes.¹⁷³

¹⁷¹ SIAC IA Rules, Introduction, para. iii.

It is possible that the SIAC text reference to subsequent consent by the “parties” to SIAC IA arbitration could be interpreted to refer to the treaty Parties in the context of a treaty-related claim. However, the clause also applies more broadly to unilateral government offers to arbitrate in statutes.

¹⁷² It is unclear if SIAC would consider such a claim to be an ad hoc contract-based claim referring to parts of a treaty as the applicable law or a claim “pursuant to a treaty”. This could affect issues such as whether the other government treaty Parties would be considered to be “Non-disputing Contracting Parties” or “non-disputing Parties” under the SIAC IA rules (which would affect their ability to make submissions on issues of law). See Art. 1.5, SIAC IA Rules (defining “Non-disputing Contracting Parties” as “a party to a treaty pursuant to which the dispute has been referred to arbitration in accordance with these rules” and a “non-disputing Party” as other non-parties) (emphasis added); arts. 29.1, 29.2 (giving a “Non-disputing Contracting Party” a right of intervention on legal issues while requiring a “non-disputing Party” to obtain permission from the arbitral tribunal for any intervention). It could also affect the disclosure regime applicable to the case. See arts. 38.2, 38.3, SIAC IA Rules (different rules for treaty-based bases and contract-based cases).

¹⁷³ An article on the SIAC website refers to the 2009 ASEAN Comprehensive Investment Agreement (ACIA) and suggests that it would permit investors to submit claims to SIAC and its appointing authority without post-dispute respondent government consent. See Vivekananda N. & Jagdish John Menezes, [Singapore as a Seat for Investor-State Disputes](#) (undated article on SIAC website by SIAC staff members, written prior to introduction of 2017 SIAC investment arbitration rules) (stating that “Article 33 of the [ACIA] provides that investor-state disputes may be submitted for arbitration ... to any other regional center for arbitration within the ASEAN, such as the Kuala Lumpur Regional Center for Arbitration (KLRCA), or the Singapore International Arbitration Center (SIAC)”).

The ACIA offers investors various arbitration options for ISDS claims. Among others, it permits investors to submit claims to the “Regional Center for Arbitration at Kuala Lumpur or any other regional centre for arbitration in ASEAN”. See ACIA, art. 33(1)(e). This appears to be the provision referred to by the authors. The Kuala Lumpur Regional Centre for Arbitration (KLRCA) was established in 1978 under the auspices of the Asian-African Legal Consultative Organisation (AALCO). AALCO is an inter-governmental organisation with

b. The appointment regime under the SIAC Investment Arbitration Rules

193. Under the SIAC IA Rules, the SIAC Court makes appointments. When appointing the chair, the SIAC Court will follow a list procedure specified in Article 8 of the SIAC IA Rules, unless the SIAC Court decides that the list procedure is not appropriate for the case. Under the list procedure, the SIAC Court first invites the parties to share their views on any qualifications of the arbitrator to be appointed. Taking these views into account, but without being bound by them, the SIAC Court then compiles a list of five candidates and communicates it to the parties. Within 15 days after the receipt of the list, or another period agreed by the parties or set by the Registrar, each disputing party has to delete the names to which it objects, number the remaining names in the order of its preference and return the list directly to the Registrar, without the other disputing party seeing it. After expiry of the 15 days, the SIAC Court will appoint the arbitrator from among the names approved on the respective lists in accordance with the order of preference indicated by the parties. If the appointment cannot be made according to this procedure, the SIAC appoints the chair. This arbitrator can be one of the earlier proposals on the list but can also be a new person.

194. In appointing an arbitrator, the SIAC Court considers any required qualifications, the impartiality or independence of the arbitrator and whether the arbitrator has sufficient availability to determine the case in a prompt and efficient manner.¹⁷⁴ The SIAC Court must ensure that where the parties are of different nationalities, the chair is of a different nationality than the parties unless the SIAC Court otherwise determines it to be appropriate having regard to the circumstances of the case.¹⁷⁵ No other information is available on the criteria for the preparation of the list. The SIAC Court generally does not have to provide reasons for its appointment-related decisions.¹⁷⁶

47 Asian and African member states which has established several regional arbitration centres. ACIA specifies that the appointing authority in claims under art. 33(1)(e) shall be “the Secretary-General or person holding an equivalent position, of that arbitration centre or institution”. See ACIA, arts. 33(1)(e) & 28(a)(3). No view is expressed about what institutions or rules, if any, might be available to investors under the art. 33(1)(e) ACIA provisions referring to regional arbitration centres or who, if anyone, would qualify as the Secretary-General or equivalent at any particular institution.

As noted above, the ACIA also separately provides for agreement, post-dispute, between the disputing parties to any arbitration institution. SIAC and all the others AIs are available to investors under this clause, but only with specific post-dispute government consent in each case. See ACIA, arts. 33(1)(f) (also providing for arbitration at any other arbitration institution “if the disputing parties agree”). It is conceivable that the authors are referring only to this provision.

¹⁷⁴ Article 10.2 and 10.3, SIAC IA Rules 2017; SIAC Practice Note No. 5.

¹⁷⁵ Article 5.7, SIAC IA Rules 2017.

¹⁷⁶ Article 39.1, SIAC IA Rules 2017.

Differences between the SIAC IA and the SIAC 2016 commercial arbitration rules include that (i) SIAC 2016 appointments are made by the president of the SIAC Court rather than the SIAC Court as under the IA Rules; (ii) appointments in SIAC 2016 cases must generally be made from the SIAC roster while SIAC Court appointments are discretionary under the IA Rules; and (iii) appointments under the SIAC 2016 Rules are made directly without the list procedure that generally applies under the IA Rules.

VI. Arbitration rule amendments expanding the role of appointing authorities in ISDS: Emergency arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce (AI-SCC)

195. As noted above, amendments to private-sector arbitration rules to introduce “emergency arbitrator” provisions have become frequent in recent years and reflect competition in that area. They substantially expand the role of appointing authorities. Emergency arbitrator provisions also highlight the differences between international commercial arbitration and investor-state arbitration outlined in Part III above. Revised or new rules that provide new rights for claimants may be balanced for purposes of commercial arbitration – where either party to a contract can be a claimant or defendant. But they may have a significantly different effect in a system like investor-state arbitration where only investors can initiate claims.

196. Four different approaches to emergency arbitrator provisions can be identified among the five arbitration institutions. In declining order of impact on ISDS, they are as follows: (1) the AI-SCC Rules contains emergency arbitrator provisions which are applicable to ISDS arbitrations under the AI-SCC Rules¹⁷⁷; (ii) the 2017 SIAC-IA Rules contain an emergency arbitrator provision, but it applies only if both disputing parties expressly opt-in to application of the clause; (iii) the ICC Arbitration Rules include an emergency arbitrator provision since 2012, but as interpreted by the ICC, the provisions categorically exclude ISDS cases from their scope of application¹⁷⁸; and (iv) arbitration rules developed by the inter-governmental organisations (ICSID, PCA, UNCITRAL) do not incorporate emergency arbitrator provisions.¹⁷⁹

197. Government opt-in to allow investor access to emergency arbitrator procedures in ISDS, as contemplated by the SIAC-IA Rules, is possible, but may be unlikely. Recent investment treaty practice has more frequently included a power for governments to compel early consideration of issues that can immediately terminate or narrow claims. Since such decisions can be final decisions terminating a claim, they cannot be made by emergency arbitrators. No example of a government opt-in to emergency arbitrator procedures or of an investment treaty containing such provisions has been located although more research is required.

¹⁷⁷ Article 37(4) and Appendix II, 2017 AI-SCC Rules.

¹⁷⁸ A recent ICC reports note that “[o]ne of the purposes of Article 29(5) of the 2012 ICC Rules was to exclude investment arbitration from the scope of emergency arbitrator proceedings”. Article 29(5) provides that the emergency arbitrator apply only to parties that are either “signatories” of the relevant arbitration agreement or their successors. The report notes that “[w]hen drafting this provision, the ICC considered that the investor and the host state are not signatories of the arbitration agreement formed by the state’s offer contained in the BIT and the investor’s acceptance contained in its notice of claim or request for arbitration”. See [ICC Report on Arbitration Involving States](#), p. 6. Art. 29(5) is unchanged in the 2017 ICC Rules.

¹⁷⁹ The recent rule revision process initiated by ICSID with input from governments and others, discussed at a recent FOI Roundtable, does not appear to include a proposal to include emergency arbitrator in the ICSID process. There are proposals to “streamline the arbitral appointment process”, but no reference to a new emergency arbitrator process. See ICSID, [The ICSID Rules Amendment Process](#) (undated), p.2.

The 2012 PCA Rules or other potentially applicable PCA arbitration rules also do not contain an emergency arbitrator provision.

198. This section will thus focus primarily on the AI-SCC approach. Emergency arbitrator procedures raise many issues for governments and deserve close attention.¹⁸⁰ The focus here is primarily on the nature and impact of the relevant appointing authority processes.

A. AI-SCC: Emergency Arbitration applicable to ISDS including under existing investment treaties

199. Under the AI-SCC Emergency Arbitrator Rules, the AI-SCC appointing authority is empowered and required to select an Emergency arbitrator within 24 hours of receipt of a claim without consultation with the disputing parties.¹⁸¹ Other time limits are similarly very short. The emergency arbitrator must issue an emergency decision within five days of receipt of the application.¹⁸² The arbitrator can grant any interim measures he/she deems appropriate which can take the form of an “order” or an “award”.¹⁸³

200. A former AI-SCC Legal Counsel has stated: “When appointing an emergency arbitrator, the Board considers the nature and circumstances of the dispute, the applicable law and the language of the proceedings, as well as the nationality of the parties. Given the urgency of the proceedings, the Board usually also takes other practical issues into consideration such as time zones, the possibility to conduct a quick conflict check, and so on. Before suggesting names of possible arbitrators to the Board, the Secretariat always eliminates firms and individuals which may have a conflict. Once the Board has decided on a list of possible candidates for the appointment, the Secretariat starts contacting potential emergency arbitrators by telephone and e-mail. Usually, the question of availability is posed first, after which information on the parties and the dispute is provided for the arbitrator to conduct a conflict check.”¹⁸⁴

201. As adopted by the AI-SCC, the rule changes introducing the emergency arbitrator rules apply to pre-existing treaties that refer in general terms to the AI-SCC Rules. The new emergency arbitrator rules have attracted a significant number of ISDS cases. The rules began to attract ISDS cases in 2014, with two of the four emergency arbitrator applications that year being based on investment protection treaties and an additional ISDS claim in 2105.¹⁸⁵ The AI-SCC reported that it had received a “Record number of requests for [an AI-SCC] emergency arbitrator” in the first six months of 2016, a total of nine.¹⁸⁶ Two of the nine requests were based on investment treaties.

202. The AI-SCC has stated that all appointing authority appointments of emergency arbitrators in 2016 were made within 24 hours of the claimant’s request. All emergency arbitrator decisions were rendered within 5-8 days. Emergency awards and orders were granted in whole or in part in a majority of emergency arbitrator cases in 2016.¹⁸⁷

B. Impact of expanded appointing authority power under emergency arbitrator provisions

203. Some news reports suggest that arbitrators appointed by appointing authorities under the AI-SCC emergency arbitrator provisions have made emergency orders on significant issues of public policy

¹⁸⁰ See Koh, *The Use of Emergency Arbitrators in Investment Treaty Arbitration*, ICSID Review Vol. 31, No. 3 (2016), pp. 536 et seq.

¹⁸¹ Article 4(1) of Appendix II to the AI-SCC Rules 2017.

¹⁸² Article 8(1) of Appendix II to the AI-SCC Rules 2017.

¹⁸³ Article 37(1), (3) and Article 1(2) of Appendix II to the AI-SCC Rules 2017.

¹⁸⁴ Knapp, *SCC Practice – Emergency Arbitrator Decisions Rendered in 2014*, p. 2.

¹⁸⁵ AI-SCC, [Statistics 2014](#), p. 4; AI-SCC, [Statistics 2015](#), pp. 2, 7.

¹⁸⁶ SCC, [Record number of requests for SCC emergency arbitrator](#) (7 July 2017).

¹⁸⁷ SCC, [SCC Statistics 2016](#).

including issuing an injunction blocking a tax increase or blocking a share divestment order issued by a central bank agency.¹⁸⁸

204. Beyond possibly obtaining preliminary orders, well-prepared claimants may gain tactical advantages as a result of immediate appointing authority appointment of an emergency arbitrator. For example, the emergency arbitrator procedure can compel the respondent government to decide whether to put in a defence within one or two days.¹⁸⁹ The one-day time limit for the appointing authority appointment of the emergency arbitrator, and the short time limits for an emergency arbitrator decision on the application may allow claimants to wait until shortly before relief is needed before requesting it, giving them time to prepare the application.¹⁹⁰ Some emergency arbitrator interim awards in ISDS have been issued without hearing from the government.

¹⁸⁸ See Luke E. Peterson, [Investigation: In at least two investment treaty cases, foreign investors use emergency arbitrators to block tax hikes and share divestment order](#), Investment Arbitration Reporter (17 February 2015).

¹⁸⁹ Even if there is time to consult experienced defence counsel, counsel might suggest foregoing a response on the merits or other issues due to risk of putting forward propositions that may prove to be inconsistent with a considered theory of the case developed after a full examination of the facts and law. Assuming there is time to consider them, such concerns would need to be balanced against the risks of non-appearance in an emergency arbitrator proceeding.

¹⁹⁰ See, e.g., Jarrod Hepburn, [In-Depth: Unpacking the Reasoning of the First SCC Emergency Arbitrator Ruling in a Russian Investment Treaty Claim](#), Investment Arbitration Reporter (17 Feb. 2015) (reporting on a challenge to a 5 Feb. 2014 central bank share divestment order that the investor did not challenge in an emergency arbitrator proceeding until 23 April 2014; the AI-SCC Board then appointed an arbitrator the next day (24 April 2014) who gave the government one day to respond to the claim and issued an interim order in favour of the investor on 29 April 2014 after the government did not put in a defence).

VII. Choosing appointing authorities: The unique role of the Permanent Court of Arbitration (PCA) in ISDS as a designator of appointing authorities and conversions of its role to appointing authority

205. As noted above, the UNCITRAL Rules do not designate an appointing authority; all five arbitration institutions offer appointing authority and arbitration administration services in UNCITRAL cases.

206. The UNCITRAL Rules do attribute to the PCA a unique role as the designating authority that designates the appointing authority. The PCA Secretary-General chooses freely without any constraint.

207. The PCA's designating authority role under the UNCITRAL Rules applies to all UNCITRAL cases. These can include commercial arbitration cases involving only private parties, but the PCA focuses on government-related government cases. It has clarified that it is not interested in administering private-sector UNCITRAL cases beyond its role as designating authority as stated in the UNCITRAL Rules.

208. The 2010 and 2013 UNCITRAL Rules provide for the PCA Secretary General to serve as the designator of the appointing authority, but also explicitly state that the disputing parties may agree on the PCA Secretary General as an appointing authority.¹⁹¹ The UNCITRAL Arbitration Rules 1976 did not contain this latter statement.

209. This section focuses first on PCA selection of appointing authorities when it serves as the designating authority. It then addresses the conversion of the PCA role from designating authority to appointing authority itself in particular UNCITRAL cases.

A. Selection of appointing authorities by the PCA as designating authority

210. The PCA's earliest known designation of an appointing authority for ISDS was a senior national judge. The PCA designates the appointing authority for the Iran-US Claims Tribunal, which operates under modified UNCITRAL rules. In 1982 the PCA Secretary General designated as appointing authority Dr. Charles M.J.A. Moon, president of the Supreme Court of the Netherlands.¹⁹² The PCA also designated the current appointing authority of the Iran-US Claims Tribunal, Justice Geert Corstens, who was also the president of the Supreme Court of the Netherlands when designated.¹⁹³

211. The disclosure of the PCA's designee as appointing authority in the Iran-US case is exceptional; the PCA does not generally disclose who it appoints as appointing authority. The PCA's disclosure about its designating authority activities in its annual reports has also steadily declined in recent years. From 1999-2001, the annual reports gave a short no-names description of all cases in which appointing authority services were requested. Where the PCA designated an institution as the appointing authority, it disclosed the designated institution. Where is designated an individual, it disclosed his/her nationality. The PCA frequently designated arbitration institutions as the appointing authority during this period, as in the following example of disclosure:

¹⁹¹ Article 6(1) of the UNCITRAL Arbitration Rules 2010/2013.

¹⁹² Brower/Brueschke, *The Iran-United Claims Tribunal*, Kluwer Law International 1998, p. 153.

¹⁹³ PCA, [Annual Report 2013](#), p. 15 (noting that the PCA Secretary General nominates the appointing authority in the absence of party agreement and that "the current appointing authority is the President of the Supreme Court of the Netherlands ("Hoge Raad"), Justice Gerard Josephus Maria (Geert) Corstens").

October [2000]: In accordance with Articles 7(3) and 6 of the UNCITRAL Arbitration Rules, a European Company requested the Secretary-General to designate an appointing authority for the purpose of selecting the president. The respondent, a North American company, in reply to the Secretary-General's notification of the request, raised objections as to the identity of the parties and informed the Secretary-General that court proceedings had been initiated in its country. The Secretary-General replied that the objections raised could only appropriately be disposed of by the arbitral tribunal once constituted. The Secretary-General designated the *International Court of Arbitration of the International Chamber of Commerce*, in Paris.¹⁹⁴

212. In 2003, the PCA ceased identifying its designated institutions. It also ceased providing nationality information for its designated individuals. It continued to provide information about each individual case from 2003-2010. It reported whether it had designated as appointing authority an individual or an institution, as in the following reports from the 2005 PCA Annual Report:

Case No. AA223: Claimants, two European individuals and an African company, requested that the Secretary-General designate an appointing authority for the appointment of a sole arbitrator in a dispute with Respondents, an African government and an African state entity. The Secretary-General designated an individual as appointing authority.

[...]

Case No. AA237: Claimant, a European individual, and Respondent, a European government, appointed their co-arbitrators. The party-appointed arbitrators were not able to reach agreement on the presiding arbitrator within the thirty-day time limit foreseen in the UNCITRAL Rules. Both parties requested that the Secretary-General designate an appointing authority to appoint a presiding arbitrator. The Secretary-General designated an institution as appointing authority.¹⁹⁵

213. Information about these categories of appointments was no longer provided in the 2011 report. The PCA continued to provide information on the outcome in each case where it received a request to designate, but reported only whether it had designated an appointing authority or not, as in the following examples:

Case No. AA 407: The Claimant, an Asian state entity, requested that the Secretary-General designate an appointing authority to appoint the presiding arbitrator pursuant to the UNCITRAL Arbitration Rules 1976 in a dispute with the Respondent, a Central American company. Having considered the request, the Secretary-General designated an appointing authority.

Case No. AA 417: The Claimant, a European company, requested that the Secretary-General designate an appointing authority to appoint the second arbitrator pursuant to the UNCITRAL Arbitration Rules 2010 in a dispute with the Respondent, another European company. The Parties subsequently settled their dispute.¹⁹⁶

¹⁹⁴ PCA, [Annual Report 2000](#), § 55 (emphasis in original).

¹⁹⁵ PCA, [Annual Report 2005](#), pp. 13-14.

¹⁹⁶ PCA, [Annual Report 2011](#), pp. 11-12.

214. Information was further limited starting in 2012. Since 2012, the PCA has not disclosed any information about its designating authority activity in individual cases in its annual reports.

215. The disclosure about designating authority and appointing authority work by the PCA in its recent reports is limited to the following aggregate information, as set forth for example in the 2014 annual report:

In 2014, the PCA received 41 requests relating to its appointing authority services. These included:

- 26 requests that the Secretary-General designate an appointing authority;
- 12 requests that the Secretary-General act as an appointing authority for the appointment of an arbitrator; and
- 3 requests that the Secretary-General act as an appointing authority to decide a challenge to an arbitrator.

Having considered each of these requests, the Secretary-General:

- Designated an appointing authority in response to 14 requests (with the remaining 12 requests still pending or having been withdrawn or rendered unnecessary);
- Appointed an arbitrator in response to 6 requests (with the remaining 6 requests still pending or having been withdrawn or rendered unnecessary); and
- Resolved 2 challenges in relation to 5 arbitrators (with the remaining request having been withdrawn).¹⁹⁷

216. These statistics address all PCA cases together – including cases involving private or government parties, or involving ISDS or not. No information is provided about the individuals or institutions that the PCA designates as appointing authority in ISDS. Recent PCA annual reports include bar charts entitled “Growth in Appointing Authority Requests” that highlight the growth of the PCA’s appointing authority-related activity across its full caseload of ISDS and other cases in recent years.¹⁹⁸

217. The PCA’s annual reports do not explain the decisions to restrict disclosure in 2003 and to further restrict disclosure in 2011 and from 2012. It is unclear if the decisions were taken by government representatives in the PCA Council or by the Secretariat. No information about the decisions has been located from other sources. The PCA does not make other information about its activity as designating authority available to the public.

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

219. Most known PCA designations are of individual law firm partners/arbitrators/professors. The PCA does not appear to have designated national judges for any ISDS cases (apart from its designations of national supreme court judges as the appointing authority for the Iran-US Claims Tribunal as noted above).

¹⁹⁷ PCA, [Annual Report 2014](#), p. 25.

¹⁹⁸ For example, the chart in the 2016 annual report reports that during the six-year period from 2011-2016, the PCA received 306 appointing authority-related requests whereas it received far fewer in earlier five-year periods such as 1981-85 (4 requests) or 1996-2000 (79 requests). This includes both requests to designate and requests to appoint. See PCA, [Annual Report 2016](#), p. 14.

220. Some examples of PCA practice in designating appointing authorities have been reported in Investment Arbitration Reporter, a specialised news service. See, e.g., *Compagnie Internationale de Maintenance (CIM) v. Ethiopia, UNCITRAL, 2009* (not public) (PCA designated Canadian lawyer and arbitrator Henri Alvarez as appointing authority to appoint a government's co-arbitrator)¹⁹⁹; *Michael McKenzie v. Vietnam, UNCITRAL* (not public) (PCA designated Swiss lawyer and arbitrator Gabrielle Kaufman-Kohler as appointing authority to appoint government's co-arbitrator)²⁰⁰; *Mr Ali Allawi v. Pakistan, UNCITRAL* (not public) (PCA designated Singaporean lawyer and arbitrator Michael Hwang as appointing authority to appoint government co-arbitrator)²⁰¹; *Dunkeld v. Belize (Case #1) and British Caribbean Bank v. Belize and Dunkeld v. Belize (Case #2)* (PCA designated arbitrator, former law firm partner and former government minister Marc Lalonde as appointing authority)²⁰²; *Albertis v. Bolivia, UNCITRAL* (not public) (PCA designated French professor and arbitrator Pierre-Marie Dupuy as appointing authority to appoint chair)²⁰³; *RECOFI SA v. Vietnam, UNCITRAL* (not public) (PCA designated Chilean professor and arbitrator Francisco Orrego Vicuña as appointing authority to appoint chair).²⁰⁴

221. 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.

222. Unlike the five arbitration institutions addressed in this note, individual appointing authorities with no affiliated arbitration institution are also likely to be unable to offer combined appointing authority/arbitration institution services in support of arbitration; an expected PCA designation of an individual as appointing authority may be seen as increasing the attractiveness to the disputing parties of having the PCA provide a combined package of administrative support services in preference to other suppliers.

B. Conversions of PCA role from designating authority to appointing authority in individual cases

223. In addition to giving the PCA a unique role as the designating authority, recent versions of the UNCITRAL Rules also provide an express mechanism for conversion of the PCA role from designating

¹⁹⁹ See Investment Arbitration Reporter, [Ethiopia prevailed in face of foreign investors' attempt to use investment treaty to sue over ICC award](#), (4 Mar. 2012).

²⁰⁰ See Luke Eric Peterson, [US investor pursues UNCITRAL arbitration claims against Vietnam – tribunal empaneled to hear allegations of treaty breach](#), Investment Arbitration Reporter (1 Dec. 2011).

²⁰¹ See Luke Eric Peterson & Jarrod Hepburn, [Former Iraqi minister initiates treaty claims against Pakistan but government is slow to respond – at least three other arbitrations afoot](#), Investment Arbitration Reporter (21 Dec. 2012).

²⁰² See Luke Eric Peterson, [Belize manages to stall trio of treaty arbitrations by foreign investors](#), Investment Arbitration Reporter (4 Jan. 2012).

²⁰³ See Luke Eric Peterson, [After arbitrator disqualification process ad hoc tribunal to hear Spanish company's investment treaty claims against Bolivia](#), Investment Arbitration Reporter (20 Mar. 2013).

²⁰⁴ See Luke Eric Peterson, [UNCITRAL arbitrations update \(Vietnam and Canada\): Appointing authorities pick chairs in a pair of investment treaty claims](#), Investment Arbitration Reporter (9 April 2014).

authority to appointing authority. Either disputing party can propose the conversion of the PCA role to that of appointing authority, which occurs if the other disputing party accepts the proposal.²⁰⁵

224. For those who perceive the PCA as having no institutional interest other than responding to disputing party requests and choosing in the best manner possible, this structure creates no issues. The disputing parties may choose the PCA as a result of their high estimation of the quality of PCA services as appointing authority. They may also choose the PCA because they want combined appointing authority and case administration services.

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.²⁰⁶

²⁰⁵ Some of the Yukos-related cases offer an illustration of this mechanism in practice. See, e.g., *Yukos Universal Holding v. Russia*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 8. After the claimants and the government each selected their co-arbitrator, the claimants requested that PCA Secretary General designate an appointing authority and further stated that they would have no objection to the PCA Secretary General acting as the appointing authority. The government accepted the PCA as appointing authority three weeks later. After the list procedure did not produce an agreed choice among the three options proposed by the PCA, the PCA Secretary General appointed Yves Fortier as the chair.

²⁰⁶ The available anecdotal information could suggest that most cases where the PCA acts as designating authority are in contexts where respondent governments have not appointed a co-arbitrator. If the government is not participating in the procedure, it is unlikely to give consent to a conversion. This could suggest that, for whatever reason, a conversion frequently occurs if both parties are engaged.

A requirement that conversion requests be submitted jointly by the disputing parties to the PCA in ISDS cases could address certain issues of potential perceived leverage on issues of adjudicator selection in this context.

VIII. Outcomes: Appointing authority policy on disclosure of their appointing activity in individual ISDS cases

226. This part addresses the policies of the arbitration institutions on disclosure of their appointing activity in individual ISDS cases. The first section addresses the major differences in disclosure among the five arbitration institutions and recent contrasting evolution. Two of the five institutions (ICSID; ICC) now provide systematic disclosure of tribunal composition in all cases, albeit with some limitations. SIAC's IA Rules, while not yet used, provide that agreement to the rules authorises SIAC to disclose the identity and nationality of arbitrators; appointment information is not explicitly addressed. The other two arbitration institutions (PCA; AI-SCC) provide very limited information about their action in individual cases; they each require express agreement by the disputing parties. The second section discusses the absence of any disclosure of lists of proposed arbitrators. A third section addresses how arbitration institutions select (or not) arbitral pool issues for attention.

227. A fourth section preliminarily identifies policy considerations with regard to disclosure by arbitration institutions about their appointing activity in individual ISDS cases. In the apparent absence of public discussion of the policy issues by Ais, some preliminary considerations can be raised although further consideration and discussion are necessary. It would appear that arbitration institution appointments of arbitrators have no link to confidential business information (other than that of arbitration institutions themselves) and are only tenuously linked to the interests of the disputing parties. In contrast, there may be important public interests in ensuring accountability for arbitration institution appointments in an ISDS system in which other some other forms of accountability are weak. Full disclosure of appointing authority action would also help to level the playing field in terms of information between insiders and outsiders regarding the appointment process.

228. Because there is no other institution in the field, Part VII above analysed some anecdotal information from other sources about outcomes from the PCA's unique role as designating authority in the absence of PCA disclosure. In contrast to the designation function, however, all five arbitration institutions are active in appointing arbitrators in ISDS. In light of the widely varying disclosure between the five arbitration institutions about their arbitral appointments as discussed below, comparisons of appointments made in ISDS between arbitration institutions are postponed; for some, only anecdotal information would be available at this stage.

A. Variations in appointing authority disclosure about their actions in ISDS

1. Arbitration institutions that generally disclose tribunal composition and the appointments by their appointing authority in ISDS

a. ICSID: systematic disclosure of arbitral composition and appointing authority appointments in all cases; non-disclosure of ballot procedure interventions

229. ICSID's Administrative and Financial Regulations require it to maintain registers that include information about "the method of constitution and the membership" of each arbitration tribunal and annulment committee.²⁰⁷ The registers must be available to the public. The ICSID SG adopts rules for access.

²⁰⁷ ICSID's Administrative Rule 23 provides in part as follows:

(1) The Secretary-General shall maintain, in accordance with rules to be promulgated by him, separate Registers for requests for conciliation and requests for arbitration. In these he shall enter all significant data concerning the

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.²⁰⁸ 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).²⁰⁹

231. As noted above, tribunal chairs selected pursuant to the ballot procedure are not separately noted. They are described as “appointed by the parties” notwithstanding the important ICSID role as a quasi-appointing authority in circumscribing the choice.

b. International Chamber of Commerce (ICC): introduction in 2016 of systematic disclosure of tribunal composition and appointing authority role going forward, subject to a joint disputing party veto

232. The ICC established a new disclosure policy in December 2015 that applies to cases registered after 1 January 2016.²¹⁰ Once arbitral tribunals are constituted, the ICC now publishes the names of the arbitrators, their nationality, their role within a tribunal, the method of their appointment and whether the arbitration is pending or closed.²¹¹ No information will be provided about the case or whether it involves ISDS: the names of the disputing parties and counsel will not be published; nor will the case reference number. Nonetheless, for undisclosed reasons, the disputing parties have the option of opting out of this limited disclosure by joint agreement.²¹² No pre-2016 historical information is provided. Given the small number of ISDS cases in the overall ICC caseload and option to opt-out, the disclosure may not allow conclusions about ICC appointing activity in ISDS.²¹³

233. In a separate 2015 decision, the ICC expanded information available to the disputing parties (but not the public) about certain ICC decisions.²¹⁴ However, the reasons for ICC arbitrator appointments fall outside of the new possible disclosure to the disputing parties.²¹⁵

institution, conduct and disposition of each proceeding, including in particular the method of constitution and the membership of each Commission, Tribunal and Committee. [...]

(2) The Registers shall be open for inspection by any person. The Secretary-General shall promulgate rules concerning access to the Registers, and a schedule of charges for the provision of certified and uncertified extracts therefrom.

²⁰⁸ See, e.g., ICSID, [Cases with details, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*](#) (ICSID Case No. ARB/09/1) (describing tribunal as follows: **President:** Thomas BUERGENTHAL (U.S.) - Appointed by the Chairman of the Administrative Council; **Arbitrators:** Henri C. ÁLVAREZ (Canadian) - Appointed by the Claimant(s); Kamal HOSSAIN (Bangladeshi) - Appointed by the Respondent(s)) (emphasis in original).

²⁰⁹ An ICSID disclaimer states that “The information in this form has been provided by the relevant arbitrator/conciliator. Every effort is made to ensure it is accurate and current. However, persons relying on this information must conduct their own due diligence research.”

²¹⁰ ICC, [ICC Court announces new policies to foster transparency and ensure greater efficiency](#) (5 Jan. 2016).

²¹¹ Section III.B.28 of the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration pursuant to the ICC Rules. Tribunal information is at ICC, [ICC Tribunals](#).

²¹² Section III.B of the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration pursuant to the ICC Rules.

²¹³ The information will be updated monthly to include new appointments and changes in the tribunal's composition. Reasons for changes will not be disclosed.

²¹⁴ ICC, [ICC Court to communicate reasons as new service to ICC users](#) (8 Oct. 2015).

²¹⁵ The ICC Court will now provide the disputing parties with the reasons for its decisions on the challenge and replacement of arbitrators at their mutual request. ICC, [ICC Court to communicate reasons as new service to ICC users](#) (8 Oct. 2015). The ICC Court president explained that “[p]roviding reasons as to [ICC Court] decisions

2. ***Arbitration institutions with an as-yet unexercised power to disclose individual tribunal composition in ISDS, but with an uncertain scope of information about their appointing action: the SIAC IA Rules***

234. SIAC has reported one appointment of an ISDS arbitrator by its appointing authority in an ISDS case. It has not disclosed his/her identity or the applicable policy.

235. The SIAC appears to apply a strict disputing party consent model to disclosure. Under the SIAC IA Rules, it applies a two-tier policy, with agreement to the SIAC IA Rules constituting consent to very limited disclosure, and express disputing party consent permitting some additional disclosure.

236. Agreement to arbitration under the SIAC IA Rules constitutes agreement to SIAC publishing limited information about the proceedings.²¹⁶ Information that may be published includes the identity and nationality of the members of the arbitral tribunal as well as the nationality of the disputing parties.²¹⁷

237. SIAC's annual reports provide some statistics of a general nature, not singling out ISDS cases. It reports on the nationality and gender of arbitrators appointed by SIAC.

3. ***Arbitration institutions that do not disclose tribunal composition or appointments by their appointing authority***

a. *Permanent Court of Arbitration*

238. The PCA generally does not provide information about its appointments for individual tribunals. As set forth on the website, PCA policy requires the consent of all disputing parties for any disclosure about any arbitral proceedings housed at the PCA:

The PCA only identifies the parties and publishes awards or other information in PCA proceedings where the parties have so agreed. No information beyond what is provided on this website will be provided by the PCA.²¹⁸

will further enhance the transparency and clarity of the ICC arbitration process. This new service is a sign of our commitment to ensuring that ICC arbitration is fully responsive to the needs of our users the world over.”

²¹⁶ Arts. 38.1, 38.2, SIAC IA Rules 2017.

²¹⁷ Arts. 38.1, 38.2, SIAC IA Rules 2017. Information that SIAC can publish as a result of agreement to the SIAC Rules “shall be limited to the nationality of the Parties, the identity and nationality of the members of the Tribunal, the treaty, statute or other instrument under which the arbitration has been commenced, if any, the date of the commencement of the arbitration and whether the proceedings are ongoing or have been terminated”. SIAC may also publish redacted excerpts of the reasoning of the tribunal and redacted decisions by the [SIAC] Court on challenges to arbitrators.

For treaty cases, this disclosure regime is much more restrictive than the UNCITRAL Transparency Rules since, for example, the full text and factual background for awards and the parties' submissions are not disclosed.

A second tier of disclosure is possible with the express consent of the disputing parties. SIAC may disclose the identity of the disputing Parties, the contract under which the arbitration has been commenced, if any, the identity of the disputing Parties' counsel, the economic sector and industry to which the dispute relates, the total sum in dispute, details of any procedural steps that have been taken in the proceedings and any orders, directions, decisions and awards issued in the proceedings. Article 38.3 SIAC IA Rules 2017. This disclosure is still significantly less extensive than the basic disclosure regime under the UNCITRAL Rules. Given the express basis of the SIAC regime on disputing party consent, the source of the apparent limits on disputing party consent to provide greater disclosure are not clear.

²¹⁸ [PCA Case Repository](#), PCA website.

There is consequently no information about some individual PCA cases.²¹⁹

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.

240. The requirement of consent from all disputing parties is stated to apply to all “PCA proceedings”. The PCA provides appointing authority services in different kinds of arbitration cases including inter-state cases. They may involve different policy issues, different scope for government liability in damages and different degrees of public interest. The PCA’s ISDS docket has expanded greatly in recent years and now forms a majority of its case load.

241. The PCA’s policy granting each disputing party the power to block any disclosure reflects a rigorous disputing party autonomy model of arbitration. To the extent public interests in disclosure exist, they are not reflected or are in any event subordinated to views of the parties. It is unclear whether the PCA has weighed the interests at stake for the different kinds of cases and tasks it performs. The rationale for a single restrictive rule is not explained.²²⁰

242. Where authorised by disputing parties, the PCA discloses the existence of cases and case documents. The PCA provides a registry to facilitate access to case documents in cases under the UNCITRAL Transparency rules or treaties such as NAFTA that provide for significant transparency. However, PCA disclosure about tribunal composition remains limited. It identifies the tribunal members as president and co-arbitrators, but does not disclose how they were appointed or the existence or nature of PCA appointing action.²²¹ (It is unclear if the PCA asks disputing parties whether it can disclose the identity of arbitrators selected by the PCA.) In some cases, further information may be obtained by consulting decisions of the arbitral tribunal if available.²²²

243. Some general aggregate information about the number and types of cases administered by the PCA in a given year is contained in the PCA's Annual Reports. As described above in part VII, information

²¹⁹ As the Roundtable has noted, amendments to the ICSID Rules in 2006 following a 2005 Statement by the OECD Investment relating to improving the disclosure of awards led to increased transparency of awards at ICSID without disputing party consent. See [Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures, Statement by the OECD Investment Committee](#); Rule 48(4), 2006 ICSID Arbitration Rules (empowering the ICSID Secretariat to publish excerpts of the legal reasoning of the tribunal without disputing party consent). In contrast to the situation at ICSID, it does not appear that action was taken by governments at the PCA or by the PCA following the 2005 IC recommendation.

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.

²²¹ See, e.g., PCA, [Case view: Louis Dreyfus Armateurs SAS \(France\) v. The Republic of India](#) (in case where disputing parties authorised disclosure, describing tribunal as “Ms. Jean E. Kalicki (Presiding Arbitrator), Prof. Julian D.M. Lew QC, Mr. J. Christopher Thomas QC”).

²²² See, e.g., the PCA [“Case view” for South American Silver Limited \(Bermuda\) v. The Plurinational State of Bolivia](#) (providing links to arbitration papers including one in which the arbitral tribunal states that the PCA SG appointed Eduardo Zuleta Jaramillo as the chair).

in the annual reports about PCA appointing activity has been progressively restricted in recent years and is now limited to general aggregate disclosure.

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

244. The AI-SCC does not disclose the identity of its arbitrator appointments in ISDS. As in the case of the PCA, anecdotal information about AI-SCC appointment activity in ISDS may become public if a case or parts of it become public. The new 2017 AI-SCC Rules include an annex with some new rules for investment treaty disputes, but it does not address the disclosure of AI-SCC appointments.²²³

245. Some statistics are included in a 2017 SCC article about “Investor-State Disputes at the SCC”.²²⁴ The article provides information about the balance between disputing party and AI-SCC Board appointments in ISDS (70%/30% respectively). Aggregate information is also provided about the nationality and region of origin of arbitrators appointed by the disputing parties and AI-SCC Board in cases under the SCC Rules. Information is not provided about AI-SCC appointment activity in cases under other rules such as the UNCITRAL Rules. Publication of statistics also appears to be at times linked with articles written by AI-SCC staff about various topics concerning AI-SCC arbitration.²²⁵

B. No disclosure of lists of proposed arbitrators prepared by arbitration institutions

246. Although the short lists of potential arbitrators submitted by appointing authorities to the disputing parties tightly circumscribe outcomes, there appears to be no disclosure of lists either individually or in aggregate. There is also no evidence of internal review systems for individual or aggregate listing practice. While some institutions are beginning to supply some information or aggregate statistics about appointing authority appointments, none supply information about their lists. While some information about appointments by appointing authorities may become public if case reports are published, there does not appear to be any mechanism for possible disclosure of lists. Competitive forces, under particular market conditions, may be at present the only form of accountability for appointing authority action in this area, although more information may be available from arbitration institutions or other sources.

C. Selection by arbitration institutions of ISDS arbitral pool issues for attention

247. Limited information about appointments by most arbitration institutions in ISDS makes it premature to seek to evaluate outcomes in this area. As preliminary question, this section considers how arbitration institutions may select some issues for attention and remedial efforts and not others. As noted above in Part II, the Roundtable has noted the general characteristics of the pool of investment arbitrators in earlier work.

1. Characteristics of the ISDS arbitral pool identified in 2012 have received varying levels of attention from arbitration institutions since then

248. The 2012 ISDS scoping paper provided information about the characteristics of the pool of ISDS arbitrators based on available information. Although more research is required, it appears that some of the characteristics have attracted significant attention from arbitration institutions while others do not appear to have done so.

²²³ See AI-SCC 2017 Arbitration Rules, Annex III.

²²⁴ Celeste E. Salinas Quero, [Investor-State Disputes at the SCC](#) (2017). A new 2016 Investment Disputes Statistics page on the AI-SCC website provides some of the same information. See AI-SCC, [A great year for investment treaty disputes](#).

²²⁵ See AI-SCC, [Articles](#).

249. The ISDS scoping paper pointed to the 95%/5% gender distribution among ISDS arbitrators as well as the significant disparities with regard to regional backgrounds between respondent governments and ISDS arbitrators.²²⁶ As part of the Roundtable discussion of the pros and cons of disputing party and institutional appointments, it was suggested that replacing disputing party appointments with institutional appointments of all three arbitrators can offer the institution more opportunities to introduce new arbitrators, including from different backgrounds. The selection of a chair by an appointing authority when the disputing parties are unable to agree was seen by some as offering less leeway in this regard. ICSID also reported on its ongoing efforts to improve gender and regional representation.

250. On the issues of gender and nationality/regional background, the situation has evolved significantly since 2012 and particularly more recently. The issue of gender balance in arbitration generally has emerged as a high-profile issue across the field of arbitration. As noted above, the ICC began in 2016 to disclose the appointments of its appointing authority as well as tribunal composition, joining ICSID in this regard at least going forward. The ICC's explanation of the new disclosure states that it "will provide an additional incentive to promote regional, generational and gender diversity in the appointment of arbitrators."²²⁷ It can also help the parties to assess the current availability of an arbitrator and to consider new arbitrators that they have so far not been aware of.²²⁸

251. The recent selection of these issues for attention by some private-sector arbitration institutions has generated some public commitments to address the issue in their action as appointing authorities and recognition more broadly of their role with regard to the arbitral pool; this also leads to greater disclosure of aggregate outcomes at least with regard to the particular issue. Although AI-SCC and SIAC do not disclose their appointments or tribunal composition, they have begun reporting on gender, nationality or regional origin of their arbitral pool. None of the three institutions report on ISDS separately in this regard.

252. Some recent statistics show changes in overall appointing practices (generally not reported as specific to ISDS) although more research is required. For example, female arbitrators appointed by the SIAC in 2015 constituted nearly a quarter of all appointments. At ICSID, 16% of ICSID appointees were women in 2015, which is almost a 50% increase over 2014. The move toward appointments of female arbitrators by appointing authorities is noteworthy because disputing party appointments of women continue to lag behind. For instance, at the AI-SCC, 39 of the 101 arbitrator appointments made by the AI-SCC in 2015 were female (nearly 27%). By contrast, where the disputing parties appointed arbitrators, 6.5% were female, and where appointments were made by co-arbitrators, 10% were women.²²⁹ General statistics are also increasingly available on issues of regional representation and more research is required.

253. The three private-sector arbitration institutions have now all signed an Equal Representation in Arbitration Pledge which is addressed to gender issues²³⁰, and have begun to report general statistics in this area. Neither ICSID nor the PCA appear to have signed the pledge. However, as noted, ICSID indicated ongoing efforts to address the gender balance in 2011-12 and regularly reports on its individual appointments and overall statistics in this area. The PCA does not appear to have a position in public on gender issues and its arbitral pool, and does not report on the issue in its statistics.

254. The high proportion of commercial arbitrators and the limited representation of government backgrounds in the ISDS arbitrator pool were other characteristics of the arbitrator pool noted by the ISDS scoping paper and discussed by the Roundtable. This aspect has attracted less visible attention from the

²²⁶ David Gaukrodger & Kathryn Gordon (2012), "[Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community](#)", OECD Working Papers on International Investment, 2012/03, pp. 45-47.

²²⁷ ICC, [ICC Court announces new policies to foster transparency and ensure greater efficiency](#) (5 Jan. 2016).

²²⁸ Jose Ricardo Feris, 'New Policies and Practices at ICC: Towards Greater Efficiency and Transparency in International Arbitration', ICC Dispute Bulletin 2016, No. 2, p. 14.

²²⁹ Statistics reported in White & Case, [Arbitral Institutions Respond to Parties' Needs](#) (10 April 2017).

²³⁰ See <http://www.arbitrationpledge.com/>.

arbitration institutions than the gender or regional origin issues. The appointing authorities at the three private-sector institutions are primarily if not exclusively composed of individuals with a background in international commercial dispute resolution. Information about the background of arbitrators or potential arbitrators in this area is not collected. ICSID does not report on the backgrounds of its arbitrator pool in this area and, as noted, the PCA does not disclose information about its tribunals or appointments. No discussions of the issue by arbitration institutions have been located although further research is required.

255. The principal locus of discussions about greater use of former national law or international law judges or other individuals with government experience as ISDS adjudicators has been with regard to the ICS. Government appointment of judges is seen by some as likely to change the pool of adjudicators to address characteristics of the arbitral pool. Some have criticised what they see as continuing uncertainty about likely government appointments under, for example, ICS provisions in CETA that remain quite general in defining qualifications. (See Annex 1.)

2. *Decision processes on the identification of issues to address and impact*

256. As elsewhere, it may be important to identify who is taking policy decisions of this type in arbitration institutions in ISDS, their rationale, how they are taken and the nature and scope of government input. It is also important to follow the impact of such decisions. The attention to gender is for some arbitration institutions a new public recognition of an appointing authority role in shaping the arbitral pool often presented as primarily resulting from disputing party appointments. As noted, it is also generating greater disclosure about arbitral appointments by some arbitration institutions at least with regard to their actions regarding the specific issue and, at the level of all appointments in commercial arbitration, some movement is visible.

D. Policy considerations relating to disclosure of appointment activity by appointing authorities in ISDS

257. As set forth above, it is not possible to provide certain basic information such as the number of ISDS cases and the role of appointing authorities in each arbitration institution across the ISDS system. The lack of basic systematic information from some arbitration institutions is noteworthy. Given the overall small number of matters and large dedicated staff at the various institutions, administrative burden would not appear to be an issue in this area. Arbitration institutions have all of the relevant information. The appointments do not implicate any confidential business or government information. No processes are needed to redact documents or decide on case-specific confidentiality issues. The extent of disclosure appears to result from different policies at each arbitration institution.

258. Little evidence has been located in the public domain of arbitration institutions weighing or balancing interests in the confidentiality or disclosure of their appointment practices. A list of all ISDS arbitrator appointments made by each appointing authority in the last fifteen years by year with or without reference to case information, for example, would increase accountability and allow a more informed discussion of appointing authority action and ISDS. ICSID is the only one of the five institutions to provide this information. A list of all arbitrators listed as potential arbitrators and presented to the parties during this period would provide further valuable information for purposes of accountability and evaluation.

259. In a competitive market, non-disclosure by certain arbitration institutions of their practices with regard to adjudicator selection in ISDS may be perceived to create various possible competitive advantages with certain constituencies. For example, it may be perceived to permit more frequent selection of arbitrators with a commercial arbitration background than would occur under transparent conditions and public debate about appointing practices that affect public budgets. This possible outcome could be perceived to appeal to covered investors and the arbitration bar, and also to some governments interested in providing a high degree of foreign investor protection. Non-disclosure may also make issues of comparative treatment of different governments by appointing authorities difficult to evaluate. More

generally, limited information about appointing authority practices can make government choices of an appointing authority and arbitration institution in treaties less well-informed and may generate information asymmetries to the detriment of some governments and investors.²³¹ No view is expressed about the real impact, if any, of any of these or other possible incentives relating to non-disclosure.

260. In addition to possible competitive considerations, the availability of information also generally improves accountability. In the absence of any explanation of their policies by arbitration institutions or governments, some critics of ISDS may contend that a disputing party consent requirement applied to disclosure of appointing authority action is more addressed to preserving the discretion of arbitration institutions to operate without meaningful scrutiny than to important interests of disputing parties.

²³¹ The Roundtable has discussed the related issue of asymmetrical information about arbitrators which can result in poor choices of co-arbitrators and chairs by some governments and investors. See David Gaukrodger & Kathryn Gordon (2012), "[Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community](#)", OECD Working Papers on International Investment, 2012/03, p. 49; Summary of discussion of FOI Roundtable 16 (20 Mar. 2012), pp. 10-12 (presentation by Prof. Catherine Rogers and discussion).

IX. Conclusion

261. This note reports on findings so far with regard to appointing authorities, arbitration institutions and the selection of arbitrators in Investor-State arbitration. The material is being collected and analysed to facilitate an informed Roundtable dialogue with appointing authorities and others. No other adjudication system has the average amount of damages at stake per case as in ISDS, and damages are sought exclusively from governments in practice. Intensive scrutiny of ISDS is to be expected and welcomed, and the system will likely be judged by standards commensurate with the importance of the issues it addresses. The Roundtable dialogue with appointing authorities can lead to better understanding of dispute settlement systems for investment treaties by governments, stakeholders and the public.

Annex: Qualifications for ISDS arbitrators/adjudicators and dispute settlement – Views at the 2016 Investment Treaty Conference and recent debates

262. In the session on dispute settlement and balancing at the 2016 Treaty Conference, governments and others addressed practice and regulation with regard to the desirable qualifications for arbitrators/adjudicators and members of tribunals.²³² The discussion notably addressed whether adjudicators should have case-specific expertise or be generalists; the range of qualifications that are important; and whether, beyond the issue of qualifications for adjudicators of the current range of disputes under investment treaties, a tribunal with a broader scope of jurisdiction to address investment-related disputes is necessary or desirable. These aspects of the discussion are outlined in turn. To place the discussion in context, the current limited treaty practice relating to arbitrator qualifications is first briefly described. The annex principally focuses on the Conference discussion, but some additional views and debates are noted.

A. *Current treaty practice and the Investment Court System proposals on required and desirable qualifications*

263. The necessary qualifications for investment arbitrators are currently couched in general terms. It appears that few investment treaties specify required competencies that arbitrators must possess. In the TPP, the only reference to arbitral expertise in particular areas for general ISDS disputes applies to contract or domestic law based claims, not to treaty claims.²³³ Article 14 of the ICSID Convention requires only “recognized competence in the fields of law, commerce, industry or finance”.²³⁴ Parties and appointing authorities can generally select arbitrators with specialised knowledge or generalists as they wish. The absence or general nature of required expertise means that challenges to arbitrators for allegedly lacking required qualifications are almost unknown.

264. CETA establishes some required characteristics and some desiderata for Members of the Tribunal:

The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.²³⁵

265. CETA thus establishes two requirements and a desideratum. Members must (i) either have the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence; and (ii) have demonstrated expertise in public international law. Expertise in investment and trade law, including in dispute resolution, is desirable.

²³² Qualifications as addressed here focuses on areas of knowledge and experience, and excludes the basic principles of independence and impartiality. One issue identified in 2014 and discussed at the Conference was economic incentives in various systems including investor-state arbitration and ICS and their possible actual impact or impact on public confidence and legitimacy. A companion paper addressing aspects of this issue is expected to be circulated following the Roundtable for consideration prior to Roundtable in March 2017.

²³³ See TPP art. 9.21(5). TPP has special regimes for certain issues such as financial services.

²³⁴ The 1965 ICSID Convention was negotiated prior to the advent of treaty-based arbitration and primarily envisaged contract disputes.

²³⁵ CETA art. 9.27(4); art. 8.28(4) (same requirements for Members of Appeal Tribunal)).

B. Case-specific expertise vs generalists

266. The Conference discussion also addressed whether expert knowledge about an economic sector or field of law is important in an adjudicator or whether experts can adequately provide such information to more generalist adjudicators. Japan emphasised that the ability to choose an arbitrator with sectoral expertise in the matter in dispute is an important advantage of arbitration over a court system staffed by generalist judges. The parties will want to have arbitrators who will have specific sectoral expertise, such as expertise in the oil industry or in labour issues. The United States also emphasised the importance of the parties' ability to select arbitrators with specific knowledge.

267. The European Commission noted that many courts staffed by generalist judges, such as the Court of Justice of the European Union or the ECHR, regularly address technical issues through the use of experts. Courts can use court-appointed experts and can also be assisted by experts retained by the parties.

268. Prof. Howse, a long-standing student of the WTO Appellate Body, also suggested that the broader perspective of generalist judges at the Appellate Body, together with other factors, has been important in what he described as a re-balancing of the WTO towards greater consideration of non-trade interests and policy space.²³⁶ In academic and policy debates, he has described this Appellate Body re-balancing as a key reason for the perceived stronger legitimacy and public support for WTO dispute resolution over ISDS.²³⁷

C. Qualifications for arbitrators/adjudicators to address the issues in ISDS cases

269. The European Commission explained that public international law expertise is required under the ICS because investment treaty claims require the interpretation and application of international treaties. The criteria are similar to those for other international courts and tribunals.

270. BIAC, the United States Council for International Business (USCIB) and the European Federation for Investment Law and Arbitration (EFILA) expressed surprise or dismay that international investment law expertise is not a required characteristic for ICS adjudicators. They considered that investment law is complex and requires specialised knowledge. The ability to adjudicate interpretive

²³⁶ In this regard, Prof. Howse pointed to the WTO decision to select as initial WTO Appellate Body members distinguished individuals who were not closely associated with the international trade community. As described notably by Claus-Dieter Ehlermann (who was among the first Appellate Body members), the Selection Committee for the Appellate Body set out to gather generalists from a range of different backgrounds including public international law rather than trade specialists. See Claus-Dieter Ehlermann, *Revisiting the Appellate Body: The first six years*, in Gabrielle Z. Marceau, ed., *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (2015), pp. 482-505. Prof. Howse's analysis of the evolution of the Appellate Body and its importance for WTO legitimacy is developed in a recent foreword in the *European Journal of International Law* and interview with the editor. See Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 *EJIL* 9 (2016).

²³⁷ An article by Joost Pauwelyn comparing adjudicators under the two dispute settlement systems and their legitimacy has given rise to vigorous debate and a wide range of views. See Joost Pauwelyn, [The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus](#), 109 *AJIL* 761 (2015); Donald McRae, [Introduction to Symposium on Joost Pauwelyn, "The Rule of Law without Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus"](#), 109 *AJIL Unbound* 277 (2016); Giorgio Sacerdoti, [Panelists, Arbitrators, Judges: A Response to Joost Pauwelyn](#), 109 *AJIL Unbound* 283 (2016); Gabrielle Marceau, Catherine Quinn, and Juan Pablo Moya Hoyos, [Judging from Venus: A Response to Joost Pauwelyn](#), 109 *AJIL Unbound* 288 (2016); Catherine A. Rogers, [Apparent Dichotomies, Covert Similarities: A Response to Joost Pauwelyn](#), 109 *AJIL Unbound* 294 (2016); Freya Baetens, [The Rule of Law or the Perception of the Beholder? Why Investment Arbitrators are under Fire and Trade Adjudicators are not: A Response to Joost Pauwelyn](#), 109 *AJIL Unbound* 302 (2016); Robert Howse, [Venus, Mars, and Brussels: Legitimacy and Dispute Settlement Culture in Investment Law and WTO Law: A Response to Joost Pauwelyn](#), 109 *AJIL Unbound* 309 (2016).

debates about the meaning of key substantive treaty clauses was also important. The European Commission noted that investment law is cited and would be an important factor, but pointed out that few if any existing treaties require such expertise and considered that it is not desirable to make it obligatory for every appointment.

271. Prof. Howse described investment treaty cases as basically involving a claim that a government has engaged in misconduct towards a private actor. From this perspective, they are similar to the due process, expropriation and other issues regularly considered by public law judges in domestic law, in particular in the area of administrative or constitutional law, or in international human rights courts like the ECHR.²³⁸ In his view, much of the expertise of the investment arbitration bar is in procedural and jurisdictional issues, fields that have expanded greatly in investor-state arbitration due to economic incentives to expand case work. A more streamlined process with a court could focus more on the merits of the cases which raise issues of public law that are not especially complex. Accordingly, in his view investment law expertise may be desirable but should not be required and public law expertise should be included as an additional desideratum. EFILA noted that expertise in procedural and jurisdictional issues would also be relevant in the context of the ICS.

272. In comments from the audience, an arbitrator suggested that the lack of public trust in investor-state arbitration was fed by a view that ISDS has failed to engage with environmental and other civil society concerns. She considered that this aspect was not addressed in the ICS approach as drafted. The European Commission noted that CETA contemplates the use of environmental experts. Lengthening the list of qualifications would give rise to debates with different groups seeking to be mentioned.

273. As outlined below, several NGOs and commentators were of the view that the structure of the current investment treaty system is unbalanced and that the selection of adjudicators with particular expertise in areas like public law or human rights cannot rectify structural issues.

D. *Proposals for a broader tribunal or state-to-state dispute settlement in addition to modified qualifications for adjudicators*

274. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) stated that no rationale had been advanced for private tribunals or courts only for foreign investors and advocated the use of SSDS as for the rest of trade agreements. USCIB stated that SSDS had not worked for investment in the past. It further stated that foreign investment is unique because investors who go overseas are the only players who take things of great value and go abroad under jurisdiction of another

²³⁸ The Roundtable has previously noted similarities of this nature. See Progress Report at p. 10 (Roundtable participants "noted that advanced national administrative law systems have many functions similar to ISDS (controlling State power, upholding the rule of law and providing remedies to regulated entities and persons for State misconduct)." (footnote omitted); id. p. 17 (noting Roundtable participant inquiry into "whether arbitrators from a commercial background have experience with or sensitivity to the public law issues in ISDS"). A key difference is the nature of available remedies with damages generally available in ISDS while national administrative law generally provides only non-pecuniary remedies. See ISDS scoping paper, pp. 24-27, 79-87. The Roundtable has also noted that available evidence suggests that there are few public law experts among ISDS arbitrators. Id. p. 44.

The German Association of Judges (DRB) was not represented at the Conference, but has also recently expressed views on the necessary qualifications to resolve investment treaty disputes. It considers that investment cases raise issues of civil, administrative, labour, social and fiscal law. It criticises the ICS criteria for failing to ensure a top selection of national lawyers with specialist knowledge of these fields and expresses concern that the pool of judges will be limited to arbitration practitioners. It emphasises the importance of the independence of the selection committee and the need for distance from the international arbitration community. It notes that the selection process is not yet outlined in detail and that acceptable outcomes are not guaranteed. The official version of the statement is in German and is available under number 04/2016 on the [association website](#). An [English translation](#) has been prepared by Friends of the Earth Europe. It has not been approved by the DRB.

government. In contrast, a trader does not set up abroad. AFL-CIO pointed to the risks taken by immigrants, who place their entire life under foreign jurisdiction, or workers, whose lives may be on the line in factories; what gets protected involves questions of value.

275. The International Institute for Sustainable Development (IISD) and the Fédération internationale des droits de l'homme (FIDH) considered that broader or different qualifications for ISDS adjudicators would be insufficient to improve the system. From this perspective, the issue is not just knowledge of different bodies of law in claims by investors, but rather the access to remedies and involvement of different stakeholders. An integrated approach to addressing investment disputes with all stakeholders at the table can better address some tensions, as for example in the case of investments in mining. IISD recommended consideration of development an ICSID-type institution with broad scope that would be available for use by parties that agree to it under other treaties or agreements. EFILA responded that it considers that it is important not to over-burden the investment law system.